

Declaring War No More:

The Use of International Legal Frameworks and the Expansion of the Presidential War Power

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It is chiefly in its foreign relations that the executive power of a nation is called upon to exert its skill and its vigour. If the existence of the Union were perpetually threatened, and if its chief interests were in daily connexion with those of other powerful nations, the executive government would assume an increased importance in proportion to the measures expected of it, and those which it would carry into effect.

Alexis de Tocqueville¹

¹ Alexis de Tocqueville, *Democracy in America*, (New York: Edward Walker Press, 1850), 121.

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Abstract:

The struggle between the President and the Congress over the power to control the use of military force is an enduring dimension of U.S. foreign policy. In the 20th century Arthur Schlesinger labeled the growth of Presidential war power the “Imperial Presidency.” While some scholars have attempted to explain the expansion of Presidential power based on the Cold War or nuclear weapons, there has been little work studying the link between America’s ascending role in international legal frameworks and this domestic legal transformation.

In this dissertation, I argue that America’s participation in international legal frameworks, such as the United Nations and NATO, has been a central factor in enabling the growth of Presidential war power. These international frameworks allow the President to circumvent Congress and to assert that the use of military force was something other than a ‘war’ that would need Congressional authorization. In case studies of pre-WWII aid to Great Britain, the Korean War, the Vietnam War and the Gulf War, I demonstrate how the rise of executive war power relied on America’s growing participation in international legal frameworks.

The dissertation contributes to the nexus of International Relations and Constitutional scholarship. It offers a unique interpretation of Presidential war power while also offering new insights on the nature of the United States’ relationship with international legal frameworks. I argue that participation in international legal frameworks has been ‘democracy-undermining’ as the President utilizes those frameworks to circumvent the Constitution’s restrictions on Presidential war power.

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Chapter 1:

International Legal Frameworks and Executive War Power

A) Two Systems in Tension

The use of military force by the United States is situated in two overlapping legal systems: America's Constitutional system and its commitments to international legal frameworks. America's Constitutional system places the power to "Declare War" in Congress.² This location emphasizes the need to restrain the President's ability to use military force and it is meant to foster a period of delay and debate before force is used. America's series of military commitments in alliances and collective security agreements are different. They emphasize the need for quick and decisive action without delay and they tend to elevate the power of the President to use military force. These actions have been termed a 'police action' or 'humanitarian intervention,' by Presidents utilizing military force without Congressional authorization.

In this legal sphere, the United States' global commitments as a super power and its domestic commitments as a democracy come into conflict. Both of these legal systems seek to control how the United States uses military force, yet the principles that undergird the legal systems stand in opposition to one another. While America's Constitutional system emphasizes caution and Congressional control, America's international legal commitments emphasize speed and Presidential control.

Since Arthur Schlesinger observed in 1973 that the United States has created an "Imperial Presidency" that uses force without Congressional authorization, generations of

² U.S. Constitution; Article 1, Section 8.

Constitutional and International Relations scholars have worked to identify the causes behind the rise of executive war power.³ The factor that scholars identify as the cause of the expansion of executive war power has varied from factors as fundamental as the development of the nuclear bomb to those as obscure as the growth of the Office of Legal Counsel in the Department of Justice. While scholars have searched high and low for the causes of this legal transformation, America's growing participation in international legal frameworks (ILFs) concerning the use of force has been largely overlooked as a source of executive power.

This dissertation explores how the President has shifted the legal terrain covering the use of force from the Constitution's emphasis on delay and robust Congressional authorization to the international legal framework's emphasis on decisive action with minimal Congressional authorization. America's entrance into the United Nations and NATO offered the executive a tool that could be deployed to circumvent the need for Congressional authorization. These ILFs, I argue, have been an overlooked yet central dimension to the expansion of the President's power to use military force.

B) Research Question and Theoretical Implications

This dissertation asks: "Has the executive's use of ILFs been central to the expansion of executive power to use military force?" This question is a historical inquiry into the sources of executive power. This study then serves as a basis for examining the relationship between ILFs and the American Constitutional order.

The use of international legal frameworks to bolster executive power, I argue, began with pre-WWII military aid to the United Kingdom when Franklin Roosevelt and his advisers

³ Schlesinger defined the "imperial presidency" as "the condition that ensues when the constitutional balance between Presidential power and Presidential accountability is upset in favor of Presidential power." Arthur Schlesinger, *The Imperial Presidency*, revised edition, (New York: Mariner Books, 2004), 420.

identified ILFs as a means to circumvent an isolationist Congress. The President's power to use ILFs to enhance Executive power was then formalized with America's accession to a system of international organizations in the post-WWII era. In the Korean War, Vietnam War and Gulf War, I identify the various ways in which the executive mobilized ILFs as a resource to expand executive power to utilize military force.

In this historical study, I chart the growth of Presidential utilization of ILFs as the legal basis for avoiding Congressional authorization. I identify the pre-WWII aid to Great Britain as the 'experimentation' phase in which the argument was first deployed and America's post-WWII accession to the UN and NATO as a 'formalization' in that process. The executive's ability to utilize ILFs to expand executive power has gained strength over time. Each Presidential action provided a precedent that a later President can cite to legitimize military action conducted through ILF authorization.

This dissertation contributes to a debate concerning the impact of America's participation in ILFs on the American Constitutional order. Leading scholars have trumpeted the "democracy-enhancing" impacts of ILFs on the American state.⁴ However, this dissertation demonstrates that ILFs can undermine American democracy by empowering the President to circumvent Congress.

C) Secondary Sources, Methodology & Case Selection

I. Literature Review: The Missing Link between ILFs and Executive Power

The literature on executive war power has largely overlooked the role of ILFs as a source of the executive's expanding power to use military force. There is widespread agreement in the

⁴ This claim is not to imply a normative position within the study. It utilizes the notion of "democracy-enhancing" as a descriptive claim as utilized in the literature, see; Robert Keohane, Stephen Macedo, and Andrew Moravcsik, "Democracy-Enhancing Multilateralism," *International Organization*, (Winter 2009).

literature, ushered in by Arthur Schlesinger's *Imperial Presidency* (1973), that the President's power to use force has expanded in the post-WWII era.⁵ Since Schlesinger's work, the field has sought to explain the growth of executive power to use force in the 'temporal,' 'technological,' and 'institutional' interpretations.

First, many scholars emphasize the 'temporal' dimension: the permanency of America's engagement in global conflict. Constitutional scholar Mary Dudziak argues that the President invoked a notion of "wartime" as an ongoing dimension of U.S. foreign policy because "wartime serves as an argument and an excuse for national security-related ruptures of the usual legal order."⁶ For Dudziak, wartime is not confined to the major wars but it is a frame that the President can invoke in more limited conflicts to expand executive power.⁷ The endurance of small wars, as historian Marilyn Young argues, has contributed to a sense of permanent war and has pushed forward a continual expansion of executive power.⁸

Second, many scholars emphasize the 'technological' dimension: the President's control over the nuclear arsenal. Gary Wills describes the President's power to use force as 'bomb power,' in which the nuclear bomb "altered our subsequent history down to its deepest constitutional roots."⁹ In the nuclear era, "only one part of the government had the supreme power, the Bomb, and all else must defer to it" which made the President a "lone eminence

⁵ Schlesinger did not endeavor to define the causes of the Imperial Presidency at a deep level. He spent much of the book, despite its virtues, in trying to distinguish between good exertions of Presidential power by Presidents he favored, notably Kennedy and Roosevelt, and the bad exertion of Presidential power by Presidents he disliked, notably Johnson and Nixon.

⁶ Mary Dudziak, *Wartime* (New York: Oxford UP, 2012), 8.

⁷ Ibid, 21.

⁸ Marilyn Young, "Limited War, Unlimited," Library of Congress, 8 July 2009; http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=4683

⁹ Gary Wills, *Bomb Power: The Modern Presidency and the American State* (New York: Penguin, 2010), 1.

above constitutional scrutiny.”¹⁰ For decades, such scholars have noted that the requirement for speedy use of force in the nuclear age has been a primary factor in driving executive power.¹¹

Third, many scholars emphasize the ‘institutional’ dimension as the catalyst for executive power. Richard Neustadt pioneered the exploration of the President’s institutional advantages in *Presidential Power*.¹² Gordon Silverstein built on this to show how the President has an array of advantages in expertise and resources over the Congress.¹³ More recent works in this tradition have explored how the President can exert pressure on Department of Justice lawyers to build expansive claims for executive power¹⁴ and how the President can utilize his public relations apparatus to convince the American people to go to war without engaging the Congress.¹⁵ In this account, the institutional resources of the executive over Congress are viewed as a driving force in the expansion of executive war power.

While all of these interpretations of the expanding executive war power provide valuable scholarly contributions, they overlook an important legal transformation of American foreign relations. A nation that found its origins in George Washington’s pledge that “our true policy [is] to steer clear of permanent alliances with any portion of the foreign world,” found itself part of a complex set of mutual security treaties and as a leader in the nascent United Nations.¹⁶ The expansion of America’s global commitments in the ratification of these ILFs has not been sufficiently acknowledged in scholarly studies on executive war power.

¹⁰ Ibid, 1-2.

¹¹ This argument gained credibility in 1980s in the debate over the lack of Congressional oversight of the of nuclear arsenal. See;

Peter Raven Hansen, “Nuclear War Powers,” *American Journal of International Law*, 83 (1989), 786.

¹² Richard Neustadt, *Presidential Power and the Modern Presidents* (New York: Free Press, 1991). Revised edition.

¹³ Gordon Silverstein, *Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford UP, 1996).

¹⁴ Bruce Ackerman, *The Fall and Decline of the American Republic* (Cambridge: Harvard UP, 2010).

¹⁵ Steven Casey, *Selling the Korean War: Propaganda, Politics, and Public Opinion in the United States, 1950-1953*. (New York: Oxford UP, 2010).

¹⁶ George Washington, “Farewell Address,” 1796 http://avalon.law.yale.edu/18th_century/washing.asp

The few scholars who have approached the relationship between executive war power and ILFs focus on making claims about the Constitutionality of Presidential use of force, rather than on rigorously analyzing the historical evidence. Such work can best be understood as “advocacy history,” which Walter Issacson describes as work “in which scholarly analysis and narrative are marshaled into the service of a political argument.”¹⁷ In the 1990s, as the Gulf War and various humanitarian interventions were conducted under the auspices of ILFs, scholars debated the Constitutionality of using force vis-a-vis an ILF without Congressional authorization. Louis Fisher, Michael Glennon and John Hart Ely condemned this position and argued that an ILF could not authorize the use of force.¹⁸ On the other side, Thomas Franck, Faiza Patel, David Golove and Robert Turner have argued that authorization from an ILF, particularly the United Nations, was a sufficient basis for the President to use force.¹⁹ This exchange typified the “Presidentialist-Congresionalist debate,” as Stephen Griffin terms it, in which each side seeks to create a selective reading of history that supports their Constitutional interpretation.²⁰ In this formulation, the “war powers debate itself lacks a historical context” with each side turning away from historical research as “the academic debate has focused more on the

¹⁷ Walter Issacson, “Who Declares War,” *New York Times*, 21 January 2010.

<http://www.nytimes.com/2010/01/24/books/review/Issacson-t.html?n=Top/Reference/Times%20Topics/People/Y/Yoo,%20John%20C.?ref=johncyoo&pagewanted=all>

For a more developed critique of lawyers writing legal history as brief-writing, see; Douglas Hay, “Archival Research in the History of the Law: A User’s Perspective,” *Archivaria* 24 (1987), 44.

¹⁸ Michael Glennon, *Constitutional Diplomacy* (Princeton: Princeton UP, 1991), 192-222.

John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton: Princeton UP, 1993), 151-152.

Louis Fisher, “Sidestepping Congress: Presidents Acting under the UN and NATO,” *Case Western Law Review* 47 (1997), 1237-1273.

¹⁹ Robert Turner, “Truman, Korea and the Constitution: Debunking the ‘Imperial President’ Myth,” *Harvard Journal of Law and Public Policy* 19 (1995-1996), 536-580.

Thomas Franck and Faiza Patel. “UN Police Action in Lieu of War: The Old Order Changeth,” *American Journal of International Law*, 85 (1991), 63-74.

David Golove. “From Versailles to San Francisco: The Revolutionary Transformation of the War Powers,” *University of Colorado Law Review*, 70 (1999), 1-23.

²⁰ Stephen Griffin, “Reconceiving the War Powers Debate,” *Tulane University Public Law And Legal Theory Working Paper Series*, Working Paper 11-06, (2011), 1.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652

claims of scholars than of presidents.”²¹ The work of Kenneth Schultz stands alone as an attempt to study how authorization from ILFs had promoted the President’s war power, yet his approach focused only on analyzing humanitarian interventions in the 1990s and lacked any broader historical analysis.²² Schultz’s study identified how the President could utilize ties to ILFs to promote executive power, but his work lacked original historical research and he saw the trend as purely confined to the 1990s.

II. Methodology: Historical Cases and Archival Evidence

The dissertation focuses on in-depth historical study of how the executive has engaged ILFs in relation to executive war power. This approach relies on process-tracing that “explores the decision-making process by which initial case conditions are translated into case outcomes,” as Stephen Van Evera notes.²³ In each case study, I use process-tracing to understand how the executive constructs its power to use force with limited Congressional authorization. In the conclusion, I engage in a broader process-tracing that seeks to identify how executive war power has evolved over time. In terms of the scope of each case, I begin with a focus on the biographical background of key policy-makers that allows for the construction of what Alexander George termed the “operational code” of the policy-maker and a political background that contextualizes the decision-making surrounding the use of force.²⁴ In the attempt to engage the historical context, the objective is not to create generalizable theories of decision-making but to establish how policy-makers understood their actions. In focusing on the ways that the

²¹ Ibid, 3.

²² Kenneth Schultz, “Tying Hands and Washing Hands: The U.S. Congress and Multilateral Humanitarian Intervention,” in *Locating the Proper Authorities: The Interaction of Domestic and International Institutions*, ed. Daniel Drezner (Ann Arbor: University of Michigan Press, 2003), 105-142.

²³ Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca: Cornell University Press, 1997), 64.

²⁴ Alexander George, “The ‘Operational Code’: A Neglected Approach to the Study of Political Leaders and Decision-Making,” *International Studies Quarterly*, 13 (1969), 201-203.

executive justified the use of military force, both publicly and privately, the dissertation seeks to understand how policy-makers approached these decisions.

Constructing this level of historical depth requires extensive archival research. Archival sources are particularly valuable to social scientists, as Deborah Welch Larson notes, to “identify the causal mechanisms underlying foreign policy events” as the “documents allow the investigator to determine if political causes such as domestic politics or economic interests actually influenced policy.”²⁵ For scholars to reach conclusions concerning causation, Larson notes that they must “open up the black box [of archival research] and reveal the mechanisms underlying foreign policy behavior.”²⁶ The way in which a policy-maker frames an issue in official documentation can “lead us back step-by-step to ‘deep’ causes of political outcomes (i.e., identities and other frames of reference),” as Richard Ned Lebow notes.²⁷

To supplement the archival research, I engage press accounts from the period and I interview policy-makers. First, press accounts offer an account not only of decision-making but contain the public language of policy-makers as they seek to justify their policies to the public. Though they are ‘secondary sources,’ they offer valuable insights into how policy-makers were seeking to justify their actions to the public. Second, interviews offer a valuable supplement for understanding the dimension of decision-making not captured in the written account. Interviewing can “augment” the archival research as a way to “put documents in context, glean insights into the motives of actors, and ferret out secret understandings,” as Lebow notes.²⁸ E.H. Carr noted that “history can not be written unless the historian can achieve some kind of contact with the mind of those about whom he is writing,” and interviews allow for the most robust

²⁵ Deborah Welch Larson, “Sources and Methods in Cold War History: The Need for a New Theory-Based Archival Approach,” in *Bridges and Boundaries: Historians, Political Scientists and the Study of International Relations*, ed. Colin Elman and Miriam Fenius Elman, (Cambridge: Harvard UP, 2001), 327

²⁶ Ibid, 350.

²⁷ Richard Ned Lebow, *A Cultural Theory of International Relations*, (New York: Cambridge UP, 2008), 5.

²⁸ Richard Ned Lebow, “Social Science and History: Ranchers versus Farmers,” in *Bridges and Boundaries*, 133

contact with the subject of historical inquiry.²⁹ For this dissertation, I conducted on the record interviews with former policy-makers who were intimately involved in the events being studied. While interviews have their limitations because memories can be fallible and policy-makers will create self-serving interpretations of events, they are a valuable supplement to documentary analysis.

With a thorough historical account, I turn in the conclusion to analyzing the implications of these findings for the debate in IR and Constitutional theory concerning the relationship between the United States' participation in ILFs and its democratic order. In drawing together history with theory, this dissertation seeks to "capture more of the richness of actually lived histories while still speaking to the social scientific goal of generating usable knowledge," as Paul Pierson outlines.³⁰

III. Case Selection

The four primary cases (pre-WWII aid to Great Britain, Korean War, Vietnam War, Gulf War) have been selected because they are the four most significant uses of force by the United States with limited Congressional authorization for which archival research was possible. First, I selected cases where I could conduct archival research. The level of historical depth that is necessary for a full examination of decision-making is only possible when there is expansive access to the relevant archives. With declassification processes still limited at the Clinton library, non-existent at the George W. Bush library until 2014 and with the Obama administration maintaining tight classification over the most necessary documents, instances of use of force under these administrations could not be considered for core cases. Second, I selected cases where the United States used military force in a significant manner with limited or no

²⁹ E.H. Carr, *What Is History*, (New York: Penguin, 1967), 24.

³⁰ Paul Pierson, *Politics in Time: History, Institutions and Social Analysis*, (Princeton: Princeton UP, 2004), 161.

Congressional authorization. The Korean War, Vietnam and Gulf War were the largest uses of force and the pre-WWII aid to United Kingdom, while limited in its size, was strategically significant for drawing the United States closer to a belligerent status in a global conflict. For each case, I examine the way in which the President was able to establish Executive power to use force with limited Congressional authorization. The study offers an in-depth analysis of each case. Due to the lack of any scholarship on the war powers debate in the Gulf War and with the archives only recently opening at the George H.W. Bush Library, the dissertation provides more analysis of that case and offers a foundation for new research on the Gulf War.

While there is a risk of “selection bias” stemming from what King, Keohane and Verba identify as “selection on the dependent variable,” this risk is mitigated with the research approach.³¹ These scholars warn that by selecting based on a dependent variable (the use of force without Congressional authorization but with ILF authorization), the study can overlook important cases in which the dependent variable did not occur.³² First, the risk of this bias is mitigated by orienting the case study selection in the American foreign relations literature. The pre-WWII aid to Great Britain is widely regarded as a crucial moment in the evolution of executive power.³³ Similarly, the combination of the Korean War, Vietnam War and Gulf War as a set of major case studies is widely used in the study of American foreign relations.³⁴ Second, the risk of selection bias is mitigated by developing a broader contextual study of the evolution of war powers issues that includes a discussion of cases with Congressional authorization. Third, in the study of the Vietnam War, I specifically address a ‘non-case’ in the Nixon administration’s

³¹ Gary King, Robert Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Method in Qualitative Research*, (Princeton: Princeton University Press, 2004), 128.

³² Ibid, 128.

³³ Schlesinger, “Imperial Presidency,” 107.

³⁴ Gary Hess, *Presidential Decisions for War: Korea, Vietnam and the Persian Gulf War*, (Baltimore: Johns Hopkins UP, 2001).

use of force in Cambodia (done without reference to an ILF) and the implications this has for the study. While the risk of selection bias is inherent in a case study approach, these efforts make such a risk incredibly minimal. The case study approach reveals what role ILFs played in each case and then allows for a broader assessment of the evolution of executive power.

D) A Proposition About ILFs as a Resource for Executive Power to Use Force

I. Why Presidents Prefer ILF Authorization to Congressional Authorization

On balance, the executive prefers to utilize an ILF to create the Constitutional legitimacy to use military force. First, the executive has a variety of actors in the international framework (i.e. UN, NATO, bilateral treaties) through which it can construct international legal authorization whereas there is a single Congress. The President suffers high political costs if he attempts to receive Congressional authorization and then fails, whereas the executive can simply attempt to obtain authorization from another international legal institution if an initial strategy fails.³⁵ Second, the President can utilize U.S. international power to obtain authorization from an international legal framework more easily than the President can obtain authorization from a partisan-driven Congress. America's strong power within the international legal framework places it in a position to regularly obtain authorization to use force. The President, as Eric Posner and Adrian Vermeule posit, "may prefer, all else equal, to generate credibility through mechanisms that do not involve Congress, if concerned about delay, leaks or obstruction by small legislative minorities."³⁶ Third, claiming authority provided by the international legal frameworks can be constructed without obtaining new authorizations. This is an important distinction: the President can construct authority from an older international legal framework,

³⁵ Louis Fisher, "The Law: Scholarly Support for Presidential Wars," *Presidential Studies Quarterly*, 35 (2005), 593.

³⁶ Eric Posner and Adrian Vermeule, *The Executive Unbound*, (New York: Oxford UP, 2010), 147.

such as a pre-existing treaty, through interpreting it in a manner that is consistent with its strategic ends. By contrast, a Congressional authorization to use force will generally have to be constructed and passed for the specific use of force. Thus, the President has comparatively lower costs in using international legal frameworks to construct the Constitutional legitimacy to use military force.

While obtaining Congressional authorization can be the most direct manner for the President to establish the Constitutional legitimacy to use force, it can often be more costly for the President. The President holds limited power within the domestic arena.³⁷ First, there is a significant risk that the attempt to obtain authorization will not pass. This is a low-likelihood yet high-risk scenario that the executive seeks to avoid. Second, there is a risk that the authorization will be passed with significant restrictions that limit the executive's capacity to act throughout the course of the military engagement. The Congress can utilize the authorization to undermine the executive's long-term objectives in the military engagement. Third, there is a risk that in submitting its use of force for Congressional authorization, the executive will limit its future capacity to use force. The Executive branch has a developed interest in preserving future capacity to use military force without Congressional restriction.³⁸ When the President goes to Congress, it becomes difficult to avoid this in the future because under "the civilizing force of hypocrisy, actors will incur a cost if they act too opportunistically in disavowing earlier positions whenever it suits their interests."³⁹ When the President goes to Congress, the President may lose future power to use force without Congressional authorization. International legal forums will have a far more difficult task in attempting to force the President to return in a different circumstance because they don't have the same powers over the President as the Congress. In

³⁷ Aaron Wildavsky, "The Two Presidencies," *Trans-Action*, 4 (1966), 7-14.

³⁸ Posner and Vermeuele, "The Executive Unbound," 104.

³⁹ *Ibid*, 73.

sum, the President bears far fewer risks in using an ILF to build the Constitutional legitimacy to use military force. On balance, the executive will seek to obtain an ILF and use that as a means to minimize their need to obtain Congressional authorization.

II. The Categories of Executive Utilization of ILFs

There are three distinct ways in which the President can utilize ILFs to expand executive war power. First, the President can utilize the ILF for “Total Substitution” for Congressional authorization wherein there is no Congressional authorization. Second, the President can utilize the ILF for “Political Coercion” wherein the President utilizes the ILF to force Congress into providing limited authorization. Third, the President can utilize the ILF for “Political Posturing” wherein the President utilizes the ILF to persuade Congress to offer expansive authorization.

This framework is a descriptive tool to classify the various cases in which the President can utilize an ILF to expand executive war power. It provides an analytical lens through which to understand how the executive seeks to utilize ILFs to expand Presidential power.

1) “Total Substitution.” The executive can argue that the ILF is sufficient to use force without any Congressional authorization. Total substitution is derived from a process of ‘legal grafting’ in which the President transfers the legitimacy of the ILF into the Constitutional realm. The President can argue that the ILF functions as a substitute for Congressional authorization because the Senate has ratified the treaty giving rise to the authorization and that the President has authority to uphold the ILF based on the President’s Constitutional power to conduct foreign relations. In this interpretation, the President draws Constitutional implications directly from the ILF to argue that the Congress has no power

to force the President to obtain authorization. The President can use the ILF to fully circumvent Congress by using force without any Congressional authorization.

2) “Political Coercion:” The executive can utilize the ILF in negotiations with Congress regarding the level of authorization that the executive has to achieve and it can employ the ILF to undermine the Congress’s power to authorize the use of military force. Oftentimes, the Congress may demand that the President come before Congress for authorization to use force (before a conflict or during it) and the President may be in a position in which he is unwilling to do so. In this case, the President can use the ILF as a tool of coercion to undermine the basis of the Congress’s power to demand that the President seek authorization. The President may employ a strategy of ‘rhetorical grafting’ in which the executive borrows the language from the ILF of labeling the use of force as something other than ‘war’ (i.e. police action, humanitarian intervention) as a means to tell Congress that the use of force does not rise to the level of ‘war’ for which Congressional authorization is required. The President may invoke the ILF as an ‘obligation’ that the United States has and use this obligation as a basis to claim in Presidential-Congressional debate over war powers that the President cannot offer Congress greater oversight. In this manner, the President translates the use of non-war language from the ILF into the Constitutional realm, thereby enhancing the President’s power to use force without significant Congressional authorization. In a “political coercion” scenario, the President may obtain very limited Congressional authorization and justifies the lack of a need for greater authorization on the ILF.

3) “Political Posturing:” The executive can utilize an ILF (either authorization from an IO or an attempt to obtain authorization from an IO) as a basis for pressuring the Congress into

supporting a robust resolution to sanction the use of force. If the ILF authorization has already been passed, the President can use that to pressure the Congress into supporting a resolution (posturing after ILF authorization). If the President is seeking authorization from an ILF, the President can pressure the Congress into authorizing the use of force to avoid undermining the President's position in obtaining authorization from the ILF (posturing during ILF authorization). In political posturing, the President ultimately obtains robust Congressional authorization but uses the ILF to posture the executive's position in such a manner where the Congress has a limited power to robustly debate or object to the proposed resolution.

In each of these modes, the executive utilizes an ILF as a means to expand executive power to utilize military force. Under "Total Substitution," the President interprets the ILF as a Constitutional replacement for the need for Congressional authorization. Under "Political Coercion," the President limits the Congress's demands for robust Congressional authorization by employing the ILF as a way to describe the use of force as less than war. The President may seek limited Congressional authorization but will use the ILF to defend executive power from Congress's demands for more robust authorization. Under "Political Posturing," the President utilizes an ILF (or negotiations with an ILF) as a means to pressure the Congress into giving Congressional authorization for the use of force. The President may seek robust authorization but will use the ILF as the basis for obtaining it. In each mode, the President uses the ILF as a means to expand executive power.

This theoretical model, if demonstrable in the case studies, offers a significant contribution to IR theory. IR scholars have increasingly turned to analyze the relationship between ILFs and domestic politics yet they have overlooked the Constitutional dimension that

is the focus of this research. Andrew Cortell and James Davis have argued that, “governmental officials themselves may appeal to international norms to legitimate unpopular decisions,” but their argument is confined to how government officials can use international norms to make policies more tolerable to the public.⁴⁰ While this is true, it is a limited account of the domestic implications of ILFs because it overlooks the Constitutional dimension. The President has an institutional advantage in creating and working through ILFs and can engage ILFs as resources to expand executive power in a way that the Congress cannot.

The ILFs do not simply lend support to unpopular policies, they elevate the power of the executive to use military force in ways that would be far more difficult without the ILFs. The theory can offer a better understanding of “how the structure of domestic constitutional law has interacted over time with the structure of international politics.”⁴¹ It uncovers an important legal dimension to what James Rosenau termed the “domestic-foreign frontier” at which “domestic and foreign issues converge, intermesh or otherwise become indistinguishable.”⁴² With all cases stemming from the United States, it can only offer a middle-range theory that is oriented on U.S. foreign policy but future scholarship can be conducted on parallel cases in other democratic states. Ultimately, this can give rise to a broader theory on the way in which participation in ILFs impacts the democratic order within member-states.

⁴⁰ Andrew Cortell and James Davis, “How Do International Institutions Matter: The Domestic Impact of International Rules and Norms,” *International Studies Quarterly*, (1996), 53

⁴¹ Harold Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, (New Haven: Yale UP, 1990), 72.

⁴² James Rosenau. *Along the Domestic-Foreign Frontier: Exploring Governance in A Turbulent Time*, (New York: Cambridge UP, 1997), 4.

CHAPTER 2:

Executive War Power in the Age of Declaring War

A) Overview

In this chapter, I document the evolution of Presidential power to use force without Congressional authorization from the Constitutional Convention through America's pre-WWII aid to the United Kingdom.

I argue that the President traditionally had a limited power to deploy military force without Congressional authorization and this power was rooted in his power as Commander-in-Chief. The power of the President expanded as America became an empire in the beginning of the 20th century but this was still a limited power. I argue that this changed in the pre-WWII aid to the United Kingdom. The President's power to use force expanded massively as the administration turned to orient the power in the President's ability to conduct diplomatic relations and in Nazi Germany's disobedience of international law. This "Total Substitution" of an ILF for Congressional authorization began a major expansion of the President's power to utilize military force without Congressional authorization.

B) Origins and Implications

The Constitution is divided on the question of whether the President can order the use of force without Congress. Article I, Section 8 of the U.S. Constitution states that, "Congress shall have the power to...declare war." Yet, the Constitution also empowers the President as the "Commander-in-Chief" and holds open the possibility for the President to use force without

Congressional authorization.⁴³ The Constitution's general vagueness on the subject of war powers invited what Erwin Corwin termed, "an invitation to struggle for the privilege of directing U.S. foreign policy," and Executive-Legislative relations have been characterized by a struggle to define institutional authority over the use of force.⁴⁴ The battle between Congress and the President over the power to use military force has been "a sort of perennial [contest]... over their respective powers."⁴⁵ Every time the United States moves to use military force, this forces a "Constitutional showdown" between the Executive and Legislative branches because "the location of constitutional authority for making an important policy decision is ambiguous, and multiple [branches] have a strong interest in establishing that the authority lies with them."⁴⁶

The division of war powers between the President and the Congress arose at the Constitutional Convention from an antagonistic debate amongst the delegates. The original draft of the Constitution gave the Congress the power to "make war." On 17 August 1787, the Constitutional Convention came to discuss this line of the draft. According to James Madison's notes on the convention, Charles Pinckney argued that the power to "make war" should be vested in the Executive because the legislature's "proceedings were too slow" and Pierce Butler similarly argued, "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."⁴⁷ Offering a successful compromise, James Madison and Elbridge Gerry had "moved to insert 'declare,' striking out 'make' war;

⁴³ U.S. Constitution; Article II; Section 2.

⁴⁴ Edward Corwin, *The President: Office and Powers 1787-1957*, (New York: New York UP, 1957), 171.

⁴⁵ Walter McDougall, "The Constitutional History of U.S. Foreign Policy," *Foreign Policy Institute Research Series*, September 2010, 1.

⁴⁶ Posner and Vermeuele, "Executive Unbound," 75.

⁴⁷ William Farrand, *The Records of the Federal Convention of 1787*.
http://avalon.law.yale.edu/18th_century/debates_817.asp

leaving to the Executive the power to repel sudden attacks.”⁴⁸ This opened up an area of acceptable executive use of force without Congressional authorization.

To a large degree, the founders wanted to leave such matters to the hands of those would follow them in governing the United States. “The framers expected the branches to battle each other to acquire and to defend power,” noted Abraham Sofaer.⁴⁹ The limited nature of what the constitution said about war powers means that, as Harold Koh notes, “we should look beyond the Constitution’s cryptic text to discover the broader constitutional principles that govern how Congress, the courts and the executive should interact in the foreign policy process.”⁵⁰ The power to use military force was not given by fiat in the Constitution. Instead, the meaning of the Constitution was “at once substantially derived from and constitutive of the power of the state...[as it] is simultaneously shaping and shaped by its power.”⁵¹ The practice of how the United States used force shaped the meaning of the Constitutional text. Thus, the Constitutional dimension of U.S. foreign policy cannot be understood just through an analysis of Constitutional text. It can only be understood through the study of the Presidential and Congressional actions.

The question of how international treaties would affect the President’s power did not arise at the Constitutional convention. Although the United States had signed a Treaty of Alliance with France, there is no record of the attendees to convention in Philadelphia addressing the question of whether the President could utilize a treaty obligation as a substitute for a Declaration of War.⁵²

That issue prominently arose in the Pacificus-Helvidius debate between Alexander Hamilton and James Madison. President George Washington’s Neutrality Proclamation declared

⁴⁸ Ibid, 318

⁴⁹ Abraham Sofaer, *War, Foreign Powers and Constitutional Power*, (Boston: Ballinger Publishing, 1976), 60.

⁵⁰ Koh, “National Security Constitution,” 68

⁵¹ John Fabian Witt, “Law and War in American History,” *The American Historical Review*, (115) 2010, 769-770.

⁵² Sofaer, “War, Foreign Powers and Constitutional Power,” 56-57.

that the United States would be neutral in a war between France and The United Kingdom. This triggered a debate concerning which branch could interpret America's treaty obligations in matters of war and peace came to the forefront of the national debate. Writing under these *noms de plume*, Hamilton and Madison engaged in an important debate concerning the limits of executive power.

Alexander Hamilton (Pacificus) argued that the President was responsible for treaty interpretation and could use treaties to determine whether the nation was at peace or war. He argued that:

If the Legislature have a right to make war on the one hand- it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations wich [sic] the treaties of the Country impose and the government; and when pursuance of this right it has concluded that there is nothing in them inconsistent with a *state* of neutrality, it becomes both its province and its duty to enforce the laws indident [sic] to that state of the Nation.⁵³

Hamilton acknowledged that the President did have the authority to interpret a treaty and to find if there was something "inconsistent with a state of neutrality" in them. Outside of a treaty interpretation, he conceded it is "the providence and duty of the Executive to preserve to the Nation the blessings of peace. The legislature alone can interrupt those blessings by placing the Nation in a state of War."⁵⁴ Hamilton was arguing that the President alone had the power to interpret whether the treaty obligated the United to go to war. The legislature, he argued, "is charged neither with *making* nor *interpreting* Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers."⁵⁵ Embedded within the argument was a corollary position. Just as the President

⁵³ Alexander Hamilton, "Pacificus," June 1793; http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html

⁵⁴ Ibid.

⁵⁵ Ibid. (emphasis in original)

in this case could interpret a treaty to mean that the United States was at peace, in another circumstance he could interpret a treaty to mean that the United States was at war.

By contrast, James Madison (Helvidius) argued that the power to interpret the treaty did not rest with the executive. Madison argued that to place “the power of making treaties, which are confessedly laws” in the executive was “in theory... an absurdity--in practice a tyranny.”⁵⁶ He argued that the “rule of interpreting [treaties] strictly must narrow, instead of enlarging, executive pretensions” to move the nation into war or peace.⁵⁷ Madison cautioned that were the executive given the power to interpret treaties, the executive would not find it “difficult to fabricate a power in the executive to plunge the nation into war, whenever a treaty of peace might happen to be infringed.”⁵⁸ For Madison, the power to interpret treaties on matters of war and peace rested with the Congress.

Though this was an instance of a President interpreting a treaty to declare peace, the Constitutional question transcended the circumstance. At stake was whether the President could interpret a treaty to decide matters of war and peace. The debate opened the question of how the President’s power to interpret treaties and conduct diplomacy would interact with the Congress’s power to declare war. The early American republic lacked a set of international alliances, a virtue extolled by George Washington in his farewell address, and the question of the relationship between international commitments and Presidential power remained a hypothetical debate in this period.⁵⁹

C) The Early Presidents

⁵⁶ James Madison, “Helvidius,” August-September 1793; http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s15.html

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Glennon, “Constitutional Diplomacy,” 192.

Early Presidents tended to obtain Congressional authorization for major military engagements. John Adams's Quasi-War with France had Congressional authorization. The authorization was understood as placing the United States "in a state of war," as Congressman Robert Livingston noted.⁶⁰ Similarly, Thomas Jefferson went to Congress to obtain authorization for the First Barbary War.⁶¹ The resolution authorized: "That it shall be lawful for the President of the United States to... cause to be done all such other acts of precaution or hostility as *the state of war* will justify, and may, in his opinion, require."⁶² For these early Presidents, war required Congressional authorization.

Minor uses of the armed force without Congressional authorization became commonplace in the mid-19th century. These operations were Naval engagements against "nongovernmental groups" and were "mostly concerned with the protection of American citizens and mostly trivial" in casualties and scope.⁶³ Rather than reflecting Presidential use of armed force to circumvent Congress, they reflected the difficulty of maintaining a chain of command on a global scale with the limited means of communication: most operations "took place not only without congressional authorization but also without presidential authorization, very often the consequence of the individual initiative or short temper of lieutenants along the southern border or commodores on the high seas."⁶⁴ Unlike later interventions these operations were "all local, mostly brief and rarely involved a challenge to sovereign states," as Schlesinger notes.⁶⁵ The President, in the early history of the United States, had a very limited power to use force without Congressional authorization.

⁶⁰ Louis Fisher, *The War Power: Original and Contemporary*, (Washington, D.C.: American Historical Association, 2008), 13.

⁶¹ *Ibid*, 14-15.

⁶² "An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers," February 1802. http://avalon.law.yale.edu/19th_century/bar03.asp.

⁶³ Schlesinger, "Imperial Presidency," 51.

⁶⁴ *Ibid*, 51.

⁶⁵ *Ibid*, 54.

D) Presidential Power and America as Empire

At the dawn of the twentieth century, as the United States became a larger power in international affairs, Presidents came to take on somewhat larger military engagements without Congressional authorization. In 1885, President Grover Cleveland deployed troops to Panama to secure land for the strategically vital Panama Canal without Congressional approval.⁶⁶ To justify the lack of Congressional authorization, Cleveland argued that the mission “necessarily involved police control where the local authority was...lawless.”⁶⁷ In the Spanish-American War, Presidents had come to refer to these operations as ‘police actions.’ President Theodore Roosevelt had developed the doctrine to imply a general right to the “exercise of an international police power” in the Western Hemisphere.⁶⁸

In 1898 America entered the Spanish-American war, which propelled the nation to an empire. In that conflict, the American people “first committed themselves to a major role in the international politics of the Far East, first found themselves policing the affairs of the Caribbean, and first fought men of a different color in an Asian guerilla war.”⁶⁹ While President William McKinley had obtained a declaration of war for the Spanish-American war, he would go on to “exclude the legislature from the Philippine and China initiatives” where he launched ‘police actions’ to crush native rebellions.⁷⁰

Subsequent Presidents followed this pattern of expanding executive power. President Theodore Roosevelt argued that “the executive power was limited only by specific restrictions

⁶⁶ Clarence Berdahl. *War Powers of the Executive in the United States*, (Champagne, Illinois: University of Illinois Press, 1921), 53.

⁶⁷ Quoted; *ibid*, 53.

⁶⁸ Quoted; *ibid*, 54.

⁶⁹ Quoted; Koh, “National Security Constitution,” 88.

⁷⁰ *Ibid*, 89.

and prohibitions appearing in the Constitution.”⁷¹ Roosevelt took this to mean that he could intervene in Cuba and Santo Domingo without any Congressional authorization and send the Great White Fleet touring around the world despite Congressional opposition.⁷² As a scholar at Princeton, Woodrow Wilson had argued that, “when foreign affairs play a prominent part in the politics and policy of a nation, its Executive must of necessity be its guide: must utter every initial judgment, take every first step of action, supply the information up which it is to act, suggest and in large measure control its conduct.”⁷³ As President, Wilson ordered military interventions in Mexico, Haiti, Santo Domingo and Cuba without Congressional authorization.⁷⁴ However, when Wilson decided to join the war in Europe he had to wait for the sinking of the *USS Lusitania* as a provocation that would enable him to go before Congress and obtain a Declaration of War.⁷⁵

While executive power to use force without Congressional authorization was expanding, it was still a limited power. The Monroe Doctrine gave rise to an understanding that the President could use force for limited ends within the Western Hemisphere without Congressional authorization. However, these interventions were excused by Congress because “the superior force of the United States was now so great relative to the Caribbean states that intrusion, whether interposition or intervention, did not invite the risk of war and therefore did not require congressional consent,” as Arthur Schlesinger noted.⁷⁶ The power to use military force without Congressional authorization was confined to interventions of a limited scale and they rested on

⁷¹ Quoted; *ibid*, 89.

⁷² On Roosevelt’s foreign policy and emphasis on ‘police power’ in international relations, see; James Holmes, *Theodore Roosevelt and World Order: Police Power in International Relations*, (Washington, D.C.; Potomac Books, 2006).

⁷³ Quoted; Koh, “National Security Constitution,” 90.

⁷⁴ John Milton Cooper, *Woodrow Wilson: A Biography*, (New York: Knopf, 2009), 247-249.

⁷⁵ *Ibid*, 300-301

⁷⁶ Schlesinger, “Imperial Presidency,” 90.

the President's power as Commander-in-Chief. The age of the "Imperial Presidency" had not yet begun.

E) The League of Nations Debate

At the end of World War One, the debate over the League of Nations in the U.S. Senate hinged on the Constitutional question of how this issue would affect the Congress's authority to declare war. As Woodrow Wilson submitted the treaty to the Senate, the League of Nations' Covenant stated, in its famous Article X, that:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.⁷⁷

Within this framework the Covenant stated that, "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."⁷⁸ The Covenant established an obligation on member states to use force in any circumstance where a nation threatened the peace.

In getting the Covenant ratified, Wilson faced an uphill battle. He had not taken any Senators with him to negotiate the Covenant. Rather than work with the Senators, he decided that he would get it passed through "fighting" the Senate.⁷⁹ Wilson believed that if he compromised on the League he would "break the heart of the world."⁸⁰ Senator Henry Cabot Lodge, the Republican Chairman of the Senate Foreign Relations Committee, was a formidable opponent.

⁷⁷ Covenant of the League of Nations; Article 10. http://avalon.law.yale.edu/20th_century/leagcov.asp

⁷⁸ Ibid, Article 11.

⁷⁹ Quoted; Cooper, "Woodrow Wilson," 505.

⁸⁰ Quoted; ibid, 506.

Lodge became fixated on how Article X of the Covenant would create an open-ended commitment for the United States to use force abroad and undermine the Constitution's vestige of the power to declare war in the Congress.⁸¹ Lodge introduced a reservation to the treaty that would cut America's commitment to Article X of the Covenant:

The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations -- whether members of the League or not -- under the provisions of Article 10, or to employ the military or naval forces of the United States under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide.⁸²

Wilson was unwilling to compromise with Lodge on this point. Without the collective security assurance under Article X, the League "is only a debating society, and I would not be interested in a debating society," Wilson told reporters.⁸³ In hearings before Lodge's Senate Foreign Relations Committee, Wilson personally went to testify that Article X was a moral commitment rather than a legal commitment but his case was unconvincing to the Senators.⁸⁴ Wilson sought to assure the Senators that after the League was ratified, he would work with the reservationists to come up with an arrangement that would alleviate their concerns about Article X but this offer was a "meager sop that did not satisfy even the mild reservationists," as historian John Cooper notes.⁸⁵ Wilson was unwilling to concede to a reservation that would have assured the Congressional leaders that the Congress would not be losing its control over the use of force in the treaty and Wilson's intransigence on this point prevented him from winning over the necessary support in the Senate.

⁸¹ Ibid, 506.

⁸² Henry Cabot Lodge, "Reservations with Regard to the Treaty," <http://www.mtholyoke.edu/acad/intrel/doc41.htm>

⁸³ Cooper, "Woodrow Wilson," 508.

⁸⁴ Ibid, 516.

⁸⁵ Ibid, 516.

Rather than negotiate with the Senators, Wilson took his case to the public in a cross-country tour where he pressed for the importance of ratifying the Charter, and he focused extensively on the necessity of Article X.⁸⁶ He fell ill during the tour and returned to Washington D.C. bed-ridden and still unwilling to compromise with any of the reservations being proposed in the Senate.⁸⁷ Though negotiations between the administration and Senators went forward, Wilson rejected any concession to the “Lodge reservations,” telling an aide that “if the treaty should be returned to me with such a reservation on Article X... I would be obligated to consider it a rejection of the treaty and of the Covenant of the League of Nations.”⁸⁸ For Wilson, “any reservation seeking to deprive the League of Nations of the virility of Article X cuts at the heart of the Covenant itself.”⁸⁹

The Covenant was ultimately defeated in the Senate. This was largely the product of Wilson’s refusal to compromise with Senators who would have been satiated by a set of mild reservations. The Senate was reluctant to surrender their power to declare war to the President vis-a-vis the President’s control of America’s representation to the League of Nations. For the first time, the Congress and the President divided on how America’s membership in ILFs would affect the distribution of war powers. The President was optimistic about the League, which could only enhance Presidential power, and many Senators were deeply distrustful of America’s membership in the League because it would undermine the Congress’s authority to declare war. The President and the Congress both saw international organizations as a mechanism that would advance Presidential power, they just disagreed over whether they wanted this trajectory.

⁸⁶ Ibid, 520.

⁸⁷ Ibid, 544.

⁸⁸ Quoted; *ibid*, 557

⁸⁹ Quoted; *ibid*, 557.

The debate over the League of Nations raised, for the first time, the difficult questions surrounding how America could participate in international organizations and maintain Congressional control over the use of force. President Wilson was steadfast in supporting the President's power to commit forces to the League *without* Congressional authorization and his unwillingness to compromise pushed many of the Senate's 'reservationists' to side with Senator Lodge in his attempt to prevent the Senate from ratifying the League. In the defeat of the League of Nations, the Senate had managed to prevent the Executive from utilizing IOs as a new means to support the use of force without Congressional authorization. However, this success would not be permanent.

By the 1920s, the idea that the President could utilize a treaty to push the United States into war without Congressional authorization was gaining some academic acceptance. Clarence Berdahl, a political scientist at the University of Illinois, wrote and published *War Powers of the Executive in the United States* in 1922. The text became his generation's canonical work on executive power to use military force. He supported the idea that the President's power to use military force could be derived from a treaty:

the President, through his control of diplomatic intercourse, holds in his keeping the peace and safety of the United States, that he may initiate such diplomatic policies and so conduct diplomatic negotiations as to force the country into a war, 'without any possibility of hinderance from Congress or the Senate.'⁹⁰

The notion that the President could use his power in the diplomatic realm to take the nation to war, even if Congress objected, was becoming an accepted interpretation of Constitutional law even though the Senate had rejected the League of Nations.

⁹⁰ Berdahl, "War Powers," 31.

Chapter 3:

The Undeclared War to Aid the United Kingdom

A) An Undeclared War

While America didn't declare war against Nazi Germany and Japan until after the attack on Pearl Harbor in December 1941, it did wage what historians William Langer and Everett Gleason termed an "undeclared war" before Pearl Harbor.⁹¹ The provision of massive military assistance to the United Kingdom involved President Roosevelt ordering the deployment of military force without any authorization from Congress. The program of providing military aid to the United Kingdom involved an exchange of 50 American destroyers for the rights to British bases, the deployment of American troops to Greenland and Iceland and finally, with some Congressional authorization, military assistance under the Lend-Lease program.

In this period, the Roosevelt administration needed to construct a legal regime that could provide Constitutional legitimacy for the deployment of American forces undertaken without any Congressional authorization. While previous scholars have pointed to how this was an assertion of Roosevelt's robust understanding of his status as Commander-in-Chief, the more important dimension is how the Roosevelt administration formulated the President's Constitutional authority as Presidential action to uphold international agreements. Roosevelt used ILFs as "total substitutes" for the need for Congressional authorization in the destroyers for bases deal and in deployments to Greenland and Iceland.

This approach represented a novel way of asserting the President's Constitutional power to deploy military force without Congressional authorization. Rather than relying, as previous Presidents had, on the centrality of the President's position as Commander-in-Chief, this

⁹¹ William Langer and Sarell Gleason, *The Challenge to Isolation: 1937-1940*, (New York: Harper, 1952) 1.

framework relied on the President's ability to conduct foreign relations and secure agreements with foreign states.

Throughout the 1930s, an increasingly isolationist Congress had fought hard to limit the President's power to provide military aid to the United Kingdom and they had succeeded with the enactment of the Neutrality Acts. The isolationist movement achieved great popularity in Congress, drawing together pacifist-leaning left-wing members and fascist-sympathizing right wing members. Senator Gerald Nye's hearings in 1934 on the profiteering of munitions manufacturers during World War One raised suspicions of how the United States had been duped into war and Congressmen vowed that this would not happen again. Isolationist Congressmen had come to view Woodrow Wilson's policies of providing material support to the United Kingdom prior to America's entry into World War One as the prelude to a disaster and they wanted to remove the Executive's power to repeat such a course of events. The series of Neutrality Acts passed in the mid-1930s were designed to prevent President Roosevelt from providing the material assistance to the United Kingdom that would force the United States into war.⁹²

B) Destroyers for Bases

When Winston Churchill became Prime Minister in 1940, he undertook a major effort to persuade the Roosevelt administration to give military aid to the United Kingdom. Having served as First Lord of Admiralty, Churchill took a particular interest in aid to the Royal Navy and, in his assessment, "destroyers were our most urgent need, and also our worst feature."⁹³ In May

⁹² Aaron Fellmeth, "A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941," *Buffalo Journal of International Law*, 413 (1996-1997), 425-436.

⁹³ Winston Churchill, *The Second World War, Volume 1: The Gathering Storm*, revised edition, (New York: Rosetta Books, 2002), 417

1940, Churchill had requested that Roosevelt supply a “loan of forty or fifty of your old destroyers,” which were seen as essential in the U-boat campaign.⁹⁴ Churchill also raised the idea of converting a series of torpedo or “mosquito” boats that the U.S. Navy was building into British ships through a donation.⁹⁵ The idea gained support from American activists who had been lobbying for greater aid to the United Kingdom. The Century Group, a New York based group of internationalist businessmen, endorsed the proposal at a meeting.⁹⁶ William Allen White and the Committee to Defend America by Aiding the Allies likewise came out in support of the proposition.⁹⁷

In the initial phases of discussion over the possibility of the United States donating destroyers to the United Kingdom, the Roosevelt administration felt restrained by the limitations on Presidential power imposed by the Neutrality Acts. After reading Churchill’s original message requesting destroyers, Roosevelt, while frightened by the possibility of the United Kingdom losing the war, found himself in a legal bind. Assuming that the isolationist Congress would not accept any such transaction, Roosevelt replied that, “As you know, a step of that kind could not be taken except with the specific authorization of the Congress and I am not certain that it would be wise for that suggestion to be made to the Congress at this moment.”⁹⁸ Roosevelt felt constrained by the restrictions on Presidential power.

With British losses at Dunkirk, Churchill reiterated the request with a new sense of urgency. Writing as a “former naval person to President Roosevelt” he noted that “it has now

⁹⁴ Winston Churchill, in *Churchill & Roosevelt: Their Complete Correspondence, Volume 1*, ed. Warren Kimball, (Princeton: Princeton UP, 1984), 37.

⁹⁵ David Barron and Martin Lederman, “The Commander in Chief at the Lowest Ebb: A Constitutional History Part II,” *Harvard Law Review*, 941 (2008), 1043.

⁹⁶ Langer and Gleason, “Challenge to Isolation,” 746.

⁹⁷ Langer and Gleason, “Challenge to Isolation,” 746.

⁹⁸ Franklin Roosevelt, in Kimball, “Churchill & Roosevelt,” 38.

become most urgent for you to let us have the destroyers.”⁹⁹ Forebodingly, Churchill said that “in the long history of the world this is a thing to do *now*” and that while the British would be able to produce more ships by 1941, “the crisis will be reached long before 1941.”¹⁰⁰ The conditions had grown far more desperate for the United Kingdom. Hitler was planning an invasion of the island by air and sea, Operation Sea Lion, and it was plausible that the United Kingdom would not be able to hold off for much longer. However, the military aid program continued to gain little traction within the Roosevelt administration because the legal obstacles still seemed insurmountable.

Roosevelt focused on the idea of donating the mosquito boats to the United Kingdom. “Roosevelt brushed aside legal concerns raised by naval lawyers, and set the wheels of the transaction into motion,” as David Barron and Martin Lederman note.¹⁰¹

The Congressional isolationists, the same group who had supported the Neutrality Acts, protested the sale and called it an unconstitutional usurpation of Congressionally-sanctioned laws.¹⁰² These activists had an ally within the administration.

When the matter came up at a 20 June meeting, Attorney General Robert Jackson said that the proposal to donate the torpedo boats would violate the Espionage Act of 1917.¹⁰³ With the Navy preparing the first ships for transfer, the donation was suddenly called off. The isolationists in the Senate had succeeded. Senator Wheeler, an original backer of the Neutrality Acts, was “very glad to hear the transaction had been called off since he did not think it was a

⁹⁹ Winston Churchill, in *ibid*, 54.

¹⁰⁰ Winston Churchill, in *ibid*, 57.

¹⁰¹ Barron and Lederman, “The Commander in Chief,” 1043.

