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# Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power

William R. Casto\*

Justice Robert H. Jackson's concurring opinion in the *Steel Seizure* case<sup>1</sup> is the best judicial<sup>2</sup> opinion ever written on the vexing question of the President's constitutional power over foreign affairs.<sup>3</sup> His opinion does not resolve specific problems that arise, but it provides a valuable framework for organizing analyses. The opinion has become the most influential pronouncement on the concurrent foreign affairs powers of the President and Congress.<sup>4</sup> His analysis in *Steel Seizure* drew

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\* Paul Whitfield Horn Professor, Texas Tech University. The present essay presents a small facet of my on-going, comprehensive study of the role of attorneys in advising President Roosevelt on the 1940 Destroyers-for-Bases Deal.

1. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952).

2. An early essay by Alexander Hamilton is equally valuable. See ALEXANDER HAMILTON, *Pacificus No. 1* (1793), in 15 PAPERS OF ALEXANDER HAMILTON 40 (H. Syrett ed., 1969). See also WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL*, at chs. 5, 10 (2006). Jackson's and Hamilton's essays, though separated by one and a half centuries, mesh well together to form a complete understanding of the allocation of foreign affairs powers under the Constitution. See *id.* at ch. 10. This compatibility is not surprising. Jackson was a gifted Supreme Court Justice, and by any standard, Hamilton was one of the five best constitutional theorists in our nation's history. In my mind, Hamilton and James Madison are at the top, with John Marshall very closely behind. As for the next two, I will let the readers pick.

3. Jackson's model is ably discussed in MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* 8-15 (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 94-96 (2d ed. 1996); and HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 107-13 (1990).

4. "Justice Jackson's concurrence in *Youngstown* . . . has been very influential. Indeed, courts and commentators often give more weight to Jackson's concurrence than to the majority opinion." CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 174 (2d ed. 2006). See also

upon his practical experience as Attorney General of the United States advising President Roosevelt on the eve of the country's entrance into World War II.

Justice Jackson's most famous opinion as Attorney General was his advice in the summer of 1940, that the President could trade fifty over-age destroyers to Great Britain in exchange for base rights in the West Indies and Canada.<sup>5</sup> Jackson had to navigate through a complex set of statutes specifically designed to limit the transfer of warships to belligerent nations while the United States was neutral. The political stakes in this episode were high. President Roosevelt believed that Great Britain's very survival was at stake and, perhaps with a smile,<sup>6</sup> told Jackson that if the legal problems were not cleared up, Jackson's "head will have to fall."<sup>7</sup> At about this same time,

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STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 47 (4th ed. 2006); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 28 (2d ed. 1993); HENKIN, *supra* note 3, at 94. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).

5. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940). DAVID REYNOLDS, THE CREATION OF THE ANGLO-AMERICAN ALLIANCE 1937-41: A STUDY IN COMPETITIVE COOPERATION, at chs. 4, 5 (1982) is the best overall treatment of the deal because Reynolds does a superb job of placing the deal in the overall context of Anglo-American relations. Another excellent treatment that is especially good in giving the reader the British perspective is JAMES R. LEUTZE, BARGAINING FOR SUPREMACY: ANGLO-AMERICAN NAVAL COLLABORATION 1937-1941 (1977). Two valuable and more narrowly focused studies are PHILIP GOODHART, FIFTY SHIPS THAT SAVED THE WORLD: THE FOUNDATION OF THE ANGLO-AMERICAN ALLIANCE (1965) and ROBERT SHOGAN, HARD BARGAIN: HOW FDR TWISTED CHURCHILL'S ARM, EVADED THE LAW, AND CHANGED THE ROLE OF THE AMERICAN PRESIDENCY (1999). Shogan's *Hard Bargain* is thoroughly researched and extremely well-grounded in original sources, but the author's analysis is flawed by naïve understandings of politics and of law. WILLIAM L. LANGER & S. EVERETT GLEASON, THE CHALLENGE TO ISOLATION, 1937-1940 (1952) is still valuable. The recent chapter-length treatment in IAN KERSHAW, FATEFUL CHOICES: TEN DECISIONS THAT CHANGED THE WORLD, 1940-1941, at ch. 5 (2007) is good but largely derivative. The treatment in LLEWELLYN WOODWARD, BRITISH FOREIGN POLICY IN THE SECOND WORLD WAR 84-92 (1962) is quite dry and relatively uninformative.

6. OWEN WISTER, THE VIRGINIAN: A HORSEMAN OF THE PLAINS 24 (1919) ("When you call me that, *smile*.").

7. Roosevelt told this to the Canadian Prime Minister in a telephone conversation, and the Prime Minister recounted the story to U.S. Ambassador Moffat that same day. Moffat recorded that the Prime Minister said that Roosevelt assured him that:

Jackson considered the idea that “In view of [the President’s] constitutional power as Chief Executive and as Commander in Chief of the Army and Navy . . . the Congress could not by statute limit [his] authority.”<sup>8</sup> If this were so, there would be no legal impediment to the transaction.

A little over a decade later, Justice Jackson wrote in *Steel Seizure* that presidential actions related to foreign affairs could be organized into three categories. In crafting these categories, Jackson consciously drew upon his experiences as Attorney General advising President Roosevelt.<sup>9</sup> The first category involves action taken “pursuant to an express or implied authorization of Congress.”<sup>10</sup> In such a situation, lawful presidential power “is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>11</sup> When the President acts pursuant to congressional authority, “the strongest of presumptions and the widest latitude of judicial interpretation” would be used to support the lawfulness of the President’s actions.<sup>12</sup>

Jackson’s second category recognizes the concept of concurrent presidential and congressional authority. If Congress has neither delegated nor denied authority to the

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[A] way out of legal difficulties, which had been blocking him, had at last been found. At least if it hadn’t, continued the President, one of the heads now in the room (Attorney General, the Secretary of War, the Secretary of Navy and the Acting Secretary of State) will have to fall.

46 JAY PIERREPONT MOFFAT, DIPLOMATIC PAPERS (Aug. 22, 1940) (on file with Harvard College Library).

8. Preliminary Draft of Jackson’s Opinion (Aug. 1940), in BENJAMIN V. COHEN PAPERS, 1902-1983 (on file with the Library of Congress, Washington D.C.), reprinted *infra* at app. pp. 383-95.

9. Jackson’s opening sentence was clearly autobiographical: “That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal advisor to a President in time of transition and public anxiety.” *Steel Seizure*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). He continued, “While an interval of detached reflection,” *i.e.*, about a decade, “may temper teachings of that experience, they probably are a more realistic influence on *my* views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.” *Id.* (Jackson, J., concurring) (emphasis added).

10. *Id.* at 635 (Jackson, J., concurring).

11. *Id.* (Jackson, J., concurring).

12. *Id.* at 637 (Jackson, J., concurring).

President, “he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>13</sup> Jackson confined his discussion of the second category to a single, brief paragraph because he believed that the President’s action in *Steel Seizure* was contrary to the will of Congress.<sup>14</sup> In practice, this second category, or “zone of twilight,” has become very significant.

Jackson’s third category involves presidential “measures incompatible with the expressed or implied will of Congress.”<sup>15</sup> In this situation, the President’s “power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>16</sup> In other words, courts “can sustain exclusive Presidential control in such a case only be disabling the Congress from acting upon the subject.”<sup>17</sup>

For many years, discussions of the president’s constitutional authority have centered upon Jackson’s second category to the virtual exclusion of his third category.<sup>18</sup> In recent years, however, the Bush II Administration’s pretensions to a broad expanse of plenary, unreviewable constitutional power has sparked interest in the third category. Professors David Barron and Martin Lederman have addressed this issue with considerable thoughtfulness and care.<sup>19</sup> They followed Jackson’s diction and described the range of plenary, unreviewable presidential power as a preclusive authority.<sup>20</sup>

In 1940, a decade earlier, Jackson had to determine whether Congress had authorized the President to sell the destroyers to Great Britain. If so, the problem fit into the first

13. *Id.* (Jackson, J., concurring).

14. *Id.* at 639 (Jackson, J., concurring).

15. *Id.* at 637 (Jackson, J., concurring).

