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W. Taylor Reveley III
William & Mary Law School

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PRESIDENTIAL WAR-MAKING: CONSTITUTIONAL PREROGATIVE OR USURPATION?

*W. Taylor Reveley III**

AMONG the principal rites of an unpopular war is the inquisition: the investigation of those men and institutions responsible for the decision to fight. Often the inquisition seeks only scapegoats.¹ But occasionally it is less concerned with fixing blame than with avoiding future evil. Much of the current inquiry into the scope of the President's constitutional authority to commit American troops to foreign conflict partakes more of the redemptive than the punitive.² Reasoned consideration of the question, however, is difficult for at least three reasons. The problem is many-faceted; the relevant context, in both its precedential and policy elements, unusually rich; and passions on the matter notably high. Thus, there is danger of a simplistic analysis based upon only a few of the pertinent factors, supported by selected bits of precedent and policy, and given direction by a visceral reaction to Vietnam. Karl Llewellyn's injunction that the reader should till an author "for his wheat, sorting out his chaff"³ is singularly appropriate regarding treatments of this aspect of presidential power. What follows is an attempt to delineate the bounds of the problem—an attempt undertaken with an awareness of the inherent opportunities for error.

* A.B., 1965, Princeton University; LL.B., 1968, University of Virginia.

¹ Some of the present assaults on the military seem to be in this vein. See, e.g., Finney, *Questions over Military: Bombardment on What It Is Doing and Why*, N.Y. Times, May 25, 1969, § 4, at 1, cols. 2-6; *The Military-Industrial Complex*, NEWSWEEK, June 9, 1969, at 74-87. See generally *Military: Servant or Master of Policy*, TIME, April 11, 1969, at 20-26.

² Among the better treatments of the question are F. WORMUTH, *THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION* (April 1968) (Occasional Paper: Center for the Study of Democratic Institutions) [hereinafter cited as WORMUTH]; Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619; Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (Jan. 1969); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968); *President's War Powers—I & II*, C.Q. GUIDE TO CURRENT AM. GOV'T 63, 67 (Spring 1968); Note, *Congress, the President and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

³ K. LLEWELLYN, *THE BRAMBLE BUSH* 10 (1960).

POLITICAL OR JUDICIAL RESOLUTION OF THE ISSUE?

In theory, both the judicial and the political processes are available to set the limits on presidential use of force abroad. As a rule, the judicial and political processes differ notably in their mode of decision-making. Courts generally reach the result dictated, or at least suggested, by pre-existing law. Thus, judges emphasize precedent over policy and strive for an impartial decision, rather than for one that recognizes the relative power of the interests concerned. Political interaction, on the other hand, usually alters the legal status quo to meet the changing needs and demands of the community. Thus, policy is emphasized over precedent, and the decision is shaped by the relative power of the participants.

These distinctions, however, lose much of their force in the context of constitutional limits on presidential power. Unlike cases involving statutory or even common law, constitutional questions leave courts far freer to make basic community decisions, not only because the judiciary is free of any actual or potential legislative ukase but also because it is interpreting an unusually ambiguous and evolutionary document.⁴ In the sensitive area of presidential power, the judiciary's instinct for self-preservation and its desire to hand down effective judgments necessitate that some account be taken of the relative strength of the opposing interests. The contextual features which increase the judiciary's room for maneuver have the converse effect upon the political decision-maker. His ability to alter the legal status quo is reduced when the norms in question are of constitutional stature. Thus, he must give far more attention to existing doctrine than usual, and he is pushed close to the role of the impartial applier of the law.

Though it is important to recognize that the judicial and political processes would not be dissimilar in their approach to the limits on presidential use of force abroad, significant differences remain. A judicial resolution would be more focused and clear-cut than a political one, but also more inflexible. It would be more concerned with the dictates of doctrine and less with the balance of power, and it would run a greater risk of being ignored or subverted than a political decision.⁵ While judicial involvement in the question at hand has been vigorously urged,⁶ the immediate prospect of such involvement is dim.⁷ Accord-

⁴ See text at notes 22-23 *infra*.

⁵ See note 104 *infra*.

⁶ See, e.g., Schwartz, *supra* note 2; Velvel, *supra* note 2, at 479-503(e). But see Moore, *supra* note 2, at 35-36; Note, 81 HARV. L. REV., *supra* note 2, at 1794.

ingly, to the extent that the issue is resolved, its resolution will come through the interaction of the President, Congress and the electorate—a method often used to settle fundamental constitutional questions.⁸

THE ISSUE MORE FULLY DEFINED

The issue is best framed in terms of the constitutional limits on presidential power to pursue a foreign policy which may easily lead to armed conflict, rather than simply in terms of executive power to commit troops to foreign combat.⁹ Resort to arms is rarely the first step in

⁷ Though given ample opportunity to resolve the constitutionality of American participation in the Vietnam War, federal courts have consistently declined to consider the matter, primarily because they view it as a political question. *See, e.g., Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968); Schwartz, *supra* note 2, at 1051 n.61.

⁸ *See* G. SCHUBERT, JR., *THE PRESIDENCY IN THE COURTS* 347-48 (1957).

⁹ It is well to note in passing the existence of a second level of legal restraints. Under international law, the United States, and possibly the President as an individual, are forbidden to use military force unilaterally except in self-defense, and are enjoined, whenever arms are employed, to follow the laws of war. The primary international sticture against the use of force by states to resolve their disputes is U.N. CHARTER art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." Article 2(4), however, is subject to the proviso stated in article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." As there is no general consensus on the precise scope of the article 51 exception, the ban in article 2(4) on the use of force has proved less expansive than might have been expected.

The laws of warfare have been codified in several multilateral treaties, especially the Hague Conventions of 1907, *e.g., Peaceful Settlement of Disputes*, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536; *Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; *Naval War*, Oct. 18, 1907, 36 Stat. 2396, T.S. No. 544; and the Geneva Prisoner of War Convention, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

The potential liability of the President, should he be guilty of waging an illegal war under international law, or of conducting in an illegal manner a struggle otherwise justified, stems from the precedent set by the Nuremberg and Tokyo War Crimes proceedings, in which individuals were held responsible for their participation in military operations deemed beyond the law. The tribunals' actions were affirmed unanimously by the United Nations General Assembly in its 1946 adoption of the principles of the Nuremberg Charter, G.A. Res. 95, U.N. Doc. A /64/ Add. 1, at 188 (1946). Barring the conquest of the United States, the President runs no risk of actual trial for violation of the Nuremberg principles, but they are likely to affect his conduct. Were he widely believed to be a war criminal, his political effectiveness would plummet,

the conduct of any American foreign policy. Armed force is generally used only *in extremis* to salvage a policy which more pacific modalities could not preserve and advance. Thus, the decision to use the military is usually taken under circumstances which make its dispatch hard to resist; pressures for commitment, both domestic and foreign, will exist which could have been avoided or mitigated had a different foreign policy been pursued.¹⁰ Though there is not a one-for-one correlation, it is generally true that to limit presidential war-making, it is first necessary to limit presidential policy-making.¹¹

both at home and abroad. And, perhaps more fundamentally, his own personal commitment to the law usually dictates adherence to these principles, at least as he understands them. See Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1100-01 n.12 (1967); Schwartz, *supra* note 2, at 1033-35.

Arguably these international provisions bear on domestic constitutional law. At one extreme, the possibility exists that presidential war-making in violation of international law is *per se* unconstitutional. See Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1155 (1966). But see Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1150-51 (1967). A middle reading of the relationship would place a breach of international law among the factors suggesting unconstitutionality. At the other pole is an analysis which finds no necessary link between domestic and international law. The prevailing American authority supports the second extreme, holding that the constitutionality of presidential use of force abroad is strictly a matter for domestic law. See Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1092-93 (1967). Thus, a war illegal under international doctrine may nonetheless be quite constitutional.

¹⁰ To remain in power, a President and his congressional supporters can ill afford to admit that they have fruitlessly pursued a costly foreign policy. Thus, once objectives are proclaimed and sought, their realization becomes important for the political survival of their proponents, irrespective of whether the goals in question have continuing merit. Similarly, to maintain the credibility of American commitments to contain communism, it has been felt essential to honor pledges to support other noncommunist governments, regardless of the inherent importance of the country being assisted. With reference to John F. Kennedy's decision to deepen American involvement in Vietnam, it has been authoritatively stated that

he believed that a weakening in our basic resolve to help in Southeast Asia would tend to encourage separate Soviet pressures in other areas. . . .

[T]his concern specifically related to Khrushchev's aggressive designs on Berlin President Kennedy clearly did believe that failure to keep the high degree of commitment we had in Viet-Nam . . . had a bearing on the validity of our commitments elsewhere.

Bundy, *The Path to Viet-Nam: A Lesson in Involvement*, 57 DEP'T STATE BULL. 275, 280 (1967). See note 20 *infra*.

¹¹ Recognition of the relationship between the President's control of foreign policy and his capacity to use the military abroad is not a recent phenomenon. It was clearly noted by Charles A. Beard, writing of times far more placid than the present:

[The President] may do many things that vitally affect the foreign relations of the country. He may dismiss an ambassador or public minister of a foreign

Presidential war-making, as an actuality or feared potentiality, has been an issue throughout our history. The controversy has been fueled by the unpopularity of most of our wars,¹² by a deep-rooted fear with us since the framing of the Constitution that the President is grasping to himself all decision-making power,¹³ and by the nature of the Constitution itself. The document is notably vague concerning the allocation of authority between the President and Congress over American foreign relations. Each is granted a line of powers which, in isolation, could support a claim to final authority. Edward S. Corwin has spoken of these grants as "logical incompatibles" and indicated, in words now hallowed and hackneyed by frequent invocation, that "the

power for political as well as personal reasons, and, if on the former ground, he might embroil the country in war. His power to receive any foreign representative authorizes him to recognize the independence of a new state, perhaps in rebellion against its former legitimate sovereign, and thus he might incur the risk of war [for example, Mr. Roosevelt's recognition of the republic of Panama in revolt against Columbia]. He may order a fleet or ship to a foreign port under circumstances that may provoke serious difficulty; the ill-fated battleship Maine was sent to the harbor of Havana by President McKinley at a time when it was regarded by many Spaniards, though not officially, as an unfriendly act. . . . As commander-in-chief of the army he might move troops to such a position on the borders of a neighboring state as to bring about an armed conflict. A notable instance of such an action occurred in the case of the opening of the Mexican War, when President Polk ordered out troops into the disputed territory, and, on their being attacked by the Mexicans, declared that war existed by act of Mexico. Again, in his message to Congress the President may outline a foreign policy so hostile to another nation as to precipitate diplomatic difficulties, if not more serious results. This occurred in the case of the Venezuelan controversy, when President Cleveland recommended to Congress demands which Great Britain could hardly regard as anything but unfriendly.

C. BEARD, *AMERICAN GOVERNMENT AND POLITICS 196-97* (3d ed. 1920) (footnote omitted); *accord*, Morgenthau, *The American Tradition in Foreign Policy*, in *FOREIGN POLICY IN WORLD POLITICS* 246 (3d ed. 1967 R. Macridis). The Morgenthau theory is even more expansive than Beard's: "[The Executive] can narrow the freedom of choice which constitutionally lies with Congress to such an extent as to eliminate it for all practical purposes." *Id.* at 264.

¹² With the exception of the two World Wars, all substantial military efforts of the United States have been bitterly condemned by various elements of the population. See Fleming, *Other Days—Other Vietnams*, *THIS WEEK*, Dec. 31, 1967, at 4-7.

¹³ Arthur Schlesinger has noted:

There has been nothing more continuous throughout American history than commentary on the supposed tendency of the presidency to absorb all the powers of the American system. The theory . . . of the President as the great moloch generating its own divinity and about to swallow all power can be reproduced at every stage in our history, beginning with those who . . . complained against the presidency of General Washington.

A. SCHLESINGER, JR. & A. DE GRAZIA, *CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES* 91 (1967); see M. CUNLIFFE & EDITORS OF *AMERICAN HERITAGE*, *THE AMERICAN HERITAGE HISTORY OF THE PRESIDENCY* 170-83 (1968).

Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."¹⁴ Beyond its complementary grants of powers, the Constitution encourages confusion and struggle by the highly abstract terms in which it states many important powers. "The Congress shall have Power . . . [t]o declare War"¹⁵ and "[t]he executive Power shall be vested in a President of the United States of America,"¹⁶ for example, leave much to further definition. Finally, the document, partly because of its complementary and abstract nature, frequently fails to indicate where the ultimate authority lies on many questions, such as the peacetime stationing of American troops abroad.

Although the scope of presidential power to involve the country in war is not a new issue, it has become a matter of increasing importance since 1945. With the exception of two World Wars and the Cold War, armed force has generally played a very insignificant role in American diplomacy outside the Western Hemisphere. Even during the years immediately following Independence, when American security was believed to depend largely on the policies of European powers, no effort was made to influence those policies by the dispatch of United States forces to participate in European conflicts. Until the twentieth century, three factors in particular—geography, the state of military technology and a viable European balance of power—enabled the United States to regard foreign relations very casually.¹⁷ American security

¹⁴ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 171 (4th rev. ed. 1957). The fact that complementary powers were granted the President and Congress was not overlooked by the Framers. "Madison emphasized at some length in 1796 that 'if taken literally, and without limit' these passages from the Constitution 'must necessarily clash with each other,'" and that "there are no 'separate orbits' in which the various powers can move and no 'separate objects' on which they can operate without 'interfering with or touching each other.'" M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 451, 453 (1960); see A. SCHLESINGER, *supra* note 13, at 1-5, 19-20.

¹⁵ U.S. CONST. art. I, § 8.

¹⁶ *Id.* art. II, § 1.

¹⁷ Woodrow Wilson's full awakening, though it preceded that of most of his countrymen, took place only after he assumed the presidency. A passage from A. LINK, *WILSON THE DIPLOMATIST* (1957), captures the lack of concern with foreign affairs typical of late nineteenth century America:

In his first book, *Congressional Government*, an inquiry into the practical functioning of the federal government published in 1885, Wilson made only a passing reference to foreign affairs, and that in connection with the Senate's treaty-making power. Four years later Wilson published *The State*, an excellent pioneer text in comparative government. Out of a total of more than one hundred pages devoted to the development of law and legal institutions, he gave a page and a half to international law. In his analysis of the administrative

was not deemed to depend upon that of distant states; there were no wide-ranging defense commitments. Moreover, even had a President desired to use armed force abroad on more than a piddling scale, he would have been pressed to muster sufficient troops. For much of their history, the Army and Navy could aptly be described as "tiny, obscure bodies,"¹⁸ with no draft laws in existence to swell their ranks and no federal income tax available to fund a large military establishment.

Under these circumstances, the armed efforts which were made tended to be modest in their use of men and resources; they were rarely directed against other established states; few were regarded as vital to our national defense; and thus most could have been easily abandoned or repudiated. Even if Presidents had believed that American interests required extensive use of force abroad, and had they possessed the capacity to act on their beliefs, the resulting danger would have had finite limits. Geography, military technology and the prevailing balance of power would have kept the ensuing conflicts within survivable bounds.

Conditions today, however, are radically different. The revolution in military technology has ended our geographic immunity,¹⁹ leading,

structures of modern governments, he described the machinery of the foreign relations of the British Empire in five words, but devoted twenty-six pages to local government in England; and he gave thirteen times as much space to the work of the Interior Department as to the Department of State in the American government. Finally, in his summary chapters on the functions and objects of government, he put foreign relations at the bottom of his list of what he called the "constituent functions" and then went on to elaborate the functions and objects of government without even mentioning the conduct of external affairs! *Id.* at 5-6 (footnotes omitted).

Wilson began to show more interest in foreign affairs during the 1890's and early 1900's, concluding that the war with Spain had once again raised foreign questions to the fore in American politics, as well as greatly enhanced the power of the President. *Id.* at 6-9. Yet, ironically, he still failed to give serious attention to world developments prior to coming to the White House. Link concludes that "Wilson did not concern himself seriously with affairs abroad during the period from 1901 to 1913 both because he was not interested and because he did not think that they were important enough to warrant any diversion from the mainstream of his thought." *Id.* at 11.

¹⁸ AMERICAN HERITAGE, *supra* note 13, at 190. In 1789 American armed forces on active duty totaled 718 men. By 1812 they had grown to over 12,000 but, with the exception of the Civil War years, never significantly exceeded 50,000 until their sudden increase to 200,000 during the Spanish-American War. After World War I, their number ranged between 250,000 and 300,000 for twenty years. Since 1950, however, there have been approximately 3,000,000 men under arms at all times. Note, 81 HARV. L. REV., *supra* note 2, at 1791 n.106. To conduct the Vietnam War, the number has swelled to almost 3,500,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 255 (90th ed. 1969).

¹⁹ The interdependence of Americans with other peoples is not due merely to ad-

first, to a belief that American security is intimately tied to that of many other countries and, second, to pledges that we will defend other nations.²⁰ Evolution in the balance of world power has left the United States as one of the two great superstates in a bipolar system which abhors the shift of territory from one bloc to another. And the revolution in American military capacity has provided the President with a potent, flexible means of intervention abroad on a moment's notice—a capacity which cold war Presidents have used freely in attempting to prevent a loss of territory to communism. Such initiation of force, even when clearly authorized by the Executive alone, was broadly supported until Vietnam, on the assumption that dissent might undermine American security.²¹ Furthermore, the existence of nuclear weapons permits no assurance that all conflicts will remain within survivable limits. In sum, there has been reason for each cold war President to feel compelled to use force abroad, few restraints on his ability to act quickly and unilaterally, and strong popular feeling that his actions—whatever their nature—must be supported, although there has been little certainty about their ultimate consequences. Under these circumstances, the scope of presidential power to commit troops abroad becomes a matter of great import—far greater than ever before.

THE RELATIONSHIP OF THE CONSTITUTION TO THE ISSUE

What possible relevance can the Constitution, a product of the late

vances in military technology and concern for our security. Revolutionary advances in the exchange of ideas, information, goods and services have left no realistic alternative to participation in global affairs. See McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 189-94 (1968).

²⁰ At present the United States has defense agreements with 48 foreign countries, and maintains approximately 400 major military installations abroad, stationing approximately 900,000 troops in foreign fields, other than Viet Nam. *TIME*, April 11, 1969, at 26. To maintain the credibility of commitments to defend such vital areas as Western Europe, with nuclear weapons if necessary, Washington has often felt compelled to protect friendly regimes in nations of little intrinsic significance. Fear has also existed that the loss of one such state could easily lead to the general collapse of others similarly situated. See, e.g., Bundy, *supra* note 10, at 280-81.

