Watch What We Do, not What We Say -- Executive War-Making Powers in 1818

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WATCH WHAT WE DO, NOT WHAT WE SAY—
EXECUTIVE WAR-MAKING POWERS IN 1818

Our southern border has been disturbed by an Indian war, which, probably, had its origin in the vile intrigues of pretended British agents located in the Floridas, and against which we can never be secured until we obtain possession of the country. The territory is of no value to Spain, but to us it is very important; and have it we must, if the state of things is not immediately changed . . . . The possession of the Floridas, by treaty or force, will probably be among the interesting events of the new year.

—"The New Year," *Niles' Weekly Register*, January 3, 1818

I.

Hostilities between settlers and Indians along the Florida border intensified during 1817. Late in the year a group of Seminoles took a stand against further American encroachment into what the Indians considered their land at Fowltown, a settlement located on territory taken from the Indians by the 1814 Treaty of Fort Jackson. Brigadier General Edmund Gaines, commander at nearby Fort Scott, sent American troops to bring the Indians in for a conference; the Indians refused to attend, and the Americans burned Fowltown to the ground. Each side treated the incident as the beginning of hostilities. Gaines notified Washington of the affair, and the War Department on December 16, 1817, authorized him to pursue the Indians into Spanish Florida, if necessary. The Indians ambushed a river boat several days after the Fowltown skirmish, and when news of this attack reached Washington, Major General Andrew Jackson, commanding general of the Army of the South, was ordered to command the war against the Seminoles. His orders were sent on December 26, and were received at Nashville on January 11, 1818.

Jackson had written President Monroe on January 6 to suggest that the present opportunity be taken to seize Florida from the Spanish; when Jackson received his orders, he proceeded to do just that. He mustered as many of his old troops as he could on short notice, and marched for Florida on January 22, leaving several officers behind to recruit more men and join him as soon as possible. The Indians offered little resistance as Jackson entered Florida in March. Jackson's forces

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1. P. Brooks, *Diplomacy and the Borderlands* 131 (1939). This work is the standard diplomatic history of the Transcontinental Treaty with Spain. This Treaty, among other things, ceded Florida to the United States.

2. This sketch has been distilled from several sources, primarily 1 J. Bassett, *The Life of Andrew Jackson* (1911); P. Brooks, supra note 1; H. Fuller, *The Purchase of Florida* (1906); 2 J. Parton, *Life of Andrew Jackson* (1861).
seized the town of St. Marks on April 7, on the pretext that the Spanish were aiding the Indians from stores there. When an Indian force eluded Jackson's army at Suwanee, it appeared they had been warned of Jackson's advance. A British soldier of fortune, Robert Ambrister, was captured at Suwanee, taken back to St. Marks, and tried by court-martial for inciting the Indians to war. Another Britisher, an old Scottish trader named Alexander Arbuthnot, had been taken prisoner at St. Marks earlier; he was court-martialed for spying and encouraging the Indians to go to war. Both men were executed, as were two Indian leaders who did not receive the benefit of military due process.

Jackson notified Washington that the Indian threat was effectively crushed, but left a garrison of several hundred troops at St. Marks and marched for Pensacola, saying he had reports that there were Indians there. None were encountered in the intervening wilderness, and only a handful of Indians were there when he arrived; Jackson nonetheless occupied Pensacola on May 24, and the defending fort, the Barrancas, was taken after brief Spanish resistance on May 28. Jackson sent the Spanish authorities to Havana, set up American customs administration and left for home the next day. After returning to Nashville, he ordered Gaines to complete the occupation of Florida by capturing the town of St. Augustine, but President Monroe cancelled those orders when he heard of them later in the summer.

Gaines' original orders from Washington had called for him not to attack Spanish towns, but instead to refer back to Washington for further authorization if the Indians should retreat into them. Jackson had clearly exceeded these orders. As Adams wrote in his diary in July 1818: "The question is embarrassing and complicated, not only as in-

3. Although some historians take the reports on the presence of hostile Indians in Pensacola at face value, it seems probable that Pensacola was seized simply because it was vital to the control of West Florida. See 1 J. Bassett, supra note 2, at 261; H. Fuller, supra note 2, at 254.
4. See 1 J. Bassett, supra note 2, at 233-64, for narration of the events in Florida.
5. 2 J. Parton, supra note 2, at 555.
6. Letter from the Secretary of War to the Commander, Fort Scott, 1817, in 16 American State Papers 689 (Military ed. 1832).
7. As James Parton wrote nearly half a century later: General Jackson, in the conduct of this campaign, had exercised imperial functions. He had raised troops by a method unknown to the laws. He had invaded the dominions of a king who was at peace with the United States. He had seized a fortress of that province, expelled its garrison, and garrisoned it with his own troops. He had assumed the dread prerogative of dooming men to death without trial. All this may have been right. But if he had been Andrew I, by the Grace of God, Emperor of the United States, could he have done more? Could the autocrat of all the Russias, leading an expedition into Circassia, do more? Would any recent autocrat of Russia have done as much? 2 J. Parton, supra note 2, at 463.
volving that of an actual war with Spain, but that of the Executive power to authorize hostilities without a declaration of war by Congress. Newspapers in Virginia and Georgia denounced the seizure of Spanish forts as an unconstitutional act of war and as a dangerous risk of commencing hostilities with European powers. The President and all of the Cabinet except Adams wanted to divert both the domestic attacks and the threat of war by characterizing Jackson's acts as contrary to his orders. Adams pointed out that this would not be an easy solution:

The Administration were placed in a dilemma from which it is impossible for them to escape censure by some, and factious crimination by many. If they avow and approve Jackson's conduct, they incur the double responsibility of having commenced a war against Spain, and of warring in violation of the Constitution without the authority of Congress. If they disavow him, they must give offence to all his friends, encounter the shock of his popularity, and have the appearance of truckling to Spain.

The Administration's position, announced to the public on July 27 and to Congress when it reconvened in November, was a compromise: the towns would be returned to Spain, but Jackson would not be censured because his actions were said to be justified by military necessity as he saw it. At first the Administration said the Spanish would be reinstated in control because the American forces could not hold the positions; in his November message to Congress, Monroe made it clear that the inability was not military but constitutional. It was apparent in November that there would be no war over Florida after all, and Monroe had parried constitutional attacks on the Administration by returning the territory to Spain. Nevertheless, both the Senate and House undertook investigations of the invasion, and committees in both houses produced reports strongly critical of Jackson's conduct.

The House debated for three weeks a resolution disapproving the executions of Arbuthnot and Ambrister, but the resolution was defeated on February 8, 1819, the same day that Florida was actually returned to Spain. The Senate committee reported after the House had voted; the full Senate, apparently seeing the inevitable political outcome, tabled its report until the session expired.

John Quincy Adams, the Secretary of State, had begun serious

8. 4 JOHN QUINCY ADAMS, MEMOIRS 108 (C. Adams ed. 1875).
9.  Id. at 115.
10. The Senate report appears at 33 ANNALS OF CONG. 256 (1819); the House report appears at 33 ANNALS OF CONG. 515 (1819).
negotiations with Luis Onís, the Spanish minister in Washington, over the Florida issue and other problems in late 1817. When the scope of Jackson's operation became clear, Spain suspended direct talks and demanded that Jackson be censured, that the towns be returned to Spanish control, and that Spain be indemnified for damages from the invasion, before negotiations could continue. Spain received no support from other European powers in the form of military or diplomatic pressures against the United States, and it was clear to her that she could not, acting alone, prevent the Americans from taking Florida at will. Thus despite the protest, negotiations continued through an intermediary. War did not break out, and after more talks between Adams and Onís, the Transcontinental Treaty with Spain was finally signed on February 22, 1819.11

II.