16. *Id.* (Jackson, J., concurring).

17. *Id.* at 637-38 (Jackson, J., concurring).

18. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 698-99 (2008).

19. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); Barron & Lederman, *supra* note 18.

20. See *Steel Seizure*, 343 U.S. at 638 (Jackson, J., concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution”); Barron & Lederman, *supra* note 18, at 720-29.

*Steel Seizure* category, and therefore the President obviously would have had authority to transfer them. But strong arguments could be made that acts of Congress forbade the transfer.<sup>21</sup> Jackson later admitted, “I should readily agree that a respectable argument against [my] conclusion could have been made.”<sup>22</sup> Such an interpretation would have moved the problem into the third *Steel Seizure* category. If the President has plenary constitutional authority over foreign affairs, which the preliminary draft advanced, the President could ignore the apparently applicable acts of Congress. This very argument of plenary—indeed, dictatorial—powers has been more recently advanced by attorneys advising President Bush.<sup>23</sup>

The present essay considers Attorney General Jackson’s encounter with plenary constitutional power in the Destroyers-for-Bases Deal. First, the essay describes the Deal’s political and diplomatic context.<sup>24</sup> Next, the essay considers the legal context in which the argument for plenary power occurred.<sup>25</sup> Finally, the essay considers possible explanations for why Jackson deleted the argument from his final opinion.<sup>26</sup>

#### AIDING GREAT BRITAIN

Although World War II began in Europe in the early fall of 1939, the German army did not bring its *blitzkrieg* to the western front until the next summer. In May and June of

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21. See Edwin Borchard, *The Attorney General’s Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT’L L. 690 (1940); Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT’L L. 569 (1940); Edward Corwin, Letter to the Editor, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940, at 72. See also Letter from Quincy Wright to Charles C. Burlingham (Aug. 21, 1940), in BENJAMIN V. COHEN PAPERS, *supra* note 8.

22. Robert Houghwout Jackson, Untitled Preliminary Draft, at 47 (Oct. 10, 1952), in ROBERT HOUGHWOUT JACKSON PAPERS (on file with the Library of Congress, Washington, D.C.).

23. See, e.g., Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa’eda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 342-53 (discussing Bush Administration policies on al-Qa’eda, the Taliban, and associated forces). See also generally Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778 (2010).

24. See *infra* notes 27-33 and accompanying text.

25. See *infra* notes 34-92 and accompanying text.

26. See *infra* notes 93-103 and accompanying text.

1940, the Wehrmacht quickly conquered the Low Countries and France, and drove the British army from the continent. At about the same time, Italy entered the war, and Great Britain stood alone against “Hitler’s gospel of hatred, appetite and domination.”<sup>27</sup> Many believed that Britain would either negotiate a peace<sup>28</sup> or be conquered through invasion.

Invasion seemed imminent, and only the English Channel, patrolled by the Royal Navy, stood between Britain and the triumphant Germans. At the same time, the Navy had to protect shipping from submarine attacks.<sup>29</sup> Destroyers were absolutely essential to both of these tasks, and the British simply did not have enough of them. Defending against an invasion was the highest priority bar none, and the Admiralty allocated a little more than half of their North Atlantic destroyers to this task.<sup>30</sup> This absolutely essential allocation left too few destroyers to protect shipping.<sup>31</sup>

Almost as soon as Churchill became Prime Minister in the middle of May, he began besieging President Roosevelt to lend or sell destroyers to the British.<sup>32</sup> In a “jigsaw puzzle”<sup>33</sup> of

27. *Winston Churchill, War of the Unknown Warrior Speech* (BBC television broadcast, July 14, 1940) (transcript available at <http://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/126-war-of-the-unknown-warriors>). See also 2 CHURCHILL WAR PAPERS 516-17 (Martin Gilbert ed., 1995).

28. The British Cabinet gave serious thought to a negotiated peace in late May. See LEUTZE, *supra* note 5, at ch. 4; KERSHAW, *supra* note 5, at ch. 1; REYNOLDS, *supra* note 5, at 103-06.

29. See 1 S.W. ROSKILL, *THE WAR AT SEA 1939-1945*, at 249-57 (1954).

30. See *id.* at 249, 253. The British anticipated that destroyers would be the primary weapon against a cross-channel invasion. Winston Churchill to General Ironsides and General Gill (July 10, 1940), 2 CHURCHILL WAR PAPERS, *supra* note 27, at 496.

31. Although the Germans had only a few U-boats operational in the summer of 1940, their assault upon the relatively unprotected British shipping was devastating. See ROSKILL, *supra* note 29, at 253, 348-52, 357. The German U-boat veterans later remembered this short period as “the happy time.” *Id.* at 348.

32. Telegram from Winston Churchill to Franklin Delano Roosevelt (May 15, 1940), in 6 MARTIN GILBERT, *WINSTON S. CHURCHILL: FINEST HOUR 1939-1941*, at 346 (1983) (stating that “[i]mmEDIATE needs are: [f]irst of all, the loan of 40 or 50 of your older destroyers”).

33. Robert H. Jackson, *The Exchange of Destroyers for Atlantic Bases* (1954), in *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 82, 82 (John Q. Barrett ed., 2003). Jackson died before he could publish this manuscript. It is reprinted in Professor Barrett’s marvelous book.

intricate discussions that lasted three months, Roosevelt agreed to sell the British fifty destroyers for base rights. Jackson's legal opinion was a *sine qua non* for the Deal, but the opinion did not spring full-grown from his forehead.

### THE LEGAL CONTEXT

In assessing the President's power, Jackson had to address a number of related statutes that appeared to bar the deal. In June, Jackson had given an informal opinion<sup>34</sup> that a section of the Espionage Act of 1917<sup>35</sup> forbade the transfer of twenty PT boats to the British.<sup>36</sup> Many people thought that the Espionage Act similarly prohibited the transfer of destroyers.<sup>37</sup>

To complicate the matter further, when the planned PT boat transfer came to light and rumors began circulating that the government might also sell destroyers to the British, Congress passed two statutes—the Walsh Amendment<sup>38</sup> and the Vinson Amendment<sup>39</sup>—to outlaw the contemplated transfer.<sup>40</sup> These two statutes, coupled with the Espionage Act, led the President and his Cabinet to believe that the Destroyer Deal would require specific congressional approval.<sup>41</sup>

34. *Id.* at 94.

35. Act of June 15, 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified at 18 U.S.C. § 33 (1940), repealed 1948, re-codified as amended at 18 U.S.C. § 964 (2006)). The Espionage Act of 1917 originated as an "Omnibus Bill" that collected many related and unrelated provisions dealing with war and neutrality. *See id.* *See also* Letter from Lawrence Smith to Attorney General Jackson (June 21, 1940), in ROBERT HOUGHWOUT JACKSON PAPERS, *supra* note 22.

36. Jackson, *supra* note 22. Jackson's precise advice on the PT boat transfer is in the Assistant Navy Secretary's notes of a telephone conversation with Newman Townsend, Jackson's assistant. Memorandum of Telephone Conversation Between Townsend and Acting Secretary Compton (June 24, 1940) (on file with the National Archives, Washington, D.C.).

37. *See* WHITNEY SHEPARDSON & WILLIAM SCROGGS, THE UNITED STATES IN WORLD AFFAIRS: AN ACCOUNT OF AMERICAN FOREIGN RELATIONS, 1940, at 259 (1941). *See also* MARK LINCOLN CHADWIN, THE HAWKS OF WORLD WAR II, at 87 (1968); H. DUNCAN HALL, NORTH AMERICAN SUPPLY 142 (1955).

38. An Act to Expedite National Defense, and for Other Purposes, Pub. L. No. 76-671, § 14, 54 Stat. 676, 681 (1940).

39. Act of July 19, 1940, Pub. L. No. 76-757, § 7, 54 Stat. 779, 780 (regarding the composition of the United States Navy).

40. *See infra* notes 63-68 and accompanying text.

