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A Constitutional Structure for Foreign Affairs

Louis Fisher

A CONSTITUTIONAL STRUCTURE FOR FOREIGN AFFAIRS

Louis Fisher*

INTRODUCTION

It is conventional, and I suppose convenient, to divide scholars on the war power and foreign affairs into "pro-congressionalists" and "pro-presidentialists." Their writings may seem to demonstrate a sympathy for one branch over another. However, scholarship is shallow if it merely latches itself onto one branch of government while shooting holes in the other. Analysis of the war power and foreign affairs demands a higher standard: recognizing institutional weaknesses along with institutional strengths, appreciating that the democratic process requires deliberation and collective action, and promoting policies that can endure rather than attempting short-term, unilateral solutions that fail. Moreover, the important point is not which branch has the political power to prevail. If that were the standard, we would always side with autocratic and even totalitarian regimes, or perhaps, in the current United States, an elected monarch. More fundamental to the discussion are the principles and procedures that support and sustain constitutional government.

In his book, *The President's Authority Over Foreign Affairs: An Essay in Constitutional Interpretation*, Professor H. Jefferson Powell challenges us to think deeply and carefully about the allocation of

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foreign affairs that would best keep faith with constitutional principles.[1] Part I of this Article discusses the constitutional framework that guides my writing. Part II identifies what I consider to be the core values that define a republican form of government. Part III focuses on the location of the foreign affairs power, followed by Part IV, which concerns the President as "sole organ." Parts V and VI discuss the treaty-making power and the power to initiate war, respectively. I close with some observations about the way that Professor Powell's framework for foreign affairs and the war power has an impact on democratic, constitutional government.

I. SHOULDN'T WE BE CONSTITUTIONALISTS?

Instead of placing scholars in rival camps and assuming there are only two communities to join and support, the focus should be on the overarching constitutional values that trump the needs of a particular branch. There is no purpose or virtue in reflexively championing one branch over another. While Professor Powell speaks about the "current impasse between the defenders of presidency supremacy and the advocates of congressional supremacy in foreign affairs,"[2] these camps exist more as a rhetorical tool than a reality. I do not believe he would defend presidential supremacy at every turn, and my record is hardly one that advocates congressional supremacy in foreign affairs. If we do our work conscientiously, those who emphasize legislative powers in foreign affairs will recognize the many practical limitations that exist within Congress, just as those who raise high the banner of presidential supremacy should draw the line on executive actions that are sheer folly.

1. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002).

2. *Id.* at 6.

I am not "pro-congressional" in the sense that I defend whatever Congress does, any more than Professor Powell, in the "pro-presidential" camp, would try to justify any and all actions by a President. If I were "pro-congressional," I would willy-nilly support the War Powers Resolution of 1973 because of its reputation for "reasserting" legislative authority and placing constraints on the President. Instead, along with David Gray Adler, I find the statute so offensive to the Constitution that I advocate its repeal.[3]

Even though I have worked for Congress for more than three decades, I feel no obligation to defend bills that Congress will soon pass. I am not a partisan for one side or the other. Committees expect me to testify on the merits, which means that I inevitably disappoint some lawmakers while I please others. They are accustomed to hearing different sides. Only once, in the course of testifying more than three dozen times, do I recall a committee that consciously stacked a hearing. The chairman asked me to be the lead witness, but when he saw that my analysis of the three constitutional issues he flagged was contrary to what he wanted, he withdrew the invitation and even omitted my statement from the published hearings. So it goes. One such experience in thirty-two years is clearly an exception to the rule.

Congressional hearings are generally serious explorations of public issues, with witnesses at liberty to state their views. I wonder if proposals in the executive branch get the same kind of full airing. How many punches are pulled to "stay within the fold?" Of course, executive officials disagree about constitutional issues and debate the merits of various positions, but some boundaries are not likely to be tested or challenged, particularly after the President or a department head has

3. *See* Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 1 (1998).

announced some core beliefs. Moreover, each department has precedents that will generally hold sway.

In testifying before congressional committees, I suspect that most of my presentations have been critical of bills and constitutional amendments that are under consideration. In several instances, I have advised committee members that the bill about to be reported to the floor represents an unconstitutional encroachment on presidential power,[4] or that it unconstitutionally weakens the independent judiciary.[5] How often does someone in the executive branch oppose a policy because it would weaken Congress or the judiciary? Why should I, a staff member of Congress, care about the other branches? Why not let them fend for themselves? The answer is that all of us have a stake in something greater than our particular institution. We need to defend the larger constitutional system because it is there to protect us and our fellow citizens.

What I describe here about myself is true for the agencies that Professor Powell has worked for, particularly the Office of Legal Counsel (OLC) in the U.S. Department of Justice. In the 1980s, at the urging of the *Wall Street Journal*, the Reagan and Bush administrations explored the existence of an inherent "item veto" that empowered the President to veto particular provisions in a bill without waiting for statutory or constitutional authority.[6] Some scholars spoke in favor of this power, while others found it nonexistent.[7]

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4. *The Balanced Budget and Emergency Deficit Control Act of 1985: Hearing on H.J. Res. 372 before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 197-200, 207-13 (1985) (arguing that under *Buckley v. Valeo*, Congress could not give substantial enforcement powers to legislative agents and that Congress should not interfere with the President's authority to present a national budget that represents his personal recommendations).

5. *See S.4 and S.14, Line-Item Veto: Hearing before the Senate Comm. on Governmental Affairs*, 104th Cong., 1st Sess. 28-31, 79-81 (1995) (objecting to the application of the Line Item Veto Act to the judicial branch).

6. CHARLES J. COOPER, ESQ. ET AL., PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 29 (Washington, DC: Nat'l Legal Center for Public Interest, 1988).

7. *Id.*, Preface.

One might have expected OLC attorneys to find a way (and have a reason) to justify this expansion of presidential power. However, Charles Cooper, as OLC head, authored a lengthy memo that found no legal or constitutional support for an inherent item veto.[8] The concept was not merely shallow. It was hollow. Empty. Despite Cooper's thorough analysis, several dozen members of Congress urged President George H. W. Bush to use the inherent item veto and test it in court.[9] However, in 1992, President Bush announced that his constitutional advisers had convinced him that there was no legal support for an inherent line-item veto: "our able Attorney General [William Barr], in whom I have full confidence, and my trusted White House Counsel [C. Boyden Gray], backed up by legal opinions from most of the legal scholars, feel that I do not have that line-item veto authority. And this opinion was shared by the Attorney General in the previous administration."[10] This was a victory for constitutional government.

II. IDENTIFYING CORE VALUES

Just as I object to Congress weakening the other branches, so do I oppose other branches weakening Congress. Like the Framers, I recoil from seeing power packed in a single place. I believe that checks and balances are vital to individual liberty and stable government. I do not accept that the President is both Commander-in-Chief and War Initiator. The Framers wanted those two powers placed in separate branches, and so do I. That eighteenth-century value applies equally well, if not more so, to the twenty-first century.

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8. *See* The President's Veto Power, 12 Op. Off. Legal Counsel 128, 165-66 (1988).

9. *Resolution Urges President to Try Line-Item Veto as a Test of Power*, ROLL CALL, May 20, 1991, at 3.

10. *Remarks to Republican Members of Congress and Presidential Appointees*, II PUB. PAPERS 479 (1992); *see* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 140-42 (2000); I PUB. PAPERS 479 (1992).

Similar to my opposition to the concentration of power in the presidency, I oppose self-serving claims by the Supreme Court that it, and it alone, determines the meaning of the Constitution. These claims have never been true and never should be true.[11] A republic abhors finality in any branch. The Court is no more the "final voice" on constitutional matters than is the President the "sole organ" of foreign affairs. Yes, there are some "exclusive" powers allocated to the three branches. The Court alone decides what is a case or controversy. Congress alone decides whether to appropriate funds. The pardon power belongs solely to the President.[12] However, we cannot, in a constitutional republic, allow the President primacy in determining foreign policy or initiating war.

Professor Powell speaks about the importance of a republic: "American foreign policy should be constituted, not by lawyers' arguments, but by democratic debate over the interests, and the responsibilities, of the Republic."[13] Two important values should limit presidential primacy in foreign affairs: democratic debate and the maintenance of a republic. Without democratic debate, there is no republic and no Constitution. Unfortunately, we know the word "republic" but have probably forgotten its meaning. The word is familiar because it appears in our Pledge of Allegiance: "I pledge allegiance to the Flag of the United States, and to the Republic for which it stands . . . ." Notice the words. The important part of the pledge is not the flag. It is what the flag *stands* for— a republic. If we lose the qualities associated with a republic, the flag and the Pledge also lose their meaning. They would stand for nothing.