The diplomatic significance of Jackson's conquest has been well discussed in the historical literature.12 Adams and Onís were attempting to define a boundary across all of North America as well as come to terms on a number of long-standing Spanish-American problems. Spain was more concerned about United States recognition of the South American republics than about an invasion of Florida,13 for Americans had controlled West Florida since 1811, and in 1817 Spain admitted to herself that the Floridas would eventually be ceded.14 By late 1818 Spain was only insisting that the provinces be returned to her before cession in order to preserve appearances,15 which objective was satisfied when Spanish authorities regained control two weeks before the treaty was signed.

But the constitutional question raised by the initiatives of Jackson vexed the Administration and disturbed the Congress. The same question persists today:16 which branch of government—the legislative or the executive—may authorize the use of force in international affairs, particularly when that force resembles, or creates a threat of, war? The Constitution itself provides little guidance, since it does not clearly define authority over force short of war.

11. See P. Brooks, supra note 1, at 71-169, for the history of the negotiations.
13. P. Brooks, supra note 1, at 133.
14. Id. at 85. Onís told Adams of King Ferdinand's decision to cede the Floridas on January 24, 1818. Id. at 147.
15. Id. at 155.
In 1819, as today, the constitutional debate, while seemingly a conflict of constitutional interpretation and of philosophies of government, was influenced by a multitude of external factors. The "Florida incursion" episode is illustrative of both an earlier view of the limits of executive power and of the political considerations that influence and often effectively resolve "constitutional" issues.

In article I, section 8, Congress is given power to declare war and to grant letters of marque and reprisal. If these phrases are to be taken merely in their technical senses, they are meaningless because formal declarations of war and authorized private reprisals were obsolete even in the late eighteenth century. "Reprisal" was a generic term for force short of war used to redress particular grievances for deprivation of private rights, and in the practice of that time, reprisals were "general" or "public," that is, involving the public forces of a nation rather than privateers. It was recognized that general reprisals could, and often did, lead to full-scale war. The Framers might, by this language, have intended to give Congress the same authority over reprisals as it was given over war, and for the same basic reasons. For generations commentators and cabinet officials have construed the quaintly obsolescent phrase "grant letters of marque and reprisal" to be coextensive with the authority to declare war. This interpretation is strengthened by the extensive listing of war powers immediately following article I, section 8, clause 11, and by the constant public insistence by the new Constitution's defenders that one of its major glories was its departure from the British constitution in dealing with the war power. In America all of the war power, not just the taxing and support role, would belong to the legislature, so that "[i]t will not be in the power of a single man, or a single body of men, to involve us in such distress . . . ."

The Constitution does not even clearly authorize repulsion of attack without congressional authorization. Article I grants to Congress powers "To lay and collect Taxes . . . for the common Defence," "To provide for calling forth the Militia to . . . repel Invasions," and article I, section 10, forbids the states to "engage in War, unless actually
invaded, or in such imminent Danger as will not admit of delay.” In such a perilous situation, presumably a state would call up its militia to meet the threat, while Congress would reconvene at the President’s call\(^2\) to consider federal action.

Article II makes the President commander-in-chief of the federal military, regular and militia, when called into national service,\(^2\) but under the Articles of Confederation and early drafts of the Constitution, only Congress had the power to “make” war.\(^2\) The 1787 Convention changed this phrase to “declare,” for reasons which are quite clear from the debate and surrounding events and commentary. “Making” war in the sense of supervising campaigns and military actions was clearly an executive function, and now that the government was to have an executive branch, the legislature ought not to be given executive duties. Although an explicit vote was not taken on the question, one delegate suggested that this change would result in presidential power only to repel sudden attacks.\(^2\) James Wilson, a distinguished delegate, commentator, and later Supreme Court Justice, asserted that it was this change in wording from “make” to “declare” which gave the President such power as he had over self-defense—not the commander-in-chief clause, which had a purely military significance.\(^2\)

Despite the conscious attempt to break with the British system, the notion persisted that use of the military was in many respects essentially an executive prerogative. The domestic problems which war brings doubtless were, and are, the justification for some legislative control over the military but wars and reprisals are instruments of foreign policy, and foreign policy is arguably very largely the executive’s discretionary business. Executive hegemony in matters of war has been justified by necessities of secrecy and dispatch, and by the need for a head of state to deal with other nations.\(^2\)

Regardless of whether secrecy and speed should be as necessary where war is potentially involved as where less drastic foreign endeavors are contemplated, the fact remains that traditionally an association has been made between war and executive prerogative. Despite what some

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22. U.S. Const. art. II, § 3; see Letters of Helvidius, infra note 36.
24. See Articles of Confederation art. IX. Under the Articles a state could engage in war if invaded or where the “danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted.” Articles of Confederation art. VI.
27. The Federalist Nos. 70, 75, at 210, 222 (Britannica ed. 1952) (A. Hamilton).
find to have been the Framers' best efforts to deny even the possibility of such an interpretation, advocates of greater presidential discretion have been able to find enough ambiguity in the text of the Constitution to permit, if not enough to authorize, extensive presidential war-making powers.

Thus a facial reading of the Constitution provided no clearly definitive answer to the question whether Jackson, in pressing his initiative against the Indians, had usurped the authority of Congress. Moreover, the dilemma was exacerbated by the fact that the judicial branch, which normally offers resolution of constitutional quarrels, customarily has turned its back on "political questions" which might precipitate a confrontation between the Court and either Congress or the President, the Court proclaiming such issues to be better suited for resolution through the political processes. John Marshall, in *Marbury v. Madison*, had already noted one category of political question:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . . The subjects are political: They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs.

Following Marshall's lead, the Court early indicated that it would refrain from interfering with the discretionary decision making of Congress or of the President where the exercise of authority constitutionally delegated to those two branches was at issue. All of the Constitution's language concerning war and foreign affairs is found in articles I and II, and the courts have consistently refused to interfere with congressional and presidential decisions in those areas.


31. See note 30 *supra*; Mora v. McNamara, 389 U.S. 934 (1967) (denial of certiorari
Marshall refers above only to the executive's discretionary power, he also found coordinate legislative power in the field of foreign affairs, particularly with regard to war.22

Looking beyond the "political question" impediment to judicial review of a foreign policy initiative, it is difficult to see how Jackson's activities in Florida could have presented an article III "case" or "controversy," since, with the Administration apparently willing to recognize that Jackson had exceeded legal authority, the constitutional issue had become moot. Moreover, the political realities of the early nineteenth century undoubtedly would have made the Court reluctant to interfere with the problems raised by Jackson; there was every possibility its decision would be ignored, further eroding its authority.33

So without explicit guidance from the Constitution, and with the Court unwilling to serve as arbiter, the President and the Congress were left to their own devices to resolve the problems created by Jackson's seizure of the Spanish towns.

III.

The legality of Jackson's activities might have been analyzed from a doctrinal point of view. Generally, two fundamentally opposed doctrinal formulations have been offered to interpret and to lend substance to the war powers framework provided by the Constitution. The "fundamentalist" theory, the first of these formulations, is constructed on the following premises. International law recognizes several categories of force, including insurrection, defense, invasion, and "marque and reprisal," as well as war;34 every reference by name to such categories in the Constitution, with the domestic exception of article IV, is
to suit based on challenge to legality of Vietnam war); cf. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (Court refused to question presidential judgment in militia call up).

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor, in the course of the argument, has it been denied, that congress may authorize general hostilities ... in which case the laws of war, so far as they actually apply to our situation, must be noticed.

But see Little v. Barreme, 6 U.S. (2 Cranch) 170, 176 (1804), where Marshall suggests that, in limited warfare authorized by Congress, presidential discretion is governed by congressional intent.

33. Previously, the Court and federal judiciary in general had suffered a loss of prestige as a result of its decision regarding the Burr Affair in Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), and the earlier impeachments of Justice Chase and Judge Pickering. See 1 H. CARSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 208-09, 215-19 (1902); D. LOTH, CHIEF JUSTICE 203-50 (1949).

