

MAKING WAR WITHOUT A DECLARATION

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INTRODUCTION

The history of the war powers under the Constitution is as old as the Republic and as current as today's headlines. It is a story that may surprise many readers. For no provision of the Constitution expressly states that "the President shall conduct foreign policy," nor does it contain the words "Congress shall make war." Indeed the Framers changed the clause to substitute the word "make" with "declare."¹

The difference between these two terms may have opened the constitutional gateway to the conduct of over 200 Presidential wars² — instances in which presidents have committed U.S. military forces to combat outside the country or into situations where the threat of hostile armed action involving U.S. units was imminent — *all* without a congressional declaration of war. Vietnam is an obvious example of actual armed hostilities and loss of life on a massive scale. Congress had passed the Tonkin Gulf Resolution³ and voted military appropriations,⁴ but it had never voted a declaration of war. The Gulf Resolution had even been repealed before all American troops left Indochina.⁵

The Cuban Missile Crisis of 1962 is an example of a president risking an even greater conflagration, a near nuclear holocaust, without any actual exchange

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1. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 313, (M. Farrand ed. 1966) (rev. ed. 1937). The full range of current opinion concerning the War Powers can be found in *Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971); E. KEYNES, UNDECLARED WAR (1982); A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187 (1975); and Goldwater, *The President's Ability to Protect America's Freedoms—The Warmaking Power*, LAW & SOCIAL ORDER, 3 ARIZ. ST. L.J. 423 (1971).

2. See Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 88-110 app. A (1972). See also *Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess., 126-148 (1973) [hereinafter *War Powers Hearings*]. A more recent list has been compiled by The Library of Congress. See CONG. RES. SERV. REP. NO. 83-204F, *Instances of Use of United States Armed Forces Abroad, 1798-1983*, (E. Collier ed. Nov. 4, 1983).

3. The so-called Tonkin Gulf Resolution is the popular name for Southeast Asia Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).

4. Congressional funding for the entire period of the U.S. military engagement in Vietnam is documented in Emerson, *Congress and the Commitment to Vietnam*, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 57-74, 1984 A.B.A. STANDING COMM. ON LAW AND NAT'L SECURITY.

5. See *supra* note 3. The Tonkin Gulf Resolution was repealed in the 91st Cong., 2d Sess. (1971) by Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

of weapons fire.⁶ No declaration of war supported President John F. Kennedy's 180 ship naval blockade of Cuba, with its associated military alert and general mobilization, lasting from October 24 to December 6, 1962.⁷ More recent unilateral Presidential military actions have included the stationing of 1,200 Marines (Lebanon in 1982 and 1983),⁸ an invasion of Grenada (1983),⁹ bombing strikes on military installations in Libya (1986),¹⁰ and attacks by U.S. war ships and helicopters on Iranian gunboats and mining installations in the Persian Gulf (1987 and 1988).¹¹ Raising memories of Franklin Roosevelt's naval escort of British supply convoys across the Atlantic in 1941 before a U.S. declaration of war,¹² the U.S. Navy reportedly escorted 54 convoys, comprising 157 ships, through the Persian Gulf between July 22, 1987, and August 9, 1988, in the midst of all-out war between Iran and Iraq.¹³ Then, late in 1989, President George Bush twice ordered U.S. military interventions abroad: first, in support of the democratically elected government of President Corazon Aquino in the Philippines; and second, in deposing Panamanian General Manuel Noriega and assisting the country's legal civilian authorities whose election Noriega had nullified.¹⁴ President Bush continued his bold initiatives in 1990 by ordering the evacuation by Marines of U.S. citizens endangered in Liberia, and committing the largest U.S. force since Vietnam to Saudi Arabia and the Persian Gulf after Iraq's invasion of Kuwait.¹⁵

These and other military actions evoke much controversy and numerous questions. Is war without a declaration contemplated by the Constitution? What constitutional checks exist to control or hold accountable independent Executive war-making, if not the Declaration Clause? Can Congress by statute restrict in advance the situations in which U.S. military force can be deployed or engaged

6. According to one of the participants, the Cuban Missile Crisis "brought the world to the abyss of nuclear destruction and the end of mankind." R. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* 23 (1969). On October 27, 1963, an American U-2 reconnaissance plane was hit by a SAM missile and crashed in Cuba, killing the pilot. President Kennedy, however, did not order retaliation against the SAM sites. *Id.* at 97-98.

7. See *War Powers Hearings*, *supra* note 2, at 146.

8. See HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., CONGRESS AND FOREIGN POLICY 1982 51-54 (Comm. Print 1983). In late 1983, Congress enacted the Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 6, 97 Stat. 805, 807, approved Oct. 12, 1983, authorizing troops to remain in Lebanon for 18 months.

9. See C. WEINBERGER, *FIGHTING FOR PEACE* 101-188 (1990); J. MOORE, *LAW AND THE GRENADA MISSION* (1984).

10. D. Hall, *The Constitution and Presidential War Making Against Libya*, XLII NAVAL WAR C. REV., at 30, 33 (Summer 1989).

11. Mark, *Persian Gulf and the War Powers Debate: Review of Events*, CONG. RES. SERV. 5, 9-11, CRS Issue Brief (rev. Feb. 6, 1989).

12. "Roosevelt was in effect declaring Naval war on Germany. . . ." J. BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM* 141 (1970).

13. See N.Y. Times, Aug. 10, 1988, at A8, col. 6, cited in Mark, *supra* note 11, at 3.

14. In December 1989, President George Bush directed U.S. combat air patrol cover for defense of the government of Philippine President Corazon Aquino. No shots were fired by U.S. aircraft. Washington Post, Dec. 3, 1989, at A1, col. 3, A30, col. 1. The Panama military operation was reported in depth in Washington Post, Dec. 21, 1989, at A1, A31-38.

15. *Americans Evacuated From Liberia*, Washington Post, Aug. 6, 1990, at A1, col. 1, A17, col. 4. According to a State Department spokesman, a force of more than 230 Marines flew 125 Americans, their dependents and other persons out of Liberia. N.Y. Times, Aug. 9, 1990, at A7, col. 1. Within 15 days after Iraq occupied Kuwait, President Bush had "put in motion the most rapid military buildup in American history." N.Y. Times, Aug. 19, 1990, at 10, col. 5, 6.

in hostilities? Can its "power of the purse" be exercised to tell the President and military commanders where and how long armed forces can be stationed, how many army divisions or naval battle groups can be deployed, and what bases or areas those armed forces should defend? Can the legislature by a declaration of war compel the President against his will to order an attack on another nation when the President is convinced the attack would be disastrous for the nation? And, in terms of the world's current crisis, could the President, without legislative approval, invade Kuwait to expel occupying Iraq forces?

CONSTITUTIONAL ARGUMENTS

The case for Congress was succinctly put by Henry Clay in his speech on the Mexican War at Lexington, Kentucky, on November 13, 1847, when he was 71 years old. Be it "Resolved," he said:

That by the Constitution of the United States, Congress, being invested with power to declare war, and grant letters of marque and reprisal, to make rules concerning captures on land and water, to raise and support armies, to provide and maintain a navy, and to make rules for the government of the land and naval forces, has *the full and complete war-making power of the United States*; and, so possessing it, has a right to determine upon the motives, cause, and objects of any war, when it commences, or at any time during the progress of its existence.¹⁶

Clay was outraged at President James K. Polk for the manner in which, Clay believed, Polk had precipitated the Mexican War on his own responsibility.¹⁷ Months before the Declaration of War of May 13, 1846, Polk had ordered General Winfield Scott to occupy disputed territory in Mexico.¹⁸ Thus, Clay believed Congress possessed authority, even *after* it had voted a declaration of war, to supplement that declaration with a later "authentic act" guiding the President as to the "purposes and objects" for which "the existing war ought to be further prosecuted."¹⁹ Moreover, Clay proposed, "it is the duty of the President in his official conduct to conform to such a declaration of Congress. . . ."²⁰ Should the President fail to conform, "it would become the right and duty of Congress to adopt the most efficacious measures to arrest the further progress of the war, taking care to make ample provision for the honor, the safety and the security of our armies. . . ."²¹

Daniel Webster agreed that if the President waged a declared war for objects exceeding the will of the legislature "then Congress ought to pass resolutions against the prosecution of the war, and grant no further supplies."²² John C.

16. C. COLTON, *THE LAST SEVEN YEARS OF THE LIFE OF HENRY CLAY* 68 (New York 1856) (emphasis in original).

17. *Id.* at 69.

18. Act of May 13, 1846, 9 Stat. 9 (1846); CONG. RES. SERV., *supra* note 2, at 4.

19. See C. COLTON, *supra* note 16, at 68.

20. *Id.*

21. *Id.*

22. M. PETERSON, *THE GREAT TRIUMVIRATE* 431 (1987). Webster said at the Massachusetts Whig Convention on September 29, 1847, that if Congress "is to have no voice in the declaration or continuance of war, if it is not to judge of the propriety of beginning or carrying it on, — then we depart at once, and broadly, from the Constitution." 13 *THE WRITINGS AND SPEECHES OF DANIEL WEBSTER* 364 (Little, Brown & Co., Boston, Mass. 1903).

Calhoun, the third member of the "Great Triumvirate," had already made his opinion known regarding the war powers by abstaining on the congressional declaration of war. In the words of historian Merrill D. Peterson, Calhoun argued that President Polk's action, "forcing a declaration of war on Congress without deliberation or reflection, effectively divested that body of the war-making power."²³

Abraham Lincoln, a first term congressman, added his opinion to these eminent voices in February 1848, just days after the Treaty of Guadalupe Hidalgo²⁴ had ended the Mexican War:

Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose.²⁵

Lincoln then stated his view of the constitutional issue:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.²⁶

What, then, is the answer to the concerns of Clay, Webster, Calhoun and Lincoln, predecessors of those legislators who enacted the War Powers Resolution²⁷ as an effort to limit future presidential wars? The answer lies in the text of the Constitution, the intent of the Framers, two hundred years of U.S. history, scattered judicial decisions, the great weight of scholarly opinion until the 1970s, and the imperatives of sound public policy. In other words, the "Great Triumvirate," in this instance at least, lacked the vision of a President Polk. His long-range actions and goals for the nation were ratified by the subsequent approval of a majority of Congress and the country.²⁸ Lincoln himself reversed his opinion when faced with the vicissitudes of higher office and the rebellion of eleven

23. M. PETERSON, *supra* note 22, at 422. Calhoun objected to the preamble to the declaration of war which stated that "by the act of the Republic of Mexico, a state of war exists. . . ." 9 Stat. 9. Calhoun believed war could not exist until it was declared by Congress. 15 CONG. GLOBE 802, 804, 29th Cong., 1st Sess. (1846). In 1862, the Supreme Court noted in dicta that the battles of Palo Alto and Resaca de la Palma had been fought before passage of the 1846 declaration of war. Justice Grier wrote that the 1846 legislation "not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act [sic] of the President in accepting the challenge without a previous formal declaration of war by Congress." Prize Cases, 67 U.S. 635, 668 (1862). Justice Grier thus refuted Calhoun's objection.

24. Treaty of Peace, Feb. 2, 1848, United States-Mexico (ratified March 16, 1848). See also 9 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 791 (C. Bevans, ed. 1972).

25. Letter from Abraham Lincoln to W. H. Herndon (Feb. 15, 1848), in THE COLLECTED WORKS OF ABRAHAM LINCOLN 451 (R. Basler ed. 1953) (emphasis in original).

26. *Id.* at 451-452 (emphasis in original).

27. Pub. L. No. 93-148, 87 Stat. 555-559 (codified at 50 U.S.C. §§ 1541-1548 (1973)).

28. President Polk was "a man of clear views and gritty determination. Measured by its results, no four-year presidency in American history so fully realized its goals." M. PETERSON, *supra* note 22, at 418.

Southern States. In 1863, he wrote: "When rebellion or invasion comes, the decision is to be made." The Commander-in-Chief "is the man who holds the power and bears the responsibility of making it."²⁹ Later presidents, from Wilson in Vera Cruz, Mexico, and Archangel, Russia,³⁰ and Coolidge in Nicaragua,³¹ to Eisenhower in Lebanon,³² and Ford in Cambodia,³³ to mention a few, directed the national force in the interest of saving the lives and freedoms of American citizens, or for strategic purposes to that end, without waiting for a signal from Congress. Whatever Clay, Webster, and Calhoun may have thought, their opinion did not prevail then,³⁴ nor does it prevail today in the much more dangerous times of global terrorism, chemical gas warfare and nuclear tipped missiles.

Textual Powers of the President and Congress

The President's claim to direction of the war powers for national defense arises out of authorities given in several provisions of the Constitution. First, the President is vested with all of the national government's "executive Power."³⁵ The Executive can reasonably claim that this is not a passive grant, but includes the traditional power held by a chief-of-state to protect the national safety, a prerogative firmly recognized in the law of nations known to the Framers. Former Solicitor General Erwin N. Griswold has made this argument.³⁶ For example, an edition of *The Law of Nations*, circulated among leaders of the American Revolution by Benjamin Franklin,³⁷ states the rule that the Executive ought "to watch for the nation, and take care to preserve it . . . and to secure it, as far as possible, against everything that threatens its safety or its happiness. Hence all the rights which a nation derives from its obligation to preserve and protect itself . . . reside in the [Executive]."³⁸

Second, the President is the primary diplomatic officer of the nation by virtue of the conjunction of the "executive Power"³⁹ and his exclusive power to

29. See A. SCHLESINGER JR., *supra* note 1, at 72. In 1864, Lincoln wrote of his actions as President: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation." Letter from Abraham Lincoln to A. G. Hodges (April 4, 1864) in ABRAHAM LINCOLN: MYSTIC CHORDS OF MEMORY (Larry Shapiro ed. 1984).

30. *War Powers Hearings*, *supra* note 2, at 140.

31. *Id.* at 142.

32. *Id.* at 145.

33. The Mayaguez incident of May 1975 is fully discussed in 31 CONG. Q. ALMANAC 1975, at 310-311 (1976) [hereinafter CQ ALMANAC 1975].

34. A House of Representatives resolution demanding the withdrawal of American troops to the east bank of the Rio Grande was defeated by a vote of 137-41. CONG. GLOBE, 30th Cong., 1st Sess., 93, 94 (1848). A similar resolution calling for the withdrawal of American forces from Mexico to a "defensive line" was tabled. *Id.* at 179.

35. U.S. CONST. art. II, § 1.

36. See statement of then Solicitor General Griswold reprinted in 117 CONG. REC. 28,976-28,978 (1971).

37. The copies of THE LAW OF NATIONS that Franklin sent to the Continental Congress and leading citizens of the Colonies were apparently based on the 1775 Amsterdam edition he had received from Frederic Dumas. 22 THE PAPERS OF BENJAMIN FRANKLIN 48, 287, 389-390, 569, 635 (W. Willcox ed. 1982).