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11. LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW (5th ed. 2003). Fisher emphasizes the participation not only of the Supreme Court but also of Congress, the President, the states, and the general public.

12. Louis Fisher, *When Presidential Power Backfires: Clinton's Use of Clemency*, 32 PRES. STUD. Q. 586, 587 (2002). The President's exclusive power to pardon is still subject to congressional review and oversight. *See id.*

13. POWELL, *supra* note 1, at xvi.

In creating a republic, the framers broke decisively with the monarchical principles promoted by writers such as William Blackstone. In his *Commentaries on the Laws of England*, he gave all of foreign affairs and the war power to the Executive, who had the sole power to make war, send and receive ambassadors, make treaties, issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and raise and regulate fleets and armies.[14] The Framers did not assign a single one of those prerogatives over foreign affairs solely to the President. They gave those powers either exclusively to Congress, such as the power to declare war, issue letters of marque and reprisal, and raise and support armies and navies, or allocated them between the Senate and the President, such as the power to appoint ambassadors and to make treaties.[15]

The Framers rejected Blackstone because they were creating something new— not just a republic, but a republic in a large territory. They put their hopes in a republic because of their faith in the ability of individuals to govern themselves. In *The Federalist No. 39*, James Madison spoke about a government "which derives all its powers directly or indirectly from the great body of the people."[16] This choice of government necessarily places the primary power and authority in Congress. A republic means self-government through elected representatives. The more we move away from that model in foreign affairs, the more we slide toward a monarchy. The more we downgrade representative government in foreign affairs, the more we exclude ordinary citizens from their own government. Madison underscored the vital link between a republican form of government and the spirit that infused the American Revolution:

14. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238-62 (1803).
15. U.S. CONST. arts. I-II.
16. THE FEDERALIST NO. 39 (James Madison) (Benjamin Fletcher Wright ed., 1961).

> [N]o other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.[17]

Such blunt, uncompromising language! Any form of government that departs from the republican character is indefensible. Elsewhere in *The Federalist*, Madison emphasizes that "[i]n republican government, the legislative authority necessarily predominates."[18] How do advocates of presidential wars or sweeping presidential powers over foreign affairs square their position with republican government? The answer: They cannot.

Professor Powell looks to *The Federalist* to support strong presidential government: "Close to the core of *The Federalist*'s argument for ratification is the contention that the Constitution will create a government capable of pursuing an effective foreign policy."[19] No doubt, the Framers constructed the new government to remedy the inefficiencies of the Continental Congress, but Justice Brandeis spoke a half-truth within his dissent in *Myers v. United States*: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."[20] The Framers tried to promote a form of government more efficient than the discredited Articles of Confederation.[21] At the same time, Justice

17. *Id.* at 280.
18. THE FEDERALIST NO. 51 (James Madison) (Benjamin Fletcher Wright ed., 1961).
19. POWELL, *supra* note 1, at 32.
20. Myers v. U.S., 272 U.S. 291, 293 (1926) (Brandeis, J., dissenting).
21. *See* Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 114-15 (1971).

Brandeis was correct about the Framers' intention to preclude the exercise of arbitrary power.

The issue is not whether the Framers desired effective government in both foreign and domestic policy. That is a given. The question is a deeper one—*What constitutes effective government*? Do we opt for unilateral presidential action, because it is more "efficient," or do we prefer collective judgment by the legislative and executive branches? Of what use, constitutionally or politically, are short-term presidential actions that cannot survive over the long run? Presidential policies that lack a foundation of support and understanding in Congress and the public are neither efficient nor effective.

For all its slowness and fractiousness, the deliberative process in Congress is generally far more effective and efficient in formulating national policy than unilateral decisions by the President. Yes, the legislative process is "sometimes slow and necessarily cumbersome,"[22] but so is the process within the executive branch. Professor Powell recognizes the importance of keeping presidential foreign policy subject to democratic control.[23] However, his model seems to invite presidential initiatives without developing legislative support and authorization in advance.

President George Washington understood the distinction between short-term tactics that backfire and the need to prepare national policy for the long-term. He inherited the American practice of paying annual bribes ("tributes") to four countries in North Africa— Morocco, Algiers, Tunis, and Tripoli. On March 11, 1792, Secretary of State Thomas Jefferson advised President Washington on whether he should make a treaty with the Algerians "on the single vote of the Senate, without

22. POWELL, *supra* note 1, at 142.
23. *See Id.* at 98, 106-07.

taking that of the Representatives."[24] Within the legislative branch, a treaty involved only the Senate. Why give consideration to the House? President Washington knew that eventually he would have to go to the House to obtain funds for the payments.[25] Should he enter into a treaty with the Senate and hope for the best later on with the House, despite bypassing it in the first place? President Washington might get by with a treaty backed by a loan obtained elsewhere, but he would likely pay dearly when he turned to the House for funds to pay off the loan.[26]

Jefferson advised against a short-term tactic that might poison relations with the House. He told President Washington that just as Senators "expect to be consulted beforehand" about a pending treaty, if Representatives need to fund a treaty, "why should not they expect to be consulted in like manner, when the case admits?"[27] Jefferson advised "against hazarding this transaction without the sanction of both Houses," and President Washington concurred.[28] On December 16, 1793, President Washington sought legislative support for a treaty with Morocco for the payment of ransom and establishing peace with Algiers.[29] He forwarded to both the House and the Senate communications and confidential letters that he asked the lawmakers to keep secret.[30]

Three years later, on the issue of the Jay Treaty, President Washington pursued an entirely different strategy. There, he argued that the House could not be trusted with secret communications and that the treaty-making power of the legislative branch lay solely with the

24. THOMAS JEFFERSON, *The Anas*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 263, 294 (Albert Ellery Bergh ed., 1905).
25. *See id.*
26. *See id.*
27. *Id.*
28. *Id.*
29. 4 ANNALS OF CONG. 20-21 (1793).
30. *Id.*

Senate.[31] He managed to survive a strong challenge in the House, but had the votes gone the other way, as they could have, President Washington would have had to surrender documents to the House to receive the funds necessary to implement the Jay Treaty.[32] Professor Powell cites Representative William Smith for the position that "[t]he Constitution had assigned to the Executive the business of negotiation with foreign Powers" and that the House had no right "to interfere in such negotiations."[33] However, negotiations over the Jay Treaty were complete. The only question was whether the House wanted to fund its implementation.

III. LOCATING THE FOREIGN POLICY POWER

Professor Powell disagrees with Edward S. Corwin in response to the question "Where does the Constitution lodge the power to determine the foreign relations of the United States?"[34] For Corwin, "[w]hat the Constitution does, *and all that it does*, is to confer upon the President certain powers . . . , other powers of the same general nature upon the Senate, and still other powers upon Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve."[35] Professor Powell, finding Corwin's answer too indeterminate, argues that there is "a clear best reading of the Constitution that resolves questions about where authority to determine American foreign policy is vested."[36] To Professor Powell, the Constitution "creates a structure in which the powers of president, Congress and the Senate are clearly (if generally)

31. 5 ANNALS OF CONG. 760-62 (1796).

32. Louis Fisher, *Invoking Executive Privilege: Navigating in Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 588-92 (2000).

33. POWELL, *supra* note 1, at 71.

34. *Id.* at 3.

35. *Id.* at 4 (emphasis supplied by Corwin).

delineated."[37] "[F]ar from being opaque or ambiguous, the Constitution is best read to yield great clarity" in the field of foreign affairs.[38]

After reviewing the essays in *The Federalist*, Professor Powell concludes that even if the language "falls short of unmistakably according the president primary responsibility for foreign policymaking, it clearly ascribes to the executive primacy in the execution of foreign policy."[39] Yes, the President implements foreign policy. We expect the executive branch to execute. However, to the extent that the President needs money to execute his foreign policy, his "primacy" begins only after he receives appropriations from Congress. Through legislative oversight and subsequent enactments, Congress can revise and even eliminate the President's policy at any time. Whatever primacy the President possesses is momentary and subject to legislative change. Later in the book, Professor Powell describes the congressional role more fully:

> [V]ery little can take place in the way of adopting or implementing foreign policy without affirmative congressional action, both through the appropriations process and through the president's dependence on Congress to create most of the tools of foreign policy. . . . [T]he diplomat's salary, and any assistance (financial, material or in support personnel) she may need, must be the product of the legislative process. The rest of the foreign policy bureaucracy is wholly the creation of Congress. Furthermore, individual members of Congress may wield great influence through committee oversight of executive agencies, informal consultation, and the formation of informal alliances with executive-branch officials.

