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Rumors of Wars: Presidential and Congressional War Powers, 1809–1829

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Drawing the line between congressional and presidential war powers has been a popular and controversial pastime throughout the past half century. But the problem is by no means new. Presidents Washington and Jefferson famously declared modest views of presidential authority in this field. The present Article takes up the story where Jefferson left off, examining legislative and executive materials illuminating a series of diplomatic and military crises that occurred during the Administrations of Madison, Monroe, and John Quincy Adams: the occupation of West Florida, the first Seminole War, the Monroe Doctrine, and other events arising out of our relations to the newly independent nations of Latin America. The Article concludes that, despite the expectable line-drawing problems in applying principles to real world cases, the express position of every President to address the subject during the first forty years of the present Constitution was entirely in line with that proclaimed by Congress in the War Powers Resolution in 1973: The President may introduce troops into hostilities only pursuant to a congressional declaration of war or other legislative authorization, or in response to an attack on the United States.

Article I, § 8 of the Constitution (as every educated citizen knows) empowers Congress, not the President, to declare war.¹ Consequently, when the Governor of Georgia in 1793 asked President Washington to send troops to retaliate against Indians who had been harassing settlers on the frontier, the President politely declined:

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“The Congress shall have Power . . . To declare War . . .” US Const Art I, § 8, cl 11. See Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in Julian Boyd, ed, 15 *The Papers of Thomas Jefferson* 392, 397 (Princeton 1958) (“We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body.”). See also St. George Tucker, 1 Appendix to Blackstone’s Commentaries, in St. George Tucker, ed, 1 *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 269–70 (Birch and Small 1803) (explaining the wisdom of vesting the power to declare war in the Congress).

“[N]o offensive expedition of importance” could be undertaken without congressional sanction.² When an American ship tangled with Tripolitan pirates in 1801, President Jefferson told Congress that after disabling the enemy the captain had let him go; for the Navy was “[u]nauthorized, without the sanction of Congress, to go beyond the line of defense.”³ In 1812, when British interference with American shipping and impressment of American seamen became intolerable, President Madison asked Congress to declare war—which it promptly did, as the Constitution envisioned.⁴

Thus in their public pronouncements the first three Presidents to address the issue took an appropriately narrow view of their authority as Commander in Chief,⁵ in accordance with the deliberate decision of the Constitutional Convention.

The incidents just described, however, do not tell the whole story of early presidential interpretation of executive and legislative powers in this field. A number of brushfires short of outright war that broke out during the Administrations of Madison, Monroe, and John Quincy Adams greatly enrich our understanding of the original understanding of the division of war powers between the President and Congress.

I. FLORIDA

Florida! Tropical paradise, holy grail, end of the rainbow, where Ponce de León sought the Fountain of Youth; peninsula reaching to the coral keys, Mecca for sunbathers, snorklers, and sailors; proud home of faceless concrete towers on what must once have been a magnificent strand, of endless rows of suburban tacky-tacky inhabited by superannuated New Yorkers, of a billion-dollar monument to a mouse in short pants, where the state Department of Natural Resources bravely urges visitors to discover the “real Florida” if they can still find it?

No. To Americans in the early nineteenth century Florida mostly meant West Florida, a narrow strip of flat, sandy, unproductive soil along the Gulf Coast from New Orleans to Pensacola, from the Mississippi to the Perdido, site of growing Yankee settlements around Ba-

² Letter from George Washington to William Moultrie (Aug 28, 1793), in John C. Fitzpatrick, ed, 33 *The Writings of George Washington* 73 (US GPO 1939). See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 84 (Chicago 1997).

³ Thomas Jefferson, First Annual Message (Dec 8, 1801), in James D. Richardson, ed, 1 *A Compilation of the Messages and Papers of the Presidents* 326–27 (US Congress 1900). That was not, however, what he had told his subordinates in the Mediterranean. See Montgomery N. Kosma, *Our First Real War*, 2 *Green Bag* 2d 169, 172–73 (1999).

⁴ James Madison, Special Message to Congress (June 1, 1812), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 499–505 (cited in note 3); 2 Stat 755 (June 18, 1812).

⁵ US Const Art II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”).

ton Rouge and valuable chiefly as an outlet from the Mississippi Territory to the Gulf of Mexico.⁶

We owned it, we said. We had bought it from France in the Louisiana Purchase in 1803. For we had bought the entire province of Louisiana, as it had existed before France ceded it to Spain in 1762 and in 1803, after Spain had agreed to give it back. And West Florida, we said, had been part of Louisiana before 1762.⁷

Spain saw it differently. West Florida was a separate province that had never been part of Louisiana, and it belonged to Spain.

The Gulf Coast had been settled by the Spanish from the east and the French from the west. By 1719 a border had been established between them at the Perdido River, western boundary of the present state of Florida. At the end of the Seven Years' War in 1763, France and Spain had ceded their respective halves of Florida to Great Britain. Spain had taken them both away from the British during the American Revolution, and the Treaty of Paris had confirmed the Spanish title.

When Congress authorized President Jefferson to take possession of Louisiana in 1803,⁸ he left the Spanish east of the Mississippi undisturbed. Congress authorized creation of a customs district at Mobile in 1804, but in establishing that district Jefferson located the sole port of entry at Fort Stoddert, safely north of the border drawn by Thomas Pinckney's 1795 treaty with Spain.⁹ When our story began in 1810 West Florida remained in Spanish hands.

President Madison decided it was time for the United States to assert their sovereign rights.¹⁰

⁶ As the accompanying map shows, West Florida was sometimes considered to extend even farther east, to the Apalachicola.

⁷ See Treaty Between the United States and the French Republic, Art I, 8 Stat 200, 202 (Apr 30, 1803).

⁸ See 2 Stat 245, § 1 (Oct 31, 1803).

⁹ See 2 Stat 251, 254, § 11 (Feb 24, 1804); Thomas Jefferson, Proclamation (May 20, 1804), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 369 (cited in note 3); Walter Lowrie and Matthew St. Claire Clarke, eds, 2 *American State Papers (Foreign Relations)* 583 (Gales and Seaton 1832); Marshall Smelser, *The Democratic Republic, 1801-1815* 105 (Harper & Row 1968). Jefferson explained to Congress that Spain had taken umbrage at the Act authorizing erection of a customs district within what it viewed as its territory and that his proclamation had been drafted so as to calm the waters while reserving U.S. claims for future negotiation. Thomas Jefferson, Fourth Annual Message (Nov 8, 1804), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 369-70. The following year, informing Congress as to defensive measures he had taken in response to Spanish designs on territory occupied by the United States under the Louisiana Purchase, Jefferson added, "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided." Thomas Jefferson, Special Message to Congress (Dec 6, 1805), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 388-89.

¹⁰ The facts are taken from Isaac Joslin Cox, *The West Florida Controversy, 1798-1813* (Johns Hopkins 1918). For a popular modern version, see Joseph Burkholder Smith, *The Plot to Steal*

Source: The London Magazine, Vol 34 (Mar 1765). From The Map Collection, University of Chicago Library. Edited for clarity.

John Adair, who had lost his Senate seat and very nearly his head for complicity in Aaron Burr's Western conspiracy, had written Madison in January 1809 that American settlers comprised 90 percent of the population in the area west of the Pearl River (that is, in what is now the eastern part of the state of Louisiana) and that the people of West Florida were "as ripe fruit waiting the hand that dares to pluck them."¹¹ Apparently with Madison's surreptitious encouragement, a popular convention declared independence from Spain and asked to be incorporated into the United States.¹²

Anticipating such a request, Madison had asked Secretary of War William Eustis what he thought the Administration could do if West Florida sought to become part of the United States. Eustis's reply was not enlightening.¹³ On October 19, 1810, Madison wrote Jefferson that the West Florida crisis raised grave questions respecting the extent of executive authority and that, with Congress about to reconvene, immediate action might be viewed as disrespectful if not illegal. Yet there was much to be said, he added, for the view that West Florida already belonged to the United States and could lawfully be absorbed, especially if there was a risk that otherwise it might fall into the hands of a stronger third party.¹⁴

Eight days later the President issued a proclamation declaring West Florida a part of the Orleans Territory and directing its Gover-

Florida: James Madison's Phony War (Arbor House 1983). For a brief introduction, see the editorial note in J.C.A. Stagg, Jeanne Kerr Cross, and Susan Holbrook Perdue, eds, 2 *The Papers of James Madison* (Presidential Series) 305-19 (Virginia 1992). Pinckney's Treaty is described in Currie, *The Federalist Period* at 215 n 74, 284 (cited in note 2). For a general description of U.S. expansion into East and West Florida, see Irving Brant, *James Madison: The President, 1809-1812* 173-89, 223-87 (Bobbs-Merrill 1956); Smelser, *Democratic Republic* at 104-08 (cited in note 9); Glyndon G. Van Deusen, *The Life of Henry Clay* 60-64 (Little, Brown 1937); Henry Adams, *History of the United States of America during the Administrations of James Madison* 214-20, 222-28, 456-57, 764-70 (Library of America 1986) (first published between 1889-91).

¹¹ Letter from John Adair to James Madison (Jan 9, 1809), quoted in Cox, *The West Florida Controversy* at 327 (cited in note 10). Adair's earlier misadventures will be discussed in another chapter of the book of which this Article is a part.

¹² West Florida's declaration of independence appears in Walter Lowrie and Matthew St. Clair Clarke, eds, 3 *American State Papers (Foreign Relations)* 396 (Gales and Seaton 1832). See also Letter from John Rhea to James Madison (Oct 10, 1810), in Lowrie and Clarke, eds, 3 *American State Papers* at 395-96 (requesting annexation by the U.S.); Cox, *The West Florida Controversy* at 312-436 (cited in note 10) (describing insurrection in West Florida); Smith, *The Plot to Steal Florida* at 13, 57-65 (cited in note 10) (branding Madison, for his alleged efforts to foment insurrection in East and West Florida, "the father of covert-action operations" in the United States).

¹³ Letter from James Madison to William Eustis (Aug 30, 1810), in Stagg, Cross, and Perdue, eds, 2 *The Papers of James Madison* at 516-17 (cited in note 10); Letter from William Eustis to James Madison (Sept 7, 1810), in Stagg, Cross, and Perdue, eds, 2 *The Papers of James Madison* at 531-32.

¹⁴ Letter from James Madison to Thomas Jefferson (Oct 19, 1810), in Stagg, Cross, and Perdue, eds, 2 *The Papers of James Madison* at 585-86 (cited in note 10).

nor, William C.C. Claiborne, to take possession on behalf of the United States, which he proceeded to do.¹⁵

When Congress met in December 1810, Madison reported and defended his actions: The situation was urgent and the occupation lawful.¹⁶ A month later, suggesting there was a danger of British intervention in *East Florida*, he asked Congress to declare that the United States would not look kindly on that province's passing into the hands of another foreign power.¹⁷ Congress adopted a corresponding resolution and authorized the President to occupy *East Florida* in the face of a foreign threat or at the behest of local authorities.¹⁸ Two years later Congress also authorized the President to occupy any part of the territory west of the *Perdido* not already in possession of the United States.¹⁹

The western part of *West Florida* was added to the new state of *Louisiana* in 1812.²⁰ The eastern part was attached to the *Mississippi Territory*, which was later divided to become the states of *Alabama* and *Mississippi*.²¹ An agent sent to negotiate with the Spanish Governor for an invitation to occupy *East Florida* incited another rebellion and took possession of *Amelia Island*, near the *Georgia* border off the

¹⁵ James Madison, Proclamation (Oct 27, 1810), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 480–81 (cited in note 3); Lowrie and Clarke, eds, 3 *American State Papers* at 397–98 (cited in note 12); James Madison, Presidential Proclamation (Oct 27, 1810), in Stagg, Cross, and Perdue, eds, 2 *The Papers of James Madison* at 595–96 (cited in note 10). See Editorial Note, in Stagg, Cross, and Perdue, eds, 2 *The Papers of James Madison* at 305, 319. “Claiborne,” Henry Adams reports, “did not advance to the *Perdido*; he went no farther than the *Pearl River*,” the present eastern boundary of *Louisiana*. Adams, *History of the United States during Madison* at 219 (cited in note 10).

¹⁶ James Madison, Second Annual Message (Dec 5, 1810), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 482, 484 (cited in note 3); also reprinted in 22 *Annals of Cong* 11–13 (Dec 5, 1810); J.C.A. Stagg, Jeanne Kerr Cross, and Susan Holbrook Perdue, eds, 3 *The Papers of James Madison* (Presidential Series) 49, 51 (Virginia 1992).

¹⁷ James Madison, Special Message to Congress (Jan 3, 1811), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 488 (cited in note 3); Lowrie and Clarke, eds, 3 *American State Papers* at 394–95 (cited in note 12); Stagg, Cross, and Perdue, eds, 3 *The Papers of James Madison* at 93–94 (cited in note 16).

¹⁸ 2 Stat 666 (Jan 15, 1811); 3 Stat 471, § 1 (Jan 15, 1811). The statute was not made public at the time; the authorization was ordered to be kept confidential until the end of the following session. 3 Stat 472 (Mar 3, 1811).

¹⁹ 3 Stat 472, § 1 (Feb 12, 1813). General Wilkinson (of Aaron Burr fame) accomplished this assignment with dispatch; it represented “the only permanent gain of territory made during the war” of 1812. Adams, *History of the United States during Madison* at 770 (cited in note 10).

²⁰ The addition was authorized—if *Louisiana* consented—by 2 Stat 708, § 1 (Apr 14, 1812). *Louisiana* accepted the addition. See A Resolution Giving the Assent of the Legislature to an enlargement of the limits of the State of *Louisiana*, July 22, 1812, *Louisiana Laws, 1812–14* 4, 6 (Thierry 1814).