38. E. DE VATTIEL, THE LAW OF NATIONS 14 (Amsterdam rev. ed. 1758) (reprint 1982). See also C. VON WOLFF, 2 THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD 26, § 39 (n.p. ed. 1764) (reprint 1934).

39. U.S. CONST. art. II, § 1.

"receive Ambassadors."⁴⁰ In this role, he possesses and exercises, as Justice Potter Stewart cast it, "a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense."⁴¹

Third, the Constitution designates the President as "Commander in Chief."⁴² This title has been defined by a leading authority as encompassing "the conduct of all military operations in time of peace and of war, thus embracing control of the disposition of troops, the direction of vessels of war and the planning and execution of campaigns"⁴³ In addition, the Commander in Chief power has been historically recognized as a functional base for the President's authority. His right to use military force "in such manner as, in his judgment, the public good . . . might require" was openly debated and accepted by the Congress as early as 1798.⁴⁴

Fourth, the President is vested with the duty and right to "take Care that the Laws be faithfully executed."⁴⁵ The Supreme Court has construed this responsibility to include enforcement not only of statutes and treaties, but also of "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."⁴⁶

Fifth, the President may view his oath of office, to "preserve, protect and defend the Constitution of the United States,"⁴⁷ as both reinforcing the executive power found elsewhere in the Constitution and as a source of power in itself. "A Constitution which does not permit the Commander in Chief to order belligerent acts whenever they are deemed necessary to defend the interests of the nation, would be less an instrument intended to endure through the ages, than a suicide pact."⁴⁸

40. U.S. CONST. art. II, § 3.

41. *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

J. Stewart added this thoughtful summary of executive defense powers:

For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.

Id. at 727-728.

42. U.S. CONST. art. II, § 2, cl. 1.

43. Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121, 134 (1920). See also holding of Court of Claims: "In time of war, the Commander in Chief has the same powers as other civilized governments, and the exercise of them need no ratification to give them effective force." *Warner, Barnes & Co. v. United States*, 40 Ct. Cl. 1, 32 (1904) (relating to the undeclared war in the Philippines).

44. 8 ANNALS OF CONG. 1269, 1410, 1445-1446, 1451, 1454-1455, 1457-1459, 1462, 1477, 1521 (1851).

45. U.S. CONST. art. II, § 3.

46. *In re Neagle*, 135 U.S. 1, 64 (1889).

47. U.S. CONST. art. II, § 1, cl. 8. But the President is under no duty to carry out an unconstitutional law, as the author believes the War Powers Resolution to be.

48. B. SCHWARTZ, 2 *THE POWERS OF GOVERNMENT* 205 (1963). In his gifted and stimulating study of the war-making power, M. GLENNON, *CONSTITUTIONAL DIPLOMACY*, (1990), Professor Glennon, a former legislative and legal counsel in the U.S. Senate, builds the thesis that there are areas where the President can initiate military defensive action in the face of legislative silence, but can

Matched against the war powers vested in the President is an array of enumerated powers conferred upon Congress, including the powers to declare war, issue letters of marque and reprisal, raise and support the army and provide and maintain a navy, make rules for the regulation of those forces, provide for calling forth the militia, define and punish piracies and offenses against the law of nations (terrorism), and control the national purse. In particular, the Declaration Clause has been raised as the conclusive, debate-ending rejoinder to Executive assertions of national defense powers.

This contest leads into an examination of what the Framers contemplated and how they distinguished the war powers of Congress from those of the President. It is my thesis that the Framers intended to leave with the President sufficient discretion and flexibility to determine in what circumstances force is necessary as an instrument of national policy to protect U.S. citizens, territory and freedoms. The checks and balances and separation of powers do apply, but they operate at their weakest, at least in the early stages of an emergency.

Declaration of War

The idea that a declaration of war is a prerequisite for the waging of war is a myth. Actually, the power to declare war was viewed as one of the least important war powers by political figures of the 18th Century. According to the contemporary meaning and usage given to the instrument, it served as an official proclamation of solemn, public war or as an initial step of commencing "offensive" war. By comparison, the power of the purse and the ability of limiting the supplies and size of the land and naval forces were by far the major means of controlling involvement in hostilities. A military campaign was either funded or it was not. To read the Declaration Clause to mean that no defensive military action can be commenced without a specific policy authorization of Congress is to confer a meaning which appears nowhere in the Constitution and to give it a purpose which the Framers never intended.

The vast majority of wars are begun without any declaration. This was as true in the Framers' day as it is today. In the eighty-seven years of the 18th Century preceding the Constitutional Convention, thirty-eight wars were waged in the western world. Only one of them was begun by a declaration.⁴⁹ That the Framers knew of this fact is proven by Hamilton's statement in the *Federalist*

continue such independent action only until Congress acts. In Glennon's model, true plenary Presidential powers, such as choosing the site of a landing operation, are few and far outnumbered by concurrent congressional authorities. Where the war powers are concurrent, Glennon argues, Congress is ultimately supreme whenever its policy conflicts with Presidential decisions.

As discussed in the text, my disagreement with Glennon's thesis is founded on multifold considerations: (i) the structural concept that a legislative body of numerous members is simply not organized in a way to direct the use of force (a fact well understood by the Framers); (ii) the value of subsequent usage as setting the meaning of the Constitution in this area; (iii) the historical truth that a "declaration of war" is a meaningless fossil today and held only a limited purpose in the late 18th Century; (iv) a concern that Glennon's model is really an argument for legislative supremacy which would make the grants of power to the President functionless; (v) a belief that Glennon misperceives the true nature and extent of Presidential war powers which are bestowed by the Constitution beyond the Commander in Chief provision; and (vi) a conviction that the Framers believed the consequence of tying the President's hands in defense of the people or nation can be disaster or national suicide.

49. J. MAURICE, *HOSTILITIES WITHOUT A DECLARATION OF WAR* 12-27 (1883).

No. 25, that declarations of war were already in disuse in his age.⁵⁰ The Framers did give a meaning to the Declaration Clause, but it was essentially concerned with "offensive" war, wars of conquest, jealousy and rivalry.⁵¹ For example, Hamilton, in the second essay of *Pacificus*, explained that by assisting France in 1793 instead of remaining neutral, the United States would have engaged in an offensive war, since France was then a belligerent nation in Europe.⁵² By the law of nations, as compiled by the authorities of their time, the Framers knew that a declaration was not required for defensive war.⁵³ Of course, the Framers meant to limit presidents from engaging in wars of aggression, ambition and conquest, but they also knew from experience that a nation must attend to its own survival and that as a consequence, this nation needed a single authority which would provide unity of action for the defense of the country.

We know from the records preserved by Washington and Madison that the Framers voted "to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."⁵⁴ In so doing, the Framers acknowledged the fact that the United States might be attacked without the formality of a prior declaration, and that defensive measures might be required without any declaration. Samuel Johnson's *Dictionary of the English Language* — used by informed Americans at the time of the Constitutional Convention — defines "declare" as "to make known" or "to proclaim," and the term "to make" meant "to create" or "to bring into any state or condition."⁵⁵

Many in the current Congress would reverse these meanings. Yet, if any concessions are to be made to contemporary notions, the principle should uphold greater Presidential discretion. In the technologically advanced, economically interrelated society of the late twentieth century, with cataclysmic weapons of

50. "[T]he ceremony of a formal denunciation of war has of late fallen into disuse. . . ." THE FEDERALIST No. 25, at 165 (A. Hamilton) (1961).

51. The "usual contests of Empire and Ambition," with which the Framers were familiar, were "waged by a ruling prince to extend his dominions, or settle a dynastic squabble, or secure a commercial advantage." D. HIGGINBOTHAM, THE WAR OF AMERICAN INDEPENDENCE 103 (1971). See also the letter by President Washington to his Cabinet, April 18, 1793, including two questions addressed to the distinctions between "offensive" and "defensive" war. J. MARSHALL, 5 THE LIFE OF GEORGE WASHINGTON 329 (1806 ed. reprint 1969). In *Dellums v. Bush*, No. 90-2866 (D.D.C. Nov. 20, 1990), forty-five Congressmen filed suit to enjoin the Executive from initiating an "offensive military attack" against the military forces of Iraq without a declaration of war. Contrary to the premise of the suit, collective defense to expel an invader, rescue hostages or otherwise confront aggression initiated by another is not "offensive war."

52. 7 WORKS OF HAMILTON 86-87, 88-93 (J. Hamilton ed. 1851). Hamilton also discusses the differences between "offensive war" and "guarding the community against the ambition or enmity of other nations" in THE FEDERALIST No. 34, at 208 (A. Hamilton).

53. "He who is attacked and only wages defensive war, needs not to make any hostile declaration. . . ." E. DE Vattel, THE LAW OF NATIONS 293, 316 (Amsterdam rev. ed. 1775) (reprint 1982). See also C. VON WOLFF, THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD 368 (n.p. ed. 1764) (reprint 1934). Grotius, the father of international jurisprudence, wrote that: "To repel force, or to punish a delinquent, the law of nature requires no declaration." Grotius believed, however, that after such a "defensive war" had commenced, a public declaration would "give it the character of a national and lawful war . . ." under the voluntary law of nations. H. GROTIUS, THE RIGHT OF WAR AND PEACE 317, 322 (n.p. ed. 1646) (reprint 1979).

54. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (M. Farrand ed. 1966) (Madison's Notes).

55. S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (n.p. ed. 1755) (reprint 1979).

war and almost instant means of their delivery, the power "to repel sudden attacks," which is conceded by all sides, must be interpreted to allow the President to meet serious foreign dangers before they become insurmountable. For example, Senator Joseph Biden, chairman of the Special Subcommittee on War Powers, said "I think it is emergency, versus policy, that provides the President with constitutional authority to initiate use of force."⁵⁶ With this concession, the door is open to the use of force in whatever situation the President judges to be an emergency. The test of the President's authority has to be the degree of the emergency — whether the risk to U.S. security is as grave and threatening in current circumstances as was the kind of "sudden attack" which was perceived in 1787.

Another power mistakenly relied upon by spokespersons for congressional supremacy over the war powers is the "Necessary and Proper Clause" of Article I.⁵⁷ This provision cannot serve as a guise for congressional measures stripping the Executive of its vested functions. To the contrary, William Whiting, special-counselor of the War Department in 1862 and its solicitor from 1863 to 1865,⁵⁸ advised President Lincoln that Congress is "bound to pass such laws as will aid [the President]" in carrying into execution his military powers.⁵⁹ The correct principle is this: congressional actions under the "Necessary and Proper Clause" must be in aid of the functions of the President as Commander in Chief; they cannot restrict his exercise of those functions.⁶⁰ This construction of the Constitution is supported by *Myers v. United States*,⁶¹ in which the Supreme Court held that Congress could not limit the President's discretion of removal of Executive officers even though Congress itself had created those offices. Chief Justice Taft, writing for the Court, emphasized that Congress cannot vary the exercise of the President's powers. This, he said, "would be a delegation by the [Constitutional] Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government."⁶² The Court also took a restrictive view of the "Necessary and Proper Clause" in *Kinsella v. Singleton*.⁶³ It held that the clause "is not a grant of power," but merely removes

56. *Hearings on The War Powers After 200 Years: Congress and the President at a Constitutional Impasse Before the Special Subcomm. on War Powers of the Senate Comm. on Foreign Relations*, 100th Cong., 2d Sess. 309 (1988) [hereinafter *War Powers After 200 Years*].

57. U.S. CONST. art. I, § 8, cl. 18. Senator Adams has suggested that Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, supports legislative limitations on the President's deployment of military force. *War Powers After 200 Years*, *supra* note 56, at 34. But this provision relates to an entirely different function; namely, court-martial jurisdiction. Its origin rests in the practice of Parliament to govern military justice. J. STOREY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1197, 110-111 (Massachusetts 1858). The provision enables Congress to enact the Uniform Code of Military Justice (10 U.S.C. § 801-940 (1950)), not to set military policy directives or "impair the authority of the President as Commander in Chief." *Swain v. United States*, 28 Ct. Cl. 173, 221, *aff'd*, 165 U.S. 553 (1897).

58. 21 DICTIONARY OF AMERICAN BIOGRAPHY 703 (H. Start ed. 1944).

59. W. WHITING, *THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON, AND SLAVERY* 33 (n.p. 10th ed. 1864) (reprint 1971).

60. J. POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 289 (1875).

61. 272 U.S. 52 (1926).

62. *Id.* at 127.

63. 361 U.S. 234 (1960).

the uncertainty that Congress may implement the powers otherwise vested by the Constitution.⁶⁴

Power of the Purse

Congress cannot use its power of appropriations to legislate policy restrictions over the conduct of the President's defense powers. Nevertheless, Congress has great powers over military affairs. It controls the size and the strength of the armed forces and the quantity and quality of weapons which are available for waging war. Congress can provide, or refuse to provide, a multitude of emergency powers involving foreign trade and the control of strategic materials.⁶⁵ The legislature can approve or reject treaties or other legislative measures, such as the Tonkin Gulf Resolution, having defense implications.⁶⁶ Ultimately, as will be discussed below, the impeachment power is available if a President should commit an irresponsible abuse of a constitutional discretion. But once Congress has decided how many personnel should be enlisted or what arms should be procured, the President may station those troops and position those weapons in such parts of the world as he determines essential to the national defense, in agreement with other friendly governments, without any geographical or time limitations imposed by Congress.

The truth of this proposition can be seen by posing a few specific examples. One was suggested by retired Judge Robert Bork, who argued as follows:

Once Congress provides the President with armed forces, it cannot interfere with his tactical decisions, and, considering that the deployment of men and material is often crucial to the conduct of foreign policy, in the modern world "tactical decisions" may encompass a great deal. . . . [S]urely it is not debatable that Congress's constitutional power would not extend to dictating the site for the invasion of Europe or to ordering that no funds be expended in the defense of Bastogne since it was better that the troops there should surrender.⁶⁷

Another quandary is presented by two intelligence specialists in their contribution to an important recent study, *The Fettered Presidency*:

It does not follow, however, that in return for appropriating funds for a given purpose, . . . Congress is entitled to impose any condition it wishes on how the funds are spent. . . . Thus, although Congress may appropriate funds to support an army or not, as it sees fit, it cannot make its appropriation conditional on the President's acquiescing to someone other than himself becoming commander in chief.⁶⁸

Former President Gerald Ford added another limit to the congressional appropriations power in his 1989 testimony on war powers before a special subcommittee of the Senate Foreign Relations Committee. He said:

64. *Id.* at 247.

65. In 1969, fully 284 national emergency laws were in effect. OFFICE OF EMERGENCY PREPAREDNESS, EXECUTIVE OFFICE OF THE PRESIDENT, GUIDE TO EMERGENCY POWERS CONFERRED BY LAWS IN EFFECT ON JANUARY 1, 1969 (1969).