36. *Id.* at 5.
37. *Id.*
38. *Id.* at 139.
39. POWELL, *supra* note 1, at 33.

> None of these forms of legislative participation in foreign policymaking, however, supports an argument that Congress is institutionally suited to be the repository of primary constitutional authority over foreign policy.[40]

No doubt, Congress has institutional limitations in exercising primary constitutional authority over foreign policy. Why go in the other direction and argue for the executive as the repository of primary constitutional authority over foreign policy? Is it not a better case that whatever leadership and initiative the President decides to supply, the two branches must share essentially and inescapably the scope, funding, and direction of foreign policy?

Professor Powell says that Jefferson, in analyzing textual arguments for the President's constitutional powers, believed that "foreign affairs are 'executive' by definition."[41] Whose definition? Where is the dictionary? If the textual argument is that clear, why did the Framers write Articles I and II the way they did? The Framers knew how to write in English. If they believed what Jefferson said they believed, they would have included within Article II the following sentence: The power over "foreign affairs vests exclusively in the President." The Constitution does not say that, nor anything similar. If foreign affairs are executive by definition, why not adopt Blackstone's position instead of repudiating it with such thoroughness? Professor Powell understands the limits of definitional arguments—"[t]hey have no purchase on anyone who simply rejects the proposed definition."[42]

Professor Powell suggests that Jefferson believed "the general principle that the Constitution lodges legislative, executive, and judicial powers in separate governmental entities dictated a presumption that all

40. *Id.* at 102-03.
41. *Id.* at 44.
42. *Id.* at 94.

authority over foreign affairs is vested in the president."[43] Of course, that does not follow. Here Professor Powell does more than take a slight jump. It is a hop, skip, and a jump. To reach his position, one would have to ignore explicit language in the Constitution, such as language vesting in Congress the powers over tariffs, foreign commerce, naturalization, declaring war, and defining the Law of Nations. Later in the book, Professor Powell lists these powers.[44]

A belief in executive primacy over foreign affairs has landed a number of administrations in hot water. In 1981, Secretary of the Interior James Watt refused to give a House subcommittee thirty-one documents relating to a reciprocity provision in the Mineral Lands Leasing Act. Canada was the country involved in the dispute. Watt relied on the judgment of Attorney General William French Smith that the documents dealt with "sensitive foreign policy considerations."[45] Did the Justice Department ever bother to look at the text of the Constitution and the powers it conferred upon Congress? Apparently not. However, the House subcommittee knew that its request securely rested on the Article I power of Congress to "regulate Commerce with foreign Nations."[46] After the subcommittee subpoenaed the documents and voted to hold Watt in contempt, the administration released the documents to subcommittee members.[47]

Again, Professor Powell states that "[t]he Constitution, as Jefferson interpreted it, thus confirmed President Washington's view that foreign

43. *Id.* at 44-45.

44. *See id.* at 108-09.

45. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO A SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR 2 (Comm. Print 1981).

46. U.S. CONST. art I.

47. Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 356 (2002).

policy is an executive prerogative."[48] However, President Washington never adopted that view.[49] The record is quite to the contrary. As Professor Powell notes, Jefferson's position was much more modest and circumscribed: "[E]xcept where the Constitution expressly provides otherwise, the conduct of foreign affairs is exclusively executive."[50] Jefferson offers two qualifications: (1) except where the Constitution provides otherwise, and (2) "conduct" (meaning the execution of foreign policy).[51] One cannot derive from those two principles a position of primacy for the President in foreign policy or an executive prerogative over foreign policy.

Moreover, the Constitution is not the only express device for limiting the President's ability to conduct foreign affairs. The experience with President Washington's Neutrality Proclamation bears this out. After issuance of the proclamation, the administration began prosecuting citizens who violated President Washington's policy of remaining neutral in the war between France and England. In court, jurors decided to acquit those charged because there was no right to convict someone of a crime established only by a proclamation.[52] Untutored in the law, jurors nevertheless knew that criminal law should rest on a statute passed by the legislature, not on edicts released by the Executive. With no statute to cite, the government had to drop prosecutions and come to Congress for a law (the Neutrality Act of 1794) that gave prosecutors the firm legal footing they needed.[53] The President's "plenary power" to enforce or execute his neutrality policy was dead in the water.

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48. POWELL, *supra* note 1, at 45-46.
49. *See infra* Part V, notes 114, 115 and accompanying text.
50. POWELL, *supra* note 1, at 60.
51. *Id.*
52. *See* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 84-85, 88 (1849).
53. *See id.* at 84-85, 88; 2 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 273 (1832).

Let's take a close look at what Jefferson said. Professor Powell quotes the following passage, which is very familiar terrain to scholars who specialize in foreign affairs:

> The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. The Constitution itself indeed has taken care to circumscribe this one within very strict limits: for it gives the *nomination* of the foreign Agent to the President, the *appointment* to him and the Senate jointly, the *commissioning* to the President.[54]

Advocates of presidential power love the assertion that "[t]he transaction of business with foreign nations is Executive altogether."[55] This language is grandiose and sweeping, or at least it appears that way. However, those who champion presidential power make too much of Jefferson's sentence. As Professor Powell explains, Jefferson was writing about a very narrow dispute concerning the Senate's role in the appointment of ambassadors and consuls.[56] President Washington had asked Jefferson whether the Senate had a right to veto the appointee and what *grade* the President might want to use for a foreign mission.[57] Jefferson concluded that if the Constitution intended to deny the Senate's power to veto the grade, "it would have said so in direct terms, and not left it to be effected by a sidewind."[58] Responding to this specific issue, Jefferson had no reason to address the larger role of Congress or the particular prerogatives of the House, such as its power

54. 16 THE PAPERS OF THOMAS JEFFERSON 379 (Boyd ed., 1961); *see* POWELL, *supra* note 1, at 44.
55. POWELL, *supra* note 1, at 44.
56. *Id.* at 44-45.
57. *See* 16 PAPERS OF THOMAS JEFFERSON 379 (Boyd ed., 1961).
58. *Id.* at 380.

to grant or withhold legislation and appropriations. He knew enough about those powers to persuade President Washington not to try and circumvent the House on the treaty with Algiers.[59]

Furthermore, the passage speaks of "transactions," which means some communication between two parties.[60] Read Jefferson's language as expansively as you like, but it hardly gives the President primacy over foreign policy. At best, it says that whenever Congress and the President act jointly to formulate foreign policy, it is the President who communicates, transmits, and explains that policy to other nations. Of course, the President can initiate policies on his own, such as the Monroe Policy, but those statements of national policy survive only with congressional acquiescence. Congress can revoke or modify presidential announcements at any time. Moreover, whatever Jefferson thought about transactions in his time has little application today. Members of Congress travel abroad on a regular basis to speak with foreign leaders, and foreign leaders make sure to stop by Capitol Hill during their visits to Washington, D.C. to meet with lawmakers and congressional committees.

In addition, compare contemporary practices of communications ("transactions") with other nations to the views embraced at the end of the 1790s. In 1798, after American negotiations with France had foundered, a Philadelphia physician by the name of George Logan traveled to Europe to see if he could negotiate more successfully.[61] His trip provoked a resolution in Congress directed against private citizens who "usurp the Executive authority of this Government, by commencing or carrying on any correspondence with the Governments

59. *See* THOMAS JEFFERSON, *The Anas*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 162, 294 (Albert Ellery Bergh ed., 1905)

60. 16 PAPERS OF THOMAS JEFFERSON 379 (Boyd ed., 1961).

61. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 232-34 (4th ed. 1997) [hereinafter FISHER, CONFLICTS].

of any foreign Prince or State."[62] The same Congress that passed the notorious Alien and Sedition Acts gave birth to the Logan Act, which provided for fines and imprisonment to punish American citizens who carried on unauthorized correspondence or intercourse with foreign governments for the purpose of influencing American policy.[63]

A strict reading of Jefferson's passage would lead to a total monopoly by the President of any communication with another nation about U.S. foreign policy. However, hundreds of individuals have defied the Logan Act by meeting with foreign leaders and attempting to negotiate solutions to pending problems.[64] Only one American was indicted, and he was found not guilty.[65] If ever there is a dead letter in the law, it is the Logan Act and the stilted thinking that inspired it.[66]

IV. PRESIDENT AS "SOLE ORGAN"

To his credit, Professor Powell recognizes the superficiality of Justice Sutherland's claim in the *Curtiss-Wright* case of 1936 that the President is the "sole organ" in foreign affairs. Professor Powell says that Sutherland "referred flamboyantly to 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.'"[67] As Professor Powell notes, the sole issue before the Court was whether Congress could delegate to the President the authority to prohibit certain arms sales in South America if he decided an embargo would contribute

62. 9 ANNALS OF CONG. 2489 (1798).

63. 1 Stat. 613 (1799); 18 U.S.C. § 953 (2000).

64. *See* Kevin M. Kearney, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L. J. 285, 286 (1987); Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268 (1966).

65. *See* Kearney, *supra* note 64, at 287; *see also* Vagts, *supra* note 64.

66. FISHER, CONFLICTS, *supra* note 61, at 232-34.

67. POWELL, *supra* note 1, at 23.

to a peaceful resolution.[68] Clearly, the issue concerned legislative, not executive, power. Professor Powell states that the ruling "patently does little to substantiate the pro-presidential position" and agrees with critics who rebuke the Court for "misread[ing] one of its sources, an 1800 speech of John Marshall."[69] Although Professor Powell seems to part company with Sutherland, his general orientation toward presidential power in foreign affairs is essentially the same.

Marshall made his statement during debate on the decision by President John Adams to turn someone charged with murder over to England.[70] Because the case was already in an American court, some members of Congress claimed that President Adams should be impeached because he had encroached upon the judiciary and violated the separation of powers doctrine.[71] At that point, Marshall took the floor to argue that there was no basis for impeachment. President Adams, he said, was properly carrying out an extradition treaty between England and the United States.[72]

Although he rejects the conventional analysis of *Curtiss-Wright* by many pro-presidential scholars, Powell finds much in Marshall's statement to support the case for broad presidential power in foreign affairs. He says that Marshall was correct that England "necessarily made its extradition request to the president because he was the only legitimate channel of official communication between foreign governments and the United States."[73] I suppose England could have worked through a lawmaker or an official in the executive branch, but certainly it made sense to communicate directly with the President, who would be the one to decide on extradition. Conceding this point,

68. *Id.*
69. *Id.*
70. LOUIS FISHER, PRESIDENTIAL WAR POWER 72 (2d ed. 2004) [hereinafter FISHER, WAR POWER].
71. *Id.*
72. *Id.*
73. POWELL, *supra* note 1, at 86.

however, hardly opens the door to presidential primacy in foreign affairs. Moreover, implementation of the extradition request "would require the employment of federal authority to apprehend, hold, and turn over the object of the request. Any exercise of this authority [would be] under the President's supervision, because he 'possesses the whole executive power' and 'holds and directs the force of the nation.'"[74] Surely the President has the authority to implement an extradition decision. "[T]he decision whether to honor an extradition request involves the interpretation and enforcement of the international obligations of the United States."[75] Again, I agree.

However, I am not sure what Marshall meant when he said that the President "holds and directs the force of the nation."[76] Later, Professor Powell reads that language broadly to suggest that the President could act militarily without congressional authority—not just defensive military actions, but also military actions "to implement policies that the president alone had adopted."[77] Professor Powell explains further: "The branch of government that commands military resources available to the nation is, by that token, the more likely locus of authority over foreign policymaking."[78] I know of no basis to believe that Marshall ever adopted such a sweeping interpretation. What we know about Marshall cuts entirely against this position.

The three points set forth by Professor Powell in explaining presidential power over extradition do not support an independent or overriding executive power over foreign affairs. As Professor Powell notes, Marshall acknowledged that "Congress unquestionably may prescribe the mode; and Congress may devolve on others the whole

74. *Id.*
75. *Id.*
76. *Id.*
77. POWELL, *supra* note 1, at 119.
78. *Id.*

execution of the contract: but till this be done, it seems the duty of the executive department to execute the contract, by any means it possesses."[79] Clearly, Marshall was not claiming a broad, independent power for the President, or anything close to primacy over foreign affairs. Surely, he was not excluding Congress. After all, President Adams was implementing a treaty entered into with the support of the Senate.[80] On other occasions, the President might have to implement a statute passed by both Houses of Congress. Marshall merely argued that once the two branches had formulated foreign policy, either by treaty or by statute, the President was the "sole organ" in *implementing* (not making) national policy.[81]

In addition to analyzing Marshall's statement in 1800 as a member of Congress, Professor Powell needs to examine Marshall's record on the Supreme Court. During his long tenure as Chief Justice from 1801 to 1835, where did he locate the power over foreign affairs? Nowhere do we find a statement, or even a suggestion, that the power rests solely within the presidency. Instead, both branches participate in formulating foreign policy, and under some circumstances Congress, not the President, prevails.

Consider Marshall's decision in an 1801 case that raised the question of whether Congress could only declare war or could also authorize it, by a succession of statutes, as it had done against France in 1798 (the Quasi-War).[82] In the year before Marshall joined the Court, the Justices had agreed that military conflicts could be "limited," "partial," and "imperfect" without requiring Congress to make a formal declaration.[83] Marshall built on that decision in 1801 when he wrote for the Court:

79. *Id.* at 87 n.97.
80. FISHER, *supra* note at 70, at 72.
81. *Id.*
82. *See* Bas v. Tingy, 4 U.S. 37, 38 (1800).
83. *Id.* at 40, 43.

"The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry."[84] Examine his language carefully. The "whole powers" of war are vested in Congress. The acts of Congress are "alone" the guides. This formulation does not come from someone who believed that the President enjoyed a position of primacy in foreign affairs.

The same conclusion appears in a Marshall decision in 1804.[85] Part of the legislation in the 1798 to 1800 period authorized the President to seize vessels sailing *to* French ports.[86] Contrary to this statutory policy, President Adams issued a proclamation directing American ships to capture vessels sailing *to or from* French ports.[87] Captain George Little followed President Adams' order by seizing a Danish ship sailing from a French port.[88] He was sued for damages and the case came before the Supreme Court. Writing for the Court, Marshall admitted that his "first bias" was in favor of the argument that, although Adams' instructions "could not give a right, they might yet excuse [a military officer] from damages" because military men are supposed to obey the orders of their superiors.[89] However, on further reflection, Marshall decided that Little could be sued for damages: "I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions [by Adams] cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[90] In short, Congress had

84. Talbot v. Seeman, 5 U.S. 1, 28 (1801).
85. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).
86. *Id.*
87. *Id.* at 171.
88. *Id.* at 175.
89. *Id.* at 179.
90. *Id.*

established foreign policy, and the President possessed no authority to act contrary to legislative commands.

From Marshall's floor statement in 1800, as a member of Congress, Professor Powell concludes that "it is the president—not Congress or the Senate—who is responsible for understanding 'the state of the political intercourse and connection between the United States and foreign nations,' as well as 'the state of the union.'"[91] Moreover, the President "must decide when to assert American rights in the international arena; and the president must be accountable to the American people for the consequences of foreign policy decisions."[92] The President's "powers to 'conduc[t] the foreign intercourse' ... and to 'negotiat[e] ... treaties,' make the president the legitimate initiator as well and the exclusive executor of the nation's foreign policy."[93] Finally, "Marshall clearly did think that the president possesses, as a consequence of our constitutional structure, the authority to formulate and initiate foreign policy."[94]

I don't know of anyone who would deny that the President has the authority to formulate and initiate policy. He also has a responsibility to understand "the state of the political intercourse and connection between the United States and foreign nations," but there is no reason to think he holds a monopoly in this area.[95] Lawmakers share with the President the duty of understanding political intercourse and the relationships with other countries. As underscored by the 1804 decision, if congressional enactments differ from presidential policy, Congress prevails.[96]

Yes, the President "must decide when to assert American rights" abroad, and he must be "accountable to the American people for the

91. POWELL, *supra* note 1, at 88.
92. *Id.* (alterations in original).
93. *Id.* at 88-89.
94. *Id.* at 89.
95. *See supra* note 94.
96. *See* Little v. Barreme, 6 U.S. (2 Cranch) 169 (1804).

consequences of foreign policy decisions," but his decisions have no binding or superior quality.[97] Lawmakers also have a right to decide when to assert American rights, and they too are accountable to the American people. Otherwise, we have no business talking about a republic and a representative government. When President Lyndon B. Johnson decided to assert American rights in Southeast Asia, Congress had every right—and duty—to examine the financial and military commitment and to terminate funding. The President has no legitimate claims to exclusivity, either in making national commitments or being accountable to the public.