²¹ 2 Stat 734 (May 14, 1812). *Georgia* had successfully opposed Giles’s initial bill to attach all of *West Florida* to the *Orleans Territory*, 22 *Annals of Cong* 26 (1810), on the convincing ground that it would deprive the *Mississippi Territory* of access to the Gulf. See Smith, *The Plot to Steal Florida* at 112 (cited in note 10); Editorial Note, in Stagg, Cross, and Perdue, eds, 3 *The Papers of James Madison* at xxviii (cited in note 16).

Atlantic coast. The Government disavowed him,²² and East Florida remained Spanish until 1819.²³

Not all of this happened without a fight. Federalist critics in and out of Congress argued that the President had exceeded his constitutional powers.

On December 18, 1810, in response to President Madison's notification that he had ordered the occupation of West Florida, Virginia Senator William Giles presented a committee bill declaring the Orleans Territory and all its laws to extend eastward to the River Perdido.²⁴ John Pope of Kentucky expounded the thesis that West Florida had been a part of Louisiana acquired in 1803.²⁵ Outerbridge Horsey of Delaware, a Federalist, disputed Pope's historical account.²⁶ Henry

²² See Letter from James Monroe to George Matthews (Jan 26, 1811), in Lowrie and Clarke, eds, 3 *American State Papers* at 571 (cited in note 12); Letter from James Monroe to George Matthews (Apr 4, 1812), in Lowrie and Clarke, eds, 3 *American State Papers* at 572; Letter from James Monroe to D.B. Mitchell (Apr 10, 1812), in Lowrie and Clarke, eds, 3 *American State Papers* at 572. A later action to dislodge "adventurers" who had taken possession of Amelia Island was justified as an exercise of authority under the 1811 No-Transfer Act to keep the area from falling into British or French hands. James Monroe, Special Message to Congress (Jan 13, 1818), in James D. Richardson, ed, 2 *A Compilation of the Messages and Papers of the Presidents* 23–25 (US Congress 1900). The East Florida story is told in Smith, *The Plot to Steal Florida* at 69–82, 113–282 (cited in note 10), and in Adams, *History of the United States during Madison* at 457–61, 765–66 (cited in note 10).

²³ The treaty by which Spain surrendered its remaining claims to Florida is printed at 8 Stat 252–64 (Feb 22, 1819). Like the Louisiana treaty, it committed the United States to "incorporat[e]" the inhabitants of the territory into "the Union" and to admit them "to the enjoyment of all the privileges, rights, and immunities, of citizens of the United States." *Id.* at 256–58, Art 6. It also drew the boundary between the United States and Mexico at the Sabine River—the present western border of the state of Louisiana. *Id.* at 254–56, Art 3.

This provision caused quite a stir in the House. Only a statute, not a treaty, Clay argued, could cede Texas to a foreign power; for under Article IV, Section 3 it was Congress that had authority to dispose of the territory of the United States. 36 *Annals of Cong* 1719–29 (Apr 3, 1820). Shades of the great debate over the Jay Treaty hovered over the Capitol, but the consensus seemed to be that the precedent was not on point; this was no cession of territory but the mere resolution of a boundary dispute, which was a common subject of treaties. See 36 *Annals of Cong* 1734 (Apr 3, 1820) (Rep Lowndes); 36 *Annals of Cong* 1772–74 (Apr 4, 1820) (Rep Anderson). The Jay Treaty is discussed in Currie, *The Federalist Period* at 209–17 (cited in note 2). For another reprise of the arguments over that treaty, see the extensive but unrewarding debates on a bill to implement a treaty with Great Britain by repealing discriminatory duties, 29 *Annals of Cong* 46–89, 160–61, 454–674 (Jan 18, 1816; Feb 27, 1816; Jan 4–15, 1816). This treaty appears at 8 Stat 228 (July 3, 1815), the statute at 3 Stat 255 (Mar 1, 1816).

The statute establishing (East) Florida as a territory appears at 3 Stat 654 (Mar 30, 1822).

²⁴ 22 *Annals of Cong* 25–26 (Dec 18, 1810).

²⁵ *Id.* at 37–42. This had been the Government's position from the beginning. See Letter from Robert Livingston to James Madison (May 20, 1803), in Lowrie and Clarke, eds, 2 *American State Papers* at 560–61 (cited in note 9); Letter from Robert Livingston and James Monroe to James Madison (June 7, 1803), in Lowrie and Clarke, eds, 2 *American State Papers* at 563–65; Letter from James Madison to Robert Livingston and James Monroe (Mar 31, 1804), in Lowrie and Clarke, eds, 2 *American State Papers* at 575–78.

²⁶ 22 *Annals of Cong* 49–53 (Dec 28, 1810) (arguing, among other things, that France had ceded West Florida to Great Britain before transferring Louisiana to Spain, and that after 1783 the Spanish had governed Louisiana and West Florida as separate provinces).

Clay, recently returned for a second short stint as Senator from Kentucky, supported it in impressive detail.²⁷

Independent of the question of sovereignty, Horsey argued that Madison had acted unconstitutionally in authorizing the occupation of West Florida, in annexing it to the Orleans Territory, and in subjecting it to territorial laws. Military occupation was war, and the rest was legislation; “[T]he Constitution has given to Congress the exclusive power of making laws and declaring war.”²⁸

Clay rose to the President’s defense. Congress in 1803 had provided for occupation of the entire territory acquired from France. The next year it had defined the Orleans Territory broadly enough to include West Florida and authorized the establishment of a customs district there.²⁹ These Acts “furnish[ed] a legislative construction of the treaty” consistent with that adopted by Madison in his proclamation.³⁰ Moreover, the President was merely executing laws enacted by Congress, and “he would have violated that provision which requires him to see that the laws are faithfully executed, if he had longer forborne to act.”³¹

Horsey argued that the 1803 law had exhausted its purpose when Louisiana proper was occupied and that it had expired in 1804. For the Act setting up a temporary territorial government had provided that the earlier statute would continue in effect only until October 1804.³² Not so, Clay retorted. What the territorial law did was to *extend* the 1803 Act until 1804 despite any contrary language in its provisions. The clear import was to continue the provisional government set up by the President, initially programmed to go out of business when Congress adjourned, until the new government could be set up; the separate section authorizing occupation of the ceded territory was unaffected.³³

²⁷ Id at 56–61 (quoting a 1712 French grant defining Louisiana to include everything from Carolina to Mexico and insisting that Spanish commandants in West Florida had been subject to the Governor of Louisiana).

²⁸ Id at 44–45.

²⁹ The Mobile Act, wrote Henry Adams, “actually annexed by statute the whole coast of Florida on the Gulf” and “indirectly authorized” the President to make war. Henry Adams, *John Randolph* 86 (Houghton, Mifflin 1898).

³⁰ 22 Annals of Cong 6162 (Dec 28, 1810) (Rep Clay). See also Cox, *The West Florida Controversy* at 97 (cited in note 10).

³¹ 22 Annals of Cong 61–62 (Dec 28, 1810) (Rep Clay). Gallatin had invoked the same statutes in advising Madison the previous autumn that he had authority to order the occupation of West Florida. Letter from Albert Gallatin to James Madison (Sept 5, 1810), in Stagg, Cross, and Perdue, eds, 2 *The Papers of James Madison* at 526–27 (cited in note 10).

³² 22 Annals of Cong 46 (Dec 28, 1810). See 2 Stat 283, 289, § 16 (Mar 26, 1804).

³³ 22 Annals of Cong 61 (Dec 28, 1810).

Historians have not dealt kindly with Madison and Jefferson's argument that West Florida was a part of the Louisiana Purchase.³⁴ Whether it was turns on the interpretation of ancient French and Spanish law, and there is no point in trying to resolve the question here.³⁵ It may be, as Clay's biographer argued, that from the standpoint of the law of nations the seizure of West Florida was "a barefaced steal."³⁶ But that does not make it also an infraction of the Constitution. For the law of nations does not limit congressional power.³⁷ So far as domestic law is concerned, Congress may repeal a treaty even if in so doing it places the country in breach of its obligations to other nations, and it may declare an unjust war.³⁸ If the statutes Clay cited made West Florida part of the Orleans Territory and empowered the President to seize it, he was usurping authority neither to legislate nor to declare war.

There was ample room for disagreement with Clay's interpretation of the relevant statutes. There was ample room for concern lest loose construction of authorizing legislation enable Presidents effectively to make war without congressional approval. The later observer is uncomfortably reminded of the Gulf of Tonkin Resolution and the war in Vietnam.³⁹ It should be noted, however, that in the case of *East* Florida, which no one claimed to be a part of the territory acquired from France, Madison undertook nothing until Congress enacted authorizing legislation and then disowned his agent for going beyond

³⁴ See, for example, Cox, *The West Florida Controversy* at 661 (cited in note 10) (describing the argument as "specious"); Van Deusen, *Life of Henry Clay* at 61 (cited in note 10) (concluding that the preponderance of evidence supported Spain's interpretation); Henry Adams, *History of the United States during the Administrations of Thomas Jefferson* 347-51 (Library of America 1986) (first published between 1889-91); Francis S. Philbrick, *The Rise of the West, 1754-1830* 213-15 (Harper & Row 1965). The French, when they acquired Louisiana from Spain, had acknowledged that it did not include West Florida. See Philbrick, *The Rise of the West* at 213.

³⁵ The question was fully argued before the Supreme Court in *Foster v Neilson*, 27 US 253 (1829), which concerned the validity of a Spanish land grant made after the United States had bought Louisiana. The Court refused to decide whether Louisiana included West Florida: On such an issue it was not for judges to question the judgment of "those departments which are entrusted with the foreign intercourse of the nation." *Id.* at 309. Accord *Newcombe v Skipwith*, 1 Martin (La) 151, 155 (Orleans Terr Sup Ct 1810).

³⁶ Van Deusen, *Life of Henry Clay* at 62 (cited in note 10). "Napoleon himself," cried Henry Adams, "never committed a more arbitrary act than that of marching an army, without notice, into a neighbor's territory, on the plea that he claimed it as his own." Adams, *History of the United States during Madison* at 216 (cited in note 10).

³⁷ Compare *Ware v Hylton*, 3 US 199, 223 (1796) (concluding that the law of nations did not limit state authority).

³⁸ Congress repealed two treaties with France by statute in 1798. See Currie, *The Federalist Period* at 250-53 (cited in note 2).

³⁹ Gulf of Tonkin Resolution, 78 Stat 384 (Aug 10, 1964); Louis Henkin, *Foreign Affairs and the United States Constitution* 101-02 (Clarendon 2d ed 1996) (concluding that by the Resolution and other actions, Congress adequately indicated its endorsement of the military actions taken in the Vietnam conflict).

his orders. The occupation of West Florida was likewise defended as authorized by statute. Neither Madison nor his supporters in Congress even remotely suggested that the President had inherent authority to initiate hostilities without congressional approval.

II. THE SEMINOLE WAR

The annexation of West Florida was a fait accompli by 1812, and Madison withdrew the troops from East Florida the next year. It was not long, however, before the United States were in trouble in Florida again.

Following a particularly nasty series of depredations upon settlers just north of the border, President Monroe in late 1817 empowered General Andrew Jackson, hero of the battle that had ended the War of 1812, to march his army into Spanish Florida, where the offending band of Seminole Indians had taken refuge.⁴⁰ There the General felt called upon to capture the fort of St. Marks and the capital city of Pensacola, together with its fortress of Barrancas.⁴¹

Jackson's zeal, sighed John Quincy Adams to his diary, "makes many difficulties for this Administration."⁴² The President and the rest of his Cabinet were convinced that Jackson had disobeyed orders and made war against Spain. Adams, now Secretary of State, argued that the General's actions had been "justified by the necessity of the case, and by the misconduct of the Spanish commanding officers in Florida."⁴³ The real question, Adams thought, was whether the Executive

⁴⁰ See Charles Francis Adams, ed, 4 *Memoirs of John Quincy Adams* 31 (Lippincott 1875).

⁴¹ See id at 87, 102 (May 4, 1818; June 18, 1818); 33 *Annals of Cong* 518–22 (Jan 12, 1819) (Rep Richard Johnson). Jackson's letters to Secretary of War Calhoun reporting and justifying his actions are reprinted in 34 *Annals of Cong* 2011–12, 2073–74, and 2077–80 (1818) (Appendix) and in Walter Lowrie and Matthew St. Clair Clarke, eds, 1 *American State Papers (Military Affairs)* 698–99, 700–01, 708–09 (Gales and Seaton 1832). The story is told concisely in George Dangerfield, *The Era of Good Feelings* 122–56 (Harcourt, Brace 1952), and in Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 341–65 (Ballinger 1976), and documented in Herman J. Viola, *Andrew Jackson's Invasion of Florida, 1818*, in Arthur M. Schlesinger, Jr. and Roger Bruns, 1 *Congress Investigates: A Documented History 1792–1974* 335, 335–478 (Chelsea House 1975). For a detailed popular account, see David S. Heidler and Jeanne T. Heidler, *Old Hickory's War: Andrew Jackson and the Quest for Empire* (Stackpole 1996). Jackson had briefly occupied Pensacola once before, after Spanish authorities had invited the British there during the War of 1812. Monroe, then Secretary of War, had tried to prevent his doing so and then ordered him to leave. See Letter from James Monroe to Andrew Jackson (Oct 21, 1814), in Harold D. Moser, et al, eds, 3 *The Papers of Andrew Jackson* 170–71 (Tennessee 1991); Letter from Andrew Jackson to James Monroe (Oct 26, 1814), in Moser, et al, eds, 3 *The Papers of Andrew Jackson* at 173–74; Letter from James Monroe to Andrew Jackson (Dec 7, 1814), in Moser, et al, eds, 3 *The Papers of Andrew Jackson* at 200; Stanislaus Murray Hamilton, ed, 5 *The Writings of James Monroe* 301–02 (Putnam 1901). For a concise account of Jackson's prior occupation and withdrawal, see Robert V. Remini, *The Life of Andrew Jackson* 87–88 (Harper & Row 1988).