41. Memorandum from Franklin D. Roosevelt (Aug. 2, 1940), in 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1940, at 58

Others believed that, notwithstanding the three statutes, the President had unilateral authority to accomplish the exchange. In early July, private citizens and Justice Felix Frankfurter asked Benjamin V. Cohen to consider the issue.<sup>42</sup> Cohen held a relatively obscure position in the Department of the Interior,<sup>43</sup> but he was generally considered the most brilliant lawyer in government.<sup>44</sup> Jackson described him as “having the best legal brain he ha[d] ever come in contact with.”<sup>45</sup> Cohen wrote a long memorandum presenting a buffet of powerful and not so powerful legal analyses supporting the transfer of destroyers to Britain.<sup>46</sup> The President, however, initially rejected Cohen’s arguments.<sup>47</sup>

On August 2, Roosevelt and his Cabinet reached a policy consensus that the fifty destroyers should be transferred to the British, but they still believed that legislative action would be necessary.<sup>48</sup> To break this logjam, Justice Frankfurter arranged for Cohen and Dean Acheson to refine and polish Cohen’s original memorandum.<sup>49</sup> Acheson was a capable attorney in private practice who later became Secretary of

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(U.S. Department of State ed., 1958) [hereinafter 3 FOREIGN RELATIONS].

42. See CHADWIN, *supra* note 37, at 89, 97.

43. He was General Counsel of the National Power Policy Committee. See WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL 3, 107, 247 (2002).

44. See *id.* at 3.

45. 3 HAROLD ICKES, THE SECRET DIARY OF HAROLD L. ICKES: THE LOWERING CLOUDS, 1939-1941, at 656 (1954) (June 22, 1941 entry quoting Jackson). Similarly, New Dealer and later Supreme Court Justice William O. Douglas had thought that “Ben was the best and most intelligent man in the New Deal.” WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 369 (1974).

46. Memorandum from Benjamin Cohen Regarding Sending Effective Material Aid to Great Britain with Particular References to the Sending of Destroyers (July 20, 1940), in FRANKLIN DELANO ROOSEVELT PAPERS (on file with the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, N.Y.) [hereinafter Memorandum from Benjamin Cohen].

47. See Letter from President Roosevelt to Navy Secretary Knox (July 22, 1940), in 2 F.D.R.: HIS PERSONAL LETTERS 1928-1945, at 1048-49 (Elliot Roosevelt ed., 1950).

48. See LANGER & GLEASON, *supra* note 5, at 749-51.

49. DEAN ACHESON, MORNING AND NOON 222 (1965); BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 210 (1982) (discussing a Benjamin Cohen interview).

State.<sup>50</sup> The two men went to work, and on August 11, published their redraft in the *New York Times*.<sup>51</sup> As soon as the Cohen/Acheson letter appeared, Jackson asked Assistant Solicitor General Newman A. Townsend<sup>52</sup> to brief the letter, and two days later, Townsend told Jackson that he was “inclined to agree with the construction which the *Times* article gives to . . . the Espionage Act.”<sup>53</sup> Townsend also thought, notwithstanding the Vinson and Walsh Amendments, that the destroyers could be sold under Sections 491 and 492 of Title 34 of the *United States Code*.<sup>54</sup> Jackson then gave the President a tentative green light to transfer the destroyers without specific legislative approval,<sup>55</sup> and the President made a tentative offer to the British that same day.<sup>56</sup>

### JACKSON’S OPINION

Jackson informally advised President Roosevelt that the deal could be consummated without specific congressional approval, and the United States concluded a formal agreement with Great Britain on September 2.<sup>57</sup> Jackson’s formal opinion,

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50. See DAVID MCLELLAN, *DEAN ACHESON: THE STATE DEPARTMENT YEARS* (1976).

51. Dean Acheson et.al., Letter to the Editor, *No Legal Bar Seen to Transfer of Destroyers*, N.Y. TIMES, Aug. 11, 1940, at 58. Cohen did not sign the *Times* letter. Instead, it was signed by Acheson and three other members of the WASP establishment, Charles C. Burlingham, Thomas D. Thacher, and George Rublee. *Id.*

52. Jackson described Townsend as “a hard-headed, conservative, and forthright former judge.” Jackson, *supra* note 33, at 95.

53. Memorandum from Newman A. Townsend to the Attorney General Regarding Over-Age Destroyers (Aug. 13, 1940), in ROBERT HOUGHWOUT JACKSON PAPERS, *supra* note 22 [hereinafter Memorandum from Newman A. Townsend].

54. *Id.* With regard to Sections 491 and 492, Townsend wrote, “It may be, however, that immediate release and sale of the over-age destroyers could be accomplished under sections 491 and 492 of title 34, U.S.C.” *Id.*

55. Jackson later wrote that on the same day, “I advised the president of Judge Townsend’s conclusion, which seemed to me sound.” Jackson, *supra* note 22, at 30-31. Jackson’s final draft of this sentence reads, “Of course, I told the President of this development.” Jackson, *supra* note 33, at 96.

56. GILBERT, *supra* note 32, at 732-33.

57. The agreement was accomplished through an exchange of notes between the British Ambassador and the Secretary of State. See Memorandum from British Ambassador to Secretary of State (Sept. 2, 1940), in 3 FOREIGN RELATIONS, *supra* note 41, at 73; Memorandum from Secretary

which he finished at the end of the month, began with the technical issue of whether the President had authority to acquire the offered bases. In this regard, no act of Congress gave the President authority, and no Act barred the President from acquiring the bases. Using Jackson's subsequent *Steel Seizure* analysis, the issue of the President's authority to acquire base rights fell into the second category or "zone of twilight." In this context, a Preliminary Draft of the opinion<sup>58</sup> argues that the President has a general constitutional authority to act in the field of foreign relations as he sees fit. "Eminent authorities," the draft states, "have long held that in the field of foreign relations the Executive's power is both complete and exclusive."<sup>59</sup> To support this proposition, the draft quotes Secretary of State Thomas Jefferson, President Theodore Roosevelt, Professor John Pomeroy, and Chief Justice John Marshall, followed by a daunting string cite of fifteen relevant—and not so relevant—books, debates, a law review article, and a case.<sup>60</sup> This portion of the Preliminary Draft concludes with a quotation from Justice Sutherland's *Curtiss-Wright* opinion.<sup>61</sup> Except for the draft's loose reference to a "complete and exclusive" presidential power, this first part of the draft is uncontroversial. To repeat, this portion deals with the "zone of twilight" in which there is no conflict between the President and Congress.<sup>62</sup>

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of State to British Ambassador (Sept. 2, 1940), in 3 FOREIGN RELATIONS, *supra* note 41, at 74 (1958).

58. Preliminary Draft of Jackson's Opinion, *supra* note 8. See app. *infra* at pp. 383-395.

59. Preliminary Draft of Jackson's Opinion, *supra* note 8; app. *infra* at pp. 383-84.

60. Preliminary Draft of Jackson's Opinion, *supra* note 8; app. *infra* at pp. 384-88.

61. Preliminary Draft of Jackson's Opinion, *supra* note 8; app. *infra* at note 124 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)).

62. Almost a year later, Jackson considered whether the President could authorize the Army Air Corps to train British military flying students. *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58 (1941). In that context, he quoted a constitutional law treatise that addressed the President's authority as Commander-in-Chief:

[I]n virtue of his rank as head of the forces, he has certain powers and duties with which Congress cannot interfere. For instance, he may regulate the movements of the army

Although Congress had not spoken to the issue of the President's authority to acquire territory, it clearly had addressed the President's authority to dispose of Navy vessels. The Walsh and Vinson Amendments were enacted specifically to restrict the President's authority to transfer destroyers to the British.<sup>63</sup> The Walsh Amendment forbade a transfer unless the destroyers were not essential to national defense.<sup>64</sup> The Vinson Amendment provided that "No [Navy] vessel . . . shall be disposed of by sale or otherwise . . . except as now provided by law,"<sup>65</sup> and the Amendment's clear legislative history limited the President's authority to two specific statutory

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and the stationing of them at various posts. So also he may direct the movements of the vessels of the navy, sending them wherever in his judgment it is expedient.

