

Waging War Against Checks and Balances--The Claim of an Unlimited Presidential War Power

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WAGING WAR AGAINST CHECKS AND BALANCES—THE CLAIM OF AN UNLIMITED PRESIDENTIAL WAR POWER

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I. INTRODUCTION

The Framers of the United States Constitution created a system of checks and balances¹ applicable to the decision to com-

¹ See generally THE FEDERALIST Nos. 47-51 (J. Madison); W. GWYN, THE MEANING OF THE SEPARATION OF POWERS 1-8 (1965); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 31-35 (1972); A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 60 (1976); Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 486-91 (1976). Checks and balances is a means to ensure the proper maintenance of a separation of powers. W. GWYN, *supra*, at 3. Pursuant to checks and balances, each branch is granted some power over the same activity, along with the constitutional means necessary to avoid interbranch encroachment. THE FEDERALIST, *supra*, No. 51, at 355-59 (J. Madison) (B. Wright ed. 1961). In this manner, the checks-and-balances system serves to create a safe and effective method for the distribution of power while avoiding the potential abuse of power. See A. SOFAER, *supra*, at 60.

At the foundation of this division of power was the Framers' attempt to safeguard the emergent republic against human fallibility. THE FEDERALIST, *supra*, No. 70, at 451 (A. Hamilton); *id.* No. 31, at 237 (A. Hamilton); *id.* No. 73, at 468 (A. Hamilton). Above all, the Framers were concerned that man's ambitious nature would result in an intentional abuse of power. Indeed, in the words of James Madison: "Ambition must be made to counteract ambition." *Id.* No. 51, at 356 (J. Madison).

The Framers originally considered two theories of government: a pure separation of powers system and a separation of powers as modified by checks and balances. A. SOFAER, *supra*, at 60. In adopting the latter theory, the Framers attempted to ensure personal freedom by imposing sufficient restraints on governmental action, thereby preventing excessive authority in one institution. T. EAGLETON, WAR AND PRESIDENTIAL POWER 4 (1974); see *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). In *Myers*, Justice Brandeis, employing the popular term separation of powers instead of the more technical phrase checks and balances, stated:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

mence war.² Specifically, the drafters intended that the nation remain at peace until both Congress and the President agreed that the national interest at stake justified the suffering caused by war. Underlying the selection of this standard were three premises: first, that war was a tremendous evil, an event to be avoided if at all possible; second, that the decision to wage war was difficult and thus readily subject to error; and third, that the possibility of such error would be reduced if congressional participation in the decision were mandated.

For over 160 years, the executive and legislative branches acted in accordance with this three-premise theory, and the attendant system of checks and balances. Despite grave threats to the United States itself and American interests abroad, American Armed Forces did not engage in any major military operation without prior congressional authorization. More importantly, throughout this period no President claimed any power to initiate combat in the absence of legislative approval, with the sole exception of authority to protect American citizens and territory. This practice changed radically with the Korean war and since then the practice of Presidents is to claim the authority to employ American military forces to protect any alleged threat to the "national security."

Not only have courts rejected the claim of unlimited executive war power, but the present presidential practice is inconsistent with checks and balances. The first premise of the Framers is as relevant today as it was in the 18th century, since the number of casualties in any modern war ranges from high to cataclysmal. Second, Presidents Truman through Reagan have adopted a foreign policy of global containment, resulting in so broad a definition of national interest that a virtually limitless number of nations and events purportedly threaten national security. Third, contempo-

Myers, 272 U.S. at 293 (Brandeis, J., dissenting).

² Many commentators note that the issue of war-initiating power was of deep concern to the Framers, and therefore was intended to be controlled by the system of checks and balances. See T. EAGLETON, *supra* note 1, at 10-11. The Framers sought to create a procedure whereby neither the executive nor the legislature alone could make a war-initiating decision, and thus established a system which required approval of both branches to put the nation at war. *Id.* at 10; see Casper, *supra* note 1, at 489-91; Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 461 (1971) ("divided allocation of warmaking authority reflects the familiar checks-and-balances motif"). See generally L. HENKIN, *supra* note 1, at 31-35; A. SOFAER, *supra* note 1, at 60. Notably, even advocates of broad executive power concede that warmaking authority is shared by the President and Congress. See, e.g., Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 834-35 (1972).

rary Congresses are certainly capable of making a positive contribution in the decision to commence war.

Moreover, a foreign policy of global containment in an age of highly destructive weapons has resulted in American Presidents jeopardizing upon their own initiative the paramount national interest—preservation of the nation-state—for far lesser national interests. This Article argues for the abolition of unlimited executive war power and the restoration of procedure that is both less menacing and more in accordance with the constitutional principle of checks and balances.

II. APPLICATION OF CHECKS AND BALANCES TO THE WARMAKING POWER

A. *The Three-Premise Theory*

Evidence that the Framers intended the war-initiating power³

³ The constitutional authority to conduct war must be distinguished from the power to initiate war. The power to initiate war requires the approval and consent of both the Congress and the President. See L. HENKIN, *supra* note 1, at 105-08; A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 5-7 (1973). One commentator has noted that the power to initiate war is one of "joint possession." A. SCHLESINGER, *supra*, at 7; see W. REVELEY, *WAR POWERS OF THE PRESIDENT AND CONGRESS—WHO HOLDS THE ARROWS AND OLIVE BRANCHES?* 63-64 (1981). The Second Circuit on a number of occasions has observed that the power to initiate war is a power that is shared by both political branches, and, therefore, both branches must participate in the war-initiating decision. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302, 305-06 (2d Cir. 1970).

In contrast, the power to conduct war belongs exclusively to the President. L. HENKIN, *supra* note 1, at 51-52; see *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827). In a discussion of the President's right to conduct war after an invasion occurs, the Supreme Court stated that "the authority to decide . . . belongs exclusively to the President, and . . . his decision is conclusive upon all other persons." 25 U.S. (12 Wheat.) at 30. Requiring legislative approval for such decisions as determining the movement of troops, weapons, and equipment, where and when a battle would be fought, whom to name as officers to direct each operation, or whether to open a new theater of operations, would undoubtedly cripple the Executive in conducting war. See G. SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 76-77 (1919); Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid* (pt. 2), 1970 DUKE L.J. 453, 463.

Despite exclusive presidential control over the conduct of war, it is clear that the Framers intended to apply checks and balances to the decision to commence war. See Wallace, *supra*, at 462-63. The debates at the Philadelphia Convention, see *infra* note 5 and accompanying text, the Ratification Debates, see *infra* note 6, judicial decisions throughout the nation's history, see *infra* notes 100-08, and many commentators, see L. HENKIN, *supra* note 1, at 33-34; G. SUTHERLAND, *supra*, at 72, state unequivocally that the war-commencing power is a shared power. Notably, Justice Sutherland, a firm advocate of singleness of command and concentration of power in the President once war has been authorized, was

to be subject to checks and balances can be garnered from the express language of the Constitution,⁴ as well as the debates at the

equally emphatic in recognizing that the Framers intended to apply checks and balances to the decision to initiate war. Justice Sutherland stated that "[t]he Framers of our Constitution . . . concluded, and I think wisely, that such a power in the hands of a single person was not consonant with the genius and spirit of a republic such as ours." G. SUTHERLAND, *supra*, at 72; see A. SOFAER, *supra* note 1, at 56.

⁴ Advocates of a broad presidential power to commence war have argued that the Commander in Chief clause, U.S. CONST., art. II, § 2, cl. 1, is an unrestricted grant of power to the President to utilize the armed forces as he sees fit. See U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966) [hereinafter cited as *1966 State Dep't Memo*]; U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173 *passim* (1950) [hereinafter cited as *1950 State Dep't Memo*]. These advocates, therefore, construe the Commander in Chief clause expansively, and narrowly construe the clause granting Congress the power to declare war. U.S. CONST., art. I, § 8, cl. 11. This interpretation of the interplay of these clauses, however, is contrary to the original meaning of these clauses. In fact, the Framers intended the function of Commander in Chief to be nothing more than the supreme commander of the American Army and Navy. THE FEDERALIST, *supra* note 1, No. 69, at 446, 450 (A. Hamilton); see E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 228 (4th rev. ed. 1957). Professor Corwin stated that the only power the Framers intended to grant the President under the Commander in Chief clause is the authority to be

top general and top admiral of the forces provided by Congress, so that no one can be put over him or be authorized to give him orders in the direction of the said forces; but otherwise he will have no powers that any high military or naval commander not also President might not have.

E. CORWIN, *supra*, at 228.

Clearly, a grant of authority to commence war unilaterally was not contemplated. *Id.* Rather, the clause expresses the Framers' intent that the President, once war has been authorized by Congress, was to possess an untrammelled power to command and to direct the movements of the naval and land forces. *Id.* Moreover, despite claims by advocates of broad executive warmaking powers that the grant of the power "to declare war" is the authority only to issue a formal declaration of war, it is evident that the Framers understood "declare" to mean authorize, make, or commence. L. HENKIN, *supra* note 1, at 80-81; Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 695 (1972); see *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800). In *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971), the First Circuit cited *Bas v. Tingy* with approval and quoted the following language from that early case: "The hostilities against France in 1799 were . . . an authorized but undeclared state of warfare." *Id.* at 33.

To be sure, the clause "to declare war" initially was worded to grant "[t]he Legislature of the United States . . . the Power . . . to make war . . ." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 167-68 (rev. ed. 1937). This clause was considered by the full Convention on August 17, 1787, *id.* at 318-19, and amended by deleting "make" and inserting "declare" in its place, *id.* According to Madison, this language change was needed to leave "to the Executive the power to repel sudden attacks." *Id.* at 318. Delegates King and Ellsworth propounded an additional reason for this alteration: that "make" war might be understood to mean "conduct" war which was an established executive function. *Id.* at 319. Thus, the change was not designed to take the warmaking initiative from Congress, but was intended instead to permit the President simply to defend American territory and to direct movement of the armed forces, following congressional authorization of war.

Philadelphia Convention⁵ and the state ratification conventions.⁶ It appears that imposition of the checks-and-balances standard to the war-initiating decision was founded upon three premises.

The first premise is derived from the Framers' attitude toward war. As opposed to viewing war as an ennobling event, the Framers regarded war as an event of grave consequence. Indeed, many commentators have concluded that statements of the Framers made during the constitutional debates manifest an unequivocal revulsion toward war's destructiveness.⁷

Second, the Framers perceived that defining national interests worthy of protection was not objective and error-free but a subjective and difficult determination.⁸ Further, even assuming universal

⁵ See DEBATES IN THE FEDERAL CONVENTION OF 1787, at 418-19 (G. Hunt & J. Scott ed. 1920) [hereinafter cited as DEBATES IN THE FEDERAL CONVENTION]. But see Lofgren, *supra* note 4, at 675 ("the manner in which the nation should be committed to war was not one of the chief concerns of the delegates [at the] Philadelphia Convention").

⁶ The ratifiers expressed views on the war-initiating decision similar to those put forth at the Philadelphia Convention, see *supra* note 5 and accompanying text, concluding that the war powers should be shared, see A. SOFAER, *supra* note 1, at 48-51. According to James Wilson:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: and this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN 1787, at 528 (J. Elliot 2d ed. 1836) [hereinafter cited as DEBATES]. Significantly, the Commander in Chief power received "extraordinarily short treatment." A. SOFAER, *supra* note 1, at 48.

⁷ See, e.g., Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 36 (1972). The Framers' aversion to war, according to Raoul Berger, influenced their decision to split the warmaking powers. *Id.* Similarly, Justice Story recognized the Framers' attitude toward war as bearing upon the division of warmaking power: "[T]he power of declaring war is . . . so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation . . ." *Id.* at 82 (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1166, at 60 (1833)); see 1 M. FARRAND, *supra* note 4, at 316; Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1284 (1969) ("[t]he Framers recognized the potentially momentous consequences of foreign conflict and wished to check its unilateral initiation by any single individual or group"). See generally Rostow, *supra* note 2, at 841 (discussing whether the drafters of the Constitution intended "to make it hard to go to war, and easy to make peace").

⁸ Note, *Congress, the President and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1783 (1968). A nation can decide that some interests are important enough that safeguarding them is worth the cost of war. *Id.*; B. BRODIE, WAR AND POLITICS 342-45 (1973). In addition to the paramount goal of retaining the independence and integrity of the United States, the maintenance of a balance of power, the advancement of the import and export of trade, and the promotion of ideological aims abroad were deemed to be legitimate

agreement as to the scope of national interest, the Framers realized that the decision as to whether any given national interest outweighed the potential misery of war was similarly subject to error.⁹

Third, the Framers believed that congressional participation in a decision to initiate war would reduce the probability that American citizens would be required to fight in an unnecessary

objectives of the National Government. See *THE FEDERALIST*, *supra* note 1, No. 6, at 111-13 (A. Hamilton); W. ROSTOW, *THE DIFFUSION OF POWER* 607-10 (1972). See generally F.R. DULLES, *AMERICA'S RISE TO WORLD POWER* 1 (1954).

At all times, the proper scope of the national interest is subject to debate. As one commentator noted:

We hear much glib talk about those interests, as if the speakers knew exactly what they are or ought to be. Yet they are not fixed by nature nor identifiable by any generally accepted standard of objective criteria. They are instead the products of fallible human judgment, on matters concerning which agreement within the nation is usually less than universal.

B. BRODIE, *supra*, at 343. Some have defined national interest broadly. For example, in 1812, Speaker of the House Henry Clay and Senator John C. Calhoun argued that the United States had an interest in maintaining its trade relations with every nation and had an interest in defending the international legal principle of freedom of the seas. R. FERRELL, *AMERICAN DIPLOMACY* 136-38 (3d ed. 1975). Other members of Congress, however, failed to adopt such a broad definition of national interest. *Id.* at 139. More contemporary assessments of national objectives may or may not include avoidance of nuclear conflict, creation of a more stable world order, or maintenance of the credibility of a promise to defend other nations from attack. See R. CLOUGH, *EAST ASIA AND U.S. SECURITY* 29 (1975); W. ROSTOW, *supra*, at 605-11.

* The fact that a national interest is at stake does not end the inquiry as to whether a war should be commenced. Indeed, the question remains whether the national interest is worth the suffering of war. This decision is more subjective, more difficult, and more prone to error than the decision of defining the scope of national interest. The Framers were determined to avoid the misery attendant to war unless the gain to the national interest outweighed the costs. See *War Powers Legislation, 1973: Hearings on S. 440 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 23 (1973) (statement of Prof. Bickel) [hereinafter cited as *Hearings on War Powers Legislation*]; S. REP. NO. 797, 90th Cong., 1st Sess. 7 (1967) [hereinafter cited as *NATIONAL COMMITMENTS REPORT*]; W. REVELEY, *supra* note 3, at 102; Reveley, *The Power to Make War*, in *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY* 93-94 (1976) [hereinafter cited as *Reveley, The Power to Make War*]; Berger, *supra* note 7, at 82; Reveley, *supra* note 7, at 1284 & n.138; Note, *supra* note 8, at 1784.

During the state ratification debates, James Wilson, one of the most active participants in the Philadelphia Convention, commented that the Framers sought to ensure that war would be initiated only after the President and Congress concurred that the national interest at stake warranted military involvement. II *DEBATES*, *supra* note 6, at 528. One commentator noted:

Presumably, any resort to war . . . is justified only because in some sense United States security is thought to be at stake. . . . That decision [to defend] will depend on a variety of factors—proximity to the United States; the value of the country as an ally; other United States interests involved, such as military bases and military sites; and the nature of the aggression and the aggressor.

Note, *supra* note 8, at 1783.

war.¹⁰ Indeed, Alexander Hamilton noted that "it cannot be doubted that [joint] participation would materially add to the safety of the society,"¹¹ and regarded congressional participation as reducing the probability of erroneously defining the national interest.¹² From these three premises, the Framers concluded that congressional as well as presidential authorization is to be required to initiate war.¹³

B. *Assumed Authorization*

Although the system of checks and balances articulated in the Constitution applies at all times to the decision to commence war, in certain instances the imperatives of the system can be fulfilled

¹⁰ The late Alexander Bickel, an eminent constitutional lawyer, stated that the Framers' requirement of congressional participation reduces the possibility that the nation might shed its blood in vain. He observed that "Congress and the President are indeed capable of acting unwisely, singly or together, but hopefully less likely together than singly." *Hearings on War Powers Legislation*, *supra* note 9, at 23. Similarly, Professor Reveley recognized that democracy "requires federal officials to take clear responsibility for national action and account for it to the voters, all on the assumption that the full play of representative democracy is most likely to produce policy in the general interest." Reveley, *The Power to Make War*, *supra* note 9, at 93. Finally, the Report of the Senate Foreign Relations Committee states: "Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions and, in so doing, limited the ability of anyone to impose tyranny or disaster on the country." NATIONAL COMMITMENTS REPORT, *supra* note 9, at 26-27.

¹¹ THE FEDERALIST, *supra* note 1, No. 75, at 478 (A. Hamilton).

¹² *Id.*

¹³ The Framers clearly and explicitly intended to foreclose unilateral executive action to commence war. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 8-9; T. EAGLETON, *supra* note 1, at 11-12; W. REVELEY, *supra* note 3, at 15-16, 54-56, 314 n.14; Berger, *supra* note 7, at 82; Reveley, *supra* note 7, at 1284 n.138. At the North Carolina Convention, Speaker James Iredell stated that "[t]he President has not the power of declaring war by his own authority" IV DEBATES, *supra* note 6, at 107. Major Pierce Butler, a delegate to the Federal Convention, voiced similar concerns at the South Carolina Convention. *See id.* at 263. As a Congressman, Abraham Lincoln reiterated the intent of the Framers that no one branch possess the power to commence war. A. SCHLESINGER, *supra* note 3, at 42-43. The Constitution was framed, Lincoln noted, so "that no one man should hold the power of bringing this oppression upon us." Letter from Abraham Lincoln to W.H. Herndon (Feb. 15, 1848), *quoted in* A. SCHLESINGER, *supra* note 3, at 43 (emphasis in original). If Congress should favor war while the President opposes it, Congress similarly would be without power to put the nation at war. *See* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 93-95 (1921). *See generally* Baldwin, *The Share of the President of the United States in a Declaration of War*, 12 AM. J. INT'L L. 1, 7, 10-11 (1918). Congress, however, typically has been the less militant branch. *See* FOUNDATIONS OF AMERICAN DIPLOMACY 1775-1872, at 261-62 (R. Ferrell ed. 1968) [hereinafter cited as FOUNDATIONS OF AMERICAN DIPLOMACY] (suggesting that the President is more apt to favor war than Congress).

without actual congressional authorization;¹⁴ that is, a legislative grant of authority to the President to wage war at times can be assumed. This assumed authority can be invoked only when the following condition is satisfied: a congressional vote in favor of war is a foregone conclusion.¹⁵ Clearly, the circumstances in which it can be properly asserted that congressional approval is a foregone conclusion are rare.¹⁶

Only a single case occurred to the Framers in which the requirement of legislative authorization can be fulfilled without an actual statute: surprise attack against the United States when Congress is not in session.¹⁷ The Framers' decision to exempt this category and the decision's underlying rationale provide guidance in identifying other situations, if any, in which assumed authorization can fulfill checks-and-balances requirements.

Inherent in the exemption of an attack on American territory is the recognition that defense of the American state is a national

¹⁴ The Framers believed that a unilateral presidential power to defend the nation's territory from attack when Congress was out of session could be exercised without explicit congressional authorization. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 8-9; 2 M. FARRAND, *supra* note 4, at 318-19; Lofgren, *supra* note 4, at 700; Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 9 (1972).

¹⁵ Note, *supra* note 8, at 1783.

¹⁶ *Id.*

¹⁷ *Mitchell v. Laird*, 488 F.2d 611, 613-14 (D.C. Cir. 1973); Note, *supra* note 8, at 1784; see U.S. CONST. art. II, § 2, cl. 1. In *The Prize Cases*, the Supreme Court stated that the President possesses a unilateral authority to protect the political independence of the state. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). At issue in *The Prize Cases* was the validity of President Lincoln's unilateral decision to blockade the ports of the rebellious South. See *id.* at 665-66. In dictum, the majority opinion accepted the premise that in the case of surprise attack against American territory, congressional authorization is conclusively presumed, stating that "[i]f war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force." *Id.* at 668. Therefore, in such circumstance, the President need not await special legislative authorization. *Id.*

The unqualified recognition of the legality of unilateral use of force by a President in defending the territorial integrity and political independence of the United States was reaffirmed during the litigation concerning the constitutionality of the Vietnam war. For example, in *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia stated:

[W]e are unanimously of the opinion that there are some types of war which without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack Otherwise the country would be paralyzed. Before the Congress could act the nation might be defeated or at least crippled. . . . Any other construction of the Constitution would make it self-destructive.

