

ARTICLE: THE PRESIDENT AS COMMANDER IN CHIEF

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Editor's Note: Over the last thirty years, the author has published numerous scholarly works relating to the scope of executive power in the realm of foreign affairs. Parts of this Article are drawn from his extensive scholarship on this subject, and wherever applicable, credit has been given to the original publisher.

Text

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Introduction: Presidential Authority and the Use of Force

The severe economic concerns facing the Obama Administration have not relieved the new President of daunting national security challenges. The ongoing crises in the Middle East and Southwest Asia will continue to challenge the parameters of the President's authority as Commander in Chief in light of differing congressional interests. ¹

Despite the repeated and forceful concerns directed at former President George W. Bush over Iraq, the authority enjoyed by Presidents writ large can actually be said to be on the ascendancy. In the areas of foreign affairs and national defense, all Presidents since James Madison have enjoyed the aggregation of national power at the expense of Congress. This expansion became most pronounced during the Jacksonian period. Only during Vietnam in the case of **[*393]** Lyndon Johnson and following the Watergate affair with Richard Nixon did Congress attempt to regain some form of partnership with the President, most notably in the areas of war powers and declarations of national emergencies. ²

¹ For a discussion of the differing considerations of Congress, the President, and the U.N. Security Council in the context of Operation Iraqi Freedom, see James P. Terry, The Regulation of International Coercion 93-103 (Naval War College, Newport Paper No. 25, 2005).

² See, e.g., War Powers Legislation: Hearing on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the S. Comm. on Foreign Relations, 92d Cong., 347, 354-55, 359-79 (1972) [hereinafter War Powers Hearing] (statement of Sen. Barry Goldwater) (arguing against legislation that would significantly expand congressional war powers at the expense of the executive and chronicling 158 foreign military actions taken by the United States, only five of which were taken pursuant to a declaration of war); Robert F. Turner, The War Powers Resolution: Its Implementation in Theory and Practice 1-15 (1983) (explaining how

Despite this occasional assertion of congressional authority over foreign affairs, political necessity (real or perceived) and the status of the United States as a world power and guarantor of the peace have operated to expand the power of the President and to diminish that of Congress. This Article makes three arguments that support a broad constitutional interpretation of the President's powers as Commander in Chief. First, a study of the historical origin of Article II of the Constitution - and of subsequent presidential practice that defined more precisely the scope and meaning of Article II - reveals that the President has sufficient legal authority under the Constitution to take unilateral action as Commander in Chief, even in many cases when his actions defy congressional will. Second, broad presidential authority as Commander in Chief (in conjunction with a correct understanding of the doctrine of preemption) is essential to waging the modern war on terror effectively. Third, because the U.N. Security Council has proven itself powerless to achieve the unanimity among its permanent members necessary for that body to authorize the use of force, the Commander in Chief must be recognized as wielding broad powers under Article II - not only vis-a-vis Congress, but also in relation to the United Nations - to preserve the United States' ability to address egregious international violations of human rights as well as serious and imminent threats to our national security.

Part I of this Article explores the Framers' understanding of presidential war powers vis-a-vis Congress and how that understanding played out in practice, with particular reference to President Jackson's handling of the Nullification Crisis of 1832. Part II examines the President's constitutional authority as Commander in Chief and reveals that in practice there has been little historical opposition to unilateral executive decision-making in addressing [*394] direct threats to the nation. Part III examines Congress's historical role in political-military crises, first, in its power to withhold or withdraw legislative authority, and second, in its ability to restrict presidential action by resort to its power over the purse.

Part IV depicts the development of the Commander in Chief's wartime powers by examining the actions of wartime Presidents. The analysis is divided into early wartime Presidents (Madison, Polk, Lincoln, McKinley) and their modern counterparts (Wilson, Franklin D. Roosevelt, Truman, Johnson, George Herbert Walker Bush, George W. Bush). Part V examines the modern terrorist threat in light of the President's traditional constitutional wartime powers. It examines presidential responses to terrorism by four of our modern Presidents (Carter, Reagan, Clinton, George W. Bush) and concludes that to combat terrorism effectively, the President must be able to exercise broad powers as Commander in Chief, including the power to take preemptive measures to protect national interests. Part V further argues that, as demonstrated by the historical practice of traditional wartime Presidents, the exercise of broad Commander in Chief powers in combating terrorism is constitutional.

Finally, Part VI examines presidential responses to two humanitarian crises under Presidents Johnson and Clinton, and concludes that, where diplomacy has failed, presidential action to prevent the continuation of substantial and fundamental human rights abuses is a legitimate exercise of power, despite the unwillingness of the United Nations Security Council to authorize the use of force.

I. Constitutional Underpinnings: Presidential Power Versus Congressional Prerogatives

Article. II. Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows³

The belief on the part of certain founders that the executive should have broad authority with respect to war powers was not shared by all. Both the broad view espoused by Alexander Hamilton and the narrower view urged by Thomas Jefferson and James Madison were [*395] the subject of serious debate. In the end, Hamilton's conception of broad executive war powers prevailed over Madison's. This Part of the Article explores the source of

dissatisfaction with the Vietnam War led Congress to pass the War Powers Resolution in 1973 over the veto of President Nixon); see also infra note 109 and accompanying text.

³ [U.S. Const. art. II, § 1, cl. 1.](#)

the concepts underlying the language adopted in the final version of the Constitution as well as the arguments presented by those representing an expansive versus a more limited view of the Presidency.

Articles XVII through XIX of the New York Constitution of 1777 formed the immediate source of Article II of the United States Constitution.⁴ Under the New York Constitution, the Governor was elected by the people for a term of three years, he was in charge of the militia, he had pardoning authority, and he was charged with ensuring the laws were faithfully executed.⁵ The New York Constitution, coupled with the Virginia Plan, formed the basis of discussion at the 1787 Constitutional Convention in Philadelphia.⁶

The Virginia Plan called for selection of the executive by the legislature.⁷ The executive's salary was to be fixed under this plan and not subject to congressional fiat. Under the Virginia Plan, the executive was precluded from standing for reelection in order that he would not be pressured into deferring to the legislature.⁸ During debate on this plan, James Wilson moved that the executive consist of a single person, and further that the executive be elected by the people, rather than the legislature, as the plan originally provided.⁹ Consideration of Wilson's former motion was deferred until related questions of powers, term, salary, method of selection, and conditions of removal had been resolved.¹⁰ When Wilson's motion was finally considered, it passed, thus assuring a strong Presidency.¹¹

Equally significant in the Philadelphia debate was consideration of a proposal that would have provided an "Executive Council" to advise the executive in all his executive duties. The Convention ultimately voted down this proposal and vested in the Senate the [*396] right to "advise and consent" with regard to several of these matters.¹² A final element related to the designation of the executive as "The President," which resulted from the draft report of the Committee on Detail and was accepted by the Convention without debate.¹³

The nature of the Presidency would prove to be far more important than its structural contours. From the earliest debate the expansionist views of Alexander Hamilton must be contrasted with the restrictive views of James Madison. Madison's view relied principally on the authority vested in Congress to declare war, thus removing it, in his view, from the executive branch. He likewise argued, on the same grounds, that the President had not the right to determine the nation's neutrality with respect to allies at war.¹⁴ Significant in Madison's argument is the implicit

⁴ Charles C. Thach, Jr., *The Creation of the Presidency 1775-1789*, at 87-88, 110-11 (1923) ("The origin of much of [Article II] is very plainly the New York Constitution.").

⁵ N.Y. Const. of 1777, arts. XVII-XIX, reprinted in 5 *Federal and State Constitutions* 2623, 2632-33 (Francis Newton Thorpe ed., 1993).

⁶ See Thach, *supra* note 4, at 81-88.

⁷ The text of the Virginia Plan can be found in 1 *The Records of the Federal Convention of 1787*, at 20-23 (Max Farrand ed., rev. ed. 1966) [hereinafter 1 *Records of the Federal Convention*].

⁸ See *id.* at 21.

⁹ *Id.* at 65-66, 68-69.

¹⁰ *Id.* at 70-74, 76-92.

¹¹ *Id.* at 93.

¹² [U.S. Const. art. II, § 2, cl. 2](#); 2 *The Records of the Federal Convention of 1787*, at 541-43 (Max Farrand ed., rev. ed. 1966) [hereinafter 2 *Records of the Federal Convention*]. The proposal relating to the "Executive Council" was voted down on September 7, 1787. *Id.* at 542.

¹³ 2 *Records of the Federal Convention*, *supra* note 12, at 176-77, 185, 401 (internal quotation marks omitted).

¹⁴ James Madison, *Helvidius No. 2* (1793), reprinted in *The Pacificus-Helvidius Debates of 1793-1794*, at 65, 65-67, 70-72 (Morton J. Frisch ed., 2007).

repudiation of the view that Article II, Section 1, bestows powers on the President not specifically vested in subsequent sections.¹⁵

Hamilton, in expounding the more expansive position and arguing for a more powerful Presidency, urged that Article II, Section 1, vests true executive power in the President; makes him Commander in Chief of the Army and the Navy; gives him power to make treaties and to receive ambassadors and other public ministers; and requires him to take care that the laws are faithfully executed.¹⁶ Hamilton further observed:

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The enumeration ought ... to be considered as intended ... [merely] to specify ... the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts of the Constitution and to the principles of free government.

The general doctrine then of our Constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.¹⁷

Hamilton, allied with President Washington on this issue, was concerned that Washington's Neutrality Proclamation of April 22, 1793, would be attacked by critics as unauthorized in law.¹⁸ Washington's proclamation declared the United States to be at peace with both France and Great Britain, and urged all American citizens to avoid hostile acts against either nation.¹⁹ In an exchange with Madison in 1793 and writing under the pseudonym Pacificus, Hamilton outlined Washington's position as follows: The power to declare neutrality can belong to neither the legislative nor the judicial branch and therefore "must belong to the Executive."²⁰ He stated that the legislative branch is not the organ of diplomacy between the United States and foreign nations and is charged with neither making nor enforcing treaties. For this reason, he urged, the legislative branch is not "that Organ of ... Government which [should] pronounce the existing condition of the Nation, with regard to foreign Powers."²¹ Hamilton thought it "equally obvious" that the judiciary was not the proper body to make a declaration of neutrality.²²

Madison, writing under the pseudonym Helvidius and speaking on behalf of himself and Secretary of State Jefferson,²³ took up the **[*398]** challenge offered by Hamilton and responded that the nature and operation of the two powers - to declare war and to make treaties - can never fall within a proper definition of executive powers.²⁴

¹⁵ See *id.* at 65-67. In the congressional debates of 1789 on the President's power to remove executive officeholders, however, Madison had urged a position quite similar to Hamilton's, finding in the First Section of Article II and in the obligation to execute the laws, a vesting of executive powers sufficient to remove subordinates unilaterally. 1 *Annals of Cong.* 495-97 (Joseph Gales ed., 1834); see also Thach, *supra* note 4, at 146-47. Madison's views were heavily relied upon by Chief Justice Taft on this point in *Myers v. United States*, 272 *U.S.* 52, 115-26 (1926). But cf. Edward S. Corwin, *The President's Removal Power Under the Constitution*, in 4 *Selected Essays on Constitutional Law* 1467, 1474-86 (Ass'n of Am. Law Sch. ed., 1938) ("Viewed purely as history, [Chief Justice Taft]'s interpretation of the decision of 1789 is without validity.").

¹⁶ Alexander Hamilton, *Pacificus No. 1* (1793), reprinted in *The Pacificus-Helvidius Debates of 1793-1794*, *supra* note 14, at 8, 12.

¹⁷ *Id.* at 13 (brackets in original omitted).

¹⁸ See Charles Marion Thomas, *American Neutrality in 1793: A Study in Cabinet Government* 35-41 (1931).

¹⁹ *Id.* at 42-43.

²⁰ Hamilton, *supra* note 16, at 11.

²¹ *Id.*

²² *Id.*

²³ Secretary of State Thomas Jefferson, who as former Minister to Paris was sympathetic to the French cause, urged Madison to take up the challenge and rebut Hamilton. Conor Cruise O'Brien, *The Long Affair: Thomas Jefferson and the French Revolution, 1785-1800*, at 1-2 (Pimlico 1998) (1996); Letter from Thomas Jefferson, Sec'y of State, to James Madison, Congressman (July 7, 1793), in *The Pacificus-Helvidius Debates of 1793-1794*, *supra* note 14, at 54, 54.

He argued that a treaty does not represent the execution of the law but rather has the force and effect of law.²⁵ He urged that the "power to declare war is subject to similar reasoning," as it has the effect of repealing all law related to a condition of peace.²⁶

It was the U.S. Supreme Court per Chief Justice Taft, however, that established Hamilton's view as the controlling doctrine of presidential power. In *Myers v. United States*, the Court interpreted Article II, Section 1, as vesting all executive power in the President, with subsequent sections read as merely particularizing some of this power.²⁷ Consequently, the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President.²⁸

Hamilton's view of a strong President was further advanced in *United States v. Curtiss-Wright Export Corp.*, where the Court, per Justice Sutherland, enunciated the position that the power of the national government in foreign relations is not one of enumerated but of inherent powers.²⁹ The Court further adopted Hamilton's position that control over foreign relations is exclusively an executive function with obvious implications for the power of the President.³⁰ Justice Sutherland, for the Court, summarized as follows:

Not only ... is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.³¹

The *Myers* and *Curtiss-Wright* decisions were eroded somewhat in *Youngstown Sheet and Tube Co. v. Sawyer*, a decision with multiple [*399] opinions, in which the Court rejected President Truman's seizure of the steel industry, then in the throes of a strike.³² The Solicitor General argued that even in the absence of statutory authority, the President's action was a proper exercise of his executive powers under Article II, by virtue of his obligation to enforce the laws and by the vesting of his role as Commander in Chief.³³ Though only four of the Justices appear to have rejected the President's arguments on the merits,³⁴ the result was nevertheless a substantial retreat from

²⁴ James Madison, *Helvidius No. 1* (1793), reprinted in *The Pacificus-Helvidius Debates of 1793-1794*, [supra note 14, at 55, 59](#).

²⁵ *Id.*

²⁶ *Id.*

²⁷ [Myers v. United States, 272 U.S. 52, 117-18 \(1926\)](#).

²⁸ [Id. at 118](#).

²⁹ [United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 \(1936\)](#).

³⁰ See [id. at 319-21](#); Hamilton, *supra* note 16, at 11.

³¹ [Curtiss-Wright, 299 U.S. at 319](#).

³² [Youngstown Sheet & Tube Co. v. Sawyer \(Steel Seizure\), 343 U.S. 579, 582, 588-89 \(1952\)](#).

³³ [Id. at 587](#). For further discussion of Solicitor General Philip Perlman's arguments before the Supreme Court, see 3 William M. Goldsmith, *The Growth of Presidential Power 2023* (1974) (summarizing Perlman's argument: "the President had the option of employing the procedures of the Defense Production Act rather than Taft-Hartley, and that when all else had failed, he had adequate power under the Constitution to act in the face of a serious national emergency").

³⁴ It appears that only Justices Black, Frankfurter, Jackson, and Burton squarely rejected the government's argument relating to the President's lack of constitutional authority to seize the steel mills in the absence of an act of Congress. Justice Black authored the majority opinion, which clearly addressed and rejected the government's argument. [Youngstown, 343 U.S. at 582, 585, 587](#). Three Justices dissented (Chief Justice Vinson, joined by Justices Reed and Minton). *Id.* at 667. And four Justices

the pronouncement of presidential powers in Myers and Curtiss-Wright. The presidential power was largely restored in 1981 in *Haig v. Agee*, however, as the Court examined the President's discretionary foreign-affairs powers under a judicial deference analysis which had the de facto effect of according the President much of the theoretically based authority spelled out in Curtiss-Wright.³⁵

As important as these Supreme Court decisions have been in establishing the power of the Executive, presidential practice has probably been more important. It was President Andrew Jackson, in fact, who set the standard for expansion of executive powers through practice. President Jackson was not only charismatic, but he had the military credentials of no individual elected President since [*400] Washington. Victorious as a military commander both in New Orleans in January 1815 over the British and in Florida against a consortium of Indian tribes, Jackson had garnered the admiration and support of the American people, and was elected by a large majority in 1828.³⁶ After winning the 1828 election by a substantial margin over incumbent John Quincy Adams - the same Adams who in 1824 finished behind Jackson in the electoral vote but who was given the Presidency by the vote in the House³⁷ - he proceeded to shape and enhance executive power in a way that would redefine the Presidency.

When Andrew Jackson came into office following the 1828 election, the Republicans (Jeffersonians) had been in power for more than twenty-five years. Representing the Northeast and Middle Atlantic States, they (Jefferson, Madison, Monroe, and John Quincy Adams) had set a course which carefully balanced the legislative with the executive authority (the result being that Congress had long "considered itself the center of the political system").³⁸ Jackson, a Westerner, saw himself as the people's President since he was the first President since Washington to be nominated and elected by the people and not by a congressional caucus or the House of Representatives.³⁹ Unlike those before him who had been beholden to the congressional leadership for their elections, Jackson did not try to court congressional leaders, as had Jefferson and his successors, but rather sought the counsel of a small coterie of advisors, all from without Congress, with the exception of Senator Thomas Hart Benton of Missouri and Representative James Polk of Tennessee.⁴⁰ President Jackson's relations with Congress were further eroded when John C. Calhoun resigned as his Vice President over the nullification issue.⁴¹ Calhoun was quickly appointed to fill South Carolina's open seat in the Senate, made available when Senator Robert Y. Hayne resigned [*401] his seat to assume the gubernatorial leadership in that state.⁴² Calhoun soon joined forces with Senator

concurring in the opinion and wrote separately to further expound their views. *Id. at 589* (Frankfurter, J., concurring); *id. at 631* (Douglas, J., concurring) (but note Justice Douglas's Fifth Amendment just compensation argument, to wit, that Congress could "ratify the seizure" by taking "subsequent action" to pay just compensation to the affected owners); *id. at 634* (Jackson, J., concurring); *id. at 655* (Burton, J., concurring). Finally, Justice Clark concurred only in the Court's judgment. *Id. at 662* (Clark, J., concurring in the judgment) (rejecting the President's actions because "Congress had prescribed methods to be followed by the President in meeting the emergency at hand").

³⁵ See *Haig v. Agee*, 453 U.S. 280, 291-92 (1981); cf. *AFL-CIO v. Kahn*, 618 F.2d 784, 785, 792-96 (D.C. Cir. 1979) (en banc) (sustaining a presidential order that denied government contracts to companies that failed to comply with certain voluntary wage and price guidelines on the basis of the Court's interpretation of certain statutory congressional delegations).

³⁶ See Elizabeth Jewell, U.S. Presidents Factbook 57-58 (2005).

³⁷ In 1824, Speaker of the House Henry Clay struck a deal with John Quincy Adams, whereby Clay threw his support to Adams, garnering Adams sufficient votes in the House of Representatives to win the Presidency, in exchange for securing a position as Secretary of State in the Adams Administration. See *id. at 57*.

³⁸ See 1 William M. Goldsmith, *The Growth of Presidential Power* 193 (1974).

³⁹ *Id. at 193-94*.

⁴⁰ *Id. at 193*. This small group was known as the "Kitchen Cabinet." *Id. at 194*.

⁴¹ *Id. at 193*. The nullification issue related to the right of states to unilaterally determine the constitutionality of federal statutes and is addressed later in this Part in the context of the 1832 crisis in South Carolina. See *infra text* accompanying notes 56-74.

⁴² 1 Goldsmith, *supra* note 38, at 193.

Henry Clay of Kentucky and Senator Daniel Webster of Massachusetts and strongly opposed Jackson on the issue of rechartering the Bank of the United States.⁴³

The Bank crisis was President Jackson's first confrontation with the old guard from the East and South in Congress. Those opposing the President were led by the Bank's president, Nicholas Biddle, and Representative John Quincy Adams of Massachusetts, as well as Clay, Webster, and Calhoun.⁴⁴ Jackson was upset with the "eastern establishment" (as represented by the Bank) because of its dismissal of the western states' demand for expanded and more flexible credit resources, as well as its centralized control of banking credit.⁴⁵ Jackson was equally concerned with the odor of corruption concerning the Bank's operations, as men like Daniel Webster, one of its heaviest borrowers, served as its counsel and legal advisor and received an annual retainer for doing so.⁴⁶

In an 1829 message to Congress, Jackson first publicly stated his opposition to renewing the Bank's charter (which was not scheduled to be renewed until 1836), indicating that the Bank had failed to establish a uniform and sound currency and suggesting that another agency should be formed to replace it.⁴⁷ He was also greatly concerned that the Bank's efforts to direct national economic policy were largely dictated "by considerations of the private profit of its stockholders and directors."⁴⁸ Before Jackson could take action, the Bank's president, Biddle, sought congressional approval in January 1832 for an application to recharter - a full four years before its current charter was set to expire.⁴⁹ Biddle reasoned that his best chance for congressional approval lay sooner, rather than later, and that any presidential veto would preclude Jackson's reelection in [*402] 1832.⁵⁰ Furious, Jackson promptly vetoed the measure and strongly pressed for transferring government funds to state banks.⁵¹ When his Secretary of the Treasury William Duane refused to transfer government deposits to state banks, Jackson removed him and appointed Attorney General Roger Taney in his stead.⁵² Jackson's stance on the Bank question, rather than hurting his public image, drove his reelection in 1832 with even stronger returns than in 1828.⁵³

Although Jackson was clearly right in his instinctive suspicion of private control over a national bank with no responsibility to the national welfare or the governing political leadership, he was wrong in believing that state banking institutions could effectively take over the regulatory role of a centralized banking system.⁵⁴ But in his parallel struggle with Congress over his exercise of the removal power to replace Treasury Secretary Duane over congressional objection, Jackson crafted a brilliant defense of his constitutional authority to remove appointees for

⁴³ Id.

⁴⁴ Id. at 193-94.

⁴⁵ Id. at 194.

⁴⁶ See Maurice G. Baxter, *Daniel Webster & the Supreme Court* 179, 181-82 (1966) (recording that some believed Webster's employment with the Bank was "unethical"); 1 Goldsmith, *supra* note 38, at 194 (relating that Jackson detested the Bank's power to mold national economic policy based, in large measure, on the private profit interests of its directors and shareholders).

⁴⁷ 1 Goldsmith, *supra* note 38, at 193-94.

⁴⁸ Id. at 194.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id. at 194-95.

⁵² See *id.* at 206-07.

⁵³ Jewell, *supra* note 36, at 60.

⁵⁴ 1 Goldsmith, *supra* note 38, at 234.

political insubordination. It is his constitutional argument that stands at the heart of current, accepted legal doctrine concerning the President's authority over his cabinet choices.⁵⁵

It was Jackson's role as National Executive, however, that had the greatest effect on strengthening the role of the Presidency. In the nullification crisis of 1832, the primacy of the federal government over state authority was clearly established. In that crisis, the State of South Carolina challenged the authority of the national government to impose tariff restrictions included within the Tariff Acts of 1820, 1824, 1828, and 1832 on the State and its citizens, and declared the acts null and void.⁵⁶ In 1832, South Carolina promulgated the Ordinance of Nullification, whereby the State proclaimed the tariffs unconstitutional and thus not binding upon the citizens or officers of the State, and ordered that no case which called into question the validity of the [*403] ordinance could be taken to the Supreme Court of the United States on appeal from a decision issued by a state court.⁵⁷ Finally, the document asserted the State would not submit to forceful imposition of the law, and, if any steps were taken to effect enforcement, South Carolina would consider itself sovereign and independent of the Union.⁵⁸

Jackson acted quickly. Utilizing information from his Charleston friend and Unionist Joel Poinsett concerning current developments in South Carolina, and from George Breathitt, whom Jackson dispatched under cover as a postal official, the President gained valuable insights into the temper of the people, the current state of federal forts such as Forts Moultrie and Johnson in Charleston Harbor, and the support he could expect from South Carolinians loyal to the Union.⁵⁹ He also acted quickly to instruct his Secretary of War, Lewis Cass, to alert officers in command of the forts in Charleston Harbor to be prepared to repel any attempt by the secessionists to capture these installations by force.⁶⁰ After taking these initiatives, he issued a very direct proclamation to the people of South Carolina.⁶¹

The carefully worded Proclamation of December 10, 1832, forms an enlightened and extensive exposition of federal versus state power. After reciting what the South Carolina Nullification Ordinance intended, Jackson carefully circumscribed the course of action that he understood was required of him under the Constitution. He first pointed out South Carolina was, in essence, claiming the right to declare an act of Congress void - to be bound only by those laws it considered constitutional - while simultaneously claiming all the rights of a state. This was, Jackson claimed, the equivalent of providing the State the power to resist all federal laws and to set itself above the Constitution.⁶²

Jackson then reminded South Carolina of the scheme set forth in the Constitution. He explained that the Framers had expressly given [*404] Congress, in its sound discretion, the right of raising revenue and of determining the sum all federal programs will require.⁶³ Jackson argued that the "States have no control over the exercise of this

⁵⁵ See *id.* at 208, 234. For the full text of President Jackson's "protest" to the Senate, defending his actions on this point, see Andrew Jackson, Protest (Apr. 15, 1834), in 3 A Compilation of the Messages and Papers of the Presidents 1288, 1288-1312 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897).

⁵⁶ 1 Goldsmith, *supra* note 38, at 257.

⁵⁷ An Ordinance to Nullify Certain Acts of the Congress of the United States, reprinted in Proceedings of the Convention of South Carolina upon the Subject of Nullification 26, 26-28 (Boston, Beals, Homer & Co. 1832) [hereinafter Nullification Ordinance]; see also 1 Goldsmith, *supra* note 38, at 257.

⁵⁸ Nullification Ordinance, *supra* note 57, at 27-28.

⁵⁹ 1 Goldsmith, *supra* note 38, at 258-59, 265.

⁶⁰ Letter from Andrew Jackson, President, to Lewis Cass, Sec'y of War (Oct. 29, 1832), in 1 Goldsmith, *supra* note 38, at 259, 259-60.

⁶¹ Andrew Jackson, Proclamation (Dec. 10, 1832), in 3 A Compilation of the Messages and Papers of the Presidents, *supra* note 55, at 1203-19.

⁶² *Id.* at 1203-05.

⁶³ *Id.* at 1208.

right." ⁶⁴ He further pointed out that the Constitution is specific in providing that the Constitution, together with federal laws and treaties, shall be paramount to the state constitutions and laws. He observed that South Carolina, by providing there would be no federal appeal from the provisions of the Nullification Ordinance, made the state law paramount to the Constitution and the laws of the United States. ⁶⁵

Jackson then explained his view of the Union: "In our system, ... authority is expressly given [to the federal government] to pass all laws necessary to carry its powers into effect, and under this grant[,] provision has been made for punishing acts which obstruct the due administration of the laws." ⁶⁶ The states severally had not retained their entire sovereignty in becoming parts of a nation, but had "surrendered many of their essential parts of sovereignty." ⁶⁷ As examples of areas in which the states were no longer sovereign, Jackson cited the right to make treaties, declare war, levy taxes, and exercise exclusive judicial and legislative powers. Most importantly, he claimed, the "allegiance of their citizens was transferred ... to the Government of the United States; they became American citizens and owed obedience to the Constitution of the United States and to laws made in conformity with the powers it vested in Congress." ⁶⁸

In explaining that the other states must oppose South Carolina's actions at all cost, he indicated that South Carolina had eschewed the opportunity to seek a convention of states for the purpose of gaining the support of two-thirds of the states, as provided in the Constitution. ⁶⁹ Jackson carefully outlined the dreadful effects that the federal use of force would have on the State's citizens and their commerce. ⁷⁰ Finally, after enunciating his firm belief in the legal and constitutional correctness of his duties as expressed, he called on the people of South Carolina to give their undivided support to his [*405] determination to execute the laws, to assist in preserving the Union by all constitutional means, and to put to rest the need for the firm measures including the need for the use of force. ⁷¹

In the face of such a carefully worded commitment to preserve the Union at all costs, including through the use of federal forces, South Carolina began to rethink its position. Less than five days after President Jackson issued his proclamation, the State suspended its Nullification Ordinance. ⁷² Despite harsh words between nullifiers and unionists in South Carolina, violence was avoided. ⁷³ As a matter of good faith, President Jackson supported legislation in Congress that softened the tariff effects on Charleston and other South Carolina ports. ⁷⁴ Jackson's articulation of principle, clarity of purpose, and careful explanation of the consequences that would follow a state's refusal to enforce federal statutes did more to enhance the stature of the Presidency than the actions of any prior Chief Executive.

II. The President's Legal Authority as Commander in Chief

⁶⁴ Id.

⁶⁵ Id. at 1209-10.

⁶⁶ Id. at 1212.

⁶⁷ Id. at 1213.

⁶⁸ Id.

⁶⁹ Id. at 1214.

⁷⁰ Id. at 1217-18.

⁷¹ Id. at 1218-19.

⁷² 1 Goldsmith, *supra* note 38, at 287.

⁷³ Id.

⁷⁴ Robert V. Remini, *The Life of Andrew Jackson* 245, 248-51 (Penguin Books 1990) (1988).

Under the Constitution, Congress alone has the power to declare war.⁷⁵ It is the President, however, who is recognized as having the authority, as Commander in Chief of all U.S. armed forces,⁷⁶ to respond to imminent threats to the United States and its citizens. In fact, most constitutional scholars recognize the President's broad power to use the armed forces in defense of national interests, short of all-out war, without formal authorization from Congress.⁷⁷ As Professor Robert F. Turner has eloquently stated: "Under the constitutional scheme, the President needed no specific authorization to use force to defend [*406] against a military threat to the United States or to faithfully execute the laws or treaties of the nation in circumstances under which the law of nations would not require a formal declaration."⁷⁸

Not only is the President authorized to use force whenever he considers it essential for the enforcement of an act of Congress, or to ensure adherence to a treaty, or to protect citizens and territory of the United States from a foreign adversary; he is, as Andrew Jackson argued in 1832, obliged by the Constitution to use his power as Commander in Chief to direct our military forces toward those ends. As this duty rests in the Constitution, it cannot be removed or abridged by an act of Congress. President William Howard Taft made that point quite succinctly:

The President is made Commander-in-Chief of the army and navy by the Constitution evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the army for any of these purposes, the action would be void.⁷⁹

In practice, then, the President's discretion to authorize the use of military force is exceedingly broad. Unique opportunities have presented themselves throughout this nation's history for expansion and refinement of this presidential authority. These were notably evident not only in our declared wars, but also in presidential determinations to use force to defend U.S. interests in the absence of a declaration of war.⁸⁰ Thus it was that President Truman never sought congressional authorization before dispatching troops to the Korean Peninsula (believing that compliance with the U.N. Security Council's recommendation was enough);⁸¹ President Eisenhower likewise acted [*407] on his own in putting troops in Lebanon,⁸² as did President Johnson when he sent troops to the Dominican Republic;⁸³ and most significantly, President Kennedy eschewed asking for any

⁷⁵ [U.S. Const. art. I, § 8, cl. 11.](#)

Editor's Note: The following material, presented here under the heading "The President's Legal Authority as Commander in Chief," was published previously in James P. Terry, *The Use of Military Force by the President: Defensive Uses Short of War*, Joint Force Q., 3d Quarter 2008, at 113, 113-15. The content as it appears in this Article has been slightly revised.