As far as being "the exclusive executor of the nation's foreign policy," Congress may intrude at any time to change the President's policy.[98] "[I]n 1983 . . . President Ronald Reagan advocated a sophisticated antimissile defense shield consisting of satellites armed with laser weapons. The concept became known as 'Star Wars' in the press and the 'Strategic Defense Initiative' (SDI) in administration announcements. [Lawmakers] were concerned that deployment or even testing of SDI would violate the understanding of the Antiballistic Missile (ABM) Treaty of 1972 with the Soviet Union."[99] Administration officials argued that treaty interpretation was a matter for executive, not legislative, determination.[100] This "great debate" over treaty reinterpretation came to a quick end when Congress enacted statutory language prohibiting the Secretary of Defense from deploying "any anti-ballistic missile system unless such deployment is specifically authorized by law after the date of the enactment of this Act."[101]

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97. *See supra* note 93.

98. *See* POWELL, *supra* note 1, at 88-89.

99. FISHER, CONFLICTS, *supra* note 61, at 246.

100. *Id.*

101. 101 Stat. 1057, § 226 (1987). For more on treaty reinterpretation, see FISHER, CONFLICTS, *supra* note 61, at 245-48.

V. THE TREATY-MAKING POWER

In offering three propositions to explain why the Constitution "is best read as lodging the power to formulate and to execute foreign policy in the president," Professor Powell begins by identifying the President's power to nominate Ambassadors and control their assignments.[102] "From the beginning," he says, "and without significant dissent, it has been assumed that United States diplomats receive their instructions from the president rather than the Senate, and that the Senate is not directly involved in the negotiation of treaties."[103]

Professor Powell refers to President Washington's experiment in 1789 to seek the Senate's advice on an Indian treaty.[104] This effort to sit down with Senators and discuss a treaty draft, including instructions given to the commissioners chosen to negotiate the treaty, was never repeated by President Washington or any other President. This led to what Professor Powell calls the "modern" treaty-making practice: "the president negotiates treaties as he thinks best and submits them to the Senate, which may give its advice and consent in whole or part or conditionally, but which has no formal role in planning or conducting negotiations."[105] That is not the "modern" practice, nor does it accurately capture practices in earlier times.

Professor Powell refers to the Senate Foreign Relations Committee's consideration of a larger role for the Senate in the negotiation of treaties, including identifying the goals that a President should pursue.[106] The committee abandoned those positions after concluding that the Constitution did not permit them.[107] The committee thought that Senate

102. POWELL, *supra* note 1, at 95.
103. *Id.*
104. *See id.* at 133.
105. *Id.* at 133-34.
106. *Id.* at 134.
107. *Id.*

interference "in the direction of foreign negotiations" would diminish the President's responsibility and "thereby impair the best security for the national safety."[108] It's always interesting to read the views of the Senate Foreign Relations Committee, but a Senate report in 1816, or at any other time, does not amend the Constitution. Neither does it prevent the committee from adopting a different position at a later time. Moreover, the 1816 report does not accurately reflect practices during the first few decades of the Republic.

Powell does not discuss the extent to which the Senate, including the modern Senate, has participated in the treaty process. The constitutional text does not divide the treaty-making process into two exclusive and sequential stages—negotiation by the President, followed by Senate action. The President "makes" treaties with the advice and consent of the Senate. The phrase "advice and consent" implies that the Senate will have an opportunity to shape the content of a treaty. If the Framers had intended to limit the Senate to voting "Yes" or "No" to a treaty prepared exclusively by the President, the word "advice" is superfluous and the phrase should have been reduced to a simple "consent." Professor Powell recognizes that Article II can be read to give the Senate "more than a mere up and down vote" on treaties.[109]

President Washington understood the difference in the procedures for appointments and treaties. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . . ."[110] Here the President's authority to nominate is solely an executive responsibility. A letter by President Washington to the Senate explains the difference between the procedures: "In the appointment to offices,

108. POWELL, *supra* note 1, at 135.
109. *Id.* at 133.
110. U.S. CONST. art. II, § 2, cl. 2.

the agency of the Senate is purely executive, and they may be summoned to the President. In treaties, the agency is perhaps as much of a legislative nature and the business may possibly be referred to their deliberations in their legislative chamber."[111] The fact that President Washington's visit to the Senate to discuss the Indian treaty was frustrating for both sides did not give the President a monopoly over treaty negotiations. President Washington continued to seek the advice of Senators, but he did so through written communications rather than personal appearances.[112]

This practice continued under subsequent Presidents. On May 6, 1830, President Andrew Jackson submitted to the Senate "propositions" for a treaty with the Choctaw Indians.[113] He indicated the amendments he thought necessary, but elicited the Senate's views: "Not being tenacious though, on the subject, I will most cheerfully adopt any modifications which, on a frank interchange of opinions my Constitutional advisors may suggest and which I shall be satisfied are reconcilable with my official duties."[114] He thought the opinion of the Senate "[would] have a salutary effect in a future negotiation, if one should be deemed proper."[115] He explained that obtaining the Senate's views "on this important and delicate branch of our future negotiations would enable the President to act much more effectively in the exercise of his particular functions. There is also the best reason to believe that measures in this respect emanating from the *united counsel* of the treaty-making power would be more satisfactory to the American people and

111. 30 THE WRITINGS OF GEORGE WASHINGTON 378 (Fitzpatrick ed., 1937).
112. *See* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 64-65, 68-69, 71-72, 81-84, 110-13, 115 (James D. Richardson ed., 1897) [hereinafter Richardson].
113. *See* Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1515 (1989) [hereinafter Fisher, *Process*].
114. 4 J. Sen. Exec. Proc. 98 (1887).
115. *Id.*

to the Indians."[116] President Jackson clearly dismissed the pretense to a presidential monopoly over treaty negotiation as no match for the practical advantages of joint action between the two branches. President Polk and other Chief Executives also invited the Senate's advice on the negotiation of treaties.[117]

Elsewhere in his book, Professor Powell emphasizes the practical advantages of giving the President great leeway in foreign affairs and the war power. He turns to *The Federalist* to demonstrate how the Framers valued efficiency and effectiveness in governmental matters.[118] Why not apply the same standard to treaty-making and have the President work jointly with Senators on the negotiation of treaties? What is the benefit of having the President work in isolation on treaty negotiation and dump the final product on the Senate?

Of course, a President may forgo the advantages of joint action and consider treaty negotiation as an executive monopoly. The Constitution does not prevent such stupid practices. A famous example of executive rigidity is the process used by President Woodrow Wilson to negotiate the Versailles Treaty. He believed that the President should not consult with the Senate and treat it as an equal partner. [119] In his academic writings, he advised Presidents to negotiate treaties single-handedly and then toss the finished product on the Senate's lap as a fait accompli. He assumed that the Senate would have no alternative but to support the President, but this theory failed miserably with the Versailles Treaty.

Other Presidents, including William McKinley, Warren Harding, and Herbert Hoover, understood the merits and common sense of including Senators and Representatives as members of U.S. delegations that

116. *Id.* at 99 (emphasis added).
117. Fisher, *Process*, *supra* note 113, at 1516.
118. POWELL, *supra* note 1, at 31-34.
119. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT 233-34 (1885); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77-78 (1908).

negotiated treaties.[120] During the negotiation of the North Atlantic Treaty (NATO), Senators Thomas Connally and Arthur Vandenburg were with Secretary of State Dean Acheson "all the time," and Senator Walter George actually wrote one of the treaty provisions.[121] The details of the United Nations Charter were hammered out at a conference in San Francisco in 1945. Half of the eight members of the U.S. delegation came from Congress—Senators Connally and Vandenburg and Representatives Sol Bloom and Charles A. Eaton. During 1977 and 1978, twenty-six Senators served in Geneva as official advisers to the SALT II negotiating team.[122]

The fast-track procedures that give both Houses of Congress a direct role in the negotiation process have further undermined the notion that the President is the exclusive negotiator of treaties and international agreements. "Fast-track" means that (1) the President's implementing bill for an international agreement is automatically introduced in Congress, (2) committees must act within a specified number of days, (3) Congress must complete floor action within a limited time, and (4) amendments to the bill are prohibited either in committee or on the floor. In receiving these procedural benefits, Presidents recognize that lawmakers must participate in the negotiations that produce the implementing bill.