Id. at 613.

interest of the highest order.¹⁸ Only the American state can defend the lives and rights of the American people.¹⁹ Absent this protection, the foreign invader would subject the American people to its unrestrained power.²⁰ The unique importance of this interest led the Framers to conclude that every legislator certainly would have voted in favor of a war to defend the American state.²¹

The conclusion to be drawn from the foregoing discussion is that checks and balances is the principle²² and actual authorization by statute is the rule.²³ Naturally, any exception to the rule must be drawn narrowly so as to ensure consistency with the principle of checks and balances.

Although the Framers considered only a single case in which assumed authorization could be invoked,²⁴ they decided to rely upon governmental practice to establish any additional exceptions.²⁵ The claims and actions of successive Presidents, the responses of the Congresses, and judicial review of the political branches' interpretation of checks and balances were to be used to

¹⁸ See U.S. CONST. art. IV, § 4. Pursuant to article IV of the Constitution, the United States guarantees "to every State in [the] Union a Republican Form of Government, and . . . protect[s] each of them against Invasion . . ." *Id.* In addition to protecting the lives, liberty, and properties of its citizens from external threats of invasion, the state provides internal protection and security from individuals within the state. See R. GILPIN, *WAR AND CHANGE IN WORLD POLITICS* 15-18 (1981); J. HERZ, *THE NATION-STATE AND THE CRISIS OF WORLD POLITICS* 126-28 (1976). Since the state provides its citizens with these essential benefits—protection from both internal and external threats—it may be argued that the Framers assumed that any reasonable man would be willing to give his life to preserve the state.

¹⁹ *E.g.*, J. HERZ, *supra* note 18, at 100-04. According to Professor Gilpin: "The state is sovereign in that it must answer to no higher authority in the international sphere. It alone defines and protects the rights of individuals and groups. Individuals possess no rights except those guaranteed by the state itself; they have no security save that afforded by the state." R. GILPIN, *supra* note 18, at 17.

²⁰ *E.g.*, J. HERZ, *supra* note 18, at 100-04, 126-28.

²¹ 2 M. FARRAND, *supra* note 4, at 318; Note, *supra* note 8, at 1783.

²² See *supra* notes 2-12 and accompanying text.

²³ See *supra* note 13 and accompanying text.

²⁴ See *supra* note 17 and accompanying text.

²⁵ See Reveley, *Constitutional Allocation of War Powers Between the President and Congress: 1787-1788*, 15 VA. J. INT'L L. 73, 82-83 (1974). It is apparent that the Framers deliberately refrained from providing an answer for every situation that might arise. *Id.* Realizing the difficulty in foreseeing and outlining all possible exigencies, the Framers observed that some areas would be better served by practice and experience. *Id.* In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall stated that the function of a constitution is to state fundamental principles and not to provide an exact answer to every situation. *Id.* at 407. Chief Justice Marshall's analysis, although directed at the relationship between a national bank and the congressional commerce power, may also be applied to the assumption of legislative authorization and the principle of checks and balances. See *id.* at 407-13.

flesh out the checks-and-balances system.²⁶ It is important to remember, however, that in implementing this authority, there must forever be compliance with constitutional principles.²⁷

III. THE CLAIMS AND ACTIONS OF THE POLITICAL BRANCHES BEFORE AND AFTER THE KOREAN WAR

In examining the distribution of the warmaking power between the executive and legislative branches, a number of fundamental constitutional principles must be borne in mind.²⁸ The relevant authorities in determining the Constitution's allocation of the war power are the claims and actions of the executive branch and Congress,²⁹ judicial review,³⁰ and the Framers' intent.³¹ Although

²⁶ See *infra* notes 29-31 and accompanying text. The Framers were very conscious of the interrelationship among the three branches of government. Madison's view of the "intentionally 'mixed' powers" served as an insight into the purposes of the ambiguity. See A. SOFAER, *supra* note 1, at 58. By not having a single superior branch, the interpretations of each branch are valued and checked against the other two, thus serving as the fulcrum of the balance of power. *Id.*

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177-78 (1803). If the Congress were permitted to act in a manner contrary to the Constitution, "[i]t would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits." *Id.* at 178. It is therefore accepted that the officials of the executive and legislative departments can utilize, but not exceed, the specific powers accorded them by the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

²⁸ See *infra* notes 29-34 and accompanying text.

²⁹ See Rostow, *supra* note 2, at 846-48. Generally, courts regard the practice of the political branches as a relevant authority in interpreting the Constitution. See *id.* at 850; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915).

³⁰ See Rostow, *supra* note 2, at 850. The Supreme Court, through judicial interpretation, has formulated rules of constitutionality, and these rules "have dominated constitutional usage and doctrine." *Id.*

³¹ *Bell v. Maryland*, 378 U.S. 226, 288-89 (1964) (Goldberg, J., concurring). In *Bell*, Justice Goldberg stated that, "[o]ur sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purpose of the Framers." *Id.* (Goldberg, J., concurring). Other cases also have stated this general proposition that the original understanding is a relevant authority in constitutional interpretation. See *Powell v. McCormack*, 395 U.S. 486, 532-41 (1969) (considering the Framers' intention to deny Congress the power to vary membership qualifications); *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (determining the original purpose of the fourteenth amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1872). This proposition certainly has application in determining the proper allocation of warmaking authority. See A. SCHLESINGER, *supra* note 3, at 13-23. Only investigation into the intention of the Framers can disclose the true meaning of the Constitution. *Id.* at 13; see Lofgren, *supra* note 4, at 673; Van Alstyne, *supra* note 14, at 5-13.

the question of whether judicial precedent overrides the original understanding in constitutional interpretation is largely unsettled,³² the initiatives of the political branches must yield to both precedent³³ and original understanding³⁴ when in conflict with either.

A. *Pre-Korean War Practice*

The thirty-two Presidents and eighty Congresses of the pre-Korean war period were presented with continual threats to a wide range of important national interests, including the political independence and territorial integrity of the United States,³⁵ the main-

³² See generally Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 278-352 (1981). The engagement in noninterpretive review by the Supreme Court when it looks "to a value judgment other than the one constitutionalized by the Framers" is a subject of controversy. *Id.* at 279; see J. ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

³³ W. REVELEY, *supra* note 3, at 206. It has been noted that "[j]udges are . . . better able than politicians to avoid the dangers accompanying constitutional evolution by practice. When ruling on the authority of the President or Congress, courts are less likely to adopt self-serving interpretations." *Id.* Moreover, the Supreme Court has held the practice of the President or Congress unconstitutional in a number of cases. *E.g.*, *United States v. Nixon*, 418 U.S. 683, 713 (1974); *Powell v. McCormack*, 395 U.S. 486, 550 (1969); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).

³⁴ See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374-87 (1981) (Framers' intent ranks higher in constitutional hierarchy than practice). In *Powell v. McCormack*, 395 U.S. 486 (1969), Representative Adam Clayton Powell, Jr. of the 18th Congressional District of New York claimed that he was unlawfully excluded from taking his seat in the House of Representatives. *Id.* at 489. Although Powell met the standing requirements of age, citizenship, and residence contained in article I, section 2, of the Constitution, *id.* at 489, the House claimed that it had the power to exclude him for certain acts of misconduct, a ground which is not mentioned in article I, section 2, *id.* at 491. John McCormack, Speaker of the House of Representatives and named as a defendant, claimed that since previous Congresses had excluded member-elects on the ground of misconduct, the congressional practice was authority for a power to exclude on grounds other than those specified in article I. See *id.* at 544-45. Moreover, the House defendants argued that in the event of a conflict between practice and original understanding, practice should take precedence over original understanding. Rejecting this argument, the Supreme Court stated that the original understanding is a higher authority than the practice of previous Congresses. *Id.* at 546-47. The broad exclusion practice, therefore, was unconstitutional because it conflicted with the original understanding. *Id.*

Significantly, Professor William Van Alstyne noted: "The claim that constitutional legitimacy may be settled by the sheer weight of an unexamined governmental practice . . . ought not lightly be accepted. . . . [R]ecent practice is perhaps the *least* instructive source of constitutional legitimacy." Van Alstyne, *supra* note 14, at 3 (emphasis in original). Van Alstyne observed that the executive and legislative branches' reliance on their own behavior as authority was expressly and unequivocally rejected in *Powell* and *Youngstown*. *Id.* at 4-5.

³⁵ See R. LECKIE, *THE WARS OF AMERICA* 222-29 (1968). During the period immediately following the formation of the American nation, the very existence of the National Govern-

tenance of the balance of power,³⁶ the export and import trade,³⁷ ideological concerns,³⁸ and the protection of American citizens.³⁹

ment was threatened by a lack of funds, a lack of administrative guidelines, and a lack of armed forces. *Id.* at 222.

In 1814, the British planned a major invasion of the United States which might have permanently detached large portions of territory from the American state. R. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY* 51 (1973). The small, ill-equipped and uncoordinated American force was in real danger of being defeated by the British with the consequent surrender of American territory and relinquishment of the newly won independence. In fact, when British forces attacked the nation's capital in 1814, the defending militia fled Washington, D.C. The British then took control of the national capital, convened a mock session of Congress, and debated whether they should "burn the Yankee capital down?" R. FERRELL, *supra* note 8, at 143. The motion passed and the British did just that, setting fire to the Capitol and to the White House. *Id.*

³⁶ See R. LECKIE, *supra* note 35, at 627-29, 677-707. Napoleon, who ruled France from 1799 to 1815, sought to destroy the balance of power in Europe and make France predominant. R. FERRELL, *supra* note 8, at 125. His attempt to upset the European balance of power during these critical years in our nation's history meant a potential or actual threat to the American state. *Id.* The period between 1815 and 1914 was one of relative peace and stability in Europe. This permitted the United States to concentrate on its domestic policies. Americans embarked upon a massive settlement and development of the states west of the Mississippi River, engaged in a war with Mexico over Texas and other territory in the Southwest, R. LECKIE, *supra* note 35, at 320-24, and experienced a civil war to resolve such issues as states' rights and slavery. *Id.* at 382-85.

The next surge of activity involving the world balance of power came with the Spanish-American War in the late 1800's. See *id.* at 542-49. World balance received its greatest threat during the periods accompanying the two World Wars when German forces were on the verge of shifting the entire European power structure to an unbalanced domination by Germany. See *id.* at 627-29, 677-707.

³⁷ FOUNDATIONS OF AMERICAN DIPLOMACY, *supra* note 13, at 11. From 1775 to 1872, "[p]rotection and increase of commerce was an end of American diplomacy second only to independence." *Id.* at 9. Moreover, in the post-World War II world, the health and prosperity of the American economy is increasingly dependent upon international trade and investment. R. KEOHANE & J. NYE, *POWER AND INTERDEPENDENCE* 8-19 (1977). It is recognized that international trade is an important determinant of the level of production, employment, and inflation. See, e.g., W. SCHNEIDER, *FOOD, FOREIGN POLICY, AND RAW MATERIALS CARTELS* 39-50 (1976).

³⁸ See F.R. DULLES, *supra* note 8, at 1. Historian Foster Rhea Dulles observed that the encouragement of freedom throughout the world has been a concern of American foreign policy since the formation of the Republic. *Id.* America's commitment to advancing freedom within foreign nations is grounded in both altruism and self-interest. S. HOFFMANN, *DUTIES BEYOND BORDERS* 108-20 (1981). Under the premise that all human beings are equal and entitled to protection for their lives, liberty and property, America has sought to bring these benefits of democracy to people everywhere. See *id.* at 97, 108-10. In addition, America has sought to promote human rights in order to create more moderate and stable nations. It is argued that a government which mistreats its own people is also likely to be an aggressive nation. Thus, the promotion of human rights would diminish the propensity of the dictatorial regime to commit acts of violence against its own citizens and its neighbors. *Id.* at 110-11.

In addition to the desire to bring democracy and human rights to nations less fortunate than our own, the United States has declared that it has an interest in preserving peace

Yet, with the sole exception of the protection of American citizens,⁴⁰ no President ever claimed that congressional authorization

throughout the world. B. BRODIE, *supra* note 8, at 62. To be sure, it has been stated that "an orderly world requires a single durable structure of world security, which must everywhere be protected against aggression: if aggression were permitted to go unpunished in one place, this by infection would lead to a general destruction of the system of world order." *Id.* at 116.

³⁹ Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 655-56 (1972). Since the late 1700's, there have been roughly 80 cases of military operations to protect citizens abroad. *See id.* at 654. In this regard, Chief Justice Marshall has stated:

The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favour, would be considered a justifiable interposition.

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804) (emphasis in original).

⁴⁰ *See* Wormuth, *supra* note 39, at 658-59. Under certain conditions, throughout the pre-Korean war period Presidents and Congress conceded and courts endorsed assumed authorization for the purpose of rescuing American citizens who were in immediate danger of losing their lives. The conditions under which Presidents protected American citizens were that no rescue mission could be dispatched unless the maximum number of American lives to be lost were zero or de minimis and that these low casualties could be predicted before the mission was dispatched with nearly complete certainty. R. Russell, *The United States Congress and the Power to Use Military Force* 242-43, 312 (1967) (unpublished Ph.D. thesis available from Fletcher School of Law and Diplomacy Library); *see* J. JAVITS, *WHO MAKES WAR* 51 (1973). The practice of Presidents complied with this stringent condition on all occasions when military force was used to protect American citizens. Even though the armed forces of the United States frequently landed on foreign soil for the purpose of protecting American citizens, Presidents never sent an American force to rescue endangered Americans in a strong nation which could fight back and inflict heavy casualties on the American soldiers. *See* J. JAVITS, *supra*, at 105-11. Rather, they dispatched landing parties against either weak states, R. Russell, *supra*, at 312, or people who were not even organized into a state, *id.* at 242-43.

The response of successive Congresses to these presidential rescue missions was approval. Moreover, in the case of protecting American citizens in primitive, stateless territories or in states with weak, impotent military forces the judicial branch endorsed the presidential claim and congressional acceptance of the executive practice. In *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court, in dictum, stated: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government." *Id.* at 79.

In addition, the practice of the political branches was consistent with the Framers' three-premise theory. The Framers' concern about the suffering caused by war was not violated in the case of conducting military operations against an impotent enemy. The maximum number of American casualties assuredly would be small since the American landing party possessed overwhelming military superiority. Moreover, without the deployment of the rescue party, the American citizens very probably would have been killed. Consequently, the net effect of dispatching a rescue party was the saving of American lives.

The fact that the presidential practice of claiming a power to protect citizens was deliberately and repeatedly accepted by successive Congresses, was endorsed by the courts, and

could be assumed until President Truman did so in June 1950.⁴¹ Successive Presidents, Congresses, and courts agreed that the scope of assumed authorization extended no further than the protection of American citizens in certain circumstances and the defense of the American state.⁴²

It may be argued, however, that the modern world poses far greater threats to national interests than those faced by pre-Korean war Presidents. It is useful in this connection, therefore, to

was consistent with the checks-and-balances system, leads to the conclusion that legislative authorization can be properly assumed in the case of protecting American citizens in stateless territories and powerless states. J. JAVITS, *supra*, at 105-11. Consequently, the executive branch acquired the unilateral authority to commence military operations in this narrow situation.

In summary, before the Korean war, Presidents' unilateral warmaking authority was limited to the narrow categories of protection of the state and citizens under limited conditions.

⁴¹ See A. SCHLESINGER, *supra* note 3, at 135-36. Senator William Spong, a member of the Senate Foreign Relations Committee, observed that "[t]he sending of armed forces to Korea in 1950 by President Truman without congressional authorization or consultation is the first instance of a President claiming an inherent power to act 'in the broad interest of American foreign policy.'" Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1, 7 (1971) (footnote omitted).

It is important to emphasize that although many Presidents actually *used* the armed forces for purposes other than the protection of state and citizens prior to the Korean war, no President ever *claimed* a power beyond the narrow authority of defending state and citizen. Instead, Presidents veiled their true purposes with a claim of protection of American territory or citizens. J. JAVITS, *supra* note 40, at 86-95. For example, in 1846 President Polk rationalized an attack on Mexico by claiming he was defending American territory, specifically Texas, from Mexican attack. *Id.* Similarly, President McKinley's avowed military aim in China during the 1900 Boxer Rebellion was to protect American citizens in Peking. E. CORWIN, *supra* note 4, at 212. Perhaps the greatest obfuscation of the true purpose of a military operation was Franklin Roosevelt's unauthorized naval deployments against Germany in 1941. See A. SCHLESINGER, *supra* note 3, at 111-13. In the summer and fall of that year, President Roosevelt ordered the American navy to convoy British vessels into waters which were patrolled by German submarines, and to "shoot-at-sight" any German submarine which sought to attack the American convoy. *Id.* at 112. Although done to aid Britain and preserve the European balance of power, Roosevelt asserted that his convoy and "shoot-at-sight" orders were designed to protect American territory and citizens; he never claimed any warmaking power beyond the traditional authority. *Id.*

⁴² See *supra* notes 39-41 and accompanying text. Political scientist Francis Wormuth and noted historian Arthur M. Schlesinger, Jr., both concluded that it was not until Truman made a claim of general warmaking power at the outbreak of the Korean war that any President had claimed a unilateral power beyond the two traditional and narrow categories. A. SCHLESINGER, *supra* note 3, at 138; Wormuth, *supra* note 39, at 664. Congress, after thoroughly studying the history of presidential warmaking, also concluded that Truman's claim of a general war power was without precedent. A 1967 Senate Report in referring to Truman's claim states, "here, clearly expostulated, is a doctrine of general or 'inherent' Presidential power—something which had not been claimed by previous Presidents." NATIONAL COMMITMENTS REPORT, *supra* note 9, at 16; see Spong, *supra* note 41, at 7.

examine the dangers that confronted Presidents and Congresses for a period of over 150 years. Despite glib assertions of the novelty and gravity of the post-Korean war period, the threats confronting the United States during the first quarter century of government under the Constitution imperiled the very independence and survival of the nation.⁴³ The United States Government fought wars against France and England, the two greatest powers of that period, to protect its existence, preserve the balance of power, and defend its commerce.⁴⁴ Notably, both conflicts, the Franco-American War⁴⁵ and the War of 1812, were authorized by statute.

The Monroe Doctrine, which proclaimed that the United States Government would view any attempt by a European nation to deprive a Latin American state of its newly won independence as a threat to the security of the United States, was announced by President Monroe in 1823.⁴⁶ Certainly, maintenance of a balance of

⁴³ See *supra* note 35 and *infra* note 44.

⁴⁴ R. LECKIE, *supra* note 35, at 223-29; see *supra* notes 35-38. During the early years of the United States Government, the environment of war still existed. British influence was still being felt in the Northwest since Britain had not removed the troops from seven posts as it originally had agreed. *Id.* at 223. At the same time, the Revolutionary French Government asked the United States to live up to the Treaty of Alliance which the United States had signed with the French monarchy in 1778. R. FERRELL, *supra* note 8, at 75. As a result, Britain began detaining French-bound American vessels in order to prevent American supplies from reaching France. *Id.* at 224. The world balance of power was endangered as a result of the cataclysmic war between Britain and France which began in 1793. See *id.* at 223; A. SOFAER, *supra* note 1, at 150.

⁴⁵ For a discussion of presidential actions during the Franco-American War and the War of 1812, see R. RUSSELL, *supra* note 40, at 89-102, 130-41. See generally C. BERDAHL, *supra* note 13, at 103; *infra* note 52.

In the early days of the Republic, the decision to fight to protect American honor against France in 1798 and Tripoli in 1801 was authorized by joint resolution. A. SOFAER, *supra* note 1, at 139-54, 214-16. In 1797, France issued a decree which charged any American working as a crewmember on a ship of an enemy nation of France with piracy. France also began seizing American merchant vessels that did not comply with the edict. *Id.* at 139. Eventually, "Congress transformed the national policy from peace to war, without a formal declaration." *Id.* at 145.