34. See 2 L. OPPENHEIM, INTERNATIONAL LAW §§ 53-60, at 201-16 (7th ed. H. Lauterpacht 1952).
found in article I and is a specific grant of power to Congress. The listing there may be incomplete in detail, but its extensiveness indicates that the exercise of force in international affairs, by any name, is initially the responsibility of Congress alone. The President may deploy the armed forces as he sees fit, exercising his powers as commander-in-chief, but Congress has complete authority over their actual engagement with forces of another nation, except of course in matters of military tactics and strategy. Congress also has constitutional power to make general or specific provisions for the use of the armed forces even in emergencies, by virtue of the necessary and proper clause, if not by the more specific provisions following the declaration of war clause in article I.  

The second formulation, the "reform" theory, is constructed from constitutional silences and necessarily inferred sovereign powers: Congress is granted powers over some categories of force in international law, including the power of transferring the nation from the *jus pacis* to the *jus belli*, but this is really only a legitimizing power over policies and actions undertaken in fact by the President and under his control. Because of the very nature of his office, the President, with the occasional advice and consent of the Senate, has ultimate authority over everything which can be called foreign relations. The United States as a nation has complete sovereign powers in foreign affairs, and if the Constitution does not grant these powers specifically to another body, they must belong to the President. Presidential power would thus be exclusive over any force short of war which is not specifically mentioned by the terms of article I. The President cannot declare war, or grant letters of marque, or decree the punishments for piracy; but once Congress has provided an army and a navy, the President as their commander-in-chief may use these forces as he chooses, including provoking war with another nation. Congressional power to provide for reactions to invasions and insurrections refers only to the militia; the President

35. Prior to the Florida incident, Congress had exercised these powers several times. In 1798 Congress authorized the President to "instruct and direct" American ships to seize any armed French vessel "found hovering on the coasts of the United States, for the purpose of committing depredations" on American shipping and to retake any captured vessel. Act of May 28, 1798, ch. 48, 1 Stat. 561. In June of the same year Congress authorized merchant vessels to resist capture by French ships and set forth regulations concerning the disposition of captured French vessels and the arming of merchant ships. This act further authorized the President to determine when French depredations had ceased and to order American vessels to submit to lawful search by the French. Act of June 25, 1798, ch. 60, 1 Stat. 572. The Congress gave the President power to deal with the Barbary Pirates, authorizing him to wage a naval war with the Bey of Tripoli. The act allowed him to commission privateers to seize enemy ships. Act of Feb. 6, 1802, ch. 4, 2 Stat. 129. In 1815 a similar act authorized action against the "Dey of Algiers, on the coast of Barbary." Act of March 3, 1815, ch. 90, 3 Stat. 230.
may use the regular army to deal with emergencies at his own discretion.

The fundamentalist theory, in some form, has usually been politically unassailable, for reasons which hardly require elaboration. James Madison asserted it as the proper constitutional construction:

Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper; and that for such, more than for any other contingency, this right was specially given to the executive.\(^{36}\)

Chancellor Kent agreed with Madison’s constitutional analysis, and the reasons underlying it:

In this country, the power of declaring war, as well as of raising the supplies, is wisely confided to the legislature of the Union; and the presumption is, that nothing short of a strong case, deeply affect-

\(^{36}\) *Letters of Helvidius* (No. 4), in *6 The Writings of James Madison* 174 (G. Hunt ed. 1906). Madison continued:

In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers, the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.

Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.

*Id.* Madison was taking exception to Hamilton’s position concerning presidential declarations of neutrality, expressed in his *Letters to Pacificus*. Madison detected a dangerously reformist tone in Hamilton, and wanted to set things straight. These partisan argumentative tracts were apparently considered to be of some authority as constitutional exegeses, for they were printed in editions of *The Federalist* during the 1790’s and for several decades afterwards.
ing our essential rights, and which cannot receive a pacific adjust-
ment, after all reasonable efforts shall have been exhausted, will ever
prevail upon congress to declare war.\textsuperscript{37}

Justice Story noted the widespread approval of the congressional, rather
than the executive, power to declare war. Moreover, he explicitly rec-
ognized exclusive congressional power over limited war, citing \textit{Talbot v. Seeman}\textsuperscript{38} and \textit{Bas v. Tingy},\textsuperscript{39} and he made reference to the provisions concerning letters of marque and reprisal as hostile measures under-
taken in a time of legal peace, necessarily authorized by Congress.\textsuperscript{40}

John Adams was perhaps the best representative of reformist thought. Adams believed that the constitutional allocation of power
to declare war was an error and resulted in absurdity. He referred to
the statutes of 1811,\textsuperscript{41} which authorized the occupation of east Florida
in the event of a threat by Great Britain, as

the \textit{secret} laws, those singular anomalies of our system which have
grown out of that error in our Constitution which confers upon the
legislative assemblies the power of declaring war, which, in the theory
of government, according to Montesquieu and Rousseau, is strictly
an Executive act. But as we have made it legislative, whenever secrecy
is necessary for an operation of the Executive, involving the question
of peace and war, Congress must pass a secret law to give the Presi-
dent the power. Now, secrecy is contrary to one of the first principles
of legislation, but this absurdity flows unavoidably from that of hav-
given to Congress, instead of the Executive, the power of declar-
ing war.\textsuperscript{42}

But the public debate stimulated by Jackson's excursion into Flor-
ida was generally not couched in "fundamentalist" versus "reformist"

\textsuperscript{37} J. KENT, \textsc{Commentaries} 55 (1826).
\textsuperscript{38} 5 U.S. (1 Cranch) 1 (1801).
\textsuperscript{39} 4 U.S. (4 Dall.) 37 (1800).
\textsuperscript{40} 2 J. \textsc{Story}, \textsc{Commentaries on the Constitution} 96 (3d ed. 1858).
\textsuperscript{41} Acts of Jan. 15, 1811, 3 Stat. 471, and Mar. 3, 1811, 3 Stat. 472. Congress, after re-
solving that the United States could not "without serious inquietude, see any part of the
... territory pass into the hands of any foreign power," authorized the President upon
arrangement with local authorities to "employ any part of the army and navy" to take
possession and occupy Florida. Congress further provided the sum of $100,000 to defray
expenses of the operation and authorized the presidential establishment of a temporary
civil government. The March 3 act provided the acts were not to be published until
the end of the next session of Congress.

In 1813, Congress authorized the President to occupy and hold all of West Florida
west of the Perdido River (the present western boundary of Florida) not already oc-
cupied by the United States. The act included authorization for deployment of military
forces and funding for the occupation. Act of Feb. 12, 1813, 3 Stat. 472.

\textsuperscript{42} 4 JOHN QUINCY ADAMS, \textsc{supra} note 8, at 32.
terms. The defense of Jackson and of the Administration was more pragmatic in nature; the appeal was to practical necessity. Public opinion could best be influenced not by academic fundamentalist or reformist arguments, but by the realistic justifications that could be offered for Jackson's initiative.

Jackson's initiative might have been characterized, and justified, on any of a variety of bases. Aside from the issue of which governmental branch enjoys ultimate authority over the use of force, the government could have taken military action against the Indians, constitutionally, under theories of insurrection, invasion or "permanent declaration of war." Jackson's undertakings could have been characterized as an attempt to suppress an Indian revolt in American territory. Congress has power to provide for such occasions, and did so in the Militia Act of 1795 which was actually invoked here, albeit imperfectly: Jackson called up the militia on his own authority, without going through the channels prescribed, but he was perhaps justified in so doing because the governors who were legally empowered to request the President to call out the troops were not available.

The insurrection doctrine provided little justification for Jackson's actions, which occurred outside American territory and involved Indians who considered themselves a separate nation and who were so considered by the Americans. The Indians claimed sovereignty over the land they inhabited, disregarding any higher sovereignty asserted by the United States. Some anti-Indian Congressmen were willing to grant the Indians' claim of sovereignty over Spanish land they inhabited, but not over inhabited American land.

