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THE WAR POWERS RESOLUTION TESTED: THE PRESIDENT'S INDEPENDENT DEFENSE POWER

J. Terry Emerson*

I. Introduction

The final months of direct United States military involvement in this nation's longest war were marked by military operations which raised many fundamental questions about the arrangement of the war powers between the executive and legislative branches. These armed actions are particularly interesting to a student of the constitutional allotment of warmaking and public defense powers, since they represent the first major test of recent enactments of Congress in which the legislative branch has sought to impose binding rules on the use of American force abroad. One of these laws, the War Powers Resolution, seems to represent a congressional will that the President not commit American military forces, even in defense of American lives, liberty, and property, without first consulting Congress. The President did, in fact, comply with the resolution and consult with Congress during the recent operations, but what if he had not? Could Congress lawfully prevent the President from acting unilaterally to defend American interests abroad?

Numerous historical precedents since the Constitution was adopted suggest that the President has power independent of Congress to commit American forces for defensive purposes. The Founding Fathers, although fearful of a too powerful Executive, were also well aware of the hazards of placing military operations under the control of a legislative body; they drafted a Constitution that reflected these concerns. While Congress cannot constitutionally legislate restrictions to these independent defensive war powers, sufficient guarantees of accountability are inherent in the constitutional system.

II. The War Powers Resolution and Its First Tests

A. Provisions of the War Powers Resolution

A history-making law, the War Powers Resolution1 was enacted by Congress on November 7, 1973, over President Nixon's veto. Never before had Congress undertaken to codify or define rules applicable to the introduction of United States armed forces into war or threatened war.

The announced purpose of the resolution, set forth in § 2(a), is to

insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or in situations where imminent involvement in hostilities is clearly indicated

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by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Section 2(c), described further herein, expresses a congressional understanding that the "constitutional powers of the President as Commander-in-Chief" to commit military forces exist only when: (1) Congress has declared war, (2) legislated specific authority, or (3) the United States is under attack.2

Section 3 provides that the President will consult with Congress "in every possible instance" before each use of armed forces in hostilities or threatened hostilities and regularly thereafter, until United States forces are disengaged or removed from such situations. The applicability of the resolution is initiated by § 4, which requires that, absent a declaration of war, whenever United States armed forces are introduced (1) into hostilities or imminent hostilities; (2) into the territory, air space, or waters of a foreign nation, when equipped for combat (other than solely for the supply, replacement, repair or training of forces); or (3) in numbers which substantially enlarge United States forces equipped for combat already located in a foreign nation, the President must report it in writing to Congress within 48 hours and periodically afterwards. It is significant that situations (2) and (3) are not tied to the actual outbreak of or imminent involvement in hostilities, but restrict the mere deployment of combat forces into another country, whether or not hostilities might be anticipated. Even the strengthening of units already located in foreign countries is similarly restricted.

Once the reporting provision has been triggered, § 5 takes effect. This section mandates that no later than 60 days after a report is required, "the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted)," unless Congress grants specific authority for the operation to continue or "is physically unable to meet as a result of an armed attack upon the United States." The 60-day period can be extended for an additional 30 days if the President determines and certifies to Congress that the safety of United States troops demands their continued use in the course of bringing about their prompt removal. Next, § 5(c), an important and often overlooked part of the war powers legislation, provides that at any time United States forces "are engaged in hostilities outside the territory of the United States, its possessions, and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." This means that at any time before the 60- to 90-day period is up, Congress can unilaterally order United States forces to pull out. The law provides that the President must obey such a congressional directive.

Sections 6 and 7 of the resolution establish congressional priority procedures for consideration of, and final action upon, legislation introduced either to author-

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2 Section 2(c) does not answer what the understanding of Congress is as to any assertions of power which the President may make by virtue of his possession of the executive power of the nation, his authorities over the conduct of foreign policy, or his right to enforce the duties and obligations "growing out of the Constitution, our international relations, and all the protection implied by the nature of the Government under the Constitution." See text accompanying notes 69-80 infra.
ize continued engagement of our forces or to compel their removal. Another major policy provision is included in § 8, which states that no authority for the use of troops shall be inferred from any provision of law, including defense appropriations, unless the law spells out a specific intent to confer such authority within the meaning of the resolution. Nor can any authority for troop deployment be inferred from any existing or future treaty, unless it is implemented by separate legislation specifically conferring such authority. In somewhat of an anticlimactic manner, Congress then declares in § 8(d) that nothing in the law "is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties," or "shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces . . . which he would not have had in the absence of this joint resolution."

The War Powers Resolution received its first tests during the closing months of America's involvement in Indochina.

B. A Chronology of Presidential Military Initiatives in 1975

Four military operations which came under the purview of the War Powers Resolution occurred in 1975. Three were rescue and evacuation efforts: (1) the evacuation of Americans and others from Danang and other South Vietnamese seaports imperiled by enemy forces; (2) the rescue of Americans and others caught in Phnom Penh before the capture of the Cambodian capital by the Communists; and (3) the evacuation of United States citizens and numerous South Vietnamese during the dying hours of the Thieu government in Saigon. Finally, there occurred the well-publicized Mayaguez incident, in which an American ship and crewmen were rescued, and freedom of the seas for United States vessels was upheld.

The first independent Presidential military activity of the year occurred on March 29, 1975, when President Ford directed United States naval vessels to assist in an international humanitarian relief effort to transport thousands of refugees and some United States nationals to safety from Danang and elsewhere in South Vietnam. American forces abroad were equipped for combat. One week later, United States Marines in 36 helicopters flew into the Cambodian capital of Phnom Penh, where they evacuated some 100 Americans, 160 Cambodians, and 35 third-country nationals. A contingent of 350 Marines, in full combat gear, participated in the operation, standing guard in the area where the helicopters landed. Twenty United States warplanes patrolled the skies and two helicopter gunships escorted the fleet. No casualties were incurred, but a

3 Implicit in this provision is the concept that because Congress funds a war does not mean it wants to share responsibility for that war.

4 In this section, Congress appears to be admitting uncertainty about what it has done elsewhere in the resolution and where the boundaries of the Constitution actually fall between the President and Congress. On the one hand, Congress says the President can do whatever the Constitution allows, regardless of what it may have mistakenly provided to the contrary. On the other hand, it does not mean to authorize him to do anything he cannot now do, whatever that is. If nothing more, this provision invites competing interpretations of the war powers allotment of the Constitution by the President and Congress.

75 mm. recoilless rifle round and at least four rockets hit the landing field.\(^6\)

By mid-April, President Ford had ordered the reduction of American personnel in the United States mission in Saigon to levels that could be quickly evacuated during an emergency. On April 29, 1975, Tan Son Nhat Airfield in Saigon came under rocket and artillery fire. Believing that the airfield was "unusable" by fixed wing aircraft and that "the collapse of the Government forces within Saigon appeared imminent," the President decided that the "situation presented a direct and imminent threat to the remaining United States citizens and their dependents in and around Saigon." Accordingly, he ordered United States military forces to proceed with "an emergency final evacuation out of consideration for the safety of U.S. citizens."\(^7\) In the final removal, approximately 5,600 Vietnamese and 1,375 Americans were evacuated from the embassy by a fleet of 70 helicopters. In addition, over 30,000 Vietnamese refugees were picked up on the open sea by Navy ships. American fighter aircraft provided protective aircover and in at least one instance suppressed North Vietnamese antiaircraft artillery firing upon evacuation helicopters. About 865 Marines were involved in the operation. Two Marines and two pilots were killed in the final withdrawal.\(^8\)

Two weeks later, President Ford directed American forces to free the unarmed American merchant vessel Mayaguez and its 39 American crew members. The ship was seized May 12, 1975, by Cambodian Communist troops 60 miles from the Cambodian coast and seven miles from the disputed island of Poulo Wai, claimed by both Cambodia and Vietnam. In a report to Congress on the event, the President charged that the seizure of the ship was "in clear violation of international law," and an "illegal and dangerous act."\(^9\) The United States had not recognized the claim of the Cambodians to the Wai Islands, nor their claim to a territorial sea of more than three miles.\(^10\)

The American rescue effort involved the destruction or immobilization of seven Cambodian patrol boats by United States aircraft on May 13; the mobilization by the United States of eight ships, 11 helicopters, 25 planes, and 300 Marines; the assault on the island of Koh Tang by United States Marines on May 14; and the successful recapture of the abandoned Mayaguez late that day. One American plane dropped the biggest nonnuclear bomb in our arsenal on Koh Tang. Other air attacks struck the military airfield at Ream and a mainland Cambodian oil storage depot shortly after the crew had been released. These missions were explained as necessary to protect Marines still left on Tang Island. Fifteen United States servicemen are listed as dead and three missing in action on and around that island.\(^11\)

\(^{9}\) 11 WEEKLY COMP. OF PRES. DOC., May 19, 1975, at 514-15.
\(^{10}\) See letter of Assistant Secretary of State Robert McIloskey to Senator Edward Brooke, printed in 121 CONG. REC. S 11572-74 (daily ed. June 25, 1975).
\(^{11}\) See text of President Ford's letter on the Mayaguez affair, supra note 9; letter of Assistant Secretary of State Robert McIloskey, supra note 10.
C. Application of the War Powers Resolution

Did the President violate the law by any of these operations? In applying the provisions of the War Powers Resolution to the facts of the 1975 Indochina military actions, the first issue to be considered is the effect that should be given to § 2(c). This provision spells out the congressional understanding that the constitutional power of the President as Commander in Chief to introduce combat forces into hostilities, or situations where hostilities are imminent, exists “only” when Congress has declared war or granted specific statutory authority, or when there is “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”

Is § 2(c) meant as a “legally” binding” definition? If it is binding, did the facts of each evacuation and rescue mission fit the congressional understanding of a situation where troops were introduced “into hostilities” or where their “imminent involvement in hostilities” was clearly indicated? Notwithstanding the restrictive language of § 2(c), does the provision allow for an implied exception in order to evacuate American citizens? Does any such exception extend far enough to encompass the humanitarian withdrawal of foreign nationals in connection with the evacuation of Americans?