⁷⁶ U.S. Const. art. II, § 2.

⁷⁷ See, e.g., Edward S. Corwin, *The President: Office and Powers, 1787-1957*, at 198-204 (4th rev. ed. 1957).

⁷⁸ Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, [34 Va. J. Int'l L. 903, 914-15 \(1994\)](#).

⁷⁹ William Howard Taft, *Our Chief Magistrate and His Powers* 128-29 (1916).

⁸⁰ See generally Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv. Report for Cong., *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (2007), available at <http://www.fas.org/sqp/crs/natsec/RL31133.pdf> (providing historical background on American declarations of war and congressional authorizations for the use of force and analyzing their legal effects under international and domestic law).

⁸¹ Comm. on Foreign Relations, National Commitments, S. Rep. No. 91-129, at 18, 25 (1969).

⁸² See *id.* at 21, 25; Louis Fisher, *Presidential War Power* 122-24 (2d rev. ed. 2004).

⁸³ Comm. on Foreign Relations, National Commitments, S. Rep. No. 91-129, at 25 (1969); Ronald D. Rotunda, *The War Powers Act in Perspective*, [2 Mich. L. & Pol'y Rev. 1, 4 \(1997\)](#).

approval in sending thousands of "advisers" into Vietnam, ⁸⁴ although President Johnson did secure passage of the Gulf of Tonkin Resolution in 1964 before introducing significant ground forces. ⁸⁵

The doctrine of inherent presidential powers to use troops abroad outside the narrow compass traditionally accorded those powers is actually more vibrant than many realize. President Truman's Secretary of State Dean Acheson explained Truman's decision not to seek congressional authorization to send troops into Korea:

His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made. ⁸⁶

An even more extensive list of military interventions where the President had not invoked congressional authority was detailed in a 1967 study by the Department of State. ⁸⁷ In that review, the State Department found the great majority of instances where the President acted without congressional authority involved one of three specific [*408] purposes: the policing of piracy; the landings of small naval contingents to protect American lives, property, or commerce; or the dispatch of Army forces across the Mexican border to control banditry. ⁸⁸ Some incidents, however, involved the exercise of significant presidential power. ⁸⁹

Similarly, the early years of the twentieth century witnessed repeated U.S. incursions, authorized by the President, in Central America and the Caribbean in furtherance of national interests, in many instances significant commercial interests. For example, the United States intervened in Panama on four separate occasions in the early 1900s, long before the United States once again intervened in 1989 to remove General Noriega in Operation Just Cause. ⁹⁰

The federal courts have largely upheld the expansive nature of the President's authority as Commander in Chief. In fact, it has been the courts which have carefully shaped the President's authority with respect to the nature and scope of that power under Article II, both in terms of the President's inherent authority as well as the President's shared authority (with Congress) to wage and fund armed conflicts. For example, the Supreme Court has stated that the Constitution vests the President with all the power and authority accorded by customary international law to a supreme commander in the field. ⁹¹ Moreover, "he may invade [a] hostile country, and subject it to the

⁸⁴ Fisher, *supra* note 82, at 128-29; accord John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, [84 Cal. L. Rev. 167, 179 \(1996\)](#). Under President Kennedy's watch, the number of American military "advisers" in Vietnam rose from 700 (sent by President Eisenhower) to 16,000. Fisher, *supra* note 82, at 128; cf. Jacob K. Javits & Don Kellermann, *Who Makes War: The President Versus Congress* 257 (1973) ("The responsibility for our involvement in Vietnam has certainly been bipartisan. If its beginnings could be found in some events in the Eisenhower Administration, it took a quantum leap when President Kennedy made the decision to send 17,500 'advisers' to South Vietnam.").

⁸⁵ Gulf of Tonkin Resolution, [Pub. L. No. 88-408, 78 Stat. 384](#) (1964); see Turner, *supra* note 2, at 2-7 (reporting that within nineteen months after passage of the Gulf of Tonkin Resolution, more than 200,000 U.S. combat troops were stationed in Vietnam).

⁸⁶ Dean Acheson, *Present at the Creation* 415 (1969).

⁸⁷ Historical Studies Div., Dep't of State, *Armed Actions Taken by the United States Without a Declaration of War, 1789-1967* (Research Project No. 806A, 1967).

⁸⁸ See *id.* at 1, 3, 5-9, 11.

⁸⁹ For example, President McKinley did not seek congressional authority before dispatching 2500 American troops into China during the Boxer Rebellion. *Id.* at 3.

⁹⁰ See James P. Terry, *Law in Support of Policy in Panama*, 63 *Naval War C. Rev.* 110, 110-11, 117 n.2 (1990).

sovereignty and authority of the United States." ⁹² He may establish and prescribe the jurisdiction of military commissions, unless limited by Congress, in territory occupied by American forces. ⁹³ He may insert covert agents behind enemy lines and obtain valuable information on enemy troop dispositions, strength, planning, and resources. ⁹⁴ Within the theater of operations, he may requisition property and compel services from American citizens and friendly [*409] foreigners, although if he does so, the federal government is required to provide just compensation. ⁹⁵ He may also bring an armed conflict to a conclusion through an armistice, and stipulate conditions of the armistice. ⁹⁶ The President may not, however, acquire territory for the United States through occupation, ⁹⁷ although he may govern recently acquired territory until Congress provides a more permanent governing regime. ⁹⁸

In addressing direct threats to the United States then, there has been little historical opposition to the President's unilateral decision-making and, in fact, it has been recognized as essential. As former Supreme Court Justice Joseph Story has succinctly stated:

Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. ⁹⁹

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III. The Role of Congress in Political-Military Crises

A. Withholding or Withdrawing Legislative Authority

⁹¹ See [Ex parte Quirin, 317 U.S. 1, 26 \(1942\)](#) (explaining that the President's constitutional power to wage war includes the corollary power to "carry into effect ... all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war").

⁹² [Fleming v. Page, 50 U.S. \(9 How.\) 603, 615 \(1850\)](#).

⁹³ [Madsen v. Kinsella, 343 U.S. 341, 348 \(1952\)](#) (adding that the President's "authority to do this sometimes survives cessation of hostilities").

⁹⁴ [Totten v. United States, 92 U.S. 105, 105-06 \(1876\)](#).

⁹⁵ [United States v. Russell, 80 U.S. \(13 Wall.\) 623, 627-28, 631-32 \(1871\)](#); [Mitchell v. Harmony, 54 U.S. \(13 How.\) 115, 134 \(1852\)](#); [40 Op. Att'y Gen. 250, 253 \(1949\)](#) (opinion of Att'y Gen. Francis Biddle).

⁹⁶ For example, in the Protocol of Agreement Between the United States and Spain, Embodying the Terms of a Basis for the Establishment of Peace Between the Two Countries, U.S.-Spain, Aug. 12, 1898, [30 Stat. 1742](#), Secretary of State William R. Day, on behalf of the United States, agreed to an armistice with Spain until representatives of the two nations could meet in Paris to negotiate and conclude a peace treaty. This protocol, by which Spain relinquished its sovereign claims over Cuba and Puerto Rico, foreshadowed not only the Peace of Paris (concluding the Spanish-American War), but also, in a broader sense, President Wilson's Fourteen Points, which were incorporated into the Armistice of November 11, 1918. See Armistice Convention with Germany, Nov. 11, 1918, reprinted in 3 Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers, 1910-1923, at 3307, 3307-12 (1923); Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, [30 Stat. 1754](#); Woodrow Wilson, Address by the President of the United States (Jan. 8, 1918), in 56 Cong. Rec. 680, 680-81 (outlining fourteen points for world peace).

⁹⁷ [Fleming, 50 U.S. \(9 How.\) at 615](#).

⁹⁸ [Santiago v. Noqueras, 214 U.S. 260, 265 \(1909\)](#); see [Dooley v. United States, 182 U.S. 222, 230-31 \(1901\)](#) (expanding on the Executive's power to govern recently conquered territories).

⁹⁹ 2 Joseph Story, Commentaries on the Constitution of the United States 360 (3d ed. 1858).

It is in the realm of the political-military crisis - where foreign policy and national defense are intertwined in a decision to use military force - that Congress has exercised its prerogative most effectively vis-a-vis the President's authority.¹⁰⁰ That has not always been the case, however. In fact, the traditional power of the President to use U.S. forces without consulting Congress was the subject of fierce debate on the Senate floor in 1945 in the ratification debates regarding the U.N. Charter. Senator Tom Connally of Texas remarked at that time, "The historical instances in which the President has directed armed forces to go to other countries have not been confined to domestic or internal instances at all."¹⁰¹ Senator Eugene Millikin of Colorado pointed out that

in many cases the President has sent troops into a foreign country to protect our foreign policy ... notably in Central and South America. That was done in order to keep foreign countries out of there - [it] was not aimed at protecting any particular American citizen. It was aimed at protecting our foreign policy.¹⁰²

This view that the President could exercise his constitutional authority to deploy forces absent congressional blessing continued even after our ratification of the U.N. Charter. Though it could be argued that after ratification the U.N. Charter provisions did become our foreign policy, this was clearly not the view of the U.S. Senate at the time it ratified the U.N. Charter. Senators continued to espouse the idea that the President is vested with an independent authority to enforce the laws and did not believe ratification of the Charter impaired his constitutional power in any way. Senator Alexander Wiley, for instance, argued:

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Outside of these agreements, there is the power in our Executive to preserve the peace, to see that the "supreme laws" are faithfully executed. When we become a party to this Charter, and define our responsibilities by the agreement or agreements, there can be no question of the power of the Executive to carry out our commitments in relation to international policing. His constitutional power, however, is in no manner impaired.¹⁰³

Senator Wiley's understanding was buttressed by the statement of Senator Warren Austin:

I have no doubt of the authority of the President in the past, and his authority in the future, to enforce peace. I am bound to say that I feel that the President is the officer under our Constitution in whom there is exclusively vested the responsibility for maintenance of peace.¹⁰⁴

It was with respect to the Executive's inherent power to "enforce peace" that President Eisenhower sought to obtain congressional support to engage the Chinese in defense of Formosa (now Taiwan) - not because he needed it legally, but because a united front with that body would be persuasive to any adversary in removing any doubt concerning our political will and our readiness to fight.¹⁰⁵ The President was nevertheless careful to point out that:

Authority for some of the actions which might be required would be inherent in the authority of the Commander-in-Chief. Until Congress can act I would not hesitate, so far as my Constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.¹⁰⁶

¹⁰⁰ Editor's Note: The following material, presented here under the heading "The Role of Congress in Political-Military Crises," was published previously in James P. Terry, *The Use of Military Force by the President: Defensive Uses Short of War*, Joint Force Q., 3d Quarter 2008, at 113, 115-17. The content as it appears in this Article has been slightly revised.

¹⁰¹ 91 Cong. Rec. 10,967 (1945) (statement of Sen. Tom Connally).

¹⁰² Id. (statement of Sen. Eugene Millikin).

¹⁰³ Id. at 8127-28 (statement of Sen. Wiley).

¹⁰⁴ Id. at 8065 (statement of Sen. Austin).

¹⁰⁵ Dwight D. Eisenhower, Special Message to the Congress Regarding United States Policy for the Defense of Formosa (Jan. 24, 1955), in *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1955*, at 207, 209-10 (1959) (asserting that a congressional resolution would send a clear message respecting America's "firm purpose" and "unified and serious intentions").

He clearly believed the Chinese government would be influenced by a united presidential-congressional initiative clearly indicating our intent to defend Formosa from Chinese aggression. In the Joint [*412] Congressional Resolution that followed, Congress gave the President authority "to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack."¹⁰⁷ Eisenhower followed the same process in addressing the 1958 crisis in Lebanon, and President Kennedy did the same during the Cuban Missile Crisis.¹⁰⁸

Although congressional legislation has operated to augment presidential powers in the foreign affairs field much more frequently than it has to curtail them, the rule is not without its exceptions. Disillusionment with presidential policy in the context of the Vietnamese conflict led Congress to legislate restrictions that not only limited the President's discretion to use troops abroad in the absence of a declaration of war, but also limited his economic and political powers through curbs on his authority to declare national emergencies.¹⁰⁹

B. The Use of the Power of the Purse to Restrict Presidential Prerogatives

Congressional power and authority to fund military activities under Article I of the Constitution has been one of the major factors in [*413] shaping and restricting presidential decision-making with respect to the commitment of forces abroad. For this pragmatic reason, Presidents have sought to keep Congress engaged and involved in joint decisions to commit forces to combat. In Vietnam, for example, President Johnson gained congressional approval and funding for the war through the 1964 Gulf of Tonkin Resolution,¹¹⁰ which was approved unanimously (414-0) by the House and by a wide margin (88-2) in the Senate.¹¹¹ Coupled with this congressional imprimatur was parallel funding for the war. Although President Johnson requested only \$ 125 million to implement the Resolution, Congress responded generously, appropriating (initially) \$ 400 million to fund the Resolution.¹¹²

As criticism of the war in Vietnam grew, however, the Johnson Administration, concerned that the Gulf of Tonkin Resolution could be rescinded at any time, argued that the President had full authority to authorize "the actions of

¹⁰⁶ Id.

¹⁰⁷ Joint Resolution Authorizing the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores and Related Positions and Territories of that Area, [Pub. L. No. 84-4](#), **69 Stat. 7** (1955).

¹⁰⁸ See 3 Goldsmith, *supra* note 33, at 1874.

¹⁰⁹ See International Emergency Economic Powers Act, [Pub. L. No. 95-223](#), §§101-102, 201-07, [91 Stat. 1625](#), 1625-26 (1977) (codified as amended at [50 U.S.C. §§1701-1706](#) (2000)) (limiting the great economic powers conferred on the President by the Trading with the Enemy Act, ch. 106, [40 Stat. 411](#) (1917) (codified as amended at 50 U.S.C. app. §§1-39, 41-44 (2000)), to times of declared war, and providing new and more limited powers, with procedural restraints, for non-wartime emergencies); Foreign Sovereign Immunities Act of 1976, [Pub. L. No. 94-583](#), [90 Stat. 2891](#) (codified as amended in scattered sections of 28 U.S.C.) (removing from executive control decisions concerning the legal liability of foreign sovereigns); National Emergencies Act, [Pub. L. No. 94-412](#), [90 Stat. 1255](#) (1976) (codified as amended at [50 U.S.C. §§1601-1651](#) (2000)) (establishing procedures for presidential declaration and continuation of national emergencies and providing for a bicameral congressional veto); War Powers Resolution, [Pub. L. No. 93-148](#), [87 Stat. 555](#) (1973) (codified as amended at [50 U.S.C. §§1541-1548](#) (2000)) (limiting the President's constitutional powers to "introduce" U.S. armed forces "into hostilities" to situations involving "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States ... or its armed forces"); cf. James P. Terry, *The Vietnam War in Perspective: Lessons Learned in the Law of War as Applied in Subsequent Conflict*, [54 Naval L. Rev. 79, 89 \(2007\)](#) ("The response of the Congress during President George W. Bush's second term, just as in Vietnam during President Nixon's Presidency, reflects a disturbing contextual remaking of its own prior voting history ...").

¹¹⁰ Gulf of Tonkin Resolution, [Pub. L. No. 88-408](#), **78 Stat. 384** (1964).

¹¹¹ National Security Law 871 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005).

¹¹² Id.

the United States currently undertaken in Viet-Nam." ¹¹³ The Administration also claimed a second prong of authority to respond to the threat to Saigon:

It is not necessary to rely on the Constitution alone as the source of the President's authority, since the SEATO [(Southeast Asia Treaty Organization)] treaty - advised and consented to by the Senate and forming part of the law of the land - sets forth a United States commitment to defend South Viet-Nam against armed attack, and since the Congress - in the joint resolution of August 10, 1964, and in authorization and appropriations acts for support of the U.S. military effort in Viet-Nam - has given its approval and support to the President's actions. ¹¹⁴

In December 1972, a bombing campaign north of the thirty-seventh parallel was initiated by President Nixon to drive the North Vietnamese to the negotiating table. ¹¹⁵ It was successful and on January 23, 1973, the President announced the signing of the Paris [*414] Peace Accords to end U.S. involvement in the Vietnam War. ¹¹⁶ When attacks by the Khmer Rouge in Cambodia continued, however, the United States responded by a resumption of bombing in that nation, arguing that it must retain freedom of action if it was to preclude the North Vietnamese or its Communist allies from violating the accords. ¹¹⁷

Despite the President's strong opposition, Congress, after the United States resumed bombing in Cambodia, passed amendments to pending defense funding legislation that had the effect of cutting off funds, after August 15, 1973, for any "combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." ¹¹⁸ With no American forces to contend with, the North Vietnamese then sent their entire army, absent one division reserved to protect Hanoi, into Laos, Cambodia, and South Vietnam. ¹¹⁹ During the next two-year period, as Hanoi's forces established military and political control over previously non-Communist Indochina, more people were killed by the new Communist regimes in these three countries than in the entire period of U.S. involvement in Southeast Asia. ¹²⁰

The congressional actions vis-a-vis Southeast Asia were followed in 1976 by Congress's passage of the Clark Amendment, ¹²¹ which cut off American funds not expressly authorized by Congress for Angolan non-Communist factions fighting Cuban troops supported by Soviet training and equipment. ¹²² And in the 1980s, Congress again invoked its power of the purse to curtail the President's power as Commander in Chief. In 1983, Congress limited President Reagan's authority to fund intelligence activities in support of the Anti-Sandinistas (the Nicaraguan Contras), and in 1987, after the Central American [*415] governments signed a peace accord, it cut off all military aid to the Nicaraguan Contras. ¹²³

¹¹³ Leonard C. Meeker, The Legality of United States Participation in the Defense of Viet-Nam, Dep't St. Bull. Mar. 28, 1966, at 474, 484.

¹¹⁴ Id. at 489.

¹¹⁵ National Security Law, supra note 111, at 873.

¹¹⁶ Id.; Richard F. Grimmert, Cong. Research Serv. Report for Cong., Foreign Policy Roles of the President and Congress (June 1, 1999), <http://fpc.state.gov/6172.htm> (under subheading "Legislative Restrictions/Funding Denials").

¹¹⁷ Grimmert, supra note 116 (under subheading "Legislative Restrictions/Funding Denials").

¹¹⁸ Act of July 1, 1973, *Pub. L. No. 93-52*, § 108, *87 Stat. 130*, 134.

¹¹⁹ National Security Law, supra note 111, at 873.

¹²⁰ Id.

¹²¹ International Security Assistance and Arms Export Control Act of 1976, *Pub. L. No. 94-329*, § 404, *90 Stat. 729*, 757 (1976).

¹²² See National Security Law, supra note 111, at 880.

¹²³ See Grimmert, supra note 116 (under subheading "Legislative Restrictions/Funding Denials").

These lessons were not lost on President George H.W. Bush when Iraq invaded Kuwait in August 1990.¹²⁴ Although his advisors urged that he was not required to obtain congressional authorization to assist the United Nations in implementing U.N. Security Council Resolution 678, which authorized member states to use "all necessary means" to implement prior Security Council Resolutions,¹²⁵ President Bush formally requested a resolution of approval from Congress to support the U.N. call for assistance. In January 1991, the Senate, by the narrow and highly partisan vote of 52-47, gave the President that authority.¹²⁶ In doing so, however, Congress refused to authorize President Bush to use force beyond ejecting Iraqi forces from Kuwait. In particular, the Bush Administration had supported a provision in U.N. Resolution 678 that authorized member states "to restore international peace and security in the area."¹²⁷ But in the Joint Resolution that Congress passed, President Bush was limited solely to actions designed to restore the status quo ante in Kuwait.¹²⁸

In 1993, Congress treated President Clinton even more harshly.¹²⁹ When, in June 1993, several Pakistani troops (serving under U.N. command) lost their lives in Somalia, and then in October 1993 [*416] eighteen Americans (also serving under U.N. command) lost their lives in Mogadishu,¹³⁰ it spelled the death knell for U.S. support for U.N. peace operations under Chapter VII of the U.N. Charter¹³¹ - unless the operations were led by U.S. officers and with a preponderance of U.S. forces. In passing the Byrd Amendment¹³² to the Fiscal Year 1994 Defense Appropriations Act,¹³³ Congress sent a strong message to the President that his enhanced authority to deploy forces without congressional approval in circumstances where no vital national interest is implicated is not unlimited. Using the power of the purse, Congress was quick to limit defense funding where it determined U.S. interests were not well served. When the Byrd Amendment lapsed on September 30, 1994 (at the end of the fiscal

¹²⁴ See James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance with the Rule of Law*, 41 *Naval L. Rev.* 83, 83-94 (1993) (discussing the events leading up to Iraq's attack, and the conduct of Coalition and Iraqi operations thereafter).

¹²⁵ S.C. Res. 678, P 2, U.N. Doc. S/RES/678 (Nov. 29, 1990). Before it passed Resolution 678, the Security Council had enacted eleven previous resolutions dating back to August 2, 1990, when it passed Resolution 660 condemning Iraq's invasion of Kuwait. S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990). The other resolutions were 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677. S.C. Res. 677, U.N. Doc. S/RES/677 (Nov. 28, 1990); S.C. Res. 674, U.N. Doc. S/RES/674 (Oct. 29, 1990); S.C. Res. 670, U.N. Doc. S/RES/670 (Sept. 25, 1990); S.C. Res. 669, U.N. Doc. S/RES/669 (Sept. 24, 1990); S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990); S.C. Res. 666, U.N. Doc. S/RES/666 (Sept. 13, 1990); S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990); S.C. Res. 664, U.N. Doc. S/RES/664 (Aug. 18, 1990); S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990).

¹²⁶ Authorization for Use of Military Force Against Iraq Resolution, **Pub. L. No. 102-1, 105 Stat. 3** (1991); 137 Cong. Rec. 1018 (1991).

¹²⁷ S.C. Res. 678, P 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

¹²⁸ See Authorization for Use of Military Force, **105 Stat. 3**.

¹²⁹ Editor's Note: The following analysis of congressional invocation of the power of the purse in the context of peacekeeping operations is taken in part from James P. Terry, *A Legal Review of U.S. Military Involvement in Peacekeeping and Peace Enforcement Operations*, [42 *Naval L. Rev.* 79, 85-87 \(1995\)](#). The content as it appears in this Article has been slightly revised.

¹³⁰ See James P. Terry, *A Legal Review of U.S. Military Involvement in Peacekeeping and Peace Enforcement Operations*, [42 *Naval L. Rev.* 79, 85 n.16 \(1995\)](#) ("The capture of CWO Durant and the U.N. inability to control the situation in Mogadishu may have been the final straw for the U.S. Senate in passing the Byrd Amendment limiting U.S. funding.").

¹³¹ U.N. Charter arts. 39-51.

¹³² Department of Defense Appropriations Act, **Pub. L. No. 103-139**, § 8151, **107 Stat. 1418**, 1475-77 (1993); 139 Cong. Rec. 24,641 (1993). The Byrd Amendment provided that any funds appropriated for the Department of Defense "may be obligated for expenses incurred only through March 31, 1994, for the operations of United States Armed Forces in Somalia." Department of Defense Appropriations Act § 8151, 107 Stat at 1476.

¹³³ Department of Defense Appropriations Act, **107 Stat. 1418**.

year), Congress quickly passed the Kempthorne Amendment ¹³⁴ to the Fiscal Year 1995 Defense Authorization Act, ¹³⁵ which continued the funding limitations.

Congress likewise showed itself entirely willing to dictate to President Clinton when it determined he was not doing enough in a peace enforcement effort. Senator Robert Dole, leading the charge, attempted legislatively to compel the United States unilaterally to lift the arms embargo against the Bosnian Muslims in early 1994 and thus vitiate the U.N. Security Council Resolution ¹³⁶ that had established the arms embargo. Senators Samuel Nunn and George Mitchell, attempting to moderate this effort through compromise, drafted the Nunn-Mitchell Amendment ¹³⁷ to the Fiscal Year 1995 Defense **[*417]** Authorization Act. Their proposal, which was ultimately enacted, did not lift the arms embargo unilaterally, but rather precluded enforcement against the Bosnian Muslims while continuing U.S. obligations as they related to the other parties of the conflict. ¹³⁸ Though not as severe as Senator Dole's proposal, the Nunn-Mitchell Amendment undoubtedly contributed to an earlier-than-planned withdrawal from Bosnia by the United Nations Protection Force.

Two other initiatives in 1994, neither of which became law, were efforts by Congress to interject itself into military affairs long thought the sole province of the President. In the Peace Powers Act ¹³⁹ and in the National Security Revitalization Act ¹⁴⁰ (part of the GOP-controlled House's Contract with America), Congress attempted to restrict the President's authority as Commander in Chief and to limit U.S. involvement in future peace operations.

The Peace Powers Act, which was Senator Robert Dole's initiative, would have limited U.S. forces from serving under foreign operational control, even where it might be in the interests of the United States, as in Operation Desert Storm. ¹⁴¹ Similarly, the National **[*418]** Security Revitalization Act would have limited the use of

¹³⁴ National Defense Authorization Act for Fiscal Year 1995, *Pub. L. No. 103-337*, § 1002, *108 Stat. 2663*, 2833 (1994); 140 Cong. Rec. 14,139 (1994). The Kempthorne Amendment, although less onerous than the Byrd Amendment, restricted funding for U.S. military personnel in Somalia after September 30, 1994. National Defense Authorization Act § 1002, *108 Stat.* at 2833.

¹³⁵ National Defense Authorization Act, *108 Stat. 2663*.

¹³⁶ S.C. Res. 713, P 6, U.N. Doc. S/RES/713 (Sept. 25, 1991).

¹³⁷ National Defense Authorization Act § 1404, *108 Stat.* at 2910-12.

¹³⁸ The Nunn-Mitchell Amendment also provided specific direction for the President to submit a plan to Congress on the manner in which U.S. and allied forces would train the armed forces of Bosnia and Hercegovina outside of the territory of Bosnia and Hercegovina. Id. § 1404(f)(1)(B). The Amendment, however, had to be read in light of U.N. Security Council Resolution 713, which called upon "all States to refrain from any action which might contribute to increasing tension and to impeding or delaying a peaceful and negotiated outcome to the conflict in Yugoslavia." S.C. Res. 713, P 7, U.N. Doc. S/RES/713 (Sept. 25, 1991). Implementation of this training was viewed by many as making the United States a party to the conflict - just as the U.S.S. New Jersey's fire missions on behalf of the Lebanese Armed Forces in 1983 were seen as taking the United States over the line and into the conflict, thus legally (if not morally) justifying the attack on the Marine barracks at Beirut International Airport.

¹³⁹ S. 5, 104th Cong. (1995). The Peace Powers Act would have eliminated the War Powers Resolution's sixty-day clock, would have severely limited the payment of assessments to the United Nations for peacekeeping, would have required fifteen days' advance notification to Congress before voting in the U.N. Security Council on peacekeeping, and would have severely restricted foreign command of U.S. forces. Id.

¹⁴⁰ H.R. 7, 104th Cong. (1995). The National Security Revitalization Act ("NSRA") would, in part, have demanded credits for U.S. voluntary activities to count toward the U.S. Contributions to International Peacekeeping Activities assessment, would have limited the use of Department of Defense funds for U.N. peacekeeping activities, would have restricted the sharing of intelligence with the United Nations, and would have added significant restrictions and reporting requirements on placing American forces under U.N. operational control. Id. §§401-02, 506-08, 512.

¹⁴¹ S. 5, 104th Cong. § 5 (1995). In Operation Desert Storm, a brigade of the Eighty-Second Airborne Division and a Marine Corps Artillery unit from the Twelfth Marines were assigned to the command of French and British forces, respectively, to allow their advance at the same pace as other coalition forces. Peace Powers Act (S. 5) and the National Security Revitalization Act (H.R. 7): Hearing Before the S. Comm. on Foreign Relations, 104th Cong. 30 (1995) [hereinafter PPA/NSRA Hearing].

Department of Defense funds for peacekeeping activities and would have restricted the sharing of intelligence with the United Nations.¹⁴² In each case, had these measures passed, the President's constitutional prerogatives would have been severely impacted. Though these measures failed, there remained bipartisan concern in Congress stemming from United Nations Operation in Somalia II (UNOSOM II) (March 1993-March 1995) that the President (and succeeding Presidents) ought to be required to exercise greater stewardship with regard to operations managed by the United Nations.¹⁴³

IV. The Development of the President's Operational Authority in Wartime

It is important to note that Congress has exercised its prerogative to declare war as provided in Article I of the Constitution on only five occasions: the War of 1812; the War with Mexico in 1846; the 1898 Spanish-American War; the First World War in 1917; and the Second World War in 1941.¹⁴⁴ In all other military engagements, including our current conflicts, the President has exercised his independent executive responsibility as Commander in Chief pursuant to the authority set forth in Article II, Section 2, of the Constitution to deploy military force on behalf of this nation and in its defense.¹⁴⁵

While the President has often sought congressional authorization to ensure a consistent funding stream, no congressional declaration of war was requested by the Commander in Chief in the more than two [*419] hundred military responses beyond the five mentioned above.¹⁴⁶ In this period of terrorist violence, we can expect this trend to continue, as the necessity of immediate action in response to terrorist planning often requires preemptive measures which cannot await the outcome of congressional debate.

A. The Early Wartime Presidents

Article II. Section 2. The President shall be Commander in Chief of the Army and Navy of the United States¹⁴⁷

During the more than two centuries of this nation's history under the Constitution, the President's power as Commander in Chief has been tested numerous times: first during the administration of James Madison in the War of 1812, and most recently under Presidents George W. Bush and Barack Obama in Iraq and Afghanistan in the Global War on Terrorism. It was not until the middle of the nineteenth century, however, under the administrations of James Polk and Abraham Lincoln, that the Commander in Chief power emerged as a central focus of presidential authority.

Despite the importance of Polk (1845-1849) and Lincoln (1861-1865) in shaping the contours of Section 2, the history of its application owes much to each of the Presidents who served as Commander in Chief of the armed

¹⁴² H.R. 7, 104th Cong. §§401, 508, 512 (1995). A major objection to the NSRA centered on its requirement to exact credits for voluntary activities against our contributions to International Peacekeeping Activities. See, e.g., PPA/NSRA Hearing, *supra* note 141, at 34 (statement of Sen. Joseph Biden).

¹⁴³ This concern is reflected in the arguments made in the debate before a bipartisan Congress during passage of the Byrd and Kempthorne Amendments, both of which were passed against the strong wishes of the Clinton Administration. See 139 Cong. Rec. 24,647-49 (1993) (Byrd Amendment debate); 140 Cong. Rec. 14,144-45 (1994) (Kempthorne Amendment debate). These matters were addressed personally by the author while serving as Legal Counsel to the Chairman of the Joint Chiefs of Staff from 1991 to 1995.

¹⁴⁴ War Powers Hearing, *supra* note 2, at 375 (report entered into the record by Sen. Barry Goldwater) (listing five declared wars). Later, this Part of the Article discusses the actions of Presidents Madison, Polk, McKinley, Wilson, and Roosevelt, who were each subject to a congressional declaration of war.

¹⁴⁵ See *id.* at 354, 359-75 (report entered into the record by Sen. Barry Goldwater) (listing and describing 153 American military actions abroad undertaken without a declaration of war).

