

# COMMENTARY

## THE CONSTITUTION AND THE PREVENTION OF NUCLEAR HOLOCAUST: A REACTION TO PROFESSOR BANKS\*

*Stephen L. Carter\*\**

Not long ago, the Soviet Union pledged that it would refrain from making a first use of nuclear weapons—turning a conventional conflict into a thermonuclear one—if the United States would commit a similar undertaking.<sup>1</sup> To the surprise of almost no one, the United States declined this invitation. American military strategists have long considered retention of the “nuclear option” as crucial to the defense of Western Europe in the event of invasion by a Warsaw Pact force that threatened to overwhelm its conventionally armed opposition.<sup>2</sup> American determination not to surrender this option may be wise or foolish,<sup>3</sup> but it remains a controversial cornerstone of NATO defense policy.

In an age when no thinking person can help worrying about the possibility of nuclear holocaust, it is quite natural that some fears would come to focus on the likelihood that the President of the United States—usually referred to as “one man” or “a single individual”—might, through a wrong decision, be the one who decides to make the first use of nuclear weapons and thus turns a conventional conflict into what might be the last war this planet will ever suffer. In a society that, like ours, prides itself on the rule of law, this debate on the morality of policy has been transformed (perhaps inevitably) into one over the wisdom and constitutionality of legislation to hold the President back.

This is the background against which Professor William C. Banks, in a recent article in the *Journal of Legislation*, has argued that the Congress possesses the power to forbid the President to order a first use of nuclear weapons unless he first receives the permission of a special committee com-

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\*\* Professor of Law, Yale University. B.A., Stanford University, 1976; J.D., Yale University, 1979.

1. *Soviet Forswears Using A-Arms First*, N.Y. Times, June 16, 1982, at 1, col. 3 (pledge made by Brezhnev).
2. For a critical but quite readable history of this doctrine, see S. ZUCKERMAN, *NUCLEAR ILLUSION AND REALITY* 59-78 (1982). Although the distinction is qualitative rather than quantitative, and drawing a brightline is therefore impossible, it is useful to distinguish “first use”—the expenditure of any nuclear weapon of any yield for any hostile purpose—from “first strike”—a pre-emptive strategic attack aimed at crippling an adversary’s ability to respond. Thus the detonation of single atomic mine would be a first use of nuclear weapons, but it certainly would not constitute a first strike.
3. Compare Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 *FOREIGN AFF.* 753 (1982) (policy to maintain the first use option is foolish) with Kaiser, Leber, Mertes & Schulze, *Nuclear Weapons and the Preservation of Peace*, 60 *FOREIGN AFF.* 1157 (1982) (policy is wise).

prising leaders of the House of Representatives and the Senate.<sup>4</sup> This proposal, put forth by the Federation of American Scientists ten years ago and recently revived,<sup>5</sup> is aimed at limiting the likelihood that the United States will be engulfed in nuclear war, or at least, preventing a single man and his close advisers from making the decision to "go."<sup>6</sup>

Professor Banks offers a three-part argument in support of the FAS proposal, which was the subject of a recent conference at Airlie House, Virginia.<sup>7</sup> First, he contends that the restriction on presidential first use represents "a constitutionally permissible clarification" of congressional authority.<sup>8</sup> Second, he maintains that the committee approval device is not a legislative veto as the Supreme Court used the term in *Immigration and Naturalization Service v. Chadha*,<sup>9</sup> which struck down most forms of that veto.<sup>10</sup> Third, he argues that even if characterized as a veto, the approval requirement does not possess "the formal constitutional defects" which led to the Court's decision in *Chadha*.<sup>11</sup>

My own conclusion that the FAS proposal would not likely survive constitutional scrutiny is a matter of record,<sup>12</sup> and I will not reprise it here. But I do believe that Professor Banks' careful and scholarly argument deserves a thoughtful and independent response. In this brief commentary, I will not quarrel with his arguments on whether this clarification is constitutionally permissible, although I think it is not, or on whether the committee approval device constitutes a veto, although I think quite clearly that it does. I will instead focus on the last part of his argument, that even if characterized as a veto, the FAS proposal suffers no formal constitutional defects. I believe that it does, not because of *Chadha's* conclusion on legislative vetoes, but rather because the history and special nature of the congressional war power prohibit its delegation to a committee empowered to do what the FAS proposal would permit. The Congress should concern itself far more that it has with the prevention of nuclear war, particularly through a more careful scrutiny of the deployment of American armed forces and the procurement of particular weapons systems, but this proposal is not a permissible means for reaching its quite admirable goal.