⁴² Adams, ed, 4 *Memoirs of John Quincy Adams* at 102 (cited in note 40).

⁴³ Id at 108.

could authorize hostilities without a congressional declaration of war; for "Jackson was authorized to cross the Spanish line in pursuit of the Indian enemy."⁴⁴

Toward Spain the Administration took a hard line. Adams told Spanish Minister Juan de Onís that he couldn't speak for the President but expected him to approve General Jackson's conduct. The United States could not stand by and watch the Indians butcher women and children when Spain admitted it could not control them, and Jackson had had to respond to the Governor's threat to drive him out of Florida.⁴⁵

The Administration's formal response to the Spanish protest blamed the victim. Spain had defaulted on its treaty obligation to restrain Indian depredations. The law of nations permitted pursuit of an enemy even into neutral territory, and Florida was in the hands of hostile Indians. Jackson had taken the Spanish forts on his own authority on the basis of self-defense. Secretary Adams was confident, his letter concluded, that Spain would henceforth live up to its promises and punish its offending officers for their derelictions of duty.⁴⁶

⁴⁴ Id. For arguments that Monroe had cryptically, silently, or indirectly authorized Jackson to seize Florida, see Samuel F. Bemis, *John Quincy Adams and the Foundations of American Foreign Policy* 314 & n 39 (Knopf 1949) (arguing that Monroe sought to encourage Jackson's action while preserving deniability); Remini, *Life of Jackson* at 118-19 (cited in note 41) (arguing Monroe's failure to caution Jackson against seizure was consistent with real intent); John B. Knox, *The Rhea Letter* 12-13 (1917) (arguing that Monroe sent a letter indirectly authorizing the seizure). For a vehement denial, see Harry Ammon, *James Monroe: The Quest for National Identity* 417 (Virginia 1971). Monroe had told Calhoun to "[i]nstruct" Jackson "not to attack any post occupied by Spanish troops, from the possibility, that it might bring the allied powers on us." Letter from James Monroe to John C. Calhoun (Jan 30, 1818), in W. Edwin Hemphill, ed, 2 *The Papers of John C. Calhoun* 104 (South Carolina 1963). An editorial note tells us there is no evidence that Calhoun passed this order on to Jackson. Monroe later explained that he considered Jackson bound by earlier orders to his predecessor, adding that "nothing beyond the power of the gov[ernment] could be authorized, by implication." Letter from James Monroe to John C. Calhoun (Mar 16, 1828), in Clyde N. Wilson and W. Edwin Hemphill, eds, 10 *The Papers of John C. Calhoun* 361-62 (South Carolina 1977). Calhoun responded that his own interpretation of Jackson's orders "corresponds with your own in every particular." Letter from John C. Calhoun to James Monroe (Apr 20, 1828), in Wilson and Hemphill, eds, 10 *The Papers of John C. Calhoun* at 376-77. Jackson, on the other hand, insisted he had acted in full accord with his instructions to take "necessary measures" to bring the war to a close. Letter from John C. Calhoun to Andrew Jackson (Dec 26, 1817), in Harold D. Moser, David R. Hoth, and George H. Hoemann, eds, 4 *The Papers of Andrew Jackson* 163 (Tennessee 1994); Letter from Andrew Jackson to John C. Calhoun (May 25, 1828), in Wilson and Hemphill, eds, 10 *The Papers of John C. Calhoun* at 387, 388 (justifying his actions as falling within Monroe's broad grant of power); Letter from Andrew Jackson to James Monroe (Aug 19, 1818), in Moser, Hoth, and Hoemann, eds, 4 *The Papers of Andrew Jackson* at 236-38. If the allegation of Presidential authorization was true, it would not affect the constitutional question.

⁴⁵ Letter from John Quincy Adams to James Monroe (July 8, 1818), in Worthington C. Ford, ed, 6 *The Writings of John Quincy Adams* 383-84 (Macmillan 1916).

⁴⁶ Letter from John Quincy Adams to Don Luis de Onís (July 23, 1818), in Ford, ed, 6 *The Writings of John Quincy Adams* at 386-94 (cited in note 45); 34 *Annals of Cong* 1823-28 (1818) (Appendix).

Writing to Jackson, President Monroe was equally severe. The law of nations allowed the Army to pursue the Seminoles into Florida, but the General had exceeded his orders. To attack Spanish forts was an act of war to which the President himself was incompetent; to retain them would amount to a declaration of war that only Congress could make.⁴⁷ Rethink your excuses, wrote the President, and we'll defend you; disgorge your booty and come home.⁴⁸

The Spanish posts were returned,⁴⁹ and war was avoided. Jackson's enemies in Congress, however, were not so easily appeased.

When Congress met in November 1818, Monroe made a full report of Jackson's adventures. Authorized to pursue the Indians into Florida, he had discovered that local Spanish officials were encouraging the wrongdoers and had taken the Spanish posts in order to stop them. He had been instructed to give them back, as only Congress could declare war.⁵⁰

Three weeks later Representative Thomas Cobb of Georgia moved that the House appoint a committee to inquire whether the

⁴⁷ This point had been pressed upon the impetuous general a year and a half before. Reacting to a subordinate's threat to use force to liberate Americans imprisoned in Pensacola, the War Department stressed Jackson's duty to bring him to heel:

It is a matter of much surprise that, that officer should, for a moment, contemplate the commission of such an act of retaliatory warfare, as would place the country in a state of actual hostility with a foreign nation, to which the power of Congress *only* is competent.

Letter from George Graham to Andrew Jackson (Nov 5, 1816), in Moser, Hoth, and Hoemann, eds, 4 *The Papers of Andrew Jackson* at 72–73 (cited in note 44).

⁴⁸ Letter from James Monroe to Andrew Jackson (July 19, 1818), in Stanislaus Murray Hamilton, ed, 6 *The Writings of James Monroe* 54–61 (Putnam 1901); Moser, Hoth, and Hoemann, eds, 4 *The Papers of Andrew Jackson* at 224–28 (cited in note 44). Monroe repeated his constitutional argument in letters to Madison (July 20, 1818) and Jefferson (July 22, 1818). See Hamilton, ed, 6 *The Writings of James Monroe* at 61–63. See also Letter from James Monroe to Richard Rush (Mar 7, 1819), in Hamilton, ed, 6 *The Writings of James Monroe* at 89–91. A few months later, writing again to his predecessor, the President was somewhat more charitable: "If a general in executing orders in a campaign against an enemy should not make just discriminations in all instances between enemies and others I do not consider him as committing a breach of the constitution." Letter from James Monroe to James Madison (Feb 7, 1819), in Hamilton, ed, 6 *The Writings of James Monroe* at 87–88. Jackson's definitive defense of his actions is printed in 34 *Annals of Cong* 2308–50 (1820) (Appendix).

⁴⁹ This took some time. See Letter from John C. Calhoun to Gen. Gaines (Aug 14, 1818), in W. Edwin Hemphill, ed, 3 *The Papers of John C. Calhoun* 29 (South Carolina 1967) (ordering the posts returned, including St. Marks if Spain could defend it against the Indians); Letter from John C. Calhoun to James Monroe (Jan 21, 1819), in Hemphill, ed, 3 *The Papers of John C. Calhoun* at 511–12 (reporting that St. Marks and Pensacola were still in U.S. possession); Letter from Edmund P. Gaines to John C. Calhoun (Mar 14, 1819), in Hemphill, ed, 3 *The Papers of John C. Calhoun* at 660 (finally reporting that Pensacola and the Barrancas had been returned to Spain).

⁵⁰ James Monroe, Second Annual Message (Nov 16, 1818), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 39, 42–43 (cited in note 22); also reprinted in 33 *Annals of Cong* 11, 14–15 (Nov 16, 1818).

Constitution and laws had been violated.⁵¹ Two months would pass before the fur stopped flying.

Virginia's Edward Colston put the case very simply:

The power of declaring war had, for the wisest reasons, been confided, by the framers of the Constitution, to Congress; and yet we have seen the province of a nation, with whom we were at peace, invaded; her fortresses besieged and stormed; her towns taken; the blood of her citizens shed; her Government subverted; her laws abrogated; the civil power usurped, and those soldiers who had been placed there to preserve her authority and enforce her laws, sent off from the province they were intended to defend, and all this without any act of Congress to warrant it.

"If these were not acts of war," Colston continued,

he knew not what were; and yet, as he before observed, Congress had not been consulted. He had no hesitation in saying, that this was the most flagrant and palpable violation of the Constitution—the most violent encroachment upon the rights of this House, which had ever occurred in this country⁵²

Occasional voices were raised to declare the inquiry out of order;⁵³ they were shouted down, with good reason.⁵⁴ Of greater interest were the efforts to defend General Jackson's actions.

There were three arguments to support Monroe's order unleashing Jackson to invade Florida, and George Poindexter of Mississippi made all of them. Since the Seminoles had attacked first, the action was purely defensive and required no declaration of war. Moreover, Indian tribes were not foreign nations, so no declaration was required

⁵¹ 33 Annals of Cong 369–70 (Dec 8, 1818).

⁵² Id at 825. Some years later, in a letter attacking Jackson as "not fitted for the office of first magistrate," Gallatin endorsed this analysis: In capturing Pensacola and in giving contingent orders to seize St. Augustine as well, Jackson had assumed "the power of making war against a foreign nation"—though the executive neither had authorized his actions nor could have done so "without a special previous Act of Congress." Letter from Albert Gallatin to Walter Lowrie (May 22, 1824), in Henry Adams, ed, 2 *Writings of Albert Gallatin* 288, 288–89, 291 (Antiquarian Press 1960) (first published by Lippincott in 1879). See also Letter from Nathaniel Macon to Bartlett Yancey (Feb 7, 1819), in Edwin M. Wilson, *The Congressional Career of Nathaniel Macon* 52 (North Carolina 1900).

⁵³ See, for example, 33 Annals of Cong 780 (Jan 25, 1819) (Rep Sawyer) (arguing that Congress had no power to censure a military officer); 33 Annals of Cong 832–50 (Jan 27, 1819) (Rep Strother) (arguing that Jackson was on the side of justice); 33 Annals of Cong 1088 (Feb 6, 1819) (Rep Desha) (repeating that Congress had no power to censure).

⁵⁴ See, for example, 33 Annals of Cong 798 (Jan 26, 1819) (Rep Mercer) (defending the House's right to respond to the President's Annual Speech); 33 Annals of Cong 985–96 (Feb 2, 1819) (Rep Fuller); 33 Annals of Cong 1012–13 (Feb 3, 1819) (Rep Harrison) (defending the right of the House to investigate the military); 33 Annals of Cong 1079 (Feb 6, 1819) (Rep Williams) (arguing variously that the House was entitled to defend its prerogatives and to inquire into the operation of the laws as well as the need for their possible revision).

even to attack them. Finally, Congress had approved the campaign by appropriating funds to support it.⁵⁵ It was true that neither the General nor the President could initiate war against Spain, but neither had done so; occupation of the Spanish forts was a necessary incident of suppressing the offending Indians.⁵⁶

Other speakers elaborated repeatedly on the same themes. In the end the House voted down Cobb's proposals to censure Jackson and to forbid the entry of troops onto foreign soil except pursuant to legislative authorization or in "fresh pursuit" of the enemy.⁵⁷

A Senate committee was less charitable. In raising volunteers without statutory authorization, wrote Senator Lacock, Jackson had usurped Congress's exclusive authority to raise armies; in seizing Pensacola and its fort he had usurped Congress's power to initiate war.⁵⁸

As in the case of Madison's foray into West Florida, there was a respectable argument that in the Seminole War Jackson crossed the line that separates legitimate from illegitimate executive action. Indians had been treated as nations for purposes of the treaty power,⁵⁹ and President Washington had said he could not make war on them without congressional authorization.⁶⁰ In voting appropriations for Jackson's troops Congress gave no indication that it meant to enable him to capture Spanish towns or forts, and doing so was a far cry from the original purpose of pursuing the Seminole marauders.

⁵⁵ 33 Annals of Cong 959-61 (Feb 2, 1819). Other members of the House advanced the same arguments. See, for example, 33 Annals of Cong 601-05 (Jan 19, 1819) (Rep Holmes); 33 Annals of Cong 677-78 (Jan 21, 1819) (Rep Smyth).

⁵⁶ Id at 962-73 (Rep Poindexter). Professor Bemis suggested that in condemning Jackson congressional critics "ignor[ed] the No-Transfer Resolution of January 15, 1811." Bemis, *Foreign Policy* at 315 (cited in note 44). The resolution, 2 Stat 666 (Jan 15, 1811) is cited in note 18. It was inapplicable; Jackson's intervention was not based upon the fear that Florida was about to fall into the hands of some other foreign power.

⁵⁷ 33 Annals of Cong 1133, 1138 (Feb 8, 1819).

⁵⁸ S Doc No 100, 15th Cong, 2d Sess 1-13 (Feb 24, 1819), reprinted in Lowrie and Clarke, eds, 1 *American State Papers* at 739-43 (cited in note 41), and in Schlesinger and Bruns, 1 *Congress Investigates* at 425, 427-28, 431-33 (cited in note 41). The Senate never took up this report but "ordered it printed and laid on the table, where it died when the second session ended nine days later." Schlesinger and Bruns, 1 *Congress Investigates* at 348. Both Calhoun and Monroe approved Jackson's recruitment of the Tennessee volunteers. See Letter from John C. Calhoun to Andrew Jackson (Jan 29, 1818), in Hemphill, ed, 2 *The Papers of John C. Calhoun* at 102 (cited in note 44); Letter from James Monroe to John C. Calhoun (Jan 30, 1818), in Hemphill, ed, 2 *The Papers of John C. Calhoun* at 104; Letter from John C. Calhoun to Andrew Jackson (Feb 19, 1818), in Hemphill, ed, 2 *The Papers of John C. Calhoun* at 148-49.

