

4-1-1992

Constitutional Separation of War Powers: Protecting Public and Private Liberty

David I. Lewittes

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 Brook. L. Rev. 1083 (1992).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol57/iss4/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

CONSTITUTIONAL SEPARATION OF WAR
POWERS: PROTECTING PUBLIC AND PRIVATE
LIBERTY

*David I. Lewittes**

I.	Basic Principles: An Overview	1087
A.	The Executive Power	1087
B.	Separation of Powers	1089
C.	The Preamble	1094
D.	Necessary and Proper	1100
E.	Oath or Affirmation	1104
II.	The Executive	1107
A.	Qualities of the Office of President	1107
1.	Independence and Vigor	1108
2.	Unity	1110
3.	Responsibility	1111
B.	The Commander-in-Chief Power	1114
1.	Commander-in-Chief of Armed Forces of the United States	1118
2.	The Question of a Council	1124
3.	Pardon Power	1130
4.	Remarks	1131
III.	Legislative Protections Against Presidential Encroachments	1132
A.	Sinew of War: Manpower	1132
1.	Raise and Support Armies	1132
2.	Provide and Maintain a Navy	1145
B.	Rules for Government and Regulation	1147
C.	Forts, Magazines, Arsenals, Dock-Yards, Etc..	1150
D.	The Power of the Purse and Related Authorities	1152
1.	Purse Power	1152
2.	Common Defense and General Welfare...	1159

* Associate, Rogers & Wells, New York City; J.D., New York University School of Law, 1987; B.A., University of Pennsylvania, 1984.

3. Borrow Money	1162
4. Power to Regulate Commerce	1165
IV. The Power to Declare War and Other Related Powers	1169
A. Offenses Against the Law of Nations	1169
B. Piracy	1171
C. The Declaration of War Clause	1172
1. Letters of Marque and Reprisal	1173
2. The Power to Declare War	1175
Conclusion and Contemporary Application	1189

INTRODUCTION

When our Founding Fathers, in the summer of 1787, devised our constitutional system of government, they had two primary goals. One objective was to secure public liberty or safety; that is, protection and defense of the Union. The other was to protect liberty in the republican sense. By this, I mean individual liberty of citizens or of states.

Under the king of England, the experience from which the Framers drew guidance, British subjects enjoyed public safety but not republican liberty.¹ Although the Articles of Confederation secured individual liberties, the Confederate Congress, dependent upon the several states, was powerless to protect public liberty.² Accordingly, the Framers, to secure both public and private liberty, formed a new system for our government. Under our Constitution, the President, like the British monarch, has the power to protect and to defend the nation. Congress, however, acts as a buffer between the executive, on the one hand, and the people and the states, on the other. It protects republican liberty from possible presidential oppression.

This basis for the separation of powers explains the different roles of the political branches of the federal government with respect to war, which is the focus of this article. The allocation of war powers is a subject of frequent debate, most recently in the period leading to the war with Iraq. Because that war was concluded successfully, with great speed and with a minimal loss of American lives, the domestic political and constitutional de-

¹ See, e.g., note 36 and accompanying text *infra*.

² See, e.g., notes 105, 220 and accompanying text *infra*.

bate has largely evaporated.

The purpose of this article is to explain, prior to any future national debate, the constitutional allocation of war powers. It is the faint hope of the author that new insights into the separation of powers of the political branches of the federal government, specifically in the context of war powers, will emerge and will elucidate a little understood area of constitutional law.

The first section of the article will discuss various principles that govern the division of authority with respect to war powers. This should serve as an overview for the remainder of the work. The following will be shown: The powers of the national government were separated to achieve liberty. Liberty, as mentioned, is a dichotomous concept covering both public liberty and liberty in the republican sense, that is, liberty of individual citizens and states. The President has not only the power, but also the duty, to "preserve, protect and defend" the nation.³ He is "the general Guardian of the National interests."⁴ The members of the legislature, on the other hand, acting by majority vote, are "more immediately the confidential guardians of the rights and liberties of the people."⁵ Accordingly, the Commander-in-Chief is responsible for "the employment of the common strength"⁶ to protect public liberty. Congress protects private, or republican, liberty.

The second portion of the article will examine the commander-in-chief power, an authority that enables the President to "preserve, protect and defend" the nation by war. The two subsequent sections must be consulted for a complete understanding of this power and of how it fits into the constitutional scheme. Respectively, these sections explore legislative checks upon the executive's public war power—to secure private safety from presidential oppression—and the publicly authorized, pri-

³ See notes 87-102 and accompanying text *infra*.

⁴ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 600 (Gouverneur Morris) (Ohio Univ. Press rev. ed. 1984) [hereinafter MADISON'S NOTES]. (I have reprinted Madison's Notes without changing the punctuation, spelling, or grammatical usage. Therefore, all errors of such nature remain as reported. In other words, I am placing the blame for such mistakes on Madison.)

⁵ THE FEDERALIST No. 49, at 330 (Alexander Hamilton or James Madison) (Mod. Libr. ed. 1941). See also THE FEDERALIST No. 78, *supra*, at 504 (Alexander Hamilton) (Congress "prescribes the rules by which the duties and rights of every citizen are to be regulated.")

⁶ THE FEDERALIST No. 75, *supra* note 5, at 486 (Alexander Hamilton).

vate war power of Congress.

In essence, the Constitution separates, from the power of the sword, the power of the purse and other powers that directly infringe upon an individual's rights to life, liberty, and property.⁷ In other words, to protect republican liberty from executive encroachments, the means of war that require direct requisitions on the people and on the states are placed in the control of the legislators as guardians of the rights and liberties of the citizens. Only after the legislature makes these incursions into private rights are the means of war put under the command of the protector and defender of public safety. Thus, for example, Congress has the power to lay and collect taxes for the common defense and the authority to raise armies. Once an army and money for its support are raised, to secure public liberty, they are placed under the President's authority.

The armed forces of the United States—the sword or common strength—therefore constitutionally may be directed and deployed by their Commander-in-Chief as, in his discretion, is best suited to “protect and defend” national interests. Without congressional consent, however, he may not conscript private individuals into the armed forces of the United States; furthermore, the President constitutionally may not authorize private acts of war. Because Congress, which prescribes rules by which the rights and duties of citizens are regulated, protects private security or liberty, *it* is the public authority that may grant individuals the right to commit private acts of war to redress injuries incurred by them as individuals. Thus, the legislature may grant letters of marque and reprisal authorizing limited hostilities to be carried out by private persons. It also may decide what private injuries, sustained by U.S. citizens and caused by individuals of another nation, warrant public war against that nation, with which we are at peace, for refusing to redress the injuries of our citizens. That, as well as conferring certain rights and obligations upon our citizenry in any war, is the function of Congress's power to declare war.

This article will demonstrate that a proper understanding of

⁷ See, e.g., THE FEDERALIST No. 78, *supra* note 5, at 504 (Alexander Hamilton) (“The Executive . . . holds the sword of the community. The legislature . . . commands the purse . . .”); MADISON'S NOTES, *supra* note 4, at 81 (Col. George Mason) (“The purse & the sword ought never to get into the same hands . . .”).

the constitutional allocation of war powers must lead to the conclusion that no declaration of war would have been required, for example, for the President to attack Iraq or Iraqi-controlled Kuwait. It would be within the President's power to employ the common strength to "protect and defend" the nation, its interests, and its citizens in Iraq or in Iraqi-controlled Kuwait. Such attack would be carried out only by U.S. armed forces, for the purpose of retaliating against Iraqi aggression, to protect public liberty. The power to defend, as will be shown, includes collective self-defense,⁸ which was a significant attribute of our effort in the Persian Gulf. In addition to restoring equilibrium in the region, an attack against Saddam Hussein (or the like) and his forces also could be for the purpose of punishing a delinquent nation. No declaration of war is necessary to conduct war on any of these grounds.⁹

I. BASIC PRINCIPLES: AN OVERVIEW

A. *The Executive Power*

The first words of Article II, Section 1, of the Constitution are these: "The executive Power shall be vested in a President of the United States of America." By this clause, the President is constitutionally granted "the whole Executive power."¹⁰

While the general grant of authority to the federal judiciary is similarly worded,¹¹ the one that confers legislative powers

⁸ See note 403 and accompanying text *infra*.

⁹ See notes 160-62, 401, 403 and accompanying text *infra*.

¹⁰ The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862). See also *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (Article II, Section 1, Clause 1, "does not mean *some* of the executive power, but *all* of the executive power" is vested in the President); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 550-51 (1977) (Rehnquist, J., dissenting) ("[T]he President is made the sole repository of the executive powers of the United States, and the powers entrusted to him as well as the duties imposed upon him are awesome indeed."); *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 681 (1952) (Vinson, C.J., dissenting) ("The whole of the 'executive Power' is vested in the President."). Cf. THE FEDERALIST NO. 69, *supra* note 5, at 446 (Alexander Hamilton) ("[T]he executive authority, with few exceptions, is to be vested in a single magistrate.").

¹¹ U.S. CONST. art. III, § 1, cl. 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The constitutionally created court has original jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party . . ." *Id.* § 2, cl. 2. Otherwise, the authority of the federal judiciary depends on Congress, though Section 2 of Article III expressly defines the

upon Congress is noticeably different in form. Article I, Section 1, reads: "All legislative Powers *herein* granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."¹² The plain import of these words is that the Constitution vests specific legislative powers in Congress to be exercised by both houses of the legislative branch. These grants of authority, in general, may be found in Section 8 of Article I. Other powers, carried out by one house and not legislative in nature, are, when not strictly for internal regulation, checks upon the past conduct of the other branches of government.¹³ The powers of Congress, in all respects, are circumscribed carefully and do not extend to all legislative subjects of national concern.

While the President's power is *defined* and its *general* objects are stated clearly (of which the Chief Executive is reminded before taking office, by mandate of the Constitution),¹⁴ for the fulfillment of his constitutional function, the President must find his own means.

In *Myers v. United States*,¹⁵ Chief Justice Taft, speaking for the Court, cited with approval Alexander Hamilton's argument on executive power in relation to the constitutionality of President Washington's Neutrality Proclamation during the war between Great Britain and France. Hamilton discussed the difference between the general grants of power to Congress and to the President arising from the nature of each authority:

The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the Constitution . . . serves

boundaries of all "judicial Power." Unlike the judicial branch, where authority is vested also in such inferior courts as are established, all executive authority resides in the Chief Executive. The President's executive authority does not depend upon an act of Congress.

It has been said that "[t]he limits of presidential power are obscure." The Steel Seizure Case, 343 U.S. at 661 (Clark, J., concurring). It is the hope (again faint) of the author that this article will help to clarify the extent of presidential war-making powers.

¹² U.S. CONST. art. I, § 1 (emphasis added).

¹³ The House of Representatives has the sole power of impeachment, *id.* § 2, cl. 5, and the Senate has the sole power to try impeachments, *id.* § 3, cl. 6, and has the power to ratify treaties and nominations, *id.* art II, § 2, cl. 2.

¹⁴ See note 87 and accompanying text *infra*.

¹⁵ 272 U.S. 52 (1926).

to confirm this inference. In [Article I] the expressions are "All legislative powers herein granted shall be vested in a congress of the United States." In [Article II] the expressions are "*The executive power* shall be vested in a President of the United States." The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.¹⁶

The powers of Congress are delineated carefully; the President's are defined but not enumerated. The reason for this difference stems from the distinction between the nature of executive and of legislative power in our republican system. The President, to "preserve, protect and defend" the nation, must respond to events; Congress enacts laws for future regulation of citizens and of states.

B. Separation of Powers

The allocation of authority among the executive, legislative, and judicial branches of the federal government suggests a separation of national powers among those departments.¹⁷ To under-

¹⁶ *Id.* at 138-39. *But see* *Zemel v. Rusk*, 381 U.S. 1, 20 (1965) (Black, J., dissenting) (emphasizing the word "all" in general grant of legislative power); *The Steel Seizure Case*, 343 U.S. at 630 (Douglas, J., concurring) (same); *In re Neagle*, 135 U.S. 1, 91 (1890) (Lamar, J., dissenting) (same). Dissenting in *Myers*, Justice McReynolds wrote:

When this Article went to the Committee on Style [at the Constitutional Convention of 1787] it provided: "The legislative power shall be vested in a Congress," etc. The words "herein granted" were inserted by the committee September 12, and there is nothing whatever to indicate that anybody supposed this radically changed what already had been agreed upon. The same form of words was used as to the legislative, executive and judicial powers in the draft referred to the Committee on Style. The difference between the reported and final drafts was treated as unimportant.

272 U.S. at 230-31. Aside from disregarding the plain language of the clause, the specific delineation of legislative powers, found in Article I, Section 8, and the fact that the delegates to the Convention decided at the start that it was necessary to enumerate carefully the limits of legislative power in the federal government, *see* MADISON'S NOTES, *supra* note 4, at 43-44, Justice McReynold's argument defeats itself. There must be some significance attached to the change in the wording of the clause related to legislative power, because those concerning executive and judicial authority remained the same. The change manifests the Framers' fear that, absent this emphasis upon the limits of its power, the legislature would arrogate authority unto itself.

¹⁷ *See, e.g.*, *Springer v. Philippine Islands*, 277 U.S. 189, 201-02 (1928) (legislature cannot usurp executive power of appointment). *See also, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam) ("The principle of separation of powers was not simply an

stand the separation of constitutional powers in general, and of war powers, in particular, one must comprehend the basis upon which the powers were distributed. It does not suffice to believe that authority was divided simply according to its character as legislative, executive, or judicial. Indeed, as James Madison wrote in *The Federalist*, an authoritative, contemporary exposition of the Constitution,¹⁸ "no skill in the science of government has yet been able to discriminate and définé, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches."¹⁹ These words were not intended to justify the fact that the founders of our republic spent the entire summer of 1787 in Philadelphia debating and struggling over the framework of government to be ordained and established. Indeed, as I intend to demonstrate, in relation to war powers, the genius of the Founding Fathers is not found in the nature and extent of the powers that they gave to the general government, which followed from necessity and, generally, existed prior to the Constitution.²⁰ Rather, it is found in the distribution of those powers. It took the entire summer of 1787 to devise this delicate scheme of government, and our history proves that the result was well worth even a summer in Philadelphia.

For the Framers, "the doctrine of separation of powers was not mere theory; it was a felt necessity."²¹

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objec-

abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").

¹⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

¹⁹ *THE FEDERALIST* No. 37, *supra* note 5, at 229 (James Madison).

²⁰ *See, e.g., THE FEDERALIST* No. 40, *supra* note 5, at 255 (James Madison) ("[T]he great principles of the Constitution . . . may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation."); *id.* No. 45, at 303 (James Madison) ("If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS.").

²¹ *The Steel Seizure Case*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

tives, must be resisted.²²

The separation of powers of the federal government defines the sphere of authority of each branch.²³ When one department exercises power within its sphere, it does so without restraint of a coordinate branch, unless the Constitution grants to the latter a prior or a subsequent check upon the former's otherwise independent authority.²⁴ This freedom from restraint by one or both of the other branches is the necessary result of the doctrine of separation of powers. "The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."²⁵ If one branch imposes such control in the house of another, its action—a violation of the doctrine of separation of powers—is unconstitutional.²⁶

The powers delegated to the federal government by the Constitution were divided for the dual purposes of securing personal and public liberties. The fear of blending executive, legislative, and judicial powers is the fear of placing *all* or any two *completely* in the hands of one political body. Madison makes this point in *The Federalist* by citing "the celebrated Montes-

²² *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983). Cf. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("The existence . . . of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule" of separated powers.); *Myers v. United States*, 272 U.S. 52, 116 (1926) ("[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.").

²³ Cf. *The Steel Seizure Case*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government").

²⁴ See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872) (pardon power not subject to control of Congress). See also *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61 (1982) (Burger, C.J., concurring) ("The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.").

²⁵ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935). Cf. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 23 (1820) ("I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other.").

²⁶ See, e.g., *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 403, 420 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983) (legislative veto case).

quieu" whom he describes as "[t]he oracle who is always consulted and cited on this subject."²⁷ The Framers, by accepting Montesquieu's theory of separation of powers, used Montesquieu's guide, the British Constitution, as a prototype of our own.²⁸ Madison explained that, from the British Constitution, it may clearly be inferred that, in saying

"there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.²⁹

In sum, a unified executive and legislative arm of government, which could "enact tyrannical laws, to execute them in a tyrannical manner,"³⁰ is (like a sole legislative and judicial arm) dangerous to private liberty.

This is consonant with the principles laid down by Judge Blackstone, whose views, as set forth in his treatise on the British Constitution, were accepted as authoritative by the delegates to the Philadelphia Convention in 1787.³¹ Blackstone wrote that

[i]n all tyrannical governments, the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.³²

²⁷ THE FEDERALIST No. 47, *supra* note 5, at 313 (James Madison).

²⁸ *Id.* at 313-14.

²⁹ *Id.* at 314-15.

³⁰ *Id.* at 315 (Charles de Montesquieu) (emphasis omitted). See CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS 202 (U. Cal. Press ed. 1977).

³¹ *Accord* Reid v. Covert, 354 U.S. 1, 26 (1957) ("Sir William Blackstone . . . exerted considerable influence on the Founders"). Blackstone was cited several times in *The Federalist*, see THE FEDERALIST No. 69, *supra* note 5, at 448, 450 (Alexander Hamilton); *id.* No. 84, at 557 (Alexander Hamilton), and was referred to by delegates to the Philadelphia Convention in their notes on the proceedings, see MADISON'S NOTES, *supra* note 4, at 547; ROBERT YATES, SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION TO FORM THE U.S. CONSTITUTION PHILADELPHIA 1787 186 (George R. Stewart, ed., 1987) [hereinafter SECRET PROCEEDINGS]. There can be no doubt that, at the time, he was considered to be a reliable authority.

³² 1 WILLIAM BLACKSTONE, COMMENTARIES *146.

Madison, Montesquieu, and Blackstone agreed that the legislative and executive powers must be divided to preserve both *public* and *private* liberties.

Elsewhere in the *Commentaries*, Blackstone noted that the judicial power should not be joined with the legislative.³³ If the judiciary were joined entirely with the legislative branch, there would be no private, or personal, liberty, because the judiciary would be able to legislate (as some advocates of individual, or civil, rights today apparently would prefer despite its danger to private liberty). Judges would not be bound by the rules and regulations, affecting life, liberty, and property, enacted by a separate, legislative body. Like Montesquieu, Blackstone agreed that a combination of the executive and the judiciary in one department "might soon be an overbalance for the legislative."³⁴ This also would be inimical to republican (or private) liberty.

The harms of inadequately separated branches of government were raised in the Convention. Madison, in his *Notes of Debates in the Federal Convention of 1787*, reports his own words:

Mr. MADISON. If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised, it is equally so that they be *independently* exercised. There is the same & perhaps greater reason why the Executive [should] be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty.³⁵

Combining executive and legislative powers in one body of government is dangerous to both public and private liberty, while a coalition of legislative and judicial authority threatens only private liberty. The good of the whole—public liberty—takes pre-

³³ 1 *id.* at *269.

³⁴ 1 *id.* This "overbalance," or oppression, would result from putting the public prosecution and judicial functions in the same hands. *Id.*

³⁵ MADISON'S NOTES, *supra* note 4, at 326-27. See also *id.* at 311-12 (Two reasons why a union of the executive and the legislature is more dangerous than combining the executive and the judiciary are that "the collective interest & security were much more in the power belonging to the Executive than to the Judiciary" and that "in the administration of the former much greater latitude is left to opinion and discretion than in the administration of the latter."); *id.* at 339 (Gouverneur Morris "concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on as the proper Guardians of [private] liberty.").

cedence over the good of a part—private liberty.³⁶ Therefore, Madison believed that a coalition that is dangerous to public liberty is a greater concern than a coalition that endangers private liberty. However, under our system of government, this general proposition is tempered by a very high regard for personal liberty.

C. *The Preamble*

On Monday, August 6, 1787, a printed copy of the draft of the Constitution, prepared by the Committee of Detail at the Convention, was delivered to each delegate.³⁷ It read, in part, as follows:

We the people of the States . . . do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.³⁸

The Committee of Style later rephrased the preamble,³⁹ which, in the Constitution, reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁴⁰

The people solemnly established by the Constitution a “more perfect Union.” The Constitution established not only a union of states, which had existed under the Articles of Confederation, but also a union of all of the people.⁴¹ The Articles of Confedera-

³⁶ Blackstone quoted John Locke:

[T]he harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people . . . the inconveniency therefore of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate, being thus set out of the reach of danger.

1 WILLIAM BLACKSTONE, COMMENTARIES *243. Under our system of government, however, further precautions are taken to prevent such “particular mischiefs.”

³⁷ MADISON'S NOTES, *supra* note 4, at 385.

³⁸ *Id.*

³⁹ *Id.* at 616.

⁴⁰ U.S. CONST. pmb1.

⁴¹ *Cf.* ARTICLES OF CONFEDERATION (“Articles of Confederation and perpetual Union between the States of New Hampshire . . .”).

tion directly operated upon, and by virtue of, the states; under the Constitution, rights and duties are delegated by the people. The acts of the federal government, created by the Constitution, directly affect the people as well as the states. The Constitution was established, as Edmund Randolph of Virginia suggested early in the deliberations of the Convention, as part of the plan prepared by the delegates of his state, "to accomplish the objects proposed by [the] institution [of the Articles of Confederation]; namely, 'common defence, security of liberty and general welfare.'"⁴² It was to "secure these rights"—"Life, Liberty and the pursuit of Happiness"—that "the thirteen united States of America" declared their independence from Great Britain.⁴³

The preamble sets forth the objects of the federal government but is not "the source of any substantive power conferred on the Government of the United States, or in any of its Departments."⁴⁴ Any power entrusted to any branch of government, to fulfill the enunciated ends, must be found in an express or implied delegation of power by the Constitution.⁴⁵ Chief Justice

⁴² MADISON'S NOTES, *supra* note 4, at 30. See also ARTICLES OF CONFEDERATION, art.

III:

The said states . . . enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

⁴³ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁴⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). Cf. *Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936) (preamble of act of Congress is not legislation but only "recital of considerations which in the opinion of that body existed and justified the expression of its will in the present act. Nevertheless this preamble may not be disregarded . . .") (emphasis omitted); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) ("The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature . . ."). However, "[i]f the preamble is contradicted by the enacting clause, as to the *intention* of the legislature, [the enacting clause] must prevail, on the principle that the legislature changed their intention." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 233 (1796) (Chase, J.). There is no danger of such contradiction when interpreting the Constitution, save for the amendments. See notes 62-63 *infra*. Therefore, the substantive provisions should be construed to fulfill the objects of the general government as elucidated by the preamble. In any case, it is a general rule of construction that, if the words or effect and operation, of the enacting clause, are ambiguous or doubtful, such construction should be made as not to extend the provisions in the enacting clause, beyond the intention of the legislature, so clearly expressed in the preamble.

Ware, 3 U.S. (3 Dall.) at 233. Similarly, the Constitution should be interpreted by reference to its intention, clearly expressed in the preamble.

⁴⁵ See, e.g., *Jacobson*, 197 U.S. at 22.

Hughes found in the preamble this guide for the government of the United States:

One of the objects of "a more perfect Union" was "to provide for the common defence." A nation which could not fight would be powerless to secure "the Blessings of Liberty to Ourselves and our Posterity." Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States. Otherwise, as Mr. Justice Story said, "the country would be in danger of losing both its liberty and its sovereignty from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule."⁴⁶

Thus, the Constitution was crafted, in large part, to provide for the common defense.

The delegates to the Philadelphia Convention suffered from no delusion that the world would remain fixed forever by the concerns or by the limitations of the period in which they lived. James Madison and others consistently reminded their fellow members of the Convention that, "[i]n framing a system which we wish to last for ages, we [should] not lose sight of changes which ages will produce."⁴⁷ Chief Justice Marshall's oft-quoted words express this proposition: The "constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."⁴⁸ Our Constitution's adapt-

⁴⁶ Charles E. Hughes, *War Powers Under the Constitution*, 42 REPS. A.B.A. 232, 232 (1917). See also note 246 and accompanying text *infra*.

⁴⁷ MADISON'S NOTES, *supra* note 4, at 194. See also *id.* at 240 (Gouverneur Morris) ("He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin . . . We must look forward to the effects of what we do. These alone ought to guide us."); *id.* at 376 (James Wilson) ("We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment."); *id.* at 551 (John Rutledge) ("As we are laying the foundation for a great empire, we ought to take a permanent view of the subject and not look at the present moment only.").

⁴⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). Hamilton's writing in *The Federalist*, no doubt, inspired those words:

[W]e must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. . . . Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.