⁴⁶ E. TATUM, *THE UNITED STATES AND EUROPE* 250 (1967). The "unsettled state" of Europe during the period preceding the Monroe Doctrine was a constant threat to the United States, since any incident involving England inevitably would disturb American interests. *Id.* at 252-53. Concomitant with the growth of resentment against Europe was a flourishing of an American spirit of nationalism. Fueled by "[t]he feeling that the United States and the New World were . . . different from Europe and England, . . ." American policymakers looked to maintaining the status quo amidst the turmoil of Europe. *Id.* At the same time, Spanish colonies in South and Central America were gaining independence as emerging republics. *Id.* at 260-61. The instability of these fledgling nations gave rise to the possibility that France would intervene in their affairs. *Id.* at 253-55. Thus, the United States barred all foreign nations from South America. President Monroe enunciated the doctrine which

power within the nation's own hemisphere is a crucial interest. Yet, when Colombia asked Monroe's Secretary of State, John Quincy Adams, whether the United States would defend Colombia from a Spanish invasion, Adams replied that congressional authorization could not be assumed, and therefore statutory authorization was required before the United States would implement the doctrine with force.⁴⁷

One of the greatest threats to the global balance of power and to the American state occurred when Nazi Germany attacked France and was on the verge of defeating the French Armed Forces and of occupying France.⁴⁸ On June 14, 1940, French Premier Paul Reynaud made an urgent request of President Roosevelt to commit American Armed Forces to aid France. The French leader pleaded: "The only chance of saving the French nation, vanguard of democracies, and through her to save England, by whose side France could then remain with her powerful navy, is to throw into the bal-

warned "Europe against interference across seas . . ." Perkins, *Deter the Continental Allies in the Western Hemisphere*, in *THE MONROE DOCTRINE* 19 (A. Rappaport ed. 1964). Although at the time, the United States lacked the necessary power to implement effectively the doctrine, the admonition nevertheless bore an impact, primarily because the British, anxious to maintain stability in South America, were able to patrol the waters of both North and South America and ward off potential intrusion. See E. TATUM, *supra*, at 263.

⁴⁷ See Nerval, *Egoistic from Its Pronouncement*, in *THE MONROE DOCTRINE* 92, 93 (A. Rappaport ed. 1964). In July 1824, the Colombian Minister to the United States, expressed his joy "that the government of the United States [had] undertaken to oppose the policy and the ulterior designs of the Holy Alliance." *Id.* at 93. The Colombian Minister then inquired as to the nature of resistance the United States would use against any interference. In his reply, Secretary of State Adams stated that "by the constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government." *Id.*

⁴⁸ See R. DIVINE, *THE RELUCTANT BELLIGERENT* 83 (1965). After conquering Poland in September 1939, Hitler waited until the spring of 1940 to resume his campaign of military aggression. W. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 916-62 (1960). On April 9, 1940, German armies invaded Denmark and Norway. *Id.* at 697. Denmark was defeated that very same day. *Id.* at 698. Norway was conquered by the end of April. *Id.* at 706-12. The Führer then turned his attention to the West. *Id.* at 713. On May 10, Nazi armies attacked Belgium, the Netherlands, and France. *Id.* at 770. The Dutch surrendered by May 15. *Id.* at 948.

While the French and British moved to reinforce Belgium, the Nazis readied for the penetration of France by way of the Ardennes. *Id.* at 723. This rough-terrained area was considered the most unlikely invasion site. See *id.* When the Nazis tore a 50-mile-wide gap in the Allied front on May 13, the German breakthrough was met with little, if any, resistance. France's strategic reserve was virtually nonexistent, an incredible condition considering that the conflict had barely begun. *Id.* at 726. So powerful and swift were the blitzkrieging German forces, that within a week after the invasion had begun, it was obvious that the French Army was going to be defeated by the revolutionary changes in weaponry and strategy that the Nazis had developed and deployed. See *id.* at 723-28.

ance, this very day, the weight of American power.'"⁴⁹ Reynaud and Roosevelt both fully understood the grave consequences of a Nazi conquest of France—complete German control over continental Europe. The Führer could then direct his attention and his armed forces against Great Britain and ultimately the United States.

Roosevelt replied to this urgent request with what came to be known as the Utmost Sympathy Speech.⁵⁰ Roosevelt praised the French soldiers for their heroic resistance to German aggression and expressed his utmost sympathy for their plight, but refrained from committing American military power. Recognizing that it was a foreign state that was to be defended and not the territory of the United States, Roosevelt concluded: "These statements carry with them no implication of military commitments. Only the Congress can make such commitments."⁵¹

While American blood was shed in the pre-Korean war period to protect such essential national interests as the balance of power, economic concerns, and ideological commitments, it was not shed unless and until Congress concurred. Thus, the naval war against France, the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II were all authorized by statute.⁵² In all of these instances, the definition of the national inter-

⁴⁹ R. DIVINE, *supra* note 48, at 84.

⁵⁰ E. CORWIN, *supra* note 4, at 246.

⁵¹ *Id.*

⁵² See C. BERDAHL, *supra* note 13, at 103; R. LECKIE, *supra* note 35, at 327. The decision to go to war with France was a joint judgment. C. BERDAHL, *supra* note 13, at 103. The legislative authorization was expressed in the form of a joint resolution. A. SOFAER, *supra* note 1, at 139-54. The 1812 war against Britain was authorized by declaration of war. *Id.* at 287.

After the War of 1812, a sense of nationalism grew in the United States which culminated in the Monroe Doctrine of 1823, R. LECKIE, *supra* note 35, at 318-20; see *supra* note 46 and accompanying text, and manifested itself in the westward expansion of the United States. This expansion resulted in a conflict over the territory of Texas between Corpus Christi and the Rio Grande River. See T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 65 (1979). Two weeks after Mexico had ambushed an American camp across the Rio Grande, President Polk approached Congress and received a formal declaration of war and a \$10 million appropriation for war purposes. R. LECKIE, *supra* note 35, at 327.

The Spanish-American War found its origins in the Cuban revolt against Spanish rule. American sympathies demanded intervention on behalf of the revolutionaries. After the destruction of the American battleship U.S.S. *Maine* in Havana harbor, President McKinley "asked Congress for authority to use force to intervene . . ." *Id.* at 546. On April 25, 1898, Congress declared a state of war between Spain and the United States. *Id.*

Still another example of congressional participation in the warmaking decision came with the Selective Service Act of May 18, 1917, which authorized the President to raise the

est and the decision to wage war to protect it were joint determinations of the President and Congress.

B. The Korean War and the Cold War Claim of an Unlimited Unilateral Power to Initiate War

In the early morning of June 25, 1950, the North Korean Democratic People's Army launched a massive offensive in an effort to reunite the northern and southern portions of Korea.⁵³ That evening, the Truman administration decided to commit American air and sea forces to the support of South Korea.⁵⁴ On June 29, Truman decided to make a commitment of ground forces.⁵⁵ Thus, for

necessary number of men needed to fight in World War I. See C. BERDAHL, *supra* note 13, at 107. Although President Wilson initially attempted to remain out of the war with Germany, he eventually concluded that "[t]he world must be made safe for democracy" and asked Congress for a declaration of war on Germany. Wilson received the authorization on April 6, 1917. R. LECKIE, *supra* note 35, at 629. Finally, after the Japanese attack on Pearl Harbor on December 7, 1941, Roosevelt called upon Congress to declare a state of war to counter "the unprovoked and dastardly attack by Japan." F.R. DULLES, *supra* note 8, at 207.

⁵³ 3 S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 432 (1972). Prior to the conclusion of World War II, Korea was divided at the 38th parallel. The North was occupied by the Soviet forces, which helped establish a pro-Soviet Communist regime. The southern sector was occupied by American forces which helped establish a pro-American government. By 1948, both the United States and the Soviet Union withdrew the vast majority of their troops from the area, leaving the two bitter Korean rivals with radically divergent philosophies to resolve their differences by themselves. *Id.* at 432-33. Border skirmishes began almost immediately after the withdrawal, threatening an outbreak of a full-scale civil war. S. WARREN, *THE PRESIDENT AS WORLD LEADER* 336-37 (1964). On June 25, 1950, an estimated 90,000 Northern Korean troops pressed across the 38th parallel using hundreds of Soviet-supplied armored tanks. The North Koreans launched the invasion in an attempt to unify the peninsula under one government. R. LECKIE, *supra* note 35, at 850-51.

⁵⁴ R. LECKIE, *supra* note 35, at 853. While the Security Council of the United Nations was preparing to meet for a discussion on the Korean crisis, President Truman instructed General Douglas MacArthur to take command of American military forces and to use his best efforts to defeat the aggressors. 3 S. MORISON, *supra* note 53, at 434-35. After examining the most productive avenues of assistance available, it was concluded that an immediate supply of arms and equipment to the defenders was imperative. It was thus necessary to employ American ships and aircraft to protect the supply lines as well as to safeguard American citizens yet unable to escape from South Korea. The President, moreover, positioned the Seventh Fleet in the Formosa Straits in order to deter both Communist and Nationalist China from entering the conflict. R. LECKIE, *supra* note 35, at 853; see S. WARREN, *supra* note 53, at 336-37.

⁵⁵ R. LECKIE, *supra* note 35, at 857. The United Nations ordered a cease-fire with an accompanying withdrawal by the North Koreans from territory below the 38th parallel. This was ignored by the invading army, and the United Nations called for its members to lend support throughout the conflict to the South Koreans. 3 S. MORISON, *supra* note 53, at 435. While this support was being organized, the South Korean troops were being pushed southward. It became apparent to the President, through advice received from General MacArthur, that the South Korean military was not capable of thwarting the North Korean thrust.

the first time in its history, the United States began fighting a sustained and major war without any congressional authorization.⁵⁶

In an attempt to justify this action, the Truman administration claimed that the President, as Commander in Chief, possessed the authority to begin a war to protect any "interest of American foreign policy" without seeking and receiving legislative approval.⁵⁷ This novel theory of presidential power was supported by the claim that Presidents throughout American history had employed the Armed Forces not merely for the protection of state and citizens, but for the protection of any national interest.⁵⁸ As has been

The President, therefore, ordered into Korea 83,000 ground troops with which MacArthur could confront the approaching aggressor and protect South Korea against conquest. R. LECKIE, *supra* note 35, at 857-58.

⁵⁶ Address by Senator Fulbright, Yale University (March 3 to 4, 1971) *reprinted in* 117 CONG. REC. 10,355 (1971) [hereinafter cited as Sen. Fulbright Address]; *see* A. SCHLESINGER, *supra* note 3, at 137.

⁵⁷ *See* 1950 State Dep't Memo, *supra* note 4, at 173 *passim*. The 1950 Department of State memorandum stated:

The President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof. He also has authority to conduct the foreign relations of the United States. Since the beginning of United States history, he has, upon numerous occasions, utilized these powers in sending armed forces abroad. The preservation of the United Nations for the maintenance of peace is a cardinal interest of the United States. Both traditional international law and article 39 of the United Nations Charter and the resolution pursuant thereto authorize the United States to repel the armed aggression against the Republic of Korea.

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The basic interest of the United States is international peace and security. The United States has, throughout its history, upon orders of the Commander in Chief to the Armed Forces and without congressional authorization, acted to prevent violent and unlawful acts in other states from depriving the United States and its nationals of the benefits of such peace and security. It has taken such action both unilaterally and in concert with others. A tabulation of 85 instances of the use of American Armed Forces without a declaration of war was incorporated in the *Congressional Record* for July 10, 1941.

Id. at 173-74.

The memorandum reprinted the list of 85 instances of presidential use of American force. *Id.* at 177-78. The memo asserted that although many of the 85 instances were for the purpose of rescuing American citizens, in some of the cases the Armed Forces were used for the purpose of advancing "the broad interests of American foreign policy." *Id.* at 174. It is true that in a few instances before the Korean war, Presidents actually used the Armed Forces for purposes other than the protection of state and citizens. Neither those Presidents nor any other pre-Korean war President, however, ever claimed a power beyond the narrow authority of defending state and citizen. *See supra* note 41.

⁵⁸ *Id.*; *see* U.S. CONST. art. II, § 2; U.N. CHARTER art. 39. The 1950 memorandum cites resolutions passed by the Security Council pursuant to article 39 of the United Nations Charter as authority for unilateral executive intervention into the Korean war. *See* 1950 State Dep't Memo, *supra* note 4, at 176. This claim, however, is spurious since United Na-

demonstrated, historical precedent supports the very opposite conclusion. No President from George Washington through Franklin Delano Roosevelt ever claimed any authority beyond the defense of state and citizens.⁵⁹ Like the commitment of forces itself, this claim of presidential power was without precedent in American history.

Truman's successors claimed and exercised authority to employ the full military power of the United States without limitation.⁶⁰ For example, the Johnson and Nixon administrations made

tions resolutions passed pursuant to article 39 cannot accord the President war power beyond that which he already possesses. It is article 43 of the United Nations Charter that makes provision for member nations of the international organization to "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage necessary for the purpose of maintaining international peace and security." U.N. CHARTER, art. 43, para. 1. In order to "prescrib[e] the domestic, internal arrangements within our Government for giving effect to our participation" in the United Nations, Congress enacted the United Nations Participation Act of 1945 (the Act). See 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 190 (1963). The Act permits the President to exercise unilateral war power pursuant to authority granted to him under an article 43 military agreement, *id.* at 191-93, but prohibits him from exercising unilateral war power under any other United Nations provision. See United Nations Participation Act of 1945, § 6, Pub. L. No. 79-264, 59 Stat. 619, 621. Section 6 of the Act expressly declares that "nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council . . . armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements." *Id.* The legislative history reiterates the prohibition against the President acquiring any new power through the United Nations Charter. The House Committee on Foreign Affairs asserted that the United Nations Charter did not create an inroad on "the exclusive power of the Congress to declare war." H.R. REP. No. 1383, 79th Cong., 1st Sess. 8, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 927, 934.

Pursuant to the Act, before the President can commit any troops to an international peace force, he must negotiate a military agreement with other members of the United Nations and must submit this international agreement to Congress for its approval. *Id.* at 191-92. At the time of the Korean war, no article 43 military agreements had been concluded. *Id.* at 194. Consequently, President Truman could not, and in fact did not, rely on article 43 as a source for unilateral war power. *Id.*

⁵⁹ See *supra* notes 41-42 and accompanying text.

⁶⁰ See T. EAGLETON, *supra* note 1, at 72, 76; A. SCHLESINGER, *supra* note 3, at 159, 170-76. President Eisenhower worked closely with Congress with regard to the use of military force. T. EAGLETON, *supra* note 1, at 72. He often stated that he would use his authority to commit troops in emergency situations but only within his constitutional limits and only to protect American people and property. *Id.* at 72-75. This is evidenced by his congressional request for permission to use force to defend Formosa and its neighboring islands against attack by Communist China if it became necessary. See *id.*; Spong, *supra* note 41, at 7. In 1958, however, Eisenhower sent 14,000 American troops into Lebanon to stabilize a tense situation and prevent a civil war. Eisenhower justified this hazardous military venture on the ground that the President possessed the authority to employ the Armed Forces to protect the national security. A. SCHLESINGER, *supra* note 3, at 162.

explicit assertions of presidential power to use force against any nation for any purpose. In a 1966 State Department memorandum, prepared by Legal Adviser Leonard Meeker, the Johnson administration asserted:

Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of the United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.⁶¹

President Kennedy was even more bold in claiming and in exercising a capacious presidential prerogative. T. EAGLETON, *supra* note 1, at 76. On his own authority, he ordered an invasion of Cuba in 1961 (the "Bay of Pigs" invasion) and went to the brink of nuclear war with the Soviet Union in order to compel the Soviets to remove missiles that they placed in Cuba in 1962 (the "Cuban missile" crisis). President Kennedy did not believe that congressional authorization was necessary to take these military actions. *Id.* at 76-77; A. SCHLESINGER, *supra* note 3, at 170-76.

⁶¹ 1966 State Dep't Memo, *supra* note 4, at 484. To equate the interest of defending the state with defending the national security is, of course, fallacious. It has been concluded:

There are a number of difficulties with the theory that, for purposes of presidential warmaking power, an attack on another country—even if under circumstances specified by a mutual defense treaty—is equivalent to an attack on the United States. Presumably, any resort to war—even where authorized by Congress—is justified only because in some sense United States security is thought to be at stake. Hence, the fact that "security interests" are involved does not in itself alter the normal processes for deciding whether such interests are worth defending at the price of war. That decision, where a foreign state is attacked, will depend on a variety of factors—proximity to the United States; the value of the country as an ally; other United States interests involved, such as military bases and military sites; and the nature of the aggression and the aggressor. In each case difficult political and military decisions must be made which may well lead reasonable men to different conclusions in determining whether the interest involved is necessary to the defense of the United States. Where, on the other hand, the attack is against the United States itself, there can be no question presumably that the "security interest" involved warrants defending at the cost of war if necessary; to require the President to await what amounts to an obvious, foregone conclusion on the part of Congress is at best a needless formality, and at worst may occasion dangerous delay.

Note, *supra* note 8, at 1783. Bernard Brodie observes that the defense of state is an interest of a different character than the defense of the national security. B. BRODIE, *supra* note 8, at 344, 347; see *supra* notes 14-24 and accompanying text.

The unilateral executive power to protect American territory is a power granted to the President. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). In contrast, the Framers did not grant the President a unilateral power to defend the "national security." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-42 (1952) (Jackson, J., concurring); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28

The 1966 memorandum broadly construed the power granted to the President at the Constitutional Convention "to repel sudden attack." The memo then continued:

In 1787 the world was a far larger place and the Framers probably had in mind attacks upon the United States. In the 20th Century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security.

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.⁶²

Similarly, President Nixon justified bombing attacks on Laos and Cambodia by claiming authority to send troops into foreign territories on his own initiative.⁶³

According to the 1967 National Commitments Report of the Senate Foreign Relations Committee, "every President since World War II has asserted at one time or another that he had the authority to commit the armed forces to conflict without the consent of Congress."⁶⁴ Moreover, even when no claim was asserted, these Presidents have undertaken military action as though they possessed this authority.⁶⁵ Despite variations in the forcefulness

(1801). Indeed, unlike the concept of defense of state, which is recognized in judicial decisions as well as in the original understanding, the concept of defense of "national security" is without any constitutional roots. The phrase "national security" was not even coined until 1945. D. YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* 194-96 (1977).

⁶² 1966 *State Dep't Memo*, *supra* note 4, at 484-85.

⁶³ See A. SCHLESINGER, *supra* note 3, at 190-94; Wormuth, *supra* note 39, at 623-25, 650-51. President Nixon faced the decision of whether to continue military action in Southeast Asia after the termination of the Vietnam war via the Paris agreement. The issue arose in response to North Vietnam's refusal to withdraw its forces from Cambodia and Laos as was stipulated in the ratified agreement. The President, claiming an inherent power to order bombing attacks pursuant to the Paris agreement, authorized such bombings at an estimated cost of \$4,800,000 per day. T. EAGLETON, *supra* note 1, at 154-59.

⁶⁴ NATIONAL COMMITMENTS REPORT, *supra* note 9, at 21.

⁶⁵ An example of unilateral presidential action was the dispatch of troops to Lebanon in 1958 by President Eisenhower. This followed the withdrawal of French and British troops from the Middle East as a result of the Suez crisis. Fearing a Communist incursion as a result of instability of the region, the United States took an active role in providing both economic and military aid. A. GEORGE & R. SMOKE, *DETERRENCE IN AMERICAN FOREIGN POLICY* 309-10 (1974). In July 1958, President Eisenhower employed military intervention in an attempt to stabilize a civil war in Lebanon. *Id.* at 349. It is believed that President Eisenhower committed troops not only to prevent Soviet subversion, but also to improve the

with which modern Presidents have put forward their claim of unlimited war power, not a single one has repudiated Truman's theory.⁶⁶ To the contrary, all have acted as though Truman's usurpa-

image of the United States in the eyes of its allies and to impress upon the Soviets that the United States backs its commitments. *Id.* at 353.

In addition, during the Cuban missile crisis, President Kennedy committed naval forces to a blockade of Cuba in 1962 to compel the Soviet Union to withdraw the medium and intermediate range ballistic missiles which they had sent into the country. The Soviets intended to supply Cuba with an arsenal capable of penetrating far into the United States. See *id.* at 447-48, 460; R. KENNEDY, THIRTEEN DAYS 5 (1971).

Other examples of unilateral presidential action include President Johnson's deployment of marines into the Dominican Republic in 1965, see B. BLECKMAN & S. KAPLAN, FORCE WITHOUT WAR—U.S. ARMED FORCES AS A POLITICAL INSTRUMENT 289-342 (1978), President Nixon's coercive diplomacy during the 1973 Yom Kippur War, see M. KALB & B. KALB, KISSINGER 450-99 (1974), and the war in Vietnam, see D. HALBERSTAM, THE BEST AND THE BRIGHTEST 805-09 (1973). More recently, President Reagan committed 800 marines, as part of a 2,000-member peacekeeping force, to Beirut to aid in the evacuation of the Palestine Liberation Organization forces from that city. This peacekeeping force was comprised of American, French and Italian troops. After accomplishing their task in Lebanon, they withdrew on September 10, 1982, only to be ordered back to that country by President Reagan following a bloody massacre of Palestinians by the Christian Militia forces in West Beirut. *U.S. Presses Israel to Let UN Troops Move Into Beirut*, N.Y. Times, Sept. 20, 1982, at 1, col. 6. A senior State Department official indicated that Congress would be informed of the deployment of the combat force. *U.S. Plans to Send Marines Back into Beirut; Reagan Terms Israeli Pullout 'Essential'*, N.Y. Times, Sept. 21, 1982, at 1, col. 6.