*Id.* at 61 (quoting HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 115 (3d ed. 1910)). In support of this proposition, Mr. Black, who incidentally was the original author of *Black's Law Dictionary*, offered three obscure opinions from the United States Court of Claims. BLACK, *supra*, at 115 n.15. In *Swaim v. United States*, 28 Ct. Cl. 173 (1893), the court held that the President had implied constitutional authority to convene a military court martial, and noted that Congress had not sought to deprive the President of this convening authority. The other two cases Black cited were "see also" authority, in which the court gave little or no express consideration to the possibility of implied power, and simply enforced the applicable acts of Congress. *See id.* (citing *Hogan v. United States*, 43 Ct. Cl. 158 (1909); *Cloud v. United States*, 43 Ct. Cl. 69 (1907)).

Notwithstanding the quotation from Black, there was not the slightest hint of a collision of congressional and presidential wills in the pilot-training situation. Jackson pointed out that the recently enacted Lend-Lease Act, Act of Mar. 11, 1941, Pub. L. No. 77-11, 55 Stat. 31 (1941), clearly gave the President authority to use military equipment to train the British pilots, but was technically silent on providing instruction services rather than training equipment. *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. at 60-61. He also noted the Act's legislative history that included a clear statement that "our national policy is and should be . . . for our national security, to aid Britain." *Id.* at 62 (quoting H.R. REP. NO. 77-18, at 2 (1941)).

In other words, the Pilot Training issue involved a situation in which the President was proposing to act in accord with very recently stated congressional policy. Therefore, the case fell within category two of Jackson's subsequent *Steel Seizure* model, or perhaps even within category one. Jackson stated in this regard, "I am inclined to the opinion that such action is likewise authorized by the Lend-Lease Act." *Id.* at 60-61. *See also id.* at 62-63 (presenting a strong statutory basis for Jackson's inclination).

63. *See supra* notes 38-40 and accompanying text.

64. An Act to Expedite National Defense, and for Other Purposes, Pub. L. No. 76-671, § 14(a), 54 Stat. 676, 681 (1940).

65. Act of July 19, 1940, Pub. L. No. 76-757, § 7, 54 Stat. 779, 780 (1940).

modes of sale.<sup>66</sup> The first was Sections 491 and 492 of Title 34 of the *United States Code*, which allowed the Navy to strike “vessels . . . unfit for further service” from the Navy List and sell them.<sup>67</sup> The second was Section 493, which allowed the Navy to sell auxiliary vessels “unsuited to the present needs of the Navy.”<sup>68</sup>

When Jackson initially gave President Roosevelt a tentative green light to transfer the destroyers without specific congressional authorization, he planned to use Sections 491 and 492.<sup>69</sup> This initial plan, however, fell completely apart when the Chief of Naval Operations refused to certify that the destroyers were “unfit for further service” as required by Section 491.<sup>70</sup> Jackson’s fall-back position was to rely solely upon Section 492.<sup>71</sup> The Preliminary Draft, which is the subject of the present essay, was written after the Chief of Naval Operations refused to go along with the idea of striking the destroyers from the naval list.<sup>72</sup> Jackson’s sole reliance

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66. S. REP. NO. 76-1946, at 7-8 (1940). *Accord* Memorandum from Newman A. Townsend, *supra* note 53.

67. 34 U.S.C. §§ 491-92 (1940). In 1956, Congress repealed Title 34, which dealt solely with the Navy, and merged the repealed provisions into Title 10, which deals with all the armed forces. Citations to Title 34 in the present article refer to the 1940 edition of the *United States Code*.

68. *Id.* § 493. *See also supra* note 67. In fact, the Navy never used Section 493 to dispose of even auxiliary vessels. *See* Diary of Oscar Cox (July 12, 1940), in OSCAR COX PAPERS (on file with the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, N.Y.) (relating advice from Admiral Ray Spear).

69. *See* LEUTZE, *supra* note 5, at 117-19. *See also* Memorandum Regarding Old Destroyers (Aug. 15, 1940), in ROBERT HOUGHWOUT JACKSON PAPERS, *supra* note 22. The memorandum is unsigned but was likely written by Newman A. Townsend and Green Hackworth. Hackworth was the Legal Advisor to the Department of State. For support of Townsend’s and Hackworth’s likely authorship of the memorandum, *see* Jackson, *supra* note 33, at 96.

70. Memorandum from Chief of Naval Operations Stark to Navy Secretary Knox, with Addenda (Aug. 17, 1940), *discussed in* LEUTZE, *supra* note 5, at 117-19. Apparently, this valuable memorandum was lost in the mid-1990s, when the Chief of Naval Operations’ files for 1938-41 were transferred from the U.S. Naval Historical Center to the National Archives. *See* SHOGAN, *supra* note 5, at 298 n.216.

71. *See infra* app. at pp. 390-92. *Accord* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att’y Gen. 484, 489 (1940).

72. The Preliminary Draft is based solely upon Section 492, but cites both Sections 491 and 492. *See infra* app. at p. 392. Someone later noticed

upon Section 492 was, at best, dubious. Until Chief of Naval Operations Stark refused to go along with Jackson's initial approach, every lawyer who considered the issue, including Jackson himself, believed that Section 492 could not be used unless the ships were struck from the Navy List.<sup>73</sup> Whoever put together the Preliminary Draft undoubtedly understood the weaknesses of the Section 492 argument and in the analysis of the Espionage Act. Accordingly, the drafter prefaced his analysis with the thought that: "In view of your constitutional power as Chief Executive and as Commander in Chief of the Army and Navy, many authorities hold that the Congress could not by statute limit your authority in this respect. I find it unnecessary, however, to pass upon that question."<sup>74</sup> It is unclear who came up with this claim of preclusive authority. Jackson's notes for his unpublished law review article suggest that the general idea came from Secretary of War Stimson.<sup>75</sup>

The basic problem with the Preliminary Draft's claim of preclusive power is that the authorities quoted or cited in the draft gave scant support to the proposition. To be sure, the President clearly has exclusive power over a few specific foreign affairs issues. Under the Constitution, only the President may nominate officers subject to Senate confirmation,<sup>76</sup> and only the President may negotiate treaties, subject of course, to Senate approval.<sup>77</sup> There also is a

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this discrepancy and struck Section 491 from the draft.

73. Memorandum from Benjamin Cohen, *supra* note 46, at 2; Memorandum from Newman A. Townsend, *supra* note 53. For Jackson's initial position, see *supra* notes 52-56, 69-71 and accompanying text. When Cohen and Acheson wrote their letter, they struck all reference to Sections 491 and 492, presumably because they believed that a finding that the ships were "unfit for further service" was impossible. See Acheson et al., *supra* note 51.

74. See *infra* app. at p. 390.

75. In some preliminary notes, Jackson wrote, "The opinion -- not rest on Stimson ground inherent power -- Letter of five -- Statutory only . . . Domestic law -- not go on inherent powers -- no danger." Untitled preliminary notes for law review article, in ROBERT HOUGHWOUT JACKSON PAPERS, *supra* note 22.

76. U.S. CONST. art. II, § 2, cl. 2. One of the sources cited in the Preliminary Draft notes this particular exclusive power. See Warren, *infra* app. note 119.

77. U.S. CONST. art. II, § 2, cl. 2. A number of the sources cited in the Preliminary Draft adduced the President's treaty power as an example of exclusive executive power. See HYDE, *infra* app. note 114; MOORE, *infra* app. note 117; POMEROY, *infra* app. note 108; WILLOUGHBY, *infra* app. note 121; WRIGHT, *infra* app. note 122.

consensus that the President has exclusive power to recognize foreign governments.<sup>78</sup> These narrow categories, however, are based upon specific constitutional language and in no way support a general constitutional authority to ignore congressional mandates. There also is a consensus that only the President may communicate officially with foreign governments,<sup>79</sup> but this is a rule of procedure and not a substantive Presidential power. At best, the Preliminary Draft's quotation of the *Curtiss-Wright* case supports this procedural power.<sup>80</sup> One of the quoted authorities<sup>81</sup> embraced a broad preclusive power stemming from the Commander in Chief Clause,<sup>82</sup> but the Preliminary Draft takes no notice of this separate argument.<sup>83</sup>

The long list of authorities cited in the Preliminary Draft was initially adduced in support of the President's unilateral power to acquire base rights, and there was no relevant act of Congress on this issue. In Jackson's *Steel Seizure* opinion, he later referred to this type of issue as a "zone of twilight" in which the President and Congress may have concurrent authority. A number of the authorities in the Preliminary Draft relied upon occasions in which Presidents took bold action in the absence of congressional guidance.<sup>84</sup> President Jefferson's Louisiana Purchase<sup>85</sup> and President Lincoln's

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78. U.S. CONST. art. II, § 2, cl. 2. A number of the sources cited in the Preliminary Draft adduced the President's recognition power as an example of exclusive executive power. See WILLOUGHBY, *infra* app. note 121; WRIGHT, *infra* app. note 122; Warren, *infra* app. note 119. See also MOORE, *infra* app. note 117.