The government might also have maintained that the United States had been invaded by the Indians, from either "Spanish" or "Indian" Florida, or even from "Indian" land in the United States. Then, under article I and the Militia Act, or perhaps under an "inherent power" theory, the President could have sent American troops to repel the attack without need for a formalized declaration of war. The war would have begun because the Indians had started it (even though it might be said that the Americans had actually initiated hostilities by seizing

43. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424. This statute provided in part:
   [I]n case of insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive, (when the legislature cannot be convened,) to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection.

44. This statute provided in part: "[W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states . . . as he may judge necessary to repel such invasion . . . ." Id.
Indian territory). Jackson was justified, under international law, in pursuing the Indians back into the territory from which they had launched their attack, in order to prevent them from regrouping to launch another strike. But another international legal principle would have forbidden him to do so if the Indians had been completely crushed and were retreating in disarray. The Spanish in Florida would have been entitled to give aid to defeated, no-longer-belligerent remnants of the Indian force, but the Spanish could not help them fight the Americans without risking war.

If the Spanish were actively aiding the Indians in their fight, there would have been no need for Jackson to await a formal declaration from Washington, because to do so might have meant losing a military advantage. But if it were only suspected that the Spanish were encouraging the Indians, the government might have been required to warn Spain that this was cause for war. These distinctions are abstract; Jackson thought they were of no particular significance, and it must be admitted that formal declarations usually followed rather than preceded fighting even in 1818.

Another possible justification for Jackson's excursion, as several Congressmen suggested, was that congressionally authorized appropriations, military deployment and policy constituted a "permanent declaration of war" against the Indians. This theory is probably sound, although it does elide many considerations, such as due deliberation, warning, and opportunity for settlement by other means. The issue of authority over the Indian war was a red herring: Florida was not, as a matter of international law, Indian territory but was Spanish, and regardless of who might have been effectively sovereign over the wilderness, Spain certainly had a legitimate claim of control over St. Marks and even more so over Pensacola, which was not even near the hostile Indian country. Jackson's army had to march for two weeks to get to Pensacola.

45. See, e.g., 7 J. Moore, Digest of International Law §§ 1299-1301, at 908-934 (1906). Assuming that the Indians involved were regarded as belligerent and Spain as a neutral, Spanish "neutrality" would have been forfeited by permitting the outfitting of hostile forces in her territory or by permitting the use of her territory as a base of operations by hostile forces. Self-defense could also serve as justification for the invasion, assuming that an appeal to Spain was impossible or fruitless. See 1 L. Oppenheim, International Law §§ 129-30, at 297-99 (8th ed. H. Lauterpacht 1955).

46. See 2 L. Oppenheim, supra note 34, §§ 336-41, at 718-25. Assuming the Indians were defeated belligerents, they were protected by Spanish neutrality.

47. Even if Spain had aided the Indians it would not have necessarily meant an end to her status as a neutral. International law distinguishes between violations of neutrality and the termination of the status of neutrality. Id. at §§ 358-59.

from Suwanee, and encountered not a single Indian in the whole two-
hundred-odd miles.49

The Pinckney Treaty of 1795, which held both Spain and the
United States responsible for preventing Indian raids across the border
upon the other's territory, provided still another justification for Jack-
son's activities.50 If Spain failed to perform her obligation under the
Treaty, then the United States could resort to self-help to control the
Indians. Such self-help could extend to any means necessary to control
the Indians, it was said, including seizure of Spanish supplies if they
were being used to aid the warring Indians. Alexander Smyth of Vir-
ginia summarized this point in the House debate on Jackson's actions:

The law of nations allows you to enter the territory of a neutral
Power in quest of an enemy, (Vattel, p. 318). It is even still more
reasonable that you should possess the right, when the territory
claimed by the neutral Power is, in fact, the country, the residence,
of your savage enemy, where alone effectual hostilities can be carried
on against him.

The right of a sovereign Power to exclusive jurisdiction within a
territory, is founded on the engagement to govern the inhabitants,
and restrain them from injuring other nations. When the Govern-
ment is no longer able to restrain the inhabitants from injuring other
nations, they have an undoubted right to attack such inhabitants,

49. 1 J. Bassett, supra note 2, at 260-61. The American policy was displacement or
 extermination of the Indians, and the policy was embodied in statutes and appropriations
 which authorized the Army of the South and its Indian warfare. The congressional man-
date could not have been clearer had it been stated in so many words. But this mandate
could not have been construed to authorize the attacks upon St. Marks and Pensacola
because of suspicion that Spain was aiding the Indians. Spain was entitled by interna-
tional custom and law to a more explicit warning than an appropriations bill. The orders
given to Gaines and Jackson did not authorize the attacks, and the government hardly
imagined that that authority could have been inferred. In fact, the Administration told
Congress in March 1818 that Jackson had been specifically ordered not to initiate an
engagement with Spanish forces, because there was no authority for such an attack without
prior approval from Congress. 2 J. Richardson, Messages and Papers of the Presidents
31 (1939). Even the evidence Jackson later adduced in his support could not substantiate
his allegations of Spanish complicity with the Indians in the war. He claimed a report
of five hundred Indians in Pensacola, but could only count seventeen in his affidavits,
and the only complicity shown by the Spanish was their presence with these Indians in
the same place. Possible embarrassments, if not disasters, which might result from self-
serving inaccuracies by commanders in the field are a prime reason to construct the Con-
stitution so that one man cannot draw us into war.

50. Treaty with Spain on Friendship, Limits and Navigation, Oct. 27, 1795, 8
Stat. 138, T.S. No. 325. Regarding Indian raids, the treaty provided: “Spain will not suffer
her Indians to attack the citizens of the United States, nor the Indians inhabiting their
territory; nor will the United States permit these last-mentioned Indians to commence
hostilities against the subjects of his Catholic Majesty or his Indians in any manner
whatever.”
and suppress them, without going to war with that Power which has become too feeble to restrain them.\(^{51}\)

Smyth insisted that article II, not article I, authorized this "defensive" action, but he did admit that the public forces of nations not at war may sometimes find it necessary to engage in violence against each other, and such acts of violence may tend to produce "public war."

Philip P. Barbour, also of Virginia, made most of the other points in support of Jackson and the Administration.\(^{52}\) He argued in terms of the sovereign war-making power of the Indians, and of an American right to defend against the Indians upon lands to which the Indians had title, even though Spain might claim some jurisdiction over those lands. Vattel was again cited for the principle that should a neighboring nation allow a defeated enemy to retreat into its territory long enough to recover and gain an opportunity to attack again, this would be a breach of neutrality and would give the belligerent a right to enter that neighbor's territory in quest of the enemy and to engage in acts of war there. Thus if the Floridas really were Indian territory, American troops rightfully entered in self-defense; if the territory were Spanish, they rightfully entered because of Spain's breach of neutrality. The hostile actions of the Spanish officials justified defensive measures by American troops, namely the occupation of St. Marks and Pensacola.

Congressman Mercer turned the self-defense argument around,\(^{53}\) saying that the Indians were admittedly sovereign in their capacity to wage war and in their right to all the legal "amenities" accorded an enemy nation in wartime. The Seminole war, Mercer said, had really begun with the American forces' destruction of the infamous Negro Fort in Florida in 1816.\(^{54}\) The next significant fighting was Gaines' sacking of Fowltown in 1817 and the Indians' retaliatory ambush which brought Jackson to the front. The Americans were depicted by Mercer as aggressors against whom the Indians had the perfect right of self-defense. The Pinckney Treaty could properly be construed only to prohibit either party from allowing its Indians to initiate hostilities across the border, and not to require the Spanish to aid in attacking her natural allies, Indians residing in Florida. The Spanish officials' conduct was hardly that of associates in war, but even if it were, that was a determination to be made not by the commander in the field, nor even by the President, but only by Congress. Principles of international

\(^{51}\) 33 Annals of Cong. 675 (1819).
\(^{52}\) Id. at 764-80.
\(^{53}\) Id. at 797-831.
\(^{54}\) Id. at 802.
law require a formal declaration of the causes of war when there is a grievance against the ally of one's enemy.\textsuperscript{55}

The conclusion to be gleaned from this brief examination of the several arguments offered as justification for Jackson's acts is that the appeal was to military necessity, not to doctrinal propriety. This was clearly reflected in the recognition by the Administration's defenders that the important question was whether Jackson's acts could be justified to the public. So the arguments were pragmatic, much as today, when executive war-making is sought to be justified on the basis of its necessity to ensure "freedom of choice" for another nation, or to "protect American troops in the field," or to "prompt the other side to negotiate." And so long as the price is not too great and the fruits are not too compelling—whether they be the acquisition of Florida or the preservation of American prestige—the issue of who properly controls the use of force receives only secondary consideration. Much of the nation was initially upset by Jackson's methods and by his constitutional nonchalance, but as it became clear that no war with Europe would follow—that there would be no price to pay—the de facto acquisition of Florida seemed very attractive.\textsuperscript{56}

IV.