¹⁰² For a sympathetic reading of the Congressional position, see; Robert Shogan, *Hard Bargain: How FDR Twisted Churchill’s Arm, Evaded the Law and Changed the Role of the American Presidency*, (New York: Scribner, 1995).

¹⁰³ Barron and Lederman, “The Commander in Chief,” 1043.

wise thing to do.”¹⁰⁴ Senator Rush Holt, another leading isolationist, felt that Robert Jackson was a hero within the administration; “I am glad Bob Jackson looked up the law on the subject.”¹⁰⁵ Without the Constitutional legitimacy to donate the mosquito boats, the United States refrained from aiding the United Kingdom.

With the mosquito boat donation defeated and the destroyers donation barely under consideration, it took a Harvard Law professor with close ties to the administration, Felix Frankfurter, to help move the deal forward. Frankfurter called on one of his closest mentees in the Roosevelt administration, Benjamin Cohen. He asked Cohen to advance a legal argument in defense of donating the destroyers. Cohen had been one of Frankfurter’s students at Harvard Law School and Frankfurter had recruited him to serve in the Roosevelt administration where he became an “architect of the new deal,” as his biographer describes him.¹⁰⁶ Throughout the 1930s, Cohen had designed some of the New Deal’s foundational legislation including the Utilities Regulation Act and adopted the progressive position that executive power was the best means for achieving social progress.¹⁰⁷ Now his concern was the threat from Nazi Germany and he was eager to apply his legal skills to justify the actions of the President. He was not concerned with the “bold exercise of executive power” but he was concerned about the “timidity in the face of the growing Nazi menace,” as his biographer noted.¹⁰⁸

Cohen took it upon himself to find a way to circumvent the legal restraints that were preventing the administration from considering the deal. He knew that he would have to make his argument to persuade those within the administration, particularly Attorney General Robert

¹⁰⁴ Quoted; “Torpedo Boat Sale to British Halted,” *New York Times*, 25 June 1940.

¹⁰⁵ Quoted; *ibid.*

¹⁰⁶ William Lasser, *Benjamin Cohen: Architect of the New Deal*, (New Haven: Yale UP, 2002).

¹⁰⁷ *Ibid.*, 3.

¹⁰⁸ *Ibid.*, 231.

Jackson, that this was a defensible position. This was the moment when he would seek to advance the law further than his superiors thought it could be pushed.

Cohen wrote a memorandum for Attorney General Robert Jackson asserting the legality of donating the destroyers to the United Kingdom. Written on his letterhead from the National Power Policy Committee, Cohen's memorandum centered on creating legal grounds to confront Nazi Germany, even without Congressional approval.

He hinged his argument on the claim that Nazi Germany had violated international law. The memo began with a focus on the "danger of German aggression being directed against us" and worked to prove that those dangers meant that the President could authorize the sale of the destroyers.¹⁰⁹ Congressional limitations should be defined narrowly he argued; "statutes [were] designed to safeguard our national defenses."¹¹⁰ They should be construed to allow the sale, he argued, as this is "dictated by a realistic appreciation of the interests of our national self-defense."¹¹¹ He cautioned against "a narrow and literal interpretation of the statute as to defeat its basic objective."¹¹² Cohen made a novel insertion in his reliance on international law as the basis for aiding the United Kingdom through executive power. Cohen turned to Germany's violation of the Kellogg-Briand Treaty as a basis for legitimizing aid to the United Kingdom. "Not only has Germany violated this pact, but she has deliberately invaded neutral countries in order to secure strategic territory from which to conduct hostile operations against the United Kingdom. Certainly in these circumstances neutral countries are warranted in taking some measures of

¹⁰⁹ Benjamin Cohen, "Re: Sending Effective Material Aid to Great Britain with Particular References to the Sending of Destroyers," 19 July 1940, Library of Congress: Benjamin Cohen Papers; box 88.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

reprisals,” he argued.¹¹³ Germany’s violation of the laws of war justified the President to take actions that would otherwise not be acceptable under the Constitution. Though the administration was at this point considering a transaction to a private company that would then sell the destroyers to the United Kingdom, Cohen was introducing the idea that the President could directly present the destroyers to the United Kingdom through a reliance on international law.

Even with Cohen’s memorandum, the Roosevelt advisers continued to view the task as futile because of the need for Congressional authorization. Cohen’s extraordinarily creative legal reasoning attracted little support within the White House because the administration feared that the reasoning would not pass public scrutiny. Roosevelt, in a memorandum to Secretary of the Interior Harold Ickes, noted: “I frankly doubt if Cohen’s memorandum would stand up” in public debate.¹¹⁴ In a private meeting between Roosevelt and his advisers “it was agreed that legislation to accomplish this is necessary.”¹¹⁵ When the British Ambassador, Philip Kerr, came to press his case for the destroyers to Secretary of State Cordell Hull, he encountered steep resistance from Hull based on the legal restraints. Hull reminded Kerr that to donate the destroyers “it would be necessary to obtain an amendment of these provisions of law... [and] that Members of Congress are extremely sensitive to representations by constituents who for one reason or another may oppose legislation of this kind.”¹¹⁶ Secretary Hull assured the Ambassador “that the matter was being given attentive consideration but that he did not desire that the British Government should gain the impression that favorable action might be taken, or if taken, that it would be within a short period of time.”¹¹⁷ Outside of the administration, even those who favored the proposal

¹¹³ This was actually only argument for Constitutionality of the plan as it went through as government-to-government aid. Cohen’s original memorandum argued for giving the ships to a company that would then sell them to The United Kingdom.

¹¹⁴ Quoted; Lasser, “Benjamin Cohen,” 225.

¹¹⁵ “Memorandum of Meeting,” 2 August 1940. Franklin Roosevelt Library: PSF Box 62.

¹¹⁶ “Memorandum of Conversation,” 4 August 1940. Library of Congress: Cordell Hull Papers; box 29.

¹¹⁷ Ibid.

largely envisioned the necessity of Congressional involvement. The *New York Herald Tribune* endorsed the strategy but conceded that “only Congress can do it.”¹¹⁸

With the memorandum garnering little attention within the administration, Frankfurter suggested that Ben Cohen contact another of Frankfurter’s mentees Dean Acheson, to write a public letter on the legality of the destroyers deal. Acheson was then a lawyer in private practice, which gave him a position to make the claim from an outside perspective. Having exhausted his channels for private lobbying within the administration, Cohen turned to Acheson to generate a public call for action.

Acheson, much like Cohen, wanted to aid the United Kingdom and embraced the broad interpretation of executive power.¹¹⁹ Acheson had developed a pragmatic view of the law. At Harvard Law School he adopted Felix Frankfurter’s approach to law as a public policy question and he subsequently clerked for Justice Oliver Wendell Holmes at the Supreme Court who mentored his pragmatic vision of the law.¹²⁰ Considering a career in legal scholarship, Acheson began work on a book on labor law which emphasized that “law was not written by the Finger of God on tablets of stone,” but as a creation of man.¹²¹

When he turned towards public service, Acheson was at the core of the burgeoning power of the executive branch as he went to work at Roosevelt’s Treasury Department, briefly rising to the level of Acting Secretary.¹²²

Together, Acheson and Cohen set out to formulate a legal defense of the destroyers donation. They moved to Cohen’s apartment in New York for a week of uninterrupted work at

¹¹⁸ “Destroyers for Britain,” *New York Herald Tribune*, 5 August 1940.

¹¹⁹ James Chace, *Acheson: the Secretary of State Who Created the American World*, (New York: Simon & Schuster, 1998), 78.

¹²⁰ *Ibid*, 46-49.

¹²¹ Dean Acheson, *Law and Justice and Their Relationship to Industry*, (unpublished manuscript), 1. Yale University Sterling Library: Dean Acheson Papers; Supplemental Series Box 1.

¹²² Chace, 3.

the Bar Association of New York Library on a public letter.¹²³ Acheson was to be the primary signatory, because as a federal employee Cohen was precluded from taking public stances. Acheson gained co-signatures from his three prominent attorneys and friends: George Rublee, Thomas Thacher and Charles Burlingham.¹²⁴ With the letter finished, Acheson contacted his friend Charles Merz, who ran the editorial page of the *New York Times*. As an active leader in the Committee to Defend America by Aiding the Allies, Merz had been pushing for greater aid to Great Britain and he was an enthusiastic supporter of the destroyers donation.¹²⁵ With this support, the letter was published on 11 August in the *New York Times*.¹²⁶ The letter catapulted an obscure debate to the forefront of the national conversation.

The letter framed the donation, for the first time, as an exchange between the United States and the United Kingdom. It introduced the idea that the President could give the destroyers to Britain through a deal in which they could be exchanged for unspecified British assets.¹²⁷ In arguing that this could be done without Congressional authorization, the authors cited Dr. Lauterpacht's volume, *Oppenheim's International Law*. Lauterpacht had argued that Presidential power should be interpreted "in light of the rules of international law."¹²⁸ Citing Lauterpacht, the authors argued that the Congressional limitations should not be interpreted to limit the President's power to donate ships that had already been built.¹²⁹ The letter, above all, emphasized that the war in Europe was not a war amongst morally equal states but a conflict in which Germany had violated international law. The Germans now occupied "neutral ports and

¹²³ Philip Goodhart. *Fifty Ships That Saved the World*. (London: Heinemann Press, 1965), 161.

¹²⁴ Quoted; *ibid*, 162.

¹²⁵ William Tuttle, "Aid-to-the-Allies Short-of-War versus American Intervention, 1940: Reappraisal of William Allen White's Leadership," *the Journal of American History*, 56 (1970), 842.

¹²⁶ *Ibid*, 162.

¹²⁷ Dean Acheson, Charles Burlingham, Tom Thacher & George Rublee, "Letter to the Editor: No Legal Bar Seen to Transfer of Destroyers," *New York Times*, 11 August 1940.

¹²⁸ Quoted; *ibid*.

¹²⁹ *Ibid*.

territories which the Nazis have seized, contrary to international law, to use as bases for their armed aggression against Britain.”¹³⁰ The authors urged action by the President and they raised the idea of a bilateral agreement as a means to make that happen without delays imposed by Congress.

The letter galvanized a renewed interest within the administration in donating the destroyers. While the earlier Cohen memorandum had been dismissed within the White House, the letter helped to turn the opinion within the administration by showing that Cohen’s argument had broad support amongst the nation’s leading attorneys. Secretary of War Henry Stimson recorded in his diary that while the Congress was unlikely to act, he found the letter’s argument “carefully worked out,” and that he now was convinced that “even without the repeal of these provisions, the Executive has the power to sell these destroyers.”¹³¹ With the publication of the letter “unilateral action [by the President] was, for the first time, seriously contemplated,” noted one historian.¹³² In a note to Roosevelt, Cohen urged him to take action and said that, “when Congress reconventions [sic] the transaction would be regarded as settled policy, and no matter which way the war turns, the wisdom of that policy will become increasingly evident.”¹³³

However, it was up to Attorney General Robert Jackson to determine the matter. Roosevelt instructed him to come back with an opinion and he would proceed accordingly.¹³⁴ Jackson read the letter with favor and proceeded to strike out a formal memorandum on the matter.¹³⁵

¹³⁰ Ibid.

¹³¹ Quoted; Goodhart, “Fifty Ships,” 163.

¹³² Ibid.

¹³³ Benjamin Cohen to President’s Secretary, 16 August 1940. Franklin Roosevelt Library: PSF Box 127.

¹³⁴ Robert Jackson. *That Man: An Insider’s Portrait of Franklin D. Roosevelt*, ed. John Barrett. (New York: Oxford UP, 2003), 97.

¹³⁵ Goodhart, “Fifty Ships,” 163.

In formulating his opinion, Jackson seized on the idea of an international agreement as the basis for transferring the destroyers to the United Kingdom without Congressional authorization. Though he had ruled the donation of mosquito boats to the United Kingdom as unconstitutional, he saw the formulation of an international agreement as an important distinction. Jackson started from the basis that an “essential characteristic” of the transaction was that the United States would “acquire rights for immediate establishment and use of naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and British Guiana.”¹³⁶ The deal would not be concluded on the basis of the President’s power as “Commander-in-Chief” but in his power of the “control of foreign relations which the Constitution vests in the President as a part of the Executive function.”¹³⁷ Jackson invoked the recent Supreme Court case that defended executive power, *United States v. Curtiss-Wright*, to argue that the President had expansive power to conduct foreign relations.¹³⁸ Jackson had Admiral Harold Stark, the Chief of Naval Operations, certify that the deal was beneficial to U.S. national security, and he used this to argue that the President should be able to conduct the bilateral agreement without Congressional authorization.¹³⁹

At last, Roosevelt had the legal go-ahead to give the destroyers to Great Britain, though it would be in exchange for extensive basing rights. The President had been upset with the legal constraints placed on his power to act in the nation’s defense and he now had the opportunity to act. Jackson understood that Roosevelt had “a tendency to think in terms of right and wrong instead of terms of legal and illegal” and that Roosevelt “found difficulty in thinking that there

¹³⁶ Robert Jackson, “Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases,” 27 August 1940; <http://www.roberthjackson.org/the-man/speeches-articles/articles/a-presidential-legal-opinion/opinion-on-exchange-of-over-age-destroyers-for-naval-and-air-bases/>

¹³⁷ Ibid.

¹³⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹³⁹ Noah Feldman. *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices*, (New York: Twelve Press, 2010), 199.

could be legal limitations on them.”¹⁴⁰ With Jackson’s memorandum, Roosevelt finally had all of the necessary legal basis he needed to take action.

Churchill resisted an official exchange because he was worried about the public reaction with the United Kingdom. He even proposed the idea of two independent donations. Roosevelt insisted that to create the Constitutional legitimacy it would have to be a single deal. “I have an attorney general and he says I have got to make a bargain,” he told Churchill.¹⁴¹ The agreement covered everything from America’s obligation to preserve a cemetery on one island to its obligation to give inhabitants on another island the right of way to use the roads.¹⁴² Conducting this as an exchange was crucial to the Constitutionality of the destroyers donation; it could only be justified on the President’s power to conduct foreign relations.

With these legal scruples addressed through the construction of an international agreement, the deal could be completed without any consultation with Congress. Roosevelt did not consult Congressional leadership nor did he seek any authorization. He merely issued a statement on 3 September informing them of the decision, to which he attached Robert Jackson’s opinion for legal support.¹⁴³ Though the deal was motivated by a desire to aid the United Kingdom, Roosevelt told Congress that the basing rights that the U.S. gained were important for national security.

Though the impetus for the transaction had been the desire to aid the United Kingdom in the fight against Nazi Germany, Roosevelt utilized the legal arrangement of an international agreement to bolster the Constitutional legitimacy of the transaction. No mention was made of how this would bring the United States far closer to fighting Nazi

¹⁴⁰ Quoted; Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court*, (New York: W.W. Norton, 2010), 44.

¹⁴¹ Quoted; Feldman, “Scorpions,” 199.

¹⁴² “Report for the Secretary of the Navy,” 25 October 1940. Franklin Roosevelt Library; PSF, Box 62.

¹⁴³ Franklin Roosevelt, “Message to the Congress,” 3 September 1940; <http://www.mtholyoke.edu/acad/intrel/WorldWar2/fdr22.htm>

Germany and would radically shift the United States' position from one of neutrality to a state of semi-belligerency. Indeed, this evasion was precisely Roosevelt's purpose. He knew that the American people could not be convinced of the importance of going to war so he would have to utilize executive power to push American closer to war and the public would follow.¹⁴⁴

With the deal completed, the ships were sent off. Forty-three were commissioned in the Royal Navy, with another seven sent to the Canadian Navy. Though it is hyperbolic to say that these were "fifty ships that saved the world," as one historian has argued, the ships represented a tangible tie between the United States and the United Kingdom at a point where America's commitment was still ambiguous.¹⁴⁵ Though the ships themselves turned out to be rather rickety and obsolete, Churchill saw their value in terms of how it "was a decidedly unneutral act by the United States...which brought the United States definitely nearer to us and to the war, and it was the first of a long succession of increasingly unneutral acts in the Atlantic which were of the utmost service to us."¹⁴⁶

The President and his advisers took pride in the fact that they had done the deal without Congressional authorization. In a private letter to his friend John McCloy, Dean Acheson wrote that:

I continually hear people saying that the President should have gone to Congress. This seems only another way of saying that the transaction was impossible, and I have very little patience with people who insist upon glorifying forms on the theory that another course is going to destroy our

¹⁴⁴ For FDR's devotion to expanding Executive power, see; Mary Stuckey, "FDR, the Rhetoric of Executive Authority and the Development of American Global Hegemony," *APSA 2011 Annual Meeting Paper*; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903200.

¹⁴⁵ Goodhart, "Fifty Ships," 1.

¹⁴⁶ Winston Churchill, *Their Finest Hour*, revised edition, (New York: Houghton Mifflin, 1976), 358.

institutions. The danger to them seems not in resolving legal doubts in accordance with the national interest but in refusing to act when action is imperative.¹⁴⁷

C) Military Deployments to Greenland and Iceland

After the destroyers had been sent to Great Britain, the Roosevelt administration felt that further military action was needed as the Nazi threat grew. The Roosevelt administration, still unable to get support from Congress for actions that could be seen as bellicose, decided that it would continue to take actions without Congressional authorization. The next step was to deploy U.S. troops to Greenland (a territory of Denmark) and Iceland in an effort to place U.S. troops closer to Europe and to relieve British troops who were stationed there for missions fighting the Nazis. This was a major step in bringing the United States closer to war and the administration decided to pursue it through international agreements to avoid the need for Congressional authorization.

The deployment to Greenland was a policy favored by Secretary of State Cordell Hull. He wrote to Roosevelt to encourage a deployment to Greenland, especially considering that, “the Danish Minister expressed the hope that we might find it possible to send a ship to Greenland, more or less for the purpose of reassuring the population there.”¹⁴⁸ Roosevelt discussed the matter at length with Prime Minister Mackenzie King in their summit at Warm Springs, Georgia in April 1940.¹⁴⁹ Shortly thereafter, the United States dispatched Coast Guard ships to Greenland and established a consulate there. The government of Greenland, while seeking to maintain its ties to Denmark, issued a declaration “to convey to the President of the United States the deep felt thanks of the people of Greenland for the sympathy with our cause and the respect for our

¹⁴⁷ Quoted; Chace, “Acheson,” 80.

¹⁴⁸ Cordell Hull to Franklin Roosevelt, 22 April 1940. Franklin Roosevelt Library; PSF, Box 25.

¹⁴⁹ Ibid.

freedom which the great American nation has proved so amply in these dark days.”¹⁵⁰ By framing the deployment as a response to a Danish invitation, Roosevelt sidestepped Congress.

In deploying troops to Iceland in July 1941, the Roosevelt administration again utilized the framework of an international agreement to build the Constitutional legitimacy for the deployment. Isolationists in Congress were opposed to any deployment to Iceland, which was viewed as outside the Western Hemisphere, and therefore outside the zone where the President could order U.S. armed forces.¹⁵¹ The Icelandic Prime Minister, Hermann Jónasson, in his invitation acknowledged that the matter was a formality that had been requested by the Roosevelt administration. He noted that Roosevelt is “prepared to send here immediately United States troops to supplement and eventually to replace the British forces here... [but] does not consider that he can take this course except at the invitation of the Iceland government.”¹⁵² This was done for legal reasons; Roosevelt wanted to be able to tell the Congress that the deployment of troops was being carried through an agreement with a sovereign state, and therefore was a matter of diplomacy rather than war-making. In his message to Jónasson, Roosevelt reaffirmed the diplomatic nature of the deployment: “I take pleasure in confirming to you hereby that the conditions set forth in your communication now under acknowledge are fully acceptable to the Government of the United States and that these conditions be observed.”¹⁵³

The agreement would remove any need to turn to Congress to authorize the deployment. Roosevelt only deigned it necessary to “request of the Congress its agreement in order that diplomatic representatives may be exchanged between our two countries.”¹⁵⁴ Roosevelt framed the deployment as simply a diplomatic matter. In reality it was a significant military deployment.

¹⁵⁰ “Declaration of the United Greenland Councils,” 3 May 1940. Franklin Roosevelt Library; PSF, Box 28.

¹⁵¹ Barron and Lederman, “Commander in Chief,” 1048.

¹⁵² Message Sent by the Prime Minister of Iceland to the President. Franklin Roosevelt Library; PSF, Box 39.

¹⁵³ Message sent by the President to the Prime Minister of Iceland. Franklin Roosevelt Library; PSF, Box 39.

¹⁵⁴ Ibid.

Admiral Stark, the Chief of Naval Operations, instructed the soldiers to “support the defense of Iceland and its territorial waters against attack by hostile forces.”¹⁵⁵ Making no mistake about the matter, Admiral Stark acknowledged in a note to Harry Hopkins, the President’s assistant, that this was far from an ordinary deployment: “I have however, as the President will note, ordered the force to cooperate with the British (in defending a British base operated by the British against their enemy). I realize that this is practically an act of war.”¹⁵⁶

By constructing the deployment as part of a negotiated agreement with Iceland, Roosevelt had been able to circumvent the need for any Congressional authorization. There was criticism, as noted in the *Los Angeles Times* that “the President has gone beyond the confines of the Western Hemisphere in attempting to bolster the defense of the Americas” and that he “did not request formal [Congressional] ratification of his action.”¹⁵⁷ Isolationists in the Senate, who felt that their Constitutional power had been violated, were outraged. Senator Burton Wheeler said that the measure was taken by those who are “for entering a shooting war” and Senator Gerald Nye labeled it “just an effort to enter the war by the back door.”¹⁵⁸

Following the deployment to Iceland, President Roosevelt finally made a speech to Congress regarding the deployment of U.S. forces. He did not seek Congressional authorization but was only “transmitting herewith for the information of Congress” the exchange of letters between himself and the Prime Minister of Iceland that was the legal framework for the deployment. By turning to the agreement, Roosevelt could draw upon a framework of legality that legitimized the deployment of force outside of Congressional authorization.¹⁵⁹ Roosevelt

¹⁵⁵ Admiral Stark, “Instructions for the Relief of a part of the British Garrison in Iceland by Troops of the U.S. Marine Corps,” 16 June 1941. Franklin Roosevelt Library; Hopkins Papers, Box 158.

¹⁵⁶ Ibid.

¹⁵⁷ “U.S. Marines Occupy Iceland,” *Los Angeles Times*, 8 July 1941.

¹⁵⁸ “Congressmen Generally Support Occupation,” *Los Angeles Times*, 8 July 1941.

¹⁵⁹ Franklin Roosevelt, “Message to Congress on Iceland,” 7 July 1941;
<http://www.mtholyoke.edu/acad/intrel/WorldWar2/iceland.htm>

emphasized that this deployment was not an occupation insofar as, “I have given the people of Iceland the assurance that the American forces sent there would in no way interfere with the internal and domestic affairs of that country.”¹⁶⁰

While Roosevelt was circumventing Congress, he decided not to directly challenge their authority in his proclamation. While a draft of his speech said that “this is strictly a military operation and that as such it could not be submitted to the Congress for prior approval any more than any other tactical operation called for by defense needs,” this line was cut from the final version.¹⁶¹ Instead Roosevelt only said that this “is a matter of broad policy clearly approved by Congress.”¹⁶² In this orchestrated strategy, the administration had been able to deploy troops to Iceland vis-a-vis an international agreement without any Congressional authorization. In a masterful stroke, Roosevelt had then told the Congress that this expansion of executive power was the logical extension of their policies despite widespread Congressional protest over the deployment.

D) The Defense of Military Aid in the Run-Up to America’s Declaration of War

Throughout the lead-up to America’s entry into World War Two, the administration would continue to defend their military aid and posturing on the basis of international law. Robert Jackson, the Attorney General who had authorized the destroyers for bases deal, took the argument further to argue that Germany’s waging of aggressive war in violation of international law *obligated* American aid to the United Kingdom. In a May 1941 speech, Jackson emphasized the illegality of aggression: “the League of Nations Covenant with sanctions against aggressors, the Kellogg-Briand Treaty for renunciation of war as an instrument of policy, and the Argentine

¹⁶⁰ Ibid.

¹⁶¹ “Draft of Speech,” Franklin Roosevelt Library; President’s Speech Files; Box 61.

¹⁶² Ibid.

Anti-War Treaty, swept away the nineteenth century basis for contending that all wars are alike and all warriors entitled to like treatment.”¹⁶³ For Jackson this meant that, “In flagrant cases of aggression where the facts speak so unambiguously that world opinion takes what may be the equivalent of judicial fiat, we may not stymie international law and allow these great treaties to become dead letters.”¹⁶⁴ In this instance, Jackson contended that “the Axis powers are the aggressors in the wars today, which is an appropriate basis in the present state of international organization for our policy” for aiding the United Kingdom.¹⁶⁵ Jackson, in his words, “advised my government in the hope that its course may strengthen the sanction against aggression and contribute to our aspiration for an international order under law.”¹⁶⁶ For Jackson, the international legal framework had become a way to circumvent the criticism that the administration was acting without Congressional authorization. In this sense, the ILF supplied a crucial tool for the executive to take action without Congress.

When further aid was needed by the United Kingdom and Congressional authorization finally seemed feasible, the administration turned to Congress for the Lend-Lease Act. However, the administration was already beginning to plot how to take these actions if Congress did not approve them. Oscar Cox, a senior lawyer at the Department of Justice, argued that under the Kellogg-Briand Treaty, “the United States is privileged to take action against an aggressor nation like Germany which has violated its treaty obligation not to resort to war as an instrument of national policy.”¹⁶⁷ The Congress was warned that if they did not pass the legislation, the President would move forward through an international agreement as they had before.

¹⁶³ Robert Jackson, “Address at the Conference of the Inter American Bar Association,” 27 March 1941; <http://www.justice.gov/ag/aghstory/jackson/1941/03-27-1941.pdf>

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ Ibid.

¹⁶⁷ Oscar Cox, “The Aid to Britain Bill: Volume 2,” 329. Franklin Roosevelt Library; Oscar Cox Papers, Alphabetical Files, Aid to Britain Volume II.

E) International Agreements as Source of Executive Power

Throughout this lead-up to war, Roosevelt wanted to avoid having to go to Congress to obtain authorization or even a Declaration of War. Isolationist Senators clamored that Roosevelt needed to secure a Declaration of War to carry out these various deployments.¹⁶⁸ The administration, by contrast, argued that these smaller engagements as the last hope for keeping the United States out of war. The President was pursuing, as *New York Times* columnist Ernest Lindley described it, a “flexible policy- no longer short of hostilities, perhaps, but short of declared, and therefore unlimited, war.”¹⁶⁹ For the administration and its supporters, the choice was not between “shooting and not shooting” but “between declaring war and taking action important to our security- without going to war,” as Lindley argued.¹⁷⁰

For the first time in U.S. history, the President had turned to international agreements as a means to assert Presidential power to utilize force even though there was Congressional opposition. There was no Congressional authorization for these actions; the President was using ILFs as “total substitutes” for Congressional authorization. With U.S. aid flowing to the United Kingdom and American troops in Iceland and Greenland, it was clear that “American neutrality was hardly more than a technicality; the United States had clearly aligned itself with resistance to Nazi aggression.”¹⁷¹ At the Constitutional level, this was made possible by Roosevelt’s reliance on international agreements as “total substitutes” for Congressional authorization.

¹⁶⁸ Ernest Lindley. “Analyzes, the President’s Dilemma -- Mr. Roosevelt Wants to Safeguard U.S. Interests But Avoid Formal Declaration of War Against Germany,” *The Washington Post*, 13 July 1941.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Langer and Gleason, “Challenge to Isolation,” 2.

Chapter 4:

America's Entry into International Organizations

Planning for a post-war United Nations became a focus for the Roosevelt administration and the Congress. While there was widespread support for establishing a United Nations, there was considerable debate, as there had been with the League of Nations, over whether the President should be able to use military force through the international body without Congressional authorization. The issue became an important political question in the 1944 Presidential election and the administration developed a nuanced legal case for the President's Constitutional authority to use force in the United Nations without Congressional authorization.

While there has been a substantial body of scholarship on American entry into the United Nations, there has been little attention to the Constitutional dimension that was heavily debated at the time. In this Chapter I argue that America's accession to the United Nations and NATO formalized the capacity of the executive to utilize military force in an ILF without Congressional authorization. While ILFs had been deployed in the pre-WWII aid to Great Britain as a means to expand executive power, this formalization process greatly enhanced the executive's ability to use ILFs as a legal basis for using military force without Congressional authorization.

A) The United Nations in the Congress

The debate over Article X in the League of Nations ratification debate had raised the question of how much power a President possessed to deploy military force vis-a-vis American participation in international organizations, but it did not resolve that question. The isolationist sentiment had dissipated with America's entry into World War Two. There was a common belief that America's failure to join the League of Nations had contributed to World War Two and

there was a commitment, from early on in the war, that America should take the lead in formulating the post-war United Nations system.¹⁷² Isolationists in the Senate, particularly the influential Chairman of the Senate Foreign Relations Committee, Arthur Vandenberg, shifted towards a commitment to internationalism.¹⁷³ At the close of World War Two, the opposition to Presidential power in an IO that had existed in 1919 no longer was there.

Instead, the American public, and the leaders in the Senate, wanted to build a strong post-war United Nations system premised on American leadership. As the war progressed, support for the United Nations grew. The war had made isolationism an untenable position for leading Republican politicians.¹⁷⁴ Wendell Wilkie had been the Republican nominee for President in 1940, a race in which he promised to thwart Roosevelt's plan to secretly drag America into war. However, during the war he became a leading internationalist.¹⁷⁵ His 1943 book, *One World*, was one of the best-selling books in the United States.¹⁷⁶ He repudiated the Republican Party's isolationist legacy, condemned the work of Republicans in thwarting the League of Nations in the Senate and urged the United States to take on a robust role in a post-war United Nations.¹⁷⁷

The debate over the relationship between executive power and American participation in the United Nations began to take its legal form within the administration in 1943. The debate was not on the question of deploying military force, but on how the President and the Congress would control American funds being sent to the United Nations Relief and Rehabilitation Administration (UNRAA). In 1943, while establishing UNRAA, there was a question as to

¹⁷² Robert Divine, *Second Chance: The Triumph of Internationalism in American During World War II*, (New York: Atheneum, 1967), 4.

¹⁷³ Ibid, 4.

¹⁷⁴ Ibid, 300.

¹⁷⁵ Howard Jones, "One World: An American Perspective," in Wendell Wilkie: Hoosier Internationalist, ed. James Madison, (Indianapolis: Indiana UP, 1992), 103.

¹⁷⁶ Golove, "From Versailles," 8.

¹⁷⁷ Wendell Wilkie, *One World*, (New York: Simon & Schuster, 1943), 199-200.

whether the Congress would have to sanction American involvement in the nascent international organization. The Roosevelt administration had long defended executive power in the field of foreign relations and this strategy seeped into how they envisioned America's relationship with an IO. The question of executive power in America's relationship with IOs was sent to Myres McDougal, a State Department lawyer. McDougal had served as a professor of international law at Yale Law School and was an advocate of executive power as a lawyer for the Lend-Lease Administration. McDougal sought to establish a legal basis for the President to control America's relationship with UNRAA. "The President, based on his competence in the field of foreign relations, has authority to enter into executive agreements the Constitutionality of which has frequently been affirmed by the Supreme Court," he argued in an official memorandum.¹⁷⁸ American participation in an IO would be an arena for executive agreements between the President and foreign heads of state. McDougal argued, "I do not think that it is important to distinguish too closely between action by executive agreement with and without prior Congressional authorization."¹⁷⁹ The State Department's approach to nascent IOs was that this would be a field for Presidential leadership and Congressional acquiescence.

The question of Presidential power to utilize military force in a United Nations system became a significant issue at the Dumbarton Oaks Conference in Autumn 1944. Soviet, American and British representatives came together at the conference to plan the establishment of the post-war United Nations.¹⁸⁰ General Nikolai Slavin, the Deputy Commander of the Soviet delegation, expressed concern that "some states might decide not to release their national [military] contingents in a crisis- thus duplicating the failure of the League of Nations," as

¹⁷⁸ Myres McDougal, "The Constitutionality of the Agreement Establishing the United Nations Relief and Rehabilitation Administration," 26 October 1943. Library of Congress: Philip Jessup Papers; Box 192.

¹⁷⁹ Myres McDouglas to Philip Jessup, 3 November 1943. Library of Congress: Jessup Papers 192

¹⁸⁰ Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the UN*, (New Haven: Yale UP, 1997), 133.

historian Robert Hilderbrand notes.¹⁸¹ The Soviet delegation argued that the only solution was an international peacekeeping force, including an air force, that would be at the United Nations' disposal as they saw necessary.¹⁸² The Americans were not willing to accept this. Admiral Russell Wilson, a leading American representative called for the establishment of a mechanism that would oblige the members, in the event of a crisis, to send troops to a U.N. mission with the troops then returning to their national forces after the engagement.¹⁸³ The proposition was fully endorsed by the British and the Soviets were open to the proposition.¹⁸⁴

From a Constitutional perspective, the plan would require that Congress not be given the option to renege on America's pledges at the United Nations. General Nikolai Slevin raised this concern. To persuade the Soviet Union that America's plan was operational, the American delegation had to be able to assure the Soviet Union that Congress would not have the power to undermine a commitment by the United Nations to use military force. Secretary of State Hull and Ambassador Edward Stettinus, America's chief representative to the conference, were left with the task of persuading the Senators that the President would need to be able to use force without Congressional approval in the United Nations system. The issue, as Hull saw it, was central to the success of the United Nations and argued that this was the "only practicable way" to approach the issue.¹⁸⁵ Senator Vandenberg initially disagreed, by arguing that a commitment from the American delegate would be "tantamount to a declaration of war," thus requiring Congressional authorization.¹⁸⁶ However, in his letter to Hull, Vandenberg left open the

¹⁸¹ Robert Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security*, (Chapel Hill: University of North Carolina Press, 1990), 148.

¹⁸² Ibid, 148.

¹⁸³ Ibid, 149.

¹⁸⁴ Ibid, 149

¹⁸⁵ Quoted: *ibid*, 149

¹⁸⁶ Quoted, *ibid* 149.

possibility for some use of force by the President vis-a-vis the United Nations without Congressional authorization:

we might accept North and South America (under the Monroe Doctrine as our primary responsibility in respect to the use of military force (just as we have always done); and allow the President and his delegate to act for us, without Congressional reference, in this primary field. But if the dispute discloses an aggressor who cannot be curbed on a regional basis - if it takes another world-wide war to deal with him- I do not see how we can escape the necessity for Congressional consent.¹⁸⁷

The administration used the Soviet proposal as a tool to force the Republicans to accept Roosevelt's plan. Citing the fear that the United States may have to accept a permanent United Nations army, the Roosevelt administration was able to convince leading Republican Senators to support the President's plan. Though the Republicans were concerned with the plan's emphasis on the President's power to use force in the United Nations, they found it preferable to the Soviet design.

Secretary of State Hull led the lobbying effort and he put the State Department legal team to work on defending this position. State Department Legal Adviser Green Hackworth, a lawyer who had served in the position since 1931, was ordered by Hull to write a memorandum on the issue. Hackworth drew upon the memoranda written by Frederick Ribble, a UVA law professor who had consulted for the State Department, to make this important argument.

Hackworth and Ribble argued that under the United Nations, the use of force would be less than 'war' and therefore not require Congressional authorization. International uses of force within the U.N. system, Ribble argued, would be civil conflicts rather than war "in a legal sense," meaning that the United States could send forces to a U.N. mission without

¹⁸⁷ Quoted: Arthur Vandenberg and Joe Morris, *The Private Papers of Arthur Vandenberg*, (Charlottesville: Greenwood Press, 1974), 118.

Congressional authorization.¹⁸⁸ Hackworth borrowed arguments from Riddle's memoranda to argue that the President would be able to use military force without Congressional authorization in a U.N. system.¹⁸⁹ The memorandum was circulated by the State Department at the Senate Foreign Relations Committee.¹⁹⁰ Hull used the legal memoranda to tell the Senators that, "the President would have the right to use those armed forces [in the United Nations] without further recourse to Congress."¹⁹¹

Secretary Hull directly engaged Congressional leaders on the question of the President's power to use military force in the United Nations. He persuaded Vandenberg to join the administration on this issue. "I said to the Senators that we were approaching the most critical stage of our peace undertaking," Hull recalled, and he warned them that the Soviet Union "was watching closely to see whether the American people were strongly behind our document or whether they [the American people] were showing prime interest in this question and forgetting the whole question of future peace."¹⁹² He warned that the Soviet Union "would not adopt a plan" that "might not function as promptly as a threat to the peace called for."¹⁹³ Hull warned the Senators that if they insisted on Congressional authorization they could be undermining the American plan and inadvertently provide support to the Soviet plan for a permanent United Nations military. To avert that possibility, the Senators were instructed to lay down their protests about the need for Congressional authorization.

Hull believed in his position but he was also carefully utilizing the Soviet proposal to gain concessions from Congress. Hull could have tried to directly attack the Soviet proposal but

¹⁸⁸ Quoted; Hiderbrand, "Dumbarton Oaks," 150.

¹⁸⁹ Quoted; *ibid*, 150.

¹⁹⁰ *Ibid*, 151.

¹⁹¹ Cordell Hull, *The Memoirs of Cordell Hull*, Volume II (New York: Macmillan, 1948), 1696.

¹⁹² *Ibid*, 1697.

¹⁹³ *Ibid*, 1697.

he chose to utilize the Soviet Union's intransigence on the issue to gain greater concessions from members of Congress.

For Hull, America's role as a leader of the United Nations implied a 'responsibility' to be able and willing to use force to enforce the United Nations resolutions on a regular basis. The Constitution, he thought, was only a tool that the Senators would use to obstruct his quest to build a peaceful post-war order. While Dumbarton Oaks is seen as the site of international diplomacy, Hull was also engaged in a careful Presidential-Congressional negotiation on Presidential power and he achieved the results he wanted.

As the Dumbarton Oaks Conference concluded, the issue of Presidential power to commit troops to the United Nations became an important issue in the 1944 Presidential election. Senator Joseph Ball, a Republican internationalist from Minnesota and early proponent of pre-war aid to the United Kingdom, raised the issue first. He promised to endorse whichever candidate would provide the most unequivocally affirmative answer to the question: "Should the vote of the United States' representative on the United Nations security council commit an agreed upon quota of our military forces to action ordered by the council to maintain peace without requiring further congressional approval?"¹⁹⁴ For his own view, Ball could "not see how the Constitutional authority of Congress to declare war is concerned in the slightest. The world security organization would not be making war, but preserving the peace. Its whole purpose is to eliminate war from the world, not make it."¹⁹⁵ Insofar as it was not making 'war,' the Congress would not have power over it, Ball reasoned. He argued that Congress had the "Constitutional authority, in light of the world situation today, to provide in advance for whatever world policing

¹⁹⁴ Golove, "From Versailles to San Francisco," 9.

¹⁹⁵ Quoted: Daniel Patrick Moynihan, *On the Law of Nations*, (Cambridge: Harvard UP, 1990), 77.

is considered necessary to prevent another great war.”¹⁹⁶ An internationalist willing to transcend partisan allegiances, Ball was willing to endorse the candidate of either party who would concur with his position best.

This was an opportunity that Roosevelt seized upon. Thomas Dewey, the Republican Candidate, was not a committed internationalist. Dewey disputed Ball’s view that the President should be able to commit forces through the United Nations.¹⁹⁷ Dewey failed to give a response to Ball’s question and Roosevelt saw a political opportunity in the close race.¹⁹⁸ Roosevelt was scheduled to give a major foreign policy address on world government to the Foreign Policy Association in New York City on 2 October 1944. He used it as a platform to address the issue. As the focus of the speech shifted towards answering the Ball question, Roosevelt enlisted the help of Benjamin Cohen, the ardent defender of executive power from the destroyers for bases deal, to help him craft the speech.¹⁹⁹ Cohen served as Roosevelt’s liaison to Senator Ball and was charged with outlining the speech’s policy positions.²⁰⁰

As they finalized the speech, even Cohen’s bold push for executive power was not strong enough for Roosevelt. Roosevelt crossed off a line from a previous draft: “We shall enter a peace organization as a sovereign power and therefore our representative in that organization cannot legislate for us.”²⁰¹ Instead, Roosevelt added in an analogy from a ‘Town Council’ to argue that the President would need the power to use force without Congressional authorization:

The Council of the United Nations must have the power to act quickly and decisively to keep the peace by force, if necessary. A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the Town Hall and call a town meeting to issue a warrant before the felon could be arrested. So to my simple

¹⁹⁶ Quoted: *ibid*, 77.

¹⁹⁷ Richard Smith, *Thomas E. Dewey and His Times*, (New York: Simon & Schuster, 1982), 414-415.

¹⁹⁸ Barbara Stuhler, “A Minnesota Footnote to the 1944 Presidential Election,” *Minnesota History*, (52) 1990, 32-33.

¹⁹⁹ Samuel Rosenman, *Working with Roosevelt*, (London: R. Hart-Davis, 1952), 439.

²⁰⁰ *Ibid*, 439.

²⁰¹ Moynihan, “Law of Nations,” 75

mind it is clear that, if the world organization is to have any reality at all, our American representative must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act. If we do not catch the international felon when we have our hands on him, if we let him get away with his loot because the Town Council has not passed an ordinance authorizing his arrest, then we are not doing our share to prevent another world war. I think, and I have had some experience, that the people of this Nation want their Government to work, they want their Government to act, and not merely to talk, whenever and wherever there is a threat to world peace.²⁰²

For Roosevelt, the requirement of the United Nations to act ‘quickly and decisively’ implied the President’s ability to use force without going to Congress for authorization. Like many Presidents had before him, Roosevelt relied on claims of necessity for the executive power to use force, but he extended this to larger operations authorized by the United Nations.

At a political level, the speech was a success. Senator Ball announced that he “shall vote for and support President Roosevelt” because the President had “met squarely and unequivocally,” the position “on which isolationists had kept America out of the League of Nations.”²⁰³ The cross-partisan endorsement provided political momentum for Roosevelt and the President quickly secured endorsements from a number of influential Republicans associated with the internationalist wing of the party.²⁰⁴ In a belated attempt to contain the political fallout and maintain support from Republican internationalists, Dewey reversed his position. He said that he “did not insist that the American delegate [to the United Nations], return to congress for authority to use force in a crisis.”²⁰⁵ It was too late for Ball’s endorsement. Ball reaffirmed his support for Roosevelt on the basis of the President’s use of executive power in foreign policy crises such as the destroyers for bases deal.²⁰⁶ Ultimately the leaders of both parties had united in

²⁰² Franklin Roosevelt, “Radio Address at a Dinner of the Foreign Policy Association,” 21 October 1944; <http://www.presidency.ucsb.edu/ws/index.php?pid=16456#axzz1chMcu6tc>

²⁰³ Barbara Stuhler, *Ten Men of Minnesota and American foreign policy, 1898-1968*, (Minneapolis: Minnesota Historical Society, 1973), 140-141.

²⁰⁴ Golove, “From Versailles to San Francisco,” 10.

²⁰⁵ Stuhler, “Ten Men,” 141.

²⁰⁶ *Ibid*, 141.

the campaign on the argument that the President, through his delegate to the United Nations, would have the power to commit U.S. forces to combat without Congressional authorization.

The position enjoyed an expanding level of support from lawyers and legal academics who rallied to support the Constitutionality of a United Nations system in which the President would be able to use force without Congressional authorization. Edward Corwin, the foremost Constitutional scholar on war powers, wrote a strong defense of the plans for the United Nations in his 1944 book, *Constitution and World Organization*, and he specifically argued that the President should be able to use force through the United Nations based on the President's traditional power to employ force without Congressional authorization.²⁰⁷ The book was interpreted within policy-making circles to mean that the Constitution should "not inhibit the American people from entering whatever sort of international organization they may wish," as the reviewer in *Foreign Affairs* noted.²⁰⁸ Seeking to convey the message to a broader public, a committee of lawyers decided to make the case in the popular press. The group included Philip Jessup, a law professor who had served with the UNRAA, and Quincy Wright, a leading scholar of Presidential war powers. They took to the pages of the *New York Times* to argue in an op-ed that the President should have the power to authorize a "relatively small force immediately available to the international council for action against aggressors without need of legislative action by the various states."²⁰⁹ This was an extension, they argued, of how "the President has always had the power under the Constitution to use force when he deemed it necessary" and thus "there can be [no] doubt of his constitutional right to utilize contingents of his armed forces for

²⁰⁷ Edward Samuel Corwin, *The Constitution and World Organization*, revised edition, (Freeport, New York: Books for Libraries Press, 1970), 22-23.

²⁰⁸ Robert Wollbert, "Review of The Constitution and World Organization," *Foreign Affairs*, July 1944: <http://www.foreignaffairs.com/articles/108573/edward-s-corwin/the-constitution-and-world-organization>

²⁰⁹ John Davis, WW. Grant, Philip Jessup, George Rublee, James Shotwell, and Quincy Wright. "Congress May Authorize Extraterritorial Use of Force, but Constitution Is Held to Place Responsibility for Prompt Action Directly Upon the Executive," *New York Times*, 5 November 1944.

[the] purpose of “carry[ing] out a commitment for participation in international policing.”²¹⁰

These arguments provided the expert support to undergird the executive’s push for expanded war powers within a United Nations system.

As the war came to a close, the public’s dedication to American participation in the United Nations continued to grow. By 1945, over 80% of Americans thought that the United States should join an international organization with the power to maintain international peace.²¹¹ A variety of advocacy organizations, such as the Commission to Study the Organization of Peace, pressured the Senate to resist inserting reservations in the treaty.²¹² The World Peace Foundation, a major advocacy group for the United Nations, decided to publish a pamphlet arguing that the President should be able to use force through the United Nations without Congressional authorization. James Grafton Rogers, a former Assistant Secretary of State, published *World Policing and the Constitution*, to make that case before the United Nations Charter was finalized in San Francisco.²¹³ According to Rogers, using force through the United Nations was not ‘war’ and therefore “the use of armed force for international police measures does not involve a declaration of war.”²¹⁴ By defining the use of force through the United Nations as peacekeeping rather than as ‘war,’ supporters of the United Nations were able to argue that the Congress need not authorize the use of military force. As the United States prepared to enter the United Nations there was consensus amongst political leadership in both parties, and strong backing from the public as well as from legal scholars and practitioners, that the President would have authority in the United Nations to use military force without Congressional authorization. The legacy of the failure of the League of Nations hung over the

²¹⁰ Ibid.

²¹¹ Golove, “From Versailles to San Francisco,” 7.

²¹² Paul Kennedy, *Parliament of Man: The Past, Present and Future of the United Nations*, (New York: Vintage Books, 2006), 25.

²¹³ Golove, “From Versailles to San Francisco,” 10.

²¹⁴ James Grafton Rogers, *World Policing and the Constitution*, (Boston: World Peace Foundation, 1945), 88.

Senators and this gave them the chance to create a strong bulwark against international aggression. Supporting executive power, in this context, was to support a durable peace.

This broad support for the United Nations produced an American delegation to the United Nations conference in San Francisco whose members accepted the President's authority to use force through the United Nations. Vandenberg was put on the delegation as the Republican representative. He was firmly committed to pushing for "a new dignity and new authority for international law" because "American interest requires it."²¹⁵ The U.S. delegation to the San Francisco conference was dedicated to creating a charter that would empower the President to use force to maintain international peace without Congressional authorization.

The one nod to the possibility that Congress would still have involvement was a refrain that 'constitutional processes' should be followed when members used force, but this was a hollow pledge. At the core of the United Nation Charter's pledge to ensure collective security was Article 43. It required members "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces...necessary for the purpose of maintaining international peace and security."²¹⁶ These agreements would have to be created "in accordance with [member's] respective constitutional processes," though the Charter did not seek to define or clarify what these constitutional processes might entail.²¹⁷ The Americans had inserted the phrase but it was seen as an empty concession to the isolationists in Congress to make sure they didn't put up resistance to ratifying the charter.²¹⁸ The concession to the isolationists didn't concern the Truman administration; they knew that they had already won

²¹⁵ Arthur Vandenberg, "American Foreign Policy," 10 January 1945, 603;
<http://www.senate.gov/artandhistory/history/resources/pdf/VandenbergSpeech.pdf>

²¹⁶ United Nations Charter; Article 43.

²¹⁷ Ibid.

²¹⁸ Stettinius had originally raised the possibility of having to introduce the language at Dumbarton Oaks to his British colleague, Sir Alexander Cadogan. He said that the matter may be necessary for political reasons though he didn't want to do it, see; Hilderbrand, "Dumbarton Oaks," 151

over Vandenberg and that the State Department had already established in its legal memorandum that the President could use force in the U.N. without Congressional authorization.

When the matter came to the Senate, only a few Republican Senators expressed concerns about preserving the Congressional right to declare war. Senator Harlan Bushfield, objected “to a delegation of power to one man or to the Security Council, composed of 10 foreigners and 1 American, to declare war and to take American boys into war.”²¹⁹ Bushfield thought that would constitute “a direct violation of the Constitution.”²²⁰ Republican Senator Burton Wheeler argued that the delegation of war-making power to the U.S. representative to the United Nations would require a constitutional amendment.²²¹ Senator Robert Taft demanded that “some power be reserved to Congress to direct voting by our representative which involves a war.”²²² These Senators gravely feared that the U.S. delegate to the United Nations could commit the country to a war without Congressional authorization.

Despite these objections, the majority of Senators were unconcerned with the possibility that the President could use the U.N. to circumvent Congress.²²³ During the League of Nations debate in the Senate, Edward Corwin noted that the “Covenant instantly stirred up in many bosoms all kinds of doubts as to the constitutional competence of the treaty-making authority to put the United States into such an organization,” yet this was different.²²⁴ The debate over the United Nations Charter occurred in the context of an “enlarged conceptions of the constitutional powers of the National Government,” which Corwin argued was the product of the “enlarged conception of the adaptability of the Constitution to problems of government in the modern era,

²¹⁹ 91 Congressional Record (1945), 7156.

²²⁰ Ibid, 7156.

²²¹ Ibid, 7988.

²²² Quoted; Geoffrey Matthews, “Robert A. Taft: The Constitution and American Foreign Policy, 1939-1953,” *Journal of Contemporary History* (17) 1980, 514.

²²³ Jane Stromseth, “Rethinking War Powers: Congress, the President and the United Nations,” *Georgetown Law Journal* 81 (1993), 605.

²²⁴ Corwin, “The President,” 265.

all of which had been confirmed and reinforced by the developments of World War II.”²²⁵ In this debate, the issue of Presidential power to use force was largely accepted without controversy. Most senators supported the birth of the United Nations and didn’t want to see a fight emerge like the one over the League of Nations.

Some members of Congress even went so far as to push forward the idea that the President would be able to use the Charter to utilize military force without Congressional authorization. Truman had an important ally in Senator Tom Connally, the Democratic Chairman of the Senate Foreign Relations Committee. Connally and Truman had previously served together on the Senate’s influential committee investigating the Defense Department’s wasteful spending during World War Two and they maintained a close working relationship when Truman became President. The Senate Foreign Relations Committee, in its official report on the bill, was given the unique opportunity to assert for posterity the ‘framer’s intent’ of the bill and to shape how it would be interpreted. The committee’s report strongly supported the notion that the President could use the United Nations as the basis for utilizing military force:

any reservation to the Charter, or any subsequent congressional limitation designed to provide, for example, that employment of the armed forces to the United States to be made available to the Security Council... could be authorized only after the Congress had passed on each individual case would clearly violate the spirit of one of the most important provisions of the Charter. One of the fundamental purposes of the Charter is to provide forces which will be immediately available to the Security Council to take action to prevent a breach of the peace.²²⁶

Truman’s allies in the Senate, led by Connally, constructed an interpretation of the United Nations Charter that would allow the executive to utilize military force without Congressional authorization. The Senate was, as the report stated, “serv[ing] notice upon the

²²⁵ Ibid, 266.

²²⁶ U.S. Senate Foreign Relations Committee, “Report on United Nations Participation Act,” in *Problems of World War II and its Aftermath*, Volume 1, (Washington D.C., U.S. Government Printing Office, 1976), 305.

world that as a nation we are prepared to carry out our obligations promptly and effectively.”²²⁷

In a quest to demonstrate the seriousness of America’s commitment to the United Nations, the vast majority of the Congress was willing to let the executive expand its war power.

In the final debate, the Senate ratified the resolution with a clear understanding that they were giving a new war power to the President. John Foster Dulles, testifying in Congress as a witness for the administration, argued that “if we are talking about a little bit of force to be used for a police demonstration,” then the President would not need Congressional approval.²²⁸ The Senate Foreign Relations Committee report on the matter declared that: “Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war,” and that “the provisions of the Charter do not affect the exclusive power of the Congress to declare war.”²²⁹ While claiming to preserve the Congress’s power to ‘Declare War,’ the Congress was defining ‘war’ in a manner where any use of force through the United Nations would, by definition, not be war. The President would therefore have the ability to use force through the United Nations in an unfettered manner.