¹⁴⁶ Donald E. Schmidt, *The Folly of War: American Foreign Policy, 1898-2005*, at 23 (2005).

¹⁴⁷ [U.S. Const. art. II, § 2, cl. 1.](#)

forces during time of war. In this Part, the records of the early Presidents are discussed in terms of how their wartime authority either enhanced this critical power or allowed us to better understand the difference in national commitment between "unlimited" war and a conflict for "limited" objectives.

1. James Madison

The first of our wartime Presidents, James Madison, was the least active in his prosecution of the authority contained in Section 2. Madison's war, the War of 1812, was a sidelight to the main event in Europe, the British war with Napoleon. ¹⁴⁸ What made the War of 1812 complex was that its strategic goals - to achieve sovereignty over **[*420]** Canada, to end British maritime oppression, and to control the Indians in Spanish Florida - were neither completely understood nor firmly supported by the American people. ¹⁴⁹ Still, Madison "believed the war to be just and unavoidable." ¹⁵⁰

Unfortunately, Congress was little convinced with Madison's war message to Congress on June 1, 1812, as it voted only 19-13 in the Senate and 79-49 in the House to support his initiative. ¹⁵¹ The three initial campaigns in 1812 along the Canadian border against British forces quartered in Canada were disasters, and these failures seemed to support the concerns of Congress. ¹⁵² The three American forces - led by Alexander Smyth, William Hull, and Stephen Van Rensselaer - were routed, and early 1813 saw little improvement. ¹⁵³ It was not until late 1813 and early 1814 that the tide of war changed and American forces began to repulse the British enemy effectively. ¹⁵⁴

Working with his excellent Secretary of the Navy, William Jones, Madison put together a naval force on the Great Lakes that won crucial victories on Lake Erie in late 1813 and Lake Champlain in 1814. This was coupled with a strong showing on the Niagara front in the summer of 1814. It was in the South, however, that Andrew Jackson's forces carried the day over the warring Indian tribes in Florida in 1814 and then won a stunning victory over British forces at New Orleans in January 1815. ¹⁵⁵

When the war concluded with the Treaty of Ghent ¹⁵⁶ in December 1814 (two weeks before the Battle of New Orleans), the country was divided concerning Madison's performance as Commander in Chief. ¹⁵⁷ While he certainly did not make an inspiring success of the task, he did not disgrace the office either. ¹⁵⁸ One of his principal

¹⁴⁸ See Marcus Cunliffe, *Madison (1812-1815)*, in *The Ultimate Decision: The President as Commander in Chief* 21, 30 (Ernest R. May ed., 1960).

¹⁴⁹ [Id. at 26-28.](#)

¹⁵⁰ [Id. at 46.](#) After diplomacy failed with Great Britain and the embargo he imposed was unsuccessful, Madison viewed war as the only alternative if "the country's freedom and integrity were to be upheld." 1 Goldsmith, *supra* note 38, at 379.

¹⁵¹ Cunliffe, *supra* note 148, at 26.

¹⁵² [Id. at 25-26.](#)

¹⁵³ [Id. at 25-26.](#)

¹⁵⁴ See [id. at 47-48.](#)

¹⁵⁵ See *id.*

¹⁵⁶ Treaty of Ghent, U.S.-Gr. Brit., Dec. 24, 1814, [8 Stat. 218](#).

¹⁵⁷ See Cunliffe, *supra* note 148, at 23-25, 48-52. To this day, historians are divided on the question of Madison's performance as Commander in Chief. *Id.*

[*421] difficulties in prosecuting the war arose from the animosity between his Secretary of State (James Monroe) and his Secretary of War (John Armstrong).¹⁵⁹ He also made a poor choice in his Army commander for the Military District of Washington, Brigadier General William Winder, who was unprepared for the August 1814 attack on Washington.¹⁶⁰ But most significantly, James Madison, although a decent and erudite statesman, was not a powerful moral and political leader, especially at a time when the northeastern states' opposition to the war forced Madison to advance U.S. forces through the Niagara front rather than the more advantageous approach through Lake Champlain.¹⁶¹ Nevertheless, as historian Charles Ingersoll notes:

[Madison left] the United States, which he found embarrassed and discredited, successful, prosperous, glorious and content. A constitution which its opponents pronounced incapable of hostilities, under his administration triumphantly bore their severest brunt. Checkered by the inevitable vicissitudes of war, its trials never disturbed the composure of the commander-in-chief, always calm, consistent and conscientious, never much elated by victory or depressed by defeat, never once by the utmost emergencies of war, betrayed into a breach of the constitution.¹⁶²

2. James Polk

President James Polk was the first of our Presidents to act truly as the Commander in Chief. When departing for Washington from his home in Tennessee in early 1845 following the 1844 election, he let everyone know that he would be the President and that he intended to be the Commander in Chief.¹⁶³ On taking office, Polk was well aware that his predecessor, John Tyler, had already begun preparations for war with Mexico.¹⁶⁴ After Congress declared war, Polk argued that since the President would be held responsible for the **[*422]** conduct of the war, he intended to exercise that responsibility to the limit of his endurance.¹⁶⁵

In the strategy arena, President Polk did indeed take immediate control. Nearly a year before the inception of hostilities, he formulated military plans that called for the west and south of Texas to be occupied and held, the northern provinces of Mexico to be seized, and California to be taken by land and sea. He further directed a landing at Vera Cruz followed by an attack on Mexico City, should the prior measures fail to bring about peace. This plan would be accompanied by a naval blockade of Mexican ports.¹⁶⁶

Unfortunately, Polk's Secretary of War William Marcy inherited an Army led by Generals Zachary Taylor (later elected President) and Winfield Scott, both extremely partisan and senior general officers. Polk, a Democrat, ultimately came to trust the ability of neither. General Scott, a Whig with presidential aspirations, openly challenged

¹⁵⁸ *Id. at 51*. See generally Charles J. Ingersoll, 1 Historical Sketch of the Second War Between the United States of America, and Great Britain 258-65 (Philadelphia, Lea and Blanchard 1845) (discussing Madison's personal and presidential characteristics).

¹⁵⁹ See Cunliffe, *supra* note 148, at 48.

¹⁶⁰ T. Harry Williams, *Americans at War: The Development of the American Military System* 25-26 (1960); Cunliffe, *supra* note 148, at 52. In August 1814, the British Army attacked the Capital through southern Maryland (at Bladensburg), and burned the White House. *Id.* at 49, 52.

¹⁶¹ See Cunliffe, *supra* note 148, at 27, 51-52; 1 Goldsmith, *supra* note 38, at 385-86.

¹⁶² 1 Ingersoll, *supra* note 158, at 262.

¹⁶³ Leonard D. White, *Polk (1845-1848)*, in *The Ultimate Decision: The President as Commander in Chief*, *supra* note 148, at 55, 57-58.

¹⁶⁴ See Alan C. Huffines, *The Texas War of Independence, 1835-1836*, at 86 (2005).

¹⁶⁵ White, *supra* note 163, at 57-58; see 1 *The Diary of James K. Polk During His Presidency, 1845 to 1849*, at 427-28 (Milo Milton Quaife ed., 1910) (entry of May 25, 1846) (expressing his expectation that his "friends in Congress and elsewhere" would allow him to conduct the war as he "thought proper").

¹⁶⁶ White, *supra* note 163, at 60.

the Democrats' bill to appoint additional generals, and in effect challenged Polk by doing so.¹⁶⁷ Polk, who hoped to avoid winning the war on the wings of two Whig generals, initially was determined to keep Scott in Washington, but ultimately relented and gave Scott his command because Polk could not find an adequate replacement.¹⁶⁸ Polk had similar reservations about General Taylor. At one point in the war, the President decided to hold General Taylor's forces in Monterrey while a subordinate commander was dispatched to attack Mexico City through Veracruz.¹⁶⁹ The decision to use someone other than Taylor as the commander of the invading force in Mexico City was the subject of a two-hour cabinet debate that Polk deemed of such import as to warrant putting every one of his cabinet members on record.¹⁷⁰

[*423] Although Polk had no prior military experience, he was organized and energetic, and used his cabinet effectively to coordinate military strategy, foreign relations, financing of the military effort, and the actual execution of the war with Mexico. Polk himself directed the drafting of war legislation, governed the size and disposition of the armed forces, and formulated the terms and conditions of the peace signed with the Mexican government in 1848.¹⁷¹ Despite Polk's lack of military experience, he developed a sound military strategy, reached deployment decisions that were generally correct in light of the military objectives he set for the nation, and consistently exercised thoughtful planning that represented thinking ahead of events. As Leonard White has so accurately summarized:

[Polk] demonstrated that a civilian commander in chief could - and did - function effectively as the single center for direction, authorization, coordination, and in lesser degree for control of a large military and naval effort. All lines concentrated in the White House, and the Chief Executive required every matter of consequence to be brought to him for approval. Thus was achieved a genuine unity of command that was not only unchallenged by either civil or military branches, but that succeeded in keeping in coordination the various movements in the field.¹⁷²

3. Abraham Lincoln

The first of our wartime Presidents to direct an unlimited war as Commander in Chief, as opposed to the prior limited wars, was Abraham Lincoln. Our sixteenth President was elected in 1860 and took office in 1861.¹⁷³ Unlike the War of 1812 and the Mexican War, the Civil War was totally disruptive of the lives of U.S. citizens and of our national economy. Like the First and Second World Wars of the next century, the Civil War required a total commitment of men and industry in the national interest. These words from Edward Corwin aptly describe Lincoln's welding of power during the Civil War: "All resources of constitutional power ever previously uncovered were brought into requisition on a scale hitherto unparalleled, by a President **[*424]** who was happily free of any mistrust of power when it was wielded by himself."¹⁷⁴

¹⁶⁷ [Id. at 60-63](#); Letter from General Winfield Scott to R.P. Letcher (June 5, 1846), in 1 *The Life of John J. Crittenden* 244, 245-46 (Chapman Coleman ed., Philadelphia, J.B. Lippincott & Co. 1871).

¹⁶⁸ White, *supra* note 163, at 62-63.

¹⁶⁹ 2 *The Diary of James K. Polk During his Presidency, 1845 to 1849*, at 198-99 (Milo Milton Quaife ed., 1910) [hereinafter 2 *Diary*] (entry of Oct. 20, 1846); White, *supra* note 163, at 71. But see 2 *Diary*, *supra*, at 199 (entry of Oct. 20, 1846) (recording that General Taylor "seemed to" agree that holding his forces at Monterrey was the best approach).

¹⁷⁰ 2 *Diary*, *supra* note 169, at 204 (entry of Oct. 22, 1846); White, *supra* note 163, at 71.

¹⁷¹ See White, *supra* note 163, at 65-73.

¹⁷² [Id. at 74](#).

¹⁷³ Jewell, *supra* note 36, at 128.

¹⁷⁴ Corwin, *supra* note 77, at 227 (speaking of Franklin D. Roosevelt).

With no military background other than minor experience as a militia soldier in Indian skirmishes, Lincoln possessed a superb mind and became a fine strategist.¹⁷⁵ No one better exemplified Carl von Clausewitz's dictum that an understanding of military affairs is not nearly as important for a wartime leader as "distinguished intellect and strength of character."¹⁷⁶ Lincoln saw the big picture from the beginning and understood that his sole objective must be the destruction of the Confederate armies and not the occupation of territory in the Southern States.¹⁷⁷

In the conduct of the Civil War, nothing was more important than the selection of general officers to lead the Northern armies. Soon after the war started, Lincoln replaced General Winfield Scott with Irvin McDowell, and later replaced McDowell with George McClellan (after McDowell's defeat at the First Battle of Bull Run).¹⁷⁸ All three had little understanding of how they could or should share their strategic views with the Chief Executive, and Lincoln had to train them and their successors to address clearly the strategic situation, make clear decisions in terms of war planning, take decisive action, and make required strategic adjustments as the campaigns unfolded.¹⁷⁹

The problem for Lincoln in his general selection of officers was compounded by the need to select an aliquot share of officers of the opposing Democrat party, just as he had maintained a national political cohesion in his administration by selecting his principal opponents for the Presidency as cabinet members.¹⁸⁰ Of those generals who did serve in positions of great responsibility during the conflict, there were as many ineffective and indecisive leaders as there were, later in the war, those who rose to the challenge and proved to be extremely capable.

[*425] After observing seventeen months of General McClellan's leadership, Lincoln became convinced that McClellan could not lead the Union army to victory.¹⁸¹ When Lincoln wrote a letter, dated October 13, 1862, to his commanding general exhorting him to move on Robert E. Lee's forces,¹⁸² and in response, McClellan complained to Lincoln of inadequate horses, Lincoln removed him in frustration and replaced him with General Ambrose Burnside.¹⁸³ Burnside was in command in the fateful Union attack across the Rappahannock River on well-fortified Confederate positions along a string of hillsides overlooking Fredericksburg, Virginia, in late 1862.¹⁸⁴ There he suffered a disastrous defeat to an inferior force.¹⁸⁵ When, following that costly defeat, Lincoln removed Burnside in favor of General Joseph Hooker, Burnside had been in command of Union forces only about seventy-five days.¹⁸⁶

General Hooker's command of the Army of the Potomac was also short-lived. In another fateful battle just west of Fredericksburg at Chancellorsville in May 1863, Confederate forces under Generals Robert E. Lee and "Stonewall" Jackson rolled up the Union infantry in perhaps the greatest flanking movement in American military history.¹⁸⁷

¹⁷⁵ T. Harry Williams, *Lincoln and His Generals* 7 (1952).

¹⁷⁶ Carl von Clausewitz, *On War* 608 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832).

¹⁷⁷ See Colin R. Ballard, *The Military Genius of Abraham Lincoln* 2, 6, 239 (1926).

¹⁷⁸ See 2 William M. Goldsmith, *The Growth of Presidential Power* 941-42 (1974).

¹⁷⁹ See, e.g., Williams, *supra* note 175, at 15-25.

¹⁸⁰ See Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 318-19 (illustrated ed. 2005); Williams, *supra* note 175, at 10-11 ("[Lincoln] used the military patronage to unite discordant groups in support of the war and to keep down divisions in the North.").

¹⁸¹ 2 Goldsmith, *supra* note 178, at 950.

¹⁸² See Letter from Abraham Lincoln, President, to Major Gen. George B. McClellan (Oct. 13, 1862), in 5 *The Collected Works of Abraham Lincoln* 460, 460-61 (Roy P. Basler ed., 1953).

¹⁸³ 2 Goldsmith, *supra* note 178, at 950.

¹⁸⁴ Bruce Catton, *This Hallowed Ground: The Story of the Union Side of the Civil War 186-90* (1956).

¹⁸⁵ *Id.* at 188-90.

¹⁸⁶ 2 Goldsmith, *supra* note 178, at 950.

Despite the ignominious military loss by the Union, the loss of General "Stonewall" Jackson to friendly fire as he returned through his own lines from a reconnaissance of Union positions represented an even greater loss to Lee and the Confederacy.¹⁸⁸ Relieved by Lincoln after only five months in command, Hooker was followed in command by General George Meade.¹⁸⁹

[*426] Following the Battle of Chancellorsville, Lee drove north into Pennsylvania.¹⁹⁰ It was at the sleepy crossroads town of Gettysburg in 1863 that Meade faced Lee in the bloodiest battle of the war. While Meade's forces won a decisive victory and halted the Confederate advance, Meade failed to counterattack, allowing Lee and his crippled forces to escape and withdraw into Virginia where they had the opportunity to reconstitute.¹⁹¹ Lincoln was totally frustrated at Meade's failure to follow up on the initial victory.¹⁹² When Meade learned of Lincoln's frustration, he asked to be relieved as commanding general of the Army of the Potomac, but Lincoln refused to accept his resignation.¹⁹³

It was General Ulysses S. Grant, however, who would prove to have all the qualities Lincoln sought in his commanding general. Grant first came to Lincoln's attention at the Battle of Vicksburg,¹⁹⁴ where the General completely cut off the city and forced its surrender.¹⁹⁵ The Union victory at Vicksburg was followed by crushing blows to the Confederate army against General Braxton Bragg in Tennessee as Grant drove that force into Georgia.¹⁹⁶ The Union General's selection of strong subordinates with the will to persevere, no matter how difficult the slog, was equally critical to Lincoln. Grant's choice of Generals Phillip Sheridan and William Sherman was crucial to keeping the pressure on Confederate forces at every turn.¹⁹⁷ When Grant was called back to Washington in March 1864, General Henry Halleck stepped down as Commanding General of the Armies of the United States to become Lincoln's Chief of Staff, and Grant replaced him.¹⁹⁸ Without question, Grant had

¹⁸⁷ See Catton, *supra* note 184, at 238-43; John T. Morse, Jr., *2 American Statesmen: Abraham Lincoln* 141 (Boston & New York, Houghton Mifflin Co. 1893) (referring to Jackson's "brilliant flanking movement"); 167 *The North American Review* 639 (David A. Munro ed., New York, N. Am. Review Publ'g Co. 1898) (relating that Chancellorsville was the last of Jackson's "brilliant flanking movements").

¹⁸⁸ See Catton, *supra* note 184, at 242, 244, 325; David Saville Muzzey, *An American History* 354 n.2 (rev. ed. 1920); Alexander H. Stephens, "Stonewall" Jackson's Death, in *8 Great Epochs in American History* 119, 119-20 (Francis W. Halsey ed., 1912).

¹⁸⁹ 2 Goldsmith, *supra* note 178, at 950.

¹⁹⁰ See Catton, *supra* note 184, at 248.

¹⁹¹ 2 Goldsmith, *supra* note 178, at 950-51.

¹⁹² *Id.* at 951; Williams, *supra* note 175, at 264-65.

¹⁹³ Stephen E. Ambrose, *Halleck: Lincoln's Chief of Staff* 143 (La. paperback ed. 1996); Williams, *supra* note 175, at 268-71.

¹⁹⁴ 2 Goldsmith, *supra* note 178, at 953.

¹⁹⁵ John Formby, *Vicksburg, The Turning-Point in Grant's Career*, in *8 Great Epochs in American History* 112, 112, 117-18 (Francis W. Halsey ed., 1912).

¹⁹⁶ 2 Goldsmith, *supra* note 178, at 953.

¹⁹⁷ See Herman Hattaway & Archer Jones, *How the North Won: A Military History of the Civil War* 504, 548-49, 616-619 (Illini Books ed. 1991).

¹⁹⁸ Ambrose, *supra* note 193, at 160; Bruce Catton, *The Civil War* 190 (Houghton Mifflin Co. 1987) (1960); 2 Goldsmith, *supra* note 178, at 953-54; John Y. Simon, *Grant, Lincoln, and Unconditional Surrender*, in *Lincoln's Generals* 161, 164-66 (Gabor S. Boritt ed., 1994). It is interesting to note that after Halleck stepped aside in favor of Grant, he became an extremely effective military Chief of Staff for Lincoln, while simultaneously serving as coordinator of all military communications for Grant. 2 Goldsmith, *supra* note 178, at 954. Halleck first served as the Union Commanding General in the West before Lincoln appointed him as Commanding General of all U.S. forces in July 1862 while McClellan was deployed to the Peninsula Campaign. Williams, *supra* note 175, at 47, 70-71, 134.

convinced **[*427]** Lincoln that he possessed the ability and the fighting heart to crush the Confederate army, and Lincoln had the wisdom to understand that this was precisely the man to lead at this critical time in our history. ¹⁹⁹

In other areas as well, Lincoln brought a willingness as Commander in Chief to exercise his war powers without hesitation and with great decisiveness. In 1861, following the attack on Fort Sumter, he called for seventy-five thousand militia without congressional consent or approval. ²⁰⁰ In order to preserve the Union, he considered a broad interpretation of his powers essential. As the President later told Congress:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? ²⁰¹

These early measures were just one small part of Lincoln's aggressive execution of his war powers. In April 1861, he directed Secretary of the Treasury Samuel Chase to advance his Administration two million dollars in nonappropriated funds to pay for the government's critical defense requirements, ²⁰² despite the clause in the Constitution specifying that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." ²⁰³ **[*428]** He did not advise Congress of this action until more than a year later. ²⁰⁴

Lincoln also took immediate and decisive action to suppress sedition and address treasonous acts on the part of Confederate sympathizers in the Northern States. His most visible actions occurred after Southern sympathizers attacked Massachusetts militiamen transiting through Baltimore. ²⁰⁵ The sympathizers also seized the telegraph office in Baltimore and precluded communications between New York and Washington for almost a week. ²⁰⁶ Once service was restored by federal forces, Lincoln exercised federal censorship over all communications from that office, ²⁰⁷ and ordered that persons engaged in, or about to engage in, treasonable actions be arrested and, if necessary, detained. ²⁰⁸ This instruction was followed by authorization, on April 27, 1861, to his commanders to suspend habeas corpus "at any point on or in the vicinity of any military line" between Philadelphia and Washington.

¹⁹⁹ 2 Goldsmith, *supra* note 178, at 952-53; see also *The Oxford Companion to American Military History* 131 (John Whiteclay Chambers II ed., 1999).

²⁰⁰ Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 4 *The Collected Works of Abraham Lincoln* 421, 428-29 (Roy P. Basler ed., 1953).

²⁰¹ *Id. at 430* (internal footnote omitted).

²⁰² 2 Goldsmith, *supra* note 178, at 959.

²⁰³ [U.S. Const. art. I, § 9, cl. 7.](#)

²⁰⁴ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 226-27 (Transaction Publishers 2002) (1948).

²⁰⁵ See 2 Goldsmith, *supra* note 178, at 959-60.

²⁰⁶ *Id. at 960*; cf. James P. Terry, *Press Access to Combatant Operations in the Post-Peacekeeping Era*, [154 Mil. L. Rev. 1, 5-6 \(1997\)](#) (discussing Lincoln's views on media censorship during the Civil War).

²⁰⁷ See Rossiter, *supra* note 204, at 227-28 (reporting that Lincoln forbade the post office from transmitting treasonous correspondence).

²⁰⁸ *Id.*

²⁰⁹ In each instance, Lincoln did what was required for the successful prosecution of the war, with little concern for what the courts would say later. ²¹⁰

4. William McKinley

When Republican William McKinley of Ohio was elected to the White House in 1896, "the Major" inherited an Army that had been [*429] largely depleted after the Civil War, ²¹¹ but a Navy that had seen the largess of a Congress anxious for the United States to compete as a major sea power with Great Britain and Russia. ²¹² The ostensible reasons voiced by Republicans and opposing Democrats alike for entering into this nation's first limited offensive war included Spain's refusal to grant independence to Cuba, retaliation for the sinking of the Maine in Havana Harbor, and the need to eliminate the Spanish fleet at Manila Bay if the Philippine Islands were to be available to the U.S. fleet as a needed coaling station and protected harbor for U.S. naval forces assigned in the Western Pacific. ²¹³

In approving the initial military operation of the campaign in 1898, McKinley ordered Admiral George Dewey, the Commander of the Asiatic squadron in Hong Kong, to "proceed at once to Philippine Islands. Commence operations at once, particularly against the Spanish fleet... . Use utmost endeavors." ²¹⁴ Dewey sailed to Manila Bay, destroyed the ill-prepared Spanish fleet, and notified Washington that he could secure the capital city if provided 5000 troops. ²¹⁵ At the White House, the decision to send an expeditionary force had been made even before news arrived of Dewey's victory, and those forces were dispatched under General Wesley Merritt upon news of the victory. ²¹⁶ Meanwhile, the Philippine leader, Emilio Aguinaldo, called for an independent republic, but as an American protectorate. ²¹⁷ McKinley declared the Islands annexed and during the remainder of his Presidency received reports from Merritt's successor, General John Pershing, addressing the Philippine insurrection. ²¹⁸

²⁰⁹ Letter from Abraham Lincoln, President, to the Commanding General of the Army of the United States (Apr. 27, 1861), in 7 A Compilation of the Messages and Papers of the Presidents 3219, 3219 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897).

²¹⁰ In *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866), decided after the war, the Supreme Court forbade the presidential establishment of military commissions for the trial of civilians in areas where the civil courts are open. The lesson here, however, is that the law of the Constitution is what Lincoln successfully did in the crisis to preserve the Union, not what politically correct judges did after the fact to satisfy their various constituencies.

²¹¹ McKinley served with the Ohio volunteers for the duration of the Civil War, was commissioned at age nineteen, and was twice cited for bravery under fire. He was universally known as "the Major." See Ernest R. May, McKinley (1898), in *The Ultimate Decision: The President as Commander in Chief*, supra note 148, at 93, 94.

²¹² See generally Margaret Leech, *In the Days of McKinley* 151-93 (1959).

²¹³ Richard Hofstadter, *Manifest Destiny and the Philippines*, in *America in Crisis* 173, 173-202 (Daniel Aaron ed., 1952).

²¹⁴ See Oscar Charles Paullin, *The American Navy in the Orient in Recent Years*, in 38 *United States Naval Institute Proceedings* 87, 87, 89-90 (Ralph Earle ed., 1912) (internal quotation marks omitted) (quoting the orders given by Secretary of Navy Long).

²¹⁵ See R.A. Alger, *The Spanish American War* 325-26 (1901).

²¹⁶ [Id. at 326-27.](#)

²¹⁷ See Stuart Creighton Miller, "Benevolent Assimilation": The American Conquest of the Philippines, 1899-1903, at 37-38 (4th ed. 1984); cf. Alfred L.P. Dennis, *Adventures in American Diplomacy, 1896-1906*, at 99 (1928) (telegram addressing the Philippine's discontent in remaining a Spanish territory).

²¹⁸ See 1 Lester H. Brune & Richard Dean Burns, *Chronological History of U.S. Foreign Relations 1607-1932*, at 284 (2d ed. 2003); 1 Frank E. Vandiver, *Black Jack: The Life and Times of John J. Pershing* 253 (1977); see also Terry, supra note 206, at 7-8 (discussing follow-on commander General John Pershing's strict control of communications during the Philippines' insurrection operations).

[*430] In the Cuban theater, the Spanish battle fleet had been located and pinned down in Santiago Harbor by the U.S. squadron commanded by Admiral William T. Sampson. Sampson reported to Secretary of War Russell Alger and President McKinley that not only could the Spanish fleet be overwhelmed by his naval forces, but that Santiago and the area proximate could be taken with a force of 10,000.²¹⁹ When McKinley learned from the Commanding General of the Army, Nelson A. Miles, that the Spanish had 125,000 troops on the island, he rethought his options.²²⁰

Ultimately, the order to engage the Spanish fleet and move on Santiago was given, and Santiago was secured by General William Shafter by July 12, 1898.²²¹ Instead of moving then on heavily fortified Havana, McKinley determined to force Spain to sue for peace by moving on lightly defended Puerto Rico and by sending ironclads under Sampson to the Mediterranean to directly threaten the Spanish mainland.²²² Before these latter events unfolded, the Spanish Captain General indicated he desired an armistice.²²³ The armistice proved difficult to negotiate because McKinley insisted on leaving the Philippine question for later negotiations.²²⁴ Nevertheless, the war effectively ended in early August 1898.²²⁵

In his essentially four months of wartime service as Commander in Chief, McKinley had secured his wartime goal of protecting the Republic, not from the Spanish, but from the Democrats. The true measure of the success of his strategy came not only in the midterm elections in November 1898, when his party won majority control of both Houses, but in 1900 when he handily won reelection by more than 900,000 votes.²²⁶

[*431]

B. The Modern Wartime Presidents

The twentieth century brought new challenges to the Commander in Chief, as new and more powerful weapons systems and equally dangerous entangling alliances, especially in Europe, would lead to two terribly destructive international conflicts. The second century of this nation would also see the first of a number of conflicts conducted under U.N. auspices, first in Korea, followed by peace enforcement and peacekeeping commitments in Lebanon, the Sinai, many areas of Africa, and then in the Balkans.²²⁷ Finally, the second century would close with a resurgence of terrorist activity.

The focus for the modern Presidents under Article II, Section 2, would shift from product to process, with the structure of the military and military leaders' relations to their service and to the War Department and then the Department of Defense seen by many to be as important as the conflicts in which the nation was engaged. Starting

²¹⁹ Telegram from Adjunct-General H.C. Corbin to General Shafter (June 7, 1898), in 1 Correspondence Relating to the War with Spain 29, 29-30 (1902).

²²⁰ See Nelson A. Miles, *Serving the Republic* 272-73 (1911).

²²¹ Corbin, *supra* note 219, at 29-30.

²²² See Miles, *supra* note 220, at 274; *The Oxford Companion to American Military History* 667-68 (John Whiteclay Chambers II et al. eds., 1999).

²²³ See *Cubans and an Armistice; They Would Accept It Only as a Precursor to the Recognition of Their Independence*, N.Y. Times, Apr. 5, 1898, at 4.

²²⁴ See *Papers Relating to the Foreign Relations of the United States* 819-30 (1901) (consisting of a series of letters between diplomats of the United States and Spain regarding the negotiation of terms of peace).

²²⁵ *Id.* at 830.

²²⁶ May, *supra* note 211, at 107.

²²⁷ See generally Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, *50 A.F. L. Rev.* 1, 9 (2001) (referencing the engagements in Lebanon and Sinai); Terry, *supra* note 130, at 79-99 (discussing the engagements in Africa and the Balkans).

with the Truman Committee in 1944, followed by the National Security Act in 1947, and finally the Goldwater-Nichols Defense Reorganization Act of 1986, the structure of the Department of Defense and its military arm was reoriented toward making the war-fighting, planning, and decision-making roles in our unified and specified commands separate from, but superior to, the role of providing personnel, training, equipment, and support resident in our Service Secretaries.²²⁸

1. Woodrow Wilson

Born on December 28, 1856, in Staunton, Virginia, Woodrow Wilson grew up in Augusta, Georgia, during the Civil War, the son of a Presbyterian minister.²²⁹ Aloof and cerebral, at the turn of the [*432] century he was a highly respected professor of political science at Princeton.²³⁰ As the Democratic Party candidate in 1912, he viewed his role as Commander in Chief differently than had preceding Presidents.²³¹ He saw the role of his military leaders as that of implementers of policy developed by the nation's civilian leadership, and believed that they should never intrude in the realm of policy development.²³² Similarly, he felt that when his military leaders were charged with a mission, the civilian leadership should not interfere but rather allow them the flexibility to execute as they determined most effective.²³³ Thus, when Congress declared war on Germany in April 1917, it was already clear that Wilson intended to exercise a very different construct of Commander in Chief than any prior Chief Executive.

When war was declared, Wilson named General John J. Pershing to lead the American Expeditionary Force in France.²³⁴ Pershing had, for a time, successfully led an expeditionary force in the Philippines during the Spanish-American War, and had, in 1916, personally directed pursuit and punishment of Pancho Villa's raiders in Mexico.²³⁵ After Pershing was named as the American Expeditionary Force Commander in France, Secretary of War Newton Baker gave Pershing the following directive: "In general you are vested with all necessary authority to carry on the war vigorously ... and towards a victorious conclusion."²³⁶ The Secretary further advised that his only [*433] orders were "one to go to France and the other to come home, but that in the meantime his authority in France would be supreme."²³⁷

²²⁸ National Security Act of 1947, [Pub. L. No. 80-253](#), [61 Stat. 495](#) (1947); Goldwater-Nichols Department of Defense Reorganization Act of 1986, [Pub. L. No. 99-433](#), [100 Stat. 992](#) (1986) (reorganizing the command structure of the U.S. military); Charles E. Schumer, Under Attack: Congressional Power in the Twenty-First Century, 1 Harv. L. & Pol'y Rev. 1, 14-16 (2007) (discussing the Truman Committee's role in overseeing war mobilization and defense production). See generally Ernest R. May, The Development of Political-Military Consultation in the United States, 70 Pol. Sci. Q. 161 (1955).