²¹ Once the President has committed troops to combat, he can generally rally support even from those opposed to his policies, by demanding that they back the boys in the field—or presumably face political oblivion. As President Johnson delicately suggested in his message to Congress of May 4, 1965, requesting additional appropriations for Vietnam: "To deny and to delay this means to deny and delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam." 111 CONG. REC. 9284 (1965); see C. ROSSITER, *THE AMERICAN PRESIDENCY* 51-52 (2d ed. 1960).

eighteenth century, have to an issue whose dimensions have changed radically even within the last twenty-five years? It seems that there are at least two major misapprehensions about the document. At one extreme is the assumption that it provides a wholly ascertainable, eternal set of dictates. Proponents of this position find much plain meaning in the constitutional language and read any ambiguous or incomplete provisions in light of the intent of the Framers.²² To depart from this intent, formal amendment is deemed necessary. Adherents of strict construction also tend to assume that once the rules—that which is written in the document—are known, the whole of constitutional law has been grasped.

At the other extreme is the assumption that the document is simply a hollow shell, given content by the practice of the moment. Proponents of this position find virtually no plain meaning in the relevant provisions, and, even when meaning appears, give it little or no weight if contemporary practice is contrary. The intent of the Framers fares no better. Thus, the mere existence of current practice is proof of its constitutionality. Adherents of this view tend to assume that once the actual practice of the moment—the basic power machinations—are known, the whole of constitutional law has been grasped.

The problems with the position of the strict constructionists will be examined first. Plain meaning is an illusory goal in the interpretation of a document, such as the Constitution, which governs the continuing conduct of an immensely complex process in language notable for its abstraction, complementarity and frequent failure to speak to vital issues. Such a document must receive much of its meaning from sources other than its wording. Moreover, since it was designed to remain perpetually viable, the intent of the Framers, when available, binds subsequent interpreters far less than does the intent of the drafters of the typical contract or statute.

In determining the meaning of any constitutional provision, the ultimate criterion must be the long-term best interests of the country. If the Constitution is to remain functional, its interpretation has to move

²² [T]he mechanical, filioipietistic theory, purports to regard the words of the Constitution as timeless absolutes. The sole problem of an interpreter . . . is to find what meaning the words had in terms of the idiosyncratic purposes of the Framers in the light of the conditions and events of their day. It is assumed that this meaning can be discovered and can and must be applied without loss or change, to the problems of the present day, by completely different people under completely different conditions.

M. McDUGAL, *supra* note 14, at 444 (footnote omitted).

in pace with our changing needs and values.²³ Encouraged by the Constitution's linguistic flexibility, and by the difficulty of its formal amendment process,²⁴ alteration by usage has proved to be the principal means of modifying our fundamental law.²⁵ The constitutional provisions governing the conduct of foreign affairs have been duly affected by this evolutionary²⁶ process.

Strict constructionists thus fail to recognize the extent to which the document's language must be supplemented before it becomes meaningful; they do not realize that the supplementation must ultimately

²³ [I]t is utterly fantastic to suppose that a document framed 150 years ago "to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions" could be interpreted today . . . in terms of the "true meaning" of its original Framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent." Each generation of citizens must in a very real sense interpret the words of the Framers to create its own constitution. The more conscious the interpreters are that this is what they are doing the more likely it is that their interpretations will embody the best long-term interests of the nation. In truth, our very survival as a nation has been made possible only because the ultimate interpreters of the Constitution—presidents and congressional leaders, as well as judges—have repeatedly transcended the restrictive interpretations of their predecessors.

Id. at 446-47 (footnotes omitted).

²⁴ McDougal suggests that the American people in their frequent alteration of the Constitution by informal adaptation

have also been motivated by a wise realization of the inevitable transiency of political arrangements. The ultimate advantage of usage over formal textual alteration as a method of constitutional change is that, while it preserves the formal symmetry of the document, it reduces the danger of freezing the structures of government within the mold dictated by the expediencies or political philosophy of any given era. A formal amendment may be outmoded shortly after it is adopted, but usage permits continual adjustment to the necessities of national existence.

Id. at 545.

In constitutions in which the language is more detailed and its formal amendment less difficult, change by usage is the exception. See Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 998-1000 (1968).

²⁵ In innumerable respects, the division of functions between the different branches of the government and the scope of federal authority, as clearly contemplated by the Framers, have been altered by usage and prescription, without resort to formal textual amendment. "For every time that the Constitution has been amended," as Justice Byrnes has pointed out, "it has been changed ten times by custom or by judicial construction." This process of constitutional evolution has by no means been restricted to the numerous phases of government which the draftsmen deliberately left ambiguous or unsettled; in many instances the very words and phrases of the written Constitution have been given operational meanings remote from the intentions of their original penmen.

M. McDougal, *supra* note 14, at 542 (footnotes omitted). For numerous instances of alteration by usage, see *id.* at 442-75, 540-60.

²⁶ For a summary of some of the more important changes, such as the end of the Senate's role as a coordinate director of treaty negotiations and preemption by the President of the power of recognition, see *id.* at 557-60.

be in terms of the best interests of the country and not simply in the lock-step of the Framers' intent; and they will not accept that upon occasion even the clear intent of the Drafters must be abandoned without the process of formal amendment, if the Constitution is to minister successfully to needs created by changing times. Their rigidity leads as well to one final misapprehension: that to know the rule is necessarily to know the law. An understanding of what is written in the Constitution, even assuming a viable interpretation of the language, simply provides information regarding peoples' expectations about the type of conduct that is constitutional. If acts forbidden by a reasonable reading of the rules continue to be performed, it is highly unrealistic to regard the rules as complete statements of the law. To constitute "the law" the course of conduct dictated by the rules must be the one followed in actual practice.²⁷

Strict constructionists are equalled in their error by those at the opposite pole who automatically bestow the mantle of constitutionality on whatever happens to be the practice of the moment. Although the document must receive much of its meaning from sources other than its language and its interpretation must evolve to meet the differing needs of differing times, it is not simply a hollow shell whose principles are ever in flux. The goal of constitutional interpretation, as indicated, should be a reading that serves the long-term best interests of the country. In realizing that goal, serious attention should be paid the intent of the Framers for at least two basic reasons. First, the Founding Fathers may have ordained a practice which still has validity. If their design is workable, it should be respected, particularly when the constitu-

²⁷ In any particular community it is possible to observe among its constituent social processes a process of effective power, *i.e.*, decisions of community-wide impact are in fact made and put into controlling effect. . . . [T]hese effective power decisions . . . [are] of two different kinds. Some . . . are taken from simple expediency, or sheer naked power, and enforced by severe deprivation or high indulgences, whether the community members like them or not. Other decisions, however, are taken in accordance with community expectations about how such decisions should be taken: they are taken by established decision-makers, in recognized structures of authority, related to community expectations of common interest, and supported by enough effective power to be put into effect in consequential degree.

It is these latter decisions, those taken in accordance with community expectations and enforced by organized community coercion, which are . . . most appropriately called "law." In this conception law is, thus, a process of decision in which authority and control are conjoined. Without authority, decision is but arbitrary coercion, naked power; without control, it is often illusion. McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1, 4 (1966); *accord*, Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 666 (1968).

tional language, read in light of the intent of the Drafters, seems to be clear. A better way of doing the job might be devised, but the design of the Framers should be honored lest its disregard undermine public confidence in the rule of law. The general public tends to take a strict view when confronted with clear language and intent,²⁸ unless they feel that the applicable provision is blatantly detrimental to their interests.

Accordingly, when conspicuous government officials disobey or appear to disobey the rules in their conduct of public affairs, the general public's respect for prevailing norms suffers.²⁹ The government, one of whose major objectives must be the creation and maintenance of a rule of law, simply cannot ignore or seem to ignore the norms applicable to its proceedings without undermining the entire system. Thus, if it appears that the President is flouting the Constitution in his use of American troops abroad, an effect on lesser mortals will be unavoidable.³⁰ If the document seems to be irrelevant to him, more

²⁸ Direct support for this proposition would be comforting, since it figures in this Article's subsequent analysis. Unfortunately, the only authority offered here is personal opinion. It seems that most people feel that the rule of law necessitates undeviating adherence to the intent of the law-giver, until the language in which he embodied his intent is physically changed in accordance with formal processes of revision. Nothing less will suffice to assure these people that our society is governed according to law, and not pursuant to the whim of public officials. Thus, pending formal amendment of the language of the Framers, most people believe that their intent ought to remain binding. Cf. P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 78-81, 258-67 (1965) (the crisis of confidence engendered by judicial overruling of well-established doctrines).

²⁹ Since it would be virtually impossible to obtain the requisite level of obedience by coercion, the stability of our legal system depends largely upon voluntary obedience to the law. Thus, most people do not base their acceptance of laws primarily on fear that disobedience will result in apprehension and punishment. See H. HART, *THE CONCEPT OF LAW* 79-88 (1961). On the contrary, public support for the legal system is motivated by a variety of other factors—habit, desire to conform, belief that a given law embodies a moral command or that it serves individual self-interest, awareness that the legal system depends on acceptance of its norms, and assurance that other people and institutions are obeying the rules applicable to them. Should it appear that some elements of society disregard the law, then the willingness of their fellows to honor norms they find to be inconvenient or ill-advised will be notably lessened.

³⁰ Edward H. Levi recently noted:

Our most pressing failure relates to our attitude toward the legal system. Civil disobedience and indifference to law have become sufficiently widespread to reflect and raise essentially naive questions as to the function of law in a modern society. It is paradoxical that the civil rights movement which in the almost immediate past built upon law, and depended so much on the morality of acquiescence, should now, to some extent, be the vehicle for the destruction of this acquiescence. *The undeclared Viet Nam war has further emphasized the morality of illegal acts . . .*

Levi, *Unrest and the Universities*, U. CHI. MAGAZINE, Jan./Feb. 1969, at 25 (emphasis added).

humble rules will be regarded with equal disdain by many of his fellow citizens.³¹

Thus, absent necessity to abandon old constitutional patterns, the contemporary interpreter would do better to follow them, reshaping and extending them to meet the needs of the times.³² Though the Framers may not have conceived of the conditions to which one of their provisions now applies, if its underlying principle remains tenable, the principle should be carefully and skillfully preserved. For example, if it seems clear that the Framers intended Congress to have a meaningful voice in decisions regarding the use of American troops abroad, then every effort should be made to give life to that guiding principle, using procedures attuned to contemporary needs.³³

Those who view the Constitution as a hollow shell, accordingly, overlook the framework which the document does frequently provide, and they fail to accord its language and the Framers' intent the weight they are due if the long-term best interests of the country are to be served. The Shellists' emphasis on the practice of the moment also leads them to a final misapprehension: that to know what is actually done is necessarily to know the law. Practice, unless it is in accord with the rules, is simply the exercise of naked power, not law.

Americans have traditionally been concerned with constitutional rules. They want governmental power to be exercised in the prescribed manner. Much of the controversy surrounding the Vietnam War concerns not simply the merits of the conflict but also the constitutionality of the United States involvement. When practice is deemed to fall outside the rules, efforts will be made to bring it back within. Accordingly, immediate past precedent may or may not be upheld; its existence is not conclusive of its legality.

In this regard, it is well to remember that most government officials—including the President—voluntarily try to stay within the bounds of the constitutional provisions applicable to them.³⁴ Peoples' expectations

³¹ The President could, of course, argue that he is attempting to amend the Constitution by usage, but the subtleties of such an argument would probably be lost on the general public. See note 28 *supra*.

³² Moreover, adherence to established constitutional patterns may often increase the actor's political power and prestige. See note 180 *infra*.

³³ Cf. L. FULLER, *THE MORALITY OF LAW* 84-85 (1964).

³⁴ See note 74 *infra* and accompanying text. A useful analogy can be drawn between presidential adherence to constitutional law in matters such as the use of force abroad and nations in their obedience to customary international law. As a rule, both appreciate the need to support the prevailing norms, and thus voluntarily accept them. Rarely would either, if accused of illegal activity, fail to deny the charge vociferously, adducing legal argument to justify the action. But since the precise demands of con-

regarding the nature of the rules strongly influence the type of action actually taken, just as practice, in turn, shapes expectations. Constitutional law, thus, is found where community understanding of the type of conduct required by the rules and what actually happens are largely synonymous.³⁵

One effective way to approach the constitutional question at hand is to study separately its practice and rule aspects, bringing them together after the features of each have been determined. Thus, an attempt needs to be made to learn the extent to which the President has unilaterally decided to commit American troops to foreign combat, irrespective of rule-based expectations regarding the constitutionality of his action. Once aware of what has in fact been the practice, there must be an attempt to determine what type of presidential conduct people have believed to be constitutional. If practice is then found to diverge significantly from the rules, the two courses must be reconciled in terms of the best interests of the country. Should practice be long-established and responsive to the needs of the times, the constitutional rules should evolve to meet it. Should practice, however, have needlessly and recently abandoned principles set out in the language of the document or evidenced by the Framers' intent, and embodied in continuing expectations, it should be altered to accord with the rules. A thorough examination of the nature just suggested would require several volumes.³⁶ For the purposes of this Article, it will suffice to trace

stitutional and international rules are often vague, and since there is little chance of clarification by judicial or legislative action (formal amendment in the case of the Constitution), both the President and nations have latitude in interpreting the relevant provisions. Each tends to define, fill in and alter the legal contours by a process of claim and concession. If presidential assertions of authority are acknowledged and acquiesced in by Congress, the electorate, and, should they choose to comment, the courts, the Executive assumes the power as his constitutional due. Even presidential claims rejected by one or more of these groups remain as potential sources of law, especially if the President has given them more than verbal substance. Nations proceed by a similar process of claim and concession. Finally, both the President and states are likely to ignore well-established rules when confronted with crisis. See M. Kaplan & N. Katzenbach, *Law in the International Community*, in 2 *THE STRATEGY OF WORLD ORDER* 34, 35-37 (R. Falk & S. Mendlovitz eds. 1966).

³⁵ See note 27 *supra* and accompanying text.

³⁶ All instances in which American troops were employed abroad would have to be examined to pinpoint the effective decision-makers. Expectations would have to be sought from a wide range of sources—"pre-1787 negotiations, subsequent practice by all branches of the government, statutory interpretations, judicial decisions and opinions, and the vast literature of expressions, formal and informal, about preferred public order." McDougal, *supra* note 27, at 18. And an intensive investigation would be required to identify the long-term best interests of the country and their policy implications.

briefly the allocation of power between the Executive and Congress since 1789, considering both the factors contributing to the present high state of presidential control and the existing restraints upon it. One constitutional rule, the congressional power to declare war, will be treated in detail, while other relevant provisions will receive more cursory attention. Finally, an attempt will be made to view practice and rules together in light of the long-term best interests of the United States, outlining what seem to be the present constitutional limits upon the President.

THE BALANCE BETWEEN PRESIDENT AND CONGRESS: PRACTICE

Historical Background

At the risk of gross over-simplification, three historical stages may be identified in the President's progress toward virtually complete control over the commitment of American troops abroad. The first ran from independence until the end of the nineteenth century and was a time of genuine collaboration between the President and Congress, and of executive deference to legislative will regarding the initiation of foreign conflicts. Numerous figures are bruited about as representing the number of times during the course of American history that the President has unilaterally employed force abroad. One total frequently cited lists 125, the great bulk occurring in the nineteenth century.³⁷ Their existence, it is often said, establishes that presidential war-making is no twentieth century *parvenu*.³⁸

³⁷ SENATE COMM. ON FOREIGN RELATIONS, 82d CONG., 1ST SESS., POWERS OF THE PRESIDENT TO SEND ARMED FORCES OUTSIDE THE UNITED STATES (Comm. Print 1951). The report states in part: "Since the Constitution was adopted there have been at least 125 incidents in which the President, without congressional authorization, . . . has ordered the Armed Forces to take action or maintain positions abroad." *Id.* at 2. For a similar finding, see J. ROGERS, *WORLD POLICING AND THE CONSTITUTION* (1945), which describes 100 uses of American troops abroad between 1789 and 1945, and concludes that most of them were ordered unilaterally by the Executive. Since the publication of both these studies, there have been numerous additional instances of presidential use of force abroad, some of major impact.

³⁸ The State Department, in its defense of the Vietnam War, has stated:

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the "undeclared war" with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential

As precedent for Vietnam, however, the majority of the nineteenth century uses of force do not survive close scrutiny. Most were minor undertakings, designed to protect American citizens or property, or to revenge a slight to national honor, and most involved no combat, or even its likelihood, with the forces of another state.³⁹ To use force abroad on a notable scale, the President of necessity would have had to request Congress to augment the standing Army and Navy.⁴⁰ Executives of this era, in any event, were generally reluctant to undertake military efforts abroad without congressional approval. Accordingly, there are instances during this period of presidential refusals to act because Congress had not been consulted or because it had withheld approval, and there are many occasions of executive action pursuant to meaningful congressional authorization.⁴¹

Some of the instances grouped within the 125 presidential uses of force are erroneously included, chiefly the Naval War with France of 1798-1800 and the Barbary Wars of 1801-05 and 1815, which were

consequences so threatening to the security of the United States that he should act without formally consulting the Congress.

Meeke, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T STATE BULL. 474, 484-85 (1966).

³⁹ For a description of the instances involved, see J. ROGERS, *supra* note 37, at 53, 56-67, 93-112; WORMUTH at 21-26. For a discussion of these events, see E. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 144-50 (1947); R. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 96-98 (1962) [hereinafter cited as LEOPOLD]; Note, 81 HARV. L. REV., *supra* note 2, at 1787-89.

⁴⁰ The Executive's power to deploy American forces as their Commander-in-Chief posed few problems. During virtually all of the 19th century the President moved military units at will and without protest; in so doing, he rarely exposed himself to the charge of provoking another nation to fire the first shot. Through his secretary of the navy he assigned permanent cruising squadrons to the Mediterranean in 1815, the Pacific in 1821, the Caribbean in 1822, the South Atlantic in 1826, the Far East in 1835, and the African coast in 1842. The purpose of these squadrons was to show the flag, protect shipping, and encourage commerce. No contingents were regularly stationed on foreign soil, either to garrison an overseas base or to honor a diplomatic commitment.

LEOPOLD at 99. Presidential deployment of armed forces did, however, impinge upon congressional power to declare war in Polk's dispatch of General Taylor into territory claimed by Mexico and in McKinley's dispatch of the *Maine* to Havana. Moreover, usurpation was threatened in Grant's abortive attempt to annex Santo Domingo and in Harrison's 1891 dispatch of a cruiser to seize Chilean ships that had violated American neutrality laws. See *id.* at 99-102, 117.