While this was intended to be a fairly limited power for the President, the lack of clarity in the law provided a platform for the expansion of executive power. Senator James Milliken raised the concern that the President’s power to conduct “policing operations” could not be differentiated from the Congress’s power to declare war because “the boundary [between policing operations and war] has never been eliminated by an acceptable definition.”²³⁰ This was an ambiguity that the executive could exploit.

²²⁷ Ibid, 305.

²²⁸ Ibid, 655.

²²⁹ U.S. Senate Foreign Relations Committee, “Problems,” 305.

²³⁰ 91 Congressional Record (1945), 8033.

After the passage of the United Nations Charter by the U.S. Senate, the United Nations Participation Act was enacted to further define executive power to use force through the United Nations. Section 6 of the bill stated that: “The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 of [the U.N.] Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided therein.”²³¹ The President was only limited in that any forces deployed “in addition” to those specified in the agreements would require Congressional authorization.²³² Jane Stromseth suggests that the debate over the UNPA “reflected the continuing tension between the majority in Congress, who believed that the Act struck the right war powers balance, and a minority, who insisted that the Article 43 approach did not adequately protect the constitutional power of Congress to declare war.”²³³ Senators Wheeler and Taft both introduced amendments to protect the Congress’s war powers, but they were both defeated by overwhelming margins.²³⁴

The debates in 1945 over ratification of the U.N. Charter and the passage of the United Nations Participation Act left the question open as to how much power the President would have to deploy American military forces under the auspices of the United Nations. The United Nations Participation Act sought to divide the power between the President and the Congress, but it also created a framework in which the President could deploy force without any Congressional authorization. America’s entry into the United Nations system deepened the clash between the President and the Congress over the proper distribution of Constitutional authority to utilize military force but it tipped in favor of the President by offering the executive a new

²³¹ United Nations Participation Act of 1945; Section 6.

²³² Ibid.

²³³ Stromseth, “Rethinking War Powers,” 616.

²³⁴ Ibid, 617.

legal basis for using force without Congressional authorization. Previously, Presidents who wanted to use force without Congressional authorization had to cite their power as Commander-in-Chief, but now they had a new legal framework oriented in the United Nations.

Once the United Nations was established, President Truman rarely utilized the United Nations in policy-making. The Truman administration became frustrated with the Soviet presence and the inability to obtain the “necessary resolutions,” as an aide put it.²³⁵ While some members of the administration were firm believers in the importance of the organization, Secretary of State Dean Acheson had maintained a skepticism of the utility of international law and the United Nations.²³⁶ Indeed, when reviewing a draft of Truman’s speech to Congress in which the President would enunciate the Truman Doctrine, Acheson deleted all references to the United Nations.²³⁷ Philip Jessup, an international law scholar and Ambassador-at-Large in the administration, wrote to Acheson that “you never agreed with me about the importance or potential importance of the UN. It seemed to be that the aspects of the UN which bore down heavily upon you were its futility, the waste of time, in the processes and the annoyance which its irresponsible members cause to the responsible members.”²³⁸ Acheson viewed the nascent international organization with a great deal of skepticism.

²³⁵ George Elsey. Interview with author; 6 August 2010. Irvine, California.

²³⁶ Acheson saw the outbreak of World War Two as a representation of how international law had failed to constrain power. See;

Dean Acheson, *Among Friends: Personal Letters of Dean Acheson*, David McLellan and David Acheson, ed. (New York: Dodd, Mead & Company, 1980), 41.

In a later speech on “The Arrogance of International Lawyers” he said that “Those who devote themselves to international relations in foreign offices...are understandably and wisely reticent about the role of law.” See; Dean Acheson, *Morning and Noon*, (Boston: Houghton Mifflin, 1962), 156.

²³⁷ Elsey had drafted the speech with multiple references to the United Nations;

Elsey, interview with author.

²³⁸ Philip Jessup, “Letter to Dean Acheson,” 20 November 1953. Library of Congress: Philip Jessup Papers, Box II; Part 3.

Within the administration the United Nations was treated largely as a political tool. In April 1948, Truman's aides speculated that it could be used to help Truman win his re-election in 1948 but there was no real engagement with the organization.²³⁹

B) Debating an Intervention in Palestine

In the summer of 1948, the Truman administration took a renewed interest in the United Nations as a means by which the President could order the deployment of military force without Congressional authorization. As the United Kingdom's trusteeship of Palestine was ending and the outbreak of a war between the Arabs and Jews seemed inevitable, members of the administration seriously contemplated the utilization of the United Nations as a legal basis for a military intervention in the area. Dean Rusk argued that such a "temporary trusteeship" would be "emergency action directed solely to the maintenance of peace" and "the United Nations is empowered to act."²⁴⁰

The more vexing question was whether the President would have the authority to act without Congressional approval. Truman indicated that he would "order American participation in whatever United Nations force can be created to police Palestine, without Consulting Congress," as the *Washington Post* reported.²⁴¹ The State Department's counselor, Ernest Gross, had drafted a letter under Acheson's supervision that made clear how the department viewed the

²³⁹ The administration thought that "foreign policy may very well prove to be the key in 1948" for the Presidential election and they wanted to emphasize how "Woodrow Wilson failed" but "Truman succeeded" with the United Nations. They asked "how [to] capitalize [on] this for 1948?" The decision was made that advisers should "give full credit to the President for carrying [the United Nations] through." See;

"Memorandum: United Nations," 28 April 1947. Truman Library Online Index; http://www.trumanlibrary.org/whistlestop/study_collections/un/large/documents/index.php?documentdate=1947-04-28&documentid=97&studycollectionid=UN&pagenumber=1

²⁴⁰ Dean Rusk, "Note to Secretary of State," 22 March 1948. Harry Truman Library; Clark Clifford Papers, Box 14.

²⁴¹ "Policing Palestine," *Washington Post*, 24 April 1948.

implications of the U.N. authorization for Presidential power.²⁴² The letter posited that, “there may be insufficient time to obtain approval of a [Congressional] protocol between its conclusion [at the United Nations] and the time when the United States armed forces might be needed in the carrying out of an interim administration in Palestine.”²⁴³ Gross was positing, in line with the administration’s earlier arguments, that the President did not need Congressional authorization to use force through the United Nations. The Truman administration posited that the President, vis-a-vis the United Nations, had the power to deploy the armed forces without Congressional consent and the U.S. Ambassador to the United Nations pledged that America would send troops if necessary.²⁴⁴ While some Congressmen continued to protest, the Truman administration moved forward with its claim that it had the Constitutional power to carry out the intervention without the Congress.²⁴⁵

Though the intervention in Palestine never took place, the administration’s contention that the President *could* intervene vis-a-vis the United Nations without approval from Congress was significant.²⁴⁶ It imposed flesh on the discussion surrounding the use of the United Nations as a substitute for Congress in a real policy-making framework. The proponents of executive power, including Dean Acheson, were looking for new mechanisms to expand executive power and the United Nations was a readily accessible tool. Deploying the military through the United Nations, as prominent lawyers had argued in the 1940s, was seen as an option that could be used without Congressional authorization.

²⁴² Clark Clifford, “Letter to Tom Clark, 10 May 1948. Harry Truman Library; Clark Clifford Files, Box 10.

²⁴³ Ernest Gross, “Cover Letter,” in *ibid*.

²⁴⁴ “U.S. Offers Its Soldiers to Back Palestine Plan,” *Los Angeles Times*, 21 April 1948.

²⁴⁵ “Truman Says He Has Power To Send Force,” *The Washington Post*, 23 April 1948.

²⁴⁶ U.S.-Soviet relations became a major reason why Truman decided not to intervene, see; Aiyaz Husain, “The United States and the Failure of UN Collective Security: Palestine, Kashmir and Indonesia,” *The American Journal of International Law*, 101 (2007), 589.

C) Ratifying NATO: The Article V Debate

In the aftermath of World War Two, the Truman administration sought to solidify a permanent set of alliances in Western Europe. An alliance with Europe, originally brought about in the 1948 Brussels Treaty, was seen by the administration as a vital means to demonstrate American commitment to European security. With a pledge of mutual security, historian Stanley Sloan notes that, the treaty “would immediately be seen by the Congress as undercutting its constitutional powers for declaring war and would therefore have no chance of winning Senate consent.”²⁴⁷ The Truman administration agreed to a treaty that would recognize an attack on any signatory state to “be considered an attack on them all” in which each signatory state will take “such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”²⁴⁸ Seeking to assuage concerns in the Senate, the Truman administration added in Article 11 that the treaty’s provisions would be “carried out by the Parties in accordance with their respective constitutional processes,” though that was not defined.²⁴⁹ The treaty was signed in Washington D.C. on 4 April 1949 and shortly thereafter it was introduced in the Senate for ratification. The treaty’s military commitment was, as Sidney Snyder noted, “the minimal commitment that Europe would accept and the maximum that [the Senate] would endorse.”²⁵⁰

A large swath of Republican senators viewed the bill as an attempt to usurp the Congress’s power to declare war. While these Senators had not been as willing to openly oppose the United Nations in 1945, the isolationist wing of the Republican Party was more willing by

²⁴⁷ Stanley Sloan, “Negotiating Article 5,” *NATO Review*, Summer 2006; <http://www.nato.int/docu/review/2006/issue2/english/art4.html>

²⁴⁸ North Atlantic Treaty; Article 5.

²⁴⁹ North Atlantic Treaty; Article 11.

²⁵⁰ Quoted; Lawrence Kaplan, *NATO 1948: The Birth of the Transatlantic Alliance*, (Lanham, Maryland: Rowman & Littlefield, 2007), 205.

1949 to vocally oppose international commitments because the public internationalist fervor of 1945 had begun to lessen. Republican isolationists had a long-standing opposition to American entanglement in Europe and saw NATO as a threat to a foreign policy premised on limited international commitments. Senator Forrest Donnell, a Republican from Missouri, referred to the efforts to protect Congressional power in the treaty as a fraud: the “apparent freedom of choice on the part of the United States was illusory,” he argued.²⁵¹ If an attack against a NATO country were to take place, he sarcastically noted that the United States would not be able to claim that, “We think that just sending over 10 gallons of coal oil would be sufficient.”²⁵² Robert Taft summed up this critique of NATO for a radio address as the Senate was considering ratification of the treaty: “It obligates us to go to war if at any time during the next twenty years anyone makes an armed attack on any of the twelve nations... Under the new Pact the President can take us into war without Congress.”²⁵³ Even Senator Vandenberg, a nascent internationalist, feared that NATO would mean the death of the Senate’s war powers and he wanted to ensure that the treaty would not mean instant war but merely “instant consideration” of using force.²⁵⁴ Seeking to preserve the Congress’s power to Declare War, Republican isolationists introduced a reservation to the NATO Charter:

...The United States assumes no obligation to restore and maintain the security or the North Atlantic area or to assist any other party or parties in said area... unless in any particular case the Congress, which under the Constitution has the sole power to declare war or authorize the employment of the military, air or naval forces of the United States, shall by act or joint resolution so provide.²⁵⁵

The resolution was defeated in a bipartisan vote of 84 to 11. With only fifty-three Democrats in the Senate, the vote was a united effort by Republicans and Democrats to push

²⁵¹ Quoted; Sloan, “Negotiating Article 5.”

²⁵² Ibid.

²⁵³ Quoted; Matthews, “Robert A. Taft,” supra 26.

²⁵⁴ Quoted; Kaplan, “NATO 1948,” 206.

²⁵⁵ Quoted: Fisher, “Presidential War Power,” 110.

NATO through. In July 1949, the United States Senate ratified the North Atlantic Treaty and in doing so established a new basis for the President to utilize military force without Congressional authorization.

As with the debate over the United Nations, most Senators wanted to ratify the treaty and they were unconcerned with the Constitutional implications. The treaty was ratified on an 82 to 13 vote.²⁵⁶ While there were more Constitutional objections to the NATO treaty than to the United Nations Charter, these objections were from a small minority of Republican Senators and there was little political will to resist the Truman administration on this.

In acceding to membership in the North Atlantic Treaty Organization and the United Nations, the United States had altered the allocation of war-making powers within its Constitutional order. The treaties became part of the ‘supreme law of the land’ and vested the Executive with new powers to use military force. NATO implied an obligation to use military force to defend European nations and the United Nations offered a platform to create resolutions that could obligate the United States to utilize military force. The delegate to the United Nations operated solely under the discretion of the President; the multilateral system was a system premised on the logic of Presidential power. The era of American participation in international organizations created a new era of executive power to use military force.

²⁵⁶ 95 Cong. Rec. 9916 (July 21, 1949).

CHAPTER 5:

The Korean War

A) Introduction: A Case of Total Substitution

The United States would lose over 33,000 soldiers in the Korean War, yet from a Constitutional perspective this was never a ‘war’ at all.²⁵⁷ As Air Force commanders began to carry out their orders that, “North Korean tanks, guns, military columns and other military targets” in South Korea are “cleared for attack,” Truman denied that there was a war.²⁵⁸ In a press conference, Truman announced that “we are not at war” but merely part of a “police action under the United Nations.”²⁵⁹ Without a ‘war,’ Truman would not have to go to Congress to obtain a Declaration of War, as many Senators demanded. The United Nations authorization was utilized by the administration as a “total substitute” for Congressional authorization.

B) The Political Context

The decision to go to war through the United Nations rather than through Congress was taken in a few days in June 1950 and defended in July 1950. However, a study of the domestic political context provides an essential understanding of why the administration was so opposed to seeking approval from Congress. I examine Acheson’s commitment to executive power and I

²⁵⁷ “U.S. Death toll from Korean War Revised Downward,” *CNN*, 04 June 2000; http://articles.cnn.com/2000-06-04/us/korea.deaths_1_death-toll-battlefield-fatalities-korean-war?_s=PM:US

²⁵⁸ Joint Chiefs of Staff, “Memorandum for Field Commanders,” in *Documentary History of the Truman Presidency: Volume 18*. Dennis Merrill, ed. (Bethesda, MD: University Publications of America, 1996.), Document 22; 54. (hereinafter *Documentary History*)

²⁵⁹ Harry Truman, “The President’s News Conference,” 29 June 1950; <http://www.presidency.ucsb.edu/ws/index.php?pid=13544>

argue that the growing schism between the Truman administration and Congress on foreign policy set the stage for the Presidential-Congressional showdown during the Korean War.

I. Acheson's Devotion to Executive Power

By 1950, Acheson had ascended from a lawyer pushing for executive power in the destroyers for bases deal to being the Secretary of State overseeing a vast range of policies. Acheson remained devoted to the expansion of executive power. This dimension of Acheson's worldview has often been overlooked because, as Jonathan Zasloff notes, scholars have "done virtually no work on his pre-State Department career, and what work is available has little analytical content... [on] his background as a lawyer... [even though] Acheson's entire professional background, experience and training was as a lawyer."²⁶⁰ Acheson had a resounding belief in executive power. Throughout World War Two he was consistently on the cutting-edge of how the Roosevelt administration was expanding executive power. Acheson became an architect of the strategy of economic warfare that was constructed "under presidential orders," as he put it.²⁶¹ In 1946, Acheson served as Vice-President of a board studying the organization of foreign policy in the wake of the massive reorganization brought about by WWII. In its report he wrote that, "within the framework of the Constitution, the President has the ultimate responsibility for the conduct of foreign affairs."²⁶² Acheson, as one scholar put it, held the belief that "political decisions in foreign affairs should be made by experts...[and] since the executive branch is the *locus* of specialized talent, it should take the initiative in foreign policy."²⁶³ Acheson had devoted much of his life in the 1940s, from the passage of the destroyers for bases deal through the post-war designs for expanding the President's power to use military force

²⁶⁰ Jonathan Zasloff, "More Realism About Realism: Dean Acheson and the Jurisprudence of Cold War Diplomacy," *UCLA School of Law Research Paper*; Number 07-01, 3.

²⁶¹ Dean Acheson, *Present at the Creation: My Years at the State Department*, (New York: W.W. Norton, 1987), 59.

²⁶² Commission on Organization of the Executive Branch of the Government, "The Organization of the Government for the Conduct of Foreign Affairs," January 1949. Harry Truman Library; Dean Acheson Papers, Box 15.

²⁶³ Oscar Perlmutter, "Acheson vs. Congress," *The Review of Politics* (22) 1960, 6.

through the United Nations and NATO, to the expansion of executive power. As the Secretary of State, he held vast influence within the administration and due to his legal background he served as the foremost adviser to Truman on Constitutional questions such as war powers.

II. The Demise of the Bipartisan Moment

The political relationship between the President and Congress had deteriorated by the time the Korean War broke out and this made the Truman administration reticent to cooperate with Congress, particularly on foreign policy. While the Democrats enjoyed a majority in both houses of Congress, they were losing much of their support and Republicans were increasingly attacking the administration.

The fall of China in December 1949 was exploited by the Republicans to demonstrate that the Democrats were soft on Communism and that the administration was weak on defense.²⁶⁴ The attacks on the administration fed into Joseph McCarthy's charges that administration officials, particularly Dean Acheson, were coddling communists.²⁶⁵ Acheson became a primary target for Republicans because, as *New York Times* columnist James Reston put it, "Acheson seems to symbolize all the things about the [State] department which Congressmen distrust."²⁶⁶ These attacks, laced with *ad hominem* charges that Acheson was "Russian as to heart," and a "pompous diplomat in striped pants with a phony British accent," infuriated Acheson and made him determined to avoid any cooperation with the Republican leadership.²⁶⁷

²⁶⁴ Julian Zelizer, *Arsenal of Democracy: The Politics of National Security from World War Two to the War on Terrorism*, (New York: Basic Books, 2009), 90.

²⁶⁵ Acheson's disdain for McCarthy was propelled by Acheson's defense of his friend, Alger Hiss, from McCarthy's attacks in 1948. Acheson's disdain for McCarthy was heightened in February 1950 when McCarthy claimed that Acheson knew of 205 Communist Party members in the State Department "who nevertheless are still working and shaping policy in the State Department." See;

Joseph McCarthy. "Speech in Wheeling, West Virginia," 9 February 1950; <http://historymatters.gmu.edu/d/6456/>

²⁶⁶ Quoted; Zelizer, "Arsenal of Democracy," 94.

²⁶⁷ Robert Beisner, *Dean Acheson: A Life in the Cold War*, (New York: Oxford UP, 2006), 281.

In the Senate, the administration saw the end of bipartisan cooperation in 1950. Despite Senator Arthur Vandenberg's public statements about a "bipartisan foreign policy," there were still profound disagreements between Vandenberg and the administration. Bipartisanship was a limited phenomenon; neither the Republicans in the Senate nor the White House took it very seriously. Truman's aide for Congressional relations, Ken Hechler, said that even with Vandenberg it often "took a lot of persuasion to get [him] on board with [administration] positions" and it took "much more pressure" with other Congressmen.²⁶⁸ Moreover, the administration was still interested in pushing its own initiatives with little Congressional consultation. For Acheson, bipartisanship only meant that "politics stops at the seaboard, and anybody who denies that postulate is a 'son of a bitch and a crook and not a true patriot.'"²⁶⁹ For Truman, bipartisanship effectively required that "the leaders of [the Republican] party have confidence in the President's conduct of foreign affairs," as he put it.²⁷⁰ When Vandenberg retired from the Senate in early 1950, Senator Robert Taft led the resurgence of the isolationist wing of the Republican party and the bipartisan moment came to an end.

The collapse of bipartisanship produced an intense fight between the Truman administration and Republican Congressmen. In June of 1949, the President called on Congress to continue an assistance program to Korea that "is of great importance to the successful achievement of the foreign policy aims of the United States."²⁷¹ In making the case for such aid, Acheson told the Congress that a U.S. presence was necessary to thwart "the Communist menace in Asia."²⁷² Congressman Kee, the Democratic chairman of the House Foreign Affairs Committee, proved prescient in fearing "that the Bill faces very tough sledding" because "it is

²⁶⁸ Ken Hechler, telephone interview with author; July 2010.

²⁶⁹ Quoted; Beisner, "Dean Acheson" 61.

²⁷⁰ Quoted: Henry Berger. "Bipartisanship, Senator Taft, and the Truman Administration," *Political Science Quarterly*, 90 (1975), 224.

²⁷¹ Harry Truman, "Note to Congress," 7 June 1949. Harry Truman Library; Clifford Files, Box 6.

²⁷² Quoted; Beisner, "Dean Acheson," 326.

likely that some Republican elements in the House may seek to raise partisan issues, using the Korean program as a springboard for an attack upon the Administration's policies in China."²⁷³ The bill was defeated in January 1950 by a vote of 193 to 191, ending America's aid to South Korea. The defeat, as Robert Beisner argues, "stunned the administration" and represented "the first congressional defeat of a major foreign policy measure in four years."²⁷⁴ Acheson wrote to Truman that this decision "will have the most far-reaching adverse effects upon our foreign policy, not only in Korea but in many other areas of the world."²⁷⁵ He found "it difficult to believe that the Members of the House of Representatives who voted against this measure took sufficiently into account the serious implications of this action upon the position of the United States in the Far East."²⁷⁶ The Truman administration, particularly Acheson, saw Congress as an irresponsible party when it came to foreign policy.

C) The Outbreak of War and the Turn to the United Nations

It was within this context that President Truman and Secretary of State Acheson received the news on 24 June 1950 that South Korea had been attacked by North Korea. America's decision to commit to intervene in Korea was swift; it was finalized just forty-eight hours after the administration had been informed that an attack was underway.

Yet, neither the decision to intervene in Korea, nor the decision to utilize the United Nations in an intervention, was inevitable. First, the administration had been reticent to commit to protecting South Korea. Acheson had conceded in his speech to the National Press Club in

²⁷³ John Kee, "Memorandum for the President: Support for the Korean Aid Program," 8 July 1949. Harry Truman Library; Clifford Files, Box 6.

²⁷⁴ Beisner, 329.

²⁷⁵ Dean Acheson, "Note to Harry Truman," 20 January 1950. Harry Truman Library; Clark Clifford Files, Box 6.

²⁷⁶ Ibid.

January that Korea would likely be outside America's "defensive perimeter."²⁷⁷ This conclusion was supported by senior figures in the Army who found the terrain too difficult to defend.²⁷⁸ Truman had stood up to demands the previous year to provide Chiang Kai-Shek with military assistance when China fell to Communists. Many pundits thought that Truman would not step in to help Korea in the event of an attack.²⁷⁹ Second, if the administration were to intervene, they might have done so without the backing of the United Nations. As noted earlier, the U.N. Secretary-General was seen by the Truman administration as becoming increasingly close with the Soviet Union.²⁸⁰ Acheson had avoided any reference to the United Nations in enunciating the Truman Doctrine. It was conceivable that an intervention could have been carried out without the support of the United Nations. Given these factors, it is necessary to examine the reasons favouring the Truman administration's use of force in response to North Korean aggression.

I. Saturday: The News Arrives (24 June)

On the evening of 24 June, Acheson was at his farm in Sandy Spring, Maryland with his family.²⁸¹ At around 9:00 he received a call from John Hickerson, the Assistant Secretary of State for U.N. Affairs, stating that "there had been a report that there was an attack from North Korea into South Korea, that there was a great deal of confusion, nobody knew whether this was another border raid or whether this was the real thing; but [Ambassador to South Korea] Muccio thought it was a real attack, and he reported that the South Korean forces were generally in a rather precipitous retreat."²⁸² During the preceding year, there had been regular North Korean raids into South Korea, but the intelligence suggested that this was a large-scale invasion and

²⁷⁷ Dean Acheson. "Speech to the National Press Club," Washington D.C., 12 January 1950; <http://teachingamericanhistory.org/library/index.asp?document=1612>

²⁷⁸ Zelizer, "Arsenal of Democracy," 99.

²⁷⁹ Ibid, 99.

²⁸⁰ Elsey, interview with author.

²⁸¹ Dean Acheson, "Princeton University Seminar," 13 February, 1954. Harry Truman Library; Acheson Papers, Box 81.

²⁸² Ibid.

Acheson agreed to call a session of the Security Council. Acheson's orders were to "proceed at once; there wasn't time to be lost on this," as he recalled.²⁸³ He then phoned President Truman, who had taken the weekend to return to the 'Western White House' in his hometown of Independence, Missouri. President Truman offered to return to Washington immediately but Acheson told him that was unnecessary and would only cause panic amongst the public. Without Truman at the helm, Acheson was "unmistakably the chief architect of the unfolding of American policy," as historian Robert Donovan surmises.²⁸⁴ Truman concurred with Acheson's suggestion that the U.N. Security Council should be summoned immediately and granted Acheson's request for the authority to carry that out. With Secretary of Defense Louis Johnson and General Omar Bradley in Tokyo, Acheson became the key policy-maker in shaping American policy in those crucial hours.

Upon Acheson's orders, as he put it, a "group of Department officers worked through the night preparing for a meeting of the Security Council which we had immediately requested."²⁸⁵ At 2:00 AM on 25 June, the State Department officials, under Acheson's authorization, sent a memo to all American embassies requesting that "in view [of the] possibility [of the] invasion [in] Korea [being the] first of series coordinated Soviet military action, PLS maintain utmost vigilance."²⁸⁶ While there was a great deal of uncertainty about whether the Soviet Union would launch attacks in other 'flash-points,' such as Berlin, the decision to turn to the U.N. was one area that Acheson could control with some certainty.

Moreover, the turn to the United Nations created a useful public relations message as the information about the attack was released to the American people. Even though it was unclear if

²⁸³ Ibid.

²⁸⁴ Robert Donovan, *Tumultuous Years: The Presidency of Harry S. Truman*, (Columbia, MO: University of Missouri Press, 1996), 198.

²⁸⁵ Dean Acheson, "Speech to American Newspaper Guild," 29 June 1950. State Department Bulletin (23), 578.

²⁸⁶ Dean Acheson, "Telegram to Certain American Diplomatic and Consular Officers," June 1950. Harry Truman Library; Korean War Files, Box 4.

the events on the border had been a major attack, Dean Rusk stated at 2:30 A.M. Sunday morning that it was “of utmost importance” to settle the resolution so that, as he put it, “the decision to present the case to the Security Council should appear in morning papers simultaneously with the news of the North Korean attack.”²⁸⁷ Acheson was leading the United States to present its case at the United Nations as a way to create a coherent narrative about the chaos unfolding in Korea. While this was directed towards the international arena, it was also a way to shore up American public support for the Truman administration’s policies.

III. Sunday: Truman Returns (25 June)

Truman spent Saturday evening in Independence and even kept his appointment to go visit his brother’s farm outside of Kansas City on Sunday morning. At 12:30 PM Acheson called to report that the situation had worsened and that South Korea faced an “all-out attack.”²⁸⁸ He also reported that John Foster Dulles, writing from Tokyo, noted that, “we believe that [military] force should be used... to sit by while Korea is overrun by unprovoked armed attack would start a disastrous chain of events leading most probably to world war.”²⁸⁹ Acheson was using these reports to convey the gravity of the situation and the need for a quick and decisive response. Truman responded that he would return quickly to Washington D.C. and wanted a meeting held at the Blair House that evening with his “chief presidential advisers, military and diplomatic.”²⁹⁰

That afternoon, the United Nations Security Council passed Resolution 82 condemning the North Korean attack. The various delegates had been called up from their weekend retreats. The vote was delayed as delegates frantically attempted to communicate with their political leadership, the resolution was finally passed 9-0, with Yugoslavia abstaining. The Soviet

²⁸⁷ Quoted: Steven Casey, *Selling the Korean War: Propaganda, Politics, and Public Opinion in the United States, 1950-1953*. (New York: Oxford UP, 2010), 22.

²⁸⁸ Ibid, 23.

²⁸⁹ Quoted: *ibid*, 76.

²⁹⁰ Quoted: *ibid*, 76.

delegate didn't appear though its unclear whether that was on orders from the Soviet foreign ministry. The resolution articulated "grave concern [with] the armed attack upon the Republic of Korea by forces from North Korea" and called for "the immediate cessation of hostilities."²⁹¹ The resolution did not explicitly invite member states to intervene with armed forces, but that threat was raised in its call "upon all members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities."²⁹² In the resolution, the American officials had crafted a doctrine which opened the door for a U.N. intervention.

The American diplomats, led by Ernest Gross, worked closely with the United Nations officials in getting the resolution passed. In secret meetings American officials were working with U.N. Secretary-General Trygve Lie's two main deputies, Andrew Cordier and Abraham Feller, on the resolutions. U.N. officials were willing to cooperate because they thought, as one American official put it, that it "would help Lie in the light of his present troubles with American public opinion. He hoped it would get good publicity."²⁹³ For U.N. officials, the North Korean attack was tremendously worrisome because it undermined the United Nations' position that tensions between the Soviet Union and the United States would be solved amicably. In light of this deep commitment by the United Nations to assisting the Americans, the passage of the resolution should be seen as an American effort rather than as a United Nations effort.

By the time that President Truman returned to Washington at 7:15, Acheson had already launched a significant aspect of the American response. He informed Truman en route to the White House about the Security Council Resolution. The American position was established.

²⁹¹ United Nations Security Council Resolution 82; 25 June 1950.

²⁹² Ibid.

²⁹³ C.P. Noyes, "Memorandum of Conversation," 26 June 1950. Harry Truman Library; Korean War Files, Box 6.

While Truman had been in Missouri, Acheson had worked hurriedly and “set in motion tentative planning for American intervention in Korea,” as Donovan stated.²⁹⁴

Truman gathered his advisers at the Blair House, a building across the street from the White House, for a dinner. During the dinner, the “conversation was general” on “the possibilities of direct Soviet or Chinese communist intervention, the chance that Korea might be a diversion to mask larger aggressions elsewhere.”²⁹⁵ After the dinner was cleared, the conversation turned to strategizing America’s policy. Acheson proposed that the President should authorize the U.S. air force to strike North Korean military targets inside South Korea, the deployment of the Seventh Fleet to Formosa and increased military aid to Indochina.²⁹⁶ Acheson’s work in pressing for authorization to begin military attacks was significantly assisted by the fact that he had already secured authorization from the United Nations. With a legal basis already in place for the intervention, no one pressed for the need to consult with Congress, much less obtain Congressional authorization. When the subject of briefing Congress arose, Truman and Acheson agreed that at this early stage “no comment on this situation should be made” by Secretaries Acheson or Johnson during their meetings regarding other matters on Capitol Hill the following day.²⁹⁷

Truman authorized MacArthur to send in supplies and a military “survey group” and told his Air Force commanders that they “should prepare plans to wipe out all Soviet air bases in the Far East.”²⁹⁸ Even though the U.N. resolution gave no authorization for such widespread action, Truman confirmed Acheson’s emphasis on the U.N. and reminded the advisers that, “we are

²⁹⁴ Donovan, “Truman Presidency,” 195.

²⁹⁵ Beverly Smith, “The White House Story: Why We Went to War in Korea,” *Saturday Evening Post*, 10 November 1951, 76.

²⁹⁶ “Memorandum of Conversation: Korean Situation,” 25 June 1950. Truman Library Online Collection; http://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-06-25&documentid=ki-12-1&pagenumber=1

²⁹⁷ Ibid, 6.

²⁹⁸ Ibid, 5.

working entirely for the United Nations.”²⁹⁹ The administration was able to push for military action beyond the framework established in Security Council Resolution 82 because the existence of a United Nations resolution condemning the attack, regardless of its specific context, was sufficient for the administration to claim that it had authorization for the intervention. While the administration was moving forward with the plans for the intervention, Congress’s cooperation was not sought.

IV. Monday: Second Blair House Meeting (26 June)

On Monday morning, Truman reviewed a statement that had been drafted by Acheson and then approved it for release. The statement relied heavily on the Security Council’s resolution to justify U.S. actions to the American public. The North Korean attack was described as a “lawless action” that demonstrated “willful disregard of the obligation to keep the peace.”³⁰⁰ The statement argued that: “In accordance with the resolution of the Security Council, the United States will vigorously support the effort of the council to terminate this serious breach of the peace.”³⁰¹

While there was still uncertainty about whether America would intervene, Acheson drafted a further statement for the President to deliver that pushed for intervention. George Kennan recalled that at 3:30, Acheson “broke off the discussion we had been having with him and said he wanted time to be alone and to dictate.”³⁰² Sitting at his desk, Acheson wrote on a yellow legal pad: “What were the Soviets up to? Where else would they probe? Berlin? Greece?

²⁹⁹ Ibid, 5.

³⁰⁰ Harry Truman. “Statement by the President;” 26 June, 1950. American Presidency Project; <http://www.presidency.ucsb.edu/ws/?pid=13537>

³⁰¹ Ibid.

³⁰² Acheson, “Princeton University Seminar;” 13 February 1954.

Turkey? Iran?”³⁰³ Kennan recalled, “we were called in about 6:30 PM and he read to us a paper he had produced, which was a first draft of the statement finally issued by the President, and which was not significantly changed by the time it finally appeared, the following day [June 27], as the President’s statement.”³⁰⁴ The statement was “something arrived at by [Acheson] himself, in solitary deliberation and in the [consideration] of all at stake.”³⁰⁵ While Acheson was formulating a strategy for intervention, President Truman was yet committed to the use of force. The President spent the afternoon reviewing reports of possible Soviet aggression in other parts of the world.³⁰⁶ He briefly received Ambassador Chang from South Korea for a discussion where he made no clear commitments to use force. He retired for a dinner alone at the Blair House only to be interrupted by a phone call from Acheson saying that he had completed a statement for the President’s review and wanted to have another meeting of the Presidential advisers that evening.³⁰⁷

Truman agreed to Acheson’s suggestion and the group reconvened at the Blair House at 9:00 P.M. Acheson immediately recommended that the air and naval forces in use to extricate American personnel be given expanded authorization and suggested that: “An all-out order be issued to the Navy and Air Force to waive all restrictions on their operations in Korea and to offer the fullest possible support to the South Korean forces, attacking tanks, guns, columns, etc., of the North Korean forces in order to give a chance to the South Koreans to reform.”³⁰⁸ Acheson reminded the group that the action was not war but was only intended “to support the South

³⁰³ Quoted: Walter Issacson and Evan Thomas, *The Wise Men: Six Friends and the World They Created*, (New York: Simon & Schuster, 1986), 506.

³⁰⁴ Acheson, “Princeton University Seminar,” 13 February 1954.

³⁰⁵ Ibid.

³⁰⁶ Smith, “The White House Story,” 80.

³⁰⁷ Ibid, 80.

³⁰⁸ “Memorandum of Conversation: Korean Situation,” 26 June 1950. Truman Library Online Project; http://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-06-26&documentid=ki-12-3&pagenumber=1

Korean forces in conformity with the resolution of the Security Council.”³⁰⁹ Acheson reiterated this point by having John Hickerson, the Assistant Secretary of State for U.N. Affairs, read a draft of a U.N. resolution that the State Department was planning to introduce the next day.³¹⁰

While Truman allowed each adviser to voice his opinion, the Security Council resolution pushed the policy debate towards an intervention. While the resolution did not dictate an American intervention, it circumscribed the policy-making process by making it seem that the United States had made a pledge in the United Nations to reverse the North Korean attack. Acheson later noted that in the meeting there was a, “complete, almost unspoken acceptance on the part of everyone that whatever had to be done to meet this aggression had to be done. There was no suggestion from anyone that either the United Nations or the United States could back away from it.”³¹¹

Acheson’s work in securing the United Nations resolutions allowed him to posture for an intervention without any consultation with Congress. He was able to invoke the U.N. Security Council resolution in the meeting to defend the position of deploying Air Force and Naval forces without any consultation with Congress. For Acheson, this was not a full-scale war but rather, in his words: “a matter which could be handled by the Navy and the Air [Force]” because “the South Koreans could be pulled together and when you gave the North Koreans a terrible pasting from the air and you sent the Navy in to give them heavy gun support from the shores, that [sic] this would probably end the thing.”³¹² Only after the decision to intervene in this manner had been reached, did Acheson suggest bringing in Congressional leaders to “tell them what had

³⁰⁹ Ibid, 2.

³¹⁰ Ibid, 4.

³¹¹ Acheson, “Among Friends,” 100.

³¹² Acheson, “Princeton University Seminar,” 13 February 1954.

been decided.”³¹³ The role of Congress, in this process, was to receive decisions that the President had made at the United Nations.

By this point on Monday evening, the decision to commit troops had been made. Upon leaving the meeting, Truman regretfully said, “Everything I have done in the last five years has been to try to avoid making a decision such as I had to make tonight.”³¹⁴ The President, in a letter written weeks later to Arthur Krock, the Editor-in-Chief of the *New York Times*, noted that “the decisions which counted most were made Sunday night and Monday afternoon.”³¹⁵ Truman knew that by this point he had committed the United States, vis-a-vis the commitment to the United Nations, to armed conflict in Korea. It was only after the decision to use force under U.N. auspices had been finalized that Truman telephoned Special Counsel Charles Murphy, at 10:00 P.M. and instructed him to call Congressional leaders for a meeting the following morning.³¹⁶

V. Deciding With the United Nations and Without Congress

While the decision to commit ground troops would not be made until later in the week (29 June), the decisions made in those first two days made that all but inevitable. Acheson would later recall that the decision to commit ground troops was a product of the initial decision to turn to the United Nations: “Well, if we have to do it [use ground troops], we have to do it. MacArthur is there; we’ve committed ourselves [in Air and Naval support]; the UN has passed this other resolution [of 27 June] we’re for this thing, now if it takes a couple of divisions, that’s what it takes.”³¹⁷ The decision to commit ground troops was, for all intents and purposes, a logical continuation of the turn to the United Nations. Acheson’s actions on the evening of

³¹³ “Memorandum of Conversation: Korean Situation,” 26 June 1950.

³¹⁴ Ibid.

³¹⁵ Charlie Ross, “Note to Arthur Kroc,” 7 July 1950. Harry Truman Library; White House Central Files, Box 1305.

³¹⁶ Charles Murphy, “Memorandum for Mr. Connolly,” *Documentary History*: Document 84; 204

³¹⁷ Acheson, “Princeton University Seminar,” 13 February 1954.

Saturday 24 June and the early hours of Sunday 25 June provided the legal foundation for the American intervention that would unfold later in the week.

For Acheson, the turn to the United Nations was a way to prepare the decision-making process in a way that favored an intervention. Acheson later conceded that, “I think that the whole attitude of the country was much more attuned to the prevention of acts of this sort [the North Korean attack] through the Charter and the principles and the existence of the U.N. than it would have been without it.”³¹⁸ Acheson realized that there would be more “inertia to overcome” in getting the Congress and the public onboard for the war and he would later concede to a colleague’s suggestion that the “existence of the U.N. resolution, it seems to me, creates a presumption of law and order that perhaps inclined [the public] towards us [the administration] and presupposes action.”³¹⁹

Though many scholars have claimed that the administration was genuinely devoted to upholding the principles of the United Nations in the intervention, this was not the case.³²⁰ This argument can be tested through a simple counter-factual; if the United Nations had declined to authorize the intervention, would the policy-makers have hesitated in finding another legal basis to justify the intervention? If commitment to the United Nations was a major component of the intervention, we should expect that decision-makers would express some hesitation on the possibility of committing American forces without support from the United Nations. This counter-factual assessment will usefully “tease out the assumptions on which theories and

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Edwin Hoyt has made this argument and it was later adopted by Meena Bose, see; Edwin Hoyt, “The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making.” *The American Journal of International Law*, 55 (1961), 70.

Meena Bose, “Leading Through Multilateralism,” in Robert Watson, Michael Devine & Robert Wolz, eds., *The National Security Legacy of Harry Truman*, (Kirksville, Missouri: Truman State UP, 2005), 156.

historical interpretations rest,” and can be utilized to “offer a different and more compelling theory or interpretation” of the history.³²¹

From the outbreak of the war, the historical record establishes that the administration would not have hesitated to conduct the intervention if the United Nations Security Council vetoed the authorizing resolutions. On 26 June, Dean Rusk expressed concern that the Soviet delegate may appear at the 27 June Security Council session and veto the resolution. Rusk stipulated that “we would still take the position that we could act in support of the charter” and Truman responded “that was right.”³²² If the Soviet Union vetoed the Resolution of 27 June, Truman said “we would go right ahead on our own and justify our actions on the grounds of the Council resolution of Sunday, June 25” even though that resolution did not include any language calling upon member-states to use military force.³²³ Harry Truman, writing on 11 July in a private letter to Dean Acheson, noted that “had you not acted promptly in that direction [of gaining U.N. authorization] we would have had to go into Korea alone.”³²⁴ Acheson held this same view, arguing that, “It is of course clear that even without any SC [Security Council] action US would have been justified under general principles of international law, which are recognized in ART 51 of [U.N.] Charter, in coming to assistance of Republic of Korea.”³²⁵ The fact of the matter is that the United States had begun its attacks on North Korean troops on 27 June before the United Nations had even passed the resolution that they cited for legal authority to intervene.³²⁶ As George Kennan would later note, “military considerations and political considerations at the time would have compelled us to intervene in South Korea,” even without

³²¹ Richard Ned Lebow, *Forbidden Fruit*, (Princeton: Princeton UP, 2010), 42.

³²² “Memorandum of Conversation: Korean Situation,” 26 June 1950.

³²³ George Elsey, “Memorandum of Conversation with Congressional Leaders,” *Documentary History*: Document 26; 75.

³²⁴ Quoted: David McCullough, *Truman*, (New York: Simon & Schuster, 1993), 783.

³²⁵ Dean Acheson, “Outgoing Telegram,” 17 July 1950. HTL; Korean War Files, Box 6.

³²⁶ Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act,” *The American Journal of International Law*, 89 (1995), 32.

the U.N. authorization.³²⁷ The Truman administration did not seek United Nations authorization because they saw it as necessary under international law for their action. The decision to seek authorization was shaped more by domestic politics than a sense of its necessity in international law.

In their later years, Truman and Acheson became more blunt in saying that they would have readily gone forward with the intervention without the United Nations. When Merle Miller interviewed Truman and Acheson for her oral biography of Truman and his aides, *Plain Speaking*, Truman and Acheson confirmed that they did not view U.N. authorization as necessary. Miller notes that, “I once asked Mr. Truman if the United States was prepared to go it alone” in Korea and Truman curtly responded, “No question about it.”³²⁸ Similarly, Dean Acheson said that if “through some sort of legal mechanism one operation was blocked,” such as by a Soviet veto at the United Nations, “then another operation would have to be found to do it.”³²⁹

Acheson’s advocacy of turning to the United Nations was certainly not born out of his commitment to the institution. Instead it stemmed from his long-standing belief in executive power in foreign relations and his view that the United Nations could help to assure a decisive response to the crisis by enabling the executive to intervene in Korea with minimal Congressional interference.

D) The Truman Administration’s Strategy of Circumventing the Congress

I. Tuesday: Informing the Congress (27 June)

³²⁷ Acheson, “Princeton University Seminar,” 13 February 1954.

³²⁸ Merle Miller, *Plain Speaking: An Oral History of Harry S. Truman*, (New York: Berkley Press, 1986.), 276.

³²⁹ Quoted; *ibid*, 278.

Up until Tuesday morning, most Senators had only been learning about the attack through the newspapers. Acheson only telephoned Senators Tom Connally and Alex Wiley, the chairmen of the Senate Foreign Relations Committee, on Monday to inform them of the administration's response to the attack. Acheson told Wiley that the administration "immediately had a meeting of the Security Council called for Sunday. At the meeting a strong resolution was gotten through calling upon North Korea to stop the attack."³³⁰ Acheson informed them that when he went before the Senate Foreign Relations Committee to discuss an unrelated matter, he "would be acting under orders of the President not to discuss Far Eastern matters since the President in the opening phase of the matter thought it important to keep control of the situation in his own hands."³³¹ Acheson was making it clear that the United Nations, not Congress, would be the forum for making policy on Korea. With the heightened sense of crisis, no Senator wanted to appear to be putting the nation at risk by insisting that Acheson disclose the administration's plans.

By Tuesday morning, Acheson and Truman were prepared to inform Congressional leaders of the decision to use force. The meeting with Congressional leaders was an information session rather than an opportunity for Congressional leaders to help construct the American policy. The Congressional leaders had been carefully selected by Dean Acheson and Charles Murphy to ensure that there would not be any protest against the administration.³³² Leading Republican Senators who were considered to be isolationists, including Robert Taft and Adrian Wherry, were not invited to participate. In this decision, political considerations overlapped with

³³⁰ "Memorandum of Telephone Conversation," 26 June 1950. *Truman Library Online Project*; http://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-06-26&documentid=ki-12-8&pagenumber=1

³³¹ Ibid.

³³² "Notes Regarding Meeting with Congressional Leaders," 27 June, 1950. Truman Library Korean War Project; http://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-06-27&documentid=ki-2-40&pagenumber=1

personal grudges. Senator Taft, the Republican of Ohio, had been Acheson's rival on the Yale Corporation's board.³³³ Acheson thought that Taft had "adopt[ed] the notion that almost any way to defeat or discredit the Truman plans was acceptable."³³⁴ Senator Kenneth Wherry, the Republican of Nebraska, was an antagonist of the administration and Acheson saw him as an "old enemy."³³⁵

By the time of the meeting on Tuesday morning, the event had become widely discussed in Washington D.C. There were "hundreds of reporters packed" into the lobby waiting for the Senators.³³⁶ Senators arrived in limousines and Senator Tom Connally strode in announcing "Make Way for liberty!"³³⁷

With the diligent note-taking of a young Presidential aide, George Elsey, there is an excellent transcript of precisely what happened at the meetings held that week. Elsey had been a PhD student in history at Harvard but was called up from his Naval Reserve position when World War Two broke out. Leaving behind his studies, he was stationed at the White House where he was given assignments that put him at the center of power such as pushing Franklin Roosevelt's wheelchair around the Map Room.³³⁸ After Roosevelt's passing, Elsey stayed at the White House as an Administrative Assistant to the President, a position in which he advised Truman on policy towards the Soviet Union. In June 1950 he was given the job of acting as the scribe at the crucial meetings at which the policy-makers would determine whether or not to go to war. With a historian's training of how important the records of this meeting would become, Elsey captured the meetings verbatim.

³³³ James Patterson, *Mr. Republican: A Biography of Robert A. Taft*, (New York: Houghton Mifflin, 1972), 453.

³³⁴ Quoted: Casey, "Selling the Korean War," 26.

³³⁵ Quoted: *ibid*, 26.

³³⁶ *Ibid*, 26

³³⁷ *Ibid*, quoted on 26.

³³⁸ George Elsey, interview with author.

The President opened the meeting by “stating that he had invited a group of Senators and Congressmen to the White House so that he could *describe* the situation in the Far East to them, and *inform* them of a number of important decisions which he had made during the previous 24 hours, and to read to them a statement which he intended to release in a matter of minutes to the press,” according to the minutes of the meeting.³³⁹ Truman made clear that he was leading the U.S. response and he would only ‘inform’ the Congress.

The statement had been drafted by Acheson the day before and it emphasized that the President had not acted on unilateral Presidential authority but instead was acting as part of a United Nations legal framework: “The Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution. In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support.”³⁴⁰ The statement further noted that, “Willful disregard of the obligation to keep the peace cannot be tolerated by nations that support the United Nations Charter.”³⁴¹ This description posited U.S. military action only as a response to the United Nations resolution while ignoring that the United Nations resolution had been constructed by the United States only days before. When Truman finished reading, there was silence in the room; the Congressional representatives had been told that they were there to listen and they obeyed.³⁴²

Acheson summarized the events that had already taken place in Korea, including the decisions taken the night before to commit Naval and Air forces.³⁴³ The President interjected to note that this was to support “the prompt action of the UN Security Council.”³⁴⁴ Senator Alex Wiley inquired “if the order to MacArthur were perusant [sic] to the Security Council’s

³³⁹ George Elsey, “Summary,” *Documentary History*: Document 26; 67. (emphasis added.)

³⁴⁰ Harry Truman, “Statement by the President,” *Documentary History*: Document 27; 78.

³⁴¹ *Ibid*, 78.

³⁴² *Ibid*, 78.

³⁴³ Philip Jessup, “Memorandum of Conversation,” *Documentary History*: Document 25; 63.

³⁴⁴ *Ibid*, 63.

resolution.”³⁴⁵ Senator Alexander Smith “wanted to be sure that the military assistance we’re giving to Korea was actually pursuant to the Security Council resolution.”³⁴⁶ Acheson assured the Senators “that all of our actions would be carried out through the United Nations” and there was no reason for concern otherwise.³⁴⁷ After copies of the Presidential statement were circulated, the President concluded the meeting by emphasizing that the U.S. intervention was “in conformity with the Security Council resolution.”³⁴⁸ During the meeting, no representative had objected to the idea that Truman would carry out the mission without any Congressional authorization.

After the meeting, Senator Alexander Smith confronted Secretary Acheson about the importance of a Congressional resolution. Acheson later recalled that Smith “asked me whether it would be a good idea to have a resolution in Congress approving what the President had done.”³⁴⁹ But Acheson seemed to minimize the seriousness of the charge: “he didn’t press it as anything very important- he just wanted to tie it all up, neat and orderly.”³⁵⁰ This was the first time that Acheson explicitly addressed the topic of a Congressional resolution and he strongly opposed it.

On the evening of 27 June, the Security Council met again. With the Soviet delegate still absent, United Nations Security Council Resolution 83 passed with only Yugoslavia voting against it. The American-drafted resolution requested: “that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack

³⁴⁵ George Elsey, “Summary,” *Documentary History*: Document 26; 71.

³⁴⁶ Ibid, 72.

³⁴⁷ Ibid, 72.

³⁴⁸ Ibid, 75.

³⁴⁹ Dean Acheson, “Princeton University Seminar,” 16 July 1953.

³⁵⁰ Ibid.

and to restore international peace and security in the area.³⁵¹ The President now had further legitimacy from the United Nations for an intervention, especially because the resolution called for member-states to intervene. By the time the resolution passed, American bombers were already attacking North Korean convoys.³⁵²

II. Wednesday: Robert Taft Speaks Out (28 June)

Initially, the Congress had reacted with enthusiastic praise of the President's action. Representative John McCormack, a Democrat, read Truman's statement in the House of Representatives on 27 June. When he finished, the members rose to their feet to cheer.³⁵³ Later that afternoon, on a vote of 315 to 4, the House voted for the Selective Service Act, which "accorded [Truman] unprecedented peacetime powers as commander in chief...particularly in the provisions authorizing him to call up the National Guard and reserve for up to twenty-one months active duty," according to historian Richard Haynes.³⁵⁴ Only the American Labor Party Representative, Vito Marcantonio, spoke against it as he accused Truman of "usurp[ing] the powers of Congress by declaring war against North Korea."³⁵⁵ Similarly, when the President's statement was read in the Senate the same day (27 June) there was "a general bipartisan endorsement of the decision to intervene" as Senators clamored for time to speak in support of the President.³⁵⁶ Only Senator James Kem, a Republican from Missouri who had been a staunch opponent of Truman from their time in Missouri politics, objected. He defiantly asked: "Does

³⁵¹ United Nations Security Council Resolution 83; 27 June 1950.

³⁵² Fisher, "The Korean War," 32.

³⁵³ Richard Haynes, *The Awesome Power: Harry S. Truman as Commander in Chief*, (Baton Rouge, LA: Louisiana UP, 1973), 172.

³⁵⁴ Ibid, 173.

³⁵⁵ Quoted; *ibid*, 173.

³⁵⁶ Ibid, 173.

that mean [Truman] had arrogated to himself the authority of declaring war?”³⁵⁷ Kem’s mild condemnation was met with a swift response from Senator Scott Lucas, a Democrat of Illinois, who argued that, “on 126 occasions in the past a President...acting in his capacity as Commander in Chief of the nation’s armed forces, has deployed these forces...without asking a declaration of war of Congress.”³⁵⁸ Lucas was citing a list drafted up by the State Department. Overall, the few outbursts in the House and Senate against the administration were overshadowed by a vastly supportive response from Congress.³⁵⁹

On 28 June, the first major criticism of the President’s handling of the conflict came when Senator Taft decried the lack of a Declaration of War. Speaking on the floor of the Senate, Taft condemned the “unprovoked aggressive military attack” of North Korea. In a thinly veiled reference to Acheson’s speech to the National Press Club, he argued that, “it was not unreasonable for the North Koreans to suppose that they could get away with it and that we would do nothing about it.”³⁶⁰ For Taft, the blame for the war rested not only with Kim II-Sung but also with Secretary of State Acheson for leading the North Koreans to believe that America would not respond to an attack on South Korea. Moving into a more robust attack, Taft complained that while Republican members had been invited to the White House “and were informed with regard to the President’s statement but, of course, they had no opportunity to change it or to consult Republican policy committees.”³⁶¹ From a legal perspective, Taft said that:

there has been no pretense of consulting the Congress. No resolution has ever been introduced asking for the approval of Congress for the use of American forces in Korea...

³⁵⁷ Quoted; *ibid*, 173.

³⁵⁸ Quoted; *ibid* 173.

³⁵⁹ Acheson, “Present at the Creation,” 410.

³⁶⁰ Robert Taft., *The Papers of Robert A. Taft Volume 4: 1949-1953*, Clarence Wunderlin, ed. (Kent, OH: Kent State UP, 2006), 167-168.