²²⁹ 1 Ray Stannard Baker, Woodrow Wilson: Life and Letters 23-24 (1927).

²³⁰ See Ernest R. May, Wilson (1917-1918), in *The Ultimate Decision: The President as Commander in Chief* supra note 148, at 109, 112.

²³¹ See Arthur S. Link, Wilson: The New Freedom 299 (1956).

²³² See *id.* For example, when war with Germany appeared imminent, the Army General Staff directed development of operational plans and other war-planning efforts by its staff. Wilson was furious when he learned of these efforts, feeling the Army staff had intruded upon his policy realm, and he ordered they cease. See Frederick Palmer, Bliss, Peacemaker: The Life and Letters of General Tasker Howard Bliss 106-07 (1934).

²³³ In 1914, for example, when he determined to exercise his prerogatives on behalf of the nation against Mexico and respond through the use of force through naval action, he let the Navy make their plans and carry them out until he changed his policy and elected to negotiate a settlement. May, supra note 230, at 113.

²³⁴ *Id.* at 113-14.

²³⁵ 6 Ray Stannard Baker, Woodrow Wilson: Life and Letters 76 (1937); James W. Hurst, Pancho Villa and Black Jack Pershing: The Punitive Expedition in Mexico (2008).

²³⁶ 1 Frederick Palmer, Newton D. Baker: America at War 170-72 (1931) (quoting orders from Sec. Baker); see also May, supra note 230, at 113-14 (discussing Pershing's appointment to lead the American Expeditionary Force).

²³⁷ 1 Palmer, supra note 236, at 180.

Wilson initially saw his role as simply backing up General Pershing, without really acting as Commander in Chief. ²³⁸ When, however, the depletion of British and French ranks required that all Allies cooperate in a unified command structure in which the U.S. forces were subservient to the Allied Supreme War Council, Pershing himself became convinced that he needed to cede command to an allied commander, in this case, the French Marshal Foch. ²³⁹ The highly successful German offensive in the spring of 1918 led the coalition to rely ever more heavily on this unified command approach. ²⁴⁰ Wilson thereafter endorsed Pershing's arrangements with the French, as well as subsequent understandings between Pershing and the British. ²⁴¹ The President made clear, however, that there was no "commitment from which the United States government is not free to depart when exigencies no longer require it." ²⁴²

Unlike preceding Commanders in Chief during wartime, Wilson had to fight the war with restrictions on his political judgment imposed by an allied coalition. ²⁴³ Unlike his successors Roosevelt, Truman, Johnson, George H.W. Bush, and George W. Bush, however, he was not in a position to control his allies. ²⁴⁴ Unlike Polk, McKinley, Truman, and George H.W. Bush, moreover, he was not seeking the conquest or liberation of territory. ²⁴⁵ And unlike Presidents Lincoln, [*434] Roosevelt, and George W. Bush, he was not even seeking the destruction of the enemy's power. ²⁴⁶

By delegating most wartime issues when they did arise during the year and a half of U.S. involvement to his military commanders, he kept his hand free to guide the armistice and demand acceptance of his fourteen points or conditions for peace, not only by Germany and its allies, but by the coalition states of Britain and France. ²⁴⁷ While he had largely avoided direct involvement as Commander in Chief during the struggle, he did so for the greater good, at least in his view, of ensuring a stronger hand for himself as President in shaping a lasting peace through the League of Nations. ²⁴⁸

2. Franklin D. Roosevelt

²³⁸ See [id. at 371-72](#).

²³⁹ Palmer, *supra* note 232, at 206; see also 10 Francis Whiting Halsey, *The Literary Digest History of the World* 116, 454 (1920).

²⁴⁰ See 3 *The Intimate Papers of Colonel House* 424-36, 441-45 (Charles Seymour ed., 1928) (containing a series of cablegrams and letters showing the transition to a unified Allied command).

²⁴¹ See [id. at 436, 441-45](#).

²⁴² Memorandum from Lord Reading to Prime Minister (Apr. 21, 1918), reprinted in 2 *United States Army in the World War, 1917-1919: Policy-Forming Documents of the American Expeditionary Forces* 336, 336-37 (1989).

²⁴³ See May, *supra* note 230, at 129.

²⁴⁴ See *id.* May discusses comparisons with Roosevelt and Truman. This author suggests similar negative comparisons with the last three named Presidents.

²⁴⁵ [Id. at 130](#). May discusses differences with Polk, McKinley, and Truman. This author suggests similar differences exist with George H.W. Bush in his conduct of the First Gulf War.

²⁴⁶ [Id. at 130-31](#). May draws contrasts with Lincoln and Roosevelt. This author suggests a similar distinction exists with George W. Bush's destruction of Iraqi and Afghan military power in Operations Iraqi Freedom and Enduring Freedom.

²⁴⁷ See generally 3 *The Intimate Papers of Colonel House*, *supra* note 240, at 316-49 (discussing President Wilson and the Fourteen Points).

²⁴⁸ See, e.g., Harry R. Rudin, *Armistice: 1918*, at 100-04 (1944) (discussing Wilson's treatment of the peace negotiations with Germany and the Allied states, Britain and France).

Franklin Roosevelt, a distant relative of President Theodore Roosevelt, the father of four sons, and married to Teddy's niece and his fifth cousin, Eleanor, was in his third term as President when the United States entered World War II. ²⁴⁹ Having led the nation out of the Depression, all of his many skills were nevertheless required to guide the nation through the greatest of the world's conflicts. Although lacking the military experience of many of our previous Presidents, Roosevelt had gained extensive executive management experience in the War Department while serving as Assistant Secretary of the Navy, and that experience would serve him well during this conflict. ²⁵⁰

There is no President who exercised his wartime powers with more authority than Franklin Roosevelt, nor any President who viewed these powers more broadly. In anticipation of war in 1939, Roosevelt transferred the offices of the Chief of Staff of the Army and [*435] the Chief of Naval Operations (then called the Joint Army-Navy Board in the War Department) to the newly created Executive Office of the President ("EOP"). ²⁵¹ By treating these officials as members of his inner circle, Roosevelt largely eliminated the traditional leadership roles of the Service Secretaries, ²⁵² a practice which continued with the establishment of the Joint Chiefs of Staff in the 1947 National Security Act and the 1986 Goldwater-Nichols Defense Reform legislation (legislation which further diminished the Service Chief roles in operational decision-making in favor of joint and unified combatant commanders). ²⁵³ The Joint Board, and not the Service Secretaries, thus became the President's principal strategic arm after 1939. Similarly, the Munitions Board and other procurement and production agencies were pulled within the President's immediate control within the EOP under the auspices of the Assistant Secretary of War, Louis Johnson. ²⁵⁴ The result of these initiatives was to make Roosevelt the center of all coordination and often the sole unifying link in strategic and procurement decision-making. ²⁵⁵

President Roosevelt had begun a serious rearmament program in 1938, some three years prior to the United States' entry into the war. ²⁵⁶ The purpose of this massive program was not so much to enhance U.S. military power as to provide all aid short of war to Britain, and later to Russia and China under Chang Kai Chek. ²⁵⁷ In fact, many asked during these prewar years whether U.S. rearmament had as its purpose preparation for war, or really was designed to provide an alternative to war. ²⁵⁸ Roosevelt undertook other strategic initiatives as well. He ordered the Pacific Fleet from its base in San Diego to the naval base at Pearl Harbor, believing a show of strength to the Japanese was essential to deter Japanese aggression. ²⁵⁹ In June 1940, he ordered that full military

²⁴⁹ See Samuel P. Huntington, *The Soldier and the State* 315-44 (1957).

²⁵⁰ See generally Herbert Feis, *Churchill Roosevelt Stalin: The War They Waged and the Peace They Sought* (1957) (discussing diplomacy of the war); Huntington, *supra* note 249, at 315-44 (providing valuable insights on American participation in World War II); William L. Langer & S. Everett Gleason, *The Challenge to Isolation, 1937-1940* (1952) (discussing Roosevelt's prewar diplomacy); Walter Millis et al., *Arms and the State* 13-138 (1958) (discussing civil-military relations during the war).

²⁵¹ See Ray S. Cline, *Washington Command Post: The Operations Division* 45 (1951).

²⁵² See *id.* at 45-47.

²⁵³ Goldwater-Nichols Department of Defense Reorganization Act of 1986, [Pub. L. No. 99-433](#), [100 Stat. 992](#); National Security Act of 1947, [Pub. L. No. 80-253](#), [61 Stat. 495](#).

²⁵⁴ Cline, *supra* note 251, at 45; Eliot Janeway, *The Struggle for Survival: A Chronicle of Economic Mobilization in World War II*, at 44 (1951).

²⁵⁵ See Mark Skinner Watson, *Chief of Staff: Prewar Plans and Preparations* 79-81, 97, 101-03, 126 (1950).

²⁵⁶ [Id. at 126-27, 131](#).

²⁵⁷ [Id. at 132-33, 138](#).

²⁵⁸ See, e.g., Janeway, *supra* note 254, at 80.

²⁵⁹ See Kermit Bonner, *Final Voyages* 56 (1996).

assistance be extended to Great Britain, [*436] even though he fully understood this would slow down our own rearmament. ²⁶⁰

Theater commanders General Joseph Stilwell, Admiral Chester Nimitz, and General Douglas MacArthur, with Navy Chief Admiral Ernest King, Army Chief General George Marshall, and Army Air Forces Commander General Hap Arnold, served as the new Combined Chiefs of Staff, and were trusted by the President to set war strategy. The Chiefs' largely had their way in war-planning, with the exception of two events in 1942 and 1943. ²⁶¹

In July 1942, Roosevelt overruled the Chiefs' plan to divert Army forces to the Pacific in favor of retaining forces in Europe for a North African invasion (Operation TORCH) favored by the British. ²⁶² The President, in intervening against the judgment of his military chiefs in 1942 in favor of a Germany-first approach, at least with respect to the forces already in Europe, may have shown both a more mature strategic understanding than his military leaders and better insight in recognizing that preserving relations with Britain during a difficult stretch was critical.

Similarly, in December 1943 at the Cairo Conference, Roosevelt broke ranks with his military leadership in ruling against U.S.-proposed operations in Burma and the Bay of Bengal (Operation BUCCANEER). ²⁶³ Roosevelt understood his support for the British position on these operations was critical to gaining British support for a cross-Channel invasion (Operation OVERLORD) then being pressed by the Americans. ²⁶⁴ In an earlier May 1943 conference in Washington, code-named TRIDENT, Roosevelt had laid the foundation for Cairo by arguing vociferously concerning the need for a major landing in France. ²⁶⁵

It was not until the planning for the Normandy invasion in 1944, however, that U.S. strategy "emerged from the White House much as it had [previously] emerged from the Pentagon." ²⁶⁶ The unity of [*437] thinking between Roosevelt and his military leadership, not always evident early in the war when he took his main counsel from Harry Hopkins, became so after the Allied victories at Guadalcanal in the Pacific and Tunis in North Africa, coupled with the end of the German submarine threat and the securing of sea lanes. ²⁶⁷ The end of the defensive war and the opening of the offensive phase also brought a confluence of political and military thinking with respect to the desire to avoid postwar U.S. entanglement in the ancient hatreds and turbulent frontiers of Europe, especially as the burdens of the final phase of the Pacific War loomed. As one historian has accurately stated, "The President wanted to keep clear of responsibility for the future pattern of relationships within Central and Eastern Europe, since he feared that it might lead to a call to keep American troops in Europe permanently." ²⁶⁸ Furthermore,

he continued [throughout the war] to restrain official interest in Eastern and Central European matters except as they might affect sentiment in the United States. He was determined to have a lot to say ... about the settlements in

²⁶⁰ [Id. at 307-08.](#)

²⁶¹ See Robert E. Sherwood, *Roosevelt and Hopkins: An Intimate History* 948 n.446 (1948); William R. Emerson, *F.D.R. (1941-1945)*, in *The Ultimate Decision: The President as Commander in Chief*, supra note 148, at 133, 149-50.

²⁶² See Sherwood, supra note 261, at 948 n.446 (commenting on the interactions of Chiefs of Staff and Roosevelt).

²⁶³ See 6 John Ehrman, *Grand Strategy: October 1944-August 1945*, at 344 (1956).

²⁶⁴ See James MacGregor Burns, *Roosevelt: The Soldier of Freedom* 404-05, 414-15 (1970).

²⁶⁵ Cf. John Ray, *The Second World War: A Narrative History* 196-98 (1999).

²⁶⁶ See 6 Ehrman, supra note 263, at 344.

²⁶⁷ See Ray, supra note 265, at 182, 236-37, 278-79. But cf. Sherwood, supra note 261, at 948 n.446 (stating that the generals discovered the advantage of acquiescing to the suggestions of the President before making formal propositions).

²⁶⁸ Feis, supra note 250, at 212.

the Pacific. But, since he thought it was nearly impossible to find happy solutions for many European problems, he wanted to remain as clear of them as he could, except for those involving Germany.²⁶⁹

As concerned as Roosevelt was about postwar commitments in Europe, he was equally concerned with the Russians' postwar intentions in those Eastern European countries on their borders. Roosevelt's intent to rebuff the Russians with respect to their intentions for Europe was as strong as that of his successor, President Truman.²⁷⁰ At the Conference at Yalta, however, while agreeing only to occupation forces for Germany proper (and a limited number in Austria), he was unwilling to commit U.S. forces to remain on **[*438]** occupation duty in Europe writ large after the conflict concluded.²⁷¹ During that conference, he placed a two-year limit on the presence of U.S. occupation forces, and while this was later extended, the President and his military leadership were joined at the hip in their belief at the time that the responsibility for the peace in Europe should not be Washington's.²⁷²

In viewing Roosevelt's role as a wartime President, three strands are evident. In the prewar years, his aggressive rearmament policy was directed toward deterring the aggressors, Germany and Japan, and providing military support for our allies. After Pearl Harbor, his role in military strategy and his involvement with his military leaders centered on his concern that the strategic decisions made would advance his political agenda to hold the alliance together. His decisions regarding the direction of the conflict in the war in Europe, notably during the defensive phase in North Africa and in the Italian campaign, were studiously guided by that critical need. In the latter phase of the war when offensive operations predominated after Guadalcanal in the Pacific and the North African campaign in the war with Germany, Roosevelt's strategy favored an approach that would ensure U.S. disengagement once the peace was secured.

This extraordinary President and leader, perhaps better than any President since Lincoln, was able to meld the political and military elements in a way that permitted a total national commitment during the war. Equally significant, he is remembered for his behind-the-scenes effort to structure the postwar environment through planning for a United Nations that could assist in international conflict resolution.²⁷³

3. Harry S. Truman

President Harry Truman was President eighty-three days shy of two full terms, having assumed the Presidency on April 12, 1945.²⁷⁴ He is our only President to have led the nation in two major conflicts, although many of the policies he executed in the remaining days of World War II, including the decision to drop the atomic bombs on Japan, **[*439]** were Roosevelt's.²⁷⁵ He is most remembered as Commander in Chief for his role as the U.S. President during the Korean War, during which more than 54,000 Americans died.²⁷⁶

²⁶⁹ Id. at 451.

²⁷⁰ See David McCullough, *Truman* 370-72, 630-31, 646-47 (1993); Samuel I. Rosenman, *Working with Roosevelt* 537-39 (1953) (arguing that President Roosevelt was puzzled and upset by Stalin's actions in the spring of 1945). See generally James P. Terry, *Moscow's Corruption of the Law of Armed Conflict: Important Lessons for the 21st Century*, [53 *Naval L. Rev.* 73 \(2006\)](#) (reviewing Stalin's post-Yalta actions and the clear evidence that Roosevelt had every right to be concerned with the intentions of the Russian leader).

²⁷¹ See Feis, *supra* note 250, at 212, 451.

²⁷² See Ray, *supra* note 265, at 240-41.

²⁷³ For a discussion of the planning for the United Nations, see Terry, *supra* note 1, at 11-23.

²⁷⁴ Jewell, *supra* note 36, at 292.

²⁷⁵ See 1 Harry S. Truman, *Memoirs* 9-11 (1955). When Truman assumed the Presidency upon Roosevelt's death, he had not been briefed on the Manhattan Project and was unaware of Roosevelt's plan to end the war through use of the atomic bomb. See *id.* at 10.

²⁷⁶ Brian Catchpole, *The Korean War* app. II (2000). This compared to the more than 57,000 U.S. servicemembers who died in Vietnam. See generally Terry, *supra* note 109, at 81.

Harry Truman had served with distinction as the Battery Commander of Company D, U.S. Army Artillery, in France in the First World War. ²⁷⁷ A no-nonsense Senator from Missouri in 1944, he was selected by Roosevelt over Henry Wallace for Vice President during that campaign because he was centered, forceful, and respected. ²⁷⁸ He had come into national prominence as head of the Truman Committee, which called for reorganization of the military structure. ²⁷⁹ The Committee's report proposed a reorganization of the Army and Navy into a single military department with a combined general staff. Although the 1947 National Security Act ²⁸⁰ was clearly a compromise and did not go nearly as far as the Truman Committee recommended, it was an important step in institutionalizing the important changes made by Roosevelt and described in the preceding pages, including formal establishment of the Joint Chiefs of Staff. ²⁸¹ Equally significant, it created the position of Secretary of Defense with clear coordinating authority over the three military departments (Air Force became a separate service) and further reduced the roles of the Service Secretaries. ²⁸² It eliminated the position of Chief of Staff to the President and replaced it with the Chairman of the Joint Chiefs of Staff ("Joint Chiefs" or "JCS"). ²⁸³ Implementation of the precise authority of the Joint Chiefs, as provided in the 1947 Act, was later effected through Department of Defense Directive 5100.1, which gave that body general direction of all combat operations. ²⁸⁴

[*440] As important as the National Security Act was for the military, it was even more important in ensuring effective coordination between our diplomatic and defense initiatives by establishing the National Security Council ("NSC") to meld political and military policy, so as to better advise the President. ²⁸⁵ The NSC replaced the State-War-Navy Coordinating Committee established to coordinate the immense demands upon all our institutions in addressing the requirements of the defeated Axis nations. ²⁸⁶ The NSC more than proved its merit in Korea by affording the President integrated input for rational decision-making and effective coordination of military operations.

When North Korean forces attacked south across the thirty-eighth parallel on June 24, 1950, Dean Acheson, Truman's Secretary of State, called the President at his home in Independence, Missouri, to report the events. ²⁸⁷ Truman took near immediate action. Meeting with his NSC on the evenings of June 25 and 26 in Washington at the Blair House (the White House was under renovation), he determined to send U.S. forces into Korea under U.N. authorization. ²⁸⁸ He further determined not to seek congressional authorization, but rather directed Acheson to prepare a list (it included eighty-seven incidents) of instances in the past when his predecessors had taken such

²⁷⁷ See McCullough, *supra* note 270, at 116-35 (1992).

²⁷⁸ See [id. at 320-23](#).

²⁷⁹ See 1 Truman, *supra* note 275, at 10, 56.

²⁸⁰ National Security Act of 1947, [Pub. L. No. 80-253](#), [61 Stat. 495](#).

²⁸¹ See Wilber W. Hoare, Jr., Truman (1945-1953), in *The Ultimate Decision: The President as Commander in Chief*, *supra* note 148, at 181, 185-86.

²⁸² [Id. at 185-87](#).

²⁸³ See [id. at 186](#).

²⁸⁴ Key West Agreement (Oct. 1, 1953), reprinted in Timothy W. Stanley, *American Defense and National Security* 176, 179-80 (1956) The Key West Agreement was later issued as DOD Directive 5100.1 on March 16, 1954.

²⁸⁵ See May, *supra* note 228, at 178.

²⁸⁶ See [id. at 175](#).

²⁸⁷ Hoare, *supra* note 281, at 189.

²⁸⁸ See Acheson, *supra* note 86, at 404-08.

action without the consent of Congress. ²⁸⁹ With this list in hand, he briefed the congressional leaders at the White House on June 27, 1950, stressing the point that it was under U.N. authority that the United States was acting. ²⁹⁰

In fact, the 1950 decision to intervene was considered under General Assembly authorization, ²⁹¹ rather than Chapter VII of the U.N. Charter with any means "as may be necessary," authorized by a Security Council Resolution. ²⁹² This use of Charter articles addressing the power of the General Assembly marked the first and only time in the United Nations' history that General Assembly authority has provided the basis for United Nations' action in a major conflict.

[*441] It had been Truman himself who had signed the United Nations Participation Act after congressional approval in 1945. ²⁹³ That Act implemented the U.N. Charter for the United States and specifically granted the President the authority to negotiate agreements with the United Nations concerning "the numbers and types of armed forces" to be supplied. ²⁹⁴ These agreements were to be submitted to Congress for approval. ²⁹⁵ Truman, however, viewed that provision to be in conflict with his Article II authority as Commander in Chief. ²⁹⁶ Thus, when Truman determined that more than logistical support was required by President Syngman Rhee's army, he directed not only air and naval assets be committed, but gave General Douglas MacArthur unfettered authority to employ the ground forces (Army and Marine) of the Far East Command. ²⁹⁷ Although Senator Robert Taft and others strongly objected to the lack of submission of these issues to Congress, the overwhelming sentiment in the country was that Truman was doing the right thing. This largely mooted the dissenting voices in Congress. ²⁹⁸

Of great importance, the relations between Truman's Secretary of Defense, George Marshall, ²⁹⁹ and the Secretary of State, Acheson, made the NSC work as it had been intended during the Korean conflict. This fact, coupled with the appointment of General Omar Bradley as Chairman of the JCS, made the relationships between the security team seamless and effective. ³⁰⁰ The United Nations Command, although established by a U.N. Resolution of July 7, 1950, literally had no impact on the actions of General MacArthur in carrying out the military campaign directed by the JCS and the President. Under the specific provisions of the Security Council Resolution, the United States acted as Executive Agent for the United Nations in Korea, and while it was required to report to the United Nations every two weeks, it had no requirement to clear its plans and **[*442]** was sole arbiter in its

²⁸⁹ See [id. at 407-10](#).

²⁹⁰ [Id. at 408-09](#).

²⁹¹ G.A. Res. 377(V), U.N. GAOR, 5th Session, Supp. No. 20 at 10-12, U.N. Doc. A/1775 (Nov. 3, 1950).

²⁹² U.N. Charter art. 42. Security Council action under Chapter VII of the Charter was blocked by Russia and China. The United Nations and International Law 107-08 (Christopher C. Joyner ed., 1997).

²⁹³ United Nations Participation Act of 1945, [Pub. L. No. 79-264](#), [59 Stat. 619](#) (1945).

²⁹⁴ *Id.* § 6, 59 Stat. at 621.

²⁹⁵ *Id.*

²⁹⁶ See Richard F. Haynes, *The Awesome Power: Harry S. Truman as Commander in Chief 171-72*, 174 (1973).

²⁹⁷ See Acheson, *supra* note 86, at 406-08; Haynes, *supra* note 296, at 180-81.

²⁹⁸ See McCullough, *supra* note 270, at 789.

²⁹⁹ Louis Johnson had been Secretary of Defense until early 1951, when, because of his inability to function effectively with Dean Acheson at State, Truman replaced him with Marshall, who had an excellent rapport with Acheson. Marshall had been Secretary and Acheson Deputy Secretary at State previously.

³⁰⁰ See *supra* note 299.

strategic decisions. ³⁰¹ In reality, the U.N. Command was the U.S. Far East Command, supplemented by South Korean and other allied forces. ³⁰²

The conflict itself saw the United States insert three Army divisions from Japan as well as a Marine brigade in July and August 1950 to halt the North Korean advance southward. ³⁰³ By September 1950, aided by a combined Marine Corps-Army envelopment through Inchon, the North Koreans had been pushed back to the thirty-eighth parallel. ³⁰⁴ In October, MacArthur's forces drove northward deep into North Korea and took Pyongyang. ³⁰⁵

The offensive was stopped short in late November as a massive Communist Chinese counter-offensive was launched across the Yalu River, driving the U.N. forces south of Seoul to the south bank of the Han River. ³⁰⁶ MacArthur then proposed a "new war" strategy that involved employing Nationalist Chinese forces from Taiwan, attacking Chinese bases and ordering a partial blockade of the Chinese coast. ³⁰⁷ Truman wanted no part of a Third World War, especially since General Ridgway was then making progress driving the North Korean and Chinese forces north again to the thirty-eighth parallel. He cabled General MacArthur with the following message:

We must act with great prudence in so far as extending the area of hostilities is concerned. Steps which might in themselves be fully justified and which might lend some assistance to the campaign in Korea would not be beneficial if they thereby involved Japan or Western Europe in large-scale hostilities. ³⁰⁸

MacArthur did not desist and went so far as to announce his own ultimatum to the Chinese and North Koreans to end hostilities, all the **[*443]** while knowing that Truman was preparing a truce proposal. ³⁰⁹ In his declaration to the opposing side, he suggested failure of the Chinese to accept his invitation could result in extended operations against the Chinese mainland. ³¹⁰ This action was accompanied by a defiant letter to Representative Joe Martin of Massachusetts in which he suggested that if the war with Communism in Asia was lost, the fall of Europe was inevitable. ³¹¹ Truman was livid, and after receiving the complete support of the NSC and the JCS, he relieved MacArthur of command and replaced him with General Matthew Ridgway. ³¹² He then proceeded to begin negotiations on an effective armistice for Korea, a task completed by his successor, President Dwight D. Eisenhower, in 1953. ³¹³

³⁰¹ See Military Situation In the Far East: Hearings Before the S. Comm. on Armed Services and the S. Comm. on Foreign Relations, 82d Cong. 10 (1951) (statement of Gen. McArthur).

³⁰² Cf. [id. at 326](#).

³⁰³ See Hoare, *supra* note 281, at 200.

³⁰⁴ *Id.*

³⁰⁵ *Id.* See generally Mark W. Clark, *From the Danube to the Yalu 24-28* (1954) (discussing the major phases of the conflict).

³⁰⁶ Hoare, *supra* note 281, at 201.

³⁰⁷ [Id. at 202](#); J. Christy & L.R. Cook, *American Aviation: An Illustrated History* 264 (2d ed. 1994).

³⁰⁸ Hoare, *supra* note 281, at 202 (quoting telegram from President Truman to Gen. MacArthur).

³⁰⁹ [Id. at 203](#).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Gary A. Donaldson, *America at War Since 1945: Politics and Diplomacy in Korea, Vietnam, and the Gulf War* 44 (1996); Hoare, *supra* note 281, at 203.

³¹³ Douglas Brinkley, *Dean Acheson: The Cold War Years, 1953-71*, at 15 (1994).

Truman, despite his relative lack of popularity when he left office, was one of our most effective wartime Commanders in Chief. As evidenced by his support and leadership in guiding the National Security Act through Congress in 1947, he clearly understood the importance of an integrated and effective national security team and a military whose leadership could work in a joint and cohesive manner. His support for the U.N. Participation Act in 1945 gave him the tools required to support the U.N. Command in Korea in 1950.³¹⁴ Harry Truman enjoyed the complete support and trust of his NSC and the JCS, and this was critical when he was forced to remove General MacArthur from command in 1951. Truman saw the big picture in understanding the consequences of expanding the Korean War beyond the Korean borders in ways that were not appreciated by Lyndon Baines Johnson in Vietnam in 1965.

4. Lyndon Baines Johnson

When Lyndon Johnson assumed the Presidency upon President Kennedy's assassination on November 22, 1963, nothing in his [*444] background had specifically prepared him for the role of wartime leader.³¹⁵ He had never served in the military, and had been by profession a teacher, Texas state official, U.S. Representative, U.S. Senator, and Senate Majority Leader before being asked by Senator Kennedy to serve as his running mate in 1960.³¹⁶

The Vietnam War, President Johnson's war, was highly complex.³¹⁷ It involved a combination of an externally supported civil war and a sustained invasion from the North.³¹⁸ The complexities of the guerrilla effort by the Viet Cong and infiltrators from the North proved particularly difficult for U.S. forces and allied forces (i.e., Australian and Korean). The enemy employed terrorism, including assassination, kidnapping, impressment of women and children into service in both military and quasi-military functions, as well as the extensive use of booby traps and the deliberate rocketing of urban areas to create an atmosphere of insecurity and uncertainty, much as the insurgents and imported terrorists have done in Operation Iraqi Freedom.

U.S. forces were engaged in a counter-insurgency for the first time in the modern era,³¹⁹ and successful prosecution of this war required a full understanding of its highly complicated strategy and techniques. Training had to be designed to address the civilian participation in combat. Equally important, the role of children as information collectors on behalf of the enemy had to be understood and addressed in a way that did not sour the U.S. force's own relations with helpful South Vietnamese. Certain U.S. units engaged in Vietnam were highly successful in employing strategies that countered the unconventional nature of this conflict, while others were not.³²⁰ And for the first time, the Department of Defense now spoke of "national [*445] security" policy and strategy instead of

³¹⁴ See United Nations Participation Act of 1945, [Pub. L. No. 79-264, 59 Stat. 619](#) (codified as amended at [22 U.S.C. § 287](#) (2006)); Robert F. Turner, Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth, 19 Harv. J.L. Pub. Pol'y 533, 541, 547 (1996) (discussing Truman's request to the Senate to promptly ratify the U.N. Charter, which could only be implemented through enactment of the Participation Act).

³¹⁵ See 7 Encyclopedia of American History 1057 (Richard B. Morris & Jeffrey B. Morris eds., 1996). See generally Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (2002) (providing an excellent biographical sketch of President Johnson).

³¹⁶ Caro, *supra* note 315, at xv-xvi, xxi.

³¹⁷ Editor's Note: This discussion of the Vietnam War and President Johnson's direction of the war is taken in part from James P. Terry, *The Vietnam War in Perspective*, [54 Naval L. Rev. 79 \(2007\)](#). The content as it appears in this Article has been slightly revised.

³¹⁸ See Stanley Karnow, *Vietnam: A History* 16-24 (1983).

³¹⁹ U.S. forces had previously engaged insurgents during the American occupation of the Philippines, including the Moro Rebellion, as well as the "Banana Wars" in Central America and the Caribbean.

³²⁰ The author personally observed that the Third and Fifth Marine Regiments were recognized for their sophistication in addressing these concerns, whereas certain other Army and Marine Corps units were less successful.