79. See HENKIN, *supra* note 3, at 41-45, 81-82. A number of the sources cited in the Preliminary Draft adduced the President's power to communicate officially with foreign nations as an example of exclusive executive power. See CORWIN, *infra* app. note 111; MATHEWS, *infra* app. note 116; MOORE, *infra* app. note 117; POMEROY, *infra* app. note 108; WILLOUGHBY, *infra* app. note 121; WRIGHT, *infra* app. note 122; Warren, *infra* app. note 119. See also HAMILTON, *supra* note 2; CASTO, *supra* note 2, at 62-63 (discussing Hamilton's *Pacificus No. 1*).

80. See *infra* app. note 124 and accompanying text.

81. See POMEROY, *infra* app. note 108 and accompanying text.

82. U.S. CONST. art. II, § 2, cl. 1.

83. See *infra* app. note 108 and accompanying text.

84. See *Little v. Barreme*, 6 U.S. 170 (1804) (discussed *infra* app. note 123); DE CHAMBRUN, *infra* app. note 109; LATANÉ, *infra* app. note 115; ROOSEVELT, *infra* app. note 107.

85. See LATANÉ, *infra* app. note 115.

actions at the onset of the Civil War<sup>86</sup> were particularly dramatic examples. None of the authorities, however, support a general Presidential power to ignore acts of Congress.<sup>87</sup> Even with respect to the dramatic actions of Presidents Jefferson and Lincoln, the authorities note that each President sought and obtained congressional ratification.<sup>88</sup> The Draft's prominent quotation from President Theodore Roosevelt ends with the clear statement that he could not take action that "was forbidden by the Constitution or by the laws."<sup>89</sup> In this context, the President clearly meant "laws" to encompass acts of Congress.<sup>90</sup>

About a week after the Preliminary Draft was prepared, Jackson gave President Roosevelt a near-final draft for review.<sup>91</sup> This draft deleted almost all of the authorities on presidential power that were quoted and cited in the Preliminary Draft, but retained the argument of a general foreign affairs power relevant to the President's authority to acquire base rights. To repeat, however, the issue of concurrent authority to acquire base rights spoke to the second *Steel Seizure* category in which there was no conflict between the President and Congress. When Jackson turned to the President's authority to dispose of the vessels, the idea of a general presidential authority to ignore congressional directives was completely gone.

Although Jackson dropped the suggestion of a broad claim of preclusive presidential power, we do not know why he did so. Perhaps he wished to avoid a political dispute with Congress. Congressional relations were certainly a consideration, but Jackson did not drop a somewhat similar, in-your-face,

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86. See DE CHAMBRUN, *infra app.* note 109. See also Barron & Lederman, *supra* note 19, at 993-1005.

87. See *infra app.* notes 106-23.

88. See DE CHAMBRUN, *infra app.* note 109; LATANÉ, *infra app.* note 115. In *Steel Seizure*, Jackson wrote that "The oft-cited Louisiana Purchase had nothing to do with the separation of powers as between the President and Congress, but only with the state and federal power." *Steel Seizure*, 343 U.S. 579, 638 n.5 (1952).

89. See ROOSEVELT, *infra app.* note 107 and accompanying text.

90. See Barron & Lederman, *supra* note 19, at 1035.

91. Robert Houghwout Jackson, Draft Opinion Regarding the Sale of Over-Age Destroyers to Great Britain (Aug. 23, 1940), in ROBERT HOUGHWOUT JACKSON PAPERS, *supra* note 22. See also Jackson, *supra* note 33 at 97-98.

argument from the near-final draft opinion that he showed the President.<sup>92</sup>

Seven years later, when he was on the Supreme Court, Jackson evinced a deep, personal mistrust of broad interpretations of war powers. He bluntly explained that,

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular.<sup>93</sup>

We may reasonably assume that Jackson would have been leery of a constitutional doctrine that would eviscerate the doctrine of separation of powers when the Executive invokes the President's foreign affairs and Commander-in-Chief powers. In *Steel Seizure*, he denied that his Destroyers-for-

92. In dealing with the Espionage Act, Benjamin Cohen had concluded that, because the Act was a criminal statute whose terms did not expressly apply to government action, the Act should be limited to private citizens. Memorandum from Benjamin Cohen, *supra* note 46, at 11-12. There was good precedent for this interpretive strategy, and some very sophisticated people believed that Cohen's approach was the strongest argument. See Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT'L L. 680, 683-84 (1940); Letter from Manley Hudson to Charles Burlingham (Nov. 12, 1940), in BENJAMIN V. COHEN PAPERS, *supra* note 8. See also James W. Ryan, Address to the American Bar Association Section of International Law (Sept. 10, 1940), in 86 CONG. REC. app. 5600-01 (1940).

In late August, Benjamin Cohen wrote, "I wholly agree that the [Espionage Act] does not prevent sending the destroyers out of the country by the Government itself." Draft Letter sent as an attachment from Benjamin Cohen to Dean Acheson (Aug. 27, 1940), in BENJAMIN COHEN PAPERS, *supra* note 8 [hereinafter Draft Letter from Benjamin Cohen]. Cohen went on to explain that he and Acheson deleted this argument from their *N.Y. Times* letter, see Acheson et al., *supra* note 51; *supra* note 48 and accompanying text, because this "view seemed to us calculated to produce the protest that we were putting the Government above the law and suggesting that it do what its citizens were forbidden to do." Draft Letter from Benjamin Cohen, *supra*. See also Letter from Benjamin Cohen to Dean Acheson (Aug. 17, 1940), in BENJAMIN COHEN PAPERS, *supra* note 8 (stating that "we feared [this view] might provoke more political as well as legal protest than the suggestion we made").

93. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring).

Bases opinion relied upon preclusive presidential authority<sup>94</sup> and restated his mistrust of broad war powers:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.<sup>95</sup>

Finally, Jackson's response to Professor Edward Corwin's critique of Jackson's final and official Destroyer opinion casts some light on the matter. On the narrow issue of presidential authority to acquire bases, Jackson quoted the *Curtiss-Wright* dictum, recognizing a "very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."<sup>96</sup> In a fit of near hysteria, Corwin shrieked, "[n]o such dangerous opinion was ever before penned by an Attorney General of the United States."<sup>97</sup> He asked, "why may not any and all of the Congress's specifically delegated powers be set aside . . . and the country be put on a totalitarian basis without further ado?"<sup>98</sup> Of course, Jackson made no such claim. His discussion of the President's constitutional power dealt solely with an issue in which there was not the slightest hint of a conflict between the President and the Congress. Corwin simply misread Jackson's opinion.<sup>99</sup>

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94. *Steel Seizure*, 343 U.S. 579, 645 n.14 (1952) (Jackson, J., concurring).

95. *Id.* at 642 (Jackson, J., concurring). Jackson was referring to President Truman's unilateral commitment of the armed forces to the Korean War.

96. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 486 (1940) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)). See also *infra* app. at note 124 and accompanying text.