³⁶¹ *Ibid*, 169.

My own opinion is that [Truman] is [usurping his Power's as Commander in Chief]; that there is no legal authority for what he has done.³⁶²

While Taft conceded that were such a resolution to be introduced, "I would vote in favor of it," he wanted to utilize the opportunity to undermine the credibility of the administration and to draw attention to what he saw as its unconstitutional expansion of Presidential war powers.³⁶³

To a large degree, the argument deployed by Senator Taft was one that he had been using for over a decade against expanded executive power. Senator Taft was a leading isolationist in the Senate before World War Two and unlike many of his colleagues his isolationism was undiminished by the war. In 1941 he had argued, as he paraphrased in his memoirs, that "the President has no legal or constitutional right to send American troops to Iceland" at the request of the Prime Minister Churchill.³⁶⁴ Taft viewed Truman as carrying on Roosevelt's illegitimate expansion of executive control over the use of the armed forces. Just as Acheson had worked vigilantly before World War II to empower the President, Taft had been engaging in a parallel quest give Congress more control over the use of force. They had been on opposing sides of this debate in the early 1940s and were similarly situated in 1950.

III. Thursday: Going to the Press (29 June)

On 29 June, President Truman and Secretary of State Acheson made comments to the press regarding the military action in Korea. In the afternoon, Truman spoke at a White House press conference and Acheson spoke at the American Newspaper Guild. In their first major public appearances since the outbreak of the war, both policy-makers expended considerable effort in clarifying the legal status of the American intervention as a U.N. action that did not require Congressional authorization.

³⁶² Ibid, 169.

³⁶³ Ibid, 169.

³⁶⁴ Robert Taft, *A Foreign Policy for Americans*, (New York: Doubleday, 1951), 31.

In his speech to the American Newspapers Guild, Acheson emphasized that the American intervention was in response to U.N. resolutions. Acheson argued:

The President has enunciated the policy of this Government to do its utmost to uphold the sanctity of the Charter of the United Nations and the rule of law among nations. We are, therefore in conformity with the resolution of the Security Council of June 25 and June 27, giving air and sea support to the troops of the Korean government.³⁶⁵

Acheson was able to portray the American intervention as merely a response to the U.N. resolutions and spoke of the President's action as the "policy of the government," to imply that the President was the sole relevant actor.³⁶⁶

Truman argued for expansive executive power to use force under the United Nations in his press conference. In the ornate Indian Treaty Room of the Old Executive Office Building, the press conference began with a series of questions on matters other than the war, such as granting statehood for Alaska. The subject of Korea arose when a reporter asked: "Mr. President, everybody is asking in this country, are we or are we not at war?"³⁶⁷ Truman succinctly responded: "We are not at war."³⁶⁸ When asked if he could "elaborate" on this, Truman responded:

The Republic of Korea was set up with the United Nations help. It is a recognized government by the members of the United Nations. It was unlawfully attacked by a bunch of bandits which are neighbors of North Korea. [sic] The United Nations Security Council held a meeting and passed [a resolution] on the situation and asked the members to go to the relief of the Korean Republic. And the members of the United Nations are going to the relief of the Korean Republic to suppress a bandit raid on the Republic of Korea.³⁶⁹

Truman emphasized the illegality of the North Korean "bandit" raid. The next question was, "would it be correct, against your explanation, to call this a police action under the United

³⁶⁵ Dean Acheson, "Speech to The American Newspaper Guild," 575

³⁶⁶ Ibid.

³⁶⁷ Harry Truman, "President's News Conference," 29 June 1950.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

Nations?,” and Truman agreed that this would be correct.³⁷⁰ Like Acheson’s argument, Truman emphasized that this was not a war, which would necessarily imply the need for Congressional authorization, but instead it was a police action responding to an illegal attack. The definition of the intervention as a “police action,” as historian Steven Casey characterizes the phrase, “encapsulated the notion that the war was not the result of North Korea’s drive for unification but rather the product of an illegal challenge to international peace and security.”³⁷¹ In using the language of a police action, Truman was creating the impression that his actions were part of a long tradition of Presidential authority to carry out “police actions” without Congressional authorization.

A “police action” was a term adopted at the dawn of the 20th century by Presidents to describe the use of military force without Congressional authorization. In the 1940s, usage was expanded to describe activity that the United Nations would take against states that violate the U.N. Charter. The term ‘police action,’ as George Elsey recalled, was “was a United Nations phrase in common usage at the time. At the United Nations, there were references to the United Nations [undertaking] a ‘police action’ in the future. It was not a phrase invented by Truman or casually coined. It was in use at that time to indicate the type of action that the United Nations would take.”³⁷² In his statement in the press conference, Truman was making an argument that U.S. action in Korea was a merging of an established tradition of Presidents intervening without Congressional authorization in a ‘police action’ and the nascent idea that the United Nations could intervene against violators of the United Nations Charter as a ‘police action.’

IV. Friday: Second Congressional Meeting (30 June)

³⁷⁰ Ibid.

³⁷¹ Casey, “Selling the Korean War,” 28.

³⁷² Elsey, interview with author.

In response to the deepening debate on Presidential war powers, the administration called another meeting with Congressional leaders. Unlike the meeting on 27 June, this session was to include a noted isolationist, Senator Kenneth Wherry, in order to win over more Republicans to the administration's position.³⁷³ However, the meeting did not go as planned.

Truman opened the meeting by letting the Congressmen know "that what we had done was being done under the auspices of the United Nations."³⁷⁴ Elsey's minutes of the meeting provides a clear understanding of the argument that ensued. After a number of cordial exchanges between members of Congress and Truman, "Senator Wherry arose, addressed the President as though he were on the Senate floor, and wanted to know if the President was going to advise the Congress before he sent ground troops there."³⁷⁵ A vague response from Truman that he would alert the Congress "if there were a real emergency" led Wherry to demand that "the Congress ought to be consulted before the President made moves like this."³⁷⁶ Truman replied at greater length: "I just had to act as Commander-in-Chief and I did. I told MacArthur to go to the relief of the Koreans and to carry out the instructions of the United Nations Security Council."³⁷⁷ In this statement, Truman specifically linked Presidential power with the United Nations Security Council Resolution as a means to rebuke a challenge from Congress.

When Vice-President Alben Barkley attempted to change the topic of conversation, Wherry "rose to his feet again, telling the Vice President that he would like the floor," and continued to demand that Truman go to Congress.³⁷⁸ Attempting to defuse the rancorous meeting, Truman assured him that "If there is any necessity for Congressional action I will come

³⁷³ Casey, "Selling the Korean War," 29.

³⁷⁴ George Elsey, "Document with Attachments," *Documentary History*: Document 60; 146.

³⁷⁵ *Ibid*, 150.

³⁷⁶ *Ibid*, 151.

³⁷⁷ *Ibid*, 151.

³⁷⁸ *Ibid*, 152.

to you. But I hope we can get those bandits in Korea suppressed without that.”³⁷⁹ Once Again, the President was referring to the North Koreans as “bandits” to emphasize that their attack was illegal and to imply that America’s response was legal. Truman was suggesting that the announced intervention with Naval and Air forces did not require Congressional authorization, but he would notify Congress if ground troops were to be employed. After another Senator interjected to change the subject, Wherry “arose again,” and accused the President of distorting “how far we were going” and demanded “that the President should not take such steps [of using military force] without Congressional approval.”³⁸⁰ As the meeting descended into shouting, Congressman Dewey Short arose to confront Senator Wherry saying that, “the Congress owed the President thanks for the quality of his leadership.”³⁸¹ The meeting was dismissed without any resolution to the dispute.

In dodging Wherry’s questions about ground troops, Truman concealed the fact that he had already authorized ground troops to be sent in to Korea. Truman had already issued an order to MacArthur on the previous day which authorized the use of “naval and air forces...to provide fullest possible support to South Korean forces by attack[s] on military targets” and allowed for the “employment of army forces...as to insure the retention of a port and air base in the general area Fusan-Chinhae.”³⁸² When that authority for the use of ground troops was deemed by MacArthur to be insufficient, he had the Secretary of the Army, General Frank Pace, call Truman on the morning of 30 June at 5:00 AM to obtain broader authorization. Truman, in a handwritten note, said that he was “already up and shaved” that morning when he “authorized a regiment to

³⁷⁹ Ibid, 152.

³⁸⁰ Ibid, 153.

³⁸¹ Ibid, 153.

³⁸² Joint Chiefs of Staff, “Orders to General MacArthur,” *Documentary History*: Document 49; 129.

be used in addition to the authorization of yesterday, to be used at Mac[Arthur]'s discretion."³⁸³ After a 7:00 AM military briefing, Truman called General Pace and Secretary of Defense Louis Johnson, and, "told them to consider giving MacArthur the two divisions he [MacArthur] asked for."³⁸⁴ Thus, by the time the meeting with the Congressional leadership occurred, later that morning, Truman had already authorized the deployment of a regiment and tacitly consented to the deployment of two divisions. However, Truman withheld that information from Wherry. Truman was unconcerned with Congressional criticism because he thought that he could continue to rely on United Nations authorization as the legal basis for an expanded intervention involving ground troops.

V. July: Maintaining Presidential Supremacy

The administration's strategy of avoiding Congressional authorization would continue over the course of the coming weeks as Acheson continued to advise Truman to merely inform rather than consult Congress. Acheson would come to recommend in a 3 July meeting at the Blair House that Truman "make a full report on the Korean situation to a joint session of Congress," which "would bring the whole story together in one official narrative and meet the objection of some members that information had come to them only through the leaders and the press."³⁸⁵ Acheson welcomed the prospect that "the President go before Congress" and give "a full report to a Joint Session of the Congresss [sic] on the Korean Situation...[and offer] a Joint Resolution expressing approval of the action taken in Korea."³⁸⁶ Such a resolution would not, in Acheson's formulation, be a request for authorization but rather a post-fact demonstration of

³⁸³ "Summary of Events," *Documentary History*: Document 55; 139.

³⁸⁴ *Ibid.*, 139.

³⁸⁵ Acheson, "Present at the Creation," 415.

³⁸⁶ "Meeting with Congressional Leaders: Memorandum of Conversation," *Documentary History*: Document 72; 180.

Congressional support for actions the administration had already taken under its own authority. Acheson, as he put it, “recommended that the President should not ask for a resolution of approval.”³⁸⁷

On 19 July, Truman finally went before Congress to give an address on the Korean War. He was not there to request any legal authorization but instead to discuss the authorization he had received from the U.N. “The prompt action of the United Nations to put down lawless aggression and the prompt response to this action by free peoples all over the world,” Truman argued, “will stand as a landmark in mankind’s long search for a rule of law among nations.”³⁸⁸ Truman emphasized that the intervention in Korea was not an American military action but instead it was being fought “under the flag of the United Nations [with] a unified command [that] has been established for all forces of the members of the United Nations fighting in Korea.”³⁸⁹ The reality, however, was that the State Department was simultaneously launching a diplomatic campaign, as Steven Casey notes, to “encourage the maximum direct participation by all members of the UN in support of the UN effort in Korea” because there was virtually no involvement from other U.N. member-states.³⁹⁰

Republicans began to push back against the administration’s description of the intervention as one led by the United Nations. Republicans focused on General MacArthur’s blunt report to the Joint Chiefs of Staff on 15 July that he had no backing from other nations. Republicans in Congress began to decry “the fact that the American boys who are fighting and dying on the battlefields of Korea today, with their backs to the sea, do not have a single nation we have helped so much, outside of Korea, fighting alongside them,” as one Congressman put

³⁸⁷ Acheson, “Present at the Creation,” 415.

³⁸⁸ Harry Truman, “Address to Congress,” 19 July 1950.

<http://www.learner.org/workshops/primarysources/coldwar/docs/onkorea.html>

³⁸⁹ Ibid.

³⁹⁰ Casey, 90.

it.³⁹¹ To legitimize the administration's war-making in Korea, the Truman administration was standing behind U.N. authorization. The very sparse involvement from other states, however, was limiting the effects of this political strategy.

With the intervention now underway, the administration began to buttress their Constitutional basis for entering the conflict. While Acheson had been serving as an informal legal adviser on this point he now felt that it was important to obtain a more detailed defense of the administration's position.³⁹² Acheson turned to Adrian Fisher, the State Department Legal Adviser, to formulate a legal memorandum. Fisher had been selected as Legal Adviser by Acheson after serving as his assistant. Like Acheson, Fisher was not only a committed Democrat but also a former clerk to Justice Louis Brandeis.³⁹³ Acheson knew that Fisher would be reliable when the administration wanted to enhance the legitimacy of its actions. Fisher's Deputy, Michael Cardozo, recalled that Acheson had "involved [Fisher] in all of the political and other activities that he himself was involved in... Fisher was always at Acheson's right hand when he was dealing with other people about these things."³⁹⁴ Fisher was valuable to Acheson not just as a lawyer but also as someone "whose judgment in politics and statesmanship could be greatly respected."³⁹⁵

On Acheson's instructions, Fisher expanded upon Acheson's argument that the U.N. authorization was sufficient for the intervention without Congressional authorization. In his memorandum, Fisher noted that, "the Armed Forces have been used to protect specific American lives and property" without Congressional sanction, and that "United States forces have been used in the broad interests of American foreign policy, and their use could be characterized as

³⁹¹ Quoted; *ibid*, 90.

³⁹² Elsey, interview with author.

³⁹³ Chace, 93.

³⁹⁴ Michael Cardozo, "Oral History," 29 May 1975, <http://www.trumanlibrary.org/oralhist/cardozom.htm>

³⁹⁵ *Ibid*.

participation in international police action.”³⁹⁶ Fisher was attempting to portray the President’s action as consistent with previous Presidential utilizations of the armed forces.

Fisher’s argument sought to portray the President’s authority to use military force as an extension of the President’s need to protect the United Nations. The President was acting, according to Fisher, for “the preservation of the United Nations” which “is a cardinal interest of the United States.”³⁹⁷ The memorandum argued that, “The President’s action seeks to accomplish the objectives of both [United Nations] resolutions.”³⁹⁸ Without an intervention, “The continued defiance of the United Nations by the North Korean authorities would have meant that the United Nations would have ceased to exist as a serious instrumentality for the maintenance of international peace.”³⁹⁹ Fisher concluded that the “the continued existence of the United Nations as an effective international organization is a paramount United States interest,” is included in a set of “interests which the President as Commander in Chief can protect by the employment of the United States without a declaration of war.”⁴⁰⁰ Fisher argued that because the continued existence of the United Nations was essential to U.S. security, the President could intervene in Korea in response to U.N. resolutions without any Congressional authorization. This was an extension of the traditional doctrine that the President could use military force to protect essential interests. However, by arguing that compliance with a U.N. resolution was a sufficient basis for the President to act without Congressional authorization, Fisher was extending this argument into a new realm and arguing, in effect, that authorization from the United Nations made Congressional authorization unnecessary. The memorandum was distributed to Congressmen

³⁹⁶ Adrian Fisher, “Authority of the President to Repel the Attack in Korea,” *State Department Bulletin*, 23 (1950), 174.

³⁹⁷ *Ibid*, 173.

³⁹⁸ *Ibid*, 176.

³⁹⁹ *Ibid*, 177.

⁴⁰⁰ *Ibid*, 177.

through the *Department of State Bulletin*, as the administration sought to quell Congressional concerns about the Constitutionality of the war.

E) Analysis and Conclusions: The United Nations as “Total Substitute” for Congress

Acheson and Truman readily utilized the U.N. authorization as a means to enhance their Presidential power to deploy military force without Congressional consultation. Congressional-Executive relations were at a low-point by June 1950 and Acheson became frustrated with what he called Taft’s “typical senatorial legalistic ground for differing with the President,” over the Constitutionality of the Korean War.⁴⁰¹ When Acheson was later challenged at a Princeton seminar on the legal basis for the war, he argued that there were many circumstances,

where the President had properly and rightfully taken military action to protect the interests of the United States, without any action of the Congress, and [Truman] must be able to do that, and clearly these actions [in Korea] might develop into a situation which was a complete struggle of one nation against another. It was against that sort of a background that you had to talk about this and not that war did not exist unless Congress either recognized it or declared it. It did exist when you were fighting, this is what war was.⁴⁰²

For Acheson, the ‘war’ in Korea had already started with the North Korean attack on 25 June and the war did not need to be recognized by Congress for it to be a reality. Acheson knew that going to Congress would be a long and arduous process and that, as Julian Zelizer notes, “if he sought a declaration of war from Congress... [he] would open the debate up to the China question and further ignite partisan questions.”⁴⁰³ Such questions focused in particular on Acheson’s National Press Club speech. Republican Senators, especially Robert Taft, viewed Acheson’s speech as the root cause of the war.

⁴⁰¹ Acheson, “Present at the Creation,” 410.

⁴⁰² Acheson, “Princeton Seminar Seminar,” 16 July 1953.

⁴⁰³ Zelizer, “Arsenal of Democracy,” 100.

Acheson was a shrewd political operator and he knew that in this position the best approach was to circumvent the Congress. He wanted to avoid a fight that would be damaging to the administration, and particularly to himself. Acheson had wanted to take decisive action through the executive and the United Nations was a convenient forum for this.

Truman had acted upon Acheson's advice out of his own desire to protect the historical powers of the President. In supporting Acheson's advice to intervene without Congress, he saw himself as protecting Presidential power for his successors. Averell Harriman, Truman's confidante who had earlier served as his Secretary of Commerce, argued for obtaining Congressional authorization but Truman refused. Truman "would not do so because it would make it more difficult for future presidents to deal with emergencies," Harriman recalled.⁴⁰⁴ While Truman paid little attention to the technical questions surrounding how U.N. authorization functioned as an alternate framework to the Congress's constitutional power to declare war, he was intuitively attracted to the idea of a strong Presidency. Truman's aide for Congressional relations, Ken Hechler, believed that Truman was concerned that going to Congress would set a dangerous precedent in history and he "did not want to handicap his successors or bind their hands."⁴⁰⁵ Acheson recalled that Truman spoke of the Presidency as "a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige."⁴⁰⁶ In Truman's memoirs he argues that he acted in accordance with his view of the President as "the absolute commander of the armed forces of the United States in time of war. He's the commander of the armed forces when they're called out for any purpose, if he wants to

⁴⁰⁴ Quoted: Ken Hechler. *Working with Truman: A Personal Memoir of the White House Years*. (Kansas City, MO: University of Missouri Press, 1996), 151.

⁴⁰⁵ Hechler, interview with author.

⁴⁰⁶ Quoted: Schlesinger, "Imperial Presidency," 131.

take control of them. Nobody else can do it.”⁴⁰⁷ Truman’s belief in the power of the President guided his turn to the United Nations as a forum for actualizing his ability to use military force without Congressional authorization.

In a Constitutional sense, the administration had purveyed a means by which the President could create a military endeavor that was short of war. In the Korean War, Dean Acheson and his legal team took an argument that had been purveyed during the destroyers for bases deal, that an international legal framework can be used to augment the power of the President to use military force, and deployed it at a large-scale level. The administration built on the advent of the United Nations to argue that U.N. authorization was a sufficient substitute for Congressional authorization. Ultimately, the administration came to regard the use of military force through the United Nations as less than true war and therefore a Declaration of War was not necessary. Philip Jessup, an esteemed international lawyer who had served with Acheson in the State Department at the outbreak of the war, would reflect on the experience of “the recent fighting in Korea” to argue that there was now a “third legal status intermediate between war and peace.”⁴⁰⁸ The Korean War had left behind not only scarred battlefields in Asia, but an intellectual imprimatur on the American Constitutional system in which it would no longer be advisable to issue a Declaration of War because such a formal statement would “raise the international temperature and thus be undesirable,” as Jessup argued.⁴⁰⁹ The administration had pushed forward the idea that the President could use massive amounts of military force without declaring it war.

⁴⁰⁷ Harry Truman, *Truman Speaks*, (New York: Columbia UP, 1960), 6.

⁴⁰⁸ Philip Jessup, “Should International Law Recognize an Intermediate Status Between Peace and War,” *The American Journal of International Law*, 48 (1954), 98.

⁴⁰⁹ *Ibid*, 102.

While there were undoubtedly international dimensions involved in their decision to seek U.N. authorization, this Constitutional dimension has not been properly understood.⁴¹⁰ Celebrating Truman's utilization of the United Nations, Meena Bose argues that "Truman's willingness to make use of the opportunity [of the Korean War] to garner international backing for his foreign policy agenda makes the legitimacy of the UN in endorsing international action part of his national security legacy."⁴¹¹ Bose emphasizes the Truman administration's commitment to the legitimacy of the United Nations while ignoring that the administration was utilizing the authorization as "Total Substitution" for Congressional authorization. The legal legacy of the Truman administration was to have "enlarged the power of future Presidents to take the nation into major war," as Schlesinger presciently noted.⁴¹²

F. Aftermath

I. The Silence of the Courts

Though the President asserted that the use of force was not a war and did not require Congressional authorization, the courts could have engaged this proposition. Instead, they chose to accept the Constitutionality of the President's ability to use force abroad without authorization (*United States v. Bolton*) and only limited the President's ability to seize a set of steel mills in Ohio (*Youngstown v. Sawyer*). The courts, in effect, tacitly accepted the ability of the President to create a war through the United Nations without any Congressional authorization.

The legal debate over whether Korea qualified as a 'war' began on a mundane veteran's health case. On 9 May 1951, a veteran of the Korean War was told he could not be admitted for

⁴¹⁰ Some scholars emphasize collective security, for instance, see; John Lewis Gaddis, *We Now Know: Rethinking the Cold War*, (New York: Oxford UP, 1997), 75.

⁴¹¹ Bose, "Leading Through Multilateralism," 156.

⁴¹² Schlesinger, "Imperial Presidency," 135.

treatment at the Veterans Administration Hospital in Tucson, Arizona because he was a “peacetime soldier,” and “no returned veteran from Korea is eligible for hospital benefits unless he had been discharged from the service because of a duty disability,” the hospital director instructed him.⁴¹³ L.C. Green, a leading legal scholar explained that because “the United States [was] technically not at war in Korea, a Korean ex-service man has the same status as a soldier discharged from the army in peace time.”⁴¹⁴ The problem was quickly addressed by the Veterans’ Administration and healthcare was provided to returning veterans but the legal question of whether this was a ‘war’ would eventually be raised in court.

The main legal challenge to the lack of a Declaration of War came from a citizen who had been drafted in 1951. He refused to report for duty because the war in Korea was being fought without a declaration of war. The United States District Court for Connecticut, where Bolton was from, convicted him of violating the Selective Service Act of 1948. On appeal to the United States Court of Appeal Second District, the justices had the opportunity to overturn this conviction which would have likely sent the issues surrounding the lack of a Declaration of War to the Supreme Court. However, the Second Circuit decided to avoid the issue entirely and rule on a very narrow technical question. The Judge ruled that because Bolton was not going to be automatically sent to Korea he lacked standing in the case. The justices said that “any question as to the legality of an order sending men to Korea to fight in an ‘undeclared war’ should be raised by someone to whom such an order has been directed, not by defendant, who might never be ordered abroad for military duty, even if he reported for induction.”⁴¹⁵ In essence, the court was suggesting that it sought to avoid having to rule on the highly-charged question of a declaration

⁴¹³ Quoted: Ronald Hamowsy, *Government and Public Health in America*, (Northampton, MA: Edward Elgar Publishing, 2007), 334.

⁴¹⁴ L.C. Green, “The Nature of the ‘War’ in Korea,” *The International Law Quarterly*, (4) 1951, 463.

⁴¹⁵ *United States v Bolton*. 2nd Circuit; 1951.

of war and in doing so it was deferring to the action taken by the executive to launch the undeclared war.

In the 1952 steel seizure case (*Youngstown v. Sawyer*), the Supreme Court rebuffed the Truman administration by ruling that the Korean War did not allow Truman to seize steel mills that were threatening to go on strike. The 6-3 ruling was one of the Supreme Court's strongest stances to curb executive power.⁴¹⁶ Yet, by drawing a boundary in terms of the limits of the President's domestic power while American forces are in combat abroad, the court found it necessary to endorse the legality of Truman's original action of sending forces into combat without a Declaration of War. The Supreme Court curtailed the power of the President within the United States during 'wartime,' and in doing so it implicitly recognized the power of the President to create 'wartime' without Congressional authorization. Though the lack of a Declaration of War was not the matter before the court, their willingness to embrace the fact that this was unquestionably 'wartime' proved that the Supreme Court would be willing to accept the President's use of force without Congressional authorization.

While all six Justices in the majority wrote separate opinions, it was Justice Robert Jackson's that has become the major statement on executive power. Justice Jackson had been instrumental in the destroyers for bases deal when he was Franklin Roosevelt's Attorney General in 1940 and had helped to expand executive power. He ruled that the steel seizure was unconstitutional because Truman had overstepped his wartime authority. Yet, to make this argument he conceded that, "Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may, in fact, exist without a formal

⁴¹⁶ *Youngstown Sheet & Tube. Co v. Sawyer*, 343 U.S. 579;
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZS.html

declaration.”⁴¹⁷ In making the argument on the steel mills he wrote, “I do not, however, find it necessary or *appropriate* to consider the legal status of the Korean enterprise to discountenance argument based on it.”⁴¹⁸ For Jackson, the limitations on executive power fell strictly on the President’s domestic power during a time of conflict. This restriction was coterminous with a sphere of permissibility that allowed the executive to determine when it would authorize the use of force abroad. Jackson would challenge the steel seizures but he did not find it “appropriate” for the Supreme Court to consider challenging the lack of a declaration of war.

The lack of a serious challenge to the absence of a Declaration of War in the courts confirmed the power of the executive branch to construct its own legal framework for utilizing force abroad. The Truman administration created a novel legal basis for its war-making in Korea by arguing that this was a United Nations police action. The memorandum constructed by the State Department was politically charged but without a challenge in court it came to stand as the defining statement on executive power to use force through an international organization. This was an arena where the Supreme Court did not want to venture, and the executive was left with the capacity to construct its own legal doctrine on the Constitutionality of using force through the United Nations.

II. Great Debate: 1951

As the war in Korea progressed, Republican political leaders and right-wing newspapers increasingly condemned the lack of European participation in the war.⁴¹⁹ The re-emergence of an isolationist strand in American foreign policy was prodded forward by elder statesmen of the

⁴¹⁷ Justice Jackson, “Special Concurrence,”
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZC2.html

⁴¹⁸ Ibid. (emphasis added)

⁴¹⁹ Ted Galen Carpenter, “United States’ NATO Policy at the Crossroads: The ‘Great Debate’ of 1950-1951,” *The International History Review*, (8) 1986), 398.

right-wing, Joseph Kennedy and Herbert Hoover, who began to argue for abandoning Western Europe in the struggle with the Soviet Union.⁴²⁰ When Truman proposed to send a number of U.S. army divisions to Europe as a commitment to NATO, the ‘great debate’ emerged. When the Congress returned from its recess in January 1951, Robert Taft issued a long challenge in the Senate to the wisdom of intertwining American interests with Europe and he argued that the President lacked the Constitutional power to carry out the deployment.⁴²¹ He declared that “there is no legal obligation to send American land soldiers to Europe.”⁴²² Measures were introduced that would restrict the President’s power to carry out these deployments.

The administration turned to its ‘obligations’ to NATO to defend the President’s power to send the forces to Europe. The United States, Truman noted, “will continue to send troops whenever it is necessary to uphold those obligations [to NATO].”⁴²³ Acheson expanded on these comments in his testimony to the Senate Foreign Relations Committee:

Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.⁴²⁴

This theory departed from the executive’s earlier pledges that the United Nations and NATO would not be used to expand executive power. Now, the administration argued that the President could utilize the armed forces in “implementing treaties” and that the Congress may not attempt to “interfere” with such actions.

Ultimately, the Republicans lacked the votes to pass the measure. As a compromise, the Senate passed a resolution that allowed for the four divisions to be sent to Europe while requiring

⁴²⁰ Ibid, 398.

⁴²¹ Ibid, 398.

⁴²² Matthews, “Robert A. Taft,” 517.

⁴²³ Harry Truman, “Press Conference,” 11 January 1951;
<http://www.presidency.ucsb.edu/ws/index.php?pid=14050#axzz1gRDCGaBB>

⁴²⁴ Assignment of Ground Forces of the United States to Duty in the European Area, Hearings before the Senate Foreign Relations and Armed Services Committees, 82d Congress, 1st sess. (1951), 92.

that the President seek further authorization to send more troops.⁴²⁵ The compromise pleased neither side; yet it demonstrated how the President could utilize the claim of a ‘treaty obligation’ to bolster the executive’s power in its relation with Congress. Outside of a Declaration of War the United States had never stationed troops in Europe during peacetime. In the conclusion of the ‘great debate,’ tens of thousands of American soldiers were sent to protect Europe against Soviet aggression based on the President’s power to invoke an obligation to NATO.

The success of the President’s position demonstrated how American participation in multilateral treaty frameworks could be employed by the executive to expand Presidential control over the power to deploy America’s military forces. In a secret legal memorandum, Franklin Pollak, a Department of Justice lawyer, codified how the executive branch could assert expansive powers to deploy military forces not only “with reference to the Constitution but also in the light of the United Nations Charter [and] the North Atlantic Treaty.”⁴²⁶

The Pollak memorandum enunciated a new era of Presidential power that could be grounded in America’s participation in international organizations. First, the U.N. Charter offered a basis for the President to deploy military force. Pollak noted that: “The United Nations Charter can reasonably be regarded as furnishing additional grounds [on] which the President, in a particular case, might properly consider as supporting a conclusion on his part that troops should be ordered abroad.”⁴²⁷ In emphasizing how authorization from the United Nations can accentuate the President’s power to use force, the administration was furthering the legal argument it had used in the Korean War. Second, the NATO treaty offered a basis for the President to deploy military force. Pollak continued: “There can be circumstances in which the

⁴²⁵ Carpenter, “United States’ NATO Policy,” 411.

⁴²⁶ Franklin Pollak, “Power of the President to Send Troops Abroad,” April 1951, 1. Department of Justice: Office of Legal Counsel Archives.

⁴²⁷ Ibid, 4.

independent honest of this Government concludes that the use of armed force by this Government... is necessary to carry out the North Atlantic Treaty; and in that case there is an obligation under that Treaty to send forces or use force in accordance with that honest judgment.”⁴²⁸ In this, Pollak extended the argument that an ILF can enhance executive power to apply to NATO.

III. Bricker Amendment

In response to the executive’s utilization of ILFs to expand the President’s war power in the Korean War and the ‘great debate,’ a group of Senators initiated a legislative response. The so-called ‘Bricker Amendment’ was introduced in 1953 by Senator John Bricker to amend the Constitution to remove the President’s power to deploy military force under the auspices of a treaty obligation without Congressional authorization.⁴²⁹ Bricker was a fervent isolationist, and a close friend of Robert Taft, who saw himself as holding up the legacy of the ‘Old Guard’ of the Republican Party against the Eisenhower administration. The amendment was “the embodiment of the Old Guard’s rage at what it viewed as twenty years of presidential usurpation of Congress’s constitutional powers,” as Robert Caro noted.⁴³⁰ The amendment was endorsed by the American Bar Association for a myriad of reasons; including fears of the “trend toward socialism and world government.”⁴³¹ The bill passed the Senate Judiciary Committee and was put into open debate in the Senate.⁴³²

⁴²⁸ Ibid, 4.

⁴²⁹ Arthur Dean, “The Bricker Amendment and Authority over Foreign Affairs,” *Foreign Affairs*, October 1953.

⁴³⁰ Robert Caro, *The Years of Lyndon Johnson: Master of the Senate*, (New York: Knopf, 2002), 179.

⁴³¹ George Finch, “The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits,” *The American Journal of International Law*, (48) 1954, 64

⁴³² Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate, “Treaties and Executive Agreements,” 83d Congress, 1st session, on S. J. Res. 1 and S. J. Res. 43, (February 18, 19, 25, March 4, 10, 16, 27, 31, April 6, 7, 8, 9, 10, and 11, 1953)

The Eisenhower administration dismissed the resolution as unnecessary and dangerous. Secretary of State John Foster Dulles had earlier endorsed the idea for an amendment but now that he was in the executive he rejected it.⁴³³ With the matter “analyzed for me by the Secretary of State,” Eisenhower rejected the amendment because it would “restrict the authority that the President must have, if he is to conduct the foreign affairs of this Nation effectively.”⁴³⁴ Dulles had a distinguished career as a lawyer and he was in a unique position to persuade Eisenhower to reject the amendment. For switching away from his earlier endorsement, Dulles became a focal point of criticism by the pro-Bricker movement.⁴³⁵ However, the administration would not shift from its opposition to the bill. Applying some wit to the debate, the assistant State Department Legal Adviser said that while Bricker hyperbolized to claim he was fighting a “trojan horse,” he was actually swinging away at “Don Quixote’s windmill.”⁴³⁶ While the administration pledged to “consult” with Congress on foreign affairs, particularly the use of force, they adamantly rejected the amendment.⁴³⁷

Upon Eisenhower’s urging, the Senate ultimately rejected the Bricker amendment. With the success of Eisenhower’s pro-executive power and internationalist wing of the party, the vote on the Bricker amendment would mark “the high water mark of the non-interventionist surge in the 1950s.”⁴³⁸ The attempt to remove power from the executive, particularly the executive’s power to deploy force through ILFs, had run its course and was thoroughly defeated. The

⁴³³ Glendon Schubert, “Politics and the Constitution: The Bricker Amendment During 1953,” *The Journal of Politics*, (16) 1954, 274.

⁴³⁴ Quoted; Herbert Parmet, *Eisenhower and the American Crusades*, (New York: Transaction Publishers, 1998), 312.

⁴³⁵ Finch, “The Need to Restrain,” 57.

⁴³⁶ “Trojan Horse or Don Quixote’s Windmill,” at p. 773, both printed in Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Congress, 1st session, on S. J. Res. 1 and S. J. Res. 43, *Treaties and Executive Agreements*, (February 18, 19, 25, March 4, 10, 16, 27, 31, April 6, 7, 8, 9, 10, and 11, 1953)

⁴³⁷ Schubert, “Politics and the Constitution,” 276

⁴³⁸ Caro, “Master of the Senate,” 178.

precedent from the Korean War, that the President could use force on the basis of an ILF, moved forward unimpaired.

CHAPTER 6:

The Vietnam War

A) The Other Cold War

The United States went to war in Vietnam out of a belief that Communism could not be allowed to spread. In this war, ‘containment,’ as pioneered by George Kennan to emphasize the use of diplomacy, was militarized by policy-makers who wanted to prove to the Soviet Union that the United States would use force to stop the spread of Communism.⁴³⁹ The escalation of America’s military commitment in Vietnam under the Johnson administration derived from the administration’s belief that, as John Lewis Gaddis summarizes, “the defense of Southeast Asia was crucial to the maintenance of world order.”⁴⁴⁰

While the war in Vietnam embodied America’s Cold War foreign policy, there was another ‘Cold War’ brewing at home between the executive and legislative branches concerning the President’s power to wage a war in Vietnam. The Gulf of Tonkin Resolution was rushed through Congress in 1964 and as more Americans came home from distant battlefields in body-bags and protests against the war grew, Congress began to demand that the Johnson administration seek a more robust Declaration of War. “I think it's not exaggerating,” recalled Pat Holt, the Senate Foreign Relation Committee Chief of Staff, “to say there developed a Cold War between the [Congressional leadership] on one side and the State Department and the White House on the other.”⁴⁴¹ This other ‘Cold War’ is the focus of this chapter. While there has been extensive scholarship chronicling America’s war in Vietnam, the debate over the President’s

⁴³⁹ John Lewis Gaddis, *Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy*, (New York: Oxford UP, 1982), 238-239.

⁴⁴⁰ Ibid, 238.

⁴⁴¹ United States Senate Historical Office, “Pat Holt Oral History: Interview 7,” November 1980; http://www.senate.gov/artandhistory/history/resources/pdf/Holt_interview_7.pdf

Constitutional power to wage the war in Vietnam has received less scholarly attention. The best Constitutional history of the Vietnam War is by John Hart Ely but Ely's account lacks in-depth historical depth. He does not utilize any archival research or interviews.⁴⁴²

This chapter analyzes the debate over executive war power in the course of the Vietnam War. I argue that the Johnson administration rooted the Constitutional power to use military force in large part on the notion of an American 'commitment' to Vietnam found in the SEATO treaty. I place particular emphasis on the Gulf of Tonkin Resolution's status as part of a political strategy to lessen Congressional dissent, the series of memoranda generated by the State Department Legal Adviser on the Constitutionality of the war, and on the Senate hearings in which the war powers debate culminated. I contrast this with the Nixon administration's approach in asserting the Constitutionality of bombing Cambodia. Cambodia was not covered in the SEATO agreement and Nixon argued that the military action was based on the President's authority as Commander-in-Chief. This expansion of executive power, I argue, was enabled by the Supreme Court's decision to not to involve itself in cases concerning the Constitutionality of the war. As a consequence of the executive's increased assertions of executive power, the Congress was able to create the political support to pass the War Powers Act in 1972 and place new constraints on executive war power.

With the expansive scope of the Vietnam War, I focus on the critical junctures in the course of the war powers debate. During the Johnson administration, the critical junctures include the Gulf of Tonkin Resolution (1964), the debate over the escalation of the war (1965), and the Senate hearings on national commitment and war powers (1967). During the Nixon administration I focus on the decision to bomb Cambodia (1970) and the debate leading up to the passage of the War Powers Act (1973).

⁴⁴² Ely, "War and Responsibility."

B) SEATO: A Treaty With Limited Commitments

Before analyzing the Johnson administration's decision-making in Vietnam, it is necessary to analyze the treaty that would undergird much of the administration's claim that they had a 'commitment' to Vietnam. The Southeast Asia Treaty Organization (SEATO) was signed in 1954 as a mutual security treaty between the United States and many of the nations of Southeast Asia. The treaty was the brainchild of Secretary of State John Foster Dulles. In the aftermath of the French defeat at Dien Bien Phu in May 1954, Dulles determined that it was necessary to demonstrate to the nations of Southeast Asia that the United States stood committed to assist them.⁴⁴³ Dulles viewed the treaty as a "means of restoring the Eisenhower administration's badly tarnished image as 'leader of the free world,'" as historian Roger Dingman notes.⁴⁴⁴ In drafting the treaty, the administration sought to assure the Southeast Asian partners that the treaty was a robust alliance while still writing the treaty in such a way that the United States would not be forced to use its military in a situation where it didn't want to.⁴⁴⁵

At the conference in Manila where the treaty was signed, Dulles assured the other states that the U.S. commitment to the region was steadfast. Though the language in the treaty did not pledge the same level of commitment as in NATO, Dulles assured the representatives that an attack would produce "a reaction so united, so strong and so well placed that the aggressor would lose more than it could hope to gain."⁴⁴⁶

When the Eisenhower administration went to the Senate for ratification, they told the Senators that the treaty would not create any major obligations for the United States to use force.

⁴⁴³ Roger Dingman, "John Foster Dulles and the Creation of the South-East Treaty Organization in 1954," *The International History Review*, (11) 1989, 459.

⁴⁴⁴ Ibid, 460.

⁴⁴⁵ Ibid, 462.

⁴⁴⁶ Quoted; *ibid*, 471.

After the treaty was signed in Manila in September 1954, its ratification was debated in the Senate in February 1955. The debate in the Senate made clear that the treaty being ratified did not entail a military commitment to defend Southeast Asia. Senator H. Alexander Smith, a Republican who had served as a U.S. representative in the negotiation of SEATO, assured his colleagues that the treaty did not give rise to large U.S. commitments:

Some of the participants came to Manila with the intention of establishing... a compulsory arrangement for our military participation in case of any attack. Such an organization might have required the Commitment of American ground forces to the Asian mainland. For ourselves, the arrangement means that we will have avoided the impracticable overcommitment which would have been involved if we attempted to place American ground forces around the perimeter of the area of potential Chinese ingress into Southeast Asia. Nothing in this treaty calls for the use of American ground forces in that fashion.⁴⁴⁷

In the Senate's debate, Dulles himself treated the treaty as a symbolic pledge rather than a military commitment. The treaty, he argued, contemplates that if an attack "arises or threatens, that we should consult together immediately in order to agree on measures which should be taken. That is an obligation for consultation It is not an obligation for action."⁴⁴⁸ Indeed, the treaty only obligated states to "consult immediately in order to agree on the measures which should be taken for the common defense" and any action would be taken in "accordance with its constitutional processes" of the signatory states.⁴⁴⁹

While the Senate questioned whether the protection of 'constitutional processes' was robust enough, they determined that the treaty would be largely symbolic.⁴⁵⁰ The treaty would have "no effect whatsoever on the thorny question of whether, how and under what circumstances the President might involve the United States in warfare without the approval of Congress," declared Senator Walter George, the Chairman of the Senate Foreign Relations

⁴⁴⁷ Quoted: William Standard, "United States Intervention in Vietnam is Not Legal," *American Bar Association Journal*, (52) July 1966, 632

⁴⁴⁸ Quoted; Glennon, "Constitutional Diplomacy," 218.

⁴⁴⁹ Southeast Asia Collective Defense Treaty, 9 September 1954; http://avalon.law.yale.edu/20th_century/usmu003.asp

⁴⁵⁰ Glennon, "Constitutional Diplomacy," 219.

Committee.⁴⁵¹ With this assurance that the treaty would not push the United States into a war in Southeast Asia, the treaty passed the Senate on an overwhelming vote of 82 to 1.⁴⁵²

The treaty itself did not include Vietnam as a signatory but it was added as a protocol state when the treaty was signed. This meant that the signatory states would have to acknowledge the same obligations under the original SEATO framework towards the protocol states; Laos, Cambodia and “the free territory under the jurisdiction of the State of Vietnam.”⁴⁵³

In framing SEATO as a robust commitment in international negotiations and as a symbolic statement in negotiations with the Senate, the Eisenhower administration set up an ambiguous legal framework for the use of force in Southeast Asia. On the one hand, the executive would be able to claim that it had made a pledge to the nations of Southeast Asia to assist them. On the other hand, the Senate would be able to claim that it had never ratified a treaty that made military commitments to use force in Southeast Asia. That tension would lie dormant until it erupted in the Vietnam War.

C) Executive War Power in the Kennedy and Johnson Administrations

I. The Embrace of Executive War Power

When John Kennedy entered the White House in 1960, he brought with him an expansive view of Presidential power. While Eisenhower attempted to obtain Congressional authorization for the potential need to use force in the Middle East or Taiwan, Kennedy brought a more expansive vision of executive power. After Richard Neustadt published *Presidential Power* in

⁴⁵¹ Quoted; Glennon, 219.

⁴⁵² Glennon, 219.

⁴⁵³ Protocol to the SEATO Treaty, 8 September 1954; <http://vietnam.vassar.edu/overview/doc4.html>

1960, Kennedy brought him in as an adviser in an effort to help the White House maximize its power.⁴⁵⁴

Kennedy utilized a broad interpretation of executive war power. In April 1961, Kennedy ordered an invasion of Cuba with a regiment of CIA-trained Cuban dissidents. The botched ‘Bay of Pigs invasion’ was launched with no Congressional authorization. Richard Bissell, the CIA officer in charge of the program, explained that “the need for congressional notification has a suffocating effect. You have to tailor the mission to them and their staffs.”⁴⁵⁵ Following the failed invasion, the administration launched an assassination program against Castro (Operation Mongoose) without notifying Congress. In the Berlin crisis of November 1961, the Kennedy administration considered a nuclear first strike policy if the crisis became violent- a policy that included no consultation with Congress.⁴⁵⁶

In the Cuban Missile Crisis, the administration formalized its expansive interpretation of Executive power. Norman Schlei, the Assistant Attorney General at the Office of Legal Counsel, argued that, “There are numerous examples of American Presidents taking measures which could internationally be regarded as acts of war without first seeking Congressional authority.”⁴⁵⁷ The administration’s lawyers carefully studied the history of Declarations of War but decided not to seek any Congressional authorization.⁴⁵⁸ Throughout the crisis, the Kennedy administration sought to make decisions through the Ex-Comm and only notify Congressional leaders after the

⁴⁵⁴ John Kessel, “Richard Neustadt’s Intellectual Contributions,” *Presidential Studies Quarterly*, (34) 2004, 21.

⁴⁵⁵ Quoted; Ronald Kessler, *Inside the CIA*, (New York: Pocket Books, 1992), 83.

⁴⁵⁶ William Burr, ed., “First Strike Options and the Berlin Crisis, September 1961,” *National Security Archive Electronic Briefing Book*, (56) 2001, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB56/>

⁴⁵⁷ Norman Schlei, “Re: Blockade of Cuba,” 19 October 1962. Department of Justice: Office of Legal Counsel Archives.

⁴⁵⁸ Ted Sorensen, *Counselor: a Life at the Edge of History*, (New York: Harper, 2008), 288.

decisions had been reached.⁴⁵⁹ By contrast, they did obtain authorization from the Organization of American States.

This embrace of executive power carried through into the Johnson administration. After Kennedy was assassinated in November 1963, Johnson kept much of the national security staff including Secretary of State Dean Rusk and Secretary of Defense Robert McNamara. At a personal level, Johnson had embraced an expansive view of Presidential power. When Truman launched military action in Korea in 1950, Senator Johnson had been the first Senator to congratulate Truman for taking action without Congressional authorization.⁴⁶⁰ Johnson wrote to tell Truman that his decision will “be remembered as the finest moment of American maturity” and that “for the decisions you must face alone, you have my most sincere prayers and my total confidence.”⁴⁶¹ From this early stage in his career, Johnson had viewed the President as holding expansive power to use military force when it was considered necessary. When he became President, that allegiance to executive power deepened.

II. The Early Phase of the Vietnam War: Escalating the War Powers Debate

Kennedy intended to pursue a cautious policy in Vietnam. But, the military commitment to Vietnam steadily expanded. When Johnson became President in 1963 he reviewed American policy and decided to send more advisers. In assessing the Constitutionality of this decision, he relied on SEATO to argue that he was fulfilling a pledge that the United States had made to support Vietnam.

⁴⁵⁹ For documentation of the decision-making during the Cuban Missile Crisis and the general exclusion of Congress, see;

Ernest May and Philip Zelikow, eds., *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis*, revised edition (New York: W.W. Norton, 2002), 163-183.

⁴⁶⁰ Caro, “Master of the Senate,” 307.

⁴⁶¹ Ibid, 307.

The Kennedy administration pursued a cautious policy in Vietnam. In his first year in office, Kennedy had major setbacks with the construction of the Berlin Wall, his poor performance at the Vienna conference and the failed Bay of Pigs invasion. Kennedy was reluctant to escalate the U.S. involvement in Vietnam because he was “aware of the need to sell any policy to Congress and to the American people,” as historian Lawrence Friedman noted.⁴⁶² Particularly, Kennedy was focused on the “limited appetite for a major commitment to Vietnam in Democratic Party circles” and initially stayed away from an escalation.⁴⁶³ However, Republican critics increased their attacks on the administration for allowing a Communist expansion in Asia.⁴⁶⁴ Some advisers saw this domestic criticism as a reason why more troops needed to be sent; “could [the] Administration afford yet another defeat, domestically,” inquired Robert Komer of the National Security Council.⁴⁶⁵ Kennedy sought to have it both ways; he escalated but only deployed ‘advisers.’ By the end of his first year in office, U.S. forces had increased 400% and they were given permission to use their weapons.⁴⁶⁶ With criticism coming both from the Republican and Democratic aisles, Kennedy did not want to turn to Congress to find support for his policy. He carried it out, like he had with other uses of force in foreign policy, based solely on Presidential power.

When Lyndon Johnson became President in the wake of Kennedy’s assassination, he made Vietnam one of the centerpieces of his nascent Presidency. As a young Congressman, he saw how the loss of China during the Truman administration had devastated the Democratic Party and he was unwilling to see the Democrats lose another war. “I am not going to be the

⁴⁶² Lawrence Friedman, *Kennedy’s Wars: Berlin, Cuba, Laos, and Vietnam*, (New York: Oxford UP, 2000), 332.

⁴⁶³ Ibid, 332.

⁴⁶⁴ Andrew Johns, *Vietnam’s Second Front: Domestic Politics, the Republican Party and the War*, (Lexington, Kentucky, University Press of Kentucky, 2010), 25.

⁴⁶⁵ Quoted; *ibid*, 25

⁴⁶⁶ Ibid, 26.

President who saw Southeast Asia go the way China went,” he told an aide.⁴⁶⁷ In his first week in office, Johnson signed an order for a planning phase that would study “different levels of possible increased activity” by the U.S. forces.⁴⁶⁸ In addressing Congress, he assured them that “this Nation will keep its commitment” to South Vietnam.⁴⁶⁹ Throughout the early months of his Presidency, Johnson expanded the number of American advisers in Vietnam.

As Johnson enlarged America’s military commitment to Vietnam in 1964, he relied on the SEATO commitment as the legal basis for using force. Speaking to a group of reporters, Johnson said that, “The request of a friend and an ally for our help in this terrible moment is a reality. The statement of the SEATO allies that Communist defeat is ‘essential’ is a reality.”⁴⁷⁰ The stakes of a failure to meet this request would be dire: “To fail to respond to these realities would reflect on our honor as a nation, would undermine worldwide confidence in our courage, would convince every nation in South Asia that it must now bow to Communist terms to survive.”⁴⁷¹ For Johnson, an obligation had to be upheld and a failure to do so would mean that America’s global systems of alliances would be undermined. The United States, he argued in a press conference, was “bound by solemn commitments to help defend this area against Communist encroachment. We will keep this commitment. In the case of Viet-Nam, our commitment today is just the same as the commitment made by President Eisenhower to President Diem in 1954--a commitment to help these people help themselves.”⁴⁷² While the

⁴⁶⁷ Quoted; *ibid*, 45.

⁴⁶⁸ McGeorge Bundy, “National Security Action Memorandum 273,” 26 November 1963; <http://www.lbjlib.utexas.edu/johnson/archives.hom/nsams/nsam273.asp>

⁴⁶⁹ Lyndon Johnson, “Address to JOint Session of Congress,” 27 November 1963; <http://millercenter.org/president/speeches/detail/3381>

⁴⁷⁰ Lyndon Johnson, “Remarks on Foreign Affairs at the Associated Press Luncheon in New York City,” 20 April 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26168#axzz1gRDCGaBB>.

⁴⁷¹ *Ibid*.

⁴⁷² Lyndon Johnson, “The President’s News Conference,” 2 June 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26286#axzz1fy07g0MY>

administration raked up the number of U.S. forces in Vietnam, the emphasis was on the notion that Johnson was merely executing a ‘commitment’ dating to the Eisenhower administration.

D) A Congressional Resolution: The Gulf of Tonkin Resolution of 1964

I. Debating the Need for Congress

In June 1964, Johnson called for a meeting with his top national security advisers in Honolulu to discuss the new Vietnam strategy and to consider the possibility of a Congressional resolution.⁴⁷³ Throughout the spring, Johnson had been pressing his aides to come up with a Congressional resolution. Jack Valenti, the Press Secretary, said that Johnson wanted “something in writing at some point. He wanted to go to the Congress and get the Congress to approve and to authorize the Southeast Asia adventure.”⁴⁷⁴ Johnson told his aides that if he were still in the Senate “the idea of some president doing this without getting the Congress to come aboard- By god, Lyndon Johnson would have torn his balls off.”⁴⁷⁵ The reality was to the contrary; when Congressman Johnson saw President Truman launch a war in Southeast Asia without Congressional authorization, he had been one of the first members of Congress to congratulate the President on the decision and urge him to carry on without Congressional authorization.

Johnson assigned William Bundy at the State Department to get a draft ready but Johnson hesitated on the timing. The President thought that pushing the resolution “would undermine his chances of getting the civil rights bill passed and might cause his defeat in the presidential election,” as Robert Dallek notes.⁴⁷⁶ While there was a consensus at the Honolulu conference

⁴⁷³ Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973*, (New York: Oxford UP, 1998), 105.

⁴⁷⁴ Quoted: *ibid*, 105.

⁴⁷⁵ Quoted; *ibid*, 105.

⁴⁷⁶ *Ibid*, 106.

that the President should go to Congress to get their support, the decision was to wait for a more opportune moment.

Returning from the conference, William Bundy sent his proposal for a resolution to Johnson in a secret memorandum. The memorandum enunciated the administration's view on the importance of the resolution as a statement of political support for the war rather than as a form of legal authorization. The public was still unconvinced of the need for America's commitment in Southeast Asia and Johnson wanted to get the resolution to lock in Congressional support. If the war went poorly he wanted to have the resolution as a way to keep Congress from attacking him over his leadership of the war. Johnson had seen this happen to President Truman with the Korean War and Johnson believed that this resolution would minimize his political risks in fighting the war.