"national defense," in an apparent attempt to integrate President Johnson's doctrine of "flexible response" into military planning and operations in Vietnam. ³²¹

A true understanding of U.S. involvement in Vietnam requires not only a historical appreciation of the world's disengagement from colonialism, but an understanding of the pertinent articles and commitments extracted from the parties in the 1954 Geneva Accords, as well as our later coordinated commitments in Southeast Asia under the Southeast Asia Collective Defense Treaty (SEATO). ³²² The Geneva Accords concerned Vietnam (they also directly addressed Laos, Cambodia, and France; and indirectly the United States, as a result of the U.S. Declaration to the Accords), and in essence memorialized French capitulation to the Viet Minh and the division of Vietnam into two non-permanent military zones, one for the French Union Forces in the South and one for the Communists in the North. ³²³ A joint commission (with an equal number of representatives from the two parties) was to be set up by agreement between the Commanders in Chief of the French Union and the People's Armies. ³²⁴ An international commission, with Poland, India, and Canada represented, was to "be responsible for supervising the proper execution by the parties of the provisions of the [Geneva Accords] Agreement." ³²⁵

In August 1964, the United States asked the U.N. Security Council to consider the situation created by North Vietnamese attacks on U.S. destroyers in the Tonkin Gulf. ³²⁶ That same month, after no U.N. action, ³²⁷ the U.S. Congress passed a joint resolution providing President Johnson with what constituted an expression of **[*446]** approval and support for the President's determination "to repel any armed attack against the forces of the United States." ³²⁸ The joint resolution or so-called Gulf of Tonkin Resolution cited the attack by the Communist regime in Vietnam against U.S. naval vessels in international waters as part of a campaign of aggression by North Vietnam against its neighbors. ³²⁹ The resolution then stated that certain nations, including the United States, joined with South Vietnam's neighbors in collective defense of their freedom. The document then resolved three things. First, that Congress "approved and supported the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." ³³⁰ Second, that the United States, regarding the maintenance of peace and security in Southeast

³²¹ Terry, *supra* note 109, at 90.

³²² Southeast Asia Collective Defense Treaty, Sept. 8, 1954, [6 U.S.T. 81](#), 209 U.N.T.S. 28.

³²³ See Agreement Between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Viet-Nam on the Cessation of Hostilities in Viet-Nam (July 20, 1954), reprinted in *The Vietnam War and International Law* 554 (Richard A. Falk ed., 1968).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ The destroyers were the U.S.S. Turner Joy and the U.S.S. Maddox. The number of attacks, however, remains in dispute. See National Security Law, *supra* note 111, at 871 n.29.

³²⁷ More often than not, the U.N. Security Council Charter System has been ineffective in authorizing the use of force - even when the facts were overwhelmingly supportive of Chapter VII authority. See, e.g., Terry, *supra* note 1, at 33-34, 81-82, 89 (addressing the U.N. Security Council's failure to authorize the use of force under Chapter VII of the Charter in Kosovo and Iraq, despite the violations by Serbia and Iraq, respectively, of prior U.N. demands and U.N. threats of military action in previous resolutions).

³²⁸ Gulf of Tonkin Resolution, [Pub. L. No. 88-408](#), § 1, **78 Stat. 384**, 384 (1964) (repealed 1971). For further discussion of the Gulf of Tonkin Resolution, see [Mattola v. Nixon](#), [318 F. Supp. 538, 543-44 \(N.D. Cal. 1970\)](#).

³²⁹ Gulf of Tonkin Resolution § 3, [78 Stat. at 384](#). Section 3 of the Resolution provided that it could be terminated by concurrent resolution of Congress. The Gulf of Tonkin Resolution was later repealed by an amendment to the Military Sales Bill. Act of Jan. 12, 1971, [Pub. L. No. 91-672](#), § 12, [84 Stat. 2053](#), 2055 (1971).

³³⁰ Gulf of Tonkin Resolution § 1, [78 Stat. at 384](#).

Asia as vital to its national interests, was prepared, "consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty [and] as the President determined, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."³³¹ Third, that "this Resolution [would] expire when the President determined that the peace and security of the area [was] reasonably assured by international conditions created by the action of the United Nations or otherwise, except it [could] be terminated earlier by ... the Congress."³³²

As American casualties grew, the opponents of U.S. involvement in Vietnam argued that the Gulf of Tonkin Resolution was never intended by Congress to authorize the large scale, long-sustained war subsequently launched by President Johnson; that, on the contrary, the intent of Congress was merely to support the President during a reported emergency in his announced determination to repel any attack upon American ships or personnel in Vietnam, and that **[*447]** Congress would be further consulted with regard to any further commitment.³³³ Those in support of our military efforts not only found clear congressional support in the 1964 Resolution, but also in its continuing appropriations bills providing billions of dollars in support of military operations, as well as the congressional extension of the Military Selective Service Act.³³⁴

The Johnson Administration neither understood the conflict nor appreciated the brutality of the North Vietnamese, and in the words of Henry Kissinger,

the Kennedy and Johnson Administrations trapped themselves between their convictions and their inhibitions, making a commitment large enough to hazard our global position but then executing it with so much hesitation as to defeat their purpose. They engaged us in Indochina for the objective of defeating a global conspiracy and then failed to press a military solution for fear of sparking a global conflict - a fear that was probably as exaggerated as the original assessment.³³⁵

When President Nixon was inaugurated in January 1969, troop level commitments exceeded 535,000 Americans and over 65,000 allied soldiers.³³⁶ More than 35,000 Americans (30,610 in combat), and 4000 foreign allied troops, and double that number of South Vietnamese - 88,343 - had already died.³³⁷ This total of U.S. dead would exceed 57,000 before our final departure in 1975.³³⁸ Unfortunately, the level of contempt for the Johnson Administration and for the Nixon Administration that followed effected a national **[*448]** bitterness that those serving in uniform found difficult to comprehend.³³⁹

³³¹ Id. § 2, 78 [Stat. at 384](#).

³³² Id. § 3, 78 [Stat. at 384](#).

³³³ See, e.g., Lawrence R. Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 Kan. L. Rev. 449, 451-53 (1968) (citing the legislative debate leading to the passage of the Tonkin Gulf Resolution and the subsequent testimony at the 1967 National Commitment Hearings).

³³⁴ Military Selective Service Act of 1967, [Pub. L. 90-40](#), § 12, [81 Stat. 100](#), 105; see, e.g., [Holtzman v. Schlesinger](#), 361 F. Supp. 553, 561-62 (E.D.N.Y. 1973).

³³⁵ Henry Kissinger, *Years of Upheaval* 82 (1982).

³³⁶ Harry G. Summers, Jr., *Vietnam War Almanac* 48 (1985). These allied troops were primarily Australian and South Korean military forces.

³³⁷ Id. This helps to explain the national angst of personal loss felt throughout the country in 1969. It is especially understandable in light of the present deep national concern as a result of more than 3000 Americans having perished in Operation Iraqi Freedom after forty-eight months.

³³⁸ [Id. at 113](#). The total was 57,690.

³³⁹ See Karnow, *supra* note 318, at 625-27.

The loss of Vietnam to Communist forces can be attributed to several factors - political, military, and economic. Politically, the self-limiting strategies imposed by the two Presidents, Johnson and Nixon, are critical to an understanding of the final phase of the war. President Johnson restricted our military effectiveness out of fear of escalating the conflict and his desire that it not hurt Democrats in the 1968 elections, while Nixon did the same until the December 1972 resumption of bombing in the North - arguably to gain maneuvering room for an honorable extrication as well as for leverage in Paris and to redress violations of the cease-fire. Meanwhile, as more and more Americans died during the latter part of President Nixon's first term, the American people were confused over a strategy to withdraw with honor while our troops were being asked to die to maintain America's global credibility.

Understanding the Vietnam War requires putting aside preconceptions and appreciating this conflict as part of a larger Cold War continuum. Indeed, certain critical post-World War II events were part of that continuum, including: the Communist victory in China in 1949, the Korean War from 1950-1953, and Fidel Castro's 1959 consolidation of power in Cuba. ³⁴⁰ Seen in their historical context, these struggles were important major battles in a war, the so-called (but inappropriately named) Cold War between Communist regimes and the West. ³⁴¹

Equally significant is an understanding that historically, no great military power - and the United States is that - can wage a war without losing battles. Vietnam was perceived by the American people, and historians generally, as a loss. ³⁴² Militarily it was not a victory, but strategically it was, as was Korea, a major element in the worldwide process of exhausting the Communist movement, and in showing that movement to be nothing more than a skill for oligarchies led by corrupt dictators.

Unfortunately, this broader scope is not yet the subject of widespread historical inquiry in the United States. In that narrower realm, however, as in the broader canvas sketched above, we have **[*449]** similarly not focused on the right issues. Both the President and military leaders must agree on a definition of victory, as Truman understood in Korea, and make this apparent to the American people. Our strategic goal need not be total submission of the enemy forces, but need only be a resolution of the political crisis that led to our involvement, such as the ejection of Iraqi forces from Kuwait in the first Gulf War or the restoration of the status quo in Korea. When, however, as in Vietnam, there is divergence between what we are doing and what we say we are doing, the loss of public support for the President is inevitable. This was true in the case of Lyndon Baines Johnson.

C. The Gulf War Presidents - The 1990-1991 and 2003-2009 Middle East Crises

The two major Gulf conflicts managed by Presidents George Herbert Walker Bush and his son, President George Walker Bush, in 1990-1991 and 2003-2009, respectively, stand in significant contrast to the other more limited post-Vietnam conflicts in which U.S. forces have been engaged: Grenada (1983), ³⁴³ Nicaragua (1982-1986), ³⁴⁴ Panama (1989-1990), ³⁴⁵ Somalia (1992-1994), ³⁴⁶ Bosnia (1992-1995), ³⁴⁷ Haiti (1992-1993), ³⁴⁸ and Kosovo (1998-2000). ³⁴⁹

³⁴⁰ See Terry, *supra* note 109, at 79, 82, 85, for a discussion of elements of this continuum.

³⁴¹ See generally Terry, *supra* note 270 (providing a full discussion of those other instances where the Soviet Union engaged in the Cold War).

³⁴² See Terry, *supra* note 109, at 101-03 (reviewing these perspectives).

³⁴³ See generally James Ferguson, *Grenada: Revolution in Reverse* (1990).

³⁴⁴ See generally Robert F. Turner, *Nicaragua v. United States: A Look at the Facts* (1987).

³⁴⁵ See generally Terry, *supra* note 90.

³⁴⁶ See generally Robert C. DiPrizio, *Armed Humanitarians: U.S. Interventions from Northern Iraq to Kosovo* 44-49 (2002); Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention under International Law - Part II*, [26 Denv. J. Int'l L. & Pol'y 827, 831-36 \(1998\)](#).

1. George Herbert Walker Bush

Few Presidents have entered the White House with the record of service enjoyed by George H.W. Bush upon his election in November [*450] 1988.³⁵⁰ He had not only served with distinction as a Navy combat pilot during World War II, but as a U.S. Representative from Texas, as U.N. Ambassador, as U.S. Envoy to China, and ably as President Reagan's Vice President for eight years.³⁵¹

In office eighteen months when Iraq invaded Kuwait in August 1990, the George H.W. Bush Administration and the U.S. ground and naval forces assigned to the U.N.-sponsored Coalition in Desert Shield/Desert Storm in 1990-1991 were to endure legal scrutiny unlike that of any prior military campaign.³⁵² In contrast to other combat in which U.S. forces were recently involved (Vietnam, Grenada, and Panama), U.S. involvement in Desert Storm was concluded under the threat of chemical strikes and of indiscriminate surface-to-surface missile ("scud") attacks.³⁵³

When an Iraqi force of over 100,000 troops and several hundred tanks invaded Kuwait with great precision on August 2, 1990, the Kuwaiti military, consisting of only 20,000 men and 250 tanks, was quickly routed.³⁵⁴ The Emir and Crown Prince (who also served as Prime Minister) fled to Saudi Arabia.³⁵⁵ The invasion followed by less than one day the collapse of negotiations on financial and territorial claims made by Iraq's Saddam Hussein.³⁵⁶ Iraq's rationale for war was multifaceted. In July 1990, Iraq was burdened with a huge \$ 82 billion dollar debt, largely as a result of its 1980-1988 war with Iran.³⁵⁷ Twenty-five billion dollars of this amount was owed to Kuwait's Emir, who claimed and administered the contested islands of Warba and Bubiyan, which controlled Iraqi access to the Persian Gulf.³⁵⁸ Kuwait had also sown displeasure in Baghdad in early 1990 by producing more than its OPEC allocation of crude oil, thus helping to [*451] drive down world prices.³⁵⁹ In Iraq's view, the invasion further served to resolve a longstanding territorial grievance with Kuwait dating to the British demarcation of Arab borders in 1922, after the collapse of the Ottoman Empire.³⁶⁰

³⁴⁷ See generally James P. Terry, UN Peacekeeping and Military Reality, *Brown J. of World Affairs*, Winter-Spring 1996, at 135-44.

³⁴⁸ See generally DiPrizio, *supra* note 346, at 87-93; Nanda et al., *supra* note 346, at 841-46.

³⁴⁹ See generally James P. Terry, Response to Ethnic Violence: The Kosovo Model, *Brown J. of World Affairs*, Winter-Spring 1999, at 233, 233-46.

³⁵⁰ See Jewell, *supra* note 36, at 419.

Editor's Note: The following material, presented here under the heading "George Herbert Walker Bush," was published previously, in large measure, in James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance with the Rule of Law*, 41 *Naval L. Rev.* 83 (1993). The content as it appears in this Article has been slightly revised.

³⁵¹ See Jewell, *supra* note 36, at 414-18.

³⁵² The legal issues arising from the First Gulf War are chronicled in the Department of Defense final report to Congress, issued pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, **Pub. L. No. 102-25, 105 Stat. 75**. See generally Dep't of Def., *Conduct of the Persian Gulf War* 602-32 (1992).

³⁵³ See John Norton Moore, *Crisis in the Gulf: Enforcing the Rule of Law* 3 (1992).

³⁵⁴ John Robert Greene, *The Presidency of George Bush* 113 (2000).

³⁵⁵ *Id.*

³⁵⁶ See *id.*

³⁵⁷ *Id.* at 109.

³⁵⁸ See *id.* at 111.

³⁵⁹ *Id.*

³⁶⁰ See generally Moore, *supra* note 353, at 201-23 (discussing the history of territorial grievances of the Arab borders).

The actions undertaken on behalf of Kuwait were pursued under Chapter VII of the U.N. Charter.³⁶¹ On the day of the invasion, the Security Council condemned the invasion and demanded that Iraq "withdraw immediately and unconditionally all its forces."³⁶² On August 6, 1990, the Council ordered a comprehensive trade and financial embargo.³⁶³ Three days later, the Council voted 15-0 to declare null and void Iraq's purported annexation of Kuwait of August 9.³⁶⁴ On August 18, the Council again voted 15-0 to demand that Iraq free all detained foreigners.³⁶⁵ Thereafter, in a subsequent resolution, this body reflected its acceptance of the U.S. position that force might be necessary to enforce the sanctions.³⁶⁶ As the embargo authorized by Resolution 661 continued, some countries began to suggest they would allow food shipments to Iraq. The Security Council had already allowed distribution to those most in need in Iraq, but not to the Iraqi military.³⁶⁷

The Council continued to be concerned with strict compliance with the embargo. One issue which arose was whether aircraft flying to Iraq were adhering to the economic sanctions.³⁶⁸ Addressing this matter directly on September 25, 1990, the Council directed States to take steps to ensure their aircraft or aircraft flying over their territory were in compliance with the embargo imposed by Resolution 661.³⁶⁹ The Security Council next tightened the pressure on Baghdad by laying the groundwork for seizing Iraqi assets that **[*452]** had been frozen around the world.³⁷⁰ Resolution 674 declared Iraq responsible for all damage and personal injuries resulting from its invasion and illegal occupation of Kuwait, and requested that States collect relevant information regarding their claims and those of their nationals and corporations "for restitution or financial compensation by Iraq."³⁷¹ Finally, when it was apparent that these lesser measures were inadequate, the Council authorized "all necessary means" after January 15, 1991, to enforce its edict that Iraq withdraw all forces from Kuwait and "to restore international peace and security in the area."³⁷²

Following the August 1990 invasion, President Bush had deployed a large military force to the Gulf region.³⁷³ Bush Administration lawyers argued that he needed no authorization from Congress to assist in implementing Resolution 678 after January 15, 1991.³⁷⁴ Congress was adamant that he did, and in January 1991, President Bush formally requested a resolution of approval without admitting it was constitutionally required.³⁷⁵ The joint resolution, which narrowly passed in the Senate (52-47), "authorized the President to use armed force "pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council

³⁶¹ *Id.* at 149. Chapter VII of the U.N. Charter provides that the Security Council may authorize enforcement action such as authorized in Resolution 678 dated November 29, 1990. *Id.*; U.N. Charter arts. 39-49.

³⁶² S.C. Res. 660, P 2, U.N. Doc. S/RES/660 (Aug. 2, 1990); Moore, *supra* note 353, at 26.

³⁶³ See S.C. Res. 661, PP 3-4, U.N. Doc. S/RES/661 (Aug. 6, 1990).

³⁶⁴ S.C. Res. 662, P 1, U.N. Doc. S/RES/662 (Aug. 9, 1990); Moore, *supra* note 353, at 26-27.

³⁶⁵ S.C. Res. 664, P 1, U.N. Doc. S/RES/664 (Aug. 18, 1990); Moore, *supra* note 353, at 27.

³⁶⁶ See S.C. Res. 665, PP 1-2, U.N. Doc. S/RES/665 (Aug. 25, 1990); see also Moore, *supra* note 353, at 27.

³⁶⁷ See S.C. Res. 661, *supra* note 363, PP 3-4.

³⁶⁸ See S.C. Res. 670, PP 2-4, U.N. Doc. S/RES/670 (Sept. 25, 1990).

³⁶⁹ *Id.* P 2.

³⁷⁰ See S.C. Res. 674, PP 8-9, U.N. Doc. S/RES/674 (Oct. 29, 1990).

³⁷¹ *Id.*

³⁷² S.C. Res. 678, P 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

³⁷³ National Security Law, *supra* note 111, at 874.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677 [but not U.N. Resolution 678]."³⁷⁶ "By refusing to authorize the President to use force 'to achieve implementation' of Resolution 678, Congress provided no authority to use force beyond ejecting Iraqi forces from Kuwait."³⁷⁷ The inclusion of the U.N. authorization contained within Resolution 678 "to restore international peace and security in the area," which would have justified going to Baghdad, was not approved by Congress.³⁷⁸

The resulting use of force against Iraq pursuant to U.N. authorization (limited as it was), and the right of collective self-defense, embraced the customary principles of necessity and **[*453]** proportionality.³⁷⁹ The forces of the U.S. Central Command under General Schwarzkopf, and those of the Coalition partners, in coordination with JCS Chairman General Powell, Defense Secretary Cheney, and the NSC, carefully avoided intentional destruction of civilian objects not imperatively required by military necessity, and avoided directly attacking civilians not taking part in the hostilities.³⁸⁰ Coalition forces adhered to these principles through target selection and the matching of available forces and weapons systems to selected targets and Iraqi defenses, notwithstanding Iraq's violations of its law of war obligations toward the Kuwaiti civilian population and civilian objects.³⁸¹

When Iraqi forces had entered Kuwaiti territory on August 2, 1990, the provisions of the Geneva Civilians Convention ("GCC") were immediately applicable.³⁸² By its actions, Iraq had become an occupying power in Kuwait, with specific obligations to the Kuwaiti people and other third-state nationals in Kuwait and in Iraq.³⁸³ Although Iraqi officials were quick to claim that U.S. citizens in Iraq and Kuwait were spies, Security Council Resolution 664 of August 18, 1990, made clear that the Iraqi government was obliged to comply completely with the GCC, and carefully outlined its legal obligations with regard to foreign civilians under Iraqi control.³⁸⁴ Resolution 644 obligated Iraq to allow the departure of U.S. citizens and other third-state nationals from Kuwait or Iraq unless national security dictated otherwise.³⁸⁵ Under Articles 5, 42, and 78 of the GCC, Iraq "could intern foreign nationals in Iraq only if internal security made it 'absolutely necessary' (in Iraq) or 'imperative' (in Kuwait)."³⁸⁶ Iraq **[*454]** did not assert these provisions in defense of its illegal hostage-taking.³⁸⁷

³⁷⁶ Id. (quoting S.J. Res. 2, 102d Cong. § 2(a) (1991) (enacted)).

³⁷⁷ Id.

³⁷⁸ Id. (quoting S.C. Res. 678, *supra note 372, P 2*).

³⁷⁹ The principle of necessity "in the law of armed conflict permits only that degree and kind of force, not otherwise prohibited by the law, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources." Terry, *supra note 124*, at 86 n.11.

³⁸⁰ See Douglas Little, *American Orientalism: The United States and the Middle East Since 1945*, at 255, 261 (2002); Moore, *supra note 353*, at 160-64.

³⁸¹ Moore, *supra note 353*, at 159-60.

³⁸² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, [6 U.S.T. 3516](#), 75 U.N.T.S. 287 [hereinafter GCC].

³⁸³ See *id.* arts. 47-78 (describing requirements and responsibilities imposed on a nation occupying another's territory); see also S.C. Res. 664, *supra note 365*, P 1.

³⁸⁴ S.C. Res. 664, *supra note 365*, PP 1-2.

³⁸⁵ Id. P 1.

³⁸⁶ *Conduct of the Persian Gulf War*, *supra note 352*, at 607; GCC, *supra note 382*, arts. 5, 42, 78.

³⁸⁷ *Conduct of the Persian Gulf War*, *supra note 352*, at 607.

The conduct of the Iraqi government was the more onerous because of its placement of U.S. and other forced detainees in or around military targets as "human shields," in violation of Articles 28 and 38(4) of the GCC.³⁸⁸ This act, coupled with the taking of hostages in violation of Article 34 of the GCC, unlawful deportations in violation of Article 49 of the same Convention, and compelling hostages to serve in the Iraqi military, were all grave breaches under Article 147 of the GCC, and thus punishable as war crimes should trial and conviction result.³⁸⁹

As a result of intense international pressure, noncombatant hostages from the United States and other third parties (except Kuwaitis) were released in December 1990, well before the commencement of Coalition combatant operations.³⁹⁰ Not only did Iraq not release Kuwaiti civilians, but it seized many more during the final phase of Operation Desert Storm and used them to shield retreating Iraqi forces from Coalition forces liberating Kuwait.³⁹¹

Iraq treated civilians in the occupied state brutally.³⁹² The government of Kuwait estimated that "1,082 civilians were murdered during the occupation," with many more "forcibly deported to Iraq."³⁹³ The August 2, 1990, invasion implicated not only the GCC on behalf of Kuwaiti citizens, but also the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, the 1948 Genocide Convention, and the 1954 Hague Convention on the Protection of Cultural Property.³⁹⁴ Although Iraq is not a party to the 1907 Hague Convention, the International Military Tribunal at Nuremberg stated **[*455]** in 1946 that its rules are recognized by all civilized nations as being a declaration of the "laws and customs of war."³⁹⁵

From the outset, Iraqi forces and its government leaders denied Iraq's status as an occupying power.³⁹⁶ That denial was belied, however, by Iraq's claim of Kuwait as the nineteenth Iraqi province and its transfer of a part of the Iraqi civilian infrastructure into occupied Kuwait for the purpose of annexation and resettlement, both of which constituted clear violations of Article 49 of the GCC.³⁹⁷

The events leading up to the first Gulf War in 1990-1991, the Desert Shield and Desert Storm operations, and the follow-on Provide Comfort and Southern Watch initiatives, will continue to be reviewed by historians and lawyers because they represent textbook examples of both disregard for, and compliance with, the rule of law. In precipitating the 1990 crisis, in invading and occupying Kuwait, and in engaging Coalition forces, Saddam Hussein reached ever-greater heights of ingenuity in flouting the rule of law of civilized nations. Conversely, the Coalition

³⁸⁸ [Id. at 608](#); GCC, supra note 382, arts. 28, 38(4).

³⁸⁹ See *Conduct of the Persian Gulf War*, supra note 352, at 607-08; GCC, supra note 382, arts. 34, 49, 147. Article 146 of the GCC requires that all those alleged to have committed grave breaches, as defined in Article 147, must be searched for and brought before the courts of a party to the Convention which can make a prima facie case. *Id.* art. 146.

³⁹⁰ *Conduct of the Persian Gulf War*, supra note 352, at 608.

³⁹¹ *Id.*

³⁹² See [id. at 609](#).

³⁹³ [Id. at 610](#).

³⁹⁴ See [id. at 608-09, 621](#); see also Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, [36 Stat. 2279](#), 249 U.N.T.S. 215; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, [36 Stat. 2277, 1 Bevans 631](#).

³⁹⁵ International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 Am. J. Int'l L. 172, 248-49 (1947).

³⁹⁶ *Conduct of the Persian Gulf War*, supra note 352, at 608.

³⁹⁷ See [id. at 608-09](#); GCC, supra note 382, art. 49 (providing in part "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies").

forces complied with both jus ad bellum (the law of just war or self-defense) and jus in bello (the law of the conduct of war).³⁹⁸

Of importance, the U.N. Security Council has never worked harder to ensure that a victim of aggression was returned to the status quo ante and that the aggressor was appropriately penalized for its actions. While the U.N.-sponsored Coalition successfully expelled Iraq from Kuwaiti territory, however, the compensation for damage and depletion of resources was not forthcoming. Stonewalling by the Baathist regime of Saddam Hussein came at the expense of the government of Kuwait.

Resolution 692 created an effective regime for compensation drawn from Iraqi oil export revenues.³⁹⁹ This resolution also allocated a share of those revenues to provide relief to the Iraqi people.⁴⁰⁰ Nevertheless, Saddam Hussein refused to avail himself of this **[*456]** opportunity, denying compensation to Kuwait and all but minimal food and medicine to his own people.⁴⁰¹

The actions of the Iraqi leadership under Saddam Hussein not only frustrated the Kuwaitis' right to reparations, but emphasized that the people of Iraq, with no history of democratic participation and no cohesive infrastructure capable of mobilizing against tyrannical leadership, would not only suffer from without, but more egregiously from within. This had nothing to do with the law of armed conflict, but with the failed political system in Baghdad.

The actions on the part of the Baathists observed during and after Desert Storm emphasized the fact that the United Nations' failure to enforce acceptable behavior on the part of Iraq could not be attributed to an inadequacy of law, but rather to an enforcement regime not fully implemented by the member states. In form, the enforcement mechanisms were more than satisfactory. In substance, the United Nations proved incapable of exerting sufficient pressure on the Iraqi government to enforce anything near full compliance. Unfortunately, the failure of the United Nations was translated as a weakness of the Bush Administration, and likely hurt President Bush during the 1992 campaign. In reality, however, President Bush's adherence to the strictures of the congressional mandate for Iraq, as it had interpreted U.N. Resolution 678, both saved American lives and restored sovereignty in Kuwait.⁴⁰²

2. George Walker Bush

When George Walker Bush was elected by the slightest of electoral college margins over Democrat Al Gore in 2000, many nevertheless believed he would be seen as one of our stronger Presidents, largely because of the strength of the national security team he assembled.⁴⁰³ The Department of Defense was headed by Donald Rumsfeld, a no-nonsense former Secretary who had been a scion **[*457]** in industry.⁴⁰⁴ His Vice President, Richard Cheney, had previously served in Congress, as Chief of Staff to Gerald Ford, and as a strong Secretary of Defense under George H.W. Bush, before serving as the Chairman and CEO of Haliburton.⁴⁰⁵ General Colin

³⁹⁸ David A. Sadoff, A Question of Determinacy: The Legal Status of Anticipatory Self-Defense, [40 Geo. J. Int'l L. 523, 526 \(2009\)](#) (discussing the difference between jus ad bellum and jus in bello).

³⁹⁹ S.C. Res. 692, P 6, U.N. Doc. S/RES/692 (May 20, 1991).

⁴⁰⁰ See id. PP 6-10.

⁴⁰¹ See Conduct of the Persian Gulf War, supra note 352, at 609. U.N. Security Council Resolution 692 was designed to ensure reparations were adequately funded for the restoration of Kuwait, and to operate in conjunction with U.N. Security Council Resolution 661. See S.C. Res. 692, supra note 399.

⁴⁰² See, e.g., S.C. Res. 678, supra note 372.

⁴⁰³ Jewell, supra note 36, at 461.

Editor's Note: The following material, presented here under the heading "George Walker Bush," was published previously, in large measure, in James P. Terry, A Legal Appraisal of Military Action in Iraq, 57 Naval War C. Rev. 53 (2004). The content as it appears in this Article has been slightly revised.

⁴⁰⁴ Jewell, supra note 36, at 461.

Powell had previously served as Deputy National Security Advisor, National Security Advisor, and as a highly respected Chairman of the Joint Chiefs of Staff under George H.W. Bush. ⁴⁰⁶ Powell's appointment as Secretary of State was viewed by many as the crown jewel in the cabinet. ⁴⁰⁷ The National Security Advisor, Condoleezza Rice, although serving in her first senior national security post, was widely viewed as one of the preeminent Russian scholars in U.S. academia, having most recently served as Stanford's Provost. ⁴⁰⁸

The determination by President George W. Bush to enter Iraq and remove the regime of Saddam Hussein from power in early 2003 followed twelve years of Iraqi violations of U.N. Security Council Resolutions following Operation Desert Storm. ⁴⁰⁹ Prior to the decision by the United States and its coalition partners to intervene in Iraq with military force in 2003, Saddam Hussein had done everything possible to avoid compliance with the will of the international community. Of the twenty-six demands made by the Security Council since 1991, Iraq had complied with only three. ⁴¹⁰ Equally significant, the regime's repression of the Iraqi people had continued.

The October 16, 2002, joint resolution of Congress authorizing the use of all means, including force, to bring Iraq into compliance was merely one of a series of actions by Congress to address the noncompliance by Baghdad of its international obligations. ⁴¹¹ In 1998, for example, Congress passed a similar resolution at the request of **[*458]** President Clinton. ⁴¹² That resolution declared that "Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security," declared Iraq to be in material breach of its international obligations, and urged the President "to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations." ⁴¹³

These congressional and U.N. Security Council Resolutions were not the only outcry for change. In the Iraq Liberation Act passed in 1998, U.S. lawmakers expressed the sense of Congress that "it should be the policy of the United States to support efforts to remove ... from power [the Iraqi regime], and promote the emergence of a democratic government to replace that regime." ⁴¹⁴ The reasons for this strong congressional reaction to the Hussein regime rested not solely on Iraqi defiance of U.N. resolutions, but also on Saddam Hussein's repression of the Iraqi people, his support for international terrorism, his refusal to account for Gulf War prisoners, his refusal to return stolen property to Kuwait following the 1990-1991 conflict, and the Baathist regime's efforts to circumvent economic sanctions. ⁴¹⁵

⁴⁰⁵ Id. at 452; Biography.com, Richard B. (Dick) Cheney Biography, <http://www.biography.com/search/article.do?id=9246063&part=0> (last visited May 20, 2009).

⁴⁰⁶ Academy of Achievement, General Colin L. Powell, <http://www.achievement.org/autodoc/page/pow0bio-1> (last visited May 20, 2009).

⁴⁰⁷ See id.

⁴⁰⁸ See Encyclopedia of World Biography, Condoleezza Rice - Biography, <http://www.notablebiographies.com/news/Ow-Sh/Rice-Condoleezza.html> (last visited May 20, 2009).

⁴⁰⁹ See James P. Terry, A Legal Appraisal of Military Action in Iraq, 57 Naval War C. Rev. 53, 55, 65 n.9 (2004) (referencing the violated U.N. Security Council Resolutions during Operation Desert Storm).