⁵⁹ See Currie, *The Federalist Period* at 24-28, 85-86 (cited in note 2).

⁶⁰ Letter from George Washington to William Moultrie (Aug 28, 1793), in Fitzpatrick, ed, 33 *The Writings of Washington* at 73 (cited in note 2). See also Charles Francis Adams, ed, 6 *Memoirs of John Quincy Adams* 268 (Lippincott 1875) (reporting Monroe's draft of a message referring to Congress Georgia's request that the Cherokees be forcibly removed from the state: "[A]s the refusal of the Cherokees to remove was absolute and peremptory, Congress alone were competent to authorize the employment of force to remove them").

On the other hand, there was a plausible argument that the entire action was a justifiable defensive measure. If Spain had attacked the United States, Representative Cobb conceded, no declaration of war would have been required to permit a response.⁶¹ As defenders of the expedition observed, Congress had authorized the President to employ both the militia and the army to repel invasions, and the entire operation was a response to foreign attack. Following the Indians into Florida was consistent with the law of nations and thus was not an act of war; even the seizure of Spanish posts was arguably justified as a further act of legitimate self-defense. Only retaining Spanish possessions, Monroe argued, would clearly be an act of war; and the President had ordered them returned.

Whoever was right on the facts, there was widespread agreement on the applicable rules of law. As Commander in Chief the President could repel invasions, as Congress had authorized him to do. Spain's breach of its treaty obligation to restrain the Indians, which Cobb conceded would justify Congress in declaring war, would not justify Executive retaliation against Spain;⁶² Representative Holmes of Massachusetts, who defended Jackson's actions, conceded that breach of the treaty did not itself constitute war.⁶³

Most important, as in the West Florida incident, both the President and his supporters agreed that he had no right to initiate hostilities against a foreign nation. As Monroe told Congress, only the legislature had a right to do that.⁶⁴ To the impetuous General Jackson he was even more explicit:

[A]n order by the government to attack a Spanish post . . . would authorize war, to which, by the principles of the Constitution, the Executive is incompetent. . . . If the Executive refused to evacuate the posts, . . . it would amount to a declaration of war It would be accused of usurping the authority of Congress, and giving a deep and fatal wound to the Constitution. . . . The last imputation to which I would consent justly to expose myself is that of infringing a Constitution to the support of which, on pure principles, my public life has been devoted.⁶⁵

These are not the words of an officer insensitive to the limits of his constitutional authority.

⁶¹ 33 Annals of Cong 594 (Jan 18, 1819).

⁶² Id at 593–94.

⁶³ Id at 601. See also the report of Senator Lacock's committee, in Schlesinger and Bruns, 1 *Congress Investigates* at 432 (cited in note 41).

⁶⁴ James Monroe, Second Annual Message (Nov 16, 1818), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 43 (cited in note 22).

⁶⁵ Hamilton, ed, 6 *The Writings of James Monroe* at 56–57, 59 (cited in note 48).

III. OUR SOUTHERN NEIGHBORS

As early as 1808 colonists in Spanish America had begun to revolt against their masters. Their struggles for independence raised a series of important issues respecting the boundaries between executive and legislative powers in the field of military and foreign affairs.⁶⁶

A. Recognition

Sympathetic from the start to the emerging new states south of the border, Presidents from Jefferson to Monroe were reluctant to recognize their sovereignty lest by premature action they provoke European intervention.⁶⁷ In 1817, eager to ascertain the strength of the new regimes, Monroe resolved to send a fact-finding commission to South America and asked Congress for \$30,000 to pay its expenses.⁶⁸

For Henry Clay, now Speaker of the House and self-appointed champion of Latin American independence, this was not enough. He moved, as the reporter paraphrased it, that Congress appropriate \$18,000 "as the outfit and one year's salary of a Minister to be de-

⁶⁶ Useful monographs on this subject include Arthur P. Whitaker, *The United States and the Independence of Latin America, 1800-1830* (Johns Hopkins 1941); Charles C. Griffin, *The United States and the Disruption of the Spanish Empire* (Octagon 1968) (first published in 1937); and Dexter Perkins, *The Monroe Doctrine, 1823-1826* (Harvard 1932). See also Bemis, *Foreign Policy* at 341-408 (cited in note 44); Ammon, *James Monroe* at 409-48 (cited in note 44); William P. Cresson, *James Monroe* 399-412, 417-50 (North Carolina 1946); Dangerfield, *The Era of Good Feelings*, 249-330 (cited in note 41).

⁶⁷ See Ammon, *James Monroe* at 410-11 (cited in note 44) (explaining the fears of Jefferson, Madison, and Monroe); Bemis, *Foreign Policy* at 343, 345 (cited in note 44); Whitaker, *The Independence of Latin America* at 42-46, 55, 82-84, 195-96, 209-11, 274, 328-29 (cited in note 66). Monroe stressed the importance of U.S. neutrality in his first and third Annual Messages in 1817 and 1819. See James Monroe, First Annual Message (Dec 2, 1817), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 11, 13 (cited in note 22); James Monroe, Third Annual Message (Dec 7, 1819), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 54, 58-59. See also Letter from John C. Calhoun to Micah Sterling (Apr 1, 1818), in Hemphill, ed, 2 *The Papers of John C. Calhoun* at 223 (cited in note 44), noting the Administration's sympathy with the rebels but arguing that premature recognition "would expose us to the greatest danger" without helping them.

⁶⁸ See James Monroe, First Annual Message (Dec 2, 1817), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 11, 14 (cited in note 22); Letter from John Quincy Adams to William Lowndes (Mar 2, 1818), reprinted in 32 *Annals of Cong* 1464-65 (Mar 24, 1818). Seconded by Hopkinson, Clay had first assailed the appointment of Monroe's commissioners as unconstitutional, on the ground that there was no showing the nominations had been presented to the Senate pursuant to Article II, Section 2. See 32 *Annals of Cong* at 1466, 1468 (Mar 24, 1818). Forsyth responded that the same provision authorized the President to make recess appointments, as he had done here. *Id.* at 1466. Though it was not mentioned this time, there was a question whether Monroe's agents fell within Article II's appointment provisions at all; President Washington had appointed foreign agents on his own as early as 1789. See Henry M. Wriston, *Executive Agents in American Foreign Relations* 157 (Johns Hopkins 1967). See also Currie, *The Federalist Period* at 44 (cited in note 2).

puted from the United States to the independent provinces of the Rio de la Plata, in South America."⁶⁹

Appointing a minister meant recognizing independence, and that was Clay's intention.⁷⁰ But recognition was a matter for the President, Samuel Smith protested, not for Congress:

The Constitution has given to Congress legislative powers—to the President the direction of our intercourse with foreign nations. It is not wise for us to interfere with his powers . . . Each branch had better confine itself to the duties assigned it by the Constitution.⁷¹

Alexander Smyth of Virginia spelled out the constitutional argument against Clay's proposal:

The Constitution . . . grants to the President, by and with the consent of the Senate, power to appoint Ambassadors and public Ministers, and to make treaties. According to the usage of the Government, it is the President who receives all foreign Ministers, and determines what foreign Ministers shall or shall not be received. It is by the exercise of one of these powers, in neither of which has this House any participation, that a foreign Power must be acknowledged. Then the acknowledgment of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation.⁷²

Clay had anticipated this objection. Yes, it was for the President to depute and receive ministers, but it was for Congress to vote the salaries of those whom he elected to send. Thus Congress had "a concurrent will" in the matter of recognition. It was immaterial whether

⁶⁹ 32 Annals of Cong 1468 (Mar 24, 1818). For Clay's role, see Van Deusen, *Life of Henry Clay* at 116–19, 121–23 (cited in note 10).

⁷⁰ See 32 Annals of Cong 1487–92, 1500, 1616 (Mar 25, 1818; Mar 25, 1818; Mar 28, 1818): "[A]ll that I want to do is to convey to the President an expression of our willingness, that the Government of Buenos Ayres should be recognised." *Id* at 1616.

⁷¹ 32 Annals of Cong 1538–39 (Mar 26, 1818). Crawford, writing to Gallatin about Clay's proposal, argued that recognition was "strictly of an Executive nature, and . . . hardly susceptible of being brought within the legislative competence of Congress. . . . For myself, I would rather see the House of Representatives employed upon subjects which are strictly within their constitutional powers." Letter from William H. Crawford to Albert Gallatin (Oct 27, 1817), in Adams, ed, 2 *Writings of Albert Gallatin* at 52, 56 (cited in note 52).

⁷² 32 Annals of Cong 1569–70 (Mar 27, 1818). See also *id* at 1597–98 (Rep Nelson). Rep Lowndes echoed these sentiments in an unreported speech preserved in his private papers. See Harriott Ravenal, *Life and Times of William Lowndes* 167–68 (Houghton, Mifflin 1901). See also William Rawle, *A View of the Constitution of the United States of America* 195 (Philip H. Nicklin 2d ed 1829) ("The power of receiving foreign ambassadors, carries with it among other things, the right of judging in the case of a revolution in a foreign country, whether the new rulers ought to be recognised.").

appropriations were made before or after a minister was appointed; in either case each branch would act as it saw fit in the exercise of its own constitutional responsibility.⁷³ Indeed, if (contrary to his opinion) recognition of the revolutionary government would create a risk of war, that was another reason for congressional action. For the Constitution gave Congress, not the President, the power to declare war, and no step that might lead to war should be taken “without a previous knowledge of the will of the war-making branch.”⁷⁴ Representative Tucker was even more emphatic: “The act of the Executive here might have the effect of a declaration of war, which it is within the Constitutional powers of the Legislative body alone to make.”⁷⁵

Moreover, said Clay, Congress had “the incontestable right to recognise a foreign nation, in the exercise of its power to regulate commerce with foreign nations”:

Suppose, for example, we passed an act to regulate trade between the United States and Buenos Ayres; the existence of the nation would be thereby recognized—as we could not regulate trade with a nation which does not exist.⁷⁶

Finally, Tucker added, “[t]his House has at all times, and on all subjects, a right to declare its opinions, leaving to the Executive to act upon them or not, according to its pleasure.”⁷⁷

Clay’s proposal was soundly defeated, but it is by no means clear that all who voted against it believed it unconstitutional; there was much debate on the merits of immediate recognition as well.⁷⁸ Three years later, after a more cursory reprise of the debate, the House adopted Clay’s resolution in somewhat altered form: Whenever the

⁷³ 32 Annals of Cong 1498–99, 1607–09 (Mar 25, 1818; Mar 28, 1818) (citing instances in which, he asserted, money had previously been appropriated for diplomatic appointments or treaties without prior presidential action or request).

⁷⁴ 32 Annals of Cong 1500 (Mar 25, 1818). See also 32 Annals of Cong 1618–19 (Mar 28, 1818).

⁷⁵ 32 Annals of Cong 1591 (Mar 27, 1818). See also Quincy Wright, *The Control of American Foreign Relations* 269 (Macmillan 1922) (arguing that “recognition of a foreign revolting state, if premature, would furnish a *casus belli*” and “usurp the power to declare war”). Former Massachusetts Senator Christopher Gore had made the same objection in 1817, when Monroe had merely dispatched an investigative mission to South America:

Such a step may lead directly to war, . . . and it is questionable, when the Right of declaring war is reserved to the whole Congress, that the Power of doing that which may appear to lead directly to such a Measure should be given unnecessarily to the President.

Letter from Christopher Gore to Rufus King (Dec 21, 1817), in Charles R. King, ed, 6 *The Life and Correspondence of Rufus King* 87 (Putnam 1900).

⁷⁶ 32 Annals of Cong 1618 (Mar 28, 1818). See also *id* at 1616 (Rep Clay).

⁷⁷ 32 Annals of Cong 1590 (Mar 27, 1818).

⁷⁸ 32 Annals of Cong 1646 (Mar 28, 1818) (reporting the vote of the House).

President decided to recognize the new governments, the House would support him.⁷⁹

As the Buenos Ayres regime became more stable and European intervention seemed less likely, recognition became a more imminent option, and Cabinet discussion turned to the question of how it should be accomplished.⁸⁰ William H. Crawford, now Secretary of the Treasury, urged that it be done “not by granting an ‘exequatur’ to a Consul, but by sending a Minister there; because the Senate must then act upon the nomination, which would give their sanction to the measure.”⁸¹ Attorney General William Wirt added with apparent approval that in that event “the House of Representatives must also concur by assenting to an Act of appropriation.”⁸² Adams vigorously disagreed:

[I]nstead of admitting the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of these bodies. It was, I had no doubt, by our Constitution, an act of the Executive authority. General Washington had exercised it in recognizing the French Republic by the reception of Mr. Genest [sic]. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onís; and in this instance I thought the Executive ought carefully to preserve entire the authority given him by the Constitution, and not weaken it by setting the precedent of making either House of Congress a party to an act which it was his exclusive right and duty to perform.⁸³

It was not until 1822 that Monroe was ready to take action. When he did it was to invite congressional participation in the decision, as he had urged all along:⁸⁴

When we regard . . . the great length of time which this war [of independence] has been prosecuted, the complete success which has attended it in favor of the Provinces, the present condition of the parties, and the utter inability of Spain to produce any change in it, we are compelled to conclude that its fate is settled, and that the Provinces which have declared their independence and are in enjoyment of it ought to be recognized. . . .