I recognize that the non-delegation doctrine is at once hoary and venerable, and probably generates on sight or hearing a well-justified skepticism. To many lawyers, non-delegation is something that an activist Supreme

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4. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1 (1986).

5. See Stone, *Presidential First Use is Unlawful*, FOREIGN POL'Y, Fall 1984, at 94. Cf. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21 (1982) (suggesting that *all* uses of nuclear weapons may be unconstitutional).

6. Stone, *supra* note 5, at 109-12.

7. The conference, entitled "First Use of Nuclear Weapons: Under the Constitution, Who Decides?," was held at Airlie House on November 15-17, 1985.

8. Banks, *supra* note 4, at 4.

9. 462 U.S. 919 (1983).

10. See Banks, *supra* note 4, at 3-4.

11. *Id.*

12. See S. Carter, *Warmaking Under the Constitution and the First Use of Nuclear Weapons* (unpublished manuscript on file in the *Journal of Legislation* office).

Court invented in order to gut the New Deal,<sup>13</sup> or perhaps something that a couple of Justices of another activist Supreme Court hope to use to gut the modern administrative state that the New Deal and the Second World War combined to spawn.<sup>14</sup> There is a form of non-delegation doctrine that perhaps deserves that description, the form that insists that some decisions require legislative discretion and therefore must be made by the legislature.<sup>15</sup>

My concern with delegation problems in the FAS proposal is, however, somewhat narrower. That discretion is delegated is irrelevant. What does matter is that the proposal would permit a handful of members of the Congress to exercise an authority that *quite possibly cannot be exercised at all*; but one which, if it can be exercised, was assigned by those who wrote and ratified the Constitution to the Congress as a whole. As I will argue in the following pages, because the FAS proposal permits a slice of the congressional war power to be exercised instead by a delegate of the Congress—and this is the net effect of the proposal—it does violence to the carefully crafted system of checks and balances of which the shared warmaking authority forms a part.

To understand the application of that doctrine to the facts at hand, it is necessary first to follow the shape of congressional and presidential authority to make war. The Constitution establishes the President as the Commander-in-Chief,<sup>16</sup> but reserves to the Congress the authority to declare war,<sup>17</sup> to regulate the armed forces,<sup>18</sup> and to provide for their support.<sup>19</sup> Those who wrote and ratified the Constitution thought that this system adequately provided for defense of the nation's interests while striking a balance that would not permit either the President or the Congress to decide alone when to fight.

Over the nation's history, of course, things have not been quite so simple. The President has quite frequently decided alone when to fight, and not always because foreign invaders forced the choice on him. He has done so far more often than the Congress has; and if the Congress can be said to have concurred, it has almost always been through appropriations bills or mere silence.<sup>20</sup> Indeed, while one of the nation's most tragic conflicts, the

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13. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

14. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., joined by Burger, C.J., dissenting); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

15. Cf. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693-97 (1975) (evaluating prospects for revival of the doctrine). *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), does suggest that even the New Deal Court contemplated a softer non-delegation doctrine in the field of foreign affairs, but, as the Court's opinion there makes clear, only when the delegate is the President of the United States, who possesses constitutional authority of his own.

16. U.S. CONST. art. II, sec. 2.

17. U.S. CONST. art. I, sec. 8, cl. 11.

18. U.S. CONST. art. I, sec. 8, cl. 16.

19. U.S. CONST. art. I, sec. 8, cls. 12-13.

20. Students of the war power have compiled long lists of historical episodes in which the Congress has acquiesced in presidential exercise of a broad discretion to commit American armed forces to battle on his own initiative. See, e.g., L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 284-99 (1985); W. REVELEY III, *WAR POWERS OF THE PRESIDENT AND*

Vietnam War, was justified by reference to a congressional resolution that might well have constituted a declaration of war,<sup>21</sup> the bloodiest conflict in the nation's history, the Civil War, was never formally declared by the Congress. The past two centuries have witnessed only a handful of formal declarations by the Congress, but the Presidents have rarely hesitated to send troops into battle when the Chief Executive's advisers have determined that the nation's interests are at risk.