⁴¹ See the instances cited in LEOPOLD at 97-98; WORMUTH at 6-20.

From 1836 to 1898, except for the administrations of Polk, Lincoln, and Cleveland, Capitol Hill tended to provide the initiative for the development of foreign policy. When, for example, the executive advocated expansionist policies—Pierce in Cuba, Seward in Alaska, Grant in Santo Domingo—he instantly encountered violent congressional opposition.

A. SCHLESINGER, *supra* note 13, at 24.

conducted with specific congressional approval.⁴² When presidential orders to American naval commanders exceeded the congressional mandate during the 1798-1800 hostilities, the Supreme Court in *Little v. Barreme*⁴³ ordered damages paid to the owner of a ship seized pursuant to executive instruction. It is unlikely, however, that President Adams was attempting by his conflicting orders to expand his war powers at the expense of Congress, since he had previously divested himself of his role as Commander-in-Chief and, with Senate approval, conferred it upon George Washington. President Thomas Jefferson was almost as self-effacing; before receiving congressional approval of the First Barbary War, he refused to permit American naval commanders to do more than disarm and release enemy ships guilty of attacks on United States vessels.

The era in question included three formally declared wars.⁴⁴ The decision to enter the War of 1812 was made by Congress after extended debate. Madison made no recommendation in favor of hostilities, though he did marshal a "telling case against England" in his message to Congress of June 1, 1812. The primary impetus to battle, however, seems to have come from a group of "War Hawks" in the legislature.⁴⁵ Similarly, McKinley was pushed into war with Spain in 1898 by con-

⁴² With respect to the Naval War: "President Adams took absolutely no independent action. Congress passed a series of acts which amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes." WORMUTH at 6; *accord*, LEOPOLD at 95. The acts were quite detailed regarding the nature of the hostilities authorized. See WORMUTH at 6-9; LEOPOLD at 95.

Though Jefferson unilaterally dispatched a naval squadron to the Mediterranean to protect American shipping from attack by Tripoli, he refused to permit offensive action until so authorized by Congress—much to Alexander Hamilton's outrage. See note 148 *infra*. Accordingly, an act was passed authorizing the President "fully to equip, officer, man and employ such of the armed vessels of the United States" as he found necessary to protect American commerce; to instruct the commanders of these ships to "subdue, seize, and make prize all vessels, goods, and effects, belonging to Bey of Tripoli, or to his subjects;" to commission privateers, and to take whatever "other acts of precaution or hostility as the state of war will justify." WORMUTH at 9-10; see LEOPOLD at 95-96.

When Algiers in 1815 attacked American shipping, President Madison obtained authorization to use force similar to that given in 1802 against Tripoli. WORMUTH at 10. Significantly, Congress refused the President's request for a formal declaration of war, granting him instead simply approval for limited hostilities. LEOPOLD at 96.

⁴³ 6 U.S. (2 Cranch) 169 (1804). See the discussion of *Little* in WORMUTH at 8-9.

⁴⁴ The greatest conflict of the period, the War Between the States, did not involve the use of force against foreign countries, though it gave rise to expectations about presidential power which have application in the foreign context. See notes 146, 158 *infra*.

⁴⁵ See LEOPOLD at 62-64, 94; A. SCHLESINGER, *supra* note 13, at 23.

gressional and popular fervor, though he himself inadvertently stoked their passion by sending the *Maine* to Havana. Full congressional authorization was given before the initiation of hostilities.⁴⁶ Congress was, on the other hand, presented with a presidential *fait accompli* in 1846. Polk provoked the Mexicans into a conflict which the legislators felt compelled to approve, particularly in light of the colored version of the facts presented by the President.⁴⁷ But within two years, the House of Representatives censured Polk for his part in the initiation of the conflict.⁴⁸

The second of the three stages mentioned previously began at the turn of the century and continued into World War II. Close collaboration between the Executive and Congress became the exception, as did presidential deference to congressional views on the use of force abroad. The legislators, nonetheless, remained a strong force in the shaping of foreign policies. Their influence, unfortunately, was often negative, obstructing the efforts of Presidents who saw a need to use American power to defend nascent security interests abroad. American military capacity had grown to the point, however, that the Executives had notable capacity for maneuver without prior congressional action.

During the first two decades of the twentieth century, Congress generally chose to watch quietly as the President unilaterally intervened in the Western Hemisphere, presumably because majority sentiment favored militant American hegemony over this area.⁴⁹ Presidents

⁴⁶ Congress first passed a joint resolution authorizing the President to use armed force if necessary to insure Cuban independence and Spanish withdrawal from the island and then followed with a formal declaration of war when Spain recalled its ambassador from Washington and showed no sign of leaving Cuba. See LEOPOLD at 117, 169-79.

⁴⁷ Until the last decade of the 19th century "[o]nly in the case of Texas and the Mexican War did the executive encroach upon the legislature's constitutional prerogative" by the manner in which he deployed American forces. LEOPOLD at 99. Leopold concludes that Polk "remains the sole president in history who, by needlessly deploying the armed forces, provoked an attack by a potential enemy." *Id.* at 101. But he also notes that virtually no protest was voiced in Congress during the first three months of General Taylor's advance into disputed territory and argues that "the silent acquiescence by the legislature destroys some of the complaint that the executive had usurped its war-making powers." *Id.*

⁴⁸ By an 85-81 vote the House ruled that the war had been "unnecessarily and unconstitutionally begun by the President of the United States." CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848). See WORMUTH at 11.

⁴⁹ It was in November, 1903, in connection with the revolution in Panama, that a President of the United States first succeeded in exercising the war-making power without the consent of Congress. The purpose for which such power was

enjoyed similar freedom in the Far East⁵⁰ although they exercised it less robustly. The first wholly unauthorized executive war-making, nonetheless, took place in China during the Boxer Rebellion at the turn of the century.⁵¹

During most of the 1920's and 1930's American force abroad was used sparingly, in part because of a more relaxed approach to the difficulties of the Latin states and in part as a result of a strong popular desire to

exerted on this occasion was so popular a one that it was acquiesced in, with only slight objections, by both Congress and the public, and a most dangerous precedent for the future was thus created.

Putney, *Executive Assumption of the War Making Power*, 7 NAT'L UNIV. L. REV. 1, 34 (May 1927).

Roosevelt, in fact, would have preferred congressional involvement in his disregard of Columbian sensibilities, but events overtook him. See LEOPOLD at 231. Though Putney seems inaccurate in stating that Roosevelt's activities in Panama marked the first instance of unauthorized presidential war-making, see note 51 *infra* and accompanying text, it did signal the beginning of significant military intervention in Latin states, generally pursuant to unilateral presidential command. See H. CLINE, *THE UNITED STATES AND MEXICO* 155-62, 174-83 (rev. ed. 1965); LEOPOLD at 251, 316-21; Putney, *supra* at 33-41; Note, 81 HARV. L. REV., *supra* note 2, at 1789-90.

⁵⁰ Before the Spanish-American War the expansionist spirit had been confined mainly to navalists and their intellectual camp-followers. The conquest of the Philippines, however, opened the eyes of the American business man in the Far Eastern markets. With the acquisition of the Philippines our line of defense was thrust into the vicinity of China and Japan. Does this seem a strange lunge for a republic which vaunted its isolationism? If so, it can be explained by saying that our isolationist barricade had only one wall. We shut only our eastern door, for Americans marched out of their house in other directions. United States history is replete with exploits, successful and abortive, against the territories of our southern, western and northern neighbors. Isolationism accelerated rather than inhibited continental expansionism, for, in the beginning, we wanted to drive Europe out of North America. This impulse created a restlessness that drove Americans westward to San Francisco and in due course beyond the Golden Gate to Honolulu and Manila.

S. ADLER, *THE ISOLATIONIST IMPULSE: ITS TWENTIETH CENTURY REACTION* 19-20 (1957); *accord*, AMERICAN HERITAGE, *supra* note 13, at 282.

⁵¹ McKinley committed several thousand American troops to the international army which suppressed the Chinese nationalists and rescued western nationals trapped in Peking. The President was accused of usurping congressional power to declare war by a few democrats, but "since the legislature had adjourned before the crisis broke and since neither party desired a special session in an election year, these complaints produced no results." LEOPOLD at 117. For more detail, see *id.* at 215-18; J. ROGERS, *supra* note 37, at 58-62.

To an extent, McKinley is vulnerable to a charge of unilateral war-making in his suppression of the Aguinaldo-led attempt to win independence for the Philippines during the years 1899-1902. According to Rogers, *id.* at 112, 126,000 United States troops were employed in putting down the movement. The decision to insist that Spain surrender all of the Philippines to the United States was made by the President alone, and Senate approval of the treaty of peace with Spain did not constitute a clear endorsement of American control of the islands. For discussion, see LEOPOLD at 150-52, 180-88, 212.

avoid involvement in the struggles of the world's other great powers⁵²—the pristine American psyche had been gravely offended by the tawdry aftermath of World War I. The mood of the country showed itself vividly when Japanese bombers deliberately sent an American gunboat, the *Panay*, to the bottom of the Yangtze River on December 12, 1937. Quite unlike the popular reaction to attacks on the *Maine* and on destroyers in the Tonkin Gulf, the *Panay* incident gave immediate and tremendous impetus to a congressional attempt to amend the Constitution to subject war decisions to popular referendum, except in case of invasion.⁵³

Congressional devotion to neutrality and to nonintervention in the affairs of other states, especially those in Europe, made intelligent use of American influence difficult during and after the First World War. Wilson's troubles in bringing American power to bear against Germany, however, were minor compared to those experienced by Roosevelt under far more desperate circumstances.⁵⁴ Both Presidents, but especially Roosevelt, were forced to resort to deception and flagrant disregard of Congress in military deployment decisions because they were unable to rally congressional backing for action essential to national security.⁵⁵

⁵² Leopold states that Congress had few complaints about presidential use of force abroad during most of the interwar years. The placidity can be explained, partly by the peace which the United States enjoyed during this interlude and partly by the modification of its protectorate policy in the Caribbean. The republic did not fight any wars, declared or undeclared, and there was a marked reduction in the sort of police action that had been frequent before 1921. Nor did the deployment of ships and men lead to congressional charges of presidential warmongering, as was the case after 1939. On one point the legislators continued to agitate. At every session, amendments to the Constitution were proposed to alter the war-making clauses. The most frequent were designed to halt profiteering, to bar using conscripts outside the continental United States, to require that a declaration of war pass each house by a three-fourths vote rather than a simple majority, and to hold a popular referendum, except in cases of invasion, before a congressional decision to go to war could take effect.

LEOPOLD at 416-17.

⁵³ See *id.* at 416-17, 534.

⁵⁴ The Neutrality Acts of 1935, 1936 and 1937 made no distinction between an aggressor and his victim; under the acts, Americans, especially the President, were to avoid any dealings which might involve the United States in another war. These laws, and the congressional and popular attitudes which they represented, placed a disastrous limitation on Roosevelt's attempt to use American power and influence to head off the impending crisis. See the accounts in S. ADLER, *supra* note 50, at 239-73; LEOPOLD at 504-09, 526-28, 531, 537-42, 557-65.

⁵⁵ Among his major unilateral steps, Roosevelt in 1940 exchanged fifty destroyers for British bases in the Western Atlantic; in 1941 he occupied Greenland and Iceland, ordered the Navy to convoy ships carrying lend-lease supplies to Britain, and on

The trauma of the Second World War and of the Cold War led to a third stage in which Congress—in penance for its policies during the twenties and thirties and fearful lest its interference harm national security⁵⁶—left direction of foreign affairs largely to the President, with the exception of a period of uproar during the early fifties.⁵⁷ As a rule, the legislators have presented no obstacles when the President wished to use force abroad, or to pursue policies likely to lead to its necessity. The Cold War has enjoyed bipartisan backing, both when the Executive acted wholly without congressional consent⁵⁸ and when he had authorization of sorts.⁵⁹ The decisions to employ arms off For-

September 11 of that year declared, in effect, that henceforth the United States would wage an air and sea war against the Axis in the Atlantic. See the accounts in E. CORWIN, *supra* note 39, at 22-34; LEOPOLD at 559-80; J. ROGERS, *supra* note 37, at 122-23.

After Germany's resumption of unrestricted submarine warfare, Woodrow Wilson in 1917 armed American merchantmen and instructed them to fire on sight. The President had sought congressional approval but had been thwarted by a Senate filibuster. He proceeded nonetheless, though he later admitted that his course was "practically certain" to lead to United States involvement in war. Message to Congress, Apr. 2, 1917. 55 CONG. REC. 102 (1917).

⁵⁶ One disquieting feature of the cold war was that perpetual crisis inhibited discussion. Criticism of the administration was apt to be interpreted as evidence of disloyalty; it was condemned as bringing aid and comfort to the enemy. The psychology of actual war—that of being either for or against one side—was applied to a situation that continued year after year.

AMERICAN HERITAGE, *supra* note 13, at 287.

⁵⁷ A "Great Debate" over Truman's authority to send troops to Korea and Western Europe raged for three months in early 1951, culminating in a Senate resolution calling for congressional authorization before the dispatch of further troops to fulfill NATO commitments. The attempt under Senator John Bricker's aegis to limit the scope of treaties and the use of executive agreements—to reassert a strong congressional influence in the shaping of foreign policy—came to naught in 1954, after Eisenhower made clear his unalterable opposition. See LEOPOLD at 660-61, 716-17. The hysteria bred by Senator Joseph McCarthy, playing upon frustrations and fears engendered by developments in China, Eastern Europe and Korea, came close to rendering Truman incapable of conducting an effective foreign policy during the latter years of his presidency.

⁵⁸ The Korean War, for example, was entered with no prior congressional authorization, and never received even *ex post facto* blessing, perhaps because it was not an unpopular conflict at its inception. LEOPOLD at 683, notes that Truman's initial commitment of naval and air forces was met with "some grumbling in the Senate about the war-making power," but that "[t]he House broke into applause on hearing the news." Senator Taft questioned the President's right to initiate the use of American forces without congressional approval, but, according to Leopold, "he blamed the method, not the move, and said he would have voted for armed intervention if that issue had been presented." *Id.*

⁵⁹ Eisenhower was authorized in January 1955 to use force if necessary to defend Formosa and its outlying islands, and in March 1957 to block communist aggression in the Middle East. A joint congressional resolution adopted in October 1962 authorized President Kennedy to use force if necessary to prevent the spread of communism from

mosa, in Korea, Lebanon, Cuba, the Dominican Republic and Vietnam were essentially the President's, as were the policies that led Washington to feel that force was essential.

Nonetheless, Congress has played an indispensable role in postwar foreign affairs. Without congressional willingness to back their policies, Presidents could have done little. Moreover, well aware that Congress could at any time hamstring their initiative by refusing requisite legislation or appropriations, Presidents have consistently conferred with congressional leaders when shaping policy and have sought their advice—or at least informed them before the fact—when deciding to employ force abroad. The point, however, is that despite its latent power, Congress has had little part in shaping American foreign policy over the last quarter century, particularly where questions of the use of force are concerned. Foreign aid may have been subjected to an annual blood-letting but not the President's capacity to commit and maintain troops abroad.

It is possible that a fourth stage is now developing in public and congressional restiveness over Vietnam. Whether a new era will come to fruition or die with the end of the present conflict remains to be

Cuba or the development there of an externally supported military capability dangerous to the security of the United States. And President Johnson received in August 1964 a joint resolution providing in part that "the United States is . . . prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." Vietnam Joint Resolution, 78 Stat. 384 (1964).

When force was used in Lebanon, in the Atlantic off Cuba during the Missile Crisis and in Vietnam, however, it was unclear to what extent the respective Executives based their action upon prior congressional approval and to what extent upon claims of inherent presidential power. It seems likely that the three Presidents would have acted as they did, even without the resolutions. Eisenhower, in fact, did not claim to be acting pursuant to the Middle East Resolution when he intervened in Lebanon in July 1958, presumably because Congress had authorized force only when the attack came from a communist state. Johnson relied more heavily on the Gulf of Tonkin resolution, since in terms of its language it certainly authorized the war he waged. See the discussion in LEOPOLD at 792-96; Note, 81 HARV. L. REV., *supra* note 2, at 1792-93.

The executive interpretation of the Gulf of Tonkin Resolution has been bitterly contested as a misreading of congressional intent. *E.g.*, Velvel, *supra* note 2, at 472-79. The fact that this controversy could arise, however, points to a fundamental characteristic of recent congressional participation in decisions regarding the use of force. With the Gulf of Tonkin Resolution as perhaps the most egregious example, the acts in question have tended to be blank checks, leaving so much to presidential discretion as to vitiate their impact as anything other than demonstrations of national unity in time of crisis. See the discussion in WORMUTH at 43-53; Pusey, *The President and the Power To Make War*, THE ATLANTIC MONTHLY, July, 1969, at 65; Note, 81 HARV. L. REV., *supra* note 2, at 1802-05.

seen. Should it come to fruition, it is difficult to determine whether it will be a return to nineteenth century collaboration or early twentieth century obstruction. Much will depend on Congress' ability to act decisively and quickly and on the nature of its decisions. And much will rest not only on the willingness of the President to involve Congress in the making of foreign policy but also upon congressional insistence that he do so.

The Factors Contributing to Presidential Ascendancy

To talk of causation is always hazardous business. It seems, however, that the growth of presidential power over foreign relations⁶⁰ has resulted largely from factors which can be grouped into three broad categories: historical developments; institutional aspects of the presidency which have made it more responsive to these developments than Congress; and finally, the greater willingness of many Presidents, than many Congresses, to exercise their constitutional powers to the fullest—and perhaps beyond. Among the relevant historical forces, the most important three are the ever-increasing pace, complexity and hazards of human life.⁶¹ To meet the heightened pace of contemporary events, a premium has been placed on rapid, decisive decision-making. To deal with the complexity of the times, government by experts—men with access to relevant facts and with the capacity to fashion appropriate policies—has increasingly become the norm.⁶² To survive the recurrent crises, there is emphasis on leadership which is always ready to respond and which can act flexibly and, if necessary, secretly. Moreover, there is continual concern that government be able to implement effectively whatever policies it adopts.