66. Approximately 52 of the unilateral Presidential military actions identified are plausibly based on authority conferred by various treaties. See Appendix G, reprinted in *War Powers Hearings*, *supra* note 2, at 117-119. Section 8 of the War Powers Resolution (Pub. L. No. 93-148), however, provides that no such authority for the use of troops is to be raised from treaties.

67. Bork, *Foreword* to G. SCHMITT & A. SHULSKY, *THE FETTERED PRESIDENCY* xiii, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH (1989).

68. *Id.* ch. 5, at 73.

I do not think Congress can use the power of the purse to tell a President that he has to use this weapon system or that weapon system in the actual undertaking of the national defense of the United States . . . [T]o try and minimanage the use of weapons in a war or vessels in a war, I think, is going too far.⁶⁹

In other words, Congress cannot use a funding measure as a tool for invading the area of discretion that is constitutionally vested with the President, just as it cannot employ the appropriations power to violate the due process of a citizen.⁷⁰ It is circular reasoning to assert that it is legal to use the appropriations power to restrict the President's role as Commander in Chief because appropriations must be "made by Law." Appropriations are one thing; a prohibition on the President's independent defense authority is another. It begs the question of whether Congress can interfere with such an independent function of another department by justifying such interference on the basis of the appropriations function. The true question is whether Congress can invade the separation of powers by attempting to increase its own power at the expense of the executive branch.⁷¹ Can Congress tell the President, for example, that he cannot commit military force to protect U.S. shipping in international waters, such as the Persian Gulf, or that he cannot defend vital U.S. interests beyond an arbitrary time period, such as the sixty days permitted by the War Powers Resolution? My conclusion is that such a prohibition, even if attached to an appropriations bill, invalidly diminishes the President's executive power. Further, it would give Congress, by inaction (within sixty days of a hostility), an automatic veto upon executive branch action in violation of the 1983 decision in *Chadha* which held that such a legislative veto is unconstitutional.⁷²

69. See *War Powers After 200 Years*, *supra* note 56, at 173-174.

70. Congress cannot do what would otherwise be unconstitutional by attaching a rider to an appropriations law. *United States v. Lovett*, 328 U.S. 303 (1946). In overruling the "Armstrong Amendment" to the Fiscal Year 1989 District of Columbia Appropriations Act (Pub. L. No. 100-462, approved Oct. 1, 1988), U.S. District Court Judge Royce C. Lamberth held that "Congress' plenary power is still bounded by the Bill of Rights. . . ." *Clarke v. United States*, 705 F. Supp. 605, 613 (D.D.C. 1988). Two plenary powers of Congress were involved, appropriations and Congress' authority "[t]o exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. U.S. CONST. art. I, § 8, cl. 17.

71. By attempting to increase its own powers at the expense of the Executive Branch, congressional policy riders are distinguished from the special prosecutor law upheld in *Morrison v. Olson*, 487 U.S. 654 (1988). Instead, they can be categorized similar to the legislative veto in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and the deficit reduction in *Bowsher v. Synar*, 478 U.S. 714, 727 (1986). In both cases, the United States Supreme Court found a danger of congressional usurpation of Executive Branch functions. Of course, the Federal Judiciary is likely to find in the future, as it has in the past, that issues requiring the exercise of expertise regarding the prosecution of national objectives through military means or national defense strategy are outside judicial competence. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333 (D.C. 1987); appeal dismissed (D.C. Cir. 1988), mandate issued Feb 16, 1989, (Civ. A. No. 87-5426)(per curiam)(Persian Gulf); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985)(aid to Nicaraguan rebels); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983)(U.S. presence in El Salvador); *Curran v. Laird*, 420 F.2d 122, 129 (D.C. Cir. 1969)(use of national defense reserve fleet); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)(Cambodian bombing); and *Ange v. Bush*, No. 90-2792 (D.D.C. 1990)(Operation Desert Shield). But *c.f.* *Dellums v. Bush*, No. 90-2866 (D.D.C. 1990)(Desert Shield). A recent study of court review of war measures finds that "almost without exception, Federal judges have been unwilling to intercede during periods of national emergency." C. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 260 (1989).

72. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

At the time of the Constitutional Convention the power of the purse was an extremely powerful check on making war, but in a different way. In the early years of the nation, it was possible to conceive of no navy and virtually no army at all. In fact, President Washington had a regular army of only 672 men available in 1789, 1,216 in 1790, and 2,128 in 1791.⁷³ Congress could put an entire clamp on war by the simple step of not raising forces or of reducing supplies. The method in which this technique could be achieved is illustrated in a law passed by the Third Congress. The Navy under the Constitution began with the Act of March 27, 1794, which authorized a small naval force for protection of trade of the United States against "Algerine" cruisers. Section nine provided that "if a peace shall take place between the United States and the Regency of Algiers, that no farther [sic] proceeding be had under this act."⁷⁴ Thus, there would be no navy, except for this one emergency.

Similarly, an amendment proposed in 1794 by Congressman Sedgwick to a bill providing for the raising of auxiliary troops would have required that the force be completely disbanded if no war should break out with any European power within two years, and six months after the time of their enlistment. Although the amendment did not pass, it reflects the understanding of our forefathers as to how war was to be controlled.⁷⁵ Congress did not pass policy rules seeking to restrict the President's discretion as to when or where the military forces provided by law were to be deployed. Congress disbanded or reduced the size of those forces if it wanted to restrain the President. When any effort was made to control the President's flexibility, it was defeated on every occasion during Washington's two terms⁷⁶ and on virtually every other time, with the exception of the Neutrality Acts of the 1930s,⁷⁷ until the 1970s. If the option of

73. 6 ANNALS OF CONG. 2073 (1797); R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 89 (1967). The maximum strength of the Regular Army under Washington's Administration was about 4,111 officers and rank and file, reached in 1793. Federalized state militia supplemented the regulars during the Whiskey Rebellion in Western Pennsylvania in 1794. Letter from Maurice Matloff, Chief Historian, Department of the Army, Center of Military History, to Senator Barry Goldwater (Sept. 19, 1975).

74. "An Act to provide a Naval Armament," 1 Stat. 350, 351 § 9. Only three of the six ships authorized in the 1794 law were completed during Washington's Presidency and these were not launched until after he had retired from office. C. PAULLIN, *HISTORY OF NAVAL ADMINISTRATION* 91, 97 (1968).

75. 4 ANNALS OF CONG. 500-504 (1794).

76. *Id.* at 1221.

77. The Neutrality Acts of 1935, 1936, 1937, and 1939 sought to keep the United States out of war in Europe. Certain provisions of the 1939 statute are still in effect. 22 U.S.C. § 441-457 (1939). As to the defeat of earlier troop removal efforts, in 1912 Senator Bacon proposed an amendment to the Army Appropriation Bill which would have prohibited U.S. troops from being "employed, stationed, or on duty" outside the United States or its possessions. It was defeated without a record vote. 48 CONG. REC. 10,927-10,930 (1912). In 1919, several Members of Congress introduced legislation seeking to bring U.S. soldiers home from Europe and Siberia. The only one that passed was a nonbinding request for information on the Siberian Expedition. 58 CONG. REC. 1864 (1919). In 1922 a heated debate took place over a proposed restriction on funds used, "except in time of emergency," for more than specified numbers of personnel on the Continent of Europe, in the Panama Canal Zone or in the Hawaiian Islands. The House of Representatives voted to strike the provision which had been reported by the Committee on Appropriations. 62 CONG. REC. 4109-4110, 4295-4298 (1922). A similar limitation applicable to Marines in Haiti and the Dominican Republic was rejected by the Senate in December 1922. 64 CONG. REC. 1131 (1922). In 1925 the Senate defeated a prohibition on Marines in Haiti. 66 CONG. REC. 2191 (1925). Then, in 1928, two Senate Amendments were defeated; one to prevent American forces from being used for intervention abroad "unless war has been

limiting the size of the forces or curtailing supplies is no longer viable in the opinion of those who want stronger control over presidential discretion, the way to address the situation is by constitutional amendment, not by reading into the Constitution powers for Congress which the Framers never contemplated.

Commander in Chief

Imagine yourself in a country where your worst enemy occupies military bases inside your territory and is inciting ethnic peoples to attack small towns along your borders. Imagine, too, that another foreign power is blockading one of your major trade routes to international waters. It is also occupying land that closes off a part of your nation from valuable warm water ports. To make matters worse, one of your few allies is trying to get you involved in its own quarrels with other powers stronger than you. What is more, serious civil rebellions have erupted in the last year within two constituent parts of your nation. Imagine all this and you can picture exactly the situation of the United States in 1787. Is it any wonder that in these circumstances the Framers were concerned with vesting the nation's defense powers with an energetic and decisive Commander in Chief?

Although forgotten today, at the moment of the Constitutional Convention the country faced foreign threats from every direction. To the north, Britain illegally held onto frontier military posts it had agreed to cede in the Peace Treaty of 1783. Britain excluded us from the Saint Lawrence River and fomented Indian raiding attacks across our northern frontier. To the south, Spain possessed New Orleans and posts at the mouth of the Mississippi River and in the Floridas. In the years immediately preceding the Convention, Spain blocked the free navigation of American boats on the Mississippi, imposed special tariffs for the deposit of goods in New Orleans, and plotted creation of an Indian buffer state between Spanish possessions and the American border. Even our erstwhile ally, France, was suspected by Secretary of State Jefferson of attempting to make the United States a dependent client embroiled in France's foreign conflicts.⁷⁸ Added to these threats was an awareness by the Framers that the "extension of our own commerce in our own vessels" as distant as "the trade to China and India" would invite hostility against our fleets and require "the best possible state of defense."⁷⁹ On top of these developments, armed rebellions had broken out in Massachusetts and New Hampshire in the year preceding the convention.⁸⁰

Clearly, the times called for decisive action on matters of defense and foreign affairs, as free as possible of transitory emotions. The Framers recognized that the very nature of deliberative legislative bodies would on occasion render

declared by Congress or unless a state of war actually exists under recognized principles of international law," and the second directing the withdrawal of troops and Marines from Nicaragua within nine months. The first was rejected by a vote of 22 to 52 and the second by 20 to 53. 69 CONG. REC. 7192 (1928).

78. See THE FEDERALIST No. 4, at 18-19 (J. Jay) (1941) ("dangers from foreign force"); L. KAPLAN, *COLONIES INTO NATION: AMERICAN DIPLOMACY 1763-1801*, at 163-166 (Great Britain), at 166-169 (Spain), at 179-180 (dependent client of France) (1972).

79. THE FEDERALIST No. 4, at 18-19 (J. Jay) (1941).

80. The Framers held fresh memories of Shay's Rebellion in Massachusetts in late-1786 and early-1787, and a similar armed disorder in New Hampshire in September 1786. See *infra* notes 91-99 and accompanying text.

Congress unequal to the vigorous action which might be required. It is inconceivable that the Framers planned to meet the ominous foreign and security problems of the day by allowing a reluctant or divided legislature to block steps necessary for the survival of the newly formed republic. Instead, they understood that the Executive must in some instances take action on his own initiative without waiting for on-the-spot authority from Congress.

It must be remembered that the Framers had witnessed at firsthand the total disarrangement of military affairs by the Continental Congress during the War of Independence. Of the fifty-five Framers who attended the Constitutional Convention, no less than thirty had performed military duty in the revolution.⁸¹ These men knew that at the time of the American Revolution, Congress possessed all the powers of the Executive and Legislature.⁸² They knew that the directives of the Continental Congress had seriously interfered with General Washington's operations and had nearly caused disaster.⁸³

It was the Continental Congress, for example, which twice decided on absolutely impractical plans for attacking Canada, without consulting a single military expert,⁸⁴ and which by its Resolution of October 11, 1776, influenced General Washington to defend a fort at Harlem Heights by "every art and whatever expense," resulting in the loss of over 2,600 American men.⁸⁵ It was Congress's order in the fall of 1777 which made it difficult for Washington to obtain reinforcements from the Northern Army.⁸⁶ He was thereby prevented from saving American forts on the Delaware River, allowing the British to open navigation of the river for the supply of its army. The Continental Congress is also accountable for the tragedy at Valley Forge.⁸⁷ In August of 1777, the Congress threw out a military commissary-general hand-picked by Washington and assumed charge of the commissariat for itself, erecting a system "in direct opposition to the opinion of the commander in chief."⁸⁸ John Marshall, who served at Valley Forge, observed in his authoritative biography of Washington that "Congress persisted in their system, and the effects of deranging, in the midst of a campaign, so important a department as that must be which feeds the troops, were not long in unfolding themselves."⁸⁹ Not only was Washington's army prevented by Congress's action from making attacks on Howe's lines about

81. See generally the sketches of each Framer set out in C. ROSSITER, 1787 THE GRAND CONVENTION 79-144, 145, 146-156 (1966). At least six signers had been aides or confidants to General Washington.

82. See D. HIGGINBOTHAM, *supra* note 51, at 91-92; M. JENSEN, THE ARTICLES OF CONFEDERATION 266-269 (1940).

83. John Marshall offers his on-the-scene narrative: "Congress were disposed to be regulated in their plans, rather by their wishes, than by the means placed in the hands of their military commanders for the execution of them. . . ." J. MARSHALL, 3 THE LIFE OF GEORGE WASHINGTON 5 (2d ed. 1926).

84. J. MARSHALL, 4 THE LIFE OF GEORGE WASHINGTON 30-41 (2d ed. 1926).

85. J. MARSHALL, 2 THE LIFE OF GEORGE WASHINGTON 485-502 (2d ed. 1926). Washington wrote that the decision not to abandon the fort was "repugnant to my own judgment." J. FLEXNER, GEORGE WASHINGTON II IN THE AMERICAN REVOLUTION 138, 145, 149 (1967).

86. T. FROTHINGHAM, WASHINGTON, COMMANDER-IN-CHIEF 228-230 (1930).

87. D. WATSON, 2 THE CONSTITUTION OF THE UNITED STATES 912 (1910).

88. J. MARSHALL, *supra* note 83, at 276.

89. *Id.* at 277.