This history—along with panicky finger-pointing following popular disenchantment with American participation in the war in Vietnam—confronted the Congress when in 1973 it forced the War Powers Resolution on a weakened President Nixon.<sup>22</sup> I have never been fully persuaded of the Resolution's wisdom, but I have few doubts about its constitutionality. I have argued elsewhere that a court confronting the question would probably rule the Resolution constitutional, notwithstanding its extensive legislative veto provisions.<sup>23</sup> This conclusion rests on my understanding of the unique nature of the shared war power. Although the matter is controversial, I will accept here the assumption shared by Professor Banks and most of the writers in this area: The declaration clause was aimed at preventing the nation from entering an offensive war without congressional consent.<sup>24</sup> In supporting the constitutionality of the War Powers Resolution, I further argued that the Congress enjoys some discretion over the manner in which it may exercise its declaration power, and that it may place procedural limitations on presidential activities, as long as those limitations are aimed at preserving for the Congress as a whole the power the Constitution seems to contemplate.<sup>25</sup> Thus, the power may be exercised either directly or through a device that permits the requisite consent—or its failure—to be made manifest.

But this consent must be the consent of the entire Congress, for under the Constitution, that is the only consent that matters. No lesser or different body can act in the legislature's stead, and no plan not providing a functional *equivalent* of that consent should stand. The entire plan for sharing the war power would be upset were the Congress entitled to delegate this authority to declare war. The restrictions on presidential freedom contained in the War Powers Resolution are constitutional under this theory because they effectively prohibit the President from fighting an offensive war unless the entire Congress, through majority votes in both Houses, manifests its consent.<sup>26</sup> The FAS proposal provides for something entirely different.

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CONGRESS 116-69 (1981); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 851-70 (1972).

21. See Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964) (Gulf of Tonkin Resolution).
22. 50 U.S.C. § 1541 (1982). For background on the adoption of the Resolution, see W. REVELEY III, *supra* note 20, at 225-34; Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV., 101, 102-05 (1984).
23. Carter, *supra* note 22, at 116-33. The War Powers Resolution includes two relevant provisions that might be characterized as legislative vetoes, section 5(b), requiring the President to withdraw American armed forces from wherever he may have sent them if he does not receive congressional permission within 60 days of their deployment, and section 5(c), requiring the President to withdraw the forces immediately if the Congress so demanded through a concurrent resolution.
24. Banks, *supra* note 4, at 16.
25. Carter, *supra* note 22, at 116-28.
26. *Id.* at 116-26.

Under the proposal, a committee of powerful members of the Congress, not the Congress itself, would be authorized to grant or deny a presidential request to make a first use of nuclear weapons.<sup>27</sup> Functionally, then, it is the committee that must make manifest the consent or lack of consent by the Congress.<sup>28</sup> The only problem is that it is logically impossible for any committee other than a committee of the whole to do so. Even if unanimous, the vote of the committee is only a vote of its members; it is not the consent or refusal of consent of the Congress itself.

Thus, I fear that simply as a matter of constitutional structure, the argument pressed by Professor Banks fails. For no matter how strong his argument that the FAS proposal contemplates no veto, no matter how earnestly he believes that there is no presentment difficulty, no matter how shrewdly he makes the case that the President would otherwise be unfettered, the proposal still founders on the requirements of bicameralism. Nothing in the Constitution suspends that requirement when the Congress finds that emergency conditions exist. Nor would it be wise to read the document that way. "Emergency" has over time proved all too malleable a justification for otherwise unconstitutional government action.<sup>29</sup>

In an effort to bolster his claim that the committee proposal furthers rather than offends constitutional goals, Professor Banks appeals to the history of the Constitution's drafting and ratification. In his discussion of constitutional history, Professor Banks writes:

It was the Executive, not Congress, whose potential for abuse of war power was the subject of lively discussion at the convention and was examined in the *Federalist*. The careful attention paid to the "declare war" language by the Framers demonstrates their concern that the President's powers be checked so that he would only be able to commit troops without a declara-

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27. Banks, *supra* note 4, at 2-3. The FAS proposal provides that:

[i]n any given conflict or crisis, whatsoever, and notwithstanding any other authority, so long as no nuclear weapons (or other weapons of mass destruction) have been used by others, the President shall not use nuclear weapons without consulting with, and securing the assent of a majority of, a committee composed of the:

President Pro Tempore of the Senate and Speaker of the House of Representatives  
Majority and Minority Leader of the House of Representatives  
Majority and Minority Leader of the Senate  
Chairman and Ranking Minority Member of:  
Senate Committee on Armed Forces  
House Committee on Armed Forces  
Senate Committee on Foreign Relations  
House Committee on International Relations  
Joint Committee on Atomic Energy. . . .