THE FEDERALIST No. 34, *supra* note 5, at 204-05 (Alexander Hamilton).

ability to the necessities of our time is one of its greatest features.⁴⁹ "Not the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future."⁵⁰

While it has the capacity to adapt to changing circumstances, however, the Constitution does not leave itself open to arbitrary application. Justice Johnson, speaking for the Court, in 1821, in *Anderson v. Dunn*,⁵¹ remarked that

[t]he science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.⁵²

Fortunately for us, the delegates to the Convention, exercising sound discretion, supplied us with the fixed principles by which we are to be governed. While some doubted whether the nation would survive as one for 150 years,⁵³ we have lasted and prospered, under the Constitution, for over 200 years. The Great Experiment is a success. It is no longer an abstract theory. The constants of the experiment, naturally, cannot be changed, if the desired result—public and private liberty—is to follow. With the constants in place, the system will succeed no matter what variables may arise.⁵⁴ Without adherence to those constants, however, constitutional protections lose all force.⁵⁵

⁴⁹ See, e.g., *Nixon v. Sirica*, 487 F.2d 700, 750 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) ("The genius of our Constitution lies, perhaps as much as anywhere, in the generality of its principles which makes it susceptible to adaptation to the changing times and the needs of the country.").

⁵⁰ *The Steel Seizure Case*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

⁵¹ 19 U.S. (6 Wheat.) 204 (1821).

⁵² *Id.* at 226.

⁵³ MADISON'S NOTES, *supra* note 4, at 410 (Nathaniel Gorham). The Civil War, of course, demonstrates that this fear had some basis.

⁵⁴ *Cf. In re Debs*, 158 U.S. 564, 591 (1895) ("Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation.").

⁵⁵ *Cf. Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 479 (D.C. Cir. 1982) ("The genius of our Constitution . . . depends ultimately on the steadfastness with which its basic principles and requirements are observed. Otherwise the critical protections against governmental tyranny [and outside forces] would quickly become meaningless, as the Government in power could shape it to suit whatever purposes seem sound at the present"), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

James Madison, who played a pivotal role in preparing that "living document" and is often referred to as "the father of our Constitution," remarked, when a member of the First Congress, that "[w]e ought always to consider the Constitution with an eye to the principles upon which it was founded."⁵⁶ The first rule of construction in determining what those principles are is that the Founding Fathers "have intended what they have said."⁵⁷ That is, if the plain meaning of the words is clear, we apply the words to fulfill that meaning. "If, from the imperfection of language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."⁵⁸ The preamble sets forth the objects of the government formed by the provisions that follow it in the Constitution. One great object is to "provide for the common defence." But, that object, like the various provisions found elsewhere in the great document, cannot be read in a vacuum.⁵⁹ It cannot be severed from a subsequent clause in the preamble. The government must "provide for the common defence" to "secure the Blessings of Liberty to ourselves and our Posterity."⁶⁰ We must be prepared to defend ourselves, as the exigencies of the time demand, if we are to enjoy the inalienable rights of "Life, Liberty and the pursuit of Happiness."⁶¹

Amendments to the constitutional frame of government should not be made often or without quite compelling reasons.⁶²

⁵⁶ *Myers v. United States*, 272 U.S. 52, 128-29 (1926) (citing 1 ANNALS OF CONG. 582 (Joseph Gales ed., 1789)).

⁵⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

⁵⁸ *Id.* at 188-89. *Cf. Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 504 (1870) ("A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law.").

⁵⁹ *Cf. Reid v. Covert*, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring) ("The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dis severed from the rest of the Constitution."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("[T]he meaning of a statute is to be looked for, not in any single section, but in all parts together and in their relation to the end in view.").

⁶⁰ See note 46 and accompanying text *supra*.

⁶¹ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁶² In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), Chief Justice Marshall declared the following:

That the people have an original right to establish for their future government,

The powers of the federal government were divided carefully among the three departments so that the goals of the nation, formed by, and consisting of, the people, could be obtained. Amendments, when made, must be accomplished by the method prescribed in the Constitution and not by statute or by any other method.⁶³

It is not unfair to say that the primary "objective of the [Constitution is] the protection of the public against internal and external enemies."⁶⁴ Without this protection, we could not secure the individual liberties that we hold dear.⁶⁵ "[W]e are a Nation with a duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other."⁶⁶

The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.⁶⁷

such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

⁶³ U.S. CONST. art. V.

⁶⁴ *Wilson v. State*, 217 N.E.2d 147, 150 (Ind. 1966).

⁶⁵ Cf. MADISON'S NOTES, *supra* note 4, at 216 (Alexander Hamilton) ("No Government could give us tranquility & happiness at home, which did not possess sufficient stability and strength to make us respectable abroad.").

⁶⁶ *United States v. Macintosh*, 283 U.S. 605, 625 (1931). Cf. Hughes, *supra* note 46, at 248 ("It has been said that the constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So, also, we have a *fighting* constitution.").

⁶⁷ THE FEDERALIST No. 23, *supra* note 5, at 142 (Alexander Hamilton).

Therefore, the war powers of the federal government are unlimited. That is not to say, though, that they are not separated between the political branches of the government charged with the duty to defend the nation from danger emanating from home or from abroad. "[W]hile the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind."⁶⁸ These aims are set forth expressly in the preamble. Each object, including "provid[ing] for the common defence," is designed to "secure the Blessings of Liberty to ourselves and our Posterity." Powers of the federal government were divided to secure the blessings of both public and private liberty.

D. *Necessary and Proper*

The last of the eighteen clauses in the Constitution that grant the fundamental legislative power to Congress is the Necessary and Proper Clause. It gives Congress power

[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.⁶⁹

Although the first section of Article I places legislative power in Congress,⁷⁰ this is the only enumerated grant that confers upon Congress the power to make laws. Hamilton states that the clause in Section 8 is "only declaratory of a truth which would have resulted by necessary and unavoidable implication."⁷¹ In a later paper, Madison explained that, while it follows that "whenever a general power to do a thing is given, every particular power necessary for doing it is included," the clause was added to remove "a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union."⁷² Not only is it "an integral part of each of the preceding 17

⁶⁸ *Lichter v. United States*, 334 U.S. 742, 782 (1948).

⁶⁹ U.S. CONST. art. I, § 8, cl. 18.

⁷⁰ "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.* § 1.

⁷¹ THE FEDERALIST No. 33, *supra* note 5, at 199 (Alexander Hamilton).

⁷² *Id.* No. 44, *supra* note 5, at 294 (James Madison).

clauses,"⁷³ but also it is essential to each power granted to any branch of the federal government in the Constitution. "There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate."⁷⁴ This characteristic of the Constitution is one of the great improvements over the Articles of Confederation.⁷⁵

The plain language of the Necessary and Proper Clause grants to Congress the power to make necessary and proper laws for the functioning of not only its own constitutional role, but also of any other department or officer of the government of the United States. The interpretation of this clause by Hamilton and Madison, to the effect that it is merely redundant, helps to clarify Article I, Section 1: "All legislative Powers *herein* granted shall be vested in a Congress of the United States."⁷⁶ The word "herein" must mean "in the Constitution," not only "in Article I." Nevertheless, the Constitution does not confer upon Congress "All legislative Powers" but only those therein granted. Thus, within *its* sphere of general powers, Congress may only pass such laws as are necessary and proper "for the carrying into Execution" the powers enumerated in the first seventeen clauses of Section 8. It also has power to pass those laws that shall be necessary and proper for carrying into execution the powers of the coordinate branches.⁷⁷

It follows that the Necessary and Proper Clause extends further than "to the specific objects before enumerated"⁷⁸ in Article I, Section 8. Congress's plenary power to make laws for the regulation of the duties and rights of citizens, however, does not give it license to curtail the powers of the coordinate departments of government.⁷⁹ "It is an established principle that the

⁷³ Reid v. Covert, 354 U.S. 1, 43 (1957) (Frankfurter, J., concurring).

⁷⁴ Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225-26 (1821).

⁷⁵ See ARTICLES OF CONFEDERATION, art. II ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.") (emphasis added).

⁷⁶ U.S. CONST. art. I, § 1 (emphasis added).

⁷⁷ Cf. United States v. Sisson, 294 F. Supp. 511, 514 (D. Mass. 1968) ("[T]he implied powers may be not only Congressional but sometimes Presidential.").

⁷⁸ Ex parte Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487).

⁷⁹ See, e.g., Chadha v. Immigration & Naturalization Serv., 634 F.2d 403, 434 (9th

attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."⁸⁰ Chief Justice Marshall's famous exposition of the Necessary and Proper Clause bolsters this principle. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁸¹ If, under the guise of making law, Congress were to intrude upon the constitutional authority of the President, the end would not be legitimate or within the scope of the Constitution; it would be prohibited and inconsistent with the letter and spirit of the Constitution. It would be a violation of the doctrine of separation of powers.

Separation of powers ensures "that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials."⁸² In other words, the Necessary and Proper Clause contemplates some ministerial overlap among the branches.

When Congress, under the Necessary and Proper Clause, makes "all laws which shall be necessary and proper for carrying into Execution" the powers of another branch, it is acting in a ministerial capacity, unless discretion otherwise is provided to Congress in the Constitution or results from separation of powers. As an example of how the Necessary and Proper Clause should work, consider the pardon power. Following the Civil War the Supreme Court held, with respect to the President's pardon power, that the legislature *must* make such laws as are necessary to carry into effect the executive action:

It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and amnesty by the President

Cir. 1980) (legislative veto case), *aff'd*, 462 U.S. 919 (1983) .

⁸⁰ *United States v. Butler*, 297 U.S. 1, 68 (1936). See *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (citation omitted) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.")

⁸¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

⁸² *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

was repealed . . . but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon "is not subject to legislation"; that "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders." . . . The repeal of the section in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or reduce in any degree the obligations of congress under the Constitution to give full effect to it, if necessary, by legislation.⁸³

This is consistent with the interpretation of the Necessary and Proper Clause given above. Congress cannot restrict, by legislation, the constitutional authority of the President. Rather, if necessary, the legislature must pass laws, including appropriations laws, to give effect to constitutional acts of the executive.

An enumeration of powers is meaningless if a branch of government cannot be confined by the limits imposed.⁸⁴ As Thomas Jefferson said, approvingly quoted by Madison,

[a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one.⁸⁵

Therefore, the powers of the federal government were separated, and Congress's power was limited strictly. Allowing Congress to usurp the powers of other departments of the federal government, by passing laws to that effect, though beyond the scope of the boundaries of legislative power granted to it, by the people, by the Constitution, would be to make a mockery of our Constitution and, therefore, of our framework of government and of our republic. "It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing lim-

⁸³ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141-42 (1872).

⁸⁴ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

⁸⁵ THE FEDERALIST No. 48, *supra* note 5, at 324 (James Madison). In *The Federalist*, Hamilton questioned the purpose of separating "the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal, and incapable of producing the ends for which it was established." THE FEDERALIST No. 71, *supra* note 5, at 465 (Alexander Hamilton).

its, and declaring that those limits may be passed at pleasure."⁸⁶ This was not the intent of the Framers. The Necessary and Proper Clause does not give Congress such control over the coordinate branches.

E. *Oath or Affirmation*

The final provision preceding the definitional section of the office of the President imposes the following obligation upon the Chief Executive:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."⁸⁷

This is not the only mention of an oath or affirmation in the Constitution, but it is the only one for which the content is expressly set forth.⁸⁸ The final clause of the original Constitution, other than the provision for ratification, demands that

[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.⁸⁹

There must be some special significance to the oath assigned to the President or the Constitution would not have prescribed one different from that to which all other officers and legislators—both federal and state—are bound.⁹⁰

The Framers, to be sure, considered an oath to be a serious matter.⁹¹ It was believed that an oath, itself, would afford some

⁸⁶ *Marbury*, 5 U.S. at 178. Cf. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (British Parliament "suspend[ed] our own Legislatures, and declare[d] themselves invested with power to legislate for us in *all cases whatsoever*." (emphasis added).

⁸⁷ U.S. CONST. art. II, § 1, cl. 8.

⁸⁸ See *id.* art. I, § 3, cl. 6 (Senators during trial of impeachments); *id.* amend. IV ("no Warrants shall issue, but upon probable cause, supported by Oath or affirmation").

⁸⁹ U.S. CONST. art. VI, cl. 3.

⁹⁰ State officers are bound to the same oath because all those officers "will have an essential agency in giving effect to the federal Constitution." THE FEDERALIST No. 44, *supra* note 5, at 297 (James Madison).

⁹¹ See, e.g., MADISON'S NOTES, *supra* note 4, at 605-06 ("there could be no danger

degree of security to the people of their leaders' fidelity.⁹² This is the essence of the oath to which all officers of the United States must swear. In Chief Justice Marshall's words, "[t]he oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required."⁹³ But, the President's constitutionally worded oath goes beyond mere fidelity.⁹⁴

The oath of the President is "a further provision for the efficacy of the federal powers."⁹⁵ It "has great significance."⁹⁶ An earlier draft of the Constitution, as reported by the Committee of Detail, provided for the following oath:

Before he shall enter on the duties of his department, he shall take the following oath or affirmation, "I _____ solemnly swear, (or affirm) that I will faithfully execute the office of the President of the United States of America."⁹⁷

Later on, at the Convention, James Madison and his fellow delegate from Virginia, George Mason,

moved to add to the oath to be taken by the supreme Executive "and will to the best of my judgment and power preserve protect and defend the Constitution of the U.S."⁹⁸

that the Senate would say untruly on their oaths.")(Gouverneur Morris).

⁹² See THE FEDERALIST NO. 64, *supra* note 5, at 422-23 (John Jay).

⁹³ McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819).

⁹⁴ The clause providing for the President's oath or affirmation is not a collection of empty words. Marshall said this of the general oath, to support the Constitution, as applied to the judiciary:

Why otherwise does it direct the judges to take an oath to support [the Constitution]? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

. . . .

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

Marbury, 5 U.S. at 180. The President also is charged with the sworn duty of preserving, protecting and defending the Constitution. It would be a "solemn mockery" and "a crime" if those words were not given their common meaning.

⁹⁵ See THE FEDERALIST NO. 18, *supra* note 5, at 106 (Alexander Hamilton or James Madison) ("As a further provision for the efficacy of the federal powers, [the Amphictyons of Ancient Greece] took an oath mutually to defend and protect the united cities . . .").

⁹⁶ *In re Neagle*, 135 U.S. 1, 82 (1890) (Lamar, J., dissenting).

⁹⁷ MADISON'S NOTES, *supra* note 4, at 392.

⁹⁸ *Id.* at 536.

The motion passed.⁹⁹ The final version, however, does not restrict the President's authority as protector of the Constitution to his judgment and to the means expressly given to him in Section 2 of Article II. He is restrained, not by his judgment and power, but, as long as his conduct is taken to "preserve, protect and defend the Constitution" and does not tend to destroy or to wage war against it,¹⁰⁰ he is limited only by his personal ability. All of the power necessary to "preserve, protect and defend" the Constitution is provided by that instrument. The executive authority set forth in the next section, of Article II, does not contract his sworn duties. Rather, the oath is a guide by which one may understand better the President's powers defined thereafter.¹⁰¹

In the *Steel Seizure Case*, Justice Clark gave his view, gleaned from scores of "pronouncements of distinguished members" of the Supreme Court, that

the Constitution [grants] to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself. As Lincoln aptly said, "[i]s it possible to lose the nation and yet preserve the Constitution?"¹⁰²

⁹⁹ *Id.*

¹⁰⁰ If the President does take action that tends to destroy or to attack the Constitution, he may be removed for breach of faith. A violation of his oath, a bond between him and the people, obligating him to pass the Constitution on to his successor as he found it, would subject him to impeachment. See U.S. CONST. art. II, § 4.

¹⁰¹ Section 3 of Article II concerns the general domestic duties of the Chief Executive and requires that he "will faithfully execute the Office of President of the United States." This is the President's power concerning internal legislation and execution of those laws. Article II also defines the President's foreign affairs and war powers. These last two powers, though distinct, sometimes merge and, therefore, are both to be found in Section 2 of Article II, while the President's domestic authority is given in Section 3. See *Worthy v. Herter*, 270 F.2d 905, 913 (D.C. Cir. 1959) ("[F]oreign affairs involve more than wars, and the President's powers over foreign affairs are not only war powers. As a matter of fact these are two separate powers in the Constitution. And, as a further matter of fact, governments have many more dealings with each other and problems concerning each other in peacetime than they do in wartime. Not only so, but, as we have already emphasized, the duty of the President to prevent war is as important as is his power to conduct one.") (emphasis added), cert. denied, 361 U.S. 918 (1959). Cf. *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1979) ("The Constitution in Article II, § 2 confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense."), cert. denied, 409 U.S. 1063 (1972).

¹⁰² 343 U.S. 579, 662 (Clark, J., concurring).

If the President, acting to the best of his ability, takes measures designed to "preserve, protect and defend" the nation, which is inseparable from the Constitution, he acts, not only in conformity with the Constitution, but also according to his most solemn duty.

II. THE EXECUTIVE

A. *Qualities Of The Office Of President*

Blackstone, in his *Commentaries* on the British Constitution, described the three categories of the king's substantive prerogatives—

first, the king's royal *character*; secondly, his royal *authority*; and, lastly, his royal *income*. These are necessary to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and vigor. Yet, in every branch of this large and extensive dominion, our free constitution has interposed such reasonable checks and restrictions, as may curb it from trampling on those liberties which it was meant to secure and establish.¹⁰³

With respect to each of these categories, the President is like the British king only to the extent necessary to protect public liberty. For the reasons that compelled the thirteen colonies to declare their independence from Great Britain, however, the office of the President otherwise is unlike the example of the British monarch in each of these categories.

The Framers endeavored to place independence and vigor in the office of the President, as it resided with the British king. The intent of the Founding Fathers, however, was to accomplish this goal without infusing the office of the Chief Executive with the attributes of a monarchy. While the delegates to the Philadelphia Convention were fearful of the tyranny of an omnipotent legislature, they equally were opposed to the establishment of a monarchy.¹⁰⁴

¹⁰³ 1 WILLIAM BLACKSTONE, COMMENTARIES *240.

¹⁰⁴ Charles Pinckney, of South Carolina, no doubt was fearful of the potential abridgement of individual liberties by the President when, early on at the Convention, he stated that he "was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c., which would render the Executive a monarchy, of the worst kind, to wit an elective one." MADISON'S NOTES, *supra* note

The Confederate Congress, by virtue of the Articles of Confederation, in theory possessed the chief powers of the king. The problem with the confederation was not the authority conferred upon the Congress but, rather, the want of independence from the states to act on their behalf and of vigor to act effectively. For that reason, the Confederate Congress, standing on its own, was not dangerous to individual liberties of citizens and of states but threatened the very existence of the states and of their inhabitants by its lack of real power to protect them from invasion or from insurrection.¹⁰⁵

Thus, the task for the Founding Fathers was to redistribute the powers of the Confederate Congress to provide for both public and private safety.

The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.¹⁰⁶

The challenge for the Framers was to form a system of government that to enforce public rights, would include a strong executive, but that also would protect individual liberties.

1. Independence and Vigor

There must be energy in the executive for him to fulfill his duties of preserving the nation, by representing the United States in foreign affairs, of protecting and defending the Union from internal and external dangers, by commanding the armed forces, and of taking care that the laws are executed faithfully. To remedy the weakness of the Confederate Congress and to provide for a strong arm of the government capable of defending the United States from any threat to its existence or to the pub-

4, at 45. Equally clear, however, is that the fear that he articulated concerned the powers to be conferred upon the President and not the character of the office. In fact, immediately after speaking these words, he seconded James Wilson's motion to establish an executive consisting of one person. *Id.*

¹⁰⁵ Cf. MADISON'S NOTES, *supra* note 4, at 128 (Edmund Randolph) ("We must resort therefor to a National *Legislation over individuals*, for which Congress are unfit. To vest such power in them, would be blending the Legislative with the Executive, contrary to the recd. maxim on this subject: If the Union of these powers heretofore in Congress has been safe, it has been owing to the general impotency of that body.").

¹⁰⁶ THE FEDERALIST No. 45, *supra* note 5, at 303 (James Madison).

lic safety, the Framers established a vigorous executive department.¹⁰⁷

As pointed out above, the powers of the federal government were separated to secure best the objects of public and of private liberty.¹⁰⁸ It is precisely in those matters that are critical to the safety of the general public that the President must be given the highest degree of discretion to act, to the best of his ability, fearlessly and without restraint.¹⁰⁹ For the good of the whole, "it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision."¹¹⁰ The Framers "relied on the vigor of the Executive as a great security for the public liberties."¹¹¹ In defining vigor as "energy," Hamilton listed its components as "first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers."¹¹²

¹⁰⁷ See THE FEDERALIST No. 70, *supra* note 5, at 454 (Alexander Hamilton) ("Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws . . ."); *id.* No. 37, at 227 (James Madison) ("[e]nergy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good government"). See also *The Steel Seizure Case*, 343 U.S. 579, 682 (1952) (Vinson, C.J., dissenting) ("It is apparent that the Presidency was deliberately fashioned as an office of power and independence. Of course, the Framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake."); *Myers v. United States*, 272 U.S. 52, 116-17 (1926) ("The debates in the Constitutional Convention indicated an intention to create a strong Executive . . . and many of his important functions were specified so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation.").

¹⁰⁸ See notes 17-36 and accompanying text *supra*.

¹⁰⁹ See *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982).

¹¹⁰ THE FEDERALIST No. 71, *supra* note 5, at 465 (Alexander Hamilton).

¹¹¹ MADISON'S NOTES, *supra* note 4, at 334 (Rufus King). On the other hand, the Founding Fathers relied "on the Representatives of the people as the guardians of their Rights & interests." *Id.* at 338 (Elbridge Gerry).

¹¹² THE FEDERALIST No. 70, *supra* note 5, at 455 (Alexander Hamilton). The Constitution provides for duration. The President holds office for a term of four years, U.S. CONST. art. II, § 1, cl. 1, and may be reelected. (The propriety (or, in my opinion, impropriety) of the Twenty-Second Amendment, which provides that no one may serve as president more than twice, need not be discussed here.)

Adequate provision for the support of the executive also may be found in the Constitution. U.S. CONST. art. II, § 1, cl. 7. See THE FEDERALIST No. 73, *supra*, at 474-76 (Alexander Hamilton).

2. Unity

Blackstone, in his *Commentaries* on the Laws of England, described the authority of the king of Great Britain:

[T]he executive part of government . . . is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation, all others acting by commission from, and in due subordination to him¹¹³

The Framers believed that, if the executive powers were not vested in a single person, the federal government would be sapped of the vigor necessary to defend public rights. Of all the powers of the President, however, the commander-in-chief power would suffer most from such decentralization. In *The Federalist*, Hamilton wrote that,

[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of *directing and employing* the common strength, forms a usual and essential part in the definition of the executive authority.¹¹⁴

Thus, unity in the office of the President provides safety to the general public.

The Framers transformed the attributes of the king of Great Britain into checks upon potential presidential tyranny. While unity in the presidency is essential to the preservation and protection of public safety, consistent with republicanism, the Founding Fathers framed the Constitution with another,

¹¹³ 1 WILLIAM BLACKSTONE, COMMENTARIES *250.

¹¹⁴ THE FEDERALIST NO. 74, *supra* note 5, at 482 (Alexander Hamilton) (emphasis added). See also *id.* No. 70, *supra* note 5, at 459 (Alexander Hamilton) ("In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.").

At the Convention, similar concerns over plurality in the executive were expressed. See MADISON'S NOTES, *supra* note 4, at 58-59 (Pierce Butler); *id.* at 60 (Elbridge Gerry) ("It wd. be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads.").

equally important, derivative object in mind—individual liberty. The Framers recognized that, because unity ensures accountability, unity in the executive department also is the best check upon possible usurpations of power by the President. James Madison reflected the substance of these thoughts, as expressed at the Convention:

Mr. WILSON said that unity in the Executive instead of being the fetus of monarchy would be the best safeguard against tyranny. He repeated that he was not governed by the British Model which was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.¹¹⁵

The delegates to the Philadelphia Convention agreed that the greatest check upon the President's ability to usurp *ultra vires* powers is that "[t]he executive Power shall be vested in a President of the United States of America."¹¹⁶ Unity "constitute[s] safety in the republican sense" by requiring "first, a due dependence on the people; secondly, a due responsibility."¹¹⁷

3. Responsibility

The President, as the sole person assigned the duties to take care that the laws of the United States are executed faithfully and to "preserve, protect and defend" the nation, is given awesome responsibility.¹¹⁸ But, responsibility is a two-way street. The Constitution gives the President a great deal of open road and sets forth a map defining his terrain, but, as he is the only vehicle out there, with everyone watching, every violation will be spotted. His license is subject to renewal after four years and may be revoked, anywhere along the road, for gross violations.¹¹⁹

¹¹⁵ MADISON'S NOTES, *supra* note 4, at 47.

¹¹⁶ U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

¹¹⁷ THE FEDERALIST No. 70, *supra* note 5, at 455 (Alexander Hamilton). See also *id.* No. 77, *supra* note 5, at 502 (Alexander Hamilton).

¹¹⁸ The Constitution, in Article II, when granting powers to the executive department, fully vests the President, alone, with all executive power. It uses the words "The President" or "He." While the Constitution provides for the appointment and use of executive advisors and agents, executive power resides solely with the President.

¹¹⁹ Plurality in the executive makes detection, of both the author of unwise policy and of misconduct, more difficult. Thus, as Hamilton wrote, the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion, which lose their efficacy, as well on account of

These vital checks on potential abuse of power can be found in the first and final sections of Article II. The first clause of Article II, Section 1, reads:

The executive power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years.