The presidency enjoys certain institutional advantages which make it a natural focus for governmental power, especially during times of rapid change, complexity and crisis. These advantages stem largely from the fact that the President, unlike Congress, is one rather than many. As a single man, always on the job, he is able to move secretly

⁶⁰ Executive control over domestic affairs has also increased, but presidential dominance in this area is notably less complete than in external matters. See Schlesinger, *The Limits and Excesses of Presidential Power*, SATURDAY REV., May 3, 1969, at 18-19.

⁶¹ The increased pace, complexity and hazards have resulted from the demographic, technological and ideological explosion of the past hundred years. These factors have also produced a burgeoning interaction and interdependence among the peoples of the world. See note 19 *supra*.

⁶² See Bracher, *Problems of Parliamentary Democracy in Europe*, 93 DAEDALUS 179, 183-85 (Winter 1964).

when the need arises, and to combine rapid, decisive action, with the flexibility in policy demanded by quickly changing developments. His singularity and continuity also facilitate long-range planning. Because he is at the center of an unsurpassed information network and because he is assisted by countless experts,⁶³ the possibility exists that his decisions will take into account the complexity of the problems faced. As the Chief Executive, he has more leverage in implementing his decisions than any other organ of government. These institutional advantages, though important in domestic affairs, are unusually significant in the conduct of foreign relations where unity, continuity, the ability to move swiftly and secretly, and access to up-to-date information are more often of the essence.⁶⁴

A second historical development fundamental to the rise of the presidency has been the growing ability of the government to communicate directly with the governed. Beginning with an upsurge in newspaper circulation in the late 1800's and continuing with radio, motion pictures and now television, the capacity of decision-makers to go directly to the electorate has greatly increased, providing a tremendous opportunity to mold public opinion. Heightened ability to communicate directly with the people has redounded largely in favor of the President. As a single rather than a collective decision-maker, he provides an easy target for the public and the media to follow. As the country's chief initiator and implementor, rather than its leading deliberator and legislator, he provides a more exciting and thus newsworthy target. As the country's master of ceremony and the head of its first family, he commands attention. Walter Bagehot, in his celebrated treatment of the English constitution, adopted a phrase, "intelligible government," which describes contemporary presidential government perhaps better than it did the constitutional monarchy of Victoria. Bagehot argued that the great virtue of a monarchy, as opposed to a republic, was that it provided the people with a government which they could understand—one which acted, or so they thought, with a single royal will and provided a ruling family to whom

⁶³ For a discussion of the establishment, elements and functions of the Executive Office of the President, see C. ROSSITER, *supra* note 21, at 127-34.

⁶⁴ See THE FEDERALIST No. 64, at 273-74 (C. Beard ed. 1948) (J. Jay); *id.* No. 75, at 319-20 (A. Hamilton). It has been frequently stated, by de Tocqueville and Woodrow Wilson among others, that the power of the executive grows in relation to a nation's involvement in foreign affairs. See AMERICAN HERITAGE, *supra* note 13, at 265; C. ROSSITER, *supra* note 21, at 85-86.

they could relate.⁶⁵ The President provides intelligible government par excellence, and, unlike Victoria, he rules as well as reigns. Aware of their newsworthiness, Presidents seek to use it to further their ends.⁶⁶ The presidential press conference, special address and grand tour have provided effective tools for winning public support for executive policies,⁶⁷ especially those dealing with foreign affairs.⁶⁸

⁶⁵ The best reason why Monarchy is a strong government is, that it is an intelligible government. The mass of mankind understand it, and they hardly anywhere in the world understand any other. It is often said that men are ruled by their imaginations; but it would be truer to say they are governed by the weakness of their imaginations. The nature of a constitution, the action of an assembly, the play of parties, the unseen formation of a guiding opinion, are complex facts, difficult to know, and easy to mistake. But the action of a single will, the fiat of a single mind, are easy ideas: anybody can make them out, and no one can ever forget them.

W. BAGEHOT, *THE ENGLISH CONSTITUTION* 30 (World's Classics ed. 1949). Bagehot admitted that there exist an "inquiring few" for whom "intelligible government" is less important, because they can handle the "complex laws and notions" of constitutional rule. *Id.* Presumably, the "inquiring few" constitute a significant portion of the present American electorate.

⁶⁶ Theodore Roosevelt was the first President to appreciate fully and capitalize upon the Executive's appeal to the media. For an account of Roosevelt's use of the press, see *AMERICAN HERITAGE*, *supra* note 13, at 266-67.

⁶⁷ See C. ROSSITER, *supra* note 21, at 33, 114-18. A French commentator has observed:

[I]n the realm of information, the political system of the United States has a real institution unforeseen in the Constitution: the presidential press conference. The importance of the press conference as a test of the American Chief Executive has often been noted. It should be emphasized that the institution of the press conference makes the press the representative of public opinion and gives to the press the role of intermediary between the citizens and their government which classic theory reserved to the legislature. It is characteristic that American senators and representatives often put their questions to the President by getting friendly or sympathetic reporters to ask certain questions at a presidential press conference.

Grosser, *The Evolution of European Parliaments*, 93 *DAEDALUS* 153, 159 (Winter 1964).

⁶⁸ The foreign tour focuses attention on the President and, if successful, enhances his political stature, thereby promoting his policies. Inherent in most foreign relations pronouncements of the Executive, particularly those dealing with the use of force, is an opportunity to "shield and enhance his authority by wrapping the flag around himself, invoking patriotism, and national unity, and claiming life-and-death crisis." Schlesinger, *supra* note 60, at 18. John Keunedy's dramatic address to the nation on October 22, 1962, certainly ranks among the most effective uses of the media to rally support for a presidential decision to use force abroad.

Far more than in domestic affairs, contemporary Presidents seem willing to argue their foreign policies directly before the people. Grosser, *supra* note 67, at 159, comments:

[T]he American presidential system, with the separation of powers, virtual direct election of the President and his nonparticipation in congressional debates, facilitates . . . recourse to a means of disseminating information that bypasses the legislature; but the situation is a phenomenon of modern civilization and not of institutional machinery. "The President from time to time shall report to the Congress on the State of the Union." The Founding Fathers certainly did not

A third force enhancing the position of the Executive has been the democratization of politics,⁶⁹ primarily a result of the way in which our political parties developed. While the party system has made increasingly democratic the process of electing the President, and given him a natural role as the external leader of Congress, it has done little to facilitate decisive action by the legislators and has left them exposed to the play of special interests.⁷⁰ The President rather than Congress has come to be seen as the symbol of national unity, as the chief guardian of the national interest, and as the most democratic organ of government.⁷¹ Consequently, the capture of the presidency has become the primal objective of American politics.

It was not unnatural that the focus of party politics became the quest for the presidency, particularly in view of its notable power and the Presidents' unusual capacity to provide the heroes and folklore needed to cement party followers and the country into a cohesive whole.⁷² Nor was democratization of the presidential nomination and election processes an abnormal development, since the President, institutionally, is the sole politician with a national constituency. This reality was appreciated and exploited first by Andrew Jackson, but received perhaps its classic statement from James K. Polk in his final annual message to Congress:

If it be said that the Representatives in the popular branch of Congress are chosen directly by the people, it is answered, the people

intend this to mean only the annual message to Congress. In the Cuban crisis of October, 1962, a statement to Congress would have corresponded to the text of the Constitution, rather than a televised talk to the nation.

⁶⁹ See C. ROSSITER, *supra* note 21, at 88-89.

⁷⁰ See C. ROSSITER, *PARTIES AND POLITICS IN AMERICA* 17-24, 60-61, 62 (1960).

⁷¹ E. CORWIN, *supra* note 14, at 307, states in resume:

In short, the Constitution reflects the struggle between two conceptions of executive power: that it ought always to be subordinate to the supreme legislative power, and that it ought to be, within generous limits, autonomous and self-directing; or, in other terms, the idea that the people are *re-presented* in the Legislature *versus* the idea that they are *embodied* in the Executive. Nor has this struggle ever entirely ceased, although on the whole it is the latter theory that has prospered. . . . "Taken by and large, the history of the presidency has been a history of aggrandizement."

⁷² According to C. ROSSITER, *supra* note 21, at 107, the great Executives are more than eminent characters and strong Presidents. They were and are luminous symbols in our history. We, too, the enlightened Americans, feel the need of myth and mystery in national life And who fashioned the myth? Who are the most satisfying of our folk heroes? With whom is associated a wonderful web of slogans and shrines and heroics? The answer, plainly, is the six Presidents I have pointed to most proudly.

For a discussion of the folklore of the Presidency, see AMERICAN HERITAGE, *supra* note 13, at 197-208.

elect the President. If both Houses represent the States and the people, so does the President. The President represents in the executive department the whole people of the United States, as each member of the legislative department represents portions of them.⁷³

A fourth factor might best be termed good fortune—the frequent election of charismatic, far-sighted men to serve as President during times of great need. It is probably true that without crisis, it is difficult for a man to perform mighty acts. The converse—that given an emergency the incumbent Chief Executive will necessarily rise to meet it—does not hold. Some Presidents, so confronted, have been restrained by their concept of the presidency⁷⁴ and some by their ineptitude.

⁷³ Quoted in *AMERICAN HERITAGE*, *supra* note 13, at 94. A 1966 statement by Lyndon Johnson seems to go beyond Polk. The President declared that “[t]here are many, many who can recommend, advise, and sometimes a few of them consent. But there is only one that has been chosen by the American people to decide.” Schlesinger, *supra* note 60, at 17.

⁷⁴ Presidents, like most other members of the American body politic, voluntarily obey its rules. Accordingly, their concept of the limits of their constitutional powers has a great bearing on the action which they are willing to take. It seems that presidential opinion has ranged widely, from the modest views of Buchanan to the brash interpretations of Franklin Roosevelt. Taft stated the basic tenet of the former in these words: “The true view of the executive functions . . . is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary.” Quoted in E. CORWIN, *supra* note 14, at 153. Buchanan adhered rigidly to his concept of the limits of his powers, going so far as to reject an 1860 Virginia proposal for a conference of states and, pending its conclusion, an agreement between the Secessionists and the President to abstain from violence. Buchanan strongly favored the plan but refused to act, stating:

Congress, and Congress alone, under the war-making power, can exercise the discretion of agreeing to abstain “from any and all acts calculated to produce a collision of arms” between this and any other government. It would therefore be a usurpation for the Executive to attempt to restrain their hands by an agreement in regard to matters over which he has no constitutional control.

Quoted in WORMUTH at 12.

At the other extreme, Franklin Roosevelt believed that he possessed constitutional power to act even in direct opposition to existing law, if an emergency so warranted. E. CORWIN, *supra* note 14, at 251. His position resembled the executive “prerogative” formulated by John Locke “as the ‘power to act according to discretion for the public good, without the prescription of law and sometimes even against it.’” Quoted in *id.* at 8. Roosevelt’s activities leading to United States involvement in hostilities with Germany in the Atlantic were of dubious legality, if not clearly contrary to law upon occasion. See E. CORWIN, *supra* note 39, at 22-29. His September 7, 1942, dictate to Congress ordering the repeal of a certain provision of the Emergency Price Control Act was clearly in accord with the Lockian prerogative. See E. CORWIN, *supra* note 14, at 250-52.

Midway between Buchanan’s and Franklin Roosevelt’s reading of their constitutional

More Presidents than not, however, have provided the requisite leadership, with a corresponding increase in the power and prestige of the office.⁷⁵

Finally, there is a momentum to the President's burgeoning influence. With each new function that the Executive has assumed, with each crisis that he has met, with each corresponding rise in his prestige, in popular expectations, in presidential folklore and myth, the office has become more potent. The President's varied powers feed upon one another to produce an aggregate stronger than the sum of his individual responsibilities.⁷⁶

Presidential control over governmental affairs has been matched by a decline in congressional influence. Although Congress remains a powerful body, far more so than the legislature of any other sizable nation, the times in which it was able to dominate public affairs have passed. The existence of two co-equal houses militated against its ever being able to assert complete supremacy, thereby relegating the Executive to a ceremonial role. Unlike the institutional characteristics of

authority stands the "Stewardship Theory," described by Theodore Roosevelt in these terms:

My view was that every executive officer . . . was a steward of the people My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. . . . In other words, I acted for the public welfare . . . whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.

Quoted in *id.* at 153. Few today would deny that the President has at least this much authority. See *id.* at 147-58. See generally A. SCHLESINGER, *supra* note 13, at 5-13.

⁷⁵ See the discussion in C. ROSSITER, *supra* note 21, at 89-114, 145-78. Arthur Schlesinger aptly notes that most advances in presidential power have engendered a counter-reaction, so that presidential aggrandizement has by no means been an uninterrupted progress forward. A. SCHLESINGER, *supra* note 13, at 15.

⁷⁶ As Clinton Rossiter lyrically noted, during an era when executive aggrandizement was viewed with greater tranquility than today:

The Presidency . . . is a wonderful stew whose unique flavor cannot be accounted for simply by making a list of its ingredients. It is a whole greater than and different from the sum of its parts, an office whose power and prestige are something more than the arithmetical total of all its functions. The President is not one kind of official during one part of the day, another kind during another part—administrator in the morning, legislator at lunch, king in the afternoon, commander before dinner, and politician at odd moments that come his weary way. He is all these things all the time, and any one of his functions feeds upon and into all the others.

C. ROSSITER, *supra* note 21, at 41. Rossiter breaks down the various functions presently in the Executive's preserve as follows: (1) five responsibilities clearly stemming from his constitutional duties: Chief of State, Chief Executive, Commander-in-Chief, Chief Diplomat, Chief Legislator, and (2) five additional functions that have evolved over time: Chief of Party, Voice of the People, Protector of the Peace, Manager of Prosperity, and World Leader. For a discussion of each, see *id.* at 16-41.

the presidency, those of Congress have not attracted power during times of rapid change, complexity and recurrent crisis. The multitudes who make up the two houses of Congress, their constitutional task of deliberation and authorization, the decision-making process necessitated when many men are engaged in a legislative endeavor, and the diversity of the legislators' constituencies inevitably make Congress a more ponderous, public and indecisive decision-maker than the President, and one, it seems, in need of external guidance.⁷⁷

Much of Congress' present eclipse, however, stems not from such inexorable factors, but rather from its own unwillingness to reform.⁷⁸ Unlike many Presidents, who have made a studied effort to adopt procedures which would enable them to wield power effectively, Congress has generally been reluctant to part with old ways, even at the cost of diminishing influence. Congressional decision-making procedures could be streamlined, its access to information and expert advice could be appreciably heightened, and its attention could be focused more on national problems and less on local and personal matters. Moreover, its regrettable public image could be improved by skillful use of the media. Latent congressional power to investigate, to set policy and to supervise exists should Congress choose to exercise it.⁷⁹ Beyond its inaction and image, the eclipse of Congress in this century can be attributed to its proclivity, when it does act, to make decisions unresponsive to the needs of the times.⁸⁰ Thus, a reversal of congressional fortunes will require not only a capacity to act but also the ability to make sound decisions.

Restraints on the Exercise of Presidential Power

Powerful as he has become, the President remains bound by numerous restraints. Fundamental limits on his action result from his own beliefs and from his own leadership ability. As noted earlier, the Presi-

⁷⁷ Rossiter goes further to suggest that even when Congress does act effectively, the result frequently is to increase the power of the President, since the implementation of congressional policy must often be left to him. *Id.* at 87-88.

⁷⁸ See Kurland, *supra* note 2, *passim*. Kurland argues that the ultimate responsibility for congressional decline lies with the people and not the legislators, since the electorate is concerned far more with ends than means; thus the voters exert little or no pressure on Congress to see to its own institutional well-being, so long as presidential policies are popular. *Id.* at 635. Credence is given this argument by the sudden embarrassment of those elements in the academic community who found presidential prerogative quite satisfying until Vietnam. See Schlesinger, *supra* note 60, at 17.

⁷⁹ See notes 165-77 *infra* and accompanying text.

⁸⁰ See Schlesinger, *supra* note 60, at 19.

dent generally acts within the law not so much because he fears the consequences of disobedience as because he voluntarily supports the system of which it is a part. Admittedly, when the question is the extent of his constitutional powers to respond to what he views as a threat to the country, an activist Chief Executive may find an unusually broad grant of authority.⁸¹ But even if the President decides that a given course of action would be legal, it will fail miserably if he is unable to persuade⁸² those whose assistance is essential to gain support for it, for there are very few matters of consequence which can be wholly accomplished by presidential dictate. Though it is unlikely, for example, that his order to dispatch troops to a foreign conflict would be disobeyed, his power to keep the troops in the field for a sustained period rests on his ability to convince the country of the wisdom of his policies. Even should the Executive win initial support for his action, if it proves ill-advised his freedom to pursue the policy will be short-lived.

Beyond these internal restraints lie a series of external limits. The President must be careful at all times to honor the bounds set by prevailing standards of "private liberty and public morality."⁸³ Clinton Rossiter aptly states that "[i]f [the President] knows anything of history or politics or administration, he knows that he can do great things only within 'the common range of expectation,' that is to say, in ways that honor or at least do not outrage the accepted dictates of constitutionalism, democracy, personal liberty, and Christian morality."⁸⁴ Lyndon Johnson's Vietnam debacle can be traced in good part to the offense the war caused various elements in the country on these scores. Arguably, again in the wake of Mr. Johnson's experience, it seems that a contemporary Chief Executive must take almost equal care not to offend the public sense of taste and style. To overstep any of these bounds risks a loss of public support, which, once gone, is difficult

⁸¹ See the discussion of Franklin Roosevelt in note 74 *supra*.

⁸² See R. NEUSTADT, *PRESIDENTIAL POWER, THE POLITICS OF LEADERSHIP* (1960).

The President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. Here is testimony that despite his "powers" he does not obtain results by giving orders—or not, at any rate, merely by giving orders. He also has extraordinary status, *ex officio*, according to the customs of our government and politics. Here is testimony that despite his status he does not get action without argument. Presidential *power* is the power to persuade.

Id. at 23.

⁸³ C. ROSSITER, *supra* note 21, at 46.

⁸⁴ *Id.* at 70.

to recover. An undercurrent of suspicion and even hatred of the President as a potential despot runs throughout American history;⁸⁵ an administration which brings it to the surface for whatever reason sacrifices much of its future effectiveness.