*Id.* at 3. The Joint Committee on Atomic Energy no longer exists. *Id.* at 3 n.15.

28. At the Airlie House conference discussing the FAS proposal, one participant argued that the President would be able to obtain the consent or refusal of consent of the entire Congress through an appeal of the crisis committee's vote. The potential availability of this procedure is beside the point. Even if *the President* is able to take an appeal, the basic problem remains unchanged: It is an act of *the committee* and not of *the Congress as a whole* that has prevented the President from acting in the first place.

29. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (sustaining the exclusion of persons of Japanese ancestry from the West Coast war area during World War II). For a detailed analysis of how the concept of urgency and deference led the Court astray in *Korematsu* and its companion cases, see Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489 (1945). The shoe, moreover, may be on the other foot: American tradition has recognized a broad (if controversial) presidential war authority in the event of emergency. See L. FISHER, *supra* note 20, at 287-92, 299-318.

tion of war in response to "sudden attacks."<sup>30</sup>

This encapsulation is only partly accurate. Madison's fragmentary notes of the Convention contain only a tiny amount concerning the reasons for the adoption of an amendment changing "make war"—the power granted the Congress under the Articles of Confederation and in early drafts of the Constitution—to "declare war."<sup>31</sup> That this was done to leave the President free to respond to sudden attacks is a popular bit of mythology without significant support in constitutional language or history.

The lack of support in language is the more important difficulty. At the time the Constitution was adopted, a declaration was not generally considered necessary before a sovereign state could engage in war.<sup>32</sup> To be sure, the declaration carried with it important consequences for the law of nations, but it had little to do with the freedom of the sovereign to fight.<sup>33</sup> The Constitution, however, established a divided sovereignty, and with it, a divided war power. The congressional war power under the Articles involved the conduct of the war.<sup>34</sup> The power to "declare war," which is all that was left to the Congress in the Constitution, is quite difficult to read as involving the conduct of all wars except when invasions must be repulsed. Yet that is the reading popularly adopted on the basis of a few snippets of notes from the Convention.

Professor Banks, like others who have written on this subject, places considerable weight on the fact that Madison records the change as having followed on the joint claim by Elbridge Gerry and Madison himself that the President must be left free to respond to "sudden attacks" against the nation.<sup>35</sup> As an initial matter, it bears noting that extrapolation from the one argument Madison happened to write down is unconvincing as a historical methodology. Certainly the note-taker is most likely to take note of what he himself has argued. That this is all he writes is no basis for assuming that nothing else was said.

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30. Banks, *supra* note 4, at 15-16 (footnotes omitted).

31. Under the Articles of Confederation, the Congress was granted "the sole and exclusive right and power of determining on peace and war." ARTICLES OF CONFEDERATION, art. IX, sec. 1. According to James Madison's notes on the Constitutional Convention, the Committee on Detail proposed to grant to the Congress the power to "make war." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 182 (M. Farrand ed. 1937) [hereinafter cited as RECORDS]. After a debate that was either remarkably brief or poorly recorded by Madison, the delegates deleted the Committee's language and substituted the current congressional authority to "declare war." *Id.* at 318-19.

32. For useful historical background, see generally R. Turner, Congressional Limits on the President's Conduct of National Security Policy: From the War Powers Resolution to the "No First Use" Debate (unpublished manuscript delivered at Perspectives on Public Policy conference in November 1985 on file in the *Journal of Legislation* office).

33. As one proponent of ratification explained, the United States would be permitted under the Constitution to maintain a standing army because otherwise "the government must declare war before they are prepared to carry it on." See "Demosthenes Minor," in *Gazette of the State of Georgia*, Nov. 22, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 243, 246 (M. Jensen ed. 1978). In New York, an opponent of ratification argued against the Constitution on precisely this ground. See "Cincinnatus III": To James Wilson, Esq., in *New York Journal*, Nov. 15, 1787, reprinted in 14 *id.* at 124.

34. The language of the Articles of Confederation was always understood to permit the Congress to dictate the conduct of the war. See A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 15-25 (1976).