97. Corwin, *supra* note 21.

98. *Id.*

99. Although Corwin was a great scholar, he was not a careful reader of legal texts. For another failure by Corwin to understand an important legal

A decade later, Jackson still remembered, and obviously resented, Corwin's strident attack. Although the Preliminary Draft of the Destroyers opinion had included a claim similar to Corwin's allegation, this extreme language was stripped from the final opinion. In an early draft of Jackson's law review article, he bluntly stated in specific response to Corwin's charges, that "[t]he fact was that the opinion expressly avoided reliance for its conclusion on inherent, implied or independent constitutional powers of the presidential office . . . . The ruling was that he could go as far as Congress authorized and no farther."<sup>100</sup>

### CONCLUSION

As the Preliminary Draft of Jackson's opinion in the Destroyer Deal demonstrates, the idea of a broad, preclusive Executive power based upon the President's foreign affairs and Commander-in-Chief powers has been around for a long time. Not until recently, however, has a high officer in the federal government formally embraced this sweeping concept. Certainly the idea did not reach the final draft of Jackson's opinion. Why did Jackson not use the preclusive power argument in his final opinion? Undoubtedly, there were political reasons. After all, the opinion was a political document.<sup>101</sup> But Jackson had to have had serious legal reservations as well.

Not a single source cited in the Preliminary Draft—neither the quotations nor the hideous string cite—supported the claimed general principle of preclusive power. Indeed, some of the sources flatly denied the principle. During the undeclared naval war with France, the Supreme Court held that, in the context of a direct conflict between an act of Congress and a presidential order, that the Congress could micromanage a

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argument, see CASTO, *supra* note 2, at 68-74, 179-80.

100. Jackson, *supra* note 22. Jackson subsequently deleted this section from his draft. Presumably he wisely decided not to engage in polemics with his critics.

101. In *Steel Seizure*, Jackson later confessed that one of his Attorney General advisory opinions was "partisan advocacy." *Steel Seizure*, 343 U.S. 579, 649 n.17 (1952) (Jackson, J., concurring).

naval campaign.<sup>102</sup> Likewise, the first President Roosevelt had a quite expansive view of the President's constitutional powers, but he clearly stated that the President's acts were subject to congressional control.<sup>103</sup>

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102. *See infra* app. note 123.

103. *See* ROOSEVELT, *infra* app. note 107 and accompanying text. *See also* WRIGHT, *infra* app. note 122; *infra* app. note 122 and accompanying text.

## APPENDIX

Preliminary Draft of Jackson's Opinion<sup>104</sup>

## The President

I have the honor to refer to your request for my opinion concerning a question which has arisen in connection with a proposed exchange of certain old destroyers of the United States Navy for naval and air bases in the Western Hemisphere.

I understand that the government of Great Britain has proposed to grant to the United States seven naval and air bases in the Western Hemisphere in exchange for fifty old destroyers to be transferred by the United States to the Canadian Government; and that the Chief of Naval Operations of the United States Navy is of the opinion that due to the strategic value of such naval and air bases the proposed exchange will result in the strengthening of the total defense of the United States. I also understand that the Chief of Naval Operations has, or will, certify that in view of the acquisition of such naval and air bases [and of their value in connection with the national defense,]<sup>105</sup> the destroyers which it is proposed to exchange for them are not essential to the defense of the United States. You request my opinion whether under these circumstances you are authorized to direct the proper officials of the United States Government to effect the exchange.

The Constitution vests the Executive power in the President. (Const., Art. 2, sec. 1) Eminent authorities have

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104. Preliminary Draft of Jackson's Opinion, *supra* note 8 (as reprinted in this Appendix). The original document can be found in the Benjamin V. Cohen Papers in the Library of Congress. All footnotes found within this reprint of the Preliminary Draft are editorial inserts by the present author. Cohen participated in drafting Attorney General Jackson's opinion. See Jackson, *supra* note 33, at 96. The Preliminary Draft was prepared sometime after August 16, 1940 and before August 27, 1940, when Jackson released his final opinion. In order to establish the President's statutory authority to transfer the destroyers, Jackson initially planned to rely upon Sections 491 and 492 of Title 34 of the *United States Code*. On August 16, however, the Chief of Naval Operations refused to make a finding of fact crucial to Jackson's original plan. See *supra* notes 70-73 and accompanying text. The Chief of Naval Operation's refusal forced Jackson to rely upon a much weaker argument based solely upon a proviso to Section 492.

105. Words in brackets are pen and ink additions.

long held that in the field of foreign relations the Executive's power is both complete and exclusive. Thomas Jefferson said that "The transaction of business with foreign nations is Executive altogether." (Writings of Thomas Jefferson (Memorial Edition). Vol. III, p. 16)<sup>106</sup> President Theodore Roosevelt, in his autobiography (pp. 388-389),<sup>107</sup> said:

\*\*\* My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.

Professor Pomeroy, in his work entitled "Constitutional Law of the United States (75<sup>th</sup> Ed., p. \_\_\_\_\_),<sup>108</sup> says:

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106. THOMAS JEFFERSON, *Opinion on the Question Whether the Senate has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions*, in 3 THE WRITINGS OF THOMAS JEFFERSON 16 (Albert Bergh ed., 1907). For the current edition, see 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian Boyd ed., 1961). In this opinion, Jefferson simply advised that the Senate, by itself, had no power to set the grade to which a diplomat shall be appointed. The opinion is quite silent on the powers of the Congress.

107. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1913). The last sentence of the quotation makes clear that he is referring to an expansive concurrent power that could not be exercised in violation of "the laws," *i.e.*, acts of Congress. *Accord* Barron & Lederman, *supra* note 19, at 1034-37.

108. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 565 (10th ed. 1888). The draft's citation to the seventy-fifth edition is a typo. The 1888 tenth edition is the last edition of Pomeroy's book. The quoted language appears in Section 672 of the book, and refers solely to the President's powers to communicate with foreign nations and to negotiate treaties.

In other portions of his treatise, to which the Preliminary Draft neither cites nor alludes, Pomeroy made sweeping claims of broad and unreviewable

\*\*\* the Executive Department, by means of this branch of its power over foreign relations, holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions. And in wielding this power it is untrammelled by any other department of the Government; no other influence than a moral one can control or curb it; its acts are political, and its responsibility is only political.

In *Marbury v. Madison*, 1 Cranch. 137, Mr. Chief Justice Marshall said:

\*\*\* 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.

Other authority on this subject are Chambrun, *The Executive Power in the United States* (1874), p. \_\_\_\_\_;<sup>109</sup> Conklin, *The Power of the Executive Department* (1866), p. \_\_\_\_; <sup>110</sup>Corwin, *The President's Control of Foreign Relations*

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presidential power stemming from the Commander-in-Chief Clause. *See id.* §§ 455-456, 703-706. *See also* Barron & Lederman, *supra* note 19, at 1019-21 (discussing these sections). Pomeroy's analysis is highly suspect today because it was based upon an unworkable assumption that all presidential and congressional powers are mutually exclusive. *See id.* at 1019-20. Today, and in Jackson's time, virtually everyone believes that the President and Congress have significant powers that overlap each other. *See* HENKIN, *supra* note 3, at 94.

109. ADOLPHE DE CHAMBRUN, *THE EXECUTIVE POWER OF THE UNITED STATES: A STUDY OF CONSTITUTIONAL LAW* (M. Dahlgren trans., 1874). De Chambrun makes no reference to direct conflicts between the Congress and the President. In the relevant portion of his text, he concentrates upon the President's power to respond to foreign and domestic attacks. *Id.* at ch. 5. He gives detailed attention to President Lincoln's unilateral response to the beginning of the Civil War, but specifically notes that Lincoln's actions were ratified by Congress. *Id.* at 120. *See also id.* at 122-23.

110. ALFRED CONKLING, *THE POWERS OF THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT OF THE UNITED STATES* (1866). Conkling makes no reference to direct conflicts between the Congress and the President. He does not discuss the President's foreign affairs powers but does discuss the President's

(1917), p. \_\_\_\_;<sup>111</sup> Elliot's Debate, Vol. 4, p. \_\_\_\_;<sup>112</sup> Hamilton, The Works of Alexander Hamilton, Vol. 7, pp. 77-117;<sup>113</sup> Hyde, International Law, Vol. 2 (1922), p. \_\_\_\_;<sup>114</sup> Latané, American Foreign Policy (1927), p. \_\_\_\_;<sup>115</sup> Matthews, The Conduct of

Commander-in-Chief powers. *Id.* at 80-88. He further notes that his discussion of these powers applies "*only in war.*" *Id.* at 83 (emphasis in original). Even in time of war, Conkling makes no mention of a direct conflict between the Congress and the President.