In the same clause that gives the executive power strength through centralization in one person, that person is made responsible to the people for his actions—he holds office for only four years subject to reelection. The last section of Article II, clearly directed by its placement within that article most significantly at the President, is the Constitution's provision for impeachment:

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.¹²⁰

The strength and independence of the executive department will preserve and protect the United States. Unity in the executive also guards personal rights, by making the President accountable. "Secrecy, vigor & despatch are not the principal properties reqd. in the Executive. Important as these are, that of responsibility is more so, which can only be preserved; by leaving it singly to discharge its functions."¹²¹

For the United States to play a responsible role in the international arena, it was necessary to give the President great discretion in foreign affairs and in war.¹²² It is essential that the nation speak with one voice. That voice also must have force to back the words lest words alone not be effective. Therefore, both powers reside with the one President of the nation; "[t]he responsibility [to the nation] must be where the power is."¹²³

the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, *secondly*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.

THE FEDERALIST No. 70, *supra* note 5, at 460-61 (Alexander Hamilton).

¹²⁰ U.S. CONST. art. II, § 4.

¹²¹ MADISON'S NOTES, *supra* note 4, at 81 (John Dickinson).

¹²² See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973).

¹²³ *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

Wisely, the Constitution places that responsibility in the executive and makes the holder answerable directly to the electorate,¹²⁴ who can publicly censure the President by failing to reelect him. Accordingly, the President should be left alone to discharge his duties, so as not to dilute his accountability.¹²⁵

If, once elected, a President acts "to preserve, protect and defend the Constitution," the people, though they may disagree with his methods, have no constitutional method of disarming him of power until the next election. The people, having chosen the President, must accept responsibility for his decisions and actions.

Justice Jackson, in a concurring opinion in the *Steel Seizure Case*,¹²⁶ wrote the following:

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.¹²⁷

While it is true that the President is more visible today than in the past because of advances in mass communication, that does not create an overbalance of executive power dangerous to republican liberty. The degree of accountability to the people, as

¹²⁴ *Worthy v. Hester*, 270 F.2d 905, 913 (D.C. Cir. 1959) ("the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the electorate").

¹²⁵ In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), the Court quoted an 1816 Senate Foreign Relations Committee report which concluded that the President,

[f]or his conduct . . . is responsible to the Constitution. The committee consider[s] this responsibility the surest pledge for the faithful discharge of his duty. . . . *They think the interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety.*

Id. (emphasis added). See also *Sardino v. Federal Reserve Bank of N.Y.*, 361 F.2d 106, 110 (2d Cir.) (foreign affairs power), *cert. denied*, 385 U.S. 898 (1966); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968) (commander-in-chief power), *aff'd*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

¹²⁶ 343 U.S. 579 (1952).

¹²⁷ *Id.* at 653-54.

he is one person constantly in the public eye, has grown in direct proportion to his power. The improved technology of our era has increased his power in terms of his capability to fulfill his duty to "preserve, protect and defend" the nation. Unfortunately, outside forces also have become more threatening to public liberty due to advanced technology. The President's power is only, and always should be, commensurate with the danger imposed. Technology by increasing accountability, has made private liberty more secure.

Responsibility diminishes in direct proportion to an increase in numbers. Under the system devised by the Framers, if the President were left to carry out *his* executive functions without a meddlesome legislature and without a behemoth bureaucracy, the President would be accountable for his actions; then, the people would benefit from a more effective bulwark against usurpations of power by the President while enjoying the benefits of public liberty.

In closing this discussion of presidential attributes, Chief Justice Hughes provided me (inadvertently I am sure) with a felicitous summation. Not eager to do any unnecessary work, I shall use it:

It was not in the contemplation of the constitution that the command of forces and the conduct of campaigns should be in charge of a council or that as to this there should be division of authority or responsibility. The prosecution of war demands in the highest degree the promptness, directness and unity of action in military operations which alone can proceed from the Executive. This exclusive power to command the army and navy and thus to direct and control campaigns exhibits not autoócracy, but democracy fighting effectively through its chosen instruments and in accordance with the established organic law.¹²⁸

The next question should be: What is the executive war power?

B. *The Commander-in-Chief Power*

Justice Frankfurter once said: "The war power is the war power."¹²⁹ This fine explanation apparently did not help Justice Jackson who, four years later, expressed puzzlement over the meaning of the constitutional provision granting the President

¹²⁸ Hughes, *supra* note 46, at 233.

¹²⁹ Ludecke v. Watkins, 335 U.S. 160, 171 (1948).

the commander-in-chief power:

These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. *It undoubtedly puts the Nation's armed forces under presidential command.* Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.¹³⁰

One can understand where a constitutional power "begins or ends" only, first, by comprehending the object of the grant and, second, by scrutinizing it in the context of related grants of, or limitations on, power found in the Constitution.¹³¹ The object of the grant is to "provide for the common defence."¹³² The Constitution, however, is replete with grants of power that, together, serve this object. Therefore, the contours of the commander-in-chief power will be found only by fitting it into the constitutional puzzle that, when complete, forms the full panoply of war powers.

To better understand the separation of war powers among the branches of the federal government, one should refer once again to Blackstone for an explanation of the British monarch's war powers at the time the Constitution of the United States was drafted. In his *Commentaries*, Blackstone wrote the following:

The king is considered . . . as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community:

¹³⁰ The Steel Seizure Case, 343 U.S. 579, 641-42 (1952) (Jackson, J., concurring) (emphasis added).

¹³¹ Cf. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring): Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to *provide* by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.* Both these powers are derived from the Constitution, but neither is defined by that instrument. *Their extent must be determined by their nature, and by the principles of our institutions.* (emphasis added).

¹³² See notes 40, 67 and accompanying text *supra*.

and the principal use of government is to *direct* that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.¹³³

Our Founding Fathers accepted the idea that unity of the states and in the federal executive is essential for vigor, which is necessary for a strong defense. Our nation, though, is founded upon republican principles. To this end, the federal government was arranged so that, in external matters, the United States speak and act as one, while, in relation to internal concerns, they and their inhabitants may be divided. In *The Federalist*, Hamilton cites Montesquieu approvingly:

"It is very probable" (says he) "that mankind would have been obliged at length to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a CONFEDERATE REPUBLIC."¹³⁴

The king of Great Britain possessed many more war-related powers than the power to direct military forces.¹³⁵ These include powers that our Constitution vests in Congress. Prior to the Constitution, the Confederate Congress, as the sole department of the confederate government, had powers that now are distributed among the three branches of the federal government, including the power to direct the operations of the armed forces of the United States.¹³⁶ Even before the Articles of Confederation had been ratified,

Congress raised armies, fitted out a navy, and prescribed rules for their government: Congress conducted all military operations both by land and sea: Congress emitted bills of credit, received and sent ambassadors, and made treaties: Congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to

¹³³ 1 WILLIAM BLACKSTONE, COMMENTARIES *262 (emphasis added).

¹³⁴ THE FEDERALIST No. 9, *supra* note 5, at 50 (Alexander Hamilton) (footnote omitted). See MONTESQUIEU, *supra* note 30, at 183. Cf. MADISON'S NOTES, *supra* note 4, at 197 (James Wilson) ("[e]very nation may be regarded in two relations I. to its own citizens. 2. To foreign nations").

¹³⁵ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *262-66, *407-21.

¹³⁶ See ARTICLES OF CONFEDERATION art. IX.

capture, and prescribed rules for the distribution of prizes.¹³⁷

To wage the Revolutionary War successfully, the Continental Congress "appointed a commander in chief."¹³⁸ Under the Articles of Confederation, the Confederate Congress retained the power appoint a commander-in-chief but was forbidden to do so without the assent of nine states.¹³⁹ Thus, military command was fragmented. The commander-in-chief was answerable to the Congress, which, in turn, depended upon the states. To remedy the weakness of this division of authority in the conduct of war, the Constitution places this power entirely in the hands of the President. For the public safety, "[t]he two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution."¹⁴⁰ For the purpose of republican safety, many of the powers of the king and of the Confederate Congress were vested in the federal legislature.¹⁴¹

Therefore, the President's power in war, while, of necessity,¹⁴² great, does not approach that of the British monarch.

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the su-

¹³⁷ *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 80 (1795).

¹³⁸ *Id.* at 111. The commander-in-chief was General Washington.

¹³⁹ ARTICLES OF CONFEDERATION art. IX, para. 6:

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the numbers of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

¹⁴⁰ *Worthy v. Hester*, 270 F.2d 905, 910 (D.C. Cir. 1959).

¹⁴¹ *See, e.g.*, THE FEDERALIST No. 49, *supra* note 5, at 330 (Alexander Hamilton or James Madison) (lawmakers "are more immediately the confidential guardians of the rights and liberties of the people"); *id.* No. 70, at 455 (Alexander Hamilton) (Congress is "best calculated to conciliate the confidence of the people and to secure their privileges and interests"). *See also* notes 5, 111 *supra*.

¹⁴² *See Ex Parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (President "is made . . . from necessity, and the nature of his duties, the commander-in-chief of the army and navy").

preme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.¹⁴³

As explained below, the powers of raising, supporting, and regulating armed forces are checks on the President's power to "protect and defend" public liberty, fashioned to protect liberty in the republican sense.¹⁴⁴ These legislative powers, however, do not restrict the Commander-in-Chief's discretion in employing and in directing the armed forces as he deems necessary against foreign aggressors (or against domestic rebels). The authority to declare war, which includes the publicly authorized, private war power, aimed at securing personal liberty,¹⁴⁵ is the power of conferring certain rights and of imposing specific obligations upon the individual citizens of the United States. It does not contract the powers of the Commander-in-Chief.

1. Commander-in-Chief Of Armed Forces Of The United States

Article II, Section 2, Clause 1 of the Constitution, invests the President with the commander-in-chief power:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

There is no qualification on the President's command of the armed forces of the United States. The distinction between that power and the President's command over the states' militia is apparent from the language of the Constitution. The President is the Commander-in-Chief of the armed forces of the United States at all times.¹⁴⁶ There need not be a war or public danger.

¹⁴³ THE FEDERALIST NO. 69, *supra* note 5, at 448 (Alexander Hamilton) (footnote omitted).

¹⁴⁴ See notes 208-75 and accompanying text *infra*.

¹⁴⁵ See notes 384-442 and accompanying text *infra*.

¹⁴⁶ See, e.g., *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893) ("President is always

"The Constitution in some of its provisions expressly refers to 'time of peace' and 'time of war.'"¹⁴⁷ This is not among them. Once a branch of the armed services is raised or is provided, the President is its commander-in-chief.

It is certain that the Framers intended, by vesting the commander-in-chief power in the President, to give him the authority to conduct war.¹⁴⁸ Conducting war includes the power to direct the movements of the armed forces and to employ them as the President determines to be necessary for the security of the United States.

The direction of war implies the direction of the common strength; and the power of *directing and employing* the common strength, forms a usual and essential part in the definition of the executive authority.¹⁴⁹

Chief Justice Taney, in *Fleming v. Page*,¹⁵⁰ reiterated this exposition of the power of the President to conduct war:

*As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States.*¹⁵¹

the commander in chief"), *aff'd*, 165 U.S. 553 (1897).

¹⁴⁷ *United States v. Rappeport*, 36 F. Supp. 915, 916 (S.D.N.Y.), *aff'd sub nom. United States v. Herling*, 120 F.2d 236 (2d Cir. 1941). See U.S. CONST. art. I, § 10, cl. 3 (various prohibitions on states); *id.* amend. III (quartering of soldiers); *id.* amend. V (grand jury indictment).

¹⁴⁸ An earlier draft of the Constitution gave Congress the power to make war. See notes 423-35 and accompanying text *infra*. The word "make" was changed to "declare," as it presently stands. The final vote, of the nine states voting, on the motion to change this language, was eight in favor and one against. Originally, there were two against, but, [o]n the remark of Mr. King that "make" war might be understood to "conduct" it which was an Executive function, Mr. Elseworth gave up his objection, and the vote of Cont. was changed to—ay.

MADISON'S NOTES, *supra* note 4, at 476 n.*. Cf. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) ("Congress cannot direct the conduct of campaigns . . .").

¹⁴⁹ THE FEDERALIST NO. 74, *supra* note 5, at 482 (Alexander Hamilton) (emphasis added).

¹⁵⁰ 50 U.S. (9 How.) 603 (1850).

¹⁵¹ *Id.* at 615 (emphasis added). *Accord Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (power as Commander-in-Chief to station forces abroad); *United States v. Ezell*, 6 M.J. 307, 316 (C.M.A. 1979) (Commander-in-Chief has power "to deploy troops and assign duties as he deems necessary"); Hughes, *supra* note 46, at 238 ("There is no limitation upon the authority of Congress to create an army and it is for the president as

Again, the President has a sworn duty to "preserve, protect and defend" the nation.¹⁵² He cannot take office until he takes an oath that he will do so to the best of his ability. If there were a danger threatening the existence or welfare of the United States, the President would be duty-bound to take action to stanch its advancement and to protect the Union.

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*."¹⁵³

Once there is a show of force that the President determines to be a threat to the nation, the President is bound to meet the force with force. War exists from the unilateral action of the hostile enemy.¹⁵⁴ As Commander-in-Chief, the President is responsible fully for the conduct of war.

Incident to the President's duty to conduct war is his power to prevent an invasion before it takes place. Justice Story wrote:

[T]he power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.¹⁵⁵

Further support for this assertion may be found in the Constitution itself, by looking at the whole document. Article I, Sec-

Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on.").

¹⁵² See note 87 and accompanying text *supra*.

¹⁵³ The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).

¹⁵⁴ See notes 383, 401 and accompanying text *infra*. Because:

[A]ccording to the law of nature there should be a mutual performance of the duties of peace, whoever takes the first step in violating them against me, has, so far as he is able, freed me from my performance of the duties of peace, and therefore, in confessing that he is my enemy, he allows me a license to use force against him to any degree, or so far as I may think desirable.

SAMUEL PUFENDORF, THE LAW OF NATURE AND NATIONS 1298 (James B. Scott ed., C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934). "War may also begin properly upon the denial of a demand, which in my opinion does not differ from actual force." CORNELIUS VAN BYNKERSHOEK, QUESTIONS OF PUBLIC LAW 19 (James B. Scott ed., Tenney Frank trans., Clarendon Press 1930).

¹⁵⁵ *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827).

tion 8, Clause 15, of the Constitution, empowers Congress

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Later, in the Bill of Rights, the Constitution provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, *when in actual service in time of War or public danger . . .*¹⁵⁶

The limitation upon the President's use of the militia is, for the protection of individual and of states' rights, much stricter than the limitation upon the President's use of the armed forces.¹⁵⁷ The President always is in command of the armed forces. He commands the militia only when called into actual service of the United States. Nevertheless, even the limitation on the President's use of the states' militia is not quite as restrictive as that imposed upon the states themselves. The Constitution states that "[n]o state shall . . . engage in War, unless *actually* invaded, or in such *imminent Danger as will not admit of delay*."¹⁵⁸ Because this language, borrowed from Article VI of the Articles of Confederation, is used as applied to the states but not as applied to the *federal* use of the states' militia, the limitations on the powers differ in degrees. If the states must wait until actually invaded or until the states are in such imminent danger of being invaded as will not admit of delay, the federal government need not wait until such an emergency exists.

This distinction rests upon the different principles that apply to private and to public self-defense powers.¹⁵⁹ The language

¹⁵⁶ U.S. CONST. amend. V (emphasis added).

¹⁵⁷ See notes 235-36 and accompanying text *infra*. Cf. *Ex Parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487) ("although the militia, when in actual service, is under his command, yet the appointment of the officers is reserved to the states, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the states").

¹⁵⁸ U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

¹⁵⁹ Cf. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS* 76 (Archibald C. Campbell, trans., Hyperion reprint ed. 1979) ("when our lives are threatened with immediate danger, it is lawful to kill the aggressor, if the danger cannot otherwise be avoided: an instance, as it has been shewn, on which the justice of *private* war rests") (emphasis added); PUFENDORF, *supra* note 154, at 1299 ("citizens are allowed to use violence in their own defence only in case of an unavoidable peril"). In this Article, principally in the final section, see notes 359-442 and accompany-

of the Constitution that describes Congress's power to call forth the militia—before placing the militia under the President's command to be employed, as he deems necessary, for the public safety—does not use the same restrictive language that applies to the states. Public danger is not "imminent danger." If the President can employ the militia in times of public danger, not amounting to imminent danger, and to repel invasions, without waiting until actually invaded, then the President must be able to deploy federal armed forces to prevent a potential threat to the security of the United States from approaching the magnitude of "imminent danger" or of an actual invasion.

[P]rivate war extends only to self-defence, whereas *sovereign powers have a right not only to avert, but to punish wrongs. From whence they are authorised to prevent a remote as well as an immediate aggression.*¹⁶⁰

This right and power of public self-defense, which includes collective self-defense of a community of nations,¹⁶¹ requires no declaration of war.¹⁶² Under the Constitution, it is the duty of the President to "protect and defend" the nation.

The powers of Congress are enumerated expressly. Conversely, the President's power is defined but not enumerated: It extends as far as the exigency of the moment dictates. Moreover, Congress must make those laws that are necessary and proper to carry into effect the direction of a war by the Commander-in-Chief. Therefore, Congress may make far-reaching laws, in sup-

ing text *infra*, I will refer to Grotius, Pufendorf, Bynkershoek, and Vattel, all of whom, at the time of the Constitutional Convention, were recognized as authorities on war and peace and on the law of nations. Grotius was cited by Blackstone as the principal authority on rights of war, *see* text accompanying note 396 *infra*, and was cited in *The Federalist* No. 20, at 121 (Alexander Hamilton & James Madison) and *The Federalist* No. 84, at 563 (Alexander Hamilton). A record exists also of Vattel being cited during the Convention. *See* MADISON'S NOTES, *supra* note 4, at 202 (Luther Martin). According to Justice Story, each of Grotius, Pufendorf, and Bynkershoek is good authority, with Bynkershoek "the highest authority." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 140 (1814) (Story, J., dissenting). Vattel, said Story, is less reliable. *Id.* at 140-41.

¹⁶⁰ Grotius, *supra* note 159, at 83 (emphasis added).

¹⁶¹ *See* note 403 and accompanying text *infra*. *See also* *United States v. Mitchell*, 246 F. Supp. 874, 898 (D. Conn. 1965) ("Unquestionably the President can start the gun at home or abroad to meet force with force; he is not only authorized but bound to do so. And under our established concept of international dependence and foreign commitments, this power must extend to repelling attacks upon our allies which threaten our own security.") (citation omitted).

¹⁶² *See* note 401 and accompanying text *infra*.

port of the military campaign, if the President deems such measures necessary, but cannot impair the authority of the Commander-in-Chief.¹⁶³ Such appropriate means are incidental to the powers of the President.

The President's public war power includes the authority to defend the nation and permits punishment of aggression and the prevention of future conflict.¹⁶⁴ This authority also comprehends collective self-defense.¹⁶⁵ The power to declare war clearly is not a defense power.¹⁶⁶ The legislative authorities essential to the common defense are the powers to raise and support armies, to provide and maintain a navy, and to prescribe rules for their government and regulation.¹⁶⁷ The defense power, once armed forces are provided, resides with the President (except with respect to prescribing rules for the government and regulation of the forces). Congress may not intrude upon the President's power to "protect and defend" the nation, which includes the power to punish aggression.

There is no constitutional limitation or check on the commander-in-chief power, once Congress provides manpower and money, other than that it extends only so far as its object: The power must be exercised to "preserve, protect and defend" the nation.¹⁶⁸ Nonetheless, the people (as the electorate) and Con-

¹⁶³ The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.

Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring). *Cf.* *Johnson v. Eisenrager*, 339 U.S. 763, 779 (1950) (President's commander-in-chief power cannot be fettered); *Street v. United States*, 24 Ct. Cl. 230, 247 (1889) (Framers put "power of command and control . . . in the hands of the President, with only two restrictions set upon it: that Congress should have power 'to make rules for the government and regulation of the land and naval forces'; that the appointment of officers should be 'by and with the advice and consent of the Senate.'"), *aff'd*, 133 U.S. 299 (1890).

¹⁶⁴ *See Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870) (power to carry on war "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress"). *See also* BYNKERSHOEK, *supra* note 154, at 118-19 ("[T]he right of self-defence. . . . permits us, as does every declaration of war, to injure the enemy in every possible manner, that is, not only to avert the peril with which the enemy threatens us, but also to strip him of all his goods.").

¹⁶⁵ *See* note 403 and accompanying text *infra*.

¹⁶⁶ *See* note 206 and accompanying text *infra*.

¹⁶⁷ *See* note 206 and accompanying text *infra*.

¹⁶⁸ Contrast this with the President's foreign affairs powers, which themselves are

gress (possessing the impeachment power) have some authority to ensure that the President stays within these bounds, as well as within the bounds of his foreign affairs power.

The commander-in-chief power, indeed, necessarily, is very broad. Its purpose is to protect public liberty. The contours of this authority may be defined only by an understanding of the powers vested in the legislature to guard against oppression by the executive of the people and of the states.¹⁶⁹ Together, the President's war and foreign affairs powers equip him with the necessary authority to make peace and to keep the peace. One method of accomplishing this is diplomacy—another is war.

2. The Question of a Council

On August 18, 1787, at the Philadelphia Convention, Oliver Ellsworth of Connecticut

observed that a Council had not yet been provided for the President. He conceived there ought to be one. His proposition was that it should be composed of the President of the Senate—the Chief-Justice, and the ministers as they might be establd. for the departments of foreign & domestic affairs, war finance and marine, who should advise but not conclude the President.¹⁷⁰

Charles Pinckney of South Carolina, in response, stated that "the President shd. be authorized to call for advice or not as he might chuse. Give him an able Council and it will thwart him; a weak one and he will shelter himself under their sanction."¹⁷¹ The question of whether the Constitution should provide for an executive council was debated heatedly by the delegates. The difference of opinion on the matter was divided roughly along the lines of argument first articulated by Ellsworth and by Pinckney.

nearly exclusive. The war powers of the President, to be clear, are those powers exercised as Commander-in-Chief. The Senate, to the exclusion of the House, however, has constitutional powers to restrain the exercise of the President's foreign affairs power. It must ratify treaties and nominations of ambassadors, of other public ministers and consuls, of judges, and of other principal officers of the United States whose appointments are not otherwise provided for in the Constitution. *See* U.S. CONST. art. II, § 2, cl. 2.

¹⁶⁹ Accordingly, I shall review these powers of Congress to complete the understanding of the commander-in-chief authority. *See* notes 206-442 and accompanying text *infra*.

¹⁷⁰ MADISON'S NOTES, *supra* note 4, at 481.

¹⁷¹ *Id.*

The notion of an executive council can be traced to the British Constitution. The king had, at his disposal, four councils, "[b]ut the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council*."¹⁷² Privy counsellors were appointed by nomination of the king, "and, on taking the necessary oaths, they become immediately privy counsellors during the life of the king that chooses them, but subject to removal at his discretion."¹⁷³ "The *duty* of a privy counsellor appears from the oath of office,"¹⁷⁴ just as the President's oath imposes obligations upon him.

Unlike our republican system, in which the President is impeachable for a breach of the public faith,¹⁷⁵ under the British Constitution, the king was not subject to the laws but, rather, was assigned the attribute of absolute perfection.¹⁷⁶ Therefore, to redress public wrongs, privy council members were made amenable to impeachment:

For as the king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.¹⁷⁷

In the United States, the President is both subject to the will of the people, at the election polls, and subject to impeachment for gross violations of the public trust. In contrast, it was the law under the British Constitution

that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional in-

¹⁷² 1 WILLIAM BLACKSTONE, COMMENTARIES *229.

¹⁷³ 1 *id.* at *230.

¹⁷⁴ 1 *id.*

¹⁷⁵ *E.g.*, THE FEDERALIST No. 65, *supra* note 5, at 423 (Alexander Hamilton) (impeachment is for "abuse or violation of some public trust").

¹⁷⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *246.

¹⁷⁷ 1 *id.* at *244. *See also id.* at *251-52 ("In the exertion . . . of those prerogatives, which the law has given him, the king is irresistible and absolute And yet, if the consequence of that exertion be manifestly to the grievance or dishonor of the kingdom, the parliament will call his advisers to a just and severe account.").

dependence of the crown, which is necessary for the balance of power, in our free and active, and therefore compounded, constitution.¹⁷⁸

In our Constitution, the independence of the President was established by vesting all executive power in him alone. Unity in the executive¹⁷⁹ is essential in our system, however, not only to equip it with the requisite independence, vigor, dispatch, and secrecy, but also to hold the President himself accountable for the actions of the executive department. In this way, the President can provide for public safety while individual liberty remains secure.