Philadelphia, but the lack of clothing, food and blankets had terrible results as cold weather came on. As summarized by one military historian: "The amount of harm, caused by the unwise military control usurped by Congress, can only be measured in terms of the appalling sufferings of the American soldiers at Valley Forge. . . ." ⁹⁰

In contrast, the Framers also held fresh memories of Shays's Rebellion of 1786-87 in which Governor Bowdoin of Massachusetts had singlehandedly called out the militia and raised an army to restore order before the indecisive state legislature could be moved to action.⁹¹ "Finding that the lenient measures which had been taken by the legislature, to subdue the resentments of the insurgents, only enlarged their demands," Marshall relates, Governor Bowdoin determined "on a vigorous exertion of all the powers he possessed, for the protection and defense of the commonwealth. Upwards of 4000 militia were ordered into service" ⁹² Since "the public treasury did not afford the means of keeping this force in the field a single week," the Governor again took affairs in his own hands, actually heading a number of citizens who financed the proposed expedition entirely with *private* money.⁹³ After hearing an explanation from Bowdoin of the necessity for "vigorous and effectual measures," ⁹⁴ the legislature replied by expressing its "entire satisfaction in the measures you have been pleased to take, pursuant to the powers vested in you by the Constitution, for the subduing a turbulent spirit" ⁹⁵ Thus did the legislative body convey its understanding of the Executive's broad defense authorities under the 1780 Massachusetts Constitution, one of the leading models available to the Framers of the U.S. Constitution in 1787.

A similar outbreak against a state government took place about the same time in New Hampshire, when an armed mob surrounded the legislature and intimidated legislators.⁹⁶ The rebellion "was crushed by the instant and vigorous exertions of General [John] Sullivan, who was at the head of the executive of that state."⁹⁷ Sullivan personally ordered out the nearest companies of cavalry and infantry and took command of the loyal troops.⁹⁸ The news of these incidents, and the way in which they were successfully handled by firm action of state executives, spread throughout the young nation. Clearly, this information favorably influenced the view of the Framers toward the role of the Executive in caring for the public safety. The Framers made no narrow distinction between domestic insurrections and foreign threats. General Henry Knox, then Secretary

90. T. FROTHINGHAM, *supra* note 86, at 234.

91. Local newspapers spread word of Bowdoin's strong action in suppressing the revolt. *Boston Gazette*, Jan. 29, Feb. 5, & Feb. 12, 1787; *Massachusetts Gazette* (Boston), Jan. 30, Feb. 6, Feb. 9, & Feb. 20, 1787.

92. J. MARSHALL, *supra* note 51, at 103. See also M. STARKEY, *A LITTLE REBELLION* 49, 186 (1955).

93. J. MARSHALL, *supra* note 51, at 104.

94. Governor Bowdoin's speech is printed in the *Boston Gazette*, Feb. 5, 1787.

95. The reply of the Senate and House of Representatives appears in the *Massachusetts Gazette* (Boston), Feb. 6, 1787.

96. E. STACKPOLE, *2 HISTORY OF NEW HAMPSHIRE* 243 (1916). The riots occurred in September 1786.

97. J. MARSHALL, *supra* note 51, at 95. Sullivan's official title was "President."

98. E. STACKPOLE, *supra* note 96, at 244.

of War, wrote Washington that as a result of these disorders, “[m]en of reflection and principle are determined to endeavour and to establish a government . . . which will be efficient in cases of internal commotions or foreign invasions.”⁹⁹ Liberty was at stake; whether the threat be from domestic or external sources made no difference.

Those who would dwell upon the concern of the Framers with a monarchical presidency would do well to study the strong fear our forefathers had of an unregulated Congress. James Wilson said at the Pennsylvania ratification convention that “[t]o control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States.”¹⁰⁰ Jefferson, in language quoted in the *Federalist*, depicted legislative government as being the equivalent of “despotic government.”¹⁰¹ If the Framers had really meant to provide the U.S. Congress with the entire panoply of war powers — the exclusive power to decide when to employ the armed forces, the power to compel an instant halt to any military activity already begun, the power to define or limit the geographical areas where the forces shall be deployed and even to set numerical limits upon deployments in specified areas — they certainly had a perfect model before them in the Articles of Confederation. This intent is doubtful, however, based on Congress’s concern with vesting excessive power in the Legislature. In addition, the Framers had a first-hand recognition of the inadequacies of the Legislature in deliberating upon and conducting defensive war. Article IX conferred upon the Continental Congress the “sole and exclusive right and power of determining on peace and war.”¹⁰² The fact that the Constitutional Convention ignored this clear-cut language, expressly voting to deny Congress the power to make “peace” and changing the power of “determining on” war to the limited power of declaring war,¹⁰³ is persuasive evidence that the Framers intended the legislative branch to have far less authority over military matters than it possessed under the Articles of Confederation.

Another contemporary model the Framers could have followed, but did not, was Article 26 of the South Carolina Constitution of 1776, which specifically restrained the Executive by prescribing that the “governor and commander-in-chief shall have no power to commence war, or conclude peace, or enter into any final treaty without the consent of the Senate and house of representatives.”¹⁰⁴ Again, one might ask, if the Framers meant to make the Executive no more than the “agent” of the Legislature in matters of military defense, why did they not say so by using the unambiguous words which were previously used?

99. J. MARSHALL, *supra* note 51, at 98.

100. 2 THE WORKS OF JAMES WILSON 770 (R. McCloskey ed. 1967) (speech delivered on Nov. 26, 1787, in the Pennsylvania Convention on the U.S. Constitution).

101. THE FEDERALIST No. 48, at 311 (J. Madison) (1961).

102. 7 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 72, art. IX (M. Urofsky ed. 1989).

103. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 319.

104. 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 3247, art. 26 (F. Thorpe ed. 1909). The restriction is repeated in the 1778 South Carolina Constitution. *Id.* at 3255, art. 33.

HISTORICAL PRACTICE

The consistent course of practice under the Constitution from the administration of George Washington until the early 1970s adds additional support for the principle that the President possesses independent power to employ the forces established by Congress in defense of U.S. citizens and the survival of their freedoms and country. A list compiled almost twenty years ago of instances in which presidents had used or sanctioned the use of military force outside the United States without a declaration of war¹⁰⁵ reveals that by 1973, the practice had grown to 199 incidents.¹⁰⁶

This number does not include several situations where the Executive disavowed or repudiated certain military engagements.¹⁰⁷ Adding the military actions occurring since 1973, such as in Libya, Lebanon, Grenada, Panama, and the Persian Gulf,¹⁰⁸ the list would exceed two hundred Presidential defense initiatives without a declaration of war. This total is supported by a recent study made by the Library of Congress,¹⁰⁹ but the list could easily be doubled. In addition to the use of the military forces as a combat instrument, an unclassified study sponsored by the Advanced Research Projects Agency of the Department of Defense has found that the United States has used the armed forces for political objectives, that is, to influence the behavior of foreign leaders without engaging in war, on 215 other instances in the three decades between January 1, 1946, and October 31, 1975.¹¹⁰

More than half of these military actions took place outside the Western Hemisphere,¹¹¹ and ninety-eight of these actions lasted more than thirty days.¹¹² These actions thus demonstrate a consistent pattern of response by presidents to foreign dangers with the use of that level of force which is needed and available for self-defense at that moment in history.¹¹³ It is true that many early incidents represented actions against pirates or stateless areas, but there were many exceptions. As the number of independent nations increased, the number of Presidential military actions involving recognized states also increased. Rather than scoffing at these early limited actions,¹¹⁴ the skeptics might recognize that events have swung full circle.

105. See Emerson, *War Powers Legislation*, *supra* note 2.

106. See *War Powers Hearings*, *supra* note 2.

107. Eight military engagements, subsequently disavowed by superiors, were omitted from the list of military actions cited as precedents. *Id.* at 148, n.3.

108. See *supra* text accompanying notes 8-15 and Table I.

109. See CONG. RES. SERV. Rep. No. 83-204F, *supra* note 2.

110. B. BLECHMAN & S. KAPLAN, *THE USE OF THE ARMED FORCES AS A POLITICAL INSTRUMENT* I-6 (1976).

111. See *War Powers Hearings*, *supra* note 2, at 154-155 (Appendix F).

112. *Id.* at 126-148 (Appendix A).

113. "When little force was needed . . . little was used; when larger commitments were necessary, they too were forthcoming." H. Monaghan, *Presidential War-Making* 50 B.U.L. REV. 19, 27 (1970).

114. In 1988, Professor Edwin B. Firmage, University of Utah, College of Law, argued "the Commander in Chief clause is not really at issue" because the 200 incidents collect "into very understandable, justifiable interventions." *War Powers After 200 Years*, *supra* note 56, at 314. Professor Firmage groups these actions into five categories: protecting American citizens, invasions of disputed territories claimed by the United States, demonstrations without combat, occupations of Caribbean states authorized by treaty, and naval self-defense. Firmage said in the same testimony, however, that "there is no base to hoist yourself up by treaty to have a war power that the President

Instead of defense against uncivilized bands of eighteenth and early-nineteenth century pirates, the U.S. and other world leaders are currently confronted with the threat of illegal drug cartels living outside all rules and strictures of organized governments or modern society. In fact, General Thomas Kelly, director of operations for the Joint Chiefs of Staff, told two House Subcommittees in October 1989, he no longer used most of his time preparing to meet the communist threat. Rather, he said: "I'm spending sixty percent of my time on the drug war."¹¹⁵ In September 1989, the Pentagon confirmed that U.S. military advisers will be authorized to leave bases to train Latin American anti-narcotics troops "beyond secured areas . . ."¹¹⁶ And in the same month, Defense Secretary Dick Cheney instructed military commanders "to find ways to stop the flow of narcotics, even if it means diverting troops from other activities."¹¹⁷ His instructions included orders for the Navy's Atlantic Command "to prepare a plan for a substantial Caribbean counternarcotics task force with appropriate planes and ships to help reduce the flow of drugs from Latin America."¹¹⁸

The Central Intelligence Agency, Defense Mapping Agency, and Drug Enforcement Administration, among other federal units, are even using satellites "to spy on the maze of clandestine air strips, roads and factories run by the illicit drug industry in South America."¹¹⁹ These activities are funded by Congress and thereby represent a collective judgment of the Executive and Legislature.¹²⁰ But this massive concentration of national means cannot be called "trivial," just as the undeclared military actions of earlier presidents against nongovernmental groups cannot be dismissed as mere "police actions" or "short temper," as historian Arthur Schlesinger, Jr. would have it.¹²¹

simply lacks." *Id.* at 312. He also rejected "the protection of U.S. citizens abroad" as being "without any base in constitutional law" because such persons "place themselves there under the sovereignty of another state." *Id.* at 313. Thus, Firmage's testimony is self-contradictory. He denies the standing of treaties or the defense of citizens as a base of Presidential authority, yet he uses those same situations to justify (and dismiss) the instances in which presidents have intervened unilaterally.

115. *Military Commanders Preparing to Meet a Different Threat*, Washington Post, Oct. 18, 1989, at A29, col. 1.

116. Washington Post, Sept. 13, 1989, at A16, col. 1.

117. Richmond Times-Dispatch, Sept. 19, 1989, at A1, col. 5.

118. *Id.* The expanded role of the military in the Bush Administration's drug war includes authority for armed U.S. Marines to assist in the drug interdiction efforts of the Border Patrol. In addition, a legal opinion issued November 3, 1989 by the Justice Department's Office of Legal Counsel finds that military forces may arrest drug traffickers outside U.S. borders. Washington Post, Dec. 16, 1989, at A1, col. 6; Washington Post, Dec. 17, 1989, at A7, col. 1.

119. N.Y. Times, Oct. 14, 1989, at A6, col. 1. Moreover, the U.S. Navy has reportedly proposed deploying a flotilla of warships operating off Columbia to monitor and interdict drug traffic in that area. Washington Post, Nov. 24, 1989, at A27, col. 1.

120. Department of Defense Authorization Act, 1986, Pub. L. No. 100-456, 102 Stat. 1933 (codified at 10 U.S.C. § 2431 note (1988)) (drug interdiction); Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, 102 Stat. 2270 (codified at 10 U.S.C. § 1584 note (1988)) (\$300 million total for drug-interdiction).

121. *E.g.*, the distinguished historian Arthur M. Schlesinger, Jr. explains away these incidents by claiming "the operations were mostly directed against nongovernmental groups, mostly concerned with the protection of American citizens and mostly trivial." A. SCHLESINGER JR., *supra* note 1, at 61-62. In contrast, Edward Corwin evaluated an earlier tabulation of 100 Presidential military actions as follows: "While inviting some pruning, the list demonstrates beyond peradventure the power of the President, as Chief Executive and Commander in Chief, to judge whether a situation requires the use of available forces to support American rights abroad and to take action in accordance with

From this record, it is suggested that if the concept of a 'living Constitution' means anything, it surely encompasses the notion that in a society in which ultimate sovereignty rests with the people, the Constitution is reflective of how they live and act under that charter. Furthermore, one of the most important interpretative authorities in such a democratic system is found in the expectations which the people and their chosen officials have thereby created. While repeated violation of the Constitution cannot make constitutional what was once unconstitutional, a long and unchallenged practice does, according to judicial precedents, put a gloss on society's understanding of the Constitution and may fix the proper construction to be given ambiguous provisions.

In the words of Justice Story, "the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself, in its various departments, upon particular questions discussed, and settled upon their own single merits."¹²² A leading present-day authority on the law of foreign affairs agrees:

[T]he emphasis upon usage, as a test of constitutionality . . . was based upon the notions that a people's genuine "constitution" is in how they live and cooperate under a basic charter and that the most important authority in a democratic community is in the expectations that people create in each other by such living and cooperation. The most important principle of interpretation in any legal system I have studied is that which requires examination of "subsequent conduct" as an index of contemporary expectation.¹²³

Usage was decisive in resolving a separation of powers issue between two branches of the government as early as the Marshall Court. In 1802, Congress enacted the Judiciary Act, which continued the former practice of the Supreme Court Justices riding circuit. Chief Justice Marshall promptly wrote letters to the Associate Justices stating that he doubted the constitutionality of this provision upon the ground that the Constitution required separate appointments for holding circuit court. He suggested the possibility that his colleagues refuse to carry out the law.¹²⁴ Even with such a serious cloud of doubt over Congress's authority to require additional judicial duties of the Justices, the Marshall Court, with Marshall not voting, abided by the principle of usage: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."¹²⁵

Usage has also been accepted by the Supreme Court on at least two other occasions as a basis for rejecting a congressional attempt to reverse its earlier acceptance of executive authority. In *United States v. Midwest Oil Co.*,¹²⁶ the

that decision."

Corwin, *Who Has the Power to Make War*, N.Y. Times, July 31, 1949, (Magazine), at 14.

122. J. STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 290 (Boston 1858).

123. Letter from Professor Myers McDougal to Barry M. Goldwater (Jan. 12, 1973).

124. L. BAKER, JOHN MARSHALL: A LIFE IN LAW 378-381 (1974).

125. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803). Justice Marshall did not participate in the decision. Practice also served as the decisive source of constitutional construction in *McPherson v. Blacker*, 146 U.S. 1, 27, 35-36 (1892).

126. 236 U.S. 459, 473 (1915).