Fast-track is a classic quid pro quo. Congress would hardly give immense procedural advantages to the President without getting something in return. In 1991, U.S. Trade Representative Carla A. Hills told the Senate Finance Committee that the fast-track "is a genuine

120. *See* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 106 CONG. 2D SESS. TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 109 (Comm. Print 2001).

121. *Executive Privilege: The Withholding of Information from the Executive: Hearings before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 262-64 (1971).

122. I. M. DESTLER, EXECUTIVE-CONGRESSIONAL CONFLICT IN FOREIGN POLICY: EXPLAINING IT, COPING WITH IT, *in* CONGRESS RECONSIDERED 310 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1981).

partnership between the two branches."[123] She assured Congress that it would have "a full role throughout the entire process in formulating the negotiating objectives in close consultation as the negotiations proceed."[124] In the same year, President George H. W. Bush gave Congress his "personal commitment to close bipartisan cooperation in the negotiations and beyond."[125]

Doctrinaire notions of presidential monopoly in treaty negotiations have given way to procedures that recognize the practical benefits of joint action between the two branches. Presidents hardly derive any advantage from pretending that they can exercise exclusive control over the negotiation of international commitments. This is especially true when those negotiations pledge the nation's economic and military resources, without involving Congress throughout the process. One could argue, as a technical point, that lawmakers in U.S. delegations do not actually engage in negotiations, which are handled officially by executive agents. However, the process of interbranch cooperation is so sufficiently close and ongoing that it explodes the claim that the President negotiates alone.

VI. WHICH BRANCH INITIATES WAR?

Professor Powell acknowledges that when it comes to the war power, the Framers adopted a model of government that broke decisively with William Blackstone and British precedents: "On issues touching on war, the Constitution works a striking departure from the British model, and clearly places the president's ability to formulate foreign policy under

123. *Extension of Fast Track Legislative Procedures: Hearings before the Senate Comm. on Finance*, 102d Cong., 1st Sess. 9 (1991).

124. *Id.*

125. *Letter Congressional Leaders on Fast Track Authority Extension and the North American Free Trade Agreement*, 1 PUB. PAPERS 450 (1991). Professor Powell discusses the fast-track procedure but not its relationship to treaty negotiation. *See* POWELL, *supra* note 1, at 141.

constraints that the eighteenth-century British executive did not face."[126] There was widespread agreement that in case of sudden attack, the President had authority to take whatever actions were necessary to repel the foreign force.[127] However, just as people at that time understood the difference "between making war and declaring it," they also understood the difference between defensive actions (presidential) and offensive actions that take the country from a state of peace to a state of war (congressional).[128]

Professor Powell does not accept this distinction. Instead, he defines the President's power over foreign affairs broadly and then shoehorns the use of military force into executive policymaking.[129] He states that the "argument that military action must always be authorized in advance by Congress is erroneous, and not only in those circumstances in which the president is responding to a direct attack upon the United States."[130] Thus, in Professor Powell's view, the President possesses not only defensive powers but something more. He argues that the "ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy."[131] These phrases prompted me to use a verb that may seem a bit crude—shoehorn. Yet, the word fits. Professor Powell maps out a generous definition of foreign policy and then makes military force a mere subset, something that slips nicely within the toolbox. There are many uncertainties about what the Framers intended, but I have no doubt that they would have repudiated this toolbox theory in spirited fashion.

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126. POWELL, *supra* note 1, at 113.
127. *Id.* at 115-117.
128. *Id.* at 116-18.
129. *Id.* at 118-19.
130. *Id.* at 119.
131. *Id.*

Professor Powell, having started out by acknowledging that the Framers' view of the war power broke decisively with Blackstone and British precedents, tries to reinsert Blackstone and English monarchical prerogatives into Article II. First, he equates presidential power with foreign policy and, next, assumes that military force is a mere instrument of foreign policy. This kind of argument shreds the Constitution.

Professor Powell reinforces his argument by stating that this "view of military force as an instrument of foreign policy follows . . . from [an] understanding of foreign policymaking that can reasonably be attributed to the rather hardheaded, effective-national-government understanding of the Constitution common[ly] shared among *The Federalist* and Washington and his associates."[132] The ability "to use the threat of military action would be empty if the president's ability to carry through on such a threat depended in every instance on congressional approval."[133] Again: "If Congress provides the president with the wherewithal, and if Congress leaves the president legally unfettered, the president has the prima facie power to employ military force in the pursuit of foreign policy objectives."[134]

Professor Powell does not place the whole of the war power in presidential hands. He says that Congress can decide to withhold funds for a presidential war, but this single limitation impermissibly allows a President to start a war and continue it until Congress stops him.[135] Nothing in *The Federalist* and nothing in the precedents established by President Washington and the Presidents who served immediately after him support Professor Powell's argument. Almost everything we know flatly contradicts it.

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132. POWELL, *supra* note 1, at 119.
133. *Id.*
134. *Id.* at 119-120.
135. *Id.* at 120-21.

Take a look at the practices during the early Presidencies when Executives were much more familiar with constitutional text, Framers' intent, and the general framework that guided the executive and legislative branches. In using U.S. troops against Indian tribes, President Washington faithfully adhered to statutes passed by Congress, scrupulously using military force purely for defensive purposes. He and his Secretary of War, Henry Knox, understood that for anything of an offensive nature they needed to come to Congress for authorization.[136] Knox wrote to Governor William Blount on October 9, 1792: "The Congress which possess the powers of declaring War will assemble on the 5th of next Month—Until their judgments shall be made known it seems essential to confine all your operations to defensive measures."[137] Writing in 1793, President Washington said that any offensive operations against the Creek Nation must await congressional action: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."[138]

Examine President Washington's reasoning. He didn't argue that on the basis of some general theory of "efficiency" or "effectiveness" he could use military force whenever he thought it would be beneficial, in the nation's interest, or a good way to implement a policy that he had established on his own. His Constitution called for *congressional deliberation and authorization.* The efficient, effective approach included full debate by elected Representatives and collective judgment between the two branches.

136. 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 194, 195 (Clarence Edwin Carter ed., 1936).
137. *Id.*
138. 30 THE WRITINGS OF GEORGE WASHINGTON 73 (John C. Fitzpatrick ed., 1940). For further details on presidential use of military force against Indians, see FISHER, WAR POWER, *supra* note 70, at 13-16.

In the Quasi-War with France, President John Adams did not argue that his foreign policy required an implied threat to use military force, that he could use force without Congressional consent, or that he could at least start the war and place the burden of withholding funds on Congress. He came to Congress and explained why he thought the legislative branch needed to prepare for war. The decision to go to war rested in the hands of Congress, not the President.[139] As noted before, Chief Justice Marshall clearly understood that only Congress could decide to declare war: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."[140] Marshall knew that, and so did President Adams.

If Powell wanted to find a framer devoted to executive power, he could hardly do better than cite the writings of Alexander Hamilton, and of course he does so repeatedly. Although Hamilton firmly supported Washington's authority to issue the Neutrality Proclamation, he warned in *Federalist No. 75* against vesting in the President the sole power to make treaties:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[141]

In 1801, Hamilton criticized President Jefferson for reading executive power too narrowly in the war against the Barbary pirates. Because

139. FISHER, WAR POWER, *supra* note 70, at 24.
140. Talbot v. Seeman, 5 U.S. 1, 28 (1801).
141. THE FEDERALIST NO. 75 (Alexander Hamilton).

Tripoli had declared war on the United States, Hamilton argued that the President had the power to respond militarily without waiting for congressional authority.[142] However, Hamilton recognized that the power to initiate war remained with Congress. By placing the power to declare war with Congress "the plain meaning . . . is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received: in other words, it belongs to Congress only, *to go to War*."[143]

When President Jefferson acted against the Barbary pirates, he understood the difference between using military force in the Mediterranean and mounting a war against other nations.[144] He said he was "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense" because it was up to Congress to authorize "measures of offense also" and lawmakers needed to exercise "this important function confided by the Constitution to the Legislature exclusively."[145] No doubt President Jefferson's message to Congress omits many details of what happened in the Mediterranean.[146] However, the key legal fact is that he went to Congress to seek statutory authority. He did not claim an independent and exclusive power to go to war. During a conflict in 1805 with Spain, he told Congress: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it

142. 25 THE PAPERS OF ALEXANDER HAMILTON 454-55 (Harold C. Syrett ed., 1977) (The Examination No. 1, December 17, 1801).