On August 20, 1787, Gouverneur Morris, of Pennsylvania, moved to submit to the Committee of Detail, for its consideration, a proposed provision for the establishment of an executive council.¹⁸⁰ On August 22, 1787, the report of the Committee of Detail was read.¹⁸¹ It included a clause establishing an executive council:

The President of the United States shall have a privy council, which shall consist of the president of the senate [the Vice-President], the speaker of the house of representatives, the chief justice of the supreme court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall from time to time be established, whose duty it shall be to advise him in matters respecting the execution of his office, which he shall think proper to lay before them: but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.¹⁸²

Later, a Committee of Eleven reported to the Convention some of its proposed amendments.¹⁸³ Among them was the insertion, after the words "He shall be commander in chief of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual service of the U.S.*,"¹⁸⁴ of the clause "and may require the opinion in writing of the principal officer in each of the Executive Departments, upon any subject

¹⁷⁸ 1 *id.* at *246.

¹⁷⁹ See notes 113-16 and accompanying text *supra*.

¹⁸⁰ MADISON'S NOTES, *supra* note 4, at 487-88.

¹⁸¹ *Id.* at 509.

¹⁸² *Id.* at 509-10.

¹⁸³ *Id.* at 573. The delegates formed the Committee of Eleven to consider the proposed amendments.

¹⁸⁴ *Id.* at 535.

relating to the duties of their respective offices."¹⁸⁵ This recommendation eliminated the establishment of an executive council but adopted some of the language employed in Morris's proposal.¹⁸⁶ It, like the proposed amendment offered by Gouverneur Morris, provided that the President may require opinions in writing. However, it rejected the notion of constitutionally mandated consultation by the President with members of the coordinate departments of the federal government. By eradicating the suggested privy council clause, which was to include the Chief Justice of the United States and the Speaker of the House, the proposal of the Committee of Eleven emphatically denied the coordinate branches of government a consultation role in executive decision making. It is evident that the Committee of Eleven exhibited a concern for preserving "the principle[s] of executive responsibility and separation of the powers, sought for by the framers of our Government," in rejecting the notion of an executive council.¹⁸⁷ Further, this amendment has the effect of limiting the responsibility of an advisor and his accountability for recommendations to the President alone,¹⁸⁸ leaving the President solely responsible and accountable to his country.¹⁸⁹

Gouverneur Morris, who had proposed that a privy council be instituted by the Constitution, explained why his proposal was rejected:

The question of a Council was considered in the Committee, where it was judged that the Presidt. by persuading his Council, to concur in his wrong measures, would acquire their protection for them.¹⁹⁰

The idea of providing a privy council for the executive was rejected, because it would have diminished that accountability of the President deemed essential to the security of personal

¹⁸⁵ *Id.* at 575.

¹⁸⁶ *See id.* at 488 (Gouverneur Morris) ("The President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members . . .").

¹⁸⁷ *Myers v. United States*, 272 U.S. 52, 167 (1926).

¹⁸⁸ *Cf.* note 118 *supra*.

¹⁸⁹ While the Committee of Detail's proposed clause, providing for a privy council, expressly stated that the advice of the committee would not "affect [the President's] responsibility for the measures which he shall adopt," *see* note 182 and accompanying text *supra*, such parchment protection would not serve as a practical safeguard of personal or state liberty.

¹⁹⁰ MADISON'S NOTES, *supra* note 4, at 601. The Committee's amendment was passed in the affirmative, with one dissent. *Id.* at 602.

liberty.

In *The Federalist*, Hamilton, after discussing the need for one executive in whom all executive power resides, asserts that the reasoning, upon which the establishment of the presidency in one man is based, applies,

though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. . . .

“I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point.” These and similar pretexts are constantly at hand, whether true or false.¹⁹¹

Therefore, the President was left fully accountable for all executive actions.¹⁹² In the performance of his constitutional functions, the President *may* require opinions from the principal officers of the executive departments. If he does, the Constitution suggests the opinion ought to be offered in writing.¹⁹³ Of course,

¹⁹¹ THE FEDERALIST No. 70, *supra* note 5, at 459-60 (Alexander Hamilton) (footnote omitted).

¹⁹² The federal courts should not review executive decision making. *Cf.* *Marbury v. Madison*, 5 U.S. at 170-71:

The province of the court is, solely to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.

. . . .

Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, *in any respect*, his conduct, would be rejected without hesitation.

(emphasis added).

¹⁹³ James Iredell, later a member of the first Supreme Court, wrote in response to George Mason's objections to the Constitution that the opinions the President may require from the principal officers of the executive departments are “to be given with the utmost solemnity *in writing*.” James Iredell, *Observations on George Mason's Objections to the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 333, 348 (Paul L. Ford ed., Da Capo Press 1968) [hereinafter PAMPHLETS]. These written opinions will provide the President with an opinion, memorialized in writing, to which he may refer, and which he may consider thoughtfully without confusing the advice that was given.

From those *written reasons*, weighed with care, surely the President can form as good a judgment, as if they had been given by a dozen formal characters, carelessly met together on a slight appointment; and this further advantage would be derived from the proposed system (which would be wanting if he had constitutional advice to screen him), that the President must be *personally responsible* for everything—for though an ingenious gentleman has proposed,

this suggestion is not meant to subvert the object of his powers. Dispatch, at times, such as in war, may require that opinions be given orally.

The clause authorizing the President to require opinions of his heads of departments is not a "trifling one[]." ¹⁹⁴ It may be "a mere redundancy . . . as the right for which it provides would result of itself from the office."¹⁹⁵ Nonetheless, its existence in the Constitution certainly results from the question of a council debated at the Convention and from the overriding concern for executive accountability. It serves to eliminate all doubts on the subject. Moreover, it was not placed in the Commander-in-Chief Clause of the Constitution without rhyme or reason. At the time the Committee of Eleven proposed its insertion into the Constitution, all executive powers were spelled out in a single section, undivided by separate clauses.¹⁹⁶ The Committee specifically recommended that the clause be inserted as part of the same sentence that contains the grant of the commander-in-chief power.¹⁹⁷ So it stands in the Constitution.¹⁹⁸ While the clause applies equally to all decision making incident to subsequent grants of executive power, it demands emphasis particularly with respect to the power, and duty, to protect and defend the nation:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of

that a Council should be responsible for *their opinions*, and the same sentiment of justice might be applied to these opinions of the great officers, I am persuaded it will in general be thought infinitely more *safe*, as well as more *just*, that the President who *acts* should be responsible for his *conduct*, following advice at his peril, than that there should be a danger of punishing any man for an erroneous opinion which might possibly be sincere. Besides the morality of this scheme, which may well be questioned, its inexpediency is glaring, since it would be so plausible an excuse and the insincerity of it so difficult to detect, the hopes of impunity this avenue to escape would afford would nearly take away all dread of punishment.

Id. at 348-49. See also THE FEDERALIST No. 70, *supra* note 5, at 462-63 (Alexander Hamilton) ("A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults.")

¹⁹⁴ The Steel Seizure Case, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

¹⁹⁵ THE FEDERALIST No. 74, *supra* note 5, at 482 (Alexander Hamilton).

¹⁹⁶ See MADISON'S NOTES, *supra* note 5, at 392, 575.

¹⁹⁷ *Id.* at 575.

¹⁹⁸ U.S. CONST. art. II, § 2, cl. 1.

the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.¹⁹⁹

To protect public liberty, the Constitution vests all executive power in the President. To protect private liberty—by making the executive fully responsible and accountable for his actions—the Constitution denies a consultation role to the legislature. The President need not consult with Congress or with anyone before carrying out his duties as Commander-in-Chief.²⁰⁰

3. Pardon Power

The pardon power, like the other powers granted in the Commander-in-Chief Clause, is not subject to any check by a coordinate branch.²⁰¹ It extends to all public offenses, with the exception that the President cannot pardon officers in cases of impeachment.²⁰² As part of the clause in which commander-in-

¹⁹⁹ THE FEDERALIST No. 74, *supra* note 5, at 482 (Alexander Hamilton).

²⁰⁰ Consulting with Congress—the entire legislative body, *see* U.S. CONST., art. I, §1; text accompanying note 12 *supra*—itself presents practical problems. Congress acts legislatively only as an entire bicameral unit.

A requirement, by Congress, that the President report to it within a specified time period on the state of military activities also is unconstitutional. Article II, Section 3, of the Constitution provides that the President “shall from time to time give to the Congress Information of the State of the Union.” It is clear that “from time to time” requires “frequent [reporting but] leave[s] enough to the discretion of the” executive. MADISON’S NOTES, *supra* note 4, at 641 (James Madison) (discussion of Article I, Section 5, Clause 3, which requires each house of Congress to “keep a Journal of its Proceedings, and from time to time publish the same”).

²⁰¹ *See, e.g.*, *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872) (“It is the intention of the constitution that each of the great co-ordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit.”).

²⁰² *See* U.S. CONST. art. II, § 2, cl. 1 (“he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment”). *Cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES *398-99:

[T]he king may pardon all offences merely against the crown, or the public . . . [and not where the] offence favours more of the nature of a *private* injury to each individual in the neighbourhood, than a *public* wrong. . . . There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the king’s pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders.

(footnote omitted).

chief authority is given, the pardon power is a war power. It is granted expressly, because its function is not limited to war, and, as it operates directly upon the individual, it has a legislative flavor. It is a war power because the pardon power was given to the President primarily to allow the Commander-in-Chief to offer traitors clemency as a means to ending their acts of war.²⁰³

James Wilson remarked, upon a motion to remove the crime of treason from the class of offenses that may be pardoned:

Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted.²⁰⁴

Thus, the pardon power requires independence, unity, and dispatch. It is a power incident to the prosecution of public rights. As the President, by the Constitution, is made the guardian of public rights, it is the President who appropriately holds the pardon power.

4. Remarks

Ours is a living Constitution. The Framers created it in accordance with the beliefs that compelled the colonists to declare

²⁰³ [T]he principal argument for reposing the power of pardoning in this case to the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and, which, if suffered to pass unimproved, it may never be possible afterwards to recall.

THE FEDERALIST No. 74, *supra* note 5, at 484 (Alexander Hamilton).

²⁰⁴ MADISON'S NOTES, *supra* note 4, at 646. *Accord id.* ("A Legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment. In Massachussets, one assembly would have hung all the insurgents in that State: the next was equally disposed to pardon them all . . .") (Rufus King). Of course, prosecution would come only after impeachment, as the President, charged with the duty to "take care that the laws be faithfully executed," U.S. CONST. art. II, §3, has the prosecutorial power. *Cf.* U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); THE FEDERALIST No. 69, *supra* note 5, at 446 (Alexander Hamilton) ("The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law.") (emphasis added); *id.* No. 77, *supra* note 5, at 502 (Alexander Hamilton) (President is "at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to forfeiture of life and estate by *subsequent* prosecution in the common course of law") (emphasis added).

their independence from Great Britain, keeping in mind the practical considerations that transform such fundamental beliefs into a workable system of government that "secure[s] the Blessings of Liberty to ourselves and our Posterity."²⁰⁵ To secure these blessings of public and of private liberty, "to ourselves and our Posterity," we must have an understanding of the objects upon which the Constitution's allocation of powers are founded. Only then, by reference to the purposes that give life to our scheme of government, can we appreciate fully the various war and war-related powers of the political branches of our federal government and their relationships to one another. To determine whether the President needs authority from Congress to wage war, because the Constitution gives the legislature the power to declare war, one must understand what that power means and why it was vested in Congress. Every action of the federal government must have a basis in the living document; there are no abiogenetic constitutional rights, powers, or duties.

III. LEGISLATIVE PROTECTIONS AGAINST PRESIDENTIAL ENCROACHMENTS

The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support.²⁰⁶

The power to direct the operations of U.S. armed forces is the commander-in-chief authority. The other necessary defense powers belong to Congress. These—and these alone—constitute the legislative checks on the President's public war powers. Each serves to protect the rights of citizens and of states against possible oppression by the executive.²⁰⁷

A. *Sinew Of War: Manpower*

1. Raise And Support Armies

In the British king's capacity as commander-in-chief, he

²⁰⁵ U.S. CONST. pmb1.

²⁰⁶ THE FEDERALIST No. 23, *supra* note 5, at 142 (Alexander Hamilton).

²⁰⁷ Cf. The Steel Seizure Case, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("power of command . . . is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment").

had "the sole power of raising and regulating fleets and armies."²⁰⁸ This power was abused by British monarchs by keeping large standing armies in times of peace—a practice dangerous to private liberty:

As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II, had, by his own authority, kept on foot in time of peace a body of 5,000 regular troops. And this number James II. increased to 30,000; who were paid out of his civil list. At the revolution [in 1688], to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that "the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against law."²⁰⁹

In times of public danger, a standing army is essential; yet, it also is the greatest threat to private liberty. As Madison stated it, "[a] standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision."²¹⁰

In the Declaration of Independence, the thirteen colonies declared their independence from Great Britain, listing grievances that made such action necessary. In large part, the Constitution "is founded upon the principles of government set forth and maintained in the Declaration of Independence."²¹¹ In the latter, Thomas Jefferson penned this:

He has kept among us, in times of peace, Standing Armies, without the

Consent of
He has
rior to the C
He has
eign to our
Assent to th
For que

²⁰⁸ 1 WILLIAM
448 (Alexander Ha
regulating of fleets

²⁰⁹ THE FEDER
Street v. United S
Constitution the c
hardly a restriction
required the annu
*413-14.

²¹⁰ THE FEDER
ert, 354 U.S. 1, 23-
tion, but one dang

²¹¹ *Ex Parte M*

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:—

He has abdicated Government here, by declaring us out of his Protection and waging War against us.—

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.—

He is at this time transporting large Armies of foreign Mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.—

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.—

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions²¹²

The colonists experienced encroachments upon their personal liberties, caused by abuses of a large standing army in times of peace and by the king's use of mercenaries and the impressment of British subjects into his armed service. Because of the experience of the colonists under British rule, "the people of America may be said to have derived an hereditary impression of danger to liberty, from standing armies in time of peace."²¹³

To prevent such oppression, the drafters of the Articles of Confederation sought to strike a balance between the necessary defense provided the states by the Union and the protection of individual and of states' rights. Article VI provided as follows:

No vessels of war shall be kept up in times of peace by any state, except such number only as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall a body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a

²¹² THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

²¹³ THE FEDERALIST No. 26, *supra* note 5, at 161 (Alexander Hamilton).

proper quantity of arms, ammunition and camp equipage.²¹⁴

The militia, a local armed force, would be maintained to protect the state from domestic violence, from actual invasions by Indians, or from threatened invasions when the danger of any such invasion would be so imminent that the confederate forces could not react in time to defeat it.²¹⁵

The states also were responsible for raising land forces for the common defense.²¹⁶ The Confederate Congress had the power to "make[] rules for the government and regulation of the said land and naval forces, and direct[] their operations."²¹⁷ It also had the authority

to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the united states; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed upon by the united states in congress assembled²¹⁸

The Confederate Congress, however, could not "agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same"²¹⁹ This dependence upon the individual states left the Union in a precarious state of defense.²²⁰

By placing power in the states to raise and to support

²¹⁴ ARTICLES OF CONFEDERATION art. VI, para. 4.

²¹⁵ See *id.* art. VI, para. 5.

²¹⁶ See *id.* art. VII; art. IX, para. 5.

²¹⁷ *Id.* art. IX, para. 4.

²¹⁸ *Id.* art. IX, para. 5. The Confederate Congress also could decide that one state should raise more forces than another, and the first state would have to provide as many added forces as it would "judge can be safely spared." *Id.*

²¹⁹ *Id.* art. IX, para. 6.

²²⁰ See, e.g., THE FEDERALIST No. 22, *supra* note 5, at 132-34 (Alexander Hamilton); MADISON'S NOTES, *supra* note 4, at 29 (Edmund Randolph) (A defect of the Confederacy is that "congress [is] not being permitted to prevent a war nor to support it by their own authority."); Edmund Randolph, *Letter on the Federal Constitution*, in PAMPHLETS, *supra* note 193, at 259, 262 (The Confederate "period is distinguished by melancholy testimonies of its inability to maintain in harmony, the social intercourse of the States, to defend congress against encroachments on their rights, and to obtain by requisitions, supplies to the federal treasury, or recruits to the federal armies.").

armed forces, the Articles of Confederation may have safeguarded personal liberties, but it jeopardized public liberty. Therefore, when the delegates met in Philadelphia in the summer of 1787 to revise the system of federal government to better protect public rights, while taking all necessary precautions to secure individual liberties, they addressed the dichotomous fear engendered by a standing army.²²¹ They understood that a standing army was necessary for defense but must be controlled for personal security.

The Framers, in theory, agreed with Blackstone that "a distinct order of the profession of arms" is dangerous domestically.²²² Therefore, they adopted, *in principle*, Charles Pinckney's proposal that

[t]he military shall always be subordinate to the Civil power, and no grants of money shall be made by the Legislature for supporting military Land forces, for more than one year at a time.²²³

By placing the command of the armed forces entirely in the hands of an elected civilian—the President—the military was made subordinate to the civil power.²²⁴ But, with such force at his sole disposal, the President would be capable of encroaching upon personal rights. He would have the strength necessary to defend the nation from outside forces, but, if he turned that force inward, republican liberty would be at peril. For this reason, the Framers, while of necessity giving the executive the commander-in-chief power, expressly deprived him of the ancillary authority that was held by the king of Great Britain. An early draft of the Constitution gave to Congress the power "[t]

²²¹ Cf. *Reid v. Covert* 354 U.S. 1, 24 (1957) ("Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders.").

²²² 1 WILLIAM BLACKSTONE, COMMENTARIES *408. Cf. DECLARATION OF INDEPENDENCE para. 1 (the king "has affected to render the Military independent of and superior to the Civil power").

²²³ MADISON'S NOTES, *supra* note 4, at 486. Pinckney also proposed the following clause: "No troops shall be kept up in time of peace, but by consent of the Legislature." *Id.* (Charles Pinckney). This clause was rejected. The Framers did not want to give Congress a concurrent, or subsequent, check on the President's war power. Once Congress decides to keep a standing army for, at most, two years, by making appropriations for that use, *see* notes 231-32 and accompanying text *infra*, it effectively gives command to the Commander-in-Chief for the duration.

²²⁴ *See* *The Steel Seizure Case*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office.").

raise armies" and, following the language of the Articles of Confederation, the power "[t]o build and equip fleets."²²⁵

In this manner, the duty to defend the nation was divided between the political branches of government. The legislature, the branch closest to the people and representative of conflicting local concerns, was given the direct power over the people. It, in conjunction with the President,²²⁶ would determine when the safety of the nation would require armed forces over and above the militia of the states.²²⁷

On August 18, 1787, it was unanimously agreed that the words "and support" would follow "[t]o raise," in the clause vesting in the legislature the power over establishing land forces.²²⁸ This gave Congress the express power over some of the means of war—both over the men comprising land forces and over the money appropriations for their support. On August 20, Pinckney moved to place a time restriction on the appropriations for the support of an army. Pickney's idea, borrowed from the British Bill of Rights,²²⁹ further secures republican liberty. On September 5, 1787, the Committee of Eleven reported its adoption, in principle, of this addition to the war-related powers of Congress. But, "[a]s the Legislature is to be biennially elected, it would be inconvenient to require appropriations to be for one year,"²³⁰ so the Committee modified the proposal. The phrase as reported by the Committee, adopted unanimously, and inserted into the clause giving the legislature the power "[t]o raise and support armies," reads "but no appropriation of money to that use shall be for a longer term than two years."²³¹ This authority, to prevent the establishment or continuation of a

²²⁵ MADISON'S NOTES, *supra* note 4, at 389. See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1318 (2d Cir. 1973) (Oakes, J., dissenting) ("the Founding Fathers deliberately eschewed the example of the British Monarchy in which was lodged the authority to declare war and to raise and regulate fleets and armies"), *cert. denied*, 416 U.S. 936 (1974). The power to declare war will be addressed at notes 374-443 and accompanying text *infra*.

²²⁶ The President has constitutionally granted powers of participation in the legislative process, necessary as a check upon the controlling passions of the Congress. See, e.g., U.S. CONST. art. I, § 7, cl. 3 Presentment Clause).

²²⁷ See note 238 and accompanying text *infra*.

²²⁸ See MADISON'S NOTES, *supra* note 4, at 481.

²²⁹ See text accompanying note 209 *supra*.

²³⁰ MADISON'S NOTES, *supra* note 4, at 580 (Roger Sherman).

²³¹ *Id.* See U.S. CONST. art. I, § 8, cl. 12.

standing army in times of peace, dangerous to individual liberties, gives Congress the power to check any propensity of the President for self-aggrandizement and tyranny.²³²

Once an army is raised, it is under the direction of the President as Commander-in-Chief.²³³ Unless supported by money appropriations at least once every two years, the standing land force is disbanded. In the President's hands, an adequate army has the strength requisite to defend the nation, on land. Without that force, the President is powerless to encroach upon personal rights.

While this authority to raise and support armies is an effectual check upon presidential encroachments upon individual liberty, the Framers believed it to be incomplete. They firmly believed in the necessity of keeping local armed forces available to protect the states. At the Convention, James Madison remarked:

As the greatest danger is that of disunion of the States, it is necessary to guard [against] it by sufficient powers to the Common Govt. and as the greatest danger to liberty is from large standing armies, it is best to prevent them, by an effectual provision for a good Militia.²³⁴

Congress, given the direct authority over the people and over the states, also is empowered

²³² Cf. *Davi v. Laird*, 318 F. Supp. 478, 480 (W.D. Va. 1970) ("the Founding Fathers envisioned congressional power to raise and support military forces as providing that body with an effective means of controlling presidential use thereof") (footnote omitted).

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

THE FEDERALIST No. 26, *supra* note 5, at 163 (Alexander Hamilton).

²³³ The President is the Commander-in-Chief of the armed forces of the United States and of the militia when called into actual service of the United States. U.S. CONST. art. II, § 2, cl. 1. The President has no authority to command any other armed individuals. He cannot direct foreign mercenary land forces. Cf. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (the king "is at this time transporting large Armies of foreign Mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation"); *Reid v. Covert*, 354 U.S. 1, 24 n.43 (1957) ("Washington warned that 'Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend'") (citation omitted).

²³⁴ MADISON'S NOTES, *supra* note 4, at 516.

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
 To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress²³⁵

To protect and defend the nation, the federal government is given power over the militia. To secure personal and states' liberties, however, the power over the militia is shared with, but distinctly divided between the federal government and, the states.²³⁶ Congress is given, temporally, the primary power of the federal government over the militia. The federal legislature must call forth the militia before the Commander-in-Chief takes its command. The President is charged with protecting and defending public rights; Congress, securing personal rights, aids in the ultimate object of common defense by providing the President with the means.²³⁷

²³⁵ U.S. CONST. art. I, § 8, cl. 15-16. George Mason, of Virginia, being sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and guarding against the danger of them, moved to preface the clause (Art. I sect. 8) "To provide for organizing, arming and disciplining the Militia &c" with the words "And that the liberties of the people may be better secured against the danger of standing armies in time of peace" Mr. RANDOLPH 2ded. the motion.

MADISON'S NOTES, *supra* note 4, at 639. The motion was defeated, so as not to "set[] a dishonorable mark of distinction on the military class of Citizens." *Id.* (Gouverneur Morris). Cf. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.")

²³⁶ [The President] is elected . . . for a brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office; he is, from necessity, and the nature of his duties, the commander-in-chief of the army and navy, and of the militia, when called into actual service; but no appropriation for the support of the army can be made by congress for a longer term than two years, so that it is in the power of the succeeding house of representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the president used, or designed to use it for improper purposes. And although the militia, when in actual service, is under his command, yet the appointment of the officers is reserved to the states, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the states.

Ex Parte Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861)(No. 9487). See also *Kinsella v. Singleton*, 361 U.S. 234, 268 (1960) (Whittaker, J., concurring in part and dissenting in part).

²³⁷ Of course, the Constitution expressly gives to Congress this authority. The Nec-

The power of the federal government over the militia was intended to limit the necessity of a standing land force stationed in the United States. If the federal government could maintain internal and external peace by quashing interruptions to the peace with, or primarily with, the militia, then there would be no need for Congress to raise or support an army, or, at least, a large one. Hamilton explained:

If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary, will be a more certain method of preventing its existence than a thousand prohibitions upon paper.²³⁸

There were a few delegates at the Philadelphia Convention who, despite the necessity of a standing army, were so fearful of potential abuses impairing individual rights that they wanted a constitutionally imposed limitation on the number of troops to be kept in times of peace. One of this overwhelming minority was Elbridge Gerry of Massachusetts, who, before the check on appropriations was provided, objected:

He thought an army dangerous in time of peace & could never consent

essary and Proper Clause would not give the legislature the power over the means necessary to carry into execution the duty of the Commander-in-Chief to protect and defend the nation. The means, without express limitation, remain with the department upon which the general power is conferred. See note 77 and accompanying text *supra*.