Court approved the validity of a long-continued practice of the President to withdraw public land from private acquisition even though this conflicted with a federal statute which made such lands free and open to occupation and purchase. That practice fixed the construction which, the Court explained, "is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or *the existence of a power*, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation."¹²⁷ A decade later, the Court again relied on usage as a basis for rejecting legislative control of the Presidency. The Court held that Congress could not reverse seventy-three years of prior practice by imposing conditions on the removal of executive officers by the President, even though the removal authority had often been the subject of bitter controversy and an impeachment trial in the past.

Nor can we concur . . . that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution.¹²⁸

More recently, in reviewing executive discretion to settle claims of American hostages and nationals against the terrorist regime in Iran, the Supreme Court once again relied on the value of past executive practice as raising a presumption of Presidential authority.¹²⁹ The facts of these cases closely parallel debate over the military command powers, except here there are 200 years of practice in which presidents have acted on their own initiative in response to any crisis which they believed might present an unacceptable threat to national safety. Many presidents have been criticized by both Houses for taking these strong military actions,¹³⁰ but Congress had never once before the 1970's passed a law prohibiting, or ordering a halt to, any of these conflicts. If the rule of the above cases is applicable, Congress cannot now, after acquiescence for almost two centuries, reverse the construction of the Constitution which has become so firmly set by practice.

SCHOLARLY AUTHORITIES

Notwithstanding the current voices of astonishment over claims on behalf of the Executive's exercise of independent power to employ military force,¹³¹ many

127. *Id.* at 472-473 (emphasis added).

128. *Myers v. United States*, 272 U.S. 52, 152 (1926).

129. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

130. *E.g.*, President Tyler was denounced in Congress and threatened with impeachment because he had deployed military units to protect Texas against Mexico in 1844, before Texas was a state. C. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 47-49, 70-74 (1970). President Polk was rebuked by a nonbinding resolution passed by the House of Representatives which declared that the war with Mexico, which his military maneuvers had precipitated, "was unnecessarily and unconstitutionally begun by the President of the United States." *Id.*

131. *See, e.g.*, A. SCHLESINGER, JR., *supra* note 1. His premise is that the Office of the President, particularly "the contemporary Presidency," has appropriated powers "reserved by the Constitution and by long historical practice to Congress." *Id.* at 10. Schlesinger adds: "There is no evidence that anyone [among the Founders] supposed that his office as Commander in Chief endowed the President with an independent source of authority." *Id.* at 18.

public officials and leading authorities throughout the greater part of our history have recognized that a broad self-defense power is vested by the Constitution in the President. On May 22, 1798, Secretary of War, James McHenry, moved the United States close to all-out war with France by ordering Navy Captain Richard Dale to convoy U.S. merchantmen sailing off the coast between the Capes of Virginia and Long Island and, if attacked while on the high seas, "to defend Yourself to the Utmost."¹³² This action was ordered *before* legislative passage of the major laws supporting defense of U.S. commerce against French decrees which treated American crews and American merchant vessels virtually as enemies of France.¹³³ Also, before enactment of those laws, Representative Jonathan Dayton, the then Speaker of the House and a signer of the U.S. Constitution, defended the Adams Administration arguing that the President, as Commander in Chief, was the official "whom the Constitution has made exclusively the judge" of employing the army and navy of the United States wherever he "thought the common defense and general welfare required them to be stationed."¹³⁴

Representative Dayton reasoned:

That the Commander-in-Chief possessed the Constitutional power of employing these armed vessels in time of peace, he himself had no doubt, for he did not see any distinction in principle between employing a naval force to protect our merchantmen in the prosecution of a fair and lawful trade, or in enforcing the observance of the law of nations and employing the military in enforcing the execution of the municipal law.¹³⁵

Three years later President Thomas Jefferson's Cabinet met to consider what action to take against despoliation of U.S. commerce by the Barbary Powers. Secretary of Treasury Alexander Gallatin construed the President's Commander in Chief power as follows: "The exve [sic] can not put us in a state of war, but if we be put into that state either by the decree of Congress or *of the other nation*, the command and direction of the public force then belongs to the exve [sic]."¹³⁶ Acting on this advice, Jefferson ordered Captain Dale to move a squadron of ships into the Mediterranean "to protect our commerce and chastise their insolence . . . by sinking, burning or destroying their ships and vessels

132. OFFICE OF NAVAL RECORDS AND LIBRARY, U.S. NAVY DEPT., *NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE* 77 (1935). On March 19, 1798, Adams had issued an order, without authority of Congress, enabling American merchant vessels to arm for defense against attack by French warships. 8 *ANNALS OF CONG.* 1271 (1851). Adams acted contrary to the opinion of members of Congress who believed such a decision "must lead to war." *Id.* at 1254-1263.

133. Major laws supporting the quasi-war with France began with the two acts of May 28, 1798, 1 Stat. 558 (1798) (provisional army), and 1 Stat. 561 (1798) (instructions to commanders of public armed ships); the act of June 13, 1798, 1 Stat. 565 (1798) (suspension of commerce going to France); and the act of June 25, 1798, 1 Stat. 572 (1798) (defense of merchant vessels). These laws were all enacted after Adams had allowed the arming of American merchant vessels and issued his active defense orders to Captain Dale.

134. 8 *ANNALS OF CONG.* 1409-1411 (1851). Dayton was the youngest delegate who attended the Constitutional Convention. 5 *DICTIONARY OF AMERICAN BIOGRAPHY* 166 (1930).

135. 8 *ANNALS OF CONG.* 1454-1455 (1851).

136. 1 *THE WORKS OF THOMAS JEFFERSON* 365-366 (P. Ford ed. 1904) (Cabinet meeting of May 15, 1801) (emphasis added).

wherever you shall find them.”¹³⁷ It was months after fighting broke out that Jefferson came to Congress for authority.¹³⁸

And in 1836, former President John Quincy Adams asserted:

The *declaration* of war is in its nature a legislative act, but the conduct of war is and must be executive. However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power Defensive war must necessarily be among the duties of the Executive Chief Magistrate.¹³⁹

Thus, the claim that reliance on the Commander-in-Chief clause as an independent source of executive authority is a modern phenomenon is illusory.

The opinions put into practice by Adams and Jefferson have constituted the general voice of scholarship throughout succeeding years until the Vietnam War traumatized American politicians. As early as 1862, William Whiting, one of the great lawyers of his time, compiled a work on the war powers of the President in which he declared:

Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements and measures essential to overcome the enemy—for the general conduct of the war—the President is responsible to and controlled by no other department of government.¹⁴⁰

John Pomeroy, Dean of the New York University Law School in the 1860s, rejected the idea that “the disposition and management of the land and naval forces would be in the hands of Congress”¹⁴¹ Pomeroy instructs that “[t]he policy of the Constitution is very different, . . . [and] [i]t was felt that active hostilities, under the control of a large deliberative body, would be feebly carried on, with uniform disastrous results.”¹⁴² He also said that the Legislature may:

[F]urnish the requisite supplies of money and materials [and] authorize the raising of men, [but] all direct management of warlike operations, all planning and organizing of campaigns, all establishing of blockades, all direction of marches, sieges, battles, and the like, are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens.¹⁴³

The Constitution, however, explicitly authorizes Congress to pass laws which are necessary and proper for executing all powers vested by the Constitution in

137. OFFICE OF NAVAL RECORDS AND LIBRARY, U.S. NAVY DEPT., 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 467 (1939).

138. Jefferson informed Congress that he had sent the squadron to the Mediterranean in his first annual message and piously stated that he was unauthorized “without the sanction of Congress, to go beyond the line of defence [sic]”. See President’s Message, Dec. 8, 1801, 11 ANNALS OF CONG. 11-12 (1801). Jefferson’s report to Congress was made after an intense battle had already broken out.

139. J. ADAMS, AN EULOGY ON THE LIFE AND CHARACTER OF JAMES MADISON 47 (1836).

140. W. WHITING, *supra* note 59, at 163-164.

141. J. POMEROY, *supra* note 60, at 288-289.

142. *Id.*

143. *Id.* at 289.

the Government of the United States, or in any department or officer thereof.¹⁴⁴ In response, Pomeroy states that "these measures must be supplementary to, and in aid of, the separate and independent functions of the President as commander in chief; they cannot interfere with, much less limit, his discretion in the exercise of those functions."¹⁴⁵

In 1910, Dr. David Watson wrote that of all the explanations of why the Constitution should make the President Commander-in-Chief of the military and naval forces of the country:

[N]one seems more reasonable than the fact that during the Revolution Washington experienced great trouble and embarrassment resulting from the failure of Congress to support him with firmness and dispatch. There was a want of directness in the management of affairs during that period which was attributable to the absence of centralized authority to command. The members of the Convention knew this and probably thought they could prevent its recurrence by making the President Commander-in-Chief of the Army and Navy. Doubtless, also, the Convention was influenced by precedents, of which there were many, running back for a long period.¹⁴⁶

Watson additionally stated that "[t]he power is vested in the President to dispose of or arrange the component-parts of the Army and Navy at his pleasure. . . . While Congress can make rules for the Army and Navy, it cannot interfere with the President's power as commander of such forces."¹⁴⁷

In the 1920's, Professor Westel Willoughby observed that the President's foreign affairs initiative "makes it possible for him to bring about a situation in which, as a practical proposition, there is little option left to Congress as to whether it will or will not declare war or recognize a state of war as existing."¹⁴⁸ Willoughby did not mean to imply that this state was improper and could be checked by Congress. He wrote that the power of the President to send United States forces outside the country in time of peace "when this is deemed necessary or expedient as a means of preserving or advancing the foreign interests or relations of the United States" is a "discretionary right constitutionally vested in him, and, therefore, not subject to congressional control."¹⁴⁹

Professor Clarence Berdahl, in his outstanding 1920 thesis on the war powers of the Executive, commented:

The members of the Convention probably had not forgotten the trouble and embarrassment caused during the Revolution by congressional interference and the lack of a centralized control over the army. They were very likely influenced also by the precedents in the practise of European states, in former plans of union for the colonies, and in the recently established state constitutions.¹⁵⁰

Anticipating legislative proposals of the kind embodied in the War Powers Resolution of 1973,¹⁵¹ Berdahl was careful to add:

144. U.S. CONST. art. I, § 8, cl. 18.

145. J. POMEROY, *supra* note 60, at 289.

146. D. WATSON, *supra* note 87, at 912.

147. *Id.* at 914.

148. W. WILLOUGHBY, 3 THE CONSTITUTIONAL LAW OF THE UNITED STATES 1558 (2d ed. 1929).

149. *Id.* at 1567.

150. C. BERDAHL, *supra* note 130, at 115.

151. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. § 1541 (1973)).

Although there has been some contention that Congress, by virtue of its power to declare war and to provide for the support of the armed forces, is a superior body, and the President, as Commander-in-Chief, is "but the Executive arm, . . . in every detail and particular, subject to the commands of the lawmaking power," practically all authorities agree that the President, as Commander-in-Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments.¹⁵²

Berdahl concludes:

Just as the President decides when and where troops shall be employed in time of war, so he alone likewise determines how the forces shall be used, for what purposes, the manner and extent of their participation in campaigns, and the time of their withdrawal.¹⁵³

Professor Edward Corwin, who was selected by Congress to edit the Congressionally sponsored *Constitution Annotated*,¹⁵⁴ also recognized the President's authority to commit military forces abroad on his own initiative.¹⁵⁵ In 1949, he wrote that this power "had developed into an undefined power — almost unchallenged from the first and occasionally sanctified judicially — to employ without Congressional authorization the armed forces in the protection of American rights and interests abroad whenever necessary."¹⁵⁶ Professor Quincy Wright, one of the preeminent scholars of international law in this century, wrote in 1969:

I conclude that the Constitution and practice under it have given the President, as Commander-in-Chief and conductor of foreign policy, legal authority to send the armed forces abroad; to recognize foreign states, governments, belligerency, and aggression against the United States or a foreign state; to conduct foreign policy in a way to invite foreign hostilities; and even to make commitments which may require the future use of force. By the exercise of these powers he may nullify the theoretically exclusive power of Congress to declare war.¹⁵⁷

Thus did Wright reaffirm his position first expressed nearly fifty years earlier:

The powers of the Commander in Chief extend to the conduct of all military operations in time of peace and of war, thus embracing control of the disposition of troops, the direction of vessels of war and the planning and execution of campaigns, and are exclusive and independent of Congressional power.¹⁵⁸

Added to the weight of the above authorities is the opinion given by the present Chief Justice of the U.S. Supreme Court when he was an official in the Justice Department during the Nixon Administration. In 1970, William Rehnquist

152. C. BERDAHL, *supra* note 130, at 116-117 (quoting 59 CONG. REC. 2135 (1906) (statement of Sen. Bacon)).

153. *Id.* at 122.

154. CONSTITUTION ANNOTATED (E. Corwin ed. 1952).

155. An eminent constitutional scholar agrees that the President "possesses the organizational authority to resort to the use of force to protect American rights and interests abroad and to fulfill the commitments of the nation under international agreements." B. SCHWARTZ, *supra* note 48, at 196.

156. Corwin, *supra* note 121, at 14.

157. Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 VA. J. INT'L. L. 43, 54 (1969).

158. Wright, *supra* note 43, at 134.

testified that: (1) there is no prohibition in the Constitution which keeps the President from initiating war without the declaration of Congress; and (2) no statute could "prevent the President from exercising his traditional powers as Commander in Chief, which do include under certain circumstances the commitment of armed forces to hostilities."¹⁵⁹

JUDICIAL AUTHORITIES

Of the few judicial statements which consider the issue, most uphold the power of the President to make and continue hostilities without a declaration of war. In approving President Lincoln's blockade of the Confederacy, the Supreme Court wrote by analogy that when "a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."¹⁶⁰ The principle of national self-defense expressed in the *Prize Cases* thus ratifies each of the undeclared wars cited above.¹⁶¹ Relying on this case, Professor Bernard Schwartz, a well-known constitutional scholar, has written:

The language of the High Court in the *Prize Cases* is broad enough to empower the President to do much more than merely parry a blow already struck against the nation. Properly construed, in truth, it constitutes juristic justification of the many instances in our history (ranging from Jefferson's dispatch of a naval squadron to the Barbary Coast to the 1962 blockade of Cuba) in which the President has ordered belligerent measures abroad without a state of war having been declared by Congress.¹⁶²

Other judicial precedents bear out the power of the Executive to use such force as is necessary for self-defense purposes. Supreme Court Justice Nelson, a member of the Court from 1845 and sitting as a circuit judge in 1860, held that the President's duty to execute the laws includes a duty to protect citizens abroad.¹⁶³ The justice wrote: "It is to him . . . the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands . . ."¹⁶⁴ He continued:

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the

159. *Hearings on Congress, the President, and the War Powers Before the Subcomm. on National Security Policy and Scientific Developments, and the Comm. on Foreign Affairs*, 91st Cong., 2d Sess. at 228-229, 232 (1970) [hereinafter *Hearings*] (testimony of William Rehnquist).