Other centers of power—both by what they do and what they might do—greatly restrain presidential action. Three competing institutions are particularly important: the federal bureaucracy, Congress and the judiciary. To implement his policies, the President must have the cooperation of the civil and military personnel who actually operate the governmental machinery. Since most of the bureaucracy falls within the presidential chain of command, obtaining their obedience ought to be among his less pressing problems. Such, however, is not the case. While the move toward rule by experts has increased presidential power at the expense of congressional, it has done even more to enlarge and strengthen the “permanent government.”⁸⁶ Each incoming Executive, for example, inherits a mass of departments, agencies and committees, all committed to the expert conduct of foreign affairs. He directly appoints only the high command of most of these entities, and often has trouble controlling even his personal appointees. Feuds within the executive hierarchy and deliberate refusal by high officials to implement presidential policies are not unknown.⁸⁷

The President's difficulties with his own people are minor beside the problems he faces in persuading the permanent officials to cooperate. Most were in place before his administration took office and most will survive it. They may passively oppose presidential policy by exhibiting great reluctance to alter existing procedures and programs,⁸⁸ or they may actively seek to determine national policy by pressing forward their own plans. Since Eisenhower's famed warning against the military-industrial complex, there has been increasing fear that this element of

⁸⁵ All strong Presidents, no matter how grateful posterity might be, have awakened the strange undercurrent of hatred, the persistent fear that the Founding Fathers had bequeathed a potential elective monarchy to the United States. The Kennedys were frequently referred to as a royal family, sometimes with affectionate mockery, more often with malice and suspicion. The latest example of the literature of antipresidential fantasy, Barbara Garson's pastiche *MacBird*, is bound by the same queer compulsion. Portraying Lyndon Johnson as the Macbeth-like assassin of Kennedy, it is a drama of monarchy and usurpation. . . . [I]t reveals obsessions akin to those of . . . bizarre bygone items . . .

AMERICAN HERITAGE, *supra* note 13, at 182.

⁸⁶ The term comes from A. SCHLESINGER, *supra* note 13, at 16.

⁸⁷ See, e.g., Morgenthau, *supra* note 11, at 265-67.

⁸⁸ See, e.g., C. ROSSITER, *supra* note 21, at 59-62; A. SCHLESINGER, *supra* note 13, at 16-17, 94-97.

the permanent government may be shaping basic national policies.⁸⁹ Even when the relevant parts of the bureaucracy attempt to implement presidential programs, they often fail for a variety of reasons, including, in some cases, incompetence. The diplomatic-military apparatus in Vietnam, for example, had only limited success in its good faith effort to realize Johnson's objectives.

Difficult as the bureaucracy may be, a greater limit upon presidential power is Congress.⁹⁰ In Richard Neustadt's words, we have "a government of separated institutions *sharing* powers."⁹¹ Thus, virtually all presidential programs and ventures require implementing legislation and funding. Unlike parliamentary executives, the President has no ultimate weapons, such as dissolution or excommunication from party ranks, with which to beat reluctant legislators into submission. As a result, an abiding concern of the Executive and his assistants is the likely reaction of Congress to their proposals and actions.⁹²

Legislators have a number of tools with which to restrain the President. Through legislation, they can restrict his options, hamstring his policies and, to an extent, even take the policy initiative from him.⁹³ It has been suggested that Congress is presently attempting to control the Executive by qualified legislation more than in the past,⁹⁴ and the movement headed by Senator Fulbright, if successful, would certainly

⁸⁹ It is not wholly accurate to describe the military-industrial complex as a part of the permanent government, for, broadly defined, it includes groups with no official or unofficial ties to the state.

It is a vast, amorphous conglomeration that goes far beyond the Pentagon and the large manufacturers of weapons. It includes legislators who benefit politically from job-generating military activity in their constituencies, workers in defense plants, the unions to which they belong, university scientists and research organizations that receive Pentagon grants. It even extends to the stores where pay-rolls are spent, and the landlords, grocers and car salesmen who cater to customers from military bases.

The Military: Servant or Master of Policy, TIME, April 11, 1969, at 23. See *id.* at 20-26; *The Military-Industrial Complex*, NEWSWEEK, June 9, 1969, at 74-87; AMERICAN HERITAGE, *supra* note 13, at 287-88.

⁹⁰ See C. ROSSITER, *supra* note 21, at 49-56.

⁹¹ R. NEUSTADT, *supra* note 82, at 42.

⁹² [A]s I saw the executive branch in action, [i]t was haunted by a fear and at times an exaggerated fear of congressional reaction. The notion that the executive goes his blind and arrogant way, saying damn the torpedoes, full speed ahead, is just not true. I would say a truer notion is that the executive branch covers day and night over the fear and sometimes quite an exaggerated and irrational fear of what the congressional response is going to be to the things it does.

A. SCHLESINGER, *supra* note 13, at 171; accord, e.g., Morgenthau, *supra* note 11, at 267.

⁹³ See Morgenthau, *supra* note 11, at 263-64.

⁹⁴ A. SCHLESINGER, *supra* note 13, at 17. But see Kurland, *supra* note 2, at 629-31.

reduce presidential freedom in foreign affairs.⁹⁵ Through the power of the purse, the legislators can similarly limit the President. Although control of the purse has been virtually a nonpower in the hands of cold war Congresses when funds were sought for the military, present reluctance to embark on major defense spending and criticism of the military establishment⁹⁶ suggest that appropriations may emerge anew as a limiting factor. A few voices have even been heard to suggest that funds supporting troops in the field be cut—traditionally, an unthinkable position.⁹⁷

The power of congressional committees to investigate and oversee, as the 1967 Fulbright hearings indicate, provides a means of sparking national debate, molding opinion and thereby influencing presidential action. Activity within Congress can frequently focus outside political pressure and bring it to bear on the Chief Executive. Similarly, legislators can work the political process privately as well, communicating quietly with the President to persuade him that his ideas are ill-advised or subject to great potential opposition. Congress can also work in tandem with rebellious elements in the bureaucracy to thwart presidential initiatives. Remote though the possibility is, the President must remain aware of the congressional capacity to impeach him or to censure his conduct by resolution—a fate that befell Polk at the hands of a House disturbed by his role in initiating the Mexican War.⁹⁸ The President is also continually hemmed in by the play of the political system—by sniping from members of the opposition party and by the demands and feelings of members of his own party.⁹⁹

⁹⁵ On June 25, 1969, the Senate by a vote of 70-16 adopted the following resolution, a modified version of the one Senator Fulbright had introduced almost two years earlier:

Resolved, That (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. S7153 (daily ed. June 25, 1969). For a further discussion of Congress and national commitments, see 48 CONG. DIG. 193-224 (1969).

⁹⁶ See note 1 *supra*.

⁹⁷ See note 21 *supra*.

⁹⁸ See note 48 *supra* and accompanying text.

⁹⁹ C. ROSSITER, *supra* note 21, at 62-64.

Finally, the Senate is constitutionally empowered to advise and consent to presidential treaties and appointments and has devised the power to delay and negate by filibuster. These senatorial prerogatives, coupled with the power of Congress over the legislation and appropriations necessary to implement the President's foreign policies, constitute the primary restraints on his action.

To date, the courts have served more to enlarge the presidential prerogative over foreign affairs than to restrain it.¹⁰⁰ The one opinion directly treating the scope of presidential power to use force abroad—an 1860 decision dealing with an 1854 reprisal against a small, stateless town in Central America¹⁰¹—took a broad view of the President's constitutional powers. Although given ample opportunity to speak in the Vietnam context, federal courts have uniformly refused to consider whether the conflict is unconstitutional for lack of congressional

¹⁰⁰ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863); *Myers v. United States*, 272 U.S. 52, 116-18 (1926) (dictum); *In re Neagle*, 135 U.S. 1, 63-68 (1890) (dictum); C. ROSSITER, *supra* note 21, at 56-59; C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF passim* (1951).

¹⁰¹ *Durand v. Hollins*, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860). The court stated in part:

As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed whether by negotiation or by force—a department of state and a department of the navy.

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence . . . cannot be anticipated . . . and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home.

Id. at 112.

Although Captain Hollins burned the town in question long after the alleged attack on United States interests, the opinion speaks, not of a reprisal, but of a rescue situation, and grants the President broad powers to respond quickly to save threatened citizens and their property. WORMUTH at 22-24, 31-32, argues that the destruction of the town was strongly condemned by contemporary public and congressional opinion, and suggests that the *Durand* decision was an attempt by the judge, "a partisan Democrat, . . . to vindicate the action of a Democratic President." *Id.* at 32.

authorization.¹⁰² The possibility remains, nonetheless, that an activist court, convinced of the unconstitutionality of presidential action, could order the Executive to desist. President Truman's immediate acceptance of the Supreme Court's ruling in the *Steel Seizure* case¹⁰³ suggests that a judicial command affecting the use of force abroad would be obeyed by the executive branch¹⁰⁴—although perhaps not without great political cost to the Court and great stress upon our constitutional system.

¹⁰² See note 7 *supra*.

¹⁰³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁰⁴ To a significant extent, it is possible to equate a decision such as *Youngstown*, which ordered the return to private management of domestic steel companies seized by executive command, with a hypothetical judicial decision ordering the President to withdraw troops from a conflict to which he has unilaterally committed them, unless he obtains immediate congressional authorization for their use. Both decisions affect American participation in foreign conflict. President Truman, for example, seized the steel mills restored in *Youngstown* because

[a]ll the members of the Cabinet agreed . . . that it would be harmful to the country and injurious to our campaign in Korea if our steel mills were allowed to close down. We were then not only trying to keep our forces in Korea, as well as elsewhere, fully equipped, but we had allies to whom we had promised arms and munitions, and whose determination to resist Communism might depend on our ability to supply them the weapons they so badly needed.

H. TRUMAN, MEMOIRS, *quoted in* A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* 9 (1958). The hypothetical decision, should Congress approve the President's action, would have only the psychological effect inherent in a judicial declaration that the war had been unconstitutionally waged in the past. Should Congress refuse authorization and the President withdraw the troops, the decision would be instrumental in reversing presidential war policy.

Although the decisions typified by *Youngstown* and the hypothetical both have strong foreign policy overtones, presidential obedience to the former is more assured. First, a *Youngstown* decision will generally enjoy greater domestic political support. Executive action the direct effects of which are felt primarily within this country will usually generate more political opposition than action whose principal effects are felt abroad. Thus, seizure of the steel industry is riskier for the President than waging war in Asia. Moreover, executive action which affects the well-established rights of powerful individuals in this country is more likely to spark political backlash than action that impinges upon the more inchoate rights of less powerful persons. Since Congress is unlikely to bring an action against the President for infringement of its right to participate in war decisions, the plaintiff in the hypothetical case would probably be a serviceman seeking to avoid participation in the conflict. See note 7 *supra*. Unlike the property rights at issue in *Youngstown*, a draftee or reservist's right to avoid involvement in an unauthorized war is not an interest that our legal system has traditionally recognized as worthy of protection. Further, the draftee's political power is miniscule compared to that of the steel magnate. Only when a series of draft cases has evoked significant moral and political condemnation do they begin to have a potential effect akin to *Youngstown*.

Second, presidential disregard of a court order is more difficult when compliance requires action solely within the United States and the reversal of a course of action whose substance has consisted largely of official proclamations. The steel mills, for

The ultimate restraint upon the President, however, does not come from his own beliefs and abilities or from competing centers of power, but rather from the activities of the electorate, which continually expresses its views in various manifestations of public opinion, and periodically in federal elections.¹⁰⁵ A President will fall from grace when his policies fail to meet popular needs and demands or when they involve him in activity which is widely viewed as illegitimate, because it transgresses popular conceptions of legality or morality.¹⁰⁶ An unpopular President and his supporters will ultimately be turned out of office, but before their dismissal, executive policies and personnel will have come back under attack from other centers of power, emboldened by the President's diminished popular standing.¹⁰⁷ Attacks from these centers will, in turn, further reduce popular confidence in the administration. The President will find it increasingly difficult to govern, even in areas distantly divorced from those in which his actions have offended the public.¹⁰⁸ Once lost, the mandate of heaven is difficult to regain.

example, could be returned to private ownership by an executive order rescinding the earlier seizure decree. It would be far easier for the President, as Commander-in-Chief, to disregard or subvert an order to bring home hundreds of thousands of troops from a distant country.

It is probable, however, that a President confronted with the hypothetical decision would seek congressional approval and, should it not be forthcoming, would like most other Americans, voluntarily obey the rules of our society, including the one which places final authority on constitutional questions in the hands of the Supreme Court. Thus, unless the President felt that the security of the country was utterly dependent upon prosecution of the war, he would be most unlikely to defy the Court. Moreover, even if the President were inclined to disregard its command, he would be restrained by knowledge that defiance could result in a constitutional crisis of disastrous consequences both for the legitimacy of his administration and the stability of the country.

¹⁰⁵ Since the success of American foreign policy frequently depends on the actions of other states and their peoples, executive use of force abroad is subject to their opinions and leadership selections, as well as to those of the American electorate.

¹⁰⁶ See notes 83-85 *supra* and accompanying text.

¹⁰⁷ These centers, of course, can act before public sentiment turns against the executive policies in question, and may be instrumental in effecting the shift. The Fulbright hearings, for example, led rather than followed public opinion. A. SCHLESINGER, *supra* note 13, at 106, does not believe that "there can be any question that the Senate Foreign Relations Committee opened up a national debate where one had really not existed before. The educational job performed by the senators on Vietnam has been quite extraordinary."

¹⁰⁸ The Presidency is "an unwieldy vessel which can navigate only when it has built up a head of steam and is proceeding at a brisk speed. When the pressure is dissipated and the speed drops, the craft is at the mercy of the elements" AMERICAN HERITAGE, *supra* note 13, at 275.

In sum, during the last several decades the allocation of power between the President and Congress over the control of foreign relations has been heavily weighted in favor of the Executive. His hegemony has resulted from the interplay of a number of factors, most of them a result of the presidency's institutional advantages in meeting contemporary challenges and opportunities. Nevertheless, executive control over foreign policy is hardly without its limits, both actual and potential.

THE BALANCE BETWEEN PRESIDENT AND CONGRESS: RULES

The Constitution

With the foregoing overview of practice, it will be helpful now to consider expectations—people's rule-based beliefs concerning the constitutional scope of the President's authority—irrespective of the actualities of his conduct. The appropriate place at which to begin such an investigation is with the language of the relevant constitutional provisions which appear in articles I and II. They may be divided into four categories: grants dealing with foreign affairs as a whole; those concerning specifically the military aspects of foreign affairs; grants of inherent, nonenumerated powers; and provisions providing the President and Congress, respectively, with weapons with which to coerce one another.

In the first category, the President is modestly endowed, at least in terms of formal, stated grants of power. Generally, he holds the executive power of the Government¹⁰⁹ and has the authority to request the executive departments to report to him,¹¹⁰ as well as the power to nominate men to fill principal offices.¹¹¹ He is enjoined to see that federal law is faithfully executed and to inform Congress periodically of the state of the nation¹¹² and is authorized to present Congress with legislative recommendations.¹¹³ More specifically, the President is empowered to make treaties and diplomatic appointments with the approval of the Senate,¹¹⁴ and he is commanded to receive foreign diplomats.¹¹⁵

¹⁰⁹ U.S. CONST. art. II, § 1.

¹¹⁰ *Id.* § 2.

¹¹¹ *Id.*

¹¹² *Id.* § 3.

¹¹³ *Id.*

¹¹⁴ [The President] . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all

Congress has more extensive powers in this category. Generally, the legislators hold all the legislative power of the Government,¹¹⁶ including the power over appropriations, the House having the privilege of initiating all money bills.¹¹⁷ More specifically, Congress as a whole controls a wide range of matters with notable transnational impact, especially in an increasingly interrelated, interdependent world.¹¹⁸ Policies regarding such matters as foreign commerce often fuel international conflict. The Senate, in effect a third branch of government in foreign affairs, has the power to give or withhold consent on treaties and appointments.¹¹⁹

In the second, specifically military category, presidential grants again lag behind their congressional counterparts. The Executive is simply named Commander-in-Chief, and given the power to commission officers.¹²⁰ His appointment prerogative mentioned previously also comes into play in the military sphere. Congress, on the other hand, has a battery of responsibilities, including, *inter alia*, the power to raise and support the armed forces and the power to declare war.¹²¹

other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law

Id. § 2.

¹¹⁵ "[H]e shall receive Ambassadors and other public Ministers" *Id.* § 3.

¹¹⁶ *Id.* art. I, §§ 1, 8.

¹¹⁷ *Id.* § 7.

¹¹⁸ The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts . . .

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations . . .

To establish a uniform Rule of Naturalization . . .

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . .

To establish Post Offices . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations

Id. § 8.

¹¹⁹ See note 114 *supra*.

¹²⁰ U.S. CONST. art. II, §§ 2, 3.

¹²¹ The Congress shall have Power To . . . provide for the common Defence . . .

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies . . .

To provide and maintain a Navy;

To make rules for the Government and Regulation of the land and Naval Forces;

To provide for organizing, arming, and disciplining, the Militia, and for gov-

In the third category, inherent powers, the President comes into his own. Whereas article II, section 1 vests in him "the executive Power," article I, section 1 vests in Congress only those "legislative Powers *herein granted*." Moreover, while the legislative article is quite tightly drawn, the executive article, in Corwin's words, "is the most loosely drawn chapter of the Constitution."¹²² Thus, the President can make a strong case that, as the holder of the executive power, he possesses residual authority to go beyond his enumerated powers to take whatever steps he deems necessary for the country's security. Congress, to the contrary, confronts a linguistic hurdle. Arguably, however, "herein granted" is not an insurmountable barrier where foreign policy is involved.¹²³

In the final, coercive category, Congress regains its textual edge. The President can seek to bend the legislators to his will through the threat of veto and special session,¹²⁴ but Congress can virtually destroy him. Impeachment and censure remain remote possibilities, but hostile use or nonuse of legislative power is an ever present mode of persuasion.

Such is the relevant constitutional language. It strongly suggests that both the President and Congress are to have a role in decisions regarding foreign policy, especially those concerned with the use of force. But, as suggested earlier,¹²⁵ the language provides minimal guidance in most concrete situations; the grants are complementary and abstract, and occasionally fail altogether to speak to contemporary problems.

Intent of the Framers

Like their language the intent of the Framers is somewhat ambiguous.

erning such Part of them as may be employed in the Service of the United States . . .

To exercise . . . Authority over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and needful Buildings . . .

Id. art. I, § 8.

¹²² E. CORWIN, *supra* note 14, at 3.

[W]hereas "legislative power" and "judicial power" today denote fairly definable *functions* of government as well as fairly constant *methods* for their discharge, "executive power" is still indefinite as to *function* and retains, particularly when it is exercised by a single individual, much of its original plasticity as to *method*. It is consequently the power of government that is the most spontaneously responsive to emergency conditions; conditions, that is, which have not attained enough of stability or recurrency to admit of their being dealt with according to rule.