Certain portions of the legislative history of the War Powers Resolution can be read to indicate that Congress intended § 2(c) to be a binding rule, codifying the President’s power as Commander in Chief in all situations involving hostilities.\(^\text{12}\) The weight of the evidence on congressional intent, however, points to the conclusion that § 2(c) does not carry binding force. The State Department claims the subsection is “at most a declaratory statement of policy,” that it “does not contain language which requires or prohibits any particular action, which is characteristic of mandatory and binding provisions.” An additional point made by the State Department is that the conference report on the War Powers Resolution expressly provides that “[s]ubsequent sections of the Joint Resolution are not dependent upon the language of this subsection . . . .”\(^\text{13}\)

To the considerations posed by the State Department may be added the fact that the primary object of the War Powers Resolution was to “insure that the collective judgment of both the Congress and the President” will apply to certain crisis situations involving armed action or its grave threat.\(^\text{14}\) The provisions of the resolution which implement congressional participation in decision-making relating to employing the Armed Forces are not found in § 2(c), but rather in other sections of the resolution which establish a process of consultation, reporting, and prompt congressional action on these matters.\(^\text{15}\) Since it is not necessary for § 2(c) to have a binding effect in order to carry out Congress’ role in the “collective judgment” process, it can be concluded that the section is not an effort at legislating a legally binding limitation on Presidential authority.

Even if § 2(c) were assumed to be an operative rule for the use of the Armed Forces in grave situations, the omission of any specific language regarding


\(^{13}\) 119 Cong. Rec. 40022-23 (1973) (remarks of Senator Eagleton).


\(^{15}\) Id. §§ 4-7.
the protection of United States citizens overseas does not mean that emergency rescue operations are prohibited. The War Powers Resolution was passed over the President's veto in an atmosphere of concern that United States forces might be reintroduced into the Vietnam war to enforce the Paris Cease Fire Agreement of January 24, 1973, \(^{16}\) or that on other pretexts the President might resume bombing missions or active American fighting in support of the South Vietnamese regime. \(^{17}\) In this setting, the term "hostilities" or "imminent involvement in hostilities," for purposes of the presumed limitations of § 2(c), would include only actions where a principal aim is to destroy enemy troops or resources, or otherwise strengthen the lasting ability of an ally. Without specific and convincing evidence of Congress' deliberate purpose to bar such an activity, it cannot be presumed that Congress intended to prohibit a humanitarian action reasonably related to protecting the safety of endangered Americans. \(^{18}\)

Moreover, there is specific legislative history to the effect that Congress did recognize that the President possesses an inherent constitutional power to employ the Armed Forces to protect United States citizens. During Senate debate over the final version of the War Powers Resolution that had been agreed to in joint conference between the House and Senate, Senator Javits, an initial author of the legislation and then manager of the proposal, discussed exactly this point in a colloquy with Senator Eagleton of Missouri. "[T]he Senator has laid great emphasis on the word 'only,'" noted Senator Eagleton. "I take it that the Senator's current position is that under the Constitution the President has no emergency authority with respect to American nationals endangered abroad." \(^{19}\)

"I said no such thing," replied the Senator from New York. "I would tell the Senator this," he added: "There was a very long argument about including the concept of rescuing nationals. It was felt that whatever was specified on that score, in order to be conservative in respect of the President's power, would have to be so hedged and qualified that we were better off just not saying it . . . ." \(^{20}\)

Senator Javits' answer makes it clear the conferees did recognize the existence of a rescue power in the President. But to avoid the difficult and perhaps impossible task of nailing down a definition of executive authority, they left the


\(^{17}\) See brief summary of the congressional attitude regarding the Indochina war in 33 Cong. Q. Weekly Rep. 842-46 (1975).

\(^{18}\) The same analysis would apply to seven other laws which seek to prohibit the use of appropriated funds to finance certain military activities in, over, or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia. Four of these prohibitions bar the use of funds to finance "directly or indirectly combat activities" by the Armed Forces. (Section 839 of Pub. L. No. 93-437; section 741 of Pub. L. No. 93-238; section 108 of Pub. L. No. 93-52; and section 307 of Pub. L. No. 93-50.) One prohibits the use of money to "finance military or para-military operations." (Section 30 of Pub. L. No. 93-189). Two laws prohibit the use of funds to finance "the involvement of United States military forces in hostilities." (Section 806 of Pub. L. No. 93-115 and section 13 of Pub. L. No. 93-126.) These seven restrictions were enacted because of concern with the possible use of the armed forces to support the Government of South Vietnam or Cambodia. The employment of the military in the Cambodian and Vietnam evacuations and the recapture of the Mayaguez have little or no bearing on the matter of aid to the Cambodian or South Vietnam regimes and were initiated for the primary purposes of protecting U.S. citizens and assisting in international humanitarian relief. Thus, the operations were not restricted by any of the above appropriations riders.

\(^{19}\) 119 Cong. Rec. 33558 (1973) (remarks of Senator Eagleton).

\(^{20}\) Id.
matter open for interpretation by the President and Congress as future practice might require. If instead of relying on his sole judgment of what may be warranted by particular circumstances, the President wishes to obtain a clarification or support of his power to act, Senator Javits explained: "He can always come to us for authority if he is in any doubt."21

Having concluded first that § 2(c) of the War Powers Resolution does not contain a legally binding definition of the President's powers as Commander in Chief, and, second, that in any event humanitarian relief missions involving in part the rescue of Americans are excepted from any limitations intended by such section, it is clear the President did not violate the War Powers Resolution in the course of the Indochina operations. All that was required was the consultation and reporting required by §§ 3 and 4 of the resolution, and this the President did.

President Ford not only consulted with Congress by bringing before both Houses in joint session on April 10, 1975, the need for the possible evacuation of Americans and Vietnamese, but he requested support from Congress in the form of related legislation which would demonstrate unity among the two political branches of government on this important matter of national policy.22 He also mentioned the urgency of the situation in Cambodia.23 On April 14, President Ford, with Secretary of State Kissinger, Secretary of Defense Schlesinger, and Army Chief of Staff Weyand, met personally with the full Senate Foreign Relations Committee for consultation on the situation in Southeast Asia. Top administration officials also testified before several congressional committees to discuss the evacuation issue.24

The same spirit of collaboration, to the degree possible, marked the Mayaguez incident. Monroe Leigh, Legal Adviser to the State Department, informed a House subcommittee investigating the application of the War Powers Resolution to the event "that although the Mayaguez incident was a rapidly unfolding emergency situation, four separate sets of communications took place between the Executive Branch and the Congressional leadership."25 He summarized these consultations as follows: "First, the Congressional leadership was informed of the principal military operations prior to the actual commencement of those operations; second, the Congressional leadership did have an opportunity to express its views concerning the impending military operations; . . . and third all views which were expressed by the Congressional leadership . . . were communicated directly to the President."26
Dissenting voices were heard. Senator Eagleton complained that "[a]t most a number of Senators and Congressmen were notified or informed of action already planned or underway."[27] He introduced an amendment that would replace the phrase "consult with Congress" in § 3 of the War Powers Resolution with the words "seek the advice and counsel of Congress."[28] This he would define to mean that the President "shall in every possible instance discuss fully the proposed decision for using [the] Armed Forces with Members of Congress... and shall fully consider their advice and counsel before committing the United States Armed Forces to any such proposed decision."[29]

Senator Javits took a similar view. He informed the same House panel that the State Department Legal Adviser appeared before that "[t]o a disturbing extent, consultations with the Congress prior to the Mayaguez incident resembled the old, discredited practice of informing selected members of Congress a few hours in advance of the implementation of decisions already taken within the Executive Branch." He proposed that "prior consultations required under the law should be conducted with the committees having legislative jurisdiction—meeting in their formal capacities as committees of the Senate and House of Representatives."[30] By this description, Senator Javits meant the 17-member Senate Foreign Relations Committee and the 37-member House International Affairs Committee, sitting in full session.[31]