⁴¹⁰ Id.

⁴¹¹ Authorization for Use of Military Force Against Iraq Resolution of 2002, **Pub. L. No. 107-243**, § 3(a), **116 Stat. 1498**, 1501.

⁴¹² Finding the Government of Iraq in Unacceptable and Material Breach of its International Obligations, **Pub. L. No. 105-235**, **112 Stat. 1538** (1998).

⁴¹³ Id. at 1540-41.

⁴¹⁴ Iraq Liberation Act of 1998, **Pub. L. No. 105-338**, § 3, **112 Stat. 3178**, 3179.

⁴¹⁵ See id. § 2.

The U.S. intervention with its coalition partners in Iraq in March 2003 must be viewed as a significant historical precedent in the relationship of a major power to the Security Council. Previously in 1999 in Kosovo, the United States and a coalition largely made up of NATO partners intervened to rescue and protect the threatened Albanian population from Serb aggression without specific Security Council approval.⁴¹⁶ The military action in Kosovo could arguably be justified as a humanitarian intervention created by the inhuman treatment of the Albanians by Milosevic. However, the coalition entry into Iraq in 2003 was justified on the basis of repeated violations of U.N. Security Council Resolutions under Chapter VII (authorizing all necessary means), and the threat to international peace and security in the region and to the world community posed by the [*459] Saddam Hussein regime as a result thereof.⁴¹⁷ As President Bush stated to the U.N. General Assembly on September 12, 2002:

Twelve years ago, Iraq invaded Kuwait without provocation. And the regime's forces were poised to continue their march to seize other countries and their resources. Had Saddam Hussein been appeased instead of stopped, he would have endangered the peace and stability of the world. Yet, this aggression was stopped by the might of coalition forces and the will of the United Nations.

In order to suspend hostilities and to spare himself, Iraq's dictator accepted a series of commitments. The terms were clear to him, and to all. And he agreed to prove he is complying with every one of those obligations. He has proven instead only his contempt for the United Nations and for all his pledges. By breaking every pledge, by his deceptions and by his cruelties, Saddam Hussein has made the case against himself.

... .

The conduct of the Iraqi regime is a threat to the authority of the United Nations and a threat to peace. Iraq has answered a decade of United Nations demands with a decade of defiance. All the world now faces a test and the United Nations a difficult and defining moment. Are Security Council resolutions to be honoured and enforced or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?⁴¹⁸

Thus, the intervention in Iraq must be viewed through a different lens than either our intervention in Afghanistan, where we responded to a direct attack on the United States, or our intervention in Kosovo, where the coalition responded to a humanitarian crisis created by Serb atrocities.⁴¹⁹ In Iraq, the coalition led by the United States and [*460] the United Kingdom was responding to an attack on the very effectiveness of the U.N. security system by seeking redress for repeated violations of Security Council resolutions. If not addressed directly, such violations would have both done irreparable harm to the minimum world-order system represented by Article 2, paragraph 4,

⁴¹⁶ See generally James P. Terry, Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism, [2004 Army Law. 36](#) (discussing the development of humanitarian intervention under international law, and the application to Kosovo).

⁴¹⁷ See *id.*

⁴¹⁸ U.N. GAOR, 57th Sess., 2d plen. mtg. at 6, 8, U.N. Doc. A/57/PV.2 (Sept. 12, 2002).

⁴¹⁹ See the statement of Christopher Greenwood, a Professor of International Law at London School of Economics:

There is a right to humanitarian intervention when a government - or the factions in a civil war - create a human tragedy of such magnitude that it constitutes a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so.

It is from this state practice that the right of humanitarian intervention on which NATO now relies has emerged.

Christopher Greenwood, Yes, but Is the War Legal?, *The Observer*, Mar. 28, 1999, at 22, available at <http://www.guardian.co.uk/world/1999/mar/28/theobserver6>.

and Chapter VII of the U.N. Charter, to the peace and security of the region, and to the well-being of the Iraqi people through continued repression. ⁴²⁰

Prior to intervention on March 19, 2003, and the inception of Operation Iraqi Freedom, the regime of Saddam Hussein had repeatedly violated sixteen U.N. Security Council resolutions designed to place sharp controls on the regime's activities, and to ensure that Iraq did not pose a threat to international peace and security. ⁴²¹ These violations spanned a period of more than a decade, and are first addressed in Security Council resolutions arising from the Iraqi invasion of Kuwait in August 1990. ⁴²²

In 1994, for example, Saddam Hussein's regime began military deployments once again designed to threaten Kuwait. ⁴²³ The Security Council condemned these military deployments, and directed Iraq not to utilize its military or other forces in a hostile manner to threaten its neighbors or U.N. operations in Iraq. ⁴²⁴

Within two years, it was apparent that Saddam Hussein was again acquiring unauthorized weapons components. In response, the U.N. Security Council passed Resolutions 1051 and 1060 in 1996. ⁴²⁵ In Resolution 1051, the Council demanded that Iraq report shipments of [*461] dual-use items related to weapons of mass destruction to the United Nations and the International Atomic Energy Agency ("IAEA"). ⁴²⁶ It also required that Iraq cooperate fully with U.N. and IAEA inspectors and allow immediate, unconditional, and unrestricted access. ⁴²⁷ This was followed by Resolution 1060, which deplored Iraq's refusal to allow access to U.N. inspectors, and Iraq's "clear violations" of previous U.N. resolutions. ⁴²⁸

With access for inspectors still effectively denied in 1997, the Security Council passed Resolution 1115, which "condemn[ed] the repeated refusal of the Iraqi authorities to allow access" to U.N. officials. ⁴²⁹ The Council claimed that these actions were a "clear and flagrant violation" of U.N. Security Council Resolutions 687, 707, 715, and 1060. ⁴³⁰ In Resolution 1134, the Security Council repeated its demands contained in Resolution 1115. ⁴³¹ When

⁴²⁰ Article 2, paragraph 4, prohibits the use of force by states while Chapter VII, and specifically Article 51 within Chapter VII, provides the one exception for states and states acting collectively to respond to breaches of the peace when necessary in national self-defense. See U.N. Charter art. 2, para. 4; id. art. 51.

⁴²¹ See, e.g., S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999); S.C. Res. 1205, U.N. Doc. S/RES/1205 (Nov. 5, 1998); S.C. Res. 1194, U.N. Doc. S/RES/1194 (Sept. 9, 1998); S.C. Res. 1154, U.N. Doc. S/RES/1154 (Mar. 2, 1998); S.C. Res. 1137, U.N. Doc. S/RES 1137 (Nov. 12, 1997); S.C. Res. 1134, U.N. Doc. S/RES/1134 (Oct. 23, 1997); S.C. Res. 1115, U.N. Doc. S/RES/1115 (June 21, 1997); S.C. Res. 1060, U.N. Doc. S/RES/1060 (June 12, 1996); S.C. Res. 1051, U.N. Doc. S/RES/1051 (Mar. 27, 1996); S.C. Res. 949, U.N. Doc. S/RES/949 (Oct. 15, 1994); S.C. Res. 715, U.N. Doc. S/RES/715 (Oct. 11, 1991); S.C. Res. 707, U.N. Doc. S/RES/707 (Aug. 15, 1991); S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991); S.C. Res. 678, *supra* note 372.

⁴²² See [supra notes 362-366, 368, 370, 372, 398, 421](#) and accompanying text.

⁴²³ S.C. Res. 949, *supra* note 421, PP 1-6.

⁴²⁴ Id. Resolution 949 also reiterated that Iraq must cooperate fully with U.N. weapons inspectors, and that it must not enhance its military capability in southern Iraq. Id. PP 4-5.

⁴²⁵ S.C. Res. 1060, *supra* note 421; S.C. Res. 1051, *supra* note 421.

⁴²⁶ S.C. Res. 1051, *supra* note 421, PP 4-6, 16.

⁴²⁷ Id.

⁴²⁸ S.C. Res. 1060, *supra* note 421, P 1. This Resolution reiterated the requirement in U.N. Security Council Resolution 1051, to cooperate and to provide unrestricted access. *Id.* P 2.

⁴²⁹ S.C. Res. 1115, *supra* note 421, P 1. This Resolution further required that Iraq give immediate, unconditional, and unrestricted access to Iraqi officials whom U.N. inspectors wanted to interview. *Id.* P 3.

⁴³⁰ Id. P 1.

Iraqi actions threatened the safety of U.N. personnel in late 1997, the Council condemned "the continued violations by Iraq" of previous U.N. resolutions, including its implicit threat to the safety of aircraft operated by U.N. inspectors and its tampering with U.N. inspector monitoring equipment.⁴³²

The Iraqi lack of cooperation with the inspection regime continued, and in March 1998, the Security Council passed Resolution 1154, stating that any violation would have the "severest consequences for Iraq."⁴³³ On August 5, 1998, the Baathist regime suspended all cooperation with U.N. and IAEA inspectors.⁴³⁴ This led to the Security Council's condemnation, and the claim that Iraqi actions constituted "a totally unacceptable contravention" of its obligations under Resolutions 687, 707, 715, 1060, 1115, and 1154.⁴³⁵ On October 31, 1998, the Iraqis made their August suspension permanent, and [*462] ceased cooperation with U.N. inspectors.⁴³⁶ The Security Council, in Resolution 1205, "condemned" this decision and described it as a "flagrant violation" of Resolution 687 and other prior resolutions.⁴³⁷

In 1999, frustrated with the continued lack of Iraqi cooperation, the Security Council passed Resolution 1284, which created the United Nations Monitoring, Verification and Inspection Commission ("UNMOVIC") to replace the previous weapons inspection team, the United Nations Special Commission ("UNSCOM"), which had been in effect since 1991.⁴³⁸ In creating this new entity, the Council stated in Resolution 1284 that Iraq must allow UNMOVIC "immediate, unconditional and unrestricted access" to Iraqi officials and facilities.⁴³⁹ This concern with Iraqi weapons was reemphasized in November 2001 with Resolution 1382, where the Council reaffirmed the obligation of all States to prevent the sale or supply to Iraq of weapons or any other military equipment.⁴⁴⁰

Finally, in November 2002, the Security Council stated in Resolution 1441 that the Council was "determined to secure full compliance with its decisions."⁴⁴¹ The Council

decide[d] that Iraq had been and remained in material breach of its obligations under relevant resolutions ... ; decide[d] ... to afford Iraq ... a final opportunity to comply with its disarmament obligations ... ; [and] decide[d] that false statements or omissions in the declarations submitted ... shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment⁴⁴²

⁴³¹ S.C. Res. 1134, *supra note 421, PP 2-4*.

⁴³² S.C. Res. 1137, *supra note 421, P 1*. This resolution also reaffirmed Iraq's responsibility to ensure the safety of U.N. inspectors. *Id. P 9*.

⁴³³ S.C. Res. 1154, *supra note 421, P 3*.

⁴³⁴ S.C. Res. 1194, *supra note 421, P 1*.

⁴³⁵ *Id.*

⁴³⁶ S.C. Res. 1205, *supra note 421, PP 1-2*.

⁴³⁷ *Id.* This resolution also required, once again, that Iraq provide "immediate, complete and unconditional cooperation" with U.N. and IAEA inspectors. *Id. P 2*.

⁴³⁸ S.C. Res. 1284, *supra note 421, P 1-2*.

⁴³⁹ *Id. P 4*. This resolution further provided that Iraq must fulfill its commitment to return Gulf War prisoners, and called upon Iraq to distribute humanitarian goods and medical supplies to its people and address the needs of vulnerable Iraqis without discrimination. *Id. P 27*.

⁴⁴⁰ S.C. Res. 1382, P 3, U.N. Doc. S/RES/1382 (Nov. 29, 2001).

⁴⁴¹ S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

⁴⁴² *Id. PP 1, 2, 4* (emphasis omitted).

Equally disturbing, during the same period represented by the preceding resolutions, Saddam Hussein had repeatedly circumvented U.N. economic sanctions, refused to allow weapons inspectors to oversee the destruction of his weapons of mass destruction, failed to destroy all of his ballistic missiles with a range greater than 150 [***463**] kilometers, failed to stop support for terrorism or prevent terrorist organizations from operating within Iraq, failed to help account for missing Kuwaitis, refused to return stolen Kuwaiti property and bear financial responsibility for damage from the first Gulf War, and continued his repression of the Iraqi people. ⁴⁴³

In addition to these legally binding resolutions, the Security Council had also issued at least twenty-five statements from its President regarding Saddam Hussein's continued violations of these resolutions. ⁴⁴⁴ Following the thirty days provided in Resolution 1441 for an Iraqi response to the requirement to fully comply, ⁴⁴⁵ Secretary of State [***464**] Powell assessed the lack of responsiveness of the Iraqi regime in detailed remarks to the Security Council in which he documented Iraq's failure to meet the requirements of Resolution 1441. ⁴⁴⁶

When President Bush earlier secured broad bipartisan support for the Joint Resolution to Authorize the Use of U.S. Armed Forces Against Iraq on October 16, 2002, ⁴⁴⁷ few could imagine that the Security Council would not ultimately follow suit. After all, U.S. leaders had obtained unanimous support in the Security Council for Resolution 1441, which all but provided Iraq with an ultimatum. ⁴⁴⁸ Secretary Powell clearly defined the burden of Council

⁴⁴³ See *id.* (referencing the initial findings of the Security Council regarding Iraq's non-compliance with Council resolutions).

⁴⁴⁴ See The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1998/11 (May 14, 1998); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1998/1 (Jan. 14, 1998); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation between Iraq and Kuwait, U.N. Doc. S/PRST/1997/56 (Dec. 22, 1997); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1997/54 (Dec. 3, 1997); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1997/51 (Nov. 13, 1997); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1997/49 (Oct. 29 1997); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1997/33 (June 18, 1997); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1996/49 (Dec. 30, 1996); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation between Iraq and Kuwait, U.N. Doc. S/PRST/1996/36 (Aug. 23, 1996); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1996/28 (June 14, 1996); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1996/11 (Mar. 19, 1996); The President, Statement by the President of the Security Council on Behalf of the Council Regarding the Situation Between Iraq and Kuwait, U.N. Doc. S/PRST/1994/58 (Oct. 8 1994); U.N. SCOR, 48th Sess., 3319th mtg. at 2-3, U.N. Doc. S/PV.3319 (Nov. 23, 1993); U.N. SCOR, 48th Sess., 3246th mtg. 2-3, U.N. Doc. S/PV.3246 (June 28, 1993); U.N. SCOR, 48th Sess., 3242d mtg. 2-6, U.N. Doc. S/PV.3242 (June 18, 1993); U.N. SCOR, 48th Sess., 3162d mtg. at 2-4, U.N. Doc. S/PV.3162 (Jan. 11, 1993); U.N. SCOR, 48th Sess., 3161st mtg. at 2-7, U.N. Doc. S/PV.3161 (Jan. 8, 1993); U.N. SCOR, 47th Sess., 3139th mtg. at 161, 211, U.N. Doc. S/PV.3139 (Nov. 24, 1992); U.N. SCOR, 47th Sess., 3139th mtg. at 6-21, U.N. Doc. S/PV.3139 (Nov. 23, 1992); U.N. SCOR, 47th Sess., 3112d mtg. at 2-3, U.N. Doc. S/PV.3112 (Sept. 2, 1992); U.N. SCOR, 47th Sess., 3098th mtg. at 2, U.N. Doc. S/PV.3098 (July 17, 1992); U.N. SCOR, 47th Sess., 3059th mtg. at 211, U.N. Doc. S/PV.3059 (Mar. 12, 1992); U.N. SCOR, 47th Sess., 3059th mtg. at 6-20, U.N. Doc. S/PV.3059 (Mar. 11, 1992); U.N. SCOR, 47th Sess., 3058th mtg. at 2-4, U.N. Doc. S/PV.3058 (Feb. 28, 1992); U.N. SCOR, 46th Sess., 2996th mtg. at 2-7, U.N. Doc. S/PV.2996 (June 28, 1991).

⁴⁴⁵ S.C. Res. 1441, *supra note 441, P 3*.

⁴⁴⁶ U.N. SCOR, 58th Sess., 4714th mtg. at 14-17, U.N. Doc. S/PV.4714 (Mar. 7, 2003) [hereinafter Powell Address].

⁴⁴⁷ Authorization for Use of Military Force Against Iraq Resolution of 2002, *Pub. L. No. 107-243*, §§1-3, *116 Stat. 1498*, 1501.

⁴⁴⁸ See S.C. Res. 1441, *supra note 441, PP 1-8*.

membership in his March 7, 2003, address to the Council, the same address in which he had carefully explained the failure of Iraq to comply with Resolution 1441. ⁴⁴⁹

The draft resolution Secretary Powell spoke of in his address to the Security Council was opposed by Russia and France, and thus never was formally proposed for a vote within that body. ⁴⁵⁰ The provisional draft of March 7, 2003, brought under Chapter VII of the Charter, stated that the Council was determined to "secure full compliance with its decisions and to restore international peace and security in the area." ⁴⁵¹ When the Council did not agree to the proposed resolution, President Bush, with the support of the United [*465] Kingdom, Spain, and many other nations, ⁴⁵² directed U.S. forces, in a coalition with the British, to enter Iraq on March 19, 2003, and remove the regime of Saddam Hussein. ⁴⁵³ This decision came only after President Bush determined that reliance by the United States on further diplomatic or other peaceful means alone would not lead to enforcement of all relevant U.N. Security Council resolutions regarding Iraq, and his further determination that the Security Council would not enforce its own mandates. ⁴⁵⁴

Not surprisingly, on May 22, 2003, after the United States and Great Britain freed the region from the threat posed by the Baathist regime in Iraq and the Iraqi people from the repression of Saddam Hussein, the Security Council passed Resolution 1483. ⁴⁵⁵ This resolution recognized the United States and the United Kingdom as the "Authority" in Iraq pending establishment of an independent democratic Iraqi government, and affirmed "the need for accountability for crimes and atrocities committed by the previous Iraqi regime." ⁴⁵⁶ Acting under Chapter VII of

⁴⁴⁹ Powell Address, *supra* note 446, at 14, 16-17.

⁴⁵⁰ *Id. at 17-20*. Chairman Henry Hyde of the House Committee on International Relations and Senator Norm Coleman, chairman of the U.S. Senate Permanent Subcommittee on Investigations, each conducted independent investigations concerning allegations of improper payments in the form of oil allocations to senior government officials in Russia and France by Saddam Hussein's regime under the guise of the Oil for Food Program. The evidence in these investigations is damning and reflects the problem with ensuring that votes in the Security Council are not corrupted. While not yet made public, references to the outcome of those investigations can be found in several documents. See generally *The Oil-for-Food Program: Tracking the Funds: Hearing Before the H. Comm. on Int'l Relations, 108th Cong. 1-4 (2004)* (statement of Rep. Hyde, Chairman, Comm. on Int'l Relations); *The United Nations Oil-for-Food Program: Issues of Accountability and Transparency: Hearing Before the H. Comm. on Int'l Relations, 108th Cong. 1-11 (2004)* (statement of Rep. Hyde, Chairman, Comm. on Int'l Relations); Norm Coleman, *Kofi Annan Must Go: It's Time for the Secretary-General to Resign*, *Wall St. J.*, Dec. 1, 2004, at A10.

⁴⁵¹ S.C. Draft Res. 215, at 2, U.N. Doc. S/2003/215 (Mar. 7, 2003). Spain, the United Kingdom, and Northern Ireland joined the United States in sponsorship of this draft resolution. *Id. at 1*.

⁴⁵² *Economic and Military Support for the U.S. Efforts in Iraq: The Coalition of the Willing, Then and Now: Hearing Before the H. Subcomm. on the Int'l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs, 110th Cong. 1 (2007)* (statement of Bill Delahunt, Chairman, Subcomm. on Int'l Organizations, Human Rights, and Oversight). The nations supporting the 2003 U.S.-U.K. intervention with troops, in addition to Spain, were Albania, Australia, Azerbaijan, Bulgaria, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Georgia, Honduras, Italy, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Netherlands, New Zealand, Nicaragua, Norway, Philippines, Poland, Portugal, Republic of Korea, Romania, Slovakia, Thailand, and Ukraine. *Id.*

⁴⁵³ See *id. at 1, 6* (quoting Bill Delahunt, Chairman, Subcomm. on Int'l Organizations, Human Rights, and Oversight, and Kenneth Katzman, Specialist in Middle East Affairs, Foreign Affairs, Defense and Trade Division, Cong. Research Service). See also President's Address to the Nation on Iraq, 39 Weekly Comp. Pres. Doc. 342, 343 (March 19, 2003). This decision executed Operation Iraqi Freedom and implemented the Joint Congressional Resolution of October 16, 2002. See *Authorization for Use of Military Force Against Iraq Resolution of 2002*, **Pub. L. No. 107-243**, **116 Stat. 1498**.

⁴⁵⁴ President's Address to the Nation on Iraq, 39 Weekly Comp. Pres. Doc. 338, 339 (March 17, 2003). The Security Council was powerless to proceed with two permanent members unwilling to lend their unanimous support to the March 7, 2003, provisional resolution authorizing the use of force. See U.N. Charter art. 23, para. 1.

⁴⁵⁵ S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

⁴⁵⁶ *Id. at 2*.

the U.N. Charter, expressly recognizing that the situation in Iraq "continued to constitute a threat to international peace and security," ⁴⁵⁷ the Security Council:

Called upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the [*466] welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future⁴⁵⁸

In light of the failure of the Council to act to enforce Resolution 1441 and all preceding relevant resolutions with respect to Iraq, it is important to consider whether this inaction in the face of prior commitment authorizes any individual state or coalition of member states to act to enforce the required action demanded of a member state by the Security Council. In the case of the United States, not only had President Bush persuasively argued his case before the United Nations on September 12, 2002, ⁴⁵⁹ but Congress had likewise endorsed the use of force by the President in its October 16, 2002, joint resolution. ⁴⁶⁰ In that resolution, Congress identified both the threat to the United States, international peace and security, and the need for humanitarian intervention. ⁴⁶¹

While the main responsibility for maintaining peace and security in the U.N. system is lodged with the fifteen-member Security Council, its effectiveness as an instrument of collective action has often been neutralized, as in 2003 regarding Iraq, when the requirement that all permanent members support such a decision is not forthcoming. ⁴⁶² This describes the situation in March 1999 when the Chinese and Russian delegates refused to support a draft Security Council resolution authorizing NATO-led forces to intervene in the Kosovo crisis, despite the majority support of remaining Council members, ⁴⁶³ and in March 2003 when the Russian and French delegates refused to support the coalition-led intervention in Iraq. ⁴⁶⁴

It was precisely this concern that led legal experts to debate, long prior to the Kosovo and Iraq crises, criteria that would satisfy the [*467] need to address future instances of Council inaction in the face of obvious violations of Charter principles. ⁴⁶⁵ In 1974, Professor Richard B. Lillich of the University of Virginia, anguished over the inability of the Security Council to function in matters requiring the unanimous approval of the permanent members for Chapter VII "all necessary means" operations. ⁴⁶⁶ Professor Lillich argued that the most significant "task confronting international lawyers is to clarify the various criteria by which the legitimacy of a state's use" of force in situations supportive of Charter principles can be judged. ⁴⁶⁷

In Iraq, as in Kosovo, the Coalition's use of military force to prevent the continuation of the myriad abuses outlined in Resolution 1441 was supportive of state practice that has established the lawfulness of intervention when

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* P 4 (emphasis omitted).

⁴⁵⁹ U.N. GAOR, 57th Sess., *supra* note 418, at 8.

⁴⁶⁰ Authorization for Use of Military Force Against Iraq Resolution of 2002, **Pub. L. No. 107-243, 116 Stat. 1498**.

⁴⁶¹ *Id.*

⁴⁶² U.N. Charter art. 27, para. 3. Article 23 of the U.N. Charter provides that the Peoples' Republic of China, Russia, France, Great Britain, and the United States are permanent members of the Security Council. U.N. Charter art. 23, para. 1.

⁴⁶³ Michael J. Glennon, *Limits of Law, Prerogatives of Power* 28, 29 (2001).

⁴⁶⁴ See Powell Address, *supra* note 446, at 17-20 (referencing the likely rationale for the failure of France and Russia to support the March 7 provisional resolution).

⁴⁶⁵ See, e.g., *infra* notes 467-68 and accompanying text.

⁴⁶⁶ See Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives* (1974), reprinted in *National Security Law*, *supra* note 111, at 131, 132.

⁴⁶⁷ *Id.*

carefully circumscribed by the parameters outlined in Article 2, paragraph 4.⁴⁶⁸ Articles 39 to 51 of the U.N. Charter establish a framework for collective security based on the use of military forces, and provide the Security Council with authority for enforcement.⁴⁶⁹ Despite these powers, the reluctance of certain Council members in the case of Kosovo in 1998 and Iraq in 2003 to use its powers left the organization on the sidelines at a time when, according to the Charter, its possibilities should have been used to the maximum.⁴⁷⁰ Evidence of partisanship and division among Council members, and especially among the permanent five,⁴⁷¹ can be used to explain the sidetracking of the Security Council. Nevertheless, such matters should be taken with the utmost seriousness, and consideration given to what can be done to restore the Security Council to the position of influence it was given in the Charter.

In Iraq, the Security Council had repeatedly condemned Iraqi actions that resulted in violations of international peace and **[*468]** security.⁴⁷² After the United States and Great Britain intervened in March 2003 both to eliminate the threat described in numerous Security Council resolutions, and to eliminate the violations of international human rights law described in Resolution 1441 and preceding Council statements, it is important to note that the Council quickly passed Resolution 1483, unanimously recognizing the coalition as the appropriate "Authority" in Iraq pending establishment of a lawful government.⁴⁷³ The incongruity of the refusal of the Security Council to support the coalition intervention when it directly supported the repeated demands the Council previously made of Iraq, and then to unanimously support a resolution recognizing the interveners as the legitimate "Authority" in Iraq, is obvious.

The crisis in Iraq, however, relates not to the removal of Saddam Hussein, but to the inability of the coalition under Resolution 1483 to establish consensus among the Shiite, Sunni, and Kurd populations to establish a workable government. The government established after the removal of Saddam Hussein, led first by Ayad Allawi and now by Jawad al-Maliki, a Shiite,⁴⁷⁴ has been unwilling or unable to exert itself to direct the new security and military forces, let alone the fledgling economy, beyond the most basic activities in an environment poisoned by al Qaeda.

Addressing terrorist violence and insurgent activities is difficult under any circumstances, but when most Iraqis identify "first and foremost with their tribal or religious sectarian background," the principal challenge for the coalition leader, the United States, has been to encourage the "development of a national Iraqi identity."⁴⁷⁵ Moreover, as former Secretary of State Henry Kissinger observed, President Bush may not have had in place a system of national security decision-making that ensured the careful examination of the downside of major policy decisions.⁴⁷⁶

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V. The Threat of Terrorism as Complicating the President's Commander in Chief Authority

⁴⁶⁸ See U.N. Charter art. 2, para. 4; S.C. Res. 1441, *supra* note 441.

⁴⁶⁹ See U.N. Charter arts. 39-51. Articles 39-51 constitute Chapter VII of the U.N. Charter, and provide the authority for the Council to direct intervention to restore international peace and security. *Id.*

⁴⁷⁰ See *supra* notes 463-64.

⁴⁷¹ U.N. Charter art. 23, para. 1 (referencing the five permanent members of the Security Council).

⁴⁷² See S.C. Res. 1441, *supra* note 441.

⁴⁷³ S.C. Res. 1483, *supra* note 455.

⁴⁷⁴ Bob Woodward, *State of Denial* 461 (2006); Ali A. Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace* 51-52 (2007).

⁴⁷⁵ Woodward, *supra* note 474, at 407.

⁴⁷⁶ *Id.* at 408.

In addressing the post-conflict terrorist threat in Iraq and the earlier terrorist attacks directed from al Qaeda headquarters in September 2001, President George W. Bush was not addressing new phenomena, but certainly a level of violence unusual to that genre. In fact, the crisis in Afghanistan and the earlier hostage-taking in Iran in 1979-1980 provided cogent lessons - nor had they been the first. During his Presidency, James Monroe established the right to enter the territory of another state to prevent terrorist attacks, where the host is unable or unwilling to quell a continuing threat.⁴⁷⁷ The Seminole Indians in Spanish Florida had demanded "arms, ammunition, and provisions, or the possession of the garrison of St. Marks."⁴⁷⁸ President Monroe directed General Andrew Jackson to proceed against the Seminoles, with the explanation that the Spanish were bound by treaty to keep their Indians at peace but were incompetent to do so.⁴⁷⁹

During the Canadian insurrection of 1837, the standard for justifiable anticipatory self-defense that could legally be exercised by the Commander in Chief during terrorist threats was more clearly established.⁴⁸⁰ Anti-British sympathizers gathered near Buffalo, New York.⁴⁸¹ A large number of Americans and Canadians were similarly encamped on the Canadian side of the border with the apparent intention of aiding these rebels.⁴⁸² The *Caroline*, an American vessel which the rebels used for supplies and communications, was boarded in an American port at midnight by an armed group, acting under orders of a British officer, who set the vessel on fire and let it drift over Niagara Falls.⁴⁸³ The United States protested the incident, which claimed the lives of at least two American citizens.⁴⁸⁴ The British [*470] government replied that the threat posed by the *Caroline* was established, that American laws were not being enforced along the border, and that the destruction was an act of necessary self-defense to terrorist violence.⁴⁸⁵

In the controversy that followed, the United States did not deny that circumstances were conceivable that would justify this action, and Great Britain admitted the necessity of showing circumstances of extreme urgency.⁴⁸⁶ The two countries differed only on the question of whether the facts brought the case within the exceptional principle. Charles Cheney Hyde summed up the incident by saying that "the British force did ... that which the United States itself would have done, had it possessed the means and disposition to perform its duty."⁴⁸⁷ Secretary of State Daniel Webster, in formulating an oft-cited principle of self-defense, said that there must be a demonstrated "necessity of that self-defence [being] instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁴⁸⁸ It is clear, however, that the Webster formulation was not applied by the British in the decision to

⁴⁷⁷ Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* 16 (2005).

⁴⁷⁸ 2 John Bassett Moore, *A Digest of International Law* 403 (1906). This mission against the Seminoles in 1818 was preceded four years earlier when President Madison dispatched General Jackson to Florida in 1814 to address a similar uprising by a consortium of tribes. [Id. at 402.](#)

⁴⁷⁹ [Id. at 403.](#)

⁴⁸⁰ [Id. at 409-12.](#) The *Caroline* incident, often called the *Caroline* "case," was not resolved through the judicial process, but rather, through diplomatic correspondence.

⁴⁸¹ [Id. at 409.](#)

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ [Id. at 410.](#)

⁴⁸⁵ *Id.*

⁴⁸⁶ [Id. at 412.](#)

⁴⁸⁷ 1 Charles Cheney Hyde, *International Law* 240 (2d rev. ed. 1947).