⁷⁹ See 37 *Annals of Cong* 1081–92 (Feb 10, 1821). For the defeat of a separate revival of the appropriation proposal, see 37 *Annals of Cong* 1029–77 (Feb 3, 1821).

⁸⁰ Adams, ed, 4 *Memoirs of John Quincy Adams* at 203–05 (cited in note 40).

⁸¹ *Id* at 205.

⁸² *Id*.

⁸³ *Id* at 206.

⁸⁴ At the time of Clay’s motion to induce recognition in 1818, Monroe said the Cabinet had found it inexpedient to recognize the new nations without public support as “manifested by measures of Congress”; but he viewed Clay’s efforts as an attempt not to inform the President but to embarrass him. Adams, ed, 4 *Memoirs of John Quincy Adams* at 71 (cited in note 40).

Should Congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect.⁸⁵

Congress appropriated the money, thus giving the legislative approval that Monroe desired but did not say the Constitution required.⁸⁶ The first new state was recognized that same year when the President formally received Manuel Torres as Chargé d'Affaires from the Republic of Colombia.⁸⁷

Was Clay's proposal to appropriate funds for a mission to a state the President had not recognized an invasion of his constitutional powers, as Smith and Smyth contended? It is fair enough to conclude, as Adams reminds us both Washington and Madison did, that the President's power to receive foreign ministers implies authority to recognize their governments—though Madison in an earlier advocate's role had argued the power was purely ceremonial.⁸⁸ The same line of reasoning confirms Smith's argument that with Senate consent the President may also recognize a new government by appointing a minister or concluding a treaty. Monroe's Cabinet, while finding it "inexpedient" to recognize the Buenos Ayres government in 1817, had reaffirmed the President's authority to do so without congressional approval.⁸⁹ But Clay never disputed this authority. He merely denied that it was exclusive:

There are three modes under our Constitution, in which a nation may be recognised: by the Executive receiving a Minister; secondly, by its sending one thither; and, thirdly, in the exercise of

⁸⁵ James Monroe, Special Message (Mar 8, 1822), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 116–18 (cited in note 22); Walter Lowrie and Walter S. Franklin, eds, 4 *American State Papers (Foreign Relations)* 818–19 (Gales and Seaton 1834). See Edward S. Corwin, *The President: Office and Powers* 220 (NYU 1940).

⁸⁶ 3 Stat 678 (May 4, 1822). For the favorable report of the House Committee on Foreign Affairs, see Lowrie and Franklin, eds, 4 *American State Papers* at 848–50 (cited in note 85).

⁸⁷ See Adams, ed, 6 *Memoirs of John Quincy Adams* at 23 (cited in note 60). The appointment of ministers was delayed by yet another dispute over the permissibility of recess appointments to new offices, prompting Adams to conclude that "the words of the Constitution were against the exercise of the power; the reason of the words is in its favor." Id at 24–26.

⁸⁸ Smith and Nelson had made this point during the debates on Clay's motion. 32 *Annals of Cong* 1539, 1598 (Mar 26, 1818; Mar 27, 1818). The incident involving Genêt, together with Madison's arguments respecting the Neutrality Proclamation, is related in Currie, *The Federalist Period* at 182 n 62 (cited in note 2).

⁸⁹ See Hamilton, ed, 6 *The Writings of James Monroe* at 31 (cited in note 48); Adams, ed, 4 *Memoirs of John Quincy Adams* at 71 (cited in note 40). When it came to the recognition of Brazil in 1824, Monroe was adamant that no message to Congress was required: The Cabinet had settled in 1817 that authority to recognize foreign governments was implicit in the power to receive ambassadors and other public ministers. Adams, ed, 6 *Memoirs of John Quincy Adams* at 329 (cited in note 60).

the Constitutional power of Congress to regulate foreign commerce.⁹⁰

Indeed the argument that recognition is implicit in various presidential powers applies as readily to the legislative powers to appropriate money and to regulate commerce; perhaps this is another case in which the President and Congress have overlapping authority.⁹¹

One is tempted to resist this conclusion. As Alexander Smyth argued, it is essential that the nation speak with a single voice in foreign affairs.⁹² Washington had made this point in insisting that Congress convey its congratulations to the French revolutionary government not directly but through him.⁹³ There seems little reason to doubt Adams and Monroe's assessment that Clay's purpose was to embarrass the Administration and to force the President's hand.⁹⁴ That the appropriation power was intended as a check on presidential authority⁹⁵ does not prove it can be used to compel the President to take action he has discretion to decline; the purpose of the provision is to protect the public purse. It is arguable that the grants of executive authority to appoint and receive diplomats and to make treaties limit the power that might otherwise be implicit in the Commerce Clause—which, it should be added, did not provide a basis for Clay's proposed appropriation.

President Washington was persuaded, however, not to deny the legislature's right to express its approval of the French constitution, so long as it did so through proper channels. Despite the anguished cries of Clay's opponents, the Speaker did not in the end propose to require President Monroe to recognize the government at Buenos Ayres. He

⁹⁰ 32 Annals of Cong 1616 (Mar 28, 1818).

⁹¹ See Corwin, *Office and Powers* at 200 (cited in note 85) ("[T]he Constitution, considered only for its affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.").

⁹² 32 Annals of Cong 1571 (Mar 27, 1818). See Wright, *Foreign Relations* at 21–23 (cited in note 75). The Supreme Court has often stressed this consideration in justifying judicial reluctance to interfere with executive decisions in the realm of foreign relations. See, for example, *Baker v Carr*, 369 US 186, 211–13 (1962).

⁹³ See Currie, *The Federalist Period* at 175–76 n 17 (cited in note 2). See also Letter from John Quincy Adams to Jonathan Russell (May 24, 1818), in Ford, ed, 6 *The Writings of John Quincy Adams* at 336–37 (cited in note 45) (asking that letters from Sweden be sent in future to the President alone rather than to the President and the Senate, since the President's authority to receive ambassadors made him the sole organ of communication with other nations); Letter from Henry Clay to Edward Everett (May 19, 1828), in Robert Seager II, Richard E. Winslow III, and Melba Porter Hay, eds, 7 *The Papers of Henry Clay* 282–83 (Kentucky 1982) (admonishing a House committee to ask the President, not the Secretary of State, for copies of diplomatic correspondence: "The constitution having confided to him the care of our foreign relations, a just execution of, and responsibility under, the trust, would seem to require that he should possess a controlling power over all correspondence connected with them").

⁹⁴ Adams, ed, 4 *Memoirs of John Quincy Adams* at 28, 71 (cited in note 40).

⁹⁵ See Currie, *The Federalist Period* at 211–17 (cited in note 2) (discussing the Jay Treaty).

made clear more than once that he expected the President to use his own judgment in deciding whether to take action;⁹⁶ and after haranguing the chamber for several hours he moved only that funds be made available to be used "whenever the President shall deem it expedient to send a Minister to the said United Provinces."⁹⁷

Maybe Congress could not recognize Buenos Ayres on its own, and maybe it could not order the President to do so.⁹⁸ But it takes a pretty ferocious view of presidential predominance in foreign affairs to deny Congress the power to appropriate money in case the President chooses to exercise his authority.⁹⁹

B. The Arms Race

Before President Monroe decided it was time to recognize revolutionary governments in Latin America, he had been confronted with a request to provide arms to the rebels. In the recognition controversy the principal question was whether Congress was treading on the President's prerogatives. With the arms request it was the other way around.

⁹⁶ 32 Annals of Cong 1499, 1608 (Mar 25, 1818; Mar 28, 1818).

⁹⁷ Id at 1500. See George H. Haynes, 2 *The Senate of the United States: Its History and Practice* 672-73 (Russell & Russell 1960):

Although in the nature of the case the President must be the organ of communication with foreign governments, Congress or the Senate has often shown a disposition to share his responsibility or to inform him as to what in their belief should be done, whether in recognizing a new state or changes in the government of an established state Of course, it is entirely within the President's discretion whether he will accept the advice and comply with the request conveyed by such resolutions

⁹⁸ "[T]he better opinion," wrote Quincy Wright some years ago, "held that the power to recognize was vested exclusively in the executive." Wright, *Foreign Relations* at 272 (cited in note 75). See also Edward S. Corwin, *The President's Control of Foreign Relations* 82 (Princeton 1917).

⁹⁹ Some aspects of this controversy had been previewed in 1809-10, when Senator Giles introduced a joint resolution condemning "insolent" remarks by the new British Minister and pledging "to call into action the whole force of the nation," if necessary, to support President Madison's refusal to deal with him in the future. 20 Annals of Cong 481 (Dec 5, 1809). The President had acted within his authority to receive ambassadors, said Giles, but his actions might provoke Britain to war, which only Congress could declare. It was thus appropriate for Congress to express its opinion and declare what it intended to do. 20 Annals of Cong 485-86 (Dec 8, 1809). Federalists attacked this proposal as an unconstitutional interference with executive prerogative. 20 Annals of Cong 909-11 (Dec 27, 1809) (Rep Livermore); 20 Annals of Cong 941 (Dec 28, 1809) (Rep Stanford); id at 961 (Rep Gardenier); 20 Annals of Cong 1046, 1052-54 (Jan 2, 1809) (Rep Upham). Both Houses approved it anyway. 20 Annals of Cong 511 (Dec 11, 1809) (Senate); 20 Annals of Cong 1151-52 (Jan 4, 1809) (House); 2 Stat 612-13 (Jan 12, 1810). A companion bill to authorize the President to use civil or military force to expel an offending minister, opposed by Hillhouse on the ground that the President already had such authority, passed the Senate handily but disappeared in the House. There was no reason to doubt its constitutionality. See 20 Annals of Cong 481, 509-10, 516, 783, 844 (Dec 5, 1809; Dec 8, 1809; Dec 8, 1809; Dec 20, 1809; Dec 22, 1809); US Const Art I, § 8, cl 18.

In March 1820, Adams recorded in his diary, President Monroe presented to his Cabinet the proposal of Manuel Torres, later to be received as the first representative of the new governments in Washington, "that the Government should sell upon credit to the Republic of Colombia any number short of twenty thousand stand of arms, to enable them to extend the South American Revolution into Peru and Mexico."¹⁰⁰ It was a preview of the famous Lend-Lease deal that President Roosevelt concluded on the eve of United States participation in World War II, and it potentially raised the same three questions. Where did the President get authority to enter into such an arrangement? Was Senate consent required because the proposed agreement constituted a treaty within the meaning of Article II? And would a transfer of arms to belligerents infringe Congress's authority to declare war?¹⁰¹

Nothing was said in 1820 about the role of the Senate, presumably because not every contract with purported representatives of a foreign government rises to the level of a treaty within Article II.¹⁰² Crawford and Calhoun did debate the question "whether the Executive could sell at all, without a special authority from Congress, arms belonging to the public." Calhoun cited a precedent in which gunpowder had been provided to the same rebels without statutory authorization, but Adams reported no argument either way on the merits.¹⁰³ Article II makes the President Commander in Chief of the armed forces, but it is Congress to whom Article IV confides power to "dispose of property belonging to the United States."¹⁰⁴ Arguably this latter provision, like Congress's power to raise and support armies as construed by Justice Jackson in the *Steel Seizure Case*, limits what otherwise might have been the authority of the Commander in Chief.¹⁰⁵

It was Adams himself who raised the decisive objections both of constitutionality and of policy:

I said there was no hesitation in my mind. To supply the arms professedly for the purpose set forth in the memorial of Torres would be a direct departure from neutrality, an act of absolute hostility to Spain, for which the Executive was not competent, by

¹⁰⁰ Charles Francis Adams, ed, 5 *Memoirs of John Quincy Adams* 45 (Lippincott 1875).

¹⁰¹ See 40 Op Atty Gen 58, 61–63 (May 23, 1941) (Robert Jackson, AG) (upholding the Lend-Lease program against all these objections). See also the Lend-Lease Act, 55 Stat 31 (Mar 11, 1941), codified at 22 USC §§ 411–19 (1952).

¹⁰² See Currie, *The Federalist Period* at 151–52 (cited in note 2), discussing the statutory authorization of postal conventions by the Postmaster General in 1792; and compare the distinction drawn between state treaties and "compacts" by US Const Art I, § 10.

¹⁰³ Adams, ed, 5 *Memoirs of John Quincy Adams* at 45–46 (cited in note 100).

¹⁰⁴ US Const Art IV.

¹⁰⁵ See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 644–45 (1952) (Jackson concurring).

the Constitution, without the authority of Congress. . . . It would, in my opinion, be not only an act of war, but of wrongful and dishonorable war, committed in the midst of professions of neutrality. It would also be as impolitic as wrongful and unconstitutional.¹⁰⁶

...

Adams's observations proved fatal to Torres's proposal. Crawford agreed it would be impolitic to sell arms without congressional approval; Calhoun agreed it would be unconstitutional. "The decision was unanimous that the proposal could not be complied with, and I am to answer Mr. Torres accordingly."¹⁰⁷

Adams's constitutional objection provided a convenient excuse for refusing a request the Cabinet thought it inexpedient to grant. But it also rang true in its own terms. It was the latest in a long succession of narrow executive interpretations of executive war powers, in line with Monroe's own statements in the Seminole controversy and the arguments of his predecessors respecting aggressive actions against the Georgia Indians, the Barbary pirates, and the Spanish in West Florida.

But Adams's argument went even further. Not only was the President forbidden to initiate hostilities himself; he could do nothing that would give a potential adversary just cause for war. That was what Clay had said in the House during the recognition debate in 1818;¹⁰⁸ it was perhaps as restrictive a construction as had ever been given to the authority of the Commander in Chief.