35. Banks, *supra* note 4, at 16.

More to the point, Madison's report of the Convention on this issue, as Charles Lofgren had noted, is at the very least suspect and may be substantially in error.<sup>36</sup> After the Convention, Madison corrected many of his notes, apparently on the basis of memory, but not his notes of the discussion on the war power.<sup>37</sup> The key point is that Rufus King recommended changing the language not to leave the President free to respond to sudden attacks, but because "making war" implied deciding on the means for the conduct of the war, which was in his judgment an executive function.<sup>38</sup> According to Madison's notes, the amendment passed overwhelmingly on the first try, so King's argument might not have been relevant (although the same might then be said for Madison's own "sudden attack" argument). According to the official Journal of the Convention, however, the motion initially *failed*, then was taken up again *after* King's remark, and this time passed overwhelmingly.<sup>39</sup> If the Journal is right, and Madison wrong, then the amendment passed not on the sudden attack claim, but on the claim that making war was an executive function. The Journal may of course be wrong and Madison right—a peculiar though possible answer—but the best that proponents of the "sudden attack" limitation can fairly claim is that the reason for the change is not clearly revealed in the available records.

The other problem with this popular view of the history is that it ends at the conclusion of the Philadelphia Convention; but the debates of the Convention were secret, and if "We, the People" ever approved the new Constitution, we—they—did so in the state ratification conventions.<sup>40</sup> Thus the truly important discussion is surely that which occurred at the state level, both in the conventions and, concurrently, in the popular press. From these subsequent proceedings, Professor Banks selects for quotation two comments by James Wilson. The first is his concern that "no man, or a single body of men" be allowed to move the nation into war; the second is his comment that "nothing but our national interest can draw us into war."<sup>41</sup> The committee proposal, Professor Banks argues, will further these objectives—objectives which he ascribes not to Wilson alone, but to the Framers generally.<sup>42</sup>

But Wilson said more in his speech about the war power, and what he said deserves to be quoted at greater length. He was not merely *urging* that no individual or group be permitted to involve the nation in war; he argued instead that the constitutional system "is calculated to guard against" this danger, because "the important power of declaring war is vested in the legislature at large" and "must be made with the concurrence of the House of

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36. See Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675-77 (1972).

37. *Id.* at 676 n.17.

38. 2 RECORDS, *supra* note 31, at 318-19.

39. Lofgren, *supra* note 36, at 676-77. For a further detailed discussion of this question, a crucial one for those who believe they have isolated in this debate an "original understanding," see W. REVELEY III, *supra* note 20, at 82-85.

40. Cf. Ackerman, *The Storrs Lectures: Discover the Constitution*, 93 YALE L.J. 1013 (1984) (discussing the significance of the opening words of the Preamble).

41. Banks, *supra* note 4, at 17.

42. *Id.*

Representatives.”<sup>43</sup> From this requirement of full legislative participation, Wilson then *concluded* that “nothing but our national interest can draw us into war.”<sup>44</sup> The genius of the system, in other words, was for Wilson the rule that the legislature alone and the legislature as a whole would hold the power to declare an offensive war. The committee proposal runs counter to this understanding.

Nor was Wilson alone in his view on the nature of the Constitution’s protection against a runaway President. Again and again, in *The Federalist*, in the popular press, in the ratification conventions, supporters of the Constitution responded to complaints of presidential strength by asserting that the legislature alone might declare war and had further authority to restrict the President’s use of the armed forces.<sup>45</sup> The role of the House was particularly emphasized, for many feared that the President and a small group of backers, most likely from the Senate, would be able to do as they pleased.<sup>46</sup> The original understanding, in short, was of plenary legislative consideration of offensive warmaking. The crisis committee proposed by FAS establishes precisely the sort of privy council warmaking of which the Framers were greatly afraid.<sup>47</sup>

But if those who approved the Constitution were afraid of warmaking by a small group—so the argument might run—is not independent presidential warmaking even worse? The answer is partly “yes” and partly “no” and rests, once more, on a consideration of the war power as a whole. The Framers plainly did not envision a system in which a single individual could fight any war of his choosing at any time of his choosing. Over the last two centuries, many Presidents have felt themselves free to do precisely that. This perception of freedom reflects no failure in the Constitution, however; at worst, it reflects a failure of congressional will.

The Constitution provides the means for congressional disapproval and prohibition of American participation in foreign adventures. The Congress may always cut off funds. It may place restrictions on the activity of American armed forces and require the President to obtain its permission through a statutory amendment if he wants to use them in some contrary manner. And it may establish a veto on presidential activity, as it has in the War Powers Resolution, as long as the veto requires majority votes of both Houses, thereby manifesting a refusal by the Congress to consent to the President’s war.<sup>48</sup>

43. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed. 1936) [hereinafter cited as DEBATES].