Pressed as to his view of the form consultation should have taken, Mike Mansfield, the Majority Leader of the Senate, stated that the consultative process should be applied to "at least the leadership and the chairmen and the ranking Republican Members."[32] Although he professed not to have been consulted, referring to "briefings" rather than "consultation," Senator Mansfield did not agree with a reporter's description that the law had been "to a slight extent, bent or violated," explaining that "maybe he didn't have the time."[33] This point was forcefully used by Monroe Leigh, who testified that "one must consider the other things that the Chief Executive had to do to discharge his obligations under the Constitution."[34]

How the President could have cooperated more fully with Congress than he did in the circumstances of rapidly changing and developing events, each of which could be seen as a new reason for consulting with Congress, is unexplained by his critics. The answer to this practical problem surely lies in a common sense approach based on Congress' own phrase, "in every possible instance,"

[27] 121 CONG. REC. S 8826 (daily ed. May 21, 1975). Earlier, Senator Eagleton had complained that Congress had not been informed in any way about an incident which he believes was the first test case for the War Powers Resolution, the evacuation of more than 500 Americans from Cyprus in two military helicopter operations on July 22 and 23, 1974. 120 CONG. REC. S 13851-53 (daily ed. July 31, 1974). The executive branch denied there had been a failure of reporting since our forces "were unarmed." 120 CONG. REC. S 14180 (daily ed. Aug. 2, 1974).


[31] Id. at 68.

[32] Senator Mansfield's remarks were made during an interview on "Face the Nation," the pertinent part of which is printed in 121 CONG. REC. S 8819 (daily ed. May 21, 1975).

[33] Id.

[34] War Powers Hearings, supra note 25, at 79.
which admits of circumstances where lengthy dialogues between the President and some 50 to 60 members of two congressional committees simply cannot take place.\textsuperscript{35}

III. The Independent War Powers of the Executive

Given that President Ford did not violate any provision of the War Powers Resolution in the course of the four Indochina military actions of 1975, the question arises of what constitutional validity the resolution would have in the case of Presidential noncompliance. Does Congress possess constitutional authority to prohibit the President from using the Armed Forces in defense of American lives, liberty, and property without first obtaining the collective judgment of both Houses of Congress? Should an incident arise where the President and Congress differ over the need for an armed response, will the Executive be able as a matter of constitutional law to carry on a defense mission which Congress has ordered him to call off? For example, if Congress fears that a contemplated rescue mission involves a risk to the public in general that outweighs the safety of those Americans immediately involved, is the President constitutionally bound to abandon those Americans when so directed by a concurrent resolution agreed to under § 5 (c) of the War Powers Resolution? Or may he undertake the operation by virtue of distinct and independent authorities vested in the President by the Constitution?

A. Historical Incidents of Defensive Presidential War-Making

History throws considerable light on these questions. Our past is replete with incidents involving threats to American lives, property, or important American overseas interests in which Presidents have used force or the threat of force for defensive purposes without a declaration of war and without policy restriction by Congress.

It is not surprising that force was not used abroad during the terms of our first President. With no Navy and a regular Army which never exceeded 4,100 men,\textsuperscript{36} President Washington could not have mounted an overseas war under any circumstances. With the influence arising from the nation's potential greatness, based on an immense land area and a growing population, he could and did, however, threaten the use of force as an arm of diplomacy when an opportune moment arose. Such an occasion presented itself in 1790, when Spain

\textsuperscript{35} E.g., as explained by the State Department Legal Adviser:
To comply with the 48-hour requirement in the last report which concerned the Mayaguez affair, the President had to be awakened at 2 o'clock in the morning in order to read and sign his report so that it could be delivered to the Speaker and the President Pro Tempore of the Senate. These deliveries were made to the offices of the Speaker and President Pro Tempore at approximately 2:30 A.M. on May 15 about four hours before the expiration of the 48-hour period.

Id. at 72.

\textsuperscript{36} Letter from U.S. Center of Military History, Dep't. of Army, to Barry M. Goldwater, Sept. 19, 1975. See C. PAULIN, HISTORY OF NAVAL ADMINISTRATION 1775-1911, at 53, 89 (1968). The Navy under the Constitution began with the Act of March 27, 1794, which authorized construction of four ships of 44 guns each and two of 36 guns each. Only three of the ships were completed, and even these were not launched until after Washington's second term had expired. Id. at 91, 97.
and England appeared to be on the verge of war. The Spanish Colony of New Orleans, and other Spanish posts to the north, were vulnerable to attack by a British operation from Detroit, a danger known by both Washington and the Spanish. Acting on Spanish fear of the British, Washington unilaterally pressured Spain to open the Mississippi to American navigation, an important foreign policy goal of his administration. Thomas Jefferson, as Secretary of State, implemented Washington's plan by instructing the American envoy in Spain to threaten that if the United States could not secure navigation down the Mississippi by negotiation, it would acquire it by force, perhaps in alliance with Britain. The threatened hostilities did not erupt, but Washington had shown his readiness to take action independent of Congress when a vital interest of the nation was at stake.

Washington's successor, John Adams, moved a step further toward the actual commencement of hostilities for reasons of national defense. On March 19, 1798, he issued an order, without the authority of Congress, allowing American merchant vessels to arm for defense against attacks by French warships. The consensus of congressional debate on arming our merchantmen, which had occurred only three days preceding Adams' order, was that "any new measures ought [not] to be gone into, or measures which, in their tendency, must lead to war." His action was promptly questioned by Congress on the ground that if the President could take the measures which he had taken, "[h]e, and not


There is at least one other example when the first President was willing to use armed force at his own discretion. In fact, he was prepared to use it against the apparent contrary judgment of Congress. Leading up to Washington's action was the scheming of "Citizen" Genet, who "deliberately planned two expeditions, to be carried on from the territories of the United States against the dominions of Spain, and had, as minister of the French republic, granted commissions to citizens of the United States, who were privately recruiting troops for the proposed service." MARSHALL at 468. These regiments were being recruited in Georgia, South Carolina, and Kentucky to attack the Spanish possessions at the mouth of the Mississippi and in Florida. J. FLEXNER, GEORGE WASHINGTON 50-53 (1972).

The Federalists reacted by introducing and passing a bill in the Senate forbidding filibustering expeditions against persons at peace with the United States. The House refused to follow the Senate's lead. "To achieve, despite Congress's unwillingness to act, what he considered essential for peace, he issued his executive proclamation." Id. at 127. This was the Proclamation of March 24, 1794, warning against enlisting citizens for the purpose of invading the territories of a nation at peace with the United States and requiring all citizens to refrain from engaging in such unlawful purposes, sometimes called Washington's Second Neutrality Proclamation. "He went, indeed, further," directing General Wayne "to post troops where they could intercept any filibustering expedition that tried to float down the Ohio." Id. Not only was Washington ready to enforce his decision of neutrality as between Spain and France on his own authority after he could not persuade Congress to act, but he used Wayne's army for a purpose totally different than the one Congress had intended, a campaign against Indian war parties in the North. Id. at 49.

38 8 ANNALS OF CONGRESS 1271 (Gales & Seaton ed. 1851). On May 22, 1798, Adams, Secretary of War, James McHenry, moved the nation closer to war by instructing Navy Captain Richard Dale to convoy our merchantmen in coming in or going 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." NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 77 (U.S. Office of Naval Records & Library 1935). Dale's orders were limited to repelling force by force primarily for political reasons. McHenry, and Alexander Hamilton, whose advice he had solicited, correctly foresaw that Congress would be induced to respond with its approval of even stronger measures than Adams had taken, thereby sharing responsibility for the military actions likely to ensue.

39 Id. at 1254-63.
Congress, had the power of making war." The matter was debated fully, but Congress rejected any legislation that would have regulated the President’s action. The House also defeated amendments which proposed to limit the manner in which the President could employ our small naval force.

From the published debates, it is clear that this early Congress distinguished between offensive and defensive military measures, recognizing that the President can take proper actions for the defense of the country, without direction from Congress. During a continuation of this debate, Representative Jonathan Dayton, then the Speaker of the House and a signer of the Constitution, argued 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.” The President was also supported by Representative Sewall, who ridiculed the idea that “[o]ur citizens going without the territory of the United States are to be no longer objects of our attention” and “were to be abandoned to the elements or to the hostility of mankind, wherever they went.”

This view of the President’s responsibility for the public safety as primary has since been followed by nearly every President. Only three years later, Thomas Jefferson sent into the Mediterranean on his own authority a squadron of four ships, with instructions that should hostilities be commenced by the Barbary pirates upon American shipping before the squadron’s arrival, “this force will be immediately employed in the defense and protection of our commerce . . .” His orders provided that pirate attacks against American shipping will be “repelled and punished.” It was only after actual fighting broke out that Jefferson came to Congress for support. Even President Buchanan, who is cited in a

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40 Id. at 1324.
41 Id. at 1459, 1462, 1521.
42 Id. at 1325, 1330.
43 Id. at 1410, 1454-55.
44 Id. at 1455-58.