160. *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). The Court's opinion, written by Justice Grier, states that one of the threshold questions presented was whether the President possessed a right to initiate military action "on the principles of international law, as known and acknowledged among civilized States." *Id.* at 665. The Court decided the "President was bound to meet [the emergency] in the shape it presented itself, without waiting for Congress to baptize it with a name" *Id.* at 669.

161. See *supra* text accompanying notes 2-15, 105-121.

162. B. SCHWARTZ, *THE REINS OF POWER* 98 (1963).

163. *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,186).

164. *Id.* at 112.

protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. . . . The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home¹⁶⁵

The Supreme Court endorsed this concept by declaring in a later case that a citizen is entitled "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."¹⁶⁶ Likewise, in 1866, four concurring Supreme Court Justices stated that "Congress cannot direct the conduct of campaigns"¹⁶⁷ Later, the Supreme Court affirmed a holding in which the Court of Claims had said that "Congress cannot in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief."¹⁶⁸ Another broad endorsement of the President's scope of power is found in *Fleming v. Page*.¹⁶⁹ Here the Supreme Court said, "[a]s Commander in Chief, he [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."¹⁷⁰

These judicial pronouncements do not definitively settle the legal issue of the President's relations with Congress. Rather, it is suggested that strong support for the President's independent defense role can be found in judicial opinions, certainly enough to outweigh the few cases that have been invoked for congressional supremacy over war-making. Those cases essentially fall into a category of three early decisions stemming out of the capture of ships during the undeclared French Naval War of John Adams's Administration.¹⁷¹ They involved the interpretation of statutes enacted by Congress under its power to "make Rules concerning Captures on Land and Water,"¹⁷² not the issue of whether Adams had prosecuted an illegal war.¹⁷³ The fundamental fact is that the Supreme Court

165. *Id.*

166. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872). The Court included protection of "life, liberty, and property" among the privileges and immunities of citizenship guaranteed by the fourteenth amendment. *Id.*

167. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866). Once war is declared, the President is vested with "such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeny*, 157 U.S. 281, 284 (1895).

168. *Swaim v. United States*, 28 Ct. Cl. 173, 221, *aff'd*, 165 U.S. 553 (1897). The Court of Claims has also stated that the exercise of the Commander in Chief powers needed no legislative ratification "to give to them effective force." *Warner, Barnes and Co. v. United States*, 40 Ct. Cl. 1, 32 (1904).

169. 50 U.S. (9 How.) 603 (1850).

170. *Id.* at 615.

171. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Talbot v. The Ship Amelia & Seeman*, 4 U.S. (4 Dall.) 34 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 36 (1800).

172. U.S. CONST. art. I, § 8, cl. 11.

173. *Bas v. Tingy* raised the narrow question of whether a vessel recaptured from the French should be governed by the rule of compensation provided by the act of June 28, 1798 (1 Stat. 574, § 2), which allowed one-eighth for salvage, or the act of March 2, 1799 (1 Stat. 709, 716, § 7), which permitted up to a one-half share of the ship and cargo for salvage. 4 U.S. at 39-40.

Talbot v. Seeman again presented the question of the amount of salvage due the U.S. ship captain who recaptured a vessel from the French. The Court was required to make an interpretation of five statutes regulating salvage. The question of independent Executive authority was not before

has never ordered the President to halt any ongoing military action. In the absence of any conclusive Supreme Court holding, it is appropriate to shift the debate to policy considerations. Is it wise, is it practical, is it helpful to society to enact legislation such as the War Powers Resolution? And, how might the two branches work together to shape a common destiny for the Republic in the sphere of national defense?

WAR POWERS RESOLUTION

Sixty Days War: Forty-Eight Hours Report

Regardless of the weight of so much informed opinion and the long record of earlier practice, the Congress, in 1973, overrode President Nixon's veto and put into law a restraint on unilateral executive decisions to employ U.S. forces abroad. The law was enacted in the emotional atmosphere of the closing days of the Vietnam War, simultaneously with the Watergate coverup investigations. The last report of the Senate Foreign Relations Committee on the legislation takes specific notice of this fact. "The immediate legislative history of the war powers bill can be dated to the controversial Gulf of Tonkin Resolution of 1964 and the subsequent conduct of hostilities in Vietnam, Laos and Cambodia without valid Congressional authorization."¹⁷⁴

The combination of Watergate and Vietnam, with their destructive impact on American politics, morale and self-confidence, may yet have a devastating effect on the national interest as a result of this unprecedented legislation.

The stated purpose of the War Powers Resolution, as announced in section 2(a), is to:

[I]nsure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.¹⁷⁵

These words disguise the true end of the statute which is to veto the President's direction of the armed forces. Section 2(c) declares that:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or

the Court. 5 U.S. at 29-31.

Little v. Barreme also involved the interpretation of an Act of Congress providing for prize money (Act of Feb. 9, 1799, 1 Stat. 613, 615. § 5). The American Captain mistakenly seized a neutral ship, believing it to be a U.S. vessel, without authority from either President Adams or an act of Congress. Captain Little was held answerable in damages to the owner. In *dictum*, Chief Justice Marshall stated that Presidential instructions could not have excused Captain Little's action even if the vessel had not been owned by a neutral because Congress had only allowed captures of American ships going *to*, not *from*, French ports. 6 U.S. at 179. The Court's decision, however, expressly exempted the U.S. government from liability for damages, and since President Adams did not claim any authority outside the statute, his independent power of action was not involved on the facts of the case. *Id.*

174. S. REP. NO. 220, 93d Cong., 1st Sess., at 4 (1973).

175. 50 U.S.C. § 1541(a) (1982).

(3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.¹⁷⁶

Moreover, Section 3 provides that:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.¹⁷⁷

Section 4 requires that reports be provided within forty-eight hours to Congress whenever military forces are introduced: (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for resupply or training; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.¹⁷⁸ When a section 4(1) hostilities type report is required, a sixty-day clock starts ticking. Under section 5(b) the President shall, within sixty calendar days, terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.¹⁷⁹

The sixty-day period may be extended for not more than an additional thirty days if necessary for safely removing the troops.¹⁸⁰ But section 5(c) also provides that at any time, even before the lapse of sixty days, U.S. military forces may be ordered withdrawn "if the Congress so directs by concurrent resolution."¹⁸¹

Congress does not allow just any statute to rise to the level of authority for war. When Congress speaks of "a specific authorization for such use of United States Armed Forces" in section 5, it does not mean appropriations approved for carrying on the military operations, nor does it mean authority pursuant to any treaty obligation. Section 8(a)(1) states that authority to introduce American troops into hostilities or threatened hostilities "shall not be inferred [from] any provision contained in any appropriation Act, unless such provision specifically . . . states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution."¹⁸² Subsection (a)(2) establishes the same disavowal concerning "any treaty heretofore or hereafter ratified."¹⁸³ In other words, the NATO alliance is a dead letter insofar as the War Powers Resolution is concerned, as is the "inherent right of individual or collective self defense"

176. 50 U.S.C. § 1541(c) (1982).

177. 50 U.S.C. § 1542 (1982).

178. 50 U.S.C. § 1543(a) (1982).

179. 50 U.S.C. § 1544(b) (1982).

180. *Id.*

181. 50 U.S.C. § 1544(c) (1982). Sections 5(b) and 5(c) clearly violate the Presentment Clause of the U.S. CONST. art. I, § 7, cl. 2.

182. 50 U.S.C. § 1547(a)(1) (1982).

183. 50 U.S.C. § 1547(a)(2) (1982).

provision of Article 51 of the United Nations Charter.¹⁸⁴ Unless a brand new statute, specifically linked to the War Powers Resolution is enacted, the President is not to claim any justification for the use of force under these or other treaties, or pursuant to any funding measure.

Section 2 of the War Powers Resolution tells us where Congress claims the power to act as a court and define in precise detail what the constitutional law of the nation is, even to the extent of deciding what nature of legislation constitutes the functional equivalent of a declaration of war.¹⁸⁵ Here, Congress makes the arbitrary and unfounded assumption that the authority to make all laws for executing the powers vested in the other departments of the United States (the Necessary and Proper Clause) is a means of limiting and restraining the exercise of those other governmental powers. This claim has been refuted based upon the previous analysis which concludes that Congress may "aid" in the execution of other authorities, but not "thwart" the conduct of those other functions.

Policy Considerations

The War Powers Resolution is not only unconstitutional under the preceding discussion, it is dangerous to the country's safety because it denies flexibility to the President in the conduct of foreign relations and conveys a message of potential disunity in the American government. Further, the War Powers Resolution constitutes bad policy because it might bring about an unnecessary vote at a dangerous moment of history when public opinion is not yet informed or mature enough to render a reasoned judgment. As one of the first opponents of war powers legislation, Professor James McGregor Burns, testified in 1970:

Artificial restrictions . . . may lead not to peace, but to war, as foreign adversaries estimate that the United States will not respond to a threat to world peace because of legal restrictions on the executive

If our friends and foes abroad must try to estimate not only how our President will respond to acts on their part, but also how a majority of the House or Senate will respond, the element of uncertainty is increased.¹⁸⁶

The uncertainty of which Professor Burns speaks may bring insecurity, instability, and a miscalculation of U.S. intentions.

Moreover, the War Powers Resolution does not stand up to the test of actual history. Consider what would have happened if the War Powers Resolution had been enacted when Franklin Roosevelt took bold initiatives in support of the democracies fighting Nazi Germany before the declaration of war of December 1941. Roosevelt had the vision to see that America and the rest of the free world could avoid disaster only if he acted independently of Congress, and outside the Neutrality Act restrictions, to help Great Britain resist the Nazi onslaught on the civilized world. Neither Congress nor the American public knew of the secret alliance between the United States and Britain. An alliance that began, in 1939,

184. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense" TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1153, 1165 (C. Bevans ed. 1969) (quoting U.N. CHARTER art. 51).

185. 50 U.S.C. § 1541(b) (1982).

186. *Hearings, supra* note 159, at 82-83 (testimony of Professor James MacGregor Burns).

with the exchange of correspondence on military matters between Roosevelt and Winston Churchill, then, First Lord of the Admiralty in the Chamberlain Cabinet.¹⁸⁷

Public opinion of the time was "divided and confused."¹⁸⁸ Many Americans believed that Britain and Western Europe were doomed and that American aid would either be lost in the Atlantic or fall into Hitler's hands. As late as November 1941, a mild revision of the 1939 Neutrality Act to permit the arming of American merchant vessels passed the House by a slim margin of 212 to 194.¹⁸⁹ There was no national consensus of an uncontested danger to the life of the nation, nor any broad perception of emergency threatening the life of the republic — criteria suggested by historian Arthur Schlesinger, Jr. as the only justification for resort to an extra-constitutional emergency prerogative power.¹⁹⁰ Yet Roosevelt acted. He exercised the initiative of decision making reserved to every President. The steps he took were in the very nature of the executive power.

Congress was not consulted when President Roosevelt sent American troops to establish bases in Greenland¹⁹¹ and Iceland,¹⁹² and to cooperate with British armed forces already present there. Roosevelt's actions violated the Selective Service Act of 1940 which expressly prohibited the deployment of any draftees beyond the Western Hemisphere. This area had been narrowly described in the course of Senate debate as the part of the Americas which "we have long engaged to protect under the Monroe Doctrine."¹⁹³ Nazi planes overflew these foreign bases and it could not be known whether a German attack was coming or not.

187. It was Roosevelt who invited Churchill "to enter into direct correspondence with him." ROOSEVELT AND CHURCHILL: THEIR SECRET WARTIME CORRESPONDENCE 79 (Lowenheim, Langley, & Jonas eds. 1975).

According to William Stephenson, chief of British intelligence, Roosevelt issued secret instructions in June 1940 to J. Edgar Hoover for the closest possible cooperation between the FBI and British agents. Roosevelt also allowed British Security Coordination, a central agency of all British intelligence groups, to direct worldwide underground operations against Nazi Germany from offices in New York City. W. STEVENSON, A MAN CALLED INTREPID: THE SECRET WAR 78-80, 102 (1976). Roosevelt's loathing for the whole Nazi regime was "in evidence by 1933." R. HERZSTEIN, ROOSEVELT AND HITLER: PRELUDE TO WAR 413 (1989).

188. J. BURNS, *supra* note 12, at 148.

189. H.R.J. Res. 237, 77th Cong., 1st Sess., 87 CONG. REC. 8891 (1941). The slim margin on the vote demonstrated that "the President could not depend on Congress at this point to vote through a declaration of war." J. BURNS, *supra* note 12, at 148. Nor, had the War Powers Resolution been in force, could Roosevelt have depended on Congress for approval of military action following a § 4(a)(1) report.

190. See *War Powers After 200 Years*, *supra* note 56, at 41, 55 (testimony of Dr. Arthur M. Schlesinger, Jr.). In fact, Roosevelt was so unsure of public opinion he went to extreme efforts to avoid disclosure of his secret alliance with Britain. The chief of British intelligence wrote of President Roosevelt:

He got us Flying Fortresses, having them secretly *pushed* over the frontier into Canada because this way their delivery was less likely to draw hostile attention. He was getting us hundreds of thousands of tons of metal for British arsenals, all done . . . when men close to the White House were shouting that this represented suicide for Roosevelt and possibly for the nation, and amid cries that Britain was finished and all this material would fall into Hitler's hands!

W. STEVENSON, *supra* note 187, at 144.

191. On April 10, 1941, Roosevelt announced he was sending American troops to establish bases in Greenland. 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 96-99 (S. Rosenman ed. 1950).

192. On July 7, 1941, Roosevelt informed Congress that, as Commander in Chief, he had sent 4400 Marines to join with a British garrison to occupy Iceland. *Id.* at 255-257.

193. 54 Stat. 885, 886; 86 CONG. REC. 10, 295 (codified at 50 U.S.C.A. app. § 301-318 (1940)).

Admiral Stark sent proposed instructions for Roosevelt's approval which left no doubt of the situation. Stark asked Roosevelt to approve instructions which "ordered the [Marine] force to cooperate with the British (in defending a British base operated by the British against the enemy)."¹⁹⁴ Admiral Stark wrote: "I realize that this is practically an act of war."¹⁹⁵ Nevertheless, Roosevelt gave his approval.¹⁹⁶

What would have been the outcome had Roosevelt laid these instructions before the Congress and reported that U.S. Marines were committed to engage in "practically an act of war?" Note that this was one year after Congress had renewed the military draft by the smallest possible margin, a single vote.¹⁹⁷ If Congress had been forced to vote on Roosevelt's risky action, is it not likely the Legislature would have failed to sustain his decision? Nor would Congress have been any more likely to approve of President Roosevelt's action in May of 1941, when he secretly lent long-range U.S. amphibian planes to Great Britain and assigned eighty navy airmen to help with a British mission to sink the German battleship, *Bismarck*.¹⁹⁸ And it is doubtful Congress would have ratified Roosevelt's instructions in September 1941 when he ordered American warships to escort British convoys west of Iceland and to destroy German submarines "on sight."¹⁹⁹ By forcing a vote in an almost isolationist Congress, the War Powers Resolution would probably have brought total disaster to the democracies of the 1940s. This same concern applies equally to the future should a cautious and hesitant Executive fail to meet the imperatives of an emergency because of the inhibitions of the statute.