The resolution would be a "demonstration of US firmness" and serve as the basis "for complete flexibility in the hands of the Executive in the coming political months," as Bundy said.⁴⁷⁷ While Bundy spoke of the need to show commitment to Hanoi, it was clear that the resolution's design was intended to force Congress into supporting the President. The "resolution must support any action required" by the President while still emphasizing "our peaceful objectives" in order to win over moderate Democrats such as "Senator Mansfield and Senator Aiken and leave ourselves with die-hard opposition mainly from Senator Morse and his very few cohorts," Bundy argued.⁴⁷⁸ Bundy was preparing a resolution that would hand the President the long-term ability to use force without Congressional oversight while packaging it in a manner where it would encounter only minimal Congressional criticism. The resolution would not reflect a "desire for a blank check" but a political sensibility in which Johnson cannot "ignore the

⁴⁷⁷ William Bundy, "Memorandum On the Southeast Asia Situation: Probable Development and the Case for a Congressional Resolution," 12 June 1964, 6. Lyndon Johnson Library: National Security File, Vietnam; Box 54.

⁴⁷⁸ Ibid, 7.

realities ahead during an election period.”⁴⁷⁹ There was a draft resolution attached with various possible lines of argumentation, including a crucial reference to the SEATO treaty that gave rise to a commitment to “the preservation of peace and security in Southeast Asia and for collective defense against Communist aggression” in Laos and Vietnam.⁴⁸⁰

While there was a growing commitment to obtaining a resolution, Johnson decided to wait. Bundy was focused on the Vietnam question and Johnson had a bigger agenda; he didn’t want to waste political capital on the Vietnam resolution in a summer when he needed to focus on winning support for the Economic Opportunity Act and the Civil Rights Bill.⁴⁸¹ Instead, in a 15 June memorandum the White House decided that, as a Constitutional matter, they could continue to use force without a Congressional resolution.⁴⁸² Without Congressional authority, the White House could encourage a strategy of “reasonably broad planning authority within which operating officers would be encouraged to work with a relatively free sense” of their power to use force.⁴⁸³ This policy would “not preclude a shift to a higher level of action if actions of the other side should justify it or require it.”⁴⁸⁴ The administration established the Constitutional authority to use force without Congressional authorization while keeping open the possibility of a Congressional resolution for political reasons.

II. Exploring the Limits of Presidential Power

⁴⁷⁹ William Bundy, “Basic Themes in Presenting the Resolution,” 13 June 1964. Lyndon Johnson Library: National Security File, Vietnam; Box 54.

⁴⁸⁰ Draft Resolution; attached to Bundy’s 12 June 1964 memorandum. Lyndon Johnson Library: National Security File, Vietnam; Box 54.

⁴⁸¹ Dallek, “Flawed Giant,” 107.

⁴⁸² “Elements of a Southeast Asian Policy that Does Not Include a Congressional Resolution,” 15 June 1964. Lyndon Johnson Library: National Security File, Vietnam; Box 54.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

In this period, the administration experimented with the idea that SEATO could serve as an independent legal basis for the use of force. Contemplating the possibility that the President would not be able to obtain Congressional authorization, McGeorge Bundy, the National Security Adviser, advocated the use of SEATO as a legal framework for using force. “There is a wide range of actions which are plainly permissible without a resolution,” argued Bundy, including “very substantial deployments of U.S. air, sea and ground forces.”⁴⁸⁵ “Within the framework of SEATO, and in defense of the agreements of 1962, we can plausibly move troops even into Vietnam, Thailand and Laos itself if the appropriate government request it,” he argued.⁴⁸⁶ This argument represented the administration’s early work in justifying the Constitutionality of a war without Congressional authorization.

Secretary of State Dean Rusk was an adamant defender of the President’s power to use force in Vietnam without Congressional authorization. Rusk viewed Congress as unworthy of playing any role in U.S. foreign policy.⁴⁸⁷ His belief that the executive should be able to use military force without Congressional authorization emanated from his experience in the Truman administration and as Secretary of State he maintained a position that the “need for secrecy and confidentiality” should dictate a policy of minimal consultation with Congress.⁴⁸⁸

To justify the lack of Congressional authorization, Rusk turned towards SEATO. In a June 1964 memorandum for President Johnson, Rusk advised against the need for Congressional authorization because the President’s use of force was “supported by the fact that South Vietnam has been designated to receive protection under Article IV of the Southeast Asia Collective

⁴⁸⁵ McGeorge Bundy, “Alternative Public Positions for U.S. on Southeast Asia,” 10 June 1964, *Foreign Relations of the United States: Vietnam, 1964, Volume I*, Document 211; <http://history.state.gov/historicaldocuments/frus1964-68v01/d211>

⁴⁸⁶ Ibid.

⁴⁸⁷ For Rusk’s dismissive view of Congress as an actor in foreign policy, see; Dean Rusk, *As I Saw It*, (New York: Penguin Press, 1990), 549-551

⁴⁸⁸ Ibid, 543.

Defense Treaty; both the Treaty and the Protocol covering Viet-Nam received the advice and consent of the Senate.”⁴⁸⁹ For Rusk, this SEATO commitment was important and could be used to defend the legality of the President’s actions in the absence of Congressional authorization.

The decision was made to wait for an ‘incident’ which could be used to serve as the basis for seeking a resolution. In the meantime, the administration tried to build public support for the war. In a secret national security memorandum, Johnson assigned the State Department to “generate and coordinate a broad program to bring to the American people a complete and accurate picture of the United States involvement in Southeast Asia, and to show why this involvement is essential.”⁴⁹⁰ The senior leaders of the administration, including the Secretary of State, the Secretary of Defense and the Director of the CIA, were instructed to “take the necessary steps” to assure that the effort received their department’s “unstinting cooperation on a priority basis.”⁴⁹¹ While the President waited to decide on whether to and how to obtain Congressional authorization, he turned the power of the American foreign policy establishment inwards- the same policy-makers prosecuting a war in Vietnam would now be responsible for fighting a battle for hearts and minds at home as well.

III. The Gulf of Tonkin Incident and Resolution

On 2 August 1964, the *U.S.S. Maddox* sent a radio message that it was under attack from North Vietnamese torpedo boats as it sat in international waters. While historians have questioned whether the U.S. Navy initiated that engagement, Johnson was furious and ordered U.S. naval ships deployed into North Vietnamese waters. In the early hours of 4 August, the

⁴⁸⁹ Dean Rusk, “Legal Basis for Sending American Forces to Viet-Nam,” 29 June 1964, *Foreign Relations of the United States: Vietnam, 1964, Volume I*; Document 226; <http://history.state.gov/historicaldocuments/frus1964-68v01/d226>

⁴⁹⁰ Lyndon Johnson, “National Security Action Memorandum 308,” 22 June 1964; <http://www.lbjlib.utexas.edu/johnson/archives.hom/nsams/nsam308.asp>

⁴⁹¹ Ibid.

U.S.S. Maddox and the *U.S.S. Turner Joy* reported that they had been under attack. Though Johnson later conceded that the reports of the 4 August attack were so flimsy that “For all I know, our Navy was shooting at whales out there,” Johnson decided to take action.⁴⁹² Despite officers questioning the validity of the second attack, the administration ordered ‘Operation Pierce Arrow’ to conduct reprisals against North Vietnamese torpedo boat bases and an oil-storage depot.⁴⁹³ More importantly, Johnson decided to use the opportunity to finally push through a Congressional resolution. This was the incident he had been waiting for.

On the evening of 4 August, Johnson called for a meeting with leaders from the Senate to discuss the situation and to introduce the resolution that he wanted them to pass. He opened the meeting by cautioning that, “It is dangerous to have the [Congressional] leaders come here. The reporters see they are coming and they go back and report all over the Hill. Some of our boys are floating around in the water. The facts we would like to present to you are to be held in the closest confidence and are to be kept in this room until announced.”⁴⁹⁴ Johnson made it clear that there would be no room for dissent.

Secretary of Defense Robert McNamara briefed the participants on the attacks in the Gulf of Tonkin and they then came to discuss the need for a resolution. To a large degree, the administration had to defend why they wanted a resolution at all. Senator Hickenlooper argued that “There should be no doubt as to whether the President should have the right to order the Armed Forces into action. [We] should not have to quarrel for weeks as to whether he had the authority or not.”⁴⁹⁵ If Johnson felt the need to have a resolution, Hickenlooper said that “it is up to the President to prepare the kind and type of resolution he believes would be proper. It is up to

⁴⁹² Quoted; Tom Wells, *The War Within: America’s Battle Over Vietnam*, revised edition (New York: Author’s Guild, 2005), 18.

⁴⁹³ *Ibid.*, 11.

⁴⁹⁴ “Notes of the Leadership Meeting at the White House,” 4 August 1964, *Foreign Relations of the United States: Vietnam, 1964, Volume I*; Document 280; <http://history.state.gov/historicaldocuments/frus1964-68v01/d280>

⁴⁹⁵ *Ibid.*

Congress to say whether they will pass it or not. I have no doubt in my mind that concrete action would be taken.”⁴⁹⁶

Johnson believed that he had the authority to take action, but he saw the Gulf of Tonkin Resolution as a political tactic. Johnson later spoke of how he could remember during the outbreak of the Korean War:

Senator Taft speak on several occasions about President Truman’s intervention in Korea. He frequently said, in substance, that while he thought what the President did was right, he did it in the wrong way; that he should have consulted the Congress and he should have asked for their opinion...Senator Taft thought that President Truman, before he committed our troops in Korea, should have asked the Congress not necessarily for a declaration but for an opinion- for a resolution.⁴⁹⁷

While Johnson had supported Truman’s actions at the time, he wanted to avoid Truman’s political fallout from taking on a costly war without Congressional support locked in. Johnson told the Congressional leaders that he wanted to “to keep the Congress informed, to keep them in place, and to keep them in agreement with what our action should be there in case of contingencies.”⁴⁹⁸ He wanted to obtain authorization to keep this from becoming ‘Johnson’s War.’

With the administration making clear that they were going to attack, the Congressional leaders had no opportunity to make a real protest against this escalation. The meeting never raised serious questions about the validity of the attacks or the implications of the resolution. President Johnson was careful to remind the Congressmen that he was not asking for authority but agreement: “I wanted the advice of each of you and wanted to consult with you. We felt we should move with the action recommended by the Joint Chiefs, but I wanted to get the Congressional concurrence. I think it would be bad to ask for it and not get it...I don’t think any

⁴⁹⁶ Ibid.

⁴⁹⁷ Lyndon Johnson, “Press Conference,” 18 August 1967; <http://millercenter.org/president/speeches/detail/5919>

⁴⁹⁸ “Notes of the Leadership Meeting,” *FRUS*.

resolution is necessary, but I think it is a lot better to have it in light of what we did in Korea.”⁴⁹⁹

Johnson’s commentary here is deeply revealing; he wanted the resolution to avoid making Truman’s mistake of having to fight a war without Congressional support locked-in.

After that meeting, Johnson delivered a message to the American people. He announced the attacks on the American ships as a “new act of aggression, aimed directly at our own forces” and announced that America’s dedication to “carry out our full commitment to the people and to the government of South Viet-Nam will be redoubled by this outrage.”⁵⁰⁰ He said that he would be introducing a resolution in the Congress and that he already had been given “assurance by these [Congressional] leaders of both parties that such a resolution will be promptly introduced, freely and expeditiously debated, and passed with overwhelming support.”⁵⁰¹ With this message to the American public, the Congress was placed in a position where there were strong political pressures to pass the resolution quickly.

Drafting the Gulf of Tonkin Resolution was a task that fell to a group of lawyers and policy-makers who were summoned to the White House for meetings.⁵⁰² Membership in these meetings consisted of leadership from the Justice Department and the State Department, including Secretary of State Dean Rusk and Attorney General Nicholas Katzenbach. The task of writing the Resolution fell to a group of lower-level lawyers, primarily Carl Salans, the State Department Assistant Legal Adviser for Far Eastern Affairs.⁵⁰³ Salans had only been admitted to the bar two years before, at which point he joined the State Department, and he found himself having to take the brunt of the work in drafting what would become one of the most important

⁴⁹⁹ Ibid.

⁵⁰⁰ Lyndon Johnson, “Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin,” 4 August 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26418#axzz1fy07g0MY>

⁵⁰¹ Lyndon Johnson, “Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin,” 4 August 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26418#axzz1fy07g0MY>

⁵⁰² Carl Salans, telephone interview with author; 09 March 2011.

⁵⁰³ Ibid.

legal documents concerning the war in Vietnam. In drafting the Resolution, the instructions from the White House were clear that “no one wanted to speak about war for constitutional reasons [because] the president didn’t want congress interfering with his Executive powers,” Salans recalled.⁵⁰⁴ He wrote the original version and the process of drafting the resolution continued into the next morning (5 August): “redrafts continued in the evening, and at a breakfast meeting in the Department of State the Secretary [Rusk] and his associates hammered out a short, basic agreed version with the bipartisan leaders.”⁵⁰⁵ By the time the bill was introduced, the President and the Congressional leadership had agreed to its passage.

The resolution was framed not as authorization for the use of force but as Congressional support for the President’s legal authority to use force as an obligation to SEATO. The resolution stated that in “accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.”⁵⁰⁶ The SEATO framework enabled the Johnson administration to frame the resolution merely as Congressional support for the President’s pre-existing power to use force in accordance with the SEATO obligation.

The decision to invoke SEATO was a deliberate legal strategy to expand executive power. Salans said that:

The reason SEATO was invoked was because the administration had to find some basis short of declaring war, or having it declared by congress, to justify the use of Presidential force while avoiding congress and SEATO was a treaty that had been ratified by the Senate and it was a really one of the only legal bases [and] Constitutional arguments that you could make; and the fact that the senate had

⁵⁰⁴ Ibid.

⁵⁰⁵ McGeorge Bundy, “A Brief Chronology of Events: August 3-7” 7 August 1964. Lyndon Johnson Library: National Security File, Vietnam; Box 77.

⁵⁰⁶ Gulf of Tonkin Resolution: Public Law 88-408.

advised and consented to it [meant] that the president could use force short of war to uphold it.⁵⁰⁷

The administration was deliberate in inserting SEATO into the resolution to boost the Constitutionality of the use of force. William Bundy, the Assistant Secretary of State for East Asia, recalled that the SEATO reference was not haphazard but was “one of the most important and deliberate parts of the Resolution” and that “in domestic Constitutional terms” the administration thought that “the reference to the SEATO treaty fortified the position of the Executive.”⁵⁰⁸ By turning to an ILF, the administration asserted that it had a strong basis to take action without continued Congressional involvement.

In placing the request to Congress to pass the resolution, the administration made clear that the President was merely asking for Congressional support for the SEATO obligation. “This treaty [SEATO] with its accompanying protocol obligates the United States and other members to act in accordance with their constitutional processes to meet Communist aggression against any of the parties or protocol states,” Johnson wrote to the Congress.⁵⁰⁹

In the Senate’s debate over the resolution, the administration’s defenders argued that the SEATO resolution gave the President an expansive power to use force. Though he would later turn on the administration, Senator Fulbright was one of the administration’s strongest defenders in the Senate. When Senator Cooper asked: “Are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense or with respect to the defense of any other country included in the SEATO treaty,” Senator Fulbright replied, “I think that is correct.”⁵¹⁰ Cooper, agitated by the answer, inquired; “If the President decided that it was necessary to use such force as could lead into war, we will give that authority

⁵⁰⁷ Salans, interview with author.

⁵⁰⁸ William Bundy. “Unpublished Memoirs.” Lyndon Johnson Library: Papers of William Bundy; Box 1. Chapter 14, 39.

⁵⁰⁹ Lyndon Johnson, “Statement to Congress,” 6 August 1964; http://avalon.law.yale.edu/20th_century/tonkin-g.asp

⁵¹⁰ Quoted: Ely, “War and Responsibility,” 18.

by this resolution,” and Senator Fulbright succinctly replied: “That is the way I would interpret it.”⁵¹¹ Despite his later claims, Fulbright was a leading proponent for an expansive interpretation of Johnson’s war powers.

The resolution passed in the Senate with only two dissenting votes and it was passed unanimously in the House of Representatives.⁵¹² Johnson delivered a speech that extolled his power to commit American forces while praising the cooperation from Congress. Johnson said that the in the decision to use force in Vietnam, “the responsibility was mine- and mine alone. I gave the orders.”⁵¹³ Importantly, Johnson did not see the resolution as granting him the power to use force but rather “this resolution confirms and reinforces powers of the Presidency.”⁵¹⁴ Already, the administration was carefully staking a public ground that the executive could commit U.S. forces and that if Congressional support waned the President would continue to have the Constitutional authority to use military force. Johnson knew that Congressional support for the war would lessen, as it had in the Korean War, and he was prepared. On his transcript of the meeting with Congressional leaders where they pledged their support for the Gulf of Tonkin Resolution and the war in Vietnam, Johnson scribbled: “put that on my desk, I’ll need it every day.”⁵¹⁵ He was preparing for the time when he could no longer count on Congressional support for the war.

E) Deepening the Debate as the War Escalates

Through early 1965, the President continued to enjoy robust support from Congress for the use of force in Vietnam and decided to not seek further authorization for the war. The

⁵¹¹ Quoted, *ibid*, 18.

⁵¹² E.E. Kenworthy, “Congress Backs President on Southeast Asia Moves,” *The New York Times*, 7 August 1964.

⁵¹³ Lyndon Johnson, “Remarks Upon Signing Joint Resolution of the Maintenance of Peace and Security in Southeast Asia,” 10 August 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26429#axzz1gRDCGaBB>

⁵¹⁴ *Ibid*.

⁵¹⁵ “Notes of the Leadership Meeting,” *FRUS*.

conflict had, to that point, resulted in limited American casualties and it was widely believed that Hanoi could be pressured into negotiating as the American military presence grew.⁵¹⁶ In March 1965, William Fulbright, who would later emerge as the Senate's leading critic of the war, argued on 'Meet the Press' that "present conditions are so critical in Vietnam" that he doubted that "a public debate either by my Committee [on Senate Foreign Relations] or the Congress would serve any good purpose."⁵¹⁷ At that point, the Congressional leadership was willing to accept the President's position and the administration would not have to defend the Constitutionality of their actions. The few Senators who were skeptical of the war were Democrats who had a partisan allegiance to the President and were unwilling to attack the President with much fervor. While some wanted Johnson to seek further Congressional authorization, the President was not sympathetic to this position. In a 'top secret' meeting with ex-President Eisenhower, Johnson took solace in Eisenhower's support that no further authorization was needed.⁵¹⁸

The escalation of military force was done without going back to Congress. In a closed-door meeting with Congressional leaders, Johnson pulled out copies of the Gulf of Tonkin Resolution and asked the Congressmen to "put it in your hip pocket- carry it home. When a newspaper report asks you tomorrow what our policy is, say, well this is what I voted for."⁵¹⁹ Leonard Meeker, the State Department Legal Adviser, put the matter bluntly in a 1 March memorandum. He advised the White House that, "from the domestic legal point of view, there is nothing to be gained by a U.S. declaration of war" and "a declaration of war would cause grave domestic concern. The act of declaring war is of so great finality that such an action would be

⁵¹⁶ William Berman, *William Fulbright and the Vietnam War: The Dissent of a Political Realist*, (Kent, Ohio: Kent State University Press, 1988), 34

⁵¹⁷ Quoted; *ibid*, 35.

⁵¹⁸ "Memorandum of Meeting With the President," 17 February 1965. Lyndon Johnson Library: Papers of William Gibbons, Box 5.

⁵¹⁹ "Congressional Briefing," 25 February 1965. Lyndon Johnson Library: Papers of William Gibbons, Box 5.

received with more fear than is desirable or necessary.”⁵²⁰ The policy-makers and the lawyers agreed that the war should proceed without further Congressional authorization.

I. Operating Rolling Thunder and the Renewed Constitutional Debate

In March 1965, the Johnson administration launched ‘Operation Rolling Thunder.’

Unlike previous operations, this large-scale bombing campaign was not tied to actions by the North Vietnamese forces but instead sought to destroy the bases of the North Vietnamese forces. The list of targets expanded from military bases to a wide array of ‘dual-use’ targets including communication lines and bridges. In Operation Rolling Thunder the U.S focus shifted from focusing their fighting in South Vietnam to fighting a war in North Vietnam.

With the expanding scope of U.S. action in Vietnam, the administration turned to the SEATO obligation as a means to denigrate protests over the administration’s policies. When a reporter challenged Johnson at a press conference on whether “the U.S. bombings of North Vietnam are bringing any results,” Johnson responded with anger.⁵²¹ The people in the administration “love peace and hate war” but “we have a commitment to the peace of South Vietnam.”⁵²² Johnson said:

That commitment is not only the result of the commitment President Eisenhower made in his letter [committing to SEATO] but that the Congress of the United States-- the Senate made in its vote of 82 to 1 in approving the SEATO Treaty... [and] if we ignore that treaty, we might as well tear up all the treaties we are party to.⁵²³

Johnson posited that because Congress had passed SEATO, they were not in a position to question the bombing of Vietnam. “We are there because we have a promise to keep,” Johnson

⁵²⁰ Leonard Meeker. “Declaration of War and the Viet-Nam Crisis,” 1 March 1965. Lyndon Johnson Library: Papers of William Gibbons, Box 5.

⁵²¹ Lyndon Johnson, “The President’s News Conference,” 1 April 1965;
<http://www.presidency.ucsby.edu/ws/index.php?pid=26859#axzz1gRDCGaBB>

⁵²² Ibid

⁵²³ Ibid

argued in his major address to Johns Hopkins University, “and I intend to keep that promise.”⁵²⁴ Johnson was seeking to justify this massive expansion of force without Congressional authorization on the basis of a ‘promise’ and ‘commitment’ to Vietnam.

As the Johnson administration escalated the offensive war against North Vietnam, and debated further troop increases, it ordered a wide-scale review of the Constitutionality of the war. The State Department, Justice Department and Defense Department were instructed to conduct independent reviews of the Constitutionality of the war, and to address the question of whether the administration should seek further Congressional authorization to expand the number of troops in Vietnam. All of the departments concluded that there was no need for further Congressional authorization. Writing for the Justice Department, Attorney General Nicholas Katzenbach argued that because the “commitment involved is certainly far less than all-out war,” the President had the power to order the operation without further Congressional authorization.⁵²⁵ State Department Legal Adviser Leonard Meeker concurred with this opinion and added that even though the Gulf of Tonkin Resolution did not anticipate such a large-scale conflict, this was irrelevant because, “The appropriation by Congress neither enlarged nor restricted the legal authority of the President to send combat troops to South Viet Nam.”⁵²⁶ In this, Meeker was arguing that the President should not be constrained by the confines of the war when the Gulf of Tonkin Resolution was passed. With these legal reassurances, the President

⁵²⁴ Lyndon Johnson, “Address at Johns Hopkins University,” 7 April 1965; <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650407.asp>

⁵²⁵ Nicholas Katzenbach, “Re: Whether further Congressional approval is necessary or desirable in connection with proposed deployment and use of troops in South Vietnam,” 10 June 1965. Lyndon Johnson Library: National Security File, Vietnam; Box 77.

⁵²⁶ Leonard Meeker, “Memorandum of Law,” 11 June 1965. Lyndon Johnson Library: National Security File, Vietnam; Box 77.

The Department of Defense took a different approach to the question. While arguing that the President did not need Congressional authorization, they emphasized that the President was acting “with Congress” due to the Gulf of Tonkin Resolution. See; L. Neiderlehner, “Regarding Armed Forces Deployment to Vietnam,” 10 June 1965. Lyndon Johnson Library: National Security File, Vietnam; Box 77.

was given the legal clearance to expand the war without going back to Congress to seek further authorization.

II. Ground Forces

In spring 1965, President Johnson ordered a large-scale increase in troops numbers and justified this on the basis of America's commitment to SEATO. Throughout 1965 the administration led a "gradual, unanalyzed shift in strategy from base protection to authorization for defensive forays against the enemy within a 50-mile perimeter of American bases."⁵²⁷ By June, General Westmoreland was given authority to "engage in full-scale offensive operations."⁵²⁸ In discussing this escalation in a 'top secret' NSC meeting, Johnson had emphatically declared that "we have a treaty obligation and we intend to keep our commitment."⁵²⁹ At that meeting, the decision was made to increase the size of U.S. forces without going to Congress. Under-Secretary of State Nicholas Katzenbach, an esteemed lawyer and former Attorney General, assured Johnson at the NSC meeting that "there is no doubt of our legal position to increase force deployments in Vietnam" and that "it is doubtful that we should go back to Congress to get additional authority every time we take a new action."⁵³⁰ The decision to escalate the war was made without consulting Congress, much less receiving any authorization, and to justify this it was framed as a fulfillment of the legal obligation to SEATO.

In announcing the decision to the American public, Johnson relied on the idea that SEATO created an obligation for the United States to deploy more troops. Johnson's 28 July

⁵²⁷ John Burke and Fred Greenstein, "Presidential Personality and National Security Leadership: A Comparative Analysis of Vietnam Decision-making," *International Political Science Review*, (10) 1989, 83.

⁵²⁸ Ibid, 83.

⁵²⁹ "Summary Notes of 522nd NSC Meeting," 11 June 1965. Lyndon Johnson Library: Papers of William Gibbons, Box 8.

⁵³⁰ Ibid.

press conference was focused on the question of “why we are in Vietnam.”⁵³¹ While he called the conflict in Vietnam a ‘war’ it was a “different kind of war” in which there would be no “solemn declarations,” such as a Declaration of War.⁵³² To justify America’s involvement in Vietnam, Johnson invoked the notion of America’s “promise” and “pledge” to Vietnam: “Three Presidents-- President Eisenhower, President Kennedy, and your present President--over 11 years have committed themselves and have promised to help defend this small and valiant nation.”⁵³³ Johnson was basing this on the 1954 SEATO commitment. To fulfill America’s commitment under SEATO, Johnson announced that on that day he had issued an order to “raise our fighting strength from 75,000 to 125,000 men almost immediately” and that “additional forces will be needed later, and they will be sent” as the military leadership saw necessary.⁵³⁴ In reality, Johnson had authorized 200,000 soldiers to be sent to Vietnam and was deceiving the Congress about the size of the military commitment.⁵³⁵

III. A Bipartisan Critique of Johnson

As the war in Vietnam escalated with a bombing campaign and a major increase in troop levels, the Congressional leadership began to demand a higher level of Congressional authorization. The Gulf of Tonkin Resolution had been passed without much consideration. That was a time when the war did not involve large-scale ground troop deployments nor the use of bombing. Congressional leaders, both Democrats and Republicans, began to demand their Constitutional prerogative to authorize the use of force.

⁵³¹ Lyndon Johnson, “The President’s News Conference,” 28 July 1965; <http://www.presidency.ucsb.edu/ws/index.php?pid=27116#axzz1dcb4Byv3>

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ Ibid.

⁵³⁵ Burke and Greenstein, “Presidential Personality,” 82

Republicans viewed the issue as a way to beat Democrats in the upcoming midterm elections in 1966. Congressman Gerald Ford, a Republican from Michigan who served as the House Minority Leader, said that obtaining a Declaration of War would be the “honest thing to do under the circumstances.”⁵³⁶ The topic even came up in gubernatorial campaigns; the Republican candidate for Governor of California, Ronald Reagan, suggested that the Gulf of Tonkin Resolution and international obligations were insufficient and that “if we are to abide by the Constitution, I think the President should go before Congress and let them decide for war or peace.”⁵³⁷ Senator Jacob Javits, a Republican from New York, quickly became the leading Republican critic of the Vietnam War and called for a new resolution. His goal was to force Johnson to scale back American involvement in Vietnam.

Democratic Senators, primarily Mike Mansfield and William Fulbright, began to turn on the Johnson administration as it became increasingly clear that the administration was unwilling to cooperate with them in a quest to seek peace in Vietnam. Fulbright was particularly agitated by Johnson’s intervention in the Dominican Republic in April 1965.⁵³⁸ Fulbright’s investigation revealed that the Congress had been deceived by the administration and he decided to go public with his findings in a September 1965 speech that severed his cooperation with the White House.⁵³⁹ With his relationship with the administration severed and his growing hostility to the war in Vietnam, Fulbright began calling for a more robust Congressional authorization for the war.

In responding to these rising calls for Congressional authorization, the administration and its defenders turned towards the international legal infrastructure to defend the Constitutionality

⁵³⁶ “War Declaration Suggested,” *The New York Times*, 6 August 1965.

⁵³⁷ “Reagan Urges Johnson to Tell Vietnam Facts,” *Los Angeles Times*, 21 October 1965.

⁵³⁸ William Fulbright, “Foreword” in Glennon, “Constitutional Diplomacy,” xii.

⁵³⁹ Randall Woods, *Fulbright: A Biography*, (New York: Cambridge UP, 1995), 384

of the President's use of force. The defenders of the administration in Congress and the media focused on the SEATO obligation and the complications stemming from a Declaration of War. In its editorial on the 'Case Against Declared War,' the *Los Angeles Times* noted that "we are legally in Vietnam not as a principal party, but as an invited ally to help the South Vietnamese stop aggression."⁵⁴⁰ This was not a 'war' in the Constitutional sense, they argued. Declaring a war, warned some Democratic Congressmen loyal to the administration, would risk bringing China into the conflict and make negotiations with Hanoi far more difficult.⁵⁴¹ In seeking to prevent a vote on the Vietnam War, the administration's defenders sought to argue that a "Declaration of War" would be catastrophic for the peaceful resolution of the conflict.

The State Department concurred with this view that a Declaration of War could undermine the war effort. In an official memorandum, the State Department argued that:

To declare war would add a new psychological element to the international situation since in this century declarations of war have come to imply the dedication to the total destruction of the enemy. It would increase the danger of misunderstanding of our true objectives in the conflict by the various Communist states, and increase the chances of their expanded involvement in it.⁵⁴²

In this view, to make peace the Congress should never have the chance to vote on a Declaration of War. A Declaration of War would "question the sincerity of the President's claims concerning his desire for a peaceful settlement allowing the various nations of the area, including North Vietnam, to live together in economic cooperation, and his reiteration that we do not threaten the existence of North Vietnam."⁵⁴³ The Constitution's emphasis on the need for a 'Declaration of War' was supposed to limit the executive's capacity to use force without

⁵⁴⁰ "The Case Against Declared War," *Los Angeles Times*, 23 November 1965.

⁵⁴¹ James Reston, "Washington: The Republicans on Vietnam," *New York Times*, 19 November 1965.

⁵⁴² State Department Position Paper, "The Question of a Formal Declaration of War in Vietnam," 19 November 1965; <http://www.virtual.vietnam.ttu.edu/cgi-bin/starfetch.exe?z71ptvCEvDuX0k@akFIK2KxhbbL9gNn4Vzo@GoIXOFK@pNVISBnA7dXk.7uchB2TTVWVfISRVWNQlyXxJu9r29nOUBMsHQ5eBcLHDLILyDA/2184810014.pdf>

⁵⁴³ Ibid.

Congressional authorization. Now, the executive was invoking the language of ‘war’ to argue that if the executive went to Congress obtain such authorization, the President would be forcing the United States into a position that would undermine international legal frameworks.

The State Department even went so far as to argue that a U.S. Declaration of War would violate U.S. Commitments to the United Nations Charter. This Declaration of War, the State Department warned, “would be the first and only since the signing of the United Nations Charter” and it would “significantly reduce the flexibility of the United States to seek a solution among extremely complex factors and reduce our adversary’s own reasoned approach to a solution” in contradiction of U.S. policy.⁵⁴⁴ The administration was taking an increasingly aggressive response to calls for a Declaration of War; in this report they argued that a Declaration of War would undermine America’s global commitments and the potential for success in the war.

The question of whether a Declaration of War was necessary continued to be at the forefront of the broader debate over Vietnam. General Maxwell Taylor, the former chairman of the Joint Chiefs of Staff, warned that a Declaration of War would wrongfully suggest that “it is not essentially a South Vietnamese war.”⁵⁴⁵ The protest from Senators concerning the need for Congressional authorization continued to grow and Johnson decided to address the issue in a major speech.

As the President prepared for his 12 January 1966 State of the Union, there was a debate within the administration on whether Johnson should use the platform to seek a Declaration of War. Johnson had tasked multiple groups of advisers with writing drafts of his major address and one group urged him to obtain a Declaration of War. They argued, as the *Washington Post*

⁵⁴⁴ Ibid.

⁵⁴⁵ “Formal War Is Opposed By Taylor,” *The Washington Post*, 13 December 1965.

paraphrased, that “the bulk of Congress stands with President Johnson, and this would be clearly demonstrated when the [Congressional] debate ended.”⁵⁴⁶ This argument was in some ways an extension of Johnson’s argument for obtaining a resolution in 1964; a Congressional vote would quiet Congressional dissent. However, Johnson did not agree this time around.

Johnson utilized the State of the Union to reaffirm the legal grounds for the war on the notion of an American ‘commitment’ to Vietnam rooted in international law. In the speech, Johnson called the U.S. involvement in Vietnam a “war” that America had to keep fighting because “a just nation cannot leave to the cruelties of its enemies a people who have staked their lives and independence on America's solemn pledge--a pledge which has grown through the commitments of three American Presidents.”⁵⁴⁷ “In Asia and around the world,” he continued, “are countries whose independence rests, in large measure, on confidence in America's word and in America's protection.”⁵⁴⁸ Johnson did not request a Declaration of War. While he did not speak to the legal issues explicitly, he was arguing that the basis for American involvement there was an American commitment stemming from the SEATO treaty.⁵⁴⁹ Standing before the House of Representatives and the Senate, Johnson was implying that he already had a legal basis for action through SEATO, which had been recognized in the Gulf of Tonkin resolution, and would not be requesting any new authorization going forward.

Beyond this rhetorical argument, the administration constructed an in-depth defense of the war’s Constitutionality. In early 1966, the White House commissioned State Department Legal Adviser Leonard Meeker to write a full-scale defense of the Constitutionality of the war. While previous defenses of the war’s constitutionality had placed a limited emphasis on the

⁵⁴⁶ Rowland Evans and Robert Novak, “Vietnam and Congress,” *Washington Post*, 2 January 1966.

⁵⁴⁷ Lyndon Johnson, “State of the Union Address,” 12 January 1966; www.presidency.ucsb.edu <http://www.presidency.ucsb.edu/ws/index.php?pid=28015#ixzz1YjNbUV00>

⁵⁴⁸ Ibid.

⁵⁴⁹ His calculation of “three Presidents” implied a continual commitment in the Eisenhower, Kennedy and Johnson administrations.

SEATO argument, Meeker made it a central defense of the increasingly unpopular war. In spelling out an argument that both Johnson and Rusk had become fond of, Meeker argued that the President did not need further Congressional authorization because he was fulfilling a commitment to protect South Vietnam as part of the U.S. obligations under SEATO. The President's power "rest not only on the exercise of Presidential powers under article II [of the Constitution] but on the SEATO treaty- a treaty advised and consented to by the Senate," argued Meeker.⁵⁵⁰ The President then had a wide-ranging power to interpret that obligation because "what constitutes an adequate deterrent or an appropriate response, in terms of military strategy, may change... [and] that does not preclude the President from reaching a different military judgment in different circumstances" than the one that was envisioned when the pact was signed.⁵⁵¹ The President, Meeker was arguing, had the power to interpret the treaty's obligation to be as robust as the President felt was necessary.

This legal defense was turned into a public argument by the administration. To convince the legal profession of the war's Constitutionality, Meeker published the work as an article in the *Yale Law Journal*.⁵⁵² Bill Moyers, the White House press secretary, enlisted Meeker to distill the argument down to a shorter version he could use in response to questions at press briefings. While Meeker disdained the task of simplifying his argument and told Moyers that "three pages is about the smallest compass into which we can compress the main points," he nonetheless complied with the request.⁵⁵³ In addressing the Constitutionality of the war, Meeker instructed

⁵⁵⁰ Leonard Meeker, "The Legality of United States Participation in the Defense of Viet-Nam," 4 March 1966. Lyndon Johnson Library: National Security File, Vietnam, Box 97.

⁵⁵¹ Ibid.

⁵⁵² Leonard Meeker, "The Legality of United States Participation in the Defense of Viet Nam," *Yale Law Journal*, (75) 1966.

⁵⁵³ Leonard Meeker, "Memorandum for Mr. Bill D. Moyers: The Legality of United States Participation in the Defense of Vietn Nam," 11 April 1966. Leonard Meeker Papers: Amherst College Library. Amherst, MA.

Moyers that “it is not necessary to rely on the Constitution alone as the source of the President’s authority” because “the SEATO treaty, which forms part of the law of the land, sets forth a U.S. Commitment to defend South Viet Nam against armed attack.”⁵⁵⁴

As the war dragged on and became increasingly unpopular, the administration placed greater emphasis on the SEATO argument to defend the Constitutionality of the war. As members of Congress began to demand a Declaration of War, the administration turned to SEATO to label the U.S. involvement in Vietnam as the fulfillment of a ‘commitment,’ rather than as a war. The debate over the war’s Constitutionality would come to a climax in 1967 when Senator Fulbright directly challenged the administration in nationally televised hearings.

F. Fulbright’s National Commitment Hearings: August 1967

By 1967, Senator Fulbright realized that he would need a more robust strategy to press Johnson into obtaining a Declaration of War. Fulbright had become increasingly agitated with the administration’s position, particularly the notion that the war in Vietnam arose out of America’s commitment in SEATO, and he wanted to directly attack that line of argument. In August 1967 he called a set of hearings on America’s ‘national commitments’ that would put public attention on this topic. Fulbright introduced a resolution lamenting that “accurate definition of the term ‘national commitment,’ in recent years has become obscured” and calling for a restoration of the idea that “a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other

⁵⁵⁴ Ibid.

legislative instrumentality specifically intended to give effect to such a commitment.”⁵⁵⁵ The resolution did not mention Vietnam explicitly but its intention was clear. Fulbright was attacking the Johnson administration’s invocation of national commitments. This would be the second ‘great debate’ on executive war power.

In undertaking the hearings to push through the resolution, Fulbright found great endorsements from inside and outside of the Senate. Fulbright’s allies in the Senate for this effort included some of the body’s highest-profile members; Frank Church, Albert Gore, Eugene McCarthy and Mike Mansfield.⁵⁵⁶ In the months leading up to the hearings, newspapers that had criticized the war saw the hearings as a vehicle for questioning the legitimacy and legality of the deeply unpopular war. The *Boston Globe* wrote that “Passage of the Fulbright Resolution, after hearings in September, would be an encouraging sign that the upper chamber of Congress is moving to regain its full power of advice and consent supposedly guaranteed by the Constitution.”⁵⁵⁷ The *Los Angeles Times* saw the hearings as a way to rid the United States of problematic global commitments: “the United States has allowed itself to become saddled with a whole collection of vague and ill-defined U.S. commitments around the world--commitments which could lead to future Vietnam-style entanglements.”⁵⁵⁸ The Fulbright hearings would, they argued, “put the White House, and the world at large, on notice that the Senate will recognize as binding only those commitments which have been submitted for review in a national manner.”⁵⁵⁹ For critics of the war who had found the Johnson administration’s reliance on SEATO to be a disingenuous legal strategy, this was a chance to publicly defeat that line of argumentation.

⁵⁵⁵ “Senate Resolution 15,” in U.S. Senate Committee on Foreign Relations, “Hearings on U.S. Commitments to Foreign Powers,” 90th Congress, August/September 1967, 4 [hereinafter ‘Commitment Hearings’]

⁵⁵⁶ Commitment Hearings, 1.

⁵⁵⁷ “The Fulbright Resolution,” *The Boston Globe*, 2 August 1967.

⁵⁵⁸ “Fulbright Move is Timely,” *Los Angeles Times*, 2 August 1967.

⁵⁵⁹ Ibid.

Fulbright's opening statement was emotionally charged as he reflected on the Vietnam War. It was a war "which I oppose so deeply" and he spoke of his new "awareness of institutional problems that I probably should have had before, but in fact did not."⁵⁶⁰ The hearings, he said, would question how the President was undertaking "major military actions on the basis of executive decisions made either secretly or under such alleged conditions or urgency as to preclude meaningful consultation with Congress."⁵⁶¹ While Fulbright had readily accepted the Gulf of Tonkin Resolution in 1964, this hearing was his attempt to make amends for what he viewed as that "considerable delinquency in not having raised similar questions at the time of the Tonkin Bay matter when that came up."⁵⁶²

While Fulbright brought in a number of friendly academics to testify, the star witness was Nicholas Katzenbach. He was the Undersecretary of State and had previously served as the Attorney General under President Johnson. As a leading government lawyer focusing on civil rights, he had stood in the door of the University of Alabama to face down George Wallace over issues of segregation. These stalwart liberal credentials made the anti-war movement view him as an administration official who could come out in support of their cause. Indeed, Katzenbach was skeptical of the war in Vietnam and had taken the position as Undersecretary because he wanted to help negotiate a treaty to end the war.⁵⁶³ He viewed Secretary of State Dean Rusk as "incompetent" and he had wanted to bring the bombing campaign launched in Operation Rolling Thunder to a close because "bombing had limitations as it only increases animosity."⁵⁶⁴ However, he kept these views out of the public debate.

⁵⁶⁰ Commitment Hearings, 1.

⁵⁶¹ Ibid, 1.

⁵⁶² Ibid, 188.

⁵⁶³ Nicholas Katzenbach, interview with author. Princeton, New Jersey. 23 September 2010.

⁵⁶⁴ Ibid.

Katzenbach prepared carefully for this moment in the national spotlight. Jared Carter, the Assistant Legal Adviser and a former clerk to Justice William Douglas, was assigned to work with Katzenbach in crafting the administration's defense of the war's legality. Carter recalls that a small group of lawyers spent "hours in Nick's office" trying to devise their argument.⁵⁶⁵ As a former Attorney General, Katzenbach was given the authority to come up with the ideas and the others "would just follow his lead," according to Carter.⁵⁶⁶ The State Department team wanted to score political points against Fulbright and the committee. Carter thought that Fulbright was just "wanting to get some publicity" and that "the big issue [for Fulbright] was casting blame for [the war] which was clearly unpopular and Fulbright, in all of his sanctimony, wanted to act like he was duped by the Gulf of Tonkin Resolution."⁵⁶⁷ From the position of the administration's lawyers, Fulbright's Senate Foreign Relations Committee was to be approached as a hostile entity.

Katzenbach's opening statement did not mention the war in Vietnam but he did make a legal argument that clearly alluded to his support for the war's Constitutionality through SEATO. He later claimed that Fulbright had personally promised him that the hearings would only be about legal principles and not the war in Vietnam.⁵⁶⁸ Katzenbach praised "the consistent, coordinate[d] action of the Executive and Legislative branches, each in their proper sphere, to propose and dispose, to create and carry out a national commitment."⁵⁶⁹ While he wasn't talking directly about Vietnam, Katzenbach was adding intellectual ammunition to the claim that SEATO obligated U.S. military action in Vietnam. Katzenbach suggested that national commitments were embraced by the legislative branch: "the underlying framework concerning

⁵⁶⁵ Jared Carter, telephone interview with author. 29 September 2010.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

⁵⁶⁸ Katzenbach, interview with author.

⁵⁶⁹ Commitment hearings, 74.

collective security in the past 20 years has been a series of treaty obligations and legislative provisions- the United Nations Charter, coupled with treaties with 42 countries. On each of these the President sought and secured the advice and consent of the Senate.”⁵⁷⁰ These commitments came to bring on a “constitutional quality” and these promises “to our allies are more than a matter of constitutional process. It is essential that these basic commitments should be clear, both to our friends and to our potential adversaries. Fitfulness of policy, and unpredictability of action make for serious international instability, disorder and danger.”⁵⁷¹ In this, Katzenbach was warning the Senate that if they sought to question America’s commitment to Vietnam they would be endangering the value of America’s promises in international relations. This was nothing less than an attempt to threaten the Senators that their hearings were endangering U.S. national security.

Fulbright was unfazed by this warning. He immediately challenged Katzenbach to specify what his position was on the Senate resolution. Katzenbach, seemingly flustered by the exchange, said that he “saw no need for it” because it is “confusing, and I doubt that even in our almost 200 years we have achieved the wisdom to resolve these problems which our forefathers, in drafting the Constitution decided that they would leave to the Congress and the President...”⁵⁷² Fulbright made clear that he did not agree with this position. Katzenbach was “livid” that Fulbright was challenging his position on Vietnam and grew increasingly frustrated with the proceedings.⁵⁷³

In seeking to defend his position, Katzenbach turned to the United Nations Charter in a somewhat unconventional argument. Katzenbach defended the administration’s stance: “The use

⁵⁷⁰ Ibid, 74.

⁵⁷¹ Ibid, 76.

⁵⁷² Ibid, 77.

⁵⁷³ Katzenbach, interview with author.

of the phrase ‘to declare war’ as it was used in the Constitution of the United States had a particular meaning in terms of the events and the practices which existed at the time it was adopted and which existed really until the United Nations was organized.”⁵⁷⁴ While the Truman administration had obtained United Nations authorization as a means to circumvent a Declaration of War, Katzenbach was taking this argument further in stating that the United Nations framework, even without an authorizing resolution, removed the Congress’s power to issue a Declaration of War.

For Congress to issue a Declaration of War, Katzenbach argued, would be to violate the United Nations Charter. “Now, with the abolition of the use of force for all but a small number of purposes, by the commitment expressed in the U.N. Charter, with respect to aggression, the question arises as to how the Congress can and should participate in the decision to use force,” and Katzenbach argued that, “a declaration of war would not, I think, correctly reflect the very limited objectives of the United States with respect to Vietnam.”⁵⁷⁵ Declaring war was just “outmoded phraseology,” he said.⁵⁷⁶ In keeping with the State Department’s earlier position, he argued that a Declaration of War “carried various international consequences to it, so that it had a greater importance than simply the use of armed forces.”⁵⁷⁷ This meant that the changing international circumstances had to be factored into how the nation utilized a Declaration of War.⁵⁷⁸ Katzenbach was delivering a robust defense of the administration’s war powers by asserting that a Declaration of War was a threat to the international legal order.

In taking the argument to its full extension, Katzenbach argued that the SEATO treaty gave the President the authority to carry out attacks in Vietnam without any Congressional

⁵⁷⁴ Commitment hearings, 80. (emphasis added)

⁵⁷⁵ Commitment hearings, 81.

⁵⁷⁶ Ibid, 81.

⁵⁷⁷ Ibid, 81.

⁵⁷⁸ Ibid, 81.

authorization. “Congress had an opportunity to participate in these decisions. Congress ratified the SEATO treaty by an overwhelming vote, which expressed the security concerns and the general obligation of the United States in accordance with its constitutional process to attempt to preserve order and peace and defense against aggression in Southeast Asia,” he argued.⁵⁷⁹ For Katzenbach, the obligations under the SEATO treaty, which itself had been approved by Congress, meant that there was sufficient authority for the President’s actions in Vietnam. He elaborated that, “the President had constitutional authority to employ troops in [Vietnam] because of a variety of expressions of view of the Congress, including the SEATO treaty.”⁵⁸⁰

By turning to the SEATO treaty and the United Nations Charter, Katzenbach was able to place the administration’s position in a legal framework and accuse the Senators of undercutting America’s legal obligations. When Senator Fulbright pursued a line of questioning on the meaning of the Gulf of Tonkin Resolution, Katzenbach attempted to turn the tables on Fulbright by arguing that the administration was defending America’s legal obligations while Fulbright was attempting to break those promises. The Gulf of Tonkin Resolution relied on SEATO and Katzenbach argued that “it wouldn’t make any difference” if the resolution was repealed because “we would still have the SEATO obligations.”⁵⁸¹ He scolded Fulbright: “we should not attempt to avoid those obligations that we have in the world, whether they come from specific treaties and take on certain formalities, specificity and, indeed, become the law of the land obliging the President to carry them out.”⁵⁸² This line of argument emphasized that the President’s use of force without Congressional authorization is not merely a legal option but a legal obligation. By affixing part of the President’s power in obligations under ILFs, the position “was consistent

⁵⁷⁹ Ibid, 162.

⁵⁸⁰ Ibid, 143.

⁵⁸¹ Ibid, 146.

⁵⁸² Ibid, 146.

with the position taken by the State Department and the executive branch generally since President Truman's decision to intervene in Korea in June 1950," as historian Stephen Griffin has argued.⁵⁸³

For Katzenbach, the whole matter was as simple as keeping a promise. He argued: "it is a little bit like making a bet in a poker game. I think if you make the bet you agree to make the bet, then you have made it, and you stay with it it is there. You do not afterward try to say that I didn't understand what I was doing," Katzenbach argued.⁵⁸⁴ In essence, Katzenbach was arguing that the United States had made a promise in the SEATO treaty and the President was now acting to uphold it and he would not need any further Congressional authorization to carry this out.

Fulbright closed the hearings by directly attacking Katzenbach's position and seeking to tie this to a broader debate over the war. He argued that "international law- and all these consequences you mentioned about neutrality and other things- applies when there is a fact of war, not a declaration. The declaration of war in the Constitution is relevant and significant only to our domestic politics of domestic law."⁵⁸⁵ Though Katzenbach had not conceded to Fulbright's position, Fulbright emerged with the more cogent argument.

The hearings had far-reaching political consequences. The Senate Foreign Relations Committee released a report calling for an end to the "dangerous tendency" of expansive executive power which threatened to bring the United States to "tyranny or disaster."⁵⁸⁶ While Senator Eugene McCarthy was silent at the hearings, he was enraged. Shortly thereafter he told the committee that, "Somebody's got to take these guys on, and I'm going to run for

⁵⁸³ Stephen Griffin, "The Legal Justification for the Vietnam War: Backwards and Forwards with Nicholas deB. Katzenbach," presented at the U.S. Department of State Conference, "The American Experience in Southeast Asia," 30 September 2010, 3.

⁵⁸⁴ Ibid, 166.

⁵⁸⁵ Ibid, 174-175.

⁵⁸⁶ John Finney, "Senate Unit Sees War Power Peril," *New York Times*, 22 November 1967.

president.”⁵⁸⁷ McCarthy would go on to run on an anti-war platform and his success would drive Johnson into deciding not to seek another term. Katzenbach’s testimony “perhaps more than any other factor” reported the *New York Times*, inadvertently “started the growing movement to repeal the [Gulf of Tonkin] Resolution.”⁵⁸⁸ The exchange had, as Stephen Griffin noted, “brought to a head constitutional issues that had been simmering throughout the Vietnam War” and it thrust the war powers debate into the national spotlight.⁵⁸⁹

At a legal level, the hearings began a process for the Senate to repudiate the President’s power to commit U.S. forces through a ‘commitment’ in an ILF. With the hearings as the impetus, the Senate passed a resolution, on a strong 70 to 16 vote, affirming that the President could not make a national commitment to use U.S. forces. The National Commitments Resolution stated that “it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty, statute or concurrent resolution of both Houses of Congress specifically providing for such a commitment.”⁵⁹⁰

Though this was only a non-binding statement of the Senate’s will, it was a direct response to the administration’s continued reliance on the SEATO argument. Senator Fulbright and his colleagues had kept silent for years concerning their frustrations over the war and they had finally come out to assault the President’s Constitutional power. With the administration seeking refuge in the SEATO resolution, the Senators attacked the Constitutional legitimacy of a treaty that would obligate the U.S. to use force without Congressional authorization.

⁵⁸⁷ Quoted: Pat Hot, “Oral History.”

⁵⁸⁸ “Gulf of Tonkin Measure Voted In Haste and Confusion in 1964,” *The New York Times*, 25 June 1970.

⁵⁸⁹ Griffin, “The Legal Justification,” 2.

⁵⁹⁰ Louis Fisher, *Congressional Abdication on War and Spending*, (College Station, Texas: 2000), 62.

G. The Tragedy of the Johnson Administration Lawyers

Throughout his Presidency, Johnson was upset by the criticism that he was waging an unconstitutional war. He paid careful attention to the legal debate surrounding the war. When a group of law professors protested that the war was unconstitutional in a 1966 letter, he personally called on Myres McDougal, the former State Department official who was then a professor at Yale Law School, to defend the Constitutionality of the war.⁵⁹¹ At Johnson's direction, White House lawyers worked carefully with a small group of professors to defend the Constitutionality of the war.⁵⁹² Johnson had, in his view, gone out of his way to engage Congress in getting a resolution precisely in order to avoid heated Congressional criticism.

In pursuing the war in Vietnam, the Johnson administration tolerated little dissent and this was particularly true of the lawyers they charged with defending the Constitutionality of the war. The administration's decision-making regarding Vietnam was characterized by a strong sense of hubris, particularly by National Security Adviser McGeorge Bundy, and there was a widespread belief that the war could be won if everyone was onboard. Dissent was actively undermined when objections to policy-making were raised and questions were steered towards the question of "how and when, rather than whether, the United States should wage war in Vietnam," as historian Andrew Preston notes.⁵⁹³ Though the Johnson administration actively put forward the arguments from their lawyers on the Constitutionality of the war, the administration's leadership prevented the lawyers from making a meaningful dissent.

The executive branch lawyers had made a tragic mistake; they had signed off on the war's Constitutionality in the vain hope that this would enable them to make meaningful change

⁵⁹¹ John Norton Moore, telephone interview with author. 16 November 2011.

⁵⁹² William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships*, Part IV, revised edition, (Princeton: Princeton UP, 1995), 246.