The United States also has adopted a significant commitment to El Salvador. President Reagan has asked for over \$100 million in both economic and military aid to that country. *U.S. Is Said to Plan \$100 Million Rise in Salvadoran Aid*, N.Y. Times, Jan. 31, 1982, at 1, col. 6. This country also has top military advisers in El Salvador and, although President Reagan has stated unequivocally that the United States will not send troops into that country, *id.*, he has not ruled out a blockade to stop the flow of arms to the guerrilla forces, *id.* at 12, col. 3.

⁶⁶ See J. JAVITS, *supra* note 40, at 251-52, 272-73. Truman's successors have encouraged the myth that the office of the President possesses a virtually unlimited war power. *Id.* at 251. "Many advocates of presidential prerogative in the field of war and foreign policy . . . [argue] that the President's powers as Commander in Chief are what the President alone defines them to be." *Id.* at 272. In 1967, the Senate repudiated such a broad reading of the Commander in Chief clause. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 23.

In addition, the Supreme Court has refused to accept such a construction. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 614 (1850). In *Fleming*, the Supreme Court stated:
[The President's] duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.
Id. at 615.

In a more recent case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson rejected the idea that the Commander in Chief clause grants the President the authority "to do anything, anywhere, that can be done with an army or navy." *Id.* at 641-42 (Jackson, J., concurring). Moreover, Justice Jackson characterized Truman's sweeping view of presidential power as "sinister and alarming," *id.* at 642 (Jackson, J., concurring), and endorsed the Framers' narrow interpretation of the Commander in Chief func-

tion of power was legal.⁶⁷

The congressional response to this presidential claim of a unilateral, unlimited war power during the height of the cold war—the period beginning in June 1950 and ending approximately by 1965—was generally one of acquiescence.⁶⁸ The National Commitments Report identified the perception of recurrent crises as the most important cause of the presidential claim of unlimited war power and congressional acquiescence in this usurpation. This 1967 report states that “crisis has been chronic and . . . has given rise to a tendency toward anxious expediency in our response to it. The natural expedient—natural because of the real or seeming need for speed—has been executive action.”⁶⁹ The report concluded that the feeling of “anxious expediency” during the period of peak cold war tension had caused Congress to disregard constitutional procedure.⁷⁰

tion, *id.* at 642 n.10 (Jackson, J., concurring).

⁶⁷ See *supra* note 65.

⁶⁸ See NATIONAL COMMITMENTS REPORT, *supra* note 9, at 6. Congress is at least partially to blame for the shift in the balance between the legislative and executive branches on the issue of war powers. See Spong, *supra* note 41, at 10. Beginning with President Truman’s commitment of combat troops in Korea, Congress has been unmindful of the procedure which the Constitution provided for the initiation of war. T. EAGLETON, *supra* note 1, at 70-74.

Despite the usual response of acquiescence during the 1950-1965 period, voices of dissent were raised in Congress from time to time. For example, in January 1951 Senator Taft said that President Truman had no authority whatsoever to commit American troops to Korea without consulting Congress and without congressional approval. “The President,” he stated, “simply usurped authority in violation of the laws and the Constitution, when he sent troops to Korea” NATIONAL COMMITMENTS REPORT, *supra* note 9, at 16-17.

The greatest resistance to unilateral executive action during the 1950-1965 period occurred in 1951 when Truman indicated his intention to send four more divisions to reinforce the American Army in Europe without referring this momentous matter to Congress. See A. SCHLESINGER, *supra* note 3, at 138-43. Since many members of Congress and presidential advisers believed that the Soviet Union was poised on an all-out assault on Europe, the President was claiming the authority to commit troops to a potentially major war against a very large and powerful enemy. See *id.* at 139. Representative Coudert objected to Truman’s conception of limitless war power, stating, “[i]f the President alone is allowed to send anywhere abroad, at any time, hundreds of thousands of American troops without a declaration of war . . . then, indeed, there is little left of American constitutional government.” *Id.* at 136. Coudert remarked that if Truman’s theory of presidential power were accepted, then the fate of American soldiers would be subject to the whim of presidential decree. *Id.* at 140. This Great Debate of 1951 ended inconclusively. *Id.* at 143. The Congress did not forbid Truman to send the four divisions to Europe, but the Senate did pass a “sense of the Senate” resolution in which the Senate approved the sending of the four divisions but stipulated the necessity for future congressional consent to additional troop movements. *Id.*

⁶⁹ NATIONAL COMMITMENTS REPORT, *supra* note 9, at 6.

⁷⁰ *Id.* Senator Fulbright, a former advocate of unlimited presidential power, discussed

Congressional acquiescence must be understood in light of the Korean war's influence on substantially expanding the objectives of American foreign policy interests⁷¹ and on creating a perception of continual crises involving the forces of the free world, led by the United States, and the forces of international communism, controlled allegedly by the Soviet Union.⁷² The world which existed in 1945 was undoubtedly a different world than the one which existed before World War II. The invention of nuclear weapons, the collapse of the balance of power in Europe, and marked improve-

how quickly procedure is cast aside when a crisis is perceived and quick and decisive action is allegedly needed to meet an actual or potential threat. He explained that the cold war crises had "one common attribute: the subordination of constitutional process to political expediency in an atmosphere of urgency and seeming danger, resulting in each case in an expansion of presidential power at the expense of Congress." Sen. Fulbright Address, *supra* note 56, at 10,355. Arthur Schlesinger agrees that the presidential perception of global threats and the propagation of a policy which committed American military power to the containment of these threats extirpated the procedure of checks and balances, which was believed to have become an obstacle to the alleged need for quick and decisive presidential action. A. SCHLESINGER, *supra* note 3, at 168-69. He proffered:

[T]he Constitution could not easily sustain the weight of the indiscriminate globalism to which the Korean war gave birth. It was hard to reconcile the separation of powers with . . . [the post-Korean war] foreign policy . . . nor with an executive branch that saw everywhere on earth interests and threats demanding immediate . . . American commitment and action. This vision of the American role in the world unbalanced and overwhelmed the Constitution.

Id.

⁷¹ See A. GEORGE & R. SMOKE, *supra* note 65, at 140; A. SCHLESINGER, *supra* note 3, at 135-37; cf. W. LAFEBER, *AMERICA, RUSSIA AND THE COLD WAR* 107-14 (4th ed. 1980) (discussing events triggering changes in foreign policy objectives and strategies). Professors George and Smoke observe that the Korean war caused the globalization of containment. A. GEORGE & R. SMOKE, *supra* note 65, at 140. Arthur Schlesinger, Jr., also concludes that the Korean war marked the abandonment of the previous foreign policy of prudent and limited containment and the adoption of an overzealous and ambitious policy of containing Soviet aggression throughout the entire world. A. SCHLESINGER, *supra* note 3, at 168-69.

⁷² A. SCHLESINGER, *supra* note 3, at 163-65. The new American commitment to international containment of Soviet aggression created the ever-present sense of impending conflict. The new objective was to preserve the non-Communist status of every non-Communist nation. *Id.* at 164. Washington appointed itself the leader of the "Free World" and "endowed itself with worldwide responsibility and a worldwide charter." *Id.* The United States adopted increasingly large military budgets and upgraded its forces in size and technological achievement in order to be able to counter a Communist move against any non-Communist nation anywhere in the world. By 1952, the United States had 3.6 million men trained to wage war. *Id.* at 165. This fact alone served to increase the presidential ability to take military action since a large, effective fighting force was placed at the disposal of post-Korean war Presidents who could use the great standing armies, navies, and air forces without any additional congressional action. *Id.* America, for the first time, "possessed a standing army, sufficiently large, sufficiently well-established, and sufficiently mobile to make possible, through presidential action alone and on very short notice, conflicts of unforeseeable dimensions anywhere in the world." Note, *supra* note 8, at 1791.

ments in the range, firepower, and mobility of conventional weapons, presented novel dangers to the defense and security of the United States.⁷³ Yet, these changes did not cause an abandonment of checks and balances during the period between the end of World War II and the outbreak of the Korean war.⁷⁴ In fact, for 5 critical years, the Truman administration collaborated with Congress to devise and implement a policy of containing Soviet expansionism.⁷⁵ Commitments were made to defend Britain, France, and other Western European nations vital to American security, but

⁷³ J. SPANIER, *GAMES NATIONS PLAY* 116-20 (1972). The invention of the atom and hydrogen bombs, coupled with the development of intercontinental-range vehicles to deliver the weapon, rendered American territory completely vulnerable to extensive and immediate destruction. The fatalities from a nuclear attack could easily reach 100 million within 1 month. OFFICE OF OPERATIONS ANALYSIS, U.S. ARMS CONTROL & DISARMAMENT AGENCY, *THE EFFECTS OF NUCLEAR WAR* 16-26 (1979). Millions more would perish from disease, starvation and radiation. *Id.* at 16. The destruction of the European balance of power presented a second novel threat to the United States. J. SPANIER, *supra*, at 9-17; R.W. TUCKER, *A NEW ISOLATIONISM: THREAT OR PROMISE* 39-44 (1972). From the end of the Napoleonic wars in 1815 until 1945, a balance of power had existed in Europe. No single nation was powerful enough to control Europe. J. SPANIER, *supra*, at 10. Since no European power was ever able to dominate or destroy all of its rivals, there was little or no chance that the United States could be menaced by a European nation. *Id.* Thus, the balance of power had provided the United States with its first line of security.

By 1945, the balance of power was destroyed. W. MILLER, *A NEW HISTORY OF THE UNITED STATES* 430-31 (1968). The Soviets emerged from World War II as the predominant power; England and France had been weakened substantially, and defeated Germany was destroyed and divided. J. SPANIER, *supra*, at 12-17. Consequently, the United States could not depend on other European powers to insulate it from attack.

The second line of defense was provided by the vast distance between the continent of Europe and the eastern shore of the United States. See R.W. TUCKER, *supra*, at 41; D. YERGIN, *supra* note 61, at 200. The invention of long-range bombers and submarines reduced the military protection that the geographic buffer previously provided. *Id.*

⁷⁴ See W. LAFEBER, *supra* note 71, at 75. During the 1945-1950 period, American interests were gravely threatened by actual or potential Communist aggression. In addition to the risk that the Soviet Union would employ its military power against Western Europe and the United States, Communist guerrillas had attacked the pro-American government in Greece. Yet, the commitments to Greece and to the North Atlantic region were not made without legislative authorization. See *infra* notes 75-76. In 1948, however, "a united administration, enjoying strong support on foreign policy from a Republican Congress, set off with exemplary single mindedness to destroy the Communist threat that loomed over Europe." *Id.*

⁷⁵ See R. BARNET, *INTERVENTION AND REVOLUTION* 97-128 (1968). The policy of containing Soviet expansionism began with President Truman's address to a joint session of Congress in March 1947 in which the President requested authorization to provide economic aid and to send military personnel for the purpose of countering the Communist guerrilla movement in Greece. E. MAY, "LESSONS" OF THE PAST 43-44 (1973). This signaled the beginning of the implementation of the Truman Doctrine, a policy based on the commitment of the United States to aid free peoples in maintaining their political independence and territorial integrity against aggressive, totalitarian movements. See R. BARNET, *supra*, at 97-128.

only after congressional consultation and approval.⁷⁶

The Korean war was a seminal event in American foreign policy as well as in American constitutional law.⁷⁷ Prior to the outbreak of the Korean war, the United States had adopted and followed a limited and carefully considered containment policy. Before the Korean war, the United States Government had identified only one nation, the Soviet Union, as its enemy.⁷⁸ In addition, only nations such as Britain and France, which were intrinsically vital to the American national interest, were considered worthy of American military protection.⁷⁹ As a result of the Korean war, both

⁷⁶ See J. JAVITS, *supra* note 40, at 242-44. The United States commitment to defend Western Europe in the event of an armed attack has not been brought about by unilateral presidential initiatives. Rather, these defense arrangements have always been subject to congressional scrutiny. In June 1949, when the Truman administration was seeking passage of the NATO treaty, Secretary of State Dean Acheson acknowledged that the Framers had designed a system in which congressional power would check presidential power. He stated that "[u]nder the Constitution, the Congress alone has the power to declare war." See S. REP. NO. 123, 81st Cong., 1st Sess. 1337 (1950). Moreover, he defined the term "war" broadly, and submitted that independent presidential power existed only with regard to the traditional categories of defense of state and citizens. See *id.*

The Report of the Senate Committee on Foreign Relations which considered and then approved the NATO treaty reaffirmed the narrowness of unilateral executive authority: "Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? . . . The answer is . . . 'No.'" S. REP. NO. 8, 81st Cong., 1st Sess. 8 (1950).

⁷⁷ See *supra* note 71. The effect of the Korean war on United States foreign policy has been noted by John Lewis Gaddis, a leading diplomatic historian, who observed:

By the end of Truman's administration the United States had moved from implementation of a restrained and cautious policy with limited objectives toward a new and far more sweeping program of action that posited the challenge to United States security as worldwide and made no real distinction between varieties of communism. Containment became globalized; it was at this point that the gap between Washington's commitments and its resources for meeting them began to widen.

Gaddis, Harry S. Truman and the Origins of Containment, in MAKERS OF AMERICAN DIPLOMACY 207-08 (1974).

⁷⁸ See W. LAFEBER, *supra* note 71, at 27. Treatment of China during the 1945-1950 period is illustrative of pre-Korean war policy toward leftwing countries other than the Soviet Union. No policy was implemented to check Chinese aggression on a permanent basis, even though President Truman expected the Chinese Communists to invade Taiwan and defeat Chiang Kai-shek's forces. See A. GEORGE & R. SMOKE, *supra* note 65, at 140. The United States containment policy remained focused solely upon Soviet aggression until the period immediately preceding Chinese intervention in Korea, at which time United States policymakers realized the need to contain Communist China as well as the Soviets. *Id.* at 150. It was not until November 30, 1950 that President Truman intimated that "the United States would use all its power to contain the Chinese." W. LAFEBER, *supra* note 71, at 119.

⁷⁹ See Gaddis, *supra* note 77, at 206-07. See generally R. BARNET, *supra* note 75, at 23-24; B. BRODIE, *supra* note 8, at 343-65. Arthur Schlesinger wrote that prior to the Korean war the United States had adopted a policy of responsible and selective containment, which

tenets of American foreign policy—perceiving the U.S.S.R. as the sole state that threatened the national security and defending only intrinsically important nations—were altered radically.

After the Korean war, President Truman and his successors abandoned the policy of limited containment and adopted a sweeping policy of global and indiscriminate containment. As a result of the new containment policy, Presidents began to claim that the threat to national security came not only from the Soviet Union, but from any nation or any guerrilla group that was a participant in the alleged worldwide conspiracy of international Communism, directed by, from and for the Soviet Union.⁸⁰ American Presidents adopted extremely broad criteria to determine whether a war fought solely by the citizens of a sovereign nation-state was in fact authorized by the Soviet Union.⁸¹ The application of these

was "addressed to the historic interests of the United States, committed only to regions of the world where American security was directly and vitally involved" A. SCHLESINGER, *supra* note 3, at 168. Another author has observed that the "Cold War arose over the fate of Central Europe, but it has been fought almost everywhere else." R. BARNET, *supra* note 75, at 13.

⁸⁰ See R. BARNET, *supra* note 75, at 26-27. Beginning with the Truman administration, American Presidents have conducted foreign policy on the assumption that any Communist or leftwing nation which maintains beneficial relations with the Soviet Union is an agent or puppet of the Soviet state. During the cold war era, Presidents have asserted that Mao Tse-tung and Ho Chi Minh were nothing more than Soviet pawns. See *id.*

Both the belief that every Communist nation is part of a single international Communist conspiracy, *id.* at 60; see Paterson, *The Search for Meaning: George F. Kennan and American Foreign Policy*, in MAKERS OF AMERICAN DIPLOMACY 264 (1974), and the view that the Kremlin instigates and controls the military activities of revolutionary third world countries, R. BARNET, *supra* note 75, at 60, have been used to justify the exercise of wide-ranging powers by the President. Gaddis, *supra* note 77, at 212-14; Trask, *The Congress as Classroom: J. William Fulbright and the Crisis of American Power*, in MAKERS OF AMERICAN DIPLOMACY 351-52 (1974).

⁸¹ See R. BARNET, *supra* note 75, at 7. The following criteria have been used by Presidents to identify whether a seemingly sovereign nation is actually no more than an agent for the Soviet-principal:

- a) whether a nation was ruled by a powerful Communist Party;
- b) even if the Communist Party did not control the government, whether a nation adopted Communist or leftwing policies such as nationalization, land reform, or "autarchic trade practices"; or
- c) regardless of a nation's political system and domestic policies, whether the nation took pro-Soviet actions in its foreign policy, such as signing a treaty of alliance with the Soviet Union, accepting weapons from the Soviets, or even accepting economic aid.

Id. at 9; Gaddis, *supra* note 77, at 212, 214; Paterson, *supra* note 80, at 264; Trask, *supra* note 80, at 351, 358; see Head, *The Hot Deals and Cold Wars of Henry Kissinger*, in *AT ISSUE: POLITICS IN THE WORLD ARENA* 249-52, 254-55, 260 (1977); Raskin, *An American Metternich: Henry A. Kissinger and the Global Balance of Power*, in MAKERS OF AMERICAN DIPLOMACY 379, 381 (1974). Thus, Sukarno's Indonesia and Mossadeq's Iran, have been in-

standards has led to the unreasonable conclusion of the executive branch that when such nationalistic states as Mao's China, Sadat's Egypt, and Indira Gandhi's India attack *their* enemies, these states are no more than Soviet agents.

In addition, the Presidents of the global containment era have declared that nations which have no intrinsic relationship to the national interest are nevertheless vital to national security.⁸² For example, the United States fought in Vietnam⁸³ and may fight in El Salvador⁸⁴ even though these nations ostensibly add little if anything to the defense of the United States, the balance of power, or American trade and investment. This seeming paradox of declaring peripheral nations vital to national interests is based upon Truman's dubious logic, enunciated at the outbreak of the Korean war and maintained by his successors, that the United States must

cluded within Moscow's demesne. R. BARNET, *supra* note 75, at 9.

⁸² See B. BRODIE, *supra* note 8, at 341-42, 351-55; Gaddis, *supra* note 77, at 205-09. Brodie states:

In the instances both of Korea and of Vietnam, the citizenry repeatedly demanded assurance that the purpose of the interventions was indeed to enhance American security, and they repeatedly received that assurance from their national leaders, who no doubt sincerely meant it. We saw the same thing happening in the case of President Franklin Roosevelt and his assurances, but there are significant differences in dimensions between the menace posed by a Hitler on the rampage in combination with Japan and Italy, and a Ho Chi Minh reaching for the control of South Vietnam. It is a strange approach to international affairs that seeks to assert that *all* threats to the peace are all on the same plane, alike not only in character but also in magnitude of danger; but this is what some of the more doctrinaire purveyors of the "indissolubility of peace" would have had us believe.

B. BRODIE, *supra* note 8, at 353 (emphasis in original).

⁸³ R. BARNET, *supra* note 75, at 29-31; B. BRODIE, *supra* note 8, at 347. The leaders who committed American forces to the defense of South Vietnam, it is suggested, did not believe that the conquest of South Vietnam would either make an attack against American territory more likely, increase the military power of the Soviet Union, or impair American trade and investment. Vietnam was merely a symbol in the struggle between the forces of the Free World and international Communism.

⁸⁴ See *Proposal for Aid to Salvador Cut By Senate Panel*, N.Y. Times, May 27, 1982, at 1, col. 2. It is difficult to conceive of a more strategically insignificant nation than El Salvador. It is one of the smallest, poorest, least powerful nations in the world. Sanction, *Terror, Right and Left*, TIME, March 23, 1982, at 28 (per capita income is \$670 a year; the Salvadoran Army consists of only 14,000 men, twice as many as the leftist guerrillas). The Reagan administration may be willing to concede this, but it probably would argue that what is at stake in El Salvador is the "worldwide Soviet interventionism that poses an unprecedented challenge to the free world." *Id.* at 18 (quoting Secretary of State Alexander Haig). Hence, in El Salvador, United States aid and military personnel are being used to counter political forces which are perceived as threatening United States interests. In El Salvador alone, over \$60 million will be appropriated for military aid in 1983, despite some limited congressional success in reducing such expenditures. *Proposal For Aid to Salvador Cut by Senate Panel*, *supra*, at 1, col. 2.

be able and willing to respond with armed force to defend a relatively insignificant nation from aggression so as to render credible the American commitment to defend more important nations. Thus, it is contended, critical American allies are reassured of American support and the Soviet Union and its "co-conspirators" are deterred from further aggression.⁸⁵ Hence, the hysteria unleashed by the Korean war and reinforced by the solemn pronouncements of successive Presidents led to a foreign policy of potentially defending any nation in the world.⁸⁶ The broad definition of Communist or Soviet-controlled, combined with an expansible area to be defended from the Kremlin-led conspiracy, resulted in a foreign policy of global and indiscriminate containment. It is with this in mind that the congressional response of acquiescence to the executive claim for power must be viewed.