Early in 1802, Jefferson again acted on his own authority without notifying Congress in a military matter of serious consequence. Having learned of the scheduled cession of Louisiana by Spain to France and the closure of the deposit at New Orleans, Jefferson threatened the French chargé in America with an Anglo-American military alliance if France took possession of Louisiana. Also, he warned that the French could remain in the territory “only so long as the Americans would permit.” He then confirmed this threat by writing a private letter to Robert Livingston, the U.S. minister in France, explicitly referring to war as a means of rejecting France from the New World. When the House of Representatives called upon him for all the official papers bearing on developments in New Orleans, Jefferson kept this letter a secret from Congress.


46 Jefferson’s idea of the way “to protect our commerce & chastise their insolence,” in case the Barbary Powers have declared war or committed hostilities, as stated in his orders to Captain Dale, was “by sinking, burning or destroying their ships & vessels wherever you shall find them.” 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WAR WITH THE BARBARY POWERS 467 (1939).

During a discussion between Jefferson and his Cabinet on sending the squadron to cruise in the Mediterranean, Jefferson records that his Secretary of the Treasury, Alexander Gal- latin, a strict constructionist, advised: “The exve 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.” 1 THE WRITINGS OF THOMAS JEFFER- SON 293 (P. Ford ed. 1892) (emphasis added).
recent report by the Senate Committee on Foreign Relations as acknowledging
the war power of Congress,\textsuperscript{47} risked a confrontation with Great Britain by order-
ing, upon his own authority, a naval force “to protect all vessels of the United
States on the high seas from search or detention by the vessels of war of any
other nation.”\textsuperscript{48} A conflict was avoided at the last moment when Great Britain,
because of this pressure, abandoned its claim to the right of boarding and search-
ing American merchant vessels.\textsuperscript{49}

President Grant, who is described by a prominent historian as having
“politely deferred” to Congress after being rebuffed by the Senate in his attempt
to annex Santo Domingo,\textsuperscript{50} nevertheless put the Navy on a war footing, upon his
sole authority, in a confrontation with Spain concerning the seizure, court-martial,
and execution of 53 crew members and passengers of the American steamer \textit{Virginius}. According to contemporary reports, every available ship was com-
missioned or recalled from foreign stations, and war appeared imminent. Grant’s
use of force succeeded: Spain yielded, returned the \textit{Virginius} with her surviving
crew and passengers, and paid an indemnity to the United States.\textsuperscript{51}

During the early 1800’s, American gunboats thus protected American
shipping in the Atlantic and Mediterranean, and made several landings on foreign
soil to protect American lives and property. By the 1850’s these protective actions
extended to the Pacific, culminating in President McKinley sending 5,000 troops
in 1900 to defend the American Legation in Peking. In the early 1900’s, Amer-
ican forces repeatedly protected American property in Panama and other
Caribbean areas, and made several landings in China. By 1927, this country
had 5,670 troops stationed in China. Prior to our official entry into World War
II, President Roosevelt, without consulting Congress, sent troops to occupy
Greenland and Iceland and ordered United States warships to protect the British
lifeline in the Atlantic. Since World War II, the United States has been involved
in major land wars in Korea and Indochina, has risked a nuclear holocaust in
order to remove offensive missiles from Cuba, and has placed the Armed Forces
on a worldwide military alert to prevent the Soviet Union from intervening in
the Middle East.\textsuperscript{52}

Presidents have deployed troops into crisis areas and used force or the threat
of force for defensive purposes without a declaration of war or other specific
authorization by Congress on approximately 200 occasions since the founding of
the Republic.\textsuperscript{53} The import and “quality” of these precedents, however, are
challenged by a distinguished historian, Arthur M. Schlesinger, Jr., on the ground

\textsuperscript{47}S. REP. No. 93-220, 93d Cong., 1st Sess. 12 (1973).
\textsuperscript{48}7 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3038 (1897).
\textsuperscript{49}G. BERDAHL, \textit{WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES} 51 (1921).
\textsuperscript{50}A. SCHLESINGER, JR., \textit{THE IMPERIAL PRESIDENCY} 86 (Popular Library ed. 1974).
\textsuperscript{53}Emerson, supra note 52, at 155-56. Up to 81 military operations may be supported by legislation other than declarations of war, if authority to use force can be inferred from treaties. But such action by the Senate alone would not constitute any precedent for requiring the consent of both the Senate and House in other circumstances.
that “the operations were mostly directed against nongovernmental groups, mostly concerned with the protection of American citizens and mostly trivial.” Such “police actions, not directed at sovereign states” can be explained as not rising “to the dignity of formal congressional concern.” Moreover, Schlesinger indicates: “A substantial number took place . . . without presidential authorization, very often the consequence of the individual initiative or short temper of lieutenants along the southern border or commodores on the high seas.”

This analysis misses the practical answer that Presidents have consistently responded to foreign threats to the United States with the force necessary, and physically and technologically available, at a given moment in history. “When little force was needed . . . little was used; when larger commitments were necessary, they too were forthcoming.” President Washington did not hesitate to threaten Spain with hostilities. President Adams risked a deeper war with France by withdrawing his previous order that had forbidden the arming of merchant vessels. President Buchanan accepted the chance of a conflict with Great Britain in upholding the right of United States vessels to be free from search or detention by foreign warships.

Furthermore, precedents of Presidential military activity cannot be uniformly categorized as actions against “stateless and lawless people”; there are too many exceptions. Even if accurate, this categorization is not of any major import. The flow of blood is the same whether from combat with pirates and unruly natives, or with regular forces. Any commitment of American forces into troubled areas involves a serious risk of armed fighting. Nothing in the 18th century materials regarding the war powers indicates that the framers made a distinction between hostilities with organized states and nongovernment groups in the allotment of those powers; nor is there a history of practice by Presidents showing they have made such an interpretation of their powers. It is true that Presidential initiatives with respect to formal states have increased notably in the 20th century, but this is surely the result of the increase in the number of nation-states and the persistent development of ways in which the United States can be affected by events abroad. One must assume the Constitution never accommodates changes in history or technology for the difference to become significant. Under such an assumption, the United States Air Force would have no constitutional basis, for the Constitution provides for raising “Armies” and maintaining a “Navy,” but nowhere refers to an Air Force.

The inference that most precedents of Presidential war powers are the result of hotheaded military officers on the scene is not supported by close examination of the incidents. In fact, only a fraction of all the incidents have been subsequently disavowed or repudiated by the Executive. Where actions may have been commenced by individual commanders, they were carried out according to what was believed to be a clear Presidential directive or policy. In any event, it

54 Schlesinger, supra note 50, at 61-62.
55 Id. at 62.
57 Emerson, supra note 52, at 110.
58 Goldwater, The President's Ability to Protect America's Freedoms—The Warmaking Power, 1971 LAW & THE SOCIAL ORDER 444 n.141.
is the President as Commander in Chief who is responsible for the command of forces and the conduct of military operations. In practice, the President acts through the executive departments and subordinate officers, and unless disavowed, their acts are in legal contemplation the acts of the President.

B. Constitutional Significance of Precedents

Accepting the existence of a nearly uniform practice of Presidents to use armed force or the threat of it in furtherance of important defense interests, without the specific approval of Congress, the question arises of what bearing historical practice has upon current constitutional construction.

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 its own intrinsic merits." A leading present-day authority on the legal aspects of foreign affairs writes that:

[The 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.]

Usage was decisive in resolving an early separation of powers issue between two branches of government. In 1802 the 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. Even with such a serious cloud of doubt over Congress' authority to require additional judicial duties of the Justices, especially without specific commissions to do so, the Marshall Court 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.

60 1 J. Story, Commentaries on the Constitution § 409, at 392 (1833).
Usage has also been accepted by the Supreme Court on at least two occasions as a basis for rejecting congressional attempts to reverse its earlier ideas of executive authority. In *United States v. Midwest Oil Co.*, the 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, 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.” A decade later the Court again relied on usage as a basis for rejecting congressional control over the Presidency. In holding that Congress could not alter 73 years of prior practice to begin setting conditions on the removal of executive officers by the President, even though such practice had often been the subject of bitter controversy in the past, the Court ruled:

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.

The facts of these two cases closely parallel debate over the military command powers. Here there are over 185 years of practice in which Presidents have reacted on their own initiative to any crisis which they believed might present an unacceptable threat to the national safety. Many Presidents have been criticized by both Houses for taking these strong military actions. 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 full consideration and acquiescence for almost two centuries, reverse the construction of the Constitution which has become so firmly set.