²³⁸ THE FEDERALIST No. 29, *supra* note 5, at 176-77 (Alexander Hamilton). Cf. MADISON'S NOTES, *supra* note 4, at 478:

Mr. MASON introduced the subject of regulating the militia. He thought such a power necessary to be given to the Genl. Government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. Thirteen States will never concur in any one system, if the disciplining [sic] of the Militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as a select militia. He moved as an addition to the propositions just referred to the Committee of detail, & to be referred in like manner, "a power to regulate the militia."

to a power to keep up an indefinite number. He proposed that there shall not be kept up in time of peace more than _____ thousand troops. His idea was that the blank should be filled with two or three thousand.²³⁹

The Framers, however, did not restrict in any way the ability of Congress to raise land forces in times of peace. Just as with the commander-in-chief power, and unlike some other provisions in the Constitution, the clause empowering the legislature to raise and support armies does not contain the restrictive phrase, "in time of war."²⁴⁰ There are two reasons for this. First, while standing armies can, and under British rule did, encroach upon personal liberties, a conspiracy between the executive and the legislature to inflict tyranny upon the people, takes time and cannot suddenly be sprung upon the states and upon its inhabitants without sufficient warning.²⁴¹ Hamilton wrote:

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series

²³⁹ MADISON'S NOTES, *supra* note 4, at 482 (footnote omitted). Luther Martin, of Maryland, and Gerry moved to insert "provided that in time of peace the army shall not consist of more than _____ thousand men." *Id.* It was rejected unanimously. *Id.*

²⁴⁰ See note 147 and accompanying text *supra*. See also *United States v. Rappeport*, 36 F. Supp. 915, 916-17 (S.D.N.Y. 1941):

The provisions of the Constitution granting power to Congress to raise and support armies, and to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces . . . do not restrict the exercise of such power to "time of war" nor do they impose any limitation as to the time or manner of exercising such power. It can not be assumed that the Constitution intended to prevent the raising of an army by voluntary enlistment or conscription until war has been declared or actually begun. The provisions can not be construed so as to restrict the exercise of the power in a way requiring a delay that may render the grant of the power useless.

Cf. United States v. Garst, 39 F. Supp. 367, 367 (E.D. Pa. 1941) ("The legislative history of the Constitution itself disposes of the contention . . . that the power 'To raise and support Armies' is limited to volunteer service in such armies in peace time.").

²⁴¹ *Cf. THE DECLARATION OF INDEPENDENCE* para. 1 (U.S. 1776) (describing the "patient sufferances of these Colonies"):

[The king] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:— For quartering large bodies of armed troops among us. . . . We have warned [our British brethren] from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. . . . They too have been deaf to the voice of justice and of consanguinity.

of time.²⁴²

Accordingly, the states and the people would be able to defend themselves against the conspiracy before their liberties are lost.²⁴³

Second, and more important, without raising and supporting armies in times of peace, the nation cannot take measures to defend itself, while there still is time, or discourage aggression by other nations. Thus, when Luther Martin and Elbridge Gerry moved to place a limitation upon the size of a standing army,²⁴⁴ General Pinckney of South Carolina "asked whether no troops were ever to be raised untill [sic] an attack should be made on us?"²⁴⁵ The Philadelphia Convention agreed with the implication of Pinckney's rhetorical question. If the United States, constitutionally, could not establish an army to defend itself in times of peace, then the nation may be forfeited in the name of liberty. Public rights must be paramount to personal liberty, to secure the latter effectively. If, to prevent invasions upon civil liberties,

it should be resolved to extend the prohibition to the *raising* of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen,—that of a nation incapacitated by its Constitution to prepare for defence, before it was actually invaded. . . . We must receive the blow, before we could even prepare to return it. . . . We must expose our property and liberty to the mercy of foreign invaders, and invite them by our weakness to seize the naked and defenceless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation.²⁴⁶

By the Constitution, "the whole power of raising armies was lodged in the *Legislature*."²⁴⁷ Article I, Section 10, Clause 3, of the Constitution prohibits the states from keeping troops or ships of war in times of peace without the consent of Congress.

²⁴² THE FEDERALIST No. 26, *supra* note 5, at 164 (Alexander Hamilton).

²⁴³ See *id.* No. 46, at 310-11 (James Madison). See also U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed") (emphasis added); THE FEDERALIST No. 29, *supra* note 5, at 179 (Alexander Hamilton).

²⁴⁴ See note 239 and accompanying text *supra*.

²⁴⁵ MADISON'S NOTES, *supra* note 4, at 482.

²⁴⁶ THE FEDERALIST No. 25, *supra* note 5, at 156 (Alexander Hamilton).

²⁴⁷ *Id.* No. 24, at 148 (Alexander Hamilton).

No limitation, other than the constitutionally imposed restriction on appropriations for longer than two years and the doctrine of separation of powers, lawfully can be imposed on the federal legislature's power to raise and support armies.²⁴⁸ As the power to raise and support armies was given to Congress, it cannot be limited. All necessary and proper means to that end follow from it, save those that are denied to Congress by the Constitution.²⁴⁹ The power to raise and support armies means the power to provide the Commander-in-Chief with the sinew of war for an effective common defense "against an enemy, actual or potential. We are not precluded from preparing for battle, if battle must come, until such time as our preparation would be too late."²⁵⁰

To effectively meet force with force,²⁵¹ the Commander-in-Chief requires a force of like kind to that of the enemy.²⁵² Therefore, the Constitution cannot limit Congress's authority to prepare for war.²⁵³ "How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation?" Madison asked rhetorically.²⁵⁴ He continued:

²⁴⁸ See *id.* No. 23, at 143 (Alexander Hamilton) ("there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter . . . essential to the *formation, direction, or support* of the NATIONAL FORCES"). See also Hughes, *supra* note 46, at 233. Cf. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942) ("Congress can draft men for battle service; its power to draft business organizations to support the fighting men who risk their lives can be no less") (citation omitted); *United States v. Macintosh*, 283 U.S. 605, 622, 624 (1931) (power to raise army includes "power to say who shall serve . . . and in what way," and "without regard to his . . . views in respect of the justice or morality of the particular war or of war in general"), *overruled on other grounds*, *Girouard v. United States*, 328 U.S. 61 (1946); *Arver v. United States*, 245 U.S. 366, 378 (1918) (Congress's power includes "power to exact enforced military duty by the citizen"); *United States v. Beit Bros.*, 50 F. Supp. 590, 593 (D. Conn. 1943) ("the Congress has the power to provide by legislation for the production and delivery of food for the armed forces").

²⁴⁹ See U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause). See also *McCulloch v. Maryland*, 17 U.S. at 407-08.

²⁵⁰ *United States v. Lambert*, 123 F.2d 395, 396 (3d Cir. 1941).

²⁵¹ See note 153 and accompanying text *supra*.

²⁵² THE FEDERALIST No. 25, *supra* note 5, at 157 (Alexander Hamilton) ("The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind.").

²⁵³ *Id.* No. 41, *supra* note 5, at 261 (James Madison) ("With what color of propriety could force necessary for defence be limited by those who cannot limit the force of offence?").

²⁵⁴ *Id.* at 262.

The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, *and by no others.*²⁶⁵

Congress has a constitutionally prescribed, antecedent function to prepare for war by gathering the resources of the nation essential to wage war successfully. Once those resources are collected, they are put into the President's hands.²⁶⁶ It is his duty to direct those resources as he deems fit to protect the United States. Both departments, by fiat of the Constitution, *must* exercise their assigned powers for the same purpose—to "provide for the common defence."

The President has the transcendent duty to "preserve, protect and defend" the nation. While the President's war power is extensive, so are the war-related powers of Congress. The President's responsibility is the general preservation and protection of public rights. To guard against abuses of this vast power, Congress is granted those powers, necessary for the common defense, that act directly upon an individual's life, liberty, and property. Congress's powers to provide "for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact."²⁶⁷

Few persons would be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion; and *if the defence of the community under such circumstances should make it necessary to have an army so numerous as to hazard its liberty, this is one of those calamities for which there is neither preventative nor cure.* It cannot be provided against by any possible form of government; *it might even result from a simple league offensive and defensive, if it should ever be necessary for the confederates or allies to form an army for common defence.*²⁶⁸

While a standing army is dangerous to republican liberty, it often is essential to public liberty and may become so for the purpose of collective self-defense.

²⁶⁵ *Id.* (emphasis added).

²⁶⁶ *Cf.* MONTESQUIEU, *supra* note 30, at 212 ("When once an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing; its business consisting more in action than in deliberation.").

²⁶⁷ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963).

²⁶⁸ THE FEDERALIST No. 26, *supra* note 5, at 165 (Alexander Hamilton) (emphasis added).

2. Provide and Maintain a Navy

Aside from the power to raise and support armies, Congress is given authority "[t]o provide and maintain a Navy."²⁵⁹ An early draft of the Constitution copied the language of the Articles of Confederation and granted to the legislature the power "to build and equip a navy . . ."²⁶⁰ Later the wording was changed, by a unanimous vote, to reflect "a more convenient definition of the power."²⁶¹ Unlike the power to raise and support armies, the power to provide and maintain a navy is not restricted by a constitutionally imposed maximum term on appropriations of money. This is because of the difference in nature between a standing army and a navy. A standing army, while often essential to public liberty, can be dangerous to personal rights. A navy, necessary to the common defense, is not to be feared as a means to encroach upon individual rights. Thus, a navy should be maintained at all times.²⁶²

James Madison, during the early stages of the Convention, when the delegates still were debating the structure of the new federal government, elucidated this distinction:

The means of defence [against] foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people. It is perhaps questionable, whether the best concerted system of absolute power in Europe cd. maintain itself, in a situation, where no alarms of external danger cd. tame the people to the domestic yoke. The insular situation of G. Britain was the principal cause of her being an exception to the general fate of Europe. It has rendered less defence necessary, and admitted a kind of defence wch. cd. not be used for the purpose of oppression.²⁶³

The fear of the Framers was that the United States would be turned into a theater of war. It needed protection from invasion,

²⁵⁹ U. S. CONST. art. I, § 8, cl. 13.

²⁶⁰ See ARTICLES OF CONFEDERATION art. IX, para. 5; MADISON'S NOTES, *supra* note 4, at 389.

²⁶¹ MADISON'S NOTES, *supra* note 4, at 482.

²⁶² Compare U.S. CONST. art. I, § 8, cl. 12 (power "[t]o raise and support Armies") (emphasis added) with *id.*, cl. 13 (power "[t]o provide and maintain a Navy") (emphasis added).

²⁶³ MADISON'S NOTES, *supra* note 4, at 214-15. The kind of defense that cannot be used to oppress the people, referred to by Madison, is a naval force. See note 266 and accompanying text *infra*.

from rebellion, and from encroachments upon the rights of its citizens. The apprehension was not that men would be sent abroad to defend the homeland and to protect citizens and the national interest. Rather, it was the danger to the life, liberty, and property of American civilians that was most to be feared. If stationing troops abroad would protect the nation from foreign invasion or from public danger, that method of defense would be preferable. *The danger from land forces is the possible use of those forces to invade personal rights of Americans and not its utility in repelling attack.* Accordingly, all branches of the armed forces—like the navy, air force, and marines—that are not kept among the people, pose a far lesser danger, and, therefore, there is no need to limit the appropriations for their support.²⁶⁴ The legislature is given the power to provide for these branches of the armed forces, for that entails direct interference with an individual's liberty. But, once these forces are provided, the Commander-in-Chief has full command over them.²⁶⁵

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure, which has spared few other parts. *It must, indeed, be numbered among the greatest blessings of America, that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad.* In this respect our situation bears another likeness to the insular advantage of Great Britain. *The batteries most capable of repelling foreign enterprises on our safety, are happily such as can never be turned by a perfidious government against our liberties.*²⁶⁶

The war powers of the United States are divided to guard against the dichotomous fears that perpetually plague a republic. By giving the President the commander-in-chief power, the Framers provided strength in the federal government to protect and defend the nation. By vesting in Congress the power to provide the Commander-in-Chief with the sinew of war—the men and the money necessary to wage war successfully—by levying

²⁶⁴ Similarly, there is no cause for apprehension that a land force stationed abroad can be employed by the Commander-in-Chief to infringe upon individual liberties of American citizens.

²⁶⁵ The President's command is subject only to compliance with the rules for the government and regulation of armed forces prescribed by Congress. See notes 267-75 and accompanying text *infra*.

²⁶⁶ THE FEDERALIST No. 41, *supra* note 5, at 266 (James Madison) (emphasis added).

directly upon the people, the Framers secured the liberty of the individual members of the nation.

B. *Rules For Government And Regulation*

At the Philadelphia Convention, on August 18, 1787, the Framers added to the powers of Congress the power “[t]o make rules for the Government and regulation of the land & naval forces.”²⁶⁷ This power previously was vested in the Confederate Congress under the Articles of Confederation.²⁶⁸ The Constitution gives this authority to the legislature, rather than to the President, for two reasons. First, it is a power conferred upon Congress to protect general personal rights of *civilian citizens* against abuse by the Commander-in-Chief through the use of the armed forces placed under his direction. Second, this power necessarily is vested in the legislative branch to guard against potential invasions into the limited personal liberties of *the members of the armed forces* of the United States.

One of the grievances against Great Britain listed in the Declaration of Independence was that the king acquiesced in Parliament’s “pretended Legislation” for the protection of the armed land forces of Great Britain “by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.” The authority of the legislature to “make Rules for the Government and Regulation of the land and naval Forces” empowers Congress to establish military tribunals to try members of the armed forces. This acts as a safeguard against the use of “mock Trials,” by the Commander-in-Chief, allowing military personnel to go unpunished for unlawful encroachments upon the “life, liberty, and property” of civilians.²⁶⁹

This authority of Congress also “creates an exception to the normal method of trial in civilian courts as provided by the Con-

²⁶⁷ MADISON’S NOTES, *supra* note 4, at 482. See U.S. CONST. art. I, § 8, cl. 14.

²⁶⁸ See ARTICLES OF CONFEDERATION art. IX, para. 4 (“making rules for the government and regulation of the said land and naval forces”); MADISON’S NOTES, *supra* note 4, at 482 (power “added from the existing Articles of the Confederation”).

²⁶⁹ *Cf. United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 330 (C.M.A. 1988) (“in the exercise of its constitutional authority as to the armed forces, Congress may grant an Article I court, such as this Court, the power to prevent officials of the Executive Branch from interfering with the administration of military justice”).

stitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights.²⁷⁰ Because there often is no time for ordinary trial procedures when trying members of the military service, Congress is given the power to prescribe swifter, more efficient methods of trying individuals in the armed forces.²⁷¹ The President's use of the armed forces, in his capacity as Commander-in-Chief, to secure public safety, requires vigor and dispatch. "When a person enters the military service, whether as officer or private, he surrenders his personal

²⁷⁰ *Reid v. Covert*, 354 U.S. 1, 19 (1957). See also *Wickham v. Hall*, 706 F.2d 713, 715 (5th Cir. 1983). It "was intended to be only a narrow exception to the normal and preferred method of trial in courts of law." *Reid*, 354 U.S. at 21. See also *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858):

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.

Article III prescribes the judicial power of the United States. An example of the safeguards provided therein is that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3. A jury trial is not required in the military courts. See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866) (Chase, C.J., concurring):

[T]he power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Similarly, the right to a grand jury does not apply to cases arising in the armed forces. The Fifth Amendment provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .*

(emphasis added). This exception was "designed to correlate with the power granted Congress to provide for the 'Government and Regulation' of the armed services . . ." *Reid*, 354 U.S. at 22. Accord *Ex Parte Milligan*, 71 U.S. at 138 (Chase, C.J., concurring) ("we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation").

²⁷¹ See, e.g., *Ex Parte Milligan*, 71 U.S. at 123:

The discipline necessary to the efficiency of the army or navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service.

rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights."²⁷²

Congress is authorized by the Constitution, as a check upon potential presidential encroachments upon individual liberties, both to raise and provide armies and a navy and to make rules for their government and regulation. Thus, the legislature determines the manner in which citizens of the United States will be deprived of certain personal rights by being chosen to serve in the armed forces and in which way a trial, which may deprive them further of the individual rights of "life, liberty, and property," will be conducted. Again, the President's power and duty to protect and defend the nation is balanced against the individual's interest in republican liberty. Public liberty, necessarily, is paramount but, in the United States, is meaningless, if it is not preserved to secure personal liberty.

By the Constitution, the President is Commander-in-Chief of the armed forces. He has the authority to direct and to employ the military services placed under his command. The power to make rules for the government and regulation of the military belongs to Congress.

[T]he two powers are distinct; neither can trench upon the other; the President can not, under the disguise of military orders, evade the legislative regulations by which he in common with the Army must be governed; and Congress can not in the disguise of "rules for the government" of the Army impair the authority of the President as commander in chief.²⁷³

The power to make rules for the government and regulation of the armed forces is not qualified by the requirement of the existence of peace or of war. It applies "to times of both peace and war."²⁷⁴ The duty to provide for the common defense is shared by the executive and by the legislature. As Commander-

²⁷² *Swaim v. United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897).

²⁷³ *Id.* at 221. *Cf. McBlair v. United States*, 19 Ct. Cl. 528, 541 (1884) ("While the President is made commander-in-chief by the Constitution, Congress have the right to legislate for the Army, *not impairing his efficiency as such commander-in-chief*, and when a law is passed for the regulation of the Army, *having that constitutional qualification*, he becomes as to that law an executive officer, and is limited in the discharge of this duty by the statute.") (emphasis added).

²⁷⁴ *Kinsella v. United States*, 361 U.S. 234, 275 (1960) (Whittaker, J., concurring in part and dissenting in part).

in-Chief, the President is obligated to secure public safety. As far as republican liberty can be safeguarded, consistent with the President's power over the military, the Constitution has conferred upon Congress the power to make rules for the government and regulation of the armed forces, to secure personal liberty.²⁷⁵

C. *Forts, Magazines, Arsenals, Dock-Yards, Etc.*

The Constitution vests in Congress the power to exercise exclusive legislation²⁷⁶ "over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."²⁷⁷ The power to purchase these properties, essential to the common defense, is made subject to the consent of the state legislatures in the states in which the properties are located. The power to erect *as well as to govern* forts and other needful buildings belonged exclusively to the king of Great Britain, at the time of the drafting of the Constitution.²⁷⁸ Because this power necessarily implicates state and individual rights over property,²⁷⁹ however, the Framers wrote into our Constitution safeguards against the potential abuse of this power.

In an earlier draft of the Constitution, the power of the federal government was not qualified by the condition that the state legislature must consent to the purchase of such property.²⁸⁰ But,

Mr. Gerry contended that this power might be made use of to enslave

²⁷⁵ Cf. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983):

It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

²⁷⁶ "Exclusive legislation" means exclusive as against the states. Legislative power, in the federal government, is vested in Congress. See THE FEDERALIST No. 43, *supra* note 5, at 280 (James Madison) (necessity of exclusive authority of the federal government over forts, magazines, etc., as against states).

²⁷⁷ U.S. CONST. art. I, § 8, cl. 17.

²⁷⁸ See 1 WILLIAM BLACKSTONE, COMMENTARIES *263.

²⁷⁹ Cf. U.S. CONST. amend. V ("private property [shall not] be taken for public use, without just compensation").

²⁸⁰ See MADISON'S NOTES, *supra* note 4, at 580.

any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government.²⁸¹

Therefore, Rufus King proposed that the words "by the consent of the Legislature of the State" be added to the clause as reported.²⁸² This modification was agreed to unanimously.²⁸³

At the Convention, Madison submitted to the Committee of Detail a proposal to add to the powers of Congress the power "[t]o authorize the Executive to procure and hold for the use of the U.S. landed property for the erection of Forts, Magazines, and other necessary buildings."²⁸⁴ This proposal was rejected in favor of the language referred to above.²⁸⁵ Under the Constitution, Congress was not interposed between the President and the states, in the *purchase* of property within the boundaries of the latter, for the erection of buildings essential to the defense of the nation. As most effective to secure the safety of the states against encroachments by the federal government, however, the state legislatures were given the power to consent to the purchase of land located within their borders. The Framers determined that this would be the safest check, consistent with public liberty, on possible executive oppression by abuse of this authority. Because the power to erect forts and other needful buildings, which, as an executive power, belonged to the king of Great Britain,²⁸⁶ was not restricted by the grant of a check to Congress, the authority to erect, as distinguished from the power to govern, forts and other needful buildings is an executive power necessary to protect and defend the nation. Congress's power over these "places on which the security of the entire Union may depend"²⁸⁷ extends only to the exercise of legislation over such places. To secure best republican liberty, however, a

²⁸¹ *Id.* at 581.

²⁸² *Id.* "This would certainly make the power safe," King added. *Id.* This restriction on the power to purchase property for the erection of forts or other needful buildings is analogous to that on the quartering of soldiers. That provision of the Bill of Rights provides that "[n]o Soldier shall, in time of peace be quartered in any house, *without the consent of the Owner*, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III (emphasis added).

²⁸³ MADISON'S NOTES, *supra* note 4, at 581.

²⁸⁴ *Id.* at 477.

²⁸⁵ See note 277 and accompanying text *supra*.

²⁸⁶ See 1 WILLIAM BLACKSTONE, COMMENTARIES *262-63.

²⁸⁷ THE FEDERALIST No. 43, *supra* note 5, at 280 (James Madison).

state's legislature must consent to the purchase of land within its borders upon which the Commander-in-Chief would like to build a military installation.

D. *The Power of the Purse and Related Authorities*

1. Purse Power

The next legislative check on possible executive oppression is the taxing power.

In Great Britain, it was the privilege and the right of the House of Commons, the more numerous branch of Parliament and the one closest to the people, to originate tax bills.²⁸⁸ In the United States,

[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.²⁸⁹

This stands in contrast to the British model, in which the House of Lords was not permitted to amend money bills but only to accept or to reject them.²⁹⁰ Thus, the power of origination of the House of Commons was greater than that of the House of Representatives. This results from the division in classes in British society that is not found but, rather, is prohibited in America.²⁹¹

The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and once influenced to continue so, than the commons, who are a temporary, elective body, freely nominated by the people. It would therefore be extremely dangerous, to give the lords any power of framing new taxes for the subject: it is sufficient that they have a power of rejecting, if they think the commons too lavish or improvident in their

²⁸⁸ See 1 WILLIAM BLACKSTONE, COMMENTARIES *169.

²⁸⁹ U.S. CONST. art. I, § 7, cl. 1. The clause granting the House of Representatives the power to originate all bills for raising revenue, which prescribes the mechanism for the passage of a bill and the method by which it becomes a law, is a procedural rule and not a substantive power. The substantive power of Congress to legislate for the raising of revenue is provided in Section 8 of Article I:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. CONST. art. I, § 8, cl. 1.

²⁹⁰ See 1 WILLIAM BLACKSTONE, COMMENTARIES *169-70.

²⁹¹ See U.S. CONST. art. I, § 9, cl. 8. ("No Title of Nobility shall be granted by the United States . . .").

grants.²⁹²

Similar fears were voiced at the Philadelphia Convention with respect to the suggestion that the Senate be permitted to *originate* money bills for raising revenue. George Mason of Virginia thought that

[t]he duration of the Senate made it improper. He does not object to that duration. On the Contrary he approved of it. But joined with the smallness of the number, it was an argument against adding this to the other great powers vested in that body. His idea of Aristocracy was that it was the govrnt. of the few over the many. . . . The purse strings should never be put into its hands.²⁹³

Edmund Randolph, also of Virginia, was apprehensive of a conspiracy between the President and the Senate, whose cooperation is necessary in some matters of foreign affairs, by which the executive could achieve an undesirable and dangerous influence over the legislature in matters of raising revenue by direct levy over the people.²⁹⁴

The subject of the origination of money bills, both for raising revenue and for spending, was a repeated topic of debate at the Convention. One reason for granting the House of Representatives the exclusive authority to originate bills for the purpose of raising revenue is to protect the people by allowing only taxation through representation.²⁹⁵ As the immediate representatives of the people, the members of the House of Representatives should be the ones to have this power. Another reason for so vesting the power in the House was as a "sweetener," for the

²⁹² 1 WILLIAM BLACKSTONE, COMMENTARIES *169-70.

²⁹³ MADISON'S NOTES, *supra* note 4, at 413.

²⁹⁴ Randolph pointed out that

[w]e had numerous & monstrous difficulties to combat. Surely we ought not to increase them. When the people behold in the Senate, the countenance of an aristocracy; and in the president, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives, a right which has been so long appropriated to them.—The Executive will have more influence over the Senate, than over the H. of Reps. Allow the Senate to originate in this case, & that influence will be sure to mix itself in their deliberations & plans.

MADISON'S NOTES, *supra* note 4, at 448.

²⁹⁵ See, e.g., MADISON'S NOTES, *supra* note 4, at 113 (Elbridge Gerry), 114 (Charles Pinckney), 436 (Edmund Randolph), 443 (Col. George Mason). *Accord id.* at 445 (Elbridge Gerry) ("Taxation & representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses.").

benefit of the larger states, for agreeing to the Great Compromise, by which representation in the House would be proportional to the population of the states and in the Senate would be equal among all states.²⁹⁶ The power of the Senate to amend revenue raising bills was deemed necessary to prevent extortion by the House of Representatives.²⁹⁷

On September 5, after many debates, the following clause was agreed to, as a compromise, in the Committee of Eleven:

All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate: no money shall be drawn from the Treasury, but in consequence of appropriations made by law.²⁹⁸

On September 8, 1787, the words "and shall be subject to alterations and amendments by the Senate" were changed to those found in the Massachusetts Constitution. The language adopted is this: "but the Senate may propose or concur with amendments as in other bills."²⁹⁹

This adopted language ensures that all bills for the raising of revenue—the lawful taking of property, in the form of money, from the people—shall originate in the House, the more numerous and popular branch of the legislature. It reduces the likelihood of extortion, by providing that the Senate may concur with or propose amendments. It does not require House origination of spending bills. Accordingly, the Origination Clause does not fetter the functioning of the federal government.³⁰⁰

This is in contrast to the Confederate Congress which had the power "to ascertain the necessary sums of money to be raised for the service of the united states . . ." ³⁰¹ It, however, could not "ascertain the sums . . . necessary for the defence and welfare of the united states, or any of them" without the assent of at least nine states.³⁰² Moreover, the states held the authority to levy the taxes that would supply the treasury with the amount of money deemed necessary by the Confederate

²⁹⁶ See, e.g., *id.* at 414 (Oliver Ellsworth), 436, 442 (Edmund Randolph).