In 1970, Congress used its financial power to prohibit the ex-

⁸⁵ See generally B. BRODIE, *supra* note 8, at 201-02; R. BARNET, *supra* note 75, at 28. One justification commonly relied upon for the use of American forces to contain the spread of Communism in peripheral areas is that the perception of United States' reluctance to participate in any conflict might encourage Russian aggression elsewhere. According to Richard J. Barnet, United States policymakers view the Third World as "the testing ground for the Communist strategy of Wars of National Liberation. If they win here, they will strike elsewhere. If they lose, they will not be so ready to start another." R. BARNET, *supra* note 75, at 28. George Kennan, the intellectual architect of the containment policy, described Soviet policy as tending to fill "every nook and cranny available to it in the basin of world power." G. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 118 (1951). Kennan believed that Soviet expansion must be met wherever it is directed:

[I]t will be clearly seen that the Soviet pressure against the free institutions of the Western world is something that can be contained by the adroit and vigilant application of counter-force at a series of constantly shifting geographical and political points, corresponding to the shifts and maneuvers of Soviet policy

Id. at 120.

Daniel Yergin concludes that nations and events which have, *in fact*, a minimal and remote effect or even no effect upon our national security are perceived as significant and urgent, threatening our security immediately, directly, and momentarily. He states:

And what characterizes the concept of national security? It postulates the interrelatedness of so many different political, economic, and military factors that developments halfway around the globe are seen to have automatic and direct impact on America's core interests. Virtually every development in the world is perceived to be potentially crucial. An adverse turn of events anywhere endangers the United States. Problems in foreign relations are viewed as urgent and immediate threats. Thus, desirable foreign policy goals are translated into issues of national survival, and the range of threats becomes limitless. The doctrine is characterized by expansiveness, a tendency to push the subjective boundaries of security outward to more and more areas, to encompass more and more geography and more and more problems.

D. YERGIN, *supra* note 61, at 196.

⁸⁶ See Paterson, *supra* note 80, at 279-81.

penditure of appropriated funds to support American ground-troops in Laos and Thailand, and to effect a complete cutoff of any combat activity in Cambodia, Laos, and Vietnam.⁸⁷ During the 1950's and 1960's, however, the response of Congress was acquiescence.⁸⁸

It is important to recognize that this acquiescence did not render the presidential practice legal nor permit the President to acquire an unlimited power to use force to defend any national interests. Rather, congressional acquiescence during this 15-year period of crisis-induced fear is entitled to little interpretative weight, since the precedents created during this interval were not based upon a reading of the Constitution, but instead were based upon a knowing disregard and abandonment of checks and balances. Despite attempts to legitimize the Chief Executive's seizure and exercise of power in the 1950 and 1966 State Department Memos,⁸⁹ the presidential theory of war power and the congressional acquiescence in it can most accurately be viewed not as a good-faith attempt by the political branches to apply the Constitution to the changed conditions of the post-World War II world, but as a design to avoid constitutional limits on executive war power. The ad-

⁸⁷ See A. SCHLESINGER, *supra* note 3, at 293. The June 1973 vote to prohibit the further use of funds clearly demonstrated congressional opposition to the war. *Id.* At that time, however, there was an insufficient number in Congress to override President Nixon's veto of the funding cutoff. United States District Court Judge Orrin Judd noted that if the courts were to rule that Congress was required to override presidential vetoes in order to terminate unauthorized military actions, Presidents could sustain wars with the support of only "one third (plus one)" of the membership of either House. *See id.*

⁸⁸ See Sen. Fulbright Address, *supra* note 56, at 10,356. No official congressional action was taken to check the unilateral commitment of troops abroad until 1970. For example, when President Truman committed United States air and sea forces in Korea without seeking congressional authorization or advice, Congress, as a whole, remained idle. T. EAGLETON, *supra* note 1, at 71. Some individual members of Congress, however, were quite vociferous. Senator Robert Taft, for instance, stated that the President had "simply usurped authority, in violation of the laws and the Constitution." *Id.* Similarly, Senator Arthur Watkins contended that "the United States [was] at war by order of the President." *Id.*

⁸⁹ See 1966 State Dep't Memo, *supra* note 4, at 474; 1950 State Dep't Memo, *supra* note 4, at 173. The 1950 State Department Memo sought to justify President Truman's use of American troops in Korea by asserting that previous presidential practice and a United Nations Security Council Resolution were authority for this action. 1950 State Dep't Memo, *supra* note 4, at 173; see *supra* notes 57-59 and accompanying text. The 1966 document was prepared for a similar purpose—to formulate a legal justification for President Johnson's unauthorized use of military power in Vietnam. See 1966 State Dep't Memo, *supra* note 4, at 474; see *supra* notes 61-65 and accompanying text. The 1966 memo, however, argued that the President's unilateral war power should be extended from a power to protect the state to a power to protect the national security. See 1966 State Dep't Memo, *supra* note 4, at 474.

vocates of abandoning constitutional principle attempted to justify this action by a claim of "necessity."

The "necessity advocates" believed that a Chief Executive capable of taking quick and decisive military action on his own initiative was necessary to contain effectively Soviet expansionism. In 1951, Truman's Secretary of State, Dean Acheson, claimed that in time of crisis, constitutional procedure can be ignored in order to permit the President to act. He suggested that "[w]e are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."⁹⁰ In 1961, Senator J. W. Fulbright, then chairman of the Senate Foreign Relations Committee, argued that the ability to act is the sole issue, and that it is irrelevant whether the procedure chosen for initiating the action is constitutional.⁹¹ He advocated abandoning what he termed "18th century procedures of measured deliberations" in order to be better able to counter Communist aggression.⁹²

In conclusion, notwithstanding that Congress did not repudiate the claim of broad warmaking power during the period of acute cold war tension but acquiesced in the presidential practice, Con-

⁹⁰ A. SCHLESINGER, *supra* note 3, at 138 (quoting S. REP. No. 797, 90th Cong., 1st Sess. 17 (1967)).

⁹¹ Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961). Senator Fulbright admitted that congressional acceptance of executive primacy in utilizing American military power was inconsistent with the constitutional system of checks and balances, yet argued that constitutional principles in this context should be abandoned:

[T]he price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past. We should do so with no illusions as to the reasons for its necessity. It is distasteful and dangerous to vest the executive with powers unchecked and unbalanced. My question is whether we have any choice but to do so.

Id.

⁹² *Id.* A decade after he asserted that constitutional procedures were inappropriate in the modern international arena, Senator Fulbright recanted his necessity argument. The Senator recognized that the notion that necessity outweighs the Constitution was illegal, unwise, and dangerous:

In those days [of the 1950's and 1960's] . . . it was possible to forget the wisdom of the Founding Fathers who had taught us to mistrust power, to check it and balance it, and never to yield up the means of thwarting it. Now, after bitter experience, we are having to learn all over again that no single man or institution can ever be counted upon as a reliable or predictable repository of wisdom and benevolence; that the possession of great power can impair a man's judgment and cloud his perception of reality; and that our only protection against the misuse of power is the institutionalized interaction of a diversity of independent opinions.

Sen. Fulbright Address, *supra* note 56, at 10,356.

gress' response must be interpreted in light of the surrounding circumstances of continual crises and the consequent demand for quick executive action. Presidents have promulgated a foreign policy theory of a ubiquitous Communist chimera which Congress accepted, along with the fallacious argument that in times of danger constitutional procedure must be ignored and abandoned so that Presidents can act.⁹³ Hence, little weight is to be accorded both the claims and actions of the Chief Executive, as well as acquiescence by Congress. Furthermore, the claim of necessity has been denounced as an illegal and dangerous theory by the Congress of the 1970's.⁹⁴ Finally, the practice of the political branches during this 15-year period is inconsistent with two higher ranking constitutional authorities—judicial review and Framers' intent.

IV. JUDICIAL REJECTION OF THE CLAIM OF UNLIMITED EXECUTIVE POWER

The Supreme Court has rejected the claim that a crisis empowers the President to disregard the Constitution in order to pursue allegedly essential emergency action.⁹⁵ From the Civil War case of *Ex parte Milligan*⁹⁶ to the steel seizure case, *Youngstown Sheet*

⁹³ See A. SCHLESINGER, *supra* note 3, at 141-52, 168-70.

⁹⁴ NATIONAL COMMITMENTS REPORT, *supra* note 9, at 7; see Sen. Fulbright Address, *supra* note 56, at 10,356.

⁹⁵ See C. ROSSITER, CONSTITUTIONAL DICTATORSHIP 212-13 (1948). In a discussion of "crisis institutions and procedures," Rossiter stated that the Framers had considered the theory that the President's powers should expand during an emergency, but they rejected the notion. *Id.* at 212. As he observed: "Emergency does not create power. . . . The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government . . . were determined in the light of emergency and they are not altered by emergency." *Id.* at 213 (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934)).

⁹⁶ 71 U.S. (4 Wall.) 2 (1866). In his opinion, Justice Davis rejected the contention that the abandonment of constitutional procedures was justified as a consequence of emergency conditions existing during the Civil War. *Id.* at 120-21. Referring to the constitutional system formulated by the Framers, the Court stated:

Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection . . . all circumstances [T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence

Id.

During the Great Depression, a Minnesota statute was enacted which imposed a moratorium on mortgage foreclosures in the event of debtor default. *Home Bldg. & Loan Ass'n v.*

& *Tube Co. v. Sawyer*,⁹⁷ the Supreme Court unequivocally has held that all of the provisions of the Constitution will continue to function during every exigency.⁹⁸ Justice Jackson's concurring opinion in *Youngstown* contains a cogent repudiation of the claim of necessity, warning that enlarging the power of the President during a period of alleged peril is dangerous as well as unconstitutional. Justice Jackson wrote:

[The Framers] knew what emergencies were, knew the pressures they engender[ed] for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not

Blaisdell, 290 U.S. 398, 415-16 (1934). Although the Supreme Court upheld the statute, the Court reiterated the *Milligan* doctrine, stating: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power . . . are not altered by emergency." *Id.* at 425.

In another Great Depression case, the Supreme Court struck down the validity of the National Industrial Recovery Act. See *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 528-29 (1935). The *Schecter* Court reaffirmed the principle that no crisis, no matter how severe or extraordinary, can justify the abandonment of constitutional procedure:

The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and [in] peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

Id.

⁹⁷ 343 U.S. 579 (1952). Holding that President Truman's seizure of steel factories was unconstitutional, the *Youngstown* Court rendered seven separate opinions overwhelmingly rejecting the view that a state of emergency justifies the exercise of powers not authorized by the Constitution. *Id.* at 582-614. Justice Douglas, reaffirming the *Milligan-Blaisdell* doctrine, see *supra* note 96, stated that, "[t]here can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power [in the executive branch] . . ." *Id.* at 629 (Douglas, J., concurring). Justice Douglas reasoned further that expediency cannot justify reinterpretation of established constitutional doctrine, stating "[i]f we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency." *Id.* at 632 (Douglas, J., concurring). The Framers' rejection of the theory that emergency can enlarge executive power is also recognized and endorsed by the opinion of the Court written by Justice Black, *id.* at 588-89, in Justice Frankfurter's concurring opinion, *id.* at 593 (Frankfurter, J., concurring), and in Justice Jackson's concurring opinion, *id.* at 649-53 (Jackson, J., concurring).

⁹⁸ See C. ROSSITER, *supra* note 95, at 211-15.

convinced it would be wise to do so⁹⁹

With respect to the warmaking authority specifically, every court which has addressed the claim raised by post-Korean war Presidents of an unlimited, unilateral war power has rejected it. In addition, contemporary courts, citing with approval pre-Korean war precedent, have not endorsed unilateral executive authority beyond the traditional categories of defense of American territory and protection of American citizens.¹⁰⁰

⁹⁹ 343 U.S. at 650 (Jackson, J., concurring) (footnotes omitted). In his *Youngstown* concurrence, Justice Jackson rendered a strong repudiation of inherent power. See *id.* at 649-50 (Jackson, J., concurring). Having considered the case of Nazi Germany, which had adopted the theory that necessity caused by crisis can expand the power to cope with an alleged emergency, Justice Jackson stated:

This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

Id. at 652 (Jackson, J., concurring).

¹⁰⁰ See A. SCHLESINGER, *supra* note 3, at 288-95. Schlesinger correctly observed that even though the courts did not declare the Vietnam war unconstitutional, no judge sustained the war on the theory that the President possesses the power to protect the national security. *Id.* at 290. Instead, the courts relied upon the political question doctrine, or found congressional authorization in the Gulf of Tonkin Resolution, military appropriation bills and selective service laws. *Id.* at 278-84.

The following is a nonexhaustive list of cases in which the constitutionality of the United States involvement in the Vietnam war was questioned. *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Massachusetts v. Laird*, 327 F. Supp. 378 (D. Mass.), *aff'd*, 451 F.2d 26 (1st Cir. 1971); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972); *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y.), *aff'd*, 429 F.2d 302 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971); see *New York Times Co. v. United States*, 403 U.S. 713, 722 (1971) (Douglas, J., concurring).

In *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 936 (1974), it was alleged that the military activities of the United States in Cambodia violated article I, section 8, of the Constitution, inasmuch as the activities had not been authorized by Congress. *Id.* at 554. After an initial victory was obtained by congressional opponents of the war in Cambodia in the form of an injunction against further bombing, the issue was eventually disposed of on the ground that it was a political question, and therefore not a matter for the courts to decide. A. SCHLESINGER, *supra* note 3, at 293-94. Although the Supreme Court in *Holtzman* denied certiorari, two of the Justices rejected the claim of broad executive war power in opinions issued in chambers. See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973) (Marshall, J.) (application to vacate stay); *id.* at 1316-18 (Douglas, J.) (reapplication to vacate stay). For an excellent description of the complicated procedural history of the *Holtzman* case, see Note, *The In-*

In *New York Times Co. v. United States*,¹⁰¹ Justice Douglas, in a concurring opinion, stated: "The Constitution by Art. I, § 8, gives Congress, not the President, power '[t]o declare War.' No-where are presidential wars authorized."¹⁰² In *Holtzman v. Schlesinger*,¹⁰³ Justice Douglas reiterated judicial opposition to the post-Korean war claim of unlimited executive power, citing *The Prize Cases*¹⁰⁴ for the proposition that the President "has no power to initiate or declare a war . . . against a foreign nation."¹⁰⁵ Justice Douglas observed that even though it has become popular to think the President has the power to initiate war on his own authority, "there is not a word in the Constitution that grants that power to him. It runs only to Congress."¹⁰⁶

In *Holtzman v. Schlesinger*, Justice Marshall stated that the scope of unilateral executive authority is limited to the case of a pressing emergency, supporting this narrow construction by citing the holding of *Talbot v. Seeman*¹⁰⁷ that the war power was vested by the Constitution in Congress. Justice Marshall then rejected the argument that the situation in the modern world required an increase in executive power, stating that nothing in the 172 years since the *Talbot* decision was rendered altered the requirement of congressional authorization.

Additionally, the lower federal courts uniformly have repudiated the assertion in the 1966 State Department Memo that the President's authority should be broadened to include the power to protect the national security, and have refused to recognize unilateral executive power in any situation other than an actual invasion of the United States.¹⁰⁸

dochina War Cases in the United States Court of Appeals for the Second Circuit: The Constitutional Allocation of War Powers, 7 N.Y.U.J. INT'L L. & POL. 137, 147-60 (1974).

¹⁰¹ 403 U.S. 713 (1971).

¹⁰² *Id.* at 722 (Douglas, J., concurring).

¹⁰³ 414 U.S. 1316 (1973); *see supra* note 100.

¹⁰⁴ 67 U.S. (2 Black) 635, 668 (1862); *see supra* note 17.

¹⁰⁵ 414 U.S. at 1317-18.

¹⁰⁶ *Id.* at 1317.

¹⁰⁷ 5 U.S. (1 Cranch) 1 (1801).

¹⁰⁸ *Berk v. Laird*, 429 F.2d 302, 304-05 (2d Cir. 1970); *Mottola v. Nixon*, 318 F. Supp. 538, 541-43 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972); *Orlando v. Laird*, 317 F. Supp. 1013, 1016-17 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

V. THE CONTINUING RELEVANCE OF THE FRAMERS' THREE-PREMISE THEORY OF CHECKS AND BALANCES

The cold war practice of an unlimited executive war power is in conflict with the Framers' theory of checks and balances. Contemporary Presidents and their advisers,¹⁰⁹ as well as Congressmen,¹¹⁰ foreign policy experts,¹¹¹ and commentators¹¹² have argued that the three premises underlying the checks-and-balances standard are not relevant in the modern world.

Though the consequences of war are immeasurably graver today than in 1787, the advocates of the abolition of checks and balances often appear indifferent to the potential casualties of modern warfare. For example, during the Cuban missile crisis President Kennedy stated that he found 150,000,000 American deaths an acceptable level of casualties.¹¹³ Second, proponents of broad presi-

¹⁰⁹ See *United States Commitments to Foreign Powers, Hearings Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 108, 140-54 (1967) (statement of Nicholas deB. Katzenbach, Undersecretary of State to President Johnson) [hereinafter cited as *Hearings on U.S. Commitments Abroad*]; 1966 *State Dep't Memo*, *supra* note 4, at 484 (President has very broad powers enabling him to deploy American forces abroad when he deems it necessary to maintain the security and defense of the United States); Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194, 1207-12 (1971) (recognizing fundamental historical changes in the world which must be considered in defining war powers); Rostow, *supra* note 2, at 900 (arguing that a tense and unstable world requires that the President possess the power to take immediate and flexible military action in order to preserve the peace).

¹¹⁰ See Fulbright, *supra* note 91, at 7 (questioning the adequacy of the "18th-century" Constitution in shaping foreign policy in a dynamic 20th century); Goldwater, *The President's Ability to Protect America's Freedoms—The Warmaking Powers*, 1971 LAW & SOC. ORD. 423, 444-45 (the President has the right to take military actions which he believes necessary without being restrained by Congress); Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT'L L. 463, 464-67 (1973) (the President must have some degree of independence in foreign affairs).

¹¹¹ G. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 14-26, 32-35 (1971) (a process endorsed by foreign policy scholars as the best method for deciding foreign policy and defense issues is that the government act as a rational, unitary decisionmaker); A. SCHLESINGER, *supra* note 3, at 166, 169-70; J. SPANIER & E. USLANER, *HOW AMERICAN FOREIGN POLICY IS MADE* 54-62, 68-78, 132-51 (1978).

¹¹² Cf. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 359-65 (1955) (the President can use his warmaking powers when the interests of the United States so require); Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19, 33 (1970) (the apparently unlimited powers exercised by the President in the Vietnam "war" were not unconstitutional); Ratner, *supra* note 2, at 467 (in modern world, President must be given power to defend allies who have been attacked). See generally R. HIRSCHFIELD, *THE POWER OF THE PRESIDENCY* 206 (1968); L. KOENIG, *THE CHIEF EXECUTIVE* 240 (1981).

¹¹³ In his address announcing the decision that the United States Government would seek to compel the Soviet Union to withdraw its nuclear missiles from Cuba, President Ken-

dential power assert that the decision to go to war is objectively determined by the international environment. Thus, the argument is made that if the President is informed as to international reality, then he alone can decide when war is necessary.¹¹⁴ Finally, presidential power advocates assert that the members of Congress invariably lack the requisite information, expertise, and judgment to render a sound warmaking decision,¹¹⁵ and that Congress as an institution is too slow and inflexible to make effective and timely determinations in a world of nuclear arms and other powerful, fast-moving weapons.¹¹⁶ It can be demonstrated, however, that the cited objections are palpably inaccurate, and that the three-premise theory is still relevant, indeed essential, in today's world.

A. Premise One: War Is Infinitely More Dangerous in the Modern World Than in the World of the Framers

War is immeasurably more dangerous in the modern world than in the world of the Framers, and thus the first premise is as relevant today as it ever was. The number of casualties in any contemporary war—whether conventional¹¹⁷ or nuclear¹¹⁸—can range

nedy acknowledged that his policy could result in an all-out nuclear war. In his October 22, 1962 address to the nation, the President stated: "We will not prematurely or unnecessarily risk the costs of worldwide nuclear war in which even the fruits of victory would be ashes in our mouth—but neither will we shrink from that risk at any time it must be faced." R. KENNEDY, *supra* note 65, at 156. The President estimated the probability of a nuclear war occurring as "between one out of three and even." T. SORENSEN, KENNEDY 705 (1965).