The actions and motivations of the more important individuals involved in the constitutional controversy of 1818 represent the public attitudes and political beliefs of those times in a conveniently allegorical way, and the interaction of those individuals similarly mirrors on a lesser scale the interplay of public attitudes and political beliefs in the constitutional process.

Andrew Jackson's constituency was the West, the frontier. He personified the frontier's impetuosity, its furious honesty and its notion of natural justice. The West was suspicious of all Spaniards\textsuperscript{57} and so was Jackson; Westerners had long insisted that interferences from Spanish Florida were intolerable, and the conquest of Florida had been Jackson's personal ambition for years.\textsuperscript{58} He had tried to take possession of

\begin{itemize}
  \item \textsuperscript{55} Id. at 806-07. \textit{But see} 2 L. Oppenheim, \textit{supra} note 34, § 94, at 293-95.
  \item \textsuperscript{56} For accounts of the reaction—both public and congressional—to the invasion, see 2 J. Parton, \textit{supra} note 2, at 506-56; 1 J. Bassett, \textit{supra} note 2, at 265-93.
  \item \textsuperscript{57} The Hispanophobia had several sources: Spain was seen as a force standing between the new nation and western expansion; Spanish treatment of American trappers and explorers created ill will, as did the belief that Spain supplied hostile Indians. See H. Fuller, \textit{supra} note 2, at 15-121, for an account of Spanish-American relations prior to Jackson's invasion.
  \item \textsuperscript{58} Jackson's territorial ambition may have included more than Florida. After the campaign and before Spain ceded Florida to the United States, Jackson, apparently
\end{itemize}
Florida during the War of 1812, but was forced to leave Pensacola after he had captured it, to meet the British at New Orleans. The overkill which he applied to the Indians and his other activities in Florida can only be explained on the assumption that he was waging his own private war against Spain, but a war to which the West had no objection. He referred to the terms of surrender of the Barrancas as "more favorable than a conquered enemy would have merited." 59

Jackson devised international law as he needed it. For example, he justified his treatment of Arbuthnot and Ambrister by saying there was an established principle "that any individual of a nation making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and a pirate." 60 This was a complete fabrication. 61 Before he entered St. Marks, Jackson wrote to Secretary of War Calhoun to explain why he planned to take the town:

The Spanish Government is bound by treaty to keep her Indians at peace with us. They have acknowledged their incompetency to do this, and are consequently bound, by the law of nations, to yield us all facilities to reduce them. Under this consideration, should I be able, I shall take possession of the garrison as a depot for my supplies, should it be found in the hands of the Spaniards, they having supplied the Indians; but if in the hands of the enemy I will possess it for the benefit of the United States, as a necessary position for me to hold, to give peace and security to this frontier, and put a final end to Indian warfare in the South. 62

Jackson had already decided that the Spanish had admitted they could not stop the Indians from seizing supplies, and that the Spanish were guilty of supplying the Indians and ought to be treated as enemies, regardless of whether the Indians had in fact obtained significant supplies. Before he even approached St. Marks, Jackson was determined to occupy the fort, no matter who was in possession. He wanted to stamp out the Indian problem completely, and he was convinced that to do so, he would have to stamp out the Spanish problem as well.

Jackson's constitutional ideas were equally convenient. In his letter
doubting Spain's good faith, wrote Secretary of War Calhoun outlining another show of force to speed up Spanish negotiations. In another letter, Jackson wondered if during the second invasion the capture of Cuba would "embarrass" the Administration. Calhoun responded that any future operations ought to be confined to Florida. 2 J. Parton, supra note 2, at 335.

59. 1 J. Bassett, supra note 2, at 263.
60. Quoted in id. at 259.
61. 2 L. Oppenheim, supra note 34, § 82a, at 261; 7 J. Moore, supra note 45, at 215-18.
of January 6, 1818,\textsuperscript{63} he told Monroe to send word by a confidential letter through a third party that it would be acceptable to Monroe for Jackson to conquer Florida.\textsuperscript{64} In this manner it would not be necessary to implicate the government in Jackson's actions. Jackson was not one to let the Constitution stand in the way of the national will. Years later Monroe claimed he never sent Jackson the requested letter, nor caused any such notification to be sent through the suggested intermediary, Congressman Rhea of Tennessee; Jackson claimed he had indeed received a letter from Rhea, but had destroyed it during the congressional ruckus of 1819 because it might embarrass the Administration.

Monroe suggested to Jackson late in 1818 that Jackson might have overstepped his orders, but Jackson retorted that Gaines' previous orders were only instructive, not binding on him as Gaines' successor in command and superior officer. He claimed that the orders of December 26, 1817, were general enough to give him authority to go to Florida to make war upon whom he saw fit, as he saw fit.\textsuperscript{65} Yet his own

\begin{quote}
63. See p. 477 supra.
64. The letter reads in part:

The executive government have ordered, and, as I conceive, very properly, Amelia Island to be taken possession of. This order ought to be carried into execution at all hazards, and simultaneously the whole of East Florida seized, and held as an indemnity for the outrages of Spain upon the property of our citizens. This done, it puts all opposition down, secures our citizens a complete indemnity, and saves us from a war with Great Britain, or some of the continental powers combined with Spain. This can be done without implicating the government. Let it be signified to me through any channel (says Mr. J. Rhea) that the possession of the Floridas would be desirable to the United States, and in sixty days it will be accomplished.

2 J. PARTON, supra note 2, at 434.
65. To the charge that he transcended the order given General Gaines, Jackson, in a letter of August 19, 1818, replied in part:

This principle is held to be incontrovertible, that an order, generally, to perform a certain service, or effect a certain object, without any specification of the means to be adopted, or limits to govern the executive officer, leaves an entire discretion with the officer as to the choice and application of means, but preserves the responsibility for his acts on the authority from which the order emanated. Under such an order all the acts of the inferior are acts of the superior; and in no way can the subordinate officer be impeached for his measures, except on the score of deficiency in judgment and skill. It is also a grammatical truth, that the limits of such an order can not be transcended without an entire desertion of the objects it contemplated; for, so long as the main legitimate design is kept in view, the policy of the measures adopted to accomplish it is alone to be considered. If these be adopted as the proper rules of construction, and we apply them to my order of December 26, 1817, it will be at once seen that, both in description and operative principle, they embrace that order exactly....

In no part of this document is there a reference to any previous order, either to myself or another officer, with a view to point to me the measures thought advisable, or the limits of my power in choosing and effecting them....

How, then, can it be said with propriety that I have transcended the limits of
\end{quote}
letter, in attempting to keep the government out of his actions, indicates that he knew there was no authority which could have promulgated such a general order as he later said he had received.66

Jackson’s protestations of willingness to submit the military to civilian control are not convincing when compared with his open-ended interpretation of orders. He raised an army on his personal authority, bypassing the authorized channels.67 His contempt of the Spanish could have resulted in a national disaster if Britain had not decided that she was not interested in any more wars at the moment. The Spanish governor at Pensacola had protested the presence of foreign troops in his province, demanded that they leave as soon as they had obtained necessary supplies, and said that if Jackson attempted to occupy the Barrancas, the governor would be compelled to repel force with force.68 Jackson considered this warning a declaration of hostilities that authorized him to attack the Barrancas, and it was a measure of Jackson’s growing political importance that some Congressmen seriously agreed with his reasoning.