⁴⁸⁸ 2 Moore, *supra* note 478, at 412 (internal quotation marks omitted).

destroy the Caroline, at least with respect to the element requiring "no moment of deliberation."⁴⁸⁹ The U.S. Department of State has properly criticized Secretary Webster's formulation as follows: "This definition is obviously drawn from consideration of the right of self-defense in domestic law; the cases are rare indeed in which it would exactly fit an international situation."⁴⁹⁰ Today, when terrorists and their sponsors possess weapons with rapid delivery capabilities, any requirement that a nation may not respond until faced with a situation providing no moment of deliberation is unrealistic.⁴⁹¹

In the modern era, four Presidents have faced major incidents of terrorist violence that have impacted the vital national interests of the United States. The November 1979 seizure of U.S. diplomats by Iranian militants protected by the Iranian government, and the Administration's ineffective response, was likely responsible for **[*471]** President Carter's defeat by Ronald Reagan in the 1980 election. In 1986, President Reagan's second Administration acted forcefully to address the threat by Kaddafi's Libyan terrorist organization after an attack on U.S. citizens in then West Germany, and followed this military action against Kaddafi with a new articulation of presidential prerogatives combating terrorism. Although President Clinton took no direct action after attacks on two of our embassies and on the U.S.S. Cole, he did reorganize our internal policy-making bodies responsible for counter-terrorism and provided effective parameters for future effective response. In responding forcefully and effectively to the al Qaeda 2001 attacks on the Trade Center and the Pentagon, President George W. Bush viewed the attacks not as terrorist violence, but as a military attack upon America that demanded the full weight of U.S. response.

A. President Carter and the Iranian Hostage Crisis

President Jimmy Carter faced by far the most difficult terrorist incident during his Administration (1977-1981).⁴⁹² The 1979 attacks on the U.S. Embassy in Tehran and the Consulates at Tabriz and Shiraz followed by one week the entrance of the Shah into the United States for medical treatment. On November 4, 1979, approximately 300 militant demonstrators overran the U.S. Embassy compound in Tehran and took sixty-six U.S. citizens hostage for a period of 444 days.⁴⁹³

As in most developing countries, there were few internal constraints - whether from opposition parties, a critical press, or an enlightened public - to pressure Khomeini, the Iranian leader, into upholding the law. In the atmosphere of fervent nationalism that accompanied Khomeini's sweep to power, forces for moderation were depicted as tools of foreign interests. In such an atmosphere, the militant supporters of the clerical leadership fomented domestic pressure to violate other recognized norms as well - in areas such as property ownership, religious freedom, and judicial protection. This combination of revolution and nationalism yielded explosive **[*472]** results - a reordering of both Iranian domestic society and its approach to foreign affairs.

However, it was President Carter's lack of resolve in addressing the crisis that proved costliest to his Administration.⁴⁹⁴ While the Security Council, at the behest of the United States, unanimously adopted Resolution 457 on December 4, 1979, calling upon the government of Iran "to release immediately the personnel of the Embassy of the United States of America being held at Teheran, to provide them with protection and to allow them to leave the

⁴⁸⁹ Id.

⁴⁹⁰ Philip C. Jessup, *A Modern Law of Nations* 164 (1948).

⁴⁹¹ See W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L. Rev.* 335, 361-63 (1962).

⁴⁹² Editor's Note: The material presented in the following two paragraphs was published previously in James P. Terry, *The Use of Military Force by the President: Defensive Uses Short of War*, *Joint Force Q.*, 3d Quarter 2008, at 113, 119.

⁴⁹³ Report of the Cong. Comm. Investigating the Iran-Contra Affair, S. Rep. No. 100-216, H. Rep. No. 100-433, at 157 (1987).

⁴⁹⁴ Editor's Note: The remaining material in this section, presented here under the heading "President Carter and the Iranian Hostage Crisis," was published previously, in large measure, in James P. Terry, *The Iranian Hostage Crisis: International Law and United States Policy*, 32 *JAG J.* 31 (1982). The content as it appears in this Article has been slightly revised.

country."⁴⁹⁵ This was not accompanied by any threat of imminent military action on the part of the United States. Resolution 457 also requested that the Secretary General "lend his good offices to the immediate implementation of the ... resolution and to take all appropriate measures to [that] end."⁴⁹⁶

In the subsequent U.S. application to the International Court of Justice, the Court on December 15, 1979, unanimously ruled that Iran should release the American hostages and restore seized premises to exclusive American control.⁴⁹⁷ This ruling was ignored by Iran. Although the United States through Secretary Vance was able to secure repeated Security Council measures requiring Iran to comply with its international obligations, there were no sanctions included as a result of a Soviet veto.⁴⁹⁸

When diplomatic efforts at securing the hostages' freedom via diplomacy failed in the United Nations and through legal means in the International Court of Justice, President Carter banned United States' purchases of Iranian oil under the Trade Expansion Act.⁴⁹⁹ He **[*473]** did so to make clear that the United States would not be blackmailed because of oil requirements.⁵⁰⁰ The United States then learned that Iran planned to withdraw all assets held in American banking institutions.⁵⁰¹ The removal of funds would have jeopardized billions of dollars in American claims against those assets - debts owed to both government and private enterprise.⁵⁰² The ripple effect of a mass withdrawal would have threatened the entire international financial system.

The President acted quickly to protect the interests of American creditors by blocking the removal of the Iranian funds.⁵⁰³ In order to do this, the President invoked the provisions of the International Emergency Powers Act of 1977.⁵⁰⁴ This Act permits the freezing of foreign assets when there exists an "unusual and extraordinary threat ... to the national security, foreign policy, and economy of the United States."⁵⁰⁵ The Secretary of the Treasury

⁴⁹⁵ S.C. Res. 457, P 1, U.N. Doc S/RES/457 (Dec. 4, 1979).

⁴⁹⁶ [Id. P 4.](#)

⁴⁹⁷ United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1979 I.C.J. 7, 20-21 (Dec. 15).

⁴⁹⁸ See James P. Terry, The Iranian Hostage Crisis: International Law and United States Policy, 32 JAG J. 31, 49 n.105 (1982); see also S.C. Res. 461, U.N. Doc S/RES/461 (Dec. 31, 1979); S.C. Res. 457, *supra* note 495.

⁴⁹⁹ See Trade Expansion Act of 1962, [19 U.S.C. § 1862](#) (2006). On November 12, 1979, President Carter amended the Trade Expansion Act to forbid Iranian oil from entering the United States. Proclamation No. 4702, 44 Fed. Reg. 65,581 (Nov. 12, 1979). See Terry, *supra* note 498, at 53 n.125 (discussing the potential reasons the United States did not petition the Security Council under Article 94 of the U.N. Charter for assistance in implementing decisions made by the International Court of Justice regarding Iran).

⁵⁰⁰ See John M. Goshko & Edward Walsh, Carter Affirms American Resolve, Wash. Post, Nov. 13, 1979, at A1, A10.

⁵⁰¹ James A. Bill, The Eagle and the Lion: The Tragedy of American-Iranian Relations 341 (1989).

⁵⁰² Terry, *supra* note 498, at 538 n.128.

⁵⁰³ Exec. Order No. 12,170, 3 C.F.R. 457 (1979), reprinted in [50 U.S.C. § 1701](#) (2003).

⁵⁰⁴ *Id.*

⁵⁰⁵ International Emergency Economic Powers Act, [50 U.S.C. § 1701](#) (2003). This law had been enacted in anticipation of emergency situations involving nations not on a war footing with the United States. Preceding legislation, the Foreign Assets Control Regulations, permitted the freezing of assets only of those nations with which the United States was at war. When difficulties with Cuba required similar protection in the late 1950s, the Cuban Assets Control Regulations were enacted. The 1977 Emergency Economic Powers legislation precludes the need for specific legislation each time the interests of American creditors are threatened, and allows for implementation of protective measures despite the absence of a declaration of war.

implemented the President's Executive Order on November 14, 1979, with a series of Iranian Assets Control Regulations.⁵⁰⁶

A month later, the United States informed the Iranian Charge d'Affaires in Washington that personnel assigned to the Iranian Embassy and Consular posts in the United States would be limited to fifteen at the Embassy and five per Consulate.⁵⁰⁷ From January to March 1980, the United States exercised restraint in generating additional pressure in order to allow the initiatives of Secretary General Waldheim to work as well as those of intermediaries. Factional disputes prevented Bani-Sadr and Iranian authorities from **[*474]** honoring their pledges regarding the authority of the U.N. Commission in Iran, and this in turn stifled Waldheim's diplomatic initiatives.⁵⁰⁸

President Carter then moved to impose unilateral sanctions on Iran, and in April 1980, all financial dealings and exports to Iran except food and medicine were prohibited.⁵⁰⁹ On April 17, the Carter Administration imposed additional prohibitions on imports, travel, and financial transfers related to Iran.⁵¹⁰ This Executive Order also restricted travel under the Immigration and Nationality Act.⁵¹¹ Finally, in April 1980, the United States broke diplomatic relations with Iran and ordered the Iranian Embassy in Washington closed.⁵¹²

While these unilateral measures were being implemented, our allies in Europe, Japan, and Canada were imposing economic and diplomatic sanctions against Iran in an effort to maintain a common front. At the April 21, 1980, meeting of the leaders of the European Community, nine allied nations reaffirmed their support for severe sanctions against Iran and stated they would seek legislation enabling them to join the effort to isolate Iran internationally in the event the hostage crisis had not been resolved by May 17, 1980.⁵¹³ When no progress had been made by that date, these allies moved to accommodate the United States' request that no new contracts be entered into with Iran and that all contracts negotiated between these nations and Iran after November 4, 1979, be disavowed.⁵¹⁴

[*475] Unfortunately, several European states - Great Britain included - were unable to gain parliamentary support for the entire package of sanctions promised.⁵¹⁵ Thus, the impact, while significant, failed to isolate Iran completely from a vital source of imports - Europe. The then-Soviet Union compounded the problem of incomplete

⁵⁰⁶ Terry, *supra* note 498, at 54 & n.131.

⁵⁰⁷ See U.S. Orders Iran to Remove Most of Its Diplomats, Wash. Post, Dec. 13, 1979, at A1.

⁵⁰⁸ See Terry, *supra* note 498, at 54.

⁵⁰⁹ Exec. Order No. 12,205, 3 C.F.R. 248, 248 (Apr. 7, 1980).

⁵¹⁰ Exec. Order No. 12,211, 3 C.F.R. 253, 254 (Apr. 17, 1980).

⁵¹¹ *Id.*

⁵¹² Terry, *supra* note 498, at 54.

⁵¹³ *Id.* at 55 & n.136.

⁵¹⁴ Of our allies, Great Britain proved to be the major surprise; Parliament refused to implement Prime Minister Thatcher's proposed sanctions and only agreed to suspend contracting with Iran from the date of the isolation measures. All contracts negotiated between November 4, 1979, and May 17, 1980, remained in effect, including those long-term contracts negotiated in anticipation of possible sanctions. As a result, the impact on Iran and the appearance of solidarity among the allies was severely reduced.

Conversely, the United States received unexpected support from Japan and Portugal. Japan, ninety percent dependent on foreign fossil fuels, announced in late May that it would purchase no further Iranian crude at the announced price of \$ 35 a barrel, \$ 7 more at the time than Saudi Arabian crude. The degree to which this determination by Japan was based on American efforts to impose sanctions on Iran as opposed to the economics of the situation is difficult to determine.

At the same time, Portugal denounced the Iranian actions and announced an intent to apply all the U.S.-requested measures. This was unexpected since the United States had recently been critical of human rights policies in Portuguese territories.

⁵¹⁵ See Terry, *supra* note 498, at 55.

support when it announced that if Iranian ports were blockaded or if primary commodities became unavailable from the West, the Soviet Union would neutralize the impact of such measures by providing all necessary assistance. Specifically, the Soviet Union offered its roads and railway system to move goods if Iran's harbors should be blocked.⁵¹⁶

The economic measures adopted by the Western nations, while psychologically satisfying, proved singularly ineffective. In fact, the only noticeable impact was a rallying of Iranians behind Khomeini and the diversion of Iranian attention from internal difficulties to the foreign challenge. These measures tended to fragment international support for the United States, while making it politically difficult for the Iranians to back down. In short, economic pressures, although perhaps politically expedient as a means to demonstrate presidential resolution, had the counterproductive effect of unifying Iranian opposition without coercing cooperation.⁵¹⁷

Concurrently with its judicial, diplomatic, and economic initiatives, in November 1979 the United States began planning a military operation to rescue the hostages.⁵¹⁸ Citing the same legal justification claimed by Israel in rescuing its citizens from terrorists at Entebbe, Uganda, and by West Germany in a similar successful rescue at Mogadishu, Somalia in 1977,⁵¹⁹ the United States entered Iran **[*476]** during the night of April 24, 1980.⁵²⁰ A team of approximately ninety American servicemen departed the aircraft carrier Nimitz by helicopter for a remote, deserted airstrip in southern Iran, approximately 300 miles from Tehran.⁵²¹ There they rendezvoused with a C-130 transport aircraft for refueling.⁵²² The plan then called for a flight from this rendezvous to Tehran.⁵²³ However, when three of the eight RH-53 helicopters were disabled by mechanical failures resulting from sand intake,⁵²⁴ the mission was aborted and the remaining aircraft departed Iran, but not before a helicopter and transport collided and exploded.⁵²⁵

With respect to the Americans held, the 1961 Vienna Convention on Diplomatic Relations obligated Iran to treat each American diplomat with "due respect," to take "all appropriate steps to prevent any attack on his person, freedom or dignity," and to ensure that diplomatic personnel were not subjected to "any form of arrest or detention."⁵²⁶ Article 37 of this Convention extends these same privileges and immunities to members of the administrative

⁵¹⁶ See Jonathan C. Randal, *Iranians Are Indifferent to European Sanctions*, Wash. Post, May 17, 1980, at A11; Thomas Stauffer, *How Iran's Soviet Rail Links Could Undercut U.S. Blockade*, Christian Sci. Monitor, Apr. 30, 1980, at 4. A contrary interpretation of the importance of this Soviet announcement quotes President Carter as discounting the Soviet promise of assistance to Iran. Carter stated that the Soviet transportation routes were insufficient to offset the impact of a blockade or boycott. Terry, *supra* note 498, at 55 & n.178.

⁵¹⁷ Terry, *supra* note 498, at 55.

⁵¹⁸ *Id.* at 56.

⁵¹⁹ See generally Richard Lillich, *Forcible Self Help by States to Protect Human Rights*, 53 Iowa L. Rev. 325 (1967), and *infra* this section, for the argument that neither customary international law nor Article 51 of the U.N. Charter prohibits such acts of intervention. Interestingly, the International Court of Justice largely ignored the American rescue attempt of April 1980, finding it irrelevant to the determination of whether Iran's conduct in seizing the diplomatic hostages and entering the diplomatic premises violated international law. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 40-41 (May 24).

⁵²⁰ Terry, *supra* note 498, at 56.

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ Secretary of Defense Harold Brown later claimed that it had been predetermined that fewer than six RH-53 helicopters would make the mission impossible. *Id.*

⁵²⁵ *Id.*

and technical staffs as well as to their families.⁵²⁷ These protections embody "the oldest established and the most fundamental rule of diplomatic law,"⁵²⁸ a point repeatedly emphasized by the International Court of Justice in its **[*477]** December 15, 1979, order discussing provisional measures with respect to the American hostages.⁵²⁹

In addition to its obligation to protect diplomatic personnel, Iran also had a duty to bring the attacking militants to justice.⁵³⁰ Its failure to take either step laid the groundwork for subsequent American claims for reparations.⁵³¹

The 1961 Vienna Convention also obligates the receiving State to protect the diplomatic premises of the sending State as well as its personnel. On November 4, 1979, according to Article 22 of the Convention, Iran was and continued to be under an obligation to ensure that American diplomatic premises in Iran were held inviolable and immune from search.⁵³² Article 22 required Iran to ensure that its agents did not enter the premises "except with the consent of the head of the mission."⁵³³ A "special duty" was placed upon Iran under this Article "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."⁵³⁴ Ironically, at the Vienna Conference that approved this Convention, Iran had been particularly vigorous in insisting that the special duty of protection be absolute and unqualified in any way, even under exceptional circumstances.⁵³⁵

⁵²⁶ Vienna Convention on Diplomatic Relations of 1961 art. 29, Apr. 18, 1961, [23 U.S.T. 3227](#), 500 U.N.T.S. 95 [hereinafter Vienna Convention].

⁵²⁷ Id. art. 37. The pertinent part of Article 37 states:

(1) The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.

(2) Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties.

Id.

⁵²⁸ See Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 135 (1976).

⁵²⁹ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 19-20 (Dec. 15).

⁵³⁰ See Terry, *supra* note 498, at 62; see also *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3, 41-42 (May 24).

⁵³¹ It is interesting to note that the ICJ ruling in the *United States' favor* with respect to reparations (12-3) indicated that an award could only be fully determined by that Court when the full extent of damages was known. *United States v. Iran*, 1980 I.C.J. at 41-42.

⁵³² Vienna Convention, *supra* note 526, art. 22. Article 22 provides:

(1) The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

(2) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

(3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Id.

⁵³³ Id.

⁵³⁴ Id.

⁵³⁵ *United Nations Conference on Diplomatic Intercourse and Immunities*, Mar. 2-Apr. 14, 1961, Official Records, PP 47-50, U.N. Doc. A/Conf. 20.

[*478] Just as Khomeini's government failed in its obligation under Article 22 of the 1961 Vienna Convention to preserve the inviolability of American diplomatic premises, so too did it fail in its related obligation to ensure the protection of archives and documents present there, as required by Article 24.⁵³⁶ By approving the seizure, by ransacking and publishing documents from the United States' mission, and by further threatening their use as "evidence" in judicial proceedings, the Khomeini government seriously impaired its international standing. By depriving itself of the respect which a state normally enjoys under the doctrine of sovereign equality, the Khomeini government forfeited an opportunity to gain world sympathy and also reduced its chances of cultivating friends and allies.⁵³⁷

Despite Iran's multiple violations of the 1961 Vienna Convention with respect to American diplomatic personnel, the diplomatic staffs of other nations - with the one exception of the arrest of the Soviet First Secretary on June 26, 1980 - continued to enjoy the requisite respect and protection.⁵³⁸

[*479] All governments have a shared interest in upholding the rights of their diplomatic representatives since the relations between states depend on free communication in myriad interdependent ways. Iran's adherence to diplomatic law, except in the case of the United States, suggested that the Khomeini regime did not want to quarrel with this basic notion.

Iran's willingness, in the case of United States' personnel, to defy both customary international practice as well as specific legal obligations, underscored the intensity and virulence of its anti-American posture in 1979. From Khomeini's perspective, it was American interference since 1953, when the Central Intelligence Agency helped to overthrow Mossadegh and restore the Shah, that had been responsible for delaying a true Islamic revolution for almost thirty years. Accordingly, the metaphor of America as "Satan" embodied Khomeini's notion of an ultimate foe, and the spasm of lawlessness which began on November 4, 1979, was perhaps best explained as a catharsis for three decades of bitterness and frustration.⁵³⁹

⁵³⁶ Vienna Convention, *supra* note 526, art. 24. Article 24 states: "The archives and documents of the mission shall be inviolable at any time and wherever they may be."

⁵³⁷ Iran also disregarded other requirements of the 1961 Vienna Convention. The ICJ noted that Iran had not met its obligations under Article 25 of the 1961 Convention to "accord full facilities for the performance of the functions of the [American] mission"; under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory"; and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes." *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1980 I.C.J. 3, 30-31 (May 24); Vienna Convention, *supra* note 526, arts. 25, 26, 27.

⁵³⁸ Terry, *supra* note 498, at 64. The ICJ recognized this and made a point of contrasting the Iranian actions of November 4, 1979 with its conduct on other occasions. The Court stated:

The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on February 14 1979, the United States Embassy in Tehran had itself been subjected to [an] armed attack ... in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

United States v. Iran, 1980 I.C.J. at 31.

⁵³⁹ After the Shah's return to power in 1953 - a return promoted by the CIA - Iran either acceded to or ratified each of the four international agreements upon which the United States relied when it asserted ICJ jurisdiction. Although none of these

In retrospect, certain implications of the 444-day Iranian hostage crisis are now clear. The continued vitality of mutual world values depends on much more than a search for national catharsis. The American public's penchant for gestures, such as candlelight vigils and yellow ribbons, was matched by the Carter Administration's tendency to confuse symbol with substance and to adopt a pose in the name of policy. Time was perceived as being on the side of the Iranians. It appeared that the crisis controlled Carter rather than he the crisis.

In the longer term, the attempt by President Carter to embrace all options other than the direct use of military force resulted in a settlement favorable to Iran. A country that confuses catharsis with defense of its interests is a nation uncertain of its values, and President Carter's effort to eschew the military instrument in favor of [*480] all others proved to be counterproductive. President Reagan's pledge during the 1980 campaign of "swift and effective retribution"⁵⁴⁰ in case of further threats to Americans abroad was clearly meant to deter future attacks as well as reassure a concerned nation. It also assured his election.

Upon his inauguration and the release of the hostages, President Reagan found himself bound by the terms of the Carter Administration's negotiated settlement, terms which the Supreme Court upheld as legal, if not wise.⁵⁴¹ Certain of the terms, such as the requirement to return unencumbered Iranian financial assets, did no more than honor a preexisting obligation. Other commitments which pertained directly to the official relationship between the United States and Iran, such as the formation of a Joint U.S.-Iranian Claims Tribunal, were also honored as positive contributions to community values.⁵⁴²

Some parts of the agreement, however, were legally unenforceable. One such provision required the United States to order all persons within U.S. jurisdiction to report all information known to them, with respect to property and assets of the former Shah, within thirty days to the U.S. Treasury for transmission to Iran.⁵⁴³ Violators were subject to civil and criminal penalties described by U.S. law.⁵⁴⁴ No such order was ever issued, nor could it have been enforced if it had been.⁵⁴⁵

B. President Reagan's Response to International Terrorism: The Case of Libya

One of President Ronald Reagan's strongest attributes was his direct approach in responding to threats to the American people. When he took office, he engaged scholars at the War Colleges to begin a review of available options to address the increased incidence of [*481] terrorist violence world-wide.⁵⁴⁶ Early in 1984, the President issued the seminal "preemption" doctrine addressing response to terrorist violence.⁵⁴⁷ In the words of former

agreements had been repudiated by the Khomeini regime, their non-application with respect to the United States arguably represents thirty years of frustration impossible to translate into a legal context. See Terry, *supra* note 498, at 64-65.

⁵⁴⁰ See *id.* at 74.

⁵⁴¹ See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames & Moore*, the Supreme Court upheld President Carter's decision to terminate all claims against Iran in the United States that was part of a package deal to secure release of the hostages. *Id.* at 674. President Reagan was obligated to carry out Carter's actions. See *id.* at 679-80.

⁵⁴² Terry, *supra* note 498, at 74.

⁵⁴³ James J. Kilpatrick, Enough of Purple Prose and Yellow Ribbons, *Wash. Star*, Jan. 29, 1981, at A12.

⁵⁴⁴ *Id.*

⁵⁴⁵ See Terry, *supra* note 498, at 74.

⁵⁴⁶ The author was a student at the Naval War College at Newport in 1985-1986 when this challenge to the War Colleges was being executed and was included in a team that met at Asilomar near Monterrey, California, immediately following the April 1986 strikes to address the operational and legal parameters related thereto.

⁵⁴⁷ See Principal Deputy Press Sec. to the President, Statement on International Terrorism, 20 Weekly Comp. Pres. Doc. 561 (Apr. 17, 1984).

Defense Department official Noel Koch, President Reagan's National Security Decision Directive ("NSDD") 138, issued April 3, 1984, "represented a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps [were] needed."⁵⁴⁸ Although NSDD 138 remains classified to this day, Robert C. McFarlane suggested at the Defense Strategy Forum on March 25, 1985, that it included the following key elements: the practice of terrorism under all circumstances is a threat to the national security of the United States; the practice of international terrorism must be resisted by all legal means; the United States has the responsibility to take protective measures whenever there is evidence that terrorism is about to be committed; and the threat of terrorism constitutes a form of aggression and justifies acts in self-defense.⁵⁴⁹

While moral justification for this U.S. policy may be obvious, the problem of defining that state support or linkage which warrants a U.S. military response, that legal framework supportive of such a proactive policy, and those reasonable force alternatives responsive to the threat, is more difficult. It is the linkage between the terrorist and the sponsoring state which is crucial to providing the United States, or any nation, with the justification for response against a violating state. Covert intelligence operatives are necessary for identifying and targeting terrorist training camps and bases, and for providing an effective warning of impending terrorist attacks. Unfortunately, as noted by former Secretary of State George Shultz in 1984, "we may **[*482]** never have the kind of evidence that can stand up in an American court of law."⁵⁵⁰

The question then is how much information is enough, from several perspectives. Former Defense Secretary Weinberger has underscored the very real and practical difficulties that exist for military planners in attempting to apply a relatively small quantum of force, over great distance, with uncertain intelligence. He has accurately noted the difficulty of ensuring success without accurate information, and has echoed the relationship between public support and demonstrable evidence of culpability in any resort to force by the United States in defending against terrorist attack.⁵⁵¹

Although no U.S. administration official, past or present, has been able to define adequately, "how much evidence is enough," the demand for probative or court-sustainable evidence affirming the complicity of a specific sponsoring state is an impractical standard that contributed to the impression - prior to the articulation of NSDD 138 in 1984 - that the United States was inhibited from responding meaningfully to terrorist outrages. This view was certainly reinforced in 1979, as addressed above, when the United States government allowed fifty-two American citizens to remain hostage to Iranian militants for more than 400 days. Hugh Tovar has correctly noted: "There is a very real danger that that the pursuit of more and better intelligence may become an excuse for non-action, which in itself might do more harm than action based on plausible though incomplete intelligence."⁵⁵²

True to his commitment under NSDD 138, and consistent with his 1980 campaign pledge to effect "swift and effective retribution" in case of further threats to Americans abroad, President Reagan directed military force against Libyan terrorists on April 15, 1986.⁵⁵³ On that date, the United States launched defensive strikes on

Editor's Note: The material presented in the following five paragraphs was published previously in James P. Terry, *The Regulation of International Coercion* 51-52 (Naval War College, Newport Paper No. 25, 2005). The content as it appears in this Article has been slightly revised.

⁵⁴⁸ Robert C. Toth, *Preemptive Anti-Terrorist Raids Allowed*, Wash. Post, Apr. 16, 1984, at A19.

⁵⁴⁹ Robert C. McFarlane, *Terrorism and the Future of Free Society*, 8 *Terrorism* 315, 321 (1986) (originally an address given at the National Strategy Information Center on Mar. 25, 1985).

⁵⁵⁰ George P. Shultz, *Terrorism and the Modern World*, 7 *Terrorism* 431, 445 (1985) (originally an address given at the Park Avenue Synagogue on Oct. 25, 1984).

⁵⁵¹ Terry, *supra* note 1, at 52.

⁵⁵² James P. Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, 36 *Naval L. Rev.* 159, 176 (quoting B. Tovar, *Low Intensity Conflict: Active Responses in an Open Society* 24 (paper prepared for the Conference on Terrorism and Other "Low-Intensity" Operations: International Linkages, Fletcher School of Law and Diplomacy (Apr. 1985))).

military targets in Tripoli and Benghazi, Libya. ⁵⁵⁴ The use of force was preceded by conclusive evidence of Libyan responsibility for prior [*483] acts of terrorism against the United States, with clear evidence that more were planned. ⁵⁵⁵ The final provocation occurred in West Berlin, on April 5, when two U.S. citizens were killed and seventy-eight others were injured by an explosive device detonated in a discotheque. ⁵⁵⁶

Eleven days earlier, on March 25, a cable from Tripoli directed the Libyan People's Bureau, in East Berlin, to target U.S. personnel and interests. ⁵⁵⁷ On April 4, a return message was intercepted, which informed Colonel Kaddafi's headquarters that a terrorist attack would take place the next day. ⁵⁵⁸ On April 5, the same People's Bureau reported to Colonel Kaddafi that the attack was a success and could not be traced to the Libyan people. ⁵⁵⁹ On the next day, "Tripoli exhorted other People's Bureaus to follow East Berlin's example." ⁵⁶⁰

Other terrorist incidents prior to the raid could also be traced indirectly to Colonel Kaddafi. The 1985 Rome and Vienna airport attacks on the ticket counters of Trans World Airlines and El Al Airlines were masterminded by Abu Nidal, the Palestinian terrorist supported both by Kaddafi and the Syrians. In fact, Abu Nidal maintained a residence in Tripoli at the time, later moving to Baghdad where he was harbored by Saddam Hussein until his (Abu Nidal's) death in Iraq in 2002. ⁵⁶¹

The April 1986 response used F-111 bombers from an American air base in Great Britain and A-6 fighter-bombers from two aircraft carriers in the Mediterranean Sea to strike five Libyan bases. ⁵⁶² The United States responded only after it was determined that the Libyan leader was clearly responsible for the April 5 bombing, that he would continue such attacks and, after an assessment that the economic and political sanctions imposed after the Rome and Vienna airport [*484] bombings had been unsuccessful, that our West European allies were unwilling to take stronger joint steps against Kaddafi. ⁵⁶³ A clear linkage existed between the threat perceived and the response directed against Libyan military targets.

President Reagan summed up the U.S. view of Kaddafi's complicity in supporting international terrorism when he spoke to the nation immediately following the April 15, 1986, defensive response by U.S. warplanes:

Colonel Qaddafi is not only an enemy of the United States. His record of subversion and aggression against the neighboring states in Africa is well documented and well known. He has ordered the murder of fellow Libyans in

⁵⁵³ James P. Terry, *Terrorist Violence in the New Millennium*, 51 *Joint Force Q.*, 4th Quarter 2008, at 137, 140-41.

⁵⁵⁴ *Id.*

⁵⁵⁵ Editor's Note: The remaining material in this section, presented here under the heading "President Reagan's Response to International Terrorism: The Case of Libya," was published previously, in large measure, in James P. Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, 36 *Naval L. Rev.* 159, 180-84 (1986). The content as it appears in this Article has been slightly revised.

⁵⁵⁶ Terry, *supra* note 552, at 180.

⁵⁵⁷ Norman Kempster, *Cables Cited as Proof of Libyan Terror Role*, *L.A. Times*, Apr. 15, 1986, at 5.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*; Abraham D. Sofaer, *Terrorism and the Law*, 64 *Foreign Aff.* 901, 921 (1986).

⁵⁶⁰ Mark Whitaker with John Walcott et al., *Targeting a "Mad Dog"*, *Newsweek*, Apr. 21, 1986, at 20, 25.

⁵⁶¹ Terry, *supra* note 552, at 181.

⁵⁶² *Id.* at 182.