¹¹⁴ See J. SPANIER, *supra* note 73, at 60, 385-87. It has been asserted that the international system fixes the behavior of a nation. *Id.* at 60. The President and Congress do not have a choice in deciding that war should be initiated, since the international environment requires the United States to fight. Thus, the argument goes, since the decision to go to war is objectively determined by the external reality, every American leader would reach the same conclusion as to whether a war should be fought. *Id.* at 60, 385. Hence, the President need only be adequately informed as to the needs of the United States in order to utilize the power to make war correctly. *Id.* at 385-87. *But see* B. BRODIE, *supra* note 8, at 343-45 (arguing against the theory that the decision to initiate war is objectively determined and universally accepted).

¹¹⁵ See A. SCHLESINGER, *supra* note 3, at 14.

¹¹⁶ J. SPANIER & E. USLANER, *supra* note 111, at 138. When confronted with a crisis situation, it is argued, Congress necessarily will be bypassed because of the need for a rapid decision in order to prevent further complications. *Id.* During the Cuban missile crisis, President Kennedy perceived a blockade as the proper course of action. His idea was to start low on the "escalation ladder" and control the movement upward so as to give the opponent sufficient time to weigh the risks and costs and thus prevent nuclear war. *Id.* at 139; *see infra* note 188. The President stated that "[t]hese steps must be carefully timed, coordinated, and calculated, for the risks of miscalculation are ever present." J. SPANIER & E. USLANER, *supra* note 111, at 139.

¹¹⁷ Modern weapons are highly destructive, exceptionally mobile, and of great range. W.

from high to catastrophic.¹¹⁹ What is intended as a minor war against a relatively weak nation may result in a major war against an able, determined enemy.¹²⁰ Vietnam provides a vivid illustration. The small, technologically primitive nation of North Vietnam, a nation without an air force and with ground forces woefully inferior to the United States Army, inflicted over three hundred thousand casualties on American forces.¹²¹ Since the Soviet Union

KOENIG, *WEAPONS OF WORLD WAR III* 24 (1981); J. SPANIER, *supra* note 73, at 117-19. This is exemplified by the 1941 German attack on the Soviet Union. J. SPANIER, *supra* note 73, at 116-19. It is estimated that the Soviets suffered "at least three million" casualties during the first 3 months alone. P. CALVOCORESSI & G. WINT, *TOTAL WAR* 183 (1972). Adding the one million German casualties to this figure indicates a total of four million dead or wounded during the first 3 months of that campaign. *Id.* at 182.

Since today's weapons are swifter and more powerful and accurate than those of World War II, Ginsburgh, *The United States Air Force*, in *THE U.S. WAR MACHINE* 150 (1978); see L. MARTIN, *ARMS AND STRATEGY* 61 (1973), it can reasonably be stated that the casualties produced by an all-out conventional war today, such as a NATO-Warsaw Pact conflict, would easily surpass those of 40 years ago, see H. OWEN & C. SCHULTZE, *SETTING NATIONAL PRIORITIES* 67 (1976).

¹¹⁸ See *supra* note 73 and accompanying text.

¹¹⁹ It is impossible to predict with certainty whether a particular use of the armed forces in a noncombat situation will culminate in war. B. BLECKMAN & S. KAPLAN, *supra* note 65, at 230; H. KAHN, *ON ESCALATION* 9-13 (1965); Note, *supra* note 8, at 1795. Deterrence strategists advocate using the armed forces in situations short of fighting, such as the deployment of ground forces into a troubled nation, a naval show of force, or airlifting persons and equipment across disputed and hostile territory. It is argued that this will demonstrate that the United States is prepared and willing to go to war to defend an ally, A. GEORGE & R. SMOKE, *supra* note 65, at 58-60, and thereby lead a potential aggressor to conclude that the benefits to be derived from contemplated aggression are now outweighed by its costs, *id.* at 97-103. If this favorable outcome results, then it is said that the American military action has deterred the outbreak of war. *Id.*

The American military move, however, might not result in the prevention of war, but rather may lead to its outbreak. Note, *supra* note 8, at 1795. Furthermore, assuming there is an outbreak of war, there is the difficulty of limiting the casualties and duration of the conflict. R. LECKIE, *supra* note 35, at 853; Reveley, *supra* note 7, at 1288-89; Note, *supra* note 8, at 1796. One commentator observes that in the modern world "it can no longer be said with any degree of assurance that the commitment of troops to combat under any conditions is unlikely to result in major conflict." Note, *supra* note 8, at 1796 (emphasis in original). Also, Professor Reveley concludes: "In any use of force today, unlike the nineteenth century, it is difficult to predict the ultimate price. What 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." Reveley, *supra* note 7, at 1288-89.

¹²⁰ President Truman intended the American commitment to Korea to be small and of short duration, with minimal American casualties. R. LECKIE, *supra* note 35, at 850-58. Moreover, the United States ruefully underestimated the ability and determination of the Vietnamese Communists. Note, *supra* note 8, at 1796.

¹²¹ American military superiority forced the Vietnamese Communists to resort to guerilla warfare. See R. LECKIE, *supra* note 35, at 943-44. The Communist forces were weaker, poorly equipped and fewer in number relative to the American and South Vietnamese forces. See *id.* at 972-73. Despite having a relatively weaker military, the Communist regime

and other technologically advanced nations have provided Third World countries with powerful weapons, even the most backward nation in the world is capable of killing tens of thousands of Americans.¹²² Furthermore, an even greater risk than the danger of a relatively weak nation using its own military forces to inflict massive casualties on American troops is the ever-present possibility of such a nation becoming allied with the Soviet Union.¹²³ Such intervention would present the prospect of Soviet conventional and nuclear forces being employed against American soldiers and civilians. For example, during the October 1973 war, Egypt sought and received a Soviet commitment that the U.S.S.R. would use Soviet conventional and nuclear power to preserve the cease-fire and to save the encircled Egyptian Third Army, even though Egypt's alliance with the Soviet Union was tenuous at the time.¹²⁴ President

killed 58,000 Americans. *NEWSWEEK*, Dec. 27, 1982, at 38.

¹²² The Soviet Union has supplied modern weapons to such Third World countries as India, Afghanistan, Egypt, Iraq, Algeria, Cuba and Guinea. J. SPANIER, *supra* note 73, at 448-49; see Smolansky, *The Soviet Union and the Middle East Empire* in *EXPANSION & DETENTE* 264-68 (W. Griffith ed. 1976). If the United States were to enter into a conflict with one of these lesser-developed nations, American forces doubtlessly would be confronted with some of the most modern weapon systems. See *CONGRESSIONAL QUARTERLY, INC., THE MIDDLE EAST* 47-49 (5th ed. 1981) [hereinafter cited as *MIDDLE EAST*].

¹²³ Soviet intervention on behalf of Third World nations has not been limited to treaty allies or Communist regimes. For example, the non-Communist government of Egypt had neither signed a mutual defense treaty, granted base rights to the Soviet military, nor otherwise aided Soviet military policy when the Soviet Union threatened to use its forces on behalf of Egypt during the 1956 Suez crisis. See A. GEORGE & R. SMOKE, *supra* note 65, at 319; W. LAFEBER, *supra* note 71, at 192; A. ULAM, *THE RIVALS* 257-58 (1971). On October 29, 1956, Israel invaded the Sinai Peninsula and quickly routed the Egyptian Army. W. LAFEBER, *supra* note 71, at 191. The next day, the British and French began the attack on the Suez Canal. *Id.* The air attacks were followed by an Anglo-French landing on November 4. A. ULAM, *supra*, at 257. At this juncture, the Soviets threatened to send troops to aid Egypt and to attack Britain and France with nuclear weapons. R. FERRELL, *supra* note 8, at 746. Seventeen years later, the Soviet Union again threatened to use its military power on behalf of a non-Communist, nonallied nation. See *infra* notes 124-26 and accompanying text.

¹²⁴ Anwar el-Sadat succeeded Gamel Abdel Nasser in 1970, and shortly thereafter Egyptian-Soviet relations began to deteriorate. *MIDDLE EAST*, *supra* note 122, at 75. President Sadat became increasingly disillusioned with the Soviet Union. H. KISSINGER, *WHITE HOUSE YEARS* 1276 (1979). On July 18, 1972, Sadat ordered more than 15,000 Soviet military advisers out of Egypt. *Id.* at 1295. In addition, the Soviet bases and equipment set up in Egypt were to become Egyptian property. *Id.* Despite this discord, the Soviet Union was prepared to employ its military power on behalf of Egypt during the October 1973 war. See M. KALB & B. KALB, *supra* note 65, at 489-92; R. NIXON, *THE MEMOIRS OF RICHARD NIXON* 938-40 (1978).

In that war, the Israelis encircled the best fighting force in the Egyptian Army, the Third Army. M. KALB & B. KALB, *supra* note 65, at 489-92. Cut off from any resupply, the Third Army was at the mercy of the Israelis. *Id.* Sadat feared that the cream of the Egypt-

Nixon, who had decided to counter any Soviet intervention with the deployment of American conventional forces and the threat of striking the Soviet Union with nuclear weapons, recognized that his decision to use American military power might have led to a nuclear holocaust.¹²⁵ In his memoirs, the President states: "We neared the brink of nuclear war."¹²⁶

The prospect of nuclear war is both real and substantial. It is most likely to occur through a process of unintended and unwanted escalation during a conventional war or superpower crisis.¹²⁷ While this has not occurred to date, success at a lottery in the past is no guarantee of success in the future.¹²⁸ American Pres-

tian Army would be destroyed and his regime overthrown. *Id.* at 490. When the October 24 cease-fire went into effect, Sadat urgently appealed to Brezhnev and Nixon to send a joint Soviet-American peacekeeping force to the Middle East to ensure compliance with the cease-fire. *Id.* at 489. The Soviets accepted the Sadat proposal, while the United States opposed a joint Soviet-American peacekeeping force. *Id.*

¹²⁵ A message sent by Premier Brezhnev to President Nixon was characterized by the President as representing "the most serious threat to U.S.-Soviet relations since the Cuban missile crisis eleven years before." R. NIXON, *supra* note 124, at 938. Brezhnev charged that Israel was in violation of the cease-fire. Therefore, he urged the United States to join the Soviet Union in dispatching military forces into the Middle East to enforce the cease-fire. *Id.* The Soviet leader coupled his request for joint action with a threat of unilateral Soviet intervention if the United States failed to comply. *Id.*

President Nixon reiterated his opposition to joint action and, as part of a strategy to deter the Soviets from sending forces to rescue the encircled Egyptian Third Army, increased the alert status of all American conventional and nuclear forces. M. KALB & B. KALB, *supra* note 65, at 492. In addition, Nixon sent a letter to Brezhnev in which he called the Soviet plan for unilateral military action "a matter of the gravest concern" and implied that it would be opposed by American military forces, including nuclear weapons. R. NIXON, *supra* note 124, at 939. These actions were taken during the night of October 24. *Id.* The Nixon counter-threat substantially increased the probability of a confrontation between American and Soviet forces.

¹²⁶ R. NIXON, *supra* note 124, at 922. The crisis ended in the late morning of October 25, when the Soviet Union agreed to an American peacekeeping proposal. The proposal specifically excluded the forces of the two superpowers, but called for the United Nations to send a force to supervise the cease-fire. M. KALB & B. KALB, *supra* note 65, at 496.

¹²⁷ See H. KAHN, *supra* note 119, at 3-15, 74-82; J. SPANIER, *supra* note 73, at 170-71; T. SCHELLING, *THE STRATEGY OF CONFLICT* 190-91 (1960). It has been American policy to run the risk of escalation to nuclear war in order to win a superpower crisis or conventional war. See *infra* note 129. President Nixon exploited the Soviet fear of nuclear war during the October 1973 crisis, see *supra* notes 124-26 and accompanying text, and President Kennedy employed the risk of escalation during the Cuban missile crisis. See *infra* note 131. In addition, the present NATO strategy requires the United States to use nuclear weapons in order to prevent the defeat of European allies in a conventional war. B. BRODIE, *supra* note 8, at 399-405.

¹²⁸ Kenneth Boulding has developed a very useful visual image of nuclear risk-taking during a superpower crisis. The crisis situation may be dramatized by conceptualizing it as "a bag containing one black ball amid many white balls . . ." K. BOULDING, *THE MEANING*

idents from Harry Truman through Ronald Reagan have recognized that although Soviet nuclear forces assuredly could destroy the United States, American nuclear forces likewise could destroy the Soviet Union, and thus, American Presidents have employed the threat of nuclear war to influence the behavior of Soviet leaders during various crises.¹²⁹ While the probability is virtually nil that an American President who is in control of events would choose to implement the threat,¹³⁰ world history in general and the much briefer history of nuclear brinksmanship indicate the ever-present danger that events may elude the control of the super-power leaders and consequently, the threat may escalate into a nuclear war intended by no one.¹³¹

OF THE TWENTIETH CENTURY 91 (1964). The black ball is nuclear war. When the leaders of the two superpowers engage in nuclear risk-taking, they must dip their hands into the bag. Up to now, the leaders have always drawn a white ball; and the world goes smugly on. But the possibility of nuclear warfare, represented by the black ball, is always present. Herman Kahn concludes: "[W]hen one competes in risk-taking, one is taking risks. If one takes risks, one may be unlucky and lose the gamble." H. KAHN, *supra* note 119, at 15.

¹²⁹ J. KAHAN, *SECURITY IN THE NUCLEAR AGE* 14-15, 18-25, 78-79, 80-84 (1975); M. KALB & B. KALB, *supra* note 65, at 484-99; J. SPANIER, *supra* note 73, at 121-24, 146-56. Professor Gilpin correctly observes that "[a] major and disturbing consequence of the advent of [nuclear] weapons . . . is that they have enhanced the threat of war as an instrument of policy." R. GILPIN, *supra* note 18, at 214.

¹³⁰ See J. SPANIER, *supra* note 73, at 118-20. President Eisenhower recognized that if the United States ever initiated a nuclear strike against the U.S.S.R., the Soviets would certainly retaliate and annihilate the United States. See J. KAHAN, *supra* note 129, at 15.

¹³¹ As long ago as the 5th century B.C., it was recognized that in time of war, risk of miscalculation is high and an initial limited move can escalate inexorably into a much more violent conflict than any adversary desired. R. GILPIN, *supra* note 18, at 200-02. One commentator noted that as war continues, it generally becomes an affair of chance for both sides. *Id.* at 202. Moreover, many historians and political scientists believe that World War I resulted from a competition in risk-taking in which experienced and able statesmen of the European powers lost control over events. See generally B. TUCHMAN, *THE GUNS OF AUGUST* 71-97 (1962).

Scholars and statesmen have recognized that whenever the United States issues a nuclear threat, or takes or threatens a highly provocative conventional action, the Soviet Union might not back down as it did during the 1962 Cuban missile crisis and the 1973 Middle East war, but instead issue a counter-threat. Then, from a process that is not entirely foreseeable, from reactions that are not fully predictable, and from decisions that are not wholly deliberate, that threat might be implemented. See T. SCHELLING, *ARMS AND INFLUENCE* 98 (1966). During the Cuban missile crisis, President Kennedy was aware of and concerned about nuclear war erupting inadvertently either by a mistaken interpretation of enemy intent or by an irreversible series of limited moves on each side. J. KAHAN, *supra* note 129, at 81. See generally H. KAHN, *supra* note 119, at 9-15. For example, if Khrushchev would have reached the conclusion that the United States was preparing to launch a nuclear attack against the Soviet Union, then he might have decided to attack first in order to prevent the American strike from destroying his missiles. See G. ALLISON, *supra* note 111, at 141, 213. While President Kennedy had made no such plans or preparations to attack Soviet

B. *Premise Two: An Erroneous Decision to Commence War is More Likely with a Foreign Policy of Indiscriminate Global Containment*

Proponents of broad presidential power assert that the decision to go to war is objectively determined and universally accepted. More specifically, they argue that the international environment compels every American decisionmaker to conclude, in certain situations, that war is the correct policy choice. Since the decision is objectively fixed by international reality, it is argued that if the President is adequately informed as to the needs of the United States, then he alone can correctly make the decision to go to war. For example, it was contended that any reasonable man who was aware of the requirements of the global balance of power would have to conclude that the United States had to fight in Vietnam.¹³²

The Framers of the Constitution, however, clearly held a diametrically opposed view. They knew that the decision as to the scope of the national interest is neither objective nor capable of universal acceptance. Even if Congress accepted a presidential definition of the extent of national interest, the drafters' logic ran, Congress nevertheless could conclude that the national interests at stake were not worth the costs of war.¹³³

territory, Khrushchev had no way of knowing this and, in interpreting American intent, might have accepted as real what were only suspicions and fears. See H. KAHN, *supra* note 119, at 10. When an American U-2 plane accidentally wandered into Soviet airspace, Khrushchev interpreted the presence of the American plane as an American reconnaissance plane whose mission was to survey targets in the Soviet Union in preparation for an imminent American nuclear attack. G. ALLISON, *supra* note 111, at 141. This interpretation, combined with the amassing of an invasion force in Florida and an unauthorized leak from the State Department threatening "further action" if work continued on the Cuban missile bases, nearly prompted Khrushchev to launch a Soviet preemptive strike. *Id.* at 47-48, 64-66.

In addition to miscalculation, a series of limited conventional moves may compel responses until the nuclear rung on the escalation ladder is reached and crossed. G. ALLISON, *supra* note 111, at 56-62. President Kennedy predicted that an American airstrike or invasion of Cuba would have killed many Soviets and thus forced Khrushchev to have made his own nonnuclear move. "If they don't take action in Cuba, they certainly will in Berlin," the President stated. R. KENNEDY, *supra* note 65, at 14-15, 98. Thus, after the first round, the United States would have won in Cuba, and the Soviet Union would have used its conventional superiority around Berlin to succeed there. The scenario thus leads to the question whether the confrontation would have ended after each side employed its conventional power, or proceeded to all-out nuclear conflict. See generally R. GILPIN, *supra* note 18, at 214; Shribman, *Experts Fear That Unpredictable Chain of Events Could Bring Nuclear War*, N.Y. Times, June 24, 1982, at A10, col. 1.

¹³² See *supra* note 114 and accompanying text.

¹³³ See *supra* notes 8-9 and accompanying text.

More significantly, the logic employed by the advocates of unbridled presidential initiative generally has been refuted by history. Pre-Korean war Congresses and Presidents did not wage war unless and until agreement was reached on the definition of the scope of national interest and the determination that the benefits to be derived from the war outweighed its costs.¹³⁴ It is specious to contend that such decisions were clear-cut and without controversy. From 1945 to 1950, for example, Western Europe lay ravaged as a result of 6 years of total war, and was completely vulnerable to the victorious and powerful Red Army.¹³⁵ The loss of Western Europe to the Soviet Union would have impaired significantly three fundamental interests of the United States: the balance of power, since one nation would be in complete control of Europe; the territorial integrity of the United States, in that the Soviet Union could then or at some future time attack the United States; and trade, in that a market for American products and a source of American imports would be lost.¹³⁶ Yet, despite the urgency and magnitude of this Soviet threat to the most vital of American interests, no commitment to defend Western Europe was made prior to securing legislative authorization.¹³⁷

Moreover, if legislative authorization could not be assumed in the case of protecting intrinsically important nations against a major and unambiguous Soviet threat, then, a fortiori, legislative authorization cannot be assumed in the case of defending an unimportant nation against more minor and ambiguous aggression in which the harm to the interests of the United States is unlikely, remote, and speculative.¹³⁸ South Korea was in the latter category,

¹³⁴ See *supra* notes 35-52 and accompanying text.

¹³⁵ See *supra* notes 74-76 and accompanying text.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See B. BRODIE, *supra* note 8, at 355, 358-59. See generally A. SCHLESINGER, *THE BITTER HERITAGE* 117-26 (1966). The futility of practicing global containment by committing American forces to areas of minor United States interest is evidenced by the recent conflict in Vietnam. Schlesinger contends that the presidential judgment had been warped by absolute, unlimited, and unchecked power to make war. A. SCHLESINGER, *supra* note 3, at 183-84. It is indisputable that throughout the last 32 years, Presidents have made some misguided determinations that the national interest at stake was sufficiently important and threatened that war was necessary and wise.