111. EDWARD S. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS (1917). Corwin makes no reference to direct conflicts between the President and the Congress. He does, however, emphatically state that "the President is the organ of diplomatic intercourse with other states . . . [and] this power is presumptively his alone . . . [and] his discretion in its discharge is not legally subject to any other organ of government." *Id.* at 35-36. There is nothing in Corwin's book to indicate that the President's foreign affairs and Commander-in-Chief powers cloak the Executive with a broad ranging authority to disregard acts of Congress. When Jackson's final opinion was published, Corwin misread the opinion as claiming such a power, and he vehemently rejected the idea. *See supra* notes 97-100 and accompanying text.

112. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION: AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot ed., 2d ed. 1876). This is a ridiculous throw-away cite. The author of the present essay is not aware of any passages in the five volumes of *Elliot's Debates* that speak directly to an Executive power to ignore acts of Congress.

113. ALEXANDER HAMILTON, *Pacificus No. 1* (1793), in 7 THE WORKS OF ALEXANDER HAMILTON 77-117 (John C. Hamilton ed., 1851). Hamilton's *Pacificus No. 1* is a brilliant discussion of the President's broad, concurrent powers in the realm of foreign affairs. *See* CASTO, *supra* note 2, at chs. 5, 10. Hamilton did not even address the possibility of the President acting contrary to an act of Congress, but did, however, note that, although the President had a concurrent, unilateral power to declare neutrality, the President's declaration would not be binding on the Congress. *See* HAMILTON, *supra*, at 75-76.

114. 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1922). Professor Hyde makes no mention of direct conflicts between the President and Congress. He notes that the President has significant unilateral authority to enter into agreements other than treaties with foreign countries. *Id.* §§ 505-09. He does not suggest, however, that Congress cannot limit the President's authority in this regard. Professor Hyde does note that only the President and his agents may negotiate and ratify a treaty. *Id.* § 517.

115. JOHN HOLLADAY LATANÉ, A HISTORY OF AMERICAN FOREIGN POLICY (1927). The only even barely relevant part of Professor Latané's history is his mention that Thomas Jefferson approved the Louisiana Purchase notwithstanding qualms that there was no constitutional authority for the acquisition. *Id.* at 109-10. This political precedent was not strictly relevant to the acquisition of bases because the Louisiana Purchase was submitted to Congress and the Senate for approval. *Id.* at 110. *Accord* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen.

American Foreign Relations (1922), p. \_\_\_\_;<sup>116</sup> Moore, International Law Digest (1906), p. \_\_\_\_;<sup>117</sup> Oppenheim, International Law, 4<sup>th</sup> Ed. (McNair, 1926), Vol. 2, p. \_\_\_\_;<sup>118</sup> Warren, Presidential Declarations of Independence (1930), p. \_\_\_\_;<sup>119</sup> Wheaton, International Law (6<sup>th</sup> English Ed., Keith, 1929), Vol. 2, p. ;<sup>120</sup> Willoughby, The Constitutional Law of the

484, 488 (1940) (opinion written by Attorney General Jackson).

116. JOHN MABRY MATHEWS, THE CONDUCT OF AMERICAN FOREIGN RELATIONS (1922). Professor Mathews makes no mention of a direct conflict between the President and the Congress. He does explain that Congress has typically deferred to the President in respect of foreign relations. *See id.* at 3-21. He also notes Representative John Marshall's argument that "The President is the sole organ of the nation in its external relations, and its sole representative with foreign relations." *Id.* at 22 (internal citation omitted). Mathews limits the "sole organ" power, however, to communications between the United States and foreign nations. *See id.* at 21-26 (quoting Marshall).

117. JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW (1906). Professor Moore's work is what it says it is: a digest of various statements, diplomatic and judicial precedents, and diplomatic incidents. He recites various precedents on the President's power to recognize foreign states. *Id.* at 243-48 (vol. I). He does the same on the issue of who speaks internationally for the United States. *Id.* at 680-83 (vol. IV). Finally, he briefly covers the rule that the Executive negotiates treaties. *Id.* at 179-80 (vol. 5).

118. 2 LASSA OPPENHEIM, INTERNATIONAL LAW (Arnold McNair ed., 4th ed. 1926). This was a leading treatise on international law and as such, devoted virtually no space to domestic law issues like the allocation of power within a particular country. Parts I and II of Volume Two deal with the "Settlement of Disputes between States and with War." Part III, on "Neutrality," was relevant to the legality of the Destroyers-for-Bases Deal under international law, but offered no guidance whatsoever on the President's powers under the Constitution.

119. Charles Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1 (1930). This interesting article by a gifted legal historian documents numerous disputes between the President and Congress in respect of foreign affairs issues. All the disputes involved fairly technical issues such as the President as the sole organ of communications with foreign governments, the President's exclusive power to nominate officers subject to Senate confirmation, the President's exclusive power to recognize foreign governments, and the President's power to control foreign service officers. None of these disputes involved a general claim to ignore acts of Congress.

120. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (A. Berriedale Keith ed., 6th ed. 1929). Wheaton's work is an international law treatise organized much like Oppenheim's. *See supra* app. note 119. Chapters I-IV deal with war and belligerents, Chapter V treats neutrality, and Chapters VI and VII cover enforcement of the laws of war and peace treaties. Like Oppenheim, Wheaton addresses international law principles relevant to the transfer of the destroyers but is silent on the internal allocation of authority within a country.

United States (2d Ed., 1929), Vol. 1, p. \_\_\_\_\_;<sup>121</sup> Wright, Control of our Foreign Relations (1927), p. \_\_\_\_;<sup>122</sup> Little v. Barreme, 2 Cranch. 169.<sup>123</sup>

The principle announced by the above authorities was aptly summarized by Mr. Justice Sutherland who, in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 3, held that the

121. 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929). Professor Willoughby makes no reference to the idea that the President's foreign-affairs and commander-in-chief powers include a general power to ignore acts of Congress. See Barron & Lederman, *supra* note 19, at 1025 n.334. He does, however, point to some limited instances where the President's power is usually deemed to be exclusive and beyond formal congressional control. These include the negotiation and ratification of Treaties, see WILLOUGHBY, *supra*, §§ 284, 289, the recognition of foreign governments, *id.* § 293, and communications with foreign governments, *id.* §§ 522, 537-38.

122. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922). Professor Wright recognized that the President is the sole organ of official communications between the United States and foreign countries. *Id.* §§ 12-17. He also stated that the Executive is the department that negotiates treaties, *id.* §§ 176, 252, and recognizes foreign nations, *id.* §§ 192-95. Insofar as direct conflicts between a President's desires and an act of Congress are concerned, Professor Wright generally endorsed the traditional American doctrine of legislative supremacy. *Id.* §§ 246, 252. Of course, Congress could not regulate the President's exercise of the comparatively narrow range of foreign powers vested exclusively in the Executive.

Similarly, Wright wrote that the Commander-in-Chief Clause vested the President with exclusive authority over "the command of the forces and the conduct of [military] campaigns." *Id.* § 221 (quoting *Ex Parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, J., concurring)). See Barron & Lederman, *supra* note 19, at 1018-19. Wright discussed *Little v. Barreme*, 6 U.S. 170 (1804), see *infra* app. note 123, elsewhere in his book, see WRIGHT, *supra*, §§ 104, 218, but made no attempt to reconcile *Little* with the President's power to command forces and conduct military campaigns.

Wright supported the Destroyers-for-Bases Deal in public and private, but never hinted that the Deal could be justified by a preclusive constitutional authority. See Wright, *supra* note 92; Letter from Quincy Wright to Charles C. Burlingham, *supra* note 21.

123. *Little v. Barreme*, 6 U.S. 170 (1804). The case is a classic example of legislative micromanagement of military operations. During the undeclared naval war with France, Congress enacted a statute to the effect that the Navy could seize ships sailing to French ports but not from French ports. The President, however, directed the seizure of ships sailing both to and from French ports. The Court noted that, in the absence of pertinent acts of Congress, the President's duty to enforce law and his commander-in-chief power give him a general authority to direct the Navy to seize ships engaged in illicit commerce. *Id.* at 177. The Court held, however, that when Congress has enacted a rule regulating the authority of Navy vessels to seize ships, the President lacks authority to contravene the statutory rule. *Id.* at 177-78.