²⁹⁷ See, e.g., *id.* at 113 (Pierce Butler), 444 (James Wilson).

²⁹⁸ *Id.* at 580.

²⁹⁹ *Id.* at 607.

³⁰⁰ See, e.g., *id.* at 413 (Charles Pinckney), 414 (James Madison). See also note 313 *infra*.

³⁰¹ ARTICLES OF CONFEDERATION art. IX, para. 5.

³⁰² *Id.* para. 6.

Congress.³⁰³

Edmund Randolph, in opening the business of the Philadelphia Convention, described the defects of the Confederate Congress. Among these listed deficiencies was that it was "not being permitted to prevent a war nor to support it by their own authority."³⁰⁴ The Confederate Congress was fully dependent upon the states. One of the most significant powers that it lacked was the revenue raising, or taxing, power. All of the principal powers of the federal government, including war, have at least some relation to money.³⁰⁵ The authority to raise revenue is a significant war-related power. The federal government now possesses all the powers of war; the Confederate Congress did not.³⁰⁶

Hamilton wrote that the power of taxation "is the most important of the authorities proposed to be conferred upon the Union."³⁰⁷ This is so, because virtually all other powers of the

³⁰³ *Id.* art. VIII:

All charges of war, and all other expences that shall be incurred for the common defence or general welfare . . . shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time direct and appoint.

³⁰⁴ MADISON'S NOTES, *supra* note 4, at 29. Randolph later wrote that the Confederate "period is distinguished by melancholy testimonies of its inability . . . to obtain by requisitions, supplies to the federal treasury, or recruits to the federal armies." Randolph, *supra* note 220, at 262. See also MADISON'S NOTES, *supra* note 4, at 7 (preface) ("the radical infirmity of the 'arts. of Confederation' was the dependence of Congs. on the voluntary and simultaneous compliance with its Requisitions, by so many independent Communities, each consulting more or less its particular interests & convenience and distrusting the compliance of the others").

³⁰⁵ See MADISON'S NOTES, *supra* note 4, at 416 (James Wilson) ("All the principal powers of the Natl. Legislature had some relation to money."); *id.* at 445 (James Wilson) ("War, Commerce, & Revenue were the great objects of the Genl. Government. All of them are connected with money.").

³⁰⁶ That Congress did not possess *all* the powers of *war* is self-evident from this consideration alone, that she never attempted to lay any kind of *tax* on the people of the *United States*, but relied altogether on the State Legislatures to impose taxes, to raise money to carry on the war, and to sink the emissions of all the paper money issued by Congress. . . . In every free country the power of laying taxes is considered a *legislative* power over the *property* and *persons* of the citizens; and this power the people of the *United States*, granted to their State Legislatures, and they neither could, nor did transfer it to Congress; but on the contrary they expressly stipulated that it should remain with them.

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 232 (1796).

³⁰⁷ THE FEDERALIST NO. 33, *supra* note 5, at 199 (Alexander Hamilton).

federal government depend upon money for their support. Money, of course, is a "sinew of war."³⁰⁸ It was accepted by the delegates to the Philadelphia Convention that "[t]he purse & the sword ought never to get into the same hands whether Legislative or Executive."³⁰⁹ Again, the fear here was of encroachments on individual liberty.³¹⁰ The fear was that a tax could be exacted, without consent through direct representation, and, further, that military force could be exerted to force compliance.³¹¹

[F]ire & water themselves are not more incompatible that [sic] such a mixture of civil liberty and military execution. Will the militia march from one State to another, in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the Citizens of the invaded State assist one another till they rise as one Man, and shake off the Union altogether. Rebellion is the only case, in which the military force of the State can be properly exerted [against] its Citizens.³¹²

Thus, the fear of the sword in the executive, essential to the safety of the public, is not that it will be used to duel against external forces, to protect and defend the nation, but, rather, that it will be turned inward and employed against the people of the United States.

The power of the purse is the power to lay and collect taxes. This power belongs to the legislature.³¹³ Without the money col-

³⁰⁸ MADISON'S NOTES, *supra* note 4, at 281 (Charles Pinckney).

³⁰⁹ *Id.* at 81 (Col. George Mason).

³¹⁰ Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *310:

[T]his precedent [of levying assessments] being . . . abused into a means of oppression, (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expenses) it became thereupon a matter of national complaint; and King John was obliged to promise in his *magna carta*, that no scutage should be imposed without the consent of the common council of the realm.

(footnote omitted).

³¹¹ The fear would be identical if the sword were kept by Congress. In fact, the sentence preceding the one quoted in the text, *see* note 309 and accompanying text *infra*, was as follows: "The Executive power ought to be well secured agst. Legislative usurpations on it."

³¹² MADISON'S NOTES, *supra* note 4, at 158 (Col. George Mason) (footnotes omitted).

³¹³ While it is empowered to lay and collect taxes, other than as comprehended by the Necessary and Proper Clause and by its authority to support armed forces, Congress is not given the power to spend. Article I, Section 7, Clause 1, provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." A prior draft of the Constitution included in this clause the origination of appropriations bills as well. *See* MADISON'S NOTES, *supra* note 4, at 386. That earlier provision also added the following:

lected from the people, pursuant to legislation, the President could not carry on war.³¹⁴ Until this money, by act of Congress, is gathered into the treasury, the Commander-in-Chief could not wage war, because "the means of carrying on the war would not

"No money shall be drawn from the Public Treasury, but in pursuance of appropriations that shall originate in the House of Representatives." This latter portion of the clause is the genesis of the provision now found in Article I, Section 9, Clause 7:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This restriction does not confer a spending power upon the legislature. The Constitution nowhere expressly vests an appropriations power in Congress, save with respect to supporting U.S. armed forces. See note 228 and accompanying text *supra*. Otherwise, it has the power to spend only by virtue of the Necessary and Proper Clause. Accordingly, when necessary and proper for carrying into execution powers of other departments, the legislature *must* provide spending. See note 83 and accompanying text *supra*. Cf. MADISON'S NOTES, *supra* note 4, at 452 (Elbridge Gerry) (If ambassadors are appointed, "the House of Reps will be obliged to provide salaries for them, whether they approve of the measures or not."); *id.* at 588 (James Wilson) (power to make treaties involves subsidies); Hayburn's Case, 2 U.S. (2 Dall.) 409, 413 (1792) (order of court "might be a means of drawing money out of the public treasury as effectually as an express appropriation by law").

As noted at notes 319-31 and accompanying text *infra*, the power of Congress to lay and collect taxes is limited to raising revenue for the purposes of paying debts and of providing for the common defense and for the general welfare. Thus, when preparing tax bills, the legislature makes *general* appropriations. It decides to raise a certain sum of money in accordance with each of these permitted purposes. This, in conjunction with the Necessary and Proper Clause and its authority to support armed forces, constitutes Congress's appropriations power. Cf. ARTICLES OF CONFEDERATION art. IX, para. 5 (Confederate Congress had authority "to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses"). Congress does not have independent authority to legislate the application and disbursement of the money raised, save with respect to U.S. armed forces. In *The Federalist No. 72*, *supra* note 5, at 468-69 (Alexander Hamilton), "the administration of government," which is "the province of the executive department," is described as follows:

The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war,—these, and other matters of like nature, constitute what seems to be most properly understood by the administration of government.

(emphasis added). The legislature holds the power of the purse—the authority to levy taxes on the people. Once the money is raised for general purposes, Congress generally does not have an independent power to spend.

³¹⁴ Cf. Randolph, *supra* note 220, at 265-66 (it was evident to the Framers, as a result of their experience under the Articles of Confederation, "that the operations of peace and war will be clogged without regular advances of money, and that these will be slow indeed, if dependent on supplication alone").

be in the hands of the President, but of the Legislature."³¹⁵ As with the power to raise armies, the taxing power is placed in the hands of Congress. It makes the initial move to provide for national defense. With respect to men and money, the sinews of war, Congress has the authority to determine the amounts that will be levied from the people. Once tax dollars are collected and soldiers are raised—except insofar as there is a constitutional limitation on appropriations for the use of standing armies for a period of two years and a constitutionally delegated authority to Congress to make rules for the government and regulation of the armed forces—Congress's control over the men and money ceases and is placed fully in the hands of the President.³¹⁶ With the supplies requisite to protect the nation in his hands, the President must be given the utmost discretion to employ them effectively to accomplish the object of public safety. The congressional check upon *potential* presidential encroachments is antecedent to the President's exercise of the war power. It is placed in the hands of Congress to curtail possible abuses of executive authority that impinge upon individual liberty.

The power of taxation is a powerful weapon against presidential encroachments. Again, it must be remembered, though, that the power must be exercised to fulfill the objects of the federal government. Congress has a duty to make certain that the United States has sufficient funds to provide for the common defense. Congress cannot use the taxing power as a weapon to thwart the purposes of its taxing authority. It cannot, by failing to collect taxes necessary for national security, obstruct the President's obligation to defend the nation. The check, placed in the hands of the legislature, against executive encroachments, is aimed at protecting individual liberties.³¹⁷ The President must

³¹⁵ MADISON'S NOTES, *supra* note 4, at 599 (Nathaniel Gorham). Congress also must provide a military force before the Commander-in-Chief could conduct war. *See* notes 208-66 and accompanying text *supra*.

³¹⁶ *Cf.* MADISON'S NOTES, *supra* note 4, at 334 (Edmund Randolph) ("Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands."). As noted, however, the military might and its monetary support can never be under his control unless placed there by Congress. *See also id.* at 599 ("the President he said would necessarily derive so much power and importance from a state of war," (James Madison) but "the means of carrying on the war would not be in the hands of the President, but of the Legislature" (Nathaniel Gorham)).

³¹⁷ One of the abuses of Parliament, of which the colonists complained in the Decla-

be given all resources necessary to secure public safety consistent with republican safety. As the Supreme Court has held, "resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."³¹⁸

The Constitution invests Congress with certain war-related powers that protect personal liberty. The legislature, though, does not possess the public war power—the authority to secure public safety. The Constitution separates the power of the sword from that of the purse.

2. Common Defense and General Welfare

At the beginning of the Philadelphia Convention, Edmund Randolph, presenting the Virginia Plan for the revision of the form of the general government, set forth the first proposed resolution:

Resolved that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, "common defence, security of liberty and general welfare."³¹⁹

This language was borrowed from the Articles of Confederation³²⁰ and formed the basis upon which the preamble to the Constitution was conceived.³²¹ While initially proposed at the Convention, no power was granted to Congress generally to provide for the general welfare. Rather, its powers were enumerated specifically.³²²

ration of Independence, was that of "imposing Taxes on us without our Consent." Under the Constitution, the concurrence of both branches of the legislature and, absent an override of his veto, of the President, is required to impose taxes upon the people.

³¹⁸ *United States v. Butler*, 297 U.S. 1, 69 (1935). *Cf. Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("Congress is granted broad power to 'lay and collect Taxes,' but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination") (footnotes omitted).

³¹⁹ *MADISON'S NOTES*, *supra* note 4, at 30.

³²⁰ *ARTICLES OF CONFEDERATION* art. III ("The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare . . .").

³²¹ *See* note 40 and accompanying text *supra*.

³²² *See* note 16 and accompanying text *supra*. *See also Carter v. Carter Coal Co.*, 298 U.S. 238, 292 (1936) ("The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication."); *Kansas Gas & Elec. Co. v. City of Inde-*

The Framers not only limited the authority of the House of Representatives to originate money bills to "[a]ll Bills for raising Revenue,"³²³ but also expressly defined which methods of raising revenue would be permissible. In Section 8 of Article I of the Constitution, in the first clause, Congress is empowered "[t]o lay and collect Taxes, Duties, Imposts and Excises."³²⁴ The Framers, however, did not stop there. The legislature cannot constitutionally raise revenue for any purpose whatsoever. The quoted clause continues and requires that the revenue to be raised must be "to pay the Debts and provide for the common Defence and general Welfare of the United States."³²⁵

These are the three purposes that limit Congress's power of taxation.³²⁶ But these purposes cannot serve as pretexts for augmenting Congress's power.

The proposition . . . that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitively rejected by this court.³²⁷

pendence, 79 F.2d 32, 38 (10th Cir. 1935) (grant of power to Congress to provide for general welfare rejected).

³²³ U.S. CONST. art. I, § 7, cl. 1.

³²⁴ Congress also has other such authority, an example of which is the power to borrow money. See notes 332-45 and accompanying text *infra*.

³²⁵ U.S. CONST. art. I, § 8, cl. 1. Cf. ARTICLES OF CONFEDERATION art. IX, para. 6 (Congress cannot "ascertain the sums and expences necessary for the *defence* and *welfare* of the united states" without assent of nine states) (emphasis added); *id.* art. VIII ("All charges of war, and all other expences that shall be incurred for the *common defence* or *general welfare*, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states . . .") (emphasis added). Taxes traditionally were levied principally for the purpose of providing defense to the population. See, e.g., PUFENDORF, *supra* note 154, at 1279 ("taxes, when levied in just measure and honestly expended, are nothing other than the price paid by individuals to the state in return for the defence of their lives and property, and to meet the expense involved therein").

³²⁶ See *United States v. Butler*, 297 U.S. 1, 66 (1935) (the "confines [of the taxing power] are set in the clause which confers it, and not in those of Sec. 8 which bestow and define the legislative powers of Congress"); *Kansas Gas & Electric Co. v. City of Independence*, 79 F.2d 32, 41 (10th Cir. 1935) ("section 8 of article I gives Congress the power of taxation and limits the purposes for which taxes may be levied and appropriated, namely, to pay the debts and provide for the common defense and general welfare of the United States").

³²⁷ *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936). Accord *THE FEDERALIST* No. 41, *supra* note 5, at 268-69 (James Madison). See also *Butler*, 297 U.S. at 64 ("The view

While the authority to tax is essential to carry out the functions of the general government, that power must be limited to those functions expressly set forth in the Constitution. Without a limitation on the power of taxation, Congress would be able constitutionally to take money from the people for any reason, by originating and by passing a revenue raising bill. Therefore, the authority is qualified to coincide with the objects of the federal government, as expressly set forth in the preamble to the Constitution, to be fulfilled by the exercise of the powers subsequently enumerated or defined therein.

The Supreme Court, in *United States v. Butler*,³²⁸ held that, while the taxing power is not unlimited, "its confines are set in the clause which confers it, and not in those of Sec. 8 which bestow and define the legislative powers of the Congress."³²⁹ The Court adopted Justice Story's reasoning that the only limitation on the power to tax is that the revenue be raised for national, as distinguished from local, matters.³³⁰ This, however, must mean those national concerns over which the Constitution grants power to the federal government. Otherwise, the legislature would be able to lay and collect taxes for purposes for which the government could not spend. The boundaries that define the extent of the power of taxation are the financial needs necessary to fulfill *all* of the powers of the federal government. Other than the payment of debts, all of the fiscal requirements of the federal government, are encompassed under the umbrella phrase, "common defense and general welfare."³³¹

that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted."). Cf. *United States v. Sanders*, 99 F. Supp. 113, 117 (W.D. Okla. 1951) ("Congress possesses no general power to regulate for the promotion of the general welfare. It is limited in its powers to those which are granted it by the Constitution, and these powers must be either expressly given, or arise by necessary implication."), *rev'd on other grounds*, 196 F.2d 895 (10th Cir. 1952). *But see* *Buckley v. Valeo*, 424 U.S. 1, 90 (1975) (*per curiam*) (General Welfare Clause is "a grant of power, the scope of which is quite expansive"); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 151 (1814) (Story, J., dissenting) (describing the clause to provide "for the common defence and general welfare" as a substantive power).

³²⁸ 297 U.S. 1 (1935).

³²⁹ *Id.* at 66.

³³⁰ *See id.* at 66-67. *See also* *Kansas Gas & Elec. Co.*, 79 F.2d at 41 ("We . . . conclude that the phrase 'general welfare' is not limited by the specifically enumerated powers, but that the welfare must be national or general as contradistinguished from local or special.").

³³¹ Cf. *Carter*, 298 U.S. at 292 (The Convention "made no grant of authority to Con-

3. Borrow Money

To raise revenue, Congress also is empowered "[t]o borrow Money on the credit of the United States."³³² This power is derived from the Articles of Confederation, which granted to the Confederate Congress the power "to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account on the sums of money so borrowed or emitted."³³³ This power is essential to the national defense.³³⁴ During the Revolutionary War, the Congress was forced to borrow money from foreign nations to keep the war effort alive and, consequently, became heavily indebted.³³⁵ To sink such debts, Congress is authorized to lay and collect taxes "to pay the Debts" of the United States.³³⁶ This power correlates with the express power "[t]o borrow money on the credit of the United States."

Hamilton wrote that, "[i]n the modern system of war, nations the most wealthy are obliged to have recourse to large loans."³³⁷ By placing the full power of taxation in the federal government, the Constitution also enables the national government to obtain credit more easily.

Foreigners, as well as citizens of America, could then reasonably repose confidence in its engagements; but to depend upon a government that must itself depend upon thirteen other governments for the means of fulfilling its contracts, when once its situation is clearly understood, would require a degree of credulity not often to be met with in the pecuniary transactions of mankind, and little reconcilable with the usual sharp-sightedness of avarice.³³⁸

gress to legislate substantively for the general welfare, and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted.") (citation omitted).

³³² U.S. CONST. art. I, § 8, cl. 2.

³³³ ARTICLES OF CONFEDERATION art. IX, para. 5. The Confederate Congress, however, was prohibited from "borrow[ing] money on the credit of the united states" unless at least nine states assented. *Id.* para. 6.

³³⁴ See THE FEDERALIST No. 41, *supra* note 5, at 267 (James Madison), ("The power of levying and borrowing money, being the sinew of that which is to be exerted in the national defence, is properly thrown into the same class with it."). See also *Luther v. Borden*, 48 U.S. (7 How.) 1, 48 (1849) (Woodbury, J., dissenting).

³³⁵ See, e.g., THE FEDERALIST No. 30, *supra* note 5, at 185 (Alexander Hamilton); MADISON'S NOTES, *supra* note 4, at 7 (preface); *id.* at 495 (Elbridge Gerry).

³³⁶ U.S. CONST. art. I, § 8, cl. 1.

³³⁷ THE FEDERALIST No. 30, *supra* note 5, at 186 (Alexander Hamilton).

³³⁸ *Id.* at 187.

The power to borrow money is related integrally to the power to tax. When money is borrowed on credit of the United States, the personal wealth of each of its citizens is pledged.³³⁹ Thus, both powers, to tax and to borrow money, reside with Congress.³⁴⁰

The power to borrow money on credit had been exercised by several colonies and by the Confederate Congress during the Revolutionary War.

³³⁹ [W]hat is the pledge which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. . . . In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer.

¹ WILLIAM BLACKSTONE, COMMENTARIES *327-28.

³⁴⁰ It has been held that the power to borrow money "includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills or notes." *The Legal Tender Case*, 110 U.S. 421, 444 (1884). *But compare* U.S. CONST. art. I, § 8, cl. 2 (power "[t]o borrow money on the credit of the United States") with ARTICLES OF CONFEDERATION art. IX, para. 5 (power "to borrow money, or emit bills on the credit of the united states") (emphasis added). *See also* THE FEDERALIST No. 44 at 290-91 (James Madison); MADISON'S NOTES, *supra* note 4, at 471 n.* (striking power to emit bills of credit, "cut[ting] off the pretext for a paper currency"). The Court, in the *Legal Tender Cases*, thus held, apparently contrary to original understanding, that, by these powers,

taken together, congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts.

The *Legal Tender Case*, 110 U.S. at 448 (emphasis added). This power to borrow, in addition to its relationship to the taxing power, *see* notes 338-39 and accompanying text *supra*, also, in the case of paper currency, nevertheless would directly implicate private rights by this effect on private debts or contracts.

The power to borrow money is aimed, as well, at preventing a single state from embroiling the nation in war:

Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member.

THE FEDERALIST No. 44, *supra* note 5, at 290-91 (James Madison).

Whilst the paper emissions of Congress continued to circulate they were employed as a sinew of war, like gold and silver. When that ceased to be the case, the fatal defect of the political System [by which the Congress was dependent upon the states for the collection of taxes] was felt in its alarming force. The war was merely kept alive and brought to a successful conclusion by such foreign aids and temporary expedients as could be applied³⁴¹

This defect of dependence on the states was remedied in the Constitution by vesting in Congress the powers of taxation and of borrowing money on credit. These powers are essential for the purpose of providing for the national defense.

Among the powers for funding a war granted to Congress are the related powers "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures"³⁴² and "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States."³⁴³ The power to borrow money on the credit of the United States is connected integrally to the powers to coin money and to tax, and each resides with Congress.³⁴⁴ Furthermore, the power to borrow money, like the powers to tax and raise armies, is an indirect means of providing for the common defense, which directly affects individual rights. While the President does have certain powers that operate upon the individual, as, for instance, the authority to command the operations of the armed forces, these powers operate to protect and defend the nation. Thus, these powers serve to protect public rights and are employed only after the legislature has made direct levies on the people or on the states.³⁴⁵ The executive's intrusions into per-

³⁴¹ MADISON'S NOTES, *supra* note 4, at 7 (preface).

³⁴² U.S. CONST. art. I, § 8, cl. 5.

³⁴³ *Id.* art. I, § 8, cl. 6. Among the powers denied to the states are the powers to "coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligations of Contracts." *Id.* art. I, § 10, cl. 1.

The power "[t]o establish Post Offices and post Roads," *id.* art. I, § 8, cl. 7, also is connected to the revenue raising power. See MADISON'S NOTES, *supra* note 4, at 118-19 (New Jersey Plan proposal that Congress "be authorized to pass acts for raising a revenue . . . by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-office").

³⁴⁴ The power to coin money also directly affects private rights. See note 340 and accompanying text *supra*.

³⁴⁵ Cf. *Ex Parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) ("The only power, therefore, which the president possesses, where the 'life, liberty or property'

sonal rights, therefore, are only *incidental*. Congress is granted those powers, essential to national security, that operate *directly* upon the people and provide the means to secure public safety.

4. Power to Regulate Commerce

Article I, Section 8, Clause 3, of the Constitution, empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This is one of the few powers granted by the Constitution that was not, in any form, vested in the Confederate Congress, except with respect to commerce with the Indians.³⁴⁶

William Patterson, in his New Jersey Plan, proposed that Congress "be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U. States . . . [and] to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other."³⁴⁷ The commerce power is essential to the general power to raise revenue and is yet another component of it. Roger Sherman listed the objects of the federal government as these few:

of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.'"). The President, though, with regard to individual citizens, takes care that laws *first passed by Congress*, affecting individual rights and duties, are executed faithfully.

³⁴⁶ ARTICLES OF CONFEDERATION art. IV ("the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . ."). The Confederate Congress was given the power of "regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." *Id.* art. IX, para. 4. By the Constitution, Congress was given the power to regulate commerce with foreign nations, with the Indians, and among the states. In no case was it given the power to manage affairs with foreign entities. To be sure, the President is vested with the foreign affairs power. See U.S. CONST. art. II, § 2, cl. 2. *Accord* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations . . ."); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) ("As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property . . . [His duties] respect the nation, not individual rights . . .") (citation omitted).

³⁴⁷ MADISON'S NOTES, *supra* note 4, at 118-19.

1. defence agst. foreign danger. 2 agst. internal disputes & a resort to force. 3. Treaties with foreign nations. 4 regulating foreign commerce, & drawing revenue from it.³⁴⁸

James Madison wrote, in a similar vein:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; *with which the last the power of taxation will, for the most part, be connected.*³⁴⁹

As Hamilton explained it,

The ability of a country to pay taxes must always be proportioned, in a great degree, to the quantity of money in circulation, and to the celerity with which it circulates. Commerce, contributing to both these objects, must of necessity render the payment of taxes easier, and facilitate the requisite supplies to the treasury.³⁵⁰

Accordingly, Congress is granted the power to regulate foreign commerce, and, incidentally, interstate commerce, as a means of raising money for the operations of the general government, including common defense.

It should be emphasized that Congress passes laws only for internal regulation and does not have the power, which is given to the executive, to make treaties with foreign nations.³⁵¹ The power to "regulate Commerce with foreign nations" is the power to regulate the states', and the people's, behavior in transacting business with the outside world. "For, as these are transactions carried on between subjects of independent states, the municipal

³⁴⁸ *Id.* at 74 (emphasis added) (footnote omitted). Rufus King thought that "[t]he most numerous objects of legislation belong to the States. Those of the Natl. Legislature were but few. The chief of them were commerce & revenue." *Id.* at 398 (Rufus King).