C. The Monroe Doctrine

Having begun to recognize revolutionary Latin American governments in 1822, President Monroe proceeded the following year to offer them protection against European interference:

The political system of the allied powers is essentially different . . . from that of America. . . . We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose

¹⁰⁶ Adams, ed, 5 *Memoirs of John Quincy Adams* at 46 (cited in note 100).

¹⁰⁷ *Id* at 47.

¹⁰⁸ Because he was convinced that mere recognition would not be cause for war, Clay had conceded the President's power to declare it. But he had insisted that aid to the rebels, even without recognition, would give Spain just cause for war. 32 *Annals of Cong* 1487 (Mar 25, 1818).

independence we have, on great consideration and just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.¹⁰⁹

Earlier in the same speech Monroe had rounded out this threat by proclaiming "that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."¹¹⁰

The date was December 2, 1823, the occasion Monroe's Seventh Annual Message to Congress. It was not until 1858 that it began to be called the Monroe Doctrine. Dexter Perkins, who wrote several books about it, called it "perhaps the most important single document in American diplomatic history."¹¹¹

Monroe's pronouncement was well received in the United States.¹¹² Virtually no one questioned it at the time. Yet it posed a constitutional difficulty of the first importance.

In 1793, when President Washington proclaimed American neutrality in the wars growing out of the French Revolution, partisans of France pilloried him for interfering with Congress's exclusive authority to decide between war and peace.¹¹³ Thirty years later, when Monroe threatened to go to war with all Europe if it monkeyed with Latin America, he was given a free pass.

¹⁰⁹ James Monroe, Seventh Annual Message (Dec 2, 1823), in Richardson, ed, *2 Messages and Papers of the Presidents* at 207, 218 (cited in note 22). Richard Rush, Monroe's Minister to England, had been prepared to make a similar declaration on his own responsibility if Britain would recognize the new nations, explaining that the Government could always disown him. See J.H. Powell, *Richard Rush: Republican Diplomat, 1780-1859* 160 (Pennsylvania 1942).

¹¹⁰ James Monroe, Seventh Annual Message (Dec 2, 1823), in Richardson, ed, *2 Messages and Papers of the Presidents* at 209 (cited in note 22). This passage, initially drafted in response to Russian pretensions on the Pacific coast, was later understood to apply to Latin America as well. Perkins, *The Monroe Doctrine* at 3-4, 200 (cited in note 66). An 1824 treaty with Russia limited that power's pretensions in the Northwest. 8 Stat 302, 304, Art 3d (Apr 5, 1824; Apr 17, 1824). See Perkins, *The Monroe Doctrine* at 28. See also George Dangerfield, *The Awakening of American Nationalism, 1815-1828* 167 (Harper & Row 1965) ("Noncolonization . . . was chiefly directed against British pretensions in the Far West.").

¹¹¹ Perkins, *The Monroe Doctrine* at v (cited in note 66). The message itself was supplemented by diplomatic correspondence that, inter alia, reaffirmed as to Latin America generally the no-transfer principle Congress had enunciated with respect to Florida in 1811. See Bemis, *Foreign Policy* at 394-96 (cited in note 44); 2 Stat 666 (Jan 15, 1911) (described in text accompanying note 18).

¹¹² See Ammon, *James Monroe* at 489-90 (cited in note 44), and authorities cited therein; Perkins, *The Monroe Doctrine* at 144-49 (cited in note 66); Whitaker, *The Independence of Latin America* at 524 (cited in note 66).

¹¹³ See Currie, *The Federalist Period* at 174-80 (cited in note 2).

In terms of the policy underlying the constitutional provision the public response to these two events was precisely backwards. The reason for giving Congress power to declare war was to keep the country out of hostilities without popular approval. Washington's action was fully in accord with this principle, for its thrust was to prevent an undeclared war. Monroe's threat was the opposite: It seemed to commit the nation to a war that Congress had never declared.

Of course Monroe neither declared war nor initiated hostilities against any nation in his 1823 speech. Nor did he so plainly risk war by giving other nations just cause for military action as he would have by selling arms to South American rebels or even, arguably, by unilaterally recognizing the revolutionary governments.¹¹⁴ And of course, as Adams emphasized, the President could not commit the country to fight for South America even if he tried, since only Congress could declare war.¹¹⁵ Nor did he really profess to do so. To warn that intervention would be a "manifestation of an unfriendly disposition" and "dangerous to our peace and safety" was only to say we would not take kindly to it; it was not to promise that we would respond by going to war.¹¹⁶

That said, Monroe's speech remains a highly belligerent utterance that risked war in two ways and thus significantly increased the risk that the decision might be taken out of congressional hands. First, like the recognition or provisioning of rebel governments, even a veiled threat of military support for them might be viewed by European powers as a hostile act justifying military action against the United

¹¹⁴ One of the questions Monroe posed to his Cabinet for discussion in 1817 was whether sending a minister to a new state unacknowledged by its parent country would give that nation "a justifiable cause of war." Hamilton, ed, 6 *The Writings of James Monroe* at 31 (cited in note 48). See also the arguments of Representatives Clay and Tucker described above in text accompanying notes 74 and 75.

¹¹⁵ Adams, ed, 6 *Memoirs of John Quincy Adams* at 208 (cited in note 60).

¹¹⁶ James Monroe, Seventh Annual Message (Dec 2, 1823), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 209 (cited in note 22). Secretary of State Clay made this clear in a letter to the U.S. chargé d'affaires in Buenos Ayres in 1828:

The declaration of the late President . . . must be regarded as having been voluntarily made, and not as conveying any pledge or obligation, the performance of which foreign nations have a right to demand. When the case shall arrive, if it should ever occur, of such an European interference as the message supposes, and it becomes consequently necessary to decide whether this country will or will not engage in war, Congress alone, you well know, is competent, by our Constitution, to decide that question. In the event of such an interference, there can be but little doubt that the sentiment contained in President Monroe's message, would still be that of the People and Government of the United States.

Letter from Henry Clay to John M. Forbes (Jan 3, 1828), in Seager, Winslow, and Hay, eds, 7 *The Papers of Henry Clay* at 6 (cited in note 93), also quoted in Dangerfield, *The Era of Good Feelings* at 304–05 (cited in note 41). See also Bemis, *Foreign Policy* at 406 (cited in note 44) (stressing the "non-binding" nature of the Doctrine); Letter from James Monroe to Richard Rush (Dec 17, 1823), quoted in Ammon, *James Monroe* at 489 (cited in note 44).

States. Of course one of the hopes in making the declaration was that it might deter European intervention by increasing its costs to the invading parties.¹¹⁷ Yet there was always the risk that it might backfire and divert European aggressions against the United States.

Second, while the declaration left Congress legally free not to respond to intervention by declaring war, as a practical matter it severely limited the legislature's freedom of action. There would be great quantities of egg on the nation's collective face if, after such a pompous boast, it allowed Spain or France to suppress South American independence without a fight. Congress would be under enormous pressure not to permit such a humiliating blow to the credibility and prestige of the United States. It would no longer be a free agent in deciding whether or not to go to war.¹¹⁸ Indeed despite his repeated protestations that nothing the President said could bind Congress, that seems to have been just what Secretary Adams had in mind. "My paper," he told his diary with reference to a draft statement containing the essence of the policy ultimately stated in the President's address, "would certainly commit us as far as the Executive constitutionally could act on this point."¹¹⁹

Although Adams acknowledged the desirability of obtaining congressional support for the President's policy, the Administration did nothing to obtain it—at least in part because, as Adams noted in his diary, to do so would have required it to divulge communications it had promised to keep confidential.¹²⁰ Speaker Clay proposed just such a resolution in the House,¹²¹ but it was neither voted on nor discussed; for it was appended to a doomed proposal to appropriate money to send a diplomatic agent to the revolutionary government in Greece.¹²²

¹¹⁷ See Adams, ed, 6 *Memoirs of John Quincy Adams* at 206, 208 (cited in note 60); Whitaker, *The Independence of Latin America* at 512 (cited in note 66).

¹¹⁸ Attorney General William Wirt, the only Cabinet member to express doubts about promulgation of the Doctrine, thought the country would be unwilling to go to war to protect Latin American independence and agreed it would be bad for the United States to make a threat and not live up to it: "To menace without intending to strike was neither consistent with the honor nor the dignity of the country." Adams, ed, 6 *Memoirs of John Quincy Adams* at 205 (cited in note 60). Adams himself, responding to Wirt's concern, noted that if it were practicable he would wish for a joint resolution of both Houses in support of the President's position. *Id.* at 202.

¹¹⁹ *Id.* One is reminded again of President Roosevelt's vigorous efforts to shoehorn the United States into World War II.

¹²⁰ *Id.* Since a warning such as the President meant to deliver "may lead to war, the declaration of which requires an act of Congress," Jefferson advised him, "the case shall be laid before them for consideration at their first meeting" Letter from Thomas Jefferson to James Monroe (Oct 24, 1823), in Paul Leicester Ford, ed, 12 *The Works of Thomas Jefferson* 318, 321 (Putnam 1905).

¹²¹ 41 *Annals of Cong* 1104 (Jan 20, 1824).

¹²² See 41 *Annals of Cong* 805 (Dec 8, 1823) (Rep Webster):

Resolved, that provision ought to be made, by law, for defraying the expense incident to the appointment of an agent, or commissioner, to Greece, whenever the President shall deem it

The Greek proposal raised all the questions of interference with executive prerogative¹²³ that had attended Clay's parallel suggestion involving South America five years before.¹²⁴ It also contradicted the third principle of Monroe's famous address, which reaffirmed the nation's longstanding reluctance to involve itself in European affairs.¹²⁵ After enduring several days of concentrated attack the Greek resolution vanished without a trace, and that was the last of reported legislative response to the Monroe Doctrine in the Congress to which it was announced.¹²⁶

Thus if the President's proclamation trampled upon congressional territory, Congress at the time seemed unconcerned.¹²⁷ No sooner had the popular Monroe left the Presidency, however, than Members of Congress began to find fault with his position, though usually without criticizing him by name. His hapless successor was to reap the blame for a policy the two had hammered out together¹²⁸ and for which Monroe himself had received most of the praise.

D. The Panama Congress

John Quincy Adams had been a superb Secretary of State. He owed his Presidency, however, to the overrepresentation of small

expedient to make such appointment.

¹²³ See 41 Annals of Cong 1197–98 (Jan 24, 1824) (Rep Fuller); 41 Annals of Cong 1205–09 (Jan 26, 1824) (Rep Smyth).

¹²⁴ See text accompanying notes 69–77.

¹²⁵ Describing Americans as “anxious and interested spectators” of European affairs, Monroe had added that “[i]n the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do.” James Monroe, Seventh Annual Message (Dec 2, 1823), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 218 (cited in note 22). For an earlier statement of this policy, see President Washington's Farewell Address (Sept 17, 1796), in Richardson, ed, 1 *Messages and Papers of the Presidents* at 213, 221–23 (cited in note 3). For invocation of this policy against Webster's proposed resolution, see 41 Annals of Cong 1131–32 (Jan 21, 1824) (Rep Cary); id at 1138 (Rep Wood); 41 Annals of Cong 1211 (Jan 26, 1824) (Rep Smyth). In an earlier draft of his message, Monroe himself had proposed sending an envoy to Greece; Adams had talked him out of it. See Adams, ed, 6 *Memoirs of John Quincy Adams* at 194–96 (cited in note 60); Dangerfield, *The Era of Good Feelings* at 298 (cited in note 41).

¹²⁶ Clay withdrew his proposal to give legislative backing to the Monroe Doctrine, saying it was no longer necessary. 42 Annals of Cong 2763–64 (May 26, 1824).

¹²⁷ Perkins described the congressional reaction as “reserve[d].” Perkins, *The Monroe Doctrine* at 148 (cited in note 66).

¹²⁸ For the relative contributions of Adams and Monroe to the development of the Doctrine, see Bemis, *Foreign Policy* at 407–08 (cited in note 44); Perkins, *The Monroe Doctrine* at 100–03 (cited in note 66). For a general discussion, see Worthington C. Ford, *John Quincy Adams and the Monroe Doctrine*, 7 *Am Hist Rev* 676 (1902) and 8 *Am Hist Rev* 28 (1902); Whitaker, *The Independence of Latin America* at 472–91 (cited in note 66) (concluding that the “chief architects” of the nonintervention policy were Jefferson and Monroe). U.S. policy, Jefferson had suggested in an 1808 letter to the Governor of Louisiana, “must be to exclude all European influence from this hemisphere.” Letter from Thomas Jefferson to W.C.C. Claiborne (Oct 29, 1808), in Ford, ed, 11 *The Works of Thomas Jefferson* 55 (Putnam 1905).

states in the process of selection by the House when no candidate received a majority of the electoral votes.¹²⁹ Supporters of his assorted opponents missed few opportunities to obstruct or embarrass the new Administration, not least in the field of foreign affairs.¹³⁰

In his very first communication to Congress, in December 1825, President Adams disclosed that several of the new Latin American nations had determined to hold a "congress" in Panama "to deliberate upon objects important to the welfare of all." They had invited the United States to participate. "The invitation has been accepted," said the President, "and ministers on the part of the United States will be commissioned to attend at those deliberations, and to take part in them so far as may be compatible with that neutrality from which it is neither our intention nor the desire of the other American States that we should depart."¹³¹

Three weeks later the President expanded on this message. He appeared to bend over backward in his desire to indicate that in accepting the invitation he had intended no slight to the interests of the House or Senate:

Although this measure was deemed to be within the constitutional competency of the Executive, I have not thought it proper to take any step in it before ascertaining that my opinion of its expediency will concur with that of both branches of the Legislature, first, by the decision of the Senate upon the nominations to be laid before them, and, secondly, by the sanction of both Houses to the appropriations, without which it can not be carried into effect.¹³²

He went on to specify in some detail the advantages of U.S. participation in the projected assembly. New nations might be talked out of discriminatory trade regulations and into a joint policy of respect for neutral shipping; they might be persuaded to promote religious liberty; they might be egged on to terminate their continuing squabbles and abandon any associated schemes detrimental to the United States.