General Jackson came to Washington in 1819 as the House and Senate were considering his actions, perhaps to remind Congress by his personal presence, if reminder were needed, that he represented a potentially powerful force in national politics. The Battle of New Orleans had already made him a national hero, and in the eyes of many voters he could do no wrong. Much of the opposition to him in Congress was from political alliances supporting other presidential contenders, notably Clay and Crawford. The Georgia delegation’s support for their favorite son, Crawford, helps explain their opposition to Jackson, even though that state took the brunt of the Indian attacks. Politics does not explain the opposition to Jackson, however, as well as it explains his support. The actual issue on which the House voted was the conduct of the courts-martial of Arbuthnot and Ambrister. Many representatives were easily persuaded not to condemn the general’s actions, which were procedurally acceptable within the court-martial rules, when they noted the great political liability they might

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my orders, or acted on my own responsibility? My order was as comprehensive as it could be, and contained neither the minute original instructions, nor a reference to others previously given, to guide and govern me. The fullest discretion was left with me in the selection and application of means to effect the specific legitimate objects of the campaign; and for the exercise of a sound discretion of principles of policy am I alone responsible.

2 J. Parton, supra note 2, at 522-24.
66. See excerpt of letter in note 64 supra.
67. The Senate investigating committee was particularly upset that a general could so easily raise an army to carry out a private vendetta, 33 Annals of Cong. 256-66 (1819).
68. 1 J. Bassett, supra note 2, at 262.
incur back home by opposing Jackson. The attack on Jackson only increased his popularity. It was even speculated that Jackson had encouraged the investigation to promote his presidential ambitions.69

Jackson's more intellectual counterpart, and in 1818, defender, was John Quincy Adams, who had a vision of America's place as a power among other world powers and of a manifest destiny which included territorial dominion over all of North America.70 Other aspects of Adams' political beliefs were not so well known at the time, and they are apparent in his activities in this controversy only on closer examination. His role was pivotal; he was involved in the diplomatic handling of the invasion, he had a significant influence on the constitutional outcome and he even dabbled in the political fight.

Adams had left his post as Ambassador to Great Britain to become Secretary of State in 1817, and he had been negotiating with the Spanish minister since that fall. He was as familiar with the attitudes and probable reactions of Spain and Great Britain as anyone in American government could have been. His assessment of the diplomatic situation proved to be correct, in that Spain eventually was persuaded that she should not continue the pretense of control over Florida, and that Britain was not sufficiently irritated to cause an international uproar. In considering the risk that his assessment might prove incorrect, Adams felt that for reasons of political tactics and national pride, if the government were to err, it should err on the side of strength.71

Adams was alone in the Cabinet in defense of Jackson. He believed that what Jackson had done could be excused as within Jackson's orders, but he could not convince any of the other members to agree with him. He had some trouble justifying the storming of the Barrancas; in June he told the British minister that it had certainly been unauthorized.72 But later, before the Cabinet meetings took place, his opinion was that Jackson's actions would not be disavowed by the Administration but would be justified in some fashion.73 The shift in

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69. H. Ammon, James Monroe 431 (1971). Jackson either became constitutionally and politically more sophisticated as he gained experience and exposure as a national figure, or else he acquired more sophisticated advisers. During his second presidential term Texas separated itself from Mexico, and Jackson referred the issue of diplomatic recognition of the new republic, normally entirely within presidential discretion, to Congress: "It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised [that is, the diplomatic power of recognition], when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished."

70. 4 John Quincy Adams, supra note 8, at 438-39.
71. Id. at 113.
72. Id. at 103.
73. Id. at 105.
view is explained by the difference in audience; the later statement was made to the French minister, who was acting as intermediary in the stalled negotiations with Onís. Adams did not want Onís to have any notion that the Americans lacked resolve. The international law argument justifying the taking of the posts, and the theory about misconduct and hostility of the Spanish officers in Florida, which Monroe later adopted in his message to Congress, were advanced by Adams in the Cabinet discussions:

I insisted that the character of Jackson's measures was decided by the intention with which they were taken, which was not hostility to Spain, but self-defence against the hostility of Spanish officers. I admitted that it was necessary to carry the reasoning upon my principles to the utmost extent it would bear to come to this conclusion.  

Adams' personal constitutional theories also helped explain his preferences in the outcome of the controversy and his defense of Jackson. When Adams could not convince the Cabinet that they should approve Jackson's actions, he tried to persuade Monroe not to repudiate those actions. Even though Monroe and the rest of the Cabinet believed that the Constitution had been ignored, Adams argued that it would be politically undesirable to mention this belief publicly. He did not disagree with their law, only their policy, and, it would seem, their steadfast adherence to an "absurdity," for speaking as a lawyer and not a reformer or a nationalist, Adams saw "difficulties in holding Pensacola without an act of Congress." More was at stake than politics; Adams wanted to establish a practice of vigorous executive action, and took advantage of Jackson's popularity to do so.

It remains to note Adams' influence upon the political events in the Fifteenth Congress. He set the stage for the Administration's position with a famous letter to George Erving, the American Ambassador to Spain, answering the Spanish protest. Adams' argument not only justified Jackson's conduct, but concluded that punishment should go not to Jackson, but to the Spanish officers in Florida for dereliction of duty. The letter, written in November 1818, was widely publicized in the weeks before Congress began debate on the invasion; it succeeded in convincing people that Jackson's conduct could be legally sustained. The argument was accompanied by an extensive selection from the documents in Adams' files in the office of Secretary of State. He opened

74. Id. at 113.
75. See p. 487 supra.
76. 4 JOHN QUINCY ADAMS, supra note 8, at 111, 119.
77. 4 AMERICAN STATE PAPERS 539-45, 546-612 (Foreign Relations ed. 1834).
his files to the pro-Jackson forces during the debate, and even prepared for them an international law brief justifying the invasion;\textsuperscript{78} as a result, Jackson's defenders presented to the House as solid and detailed a case as could have been devised.

President James Monroe made the final statement of the Administration's position, and thus, in effect, the executive's construction of its own power. Monroe professed a fundamentalist constitutionalism in the Cabinet discussions and in his public pronouncements, but a closer look at his actions demonstrates that he allowed politics to influence his constitutional views.

Monroe had been a member of a committee of the Continental Congress concerned with Florida problems.\textsuperscript{79} He negotiated with Spain and France in 1804 over American rights under the Louisiana Purchase, which according to the United States included West Florida. The experience must have been exasperating, for in 1805 he advocated that the United States seize Florida first and negotiate later.\textsuperscript{80} As Secretary of State under President Madison, Monroe asserted United States claims to East Florida for defense and sought indemnification of claims against Spain,\textsuperscript{81} arguments which are strikingly repeated in Jackson's letter of January 6, 1818, to Monroe. Monroe also supervised George Mathews' occupation of Florida in 1811, carrying out the objective of the statutes which Madison had requested.\textsuperscript{82} Supervision is perhaps an inappropriate word; Mathews wrote Monroe, telling him of the tactics he planned to use, but Monroe never replied. Mathews interpreted silence as consent to his plan to stage a phony revolution with the aid of American "patriots" available along the border. Marching into Florida just ahead of Mathews' forces, the patriots' "revolutionary regime" constituted the "local authority" which under the terms of the statute was to invite Mathews in. Since the Administration could not afford an embarrassment of this type, Monroe removed Mathews from command. The troops remained in East Florida, however, because of the territory's strategic importance. The Administration requested congressional authorization to annex the area, but Congress was not in the mood for a war with Spain as well as with Great Britain in 1813, and the proposals were defeated.

Monroe noted the importance of settling the Florida question in

\textsuperscript{78} 4 John Quincy Adams, \textit{supra} note 8, at 210-22 \textit{passim}.