C. Constitutional Source of President's Powers

The President need not rely solely upon practice to establish his authority to use armed forces in certain instances. The basic source of his power is the Constitution itself. First, article II of the Constitution states that “[t]he Executive power shall be vested in a President of the United States of America.” There is authority for the proposition that this is not a passive grant, but includes the traditional power of protecting the national safety as historically recognized by the law of nations. For example, an edition of Vattel, circulated among leaders

64 236 U.S. 459, 473 (1915).
65 Id. at 472-73 (emphasis added).
66 Myers v. United States, 272 U.S. 52, 152, 175 (1926).
67 Goldwater, supra note 58, at 426-28.
of the American Revolution by Benjamin Franklin,\textsuperscript{70} 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]."\textsuperscript{71}

Second, the President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations."\textsuperscript{72} At least six of the present members of the Supreme Court have accepted Chief Justice Marshall's description of executive power to mean that the President has "primary responsibility for the conduct of foreign affairs." For example, Justice Stewart, joined by Justice White, stated the Constitution endows the President with "a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense . . . ."\textsuperscript{73} Marshall's quote also is cited with approval in \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{74} where it is stated that the power of the President in the field of international relations is "delicate, plenary and exclusive" and "does not require as a basis for its exercise an act of Congress."\textsuperscript{75}

\footnotesize{\textsuperscript{70} 2 B. Franklin, \textit{The Life of Benjamin Franklin} 349 (J. Bigelow ed. 1874).
\textsuperscript{71} E. Vattel, \textit{The Law of Nations} 14, 15 (1863). \textit{See also} C. Wolf, \textit{The Law of Nations Treated According to a Scientific Method} § 39, at 26 (1934 reprint of ed. 1764). The framers also had before them the instruction of Thomas Rutherford, who, while he dissented from an opinion that "the external executive power" is "from its own nature" independent of control by the legislature, nevertheless concluded that in those societies "where the legislative and the executive power are lodged in different hands," and especially where the legislative power resides "in a considerable number of representatives," the \textit{usual practice} "is to allow some degree of discretionary power in respect of war or peace" to the executive.
\textsuperscript{72} 2 T. Rutherford, \textit{Institutes of Natural Law} 54-56, 59 (Cambridge ed. 1756).
\textsuperscript{73} So said John Marshall, on March 7, 1800, while a member of the House of Representatives. \textit{10 Annals of Congress} 613 (Gales & Seaton ed. 1851).
\textsuperscript{74} \textit{New York Times Co. v. United States}, 403 U.S. 713, 729 (1971) (Stewart & White, JJ., concurring). Justice Thurgood Marshall, in his concurring opinion in the same case, said that "it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander-in-Chief." \textit{Id.} at 741. Justice Blackmun, dissenting in that case, stated: "Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety." \textit{Id.} at 761. Justice Rehnquist, joined by Chief Justice Burger and Justice White, writes of the "primacy of the Executive in the conduct of foreign relations" and "the lead role of the Executive in foreign policy," in \textit{First Nat'l City Bank v. Banco Nacional De Cuba}, 406 U.S. 759, 767 (1972).
\textsuperscript{75} \textit{299 U.S. 304}, 319-20 (1936).
\textsuperscript{76} \textit{Id.} The well-known Neutrality Proclamation of 1793 by President Washington is commonly cited as the first major action which set the doctrine of Presidential responsibility for determining on foreign policy. \textit{E.g.}, C. Rossiter, \textit{Alexander Hamilton and the Constitution} 84-85 (1964). The actual facts of the matter bear out its significance. Washington's policy arose out of the French Revolution and the declaration of war made by France against Great Britain, Holland, and Russia. As American vessels were being designated by French representatives in the United States as privateers against British merchant shipping, we were in "the most extreme danger of being drawn into the war." 4 A. Flexner, \textit{George Washington} 26 (1970).

Even before word of these declarations reached him, Washington had decided upon and often avowed a fixed purpose of maintaining "the neutrality of the United States, however general the war might be in Europe." On the 12th of April, 1793, he reasserted this policy in similar letters to Jefferson and Hamilton: "War having actually commenced between France and Great Britain, it behoves the government of this country to use all the means in its power to prevent the citizens thereof from embroiling us with either of the belligerent powers, by endeavouring to maintain a strict neutrality." \textit{Marshall, supra} note 37, at 326-28. Six days later, he addressed a circular letter to all his Cabinet members, enclosing for their consideration "a series of questions, the answers to which would form a complete system" by which to implement his policy. \textit{Id.} at 328-29. Among other things, the meeting of the heads of departments led to the issuance of a proclamation "forbidding the citizens of the United States to take part in any hostilities on the seas, with or against any of the belligerent powers . . . and enjoining
Third, § 2 of article II designates the President as "Commander in Chief." This title has been defined 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 . . ."Nor has the Commander in Chief power been discovered only recently as a functional base for the President's authority. His right to use force "in such manner as, in his judgment, the public good . . . might require," was specifically made the subject of congressional debate, and was ultimately accepted by the Congress, as early as 1798.

Fourth, § 3 of article II vests in the President the duty and right to "take care that the laws be faithfully executed." The Supreme Court has construed this power 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." Nor has the Commander in Chief power been discovered only recently as a functional base for the President's authority. His right to use force "in such manner as, in his judgment, the public good . . . might require," was specifically made the subject of congressional debate, and was ultimately accepted by the Congress, as early as 1798.

Fifth, the President could view his oath of office, to "preserve, protect and defend the Constitution of the United States," as both reinforcing executive powers found elsewhere in the Constitution and possibly standing alone as a source of power. "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."
The contemporary setting in which the Constitution was drafted points to a general understanding among most of the framers that the President would possess and exercise an independent role as required by the national defense.\(^8\) Although it is almost forgotten today, at the time of the Constitutional Convention the country faced overwhelming foreign dangers. To the north, Britain was illegally holding onto frontier military posts it had agreed to cede, and was supporting Indian raiding attacks across our northern frontier. To the south, Spain possessed New Orleans and posts at the mouth of the Mississippi and in the Floridas. In the years immediately preceding the Convention, Spain had ended 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 Jefferson of attempting to make the United States a dependent client embroiled in French foreign conflicts. 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 our defense of “that commerce.”\(^2\)

Admitting this existing state of things, W. Taylor Reveley contends that the framers remedied this situation “by loosening the hold of individual states on

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\(^8\) A recent major contribution to the law of foreign affairs arrives at exactly the opposite conclusion. Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527 (1974). Professor Arthur Bestor builds a painstaking case for the proposition that the framers of the Constitution “validated a transfer” of the powers of war and peace from executive to legislative hands “that had taken place a dozen years earlier and which they sought to modify in only a very limited way.” *Id.* at 563. His view is that the Constitutional Convention essentially borrowed the principles of the Articles of Confederation by which every crucial decision of foreign policy was to be arrived at through legislative deliberation. *Id.* at 568. Developing his premise beyond the concept of mere joint participation of the two branches in the making and carrying out of critical decisions, he argues that the majority and minority at the Constitutional Convention “were in agreement on one point—that foreign policy should be determined by legislative deliberation and that the executor of that policy should be the agent of the legislature, bound by the instructions it formulated.” *Id.* at 619.

Professor Bestor’s impressively documented work deserves close attention, but an awareness of basic differences in treatment may explain the divergent conclusions of that paper and this one. Bestor (1) gives absolutely no weight to subsequent usage as a source of collateral interpretation of the Constitution, *id.* at 663, (2) gives no notice to interpretations of the foreign-affairs provisions of the Constitution by at least six members of the present Supreme Court who have put forward the view that the President holds primary responsibility for foreign affairs, *see* note 73 *supra*, (3) fails to consider evidence that the framers equated “war” in the declaration clause with “Offensive” war, thus overlooking a meaning to that clause beyond that of simply “communicating a warning or a notice to the enemy,” which Bestor rules out as “absurd,” *id.* at 608-09, (4) neglects substantial contemporary evidence that the framers knew of and blamed the Articles of Confederation for the system which allowed Congress to dangerously interfere with the conduct and planning of military affairs during the Revolution and the fact that the obvious remedy for this defect was augmentation of executive power, *id.* at 570-71, (5) ignores the significance of the shift in direction of state charters towards giving the executive office greater powers of independent action for the public safety, (6) fails to consider the implications of evidence the framers held strong fears of delegating too much power to the Congress, and (7) is concerned with the entire field of foreign relations decisions, whereas this article is addressed solely to the power of determining on the use and deployment of military force in defense of important national interests.

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\(^2\) L. KAPLAN, COLONIES INTO NATIONS 163-70, 179-80 (1972); *cf.* THE FEDERALIST NOS. 4, 34 (A. Hamilton).
congressional action and by restructuring Congress to make it a more viable executive force.

Certainly the framers meant to correct the delays and dearrangements in government that resulted from the neglect and inaction of the 13 independent sovereignties, each State exercising its own discretion over matters of foreign affairs and national defense. But to stop here is to ignore the totality of the problem and the obvious remedy.