¹²⁹ See US Const Art II, § 1 and Amend XII; 1 *Register of Debates in Congress* 526–27 (Gales and Seaton 1825).

¹³⁰ See Dangerfield, *The Era of Good Feelings* at 359–60 (cited in note 41) (adding that "the leading spirit" of this coalition was New York Senator Martin Van Buren). After the mid-term elections in 1826 the President faced hostile majorities in both Houses of Congress. *Id.* at 396–97.

¹³¹ John Quincy Adams, Special Message (Dec 6, 1825), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 299, 302 (cited in note 22). For brief summaries of the Panama controversy, see Dangerfield, *The Era of Good Feelings* at 360–63 (cited in note 41); Van Deusen, *Life of Henry Clay* at 204–09 (cited in note 10); Whitaker, *The Independence of Latin America* 564–602 (cited in note 66).

¹³² John Quincy Adams, Special Message (Dec 26, 1825), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 318 (cited in note 22), also reprinted in Asbury Dickins and James C. Allen, eds, 5 *American State Papers (Foreign Relations)* 834 (Gales and Seaton 1858).

Above all, the conference might serve to cement U.S. friendship (and influence, which he did not have to mention) with the new nations of Latin America: "[A] decisive inducement with me for acceding to the measure is to show by this token of respect to the southern Republics the interest that we take in their welfare and our disposition to comply with their wishes."¹³³ The message concluded by requesting Senate consent to the appointment of two "envoys extraordinary and ministers plenipotentiary to the assembly of American nations at Panama," and of a third individual as "secretary to the mission."¹³⁴

Improbable as it seems, this sensible proposition generated a storm of assaults on the Administration, a number of which were based on the Constitution.

The first blow was struck by the Senate Committee on Foreign Relations in a report made by Nathaniel Macon of North Carolina, one-time Speaker of the House and a Republican of the old school. In passing on nominations for offices that had never been filled or authorized by statute, he said, it was the Senate's responsibility to evaluate not only the fitness of the candidates but also the expediency of their mission; and it was inexpedient for the United States to participate in the Panama Congress. Both the objects of that assembly and the powers of its members were undefined; the topics of discussion suggested by the President were either improper or could be better pursued elsewhere; other participants had said their principal purpose was to conclude a defensive alliance that it would be improper for the United States to join. The entire enterprise, the report concluded, was inconsistent with the longstanding policy of avoiding entanglement in other nations' affairs, and the nominations should not be approved.¹³⁵

From the constitutional perspective there was nothing wrong with this report. Macon might be benighted and provincial in his approach to foreign affairs, but that was his prerogative. He was right that the requirement of Senate consent was intended as a check on presidential appointments, and the Senate had long employed it to test not only the qualifications of diplomatic appointees but the desirability of making any appointments at all.¹³⁶

¹³³ John Quincy Adams, Special Message (Dec 26, 1825), in Richardson, ed, *2 Messages and Papers of the Presidents* at 318–19 (cited in note 22).

¹³⁴ *Id.* at 320. Adams expanded on this explanation in another excellent communication to the House on March 15, 1826, Richardson, ed, *2 Messages and Papers of the Presidents* at 329–40 (cited in note 22). Copious documents supplied to the Senate in connection with the December 26 message, and others submitted in response to a later House inquiry, are printed in *2a Register of Debates in Congress* 43–85 (Gales and Seaton 1826).

¹³⁵ *2a Register of Debates in Congress* at 92–100 (cited in note 134).

¹³⁶ While he was Secretary of State, Jefferson had sternly lectured the Senate that where the President chose to send ministers was none of the Senate's business, but in 1813 the Senate had

Taking the floor to defend Macon's report, Senator Robert Hayne of South Carolina—soon to become famous for his celebrated exchanges with Webster over the protective tariff—argued that the objects of the Panama Congress were “essentially belligerent,” and that participation by the United States would be a departure from neutrality that would give European states cause for war.¹³⁷ Moreover, a principal purpose of the assembly, Hayne asserted, was to induce the United States to enter into treaties to redeem “the pledge which Mr. Monroe is supposed to have given, ‘not to permit any foreign power to interfere in the war between Spain and her colonies.’”¹³⁸

President Monroe, said Senator Hayne, had made no such pledge. President Monroe had had no right to do so. In warning that the United States would view European interference as “dangerous” and “unfriendly” he had left the nation “free to act in any emergency according to circumstances and a sense of our own interests.” Monroe's declaration had created “no obligation to others,” but apparently the new nations had perceived one. Worst of all, “the new Administration” appeared to have acknowledged their claims. For Joel Poinsett, U.S. Minister to Mexico, had assured the Mexican government that “the United States had pledged themselves not to permit any other power to interfere either with their independence or form of Government.”¹³⁹ Furthermore, the new Secretary of State (who was none other than the fire-breathing Henry Clay) had announced that the United States would permit the conquest of Cuba by Mexico or Colombia but would not allow Spain to transfer that island to any other European power.¹⁴⁰

As all of this was bad policy, Hayne continued, the Senate ought not to approve participation in a congress that was designed to confirm it.¹⁴¹ More important for present purposes, he added that in attempting to commit the United States on these matters the Adams Administration had exceeded its constitutional powers:

rejected the nomination of Jonathan Russell on the ground that “it is inexpedient, at this time, to send a Minister Plenipotentiary to Sweden.” 26 *Annals of Cong* 97–98 (June 24, 1813). The House had asserted the same authority in passing upon appropriations to pay diplomatic salaries. See Currie, *The Federalist Period* at 45 n 267, 218 n 93 (cited in note 2).

¹³⁷ 2 *Register of Debates in Congress* 152–57 (Gales and Seaton 1826).

¹³⁸ *Id.* at 161.

¹³⁹ *Id.* at 162. Yes, Mr. Poinsett was also an amateur botanist, to whom we are indebted every winter when we bedeck our homes with large red or white flowers—which are really, as everyone knows, nothing but misguided leaves. See J. Fred Rippy, *Joel Roberts Poinsett, Versatile American* 205 (Greenwood 1968) (first published in 1935); “Poinsetta” in 9 *The New Encyclopaedia Britannica* 545 (Encyclopaedia Britannica 15th ed 1998).

¹⁴⁰ 2 *Register of Debates in Congress* at 168 (cited in note 137).

¹⁴¹ *Id.* at 164, 169.

The true Constitutional ground is, that the President has no right to pledge this nation, either as to our not permitting any foreign nation to take Cuba, or as to there being no ground to interfere to prevent its capture by the new Republics.¹⁴²

And thus the debate over the Panama Congress became yet another debate on the respective powers of the President and of Congress in the field of foreign affairs.

Before he sat down, Hayne took an additional pot shot at the President. In his initial message Adams, in announcing his acceptance of the invitation to Panama, had imperiously declared that ministers would be commissioned to attend; only later had he said anything of requesting Senate consent to their appointment, and even then he had insisted that he had the right to act on his own. But these ministers were not mere "private agents" like those Monroe had sent to gather information before proposing to recognize the new republics; the fact that they were to be "commissioned" demonstrated that they were officers of the United States whose appointment was governed by Article II. That meant they could not be appointed, in the absence of statute, without Senate approval.¹⁴³

Thus Hayne contrived to inject two major constitutional issues into the Panama debate: the President's power to commit the nation to military action and the scope of the Senate's right to pass upon nominations to federal office.

After much haggling the Senate confirmed the appointments, and Congress appropriated the funds to support their mission.¹⁴⁴ The Senate spent the better part of a week debating a separate motion to adopt Hayne's position that the President lacked authority to appoint ministers without Senate consent.¹⁴⁵

¹⁴² Id at 169.

¹⁴³ Id at 171–72. For critical dissection of Hayne's and others' distinctions in this debate, see Henry M. Wriston, *Executive Agents in American Foreign Relations* 226–37 (Johns Hopkins 1929). Wriston also concludes that "[t]he temporary and transient character of their duties" was the "decisive factor" in distinguishing agents whom the President could appoint on his own from "officers" whose appointment required Senate approval. Id at 170.

¹⁴⁴ In the House discussion there were echoes of the great 1795 debate over whether Congress was *required* to appropriate money for actions taken by the President and Senate within their constitutional powers, but nothing of interest was added. See 2a *Register of Debates in Congress* at 2169 (cited in note 134) (Rep Buchanan); id at 2197–98 (Rep Livingston); id at 2352 (Rep Ingham); id at 2472, 2484–88 (Rep Polk); id at 2482 (Rep Wood); id at 2491–92 (Rep McDuffie); Currie, *The Federalist Period* at 211–17 (cited in note 2).

¹⁴⁵ The U.S. Ministers never made it to Panama, and "[t]he Congress never came to anything." Dangerfield, *The Era of Good Feelings* at 365–66 (cited in note 41). For a somewhat brighter assessment, see Whitaker, *The Independence of Latin America* at 581–82 (cited in note 66). A report from President Adams to the House committee detailing what actually happened at the Congress appears in Asbury Dickins and James C. Allen, eds, 6 *American State Papers (Foreign Relations)* 356–66 (Gales and Seaton 1859).

Additional constitutional objections were ventilated in the course of these tiresome proceedings. The President could not make recess appointments to new diplomatic positions, because no vacancy had "happen[ed]" during the recess.¹⁴⁶ He could not create the offices in question by making appointments, even with Senate consent, because diplomats not accredited to any particular country were not "ambassadors and other public ministers" within the meaning of Article II.¹⁴⁷ Most significantly, in the words of New York Senator Martin Van Buren, not even Congress itself could authorize the Government to participate in the Panama Congress. For that Congress was no mere diplomatic meeting to discuss common concerns. A line-by-line comparison of its charter with the Articles of Confederation, Senator Benton argued, exposed the Panama Congress as the "Congress of Deputies" of a new Pan-American confederacy.¹⁴⁸ Such a body was "unknown to the Constitution," and the United States could not be a party to it.¹⁴⁹ For as Van Buren's proposed resolution proclaimed,

the power of forming or entering, (in any manner whatever), into new political associations, or confederacies, belongs to the People of the United States, in their sovereign character, being one of the powers which, not having been delegated to the Government, is reserved to the States or People¹⁵⁰

The arguments about recess appointments and agents who were not "officers" were not new, and nothing new was offered to support or refute them. The argument that "ministers" could be appointed only to particular countries had little to recommend it in light of the apparent purpose of the appointment provision; the nation may need representatives to international assemblies as well as to individual states.

The argument against participating in the Congress at all was more arresting and of greater import for the future. It would emerge again 120 years later in opposition to joining the United Nations. Moreover, as an abstract proposition there was a good deal to be said for it. Nowhere in the Constitution was Congress, let alone the Presi-

¹⁴⁶ 2 *Register of Debates in Congress* at 601-14 (cited in note 137) (Sen Tazewell).

¹⁴⁷ Id at 149 (Sen Van Buren); id at 292-94 (Sen Berrien). "The established view," wrote Professor Corwin, "is clearly that the term . . . comprehends 'all officers having diplomatic functions, whatever their title or designation.'" Corwin, *The President's Control of Foreign Relations* at 57 (cited in note 98).

¹⁴⁸ 2 *Register of Debates in Congress* at 312-20 (cited in note 137). See also id at 265-71 (Sen Holmes).

¹⁴⁹ Id at 321, 340 (Sen Benton).

¹⁵⁰ Id at 149. See also 2a *Register of Debates in Congress* at 2142 (cited in note 134) (Rep Hamilton) (characterizing the Panama Congress as a threat to the United States' sovereignty); id at 2495-98 (Rep McDuffie) (arguing that no branch of the government had the power to send delegates to the Panama Congress).

dent, given express or implied authority to transfer sovereign powers to an international body.¹⁵¹

However, it was pure fantasy to suppose that sending ministers to Panama would have any such effect. Even Benton's painstaking parsing of the treaties that laid the ground rules for the Congress revealed that its "deputies" were to have none of the powers that had made the Continental Congress a governmental assembly, and the relevant texts expressly denied that the "compact of union, league, and Confederation" they aimed to establish would limit the sovereignty of its adherents in any way.¹⁵² More important, the United States was not a party to these treaties, and it should have been obvious from President Adams's earlier statements that, as he made crystal clear after Van Buren's motion had been defeated, the ministers would have authority only to talk:

I can scarcely deem it otherwise than superfluous to observe that the assembly will be in its nature diplomatic and not legislative; that nothing can be transacted there obligatory upon any one of the States to be represented at the meeting, unless with the express concurrence of its own representatives, nor even then, but subject to the ratification of its constitutional authority at home. The faith of the United States to foreign powers can not otherwise be pledged. I shall, indeed, in the first instance, consider the assembly as merely *consultative*; and although the plenipotentiaries of the United States will be empowered to receive and refer to the consideration of their Government any proposition from the other parties to the meeting, they will be authorized to conclude nothing unless subject to the definitive sanction of the Government in all its constitutional forms.¹⁵³

¹⁵¹ Contrast the French and German constitutions, both of which expressly authorize the transfer of governmental powers to cited supranational organizations such as the European Union, and the grudgingly narrow constructions that continue to be given them in the interest of ensuring democratic legitimacy for such modifications of national sovereignty. German Const Art 23, reprinted in Gilbert H. Flanz, ed, *7 Constitutions of the Countries of the World* 115–16 (Oceana 1994); 89 BVerfGE 155 (1993); French Const Art 88-1–88-3, reprinted in Gilbert H. Flanz, ed, *7 Constitutions of the World* (Supp) 11 (Oceana 1994); French Const Art 88-2 (amended Jan 25, 1999), amended version reprinted in *7 Constitutions of the World* at 3 (Oceana May 1999); 308 DC (1992).