143. *Id.* at 455-56.

144. *See* Richardson, *supra* note 112, at 315.

145. *Id.* at 315.

146. *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 213-14 (1976).

my duty to await their authority for using force in any degree which could be avoided."[147]

In cases involving violations of the Neutrality Act, federal judges looked to congressional prerogatives to determine the scope of the war power. A circuit court in 1806 reviewed the indictment of Colonel William S. Smith for engaging in military actions against Spain.[148] He claimed that his military enterprise "was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government."[149] According to Professor Powell, a President could authorize these military adventures if Congress had left him "legally unfettered" and if the President decided that military force would implement his foreign policy objectives. The circuit court repudiated such claims: "Does [the President] possess the power of making war? That power is exclusively vested in congress."[150] The court recognized that the President had authority to repel sudden attacks, but there was a "manifest distinction" between going to war with a nation at peace and responding to an actual invasion. "In the former case, it is the exclusive province of congress to change a state of peace into a state of war."[151]

Much as President Adams had done with the Quasi-War against France, President James Madison submitted a message to Congress on November 5, 1811, alerting lawmakers to a number of hostile and discriminatory actions by England that required the legislative branch to prepare for war.[152] The decision to take military action resided with Congress, not the President, no matter what foreign policy the administration had formulated.[153] Even though President Madison

147. Richardson, *supra* note 112, at 377.
148. *See* United States v. Smith, 27 Fed. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342).
149. *Id.* at 1229.
150. *Id.* at 1230.
151. *Id.*
152. FISHER, WAR POWER, *supra* note 70, at 37.
153. *Id.* at 37-38.

concluded that the British practices amounted to "a state of war against the United States," he awaited congressional judgment on "a solemn question which the Constitution wisely confides to the legislative department of the Government."[154]

The decision by President James Polk to put American troops in disputed territory along the Texas-Mexican border ranks as the most provocative war power action by a Chief Executive in the nineteenth century.[155] Certainly President Polk would fit Professor Powell's framework as a President who wanted to use military force to achieve his foreign policy objectives. Professor Polk had long sought to add Mexican territory to the United States.[156] After a military clash between American and Mexican forces, President Polk told Congress that "war exists."[157] Nevertheless, President Polk did not go to war. He knew it was necessary to present the matter to Congress for deliberation, allowing lawmakers to decide whether war did indeed exist or whether the dispute amounted to hostilities that could be resolved without a war. After legislative debate, Congress recognized that "a state of war exists."[158]

By the time of the Civil War, it was still understood that whatever authority the President had in repelling sudden attacks, the decision to take the country from a state of peace to a state of war was one that only Congress could make. Both the courts and the executive branch shared that understanding. In *The Prize Cases*,[159] Justice Grier said that the President as Commander in Chief had no power to initiate war, but in the event of a foreign invasion, the President was not only authorized "but bound to resist force by force. He does not initiate the war, but is

154. Richardson, *supra* note 112, at 489-90; *see also* FISHER, WAR POWER, *supra* note 70, at 37-38.
155. *See* FISHER, WAR POWER, *supra* note 70, at 39-43.
156. *Id.*
157. Richardson, *supra* note 112, at 2292.
158. 9 Stat. 9 (1846); *see also* FISHER, WAR POWER, *supra* note 70, at 42.
159. 67 U.S. 635 (1862).

bound to accept the challenge without waiting for any special legislative authority."[160] Grier carefully limited the President's power to defensive actions, noting that he "has no power to initiate or declare a war against either a foreign nation or a domestic State."[161] The executive branch took exactly the same position. During oral argument, Richard Henry Dana, Jr., who was representing the President, acknowledged that President Abraham Lincoln's actions had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty.* That is vested only in Congress."[162]

Even President Woodrow Wilson, stiff-necked as he was about executive prerogatives, never believed that Presidents could enter into wars on their own without legislative authority. [163] Although he was willing to use military force on some occasions, such as the occupation of Veracruz and his interventions in Haiti and the Dominican Republic,[164] when he tangled with the Senate over the Lodge Amendments to the Versailles Treaty, he understood what he could do alone and what required congressional authorization: "There can be no objection to explaining again what our constitutional method is and that our Congress alone can declare war or determine the causes or occasions for war, and that it alone can authorize the use of the armed forces of the United States on land or on the sea."[165]

Notwithstanding the wealth of these precedents, Professor Powell would allow the President to initiate war and continue it until Congress decided to withhold funding. Professor Powell seems to recognize that this definition of presidential power may be too broad, when he posits

160. *Id.* at 668.
161. *Id.*
162. *Id.* at 660 (emphasis in original).
163. FISHER, WAR POWER, *supra* note 70, at 62.
164. *Id.* at 61-64.
165. 65 THE PAPERS OF WOODROW WILSON 68 (1991) (letter from Wilson to Senator Gilbert Monell Hitchcock, March 8, 1920).

that if Congress failed to disable or prohibit the President from taking military action, "does he or she enjoy constitutionally unlimited authority to use American armed forces at discretion, regardless of the consequences?"[166] To answer this affirmatively, he says,

> would be to dismiss as entirely irrelevant the evidence of founding-era concern over unilateral presidential power to involve the United States in war, as well as the intrinsic political and moral unattractiveness of a constitutional regime that would permit a single official actively to engage his or her country in unlimited war without the participation of other officials. (Publius's concern that the executive be dependent and responsible shows that such concerns were part of the founders' thinking about the meaning of a national constitution. They ought to be part of ours as well.) Furthermore, the declaration of war clause suggests, if it does not entail, that the Constitution of its own force sets some sort of outer boundary on the president's ability to use the commander in chief power to pursue sheerly executive-branch policies.[167]

Although Professor Powell sees the need to place some limits on presidential wars, his argument appears to leave the scope of executive power entirely up to executive judgments about what is politically prudent and morally attractive. He adds one other qualification, developed in an OLC opinion on President Bill Clinton's authority to invade Haiti in 1994.[168] "In deciding whether prior Congressional authorization . . . was constitutionally necessary, the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk

166. POWELL, *supra* note 1, at 121.
167. *Id.*
168. *See id.*

that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment."[169]

The Framers didn't leave the war power in that state of ambiguity, nor did they place their hopes in sound executive judgment. Neither should we. Presidents Harry Truman and Lyndon B. Johnson never expected to take as many casualties as they did in the Korean and Vietnam wars. What administration can be entrusted with such decisions? Elected representatives must make those judgments, not executive officials. President George H. W. Bush claimed that he could go to war without congressional authorization.[170] Professor Powell says in that case President Bush needed legislative approval.[171] In 2002, the White House Counsel's office argued that President George W. Bush did not need congressional authority to go to war against Iraq.[172] How would Professor Powell's framework apply to this presidential war? Leave it to executive judgment or require congressional authority? In my opinion, legislation was needed.[173]

I do not argue that the President only has the power to undertake military actions that "repel sudden attacks." Presidents can use military force on other occasions, such as against Libya in 1986 and the rescue operation in Grenada in 1983. Those actions shake the Constitution but do not destroy its essential allocation of power. I think Truman engaged in an unconstitutional war against North Korea.[174] Does Professor Powell's framework allow for President Truman's war or hold it illegal?

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169. *Id.* at 122.

170. *See* FISHER, WAR POWER, *supra* note 70, at 169, 171-72.

171. POWELL, *supra* note 1, at 131-32 n. 137.

172. Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote*, WASH. POST, Aug. 26, 2002, at A1; Ron Fournier, *White House Lawyers say Iraq Decision is Bush's*, WASH. POST, Aug. 25, 2002, at A3.

173. Louis Fisher, *The Road to Iraq*, LEGAL TIMES, Sept. 2, 2002, at 34.

174. *See* Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 22 (1995).

Similarly, I believe that President Clinton engaged in an unconstitutional war against Yugoslavia. Where does Professor Powell stand on that presidential initiative?

CONCLUSION

Professor Powell appears to occupy a middle position between the two poles of legislative and executive power. He criticizes the "legalistic and one-sided absolutisms of the pro-presidential and pro-congressional viewpoints."[175] As I read his book, he sided excessively with presidential power and weakens republican government. I do not disagree so much with where Professor Powell says we are today in the allocation of foreign affairs and the war power.[176] No doubt, the pendulum has swung far toward the executive branch and shows little likelihood of swinging back. My disagreement is more with where we ought to be, or need to be, if republican government is to survive.