The times called for swift and unified decisions on matters of foreign affairs, as free as possible of transitory emotions. The framers recognized that the very nature of deliberative legislative bodies would on occasion render Congress unequal to the vigorous action required. It is inconceivable that the framers planned to meet the ominous foreign problems of the day by allowing a reluctant or divided Legislature to block steps necessary for the public safety. Instead, they understood that the Executive must in some instances take action on his own initiative without awaiting specific authority from Congress.

It must be remembered that the framers had witnessed firsthand the inefficiency of the Continental Congress in the management of military affairs during the War of Independence. Of the 55 framers who attended the Constitutional Convention, no less than 30 had performed military duty in the Revolution. These men knew that at the time of the American Revolution, Congress had jointly possessed the powers of the executive and legislature. They knew that the directives of Congress had interfered with General Washington's operations and had nearly caused disaster.

It was the Continental Congress, for example, which twice decided on absolutely impractical plans for attacking Canada, without consulting a single military expert 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 men. It was the Continental Congress' order in the fall of 1777 which made it difficult for Washington to obtain reinforcements from the Northern Army, thereby preventing him from saving American forts on the Delaware River and allowing the British to open nav-

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84 See generally the sketches of each framer set forth in G. Rossiter, 1787 THE GRAND CONVENTION 79-137 (1966). At least six signers of the Constitution, in addition to Washington, were intimately familiar with the General's problems. Gouverneur Morris had defended the Commander in Chief in Congress and had come to Valley Forge to see things for himself; Thomas Mifflin had been quartermaster general of Washington's army; Robert Morris had managed to finance Washington's campaign; Hamilton had served on Washington's staff and stormed Yorktown; James McHenry had frozen at Valley Forge and become a secretary to Washington; and General C. C. Pinckney had been an aide to Washington in the battles of Germantown and Brandywine.


86 John Marshall, himself a contemporary observer, remarks: "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...." 3 J. Marshall, The Life of George Washington 5 (AMS Press ed. 1969).


gation of the river for the supply of its army. That Congress is also accountable for the tragedy of Valley Forge. In August of 1777, the Continental Congress threw out a military commissary-general chosen by Washington and assumed charge of the commissariat for itself, erecting a system "in direct opposition to the opinion of the commander in chief." John Marshall, who served with General Washington throughout the winter of 1777, 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." Not only was Washington's army prevented from making attacks on Howe's lines about Philadelphia, but the lack of clothing, food, and blankets had tragic 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..."

The framers also held fresh memories of Shays' Rebellion of 1786-87, in which Governor Bowdoin of Massachusetts had been required to singlehandedly call out the militia and raise an army to restore order before the reluctant and divided legislature could be moved to action. "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 4,000 militia were ordered into service..." 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, heading a number of citizens who financed the proposed expedition entirely with private money.

A similar outbreak against a state government took place in New Hampshire, when an armed mob surrounded the legislature and intimidated the legislators. 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." Sullivan personally ordered out the nearest companies of cavalry and infantry

89 T. Frothingham, Washington, Commander-in-Chief 228-30 (1930).
90 Watson, supra note 59, at 912.
91 Marshall, supra note 86, at 276.
92 Id. at 277.
93 Frothingham, supra note 89, at 234.
94 News of the Governor's strong claim to and use of executive defense powers was quickly spread in the public press. E.g., Boston Gazette, Jan. 29, Feb. 5, Feb. 12, 1787. Massachusetts Gazette (Boston), Jan. 30, Feb. 6, Feb. 9, Feb. 20, 1787. Governor Bowdoin's speech to the legislature explaining the necessity for "speedy and vigorous measures" pursuant to the independent powers vested in him by the Constitution of the Commonwealth is reprinted in the Boston Gazette, Feb. 5, 1787. Also see the reply of the legislature, in which "the Senate and House of Representatives, in General Court assembled... take this earliest opportunity to express their 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..." Massachusetts Gazette, Feb. 6, 1787, at 1 (emphasis added).
95 Marshall, supra note 37, at 103. See also M. Starkey, A Little Rebellion 49, 186 (1955).
96 Marshall, supra note 37, at 104.
98 Marshall, supra note 37, at 95.
and took command of the loyal troops. These disorders, and the way in which they were handled by firm action of the executives, were known throughout the American States. They certainly influenced the view of the framers as to the nature of executive responsibility for the public safety and the necessity for having at the head of government an officer who could have adequate independent power to protect against armed threats to our lives, property, and government itself.

The Founding Fathers also had before them the example of recently established state constitutions, such as those of Massachusetts (1780) and New Hampshire (1784), which conferred far broader defense powers upon the state executives than had earlier charters adopted in the immediate period of the Revolution. Eight constitutions and two royal charters had been completed in the year of independence. The following year was marked by the adoption of three more constitutions. These charters generally provided for a weak executive and reflected the animosity then prevailing towards King George. It is striking that each of the two state charters revised in the 1780's, when the drafters worked in a less prejudicial atmosphere and had the advantage of wartime experience under the weak laws, allotted strong military defense powers to the executive. A comparison of these two later charters with the original 13 reveals the same dramatic shift of powers to the executive as is manifest in the transition from the Articles of Confederation to the Federal Constitution.

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99 Stackpole, supra note 97, at 244.
100 Reveley would deny the significance of these executive initiatives by compartmentalizing the concerns of the Framers into two independent categories, one involving their concern with "purely domestic tranquility," and the other their considerations of foreign affairs. Reveley, supra note 83, at 94. The framers themselves made no such narrow distinctions. General Henry Knox, then Secretary at War, wrote Washington that as a result of these disorders: "Men 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." Liberty was at stake; whether the threat be from domestic or external sources made no difference. Marshall, supra note 37, at 98. Also see the references to "dangers from foreign arms and influence," "hostilities from abroad," "dangers from foreign force," "dangers from abroad," and dangers ... from the arms and arts of foreign nations," warned against in The Federalist Nos. 3-6 (A. Hamilton).
102 Id., Pt. II, at 1288.
103 Although Hamilton states, in The Federalist No. 69, that "it may well be a question," whether the Constitutions of New Hampshire and Massachusetts, "do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States," it must be remembered he was trying to "sell" the Federal Constitution to the public. Hamilton does not flatly say the President is given less powers. He merely observes that "it may well be a question." He does not mention how serious a question it is or indicate how it shall be answered. Nor does he catalogue the powers of the governors so we can know which aspects of those powers may be in question. For example, the Executives may have possessed powers regarding martial law or the raising of armies which the President does not have.
105 Raoul Berger points out that the constitutions of Massachusetts and New Hampshire provided that the Executive shall exercise the powers of commander in chief "agreeably to the rules and regulations of the constitution and the laws of the land and not otherwise." He argues from this that the Executive was "subject to governance by the legislature." Berger, War-Making by the President, 121 Harv. L. Rev. 51, 57 n.67 (1972). Berger makes an assumption that is unsupported. He offers no legislative history regarding adoption of these Constitutions and no court decision of either of the two States so interpreting the above phrase.
The trend toward a strong executive was reflected in ways other than the new constitutions of Massachusetts and New Hampshire. In 1780, the Continental Congress requested the several state legislatures to invest the executive authority "with powers sufficiently ample" to comply with such applications as might be made to them by a committee of Congress from camp with General Washington.106 Marshall reports that: "Under the impressions produced by these representations, some of the state legislatures vested extensive powers in the executive. . . ."107 The following year Congress reformed the organization of its executive functions, consolidating power into fewer hands.

From an ill-judged prejudice against institutions which had been sanctioned by experience, all the great executive duties had heretofore devolved, either on committees of Congress, or on boards consisting of several members. . . . But the scantiness of the national means at length surmounted the prejudices which had so long prevailed; the several committees and boards yielded to a secretary for foreign affairs, a superintendent of finance, a secretary of war, and a secretary of marine.108

Thus, an impartial review of the history of this early period reveals that the attitudes of the majority of persons who wrote the state constitutions had undergone a change from an initial dread of the royalty in the 1770's to a perception of the need for a strong executive by the 1780's. Experience had by then established the validity of the position that nothing short of conferring upon the Executive an independent power for defense of the nation's safety would ensure the preservation of its freedoms.

Those who would dwell upon the concern of the Founders with a monarchical Presidency would do well to study the fear our forefathers had of an unregulated Congress. James Wilson instructed his law class in 1790 that "[t]o control the power and conduct of the legislature by an over-ruling constitution, was an improvement in the science and practice of government reserved to the American States."109 Jefferson, in language quoted in the Federalist, depicted congressional government as being the equivalent of "despotic government."110

Nor has a study of available materials by the author turned up any support for Berger's premise. On the other hand, contemporary interpretations of the Constitutions by the Executives, and accepted by the Legislatures of each State during the two emergencies which arose in 1786 show that they construed their powers broadly. See text at notes 94-100 supra. All that the provision on its face conveys is the statement that the Executive shall act agreeably to the rules and regulations of the Constitution and laws of the land, whatever they may be. It does not define or describe those rules and regulations. If the Constitution confers independent and exclusive defense powers on the Commander in Chief, as applied in the crises of 1786-87, then that is the law of the land. Berger would rewrite the provision to read that the Executive "shall at all times be subject to whatever rules and regulations the legislature may enact, and the legislature shall have power, notwithstanding any other provision of this constitution, to define the powers of the Executive as Commander-in-Chief." This, however, is not what the language reads.