\textsuperscript{79} H. Ammon, \textit{supra} note 69, at 50.

\textsuperscript{80} Letter from Messrs. Monroe and Pinckney to President Madison, 1805, in 2 \textit{American State Papers} 667-69 (Foreign Relations ed. 1832).

\textsuperscript{81} Letter from Secretary of State Monroe to Mr. Foster, 1811, in 3 \textit{American State Papers} 543-45 (Foreign Relations ed. 1832).

\textsuperscript{82} See H. Ammon, \textit{supra} note 69, at 306-07.
correspondence with Jackson in 1817, and the language in Jackson's letter in January 1818 urging the capture of East Florida could have been taken from Monroe's own earlier statements. The mail took two or three weeks to travel from Nashville to Washington. On January 30, three weeks after Jackson wrote, Monroe told Calhoun to be sure Jackson understood that he was not to attack any Spanish towns, but Calhoun never sent the notice to Jackson. On January 16, Adams told Onís that the United States might be forced to occupy Florida soon because of the Indian problems. The Administration obviously had an inkling of what Jackson might be up to. Yet Monroe said later that Jackson's letter had arrived when he was indisposed, that it had been passed around the Cabinet perfunctorily, without being brought properly to anyone's attention. Either no one in the Administration took Jackson—the notorious man of action—seriously, or else it was thought that simple silence would indicate sufficient disapproval of his intentions. Or the Administration may have decided to take Jackson at his word, but to go one step further in giving tacit approval without implicating the government: rather than send confidential, third-party authorization, they would send none, trusting Jackson to follow his natural instincts and conquer Florida anyway. If Jackson's action proved successful, the Administration could share the credit; if not, it could avoid the blame. This conjecture may seem unnecessarily Machiavellian, but after Monroe's long and futile personal involvement with the Florida problem, his "oversight" of Jackson's letter might have been more than accidental.

As was his normal habit, Monroe was generally silent during the Cabinet discussions, letting Crawford and Calhoun carry the argument against Adams. In the end he decided to return the towns to Spain, but without criticizing Jackson's conduct. He wrote Jackson to explain the Administration's position and to enlist Jackson's support for it. Monroe told him that the Cabinet believed the seizure of the Spanish posts was not authorized by the orders, even though Jackson may have felt it justified by military necessity; that the seizure was unconstitutional because Congress had not authorized it, and because it was a warlike act; that it risked war, which would be improvident both because of the likelihood of foreign intervention on behalf of Spain, and more importantly, because popular support for a war would be lacking un-

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83. There are suggestions that Monroe and Jackson had a thorough meeting of the minds over how to resolve the Florida problem—pre-emptive conquest at the earliest excuse. See 1 J. Basset, supra note 2, at 243-46; M. James, Andrew Jackson—the Border Captain 306-07 (1983).

84. 1 J. Basset, supra note 2, at 247.
less it were clear that Spain were the aggressor.  

No mention was made of the letter of January 6, 1818, although by that time Monroe was aware of it, nor did Jackson mention it in his reply. Monroe's tone was deferential and his language diplomatically chosen, possibly because he was trying to get Jackson to admit that the orders did not exactly cover his conduct and that some of his subsequent public statements on the problems might have been careless and inaccurate. Jackson ignored the subtleties and insisted in reply that he did what he did because he thought it was necessary, and that was justification enough.

Monroe was anxious to finish the negotiations with Spain before Congress returned, probably because he did not think the Congress would approve the seizure or the conduct of the invasion. Congress had authorized action in 1811, but their second thoughts in 1813 had forced Monroe to bring the troops back. Although the risk of war appeared to be abating, the negotiations had not been completed by November, when Monroe sent his annual message to Congress:

Although the reasons which induced Major General Jackson to take these posts were duly appreciated, there was, nevertheless, no hesitation in deciding on the course which it became the government to pursue. As there was reason to believe that the commanders of these posts had violated their instructions, there was no disposition to impute to their Government a conduct so unprovoked and hostile. An order was in consequence issued to the General in command there to deliver the posts—Pensacola, unconditionally to any person duly authorized to receive it; and St. Marks, which is in the heart of the Indian country, on the arrival of a competent force, to defend it against those savages and their associates.

... In entering Florida to suppress this combination, no idea was entertained of hostility to Spain, and, however justifiable the Commanding General was, in consequence of the misconduct of the Spanish officers, in entering St. Marks and Pensacola, to terminate it, by proving to the savages and their associates that they should not be

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85. *Id.* at 273-74.
86. In the August 19th letter to President Monroe, *supra* note 65, Jackson, after admitting responsibility for the actions, justified his action as the result of Spanish hostility:

> It will afford me pleasure to aid the government in procuring any testimony that may be necessary to prove the hostility of the officers of Spain to the United States . . . . [T]he officers of Spain had identified themselves with our enemy, and St. Mark's and Pensacola were under the complete control of the Indians, although the Governor of Pensacola at least had force sufficient to have controlled the Indians, had he chosen to have used it in that way.

*Letter from Andrew Jackson to James Monroe, August 19, 1818, in 2 J. Parton, supra* note 2, at 524.
protected even there; yet the amicable relations existing between the United States and Spain could not be altered by that act alone. By ordering the restitution of the posts, those relations were preserved. To a change of them the power of the Executive is deemed incompetent. It is vested in Congress only.\textsuperscript{87}

In form, Jackson's judgment was respected, but in fact, the Spanish towns were to be returned to the very forces whose inability to defend them was Jackson's only permissible excuse for their capture. Thus Jackson's judgment was faulted by implication. The facility of the American conquest showed that only the United States had sufficient military forces to control Florida, leading Monroe to suggest in the paragraph following the quoted passage that Spain should thank the United States for its generosity in returning the towns and for giving Spain a decent opportunity to reflect upon the proper disposition of her interests in Florida.

The Administration was undoing Jackson's unconstitutional act, thus quieting its critics. Most importantly, Monroe explicitly stated that constitutional principles compelled his decision: to continue to hold the towns would have been an act of war in violation of the Constitution, and in 1819 this was not a charge to be taken lightly. The Administration claimed not to have undertaken a full-scale war with Spain, maintaining that what it had done was justifiable under the circumstances and defensible under a plausible, albeit far-fetched on the facts, doctrine of international law. Nevertheless, the actions taken might have been construed by Spain as an act of war, providing a cause for her to engage in war with the United States. That she had not gone to war, and that she apparently was willing to settle differences by negotiation even after Jackson's invasion, was immaterial.

V.

Neither Spain nor Britain went to war with the United States in 1818. Spain might have fought if she could have gotten support from stronger European allies, but none of them thought Spanish interests were worth committing their own forces.\textsuperscript{88} The British government wanted neither war nor further foreign involvement at the moment. Spain asked her to mediate the boundary dispute with the United States, with the understanding that Britain would use her influence on Spain's behalf; but Britain, even though she made it no secret that she

\textsuperscript{87} 33 \textit{Annals of Cong.} 14-15 (1819).

\textsuperscript{88} P. Brooks, \textit{supra} note 1, at 93. In late 1817, Spain felt so distraught that she was preparing to go to war alone, but later thought better of it.
preferred that Spain retain Florida, said she would not mediate unless the United States also requested her to do so. The United States politely declined to ask for help in January 1818 because the Administration suspected that a *fait accompli* might persuade Spain to come to terms sooner than would more discussion. Spain feared the worst, and even before Madrid heard about the details of Jackson’s invasion, Onís was authorized to accept the essential points of what eventually became the final settlement.

It was not in fact Jackson’s invasion, but the occupation of Amelia Island by General Gaines in November 1817, that persuaded the Spanish foreign minister that action must be taken quickly on the treaty. When the request for British mediation failed, and after reports were received of imminent American action against the Seminoles, possibly spilling over into Florida, the foreign ministry in Madrid sent Onís instructions on April 25, 1818, to accept a boundary at the Sabine River, west of the Mississippi. These instructions, authorizing the first major concession Onís could make, concerning claims to Louisiana and the most seriously disputed problem—the United States western border—arrived in Washington simultaneously with news of Jackson’s conquests. The news caused cessation of direct talks at a time when they could have made their first progress in months.