CHECKS ON PRESIDENTIAL ABUSE OF POWER

This is not to say that the President possesses unbridled war powers. He cannot constitutionally initiate offensive wars of conquest or jealousy. The test, however, is not the highly technical legal standard of "proportionate measure" or any other standard to be found in the decrees of the International Court of Justice.²⁰⁰ Rather, the test is to be found in the standards of free government applied by the American people in the political operations of a free Republic. The President can only use the military forces Congress has put at his command.

194. J. BURNS, *supra* note 12, at 104-105. Admiral Harold Stark served as Roosevelt's Chief of Naval Operations.

195. *Id.*

196. *Id.*

197. H.R. 10,132, 76th Cong., 3rd Sess., 86 CONG. REC. 11,755 (1940).

198. W. STEVENSON, *supra* note 187, at 236.

199. J. BURNS, *supra* note 12, at 140-141.

200. In *Nicaragua v. United States*, 1986 I.C.J. 14 (Judgment on the Merits of June 27), the International Court of Justice ("ICJ") concluded that customary international law does not allow the use of force in collective self-defense against "assistance to rebels in the form of the provision of weapons of logistical or other support," referring to the conduct of Nicaragua in supplying arms to Marxist revolutionaries in El Salvador. *Id.* Instead of "self-defense," the ICJ developed the novel notion of "proportionate countermeasures" practiced by the victim state itself, not by an ally. *Id.*

For criticism of this decision, see the address to the American Society of International Law on April 22, 1988, reprinted in *War Powers After 200 Years*, *supra* note 56, at 1085-1091. Needless to say, the Framers could not have had in mind such a highly technical standard for purposes of judging the President's conduct under the Constitution.

He cannot usually raise and equip an army on his own authority; although Lincoln did in the first days of the Civil War.²⁰¹

The President must receive the Senate's consent to his appointments of ambassadors, judges, and cabinet officers, and he needs the "advice and consent" of the Senate in making treaties. If he wishes to serve another term, he must stand for re-election after four years. Moreover, if he wants his political program to succeed he knows that his own political party will be subject to popular will in free elections held each two years. He also faces the constant scrutiny of a free press and ultimately the legislative power of impeachment and removal from office. The most extreme check on the power of the President, however, is impeachment. Many lawyers do not realize that the constitutional term "high Crimes and Misdemeanors" means a political offense, a crime against the state. It does not mean a crime in the sense of ordinary criminal statutes. It is a far more serious offense because it undermines the viability of the political process and basic political institutions and thereby affects all of society, not just a single, unfortunate victim or class of victims.

It is important to remember that the original language of the "high Crimes and Misdemeanors" provision, accepted by the Constitutional Convention on September 8, 1787, included the descriptive words "against the United States."²⁰² The report by the Committee on Style and Arrangement on September 12, 1787, dropped the latter words,²⁰³ but without any authority or intent of changing the substance of the clause. Thus, impeachment was seen as a category of offenses against the political state.

In the very context we are considering, we have the words of Edmund Randolph, who introduced the Virginia Plan at the Convention. The "propriety of impeachments was a favorite principle with him," Randolph said, because the "Executive will have great opportunities of abusing his power, particularly in time of war when the military force and in some respects the public money will be in his hands."²⁰⁴ Moreover, Alexander Hamilton wrote that the subjects of the Senate's jurisdiction in cases of impeachment "are those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL as they relate chiefly to injuries done immediately to the society itself."²⁰⁵

In short, the President is subject to all the political processes of a free government and free citizens operating under a written Constitution. He cannot legally suspend the civil process created by that charter of government.²⁰⁶ Yet he

201. In the ten week interval between the fall of Fort Sumter and the convening of Congress in special session, "Lincoln amalgamated the available state militias into a ninety days' volunteer force, called 40,000 volunteers for three years' service, added 23,000 to Regular Army and 18,000 to the Navy, [and] paid out two millions from unappropriated funds in the Treasury to persons unauthorized to receive it" E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 229 (4th rev. ed. 1957).

202. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 1, vol. 2, at 545, 575.

203. *Id.* at 590, 600.

204. *Id.* at 67.

205. *THE FEDERALIST* No. 65, at 396 (A. Hamilton) (emphasis in original).

206. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).

has the duty and responsibility of judging how best to defend the nation against foreign threats. He may, as Thomas Jefferson suggested in his concept of the "law of necessity, of self-preservation," have to act in the interest of "saving our country when in danger" or when "some of its very high interests are at stake."²⁰⁷ In these circumstances, Jefferson advised, a public official or military officer must perform his duty and "throw himself on the justice of his country and the rectitude of his motives."²⁰⁸ In turn "the controlling powers of the constitution . . . are bound to judge according to the circumstances under which he acts [and] to put themselves into his situation."²⁰⁹

Like Franklin Roosevelt, of whom his speechwriter Robert Sherwood²¹⁰ tells us, "never for a moment overlooked the fact that his actions might lead to his immediate or eventual impeachment,"²¹¹ a president has an independent responsibility to exercise his judgment on the needs of defending the nation in time of crisis. He thereby subjects his action to the political will of the American people. If the President does not act when required in the interest of saving the Republic, he risks himself (and the nation) as much as if he had gone ahead and acted boldly in the situation. For example, President John F. Kennedy believed he would have been impeached if he had failed to react strongly to the Russian missile threat in Cuba.²¹²

The issue of accountability is one in which the author disagrees with the President's closest supporters, those who can be counted on to defend the executive action whatever the issue and without any apparent standard, other than a belief that the President is always right. For even in the area of self-defense and action for the safety of the nation, someone has to be responsible for the acts of the government and accountable to the American people. Clear identity of the decision maker is one of the major grounds given by Hamilton in his justification of uniting the executive power in a single person.²¹³ But there can be no accountability, no functioning of the political process and the checks on abuse of power described above, if Presidential actions are kept secret. This raises the question of covert intelligence operations. Such activities are beyond the scope of this discussion, *unless* they involve the use of force and rise to the level of an act of war. Military operations, such as mining foreign harbors, bombing neutral nations, or supplying weapons systems to nations engaged in war, whether performed by the Central Intelligence Agency, National Security Council, the regular armed forces or any other U.S. agency, are covered by any

207. 12 THE WRITINGS OF THOMAS JEFFERSON 418 (A. Lipscomb ed. 1905).

208. *Id.* at 422.

209. *Id.*

210. Robert E. Sherwood, writer and playwright, was one of the major draftsmen of Roosevelt's wartime speeches. DICTIONARY OF AMERICAN BIOGRAPHY 623-624 (J. Garraty ed. 1977).

211. W. STEVENSON, *supra* note 187, at 255 (quoting R. SHERWOOD, ROOSEVELT AND HOPKINS (1948)). See also, *id.* at 238. It should be noted that the Lend Lease Act, Pub. L. No. 77-11, 55 Stat. 31 (1941), did not provide authority for Roosevelt's military actions in the Atlantic. To the contrary, § 3(d) expressly provided: "Nothing in this Act shall be construed to authorize or permit authorization of convoying vessels by naval vessels of the United States." *Id.* at 32. No wonder Roosevelt was concerned about impeachment.

212. R. KENNEDY, *supra* note 6, at 71. A leading historian believes Madison "might have been impeached" had he not called for war against Britain in 1812. R. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 223 (1987).

213. THE FEDERALIST No. 70, at 427-429 (A. Hamilton).

serious concept of accountability. If the use of military force is concealed from all other components of government and from the body politic itself, we have become another form of government, a one person tyranny, and are no longer a representative Republic.

There must be an opportunity at some point for review of the emergency defense measure in question, for its possible approval or adjustment, or for its disapproval accompanied by political censure or punishment. The ability of taking the initiative when demanded in the national interest is and must be reserved to the President, along with flexibility in exercising his discretion. Although these attributes are essential to the achievement of legitimate national security goals, long continued secrecy of acts of war are not. Within a time fitting to the particular emergency, the Executive must place his decision and his acts before the appropriate legislative leadership or before the entire Legislature and the American people and thereby bear their judgment on his course. Lincoln assembled an army and imposed martial law on his own, but his actions were public knowledge. Roosevelt alone made the decision to order U.S. warships to attack Axis submarines "on sight," but his decision was announced in a public radio address.²¹⁴ Reagan directed an air strike on Libyan military installations on his own authority, but the world learned of his action almost simultaneously. To act is one thing. To try to keep the action forever secret is a different matter. In a proper concept of Presidential war powers, excessive secrecy of warmaking is not justified.

BYRD RESOLUTION

The present situation thus matches a measure of doubtful constitutionality, which purports to prevent the President from acting unilaterally beyond sixty days, against Presidential actions, historically regarded as appropriate. What steps might at least improve this uncertain situation? Putting aside the purely legal issues, how might the nation present itself as capable of purposefulness and unity in time of national peril? What changes will prevent the erosion (or appearance of erosion) of national authority and unity in the field of military defense?

Some may argue that the answer is clear. They believe that the President merely has to ask for authorization.²¹⁵ President Gerald Ford did exactly that in 1975. He sent a special message to Congress seeking a waiver of the War Powers Resolution so that he could evacuate Americans and our allies who had joined the U.S. in resisting Communist aggression. In doing so, the President sought to act with the shared deliberation of the Congress.²¹⁶ South Vietnamese defense

214. Roosevelt's "fireside chat" including the "shoot on sight" message is discussed in J. BURNS, *supra* note 12, at 140-141. There is always a problem that unilateral Presidential decisions to engage in political or psychological operations that must be kept secret can grow into large quasi-military campaigns such as the Bay of Pigs or the Contra operations in Nicaragua. The notion of "timely notice" of such covert operations to the intelligence oversight committees of Congress, without legislating any precise number of hours or days, is the proper procedure.

215. See *War Powers After 200 Years*, *supra* note 56, at 270. Senator Joseph Biden (D-Del.) asserted that "there is not a Congress that could resist" a Presidential request to "have an up or down vote" within as few as "the next 10 days." *Id.*

216. President Ford's "State of the World" Message of April 10, 1975, urged Congress to clarify several restrictions placed on U.S. military activities so that he could evacuate Americans, their dependents and South Vietnamese "whose lives may be endangered should the worst come to pass."

lines were collapsing all around the invaded country. With this emergency at hand, Congress stalled and never approved the President's request. Weeks after delivering his message, while Congress was still debating the issue, President Ford took matters in his own hands. He announced to the nation that the Indochina evacuation was completed on his own authority.²¹⁷ This sorry event in our recent history stands as proof enough of the Legislature's hesitance to respond timely to a Presidential request for legislative concurrence in even the most demanding of circumstances.

Returning to the practical question of how matters might be improved without requiring that either Congress or the White House yield its basic constitutional claims, it is suggested that the answer may lie in the thoughtful legislation introduced by a broadly bipartisan group of Senators, including the current Majority Leader, the Chairman and Ranking Minority Member of the Armed Services Committee and other legislative leaders. The primary sponsor is Senator Robert Byrd (D-W.Va.), the former Senate Majority Leader. This measure, S.J. Res. 323 of the 100th Congress,²¹⁸ would correct many of the most glaring defects in the 1973 statute. In pertinent part, the measure provides:

(1) Troops would no longer be subject to being automatically pulled out of a crisis area in sixty days if Congress fails to act on legislation authorizing the President's action. The arbitrary time limit for mandatory withdrawal would be repealed, thereby removing one of the major legal defects of the statute.²¹⁹ The automatic "no-House" veto of the War Powers Resolution, under which not even a single House need vote to halt a Presidential action, is more seriously flawed under the bicameral requirement and the Presentment Clauses²²⁰ of the Constitution than the "one-House" legislative veto struck down by the Supreme Court in *Chadha*.²²¹

(2) Congress could no longer use a simple concurrent resolution to order a halt to the deployment or engagement of U.S. forces abroad. Instead the Legislature would have to use a joint resolution which is, of course, subject to Presidential veto.²²²

(3) Congress will identify with whom the President is to consult. Instead of contacting 535 members of Congress every time an emergency or vital national security issue arises, he would be called on to consult with a group as small as six members and never larger than eighteen. The consultative body will be a permanent joint Senate-House group which should mean that only one consultation is mandated at a time, not multiple sessions with the two Houses and a multitude of different committees.²²³

CQ ALMANAC 1975, *supra* note 33, at 306-309. He did not submit a formal § 4(1) report pursuant to the War Powers Resolution, but his public request constituted an appeal for the kind of "specific statutory authorization" contemplated by the legislation.

217. President Ford's evacuation statement of April 29, 1975. *Id.* at 314.

218. See the text of S.J. Res. 323 reprinted in *War Powers After 200 Years*, *supra* note 56, at 346-362. The legislation was reintroduced as S. 2, 101st Cong., 1st Sess., 135 CONG. REC. 167 (daily ed. Jan. 25, 1989).

219. S.J. Res. 323, 100th Cong., 2d Sess., 134 CONG. REC. 6239 § 4(a) (1988).

220. U.S. CONST. art. I, § 1; U.S. CONST. art. I, § 7, cl. 2-3.

221. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 946-951 (1983).

222. S.J. Res. 323, § 4(b)(1)-(2).

223. S.J. Res. 323 § 3(b)(1)(A), 3(c)(1) (as amended).

Students of history may find the proposed panel comparable to the original Senate created by the Framers, which had twenty-two members and (at least in concept) was small enough for intimate consultation but not too numerous to safely trust with state secrets. It is true that George Washington did not find that body helpful in his one meeting in person with the Senate regarding Indian treaties,²²⁴ but in our modern age of nuclear weapons, chemical warfare, terrorism, and drug cartels, a national unity of purpose on vital foreign policy decisions is more essential than ever to the survival of the nation. Therefore, it may be constructive to experiment with a special consultative group of this nature in the search for a new partnership among the political branches with respect to national ends and strategy regarding the most important national security matters.

It is true that contacting legislators at a moment of extreme emergency may leave them little to do but support the country in time of grave threat. Even so, the practice will bring members of Congress into the decision-making arena from that time forward. It gives the President a glimpse into what the range of legislative opinion will be regarding the steps he is proposing (or is committed) to take. And, it is at least mindful of the role the legislative branch may have to play at some future date in sustaining the nation's policy course over an extended period.