44. *Id.*

45. *See, e.g.*, THE FEDERALIST No. 69 (A. Hamilton); 4 DEBATES, *supra* note 43, at 107-08 (Iredell); 4 *id.* at 287 (Pinckney).

46. *See, e.g.*, 3 DEBATES, *supra* note 43, at 233 (Marshall).

47. For this reason, Edmund Randolph opposed granting the Senate any role in the decision whether to go to war. 2 RECORDS, *supra* note 31, at 278-79. The fear of the President acting in concert with the Senate, which was expected to remain relatively small, recurred during the ratification debates. *See, e.g.*, 3 DEBATES, *supra* note 43, at 491 (W. Grayson) (President and Senate will be “partners in crime”); 3 *id.* at 498 (J. Monroe) (the Senate is no more than the President’s “own council”).

48. Warmaking is not, of course, the only area in which the Congress, in its rush to participate in the day-to-day making of policy, often ignores the possibility of indirect checks on the exercise of presidential power. *See* Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1384-94 (1983).



Little of this would be effective, of course, in “micromanaging” the President’s choice of particular weapons systems in any particular conflict. Yet the change in constitutional language from “make” to “declare” strongly suggests that nobody thought micromanagement of that nature was an appropriate congressional role. Thus if other mechanisms for permitting the Congress to play a direct role in approving the expenditure of particular weapons seem awkward or unworkable, this may simply be evidence that the system cannot be adapted to that purpose. The Congress can and should decide whether the nation will fight and—on the theory I have pressed—whether the nation should stop. But once the battle is joined, the Constitution surely leaves the choice of weapons to the President.<sup>49</sup>

There are ways, of course, for the Congress to play a role in weapons selection without exceeding the proper scope of its authority. The Congress might prohibit any use of nuclear arms (except to respond to nuclear attack) without congressional permission. That might prove unwieldy and unwise, and if so, would simply illustrate once more the wisdom of those who structured the war power. Or the Congress might impose rules governing the particular set of circumstances in which nuclear weapons should be used. Naturally, not every contingency could be anticipated, and such a rule might be more a hindrance than a help to national security. Finally, the Congress might decline to authorize the purchase of weapons systems it does not want the President to use. If this instrument seems too blunt, then perhaps the Congress ought to do none of these things, and ought instead to acknowledge the fact that we live under a Constitution that makes plain who is the Commander-in-Chief.

Micromanagement is probably a mistake. The Congress might do better to take more seriously its role in appropriating money and making rules to regulate the armed forces, thus being more certain that the weapons the nation possesses are the weapons that it needs and that the places where American troops are at risk are the places where the nation’s security demands that they be. These policy choices are not easy ones, but they are the essence of legislation. A legislature is not constructed for deep involvement in crises as they develop, and in particular, cannot easily play an important role in decisions on the particular tactics to be used in a given conflict. For the legislature to restructure itself to take on these essentially executive tasks, as Rufus King might have called them, really is to insist that nobody look at the forest and everybody count the trees. And those who hold nevertheless that counting the trees is what really matters should bear in mind Justice Jackson’s admonition in *The Steel Seizure Case* on the nature of power in the federal system: “[O]nly Congress itself can prevent power from slipping through its fingers.”<sup>50</sup> If the Congress grows obsessed with the trees, then the President will plan the forests. A Congress that seeks to

49. Obviously, this choice would be only from among the weapons that the Congress, either through legislative action or through implication, has authorized the President to use. I would make no claim (although I believe that there are some who would) that the President as Commander-in-Chief has the right to order the purchase of weapons the use of which the Congress has expressly forbidden.

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

exercise executive authority should profess no surprise if the legislative power is in its turn adopted by the President.

The FAS proposal for a crisis committee is a well-intentioned suggestion for dealing with a problem less tractable than most of us wish. But there is no means both constitutional and convenient through which the Congress can share the first-use decision with the President. The Congress possesses an enormous residuum of power that might be used in channeling presidential discretion and in taking other steps to make nuclear war less likely, and deeper congressional involvement in the setting of the war policy of the United States is a sensible course. Setting policy, however, is not the same as implementing it, and the FAS proposal encourages the latter at the expense of the former. Its approach is a mistake, and an unconstitutional one at that.