⁵⁶³ See Bernard Weinraub, *U.S. Says Allies Asked for More in Libya Attack*, *N.Y. Times*, Apr. 22, 1986, at A1.

countless countries. He has sanctioned acts of terror in Africa, Europe and the Middle East, as well as the Western Hemisphere.⁵⁶⁴

The United States directed its response to continuing Libyan violence at military targets only. The objective was to strike at the military nerve center of Kaddafi's terrorist operations and limit his ability to use his military power to shield terrorist activities, thus raising the costs of terrorism in the Libyan leader's eyes and deterring him from future terrorist acts.⁵⁶⁵ Press Secretary Larry Speakes advised that the "American raids on Libya were justified as 'self-defense' to pre-empt such attacks."⁵⁶⁶

In an April 21, 1986, meeting in Luxemburg that followed, the foreign ministers of twelve European states reflected the profound effect the defensive raid had on inspiring allied efforts to resist terrorism.⁵⁶⁷ The foreign ministers approved a package of diplomatic sanctions, aimed at limiting Libya's ability to sponsor terrorist attacks, which had been rejected only a week earlier.⁵⁶⁸ These sanctions were endorsed and refined during the Tokyo Economic Summit in May 1986, when President Reagan met with the leaders of **[*485]** Britain, Canada, France, Italy, Japan, and West Germany, as well as other representatives of the European Community.⁵⁶⁹ It is worthy of note that the United States essentially had to act alone against Libya, following Kaddafi's implication in the 1985 Vienna and Rome airport bombings. In April 1986, however, the United States' use of force suddenly spurred more active support among the allies.

This allied support, even though offered only after the fact, suggested that the allies viewed the April 15, 1986, U.S. actions to be proportional to the perceived threat. Proportionality in the Libyan case could be assessed from a dual perspective. First, this element of self-defense required that U.S. claims, in the nature of counter-terrorist goals, be reasonably related to the existing terrorist threat to U.S. national interests. Second, proportionality mandated that the United States and other offended states use only such means in addressing terrorist violence as were required to induce termination of the offending course of conduct. In the first sense of proportionality, the U.S. actions in 1986 sought only to neutralize the broad effort to overthrow the power balance in the Mediterranean region through terrorist violence. The U.S. response did not seek to create a new alignment of that balance in North Africa. In the second sense of proportionality, the defensive strikes, directed at targets in Tripoli and Benghazi, were restricted to military installations behind which Kaddafi's terrorist infrastructure was concealed.

The 1986 defensive response of the United States to Libyan state-sponsored terrorism met customary and conventional legal requirements to counter aggression, and thus was valid under international law. The four basic elements of the law of armed conflict were clearly evident in the United States' response. The force used was capable of being and was, in fact, regulated by the United States. Necessity for its use was established by exhaustion of lesser means. Libya's complicity in supporting international terrorism was clearly established. The force used was not otherwise prohibited. The raid of April 15, 1986, was proportional to the threat and was no greater in effect than required.

Response to terrorism, like response to other forms of armed conflict, has as its principal purpose termination of hostilities under favorable conditions. Having forcefully demonstrated that the United States would respond to weaken Libya's military support for terrorist violence, President Reagan's follow-on moves were clearly **[*486]** appropriate. The President, through his support for coordinated diplomatic and economic sanctions at the April 21, 1986, European Community ministerial session,⁵⁷⁰ and his plea for concerted action at the follow-on Economic

⁵⁶⁴ Ronald Reagan, President, Address to the American People (Apr. 14, 1986), in N.Y. Times, Apr. 15, 1986, at A10.

⁵⁶⁵ See Bernard Gwertzman, Plots on Global Scale Charged, N.Y. Times, Apr. 15, 1986, at A1.

⁵⁶⁶ Id. at A11.

⁵⁶⁷ See Richard Bernstein, Europe Broadens Anti-Libyan Curbs, N.Y. Times, Apr. 22, 1986, at A8.

⁵⁶⁸ See id.

⁵⁶⁹ Terry, supra note 552, at 182.

Summit in Tokyo, ⁵⁷¹ emphasized that non-military coercive measures against a pariah state are only effective if all major free nations participate. If the April 15, 1986, blow against Libya was to do more than reestablish the credibility of U.S. forces, an integration of strategies involving those nations trading with Libya was imperative.

The Libyan incident just cited does not suggest the lack of international law restraints upon the determination of necessity for preemptive action. Rather, it affirms that a self-defense claim must be appraised in the total context in which it occurs. One aspect of this contextual appraisal of necessity, especially as it relates to responding after the fact to terrorist violence, concerns the issue of whether force can be considered necessary if peaceful measures are available to lessen the threat. To require a state to tolerate terrorist violence without resistance, on the grounds that peaceful means have not been exhausted, is absurd. Once a terrorist attack has occurred, the failure to consider a military response would play into the hands of aggressors who deny the relevance of law in their actions. The legal criteria for the proportionate use of force is established once a state-supported terrorist act has taken place. No state is obliged to ignore an attack as irrelevant, and the imminent threat to the lives of one's nationals requires consideration of a response.

C. President Clinton's Response to Terror-Violence

Although the United States under the Clinton Administration suffered three significant attacks against U.S. facilities abroad - the U.S. Embassies in Nairobi and Dar es Salaam in 1998, and the attack in Yemeni waters against the U.S.S. Cole in 2000 - President Clinton never responded directly to these attacks. ⁵⁷² His Administration did, however, do much to address the terrorist threat through [*487] development of a comprehensive counter-terrorism structure. When the former President signed Executive Order ("EO") 13010 on July 15, 1996, he established the President's Commission on Critical Infrastructure Protection ("CCIP"). ⁵⁷³ The then-President declared that certain designated "national infrastructures are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the United States." ⁵⁷⁴ The eight categories of critical infrastructure designated in the EO as requiring the development of a national strategy for protection included: continuity of government, telecommunications, transportation, electric power systems, banking and finance, water supply systems, gas and oil storage and transportation, and emergency services (medical, police, fire and rescue). ⁵⁷⁵

Initially chaired by Robert T. Marsh, a retired Air Force General, the CCIP was tasked with developing a comprehensive national strategy for protecting critical infrastructures from electronic and physical threats. ⁵⁷⁶ On October 13, 1997, the CCIP issued the unclassified version of its report entitled "Critical Foundations: Protecting America's Infrastructure." ⁵⁷⁷ In addition to recognizing the challenge of adapting to a changing culture, the report found that the existing legal framework was inadequate to deal with threats to critical infrastructure. ⁵⁷⁸ Although

⁵⁷⁰ See Bernstein, *supra* note 567, at A8.

⁵⁷¹ See Terry, *supra* note 552, at 182.

⁵⁷² *Id.* at 142.

Editor's Note: The remaining material in this section, presented here under the heading "President Clinton's Response to Terror-Violence," was published previously, in large measure, in James P. Terry, Responding to Attacks on Critical Computer Infrastructure, [46 Naval L. Rev. 170, 181-83 \(1999\)](#). The content as it appears in this Article has been slightly revised.

⁵⁷³ Exec. Order No. 13,010, 61 Fed. Reg. 37,347 (July 15, 1996).

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ James P. Terry, Responding to Attacks on Critical Computer Infrastructure, [46 Naval L. Rev. 170, 181 \(1999\)](#).

⁵⁷⁷ President's Commission on Critical Infrastructure Protection, Critical Foundations: Protecting America's Infrastructures (1997).

the report itself provided few specifics, on May 22, 1998, the Clinton Administration issued Presidential Decision Directives ("PDD") 62 and 63 in implementation of its policy framework.⁵⁷⁹

PDD 62, Combating Terrorism, was the successor to National Security Decision Directive ("NSDD") 138, which determined that the threat of terrorism constitutes a form of aggression and justifies acts **[*488]** in self-defense.⁵⁸⁰ PDD 62 was more expansive in its coverage than NSDD 138 and addressed a broad range of unconventional threats, including attacks on critical infrastructure, terrorist acts, and the threat of the use of weapons of mass destruction. The aim of the PDD was to establish a more pragmatic and systems-based approach to protection of critical infrastructure and counter-terrorism, with preparedness as the key to effective consequence management. PDD 62 created the new position of National Coordinator for Security, Infrastructure Protection and Counter-terrorism, which would coordinate program management through the Office of the National Security Advisor.⁵⁸¹

PDD 63, Critical Infrastructure Protection, mandated that the National Coordinator, established in PDD 62, initiate immediate action between the public and private sectors to assure the continuity and viability of our political infrastructures.⁵⁸² The goal established within PDD 63 was to significantly increase security for Government systems and a reliable interconnected and secure information system.⁵⁸³ A National Plan Coordination Staff integrated the plans developed by the various departments of government which served as lead agencies within their respective areas of responsibility into a comprehensive National Infrastructure Assurance Plan.⁵⁸⁴ The Assurance Plan is overseen by the National Infrastructure Assurance Council.⁵⁸⁵ The Council includes representation from both the public and private sectors.⁵⁸⁶ Under the PDD, the Federal Bureau of Investigation's National Infrastructure Protection Center, **[*489]** established in February 1998, would continue to provide a control and crisis management point for gathering information on threats to critical infrastructure and for coordinating the federal government's response.⁵⁸⁷

⁵⁷⁸ *Id.* at 23.

⁵⁷⁹ See Presidential Decision Directive No. 63, Critical Infrastructure Protection (May 22, 1998), available at <http://www.fas.org/irp/offdocs/pdd/pdd-63.pdf>; Presidential Decision Directive-62, <http://ojp.usdoj.gov/odp/pdd62.htm> (last visited May 20, 2009) (providing an unclassified extract of PDD 62, which remains classified).

⁵⁸⁰ James P. Terry, An Appraisal of Lawful Military Response to State-Sponsored Terrorism, 39 Naval War C. Rev. 59, 59 (1986); see also McFarlane, *supra* note 549, at 321.

⁵⁸¹ Terry, *supra* note 576, at 182. Richard A. Clarke, longtime senior National Security Council staff member, was appointed the first National Security Coordinator. *Id.* at 182 n.32. In early 2004, during the 9/11 Commission hearings following the attacks on the World Trade Center and the Pentagon, Clarke testified that his strong advice to the Clinton and Bush Administrations to take the threat of bin Laden seriously was not heeded sufficiently. In one embarrassing moment, former National Security Advisor Sandy Berger attempted to remove draft memoranda from the National Archives that showed the recommendations of Clarke that were not acted on during the Clinton Administration. See Staff of H.R. Comm. on Oversight and Gov't Reform, 110th Cong., Sandy Berger's Theft of Classified Documents (2007).

⁵⁸² Presidential Decision Directive 63, *supra* note 579, at 3-4; see Terry, *supra* note 576, at 182-83.

⁵⁸³ See Presidential Decision Directive 63, *supra* note 579, at 2; Terry, *supra* note 576, at 182-83.

⁵⁸⁴ Terry, *supra* note 576, at 182-83.

⁵⁸⁵ *Id.* at 183.

⁵⁸⁶ *Id.*

⁵⁸⁷ Presidential Decision Directive 63, *supra* note 579, at 6-7. See Walter Gary Sharp, Sr., Cyberspace and the Use of Force 201-04 (1999), for a comprehensive review of the major elements of PDD 63 and the requirements that have been imposed upon the various Departments of Government and the private sector under this directive.

Together, these measures and the structure created, if implemented, would be invaluable in addressing current threats to the United States. Unfortunately, when, in the summer of 1998, two U.S. embassies were attacked, and in the fall of 2000 when the U.S.S. Cole was the target of terrorist violence, implementation by the Clinton Administration was totally lacking.⁵⁸⁸

D. President George W. Bush's Response to the al Qaeda Attacks in New York and Washington

The attacks by the al Qaeda terrorists on the World Trade Center in New York and on the Pentagon in Washington, D.C., on September 11, 2001, presented new challenges to the Presidency and the effective exercise of the Commander in Chief powers. Following the September 11 attacks, the rapid U.S. response by the Bush Administration was only possible because of the clear linkage established between Osama bin Laden's organization and the assault on U.S. personnel and property. The thrust of the U.S. strategy by President Bush, outlined in NSDD 138, and reflected in Operation Enduring Freedom in Afghanistan, was to reclaim the initiative lost when the United States pursued a reactive policy toward unconventional threats and attacks, as represented by our inaction in response to the attacks on our Embassies in Nairobi and Dar es Salaam, and on the U.S.S. Cole under President Clinton.

To counter the worldwide al Qaeda threat, President Bush implemented the proactive policies later incorporated in the critically important 2006 National Security Strategy.⁵⁸⁹ When President George W. Bush released the National Security Strategy for his second term on March 16, 2006, his Administration continued the emphasis on **[*490]** preemption articulated in his 2002 speech at West Point and included the points made earlier in the National Security Strategy announced for his first term in 2002.⁵⁹⁰

In the Washington Post's review of the 2006 Strategy, Peter Baker, like other writers around the country, suggested that this security framework had been developed by the Bush Administration in 2002, prior to our invasion of Iraq. Baker wrote on March 16:

The strategy expands on the original security framework developed by the Bush administration in September 2002, before the invasion of Iraq. That strategy shifted U.S. foreign policy away from decades of deterrence and containment toward a more aggressive stance of attacking enemies before they attack the United States.⁵⁹¹

The Doctrine of Preemption was certainly put in context for the current terrorism threat in the 2002 National Security Strategy, just as it was updated in 2006 for the second term. The language in the current version clearly relates the doctrine to events in Iraq and elsewhere that are creating current threats. For example, one section is entitled "Prevent attacks by terrorist networks before they occur."⁵⁹² In another section, the text claims: "We are committed to keeping the world's most dangerous weapons out of the hands of the world's most dangerous people."⁵⁹³ A further section states: "We do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack."⁵⁹⁴ The Doctrine of Preemption, or Anticipatory Self-

⁵⁸⁸ See James P. Terry, *The Lawfulness of Attacking Computer Networks in Armed Conflict and in Self-Defense in Periods Short of Armed Conflict*, [169 Mil. L. Rev. 70 \(2001\)](#), for a careful discussion of the inaction by President Clinton with respect to these attacks on America.

⁵⁸⁹ The White House, *The National Security Strategy of the United States 2006 (2006)* [hereinafter *NSS 2006*].

⁵⁹⁰ The White House, *The National Security Strategy of the United States 2002 (2002)*; George W. Bush, President, Commencement Address at the United States Military Academy in West Point, New York, 38 *Weekly Comp. Pres. Doc.* 944, 946-47 (June 1, 2002).

⁵⁹¹ Peter Baker, *Bush to Restate Terror Strategy*, *Wash. Post*, Mar. 16, 2006, at A1.

⁵⁹² *NSS 2006*, *supra note 589*, at 12.

⁵⁹³ *Id.* at 19.

⁵⁹⁴ *Id.* at 23.

Defense, as it is otherwise known, was clarified in terms of its use by the Bush Administration, just as it had been by the Reagan Presidency, which was the first to formally adopt this venerable legal principle as an administration policy.

These policies require that we make the fullest use of all the weapons in our arsenal. These include not only those defensive and protective measures which reduce U.S. systems' vulnerability, but also new legal tools and agreements on international sanctions, as well as the collaboration of other concerned governments. While we [*491] should use our military power only as a last resort and where lesser means are not available, there will be instances where the use of force is the only alternative to eliminate the threat to critical civil or military infrastructure. The response to al Qaeda posed such a requirement.

The thrust of this strategy, if it was to be effective, had to reclaim the initiative lost while the United States pursued a reactive policy to incidents of unconventional warfare under the prior Presidency, which neither deterred terrorists nor engaged in effective response. The key to an effective, coordinated policy to address the threat posed by those willing to target our critical infrastructure in New York and at the Pentagon was the commitment to hold those accountable responsible under the Law of Armed Conflict.

Full implementation of the Bush National Security Strategy, as in that articulated by President Reagan, should lead to increased planning for protective and defensive measures to address this challenge to our national security, and where deterrence fails, to respond in a manner which eliminates the threat; rather than, as prior to the articulation of NSDD 138 by President Reagan, treating each incident after the fact as a singular crisis provoked by international criminals. By treating terrorists and others attempting to destroy our critical infrastructure as participants in international coercion where clear linkage can be tied to a state actor, the right of self-defense against their sponsor is triggered, and responding coercion (political, economic, or military) may be the only proportional response to the threat.

This proactive strategy to the threat posed by attacks on our critical national security interests embraces the use of protective, defensive, non-military, and military measures. The Bush Doctrine attempts, as did the Reagan Initiative, to define acts designed to destabilize our national interests in terms of "aggression," with the concomitant right of self-defense available as a lawful and effective response. The use of international law, and more specifically, the Law of Armed Conflict,⁵⁹⁵ has not only complimented the existing criminal law approach, but should give pause to those who would target vital U.S. interests in the future. In the response to al Qaeda and Taliban [*492] elements in Afghanistan, the Bush Doctrine outlined in the 2006 National Security Strategy was closely followed.

VI. Humanitarian Crises Addressed by Presidents Johnson and Clinton

A. President Johnson's Intervention in the Congo

After the ratification of the U.N. Charter in 1945, authority to direct the use of force to rescue or protect U.S. or foreign citizens abroad rests exclusively with the fifteen-member U.N. Security Council.⁵⁹⁶ When the Security Council is unable to agree on a course of action, however, national leaders must rely upon the customary international law of humanitarian intervention.⁵⁹⁷ The most significant post-Charter example of humanitarian

⁵⁹⁵ The Law of Armed Conflict is comprised of both regulations concerning the conduct of armed hostilities represented by the Hague Conventions of 1899 and 1907, and regulations concerning protection of the victims of warfare as reflected in the four Geneva Conventions of 1949. See generally Terry, *supra* note 1, in which the law of armed conflict within the construct of the regulation of international coercion is carefully dissected.

⁵⁹⁶ U.N. Charter arts. 39-51. These articles of the Charter comprise Chapter VII, which vests exclusive authority within the fifteen-member U.N. Security Council to address breaches of the peace, such as the unrest giving rise to the need to intervene for humanitarian reasons. In order for the Security Council to act, a majority of its members and each of the five permanent members must agree. *Id.* art. 27.

intervention directed by a U.S. President, other than Kosovo, occurred in the Congo in 1964 on President Lyndon Baines Johnson's watch.

The Stanleyville intervention was unlike the 1965 interventions in the Dominican Republic by U.S. Marines or the December 1989 intervention in Panama by USSOUTHCOM forces which were ordered to protect American lives.⁵⁹⁸ The intervention in the Congo was directed by President Johnson and the leaders of Great Britain and Belgium to protect not only their own nationals, but also the nationals of third states and nationals of the country in which the intervention occurred.⁵⁹⁹ As the late Professor Lillich explains, "the Congo airdrop was a classic occasion of humanitarian intervention, and the Dominican Republic, at least initially, was a classic case of forcible self-help."⁶⁰⁰

[*493] The Congo crisis in 1964, managed by President Johnson, presented nearly parallel legal issues to those faced by President Clinton and other NATO leaders in 1999. In the 1964 Congo situation, there were more than a thousand Congolese, U.S., British, Belgium, French, and nationals of other states captured by the Congolese rebels in Stanleyville.⁶⁰¹ The captured civilians were being held as hostages with the rebels threatening to kill them if their demands were not met.⁶⁰² There is no doubt that this constituted a violation not only of the U.N. Charter, but also of the Geneva Conventions. No one took issue that the situation presented these violations, but the Security Council was unable to agree upon a course of action.⁶⁰³ The Organization of African Unity was thereafter ceded authority to deal with the situation.⁶⁰⁴ It failed miserably.⁶⁰⁵ The United States, seeing no alternative, much as it had in the later Kosovo crisis, cooperated with other concerned states (Britain and Belgium) in leading an airdrop of paratroopers without the benefit of U.N. Security Council authority.⁶⁰⁶ The forces involved in the humanitarian intervention landed at Stanleyville and rescued the hostages.⁶⁰⁷

It is interesting to note that while there was much political criticism of the allied intervention, led by the Russian Ambassador to the United Nations,⁶⁰⁸ there has been little scholarly legal criticism alleging a violation of Article 2(4) of the Charter in the Stanleyville operation. Not one legal commentator has found the use of limited force represented in the collective effort of Britain, Belgium, and the United States to have impaired the long-term territorial integrity or political independence of the Congolese state. In fact, it can be argued that the stability of the government was enhanced once the hostage crisis was resolved.

⁵⁹⁷ Where the Security Council is unable to act because of disagreement among its members, as in the Congo Crisis, members are obliged to look to the customary international law. See Terry, *supra* note 1, at ch. 3, for a discussion of the application of customary international law in the context of humanitarian intervention.

⁵⁹⁸ See Terry, *supra* note 90, at 110-11.

⁵⁹⁹ See Richard Lillich, *Forcible Self Help Under International Law*, in 62 Readings in International Law from the Naval War College Review 1947-1977, at 135 (Richard Lillich & John Norton Moore eds., 1980) [hereinafter Lillich, *Forcible Self Help*].

⁶⁰⁰ *Id.* at 137.

⁶⁰¹ See 5 Marjorie M. Whiteman, *Digest of International Law* 475-76 (1965).

⁶⁰² *Id.*

⁶⁰³ 51 Dep't St. Bull. 840 (1964); Robert F. Gorran, *Great Debates at the United Nations: An Encyclopedia of Fifty Key Issues 1945-2000*, at 145 (2001).

⁶⁰⁴ See Richard A. Falk, *Legal Order in a Violent World* 328, 334 (1968).

⁶⁰⁵ See generally Howard L. Weisberg, *The Congo Crisis in 1964: A Case Study in Humanitarian Intervention*, 12 Va. J. Int'l L. 261 (1972) (discussing the Congo Crisis in depth).

⁶⁰⁶ See 51 Dep't St. Bull. 840, 842 (1964).

⁶⁰⁷ *Id.* at 843-44.

⁶⁰⁸ See Whiteman, *supra* note 601 at 476.

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B. President Clinton's Successful Resolution of the Kosovo Crisis

As in the case of the Congo, the resolution of the crisis faced by President Clinton in Kosovo reflected a multilateral effort spearheaded by the United States to do that which should have been the responsibility of the Security Council.⁶⁰⁹ When fighting broke out in early 1998 between Federal Republic of Yugoslavia ("FRY") authorities and Kosovo Albanian paramilitary units, commonly known as the Kosovo Liberation Army ("KLA"), it became clear the Serb offensive was designed to eliminate all elements of Kosovar resistance.⁶¹⁰ The United Nations responded to the extreme violence with Security Council Resolutions 1160, 1199, and 1203.⁶¹¹ When fighting continued, NATO leadership threatened airstrikes. This led to negotiations between President Clinton's Envoy Richard Holbrooke and the FRY leadership, which produced an October 12, 1998, accord between Holbrooke and President Milosevic, leading to signed agreements on October 15, 1998, between NATO and the FRY,⁶¹² and on October 16, 1998, between the Organization for Security and Cooperation in Europe ("OSCE") and the FRY.⁶¹³

When the follow-on peace negotiations in March 1999 at Rambouillet, France, failed to reach agreement on a peace settlement the FRY was willing to sign, and the Serbs once again escalated the [*495] violence against ethnic Albanians in Kosovo, NATO forces led by a U.S. commander entered Yugoslavia as part of a humanitarian intervention to force Serb forces from Kosovo and to bring an end to the violence against the ethnic Albanian citizens of this province.⁶¹⁴

The determination by President Clinton and other NATO leaders to intervene in Kosovo under other than U.N. Security Council authority came after the Russian and Chinese Permanent Representatives to the Security Council advised the Council in early March 1999 that their governments would not support a draft resolution which would authorize the use of force to stop the Serb attacks in Kosovo.⁶¹⁵ Neither Russia nor China had impeded passage of earlier Security Council Resolutions 1160, 1199, and 1203.⁶¹⁶ These Security Council Resolutions under

⁶⁰⁹ Editor's Note: The following material, presented here under the heading "President Clinton's Successful Resolution of the Kosovo Crisis," was published previously, in large measure, in James P. Terry, *Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism*, [2004 Army Law. 36, 42-43](#). The content as it appears in this Article has been slightly revised.

⁶¹⁰ See Terry, *supra* note 416, at 42-43 for a full discussion of the facts and circumstances underlying the conflict and the U.S. and NATO actions prior to and during the conflict.

⁶¹¹ S.C. Res. 1203, pmb., P 1, U.N. Doc. S/RES/1203 (Oct. 24, 1998) (endorsing the October 1998 cease-fire agreement and further condemning all acts of violence and terrorism); S.C. Res. 1199, P 1, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (demanding that "all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo"). See generally S.C. Res. 1160, pmb., U.N. Doc. S/RES/1160 (Mar. 31, 1998) (condemning the excessive use of force by Serbian authorities).

⁶¹² The October 15, 1998 Agreement between the FRY and NATO established an Air Verification Mission for NATO forces to enforce the requirements of UNSC Res. 1160 and 1199. See Terry, *supra* note 416, at 42-43; see also Sean D. Murphy, *Humanitarian Intervention in Kosovo*, [93 Am. J. Int'l L. 161, 169 \(1999\)](#).

⁶¹³ The October 16, 1998, Agreement between the OSCE and FRY established a Verification Mission for the OSCE on the ground in Kosovo, again to ensure compliance with UNSC Res. 1160 and 1199. The OSCE is a fifty-five member body which serves as an instrument for early warning, conflict prevention, and crisis management in Europe. Both the United States and Russia are members. There is no military arm of this organization.

⁶¹⁴ Operation Allied Force was executed on March 24, 1999. See Press Release, Security Council, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo, U.N. Doc. SC/6657 (Mar. 24, 1999).

⁶¹⁵ See Terry, *supra* note 349, at 235-38.

⁶¹⁶ See *id.*

Chapter VII of the U.N. Charter called upon both Serb and KLA forces to end the fighting, called upon Serb forces to withdraw, called upon Serb forces to cooperate with investigators and prosecutors from the War Crimes Tribunal at the Hague, and endorsed the October 15 and 16, 1998, monitoring agreements brokered by Clinton's Special Envoy Richard Holbrooke, the architect of the Dayton Peace Accords in Bosnia. ⁶¹⁷

As noted above, when the Serbs then violated these obligations through renewed violence and refused to sign the follow-on Rambouillet Agreement in mid-March 1999 (calling for a cease-fire, Kosovo autonomy, and a NATO peacekeeping force), and commenced an offensive designed to drive all Albanian resistance from Kosovo, NATO directed execution of Operation Allied Force against Serbian aggression and human rights violations on March 24, 1999. ⁶¹⁸ The operation continued until June 10, 1999. ⁶¹⁹

In the first eight days of the operation, the U.N. High Commissioner for Refugees reported that some 220,000 persons were forcibly expelled from Kosovo to neighboring states, principally [*496] Albania, by Serbian forces. ⁶²⁰ The OSCE Verification Mission in Kosovo estimated that over 90% of the Kosovo Albanian population - some 1.45 million people - had been displaced by the conflict by the time it ended. ⁶²¹

Although the Security Council had never authorized the intensive bombing campaign, it endorsed the political settlement that was reached and agreed to deploy an extensive "international security presence" along with a parallel "international civil presence." ⁶²² The considerable responsibilities of each of these missions were spelled out in detail in U.N. Security Council Resolution 1244 of June 10, 1999. ⁶²³

What the justifications of a number of the contributor states, including the United States, reflect is that there is an uneasy recognition that the Charter system is inadequate to address certain of the humanitarian crises that may come before the United Nations, if unanimity among the five permanent members of the Security Council continues to be a requirement. Only the United Kingdom, Belgium, and Germany, among the NATO participants, directly addressed the matter, and found that the authorization of the Security Council was not necessary in Kosovo since the action was supportive of, rather than contrary to, the values represented in Article 2(4), thus obviating a need for that body to consider the matter. ⁶²⁴

In Kosovo, NATO's use of military force to prevent the continuation of massive human rights abuses was supportive of state practice which has established the lawfulness of humanitarian intervention, as carefully circumscribed by international lawyers, before and since. ⁶²⁵ International law requires that the community of nations first consider all means short of force to address threats to international peace and security. ⁶²⁶ Where diplomacy fails and egregious human rights violations are observed, the international [*497] community must not be allowed to excuse its failure to act with pre-Charter references to principles of non-intervention and sovereign immunity, and to the

⁶¹⁷ See James P. Terry, *The Importance of Kosovo to NATO*, 21 ABA Nat'l Sec. L. Rep. 1, 1-2, 4 (1999).

⁶¹⁸ See Walter Gary Sharp, Sr., *A Short History of the Kosovo Crisis*, 21 ABA Nat'l Sec. L. Rep. 3, 3, 6 (1999).

⁶¹⁹ *Id.* at 8.

⁶²⁰ The Organization for Security and Co-operation in Europe, *Kosovo/Kosova As Seen, As Told: An Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission October 1998 to June 1999*, ch 14, available at www.osce.org/publications/odhr/1999/11/17755_506_en.pdf.

⁶²¹ *Id.*

⁶²² Terry, *supra* note 416, at 43; S.C. Res. 1244, PP 3-4, U.N. Doc. S/RES/1244 (June 10, 1999).

⁶²³ See generally S.C. Res. 1244, *supra* note 622.

⁶²⁴ See Terry, *supra* note 416, at 43, for a recitation of statements by NATO leaders to this effect.

⁶²⁵ *Id.* at 45.

⁶²⁶ See Terry, *supra* note 1, at 7-10.

Charter requirement for Security Council approval, when the lack of approval is contrary to the values for which the Charter stands.

Observations and Conclusions: Reflections on the President's Commander in Chief Authority

In Article II of the U.S. Constitution, the drafters granted the President the following powers in the realm of foreign relations: to serve as Commander in Chief, to receive ambassadors, to appoint ambassadors, and to make treaties with the advice and consent of the Senate. It is the Commander in Chief authority, however, which has proven over time to represent the greatest strength and the greatest burden to each of our Presidents, whether in war or in periods of crises short of war. The powers granted the President, as broad as they are, are nevertheless circumscribed by equally fulsome and intersecting congressional authorities. Principal among these are the withholding or withdrawal of legislative authority, and the limitation on funding for military operations as occurred in Vietnam and Somalia.

It has been the conduct of our most effective Presidents, however, who have, in the management of these crises, successfully expanded the Commander in Chief authority through practice. Among our early wartime leaders, President Lincoln was foremost in integrating both national security strategy and policy issues. Understanding from the beginning the Union's advantage in personnel, equipment, and resources, he orchestrated the war to destroy only that necessary to secure victory; that is, the armies of the South and the logistical support they required.

Among the modern wartime leaders, Roosevelt and Truman were the strongest and most effective Presidents. Roosevelt exercised his wartime powers more broadly than any other President, before or since. Between the two Gulf War Presidents, George H.W. Bush was suited both by temperament and experience to not only succeed, but excel as a wartime Commander in Chief. He worked with the United Nations and with coalition states to develop a strategy designed to return Kuwait to the status quo ante while adhering to the limitations imposed by Congress that carefully circumscribed the broader authority contained within U.N. Security Council Resolution 678.

[*498] Among those Presidents facing terrorist violence, Presidents Ronald Reagan and George W. Bush had the clearest vision concerning how best to both garner the support of Congress, the American people, and our allies in addressing the threat. Similarly, Presidents Lyndon Johnson and William J. Clinton were highly successful in directing humanitarian efforts to protect the Congolese and Kosovars, and their military operations were flawless.

In each instance of challenge and response to attacks on U.S. interests, our most successful Presidents have had both the support of Congress and of the American people in prosecuting the response to the national emergencies they faced. Their appreciation of superior leadership among the military leaders available allowed them to focus on national policy while entrusting the execution of that policy, in the form of military strategy, to their designated military leaders, without fear that their national policy might be misunderstood or skewed in a manner inconsistent with their guidance. Having skilled statesmen serving as President, statesmen unafraid to reign in their cabinet members and their senior military officers where necessary, provided the nation with superior leadership and reinforced Clausewitz's maxim that the conduct of war is the province of the statesman, and not the general.