The result was a policy of indiscriminate global intervention which has neither advanced nor strengthened the national interest. Instead, it has weakened the nation's security by involving the United States in remote, dangerous, and potentially cataclysmic confrontations and wars. A. SCHLESINGER, *supra* note 3, at 168-69. Moreover, while the United States has devoted its attention, resources and blood to marginal problems in peripheral areas, the

strategically¹³⁹ and economically valueless.¹⁴⁰ In fact, before the outbreak of the Korean war, Truman and his advisers calculated American interests in Korea and concluded that in the event of a North Korean attack, the best policy for the United States was neutrality.¹⁴¹ Moreover, Congress had considered this contingency

American commitment to the parts of the world which are truly vital to the national interest has been neglected. See A. SCHLESINGER, *supra*, at 142-43.

Two eminent scholars of international relations, Alexander George and Richard Smoke, identified and criticized the false premises and fallacious logic that the Presidents of the 1950's and 1960's employed, stating that "the Cold War had been dominated by a belief in the necessary *indivisibility of issues*, with everything somehow connected with everything else" A. GEORGE & R. SMOKE, *supra* note 65, at 598 (emphasis added). The advocates of containment perceived the Soviet ruler as possessing an almost compulsive desire for expansion in order to enhance Soviet influence and ultimately bring the rest of the world under Soviet hegemony. The Soviet Union was viewed as the head of an international Communist movement, designed to upset the status quo or exploit any takeover by a reformist or revolutionary group. The perception of the Soviet rulers as malevolently and ruthlessly efficient gradually has given way, however, as the Soviet Union exhibits caution and a lack of success in expanding its influence. Moreover, the beneficiaries of Soviet economic and military aid display an unexpected independence of their benefactors. *Id.* at 597.

¹³⁹ See R. LECKIE, *supra* note 35, at 849 (Secretary of State Acheson and Chairman of the Senate Foreign Relations Committee Connally commented that Korea was unimportant to the defense of American territory or to the balance of power); E. MAY, *supra* note 75, at 58-62. During successive careful and high-level deliberations over a 2-year period before the North Korean invasion, there was "fairly unanimous agreement to abandon the Koreans to their fate," the grounds being "that Southern Korea is without strategic value to us, is, in fact, a strategic liability" *Id.* at 59.

¹⁴⁰ See R. LECKIE, *supra* note 35, at 846-47. In 1945, the Soviet Union occupied northern Korea and established the 38th parallel as the demarcation line between the industrial north and the agricultural south. *Id.* The Soviets then isolated the south by shutting off electric power and cutting off railroad access. *Id.* at 847. Trade between the two halves of the country became nonexistent. *Id.* The south lacked coal and chemicals and suffered from spiraling inflation. *Id.*

¹⁴¹ E. MAY, *supra* note 75, at 59-67. Whenever "American officials reflected . . . upon the possibility of North Korean aggression, they apparently took it as a foregone conclusion that the United States should not and would not resist with force." *Id.* at 64. Moreover, Professor May states:

It was the policy of the United States in June 1950 to avoid using American military forces in Korea. This had been the consistent position of the Joint Chiefs, twice considered by the National Security Council, and on both occasions approved by the President [T]he government can be said to have coolly assessed the national interest and decided what decision ought to be made in the event of a [North Korean attack]

Id. at 67.

Presently, an analogous situation exists in El Salvador. See *The Peekaboo Offensive*, NEWSWEEK, Mar. 15, 1982, at 35. Although the United States continues to supply military and economic aid to El Salvador, former Secretary of State Haig denied any intention of sending United States ground troops to the Central American nation. *Id.* at 36. The distinct possibility, however, that Reagan will send troops should the Salvadoran Government falter is evident. *Id.*

and was firmly behind the policy of nonintervention in the Korean civil war.¹⁴² Yet, the decision was made to intervene.¹⁴³

In a world where any commitment of American military forces may lead to a major war or even to nuclear holocaust, a requirement of congressional authorization is necessary to prevent the President from unnecessarily endangering the lives of American troops and civilians. Since any President who adopts a foreign policy of indiscriminate global containment perceives a virtually limitless range of threats to the national interest,¹⁴⁴ there is a very high probability that a decision will be made to intervene in a foreign conflict which has only a slight, indirect, or illusory effect on the defense of American territory, the balance of power, and American economic interests. This foreign policy of limitless containment, combined with the destructiveness of modern weapons, may result in American Presidents risking survival of the state and countless American lives, for interests that, by comparison, are trivial.¹⁴⁵ Thus, congressional participation is required now more than at

¹⁴² See E. MAY, *supra* note 75, at 66-67.

¹⁴³ *Id.* at 69, 81-82. "Communism was acting in Korea just as Hitler, Mussolini, and the Japanese had acted ten, fifteen, and twenty years earlier. . . . If this was allowed to go unchallenged," President Truman concluded, "it would mean a third world war, just as similar incidents had brought on a second world war." *Id.* at 81-82 (quoting 2 H. TRUMAN, MEMOIRS 332-33 (1955)). Again and again throughout the post-Korean period of global and indiscriminate containment, the lesson of Munich was cited as the authority for interpreting events and determining American policies. B. BRODIE, *supra* note 8, at 70, 118, 351, 353, 432. The notorious "domino theory" was based on the Munich analogy. *Id.* at 144-53. Every commitment of American forces during the last 32 years was based, at least in part, on the notion that Soviet foreign policy goals and methods were identical with Nazi ambitions and techniques. For example, former Secretary of State Haig asserted that the war in El Salvador is not really a civil war, but only the latest move in "worldwide Soviet interventionism." Isaacson, *A Lot of Show But No Tell*, TIME, Mar. 22, 1982, at 18.

¹⁴⁴ See B. BRODIE, *supra* note 8, at 344, 350; J. SPANIER, *supra* note 73, at 216. It should be stated that the Constitution permits the adoption of any foreign policy, including indiscriminate global containment. Article I of the Constitution gives Congress the power to declare war, U.S. CONST., art. I, § 8, cl. 11, while article II makes the President the Commander in Chief of the Army and Navy and bestows on him the power to make treaties with the advice and consent of the Senate, *id.*, art. II, § 2, cls. 1-2. No specific foreign policy is mentioned in, much less mandated by the Constitution. While the Constitution permits the adoption of any foreign policy, the President "shall take care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. It follows that, if the President chooses a policy of global containment, the means by which he implements that policy must be consistent with, and faithful to, the laws passed by Congress and the Constitution itself.

¹⁴⁵ B. BRODIE, *supra* note 8, at 344, 350; A. SCHLESINGER, *supra* note 3, at 168-70, 183-86, 273-75, 288-89; J. SPANIER, *supra* note 73, at 216; cf. NATIONAL COMMITMENTS REPORT, *supra* note 9, at 26 ("Congress has permitted its war power to be transferred to the hands of an executive which, though less susceptible to self-doubt than the Congress, is no less susceptible to error").

anytime in our history.¹⁴⁶

C. Premise Three: Congressional Participation in the War-Commencing Procedure Can Reduce the Probability of an Erroneous Decision

Proponents of presidential power have asserted that congressional participation in the war-commencing process would not make a positive contribution, but would only burden the process with error and delay.¹⁴⁷ It is submitted that this criticism, that members of Congress lack sufficient information, expertise, and judgment to define the national interest and determine whether the national interests at stake justify the dangerous risks of modern war,¹⁴⁸ is meritless. Although some Presidents and their advisers may be more experienced and educated in foreign affairs than some members of Congress, a comparison of the knowledge and skill of Senators and Representatives with Presidents and their advisers reveals that executive branch individuals are in no better position to make such decisions than members of Congress.¹⁴⁹ If either branch contains more informed and experienced members, it is probably the Congress. Senators and Congressmen who are on the Foreign Relations or Armed Services Committee, for example, presumably have had more extensive involvement in analysis of American interests and commitments than the more transient Presidents and their advisers.¹⁵⁰ Legislative participation in fact will reduce the probability of engaging in an unnecessary war by playing the role of a constructive adversary.¹⁵¹ Congress can pre-

¹⁴⁶ See *supra* notes 133-45 and accompanying text.

¹⁴⁷ See *supra* notes 115-16 and accompanying text.

¹⁴⁸ See *supra* text accompanying note 115.

¹⁴⁹ A. SCHLESINGER, *supra* note 3, at 282-84, 326, 452 n.94.

¹⁵⁰ In 1974, the executive branch was headed by Gerald Ford who had never held any foreign affairs position. In contrast, the Senate Foreign Relations Committee was comprised of many experienced foreign policy decisionmakers, namely Senators Fulbright, Mansfield, Church, Symington, McGovern, Muskie, Humphrey, Case, Javits and Percy. A. SCHLESINGER, *supra* note 3, at 452 n.94.

¹⁵¹ R. DAHL, CONGRESS AND FOREIGN POLICY 104 (1950); Reveley, *supra* note 7, at 1295. Professor Reveley states: "The determination that military action is in our national interests requires the setting of priorities in light of existing values." Reveley, *supra* note 7, at 1295. Congress is certainly as able as the executive branch to make that decision. *Id.* Political scientist Robert Dahl observes that in deciding what elements to include in national interest and whether the national interest is worth war, legislators are as qualified as the President and his advisers. According to Dahl, "[t]he more important the questions of preference become, the less competent becomes the expert. . . . [A]t the top of the pyramid, the skills of

vent the President from defining the national interest overbroadly or from reaching an erroneous determination as to whether the gains to be derived from a military involvement exceed the costs.¹⁵² Moreover, Congress is in a better position than the President to gauge the willingness of the American people to suffer the misery of war.¹⁵³ In conclusion, Congress can reduce the probability of fighting an unnecessary war by scrutinizing presidential policy and by ensuring the representation of public sentiment in the warmaking decision.¹⁵⁴

an Acheson [former Secretary of State] and a Vandenberg [former Chairman of the Senate Foreign Relations Committee] may be of much the same kind." R. DAHL, *supra*, at 104. Dahl speaks of "bring[ing] the highest competence of the *entire* skill group to bear upon the making of policy." *Id.* (emphasis in original).

¹⁵² See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring); *id.* at 629-30 (Douglas, J., concurring); *id.* at 652-53 (Jackson, J., concurring); NATIONAL COMMITMENTS REPORT, *supra* note 9, at 7; T. FRANCK & E. WEISBAND, *supra* note 52, at 32. In *Youngstown*, Justice Frankfurter in a concurrence observed that the American scheme of government lacks the power to act with complete, swiftly moving authority. The price of this restriction, however, according to Justice Frankfurter, is outweighed by the safeguards it affords. *Id.* at 613-14 (Frankfurter, J., concurring). He cited *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), in which Justice Brandeis stated that the doctrine of the separation of powers was adopted by the Constitutional Convention not to promote efficiency, but, through the inevitable friction among the three branches of government, to prevent the establishment of autocracy. 343 U.S. at 613-14 (Frankfurter, J., concurring).

Senator William Fulbright noted that American policymakers, from Korea to Berlin to Cuba to Vietnam, implemented a policy of containment based on assumptions that few really questioned. The premises of containment were never reexamined by the architects of our foreign policy, nor were these premises subject to criticism in constructive adversary proceedings. H. NASH, *AMERICAN FOREIGN POLICY: RESPONSE TO A SENSE OF THREAT 2* (1973).

Professor Bickel perceived the modern relevance and significance of preventing the President from committing hasty and ill-conceived military moves by the check of congressional questioning, constructive criticism, and creative initiative. He stated:

There is no assurance of wisdom in Congress, and no such assurance in the presidency The only assurance there is lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent. . . . Singly, either the President or Congress can fall into bad errors So they can together, too, but that is somewhat less likely, and in any event, together they are all we've got.

Bickel, *The Need for a War-Powers Bill*, New Republic, Jan. 22, 1972, at 18. Professor Reveley conceded that "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." Reveley, *supra* note 7, at 1301.

¹⁵³ Berger, *supra* note 7, at 85; Note, *supra* note 8, at 1775.

¹⁵⁴ 128 CONG. REC. S1706-07 (daily ed. Mar. 8, 1982) (statement of Sen. Byrd); Berger, *supra* note 7, at 84; Reveley, *supra* note 7, at 1295; see Roberts, *A Majority in Poll Want U.S. to Stay Out of Salvador War*, N.Y. Times, Mar. 21, 1982, at 1, col. 2; Byrd *Seeking to Bar U.S. Combat Troops from Salvadoran War*, N.Y. Times, Mar. 7, 1982, at 17, col. 1. On March 8, 1982, Senator Robert Byrd, the leader of the Democratic Party in the Senate,

VI. THE RESTORATION OF CONSTITUTIONALISM

A. *The War Powers Resolution: The Failed Attempt to Restore Checks and Balances*

The Vietnam war caused many legislators to reexamine cold war assumptions concerning the respective roles of Congress and the President in committing American military forces abroad.¹⁵⁵ Between 1969 and 1973, Congress considered various bills that sought to reverse presidential usurpation and restore checks and balances.¹⁵⁶ In the fall of 1973, the War Powers Resolution became law.¹⁵⁷

The resolution is a hybrid of two different concepts of limiting presidential power.¹⁵⁸ The House bill required the President to terminate hostilities automatically by the end of a given period unless Congress had declared a war or otherwise authorized the use of the military,¹⁵⁹ and permitted Congress to terminate hostilities at any

announced that he would introduce legislation which would bar the President from ordering combat troops to El Salvador without seeking a prior statutory authorization from Congress. The bill, an amendment to the War Powers Resolution of 1973, would restore constitutional procedures at least in regard to the decision to fight in El Salvador. *Byrd Seeking to Bar U.S. Combat Troops from Salvadoran War, supra*, at 17, col. 1.

¹⁵⁵ W. REVELEY, *supra* note 3, at 225; Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 WM. & MARY L. REV. 823, 823-24 (1975); see Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 89-90 (1977). Professor Berger criticized the extension of presidential warmaking power:

Through presidential conduct of foreign policy, . . . we have become entangled in a succession of great wars. If we are to forfend such catastrophes we must begin by demanding to be consulted—for example, does the nation want to risk a confrontation with the Soviet Union to halt its expansion into Africa? Perhaps it should, but the decision cannot be left to Mr. Kissinger and Mr. Ford. Too many calamitous executive decisions counsel against making them the sole and secret arbiters of foreign policy.

Berger, *The Tug-of-War Between Congress and the Presidency—Foreign Policy and the Power to Make War*, 16 WASHBURN L.J. 1, 8 (1976).

¹⁵⁶ Spong, *supra* note 155, at 824.

¹⁵⁷ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1976 & Supp. IV 1980)).

¹⁵⁸ Spong, *supra* note 155, at 827-33. Compare S. 440, 93d Cong., 1st Sess. §§ 2-5 (1973) (Senate attempt to avoid unauthorized presidential wars by defining scope of unilateral executive authority) and S. REP. NO. 220, 93d Cong., 1st Sess. 2-4, 21-27 (1973) (report on proposed bill attempting to delineate the circumstances for unilateral presidential war power) with H.R.J. RES. 542, 93d Cong., 1st Sess. § 4 (1973) (House proposal allotting President greater authority than Senate proposal, subject to subsequent congressional approval) and H.R. REP. NO. 287, 93d Cong., 1st Sess. 5-7, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2346, 2349-51 (providing for consultation between Congress and the President prior to war); see *infra* notes 159-63 and accompanying text.

¹⁵⁹ H.R.J. RES. 542, 93d Cong., 1st Sess. § 4b (1973); see Spong, *supra* note 155, at 829.

time if a majority of the members in each house voted by concurrent resolution to end the war.¹⁶⁰

In contrast to this "performance" test of the House, the Senate adopted an "authority" approach.¹⁶¹ The Senate war power proposals sought to define the circumstances, such as attack against American territory, armed forces, or citizens, under which the President could commit the military to hostilities.¹⁶² In all other circumstances, the President could not initiate war on his own authority.¹⁶³

Essentially the compromise bill which emerged from the joint House-Senate conference committee embraces the House "performance" test.¹⁶⁴ The resolution does not confine presidential

¹⁶⁰ H.R.J. Res. 542, 93d Cong., 1st Sess. § 4c (1973). Concurrent resolutions neither require the President's signature nor are affected by his veto. Spong, *supra* note 155, at 829 n.43. Such resolutions have been used to terminate hostilities in the past. Additionally, Congress has incorporated these resolutions in subsequent legislation. See, e.g., Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 617, 75 Stat. 424, 444; The Lend Lease Act, ch. 11, § 3 (c), 55 Stat. 31, 32 (1941); Reorganization Act of 1939, ch. 36, § 5 (a), 53 Stat. 561, 562.

¹⁶¹ Spong, *supra* note 155, at 832-33. The characterization of the House approach as "performance test" and the Senate approach as "authority" is Senator Spong's. *Id.* It is suggested that these labels are derived from the actual nature of the rights afforded the President under the different bills. In the Senate bill the President is given specific situations under which he will have unilateral "authority" to commence war. See *infra* note 162 and accompanying text. In the House bill, the President is given unilateral authority to initiate or to "perform" the initiation of war in almost every situation and executive power is merely subject to later ratification or approval by Congress. See H.R.J. Res. 542, 93d Cong., 1st Sess. § 4b (1973).

¹⁶² S. 440, 93d Cong., 1st Sess. § 3(1)-(4) (1973). Section 3 provides in pertinent part: [T]he Armed Forces of the United States may be introduced in hostilities . . . only—(1) to repel an armed attack upon the United States . . . ; (2) to repel an armed attack against the Armed Forces of the United States . . . ; (3) to protect . . . citizens and nationals from . . . any situation . . . involving a direct and imminent threat to [their] lives . . . ; or (4) pursuant to specific statutory authorization.

Id.

¹⁶³ *Id.* § 3. The Bill limited the conditions under which the President has unilateral authority to initiate war and reserved all other situations for congressional approval through the use of the introductory phrase: "In the absence of a declaration of war by Congress." *Id.*

¹⁶⁴ T. EAGLETON, *supra* note 1, at 206-25; T. FRANCK & E. WEISBAND, *supra* note 52, at 68-71; see *supra* note 161 and accompanying text. The Senate approach of defining the circumstances under which the President possesses the legal authority to commence military operations was rejected by the conference committee. Spong, *supra* note 155, at 833. Although the Representatives in the conference committee who rejected the Senate approach permitted the language of the authority approach to remain in the bill, the authority language was no longer in the legally binding portion of the bill. Thus, the authority section of the law, section 2(c), places no legal limits on the President's power to commence war. *Id.* at 834-35, 837-41; T. EAGLETON, *supra* note 1, at 202-05.

The War Powers Resolution produced by the conference committee was approved by

warmaking to the circumstances under which the Chief Executive has authority under the Constitution,¹⁶⁵ but instead, effectively permits Presidents to continue to claim and exercise an unlimited warmaking power.¹⁶⁶ The only limit placed upon the presidential power is durational—the President must receive congressional authorization within 60 days after the war begins¹⁶⁷ and he is obli-

the Senate by a majority of 75 to 20. 119 CONG. REC. 33, 569-70 (1973). The conference report was approved in the House by a 238 to 123 vote. *Id.* at 873-74. Although President Nixon vetoed the War Powers Resolution, H.R. Doc. No. 171, 93d Cong., 1st Sess. 1-2 (1973), Congress subsequently overrode the President's veto, Spong, *supra* note 155, at 836-37. At least one commentator has noted that despite general congressional opposition to the conference committee bill, many members voted to override the presidential veto because of transient political considerations. *Id.* at 836; T. EAGLETON, *supra* note 1, at 214-15. The Indo-China war, Watergate, and partisan politics influenced legislators more than the merits of the law. *Id.*; T. FRANCK & E. WEISBAND, *supra* note 52, at 70.

¹⁶⁵ See T. EAGLETON, *supra* note 1, at 203-05. Senator Eagleton voiced his views on the possible results of congressional failure to adopt the "authority" approach. *Id.* The result of this omission, Eagleton concluded, was that the War Powers Resolution would provide "a legal basis for the President's broad claims of inherent power to initiate war." *Id.* at 203. Moreover, Eagleton cautioned, the War Powers Resolution is a dangerous piece of legislation which could "effectively eliminate Congress' constitutional power to authorize war." *Id.* at 204. Others have joined Eagleton's philosophy, attempting to restore constitutionalism to the war-decision procedure by suggesting amendment of the War Powers Resolution. See, e.g., Byrd Seeking to Bar U.S. Troops From Salvadoran War, *supra* note 154, at 17, col. 1.

¹⁶⁶ See T. EAGLETON, *supra* note 1, at 213; Spong, *supra* note 155, at 841; *supra* note 165. Senator Eagleton stated: "What this bill says is that the President can send us to war wherever and whenever he wants to. . . . Despite what has been written and said about it, it does not limit the power of the President of the United States to wage war by himself. Quite to the contrary. It attempts to emblazon into law, that unilateral decisionmaking process." 119 CONG. REC. 36,177 (1973).