¹⁵² *2 Register of Debates in Congress* at 318–19 (cited in note 137).

¹⁵³ John Quincy Adams, Special Message (Mar 15, 1826), in Richardson, ed, *2 Messages and Papers of the Presidents* at 336–37 (cited in note 22); Dickins and Allen, eds, *5 American State Papers* at 882, 885 (Mar 17, 1826) (cited in note 132). See also his earlier assurances, in emphasizing that the purposes of the meeting were "consult[ation]" and "discussion":

It will be seen that the United States neither intend nor are expected to take part in any deliberations of a belligerent character; that the motive of their attendance is neither to contract alliances nor to engage in any undertaking or project importing hostility to any other nation.

Jawboning, not the exercise of sovereign powers, was Adams's object in sending representatives to the Panama Congress.¹⁵⁴

The most interesting contribution of the Panama debate to constitutional discourse was the additional light it shed on the legitimacy of the Monroe Doctrine.

Senator Benton, as noted, began the debate on confirmation of Adams's ministers by suggesting that the Administration had usurped legislative authority by attempting to commit the United States to resist European meddling in the New World. Other speakers took up the suggestion. Senator Branch, speaking nominally to the proposed resolution negating the President's authority to appoint ministers without Senate consent, branded it one link in a chain of executive "usurpation" that included the current interpretation of Monroe's nonintervention policy. Monroe's original proclamation, Branch insisted, was bad enough; an "unauthorized, unmeaning, and empty menace," it had been "calculated to excite the angry passions, and embroil us with foreign nations." The present Administration's position was ever so much worse, for it claimed the right to bind the nation to protect Latin America, and of course it had no power to do anything of the sort.¹⁵⁵ For only Congress, he had no need to add, could declare war.

Senator Macon attacked Monroe himself for having, by proclaiming the nonintervention principle, contributed to the "constant increase of Executive power." And now, he complained, "they were told that this was a *pledge*, and the United States were to take the front of the battle. If every Department of this Government," he con-

John Quincy Adams, Special Message (Dec 26, 1825), in Richardson, ed, 2 *Messages and Papers of the Presidents* at 318. Secretary Clay's instructions to the U.S. envoys to the Panama Congress were entirely in accord with these observations. Letter from Henry Clay to Richard Anderson and John Sergeant (May 8, 1826), in Seager, Winslow, and Hay, eds, 7 *The Papers of Henry Clay* at 313–35 (cited in note 93).

¹⁵⁴ See also the House committee report recommending appropriations to finance the mission, 2a *Register of Debates in Congress* at 100–01 (cited in note 134). In response to a motion to limit the envoys' authority in order to ensure that they *did* nothing but talk, id at 2011 (Rep McLane), defenders of the Administration argued that for Congress to give instructions to the ministers would usurp presidential powers. Id at 2021–22 (Rep Webster); id at 2050 (Rep Wood); id at 2090 (Rep Buckner); id at 2184 (Rep Wurts); id at 2199 (Rep Livingston); id at 2216 (Rep Reed); id at 2337–38 (Rep Thomson); id at 2347–48 (Rep Garnsey). The concern expressed was legitimate; the President, not Congress, is supposed to execute the laws. Compare *Buckley v Valeo*, 424 US 1, 124–37 (1976); *Bowsher v Synar*, 478 US 714, 726 (1986); *INS v Chadha*, 462 US 919, 957–59 (1983). See also Henkin, *Foreign Affairs and the Constitution* at 249 (cited in note 39). Yet the appropriation power necessarily includes authority to determine the purposes for which the funds appropriated shall be spent, and Congress courts other constitutional objections if it *fails* to limit the discretion granted to executive officers. See Currie, *The Federalist Period* at 46, 68, 110, 165 (cited in note 2) (discussing debates over the specificity of appropriations). Like so much else in this world, the question is one of degree.

¹⁵⁵ 2 *Register of Debates in Congress* at 385–86 (cited in note 137).

tinued, “the Senate, the House of Representatives, and the President, did not watch the power which the Constitution has given them, but let it be taken from them by piece meal, who could tell where it would end.”¹⁵⁶ Representative Floyd of Virginia, in the House debate on appropriations, went one better: He had objected, he said, to Monroe’s announcement when it was made.

Sir, when that message was delivered to this House, I then rose in my place, and protested against that declaration of unwarrantable power; violating the spirit of the Constitution; assuming grounds and an attitude in regard to European Powers, calculated to involve us in the strife which there existed, and in which we had no interest; and indirectly leading to war, which Congress alone had the right to declare.¹⁵⁷

The record does not reveal Mr. Floyd’s brave contemporaneous objection. No matter; the record is not complete.

Before the appropriation debate began, Representative Charles Wickliffe of Kentucky moved that a committee be instructed to inquire “upon what authority, if any,” Poinsett had told the Mexican government that the United States was “pledged” to prevent European intervention.¹⁵⁸ A heated debate ensued in which everyone agreed that neither the President nor his agents could constitutionally commit the nation to go to war. What was disputed was whether Mr. Poinsett had done so and whether, if he had, he had acted pursuant to the instructions of the Secretary of State.¹⁵⁹ The upshot was a request to the President for additional information, including the point-blank demand whether or not the United States had ever made such a pledge.¹⁶⁰

President Adams responded with a letter from Secretary Clay that seemed to leave no room for further debate:

[T]he United States have contracted no engagement, nor made any pledge, to the Governments of Mexico and South America, or to either of them, that the United States would not permit the interference of any foreign Power with the independence or form

¹⁵⁶ Id at 633–34.

¹⁵⁷ 2a *Register of Debates in Congress* at 2446 (cited in note 134).

¹⁵⁸ Id at 1765.

¹⁵⁹ Id at 1765–68, 1798–1820. Representative Hamilton also objected to Secretary Clay’s letter directing our minister to inform the French government that the United States “could not consent to the occupation of Cuba by any other European power than Spain.” “This consent must mean fight,” said Hamilton, “or it is sheer bullying.” Representative Trimble took the wind out of his sails. Clay had said only that the United States would not consent, not that it would fight. “How far we should be inclined to go in extremities, we do not say; nor is it prudent that we should.” Id at 1804.

¹⁶⁰ Id at 1820.

of government of those nations; nor have any instructions been issued, authorizing any such engagement or pledge. It will be seen that the Message of the late President of the United States is adverted to in the extracts now furnished from the instructions to Mr. Poinsett, and that he is directed to impress its principles upon the Government of the United Mexican States. All apprehensions of the danger, to which Mr. Monroe alludes, of an interference, by the allied Powers of Europe, to introduce their political systems into this hemisphere, have ceased. If, indeed, an attempt had been made, by allied Europe, to subvert the liberties of the Southern nations on this continent, and to erect, upon the ruins of their free institutions, monarchical systems, the American people would have stood pledged, in the opinion of their Executive, not to any foreign State, but to themselves and their posterity, by their dearest interests, and highest duties, to resist, to the utmost, such attempt; and it is to a pledge of that character that Mr. Poinsett alone refers¹⁶¹

The carping continued, however, as the House proceeded to debate appropriations for the Panama assembly. Members on both sides of the present controversy leapt once again to Monroe's defense. He had made no pledge, they argued; he had merely expressed his own opinion, leaving it to Congress to carry through on his warning.¹⁶² Daniel Webster, now representing Massachusetts in the House, argued that Monroe's pronouncement had been "wise, seasonable, and patriotic."¹⁶³ It had "meant much," and it had "effected much good." It had done "great honor to the foresight and the spirit of the Government," and it had met with "the entire concurrence, and the hearty approbation of the country." There was no reason to attack it now, when the danger of European intervention was past.¹⁶⁴

Nor, Webster continued, had the Adams Administration in any way altered the sense of Monroe's policy. If Mr. Poinsett had accurately reported his conversation with the Mexican minister, "he did go too far; farther than any instruction warranted." But Poinsett had set the matter straight by making clear "that this Government had given

¹⁶¹ Letter from Henry Clay to John Quincy Adams (Mar 29, 1826), in Dickins and Allen, eds, *5 American State Papers* at 908 (cited in note 132); James F. Hopkins, et al, eds, *5 The Papers of Henry Clay* 201-02 (Kentucky 1973). Clay's innocuous instructions to Poinsett appear in Hopkins, et al, eds, *4 The Papers of Henry Clay* at 166, 171 and in Dickins and Allen, eds, *5 American State Papers* at 908-09.

¹⁶² See, for example, *2a Register of Debates in Congress* at 2172 (cited in note 134) (Rep Buchanan); id at 2190 (Rep Wurts); id at 2227 (Rep Hemphill); id at 2489 (Rep Polk).

¹⁶³ Id at 2268.

¹⁶⁴ Id at 2269-70. For an earlier statement of similar import, see id at 1810-11 (Rep Johnson of Kentucky).

no pledge which others could call upon it to redeem"; he had "deceived nobody, nor has he committed the country."¹⁶⁵

Webster did not mention the Constitution. Implicit in his argument, however, is the standard constitutional defense of the Monroe Doctrine. Of course the President had no authority to bind the United States to come to the defense of Latin America; only Congress could declare war. But neither Monroe nor his successor attempted to bind the United States. Nothing in the Constitution prevented them from warning the European powers that they *risked* war if they interfered with the independence of the new nations. In an earlier debate Webster with his usual eloquence had put the affirmative case for Monroe's declaration:

It must, of course, happen, in every Government, that the Executive should undertake to speak, towards foreign nations, of the wishes and objects of the Government. It cannot be otherwise. But this it does on its responsibility. General Washington proclaimed neutrality at the breaking out of the great European wars. But it was competent to the two Houses to present him a law, the next day, declaring war. The intercourse of nations could hardly go on, and one great end of an Executive would be defeated, if it could not venture, on proper occasions, to express the views and wishes of the Government.¹⁶⁶

Maybe. Yet of all the presidential actions of this period, the Monroe Doctrine may be the most questionable in terms of executive encroachment on legislative authority. For by issuing his declaration the President claimed the right to threaten European nations with war if they intruded into Latin American affairs. Although he could not legally commit the country to intervene, he committed its honor and prestige, made it difficult for Congress not to carry out his threat, and thus created a serious risk of provoking a war he had no power to begin. In so doing it is arguable that he effectively interfered with Congress's authority to decide whether or not to declare war.¹⁶⁷

Even in this instance, however, Monroe neither claimed the right to initiate hostilities nor committed an act of war. He had expressly denied any such right both in the Seminole controversy and in reject-

¹⁶⁵ Id at 2270.

¹⁶⁶ Id at 1808. Apart from the question whether Monroe's declaration infringed Congress's war powers, affirmative authorization for it must of course be found in the Constitution. The most promising source is the implicit power over foreign affairs asserted by Hamilton in his defense of the Neutrality Proclamation and blessed by the Supreme Court in *United States v Curtiss-Wright Corp*, 299 US 304, 315, 319-20 (1936). See Currie, *The Federalist Period* at 217-18 n 63 (cited in note 2).

¹⁶⁷ See Henkin, *Foreign Affairs and the Constitution* at 101 (cited in note 39) ("[A] President begins to exceed his authority if he willfully or recklessly moves the nation towards war.").

ing the arms request of the South American rebels. Whether or not they could really be justified, the martial acts of Madison and Monroe in Florida were explained as either defensive or authorized by statute or both—consistent with the Convention's alteration of the constitutional text to make clear that the President, in Madison's words, could "repel sudden attacks."¹⁶⁸

Thus despite the usual line-drawing and factual difficulties the express position of every President to address the subject during the first forty years of the present Constitution was entirely in line with that proclaimed by Congress in the celebrated War Powers Resolution in 1973: The President may introduce troops into hostilities only pursuant to a congressional declaration of war or other legislative authorization, or in response to an attack on the United States.¹⁶⁹

¹⁶⁸ Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 318–19 (Yale 2d ed 1937). Compare the words of John Quincy Adams, ruminating on the lessons of experience:

The respective powers of the President and Congress of the United States, in the case of war with foreign powers, are yet undetermined. Perhaps they can never be defined. The Constitution expressly gives to Congress the power of *declaring* war, and that act can of course never be performed by the President alone. But war is often made without being declared. War is a state in which nations are placed not alone by their own acts, but by the acts of other nations. . . . However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power. In the case [of Washington's Neutrality Proclamation] . . . the recognition of the French Republic and the reception of her minister might have been regarded by the allied powers as acts of hostility to them, and they did actually interdict all neutral commerce with France. Defensive war must necessarily be among the duties of the Executive Chief Magistrate.

John Quincy Adams, *The Lives of James Madison and James Monroe* 58–59 (Derby 1851). See also Tucker, 1 *Blackstone's Commentaries* at 270 n. 3 (cited in note 1) ("[I]n the practical exercise of the functions of the president of the United States, it may be found to be in the power of that magistrate to *provoke*, though not to *declare* war."); Rawle, *A View of the Constitution* at 109 (cited in note 72).

¹⁶⁹ War Powers Resolution, 87 Stat 555 (Nov 7, 1973), 50 USC §§ 1541–49 (1973). Professor Sofaer prefers to stress what he views as the discrepancy between what Madison and Monroe said and what they did:

In several key situations, they selected aggressive agents, sympathetic to administration policy, issued unnecessarily vague instructions, failed to respond to letters indicating that constitutionally questionable actions were contemplated, and suppressed information that would have revealed their conduct. In this manner . . . [they] were able to encourage activities to be undertaken that exceeded the bounds of behavior by which they publicly purported to be governed, and to place responsibility for those activities upon others.

Sofaer, *War, Foreign Affairs, and Constitutional Power* at 379 (cited in note 41).