Spain could find no allies, and in late 1818, despite Monroe’s promise to return Florida to a competent Spanish force, Jackson’s army remained in St. Marks and Pensacola. Spain was too weak and had too many other problems to be able to go to war by herself over territory much of which had already been effectively lost in 1811 and which was by 1817 admitted to be lost. Negotiations had resumed by the fall of 1818 and, perhaps spurred by last-minute parliamentary prodding, were completed in February 1819.

90. Amelia Island, off the coast at the Florida-Georgia border, was a den of smugglers and privateers, which had been taken over in 1817 by a band claiming authority from both the Republic of Mexico and the United Provinces of New Granada and Venezuela. H. Fuller, *supra* note 2, at 233.
91. See P. Brooks, *supra* note 1, at 136-44.
92. The negotiations were held up between late October 1818 and the following January, largely because Onís felt he needed broader instructions to meet what appeared to be an ultimatum from Adams. The Administration, either unaware of the problem of the instructions or suspicious of the excuse, thought that more prodding might be necessary. A statute was proposed and a bill prepared by the House Committee on Foreign Relations, authorizing the President to continue to occupy Pensacola and St. Marks. It received final action in the form of provisions for governing the territory after its cession by Spain, because Onís became disgusted with Madrid’s vacillations and decided to go ahead with negotiations before the bill was reported. In late January, the belated instructions finally arrived anyway, and the treaty was signed a few weeks later.
The congressional debate was considerably simplified by the European inaction. Representative George Poindexter of Mississippi observed that, regardless of how Jackson's military actions might be classified, none of the possible opponents had considered those actions to be acts of war, and consequently there was no need for Congress to have declared anything. This argument only solves the problem by hindsight; in the summer of 1818 the Administration and the public believed war to be a real possibility. Castlereagh, the British foreign minister, had told Adams in 1816 that an American threat to Florida might force an English occupation of the peninsula—at least that is what Adams thought he had said. Monroe and Adams were suspicious of English motives and actions until late 1818, a suspicion generally shared in the United States. Castlereagh exaggerated only slightly when he said that British popular opinion in 1818 was so excited over Arbuthnot and Ambrister that a motion for war could have been carried if he had held up a finger. He instead explained to Parliament that Arbuthnot and Ambrister did not appear to be the sort of citizens the government had any duty to protect, and popular indignation cooled. Nevertheless, opinion was still such that when news of the signing of the treaty arrived, the London Star's reaction on March 27, 1819, was:

What with unpunished murders and territorial acquisition, the Americans are drunk with exultation. The acquisition of Florida is a matter of great triumph . . . . [I]t will be allowed that they are as much to be praised in point of diplomacy, as to be execrated in point of morality. Of civilized nations, the Americans are unquestionably the most depraved in principles, and the duties of social relation, of any upon the face of the earth.

Ultimate approval by the American people of the occupation of Florida encouraged the acceptance of the means employed, and those means were personified in the political force of Andrew Jackson. The congressional investigation began after Monroe had defused the constitutional issue, leaving the House and Senate with the politically undesirable prospect of condemning Jackson's judgment. The Crawford forces attempted to generalize the debate by introducing legislation which would sharply curb the Executive's authority to engage in hostilities such as Jackson's, but these motions were attacked as politically

93. 33 ANNALS OF CONG. 972-73 (1819).
95. See E. TATUM, THE UNITED STATES AND EUROPE 1815-1823, ch. VI (1936).
96. B. PERKINS, supra note 89, at 291, 294-95.
97. 33 ANNALS OF CONG. 588 (1819). Thomas Cobb of Georgia led off the debate, and
motivated and as a slur upon Jackson, and were not debated very seriously on their merits. The first motion would have required presidential approval of military executions during peace or mere Indian war. The second was a general disapproval of Jackson's actions as unconstitutional and beyond the scope of his authority. These proposals clearly were aimed primarily at Jackson, not at loftier constitutional principles. The last resolution would have prohibited the march of the army into any foreign territory without prior congressional authorization, but it contained an exception for pursuit of a defeated enemy, and Jackson might have claimed that was what he had been doing. There would be time enough, it was said, for the Congress to reassert civil authority when the nation really faced a Julius Caesar at the Rubicon, rather than the Napoleon of the Woods at the Appalachicola. No Congressman claimed that such a usurpation of power could never happen here—and a few even dared suggest that it already had. Clay was one who so suggested, and by his speech he won Jackson's life-long enmity.

Congress could control military operations indirectly through its powers to fund, raise and regulate armies, and Congress had specifically submitted these resolutions during his speech:

Resolved, That the Committee on Military Affairs be instructed to prepare and report a bill to this House, prohibiting in time of peace, or in time of war with any Indian tribe or tribes only, the execution of any captive, taken by the Army of the United States, without the approbation of such execution by the President.

Resolved, That this House disapproves of the seizure of the posts of St. Marks and Pensacola, and the fortress of the Barancas, contrary to orders, and in violation of the Constitution.

Resolved, That the same committee be also instructed to prepare and report a bill, prohibiting the march of the Army of the United States, or any corps thereof, into any foreign territory, without the previous authorization of Congress, except it be in the case of fresh pursuit of a defeated enemy of the United States, taking refuge within such foreign territory.

98. As the French minister in Washington, Hyde de Neuville, once called him.

P. BROOKS, supra note 1, at 142.

99. The climax to Clay's speech read in part:

Recall to your recollections the free nations which have gone before us. Where are they now and how have they lost their liberties? If we could transport ourselves back to the ages when Greece and Rome flourished in their greatest prosperity, and, mingling in the throng, ask a Grecian if he did not fear some daring military chieftain, covered with glory, some Philip or Alexander, would one day overthrow his liberties? No! no! the confident and indignant Grecian would exclaim, we have nothing to fear from our heroes; our liberties will be eternal. If a Roman citizen had been asked if he did not fear the conqueror of Gaul might establish a throne upon the ruins of the public liberty, he would have instantly repelled the unjust insinuation. Yet Greece had fallen, Caesar had passed The Rubicon, and the patriotic arm even of Brutus could not preserve the liberties of his country!

1 J. BASSETT, supra note 2, at 285.
appropriated funds for Jackson to wage Indian warfare—not international war. The Florida excursion incident exposed the most severe problem with indirect controls such as these—that political problems only tangentially related to the central policy issues of war and peace will distort and overwhelm the consideration of these central issues. In 1819 the political issue was Jackson. His attitudes and actions had strained the constitutional framework to the breaking point, but no disaster had occurred, and nothing except political injury could possibly result from a congressional vote criticizing him. Congressional censure would appear to the electorate, who seemed to admire Jackson's native forthrightness, not as a defense of constitutional principles but as petty political maneuvering. So the issues were narrowed to a ground upon which Jackson could hardly be disapproved, and the final votes in the House were overwhelmingly in his favor.\textsuperscript{100} Congressional deference to popular adulation of a military hero, expressed in an oblique procedural consideration and in a strained legal construction of the events, resulted in what appeared to be constitutional approval of Jackson's personal war with Spain.

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\textsuperscript{100} The resolutions presented by Representative Cobb of Georgia, note 97 \textit{supra}, were defeated. The resolution concerning execution of captives during peacetime failed fifty-seven to ninety-eight. A resolution, a modification of Cobb's original, disapproving the seizure of the Spanish posts as unconstitutional, was rejected by a vote of sixty-five to ninety-one. The resolution limiting the operations of the army absent congressional consent fared even worse, receiving only forty-two "aye" votes. The only resolution that the House did approve was a condemnation of "the trial and execution of Robert C. Ambrister" which carried by a vote of one-hundred seven to sixty-three. \textit{33 Annals of Cong.} 1132-38 (1819).

*This note was submitted to \textit{The Review} by the author while a student at the Yale Law School.