Executive's power in the field of foreign relations is "a very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."<sup>124</sup>

In the exercise of this power the Executive has not hesitated in the past to acquire territory and concessions from foreign nations without express congressional authority. Notable examples in this field were the Louisiana Purchase in 1803, the purchase of Florida in 1819, and the acquisition of the Panama Canal Zone in 1903. In all of these instances, and in many others, the President acted without authority from the Congress, relying solely upon his constitutional authority.

In view of the above, it is my opinion that you have full authority to acquire the naval and air bases if in your opinion such bases are essential to the defense of the United States or their acquisition is otherwise in the interest of the people of the United States. The only question remaining is whether in acquiring these bases you have a right to direct that old destroyers of the United States Navy be transferred in exchange for them. Since the power to acquire includes the power to give compensation, you unquestionably have such authority unless the congress in the exercise of constitutional

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124. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) involved Congress's constitutional power to delegate authority to the President to declare an embargo on the sale of arms to countries engaged in a bloody and seemingly pointless war in South America. See William Casto, *United States v. Curtiss-Wright Export Corp.*, in 5 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 107 (David Tanenhaus ed., 2008); H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, in PRESIDENTIAL POWER STORIES 195, 195-232 (Christopher Schroeder & Curtis Bradley eds., 2009). Among other things, the congressional delegation required the President to consult with and seek the cooperation of other countries before deciding whether an embargo would be appropriate. *Curtiss-Wright*, 299 U.S. at 312 (quoting H.R.J. Res. 347, 73rd Cong. (1934)). The Court's reference to "the President as the sole organ of the federal government in the field of international relations" was based upon John Marshall's well known speech in the House of Representatives. *Id.* at 320. In other words, the *Curtiss-Wright* quote is simply a restatement of the well-established doctrine that the President is the sole organ for communicating with foreign nations. Given the need for communicating with other nations, a presidential authority to implement the Act's embargo provisions made a good deal of sense.

power has enacted legislation prohibiting the proposed transfer of destroyers.

In view of your constitutional power as Chief Executive and as Commander in Chief of the Army and Navy, many authorities hold that the Congress could not by statute limit your authority in this respect. I find it unnecessary, however, to pass upon that question. By section 5 of the act of March 3, 1883, 22 Stat. 599 (sec. 492, title 34, U.S.C.), the Congress has expressly authorized the disposition of vessels of the Navy, and I think the authority contained in that statute is broad enough to include the transfer of destroyers here proposed. True, the first part of that statute prescribes the usual and ordinary methods of disposition by the Secretary of the Navy, after appraisal and advertisement [of vessels which have been found unfit for further use and have been stricken from the navy register.]<sup>125</sup> but the last clause of the statute provides that “except as otherwise provided by law no vessel of the Navy shall hereafter be sold in any manner then herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing.” (Underscoring supplied) Construing this clause the Supreme Court in *Levinson v. United States*, 258 U.S. 198, held that under it “the power of the President to direct a departure from the statute is not confined to a sale for less than the appraised value but extends to the manner of the sale.” The Court further held that “the word ‘unless’ qualifies both the requirements of the concluding clause.”

I find no statute which expressly repeals section 5 of the Act of March 3, 1883, nor do I find any which in my opinion repeals it by implication. It may be suggested that section 14(a) of Public No. 671, approved June 28, 1940, contains such an implied repeal, but I am unable to agree with that view. That section reads as follows:

Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall

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125. Words in brackets are pen and ink additions.

hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military materials, shall first certify that such material is not essential to the defense of the United States.

It is well settled that implied repeals are not favored and will not be recognized unless the provisions of the latter act are clearly in conflict with the provisions of the former. (cite authorities) I find no such conflict between section 14(a) of Public No. 671 and section 5 of the set of March 3, 1883. The more reasonable view is that section 14(a) produces no conflict but merely creates an additional requirement. This view is supported by the history of section 7 of Public No. 757, approved July 19, 1940 (subsequent to the enactment of section 14(a) above), which reads as follows:

No vessel, ship, or boat (except ships' boats) now in the United States Navy or being built or hereafter built therefor shall be disposed of by sale or otherwise, or be chartered or scrapped, except as now provided by law.

As passed by the House, section 7 of the bill which became Public No. 757 read as follows:

No vessel, ship, or boat now in the United States Navy, or being built therefor, shall be disposed of by sale or otherwise, or be chartered or scrapped, without the consent of the Congress."

The Committee on Naval Affairs of the Senate amended the section to read as it now appears in the act, and in reporting to the Senate on the section said [(S Rept. \_\_\_\_\_):]<sup>126</sup>

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126. Words in brackets are pen and ink additions.

The Committee were informed that this section as approved by the House of Representatives would prevent the Navy Department from disposing of small ships' boats without the consent of the Congress. Admiral Stark, Chief of Naval Operations, suggested that this section be deleted from the bill and stated that in his opinion other provisions of law regarding the sale and disposal of naval vessels were adequate.

The report then "quoted" as "existing laws on this subject" section 14(a) of Public No. 671, 76<sup>th</sup> Cong., approved June 28, 1940, and sections ~~491 and 492 of title 34, U.S.C.~~ [5 of the act of March 3, 1883.]<sup>127</sup>

It is my opinion, therefore, that section 5 of the set of March 3, 1883, is still controlling, subject, of course, to the additional requirement imposed by section 14(a) of Public No. 671, approved June 28, 1940.

Under both the language of section 5 of the set of March 3, 1883, and the construction placed thereon by the Supreme Court, the power of the President to dispose ~~resale~~ of the [old destroyers]<sup>128</sup> ~~Navy~~ in such manner and under such terms and conditions as he deems best for the interests of the United States is unlimited, except in so far as it may now be limited by the requirements of section 14(a) of Public No. 671, approved June 28, 1940, [and]<sup>129</sup> You state that the provisions of that section have been or will be complied with.

The national defense is of extreme importance to the U.S. and to its people. It is the constitutional duty of the President at all times to take such action as he deems necessary to assure the adequacy of that defense. This duty is no less in time of peace than in time of war. Unquestionably it is at the present time imperative. It follows that if in your opinion an exchange of the old destroyers for naval and air bases in accordance with the proposal of the Government of Great Britain will enhance

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127. Words in brackets are pen and ink additions that replaced the marked-out words.

128. Words in brackets are pen and ink additions.

129. Words in brackets are pen and ink additions.

or increase the total defense of the U.S., you are not only vested with full authority but you are also charged with the constitutional duty to direct the proper officer of the U.S. Govt. to effect the change.

This view is not in conflict with my recent memorandum to you ~~holding~~ [advising]<sup>130</sup> that the sale and delivery of motor torpedo boats by an American builder to a belligerent government would be in conflict with section 3 of title ~~5~~ V of the [Espionage]<sup>131</sup> act of June 15, 1917 (sec. 33, title 18, U.S.C.). That memorandum dealt only with torpedo boats constructed by American builders to the order of a belligerent government. The statute involved reads:

During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

The legislative history of this statute shows that it was enacted by the Congress for the purpose of making the statutory law conform to international law. In view of this fact [Oppenheim in his work on International Law, 5<sup>th</sup> Edition, Vol. 2, pages 574, et seq., gives the following as the international law on the question:]<sup>132</sup>

Whereas a neutral is in no wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents,

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130. Words in brackets are pen and ink additions.

131. Words in brackets are pen and ink additions.

132. Words in brackets are pen and ink additions.

such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to war-like use. The difference between selling armed vessels to belligerents and building them to order is usually defined in the following ways:

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port. In the cases of *The La Santissima Trinidad* (1822) and *The Meteor* (1866), American courts have recognized this; and so did the ungratified Declaration of London, which in Article 22 (10) enumerated as absolute contraband "warships, including boats, and their distinctive component parts."

On the other hand, if a subject of a neutral builds armed ships *to the order of a belligerent*, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made

the base of naval operation,; and as the duty of impartiality includes an obligation to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war.