106 MARSHALL, supra note 87, at 248.
107 Id. at 250-51.
108 Id. at 404-05.
110 THE FEDERALIST No. 48 (A. Hamilton), quoting from Jefferson's Notes on Virginia, printed in Paris in 1784 for distribution among his friends in Europe and America and printed in England in 1787. The pertinent text is in 2 THE WRITINGS OF THOMAS JEFFERSON 162-165 (B. Lipscomb-Bergh ed. 1903).
He said: "It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one."\(^{111}\) Consistent with this theme is the history published by John Adams in 1787, which was much circulated at the Constitutional Convention and undoubtedly contributed to the opinions of the members.\(^{112}\) This work concludes:

If there is one certain truth to be collected from the history of all ages, it is this; that the people's rights and liberties, and the democratical mixture in a constitution, can never be preserved without a strong executive, or, in other words, without separating the executive from the legislative power.\(^{113}\)

If the framers, contrary to this concern with vesting excessive power in the Legislature and contrary to their recognition of the inadequacies of the Legislature in deliberating upon and conducting defensive war, meant to provide Congress with the entire panoply of war powers—the sole power to decide when to employ the Armed Forces, the power to compel a 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. Article IX of the Confederation conferred upon the Continental Congress the "sole and exclusive right and power of determining on peace and war." The fact that the Constitutional Convention turned away from this clear-cut language, voting to remove from Congress the power to make "peace"\(^{114}\) and changing the power of "determining on" war to the sole power "to declare" war,\(^{115}\) is persuasive evidence that the framers intended the legislative branch to have less authority over military matters than it possessed under the Articles.

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."\(^{116}\) Again, one might ask why, if the framers meant to make the Executive no more than the "agent" of the Legislature in matters of military affairs, did they not say so in clear words of the kind they had available for use?

### IV. Limits to Presidential War Power

#### A. The Powers of Congress Distinguished

In the famous book which first formulated the war powers of this nation, William Whiting wrote:

\(^{111}\) Id. at 163.


\(^{113}\) Id. at 290.

\(^{114}\) 2 Records of the Federal Convention of 1787, at 319 (M. Farrand ed. 1937) [hereinafter cited as 1787 Records].

\(^{115}\) Id. at 318-19.

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.

He added that the Constitution "does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted." 3

Dr. John Pomeroy, Dean of the New York University Law School in the 1860's, similarly rejected the idea that "the disposition and management of the land and naval forces would be in the hands of Congress..." 4 "The policy of the Constitution is very different," Pomeroy instructed. The Legislature may "furnish the requisite supplies of money and materials" and "authorize the raising of men," but "all direct management of warlike operations... are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens."

Congress has great powers over military matters. It controls the size and the strength of the Armed Forces and the amounts and kinds of materials with which war is waged. 5 Congress can provide or refuse to provide a multitude of emergency powers involving foreign trade and strategic materials. 6 Congress can

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118 Id. at 166.
119 J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 288-89 (1870).
120 Id. at 289.
121 To the framers the power of the purse was an extremely effective check on going to war. In the early years of the Republic, it was possible to conceive of no navy and almost no army. In fact, Washington had a regular army of only 672 in 1789, 1,216 in 1790, and 2,128 in 1791. 6 ANNALS OF CONGRESS 2073 (Gales & Seaton ed. 1849); R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 89 (1967). Congress could put an entire clamp on the means of making war by the simple and then practical method of not raising forces. That this is exactly how the first Congresses viewed the power is shown in 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 of this law provided that "if a peace shall take place between the United States and the Regency of Algiers, that no farther proceeding be had under this act." 4 ANNALS OF CONGRESS 1428 (Gales & Seaton ed. 1849). Thus, there was 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 shall be completely disbanded if no war shall break out with any European power within two years and six months after the time for their enlistment begins. Although the amendment did not pass, it reflects the understanding of our forefathers as to how war was to be controlled. Id. at 500-04. Congress did not pass policy rules seeking to restrict the President's discretion as to why or where the military forces were to be employed. Congress reduced the size of those forces, if it wanted to restrain the President. When an effort was made to control the first President's discretion, it was defeated as has been every similar attempt in Congress up to the 1970's. Id. at 1221.

Also, it is instructive to consider Gouverneur Morris' argument at the Constitutional Convention that "if a majority of the Senate be for peace, and are not allowed to make it, they will be apt to effect their purpose in the more disagreeable mode, of negativing the supplies for the war." RECORDS, supra note 114, at 548. If the option of reducing the size of the forces or curtailing supplies is no longer adequate, in the opinion of those who want stronger control over Presidential discretion, the way to change the situation is by a constitutional amendment, not by reading into the Constitution powers for Congress which the framers never comprehended.

122 See generally, e.g., OFFICE OF EMERGENCY PREPAREDNESS, EXEC. OFFICE OF THE PRESIDENT, GUIDE TO EMERGENCY POWERS CONFERRED BY LAWS IN EFFECT ON JANUARY 1, 1969 (1969). This book compiles 284 national emergency laws in effect on January 1, 1969. The House of Representatives acted to greatly reduce the President's authorities with respect to
approve or reject treaties or area-resolutions having defense implications.\textsuperscript{123}

Ultimately, the impeachment power is available if a President should commit an irresponsible abuse of a constitutional discretion.\textsuperscript{124} But once Congress has decided how many men should be drafted, or what arms should be constructed, history indicates that the President may station those men and send out those arms to such parts of the world as he determines appropriate in the national defense, without any geographical or time limitations imposed by Congress.

One constitutional provision which is claimed to vest the final decision of going to war with Congress is the declaration of war clause.\textsuperscript{125} But the idea that a declaration of war is a necessary condition for the waging of war is a myth. Actually, the power to declare 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 declaration of war, 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 power of limiting the supplies

\begin{itemize}
\item Approximately 52 hostilities arguably have been authorized by treaties. Emerson, \textit{supra} note 52, app. G., at 117-19.
\item It is important to remember that the original language of the “high crimes and Misdemeanors” phrase, accepted by the Constitutional Convention, included the descriptive words “against the United States.” The Committee on Style and Arrangement dropped the latter words, but without any authority or intent of changing the substance of the provision. 1787 Records, \textit{supra} note 114, at 550. Thus, impeachment was seen as a category of offenses against the state—political crimes.

During an earlier discussion in the Convention regarding impeachment, Edmund Randolph stated that the “propriety of impeachments was a favorite principle with him” 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.” \textit{Id.} at 67. This indicates a recognition both that the President would possess broad war powers and that his exercise of discretion would still remain a subject of possible check by the process of impeachment.

Alexander Hamilton wrote in \textit{THE FEDERALIST} No. 65 that the jurisdiction of the Senate 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.” See also Bestor, \textit{Reviews: Impeachment}, 49 Wash. L. Rev. 255 (1973); Broderick, \textit{What Are Impeachable Offenses?}, 60 A.B.A.J. 415 (1974); Broderick, \textit{The Politics of Impeachment}, 60 A.B.A.J. 554 (1974).

\item U.S. Const. art. I, § 8, cl. 11.

James Wilson, one of six men who signed both the Declaration of Independence and the Constitution and one of the original Justices of the Supreme Court, instructed his law students in 1792 that the Constitution of the United States renews the principles of government known in England before the Norman conquest by which “the power of making peace and war was invariably possessed by the [legislative body].” Wilson, \textit{supra} note 109, at 433.

Earlier in the same lectures Wilson had pointed out that it is a part of the law of nations that a “state ought to attend to the preservation of its own existence.” \textit{Id.} at 151, 154. Further he declared: “The same principles, which evince the right of a nation to do every thing, which it lawfully may, for the preservation of its members, evince its right, also, to avoid and prevent, as much as it lawfully may, every thing which would load it with injuries or threaten it with danger.” \textit{Id.} at 156.

Would the framers violate one of the cardinal duties of a nation, which Wilson believes is obligatory upon it by the law of nature? If Wilson’s reference to the war-making power of Congress is considered an all-encompassing statement, the nation would be helpless to preserve itself whenever a threat exists that the legislature, for one reason or another, is reluctant “to avoid and prevent.” Considering the enormous problems which the framers faced, including serious dangers of internal disorders and foreign pressures, both military and economic, and believing the framers were practicable men who strived for a workable charter that would endure, it is believed that Wilson did not mean to deny an independent power in the executive of reaction against serious foreign menace.
and size of the Armed Forces were by far the major means of controlling the occurrence of hostilities. To read the declaration clause to mean that no defensive war or other reaction can be commenced without a specific authorization by Congress is to confer a meaning upon that clause which nowhere appears 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 Founding Fathers’ day as it is today. In the 87 years preceding the Constitutional Convention, 38 wars were waged in the Western World; only one was preceded by a declaration. That the Founders knew of this condition is proven by Hamilton’s statement in the Federalist No. 25 that declarations of war were already in disuse in the 18th century. When the Constitutional Convention narrowed the scope of Congress’ war power by substituting “declare” for “make” in the declaration of war clause, the framers must have understood that there had been and would continue to be many instances in which hostilities would occur without declaration.