⁵⁹³ Andrew Preston, *The War Council: McGeorge Bundy, the NSC, and Vietnam*, (Cambridge: Harvard UP, 2006), 7.

within the administration. Early on, Leonard Meeker had told Dean Rusk that “the war’s Constitutionality was questionable” but Meeker decided to ignore that issue in hopes of being able to focus on more narrow questions of how the war was being fought.⁵⁹⁴ Indeed, Meeker wrote a strident dissent in February 1966 to the mining of North Vietnamese harbors because it was dubious if “our action would be sustained if a judicial body were ever to scrutinize it in litigation” that could arise.⁵⁹⁵ While Meeker was challenging a relatively minor dimension of the war, Bill Moyers, the White House press secretary, enlisted him to convince skeptical reporters of the war’s Constitutionality.⁵⁹⁶

While Meeker was publicly supporting the Constitutionality of the war, he was working within the administration to push forward a second Congressional resolution. Meeker was not directly questioning the Constitutionality of the war, but in 1966 he drafted a new Congressional resolution that he wanted the administration to obtain. In the “confidential” memorandum to his State Department superiors, Meeker argued that the resolution would “bring history up to date” and that with this resolution the administration would “retain the full authorization to the President set forth in the 1964 resolution.”⁵⁹⁷ The resolution would “have a reassuring and unifying effect on members of the Congress,” Meeker assured.⁵⁹⁸ His proposal to return to Congress went nowhere and historians overlooked his effort. Instead, Meeker’s legacy centered on the “Meeker Memorandum” justifying the war’s Constitutionality. The public support for the war, not the private dissent, became the consequential aspect of Meeker’s work.

⁵⁹⁴ Salans, interview with author.

⁵⁹⁵ Leonard Meeker, “Possible Mining of North Vietnamese Harbors,” 4 February 1966. Amherst College: Leonard Meeker Papers, Box 10.

⁵⁹⁶ Leonard Meeker, “White House Press Briefing,” 4 February 1966. Amherst College: Leonard Meeker Papers, Box 10.

⁵⁹⁷ Leonard Meeker, “Draft of Joint Resolution on Viet Nam,” 21 February 1966. Meeker Papers, Box 10.

⁵⁹⁸ Ibid.

In the few times when the lawyers directly challenged the Constitutionality of the war, they were castigated. Carl Salans, the Deputy Legal Adviser at the State Department, recalled a meeting with Under-Secretary of State U. Alexis Johnson in which he “raised questions about the legality of the war [and Johnson] shut me up and told me that the legal advisers should butt out of the war; he told me that the legal arguments were not what the President’s office wanted. And [he] told me president wanted some Constitutional authority to do what he and his team wanted.”⁵⁹⁹ The message to the lawyers was clear; they could continue to have limited input on the war as long as there was no dissent on the Constitutionality of the war. Throughout the course of the war, they continued to try to work within the administration to influence how the war was being fought.

In making this calculation, the lawyers learned only when it was too late that their views would be entirely ignored as they continued to protect the Constitutionality of the war. In making decisions regarding the war, Carl Salans reflected that, “the legal adviser’s office was largely ignored and the voices coming out of the office were largely suppressed except to the extent that they were necessary to dress up the military intervention as in compliance with international law and the constitution.”⁶⁰⁰ Jared Carter reflected bitterly on the experience of being “stiff-armed and not as intimately involved as we would liked to have been” in Vietnam policy.⁶⁰¹ The lawyers stayed in place to assert, despite their doubts, that the war was Constitutional. They hoped to somehow make the war more lawful, or even to scale it down, but found that they were ultimately just the spokesmen for a war that continued to rage even as the Johnson administration came to its conclusion in January 1969. The lawyers had failed to stop the war in any meaningful sense. In Johnson’s final year in office, 1968, the United States had just finished a year in which

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ Carter, interview with author.

it had lost more soldiers than in any previous year and the Viet-Cong resistance was rising with the Tet Offensive. These lawyers wished to curtail the war but had instead helped to establish the legal basis for prolonging and deepening America's military involvement.

With the war behind them, these lawyers often found it hard to reflect on what they had done. William Bundy, while being too proud to admit that he had made a mistake in his authorship of the Gulf of Tonkin Resolution, would seek to distance himself from the document that he had done so much to push for and prepare. He cast the blame on Abram Chayes, whom he claimed was brought in to write the resolution.⁶⁰² While it is impossible to know for certain, it is highly unlikely that Chayes played any role in the resolution- the reality was that Bundy was trying to disavow his involvement with the notorious resolution.⁶⁰³ By contrast, Nicholas Katzenbach would go on to disavow the position he had taken during the war on the President's power to use force and become an active campaigner against the President's power to use force in the Gulf War without Congressional authorization. Even forty years after he left government, he remained envious of his colleague, Undersecretary of State George Ball, who has been valorized in history for his role in resigning from the administration over his dissent against the war.⁶⁰⁴ Katzenbach was a silent dissenter but his more significant role was to lead the administration's resistance against having to obtain a Declaration of War. Katzenbach, and the other Johnson administration lawyers, had opposed a war they helped to prolong.

G) The Nixon Administration: The Legal Basis for the War in Cambodia

⁶⁰² William Bundy, "Interview," *WGBH Vietnam Collection*; <http://openvault.wgbh.org/catalog/vietnam-0a7751-interview-with-william-p-bundy-1981>

⁶⁰³ Antonia Chayes, correspondence with author. 2-4 December 2011.

⁶⁰⁴ Katzenbach, interview with author.

When he became President in 1969, Richard Nixon set about to readjust the war in Vietnam. Working with National Security Adviser Henry Kissinger, Nixon emphasized a policy of ‘Vietnamization’ that would slowly withdraw U.S. forces while also embracing a more expansive military effort in Cambodia.

In this period of the war, the Nixon administration shifted the legal grounds for the war away from SEATO and the Gulf of Tonkin Resolution towards the President’s power as Commander-in-Chief. With Cambodia opting out of SEATO and Congress gaining the momentum to overturn the Gulf of Tonkin Resolution, this legal strategy was a necessity.

Secret bombing in Cambodia began in March 1969 as part of “Operation Menu,” but it wasn’t until April 1970, following a coup in Cambodia, that the Nixon administration decided to commence a ground-troop invasion of the country and to make this public. While Secretary of Defense Melvin Laird and Secretary of State William Rogers both opposed the plan because it would undermine negotiations in Paris and intensify domestic opposition to the war, National Security Adviser Henry Kissinger pushed the plan forward as a necessary tactic to defeat the Viet-Cong.⁶⁰⁵ On 26 April 1970, Nixon gave the order that “we would go for broke” and he authorized the incursions and the assaults began on 1 May.⁶⁰⁶

The task of defending the Constitutionality of this incursion fell to the Department of Justice’s Office of Legal Counsel. The director of the office, William Rehnquist, was a young lawyer who had been a steadfast Republican and supporter of Nixon. The future Supreme Court Chief Justice was faced with a challenge that Johnson’s lawyers had not confronted; Cambodia had previously pulled out of SEATO which would have made any claim that the U.S. was fulfilling an obligation to the ILF null and void.

⁶⁰⁵ Bernard Nalty, *Air War Over South Vietnam*, (Washington, D.C., Air Force History and Museum Program, 2000), 129.

⁶⁰⁶ Samuel Lipsman and Edward Doyle, *Fighting for Time*, (Boston: Boston Publishing Company, 1983), 152.

Instead, Rehnquist argued that the incursions into Cambodia could be justified entirely through the President's power as Commander-in-Chief. He developed a historical argument which demonstrated that "the United States may lawfully engage in armed hostilities with a foreign power without a congressional declaration of war."⁶⁰⁷ Seeking to utilize Truman's use of force in the Korean War as a precedent for the far-ranging powers of the President as the Commander-in-Chief, Rehnquist had to argue that the President's powers in that circumstance had not been enhanced by the United Nations authorization:

The fact that [Truman's] actions were authorized by the United Nations Charter, however, does not reduce the value of the incident as a precedent for executive action in committing United States Armed Forces to extensive hostilities without a formal declaration of war by Congress. The United Nations Charter was ratified by the Senate and has the status of a treaty, but it does not by virtue of this fact override any constitutional provision. If a congressional declaration of war would be required in other circumstances to commit United States forces to hostilities to the extent and nature of those undertaken in Korea, the ratification of the United Nations Charter would not obviate a like requirement in the case of the Korean conflict.⁶⁰⁸

Rehnquist argued that because the Korean War had been fought based on the President's power as Commander-in-Chief, Nixon had the Constitutional power to pursue a much smaller conflict in Cambodia. In this, Rehnquist was backtracking on the Truman administration's claim that the United Nations gave the President a heightened power and the Johnson administration's embrace of this logic. Rehnquist wanted to make the Korean War a simple example of a President using massive force as Commander-in-Chief. This was the precedent he needed to justify the Constitutionality of Nixon's use of force in Cambodia.

In describing the Constitutional basis for fighting in Vietnam, Rehnquist omitted any reference to the SEATO argument. Instead, he sought to emphasize the President's power as

⁶⁰⁷ William Rehnquist, "The President and the War Power: South Vietnam and the Cambodian Sanctuaries," *Opinion of the Office of Legal Counsel*, 21 May 1970; <http://www.lawfareblog.com/wp-content/uploads/2011/03/rehnquist.cambodia.pdf>

⁶⁰⁸ Ibid.

Commander-in-Chief.⁶⁰⁹ This was a direct departure from the line of argumentation emphasized by the Johnson administration. In developing this claim, Rehnquist concluded that the incursion into Cambodia, which was certainly a smaller commitment than the one in Korea or Vietnam, fell within the President's power as Commander-in-Chief. "President Nixon's determination to authorize incursion into the Cambodian border area by United States forces in order to destroy sanctuaries utilized by the enemy," argued Rehnquist, "is the sort of tactical decision traditionally confided to the Commander-in-Chief in the conduct of armed conflict."⁶¹⁰ While the nation protested the expansion of the war into Cambodia, a campaign that greatly escalated the human costs of the war, Rehnquist asserted that this was merely a 'tactical' decision that was within the confines of the President's power as Commander-in-Chief.

The Nixon administration had no recourse to the SEATO argument and decided to forgo any reliance on the Gulf of Tonkin Resolution. Witnessing the growing tide of Congressional anger over the resolution, the Nixon administration supported the Congressional attempt to overturn the resolution. The State Department endorsed the repeal of the resolution because it would "contribute greatly to an early and honorable settlement by making clear to the other side that the majority of the American people are firmly behind our present efforts to reach an honorable negotiated solution."⁶¹¹ In reality, the Nixon administration accepted the repeal of the resolution because they knew that they could continue to defend the use of force, particularly their escalation in Cambodia, exclusively on the President's position as Commander-in-Chief. "The Administration's position," explained the *New York Times*, "is that it is not relying on the resolution as authorization for the current military involvement in Vietnam but rather on the

⁶⁰⁹ Ibid.

⁶¹⁰ Ibid.

⁶¹¹ H.G. Torbert, "Letter to William Fulbright," 4 December 1969, in Senate Foreign Relations Committee, "Termination of Southeast Asia Resolution Report," 15 May 1970; <http://www.virtual.vietnam.ttu.edu/cgi-bin/starfetch.exe3Yppl@qk@faHYRfFfM.VroDDLpzdFOgF3tALTHzeJ4qWcsIBPWjKinT67r6PtXIjNwTAHOR2YYFIllSSTfmX8tGYizNLFqQbWUS5F9yqkOEDmcRoORkkVQ/2390605002.pdf>

President's constitutional authority as Commander in Chief to protect the lives of American troops as they are withdrawn from Vietnam."⁶¹² While Johnson had gone to great lengths to defend the Gulf of Tonkin Resolution, the Nixon administration actively worked with Senate Republicans, primarily Senator Robert Dole, to get the resolution repealed.⁶¹³

Indeed, when the President defended the Cambodian incursion to the American public in a radio address in June, Nixon relied on his powers as Commander-in-Chief. The attacks were, he argued, the fulfillment of his pledge that if there were any "increased attacks in Cambodia, Laos, or South Vietnam [that] endangered the lives of our men remaining in South Vietnam I would, in my capacity as Commander in Chief of our Armed Forces, take strong action to deal with that threat."⁶¹⁴ Nixon portrayed the incursions in Cambodia as a tactical operation that would deprive the Viet-Cong of the "sanctuaries" they were using to wage assaults on American soldiers and in this sense, he argued, "we take this action not for the purpose of expanding the war into Cambodia but for the purpose of ending the war in Vietnam. That purpose is being advanced."⁶¹⁵ Nixon argued that the use of force in Cambodia was a tactical necessity to end the war and therefore Congress would have no place to object to the mission.

In using force in Cambodia, Nixon made clear that he not need to seek any form of Congressional authorization. Nixon explained on national TV that "I can assure the American people that this President is going to bend over backwards to consult the Senate and consult the House whenever he feels it can be done without jeopardizing the lives of American men," but in this case it was a decision between "the lives of American men or the attitudes of the people in

⁶¹² John Finney, "Senate Votes Again for Tonkin Repeal," *The New York Times*, 11 July 1970.

⁶¹³ Harold Relyea and Elaine Halchin, *Informing Congress: The Role of the Executive Branch in Times of War*, (Hauppauge, New York: Novinka Books, 2003), 41.

⁶¹⁴ Richard Nixon, "Address to the Nation on the Cambodia Sanctuary Operation," 3 June 1970; <http://www.presidency.ucsb.edu/ws/?pid=2530#axzz1fy07g0MY>

⁶¹⁵ Ibid.

the Senate [and] I'm coming down hard on the side of defending the lives of American men.”⁶¹⁶

Nixon was protecting what he saw as the power of the Commander-in-Chief to “act quickly” in defense of American lives.⁶¹⁷ In other words, Nixon was arguing that he could expand the war into Cambodia without Congressional authorization because he saw it as necessary to fight more effectively in Vietnam.

While Nixon took an expansive view of executive war power, he did so in a way that was fundamentally distinct from the argument put forward by Johnson and Truman. Whereas they had relied on ILFs as a means to augment the power of the President, and had lessened the emphasis on the President's power as Commander-in-Chief, Nixon rested the entirety of his Executive war power on the President's power as Commander-in-Chief and disengaged from the strategy of utilizing ILFs to expand executive power. This reflected the necessities of the times; he could not take recourse to SEATO with regards to Cambodia and there was rising political will on Capitol Hill to limit the President's power.

In terms of the relationship between ILFs and executive power, this episode is revealing. Nixon's case for executive war power demonstrates how the executive can adapt its positioning for executive war power based on the needs arising in a specific circumstance. While the executive tends to prefer the ability to build a legal position resting in part on ILFs and in part on domestic sources such as the President's power as Commander-in-Chief, this position was unavailable for the Nixon administration. Moreover, in an attempt to show that previous wars, particularly the Korean War, had been waged through the President's power as Commander-in-

⁶¹⁶ Quoted: David Lawrence, “Nixon Views Must Be Seen in Perspective,” *Lewiston Daily Sun*, 7 July 1970; <http://news.google.com/newspapers?nid=1928&dat=19700707&id=gpwgAAAAIBAJ&sjid=JmgFAAAAIBAJ&pg=3660,595770>

⁶¹⁷ Quoted: Schlesinger, “Imperial Presidency,” 189.

Chief, the administration's defenders argued that authorization from ILFs was Constitutionally irrelevant.⁶¹⁸

This demonstrates that while the 'Imperial Presidency' grew through the Vietnam War, the legal defense of executive power was divided into two distinct eras. Under Johnson, the lack of robust Congressional authorization was defended based on SEATO and the limited authorization in the Gulf of Tonkin Resolution. Under Nixon, the lack of robust Congressional authorization was defended solely based on the President's power as Commander-in-Chief. This dichotomy in the construction of the Constitutionality of the war between the Johnson and Nixon administrations is an important dimension of the war's legal history that earlier historians, including Arthur Schlesinger and John Hart Ely, have overlooked.

H) The Supreme Court Considers the Lack of a Declaration of War

Throughout the Vietnam War, the Supreme Court never ruled on the Constitutionality of the President's lack of a Declaration of War. The Supreme Court, unlike the President or the Congress, did not have the agency to assert new issues into its docket and was only reactive to rulings from lower courts that were challenged. The one area where the lack of a Declaration of War came before the court was in a series of challenges to the draft. While the United States' draft regime had dated to the 1948 Selective Service Act, with earlier drafts stretching back to the colonial period, the large-scale utilization of the draft by the Johnson administration in the mid-1960s fueled the anti-war movement and created a hostile political climate surrounding the war.

⁶¹⁸ Professor Robert Bork of Yale Law School was amongst the administration's most vocal defenders. He argued that the Korean war was a precedent for the President using force without Congressional authorization. In making this argument, he dismissed the Constitutional significance of UN authorization. See; Robert Bork, "Comments on Legality of U.S. Action in Cambodia," *The American Journal of International Law*, (65), 1971, 79.

In 1968, Abram Holmes, a Jehovah's witness who opposed the war, challenged the President's right to conscript without a declaration of war. Of the Supreme Court's nine justices, only Justice William Douglas voted to hear the case, arguing that the court "never decided whether there may be conscription in absence of a declaration of war... I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question."⁶¹⁹ That case went unheard and the Constitutionality of the draft stood.

Seeking to file a harder attack on the draft, in 1970 the state of Massachusetts passed a law that declared that no citizen of the state could be required to serve in an undeclared war. The law instructed the Attorney General to challenge any such requirement.⁶²⁰ The law was intended to form the basis of a challenge to the draft and the case, *Massachusetts v. Laird*, was quickly filed against Secretary of Defense Melvin Laird.⁶²¹ Justices William Douglas, John Harlan, and Potter Stewart voted to take the case but four were needed; the case was reprimanded to a lower court. Writing for why the Supreme Court should take the case, William Douglas argued that the case was important: "We are asked instead whether the Executive has power, absent a congressional declaration of war, to commit Massachusetts citizens in armed hostilities on foreign soil. Another way of putting the question is whether under our Constitution presidential wars are permissible."⁶²² Douglas, who had become increasingly disturbed by the Court's reluctance to hear cases related to the war, concluded that the "question of an unconstitutional war is neither academic nor 'political.' These cases have raised the question in adversary settings.

⁶¹⁹ Justice William Douglas, "Dissent," in *Holmes v. United States*, 391 U.S. 936; <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=391&invol=936>

⁶²⁰ Antony D'Amato, "Massachusetts In The Federal Courts: The Constitutionality Of The Vietnam War," *Journal of Law Reform*, (11) 1970, 2.

⁶²¹ *Ibid*, 2.

⁶²² *Massachusetts v. Laird*, 400 U.S. 886 (1970); <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=400&invol=886>

It should be settled here and now.”⁶²³ Without a fourth Justice willing to hear the case, it never reached the Supreme Court.

In the end, the Supreme Court never ruled on the Constitutionality of the war and the executive’s insistence on the Constitutionality of the war remained intact. The arguments deployed by administration officials, most notably Nicholas Katzenbach, that the action in Vietnam was constitutional because of the United Nations ban on war and the United States’s obligation under the SEATO treaty were not subject to the scrutiny of the Justices. To a large extent, this was the product of how the executive had already staked a claim on the Constitutionality of the war and the Supreme Court, with the exception of William Douglas, was not eager to take on such a political issue.

Despite their lack of success, the cases were important because they established that the Constitutionality of a war could be challenged if the President chose to rely on international organizations rather than on a declaration of war for the legal basis of a conflict. A cohort of lawyers who came of age during this period would later cite this work in challenging the Constitutionality of the Gulf War.⁶²⁴

I) Aftermath: The War Powers Act

In response to the Presidential usurpation of power in the Vietnam War, Congress pursued an agenda of taking back war powers. Many Senate Democrats had felt betrayed by the Johnson administration’s reliance on SEATO and the expansion of the Gulf of Tonkin Resolutions as the legal justifications for the President’s use of force in Vietnam. Senator Wayne

⁶²³ Ibid.

⁶²⁴ The leading litigator of the case challenging the Constitutionality of the Gulf War, Jules Lobel, noted that the Vietnam cases inspired him to take up the case. See; Jules Lobel, *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America*, (New York: New York University Press, 2003), 8.

Morse expressed frustration that “we are using SEATO not as a collective commitment among interested and affected parties, but as an American hunting license to do what we choose to do in Vietnam.”⁶²⁵ Building on arguments advanced by the anti-war Senators, primarily William Fulbright and Wayne Morse, the Congress passed the War Powers Act in 1973.

In response to President Johnson’s utilization of SEATO to justify the war in Vietnam, the resolution included a specific clause that:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred... [from] any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.⁶²⁶

The resolution, at the broadest level, sought to rein in Presidential power. The framers of the resolution understood from the earlier hearings on national commitments that undermining the President’s ability to turn to treaties to justify wars was an important component of this restriction.

President Nixon’s veto of the War Powers Act and the Congressional override of the veto reignited a debate about the President’s war powers. While the resolution could not be enforced against the President there was a fear that, as Henry Kissinger wrote to President Nixon, “although not legally binding, passage would erect formidable political constraints to observe the letter of the restrictive measures.”⁶²⁷ In vetoing the bill, Nixon said that “the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and

⁶²⁵ Benjamin Dore, “Senator Wayne Morse and War Powers,” *Wayne Morse Historical Park Research Series*; March 2010, 23; http://pages.uoregon.edu/morse/_pdfs/publications/dore_monograph.pdf

⁶²⁶ Ibid

⁶²⁷ Henry Kissinger, “Memorandum for the President: War Powers Legislation,” *Foreign Relations of the United States: 1969-1976, Volume II*; <http://history.state.gov/historicaldocuments/frus1969-76v02/d392>

dangerous to the best interests of our Nation.”⁶²⁸ He seized on the War Power Resolution’s restriction on the use of treaties to justify the use of force to respond that: one of the “adverse consequences of this resolution would be the prohibition contained in section 8 against fulfilling our obligations under the NATO treaty as ratified by the Senate.”⁶²⁹ Though the Congress was able to muster the votes to pass the bill over Nixon’s veto, this was far from the end of the struggle between the President and Congress over war powers.

J) Conclusions and Analysis

While the United States was bogged down in a war in Southeast Asia, another ‘Cold War’ between the President and the Congress was raging at home. The Vietnam War, in both the Johnson and Nixon administrations, was pursued on the basis of Presidential power to use military force. In the Johnson administration, this argument relied heavily on the American ‘commitment’ to SEATO and the claim that the President could use force to fulfill a treaty obligation without seeking robust Congressional authorization. In the Nixon administration, the SEATO argument was discarded, along with the Gulf of Tonkin Resolution, in favor of a reliance on the President’s power as Commander-in-Chief. While Nixon was able to carry out a massive bombing campaign under this legal defense, his brazen assertions of inherent Executive power provided much of the political will necessary to pass the War Powers Act.⁶³⁰

In terms of the role of ILFs in supporting executive war power, the Vietnam War demonstrates the flexibility of the executive’s justification for its war power but it ultimately affirms why the executive prefers orienting its power in ILFs.

⁶²⁸ Richard Nixon, “Veto of the War Powers Resolution,” 24 October 1973; <http://www.presidency.ucsb.edu/ws/index.php?pid=4021>

⁶²⁹ Ibid.

⁶³⁰ Robert Dallek, *Kissinger and Nixon: Partners in Power*, (New York: Harper, 2007), 519-520.

The Johnson administration rooted its defense of the Vietnam War, both in how it crafted the Gulf of Tonkin Resolution and how it later defended the war, on the commitment to SEATO. Secretary of State Dean Rusk, the primary architect of the ‘SEATO argument,’ told Congress that, as a Constitutional matter, SEATO was “the law of the land and linked South Vietnam to the general structure of collective security.”⁶³¹ The President, Rusk argued, was bound to uphold the “pledged word of the United States” or face the prospect that America’s “solemn alliances would crumble.”⁶³² This attempt to limit the impact of Congressional dissent by staking the President’s power to use force in an ILF was a strategy of “political coercion,” as defined in my framework from Chapter 1. The executive utilized the ILFs, primarily the obligation in SEATO but also the U.N. Charter’s ban on war, as a means to assert executive power to use force with highly limited Congressional authorization. When the Congress began to demand a more robust form of authorization, such as a Declaration of War, the executive deployed these ILFs as a means to continue to use force with the highly limited Congressional authorization. This demonstrates the way in which ILFs can become an integral source of Presidential war power.

The Nixon administration, by contrast, demonstrated how the President can construct expansive executive war power solely on the President’s power as Commander-in-Chief. Without the ability to place executive power in SEATO or the Gulf of Tonkin Resolution, this strategy became a necessity. This demonstrates the limits of the theory that Presidents engage ILFs to support Presidential war power. When an ILF is unavailable, the President can defend executive war power on more traditional sources. However, the substantially larger Congressional response to Nixon’s assertions of executive war power, as compared to the limited response to the more tepid criticism of Johnson’s reliance on SEATO, suggests that defending

⁶³¹ Quoted: Joseph Fry, *Debating Vietnam: Fulbright, Stennis and their Senate Hearings*, (New York: Rowman, 2006), 64.

⁶³² Quoted; *ibid*, 66.

expansive executive war power is more politically salient when the President can rely on both ILFs and domestic sources of executive war power.

The Vietnam War is the most complex and costly chapter in America's foreign relations in the Cold War. With the origins of America's involvement in the 1950s through the withdrawal of the last soldier in 1973, American policy went through a number of paradigm shifts and realignments. While the scholarly literature on the war is vast, this chapter has made a significant contribution to our understanding of the under-studied legal debate over executive war power during the course of the war. By chronicling the major battles in this executive-legislative struggle, I have demonstrated the importance of ILFs to asserting executive war power in the Johnson administration and how the Nixon administration shifted the rationale for executive war power onto his position as Commander-in-Chief. This matters because it shows the flexibility of the sources of the executive war power while demonstrating that the Johnson administration was more politically effective by placing a strong emphasis on ILFs as a source of executive war power.

Chapter 7:

The Gulf War

A) Overview

In the 1992 election, President George H.W. Bush was asked about his decision to obtain a Congressional resolution for the Gulf War. Bush proudly told a group of Republican activists that he enjoyed fighting the war more than working on domestic policy because, “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam out of Kuwait.”⁶³³ The statement not only reflected Bush’s disdain for Congress, particularly their vocal role during the Gulf War, but his belief that the resolution that had been passed by Congress was not ‘permission’ he needed to use military force.

Throughout the lead-up to Operation Desert Storm, the Bush administration sought to utilize the United Nations authorizations as a substitute for the need for Congressional authorization. In this chapter, I explore the war powers debate in the Gulf War. As the debate with Congress, the courts, and in the public over war powers became more heated, the Bush administration, led by the White House Counsel and the Office of Legal Counsel, turned to the international legal framework to expand executive power to use force. I demonstrate how the Bush administration, in a quest to preserve and expand executive power, utilized authorization from the United Nations to act as a substitute for Congressional authorization and how it used international financial backing to remove the Congress’s ‘power of the purse’ to defund the war. Once the administration had Chapter VII authorization from the United Nations in UNSC

⁶³³ George H.W. Bush, “Remarks at the Texas State Republican Convention,” 20 June 1992; <http://www.presidency.ucsb.edu/ws/index.php?pid=21125#axzz1cItnZakZ>

Resolution 678, the Bush administration used this to pressure Congress to pass a resolution in support of the President's permission to use force per the United Nations Resolution.

Without any scholarly studies of the war powers debate during the Gulf War, this chapter represents a major contribution to the scholarly understanding of the Gulf War and its place in the evolution of executive war power. With the major oral histories of the administration released in 2011 and new documents being released from the George H.W. Bush Presidential library, there is a rich set of primary sources that no scholar has previously engaged with. As such, this chapter goes into greater depth than is necessary for case studies where there is already a reasonable amount of scholarship to build on.

In this executive-legislative dispute, Bush never acknowledged a need to go to Congress for 'permission.' Throughout the controversy, the Bush administration was dismissive of Congress's role in authorizing the use of force and maintained that, as President Truman had done in the Korean War, the United Nations was a sufficient legal basis for Presidential use of force. By the time that Bush finally requested Congressional support in the days before the operation's commencement, he framed this simply as Congressional support for his ability to uphold United Nations Resolutions by using force in Kuwait. He had already decided that he was going to go forward with the operation whether or not Congress was onboard.

B) Background: The George H.W. Bush Administration's Trajectory in Executive Power

I. The Republican Embrace of Executive Power: The Ford and Reagan Administrations

George H.W. Bush entered office in 1988 heir to the Republican attempt to reclaim executive power to use force. Bush was a leader who, as Presidential historian Nancy Kassop notes, "almost reflexively, resented Congress and who was driven by an underlying hostility and

a relish to challenge Congress at every turn.”⁶³⁴ Though he had in the early phases of his career served in Congress, Bush embraced the executive branch in his career. Bush had risen up through the executive branch, particularly as CIA Director for Gerald Ford, and frequently encountered a Congress that he viewed as encroaching on Presidential power. He was a Chairman of the Republican National Committee in the 1970s who had risen in Republican politics at a time when increasing executive power was increasingly becoming a central tenant of the Republican platform.

Similarly, his team of foreign policy advisers that would shape his actions during the Gulf War had worked their way up through the Ford and Reagan administrations. This was the era when, as Julian Zelizer puts it, “conservatives learned to stop worrying and love presidential power.”⁶³⁵ In forming a team in 1990, Bush brought in a number of Republican policy-makers who had developed expansive views on executive power.

Secretary of Defense Richard Cheney had built much of his career as an advocate for expanding executive power. Cheney became Chief of Staff to President Ford in the aftermath of the Congressional attempts to reign in executive power. The Ford administration had to contend with the War Powers Act and the diminished view of the executive in the aftermath of the Vietnam War and the Watergate scandal. While scholars have recognized that Cheney “was *part* of a group pushing back during congressional efforts to re-impose some controls on the Executive,” the truth is that he was far more central to these efforts than has been recognized.⁶³⁶ Cheney recalled that he had “strong feelings that Congress under the guise of correcting what

⁶³⁴ Nancy Kassop. “The Bush Administration’s Approach to Separation of Powers: An Invitation to Struggle,” in Leslie Feldman & Rosanna Perotti, *Honor and Loyalty: Inside the George H.W. Bush White House*. (Westport, CT: Greenwood Publishing, 2002), 226

⁶³⁵ Julian Zelizer, “How Conservatives Learned to Stop Worrying and Love Presidential Power,” in *The Presidency of George W. Bush: A First Historical Assessment*, ed. Julian Zelizer, (Princeton: Princeton UP, 2010), 15.

⁶³⁶ Charlie Savage, *Power Wars: Unmasking National Security Legal Policy Deliberations Under Bush & Obama*, Kindle Single, (Amazon: 2011). (emphasis added)

they thought were problems with respect to Watergate asserted itself in inappropriate ways with regard to national security,” and he set out to “restore the balance.”⁶³⁷ Cheney was at the center of the attempt to push back on executive power and when he gave advice to the incoming Chief of Staff for the Reagan administration, James Baker, Cheney said that Baker’s top priority should be executive power.⁶³⁸ Reflecting on his time in the Ford administration, he said, “I emerged from that experience a very strong believer in the authority of the President to manage these issues [of foreign policy] as contrasted with the Congress.”⁶³⁹ Even as a Congressman, Cheney kept an expansive view of executive power and was a major ally of the Reagan administration. At the outbreak of the Iran-Contra scandal, Congressman Cheney took the side of the administration. He said that he was “convinced that the Democrats were trying to turn it into another Watergate” and that “they were doing their damnest [sic] to allege wrongdoing by the President.”⁶⁴⁰ Cheney, coordinating with the White House Counsel’s Office, felt that “it was important to defend the President against those charges.”⁶⁴¹ This experience deepened Cheney’s commitment to executive power and the minority report he issued from the Iran-Contra hearings put forward his view that: “Congressional actions to limit the president in this area therefore should be reviewed with a considerable degree of skepticism. If they interfere with the core presidential foreign policy functions, they should be struck down.”⁶⁴² At the time he was

⁶³⁷ Richard Cheney, interview with author; 1 February 2012. McLean, Virginia.

⁶³⁸ Cheney to Baker, 19 November 1980;
http://blog.washingtonpost.com/cheney/sidebars/cheney_advice_to_baker/

⁶³⁹ Richard Cheney, “Oral History,” George H.W. Bush Presidency Oral Histories at the Miller Center of Public Affairs at the University of Virginia, 2011; <http://millercenter.org/president/bush/oralhistory> [hereinafter BOHUVa]

⁶⁴⁰ Cheney, interview with author.

⁶⁴¹ Cheney, interview with author.

⁶⁴² “Excerpts from Iran-Contra Minority Report,” PBS Frontline;
<http://www.pbs.org/wgbh/pages/frontline/darkside/themes/ownwords.html#1>

recruited to become Secretary of Defense in the Bush administration, Cheney had become one of the right's leading advocates for a more expansive interpretation of executive power.⁶⁴³

Other senior policy-makers, including James Baker and Brent Scowcroft, held expansive views about executive power. Baker had served as Reagan's Chief of Staff and was a longtime confidante of George Bush who combined a reputation as a supreme political 'tactician' with a keen interest in international affairs.⁶⁴⁴ Ford's National Security Adviser was Brent Scowcroft, a retired General who had completed a PhD at Columbia University critiquing the role of Congress in U.S. foreign policy.⁶⁴⁵ Scowcroft would serve as Bush's National Security Adviser as well.

To understand the Bush administration's approach in the Gulf War, one must first understand the approach he and his aides inherited, and in some ways participated in, through the Ford and Reagan presidencies. The 1970s had seen a dramatic rise in Congressional attempts to control the use of force, as seen in the War Powers Resolution, and a decline in public support for the Presidency. This was largely the product of the Watergate scandal and the Vietnam War. In the Ford and Reagan administrations, the Republicans attempted to reclaim the power that the executive had lost by the end of the Nixon administration.

In 1975, President Gerald Ford had to respond to the capture of a U.S. Naval ship, the *Mayaguez*, by the Cambodian Khmer Rouge. The War Powers Act represented a legal obstacle to executive use of force. This incident represented a test of whether the War Powers Act would constrain the Presidency. Without consulting Congress, Ford ordered not only a rescue mission but a large-scale bombing mission in the surrounding part of Cambodia.⁶⁴⁶ In writing to the

⁶⁴³ Dick Cheney, "Congressional Overreaching in Foreign Policy in Foreign Policy and the Constitution," in *Foreign Policy and the Constitution*, Robert Goldwin and Robert Licht, eds. (Washington D.C.: American Enterprise Institute, 1991), 101.

⁶⁴⁴ John Newhouse, "The Tactician," *The New Yorker*, 7 May 1990

⁶⁴⁵ David Schmitz, *Brent Scowcroft: Internationalism and Post-Vietnam War American Foreign Policy*, (New York: Rowman & Littlefield, 2011), 27.

⁶⁴⁶ Sean Wilentz, *Age of Reagan: A History, 1974-2008*, (New York: HarperCollins, 2009), 56.

Senate, Ford noted that the Cambodian attack was “illegal” under international law and then argued that, by contrast, his response was entirely legal: “This operation was ordered and conducted pursuant to the President’s constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces.”⁶⁴⁷ Philip Buchen, the White House Counsel, prepared a response to questions that the operation violated the War Powers Act. He instructed Ford to argue that “The War Powers Resolution does not in any way restrict the introduction of U.S. armed forces into hostilities,” and therefore he was free to use military force at his own discretion.⁶⁴⁸ The raid was largely successful in rescuing the American sailors, and also bombing surrounding areas in Cambodia. The public judged it a validation of the President’s decisiveness. *Time Magazine* had a cover-story on Ford’s decision to intervene, with the headline “Ford Draws the Line,” that argued that the intervention was “showing the world that the U.S. will not accept humiliating provocations.”⁶⁴⁹ Ford had taken a major step in pushing back against the War Powers Act by refusing to consult with Congress and he had set the tone for how future Presidents would be able to circumvent the limitations on executive power.⁶⁵⁰ Though these were military action was relatively small, it set an important precedent in the construction of executive power.

The Reagan administration went further. It utilized ILFs to expand executive power to use force. The team was led from the White House by Chief of Staff James Baker and Vice President George Bush. In interventions in Lebanon and Grenada, the Reagan administration ensured that there was adequate support from IOs; the U.N. for Lebanon and the OAS for Grenada. They utilized this framework to argue that the American use of force did not require

⁶⁴⁷ Gerald Ford, “Letter to James Eastland,” 15 May 1975. Gerald Ford Library: Philip Buchen Files, Box 65.

⁶⁴⁸ Philip Buchen, “Notes for the President,” 17 May 1975. Gerald Ford Library: Philip Buchen Files, Box 65.

⁶⁴⁹ “A Strong But Risky Show of Force,” *Time Magazine*, 26 May 1975.

⁶⁵⁰ Wilentz, “Age of Reagan,” 56.

Congressional authorization as it was below the level of ‘war.’ Reagan said that the troops in Lebanon were “part of a multinational force” and he emphasized that “our marines are assigned to the south of the city of Beirut, near the only airport operating in Lebanon. Just a mile or so to the north is the Italian contingent and not far from them, the French and a company of British soldiers.”⁶⁵¹ In justifying airstrikes against Libya in 1986, Reagan invoked his position as “Commander-in-Chief” but more centrally emphasized that, “Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter.”⁶⁵² When Congress questioned the administrations policies, Reagan responded forcefully. He accused Congressional Democrats of encouraging the “enemies of democracy.”⁶⁵³ James Baker, who would go on to play a key role in the Gulf War, was influenced by the commitment to executive power in the Reagan administration. He fondly recalled serving as Chief of Staff when Reagan told Congressional leaders during the Grenada invasion that they were receiving “notification, not consultation.”⁶⁵⁴

When Bush became President, he brought with him a staff that aimed to advance executive power on this trajectory. James Baker became Secretary of State. With a strong political background he knew not only how to run a foreign policy but how to then “play to two constituencies- the Congress and the press” in getting them to accept the President’s decisions without much protest.⁶⁵⁵ Brent Scowcroft became the National Security Adviser. In the post-Vietnam era, Scowcroft thought that “Congress had taken on a more powerful role and one of

⁶⁵¹ Ronald Reagan, “Address to the Nation on Events in Lebanon and Grenada,” 27 October 1963; <http://www.reagan.utexas.edu/archives/speeches/1983/102783b.htm>

⁶⁵² Ronald Reagan, “Address to the Nation on the United States Air Strikes Against Libya,” 14 April 1986; <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.html>

⁶⁵³ Bernard Gwertzman, “President Assails Congress Over Use of Force,” *New York Times*, 7 April 1984.

⁶⁵⁴ James Baker, *The Politics of Diplomacy: Revolution, War and Peace, 1989-1992*, (New York: G.P. Putnam’s Sons, 1995), 334.

⁶⁵⁵ Newhouse, “The Tactician,” 51.

my major goals [in the Bush administration] was to reassert the power of the Presidency.”⁶⁵⁶ In this task he was guided by what he described as a “basic philosophy that was based on the words of a Constitutional scholar who said that on matters of foreign policy the Constitution is an invitation to struggle.”⁶⁵⁷ In translating Edward Corwin’s dictum into a course of action, Scowcroft said that “the President needs to run foreign policy and the War Powers Act is very much unconstitutional.”⁶⁵⁸ These leaders in the Bush administration were not only experts on foreign policy but ardent supporters of executive power. Along with his staff, Bush shared the belief that the executive would have to steer foreign policy, particularly on the question of using force. He had a belief in his capacity to shape history and was now in a position to do just that.⁶⁵⁹

The administration combined the dedication to executive power with a developed capacity to circumvent Congressional limitations. These policy-makers had spent their career fighting against Democratic Congresses that were trying to limit their power and they were prepared for a fight on the President’s power to use force.

II. Panama: International Legal Frameworks to Utilize Military Force

In taking office, Bush quickly found himself having to address a question concerning war powers. In December 1989, Bush ordered U.S. armed forces into Panama to remove Manuel Noriega and reinstate President Guillermo Endara’s regime following Noriega’s coup.⁶⁶⁰ Bush never considered obtaining a Declaration of War from Congress, or Congressional authorization of any kind. Instead he relied on the notion that the United States was engaged in conflict

⁶⁵⁶ Brent Scowcroft, telephone interview with author, 21 November 2011.

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid.

⁶⁵⁹ Herbert Parment, *George Bush: the Life of a Lone Star Yankee*, revised edition, (New Brunswick, New Jersey: Transaction Publishers, 2001), 9.

⁶⁶⁰ Fisher, “Congressional Abdication,” 74.

because, as Bush said in a national address, “Noriega declared his military dictatorship to be in a state of war with the United States.”⁶⁶¹ Noriega was a dictator that no members of Congress wanted to be seen as standing up for. As the President prepared to use military force, there was little protest from Congress.

The Panama intervention offered the Bush administration an opportunity to conduct creative lawyering to assert Presidential power to use military force. In a letter to Congressional leaders, Bush contended that he did not need Congressional authorization for the military action because “the lives and welfare of American citizens in Panama were increasingly at risk” under Noriega’s regime, and the President possessed the power to “ensure the integrity of the Panama canal treaties.”⁶⁶²

The administration turned to ILFs, both the OAS authorization and the U.S. treaty with Panama, as the legal frameworks to use military force. In a prelude to the larger use of force, the administration, as Secretary of State James Baker recalled that he “decided to invoke a provision of the canal treaty that allowed U.S. troops unlimited training exercises, in order to increase the frequently and scope of our troop movements within Panama,” in order to achieve a level of what he called “psychological warfare.”⁶⁶³ On 20 December, the invasion, termed ‘Operation Just Cause,’ commenced with U.S. forces assaulting Panama’s strategic installations.

Though the Congress had been ignored in the lead-up to the use of force, the Congress came to support the administration. Historian Rebecca Grant notes, “the dangers and frustrations of contending with Noriega” had boosted public support for military action and “President Bush

⁶⁶¹ George Bush, “Address to the Nation Announcing United States Military Action in Panama,” 20 December 1989; <http://www.presidency.ucsb.edu/ws/index.php?pid=17965&st=panama&st1=#axzz1Zs7UoB7E>

⁶⁶² George Bush, “Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate On United States Military Action in Panama,” 21 December 1989; <http://www.presidency.ucsb.edu/ws/index.php?pid=17973&st=panama&st1=#axzz1Zs7UoB7E>

⁶⁶³ Baker, “Politics of Diplomacy,” 183.

won immediate support for the action, both from the Congress and from a majority of the American public.”⁶⁶⁴ While some Democratic Congressmen were displeased to see the President take military action without their authorization, they could do little in response. A few hours after American troops began the military attacks, Senator Chris Dodd, a prominent Democrat, was on TV supporting the President’s actions.⁶⁶⁵ In February 1990, the Congress passed a resolution applauding how the administration had acted “decisively and appropriately in ordering United States forces to intervene in Panama.”⁶⁶⁶

While the military action was modest, it formed an essential backdrop to shaping how the administration would approach the use of military force during the Gulf crisis. The successful use of force in Panama, complete with the apprehension of Manuel Noriega, helped to convince the American public that the United States could carry out limited uses of military force without being pulled into a Vietnam-like quagmire. For Secretary of State Baker, the Panama intervention mattered because it convinced the American public that the use of military force could be done effectively: “in breaking the mindset of the American people about the use of force in the post-Vietnam era, Panama established an operational predicate that permitted us to build the public support so essential to the success of Operation Desert Storm thirteen months later.”⁶⁶⁷

Similarly, the intervention mattered for the administration as a test-run in how the administration would use military force with limited Congressional involvement. The intervention, as Baker said, “simply showed that the United States was going to use all of the

⁶⁶⁴ Rebecca Grant, *Operation Just Cause and the U.S. Policy Process*, (Santa Monica: RAND, 1991), 39.

<http://www.rand.org/pubs/notes/2007/N3265.pdf>

⁶⁶⁵ Matthew Rothschild, “Foray for Panama’s Democracy Wounds Constitution Here,” *Los Angeles Times*, 21 December 1989; http://articles.latimes.com/1989-12-21/local/me-693_1_constitutional-government

⁶⁶⁶ Richard Grimmett, “The War Powers Resolution: After Thirty Years,” 11 March, 2004, 24; http://www.fas.org/man/crs/RL32267.html#_1_24

⁶⁶⁷ Baker, “Politics of Diplomacy,” 189.

arrows in its quiver.”⁶⁶⁸ Within a few months, the Bush administration would once again be preparing to use military force, though this would be on a far larger scale and it would again have to grapple with a war powers debate.

C) The Opening: August 1990 and the Deployment to Saudi Arabia

On 2 August 1990, the Iraqi army swiftly moved through neighboring Kuwait and occupied the small yet oil-rich nation. Saddam Hussein was determined to expand Iraqi power and Kuwait was an ideal target with its expansive oil resources and a coastline on the Persian Gulf that was over three times as long as the Iraqi coastline.⁶⁶⁹ While there had been warnings of an impending invasion, American policy-makers trusted the “Egyptians and the Saudis [whom] all told us it was a bluff,” as Richard Cheney recalled.⁶⁷⁰

While the invasion was a surprise, the American government had already established a policy that emphasized a military response if Saddam were to use military force. April Glaspie, the American Ambassador to Iraq, had directly warned Saddam “that disputes [must] be settled peacefully and not by threats or intimidation.”⁶⁷¹

At a broader level, the invasion coincided with a strategic shift in U.S. force posture towards an emphasis on confronting regional aggression. With American-Soviet tensions dissipating, there were widespread cuts to U.S. military assets in Europe and the emergence of a new strategic posture that emphasized the need to confront regional threats. The new policy, as Richard Cheney explains, was designed “to focus on regional conflicts and to prevent an adversary from controlling a region of the world that was vital to our interests as opposed to

⁶⁶⁸ Jim Baker, “Oral History,” BOHUA.

⁶⁶⁹ Susan Rosegrant and Michael Watkins, “The Gulf Crisis: Building a Coalition for War,” *Kennedy School Case Studies Series*, (Number 1264), 1994, 3

⁶⁷⁰ Cheney, interview with author.

⁶⁷¹ Quoted; Rosegrant and Watkins, “The Gulf Crisis,” 3.

focusing on a global nuclear conflict.”⁶⁷² Secretary of Defense Cheney, along with General Colin Powell, had been scheduled to brief the President on the new strategy on the weekend following the invasion and they now had a perfect case for how the new strategy would work. The Defense Department suddenly found its strategy moved from its policy workshops directly into action; “we were all of a sudden in the position where we were going to be implementing the strategy we had laid out for regional conflicts because of Saddam’s invasion,” Richard Cheney noted.⁶⁷³

The Bush administration was determined to react swiftly both on the military and diplomatic levels. From the beginning, it was clear that the administration would have to engage in a war powers debate. Hours after the invasion, Undersecretary of State Robert Kimmitt called Deputy Attorney General Robert Barr and told him to get working on how the President could take military action and how the War Powers Resolution would relate to the decision to use military force.⁶⁷⁴ Kimmitt had served as the General Counsel of the National Security Council in the Reagan administration and knew that a war powers showdown would be coming shortly. Brent Scowcroft recalled that “by the next day after the invasion” he turned to the question of “how are we going to manage this with the Congress” without having to get authorization.⁶⁷⁵ At the Defense Department, Cheney began to pull out old military plans for deploying force to the Gulf but “we didn’t feel any need to go to Congress to get authorization to deploy the force.”⁶⁷⁶

At the diplomatic level, the United States quickly obtained resolutions of condemnation from the United Nations. On the night of the invasion, Undersecretary of State Robert Kimmitt

⁶⁷² Cheney, interview with author.

⁶⁷³ Cheney, interview with author.

⁶⁷⁴ Robert Kimmitt, telephone interview with author, 27 October 2011.

⁶⁷⁵ Scowcroft, interview with author.

⁶⁷⁶ Cheney, interview with author.

called the U.S. Ambassador to the United Nations, Thomas Pickering.⁶⁷⁷ Pickering was en route to an event in Baltimore but Kimmitt instructed him to turn around and head to the United Nations in New York City; there had to be a resolution issued that night, Kimmitt told him.⁶⁷⁸ After rejecting a first draft that was “not strong enough,” Kimmitt agreed to a resolution that called for Iraq’s unconditional withdrawal from Kuwait.⁶⁷⁹ Pickering secured the passage of the resolution with all of the Security Council members voting for it with the exception of Yemen.⁶⁸⁰ After intensive lobbying by U.S. officials, the Soviet Union and China joined the United States to support the resolution.⁶⁸¹ United Nations Security Council Resolution 660 demanded “that Iraq withdraw immediately and unconditionally all its forces” from Kuwait.⁶⁸² Kimmitt had gotten the resolution he desired. He knew that this was “laying the foundation for what we were going to do down the road” and he had set it off on the course of an aggressive response.⁶⁸³

President Bush spent the weekend at Camp David contemplating America’s reaction. When he returned, he told the press corps, “This will not stand, this aggression against Kuwait.”⁶⁸⁴ Military leaders and the public interpreted this as a commitment to using military force.⁶⁸⁵ “From that point there was never any doubt in my mind that if we had to, we were ready to go. He was going to use the force,” Richard Cheney recalled.⁶⁸⁶ Throughout August, the Security Council passed a number of American-drafted resolutions condemning the invasion. and imposing sanctions. The resolutions fell short of authorizing member-states to utilize military

⁶⁷⁷ Kimmitt, interview with author.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid.

⁶⁸⁰ United Nations Security Council Resolution 660; 2 August 1990.

⁶⁸¹ Richard Haass, *War of Necessity, War Of Choice: A Memoir of Two Iraq Wars*, (New York: Simon & Schuster, 2009), 61.

⁶⁸² United Nations Security Council Resolution 660; 2 August 1990.

⁶⁸³ Richard Haass, interview with author, 17 August 2011.

⁶⁸⁴ George Bush, “The PResident’s News Conference on the Persian Gulf Crisis,” 8 November 1990; <http://www.presidency.ucsb.edu/ws/index.php?pid=19019#axzz1gXycDfrS>

⁶⁸⁵ Quoted; George Bush with Brent Scowcroft, *A World Transformed*, (New York: Knopf, 1998), 333.

⁶⁸⁶ Richard Cheney, “Oral History,” BOHUA.

force.⁶⁸⁷ For the American policy-makers, “these initial acts of condemnation had occurred almost without debate.”⁶⁸⁸

At the military level, the United States sent forces into Saudi Arabia almost immediately. There was concern that the Iraqi forces would push forward into Saudi Arabia, which would have been strategically crippling for the United States considering its reliance on Saudi oil. “The first notion that we had,” Brent Scowcroft recalled, “was to get troops in along the Saudi border so that if Saddam Hussein wanted to keep going he would have to overrun our trip wire.”⁶⁸⁹ On August 8, American forces began deploying to Saudi Arabia including two F-15 squadrons and a brigade from the 82nd Airborne Division.⁶⁹⁰ Operation “Desert Shield” commenced.

Bush assured the American public that despite the appearance of a prelude to war, this mission was “wholly defensive.”⁶⁹¹ The language and tone were deliberate; “It wasn’t in our interest to talk publicly about offensive military action,” argued Richard Cheney.⁶⁹² Though officials declined to comment on how many troops would be stationed in Saudi Arabia, the press soon reported that over 250,000 Americans were being sent.⁶⁹³

D) Congress and the Road to War

The Bush administration went forward with their strategy of arguing that the President had the Constitutional authority to launch the invasion without Congressional authorization. In

⁶⁸⁷ See further discussion concerning United Nations Security Council Resolutions 665 (25 August).

⁶⁸⁸ Rosegrant and Watkins, “The Gulf Crisis,” 5

⁶⁸⁹ Scowcroft, interview with author.

⁶⁹⁰ George Bush, “Letter to Speaker of the House,” 9 August 1990. George H.W. Bush Library: Nelson Lund Files, War Powers/Iraq, File 4.

⁶⁹¹ George Bush, “Address on Iraq’s Invasion of Kuwait,” 8 August 1990; <http://millercenter.org/president/speeches/detail/5529>

⁶⁹² Quoted; Rosegrant and Watkins, “The Gulf Crisis,” 13.

⁶⁹³ Ibid, 12.

rebutting criticism from Democratic Congressional leaders, the Bush administration came to rely on the United Nations authorization as a crucial justification for the President's power.

The Democratic-controlled Congress protested that the President lacked the Constitutional authority to go forward with military action. Senate Majority Leader George Mitchell and Speaker of the House Thomas Foley, wrote to President Bush that "we expect that your decision to send U.S. forces to Saudi Arabia will...[comply with] the War Powers Resolution. As you know, U.S. law requires the submission of such a report to Congress when U.S. forces are introduced into situations where imminent involvement in hostilities is clearly indicated by the circumstances."⁶⁹⁴ They emphasized the need for Bush's "compliance with the War Powers Resolution" to "promote this unity of purpose and resolve" between the President and the Congress.⁶⁹⁵ This was an attempt by Democratic Congressional leaders to notify Bush that they would be seeking his compliance with the War Powers Resolution as the path towards war commenced. Bush viewed the matter not as a question of Constitutional allocation of war-making power but as a struggle of "weighing what is right against what you believe to be right."⁶⁹⁶ Bush thought that "the magnitude of what was happening to Kuwait was not properly covered by the press, and therefore was not understood by the American public or members of Congress."⁶⁹⁷ Bush saw himself as a noble leader who was taking the morally just position even in the face of public disapproval.