Id.

¹²³ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); M. McDUGAL, *supra* note 14, at 496-503; *cf. id.* at 492-96.

¹²⁴ U.S. CONST. art. I, § 7; *id.* art. II, § 3.

¹²⁵ See notes 14-16 *supra* and accompanying text.

The relevant provisions were written only after long discussion and much compromise—processes certain to breed confusion about the exact nature of the end product. As is the case where many views are advanced, and where the drafters do not know from past experience what demands reality will make upon their rules, much that the Framers adopted was left either vague or unsaid, to be filled in by practice.

The Constitution's foreign affairs provisions were drafted against a background of legislative control of external matters in America,¹²⁶ and of executive domination in Britain.¹²⁷ The Framers wished to alter the American practice to profit from executive speed, efficiency and relative isolation from mass opinion,¹²⁸ without incurring the disadvantages of an unchecked British monarch. Thus, speed and efficiency, on the one hand, and restraint upon executive prerogative, on the other, appear to have been the basic objectives of the Drafters. Accordingly, they created an Executive independent from Congress,¹²⁹ who was

¹²⁶ Prior to the installation of the Constitution on March 4, 1789, the direction of foreign policy was in the hands of a unicameral legislature which functioned through a Committee of Secret Correspondence (1775-7), a Committee for Foreign Affairs (1777-81), and the Department of Foreign Affairs (1781-9). The last was under a secretary who was responsible to the Congress.

LEOPOLD at 67 n.1.

¹²⁷ Madison stated in 1793 that "[t]he power of making treaties and the power of declaring war are *royal prerogatives* in the *British government*, and are accordingly treated as *executive prerogatives* by British commentators. . . ." Quoted in E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 21 (1917); see James Wilson's comment, I *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65-66 (M. Farrand rev. ed. 1937) [hereinafter cited as *RECORDS*], and Hamilton's Analysis in *THE FEDERALIST* No. 69, at 295 (C. Beard ed. 1948) (A. Hamilton).

¹²⁸ The Framers seem to have been seriously concerned about the "temporary errors and delusions" of the people, their "passing popular whims" and "public passions." See *THE FEDERALIST* No. 49, at 220 (C. Beard ed. 1948) (J. Madison); *id.* No. 63, at 268 (J. Madison); *id.* No. 71, at 303 (A. Hamilton). Thus, they sought a check on mass opinion in a strong President, *id.* No. 71, at 303 (A. Hamilton), and in the Senate's "temperate and respectable body of citizens," *id.* No. 63, at 268 (J. Madison). See also *id.* No. 62, at 263-64 (J. Madison).

¹²⁹ The creation of an Executive, wholly outside the legislative sphere, was by no means a foregone conclusion when the Framers first met. C. ROSSITER, *supra* note 21, at 76-79, suggests that among the crucial decisions taken in favor of a strong Executive were that the office would be separate from the legislature; that it would be held by one man, who would have a source of election outside Congress, and a fixed term subject only to impeachment; that he would be eligible for reelection; that he would be granted his own constitutional powers, and not be saddled with a council whose approval he would have to obtain for various actions; and that he could not be a member of either house of Congress during his presidency. For further discussion, see *id.* at 74-81, 87; *AMERICAN HERITAGE*, *supra* note 13, at 12-24; E. CORWIN, *supra* note 14, at 3-16; A. SCHLESINGER, *supra* note 13, at 6-7.

perhaps at his strongest in external matters. Simultaneously, they placed in both Houses of Congress and in the Senate alone powers designed to prevent unilateral control of foreign relations by the President.¹³⁰

Of the various grants of power to both the President and Congress, the one most central to the present question is the congressional power to declare war. If there are constitutional limits on presidential authority to use the military abroad *sua sponte*, this provision provides them more than any other.¹³¹ "The Congress shall have Power to . . . declare War . . ." could mean any of a number of things, ranging from a relatively meaningless authority to recognize an existing state of large-scale conflict¹³² to the authority to make virtually all decisions regarding the use of force by the United States.

It seems reasonably clear from proposals made and rejected at the Constitutional Convention, from debates there, subsequent statements by

¹³⁰ The Framers intended that the Senate share in the actual execution of certain aspects of our foreign relations. See E. CORWIN, *supra* note 127, at 84-88; THE FEDERALIST No. 64, at 272-74 (C. Beard ed. 1948) (J. Jay); M. McDUGAL, *supra* note 14, at 436-37, 557-59. But in the interests of practicality, the implementation of foreign policy came quickly to rest almost exclusively with the Executive. The legislators retained, however, a strong voice in shaping the policies to be implemented, especially regarding the use of force abroad. See notes 37-48 *supra* and accompanying text.

¹³¹ The Framers also viewed congressional control over the raising and support of the military as a primal check on presidential use of force, whether at home or abroad. See, e.g., THE FEDERALIST No. 26, at 106-07 (C. Beard ed. 1948) (A. Hamilton); *id.* No. 41, at 177 (J. Madison). But with the establishment of a large standing military capacity, the assumption of world-wide defense commitments and a prevailing belief that presidential use of troops abroad requires bipartisan support in the interests of national security, the power of the purse has become relatively meaningless. See note 21 *supra* and accompanying text. In the wake of the disquiet induced by Vietnam, it is possible that Congress will once again use its control of appropriations as a check on the Executive, see text at notes 96, 97 *supra*, although it is unlikely that the President will ever be deprived of the mobile task forces which enable him to intervene abroad on short notice. To use its power over the purse to restrain such action, Congress would have to demonstrate willingness to refuse funds to carry on an intervention once begun, or to fund it only at the cost of other programs the President favors.

¹³² Such recognition may have some effect. A formal declaration of this nature would effectuate certain legal results with potentially profound consequences. Treaties would be canceled; trading, contracts and debts with the enemy would be suspended; vast emergency powers would be authorized domestically; and legal relations between neutral states and the belligerents would be altered. But though there may have been a time when these changes in legal status were uniquely the result of the issuance of a formal declaration, this is clearly no longer true today. Countries have long engaged in undeclared hostilities which in terms of the effort involved, the impact on citizens, and the effect on domestic and international legal relations are often indistinguishable from a formally declared war.

Note, 81 HARV. L. REV., *supra* note 2, at 1772 (footnotes omitted).

the Framers and from practice in early years that the Drafters intended decisions regarding the *initiation* of force abroad to be made not by the President alone,¹³³ not by the Senate alone,¹³⁴ nor by the President and the Senate,¹³⁵ but by the entire Congress subject to the signature or veto of the President. The Framers recognized the potentially momentous consequences of foreign conflict and wished to check its unilateral initiation by any single individual or group.¹³⁶ Madison expressed this concern early in the Constitutional Convention: "A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them [wars] on the whole."¹³⁷ Foreign conflicts, since they involve the entire nation, are to be begun only after both legislative houses and the Executive have been heard, even at the cost of some delay in reaching a decision.¹³⁸

¹³³ Mr. Butler, apparently the only proponent of his view, favored "vesting the power in the President, who will have all the requisite qualities [*e.g.*, dispatch, continuity, unity of office] and will not make war but when the Nation will support it." II RECORDS 318.

¹³⁴ Mr. Pinkney opposed the vesting of this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one—authority to make war, and another peace.

Id. (footnotes omitted).

¹³⁵ Hamilton presented a plan in which the Executive was "to make war or peace, with the advice of the senate . . ." I RECORDS 300.

¹³⁶ See note 138 *infra*.

¹³⁷ I RECORDS 316. Madison was speaking to the possibility that individual states through their "violations of the law of nations & of Treaties" might bring foreign war upon the country as a whole. *Id.* The unfortunate consequences of war were alluded to by others among the Framers. Mr. Elsworth, for example, argued that "[i]t shd. be more easy to get out of war, than into it." II RECORDS 319. And Mr. Mason was "for clogging rather than facilitating war . . ." *Id.*

¹³⁸ Objections were made to legislative involvement on this ground. See the comments of Messrs. Butler and Pinkney, II *id.* at 318. But the approach of Mr. Mason proved more persuasive; he stated that he was "agst. giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it." *Id.* at 319.

Fear existed that if the President were given the right to wage war unilaterally, he might unwisely engage the country in ruinous conflict or use the existence of war to raise military forces with which to seize control of the country. Moreover, the Executive, like the Senate, was not directly elected, and thus lacked the moral authority to commit the entire country to so potentially devastating a course. The House of Representatives possessed the legitimacy given by direct election, but, due to its close ties to the general public, was suspected of flighty judgment. Accordingly, the

The discussion to this point has been of Congress' power to *initiate* the use of force abroad—to take the country from a state of peace to one of war. When, however, war is thrust upon the United States by another power, the Framers apparently intended that there be unilateral presidential response if temporal exigencies do not permit an initial resort to Congress.¹³⁹ Under such circumstances, there is no longer a need for check and deliberation; all reasonable men would agree that the survival of the nation is worth fighting for; speedy and effective defense measures are the constitutional objectives given a direct attack upon the country.¹⁴⁰ Congressional involvement comes at a later point; as soon as feasible, the legislators are to be given an opportunity to ratify past presidential actions and authorize future conduct.¹⁴¹

Although the Framers did not delineate what constitutes a thrust of conflict upon the United States, it appears that any direct, physical assault upon American territory will suffice.¹⁴² Moreover, if a blow

Representatives' passions were to be controlled by involving the Senate and President in war decisions. Involvement of the Senate, moreover, would ensure that force could not be initiated abroad unless a majority of the states agreed. In short, an attempt was made to devise a scheme in which war would be entered upon only after measured deliberation, thus avoiding involvement in conflicts where the costs, upon reflection, appeared to outweigh the gains, or where the primary "gains" would be executive aggrandizement or the satiation of popular passion. These checks were intended to insure that the fighting would be supported by most Americans, thus avoiding disastrous internecine struggle within the country over war policy.

¹³⁹ The Framers initially intended to grant Congress the power "to make" war, as opposed to declaring it. In due course, however, "Mr. M[adison] and Mr. Gerry moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks." The motion passed, though it had failed upon an earlier vote. *Id.* at 318-19, 313. What precisely those who voted in favor of the change intended is difficult to say in light of existing information, but it does seem clear that the amendment was not even remotely designed to empower the Executive to initiate hostilities. See WORMUTH at 3-4; Note, 81 HARV. L. REV., *supra* note 2, at 1773 n.16. Compare a provision temporarily inserted by the Committee of Style, which stated that "[n]o State, without the consent of the Legislature of the United States shall . . . engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion shall be so imminent, as not to admit of a delay, until the Legislature of the United States can be consulted." II RECORDS 577.

¹⁴⁰ Arguably, under such circumstances constitutional procedures are superceded by an inherent right of the country, as a sovereign state, to protect its territorial integrity against foreign attack. Since the President is generally the citizen most able to galvanize a defensive reaction, he acts. Language in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936), lends a measure of judicial support to this contention. See also M. McDUGAL, *supra* note 14, at 496-503; L. SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 291-92 (1951); Note, 81 HARV. L. REV., *supra* note 2, at 1778.

¹⁴¹ See notes 41-42, 46-47 *supra* and accompanying text.

¹⁴² Polk's action set a precedent for also viewing as 'war' the invasion of disputed

is clearly imminent, the Executive need not wait for it to fall. Arguably, the change in world conditions since 1789—the end of our geographical immunity, the revolution in military technology and the new balance of power¹⁴³—permits unilateral executive reaction to a sudden attack on a foreign state deemed essential to our security. Accordingly, a declaration of war by a foreign power of only paper force would not justify unilateral presidential response,¹⁴⁴ but the launching of nuclear weapons aimed at American cities would, even before the missiles reached their targets.¹⁴⁵ Perhaps a sudden assault upon Canada or West Germany would similarly justify immediate executive action.

The President obviously must be the one who determines when a thrust is in progress which justifies his unilateral response.¹⁴⁶ His judgment, however, may be repudiated when the matter is later placed before Congress.¹⁴⁷ Such repudiation, in the face of genuine enemy attack, is most unlikely; virtually all citizens will agree that the survival of the country is worth the price of conflict, and Congress will generally be far more prone to attack a President who fails to defend the nation, than one who responds vigorously.

Defense of the country, however, is not synonymous with offensive action against the attacker, though admittedly there is no clear line

territory claimed under a treaty of annexation." Note, 81 HARV. L. REV., *supra* note 2, at 1781.

¹⁴³ See notes 19-20 *supra* and accompanying text.

¹⁴⁴ For Franklin Roosevelt's response to declarations of war against the United States by Bulgaria, Hungary and Rumania at the outset of American involvement in World War II, see Note, 81 HARV. L. REV., *supra* note 2, at 1781.

¹⁴⁵ The sudden and provocative establishment of offensive weapons by an unfriendly state on the territory of an ally located near the United States might justify immediate preventive action by the President—for example, John Kennedy's response to the Cuban Missile Crisis in 1962.

¹⁴⁶ Absent such presidential discretion, the "sudden attack" exception to the necessity for prior congressional approval of hostilities would become meaningless. The exception assumes that the country is presented with an accomplished fact and with the need to respond before Congress could reasonably be expected to act. Mr. Justice Grier stated in 1863 that

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . .

. . . .

This greatest of civil wars was not gradually developed [I]t nevertheless sprung forth suddenly The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

The Prize Cases, 67 U.S. (2 Black) 635, 668-69 (1863).

¹⁴⁷ See note 48 *supra*.

between the offensive and the defensive. Under the Framers' rationale, rapid response should give way to check and deliberation once the country is secure from the prospect of immediate physical assault.¹⁴⁸ The nature of the Executive's defensive measures will depend upon the nature of the thrust, but at no time should his response be disproportionate to the assault. Should he be responding to a nuclear attack, presumably there would be little or no distinction between defensive and offensive action—the exchange would likely be terminal for both parties. But should enemy submarines shell coastal cities with conventional ordinance, the President need only clear the coasts of enemy ships; the launching of SAC and invasion of the enemy homeland ought to await congressional authorization. In sum, the Executive does not receive full war-time powers simply because another state has directly assaulted American territory.

While the President under the Framers' rationale can always respond to sudden attacks upon United States territory, and arguably upon the

¹⁴⁸ President Jefferson refused to take offensive measures during the First Barbary War until Congress approved them. See note 42 *supra* and accompanying text. Faced with a declaration of war by Tripoli and its attacks on American ships, he stated in his message to Congress of December 8, 1801, that "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel [a Tripolitan cruiser which had attacked a United States schooner], being disabled from committing further hostilities was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries." Quoted in E. CORWIN, *supra* note 127, at 132. Alexander Hamilton replied heatedly that "it is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; . . . in other words, it belongs to Congress *to go to War*. But when a foreign national declares, or openly and avowedly makes war upon the United States, they are then by the very fact already *at war*, and an declaration on the part of Congress is nugatory; it is at least unnecessary." Quoted in *id.* at 134.

One writer understands Hamilton's position to have been that "[a]s long as the United States is not the initial aggressor, the President's actions will remain 'defensive' requiring no further congressional action to enable him to continue to wage the war thrust on the country." Note, 81 HARV. L. REV., *supra* note 2, at 1779-80 (footnote omitted). In other words, once the Executive has beaten off an enemy assault, he then has discretion to take offensive measures. If this was Hamilton's position, it seems to be at odds with that of the Framers; they intended the process of check and deliberation to precede decisions to use force except when force was used to repel sudden attacks.

When the whole of Hamilton's reply is considered, however, his primary complaint appears to have been with Jefferson's bizarre understanding of what constitutes defensive action. See E. CORWIN, *supra* note 127, at 133-35. On this score, the merits are clearly against the President's release of an enemy ship and crew captured in the process of attacking an American vessel. While the Framers did not intend the Executive to take aggressive action on his own initiative, it is not at all plausible that they intended his defensive action to be so potentially self-defeating.

territory of states absolutely vital to our security, the Drafters did not intend unilateral presidential response to threats to American interests or citizens abroad, except under the most modest circumstances. As the constitutional provision granting Congress control over letters of marque and reprisal suggests,¹⁴⁹ the Framers intended "war" to be a broad concept. Judging by early practice, it appears that war in the constitutional sense was deemed to arise when the United States decided to settle a dispute with another state by the use of military force. The Naval War with France, from 1798-1800, involved neither appreciable force nor complete rupture of relations between the combatants; it did, however, require and receive congressional authorization.

Congress must be given an opportunity to say whether it finds the potential gains from the use of force worth the potential losses. The latter may be twofold.¹⁵⁰ First, there are the physical and economic costs, and the diminished legal rights produced by war. Their extent depends upon the scale of the fighting, the enemy's strength, his location and the harm to be inflicted on him. In any use of force today, unlike the nineteenth century, it is difficult to predict the ultimate price. What

¹⁴⁹ WORMUTH at 6, states:

Even before the adoption of the Constitution, American law recognized that it was possible to wage war at different levels. In 1782 the Federal Court of Appeals, the prize court established under the Articles of Confederation, observed: The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquility, and lays the foundation of every possible act of hostility. The imperfect war is that which does not entirely destroy the public tranquility, but interrupts it only in some particulars, as in the case of reprisals.

The framers of the Constitution accepted this conception and assigned the power to initiate both perfect and imperfect war to Congress, which was "To declare war, grant letters of marque and reprisal, and makes rules concerning captures on land and water."

(footnote omitted).

¹⁵⁰ Note, 81 HARV. L. REV., *supra* note 2, at 1775, defines war in the constitutional sense as having a "quantitative" and a "qualitative" aspect:

There are two possible reasons for requiring [approval of hostilities] from the body most directly representative of popular sentiment. The first is that such a decision involves a risk of great economic and physical sacrifice not to be incurred without such approval. The second is that even in cases where no significant physical effort is likely to be required . . . the very act of using force against a foreign sovereign entails moral and legal consequences sufficiently significant to require an expression of popular approval. . . . The first argues for a definition phrased in quantitative terms, which would require congressional action prior to engaging in "major" hostilities above a certain level of intensity. The second would result in a more comprehensive, qualitative definition which would forbid any use of force against a foreign sovereign without prior congressional approval.

(footnote omitted).

is initially intended to be a minor effort, perhaps involving only a bloodless show of force, can easily grow into a major war, even a nuclear one. Moreover, the world is today so interrelated and interdependent in economic, ideological and security matters that any use of force is likely to have repercussions which cannot be reliably charted in advance.