³⁴⁹ THE FEDERALIST No. 45, *supra* note 5, at 303 (James Madison) (emphasis added). Cf. *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 19, 23 (1781) ("The national interest of every commercial country requires, that some mode or criterion be adopted to ascertain the ship, cargo, destination, property, and nation to which such ship belongs; not only as a security for a fair commerce according to law; but as a guard against fraud and imposition in the payment and collection of duties, imposts and commercial revenues."); 1 WILLIAM BLACKSTONE, COMMENTARIES *263-64 ("It is . . . partly upon a fiscal foundation, to secure his marine revenue, that the king has the prerogative of appointing *ports* and *havens*, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper.").

³⁵⁰ THE FEDERALIST No. 12, *supra* note 5, at 71 (Alexander Hamilton).

³⁵¹ See U.S. CONST. art. II, § 2, cl. 2.

laws of one will not be regarded by the other."³⁵²

Individuals may engage in business transactions with citizens of foreign nations. The President, on behalf of the United States, may enter into compacts with other countries. The federal legislature's power goes only so far as to raise revenue for the United States, while, through legislation, protecting the fairness of trade, preventing one state, or a group of them, from unfairly profiting at the expense of another.³⁵³ These are the objects of federal legislation in the nature of commercial regulation. One object is to raise money; the other is to maintain fairness in the system of trade.³⁵⁴

While the power to regulate commerce belongs to Congress, the foreign affairs power of the federal government—a part of the more general authority to regulate intercourse with foreign nations³⁵⁵—is vested in the President.³⁵⁶ This includes the treaty

³⁵² 1 WILLIAM BLACKSTONE, COMMENTARIES *273.

³⁵³ Cf. U.S. CONST. art. I, § 10, cl. 3. ("No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ."). To ensure fairness and harmony among the states, the commerce power was vested in the federal legislature. See, e.g., *Gibbons v. Ogden*, 22 U.S. (19 Wheat.) 1, 224 (1824) (Marshall, C.J.).

³⁵⁴ When debating the power of origination of money bills, see notes 293-300 and accompanying text *supra*, Madison said the following:

The word *revenue* was ambiguous. In many acts, particularly in the regulations of trade, the object would be two-fold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue shd. be the sole object, in exclusion even of other incidental effects. When the Contest was first opened with G.B. their power to regulate trade was admitted. Their power to raise revenue rejected. An accurate investigation of the subject afterward proved that no line could be drawn between the two cases.

MADISON'S NOTES, *supra* note 4, at 445-46. There also can be no doubt that [t]he power to regulate commerce comprehends the control for that purpose [of removing obstructions], and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For that purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders.

In re Debs, 158 U.S. 566, 586 (1895) (quoting *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724 (1865)). See also note 369 and accompanying text *infra*.

³⁵⁵ In *The Federalist*, Madison listed the powers, vested in the general government, that

consist of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and

power³⁵⁷ and the power to appoint ambassadors and other public ministers and consuls. These executive powers are not subject to qualification by the entire Congress. The Senate alone, though, to protect the interests of individual or groups of states, must ratify treaties or appointments made by nomination of the President.³⁵⁸

consuls; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to regulate foreign commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of ten dollars per head, as a discouragement to such importations.

THE FEDERALIST No. 42, *supra* note 5, at 270 (James Madison). U.S. CONST. art. I, § 9, cl. 1, provides:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

³⁵⁶ U.S. CONST. art. II, § 2, cl. 2. *See also* note 346 *supra*.

³⁵⁷ Later the first Chief Justice of the United States, John Jay, wrote of the authority to enter into treaties: "The power of making treaties is an important one, especially as it relates to war, peace, and commerce . . ." THE FEDERALIST No. 64, *supra* note 5, at 417 (John Jay).

³⁵⁸ U.S. CONST. art. II, § 2, cl. 2. That the House is excluded, by the Constitution, from foreign affairs does not mean that congressmen should not be familiar with it. Because of the commerce power, members of the House should familiarize themselves with foreign policy.

A branch of knowledge which belongs to the acquirements of a federal representative . . . is that of foreign affairs. In regulating *our own commerce*, he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of *municipal legislation*, is submitted to the federal government. And although the House of Representatives is not immediately to participate in foreign negotiations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will and frequently deserve attention in the ordinary course of legislation, and will sometimes *demand* particular legislative sanction and *cooperation*.

THE FEDERALIST No. 53, *supra* note 5, at 351-52 (Alexander Hamilton or James Madison) (emphasis added). While congressmen are expected to have knowledge of foreign affairs, they need not have "[a]ccurate and comprehensive knowledge." *Id.* No. 75, at 488 (Alexander Hamilton). The Senate participates in the treaty-making power; the House, along with the Senate, must conform domestic legislation to ratified treaties. *See* THE FEDERALIST No. 69, *supra* note 5, at 450-51 (Alexander Hamilton):

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. . . . Every jurist of [the British] kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties

As these sections have shown, when personal rights are affected directly, the power resides with Congress. The power of the federal legislature to regulate commerce is internal only. It is the authority to regulate the behavior of citizens or of individual states. When a commercial agreement is struck between the United States and a foreign nation, the exercise of power, which incidentally may affect individual rights, is, according to our Constitution, executive. Such compacts, made on behalf of the whole country, can be accomplished only with the paramount goal of promoting the public good, by preserving and protecting the nation, by preventing hostility and animosity among nations, and, by fostering friendship and economic and defensive cooperation among them.

IV. THE POWER TO DECLARE WAR AND OTHER RELATED POWERS

Article I, Section 8, of the Constitution grants Congress the war-related power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”³⁵⁹ along with the war power, the authority “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”³⁶⁰ These too are legislative powers that regulate the behavior of citizens.

A. *Offenses Against the Law of Nations*

The authority to define and punish offenses against the law

exists in the crown in its utmost plentitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. *The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its cooperation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature.*

(emphasis added and footnote omitted).

³⁵⁹ U.S. CONST. art. I, § 8, cl. 10.

³⁶⁰ *Id.* cl. 11.

of nations means the power to prescribe rules for the conduct of U.S. citizens with respect to foreign individuals. The purpose of the power is to prevent private persons (or individual states) from embroiling the union in war with a foreign nation.

[W]here the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war.³⁶¹

For that reason, "[i]t is of high importance to the peace of America that she observe the laws of nations towards all these powers."³⁶² "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."³⁶³

The law of nations "is the political law of each country considered in its relation to every other."³⁶⁴ "Political law" is the body of "laws relative to the governors and the governed."³⁶⁵ Offenses against the law of nations, which regulate the conduct of citizens, must be defined, because the law of nations is "often too vague and deficient to be a rule."³⁶⁶

One of the inadequacies of the Articles of Confederation was that it contained "no provision for the case of offences against the law of nations; and consequently [left] it in the power of any indiscreet member to embroil the Confederacy with foreign nations."³⁶⁷

³⁶¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

³⁶² THE FEDERALIST NO. 3, *supra* note 5, at 14 (John Jay).

³⁶³ *Id.* No. 80, *supra* note 5, at 517 (Alexander Hamilton).

³⁶⁴ MONTESQUIEU, *supra* note 30, at 190.

³⁶⁵ *Id.* at 103.

³⁶⁶ MADISON'S NOTES, *supra* note 4, at 637 (Gouverneur Morris). *Cf.* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (King has given assent to acts of pretended legislation "[f]or transporting us beyond Seas to be tried for pretended offenses").

³⁶⁷ THE FEDERALIST NO. 42, *supra* note 5, at 272 (James Madison). *Cf.* MADISON'S NOTES, *supra* note 4, at 142 (James Madison) (New Jersey Plan proposed at the outset of Convention would not "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars. . . . The existing Confederacy does not sufficiently provide against this evil. The proposed amendment to it does not supply the omission."). The power to prevent violations of treaties may be found in the Constitution's Necessary and Proper Clause. *Cf.* note 358 *supra*.

The principal offenses against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.³⁶⁸

Violations of safe-conduct

are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offenses may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community.³⁶⁹

To prevent war with foreign nations, immunities of ambassadors and of other public ministers are protected by civil laws.³⁷⁰ Ambassador immunity, safe conduct, and piracy "are the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offenses against that universal law, *committed by private persons*."³⁷¹

B. Piracy

The crime of piracy, at the time of the Philadelphia Convention, had an accepted meaning of robbery on the high seas. Statutory laws, however, occasionally expanded its definition.

The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But, by statute, some other offences are made piracy also . . .³⁷²

Accordingly, the Constitution gives Congress the power to define

³⁶⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES *68. *Accord* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985).

³⁶⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES *68-69. See notes 354, 361, 363, 367 and accompanying text *supra*.

³⁷⁰ See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *70, *256; GROTIUS, *supra* note 159, at 207.

³⁷¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *73 (emphasis added).

³⁷² 4 *id.* at *72. See also *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 465, 469 (1863) (piracy is robbery on the high seas); GROTIUS, *supra* note 159, at 169 (piracy is robbery); VAN BYNKERSHOEK, *supra* note 154, at 98 ("those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands").

and punish piracies and felonies committed on the high seas that might involve the nation in war.

The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offences. The definition of piracies might . . . be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas is evidently requisite. Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption.³⁷³

Punishment of individuals for such acts, by the civil authority of the nation, is another method by which the Constitution discourages the invitation of war.

C. *The Declaration of War Clause*

The war power of Congress, under the Constitution, consists only of the power to declare war, a very limited authority, and the related, publicly authorized, private war power to grant letters of marque and reprisal. While the power to declare war was included within the war power of the Confederate Congress, it was only an incidental power under the Articles of Confederation. It was not enumerated expressly. The authority of the Confederate Congress nominally was the same as that of the British monarch. It was rendered ineffective, however, because, for its exercise, it required the assent of at least nine states.³⁷⁴ Under the Constitution, most of the war power is vested in the executive. The relatively insignificant power to declare war was left to the legislative body, to secure republican liberty. Congress also is invested with the power to grant letters of marque and reprisal. This authority, which existed under the Articles of Confederation, was expanded under the Constitution.

³⁷³ THE FEDERALIST No. 42, *supra* note 5, at 272 (James Madison). Under the Articles of Confederation, art. IX, para. 1, the Confederate Congress had the power of "appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures."

³⁷⁴ See ARTICLES OF CONFEDERATION art. IX, para. 6.

1. Letters of Marque and Reprisal

Letters of marque and reprisal are commissions from the sovereign authority of the state, allowing citizens to seize the persons or goods of foreign subjects. Under Article IX of the Articles of Confederation, the Confederate Congress possessed "the sole and exclusive right and power . . . of granting letters of marque and reprisal in times of peace."³⁷⁶ Under the Constitution, only Congress may grant such commissions and may do so at any time.³⁷⁶

Under the British model, letters of marque and reprisal were issued by ministers of the crown.³⁷⁷ "[T]he prerogative of granting" such commissions "is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war."³⁷⁸ As Van Bynkershoek points out, this practice

belongs to public law, not only because privateering requires public authorization, but also because controversies that arise out of it frequently disturb states and bring them into conflict. . . . *Princes have now, for a very long time, employed the resources of individuals in addition to their public resources against their enemies.*³⁷⁹

Under our system, only Congress can decide whether to employ the resources of individuals. It may make requisitions on individuals, conscripting them into public service or applying a portion of their property to public use. While the President commands the men and money that comprise the "public resources"

³⁷⁶ *Id.* para. 1. The power was constrained by the requirement of the assent of nine states. *Id.* para. 6.

³⁷⁶ See U.S. CONST. art. I, § 10, cl. 1.

³⁷⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *258.

³⁷⁸ 1 *id.* See also *Barron v. The Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (Marshall, C.J.) (states are forbidden "[t]o grant letters of marque and reprisal, [as such] would lead directly to war; the power of declaring which is expressly given to Congress"); GROTIUS, *supra* note 159, at 311 (in addition to declaration of war, "[a]nother method of obtaining redress for any violation of persons, or property is by having recourse to what, in modern language, are called REPRISALS, which the Saxons and Angles denominated WITHERNAM, and to which the French gave the name of LETTERS OF MARQUE, and those were usually obtained from the crown"). Late in the proceedings of the Constitutional Convention, a proposal was made to add a power to grant letters of marque and reprisal. Mr. Gerry, of Massachusetts, "thought [it] not included in the power of war." MADISON'S NOTES, *supra* note 4, at 478.

³⁷⁹ VAN BYNKERSHOEK, *supra* note 154, at 104 (emphasis added).

of the nation once gathered by Congress, Congress may authorize private acts of war wholly separate from the President's use of U.S. armed forces.

The legislative determination on whether to grant letters of marque and reprisal in times of peace concerns injuries to *private* citizens by *individuals* of nations with which we are at peace.

It is a matter beyond all doubt that the liberty of private redress, which once existed, was greatly abridged after courts of justice were established. Yet there may be cases, in which private redress must be allowed.³⁸⁰

Letters of marque and reprisal are an example of this exception to the general rule of abridgment of private redress.

These letters are grantable by the law of nations, whenever the *subject* of one state are oppressed and injured by *those* of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal . . . may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. . . . But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause.³⁸¹

"Thus letters of marque and reprisal, by which individuals are enabled to redress their own wrongs, must issue from the sovereign power, otherwise the hostilities of such individuals would be unlawful."³⁸² Without "a commission as a privateer," if an individual engages in such hostilities, he would be a pirate or a robber.³⁸³ As the guardian of private liberty, Congress determines

³⁸⁰ GROTIUS, *supra* note 159, at 56.

³⁸¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *258-59 (emphasis added and footnotes omitted). See also BYNKERSHOEK, *supra* note 154, at 134 ("The denial of justice is therefore usually met by the issuance of letters of reprisal, and through them we receive from the government the license to seize the persons and goods of others, on account of the violence or injustice previously done the subjects of the government, if restitution for the injustice has been denied. Thus an injury done by force and not rectified by the courts is repaired by force.").

³⁸² GROTIUS, *supra* note 159, at 278 n.*.

³⁸³ VAN BYNKERSHOEK, *supra* note 154, at 102. Accord 1 WILLIAM BLACKSTONE, COMMENTARIES *257 ("Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers"). See also *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 465, 470 (1863):

Because the officers and crew of the Sumter acted under commissions issued, by a *de facto* government, engaged in levying war against the United States, it

whether letters of marque and reprisal ought to be granted.

2. The Power To Declare War

Under the Articles of Confederation, the Confederate Congress possessed "the sole and exclusive right and power of determining on peace and war."³⁸⁴ Indeed, this authority is commensurate with that of the Framers' model of executive power, the British monarch who had "the sole prerogative of making war and peace."³⁸⁵ The Constitution hardly vests this extraordinary power in the Congress of the United States.

Under the Constitution, the powers to declare war and to grant letters of marque and reprisal are vested in Congress. The rest of the war-making power was conferred upon the Commander-in-Chief. The President also is invested with the power to make peace, in which, because it includes the treaty-making power, the Senate participates. An oversimplification of the distinction between the war powers of the legislature and of the executive is this: The Commander-in-Chief has the power to turn a state of war into a state of peace; Congress has the power to change a state of peace into a state of war. This is true.³⁸⁶ But, the power to declare war, for example, involves more than commencing war.³⁸⁷ A more complete characterization of the di-

is said that they were not *pirates*, but *enemies*.

That they were liable to be regarded as "enemies," is undoubtedly true. This implies the existence of "war." But every forcible contest between two governments, *de facto*, or *de jure*, is war. War is an existing *fact*, and not a legislative decree. Congress alone may have power to "declare" it *beforehand*, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is any declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican war, declare its *previous* existence. In either case it is the *fact* that makes "*enemies*," and not any legislative Act.

If American citizens are injured by the sovereign authority of a foreign state, and not by individual foreigners, the public interest is implicated. The President, possessing the public war authority, protects and defends the nation against such enemies, *cf.* note 428 and accompanying text *infra*, though Congress still in that case may authorize private citizens to commit acts of war.

³⁸⁴ Art. IX, para. 1.

³⁸⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *257.

³⁸⁶ See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 698 (1862) (Nelson, J., dissenting) ("The power to "change the country and all its citizens from a state of peace to a state of war . . . belongs exclusively to the Congress . . .").

³⁸⁷ Indeed, initiating hostilities does not comport with the principles upon which this nation was founded, unless hostilities are begun to secure rights of individual Ameri-

vision of the war power is this: The President protects public liberty; Congress protects private or republican liberty. Accordingly, the President possesses the public war power through use of U.S. armed forces; Congress possesses the publicly authorized, private war power.

The power to make war is ambiguous³⁸⁸ and encompasses numerous powers.³⁸⁹ The Constitution does not empower Congress to make war, to wage war, to engage in war, to levy war, or even to authorize war. It vests in the legislature what was, even in 1787, only a formal power—simply a ceremonial announcement—that was in disuse.³⁹⁰ It, however, does have significance.

Under the Articles of Confederation, the Confederate Congress, in theory holding the power to make war, could not “engage in a war . . . unless nine states assent to the same.”³⁹¹ The most conspicuous defect of the confederation, thus, was that the Confederate Congress was not “permitted to prevent war nor to support it by their own authority.”³⁹² The power to declare war, however, which clearly is incidental to the power to make war,³⁹³ was established in the confederation “in the most ample form.”³⁹⁴ If the Confederate Congress were fettered from supporting or from preventing war by its own authority, even though the power to declare war was established “in the most ample form,” that authority could not be the expansive war power that proponents of a congressional public war-making authority suggest.

can citizens, *see* notes 396-97, 428 *infra*.

³⁸⁸ *See* note 208 and accompanying text *supra*; notes 423-35 and accompanying text *infra*.

³⁸⁹ *Cf.* M.D. VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* Bk III, ch. I, § 4, at 357 (Massachusetts, Simeon Butler 1820) (“the sovereign power has alone authority to make war. But as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited according to the will of the nation . . . we are to seek the power of making war in the particular constitution of each state”).

³⁹⁰ “The ceremony of a formal denunciation of war has of late fallen into disuse.” *THE FEDERALIST* No. 25, *supra* note 5, at 156 (Alexander Hamilton). *See* note 422 and accompanying text *infra*.

³⁹¹ Art. IX, para. 6.

³⁹² MADISON’S NOTES, *supra* note 4, at 29 (Edmund Randolph).

³⁹³ *See* notes 384, 389 and accompanying text *supra*; ARTICLES OF CONFEDERATION art. VI (States retained authority to grant letters of marque and reprisal only “after a declaration of war by the United States in Congress assembled . . .”).

³⁹⁴ *THE FEDERALIST* No. 41, *supra* note 5, at 261 (James Madison).

There is an external function of a declaration, or denunciation, of war. It is "a public renunciation of friendship."³⁹⁵ It serves, thus, to *begin* a war, by the public authority of a nation, to redress injuries caused and to secure against future aggressions by individual foreigners. Blackstone stated this:

[T]he reason which is given by Grotius, why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community³⁹⁶

It is an announcement, prior to hostilities, that war is being conducted under the public authority of the state and is not a private undertaking.

A declaration of war, as Judge Blackstone explained, also is necessary, by the customary law of nations of some states, for the declaring nation to give peculiar rights and impose certain duties on its citizens. "[T]o make a war *completely effectual*, it is necessary with us in England that it be publicly declared and

³⁹⁵ VAN BYNKERSHOEK, *supra* note 154, at 18.

³⁹⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *258 (footnotes omitted). It is noteworthy that Blackstone, when speaking of the announcement to the enemy, uses the term, "denunciation of war." War is "publicly declared" to citizens within the nation; the notification to a foreign nation that, thus, becomes an enemy, commonly is called a "denunciation." *Id.* See Vattel, *supra* note 389, Bk III, ch. IV, §§ 63-64, at 384-85; note 422 and accompanying text *infra*. Cf. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("[O]ur British brethren . . . too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity, which *denounces* our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.") (emphasis added); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 45 (1800) (Chase, J.) ("The acts of congress have been analysed to show, that a war is not openly denounced against *France*").

Blackstone asserts that "impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown." 1 WILLIAM BLACKSTONE, COMMENTARIES *258. Under our Constitution, the impeachment check may be used to restrain the President from improperly conducting or concluding a national war. As a further precaution at one end, the Senate has the power to ratify treaties of peace. At the other, republican safety is secured by Congress's power to declare war. Only Congress may initiate an offensive war. See notes 414, 418 and accompanying text *infra*. In our republic, this means that only by authority of the legislature may this nation commence war to assert publicly the private rights of citizens. Cf. *Fleming v. Page*, 50 U.S. (9 How.) 603, 614 (1850) ("the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens").

duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it."³⁹⁷

Hugo Grotius, upon whom Blackstone relied, explained

that certain formalities, attending war, were introduced by the law of nations, which formalities were necessary to secure the peculiar privileges arising out of the law. *From hence* a distinction, which there will be occasion to use hereafter, between a war with the usual formalities of the law of nations, which is called just or perfect, and an informal war, which does not for that reason cease to be just, or agreeable to right.³⁹⁸

The formality of a declaration of war, as explained below, which operates on the citizens of the declaring state,³⁹⁹ has given rise to a distinction between a just or perfect war and an informal (or less formal) war. A "just" or formal war, however, which is declared, is not more just, in a real sense, than an undeclared war.

"The justifiable causes generally assigned for war are three, defence, indemnity, and punishment."⁴⁰⁰ A declaration of war is necessary only when, instead of commissioning privateers, the sovereign power directs all citizens to go to war to indemnify personal injuries suffered by individuals. It is clear that "[t]o repel force, or to punish a delinquent, the law of nature requires

³⁹⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *258 (emphasis added). Obviously, when Blackstone says that it binds all citizens on both sides, he means only that each of a declaring state's subjects will be obligated to wage war against all those of the contending nation. Cf. VAN BYNKERSHOEK, *supra* note 154, at 30 (In a formal declaration, "every man is ordered to attack the subjects of the hostile prince, to seize their goods, and to do them all possible harm."); *id.* at 120-21 ("in every declaration of war every man is asked to do as much damage to the enemy as he can"); GROTIUS, *supra* note 159, at 327 ("whenever . . . war is declared against any power, it is at the same time declared against all the subjects of that power").

³⁹⁸ GROTIUS, *supra* note 159, at 36 (emphasis added).

³⁹⁹ See, e.g., VATTTEL, *supra* note 389, Bk. III, ch. IV, § 56, at 382-83:

[I]t is necessary for a nation to publish the declaration of war for the instruction and direction of its own subjects, in order to fix the date of the rights belonging to them from the moment of this declaration, and relatively to certain effects which the voluntary law of nations attributes to a war in form. Without such a public declaration of war, it would be difficult to settle, in a treaty of peace, those acts which are to be accounted the effects of the war, and those which each nation may consider as wrongs, for obtaining reparation.

⁴⁰⁰ GROTIUS, *supra* note 159, at 75. "[W]here intention has proceeded to any outward and visible signs of insatiable ambition and injustice, it is deemed a proper object of jealousy, and even of punishment." *Id.* at 246.

no declaration."⁴⁰¹ Such force need not be a "sudden attack" but, rather, any force.⁴⁰² Furthermore, those possessed of authority to punish acts of aggression "have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, *done to other states and subjects*."⁴⁰³

Though a declaration of war may not be necessary to punish an aggressor or to repel force, it is required in all cases to confer certain rights and to impose certain obligations upon individuals.

[T]o make a war just, according to this meaning, it must not only be carried on by the sovereign authority on both sides, but it must also be duly and formally declared, and declared in such a manner, as to be known to each of the belligerent powers.⁴⁰⁴

⁴⁰¹ *Id.* at 317. Cf. VATTEL, *supra* note 389, Bk. III, ch. IV, § 57, at 383 ("He who is attacked and makes only a defensive war, need not declare it, the state of war being sufficiently determined by the declaration of the enemy, or his open hostilities.").

⁴⁰² See notes 424-27 and accompanying text *supra*. "[T]he extortion of debts through illegal means," for example, "constitutes 'force' as defined by law quite as much as the infliction of wounds." VAN BYNKERSHOEK, *supra* note 154, at 15. "[A]ll laws permit the repelling of force by force" without a declaration of war. *Id.* at 21. Cf. *United States v. Fries*, 9 F. Cas. 826, 848 (C.C.D. Pa. 1799) (No. 5126) ("[W]ar may be sufficiently levied against the United States, although no violence be used, and although no battle be fought. It is not necessary that actual violence should take place, to prove the actual waging of war.").

⁴⁰³ GROTIUS, *supra* note 159, at 247 (emphasis added). For collective self-defense, nations have a right to repel force and need not wait for the delinquent state to attack. See also VATTEL, *supra* note 389, Bk. III, ch. III, § 49, at 379:

[I]f this prince makes an unjust war, every one has a right to succour the oppressed. . . .

In fine, *should this formidable power plainly entertain designs of oppression and conquest, should it betray its views by preparative or other motions, the neighboring nations have an unquestionable right to prevent it. And if the fate of war declares on their side, a farther right to make use of this happy opportunity for weakening and reducing a power too contrary to the equilibrium, and dangerous to the common liberty.*

This right of nations is still more evident against a sovereign, who from a precipitate order of running to arms without reasons, or even so much as plausible pretences, is continually disturbing the public tranquillity.