During the floor debate in the House, many representatives stated that the War Powers Resolution failed to deprive the executive branch of the power it seized during the cold war, and that the bill's failure to undo the usurpation permitted Presidents to continue to perpetuate the unconstitutional practice. For example, Representative Green stated that "a careful reading of the bill indicates . . . an expansion of Presidential warmaking power Thus, the net result could be absolutely no legislative constraint on the President's claims to constitutional warmaking authority." 119 CONG. REC. 36,204 (1973). Further, Representative Abzug said that the War Powers Resolution gives the President power that he did not already have under the Constitution. *Id.* at 36,221. She stressed that the resolution gives the President "90 days in which to commit our forces anywhere in the world, only requiring that he report to the Congress within 48 hours on what he has done." *Id.* Representative Culver rebuked his colleagues of the 93d Congress for failing to annul the constitutional procedure and to restore checks and balances, stressing that the resolution "[gives] the President a blank check to wage war anywhere in the world for any reason of his choosing for a period of 60 to 90 days." *Id.* Similarly, Representative Dellums observed that "many Congressmen will live to see the mistake they made in allowing any President . . . [this type of power]." *Id.* at 36,220.

¹⁶⁷ 50 U.S.C. § 1544(b) (1976). Section 1544(b) provides:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President

gated to end the war before the 60-day grace period expires in the event that Congress passes a concurrent resolution ordering the President to end hostilities.¹⁶⁸ Thus, there is no restraint on the initial presidential exercise of war power, and the War Powers Resolution does nothing to reverse the usurpation.¹⁶⁹ The failure of Congress to reclaim its rightful authority has left the unconstitutional practice intact to the present day.¹⁷⁰

shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Id.

¹⁶⁸ *Id.* § 1544(c). Subsection (c) states:

Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id.

¹⁶⁹ *Id.* § 1541(c) (1976). Section 1541(c) provides:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Id. The conference committee did not intend section 1541(c) to be mandatory, but only precatory. T. EAGLETON, *supra* note 1, at 202-03; Spong, *supra* note 155, at 837-41. This conclusion is derived from the conference report wherein it was stated that "[s]ubsequent sections of the joint resolution are not dependent upon the language of [section 1541(c)]." H.R. REP. No. 547, 93d Cong., 1st Sess. 8 (1973). The effect of this statement, Senator Eagleton claims, not only diminishes the authority of section 1541(c), but "now¹⁷⁰ even its value as a statement of policy . . . [is] questionable." T. EAGLETON, *supra* note 1, at 203. After carefully analyzing the language of the law, the language in the House and Senate bills, the legislative history, and principles of statutory construction, Senator Spong concluded that section 2(c) is not mandatory and thus places no legal limits on the President's power to commence war. Spong, *supra* note 155, at 840.

¹⁷⁰ See 50 U.S.C. § 1547(d) (1976). Section 1547(d) states:

Nothing in this chapter—(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.

B. *Checks and Balances and Modern International Exigency*

As this Article has demonstrated, the legitimate scope of independent executive authority is quite narrow. At most, the President can act when American territory or American citizens are in danger of attack.¹⁷¹ In all other circumstances the Constitution does not permit a unilateral executive power and therefore prohibits the President from acting in these circumstances absent congressional authorization. It has been argued that the application of checks and balances to the war-commencing decision, although indisputably required by the Constitution, is misplaced in the post-World War II world of highly destructive and swiftly moving conventional and nuclear weapons. It is submitted, however, that the restoration of checks and balances will not impair the ability of the United States Government to protect itself or its vital interests. Three factors—the development of a means of immediate mass destruction;¹⁷² a vehicle that can deliver this weapon between continents in a matter of minutes;¹⁷³ and the absence of effective defenses¹⁷⁴—all of which are fundamental changes in the technology

Id. Since Presidents had claimed broad power to make war for any reason of national interest before the bill became law, section 1547(d) has been interpreted as permitting the continuation of that claim. See 119 CONG. REC. 36,204 (1973) (remarks of Rep. Green); *id.* at 36,189 (remarks of Sen. Eagleton); T. EAGLETON, *supra* note 1, at 202-03.

¹⁷¹ See *supra* notes 40-42 and accompanying text. During the pre-Korean war period, Presidents acquired the unilateral power to rescue American citizens who were in danger in stateless territories and weak states. In the modern world, however, it appears that the President can never exercise the power to protect citizens in foreign territories, since there are no longer any stateless territories or weak states. Whereas nations in which our citizens were endangered in the past were too weak to inflict anything more than minimum casualties, now, even the smaller nations of the world possess the military capability to inflict massive casualties on American troops which land on their soil. See J. SPANIER, *supra* note 73, at 267-68. Second, in the past, nationalistic feelings were not as pronounced as they are today. Currently, nation-states so value their sovereignty that they would regard the landing of American troops to rescue American citizens as an invasion of their sovereign territory. See *id.* at 114-15.

¹⁷² J. SPANIER, *supra* note 73, at 70-72; D. ZIEGLER, WAR, PEACE AND INTERNATIONAL RELATIONS 343-44 (2d ed. 1981).

¹⁷³ Turner & Challener, *Strategic and Political Implications of Missiles*, in NATIONAL SECURITY IN THE NUCLEAR AGE 83-87 (1960). Professors Challener and Turner observed that the

sharply increased velocity of . . . missiles . . . [is] causing military experts to recast some of their most modern concepts of military policy and strategy. . . . The advent of missiles has greatly intensified the compression of the time scale for modern warfare. . . . [T]he United States, protected by oceans . . . [has] had to adjust radically to the new situation.

Id. at 83-84.

¹⁷⁴ Despite extensive research and development by both the United States and the So-

of war, have led military strategists to conclude that since the United States is vulnerable to complete destruction¹⁷⁵ American strategy should not be to fight a nuclear war but to deter it.¹⁷⁶

The strategy of deterrence requires the President to maintain American nuclear forces in a permanent state of readiness so that American missiles and bombers can retaliate immediately in the event that the Soviets would launch a surprise nuclear attack.¹⁷⁷ According to deterrence strategy, if the President were able to order an immediate, devastating retaliatory strike, then the Soviet Union could be totally and assuredly destroyed. With this in mind Soviet leaders will refrain from launching a nuclear attack against the United States.

Conversely, if the President lacked the authority to order an immediate retaliatory strike, the Soviet leaders might question the ability and the willingness of the United States to retaliate efficaciously, and thus might be tempted to launch a first strike.¹⁷⁸ The President, however, can order an immediate retaliatory strike without exceeding the authority granted him under the Constitution. It is clear that the President has always possessed the authority to protect the territorial integrity and political independence of the United States from armed attack.¹⁷⁹ Thus, the invention of nuclear weapons and the changed strategic requirements of protecting United States territory do not in fact require any modification of traditional war-commencing procedure.

Opponents of a restoration of the checks-and-balances system

viet Union, neither nation has yet developed an effective antiballistic missile (ABM) system. B. BRODIE, *supra* note 8, at 379; D. GOMPERT, M. MANDELBAUM, R. GARWIN & J. BARTON, *NUCLEAR WEAPONS AND WORLD POLITICS* 34, 91 (1977); J. KAHAN, *supra* note 129, at 257-59. "Knocking down an incoming missile with an interceptor vehicle is a complicated undertaking. . . . President Kennedy described it as tantamount to hitting a bullet with another bullet." D. GOMPERT, M. MANDELBAUM, R. GARWIN & J. BARTON, *supra*, at 34.

¹⁷⁵ J. SPANIER, *supra* note 73, at 124. With the advent of nuclear technology, "[n]uclear weapons now ensure that any total war will risk the very substance of national life." *Id.*

¹⁷⁶ See J. SPANIER, *supra* note 73, at 124-30. See generally B. BRODIE, *supra* note 8, at 375-432; R. GILPIN, *supra* note 18, at 213-30.

¹⁷⁷ See, e.g., J. KAHAN, *supra* note 129, at 35-47.

¹⁷⁸ See J. SPANIER, *supra* note 73, at 124. It has been stated that "[t]he actual application of force to beat the enemy [has been] replaced by the *exploitation of potential* force to dissuade the potential aggressor from striking." *Id.* at 130 (emphasis in original).

¹⁷⁹ See *supra* notes 14-24 and accompanying text. Professor Henkin, an eminent authority on the war powers, states: "In our day of instant war, all assume that the President would have the power to retaliate against a nuclear attack, if only on the theory that retaliation was a form of defense and might prevent or deter a . . . strike." L. HENKIN, *supra* note 1, at 52.

to presidential war power also argue that improvements in conventional weapon systems require the President to rely on a response system which is speedier than legislative authorization in order to mount an effective defense of an ally nation. An aggressor nation, the argument is made, could conquer another nation with a devastatingly swift attack.¹⁸⁰ Once again, history belies this assertion. While it is true that the development of artillery, tanks, and aircraft has given an aggressor nation the capability to inflict the same number of casualties in a week that would have taken a year in 1787,¹⁸¹ it is also true that these weapons were invented and utilized long before the cold war era.¹⁸² Yet, in the pre-cold war era, no President ever claimed that the increased fire power and mobility of foreign armies justified a commensurate increase in presidential power. Again, reference is made to when Nazi Germany launched a devastating blitzkrieg attack against France. Within 1 month, Hitler's forces had routed the French forces¹⁸³ and French Premier Reynaud appealed to President Roosevelt for assistance in defending against the most rapidly moving attack then known to mankind. President Roosevelt, however, regarded the mobility and firepower with which German Armed Forces could destroy the French as constitutionally immaterial, and refused to commence war in the absence of congressional authorization.¹⁸⁴

Further, with respect to expeditious response, Congress presently can convene and legislate quite rapidly. Unlike Congresses of 50 or 150 years ago, the contemporary Congress is in session throughout the year, and, even if the members of Congress are in recess, modern transportation enables them to be present at the Capitol in a matter of hours.¹⁸⁵ Once assembled, Congress can au-

¹⁸⁰ Ratner, *supra* note 2, at 466-67.

¹⁸¹ See generally R. GILPIN, *supra* note 18, at 62.

¹⁸² See generally *id.* One commentator notes that the development of modern tank warfare and tactical aircraft permitted a nation to employ a highly effective offense strategy by 1939—more than a decade before the Korean war. *Id.* at 62. Therefore, neither the increase in our offensive capabilities nor those of our actual or potential foes should have an influence on the scope of unilateral executive power to initiate war. See *infra* notes 183-84 and accompanying text.

¹⁸³ See W. SHIRER, *supra* note 48, at 738-39.

¹⁸⁴ See *supra* notes 49-51 and accompanying text.

¹⁸⁵ See W. REVELEY, *supra* note 3, at 162-63. Professor Reveley observes that in the past there were many aspects of congressional procedure that prohibited speedy decision-making. *Id.* He concedes, however, that "[t]elephones and airplanes, in addition to briefer recesses, now ensure the physical possibility of congressional influence during most crises."

thorize war as quickly as a rollcall vote can be completed. For example, after the Japanese attack on Pearl Harbor, President Roosevelt's request for a declaration of war was granted that same day.¹⁸⁶ Additionally, 1 day after President Eisenhower asked Congress for authority to use American Armed Forces to protect Taiwan from attack by mainland China,¹⁸⁷ the Chairman of the House Rules Committee called up the resolution under a closed rule permitting only 2 hours of debate and no amendments.¹⁸⁸ The House passed the resolution that same day.¹⁸⁹ Three days thereafter, the Senate approved what has become known as the Formosa resolution.¹⁹⁰ Furthermore, despite executive assertions to the contrary, there is abundant evidence that there was sufficient time for President Truman to seek congressional authorization before he unilaterally committed American forces to the defense of South Korea.¹⁹¹ Thus, it is suggested, Congress can assemble and consider a war resolution with sufficient speed for the United States to respond to any attack anywhere in the world.¹⁹²

Id. at 163.

¹⁸⁶ R. Russell, *supra* note 40, at 370.

¹⁸⁷ 101 CONG. REC. 600-01, 625-26 (1955). For the historical, political and military causes of the Taiwan Strait Crisis, see A. GEORGE & R. SMOKE, *supra* note 65, at 266-92. For congressional debate on the Taiwan Strait Crisis, see 101 CONG. REC. 735-69, 813-52 (1955).

¹⁸⁸ 101 CONG. REC. 659 (1955).

¹⁸⁹ R. Russell, *supra* note 40, at 410-13.

¹⁹⁰ *Id.* at 680-81.

¹⁹¹ Reveley, *supra* note 7, at 1294; Note, *supra* note 8, at 1791. Professor Reveley admits that "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." Reveley, *supra* note 7, at 1294.

¹⁹² Historian Ruhl Bartlett contended:

The world, it is said, has moved in the space age where the weapons of destruction are swifter and deadlier than ever before, where decisions on national defense may need to be so immediate that no time can be allowed for the slow and possibly faltering deliberations of democratic assemblies. This argument has been affirmed, and repeated and repeated until people are mesmerized by it, and it is fundamentally specious. The President has—and always had—the duty to use the armed forces at his disposal to repel sudden armed attacks on the United States, and there has never been a case in the whole history of the United States when the imminence of danger to the Nation was so great that the decision to do more than repel attacks could not be entrusted to the Congress.

Hearings on U.S. Commitments Abroad, *supra* note 109, at 20. Similarly, in 1971 Senator Fulbright asserted that the alleged need for urgent and immediate action is merely a false excuse for unilateral presidential war power. Sen. Fulbright Address, *supra* note 56, at 10,355. Professor Reveley described the claim that great speed is necessary in most decisions respecting war as dubious: "[The] necessity [of speed] during the last twenty-five years has been exaggerated." Reveley, *supra* note 7, at 1294. Reveley stated that since World War II, there are only two instances in which it plausibly can be argued that the process of requiring

Many military strategists have argued, however, that the United States Government should be capable of not merely defending an ally, but of deterring the aggressor from attacking the ally.¹⁹³ Since the success of deterrence strategy depends upon the credibility of the commitment to defend other states from aggression,¹⁹⁴ the President must have the power to respond to acts of aggression with certainty and promptness. Under a "new" constitutional system, the credibility of the American commitment might be diminished because the potential aggressor would regard a deterrent threat that was contingent upon the President seeking and receiving an after-the-attack statutory authorization as less credible than a deterrent threat that could be immediately and definitely executed by the President.

A threat issued under a restored constitutional system, however, could retain the same credibility as one issued under the present system, if the President and Congress were to make use of a statute authorizing the President to commence military operations in the event of an attack against an American ally. This before-the-attack resolution will have been considered by Congress before the enemy strikes his blow, and would grant the President the power to commence specified military operations without having to seek additional congressional authorization. Consequently, the President would possess the legal authority for immediate employment of American military capabilities.

Some might question whether the before-the-fact resolution is sufficient to protect the national interest in all circumstances.¹⁹⁵ As

legislative authorization was too slow to protect national security. *Id.* Those two cases were the Korean conflict and the Cuban missile crisis. *Id.* He concluded, however, that there was, in fact, sufficient time available to the President to seek and to receive legislative authorization in both cases. *Id.*

¹⁹³ See J. SPANIER, *supra* note 73, at 124. Recognizing how deterrence pervades American foreign policy, two commentators have concluded:

The problem for American foreign policy has been that of "projecting" deterrence beyond her own borders to cover other parts of the world, seeking to protect some third party—an ally, or a neutral we wish to safeguard. Accordingly, theory about the deterrence of limited threats to the U.S. has focused almost exclusively upon a "three-nation problem" involving an aggressor nation, the U.S., and some smaller nation which is the object of the aggressor's designs and which the U.S. seeks to protect. The goal of this theory has been to discover how the U.S. can successfully project its deterrent power to protect a third nation or group of nations.

A. GEORGE & R. SMOKE, *supra* note 65, at 58-59; see Snyder, *Deterrence and Defense*, in THE USE OF FORCE 56-76 (1971).

¹⁹⁴ A. GEORGE & R. SMOKE, *supra* note 65, at 64-65.

¹⁹⁵ See, e.g., Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L.

Alexander Hamilton observed: "[T]he circumstances that endanger the safety of nations are infinite."¹⁹⁶ It is true that not every specific threat can be anticipated by Congress.¹⁹⁷ Congress, however, can determine the scope of national interest in advance of the particular threat, and can foresee the general category of threat. For example, the United States has important economic and security interests in the Middle East.¹⁹⁸ In addition, the identity of potential aggressors is known in advance of the attack.¹⁹⁹ Thus, even though one factor, the specific nature of the threat, may not be known to the Congress at the time it is considering a before-the-fact resolution, all other considerations can be foreseen and contemplated by Congress: the nations to be protected, the identity of the enemy, and the type of aggression.²⁰⁰ If, for example, Congress determines that the United States needs to protect a large number of Middle Eastern nations from a wide variety of enemies and types of aggression, the Congress could pass a resolution akin to the following:

The President of the United States is hereby authorized to employ the armed forces of the United States for the purpose of protecting American allies and friendly nations in the region of

REV. 719, 759 (1972). While all conceivable relevant factors cannot be foreseen by Congress, a before-the-attack resolution can be used by the President and Congress to protect effectively the national security. See *infra* notes 197-201 and accompanying text.

¹⁹⁶ THE FEDERALIST, *supra* note 1, No. 23, at 200 (A. Hamilton).

¹⁹⁷ See Wallace, *supra* note 195, at 759. There are some specific threats that cannot be anticipated. For example, on July 14, 1958, Iraqi General Abdul Karim Qassim overthrew the government of King Faisal and Prime Minister Nuri Es-Said. A. GEORGE & R. SMOKE, *supra* note 65, at 347. Qassim's successful coup d'etat came as a complete surprise to the United States. *Id.* While Faisal and Es-Said governed Iraq, Iraq had adopted conservative domestic policies and a pro-United States foreign policy. See *id.* The Western leaders were unable to determine the political composition of the Qassim government and many American policymakers feared that the Iraqi coup would jeopardize American interests in the ongoing Lebanese civil war. See *id.* at 348-49; R. BARNET, *supra* note 75, at 144-46.

¹⁹⁸ See Campbell, *The Middle East: A House of Containment Built on Shifting Sands*, 60 FOREIGN AFF. 593, 598 (1981).

¹⁹⁹ Three potential aggressors threaten the Middle East: the Soviet Union, radical nations, and radical groups within conservative nations. Radical nations that threaten American interests include Iraq, Syria, Libya, and Iran. See MIDDLE EAST, *supra* note 122, at 143-69; see also A. GEORGE & R. SMOKE, *supra* note 65, at 328, 332. Radical groups include the Palestinians residing within Jordan and Lebanon. See MIDDLE EAST, *supra* note 122, at 31. See generally H. OWEN & C. SCHULTZE, *supra* note 117, at 17-23.

²⁰⁰ It is submitted that "aggression," although variegated, consists of finite and foreseeable types. "Aggression" may include the following forms: conventional invasion, guerrilla warfare, arms transfer, internal violence and instability, and nuclear attack and intimidation.

the Middle East from international and internal aggression from any source.

This authorization is indeed broad. Congress, if it so desired, could narrow the scope of the authority by identifying the friends, foes, and type of aggression.

For example, the Congress could decide that American blood should be shed only if the Soviet Union invaded the territory of any nation in the Middle East, and could draft a resolution accordingly.²⁰¹ Pursuant to this resolution, intraregional wars and internal conflicts would be excluded and therefore the President would be without power to intervene unilaterally in these conflicts. Thus, this resolution would empower the President to interpose American forces to defend Iran from a Soviet invasion, but would leave the President without authority to intervene in an Iraq-Iran war, a Lebanese civil war or an Arab-Israeli war. Of course, after a war erupts in the Middle East the President is free to seek congressional authorization, and if Congress authorizes war the President can then act.

VII. CONCLUSION

The United States has possessed and continues to possess significant extraterritorial economic, political, and security interests. Admittedly, the variety and complexity of these interests have increased since World War II. A growth in overseas interests, however, does not compel the elimination of congressional participation in determining the scope of national interest and the threats that are important enough to justify commitment of American lives. Furthermore, the institution of Congress can move quickly enough and is flexible enough to foresee and respond to any threat to the national interest, and the members of Congress certainly are able to reduce the probability of fighting an unnecessary war. Therefore, it is urged that the practice of waging war in contraven-

²⁰¹ On January 23, 1980, during a State of the Union Address, President Carter warned that the United States would go to war, if necessary, to protect the Persian Gulf oil supply. See *MIDDLE EAST*, *supra* note 122, at 239. Similarly, on October 1, 1981, President Reagan announced in a news conference that the United States would not allow Saudi Arabia to become another Iran. See *id.* at 245. He pledged military action if the Persian Gulf oil supply were threatened. *Id.* While President Carter's threat was directed solely against the Soviet Union, President Reagan's threat was directed against radical Arab or Persian nations or radical Arab forces within Saudi Arabia who were considering invading Saudi Arabia or overthrowing the Saudi monarchy.

tion of checks and balances be abruptly halted, and the constitutional procedure restored.