Second, there are the political and moral costs and the potential legal sanctions entailed in using force against another state. Since World War I there has been a steady move toward the complete outlawing of the use of force by international disputants, except in self-defense. Heightened respect for national independence and self-determination had led to the prohibition of one state's intervention in another's affairs and to emphasis on collective control over armed enforcement of international law—with an accompanying distaste for unilateral police action. Thus, many armed activities which would have been acceptable under nineteenth century standards of legality and morality are unacceptable today.¹⁵¹ Accordingly, even if a contemporary use of force to protect American interests involved little fighting, it might be costly in terms of its violation of international political sensibilities, law and morality.¹⁵² Whether the cost is justifiable is a decision in which Congress should have a voice.

Congressional authorization need not be by formal declaration of war: “[N]either in the language of the Constitution, the intent of the framers, the available historical and judicial precedents nor the purposes behind the clause” is there a requirement for such formality,¹⁵³ particularly under present circumstances when most wars are deliberately limited in scope and purpose.¹⁵⁴ A joint resolution, signed

¹⁵¹ The landing of military units in backward states to protect American property or citizens, though common in the nineteenth century, would be acceptable today—if at all—only in situations in which public order has wholly collapsed, with great resulting danger to United States citizens; American property would have to suffer unaided. Similarly, armed reprisals against states delinquent in their adherence to international law, though common in the 1800's, are precluded today in favor of peaceful means of dispute resolution. See note 9 *supra*.

¹⁵² So Senator William Fulbright characterized the 1965 American use of force in the Dominican Republic. 111 CONG. REC. 28374-79 (1965).

¹⁵³ Note, 81 HARV. L. REV., *supra* note 2, at 1802.

¹⁵⁴ Although formal declarations of war are effective devices for rallying support on the home front, empowering the Government to take all necessary emergency measures and serving notice on the enemy and all the world that our goal is conquest, [t]here are . . . numerous policy arguments why the formal declaration of war is undesirable under present circumstances. Arguments made include increased danger of misunderstanding of limited objectives, diplomatic embarrassment in

by the President, is the most tenable method of authorizing the use of force today.¹⁵⁵ To be meaningful, the resolution should be passed only after Congress is aware of the basic elements of the situation, and has had reasonable time to consider their implications. The resolution should not, as a rule, be a blank check leaving the place, purpose and duration of hostilities to the President's sole discretion. To be realistic, however, the resolution must leave the Executive wide discretion to respond to changing circumstances. If the legislators wish to delegate full responsibility to the President, it appears that such action would be within the constitutional pale so long as Congress delegates with full awareness of the authority granted.¹⁵⁶

Since the Constitution was ratified, there have been countless manifestations of expectations that decisions to initiate the use of military force abroad must meaningfully involve the legislators. Presidents prior to 1900 generally held such expectations themselves and acted accordingly, and twentieth century Executives prior to the Cold War frequently gave the concept verbal support, though their conduct often belied their words.¹⁵⁷ Many members of Congress, particularly in

recognition of nonrecognized . . . opponents, inhibition of settlement possibilities, the danger of widening the war, and unnecessarily increasing a President's domestic authority. Although each of these arguments has . . . merit, probably the most compelling reason for not using a formal declaration . . . is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out "[T]here has not been a formal declaration of war—anywhere in the world—since World War II."

Moore, *supra* note 2, at 33 (footnote omitted).

¹⁵⁵ Senate approval of a treaty would not suffice, as that would exclude the House from the decision-making process. An executive agreement, approved by the entire Congress and specifically described as authorization to use force, should be acceptable. Similarly, legislation to increase the size of the armed forces or to appropriate additional money to sustain a use of force might be regarded as authorization if legislative intent to that effect is made abundantly clear. Absent such clarity, simple legislation ought not to be regarded as implied approval, since it may have been adopted for reasons other than to ratify a presidential *fait accompli*. See note 21 *supra* and accompanying text. Nothing can be assumed from a congressional failure to act. The burden is not upon Congress to make its views clear or be deemed to have acquiesced, but rather upon the President to obtain legislative approval before he acts. See E. CORWIN, *supra* note 39, at 152-53; WORMUTH at 33; VELVEL, *supra* note 2, at 455-56, 465-68; Note, 81 HARV. L. REV., *supra* note 2, at 1798-1803.

¹⁵⁶ The extent to which Congress may constitutionally delegate its war power to the President has been a matter of some controversy in the past. In the wake of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), however, it seems unlikely that strict anti-delegation rules apply in the foreign context. See Moore, *supra* note 2, at 34. But see WORMUTH at 43-58.

¹⁵⁷ See E. CORWIN, *supra* note 14, at 201-02. See the collection of presidential statements in Putney, *supra* note 49, at 6-30.

the Senate, and much of the general public retain a view that the Constitution requires congressional involvement in decisions to initiate conflict abroad.

Constitutional argument in favor of the present high state of presidential prerogative has, as a rule, not frontally attacked these expectations. Rather, doctrinal justification for presidential practice, when offered, has tended to ignore the constitutional grants to Congress¹⁵⁸ and to read expansively the complementary provisions applicable to the Executive. The broad interpretation has been dictated, it is said, by the demands of national security. Accordingly, the President's powers have been rolled into one ill-defined, mutually supportive bundle and used to justify presidential authority to do virtually "anything, anywhere, that can be done with an army or navy."¹⁵⁹

¹⁵⁸ A notable exception has been the expansive reading of the "sudden attack" exception. One writer argues that in the event of a direct attack, the President need not obtain prior congressional approval, even though he has sufficient time to do so. Significantly, however, in instances cited for support—First Barbary, Mexican and Civil Wars—authorization was sought and received concurrently with or immediately after the President's action. Note, 81 HARV. L. REV., *supra* note 2, at 1779-81, 1783, 1784 n.69. With regard to the place of the attack, a good case can be made that under present conditions, the enemy activity need not directly affect United States territory, if it poses a threat to American territorial integrity. Compare *id.* at 1782-85, with Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 359-65 (1955). Finally, regarding the nature of the presidential response, it has been argued, particularly in the wake of the Prize Cases, 67 U.S. (2 Black) 635 (1863), that the President possesses full power to conduct the hostilities as he sees fit, once war is thrust upon the United States. Under this view it becomes important to determine when an enemy assault constitutes "war," lest presidential powers be unleashed too readily. See Note, 81 HARV. L. REV., *supra*, at 1778-82. But as contended earlier, see note 148 *supra* and accompanying text, it does not appear that the President receives unilateral authority to do more than stifle an enemy attack. If such is the case, there is no need to haggle over when an attack is and when it is not war," since the President never enjoys unilateral authority to escalate the conflict.

¹⁵⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-42 (1952) (Jackson, J., concurring); see Velvel, *supra* note 2, at 453-72.

The President as the enforcer of the law is deemed to have constitutional authority to implement treaties, international law and the basic foreign policy objectives of the United States. See, e.g., E. CORWIN, *supra* note 14, at 194-204; E. CORWIN, *supra* note 127, at 142-63; M. McDUGAL, *supra* note 14, at 487; 3 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1567 (2d ed. 1929); Banks, *Steel, Sawyer, and the Executive Power*, 14 U. PITT. L. REV. 467, 506-16 (1953); Mathews, *supra* note 158, at 360-61, 363-65, 366-69; Note, 81 HARV. L. REV., *supra* note 2, at 1776-77, 1787-94. The President's constitutional role as the country's foremost diplomat has been read to include control over both the conduct and the shaping of our foreign relations. See, e.g., the discussion in AMERICAN HERITAGE, *supra* note 13, at 276-78; E. CORWIN, *supra* note 14, at 170-226; E. CORWIN, *supra* note 127, at 1-32; M. McDUGAL, *supra* note 14, at 435-41, 487-92, 557-60; C. ROSSITER, *supra* note 21, at 90-91; Foley, *Some Aspects of*

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Constitutional law is most certain when peoples' expectations about the nature of constitutional behavior are actually realized in the conduct of public affairs¹⁶⁰—when the constitutional rules governing the President's use of force abroad are given effect. Without such realization in practice, rule-based expectations about the scope of presidential authority are quixotic; without adherence to the rules, the Executive's practice is simply the illegitimate exercise of power. As suggested,¹⁶¹ the ultimate goal of constitutional interpretation is constitutional law—both rule and practice—which serves the long-term best interests of the country. Thus, it is ill-advised to promote constitutional rules whose implementation would not meet contemporary needs, just as it is ill-advised to promote practices which needlessly flout the rules.

The previous discussion has demonstrated that practice with regard to the use of American troops abroad has been varied. Certainly, however, presidential action immediately before the two World Wars and during the last twenty-five years provides precedent for plenary executive control. The factors which have seemed to necessitate this practice, and its existence over a significant period of time, have naturally broadened expectations about the scope of the President's authority. It is doubtful, however, that most people now believe that

the Constitutional Powers of the President, 27 A.B.A.J. 485, 487-88 (1941); Mathews, *supra* note 158, at 362-63, 366, 369-70; Morgenthau, *supra* note 11, at 264-65; Note, 81 HARV. L. REV., *supra* note 2, at 1777-78. As Commander-in-Chief, the Executive has constitutional authority to do whatever he feels necessary for the defense of the country. See, e.g., the analysis in E. CORWIN, *supra* note 14, at 227-62; M. McDUGAL, *supra* note 14, at 485-87; C. ROSSITER, *supra* note 21, at 24-25; W. WILLOUGHBY, *supra*, at 1567-68; Foley, *supra*, at 485-87; Jones, *The President, Congress, and Foreign Relations*, 29 CALIF. L. REV. 565, 575-83 (1941); Mathews, *supra* note 158, at 352-65. The fact that he holds the executive power has been treated as confirmation of his plenary authority over foreign affairs; if his enumerated powers are found wanting in constitutional weight, his inherent authority as Chief Executive is thought to flesh them out as required. See, e.g., E. CORWIN, *supra* note 14, at 3-16, 147-58; M. McDUGAL, *supra* note 14, at 487-92; C. ROSSITER, *supra* note 21, at 36, 78-79, 147, 259; C. ROSSITER, *supra* note 100, at 65-77; J. SMITH & C. COTTER, *POWERS OF THE PRESIDENT DURING CRISES* 4-13, 125-46 (1960); W. WILLOUGHBY, *supra*, at 1567-68; Banks, *supra*, at 499-502, 516-22; CORWIN, *The Steel Seizure Case: A Judicial Brick without Straw*, 53 COLUM. L. REV. 53 (1953); Foley, *supra*, at 485, 488-90; Gibson, *The President's Inherent Emergency Powers*, 12 FED. B.J. 107 (1951); Jones, *supra* at 565-67, 575-83; Mathews, *supra* note 158, at 381-85; Note, 81 HARV. L. REV., *supra* note 2, at 1775-76, 1792-94.

¹⁶⁰ See notes 27, 29-31 *supra* and accompanying text.

¹⁶¹ See note 23 *supra* and accompanying text.

the President is entitled to initiate foreign wars *sua sponte*. The general public takes a relatively blackletter view of the Constitution,¹⁶² and unless there is pressing need for its amendment, popular understanding of the rule of law dictates adherence to provisions whose language and initial intent seem clear. The power vested in Congress to declare war is a primal instance of such a provision. Even the strongest supporters of presidential prerogative would likely prefer to have congressional approval of American involvement in foreign war—if only they were confident that Congress would vote wisely. Accordingly, it is important to determine whether the present degree of presidential control over the use of force abroad is essential to long-term national interests, and is therefore the constitutional order that must prevail irrespective of countervailing expectations.

The primary argument for sanctification of present practice centers on past congressional inability to cope with questions of foreign policy, particularly those concerned with the use of force.¹⁶³ Fault can be found with the congressional decision-making process; it is too uninformed and inexperienced, too indecisive and inflexible, overly public, almost always too slow and sometimes out-of-session when crises arise. There is also grave doubt as to the wisdom of the policies that would be generated even by a smoothly functioning legislative decisional process, particularly in light of the disastrous congressional approach to foreign affairs between World Wars.

The factors behind the contemporary strength of the presidency, noted above,¹⁶⁴ are relevant to the question whether Congress might regain some of its lost influence over foreign affairs without harm to national security. Thus, inquiry must determine the extent to which the present balance of power has resulted from the tendency of both Congress and the Executive to follow the path of least resistance, carried along by the interplay of their institutional characteristics and certain historical forces, and whether it exists because national security requires presidential hegemony. The more the latter is the case, the more any rules requiring meaningful congressional participation in decisions to use force abroad should be discarded. Conversely, the more

¹⁶² See notes 28-31 *supra* and accompanying text. Opposition to presidential policies in Vietnam has undoubtedly played a part in rekindling expectations that Congress is constitutionally entitled to a meaningful voice in American decisions to go to war. See note 78 *supra*.

¹⁶³ See notes 77-80 *supra* and accompanying text.

¹⁶⁴ See note 80 *supra* and accompanying text.

presidential practice appears needlessly to have diverged from the rules, the greater the need for strenuous effort to bring it back into line.

At the outset, it must be readily admitted that no easy distinctions can be made between the path of least resistance and the security interests of the nation. Once any practice has developed in a reasonably efficient manner, any change will involve the costs of establishing new patterns and will risk the creation of a less viable order. The latter possibility is of particular concern in the present context.

Of the historical forces contributing to the existing allocation of power between the President and Congress, none has been more important than the increased pace, complexity and danger of the times. The President, who singly holds his office, who has unsurpassed access to information and experts, and who is always on the job, has been more able to meet current demands than has Congress, with its many men in office, inferior access to information and experts, and frequent inability to assemble its members quickly. It has been suggested that for these reasons Congress is inherently incapable of participating effectively in decisions regarding the use of troops abroad.

Such is not necessarily the case. To the extent that Congress' problem is its indecisive, inflexible, slow and noncontinuous decision-making process, improvement is possible. Legislators need to decide to act and to do so with reasonable dispatch. They need to restructure procedures such as the seniority system which now serve to clog debate and decision. When speed is of the essence,¹⁶⁵ the President can respond and then place the issue before Congress. It is questionable, however, that great speed is required in most decisions regarding the use of force. With the possible exceptions of Korea and the Cuban Missile Crisis, its necessity during the last twenty-five years has been exaggerated. Even in the Korean situation, congressional authorization could have been obtained since Congress was in session and the legislators are capable of rapid action when confronted with an act such as the North Korean invasion. In the Cuban situation, the President's reluctance to involve Congress appears to have been a fear of exposing the nature of the American response before it could be sprung full-blown on the unsuspecting Soviets, rather than a lack of time.

To the extent that Congress' problem stems from its inability to operate secretly, a defect precluding access to certain information and participation in highly sensitive decisions, existing procedures for exec-

¹⁶⁵ See note 140 *supra* and accompanying text and note 158 *supra*.

utive session could be further developed. The inclusion of legislators in selected secret decisions, on the assumption that national secrets would not be divulged, is not without precedent.¹⁶⁶ If secrets were in fact divulged, the practice could be abandoned. In situations such as the Cuban Missile Crisis, where it is felt that initial planning must take place while maintaining an outward appearance of normality, the President can either involve congressional leaders in the decision under a procedure previously established by Congress, or simply make the decision unilaterally and present it to Congress for approval after the need for secrecy had passed.

Cuban Missile Crises are rare. The secrecy argument usually arises in the context of classified information. Even were such data not available to the legislators, it is questionable that their ability to make basic foreign policy decisions would be materially impaired. Information is frequently deemed secret by the executive branch for reasons other than its inherent nature, and it has been suggested that ninety-five percent of the data needed to make an informed decision on most foreign policy issues can be found in *The New York Times*.¹⁶⁷

Similarly, it is debatable that experts must make the basic decisions regarding the initiation of hostilities. The determination that military action is in our national interests requires the setting of priorities in light of existing values. It is largely a political decision, and thus arguably less susceptible to resolution by diplomatic and military experts than by politicians, although experts and relevant information are important to insure that the political decision-maker sees and understands the various alternatives and their probable consequences. Information and expertise are already available in the military and foreign relations committees of both houses. Cooperation of the executive branch would also be required, particularly regarding access to classified data. Once adequately buttressed by information and experts, Congress would be better prepared to make rapid, wise decisions and to avoid inundation and intimidation by the torrent of data and expert opinions flowing from the executive branch.

¹⁶⁶ See Note, 81 HARV. L. REV., *supra* note 2, at 1797 n.143.

¹⁶⁷ As one who has had the opportunity to read . . . [top secret] cables at various times in my life, I can testify that 95 per cent of the information essential for intelligent judgement is available to any careful reader of *The New York Times*. . . . Secrecy in diplomatic communication is mostly required to protect negotiating strategies, techniques of intelligence collection, details of weaponry, and gossip about personalities. . . . The myth of inside information has always been used to prevent democratic control of foreign policy Schlesinger, *supra* note 60, at 61-62.

A second historical force behind the power of the President has been the development of communication devices which permit direct contact between government officials and the electorate, and which the Chief Executive, as the most active, intelligible branch of government, has been able to exploit in an unsurpassed manner. Though Congress will never be able to compete with the President in manipulating the media to mold public opinion, it could greatly improve its present efforts. Whereas the President assiduously sees to his public image, Congress rarely employs professional image cultivators and seldom works to appear concerned and competent to deal with national problems.¹⁶⁸ Accordingly, the legislators' collective image tends to be one of a parochial and inefficient group, unduly concerned with trivia and self-interest, an image which could be dispelled in part by the use of professional public relations techniques and, more basically, by a willingness to grapple effectively with the country's problems.

Committee hearings are one area in which the legislators could use the media to greatest advantage, as the 1967 Fulbright proceedings indicate. But before committee efforts can have their maximum political and educational effect, they must be purged of the witchhunt aura imparted by past abuses. Responsible and civilized conduct of all committee proceedings would go far toward this end.¹⁶⁹

A third force behind presidential aggrandizement has been the democratization of politics in this country, rewarding the branch of government which seemed most representative of all the people and thus most concerned with the welfare of the nation. It may be argued that since the President represents all the people, he is entitled to rule by plebiscite, appealing directly to the public for support, and regarding the legislature as a necessary evil. But such a view is compelling only if Congress is in fact an undemocratic body—as it was when malapportioned districts, excessive obeisance to the seniority system and undue devotion to local, special and personal interests were at their peak.¹⁷⁰ Reapportionment, a move toward younger leadership and a

¹⁶⁸ See Kurland, *supra* note 2, at 635.

¹⁶⁹ See *id.* at 633.