⁴⁰⁴ GROTIUS, *supra* note 159, at 317. Cf. PUFENDORF, *supra* note 154, at 1300 ("A common distinction is drawn between war that is *formal* and one that is *less formal*. The former requires that it be conducted on each side by the authority of the supreme sovereignty of a state, and that proper notice be given of its opening, while the designation less formal is given to such a war as is not proclaimed, or which is waged against private citizens."). Pufendorf wrote that Grotius provides "all the necessary information" on a "declaration required for a formal war." *Id.* at 1307.

In other words,

*to obtain the peculiar rights and consequences resulting from the law of nations, a declaration of war by one of the parties, at least, if not by both, is absolutely requisite in all cases.*⁴⁰⁵

As Blackstone repeated, the reason for a denunciation of war, according to Grotius, is not "to prevent every appearance of clandestine and treacherous dealing: an openness, which may be dignified with the name of magnanimity, rather than entitled a matter of right."⁴⁰⁶ Rather,

a more satisfactory reason may be found in the necessity that it should be known for CERTAIN, that a war is not the PRIVATE undertaking of BOLD ADVENTURERS, but made and sanctioned by the PUBLIC and SOVEREIGN authority on both sides; so that it is attended with the effects of binding all the subjects of the respective states;—and it is accompanied also with other consequences and rights, which do not belong to wars against pirates, and to civil wars.⁴⁰⁷

⁴⁰⁵ GROTIUS, *supra* note 159, at 318 (emphasis added). See also *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40-41 (1800) (Washington, J.):

It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the members are not authorised to commit hostilities such as in a solemn war, where the government restrain the general power.

Congress, by the Constitution, can authorize hostilities in two ways; each authorizes individuals to commit acts of war. It may declare war, authorizing all citizens to commit acts of war, or it may grant letters of marque and reprisal to certain individuals. *Cf. id.* at 43 (Chase, J.) ("Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases").

⁴⁰⁶ GROTIUS, *supra* note 159, at 321.

⁴⁰⁷ *Id.*

Thus, while the law of nature requires no declaration of war to repel force,

it is no less necessary to shew by way of vindication that it is a defensive war, and at the same time by public declaration to give it the character of a national and lawful war, *in order to establish those rights and consequences*⁴⁰⁸

according to the law of nations.

An example of such rights and consequences concerns captures. The type of war has an impact on whether captures are lawful prizes.⁴⁰⁹ Because captures are related integrally to a declaration of war and to letters of marque and reprisal, Congress is granted the power to "make Rules concerning Captures on Land and Water" in the same clause by which it is empowered to declare war and to grant letters of marque and reprisal.⁴¹⁰ This

⁴⁰⁸ *Id.* at 322 (emphasis added).

⁴⁰⁹ See *id.* at 321-22. Cf. *id.* at 200 ("For any thing given up to pirates or robbers, through fear, is no lawful prize: but it may be recovered, unless a solemn oath of renunciation has been taken. This is not the case with the captures made in just war."). Congress may confer numerous rights and impose many obligations on citizens in war. For example, commercial intercourse between enemies generally ceases during war. Thus, Congress may confer certain rights or impose duties relating to commercial intercourse. See VAN BYNKERSHOEK, *supra* note 154, at 29. "[W]hile contracts made during war between alien enemies are absolutely void, being against public policy, private interests are protected, and bona fide contracts made before the breaking out of the war are suspended during its continuance, but revive at its termination." Jackson Ins. Co. v. Stewart, 13 F. Cas. 259, 259 (C.C.D. Md. 1866) (No. 7152). Further examples of the many rights and consequences that may be provided for by a declaration of war would be the right of postliminium—that to which a returning prisoner of war would be entitled—or the treatment of neutral neighbors of those with whom we are at war. See GROTIUS, *supra* note 159, at 351, 377.

⁴¹⁰ See U.S. CONST. art. I, § 8, cl. 11. See also PUFENDORF, *supra* note 154, at 1310-11:

The question is also raised, to whom the things acquired in a formal war belong; whether to the whole people, or to individuals among the people, or to those who were the first to acquire them. This, we feel, can be answered in a few words. Now it is certain that the right of war, under which is comprehended the right to arm citizens, and to lead them out into the field, as well as the right to levy upon them money, or whatever is needful for war, is vested in the supreme sovereignty. But since wars are undertaken either to assert the private debts of individuals, which an enemy wilfully refuses to pay, or for some reason which concerns the whole commonwealth, it is clearly to be seen, that in the first case, the prime point to be held in mind is that those, for whose sake the war is waged, should receive what is owed them. What is taken over and above such debts, and in wars undertaken for reasons of the state, whosoever it be that first acquires it . . . belongs to the author of the war, which is the supreme sovereignty. . . . But since the burden of war lies heavy

power is not limited to captures made pursuant to a declaration of war or to a letter of marque and reprisal.

As discussed above, the power to grant letters of marque and reprisal is closely related to the authority to declare war.⁴¹¹ When citizens of a nation are injured by those of another, and redress is denied by the foreign government, the sovereign power of the state determines whether to grant its injured a commission privately, but upon public authority, to seize the bodies and belongings of the offending state's subjects.⁴¹² The arm of the government in which resides the powers to grant letters of marque and reprisal (which often result in a formal declaration of war⁴¹³) and to declare war must determine whether to allow private individuals to commit acts of violence to obtain satisfaction by captures. It also determines whether injuries suffered by individuals at the hands of subjects of another nation justifies binding all citizens in war. "[I]t is only proper for the heads of states to go to war for individual citizens, if it can be done without entailing a greater hardship upon all or a majority of the other

upon individual citizens, whether they are called upon for taxes, or for military service, it is both right and humane on the part of him in whom resides the supreme sovereignty, to make it possible for individual citizens to derive some profit from a war. Now, this is possible in several ways: If citizens who participate in a war may receive some salary from the public treasury . . . or if all share in the booty, or every soldier be allowed to keep what he has seized (this we are told by Polybius, Bk. IV, chaps. XXVI, XXXVI, that when a Greek state declared war it "gave public announcement of the booty," that is, a crier announced it to be the will of the state that every man could take booty); or if the booty is appropriated by the state treasury for future use, to be employed in decreasing the burdens and taxes of the citizens. . . . But when [Grotius] distinguishes between public and private acts of war, of which the latter are only undertaken upon occasion of a public war, it is to be observed that it is questionable whether everything that is taken in war by private acts and on the unbidden initiative of individuals, can belong to those who take it. For it is a part of the right of war to stipulate what persons can injure an enemy, and how far they may proceed. And so private individuals will not be permitted to make booty of an enemy's property, or take off any of his possessions, without permission from the supreme sovereignty, whose province it is to decide how far private individuals should exercise that license of plunder, and whether all the booty or only a part should be allowed to them. And so whatever belongs to private citizens in a war, depends entirely upon the indulgence of the supreme sovereignty, or, in other words, the state alone authorizes a man to be a soldier and allows him to commit the acts of offensive war.

(emphasis added).

⁴¹¹ See note 378 and accompanying text *supra*.

⁴¹² See note 381 and accompanying text *supra*.

⁴¹³ See note 378 and accompanying text *supra*.

citizens, since their duty is more concerned with the whole body of citizens than with a part, and the greater the part the more closely it approximates the whole."⁴¹⁴ Under our Constitution, there can be no declaration without representation.

Cornelius Van Bynkershoek agreed with Grotius "that the law of nature does not require a declaration of war."⁴¹⁵ He disagreed with Grotius, however, that a denunciation of war is necessary to notify the enemy that war is being waged by the public authority of the state.⁴¹⁶ Rather, Van Bynkershoek considered "a declaration of war as an act of mere humanity, which no one can be compelled to perform."⁴¹⁷

[A] declaration is not demanded by any exigency of reason . . . while it is a thing which may properly be done, it cannot be required as a matter of right. War may begin by a declaration, but it may also begin by mutual hostilities. . . . [N]ations and princes endowed with some pride are not generally willing to wage war without a previous declaration, for they wish by an open attack to render victory more honourable and glorious. But here I must repeat the distinction between generosity and justice. . . . The latter permits the use of force without a declaration of war, the former considers everything in a nobler manner, deems it far from glorious to overcome an unarmed and unprepared enemy, and considers it base to attack those who may have come to us in reliance upon public amity and to despoil them *when such amity has suddenly been broken through no fault of theirs*.⁴¹⁸

Thus, a denunciation of war is a "public renunciation of friendship."⁴¹⁹ When there is no state of amity between nations, even

⁴¹⁴ PUFENDORF, *supra* note 154, at 1305-06. See also GROTIUS, *supra* note 159, at 285.

⁴¹⁵ VAN BYNKERSHOEK, *supra* note 154, at 18. See also *id.* ("where, as in the case of different sovereigns, no courts have jurisdiction, each one may properly seize the property which another has wrongly taken and refused to restore. If this be true, every one is at liberty to make or to withhold the declaration, otherwise a declaration is a certain solemn form that could only have been introduced by an agreement between nations—a thing which does not exist").

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 19 (emphasis added). Cf. *id.* at 21 ("Certainly the mutual use of force may properly begin a war, not to mention other cases which may fall into this class, and which according to the jurists do not require a previous declaration."). Cf. MADISON'S NOTES, *supra* note 4, at 138 (under Hamilton's plan, proposed at the Convention, the Senate would "have the sole power of declaring war," and the executive would "have the direction of war when authorized or begun") (emphasis added); VATTÉL, *supra* note 389, Bk. III, ch. IV, § 57, at 383 (warfare is established by declaration or open hostilities).

⁴¹⁹ VAN BYNKERSHOEK, *supra* note 154, at 18.

generosity (that would compel the sovereign to announce war to a foreign nation before attacking its "unarmed and unprepared army") would not require that kind of formal "declaration."

The disagreement between Van Bynkershoek and Grotius arises from the reliance by Grotius on European customs. This distinction between customs and the law of nations was recognized by Blackstone: "[T]o make war completely effectual, it is necessary *with us in England* that it be publicly declared."⁴²⁰ Moreover, Van Bynkershoek noted that Grotius, who

himself teaches us that customs do not constitute the law of nations . . . as in this case, so also in others. . . has frequently deduced the law of nations from customs, and consequently when customs differ he has hardly dared to decide the question. . . Indeed, with the exception of [the Achaeans and the Romans], the custom of declaring war was not frequently observed among the ancients. . . Even now, as far as I can discover, European nations are the only ones that make formal declarations of war, and even these do not all do so nor at all times. . . Reason . . . is . . . the soul of the law of nations, and if we refer to reason, we shall find no argument to support the need of a declaration, but many . . . to the contrary.⁴²¹

In 1788, Alexander Hamilton acknowledged that this "*ceremony* of a formal denunciation of war has of late fallen into disuse,"⁴²² apparently even in Europe.

This was the Framers' understanding of the power to declare war. A draft of the Constitution provided that the legislature have power "[t]o make war."⁴²³ The debate on this provision often is cited by both those who believe that the power to declare war is an expansive war-making authority as well as by those who (quite correctly) comprehend that it is a narrow one.

⁴²⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *258 (emphasis added).

⁴²¹ VAN BYNKERSHOEK, *supra* note 154, at 20-21.

⁴²² THE FEDERALIST NO. 25, *supra* note 5, at 156 (Alexander Hamilton) (emphasis added). Accordingly, he argued, Congress must be permitted to raise armies in time of peace. Otherwise,

the presence of an enemy within our territories must be waited for, as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow, before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger, and meet the gathering storm, must be abstained from, as contrary to the genuine maxims of a free government.

Id. War may be commenced by a denunciation of war, but it more commonly is begun by force; often by distant force.

⁴²³ MADISON'S NOTES, *supra* note 4, at 389.

Those who advocate broad congressional war-making power seize upon an isolated, unfortunately phrased clause from the decidedly unclear debate—that the substitution of “declare” for “make” leaves “to the Executive the power to repel *sudden* attacks.”⁴²⁴ To be sure, as demonstrated long ago,⁴²⁵ the Constitution does not restrict the President’s war power to the scope of that of the states. The states may not “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”⁴²⁶ In contrast, the Commander-in-Chief may defend against remote aggression.⁴²⁷

Viewed in its full context, nevertheless, the debate that resulted in “declare” for “make” does establish that, as an examination of the Articles of Confederation and early authorities on war illustrate, “declare” is much more narrow than “make” and that “declare” is a simple announcement that may be used to commence offensive war. The debate also establishes that the President is left with the power to repel force. In sum, by leaving with the executive the power to turn a state of war into a state of peace, peace—brought about by war, diplomacy, or treaties—is facilitated. War, the Framers explained, is clogged, by placing the power to declare war in the legislative branch. (By this, the Founding Fathers could not have meant acts of another nation amounting to war, over which we have no control, but only war begun by the United States.⁴²⁸)

The following is the controversial debate from the Constitutional Convention, divided up by commentary.

“To make war.”

MR. PINKNEY opposed the vesting this power in the Legislature. Its proceedings were too slow. It [would] meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are

⁴²⁴ *Id.* at 476 (emphasis added). See note 430 and accompanying text *infra*.

⁴²⁵ I now mean “long ago in this article.” See notes 156-60 and accompanying text *supra*.

⁴²⁶ U.S. CONST. art. I, § 10, cl. 3.

⁴²⁷ See notes 155-60 and accompanying text *supra*.

⁴²⁸ An offensive war, on the part of the United States, may be begun against a foreign nation to redress injuries suffered by American citizens at the hands of subjects of other states; that is, by pirates or robbers. The use of military force against an enemy is public war, though Congress also may authorize private hostilities against the enemy. See note 383 and accompanying text *supra*.

equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.

MR. BUTLER. The objections [against] the Legislature lie in great degree [against] the Senate. 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.⁴²⁹

The first of these two gentlemen from South Carolina wanted the Senate to "make" war. The second thought that the Senate would be as incompetent as Congress to be trusted with this power. He was for vesting it in the President. Apparently to clarify the nature of the power to be conferred upon Congress,

MR. MADISON and MR. GERRY moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks.⁴³⁰

One of the Connecticut delegates, Roger Sherman, understood that "declare" was more narrow than "make" but, for some reason,

thought it stood very well. The Executive [should] be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.⁴³¹

This apparently discombobulated one of the proponents of the motion to substitute "declare" for "make." He now believed that there was a motion to give the power to declare war to the President:

MR. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.⁴³²

Because a declaration of war confers rights and imposes duties on citizens, it would be inconsistent for the executive power of a republic to possess this power. Another delegate from Connecticut, Oliver Ellsworth, explained that

there is a material difference between the cases of making *war* and making *peace*. It [should] be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intri-

⁴²⁹ MADISON'S NOTES, *supra* note 4, at 475-76 (footnote omitted).

⁴³⁰ *Id.* at 476.

⁴³¹ *Id.*

⁴³² *Id.*

cate & secret negotiations.

MR. MASON 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. He preferred "declare" to "make."⁴³³

Our nation cannot control the commencement of war by another. To facilitate peace, the power to meet the challenge of war, to "protect and defend" the United States, rests with the President. To clog commencement of war by our nation, the narrow power to declare war—but not the ambiguous authority to "make" war—is vested in Congress.

On the motion to insert *declare*—in place of *make*, it was agreed to.

N.H. no. Mas. abst. Cont. no. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. ay. Geo. ay.⁴³⁴

When Rufus King remarked that "make" war might be understood as "conduct" war, an executive function, some of the bewilderment may have dissipated, and the vote of Connecticut was changed to "ay."⁴³⁵

This otherwise confusing exchange suggests that the Framers understood that the power to declare war is a very narrow authority. The Framers opted in favor of denying Congress the power to make war. Instead, the Constitution grants the legislative branch only the limited authority to declare war. Congress initiates offensive wars to secure private rights⁴³⁶ and, in any war, may confer peculiar rights upon and cause certain consequences to befall the citizens of the United States. Otherwise, the war power (subject to the constitutional checks on the executive's ability to originate the means of war) resides in the President.

Hamilton noted that, as a practical matter,

nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians

⁴³³ *Id.* at 476.

⁴³⁴ *Id.* (footnotes omitted).

⁴³⁵ *Id.* n.*.

⁴³⁶ See note 378 and accompanying text *supra*. See, e.g., PUFENDORF, *supra* note 154, at 1294 (Defensive war is waged "[t]o preserve and protect ourselves and our possessions"; offensive wars are "those by which we extort debts which are denied us, or undertake to recover what has been unjustly taken from us, and to seek guarantees for the future.") (emphasis added). Cf. notes 396-97 *supra*.

will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.⁴³⁷

Much has been made—mostly for political purposes—of so-called “presidential war-making.” This practice, however, that began with the birth of our nation under the Constitution, has been necessary to “preserve, protect and defend” the nation. The legislature is ill-equipped to employ and to direct our national resources to repel aggression and to secure public safety. Accordingly, “though dictated by necessity,” most of the war power was placed by the Constitution in the President’s hands. He conducts war and concludes peace. To turn a state of hostility into one of amity, the President possesses all necessary powers—the power to direct and to employ U.S. armed forces, the diplomacy power, and the peace-treaty power (subject to ratification by the Senate).

To be sure, as demonstrated at length above, Congress has various war-related powers that protect the people against executive usurpations.⁴³⁸ If it were to become necessary, however, to place under the President’s command a large military force and great wealth to support it, there would be no alternative. The President must be permitted to employ those forces to resist force, as he deems necessary, to protect public liberty.

The Framers found

that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations.⁴³⁹

The power to declare war, like the authority to grant letters of marque, does relate to “[s]ecurity against foreign danger.”⁴⁴⁰

⁴³⁷ THE FEDERALIST No. 25, *supra* note 5, at 158 (Alexander Hamilton).

⁴³⁸ See notes 206-358 and accompanying text *supra*.

⁴³⁹ THE FEDERALIST No. 34, *supra* note 5, at 205-06 (Alexander Hamilton).

⁴⁴⁰ *Id.* No. 41, at 261 (James Madison). Accord GROTIUS, *supra* note 159, at 308-09 (“Subjects, being thus liable to the loss of their property, by the conduct of their fellow subjects, or by that of the state, might sometimes feel it hardship, while on other occasions, it would prove their greatest security against aggressions from the *subjects* of an-

These powers, however, are not "essential to the common defence."⁴⁴¹ Rather, they concern private security by public authority. They are means of enforcing rights of private citizens that could be avoided if offenses against the laws of nations were defined and punished by foreign nations. Public liberty is protected by the President. It is his responsibility to guard the interests of the United States "against the ambition or enmity of other nations." While Congress is "more immediately the confidential guardian[] of the rights and liberties of the people,"⁴⁴² the President is "the general Guardian of the National interests."⁴⁴³

CONCLUSION AND CONTEMPORARY APPLICATION

It is the sworn duty of the President to "preserve, protect and defend" the nation. To aid the President in accomplishing that end, yet to safeguard liberty in the republican sense, the Constitution invests Congress with the power to make direct requisitions on the people to provide the means of war. Once U.S. armed forces are placed into the hands of the Commander-in-Chief, with money for their support, the President has the power to use those forces to protect public liberty.

A declaration of war is not required for defensive wars, which includes military action taken to defend other nations. It also is not necessary before engaging in hostilities for the purpose of punishing an aggressor state. Rather, a declaration of war is part of the legislature's private war power and functions to authorize, publicly, private acts of war, to redress individual injuries (suffered by citizens and caused by individual foreigners) or to confer upon citizens peculiar rights and to impose on them certain duties that may arise from war.

As mentioned at the outset of this article, a contemporary application of this allocation of constitutional war powers is the recent Gulf War. Fifty-four members of Congress brought suit to

other power.") (emphasis added).

⁴⁴¹ *Id.* No. 23, at 142 (Alexander Hamilton). See note 206 and accompanying text *supra*. Thus, these authorities are unlike "the power of raising armies and equipping fleets" that is connected to the power to declare war but also "is involved in the power of self-defence." *Id.* No. 41, at 261 (James Madison).

⁴⁴² THE FEDERALIST No. 49, *supra* note 5, at 330 (Alexander Hamilton or James Madison).

⁴⁴³ MADISON'S NOTES, *supra* note 4, at 600 (Gouverneur Morris).

enjoin the President from ordering an attack by U.S. armed forces against Iraq without first securing a declaration of war or some "other explicit congressional authorization for such action" (the provision for which clearly was left out of my copy of the Constitution).⁴⁴⁴ The request for a preliminary injunction was denied.⁴⁴⁵

While the court's holding was correct, the court, in dicta, found that the constitutional provision that vests in Congress the power to declare war is an "unambiguous direction"⁴⁴⁶ that makes it "clear that congressional approval is required if Congress desires to become involved"⁴⁴⁷ in the process of deciding whether U.S. armed forces should attack an aggressor nation, such as Iraq. At this point, it is not necessary to repeat the reasons that demonstrate why the court misunderstood this "unambiguous direction." Instead, I will elaborate on the court's primary citation to support its position. The court wrote that, "[t]o the extent that this unambiguous direction requires construction or explanation" (as it obviously does),

it is provided by the framers' comments that they felt it to be unwise to entrust the momentous power to involve the nation in a war to the President alone.⁴⁴⁸

Cautious that I might seem remiss in that, in this long article, I have not cited (with respect to this issue) the court's single reference, I shall discuss it now. To support its proposition that Congress has, in effect, like the Confederate Congress, "the sole and exclusive right and power of determining on peace and war,"⁴⁴⁹ or, like the British monarch, "the sole prerogative of making war and peace,"⁴⁵⁰ the court cited one of the essays in

⁴⁴⁴ *Dellums v. Bush*, 752 F. Supp. 1141, 1143 (D.D.C. 1990).

⁴⁴⁵ The decision was based on a finding that the issue was not ripe for adjudication. *Id.* at 1149-52. The discussion of the ripeness issue in which the court noted that "only if the majority of the Congress seeks relief . . . may it be entitled to receive it," *id.*, at 1151, itself convincingly shows that the court erred in denying the motion for a preliminary injunction on other grounds raised by the executive. Indeed, I believe that the case should have been dismissed for lack of standing. What is not revealed in the opinion is why there was any need for discussion beyond that necessary to resolve the issue.

⁴⁴⁶ *Id.* at 1144.

⁴⁴⁷ *Id.* at 1145.

⁴⁴⁸ *Id.* at 1144 (footnote omitted).

⁴⁴⁹ See note 384 and accompanying text *supra*.

⁴⁵⁰ See note 385 and accompanying text *supra*.

The Federalist (No. 75).⁴⁵¹

In that paper, Hamilton demonstrated that it would be unwise to entrust the *treaty-making* power to the President alone.⁴⁵² It did not discuss employing armed forces other than to emphasize that the *President* alone is responsible for "the employment of the common strength."⁴⁵³ Hamilton *did* note in that paper, however, that the House of Representatives should have no role in the treaty-making power because it (unlike the Senate alone) lacks the requisite qualities.

Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and despatch, are incompatible with the genius of a body so variable and so numerous.⁴⁵⁴

In sum, the House of Representatives should not participate in the treaty-making power, because it is less like the executive office than is the Senate. The House does not share any of the attributes of the office of the President that were fashioned to direct and to employ the armed forces of the United States most effectively. Thus, Congress plays no role in the use of U.S. armed forces once placed in the hands of the Commander-in-Chief (save for passing necessary and proper laws and for prescribing rules for the government and regulation of the armed forces).

With respect to the recent Gulf War, Saddam Hussein, the sovereign authority of Iraq, by committing acts of aggression, having attacked Kuwait and having threatened Saudi Arabia, declared himself and his nation to be public enemies of the United States and of the community of civilized nations. The Commander-in-Chief determined that these actions "pose[d] a direct threat to neighboring countries and to vital U.S. interests in the Persian Gulf region."⁴⁵⁵ It was within the President's constitutional war power, without any additional permission conferred by Congress, to use U.S. armed forces to "protect and defend" public liberty against Iraq and, to that end, if the Commander-in-Chief were to deem it necessary, to punish the

⁴⁵¹ 752 F. Supp. at 1144 n.6.

⁴⁵² See THE FEDERALIST No. 75, *supra* note 5, at 486-87 (Alexander Hamilton).

⁴⁵³ *Id.* at 486.

⁴⁵⁴ *Id.* at 488. See also note 358 and accompanying text *supra*.

⁴⁵⁵ H.R. Doc. No. 225, 101st Cong., 2d Sess. 2 (1990).

delinquent nation.

Once Congress gathers the means of war by direct requisitions on the people, the President commands the forces and money raised and must employ the "sinew of war" as he deems necessary to "protect and defend" the nation. Congress's power is limited to direct intrusions into an individual's life, liberty, and property and to authorization of private acts of war. Once the direct requisitions on the people are made, the force is placed in the President's hands to protect public liberty. The President's defense power clearly includes collective self defense; Congress emphatically is denied a consultative role in determining the use of the means of war placed under the President's command. Accordingly, no legislative authorization is necessary before a President commits U.S. armed forces to war against foreign aggressor nations; thus, no legislative authority was necessary before the President could commit forces to war against Iraq.