Professor Powell places great trust in presidential control over foreign affairs and the war power, "secur[ing] the benefits of executive energy and unity of purpose, while preserving for the national legislature the power to exercise a veto over presidential foreign policy which Congress views as misguided or dangerous . . . ."[177] That model of government reduces Congress to junior varsity status. Every time we minimize the power of lawmakers, we also diminish the role of voters who put them in office. Under Professor Powell's framework, the President may unilaterally commit the nation and Congress must come in after the fact to pass legislation to block the President. This disapproval legislation, of course, is subject to a presidential veto, and

175. POWELL, *supra* note 1, at 140.
176. *See id.* at 139-42.
177. *Id.* at 141.

Congress can prevail only if it musters a two-thirds majority in each House.

That situation developed in 1973 when Congress cut off funds for the war in Southeast Asia.[178] President Richard Nixon vetoed the bill, and Congress could not override. Representative Elizabeth Holtzman filed a lawsuit, asking a federal court to determine that Nixon could not engage in combat operations in Cambodia and elsewhere in Southeast Asia in the absence of congressional authorization.[179] Judge Orrin Judd held that Congress had not authorized the bombing in Cambodia, and its inability to override Nixon was not an affirmative grant of authority: "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized."[180] Holtzman's lawsuit later became moot,[181] but Judge Judd's question remains. Do we want a constitutional system where executive decisions over foreign affairs and war prevail so long as the President maintains a margin of one-third plus one in either House? We cannot call that a republic.

In other places, Professor Powell espouses positions that are less biased toward presidential power. Presidents may use military force provided the "anticipated or actual severity, scope or duration of hostilities [do not rise] to the level of 'war' in a constitutional sense."[182] However, this principle is too vague for constitutional government because too much depends on a President's willingness (or unwillingness) to use the word "war." President Truman steadfastly

178. *See* Holtzman v. Schlesinger, 361 F.Supp. 553, 555 (E.D.N.Y. 1973).
179. *Id.* at 554.
180. *Id.* at 565.
181. *See* FISHER, WAR POWER, *supra* note 70, at 144.
182. POWELL, *supra* note 1, at 139.

refused to call hostilities in Korea "war," even though federal courts had no problem in giving it that name.[183] During the Clinton administration, Press Secretary Joe Lockhart did somersaults in avoiding the word "war" for combat operations against Yugoslavia:

> Q. Is the President ready to call this a low-grade war?
> MR. LOCKHART: No. Next question?
> Q. Why not?
> MR. LOCKHART: Because we view it as a conflict.
> Q. Well, when there is such a discrepancy about sending in troops, you've got this humanitarian effort that's massive, how can you say it's not war?
> MR. LOCKHART: Because it doesn't meet the definition as we define it.
> Q. Well, what is the definition as you define it? . . .
> MR. LOCKHART: Let me take the question, then, and I'll get you—there's a long issue, and it has some constitutional implications, and I'll take the question and try to get you an answer.[184]

The answer never came, nor should we expect an administration to use the word "war" if it appears to create legal or political difficulties for itself. Moreover, there is no reason for Presidents to speak truthfully about the "anticipated or actual severity, scope or duration of hostilities."[185] In 1995, President Clinton said he expected that the U.S. military commitment in Bosnia "can be accomplished in about a year."[186] Anyone following the issue knew that his estimate was

183. *See* FISHER, WAR POWER, *supra* note 70, at 99-100.
184. Press Briefing, Joe Lockhart, The White House (April 13, 1999), *available at* http://www.fas.org/man/dod-101/ops/docs99/990413-wh3.htm.
185. POWELL, *supra* note 1, at 139.
186. II PUB. PAPERS 1917 (1995).

inaccurate. A year later, he extended the troop deployment for another "18 months."[187] Of course, as of 2003, U.S. troops are still in Bosnia.

Elsewhere, Professor Powell cautions that the executive branch cannot adopt policies that usurp congressional prerogatives over foreign commerce.[188] That is a welcome qualification, but on the whole, the President remains foot loose and fancy free. In recent years, Presidents generally see a green light to act as they like, regardless of whether it is constitutional, legal, or authorized. After President George H. W. Bush received authority from Congress in 1991 to conduct war against Iraq, he remarked: "[E]ven had Congress not passed the resolutions I would have acted and ordered our troops into combat. I know it would have caused an outcry, but it was the right thing to do. I was comfortable in my own mind that I had the constitutional authority. It had to be done."[189] Bush had little interest in constitutionality. The decisive point was that military action was "the right thing to do" and "had to be done."[190]

The same lackadaisical, nonchalant attitude about constitutionality appears in comments by President Clinton. With or without legislative authority, he was prepared to invade Haiti in 1994: "But regardless [of this opposition], this is what I believe is the right thing to do. I realize it is unpopular. I know it is unpopular. I know the timing is unpopular. I know the whole thing is unpopular. But I believe it is the right thing."[191] Presidents Washington, Jefferson, and Madison, among others, did not offer such shallow justifications. President Clinton used

187. II PUB. PAPERS 2221 (1996).
188. POWELL, *supra* note 1, at 140-41 n. 151.
189. GEORGE BUSH & BRENT SCOWCROFT, A WORLD TRANSFORMED 446 (1998).
190. *See id.*
191. *Interviews with Wire Service Reporters on Haiti*, II PUB. PAPERS 1551 (1994).

the same cliché in 1995 to justify sending troops into Bosnia: "It is the right thing to do."[192]

The U.S. cannot enter into multibillion-dollar commitments simply because a President considers it the right thing. That is a strikingly superficial foundation for national policy, domestic or foreign. More important than doing the right thing is doing things the right way—following constitutional procedures, developing a national consensus and public support, and working with the legislative branch instead of circumventing it. Clearly, Presidents and their advisers for the past fifty years do not think this way. We should.

Professor Powell finds comfort in the fact that Congress, as an institution, is not likely to abuse its powers because lawmakers "will possess a modicum of good sense and patriotism."[193] Unfortunately, the same does not apply to Presidents of the twentieth century, particularly those who have served since World War II. President Dwight D. Eisenhower stands as the only Chief Executive of the last half century who had an adequate understanding of how the Constitution limits presidential power and the need for working jointly with Congress.[194]

Professor Powell aims to resolve constitutional issues so that whatever disputes remain will be purely political. He hopes to reduce "to a minimum the number of actual foreign-affairs controversies that can be resolved, even in principle, by legal argument."[195] Under his framework, "disagreement with the president's implementation of his or her foreign-affairs objectives almost never can be expressed as an objection to executive authority. The president's constitutional authority to act on the international stage for the United States is the

192. *Address to the Nation on Implementation of the Peace Agreement in Bosnia-Herzegovina*, II PUB. PAPERS 1784 (1995).

193. POWELL, *supra* note 1, at 142.

194. *See* FISHER, WAR POWER, *supra* note 70, at 117-25.

195. POWELL, *supra* note 1, at 147.

ordinary or default state of constitutional affairs."[196] "Disagreement, therefore, must be expressed in terms of policy, [or] substantive disagreement . . . ."[197] Critics must express objections in "political terms."[198] Basically, we are left without a constitution. Whatever the President desires in foreign affairs is home-free unless Congress, by overriding a veto, manages to prevail.

I do not fault Professor Powell for stating accurately where we are today, constitutionally and legally. Apparently, he thinks the current distribution of power is working fairly well and satisfies constitutional needs. I do not. It looks to me like an elected monarchy, something the Framers thought they had put behind them. I think their model of separated powers, checks and balances, deliberative processes, and representative government was a good thing in the eighteenth century and is even more necessary for the twenty-first century. For my part, I hope the debate over the allocation of foreign affairs and the war power will continue at the constitutional level and will not be replaced by mere differences over policy and politics.

Professor Powell believes that the President and the political system will be better off by giving broad recognition to executive power at the constitutional level and by confining all subsequent controversies to debates over politics, morality, prudence, and policy. Constitutional issues should not be put to rest. Broad claims of executive power do not settle constitutional disputes. They merely trigger objections from scholars and lawmakers who still care about checks and balances and still oppose the concentration of power within a single branch, particularly when it comes to initiating war. If Presidents want to maximize their power, they would be better off formulating a foreign

196. *Id.*
197. *Id.*
198. *Id.*

policy that gains the support and understanding of Congress and the public. There are no shortcuts to that end, nor should there be.