To advance their case for the President's authority to use force, the administration assembled an inter-agency legal working group of experts. Coordinated out of the White House by Nicholas Rostow of the National Security Council, the so-called "War Powers Group"

⁶⁹⁴ George Mitchell and Thomas Foley, "Letter to President Bush," 8 August 1990. George Bush Library: Nelson Lund Papers, War Powers/Iraq, File 4.

⁶⁹⁵ Ibid

⁶⁹⁶ Bush and Scowcroft, "A World Transformed," 356.

⁶⁹⁷ Ibid, 358.

brought in top lawyers from the State Department, the Joint Chiefs of Staff and the Department of Justice's Office of Legal Counsel.⁶⁹⁸ Rostow was a firm believer in executive power, a view he shared with his father, Eugene Rostow, the Undersecretary of State in the Johnson administration and a Dean of Yale Law School who outspokenly defended executive power to use military force.⁶⁹⁹ Armed with a PhD in history and experience as a litigator, Nicholas Rostow was uniquely qualified to push the Bush administration's position forward on executive power. The inter-agency legal process dated back to the interventions in Somalia and Panama and had more distant roots in Reagan's interventions in Lebanon.⁷⁰⁰ Beyond the formal nature of the working group there was what associate White House Counsel Nelson Lund described as the "semi-formal and informal personal relations" amongst the lawyers who had worked with each other, some of them coming from the same law firms, prior to their government service.⁷⁰¹ With the Gulf crisis, the lawyers came together to create, as one official described it, "a forum for the exchange of ideas, a place to close loopholes... a sounding board."⁷⁰² Their task, as Reagan's White House Counsel Fred Fielding said, was to "come together" as a team "whenever there was even a whisper that a war powers issue might arise," and this was their definitive moment.⁷⁰³ At a more long-term level, the war powers group was working on finding ways to repeal the War Powers Resolution.⁷⁰⁴

This was an important transformation in how the executive handled war powers issues. In previous war powers crises, there were a few lawyers who asserted the President's power but this

⁶⁹⁸ Nick Rostow "Letter Concerning a Draft Report to Congress," 8 August 1990. George H.W. Bush Library: Nelson Lund Files, War Powers/Iraq, File 4.

⁶⁹⁹ Eugene Rostow, "Once More Unto the Breach: The War Powers Resolution Revisited," *Yale Law Faculty Scholarship Series*, (Number 2115), 1986.

⁷⁰⁰ Tom Watson, "The Legal Machine Behind the War Machine," *The Legal Times*, 14 January 1991.

⁷⁰¹ Nelson Lund, telephone interview with author, 31 July 2011.

⁷⁰² Quoted; Watson, "The Legal Machine."

⁷⁰³ Quoted; *ibid.*

⁷⁰⁴ Fred Green, telephone interview with author, 29 August 2011.

was done in an ad hoc process that lacked coordination.⁷⁰⁵ The formalization of the process, beginning in the Reagan administration and culminating in the lead-up to the Gulf War, represented an expanding level of executive attention to winning war powers debates.

The legal team advised Bush to pursue an aggressive policy of confronting Congress and avoiding an attempt to obtain a Declaration of War. C. Boyden Gray, the White House Legal Counsel, directed George Bush on 6 August that a declaration would not be necessary.⁷⁰⁶ Gray suggested that while a Declaration of War would be advantageous in giving the President a myriad of powers not afforded to him in peacetime, “we believe that it is legally sufficient to proceed with no congressional authorization at all.”⁷⁰⁷ Gray argued that under the Constitution, the President had the power to “respond quickly to aggression” and because “we believe that the United States does not initiate aggression, the Executive branch has generally held that the President can order U.S. forces into combat without a declaration of war.”⁷⁰⁸ In making this argument, Gray drastically expanded the notion that the President could “repel sudden attacks” to mean that the President could respond to aggression against any state without Congressional authorization. So long as the action of the foreign nation was aggression, in terms of violating internationally recognized boundaries, Gray suggested the President would have the power to commit American forces. While other members of the administration grew frustrated with Gray “running around and writing papers on what happens if a president goes to war even if a

⁷⁰⁵ This was the role of Benjamin Cohen in the destroyers for bases deal, Dean Acheson and Adrian Fisher in the Korean War, and Nicholas Katzenbach and William Rehnquist in the Vietnam War. In these war powers crises, a few lawyers within the executive stepped forward to advance executive power claims but the process lacked any formalization.

⁷⁰⁶ C. Boyden Gray, “Potential Significance of a Declaration of War Against Iraq,” 6 August 1990. George H.W. Bush Library: Nelson Lund Files, War Powers/Iraq, File 2.

⁷⁰⁷ Ibid

⁷⁰⁸ Ibid

Congress has voted that he shouldn't go to war," the legal advice he provided was integral to Bush's hardening stance against obtaining a Declaration of War.⁷⁰⁹

Rather than going to Congress for authorization to use force, Bush pushed the idea that the deployment to Saudi Arabia was part of his power to conduct diplomacy. In writing to Congressional leaders, Bush emphasized that the action was responding to "the request of the Government of Saudi Arabia" to deploy forces in that nation.⁷¹⁰ The reality was quite the opposite; Secretary Cheney had gone to Saudi Arabia to persuade them that they would have to accept large numbers of U.S. troops and they had reluctantly agreed.⁷¹¹ Rather than having to rely exclusively on the problematic ground of his status as Commander-in-Chief, Bush took the more robust position that "I have taken these actions pursuant to *my constitutional authority to conduct our foreign relations* and as Commander in Chief. These actions are in exercise of our inherent right to individual and collective self-defense."⁷¹² By emphasizing the invitation from the Saudi Arabian government, the deployment could be framed not as a precursor to the use of force but as a normal part of the conduct of foreign relations.

This was a subtle yet important action in grounding how Bush would begin to frame the Constitutional basis for executive action during the Gulf War. The President, in the Constitution, does not have an explicit power "to conduct foreign relations." Instead, "he shall receive Ambassadors and other public ministers."⁷¹³ Bush was establishing a far broader power to take any steps necessary, even if they involved the deployment of military force, in order to conduct a robust diplomacy. His promise to the Congress was that "our Armed Forces will remain [in Saudi Arabia] so long as their presence is required to contribute to the security of the region and

⁷⁰⁹ Janet Mullins, "Oral History." Princeton University: James Baker Papers, Box 173.

⁷¹⁰ George Bush, "Letter to Speaker of the House," 9 August 1990.

⁷¹¹ Cheney, interview with author.

⁷¹² George Bush, "Letter to Speaker," 9 August 1990.

⁷¹³ U.S. Constitution; Article 2; Section 2

desired by the Saudi government to enhance the capability of Saudi armed forces to defend the Kingdom.”⁷¹⁴ Bush’s framing placed the responsibility for the deployment on Saudi Arabia rather than with his own administration.

Like Presidents before him, such as Roosevelt with the deployment to Iceland or Truman with the deployment to Europe, Bush grounded his Constitutional power to deploy a massive level of U.S. forces into a hostile area on his Constitutional authority to respond to a request from a foreign state. This represented a slight-of-hand in which the President shifted from relying primarily on his power as Commander-in-Chief, which had become significantly more contestable after the passage of the War Powers Resolution, onto a power to conduct diplomacy. While this power was not in the Constitution, it was far more difficult at a political level for the Congress to challenge the President’s power to conduct diplomacy than it was to challenge his power to take the opening steps towards war. Ultimately, Bush could argue that this deployment would not lead to “involvement in hostilities” but rather “it is my belief that this deployment will facilitate a peaceful resolution of the crisis.”⁷¹⁵

From this opening salvo of the conflict, Bush found Constitutional legitimacy not in the power of Commander-in-Chief but in the power he accumulated to conduct diplomacy in responding to the Saudi request for military aid. Through this turn in Constitutional argumentation, Bush could claim that the deployment was a step in peace-making rather than war-making. As such, he could deny that hostilities were imminent, thereby side-stepping the limitations on Presidential power in the War Powers Act.⁷¹⁶

⁷¹⁴ George Bush, “Letter to Speaker of the House,” 9 August 1990.

⁷¹⁵ Ibid.

⁷¹⁶ The War Powers Act starts the ‘clock’ when President takes action that makes conflict ‘imminent’ see the resolution.

The strategy was deliberate. “I didn’t want to have a precise time where it looked like we turned from a defensive to an offensive strategy,” recalled Brent Scowcroft, “because we didn’t have the Congress on board yet [and] we thought we could just get away with it and nobody would notice.”⁷¹⁷ Rather than work to bring Congress on board, the administration’s goal was to work around them.

While publicly stating that the United States would seek to avoid hostilities, internally the administration was constructing a secret policy that was premised on the necessity of using force to repel Saddam Hussein. On 20 August, the President circulated National Security Directive 45 to his top advisers. The secret memorandum stated that the “United States will defend its vital interests in the area, through the use of U.S. military force if necessary and appropriate, against any power with interests inimical to ours.”⁷¹⁸ Speaking to the legal basis of the operation to protect Saudi Arabia Bush stated that the “UN charter provides the legal basis for the conduct of this operation.”⁷¹⁹

While the United Nations authorization was valuable for many reasons, it was a central part of the political strategy to win the war powers debate. The administration was conscious of the need to boost domestic support for the war, Secretary of Defense Richard Cheney stated: “I think it’s difficult to overstate the pressures that the President was under through this period of time [in November]...we’d been through this cycle where in the fall there was a lot of doubt. The public was not united behind this matter when we started, the Democrats and the Congress were opposed to it.”⁷²⁰ With such limited public support, the authorization from the United Nations was seen as crucial. Secretary of State Baker “realized early on was that the UN was not just a

⁷¹⁷ Quoted; Rosegrant and Watkins, “The Gulf Crisis,” 27.

⁷¹⁸ George Bush, “National Security Directive 45,” 20 August 1990; <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39/document2.pdf>

⁷¹⁹ Ibid.

⁷²⁰ Richard Cheney, “Oral History,” PBS Gulf War Oral History Collection; <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/cheney/1.html>

mechanism for bringing together the international community... [but] that at the end of the day, if we wanted to get the Democrats to go along with us on this, we had to have UN resolutions in support,” as his aide for Congressional relations, Janet Mullins, recalled.⁷²¹ The strategy was set; the United Nations authorization would help in obtaining Congressional authorization.

United Nations Security Council Resolution 665 was particularly important because it authorized the use of force in a Naval blockade of the Iraqi coast. The resolution authorized the member-states to deploy “maritime forces to the area [and] to use such measures commensurate to the specific circumstances as may be necessary.”⁷²² This resolution gave the United States a legal basis for their naval operations in the Persian Gulf, the Gulf of Oman and the Red Sea. All of these were conducted without any Congressional authorization.⁷²³ The administration was careful to label the use of naval force a ‘quarantine’ because a ‘blockade’ would be an act of war that would then require a significant degree of Congressional authorization.⁷²⁴ The resolution provided a means by which the Bush administration could characterize its actions as unwarlike and therefore outside of Congressional control. In the short term, the resolution was seen as a way to prevent arms from going into Iraq. John Bolton, the Assistant Secretary of State for International Organizations, argued that “since sanctions had been so ineffective, without enforcement nothing would get done.”⁷²⁵ At the same time, the resolution was also seen as a way to move towards a final resolution authorizing the use of force. As Robert Kimmit saw it, “the resolution opened the door for a broader use of force resolution down the road.”⁷²⁶ The

⁷²¹ Mullins, “Oral History,” Princeton University.

⁷²² United Nations Security Council Resolution 665; 25 August 1990.

⁷²³ Michael Gordon, “Confrontation in the Gulf,” *The New York Times*, 17 August 1990.

⁷²⁴ James Gerstenzang and Norman Kempster, “U.S. Buoyed by Impact of Economic Embargo,” *The Los Angeles Times*, 14 August 1990.

⁷²⁵ John Bolton, telephone interview with author, 16 November 2011.

⁷²⁶ Kimmitt, interview with author.

administration was gearing up for a final resolution that would provide the necessary “domestic and international legitimacy,” as Kimmitt said, to use military force.⁷²⁷

To counter Democratic opposition to the military mobilization, Bush addressed a joint session of Congress on 11 September. He used the international support to condemn Congressional opposition to the use of force. Bush demanded that, “Iraq must withdraw from Kuwait complete, immediately, and without condition,” and noted that this position had been “endorsed by the United Nations Security Council five times in as many weeks. Most countries share our concern for principle.”⁷²⁸ Bush was utilizing the U.N. authorization for leverage in domestic politics by arguing that to not use military force would be to let down the international community. Bush spoke of “our obligations in the Gulf” and utilized the frame of ‘international cooperation’ to make dissent against the President appear unpatriotic:

Once again, Americans have stepped forward to share a tearful goodbye with their families before leaving for a strange and distant shore. At this very moment, they serve together with Arabs, Europeans, Asians, and Africans in defense of principle and the dream of a new world order. That's why they sweat and toil in the sand and the heat and the sun. If they can come together under such adversity, if old adversaries like the Soviet Union and the United States can work in common cause, then surely we who are so fortunate to be in this great Chamber—Democrats, Republicans, liberals, conservatives—can come together to fulfill our responsibilities here.⁷²⁹

Bush’s address made clear that international support for the use of force would have domestic implications. Bush directed his speech at Congress but he was also addressing the American people to signal that Congressional dissent to the use of military force would be unpatriotic. In his rhetorical construction, the international solidarity surrounding the use of force meant that domestic dissent would constitute a threat to national security.

⁷²⁷ Ibid.

⁷²⁸ George Bush, “Address Before a Joint Session of Congress,” 11 September 1990; <http://millercenter.org/president/speeches/detail/3425>

⁷²⁹ Ibid.

In this speech, Bush introduced the central framing device for the use of force-supporting a ‘new world order.’ This would be, Bush declared: “A new era—freer from the threat of terror, stronger in the pursuit of justice and more secure in the quest for peace. An era in which the nations of the world, east and west, north and south, can prosper and live in harmony.”⁷³⁰ The rhetoric of a ‘new world order,’ had its origins in Bush’s earlier emphasis on a ‘commonwealth of nations,’ a term brought in by Philip Zelikow of the National Security Council that was meant to convey “that the nations would freely act together to promote international law.”⁷³¹ Scowcroft and Bush had decided on the term ‘new world order’ while fishing in August and they were “sitting out in a calm ocean, and it was a marvelous opportunity for a philosophical talk,” as Scowcroft recalled.⁷³² The term was meant to signify that “if there was a chance to deal with interstate aggression in a way that had never been possible before, it would be a great boon,” Scowcroft said.⁷³³ The term represented a commitment on the part of the Bush administration to readily use force to repel aggression through multilateral action. The ‘new world order’ was to be one where the President could quickly use force and a world in which Congress, necessarily, would stand by to support such military action. Much like the arguments advanced in the 1940s to support the President’s ability to use force through the United Nations, the notion of a ‘new world order’ encapsulated the idea of a powerful President who would use force through the United Nations to preserve international harmony.

In response, Congress invoked the War Powers Resolution in a resolution while stopping short of demanding a Declaration of War. House Resolution 658 was passed on 27 September 1990 and while it sought to “support actions the President has taken with respect to Iraqi

⁷³⁰ Ibid.

⁷³¹ Philip Zelikow, telephone interview with author, 17 October 2011.

⁷³² Scowcroft, “Oral History,” BOHUV.

⁷³³ Ibid.

aggression against Kuwait and to demonstrate United States resolve,” it also warned the President that the War Powers Resolution did apply to the situation.⁷³⁴ The Senate passed a similar resolution, emphasizing that the President must act “in accordance with the United States constitutional and statutory processes, including the authorization and appropriation of funds by the Congress” as it deployed forces in the Gulf.⁷³⁵ Many in the Congress wanted to combine the two resolutions, which would have created a Joint Resolution that forced the President to sign or reject it.⁷³⁶ This would have created a level of authorization for the President to use force, yet would have ceded some of the President’s power to use force to Congress. The administration told the Congress, “we don’t want any of your resolutions,” as Senator Daniel Patrick Moynihan recalled.⁷³⁷ The administration chose to pursue a policy of using force through Presidential power even though they could have Congressional authorization.

The President had allies in the Senate who were willing to support the President because of his United Nations backing. Senator Rudolph Boschwitz, a Republican from Minnesota, thanked the administration for building a “U.N. [that] is finally acting in the way we had always hoped it would” and he deplored calls for the Congress to authorize the use of force because “that kind of debate, in my judgment, would be terribly divisive. It could take days and weeks, and I think that American lives in Saudi Arabia could clearly be jeopardized.”⁷³⁸ For Senators supporting the President, the United Nations authorization was sufficient.

⁷³⁴ House Resolution 658, “United States Policy on Iraqi Aggression,” 1 October 1990; <http://www.wjopc.com/site/historical/HJRes658-101.pdf>

⁷³⁵ Senate Concurrent Resolution 147, 2 October 1990; <http://thomas.loc.gov/cgi-bin/query/D?c101:3:./temp/~c101NZLMcG::>

⁷³⁶ Senate Foreign Relations Committee, “U.S. policy in the Persian Gulf : hearings before the Committee on Foreign Relations, United States Senate, One Hundred First Congress, second session,” September/October 1990, (Washington D.C.; Government Printing Office, 1990), 121.

⁷³⁷ Ibid, 121.

⁷³⁸ Ibid, 114.

In this line of argumentation, the President found support from Senator Daniel Patrick Moynihan, a Democrat of New York. An unusual Senator, Moynihan was an academic with a PhD in sociology from Tufts who had worked on domestic policy in the Johnson and Nixon administrations. As a former Ambassador to the United Nations, Moynihan was a strong proponent of international law and had written a book on the matter in 1990, *On the Law of Nations*.⁷³⁹ His attention to Franklin Roosevelt's argument, that the United Nations "must have the power to act quickly and decisively to keep the peace by force if necessary," was cited in the hearings to justify the need for the Congress to stand down in the face of Presidential work at the United Nations.⁷⁴⁰ Based on that argument, Senator Paul Simon, a Democrat from Illinois, conceded that "we do have to deal with this problem of [UN] enforcement, and we have to do it in the traditions of the law of the nations, not only our own statutes."⁷⁴¹ Moynihan was a Democrat but he was firmly dedicated to American action at the United Nations.

When Bush argued that the Congress needed to let the President conduct policy unfettered at the United Nations, he supported the President. "When [the Senators] were sitting in our rooms, talking about a Persian Gulf Resolution," Moynihan explained, "we said that the President is invoking international law. A treaty is the 'supreme law of the land.' The argument was made that the War Powers Resolution did not arise here because under Article 25 of the Charter, we are bound to comply with a U.N. Security Council resolutions [sic] and that is what the President was doing."⁷⁴² The authorization from the United Nations had persuaded Senator Moynihan not to push a Joint Resolution that would have curtailed the President's power to use force.

⁷³⁹ Moynihan, "On the Law of Nations."

⁷⁴⁰ House Foreign Relations Committee, "Relations in a multipolar world : hearings before the Committee on Foreign Relations, United States Senate, One Hundred First Congress, second session," November 1990, (Washington, D.C.: Government Printing Office, 1991), 3.

⁷⁴¹ Ibid, 4.

⁷⁴² Senate Foreign Relations Committee, "U.S. Policy in the Persian Gulf," 120.

Moynihan took his role as the foremost historian in the Senate seriously and he worked to educate his colleagues on the United Nations Participation Act. He interpreted it as meaning that “the United States would make available to the Security Council certain forces...[and] Congress would have no further say in the matter.”⁷⁴³ While many of the other Senators “did not believe that the Senate had ever voted for such a thing,” Moynihan was able to assuage their doubts.⁷⁴⁴ With the administration acting, as Moynihan saw it, he didn’t want the concern about Congressional authorization to hold the President back. He advised the President, in confidence, that he would preserve the executive’s war power if the President continued to work through the United Nations.⁷⁴⁵

By October, Bush was ready to use military force without any Congressional authorization and he gave the order to double forces in the Gulf region. He noted in his diary on 17 October that “The news is saying some members of Congress feel I might just use a minor incident to go tow and they may be right.”⁷⁴⁶ In late October, Bush gave authorization to double the troop level in Saudi Arabia to 250,000 as preparations continued for the eventual use of force in Kuwait.⁷⁴⁷ Though Bush made the decision in late October to double troop levels in Saudi Arabia, there was a political element to the roll-out of this major development. “The announcement of the decision was to be delayed, however, until after the midterm elections,” Richard Haass noted, because “many in Congress were arguing that any such troop increase would be tantamount to making a decision to use force, and the president did not want this issue

⁷⁴³ Daniel Patrick Moynihan, “The Gulf War: Collective Security, War Powers, and Laws of War,” 17 April 1991, in *Proceedings of the Annual Meeting of the American Society of International Law*, (85) 1991.

⁷⁴⁴ *Ibid*, 2.

⁷⁴⁵ Daniel Patrick Moynihan and Steven Veisman, ed., *Daniel Patrick Moynihan: A Portrait in Letters of an American Visionary*, (New York: PublicAffairs Press, 2010), 547.

⁷⁴⁶ Bush and Scowcroft, “A World Transformed,” 382

⁷⁴⁷ Haass, “War of Necessity,” 97.

to be central to the political campaign.”⁷⁴⁸ This decision was made without briefing Congress, much less seeking to consult them or get their authorization.⁷⁴⁹ Only on 8 November, weeks after the decision had been made, did Bush announce the troop increase to the American public.⁷⁵⁰ Secretary of State Baker was abroad during this decision but his aide for Congressional relations warned him about the negative fallout this would have with Congress; “I said to Baker, you’re gonna [sic] have a load of shit on your hands when you come back, which he did, Sam Nunn went bananas. Les Aspin went bananas.”⁷⁵¹

The administration’s refusal to obtain authorization from Congress gave way to the President’s heated exchanges with Congressional leaders. While there had already been some protests from Congress this was when, as Brent Scowcroft recalled, “we started to lose support in the Congress.”⁷⁵² After doubling U.S. forces in the Gulf, Bush met with senior Congressional leaders. While Republicans supported the President, “the President and congressional Democrats clearly remain at odds over Bush’s refusal to agree to seek the consent of Congress before going to war against Iraq.”⁷⁵³ With Senate Majority Leader George Mitchell and House Speaker Thomas Foley, both Democrats, pressing Bush on the Constitutional requirement to obtain authorization, Bush responded angrily as he pulled a copy of the Constitution from his jacket pocket and told the Democrats, “I know what the Constitution says- but it also says I am commander in chief.”⁷⁵⁴

The administration was growing frustrated with Congress. Scowcroft felt that “Congress had been strongly supportive as long as we were in a defensive mode” but they had then backed

⁷⁴⁸ Ibid, 97.

⁷⁴⁹ Baker, “Politics of Diplomacy,” 330.

⁷⁵⁰ Rosegrant and Watkins, “The Gulf Crisis,” 26.

⁷⁵¹ Mullins, “Oral History,” Princeton University.

⁷⁵² Scowcroft, interview with author.

⁷⁵³ Michael Ross and William Eaton, “Bush Says War is Not Imminent,” *The Los Angeles Times*, 15 November 1990.

⁷⁵⁴ Quoted; *ibid*.

away as soon as the administration began to take a position to use force.⁷⁵⁵ While Bush was willing to meet with Democratic leaders, he continued to insist that he would not obtain Congressional authorization for the use of force in the Persian Gulf.

In the months leading up to the war, the Bush administration pursued a multi-faceted strategy in the war powers debate. First, the administration formalized the process for advancing Presidential war powers. This greatly expanded the influence of legal advisers in the decision-making process and gave the President a greater capacity to push for executive power. Second, the administration made a clear decision against obtaining a Declaration of War, or any authorization, and instead sought to argue that the invitation from Saudi Arabia constituted a sufficient Constitutional basis for the President's order to deploy forces. Third, as the debate over war powers escalated, the administration renewed its effort to obtain United Nations authorization. This decision was largely motivated out of a belief that winning authorization from the United Nations would provide the administration with the Constitutional legitimacy to use force without getting Congressional authorization.

D) UN Authorization and Diplomatic Outreach as Domestic Politics

The quest to win support at the United Nations soon became the centerpiece of the administration's effort to build the case to the American public. "From the outset," Baker explained, "our diplomatic offensive at the United Nations was a critical component in winning over a reluctant Congress."⁷⁵⁶ Baker understood that "the stronger the coalition, the easier it was to generate consensus at home."⁷⁵⁷

⁷⁵⁵ Scowcroft, interview with author.

⁷⁵⁶ Baker, "Politics of Diplomacy," 332.

⁷⁵⁷ Baker, "Politics of Diplomacy," 333.

The decision to go to the United Nations before even considering whether to obtain Congressional authorization was intentional. The issue was, as Cheney put it, “whether or not we wanted to have a vote in the U.N. first before we had a vote in the Congress” and it was decided that with the U.N. going first, “it would be very hard for the Congress not to go along. They’d look like a bunch of wusses [sic] if on the one hand the U.N. is willing to support this but the Congress isn’t.”⁷⁵⁸ This was a “conscious decision,” as Cheney put it, that Jim Baker had first put forward and the administration had accepted.⁷⁵⁹

The decision to obtain United Nations authorization for the invasion was seen, in part, as a way to circumvent the Congressional opposition to the war and boost public support for military action. While the official position was to assemble allies, it was “not apolitical in terms of domestic politics,” as Richard Haass, the National Security Director for Middle Eastern and South Asian Affairs, recalled.⁷⁶⁰ There was a sense that you “have to check boxes to manage [domestic] constituencies” and the administration saw the outreach to the United Nations as part of “domestic political management.”⁷⁶¹

With the popularity of multilateral action, the President had a high incentive to go to the United Nations.. “Going to the UN first was a very deliberate move to try to enhance our ability to get Congressional support,” Brent Scowcroft recalled.⁷⁶² At first, “we didn’t know what the attitude of the UN would be” but Baker assured the administration that “there is no problem.”⁷⁶³ With that, “we decided that the best thing to do was get UN authorization first.”⁷⁶⁴ Secretary of

⁷⁵⁸ Cheney, interview with author.

⁷⁵⁹ Cheney, interview with author.

⁷⁶⁰ Haass, interview with author.

⁷⁶¹ Ibid.

⁷⁶² Scowcroft, interview with author.

⁷⁶³ Ibid.

⁷⁶⁴ Ibid.

State James Baker thought that by going to the United Nations, the administration could ensure that the war was “done in a way that would be supported particularly by the American people” and overcome the problem that there was “very little public support in the United States for the idea of going to war in the Persian Gulf.”⁷⁶⁵ With war an option that was “overwhelmingly opposed” at home, Baker saw going to the United Nations as “one way in which we'd built domestic political support [by] bring[ing] together an unprecedented international coalition.”⁷⁶⁶

The administration was split over the question of going back to the United Nations, and Baker utilized the claim that the resolution would build domestic support to argue that the administration should go to the U.N. “The voices [in the administration] that were opposed to that [decision to go to the UN], they had to acknowledge or recognize that if we were able to do it, it would go a long way toward getting the approval of the American people,” Baker recalled.⁷⁶⁷ The American decision to go to the U.N. for Resolution 678 was decisively influenced by the belief that the authorization would help in the administration’s growing domestic political problems concerning the use of force.

Beyond building public support, the United Nations authorization was seen as a means to quell Congressional dissent against a Presidentially-ordered military action. Robert Kimmitt, the Under-Secretary of State For Political Affairs, said that the administration’s “feeling was that if we could lay a foundation in the U.N., it would make it tougher for the people in Congress not to support us living up to our U.N. obligations” by using force.⁷⁶⁸ There was a recognition that while “much of the Congress opposed moving from sanctions to armed force,” as Richard Haass

⁷⁶⁵ Baker, “Oral History,” PBS; <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/baker/1.html>

⁷⁶⁶ Ibid.

⁷⁶⁷ Baker, “Oral History,” BOHUA.

⁷⁶⁸ Robert Kimmitt, in “Providing Intelligence to Policymakers,” a panel at “US Intelligence and the End of the Cold War,” at Texas A & M University. (transcript on file with author). Summary at; <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/summer00/art02.html>

noted, many would be willing to support military action if it was “authorized by the U.N. Security Council.”⁷⁶⁹

The administration wanted the U.N. resolution because if they ever had to go to Congress, they knew they could use the U.N. authorization to force Congress to pass its own authorization. Secretary of Defense Cheney recalled that as the administration juggled questions about authorization from Congress or the UN Security Council:

We concluded that we might have to go for a vote with Congress, there might be one. If there was to be one, we wanted to get the Security Council on record first, if we could, giving us the authorization to go to war. We thought if we got the authorization to go to war from the UN Security Council, how the hell can the Congress vote you down? That wasn't a decision necessarily to go to Congress at that point, but we did decide we could control the process.⁷⁷⁰

Within the Bush administration, a United Nations Security Council authorization for the use of force under Chapter VII was seen as an essential tool in domestic politics. Richard Haass summarized it as a “U.N. first, Congress second, sequence” rooted in the belief that “we could lock in the international community and that would make it less difficult to deal with Congress.”⁷⁷¹ Other members of the coalition, particularly Prime Minister Margaret Thatcher, were opposed to returning to the United Nations for further authorization.⁷⁷² She personally came to Washington D.C. to lobby on this point- she came to the Oval Office and pleaded with Bush: “Oh George, let's just go do it.”⁷⁷³ Unlike Thatcher, the Bush administration, particularly James Baker, had a strong domestic motivation for obtaining the United Nations authorization. Baker later said that without “a use of force resolution [then] we wouldn't have had the Congress of the United States.”⁷⁷⁴ Baker stated that he believed that “the President was within his prerogative to

⁷⁶⁹ Haass, “War of Necessity,” 95.

⁷⁷⁰ Cheney, “Oral History,” BOHUA.

⁷⁷¹ Haass, “Oral History,” BOHUA.

⁷⁷² Thatcher, “Oral History,” PBS; <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/thatcher/1.html>

⁷⁷³ Baker, “Oral History,” BOHUA.

⁷⁷⁴ Ibid.

act under Article 51 of the United Nations Charter” but he still wanted a final resolution for political reasons.⁷⁷⁵

After all, Baker had always believed that the debate was about politics rather than about the law. “To my way of thinking, our disagreement about legalities was academic,” and Baker was a savvy political operative who understood the importance of mobilizing public opinion for the war.⁷⁷⁶ He knew that the UN resolution would be important domestically and he told Thatcher to “please let us be the judge of domestic political consequences of the US” on this matter.⁷⁷⁷

Baker surprisingly found himself in agreement with the Socialist French Prime Minister, François Mitterrand, who had said that Article 51, while a legal basis for using force, was not a sufficient basis for swaying public opinion: “Fifty-five million French people are not international lawyers. We need that resolution to ensure the consequences it will entail.”⁷⁷⁸ With some international agreement on the matter, the Bush administration decided to call for a final United Nations Security Council Resolution that would provide explicit authority for members to use force against Iraq.

In pursuing the United Nations authorization, the Bush administration made a full-scale diplomatic effort to obtain support from other nations and the United Nations itself. Secretary of State James Baker flew to Brussels to conduct “an intensive round of country-by-country conferences, involving at least 9 of the Security Council’s 15 members.”⁷⁷⁹ Baker paid particular attention to securing support from China and the Soviet Union.⁷⁸⁰ The United States had failed to

⁷⁷⁵ Baker, “Politics of Diplomacy,” 278.

⁷⁷⁶ Ibid, 279.

⁷⁷⁷ Ibid, 314.

⁷⁷⁸ Ibid, 315.

⁷⁷⁹ R.W. Apple, “U.S. Reported Ready to Ask U.N. to Back a Gulf Assault,” *The New York Times*, 16 November 1990.

⁷⁸⁰ Ibid

pay a substantial amount of its debt to the United Nations and Bush tried to quickly rectify this. “We’re now in sight of a United Nations that performs as envisioned by its founders,” he said as he made the case for the United States to pay its dues.⁷⁸¹

Conjoined with the diplomatic outreach was the administration’s ‘tin cup’ diplomacy. This was a strategy that was intended to assuage the concerns of Congress as much as to bolster international support for the war. As the United States was deploying troops to Saudi Arabia, Senator Robert Byrd, a Democrat from West Virginia, confronted Secretary of State Baker and asked, “How can you do this in the face of all the needs we have here?”⁷⁸² A large part of the Congress’s concern about the use of force was, as Bush described it, was rooted in wanting “to know who else was going to put up money for Gulf defense efforts and how much.”⁷⁸³ Considering that oil-rich Arab states had much to gain from U.S. military action, the Congress wanted them to help pay for the war. There was a sense on Capitol Hill, as Philip Zelikow paraphrased, “that the least these countries could do was finance the war.”⁷⁸⁴ The administration had just emerged from a protracted budget battle with Congress and they knew that the nation would only be willing to support a war that had international financial backing.

Baker urged Bush to allow him to lead an effort to build up financial support for the use of force.⁷⁸⁵ They also would seek some assurances from other states for military commitments to an operation. Baker’s motivation in this was more about political strategy than geopolitics. Baker noted during a meeting with General Powell in the lead-up to the war that we “can’t survive politically if we are 75-95% of the casualties. So need substantial addl [additional] forces partic

⁷⁸¹ Elaine Sciolino, “As U.S. Warms to U.N., It Finds Unpaid Debts Embarrassing,” *The New York Times*, 13 September 1990.

⁷⁸² Baker, “Oral History,” BOHUA.

⁷⁸³ Bush and Scowcroft, “A World Transformed,” 359.

⁷⁸⁴ Zelikow, interview with author.

⁷⁸⁵ Baker, “Oral History,” BOHUA.

[particularly] arab.”⁷⁸⁶ In his private notes, Baker was conceding that the U.S. needed an international coalition largely for domestic political reasons. The administration understood that sacrifice by the international community, particularly the Arab states that benefited from the U.S. mission, was the only way that the administration could gain support from the Democrats.

Secretary of State James Baker and Secretary of the Treasury Nicholas Brady flew around the world to request that other nations donate funds to meet the costs of the war. The administration was successful with their main concern being that “we would raise too much.”⁷⁸⁷ The U.S. raised \$15 billion from Kuwait and \$15 billion from Saudi Arabia.⁷⁸⁸ The Germans and the Japanese, neither of whom were capable of deploying military force because of post-WWII Constitutional restrictions, pledged large sums as well.⁷⁸⁹ The strategy was not only intended to lower United States costs in a war but also because “members of Congress were insistent on this,” Richard Haass recalled, and ‘burden sharing’ was a “popular refrain on Capitol Hill.”⁷⁹⁰

The diplomatic effort was constructed, in part, to position the administration in a manner in which they could defend the decision to use force as part of an international coalition that had been established. With protests rising from members of Congress, the administration brought in Secretary Baker to brief Congressional leaders on his international diplomacy and “on the strong international opposition to partial solutions.”⁷⁹¹ When some pledges were considered by Baker to be “unacceptably low” in terms of domestic politics, Baker “doubled them all on the spot” to create numbers that “might be loosely defined as politically acceptable ones.”⁷⁹² The administration always saw the international fundraising, as Baker put it, as “primarily a political

⁷⁸⁶ James Baker, noted on meeting “Colin Powell in Office at State” 19 October 1990. Princeton University: James Baker Papers, Box 109.

⁷⁸⁷ Haass, “War of Necessity,” 87.

⁷⁸⁸ Baker, “Oral History,” BOHUV A.

⁷⁸⁹ Ibid.

⁷⁹⁰ Haass, “War of Necessity,” 86.

⁷⁹¹ Ibid, 99.

⁷⁹² Baker, “Politics of Diplomacy,” 288

challenge rather than an economic one. We had to demonstrate to our *domestic* audience that everyone not just us, was taking risks and making sacrifices.”⁷⁹³

The diplomatic effort culminated with the vote at the United Nations Security Council on 29 November where the resolution passed on a 12-2 vote, with China and Cuba opposing the resolution.⁷⁹⁴ Secretary of State Baker opened the session with an impassioned speech that was directed to “confront both Iraq *and* the American people with the proposition of war in the desert.”⁷⁹⁵ Baker argued that force should be authorized because “we must not let the United Nations go the way of the League of Nations. We must fulfill our common vision of a peaceful and just post-Cold War world.”⁷⁹⁶ The argument paralleled the one made by Acheson to the United Nations in 1950 and Baker exploited the comparison: “Not since Korea in 1950 had the United Nations granted such sweeping authority to wage war.”⁷⁹⁷

Under Chapter VII of the United Nations Charter, the UNSC Resolution 678 took on binding force. The resolution set 15 January 1991 as a deadline for Iraqi withdrawal from Kuwait and “authorizes member states co-operating with the Government of Kuwait” to “use all necessary means” to force Iraq from Kuwait and “restore international peace and security in the area.”⁷⁹⁸ This was the final measure that the President needed; he now had a firm ultimatum issued from the United Nations and a date on which the war could commence.

The resolution was a success for the White House and a setback for Democratic Congressional leaders. At the behest of Congressional leaders, former President Jimmy Carter had written a note to the leaders of other states on the Security Council urging them not to

⁷⁹³ Ibid, 288 (emphasis added)

⁷⁹⁴ China opposed the resolution but did not use their veto.

⁷⁹⁵ Baker, “Politics of diplomacy,” 325. (emphasis in original)

⁷⁹⁶ Ibid, 326.

⁷⁹⁷ Ibid, 327.

⁷⁹⁸ United Nations Security Council Resolution 678, 29 November 1990; <http://www.unhcr.org/refworld/docid/3b00f16760.html>

support the Bush administration and to vote against UNSC Resolution 678.⁷⁹⁹ The Democratic leadership understood that the resolution would greatly undermine the Democratic opposition's ability to force Bush to engage with the Congress concerning the use of force.⁸⁰⁰ Congressman Lee Hamilton, the Chairman of the House Foreign Relations subcommittee on the Middle East, expressed concerns that the United Nations Resolution had no "protection for congressional authority to declare war."⁸⁰¹

For the administration, the resolution was a major political success. It meant that, as Baker said, "an essential building block of our domestic strategy fell into place. Now we not only had the diplomatic authority for waging war, but also the political leverage to, in effect, shame the recalcitrants in Congress into doing the right thing."⁸⁰² Baker's emphasis on 'shame' is important; the administration was working to undermine the legitimacy of Congress by deploying the support of foreign states as a means to question the patriotism of the Congressional leaders. John Bolton recalled that there was a joke going around the administration at the time; "we got Finland to vote in favor of force before congress."⁸⁰³ The U.N. resolutions were utilized by the administration to make dissent far more difficult.

The administration was prepared to use the U.N. resolution to force Congress to go along with the war. Baker was prepared to argue that if Congress voted against the war it "not only be turning its back on America's traditional obligation to support U.N. Security Council resolutions for which it voted, but also would be spurning the will of the international community."⁸⁰⁴ At the time, he pushed the members of Congress by arguing: "if X number of countries [say] that this

⁷⁹⁹ Douglas Brinkley, *The Unfinished Presidency: Jimmy Carter's Journey Beyond the White House*, (New York: Viking, 1998), 339.

⁸⁰⁰ Walter Pincus, "Hill Split over When and How to Deal With UN resolution," *The Washington Post*, 30 November 1990.

⁸⁰¹ Ibid.

⁸⁰² Baker, "Politics of diplomacy," 332.

⁸⁰³ Bolton, interview with author.

⁸⁰⁴ Baker, "Politics of Diplomacy," 344.

is the right thing to do, how can you guys be opposed to the decision of your president,” and he believed that “if it didn’t convince these guys to be with us [the administration], it convinced them to be quiet.”⁸⁰⁵ The commitment by the executive at the United Nations would force the Congress to follow.

E) *Dellums v. Bush*: Litigating War Powers

As President Bush pursued authorization from the United Nations, and expanded its deployments in the region, the administration found itself facing an increasingly daunting set of legal challenges and protests from Congressional Democrats.

On 19 November, Ronald Dellums, along with a group of 44 of his fellow Congressmen, filed a lawsuit in the District Court of Washington D.C. Dellums was one of the foremost liberals in the House of Representatives and he had devoted his Congressional career to challenging military expenditures and attempting to refocus spending towards domestic priorities.⁸⁰⁶ He had begun plans for a lawsuit in October. Represented by Jules Lobel, a law professor at the University of Pittsburgh, the suit challenged George Bush’s authority to launch an invasion of Kuwait without Congressional authorization. While the plaintiffs knew that the suit would likely be defeated, there was a hope that it would, as Dellums put it, “throw a monkey wrench into this situation,” and slow or halt the path to war.⁸⁰⁷ The suit, which had been drafted by Lobel in cooperation with the Center for Constitutional Rights, argued that, “If the President takes it upon himself to initiate a war without the unequivocal consent of Congress, the victim of Iraqi aggression will be not just Kuwait, but the Constitution of the United States.”⁸⁰⁸ The case was

⁸⁰⁵ Janet Mullins, “Oral History,” Princeton University.

⁸⁰⁶ Lobel, “Success Without Victory,” 12.

⁸⁰⁷ Quoted; *ibid*, 12.

⁸⁰⁸ Quoted; *ibid*, 22-23.

selected to be heard by Judge Harold Greene, a Carter-appointee who was considered one of the more liberal on the D.C. Circuit Court.

Though the case had been filed strictly as a legal challenge against the potential military action in Kuwait, it was inextricably bound up with the broader politics of the issue. Dellums knew that even if the case did not win in court, it would help persuade public opinion; a loss in court could mean that “we’ll win in the courtrooms and living rooms of America, where this case will eventually be tried.”⁸⁰⁹ Standing on the courtroom steps, a group of Congressmen and lawyers held a press conference that sought to take the message of the lawsuit to the public. In pressing the argument to the public, the Congressmen invoked the specter of Vietnam to make the case for going to Congress. Congresswoman Marcy Kaptur described herself as a woman who had grown up with “friends who fought and died in Vietnam” in an “undeclared war that split this nation in two,” and as a Congresswoman she pledged not to allow another “undeclared war.”⁸¹⁰ Dellums himself spoke of the deployment even short of war as the “inconveniencing of 100,000s of American people by deploying them in the context of the Persian Gulf and at a time when we have extraordinary pressure on the American budget, you’re talking about the expenditure of billions and billions of dollars.”⁸¹¹ From outside the courthouse, these plaintiffs were attempting to assert their case into a broader political debate that was beyond the arcane legal questions that the case would hinge on.

In conjunction with the Dellums group, the House Democratic Caucus passed a non-binding resolution on the President’s war powers. Citing the “possibility of offensive military action,” the caucus warned the President that “the Constitution of the United States gives

⁸⁰⁹ Quoted; *ibid*, 27.

⁸¹⁰ Center for Constitutional Rights Press Conference, “Lawsuit on Congressional War Powers,” 20 November 1990; <http://c-spanarchives.org/program/Lawsui>

⁸¹¹ *Ibid*.

Congress the exclusive authority to declare war” and demanded that “no initiation of offensive military action shall be taken by U.S. forces in the Persian Gulf without the affirmative approval of Congress.”⁸¹² The resolution was non-binding but it helped to bring out the legal arguments of the case into a broader public debate.

The turn to the courts by Dellums created a surging effort by White House and Justice Department lawyers to place more focus on the war powers issue. The Justice Department took the lead in litigating the case but they worked closely with a wide array of administration officials and met with President Bush on numerous occasions.⁸¹³ With Congressional leaders attacking the President’s power to use force, the lawyers took on a more active role in advocating for executive power.

President Bush took an active interest in the case and its proceedings. Stuart Gerson, the Department of Justice official who handled the Dellums case, recalled that: “President Bush and I were friends, I knew them [the Bush family] as head of opposition research [for the 1988 campaign]. He understood his power, he understood war power, and he understood the relationship between the political branches...he called the bluff of the Congress.”⁸¹⁴ Bush selected Gerson to handle the case because he knew that he could be trusted to win it and because Gerson was passionate about the issues surrounding executive power.⁸¹⁵ Gerson and Bush had discussed war powers issued during the campaign and in this situation, “The President was enmeshed in the details.”⁸¹⁶ Throughout his handling of the case, Gerson would get telephone calls from the President and Bush carefully followed its course.⁸¹⁷ For Gerson, the case

⁸¹² “Sense of the Caucus Regarding the Persian Gulf Crisis,” 5 December 1990. George Bush Library; C. Boyden Gray Papers, War Powers/Kuwait, File 2.

⁸¹³ Stuart Gerson, telephone interview with author, 26 August 2011.

⁸¹⁴ Ibid.

⁸¹⁵ Ibid.

⁸¹⁶ Ibid.

⁸¹⁷ Ibid.

held a strong personal interest: “Separation of powers is something I’ve been interested in since my university days. I knew the history of this pretty well and I remembered that every president since Truman had confronted a war powers issue.”⁸¹⁸ He felt that those who advocated for limits on Presidential power were too willing to state that “hostilities against a foreign sovereign, indeed against anyone [was] ‘war.’”⁸¹⁹

Despite Gerson’s deep interest in the subject, his argument in court came across as deeply flawed. He argued that the ‘Declare War’ clause of the Constitution could not be used by the Congress to restrict Presidential action. Rather, he argued that, “A Congress at loggerheads with a pacifist President might, on its own, want to declare war.”⁸²⁰ In Gerson’s formulation, the Congress could not halt the President’s use of force but “each branch might advance its conduct in support of belligerency ahead of the other: the President undertaking it, Congress in declaring it.”⁸²¹ The Declaration of War, as Gerson argued, was not important because “The Constitution does not say war must be declared in *advance* of hostilities.”⁸²² For Gerson, the President could simply use force and then the Congress could elect to ‘declare war’ or elect not to. Judge Harold Greene greeted the argument with a sense of bafflement; he reminded Gerson that a major purpose of the Constitution was to prevent one man from taking the nation to war.⁸²³ Similarly, the *New York Times* lambasted Gerson’s argument as “a breathtaking misinterpretation of the Constitution.”⁸²⁴

The decision given by Judge Greene was technically a victory for the Bush administration, but it rejected much of the administration’s position and held open the possibility

⁸¹⁸ Ibid.

⁸¹⁹ Email correspondence from Gerson to author, 02 September 2011.

⁸²⁰ Quoted; Editorial Board, “Who Can Declare War,” *The New York Times*, 15 December 1990.

⁸²¹ Quoted; *ibid.*

⁸²² Quoted; *ibid.*

⁸²³ Ibid.

⁸²⁴ Ibid.

for further lawsuits by the Congress to prevent the war. While the Bush administration had argued that the use of force in Iraq would not constitute a war, Greene ruled that, “the forces involved are of such *magnitude* and *significance* as to present no serious claim that a war would not ensue if they became engaged in combat” and therefore, “clear that congressional approval is required if Congress desires to become involved.”⁸²⁵ By defining the threshold for ‘war’ based on the ‘magnitude’ and ‘significance’ of the troops involved, Greene was rejecting the administration’s argument that the qualitative dimension of the operation, to uphold United Nations resolutions as part of a peacekeeping operation, could prevent the use of force from being considered ‘war.’ This was a “quantitative definition of war” that Gerson saw as “deeply flawed” because it rejected the premise that this was not a war that was being contemplated.⁸²⁶

Most problematically for the administration, Greene argued that the court could prevent the use of force. The court, in his opinion, may issue an injunction “at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization.”⁸²⁷ He refused to act at this time because the Congress had not yet taken sufficient steps to prevent Bush from using force, such as passing a resolution against it and therefore, “No one knows the position of the Legislative Branch on the issue of war or peace.”⁸²⁸ Until the Congress took action Greene wouldn’t act because, “If the Congress chooses not to confront the President, it is not our task to do so.”⁸²⁹ The ruling left open the possibility that were the Congress to take further action, and if more members joined onto a rehearing of the *Dellums* case, that Judge Greene would be willing to try and block the use of force.

⁸²⁵ Judge Harold Greene, “Ron Dellums v. George Bush,” 752 F. Supp. 1141; 1990 U.S. Dist. Lexis 16611, 13 December 1990; http://www.personal.psu.edu/faculty/m/c/mcw10/Download/Dellums_V_Bush.htm (emphasis added)

⁸²⁶ Gerson, interview with author

⁸²⁷ Greene, “Dellums v Bush.”

⁸²⁸ Ibid

⁸²⁹ Ibid.

The administration was furious with the decision. Stuart Gerson always viewed Greene as a “risk” because he was a “hardened veteran of the [Department of Justice’s] Civil Rights Division” but Gerson was nonetheless “surprised by the decision’s flaws.”⁸³⁰ The State Department Legal Adviser Edwin Williamson called Greene’s ruling an “absurd opinion.”⁸³¹ The case was technically a victory for the Department of Justice, making it difficult for them to appeal it, but it meant that the courts would pose a continued threat to the administration’s efforts to use military force if the administration did not get Congressional authorization. However, some of the policy-makers within the administration gave little consideration to the ruling and in mid-December were still continuing to prepare to use force without Congressional authorization. Vice-President Quayle “barely noticed the decision” as the administration prepared for war.⁸³²

F) Executive Branch Lawyers as Advocates Against Congress

With the increased level of confrontation between the Congress and the White House, the executive branch lawyers proved unwilling to compromise when a moderate Democratic Congressman proposed an authorizing resolution. The White House refused to give up any legal ground that would concede that the Congress had some authorization over the President’s power to deploy the armed forces. To a large degree, the lawyers were taking their lead through inferences about what policy-makers were planning on doing. While it is commonly argued that executive branch lawyers take ‘orders’ from the policy-makers, the process is far more nuanced. William Barr, the Deputy Attorney General, recalled that while he “knew the issue would eventually come, and the President would need some advice on the parameters of his power” he

⁸³⁰ Gerson, interview with author.

⁸³¹ Edwin Williamson, telephone interview with author, 29 October 2011.

⁸³² Dan Quayle, telephone interview with author, 25 October 2011.

thought that Bush already had decided that “he had the authority to do it, and that’s ultimately more important than what I believe.”⁸³³ Barr had watched for months as the troops assembled in Desert Storm and knew that Bush “didn’t put 500,000 troops over there for them to sit there, and there was no doubt in my mind that he was going to go on the offensive unless the Iraqis withdrew unilaterally.”⁸³⁴ This reflected a belief in the executive branch legal community that the attack was going to happen regardless of their judgment and they would be best-served by being on the correct side of the issue. While the Department of Justice has the statutory power to issue a binding judgment on the powers of the President, the leaders at the Department of Justice viewed their work merely as constructing “advice” that was less important than the beliefs of the President.⁸³⁵ This frame reflected the belief amongst DOJ leaders that their job was to assist the President in using force rather than acting as neutral adjudicators on Presidential power.

Though the Dellums suit was defeated, Congressional leaders became increasingly vocal in demanding Congressional authorization for military action in Kuwait. While the President does “not need the approval of the Congress to *threaten* war,” Senate Majority Leader George Mitchell said that Bush “does need the approval of the Congress to *make* war.”⁸³⁶ Later in the month, a group of 110 Democratic Congressmen, with significant representation from the Dellums group, released a public letter to the administration that put forward their interpretation of the United Nations authorizations more explicitly. Under the leadership of Congressman George Miller, they argued that, “the vote of the United Nations must not be interpreted as an authorization for the use of American forces in an offensive capacity against Iraq.”⁸³⁷

⁸³³ William Barr, “Oral History,” BHOUVA.

⁸³⁴ Ibid.

⁸³⁵ Ibid.

⁸³⁶ Walter Pincus, “2 Key Democrats Back Bush in Threat of Force Against Action,” *The Washington Post*, 11 December 1990. (Emphasis added)

⁸³⁷ George Miller et al. “Letter to President Bush,” 27 December 1990. George Bush Library: Boyden Gray Papers, War Powers/Iraq, File 7.

Constitutionally, “the United Nations does not commit, or authorize the use of United States armed forces,” because the power “to commit U.S. troops to offensive combat lies solely with the Congress of the United States.”⁸³⁸

While Gerson’s litigation team had managed the in-court strategy for the case, the White House Counsel had shifted into a more aggressive position. As the Congressional attack on executive power continued, the executive branch lawyers became increasingly consumed with beating back these attacks. White House counsel even took on public relations work such as drafting talking points for White House spokesmen.⁸³⁹ The secretive nature of this arrangement, with associate White House Counsel Nelson Lund urging the spokesman to “not hand this paper out,” is indicative that the Counsel’s office understood that this work stretched the limits of their office’s traditional boundaries.⁸⁴⁰ In shaping the public relations campaign against the lawsuit, the White House Counsel gave up any claim to being an apolitical legal unit; they were now in the position of creating “talking points” to bolster executive power.⁸⁴¹

The White House Counsel’s Office became full-fledged activists for executive power. Headed by C. Boyden Gray, the office had a powerful place in the White House. Gray, a longtime aide to Bush, was “an influential figure on a variety of issues, largely as a result of his special rapport and length of service with George Bush,” as one reporter put it.⁸⁴² Gray said that “the White House counsel should be a figure inconspicuous to the public” yet within the White House he was a powerful figure who could “go in and talk to the President on any issue he

⁸³⁸ Ibid.