In this manner, the Bush Administration has effectively managed several military crises while building and keeping the domestic political support necessary to uphold its goals. Within three hours of receiving a request from Philippine President Corazon Aquino for military assistance during a coup attempt in December 1989, Vice President Quayle had telephoned House Speaker Thomas S. Foley (D-Wash.) and Senate majority Leader George J. Mitchell (D-Maine) to advise them of the President's decision to act in support of Mrs. Aquino's government. White House legislative liaison Fred McClure and his staff telephoned several other congressional leaders within the first hours after the crisis broke.²²⁵

During the much larger Panama intervention, President Bush himself contacted the bipartisan leadership of Congress shortly before ordering the assault on General Noriega's headquarters. The next morning, the President told the American people about the invasion and why he had directed it.²²⁶ Bush also personally called Speaker Foley and Senate Minority Leader Robert J. Dole (R-Kan.) immediately upon ordering U.S. military aircraft and troops to Saudi Arabia on August 3, 1990.²²⁷ National Security Adviser Brant Scowcroft telephoned Senator Mitchell, and the Democratic and Republican leaders of the House and Senate Armed Services and Intelligence Committees were also informed promptly of the decision.²²⁸ Bush subsequently tried to build on the early support given for his policy by holding several press conferences and making televised speeches to the nation explaining his view of the vital interests at stake.²²⁹ For example, he met with Congress in both open and executive sessions on August

224. See A. SOFAER, *supra* note 1, at 95-96 (discussion of Washington's ordeal in the Senate Chamber).

225. *Chronology of a Crisis*, Washington Post, Dec. 2, 1989, at A15, col. 6.

226. Washington Post, Dec. 21, 1989, at A38, col. 1, 2.

227. Washington Post, Aug. 8, 1990, at A18, col. 6.

228. *Id.*

229. Washington Post, Sept. 12, 1990, at A1, col. 1.

28, 1990, to present a formal report to the lawmakers and spoke to the American people in a primetime address before Congress on September 11, 1990, again discussing the military deployments and his objectives in the Persian Gulf.

Although his written reports to Congress were submitted as being "consistent with" rather than "required by" the War Powers Resolution,²³⁰ strong bipartisan support was given for actions he had taken to date and the lawmakers seemed to feel President Bush had gone far enough in consulting (or informing) them.²³¹ Thus, the practice used by the Bush Administration bears out the prudence of institutionalizing such a process of crisis consultation as a standard method of behavior. This is in recognition of the fact that the road to national unity concerning military decisions is more a political task than it is a constitutional problem. Indeed, former Under Secretary of State, Eugene V. Rostow, has stated that consultation "is not a term of any fixed constitutional meaning."²³² Instead it is "a matter of political intuition and of discretion."²³³ The response to Rostow's insight is that any legislated system of consultation should be cooperative in form and not inhibitive. In other words, as Rostow writes, a statute "should never deny the President his inherent power to make his own choices about whom to consult and when."²³⁴ Arranged in a system which not only allows the President to consult whomever and whenever he decides, but in addition, calls on him to meet or talk with at least a small number of identified Congressional Party and Committee leaders, consultation would provide the opportunity to initiate a dialogue and foster trust. Moreover, consultation would lay the groundwork for shared responsibility that could solidify the President's policy over the long haul, when matters may become more difficult. It may be true that such a legislated consultative process is an extra-constitutional scheme. Nevertheless, it is a pragmatic one in line with traditional American notions about greater deliberation leading to more reasoned decisions.

CONCLUSION

In answer to the questions raised at the outset of this article, the President can unilaterally initiate self-defense actions to protect the safety of U.S. citizens,

230. Whatever the actual risks of war — and military officers in the field were openly concerned about the safety of the first, thinly deployed troops arriving in Saudi Arabia — the Presidential statement sent to Congress on August 10 denied that hostilities were imminent. 48 CONG. Q. 2598-2599 (Aug. 11, 1990). If the War Powers Resolution is to be so easily evaded by the simple use of clever wording, then it is an embarrassment to the legislature (as a sign of its unenforceability) and would be better dropped from the statute books.

231. *Democrats Pledge Strong Support for President's Policy*, Washington Post, Sept. 12, 1990, at A35, col. 5; *Bush Wins Support on Hill*, Washington Post, Aug. 29, 1990, at A1, col. 5. All 100 Senators signed a letter to the Japanese Ambassador in Washington supporting President Bush's stance on economic sanctions against Iraq. Financial Times (London), Aug. 6, 1990, at 2, col. 1.

In early October 1990, the House of Representatives and Senate each approved by overwhelming margins legislative resolutions supporting President Bush's actions in response to Iraqi aggression and to protect American lives and vital interests in the Persian Gulf region. Although neither measure achieved final passage in both chambers, the resolutions expressed the collective judgment of Congress in affirmation of Bush's deployment of U.S. armed forces in the region and the maintenance of credible deterrent military force to achieve U.S. objectives in the Gulf. H.R.J. Res. 658, 101st Cong., 2d Sess., 136 CONG. REC. H8441-8442, H8549 (daily ed. Oct. 1, 1990) (380 votes to 29); S. Con. Res. 147, 101st Cong., 2d Sess., 136 CONG. REC. S14338 (daily ed. Oct. 2, 1990) (96 votes to 3).

232. Remarks of Eugene V. Rostow at American Enterprise Institute Conference of April 1988, reprinted in *THE FETTERED PRESIDENCY*, *supra* note 67, at 43.

233. *Id.*

234. Letter from Eugene V. Rostow to J. Terry Emerson (Aug. 12, 1987).

U.S. property, or the fundamental rights of the nation. This includes cooperating in regional self-defense actions, whether in Central America or the Persian Gulf, vital to the national security interests of the United States. In the case of Iraq's aggression in the Middle East, the interests of protecting the U.S. citizens against terrorism, the stability of worldwide economies, the freedom of shipping in international sea lanes, and the avoidance of escalating this limited conflict into a larger religious or cultural war, are all involved as considerations supporting the President's discretion.

The President, however, cannot start offensive war. To use a scenario suggested by Senator Joseph Biden (D-Del.), the President would clearly be engaged in an unconstitutional war of aggression if he attempted to hold onto Clark Air Field and Subic Naval Base in the Philippines by force after failing to negotiate a satisfactory new base agreement, regardless of the strategic importance of those bases to our Pacific Basin strategy.²³⁵ On the other hand, the President can ignore a declaration of war or veto it (and ignore the veto override),²³⁶ just as he can refuse to ratify a treaty by failing to exchange the instruments of ratification with another government, even after the Senate has given its advice and consent to that treaty.²³⁷

The President can also ignore funding restrictions on his deployment of military units in particular regions of the world and he does not have to comply with Congress's command about what weapons systems or strategy he is to employ in any given hostile action. Congress's appropriations power is subservient to the separation of powers doctrine.²³⁸ It is true the Legislature could recklessly

235. See *War Powers After 200 Years*, *supra* note 56, at 309. The need for an immediate reaction to foreign events without awaiting a declaration of war or prior legislative review is illustrated in President George Bush's prompt decision to comply with the request for military assistance made by Philippine President Corazon Aquino during a revolt against her government in late 1989. If Bush had failed to instruct U.S. F-4 Phantom fighter-bombers to provide tactical air cover ("an aggressive cap") over two Philippine air bases held by rebels, the Aquino government might not have survived until Congress could meet or be consulted.

The air cover mission included the "explicit" warning to the rebels that their planes "would be shot down." In addition, the F-4 pilots accompanied Philippine jets during strikes at a rebel base. If the coup attempt had succeeded, the matter of our continued presence at six U.S. military bases in the Philippines may have arisen sooner than anyone, even Senator Biden, had anticipated. *Washington Post*, Dec. 2, 1989, at A1, col. 4; *Richmond Times-Dispatch*, Dec. 2, 1989, at A4, col. 2.

236. Senator Brock Adams (D-Wash.) equated a declaration of war to the Congress' plenary power of impeachment, which the President cannot veto. *War Powers After 200 Years*, *supra* note 56, at 109. The two Houses of Congress, however, act on impeachment cases as prosecutor and court. Impeachment is a trial, not a legislative proceeding. Congress is conferred with plenary power over interstate commerce, yet the President can veto a legislative measure passed under the Commerce Clause. Or, he can veto an appropriations bill even though Congress has plenary power to make appropriations.

237. A treaty enters into force for the United States only when the President "has ratified it or otherwise given official notification of assent to it . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 comment j (1987). "Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it." L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 136 (1975).

238. Recent U.S. military actions in the Middle East have raised serious peripheral questions concerning the use of nonappropriated funds, assassination attempts and foreign basing. Specifically: (1) The Bush Administration asked Congress (unsuccessfully) for sweeping power to use gifts, monies, services and property contributed by foreign governments to defray U.S. military costs "as the Secretary of Defense deems appropriate" and without further Congressional approval or regulation;

disband the four military services by failing to appropriate any defense funds and leaving the nation's safety to the militia. If it can do the greater, why not the lesser? The answer is because congressional policy restraints invade the President's role as Commander-in-Chief and bearer of the executive power of national self-defense. Congress cannot increase its own powers at the expense of the executive branch. Also, we can conclude that Congress cannot be counted on to vote expeditiously if a president would simply say, "I am submitting a report under the War Powers Resolution and I want you to have that vote within the next ten days."²³⁹ Neither House in Congress voted up or down on President Ford's request for legislative participation in his decision to evacuate American citizens and South Vietnamese nationals from Saigon in 1975.

This leaves us with the fundamental question asked by historian Richard J. Barnet in his introduction to *The Rocket's Red Glare*: "If the President need not consult either the people or their representatives on such life-and-death decisions for the nation, what role is left for the people in setting the nation's course?"²⁴⁰ Barnet answers his own question at the conclusion of his book by stating: "Presidents now wield life-and-death power over every citizen, but they feel compelled to make ever greater efforts to court public opinion because the consent of the governed has been withdrawn from time to time in dramatic and unprecedented ways."²⁴¹ Barnet points to practical limits on military adventures in Central America and real nuclear arms reduction proposals by the Reagan Administration as examples of policy changes forced by popular opinion.²⁴²

My own response to his question is that any president who invokes his discretionary power to use force in active defense of national interests, without congressional participation in his decision, or who goes further to actually thwart the expressed will of Congress, is risking the collapse of his political program and the ruin of his party, if not the sanction of impeachment. The Vietnam War itself is an example of how the force of a free media and public opinion worked to end the spiral of escalation of America's military role in Indochina. When the clear majority of the American people stopped backing the war, we withdrew

(2) The House voted for a conditional troop pullout from Japan in reaction to the view widely held in Congress that wealthy Japan's support of our Gulf operations was insufficient, thus presenting the issue of who may make the decision of stationing troops in a foreign land thousands of miles from an ongoing crisis zone; and (3) The disclosure of U.S. air strike planning against Iraq highlighted the issue of targeting a foreign leader (Saddam Hussein) for possible assassination, contrary to past Presidential policy accords with Congress.

Under my suggested model of the separation of powers, these are political issues requiring political, not judicial, resolution. As a practical matter, the decisions will likely be worked out in concert among the two branches, but viewed as a pure constitutional issue, they are left in the first instance for the President to act on as he finds necessary for the national defense, subject to the several political sanctions (including impeachment) discussed in the text.

239. *War Powers After 200 Years*, *supra* note 56, at 270 (paraphrasing the testimony of Senator Biden). Congress did approve authority for the use of military force to carry out 12 U.N. Security Council Resolutions condemning Iraq's invasion of Kuwait, but the vote was close and is no guarantee that a constitutional statement will not occur in the future. H.R.J. Res. 77, 102d Cong., 1st Sess., Pub. L. No. 102-1 (approved Jan. 12, 1991).

240. R. BARNET, *THE ROCKETS' RED GLARE: WHEN AMERICA GOES TO WAR: PRESIDENTS AND THE PEOPLE* 13 (1990).

241. *Id.* at 399.

242. *Id.* at 399.

from it. All the while, the political process continued to function and survived uninterrupted during a major war. The outcome of that process overruled the judgment of the President and ended the war.

In sum, the U.S. constitutional system satisfies the needs of national military security and domestic liberty in a democracy. The problem of a Vietnam War or Nicaraguan mining does not call for legislative impediments on the President's constitutional role, but rather improved political leadership, a human trait evolving from the American election system and society itself, not from a defect in the separation of powers.²⁴³

243. The Persian Gulf crisis, in late-1990, illustrates that there are at least four separate situations, other than the classic example of repelling an attack, in which the President may commit troops without a declaration of war: (i) to protect U.S. citizens held as hostages or otherwise in immediate danger of harm; (ii) to protect property held by the U.S. or Americans abroad; (iii) to protect the vital economic, political or other strategic interests of the U.S. directly threatened by illegal aggression of a foreign power; and (iv) to enforce the international obligations of the U.S., including U.N. Resolutions.

Table I

U.S. MILITARY INTERVENTIONS
1950-1990

1990	Persian Gulf	(Desert Shield) (over 400,000 troops) ²⁴⁴
1990	Panama	(U.S. troops suppressed rebellion)
1990	Liberia	(230 Marines, rescue mission)
1989	Panama	(24,500 combat forces; 23 killed)
1989	Philippines	(F-4 Phantom jets combat air patrol)
1989	Libyan coast	(2 MIG-24s shot down)
1987-1988	Persian Gulf	(27 warships, 85 escort operations)
1986	Libya	(bombing strikes by F-111 & Navy attack aircraft)
1984	Nicaragua	(three harbors mined by Presidential order)
1983	Grenada	(3,000 combat troops)
1983	Chad-Libya crisis	(8 F-15s, AWACs, ground logistic forces)
1982	Lebanon	(1,200 Marines peace-keeping mission)
1981	El Salvador	(54 military advisers)
1981	Sinai	(multinational force)
1980	Iran	(hostage rescue mission)
1978	Zaire	(military transport aircraft)
1976	Lebanon	(evacuation mission)
1975	Cambodia	(<i>Mayaguez</i> rescue)
1975	Vietnam	(evacuation of U.S. nationals)
1975	Cambodia	(evacuation of U.S. nationals)
1974	Cyprus	(evacuation mission)
1970	Jordanian-Syrian crisis	(Sixth Fleet deployment)
1967	Congo	(150 man task force)
1965-1966	Dominican Republic	(21,500 troops)
1964-1972	Vietnam	(540,000 troops; 56,000 deaths)
1964	Congo	(100 airlift personnel, 68 military advisers)
1962	Cuban Naval Quarantine	(180 ships, 24 troop-carrier squadrons)
1962	Thailand	(5,000 Marines)
1958	Lebanon	(14,000 soldiers and Marines)
1957	Taiwan Straits	(4 carriers)
1956	Egypt	(Alexandria evacuation missions)
1954-1955	China	(Tachen islands evacuation)
1950-1953	Korean War	(480,000 U.S. forces; 33,647 deaths)

244. Desert Shield became Operation Desert Storm on Jan. 16, 1991.