The framers did give a meaning to the declaration clause, but it was essentially concerned with “offensive” war, the distinction between offensive and defensive wars being well known by the framers. For example, Hamilton, in the second of eight papers written under the pseudonym “Pacificus,” explained that had the United States assisted France in 1793 instead of remaining neutral, we would have engaged in offensive war, since France was then a belligerent nation in Europe. By the law of nations, as compiled by authorities known to the framers, a declaration of war was not required for defensive war. Of course, the framers meant to check Presidents from engaging in wars of aggression and conquest, but they also knew from experience that a nation must attend to its own survival, and that as a consequence there was needed an ultimate authority who could act in defense of the country.

Another power relied upon by spokesmen for congressional supremacy in the field of war powers is the “necessary and proper” clause of article I. It is not believed Congress can restrain Presidential defensive operations under the guise of this provision. To the contrary, William Whiting counseled President Lincoln that Congress is “bound to pass such laws as will aid him” in carrying into

126 L. MAURICE, HOSTILITIES WITHOUT A DECLARATION OF WAR 12-27 (1883).
127 1787 RECORDS, supra, note 114, at 319.
128 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.” Higginbotham, supra note 85, at 103, quoting and interpreting a writing of George Washington’s. These are the aims of warfare that characterized “offensive” war, and that the Framers meant to prevent absent legislative collaboration.

The declaration also serves the purpose of making it known to our citizens and the world that our nation is in the condition of war. Whiting, supra note 117, at 39-40; Wolff, supra note 71, at 364-66.
129 E.g., the letter addressed by President Washington to his Cabinet on April 18, 1793, regarding the means of maintaining a neutrality in the war commenced between France and Great Britain, included two questions specifically addressed to the distinctions of “offensive” from “defensive” war. Marshall, supra note 37, at 329.
130 7 WORKS OF HAMILTON 86-97 (J. C. Hamilton ed. 1851).
131 Vattel, supra note 71, at 316; Wolff, supra note 71, at 368. See N. Grothus, On the Law of War and Peace 57, 184 (1923 reprint of 1646 ed.).
execution his military powers. Congressional measures 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. This interpretation of the Constitution is supported by Myers v. United States, in which the Supreme Court held that Congress could not limit the President's discretion of removal of Executive Officers even though Congress itself created those offices. Chief Justice Taft, writing for the Court, emphasized that Congress cannot vary the exercise of the President's distinctive 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." The Court also took a restrictive view of the necessary and proper clause in Kinsella v. Singleton. There it held the clause "is not a grant of power," but merely removes the uncertainty that Congress may implement the powers otherwise vested by the Constitution.

In the same vein, neither can Congress use its power of appropriation to legislate policy restrictions over the conduct of the President's defense powers. This would be placing "the keys of the Treasury and the command of the army into the same hands," something that Madison rejected in Federalist No. 37 as being "particularly dangerous" and therefore unintended by the Constitutional Convention. If the Constitution does give the President authority to protect American rights and interests abroad, Congress cannot by a mere appropriation rider redefine the allotment of powers made by the framers.

B. Accountability of the War Power: The Constitution and the Media

Referring to the concept of allowing the President to wage defensive war on his own decision, Abraham Lincoln, when a first-term Congressman, asked, "Study to see if you can fix any limit to his power in this respect." He added, "no one man" should hold the power of bringing the oppression of war upon us. Lincoln withdrew his opinion in part 15 years later by writing, "When rebellion or invasion comes, the decision is to be made," and the man whom the people have made the Commander in Chief "is the man who holds the power and bears the responsibility of making it." But his original question requires an answer.

One reply is that the concept put forward does not give an unrestrained power to the President to do anything he wants. He cannot conduct a war of aggression. He cannot bully another country with threats of armed action simply
because he does not like its tariff policies or the way it governs its internal affairs. His constitutional power of independent action is limited to the defense of the nation, its citizens, and its freedoms. One principle that is clear in every writing or speech of the Founding Fathers is that they meant to curb the self-destructive wars of aggression that marked the rule of the European nations. This explains why the President's independent use of force can be invoked only for purposes of defense.

The President's actions are checked by the constitutional system of accountability. He must, under current practice, come to Congress at least once a year, and usually more often, for funds to maintain and equip the Armed Forces. In this connection, Congress has the right and resources to conduct extensive investigations into the state of the nation's defense arsenal, the strategy and assumptions that underlie American foreign policy and defense, and the general role of the United States in the world. If Congressmen and Senators disagree with the basic assumptions that support the nation's defense policies or the kinds of commitments the Government makes and guarantees, they can slash funds for the programs and weapons systems which implement these policies.

Congress' opportunity to bring a different viewpoint to the electorate through the news media should not be underestimated as a means of control over the Executive. The chambers of each House contain attentive press galleries; sound and television studios are located in the Capitol. If members are not solicited to give their opinions, each invariably has a full-time assistant on his or her personal staff who is responsible for the preparation and issuance of press releases to the newspaper, wire service, periodical, and television rooms situated in the Capitol, heralding the legislator's position. A news desk is an ever-present sight at all open committee hearings, which offers members another means of making public their own alternative policies. With the news media's preference for controversy, the legislator critical of the Executive or possessed with a contrary plan of action is reasonably assured of coverage.

Nor should the importance of the press as an institution in its own right be slighted. The power of the press to influence decisions is also visible in the many unofficial gatherings held in Washington, where the roles of bureaucrat and newsmen are reversed; reporters and journalists become the briefers and the speakers, who dispense information and opinions to audiences of high level executive branch officials and congressional aides. Investigative reporting, too, has taken on a scope and significance that rival or surpass the fact-finding efforts of Congress itself.

What does this mean? In the words of a critic of a rampant Presidency: "Through history the media of mass opinion—newspapers and, in more recent years, radio and television—had provided an unwritten check on Caesarism."

142 Congress is already applying a greater axe to the defense budget than is generally understood. Defense is now receiving its smallest share of the federal budget since 1940, about 27 per cent, and the smallest proportion of the gross national product since 1950, about 6 per cent. 121 Cong. Rec. S 14747 (daily ed. Aug. 1, 1975).
143 SCHLESINGER, supra note 50, at 219.
THE WAR POWERS RESOLUTION TESTED

Indeed, the Vietnam war is an example of how the force of public opinion worked to end the spiral of escalation of the American fighting role in Indochina. When the majority of the American people and their elected representatives in Congress stopped backing the war, it was ended.

Our forefathers knew that the 40 some newspapers published between 1775 and 1783 helped to unify the patriots during the American Revolution and to stiffen their resolve to last the war out to its successful conclusion. They realized that the media deserved much of the credit for the remarkable fact that 11 states approved the Constitution within 10 months after the end of the Convention of 1787. In the nationwide debate preceding the adoption of the Constitution, 90 of the 100 newspapers then published supported ratification. The early magazines of America also helped to mold public opinion for the Federal Charter.

The point that must not be missed in all the criticism of the supposed lack of accountability on the part of the Executive is the enormous influence the press has had in affecting the course of history. We should not discount the opinion of George Washington, who credited the wide circulation of the printed word as being "the security of a free Constitution." And when all else fails, there remains the check of impeachment, which is meant to be a viable safeguard against political offenses, such as an irresponsible abuse by a Chief Executive of a constitutional discretion.

V. Conclusion

With time, public opinion or Congress will curtail or remove from office a President who oversteps the bounds of his emergency war powers. It is the people who have the last word. They can either reject the President as a candidate in the next election or act through their Congressmen to impeach and remove him from office. So long as he holds office, however, the Constitution, as designed by the framers and interpreted in the course of history, does not permit Congress to prescribe the situations, length of time, or places when or where the President can use the Armed Forces in defense of the nation and the constitutional guarantees of liberty and safety for the American people.

In summary, President Ford acted in conformity to the War Powers Resolution and consistently with a long line of precedents set by his predecessors when
he committed United States military forces in defense of American evacuees and related foreign nationals from the war zones of Indochina, and when he upheld the safety of American citizens and the freedom of the seas for American vessels by rescuing the *Mayaguez* and its crew. But even if his actions had been in open conflict with the War Powers Resolution, it would have made no legal difference; and although some future Presidential undertaking may involve far more than a short-lived action to rescue citizens, or may run afoul of a specific concurrent resolution of the Congress aimed at halting the President's use of the armed forces, the President can legally continue whatever defensive measure he believes is justified. To the extent it limits the President's independent defense powers, then, the War Powers Resolution is unconstitutional.