¹⁷⁰ Congress was possibly at its lowest ebb as a representative body of the national interest at the turn of the century. See AMERICAN HERITAGE, *supra* note 13, at 270-71. The Editors of *American Heritage* conclude that, over the long term, [i]f decisive leadership had been lacking in the White House, the United States might have become another sort of country, and an inferior one, pervaded by the spirit of what Emerson termed "village littleness." This is the spirit that infuses many of the activities (or inactivities) of Congress at its narrowest. It

growing concern with national problems preclude a dismissal of Congress on these grounds today.¹⁷¹ Individual congressmen will always be somewhat more parochial than the President, as is appropriate for men who are the representatives of a part rather than the whole of the national electorate.

A corollary of the plebiscite view holds that the President alone possesses the willpower to make the hard decisions required for a practical foreign policy,¹⁷² and that he alone is capable of persuading a reluctant electorate to support them. Congress, out of both a predilection for

is expressed in such legislative slogans as To get along, go along (go along, that is, with the rest) and Vote your district first.

Id. at 372.

¹⁷¹ Since all states, regardless of their population, have two representatives in the Senate, presumably it can be argued that the upper house *institutionally* will always be less representative than the President. See Morgenthau, *supra* note 11, at 268. It is doubtful, however, that Senators from small states are necessarily less responsive to national sentiment than their colleagues from large states.

¹⁷² Dependence upon the President for an intelligent approach to the world is necessitated, it is said, by the failings of untutored public opinion. The point is worth developing in some detail, as it accounts for much of the fear of involving the people, via their representatives in Congress, too extensively in foreign policy decision-making. Morgenthau, *supra* note 11, at 261, argues that

there exists an inevitable incompatibility between the requirements of good foreign policy and the preferences of a democratically controlled public opinion. As de Tocqueville wrote with special reference to the United States, "Foreign politics demand scarcely any of the qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient . . . [A] democracy can only with great difficulties regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or wait their consequences with patience." The history of foreign policy conducted under democratic conditions illustrates the truth of these observations.

W. LIPPMANN, *ESSAYS IN THE PUBLIC PHILOSOPHY* 19-20 (1955), elaborates upon this theme:

Experience since 1917 indicates that in matters of war and peace the popular answer in the democracies is likely to be No. . . . The rule to which there are few exceptions—the acceptance of the Marshall Plan is one of them—is that at critical junctures, when the stakes are high, the prevailing mass opinion will impose what amounts to a veto upon changing the course on which the government is at the time proceeding. Prepare for war in time of peace? No. It is bad to raise taxes, to unbalance the budget, to take men away from their schools or their jobs, to provoke the enemy. Intervene in a developing conflict? No. Avoid the risk of war. Withdraw from the area of conflict? No. The adversary must not be appeased. Reduce your claims on the area? No. Righteousness cannot be compromised. Negotiate a compromise peace as soon as the opportunity presents itself? No. The aggressor must be punished. Remain armed to enforce the dictated settlement? No. The war is over.

The unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures.

See also, e.g., J. SPANIER, *AMERICAN FOREIGN POLICY SINCE WORLD WAR II* 216, 256-57 (rev. ed. 1960).

the status quo and a fear of offending constituents, is said not to represent the true spirit of the nation, and to pose a negative force which the President must overcome.¹⁷³ Though admittedly the Executive is often more willing to make hard decisions than Congress, there is strong reason to believe that on most occasions the President could persuade the legislators, as well as the electorate, to support wise policies. During the Cold War Congress has shown itself quite receptive to presidential leadership in foreign affairs. Moreover, to eliminate Congress as a participant in the shaping of foreign policy removes the country's first line of defense against an Executive who is incapable of making sound decisions.

Yet another variant of the foregoing view treats Congress with more respect. The legislators are not dismissed as undemocratic or spineless; rather their opinions, like those of the people at large, are said to rest within the presidential bosom. Of all men, the President is deemed the best informed concerning popular and congressional opinion.¹⁷⁴ Thus, when he acts, he does so with an awareness of what Congress would very probably have done had it been given the opportunity. But the extent to which this happy state obtains, of course, depends upon the President—upon the caliber of his intelligence-gathering machinery, upon the degree of his receptiveness to views other than his own, upon his ability to understand information at his disposal. And much depends upon the extent to which the President is willing to bow to what he understands to be the will of Congress and the country; even certain knowledge of congressional opinion provides far less a check on a determined President than would the necessity of seeking formal congressional approval.

A fourth factor in the rise of the presidency has been the election of many men who have worked to enlarge the scope of their powers and

¹⁷³ See Morgenthau, *supra* note 11, at 267-68. See note 170 *supra*.

¹⁷⁴ A. SCHLESINGER, *supra* note 13, at 187-88, states:

I would say that any President incorporates, in a sense, a deep awareness of the probable congressional reactions. I think one of the great myths of the presidency is that the President is the most lonely man in the world. The fact is that no one sees more people or is exposed to a wider range of opinion or has imaginatively to expose himself to a wider hypothetical range of opinion than the President . . . He is not the loneliest man in the world. He knows more, he is aware of more and he is aware of more possibilities and more probable reactions and objections than anyone else. And the President knows that he has to incorporate in himself a sense of all this if what he does is going to be accepted. So the fact that this is technically a decision of his own doesn't mean that in practice that these considerations of what other people feel or the Congress feels or the country feels are excluded from his processes in making that decision.

responsibilities. It is at this point that serious doubts arise as to the capacity of Congress to reverse the trend toward executive domination of foreign affairs. Though the legislators still have the power to force even a reluctant President to consult Congress about the employment of force abroad,¹⁷⁵ a majority of them may well choose not to assert it. Much of the leadership would oppose for reasons of personal power the changes in the decision-making process that would be required. Some legislators at any time will approve of the President's policies and be unwilling to think in institutional terms.¹⁷⁶ Some perhaps would fear that realistic procedures for congressional involvement in such crucial decisions could not be fashioned. Some will always prefer to avoid having to make such politically explosive decisions, and virtually all would be hard pressed to find the time to make the effort to reestablish and then sustain a congressional voice in foreign policy decisions. The tendency, accordingly, will be to make a few noises about executive usurpation without really disturbing the status quo.¹⁷⁷

Should Congress not have the will to reassert itself, the fifth factor behind the President's rise, momentum, will continue to inure solely to his advantage. But should the legislators prove themselves capable of acting, and acting wisely, momentum may serve them also. Successful congressional involvement in one decision regarding the use of force would lead to greater opportunities for future participation as public and presidential confidence in Congress grew, as well as the legislators' confidence in themselves.

In sum, the President's control over decisions to use force abroad is a perfectly natural and explicable development, but it is not one inexorably necessitated by national self-interest. This is not to say that the President should surrender his power over the day-to-day conduct of foreign relations or relinquish his role as a forceful external leader. It is to say that Congress is capable of having a voice in shaping foreign policies and a decisive voice on whether the United States will

¹⁷⁵ See text at notes 90-99 *supra*.

¹⁷⁶ There are certain institutional interests which put the Congress as a whole against the presidency. But I think, that despite this, many people in Congress believe in and support the program of the President if he is of their party.

A. SCHLESINGER, *supra* note 13, at 162. See Kurland's conclusion that Americans are extremely result-oriented at note 78 *supra*.

¹⁷⁷ For example, the "Great Debate" over the President's authority to send troops to Korea and Western Europe, which raged for three months in early 1951 under the impetus of Senator Robert A. Taft, ultimately came to naught. See note 57 *supra*.

initiate the use of force abroad.¹⁷⁸ To have this influence, Congress would have to alter its institutional framework, but not radically. The primary transformation would have to be in willpower. Lacking to date has been both the will to make the structural changes essential to a systematic, informed voice in foreign affairs, and the will to use existing powers¹⁷⁹ to persuade an unconvinced President to seek meaningful congressional approval before initiating foreign conflict.¹⁸⁰

Congressional participation in these decisions would not guarantee more peaceful foreign policies, though it should not lead to more conflict. It is difficult for Congress to fight a war through a reluctant President. Nor would congressional involvement ensure wise policies, as the legislators' myopia during the twenties and thirties indicates. Should Congress take stands that the President found in error on vital

¹⁷⁸ W. LIPPMANN, *supra* note 172, at 30, suggests the executive-legislative relationship that should prevail:

The executive is the active power in the state, the asking and the proposing power. The representative assembly is the consenting power, the petitioning, the approving and the criticizing, the accepting and the refusing power. The two powers are necessary if there is to be order and freedom. But each must be true to its own nature, each limiting and complementing the other. The government must be able to govern and the citizens must be represented in order that they shall not be oppressed. The health of the system depends upon the relationship of the two powers. If either absorbs or destroys the functions of the other power, the constitution is deranged.

¹⁷⁹ It has been suggested that Congress, like the malapportioned plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962), can do very little to help themselves. Schwartz, *supra* note 2, at 1047, states:

It is claimed that the action that is under attack has circumvented the very political process that the framers of the Constitution intended as a check on the President's power to commit American forces to combat. Thus, unless it is established through the courts that Congress has an indispensable role to play, the political branch can never perform its intended function.

This situation, then, is much like the one in *Baker v. Carr*. There the decision in allocating power within the state was, as perhaps is the decision to commit troops to combat, political in the profoundest sense. But it became clear that despite the wide range of reasonable choice that might be open to state legislatures, apportionment was not being carried out under any rational standard but rather was being used simply to perpetuate the existing power structure. It thus became necessary for the Court to impose rationality in order to restore the very integrity of the political process.

It seems, however, that the situations of the *Baker* plaintiffs and Congress are significantly different. No amount of will power on the part of the former could have effected reapportionment of legislatures controlled by men from overrepresented districts. Congress, on the other hand, is perfectly capable *itself* of pressing the President into cooperation, *if* it chooses to do so.

¹⁸⁰ Since few Presidents are unaware that they are strongest when supported by Congress, and hamstrung when opposed, they are likely to bow with notable grace to congressional insistence on a role in shaping foreign policy—so long as the relationship remains that described by Lippmann, *supra* note 178, and so long as the legislators make their decisions in terms of their understanding of the national interest.

matters, however, he would probably do as Woodrow Wilson and Franklin Roosevelt did. No branch of government will ever find its powers respected if it insists on taking positions that do not respond to contemporary realities.

Congressional participation would have one clear benefit. It would add legitimacy to the use of American troops abroad. The Constitution as popularly understood would be heeded, with substantial gains for the rule of law.¹⁸¹ Moreover, a congressionally authorized conflict would receive greater public backing than would presidentially authorized hostilities. Such political support is crucial in modern limited wars, which are more easily lost in domestic politics than on foreign battlefields. Of course, it is also possible that congressional involvement in the decision-making could lead to wiser policies; the mere process of articulating and debating goals and strategies might lead all concerned to a fuller understanding of the interests and alternatives at stake. It bears reiteration that the articulation and debate, if it is to be meaningful, must begin with the shaping of the policies that lead to the need to consider the use of force, and not with the actual determination whether to fight.

UNILATERAL EXECUTIVE WAR POWERS IN OUTLINE

Even with meaningful congressional participation in foreign affairs decision-making, it seems that independent executive power over the use of force would remain in at least five areas.

First. The President would doubtless continue to be the primary initiating force in American foreign relations.¹⁸² He would structure our policies and present them to Congress for its advice and consent. In most instances, Congress would very likely accept and follow his guidance. He would retain his control over the recognition of states and governments and over the conduct and maintenance of diplomatic intercourse—each potentially important to questions of war and peace. Even when working under a meaningful congressional war resolution—one specifying the time, place and purpose of the use of force—his powers as Commander-in-Chief over strategy, tactics and weapons, and his control over negotiations with the enemy, allies and other states would have great impact upon the nature of the conflict.

Second. The President could respond unilaterally to direct, physical

¹⁸¹ See notes 29-31 *supra* and accompanying text.

¹⁸² See note 178 *supra* and accompanying text.

assaults upon the territory of the United States or its possessions. The blow need not have actually fallen before he initiates defensive measures, if the attack appears to be imminent and inevitable. The presidential response, however, should be proportionate to the assault, sufficient only to repel the attackers and to ensure that they lack the immediate capacity to strike again. Before proceeding beyond such defensive measures, the President should seek the authorization of Congress.¹⁸³ Though no reasonable congressman would oppose defense of American territorial integrity, once an attack is repelled many legislators might wish to limit in some manner the means taken to resolve the hostilities so commenced.

Third. American citizens or military units under sudden attack abroad can, of course, defend themselves to the best of their ability. When the attack takes place in international territory, air or sea, the situation becomes closely analogous to an assault on American territory, and the President could take all steps necessary to stifle the attack. He might, for example, have resisted with all available force recent North Korean attacks on American reconnaissance units.

But when the attack occurs within the territory of another state, he should use force to defend the besieged only if his action is unlikely to risk the initiation of substantial hostilities, and only if it does not involve battle with the troops of the state in question, as opposed to battle with individuals not under its control.¹⁸⁴ The joint 1965 effort by the United States and Belgium to rescue whites trapped by rebellious elements in the Congo seems to have been a prime instance of constitutional rescue action by the President. An attempt to recover the *Pueblo* and its crew, once they were forced into port, however, would have risked renewal of the Korean War and almost surely would have involved a pitched battle with North Korean forces; thus, the venture would have required congressional authorization. Military reprisals

¹⁸³ For example, in the event of conventional shelling of coastal cities by foreign submarines, the President could clear coastal waters of enemy ships. An attack on the enemy homeland, however, should await congressional approval.

¹⁸⁴ When such individuals become disciplined insurgents who control appreciable territory, rather than a mob or ill-organized rebels, they should be treated as the forces of a *de facto* state for purposes of judging the appropriateness of presidential action against them. Moreover, special considerations become applicable when forces under the control of one country oppose United States presence in a third country. If such forces are irregular, and escalation of the conflict is unlikely, presidential action may be permissible. On the other hand, where intervention is likely to lead to increased hostilities, congressional involvement is mandatory.

against another state to avenge its attacks upon American citizens or troops should always have prior congressional approval.

Should the President conclude that an immediate response is essential, he could act and simultaneously go to Congress with his recommendations. Presumably the President could make the strongest case for immediate response when he is able to act effectively while the attack is yet in progress; upon its completion, there would generally be less cause for haste.¹⁸⁵ Similarly, should the President determine that secrecy is essential to a successful response, he could delay his submission of the matter to Congress.

Fourth. The President could respond unilaterally to attacks on American security interests abroad if he concludes that no delay can be brooked or if he feels that absolute secrecy in the initial planning and execution of the American response is essential. He must, however, inform Congress as soon as feasible, seeking ratification for the steps taken and authorization for future action. During the Korean invasion, arguably there was cause for unilateral presidential response in the interests of speed, and during the Cuban Missile Crisis in the interests of secrecy. Vietnam at no point required unilateral executive action on these grounds. Attacks on American destroyers in the Tonkin Gulf fell within category three above. As noted there, the President could take all necessary measures to repel the assaults, but he could not use them to justify his initiation of further hostilities.

Fifth. The President could deploy American forces, intelligence missions, military aid and advisers, although he should attempt in good faith to prevent their use in an offensive or provocative manner without congressional blessing. The prewar activities of Presidents Wilson and Roosevelt clearly violated this canon, but particularly in Roosevelt's case it is difficult to fault his action, considering the low ebb of congressional wisdom. It is well to reiterate a point made earlier: Neither Congress, nor for that matter the President, will find that

¹⁸⁵ Delay until congressional authorization might preclude action until the attack had been consummated and the need for defensive measures mooted. Moreover, the attacking state is less likely to regard as provocative steps taken to repel its assault, as opposed to the initiation of force against it in a rescue attempt or retaliatory raid. It seems, for example, that the United States could have recaptured the *Pueblo* even after it entered North Korean territorial waters, en route to captivity, with less risk of leading the attackers to take additional, unrelated military action (for example, invasion of South Korea) than would have been the case had Washington, at some later date, staged reprisal raids or attempted to rescue the ship and its crew.

their constitutional powers remain intact if their policies are dangerously ill-advised.

As in Vietnam, the commitment of military advisers can grow to something far more than originally envisioned, particularly when the government aided is battling indigenous insurgents who have external backing. At some point during the American buildup, specific congressional authorization for the use of force should be sought. Perhaps the logical moment would be before the introduction of regular American units for probable combat use.¹⁸⁶

CONCLUSION

To recapitulate, the goal here has been a brief development of factors bearing on the scope of the President's constitutional authority to commit American forces to foreign conflict. If realistic limits are to be placed on his use of the military abroad, it seems necessary to lessen presidential hegemony over the shaping of foreign policies which lead to the need to use armed forces, as well as over actual military deployment. The extent of the President's constitutional prerogative in these areas, however, is not easily ascertained.

As a matter of practice, presidential control has moved unevenly along a continuum, ranging from collaboration with and deference to Congress in the early years of the Republic, to the presidential *faits accomplis* of the Cold War. But even today there remain both internal and external restraints on the President's use of the military abroad. Not the least of the latter are the powers of Congress, both exercised and latent.

Popular expectations regarding the constitutional uses to which the Executive may put the military have not kept pace with his actual practice. There continue to exist expectations, rooted in the language of the Constitution and in the intent of the Framers, that Congress must have a meaningful voice in decisions to initiate hostilities abroad. A conflict therefore exists between expectations and practice. Some shift in one or the other, or both, is necessary if constitutional law is to obtain. The resolution should be one that results in that pattern of expectations, realized in practice, which best serves the long-term interests of the country.

To this end, it appears that change should occur largely in the practice of the last twenty-five years. The present high state of presi-

¹⁸⁶ See Moore, *supra* note 2, at 32.

dential prerogative has evolved naturally out of a set of historical and institutional factors which enabled the President to respond to contemporary pressures more easily than Congress. If Congress has the will, however, it too can meet the demands of modern foreign policy decision-making. While certain changes in institutional structure will be necessary, the critical factor will be the development of a congressional willingness to act quickly and wisely on vital issues and to use its existing powers to make its influence felt.

It is sometimes suggested that claims of undue presidential aggrandizement are pointless, since restraints exist which can hamstring executive policies. Thus, it is said, leave all to the political process: If the President is a usurper, he will be struck down in good time. The reality ignored, however, is that peoples' conduct is very much influenced by what they believe they have an obligation to do. In so sensitive an area as national security, the natural tendency will be to leave matters as they stand, since the existing order is, after all, tenable, if not clearly constitutional. Accordingly, unless Congress believes that it has a constitutional duty to make its voice felt in these decisions, unless the President believes that he has a constitutional duty to seek and honor congressional views on a systematic basis, and, ultimately, unless the electorate insists on such a relationship between the two branches, presidential hegemony will continue undisturbed, save in those rare instances when executive policies result in lengthy, costly and seemingly fruitless struggles.