⁸³⁹ Nelson Lund to Steve Hart, “Desert Shield Lawsuit,” 4 December 1990. George Bush Library: Boyden Gray Papers, War Powers/Iraq, File 2.

⁸⁴⁰ Ibid.

⁸⁴¹ Ibid.

⁸⁴² Neil Lewis, “Turning Loyalty and Service to Bush into Power as Presidential Counsel,” *New York Times*, 12 December 1990.

chooses,” as another administration official put it.⁸⁴³ The Dellums lawsuit necessarily elevated the position of the lawyers within the administration as the legal questions surrounding war-making became more pressing.

As the Dellums case elevated the questions around Presidential powers, Gray led the White House Counsel’s office into taking an aggressive position on Presidential power. Gray set out to investigate the history of the President’s power to use military force.⁸⁴⁴ In analyzing the Gulf of Tonkin Resolution, which was being invoked by Democrats as evidence of the need for the President to obtain Congressional authorization, Gray argued that “the resolution was adopted at Johnson’s request. He wanted the resolution in order to ensure congressional support for his policy and avoid the problems that President Truman encountered with Congress over Korea.”⁸⁴⁵ Gray advanced the argument that the question of a resolution was a political question rather than a legal necessity. The President’s lawyers, Gray assured Bush, would be prepared to protect the President’s authority against any legal challenges.⁸⁴⁶

The Dellums litigation deepened the commitment to executive power amongst executive branch lawyers. White House Associate Counsel Nelson Lund recalled that the White House legal staff came to embrace their role as “the President’s lawyers” with a task of “advocating for their client’s needs.”⁸⁴⁷ In defending the President’s power, the White House Counsel would become an important component of the administration’s preparations to use military force.

The White House counsel took on the issue of the War Powers Resolution with aggressive interpretations of the statute. In an internal White House memorandum, C. Boyden Gray explained to White House Chief of Staff that “we have consciously avoided notifying

⁸⁴³ Ibid.

⁸⁴⁴ C. Boyden Gray, “Background to the Gulf of Tonkin Resolution,” undated note to President Bush. George Bush Library: Nelson Lund Papers, War Powers/Iraq, File 4.

⁸⁴⁵ Quoted; *ibid.*

⁸⁴⁶ C. Boyden Gray telephone interview with author, 3 October 2011.

⁸⁴⁷ Lund, interview with author.

Congress consistent with section 4 [of the War powers Resolution] that hostilities in the region are imminent, because this would trigger the Resolution's 60-day clock under section 5(b)...[then] the President would be required by the resolution to terminate the deployment of U.S. forces to the region unless Congress passed legislation..."⁸⁴⁸ Internally, the White House understood that they were violating the spirit, if not the letter, of the War Powers Resolution by denying that hostilities were imminent. Gray would dismiss such concerns by telling Sununu that the "War Powers Resolution is unconstitutional insofar as it purports to allow Congress to compel the withdrawal of U.S. forces through inaction..."⁸⁴⁹ Within the White House, advisers were going so far as to suggest that the War Powers Resolution was not merely inapplicable to the situation but that it was entirely unconstitutional. Indeed, "none of us thought the War Powers Resolution was constitutional," Stuart Gerson recalled.⁸⁵⁰ While they believed that the War Powers Resolution was unconstitutional, their response was to create arguments for how they were complying with it when, in reality, they had no intention of doing so.

Even the more politically removed Office of Legal Counsel found itself taking an activist role. While the OLC had been involved in the inter-agency legal process from the beginning, they had originally taken on a more minor role. The office's culture traditionally had been more removed from activism and the office was designed to respond to requests for review rather than to proactively promote the President's agenda. Yet, Assistant Attorney General Michael Luttig came from a deep Republican background and was willing to engage the office in political advancement of the President. Now that the Congress was charging Bush with acting unconstitutionally, Luttig took on a more activist role. While the explicit job of the Office of

⁸⁴⁸ C. Boyden Gray, "War Powers Resolution," memorandum to John Sununu, 6 December 1990. George Bush Library: George Bush Library: C. Boyden Gray Papers, War Powers/Iraq, File 3.

⁸⁴⁹ Ibid.

⁸⁵⁰ Gerson, interview with author.

Legal Counsel is to review the White House's requests on whether an executive action is constitutional, Luttig went beyond this to offer advice to the White House counsel on how to frame the issues.⁸⁵¹ The White House Counsel's office actively took the assistance, with Associate White House Counsel Nelson Lund arguing that OLC was "just like the White House Counsel's office except that they [OLC] could do more in-depth legal research."⁸⁵² When the Senate Judiciary Committee moved to hold hearings on the war powers issue in December 1990, Luttig actively cooperated in political posturing. Along with Nick Rostow of the National Security Council, Luttig drafted a series of questions that could be provided to "friendly senators on the Senate judiciary committee."⁸⁵³ Luttig, an expert in executive power, used his knowledge to create 34 questions for the Senators to ask that were little more than statements of support for the executive's expansive interpretation of war powers.⁸⁵⁴

This represented a shift for the Office of Legal Counsel from being a more apolitical legal unit towards a more politically engaged part of the White House's push for executive power. This period also signaled a shift in power in the executive branch's legal infrastructure away from the Attorney General and the formalized interagency 'War Powers Group,' towards an informal yet close alliance between the Office of White House Counsel and the Office of Legal Counsel.

First, the War Powers Group fell into disuse because it was seen by some executive branch lawyers as lacking sufficient ideological coherence. The group included some officials who could not be fully trusted by the White House as it sought to build the case for executive

⁸⁵¹ Michael Luttig, "Memorandum," to C. Boyden Gray, 3 December 1990. George Bush Library: George Bush Library: C. Boyden Gray Papers, War Powers/Iraq, File 2.

⁸⁵² Lund, interview with author.

⁸⁵³ Nick Rostow, "Questions for transmittal to friendly senators on the senate judiciary committee," note to Michael Luttig, 7 January 7, 1991. George Bush Library: George Bush Library: C. Boyden Gray Papers, War Powers/Iraq, File 3.

⁸⁵⁴ Ibid.

power. CIA General Counsel Elizabeth Parker was an advocate for Congressional oversight of covert action.⁸⁵⁵ While the CIA had great expertise on Presidential power questions, she was told that debates regarding the use of force in the Gulf would be “out of her purview” and she soon found herself excluded from meetings on the Gulf.⁸⁵⁶

Second, the leadership at the Department of Justice, including the Attorney General and the Deputy Attorney General, were removed from their traditional involvement in these matters. Attorney General Richard Thornburgh, an ardent Republican and the former Governor of Pennsylvania, said that he “trusted OLC to handle this” and it was his “management style when I was Governor and the Attorney General to whole-heartedly delegate out to subordinates.”⁸⁵⁷ For Thornburgh, this was a matter that “[White House Counsel’s] Gray and [Office of Legal Counsel’s] Luttig were great for” and he wanted to stay out of as much as possible.⁸⁵⁸ Similarly, Deputy Attorney General Barr relegated these questions to OLC because that office “knows all this stuff anyway, because [it does] stuff on covert actions and things like that. So it’s almost like boilerplate what the powers of the President are in war.”⁸⁵⁹ While Attorney General Robert Jackson had been President Roosevelt’s paramount adviser on war powers questions, and had even denied the President the legal permission to carry out some actions, the growth of the Office of Legal Counsel within the Department of Justice and the development of the White House Counsel’s office meant that the Attorney General no longer held the same position in the war powers debates. OLC had been taken from a small and largely irrelevant office and White

⁸⁵⁵ Elizabeth Parker, *Intelligence Oversight in a Democracy*, Houston Journal of International Law, (21), 1988.

⁸⁵⁶ Elizabeth Parker, telephone interview with author, 07 October 2011.

⁸⁵⁷ Richard Thornburgh telephone interview, 19 October 2011.

⁸⁵⁸ Ibid.

⁸⁵⁹ Barr, “Oral History,” BHOUVA.

House Counsel had been taken from merely the President's personal lawyer to being the key institutions that advanced executive power to utilize military force.⁸⁶⁰

G) The Scholarly Debate in the Public Arena

As the Dellums case brought the war powers question into national politics, the nation's newspapers erupted with contending legal experts supporting and decrying the Bush administration's legal position. The Bush administration relied on advocates of American participation in international organizations and proponents of executive power to convince the public that the President had the Constitutional legitimacy to rely on U.N. authorization without Congressional authorization.

Initially, the White House found itself on the defensive against legal scholars. The Dellums case had been accompanied by an *amicus brief* organized by Professor Harold Koh of Yale Law School. It included the signatures of leading law scholars.⁸⁶¹ The brief had been organized in a frenzied two-week period but its haphazard design did not undermine its long-term effect.⁸⁶² Koh utilized the platform of the *amicus* brief to testify on Capitol Hill at the Senate Foreign Relations Committee. Koh spoke of the case "challenging various aspects of the Executive branch policy," and he was warmly received by the Senators.⁸⁶³ With the case receiving this level of political support, Bush administration felt that it would have to work to get some academic support for the administration's position.⁸⁶⁴

⁸⁶⁰ Ackerman, "The Decline and Fall," 177-178.

⁸⁶¹ Harold Koh, et al. "Memorandum Amicus Curiae of Law Professors," 1990; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932883

⁸⁶² Harold Koh, "Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush," *Yale Law Faculty Scholarship Series*, Paper 2074, 249.

⁸⁶³ House Foreign Relations Committee, "Relations in a multipolar world," 93.

⁸⁶⁴ Gerson, interview with author.

The legal scholars supporting the need for Congress to declare war argued that the authorization from the U.N. was Constitutionally irrelevant. Koh had warned in his testimony against “multilateralism by the executive branch” that enables the President to launch a “secret military strike” by the President against “a recalcitrant foreign dictator,” as Bush had done in Panama and now could do against Saddam.⁸⁶⁵ William Van Alstyne, a Duke University law professor, argued that the issue involves the “constitutional processes of the United States and does not come from the United Nations at all. The question [of war powers] is obviously and squarely one for us to resolve. It involves our armed forces, not those of the United Nations.”⁸⁶⁶ For such scholars, the U.N. resolution was a political matter that was entirely divorced from the Constitutional question at hand.

The supporters of Bush included proponents of executive power and proponents of the United Nations system. These two groups of advocates shared a commitment to protecting the President’s ability to take military action in this circumstance. Though they came from distinct ideological backgrounds, the two groups found common cause in this instance.

Many pundits argued that under Bush’s Constitutional power as Commander-in-Chief he could utilize military force. Stephen Carter of Yale Law School argued that, “There is nothing in the history of the ratification of the Constitution to suggest that the Founders imagined that a congressional declaration of war would be needed whenever American troops fought an engagement,” and since “the Gulf War has already begun” with Saddam’s invasion of Kuwait, Bush did not need any authorization from Congress.⁸⁶⁷ L. Gordon Crovitz, a lawyer who had become a leading figure in the conservative push for executive power with his 1989 book, *The Fettered Presidency: Legal Constraints on the Executive Branch*, used his position as an editor at

⁸⁶⁵ House Foreign Relations Committee, “Relations in a multipolar world,” 93.

⁸⁶⁶ William W Van Alstyne, “Letting Slip the Dogs of War,” *The Washington Post*, 23 December 1990.

⁸⁶⁷ Stephen Carter, “Going to War Over War Powers,” *The Washington Post*, 8 November 1990.

the *Wall Street Journal* to advocate for Presidential powers. In an editorial, Crotitz argued that the President had the power to take action against Iraqi forces because the Congress's power to "declare war" left the President with the power to actually "make war."⁸⁶⁸

Other commentators emphasized the importance of upholding the commitment to the United Nations as a justification for Presidential power. Thomas Franck of NYU law School had long been a proponent of the use of the United Nations in peacekeeping and he saw Congressional activism as hobbling America's capacity to support the United Nations. He turned to the history of the United Nations to argue that, "in ratifying the Charter, the U.S. became a part of a new world order. The Charter system does not leave room for each state, once the Council has acted, to defer compliance until it has authority from its own legislature."⁸⁶⁹ Franck joined with Faiza Patel, another prominent scholar of international organizations, to argue: "the purpose of the war-declaring clause was to ensure that this fateful decision did not rest with a single person" and now the United States should "vest that responsibility [to declare war] in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power. This Council is far less likely to be stampeded by combat fever than is Congress."⁸⁷⁰ In this formulation, the Security Council was a direct substitute for Congress. Robert Turner of UVA law echoed this argument: "If members of Congress feel that their prerogative to issue such a declaration [of war] has been weakened in the post-World War II era, they are correct- but the explanation is not executive usurpation but the outlawing through the U.N. charter of aggression itself."⁸⁷¹ For Turner, obtaining Congressional authorization would weaken American commitment to the United

⁸⁶⁸ L. Gordon Crovitz, "Lawsuit Offensive Against the Commander in Chief," *The Wall Street Journal*, 5 December 1990.

⁸⁶⁹ Thomas Franck, "Declare War? Congress Can't," *The New York Times*, 11 December 1990.

⁸⁷⁰ Thomas Franck & Faiza Patel, "UN Police Action in Lieu of War," 74.

⁸⁷¹ Robert Turner, "Constitutional Controversy: Continued," *The Washington Post*, 29 December 1990.

Nations. Gregory Stanton, a law professor at Washington and Lee University and a leading anti-genocide activist, stated their argument in precise legal terms:

Security Council Resolution 678 authorizes members of the United Nations to “use all necessary means,” including armed force, to assist Kuwait in its defense against Iraq’s invasion. If Iraq does not withdraw from Kuwait, as it has been ordered to do so by the Security Council, the United States will have legal authority to take military action. As in the Korean “police action,” the United States will be acting under the United Nations Charter. *To execute such a United Nations-authorized police action, the President need not obtain the legal authority of a Congressional declaration of war. He already has such legal authority under the United Nations Charter, constitutionally part of the supreme law of the land.*⁸⁷²

These writers supported American participation in the United Nations system and saw Congressional authorization as a constraint on the President’s capacity to make commitments to the United Nations. As Stanton argued, the United Nations Charter was embedded within the American Constitutional system as a treaty that then became, per Article VI of the Constitution, the “supreme law of the land.”⁸⁷³

The cause brought together activists who had been advocates for the United Nations with those who had traditionally argued for enlarged executive war power. While these legal scholars could not hope to outnumber the group of professors who had filed in the Dellums lawsuit, that was not their goal. They demonstrated that there was an intellectually sophisticated case for the President to use force without Congressional authorization.

The public debate reflected the new coalitions forming around the war. The position of expansive executive power was being supported not only by conservatives, but also by scholars who had been leading proponents of the United Nations system. The debate reflected the deep divisions in the country with approximately one-half of the nation supporting the use of force, and the other half opposing it.⁸⁷⁴ While these writers acted independently of the White House,

⁸⁷² Gregory Stanton, “Law of the Land,” *The New York Times*, 29 December 1990. (emphasis added)

⁸⁷³ US Constitution: Article VI

⁸⁷⁴ Exact numbers depend on the wording, see:

John Mueller, “The Polls: a Review,” *The Public Opinion Quarterly*, (57), 1993.

Stephen Carter was personally invited to the Department of Justice to discuss the war powers issues throughout this period.⁸⁷⁵ There was a mutual affection between the professors who had expansive interpretation of executive power and the executive branch lawyers. These authors helped to assuage public concerns over the President's power to use force.⁸⁷⁶

H) The Nunn Hearings and the Debate in Congress

After months of public sparring over the powers of the President to use military force, the Senate Armed Services Committee, under the leadership of Sam Nunn, raised the stakes of the debate by calling for an official set of hearings. Nunn was a Democrat from Georgia who wanted to use the hearings to raise his profile on defense issues and to directly oppose the administration's case for going to war. He had been angered by the lack of consultation with his committee regarding the October troop increase, which he called a "fundamental change" in policy, and he wanted to use his committee to critique the administration.⁸⁷⁷ Nunn believed that the war was going to kill tens of thousands of American soldiers and was determined to delay it or stop it entirely.⁸⁷⁸ In calling forward the administration's top defense and legal officials to defend the President's power to use military force, Nunn was attempting to focus public attention on the President's power-grab and force the President to obtain Congressional authorization. Like Fulbright had done in his 1967 hearings, Nunn was determined to utilize the spotlight of official hearings to directly engage the administration in a debate over war powers.

⁸⁷⁵ Gerson, interview with author.

⁸⁷⁶ Adam Clymer, "War in the Gulf: Public Opinion, Poll Finds Deep Backing While Optimism Fades," *The New York Times*, 22 January 1991.

⁸⁷⁷ Quoted; Rosegrant and Michael Watkins, "The Gulf Crisis," 26.

⁸⁷⁸ Nolan Walters, "Nunn Looks Back on the Persian Gulf War and Forward to Life in the Private Sector," *The Macon Telegraph*, 30 December 1996.

The administration had been strategic in delaying these hearings until they were on the cusp of obtaining authorization from the United Nations.⁸⁷⁹ Bush believed that a U.N. resolution would “focus the issue for Congress” and that “if the U.N. doesn’t work out...this would not be the time to make a pass at Congress.”⁸⁸⁰ With the United Nations resolution, the administration was prepared to take on confrontational hearings on Capitol Hill.

The debate in the hearings hinged on the relationship between the success of the President’s international diplomatic efforts and the President’s power to use military force. First, the debates focused on the meaning of the United Nations authorization to use force. The administration would argue that this served as a reasonable substitute for Congressional authorization and meant that the use of force was not a ‘war.’ Second, the debates focused on how international aid was being received by the United States. The Senate was exploring the possibility of using their control of the ‘purse-strings’ to defund Desert Storm, thereby forcing the President to avoid the use of force. The executive was attempting to thwart such an attempt by arguing that the international financial support from the tin-cup diplomacy could directly fund the use of force.

I. United Nations Authorization and the Constitution

The debate focused on the relationship between authorization from the United Nations and the President’s need to obtain Congressional authorization to use force. With the President’s unfolding strategy at the United Nations, Democratic Senators were concerned that the Bush administration planned to use the United Nations authorization as the legal basis for war, while leaving the Congress out of a decision-making role. Senator Edward Kennedy spoke for these

⁸⁷⁹ Baker, “Politics of Diplomacy,” 339.

⁸⁸⁰ Walter Pincus, “Bush is Said to Want UN Assent on Force Before Seeking Hill’s,” *The Washington Post*, 21 November 1990.

Senators in arguing that “it is not enough for President Bush to go to the United Nations to get approval for the use of military force in the Persian Gulf. He must also come to Congress.”⁸⁸¹ While many were citing the past precedents of the U.S. using force without Congressional authorization Kennedy charged that “we are not talking about Libya or Panama or Grenada. We are talking about a very important and potential conflict that would involve the United States in a very dramatic way.”⁸⁸²

At the same time, these Democratic Senators did not want to denigrate the value of the United Nations resolutions. They chose to distinguish between U.N. authorization and Congressional authorization by calling the former a political benefit and the latter a legal necessity. Timothy Wirth, a Democratic Senator from Colorado, praised the administration’s efforts to obtain U.N. resolutions while noting that while there was a need for some debate in Congress, “A UN resolution on the use of force is good politics, [whereas] congressional approval is a Constitutional requirement.”⁸⁸³

When resolution 678 passed in the United Nations, this concern became central to the hearings. Richard Perle, a fellow at the American Enterprise Institute with close ties to Secretary Cheney, argued that with the United Nations resolution, “I am not sure that it is necessary to pass a specific [Congressional] resolution,” for the President to go to war.⁸⁸⁴ Senator Kennedy directly addressed the issue: “The United Nations cannot decide when America goes to war. Under the Constitution, only Congress and the administration can make that decision for our Country.”⁸⁸⁵ He called for the Congress to pass a parallel resolution that would shift the deadline on Iraq from 15 January 1991 to 2 August 1991, in a belief that the extra time would give

⁸⁸¹ U.S. Senate Armed Services Committee, “Crisis in the Persian Gulf region : U.S. policy options and implications,” September-December 1990, 136.

⁸⁸² Ibid, 136.

⁸⁸³ Ibid, 157.

⁸⁸⁴ Ibid, 339.

⁸⁸⁵ Ibid, 345.

sanctions a chance to work.⁸⁸⁶ Kennedy was concerned that unless the Congress passed a resolution directly in contradiction with the framework established by resolution 678, the President would use the UN authorization to use military force without going to Congress.

The issue came to a head with the testimony of Secretary of Defense Cheney at the committee. Cheney had an extended argument with Senator Kennedy. By this point, Cheney was convinced that there was no need for Congressional authorization and he wanted to use the hearings as “an opportunity to educate the public and members of Congress about what we were doing and why we were doing it.”⁸⁸⁷ Cheney had sent his staff to study the precedent from the Korean War and was impressed by how “Truman had committed the force and gone to war in Korea basically under article 51 of the U.N. Charter and didn’t need and didn’t seek a Congressional resolution.”⁸⁸⁸ From this, Cheney was deeply influenced by the idea that the United Nations authorization should serve as a substitute for any Congressional authorization. He believed that, “The US senate had ratified the UN charter and under article 51 of the charter, we were justified, even obligated, to come to the assistance of a member state, that had been invaded.”⁸⁸⁹

In his testimony, Cheney emphasized how the United Nations authorization replaced any need for Congressional authorization. He complained about the “amount of time we have spent consulting [Congress] on the issue,” and argued that consultation was sufficient.⁸⁹⁰ “I do not believe the President requires any additional authorization from the Congress before committing

⁸⁸⁶ Ibid, 355.

⁸⁸⁷ Cheney, interview with author.

⁸⁸⁸ Cheney, interview with author.

⁸⁸⁹ Cheney, interview with author.

⁸⁹⁰ Ibid, 701.

US forces to achieve our objectives in the Gulf,” Cheney declared.⁸⁹¹ Cheney argued that there “have been some 200 times, more than 200 times, in our history when Presidents have committed U.S. forces, and on only five of those occasions was there a prior declaration of war.”⁸⁹² Kennedy responded that “we are not talking about Libya, not about Grenada, not about Panama” because there were “440,000 American troops who are over there.”⁸⁹³ Rather than rely on the minor uses of force that made up much of the list of 200 instances, Cheney turned to rely on authorization from the United Nations as a substitute for Congressional authorization. Based on “the vote by the United Nations in support of that effort [to use force], the President is within his authority at this point to carry out his responsibilities.”⁸⁹⁴ Cheney invoked the United Nations authorization as the basis for a Constitutional power of the President to use military force and he elaborated that “the notion of a declaration of war to some extent flies in the face” of the US mission in the Gulf because “we are trying to accomplish is to marshal an international force... working under the auspices of the United Nations Security Council.”⁸⁹⁵ For the Senate to ‘declare war,’ Cheney warned the Senators, would be for the “United States to go out and unilaterally on its own turn this into an Iraq-U.S. war.”⁸⁹⁶ Cheney was invoking the argument that Katzenbach had made in 1967; to ‘declare war’ would be to violate the U.N.’s ban on war and isolate the United States in the international community.

Cheney was not trained as a lawyer, a fact of which he was proud, but he did understand how to make a legal argument for the United Nations authorization acting as a replacement for Congressional authorization. He had fought against Congress’s role in the use of military force since the Ford administration and this was a pinnacle moment for him in that quest. While many

⁸⁹¹ Ibid, 701.

⁸⁹² Ibid, 702.

⁸⁹³ Ibid, 702.

⁸⁹⁴ Ibid, 702.

⁸⁹⁵ Ibid, 703.

⁸⁹⁶ Ibid, 703.

Senators disagreed with him, Cheney had publicly asserted the administration's position that it would be able to use military force on the basis of the U.N. authorization without going to Congress.

Cheney's emphasis on the United Nations was not disingenuous but he did have a deeper reason for wanting to avoid Congressional authorization. Cheney had fought for executive power since the 1970s and he feared that if they went to Congress now this would be a "sign of weakness [and] it would be taken and used and set a precedent" for later administrations.⁸⁹⁷

II. International Financial Backing and Congressional Defunding

The war powers debate also raised the question of how the inflow of funds from the international coalition would configure with Congress's traditional control of funding military operations. From the birth of the American republic, the founding fathers had vested the power of the 'purse-strings' in the Congress out of a belief that, as George Mason said, "The purse and the sword ought never to get into the same hands, whether legislative or executive."⁸⁹⁸ Congress has always allocated the funds for America's wars and exercised substantial oversight on how those funds were allocated. During the Vietnam War, Congressional defunding of the war had been raised as a last-ditch prospect to rein in executive power.

Military action in the Gulf, unlike all of America's previous wars, would be largely financed through international donations. This raised a Constitutional problem for the Congress as they sought to explore their options to force the executive to come to Congress for authorization: the Congress no longer controlled the purse-strings for war. The international

⁸⁹⁷ Cheney, interview with author.

⁸⁹⁸ George Mason, "The Debates in the Federal Convention," 6 June 1787; http://www.constitution.org/dfc/dfc_0606.htm

coalition had largely replaced Congress as the funding body for the use of force. “If U.S. military activities in support of operation Desert Shield are to be largely bankrolled by outside contributions” Senator Sam Nunn warned that the Congress would have to find a way to preserve its “power of the purse, the very final oversight mechanism that Congress has...”⁸⁹⁹ The Democratic Senators argued that the funds should come through Congressional appropriation, rather than being deposited directly in the U.S. Treasury, so that the Congress would still control them.⁹⁰⁰

However, the executive branch representatives argued that they directly controlled the international donations and, in effect, could launch a war without Congressional control over the funding. In his opening testimony, Secretary of Defense Cheney asserted that, “the Treasury would receive the funds” and legally “this authority resides in Treasury to receive gifts, in effect, for specific defense purposes.”⁹⁰¹ Cheney sought to utilize the ‘National Defense Conditional Gift Fund’ as an “existing authority [to receive] such gifts in the treasury.”⁹⁰² Cheney was asserting that if Congress chose not to fund the war in the way the administration wanted, they could go to the international coalition to get the requisite funds. Nunn vehemently disagreed with Cheney’s response and demanded that Cheney’s lawyer appear before the committee.

In developing his argument, Cheney had the Department of Defense General Counsel, Terrence O’Donnell, testify before the committee. O’Donnell defended the legal veracity of Cheney’s statement that the funds would go directly to the Treasury. While O’Donnell ceded that they could not be used for purposes expressly banned by Congress, he found a more creative mechanism for asserting the executive’s capacity to use the funds without Congressional

⁸⁹⁹ U.S. Senate Armed Services Committee, “Crisis in the Persian Gulf region,” 4.

⁹⁰⁰ Ibid, 85.

⁹⁰¹ Ibid, 85.

⁹⁰² Ibid, 95.

supervision. Under the Feed and Forage Act, the Defense Department had the power to incur debt without Congressional authorization. Cheney had already claimed that with his authority “under the Feed and Forage Act, where, in effect, I am authorized to obligate funds to support forces in the field and send the bill to Congress.”⁹⁰³ O’Donnell took the argument one step further by arguing that the President could use international donations to pay down the costs that the Defense Department was incurring. The funds donated from the international community could be used for “the funding of the deficiencies created by obligating funds under the Feed and Forage Act. We are now creating, by obligations, a deficiency. These funds, theoretically, could be used to liquidate that deficiency.”⁹⁰⁴ The message for the Senate was clear; if they attempted to defund the use of force, the executive would utilize the international financial backing as a substitute for Congressional appropriation. The executive was seeking to hollow out any threat from Congress to defund the war, and the international community was becoming a substantive replacement for Congress as a source for the executive to fund the use of military force.

III. Implications of the Nunn Hearings: Deepening the Executive-Congressional Battle

Ultimately, the hearings could not prevent the executive from utilizing military force. Seeking to wield his influence from the hearings in persuading the Bush administration, Nunn decided to directly confront Bush in a November closed-door meeting at the White House. Nunn told the President: “I’m very concerned about the kind of war that we’re preparing for over there. You changed the military strategy and this was a fundamental change and ‘liberating Kuwait’ was never expressed as a part of our military strategy.”⁹⁰⁵ Bush had brushed his concerns aside

⁹⁰³ Ibid, 49.

⁹⁰⁴ Ibid, 100.

⁹⁰⁵ James Baker, “Congressional Bipartisan Leadership Meeting w POTUS,” 14 November 1990. Princeton University: James Baker Papers, Box 109.

by saying that he had “time to work” on the final strategy.⁹⁰⁶ The exchange illustrated the inability of the hearings to garner significant power for Nunn. Despite his best efforts to raise public attention about the war’s dubious strategy and Constitutionality, Bush could still dismiss his concerns with ease when it came to making decisions.

Against Nunn’s intentions, the hearings provided a platform for the administration to put forward its claims that the authorization from the United Nations and financial support from the international community lessened the influence of the Congress in being able to control the Executive branch. Senator Nunn and his colleagues had attempted to slow the march to war by deploying the Constitutional objections to the use of force through Presidential power that others in Congress had invoked before them. The executive branch, particularly Secretary of Defense Cheney, sought to utilize the international backing for the use of force to change the nature of the executive-legislative relationship by threatening the Congress that the international backing would be a substitute for Congressional backing or authorization.

The hearings closed in December with a lingering sense of acrimony between the Senate’s Democrats and the Bush administration over what would happen in January when the United Nations deadline came. The hearings reified the executive’s dedication to using force regardless of whether they had Congressional authorization or not. “At the Congressional hearings [Senators] say one thing, and then another. They have these experts for a couple hundred bucks come crowing out of think tanks,” Bush commented to foreign heads of state.⁹⁰⁷ He was steadfastly dedicated to using force through Presidential power: “I know the powers of the President. We [the Presidents] have used force 200 times before in history,” without

⁹⁰⁶ Ibid

⁹⁰⁷ The White House, “Meeting with Gulf Coalition Financial Contributors,” 21 December 1990; http://bushlibrary.tamu.edu/research/pdfs/memcons_telcons/1990-12-21--Gulf%20Coalition%20Financial%20Contributors.pdf

Congressional authorization.⁹⁰⁸ State Department Legal Adviser Edwin Wilkinson saw the hearings as “the latest in a series of crap [hearings] that happens on [Capitol] Hill, that we don’t bother with.”⁹⁰⁹ Scowcroft considered Sam Nunn a “personal friend” but was nonetheless “very upset” by the tenor of the hearings.⁹¹⁰ Even some of the nonpartisan members of the administration became politically oriented in their work after the hearings. Philip Zelikow had joined the Foreign Service without partisan affiliation but as he closely followed the Nunn hearings, he decided to become a Republican.⁹¹¹ The work of the State Department, as he saw it, was being politicized by the hearings.

Though the Senate was engaging in Constitutional arguments, the administration chose to dismiss the hearings as driven by partisan politics. By confronting the administration over the question of war powers, the Nunn hearings encouraged the administration to push forward the argument that they could use force without Congressional authorization.

I) January: Authorizing Resolution

I) Deciding on a Congressional Resolution

The question of whether to go to Congress was a divisive one within the administration. When Bush had first asked his Legislative Affairs Director, Frederick McClure, in November on whether they even could get enough votes, McClure said, “No. We don’t have enough votes. I haven’t checked it out. I can go do so, but I don’t think you can do it.”⁹¹² The best that McClure could promise him was that if the Congress tried to ban the use of force and Bush vetoed the bill,

⁹⁰⁸ Ibid.

⁹⁰⁹ Williamson, interview with author.

⁹¹⁰ Scowcroft, interview with author.

⁹¹¹ Zelikow, interview with author.

⁹¹² James McClure, “Oral History,” BHOUVA.

McClure could get enough votes to sustain the veto.⁹¹³ As one of Bush's closest political advisers, McClure warned the President that, "I don't know that you want to send men and women off to war with 32 votes [in the Senate]."⁹¹⁴ This report was confirmed by Senator George Mitchell. Though he was leading a push against the use of force, Mitchell wanted to avoid a Senate vote against the use of force because he was concerned "that would be a disaster for us as a country, to be in that kind of disarray when we were in the middle of a foreign policy crisis," as Janet Mullins, the State Department Congressional liaison, recalled.⁹¹⁵ In November, Mitchell came to the Oval Office to personally tell Bush that he didn't have the votes to win in the Senate at that point.⁹¹⁶ Though some leading Republican Senators, including Richard Lugar and Bob Dole, were pressing the White House for a vote, and being "perpetual problems for us" as Mullins put it, the White House knew that they didn't have the votes yet.⁹¹⁷

When Congress went into recess in late November to prepare for their elections, McClure took advantage of a situation where "we got Congress out of town" and "the President had the platform all to himself," to build public support for the war.⁹¹⁸ The administration decided to use a wide array of arguments to support the invasion, ranging from moralistic claims comparing Saddam to Hitler to more banal claims about how the war was necessary to protect American jobs. There was a sense in the administration, as James Baker said, "there are a lot of good arguments for doing it" and they wanted to "use them all."⁹¹⁹

The victory in the Dellums case and the success of the President's continued public relations campaign for the use of force made the administration feel that they were in a better

⁹¹³ Ibid.

⁹¹⁴ Ibid.

⁹¹⁵ Janet Mullins, "Oral History," Princeton University.

⁹¹⁶ Ibid.

⁹¹⁷ Ibid.

⁹¹⁸ McClure, "Oral History," BHOUVA.

⁹¹⁹ Baker, "Oral History," BHOUVA.

position when the Congress returned in January. McClure couldn't promise a success in a vote but they certainly held a better position than they had in November and the discussion regarding going to Congress for a resolution became more serious as a result.

Richard Cheney was the most vocal opponent of a Congressional resolution. In addition to the legal case he had made at the Nunn hearings for why the United Nations was a substitute for Congressional authorization, he made two pragmatic arguments as to why getting Congressional authorization was a bad idea. First, reflecting on Johnson's experience in Vietnam, Cheney argued that a resolution would do little to provide political cover for the administration. Cheney thought that Johnson had obtained a Congressional resolution yet had continued to suffer Congressional assaults when the war went bad. "It almost didn't matter whether they voted for you or not," Cheney argued, because "even if they voted with you and approved it and you had a train wreck and got a lot of people killed, it wouldn't matter. They'd be all over your case. There wouldn't be anybody who'd stand up and say, 'Well, I voted for it and it was a disaster.'"⁹²⁰ Acknowledging that he may be a "cynic" about Congress, Cheney believed that, "The way the Congress was going to view the operation was whether you won or not and how well it went. They'd cover their fannies whichever way it went."⁹²¹ This argument reflected Cheney's belief in a dichotomy between opportunistic Congressmen and the virtuous statesmen of the Executive branch. Second, Cheney argued that by this point the invasion was inevitable and it was a huge risk to try to get further authorization. "If they turned us down, you were in a hell of a mess because you still had to go [because] you couldn't not go. Once you had 500,000 troops in the desert and Saddam in Kuwait, you couldn't go to Congress and have them

⁹²⁰ Cheney, "Oral History," BHOUVA.

⁹²¹ Cheney, "Oral History," BHOUVA.

vote no and say, ‘Okay, bring everybody home.’ That just was unacceptable.”⁹²² Cheney viewed the invasion as inevitable and didn’t want to bring the question before the Congress when he knew that the President would go in regardless of the Congressional vote. Joining Cheney in this position was Brent Scowcroft. He thought that the “Constitution is vague” on the matter and that the President should interpret it in a way that was consistent with their push towards using force.⁹²³

Others saw the resolution as necessary political cover for a major military commitment. General Colin Powell, the Chairman of the Joint Chiefs of Staff, was known to favor a resolution as part of his commitment to the use of overwhelming force; he wanted the nation fully invested in a war if the military was to be used.⁹²⁴ At a pragmatic level, many within the administration believed that the Congress would support the authorization because it was in their own best interest. “I’ve served in the Senate,” Vice-President Dan Quayle argued and “these guys are not going to take responsibility. They will figure out a way to give us 51 votes. They’re not going to want to defeat this. They don’t want responsibility.”⁹²⁵ With a severe split within the administration, the decision on whether or not to seek Congressional support rested with Bush himself.

Regardless of whether he got a resolution from Congress or not, Bush was dedicated to maintaining a level of support in the public and in the Congress for the use of force and he knew that maintaining the appearance of a strong international coalition would be crucial for this. In speaking with foreign heads of state, Bush continued to convey the message that the international support would be crucial for the administration as they sought to build public and Congressional

⁹²² Cheney, “Oral History,” BHOUVA.

⁹²³ Scowcroft, interview with author.

⁹²⁴ Bob Woodward, *The Commanders: The Pentagon and the First Gulf War, 1989-1991*, paperback edition (New York: Simon & Schuster, 2005), 256.

⁹²⁵ Quayle, “Oral History,” BHOUVA.

backing for the upcoming war. In a secret 21 December meeting with leaders of the Gulf Coalition Financial Contributors, Bush told foreign leaders that “responsibility sharing is vital to maintain political support, domestic and international, for the coalition to stay together. I tell our [domestic] critics that we have a disproportionate responsibility because we are blessed in this country with so much.”⁹²⁶ Secretary of the Treasury Brady warned the foreign leaders that, “As Congress return in January, the testimony will get into how much has been committed, and how much received. There will be no way to avoid it. Those countries who have committed funds but not dispersed them may want to think about doing so now. We do not want big press items.”⁹²⁷ In managing the push for domestic approval of the use of force, the Bush administration was attempting to bolster the appearance of a strong international coalition.

As the Congress prepared to resume its session in January, Bush continued to hesitate on whether to obtain Congressional authorization. “Congress is covering its own tracks. They do not want to take action and do not have the power or right to tie the hands of the President,” Bush explained to Saudi Arabia’s King Fahd on 30 December.⁹²⁸ As 1990 turned to 1991, Bush still had not made up his mind on whether the invasion, which was only a few weeks away, would have a Congressional resolution of support or some form of authorization.

Consistent with his penchant for making decisions without his advisers, Bush arrived at the decision to go to Congress on his own during the first few days of January 1991. On 4 January, Bush held an informal meeting with White House Counsel Boyden Gray and National Security Adviser Brent Scowcroft. In private consultations, Gray had advised Bush to go to

⁹²⁶ The White House, “Meeting with Gulf Coalition Financial Contributors,” 21 December 1990.

⁹²⁷ Ibid.

⁹²⁸ President Bush and King Fahd, “Memorandum of Telephone Conversation,” 31 December 1990; http://bushlibrary.tamu.edu/research/pdfs/memcons_telcons/1990-12-31--Fahd.pdf

Congress for “political reasons.”⁹²⁹ Scowcroft had advised him that under the Constitution, the administration did not need Congressional authorization and did not advise going to Congress.⁹³⁰ On that day, Bush informed them that he had decided to go to Congress for authorization because he thought that it was politically important.⁹³¹ Bush had been influenced, as Scowcroft viewed it, by the lessons of the Lyndon Johnson administration from Vietnam. Bush believed that the “President could only wage an effective war if there was widespread public support,” as Scowcroft surmised.⁹³² While Bush was departing to Camp David for the weekend, he instructed them to get working on a draft resolution.⁹³³

This decision was in keeping with Bush’s proclivity to keep major decisions to a small group. Bush liked the intimacy of that environment and tended to “keep legal decisions within the White House,” as Boyden Gray said.⁹³⁴ While at Camp David, Bush sat down at a type-writer to personally draft some language he wanted in the resolutions.⁹³⁵ With the decision already made, Bush planned a larger meeting to gain input on implementation and to get buy-in from the prominent dissenters within the administration.

Bush wanted to build consensus within the administration on the idea of going to Congress for a resolution. At a 6 January meeting, he informed Secretary of Defense Cheney.⁹³⁶ While Cheney suggested that the Congress could undermine the administration’s position, Bush maintained that resolution could be valuable later on. He called for a meeting with his top legal and political advisers where the administration’s position would be discussed.

⁹²⁹ Gray, interview with author.

⁹³⁰ Scowcroft, interview with author.

⁹³¹ Gray, interview with author.

⁹³² Scowcroft, interview with author.

⁹³³ Gray, interview with author.

⁹³⁴ Ibid.

⁹³⁵ McClure, “UVA Oral History,” BHOUVA.

⁹³⁶ Woodward, “The Commanders,” 355.

On 8 January, the administration convened its top lawyers and policy-makers for a meeting to come up with a policy on obtaining a Congressional resolution. The 11:00 A.M. meeting filled the Cabinet Room in the West Wing of the White House. With the senior lawyers, legislative directors and some of the Cabinet attending, this was slated as the definitive meeting on the administration's approach to obtaining a Congressional resolution.⁹³⁷ President Bush opened the meeting by presenting a copy of a letter he had drafted to Congressional leadership requesting that they pass a resolution. The legislative directors assured him that he would win a vote in both chambers, but warned him that it would be close. Bush wanted to know what authority he would have without the Congressional authorization and he turned to Deputy Attorney General William Barr. A long-time advocate of executive power, Barr said that: "the President has full authority to conduct military operations as the commander in chief, regardless of whether Congress voted a resolution of support" and Congress "is to provide the forces and the laws under which they operate."⁹³⁸ Turning to historical precedent, Barr told the President that, "the situation most closely resembl[ing] the current crisis was the Korean War, when Truman acted without Congress under a United Nations resolution somewhat similar to the current one."⁹³⁹ The legal position outlined by Barr, and supported by the other attorneys, was that the President has full Constitutional authority to act without any Congressional authorization.

At a political level, the advisers were arguing that a Congressional resolution could prove helpful to the President's domestic political standing. National Security Adviser Brent Scowcroft advised the President to introduce a resolution, saying that "the President's political authority would be vastly enhanced with congressional backing" and that the President "would not want to

⁹³⁷ Woodward, "The Commanders," 356.

⁹³⁸ Quoted: Woodward, 357.

⁹³⁹ Quoted, *ibid*, 357.

start a war with a country divided.”⁹⁴⁰ Even William Barr conceded that the President would be in a good position to obtain a resolution from a political perspective; “Congress can put you in a difficult political position, so it’s worth being active to affect what they might do,” he advised Bush.⁹⁴¹ He cited Robert Jackson’s decision in *Youngstown* to argue that the President’s power was at its highest ebb when the President acted with Congress, and in this situation it meant that “if Congress is with you on this and does something supportive, then you’re in your strongest possible position.”⁹⁴²

Colonel Fred Green, General Powell’s lawyer, argued that the Congressional authorization was an essential component of the ‘Powell Doctrine.’ General Powell’s position emphasized using military force with the fullest support of the American public, and this included robust authorization from Congress.⁹⁴³ Green argued that, “you absolutely want the authority and support, full support of the government and the full support of the people. We’d been working to develop the public support. We’d been working to acquire the support in the Congress.”⁹⁴⁴ While Powell had not attended the meeting, Green was a forceful voice from within the military ranks for obtaining some authorization from Congress.

Even as it became increasingly clear that the administration would obtain Congressional authorization, Richard Cheney continued to insist that they not. Cheney argued that “if we don’t get it passed, then we’ll have a negative expression from Congress, and we’ve got to do this regardless, so let’s not take that risk.”⁹⁴⁵ He lambasted the attorneys at the meeting, particularly William Barr, for providing advice that was “political” rather than a more narrow legal

⁹⁴⁰ Quoted; *ibid*, 357.

⁹⁴¹ Quoted; *ibid*, 357

⁹⁴² Barr, “Oral History,” BHOVA.

⁹⁴³ Green, interview with author.

⁹⁴⁴ Fred Green, “Oral History,” US Army Judge Advocate General’s Legal Center and School, December 2010. (on file with author).

⁹⁴⁵ *Ibid*.

opinion.⁹⁴⁶ Barr defended himself by pointing out that his opinion was “both political and legal advice. They’re really sort of together when you get to this level.”⁹⁴⁷ This encapsulated the decision-making within the Bush administration; the legal and political considerations had blurred together. Though Cheney had dissented, there was a belief that a resolution from Congress was inevitable, whether or not the administration played a role in obtaining one, and as Chief of Staff John Sununu said, “we’ve got to try to shape it.”⁹⁴⁸

As the meeting came to a close, Bush declared that the administration would attempt to obtain a resolution from Congress supporting the use of force. While there were still concerns about winning the Senate, Bush pushed forward with it nonetheless.⁹⁴⁹ The question then arose at the meeting, “should the administration send a letter requesting it” and “what should the letter include,” as General Powell’s lawyer, Colonel Fred Green, recalled.⁹⁵⁰ Bush decided that they would send a letter requesting the resolution- he told the lawyers to “check it over and give it the last scrub.”⁹⁵¹ As the policy-makers left, the lawyers stayed back and they carefully worded the letter. Colonel Green recalled:

We [the lawyers] said, “We’ve got to change one word in here. We’ve got to go from ‘authorize’ to ‘support.’ If we ask for authorization, we are implicitly admitting that the Congress has a legal role and we’re negating the President’s right to do this under his own commander in chief powers and his powers as the chief executive to give effect to the laws and protect the Constitution.” So we changed that word from authorize to support the use of the forces.⁹⁵²

In essence, the resolution was designed by the Bush administration to be a political statement of Congressional support for the President’s action. It was explicitly designed to not be a legal authorization of Presidential action. In going to Congress the administration was “not

⁹⁴⁶ Barr, “Oral History,” BHOVA.

⁹⁴⁷ Barr, “Oral History,” BHOVA.

⁹⁴⁸ Woodward, “The Commanders,” 358

⁹⁴⁹ Green, phone interview.

⁹⁵⁰ Green, phone interview.

⁹⁵¹ Quoted; Green, “Oral History.”

⁹⁵² Green, “Oral History.”

saying that [Congressional] authorization was necessary” according to Richard Haass but only that it “might prove helpful down the road [because] no one knew how extensive this [war] would be and how many casualties we would take.”⁹⁵³ If the war went poorly, the backing from Congress would provide what Haass called a “safety net” for the administration to fall back on to keep Congressional criticism limited.⁹⁵⁴

At the same time that the President’s lawyers were crafting a resolution designed to be political support, the Senate Judiciary Committee was meeting at the other end of Pennsylvania Avenue and arguing that the President, as a Constitutional matter, had to obtain Congressional authorization. The 8 January hearings were chaired by Senator Joseph Biden, a Democrat of Connecticut, who had become an early critic of the Bush administration’s attempt to use military force through Presidential power.⁹⁵⁵ Biden specifically sought to target the argument that the U.N. authorization allowed the President to use force without Congressional authorization, and he commissioned a study from the Carnegie Endowment to defend that position.⁹⁵⁶

The hearings’ star witness was none other than Nicholas Katzenbach, the former Attorney General and Undersecretary of State, who had given a defense of Presidential power in Senate hearings over thirty years before. Katzenbach had remained close with the Kennedy family over the years and was appearing at the request of Senator Edward Kennedy.⁹⁵⁷ “I believe that the President is obligated in present circumstances to seek congressional approval for the use of the massive forces involved in the Middle East in an attack to force Iraq out of Kuwait,”

⁹⁵³ Haass, interview with author.

⁹⁵⁴ Haass, interview with author.

⁹⁵⁵ Joseph Biden, “Letter to President Bush,” 27 October 29 1990. George Bush Library: Boyden Gray Papers, War Powers/Iraq, File 4.

⁹⁵⁶ Senate Judiciary Committee, “War Powers and the UN Charter: Constraints on the President’s Power to Commit US Armed Forces to Combat Under the Authority of the UN Security Council,” 8 January 1991, (Washington D.C., Government Printing Office, 1991), 5.

⁹⁵⁷ Ibid, 65.

Katzenbach argued.⁹⁵⁸ Responding to a question from Senator Strom Thurmond on Truman's utilization of the UN Security Council in lieu of Congress in the Korean War, Katzenbach argued that "Truman did not have constitutional authority to send US forces into war to defend Korea," because U.N. authorization could not replace Congressional authorization.⁹⁵⁹ This was a strong indictment of the Republican attempt to claim legitimacy from Truman's actions from one of the nation's most distinguished lawyers. It was also a radical departure from his own position on war powers in the 1960s.

Following on this theme, other witnesses, including Harold Koh, sought to argue that the U.N. authorizations had no Constitutional relevance. "However politically desirable it might be for us to support a revived UN order, and I very much favor that as a political matter," Harold Koh said, "the U.N. argument simply does not justify dispensing with the domestic constitutional requirement of approval for war."⁹⁶⁰ The hearing escalated the Senate's pressure for a resolution that would grant the President the Constitutionally-required power to use military force.

From the beginning of the debate over a Congressional resolution, the executive branch and the Congress were envisioning the resolution in fundamentally different terms. The executive believed that they already had the Constitutional authority to use force through the U.N. resolutions, and the resolution was simply a matter of gaining political support. The Senate Democrats, backed by their witnesses, were arguing that a resolution was a Constitutional necessity if the Bush administration wanted to use military force.

II. Lobbying the Senate

⁹⁵⁸ Ibid, 68.

⁹⁵⁹ Ibid, 117.

⁹⁶⁰ Ibid, 124.

Once the administration introduced a resolution, they devoted an intense amount of effort to lobbying members of Congress to pass it. The administration focused both on keeping the Republican Senators in line with the administration and, more importantly, enlisting a large number of Democrats to vote for the resolution.

Secretary of Defense Richard Cheney took the lead on ensuring that Republican Senators would support the President. In closed-door sessions for House and Senate Republicans, Cheney said that the resolution was not “another diplomatic lever” but was a prelude to the use of force.⁹⁶¹ Cheney worked closely with Senate Minority Leader Robert Dole in rounding up the votes.⁹⁶²

While the administration was confident that almost all Republicans would support the measure, the Democrats held majorities in both houses of Congress. Vice-President Quayle took the lead on lobbying Democratic Senators, knowing that they would have to persuade some of them in order to pass the resolution. His strategy was to “pick off individual Senators one by one.”⁹⁶³ Quayle had been a leading proponent of going to Congress, arguing that his former colleagues in the Senate would support the President to “avoid the responsibility of this” and he had to deliver.⁹⁶⁴ He focuses his efforts on Southern Democrats who he saw as “traditionally less partisan on foreign policy.”⁹⁶⁵ He invited individual Senators to the White House for meetings with himself and the President, “to try and win them over.”⁹⁶⁶ While there wasn’t “the kind of trade-offs you would see in an appropriations or tax bill,” Quayle was sure to remind the Democrats that their support at this critical hour “would be remembered- and they understood

⁹⁶¹ Woodward, “The Commanders,” 362.

⁹⁶² Cheney, interview with author.

⁹⁶³ Quayle, interview with author.

⁹⁶⁴ Ibid.

⁹⁶⁵ Ibid.

⁹⁶⁶ Ibid.

what that meant.”⁹⁶⁷ Even on the question of war, there was a certain amount of political bargaining that was taking place.

Quayle was assisted in this by both senior policy-makers and even lower-level national security personnel. Even as Secretary of State Baker traveled to the Soviet Union to coordinate policy, he carried with him a list of Congressmen he was instructed to call to garner their support.⁹⁶⁸ The lobbying effort extended beyond outreach by top-level executive officials. To counter Congressional proposals for expanding sanctions, the administration sent CIA officials to Capitol Hill to dissuade Congressmen of the efficacy of this idea.⁹⁶⁹

III. Maintaining Presidential Authority to Use Military Force

Even as the administration frantically lobbied Congress to pass the resolution, they continued to maintain that they could legally utilize military force with no Congressional authorization because the United Nations authorization was a sufficient substitute. The administration had already posited that they could take military action under the sole authorization of the United Nations. As Secretary Cheney put it, they had the authority to use force “under article 51 of the UN charter [because the Senate had ratified it a number of years before [therefore] we had all the authority we needed.”⁹⁷⁰ With the looming possibility that the administration could decide to act on United Nations authorization, Congressmen were not in a position to vote against authorization. To do so would have been unpatriotic; with the President already acting with the international community, to vote against authorization would have been to contradict the President’s position that had already been established. In lobbying members of

⁹⁶⁷ Ibid.

⁹⁶⁸ Baker, “Oral History,” BHOVA.

⁹⁶⁹ R.A. Zaldivar and David Hess, “Bush Applies Pressure for Gulf War Resolution,” *Philadelphia Inquirer*, 12 January 1991; http://articles.philly.com/1991-01-12/news/25818813_1_gulf-war-resolution-vote-military-force

⁹⁷⁰ Richard Cheney, comments at “20th Anniversary of the Persian Gulf War,” Conference at Texas A & M University, 20 January 2011; <http://www.c-spanvideo.org/program/297623-1>

Congress, the administration forcefully utilized the United Nations authorization to push Congressmen towards voting for the Congressional resolution. The United Nations authorization, Secretary of State James Baker recalled, “made the job of getting approval of a Democratic House and Senate considerably easier because we could go to a Senator...who was withholding his support and say to him, ‘you mean you’re not going to support the president when the president of Ethiopia or the president of this other country?’”⁹⁷¹ This particular line of argumentation was one of Baker’s favorite tools and he reflected that it was “a very powerful argument.”⁹⁷² His assistant for Congressional relations, Janet Mullins, recalled that this ‘Ethiopia argument’ was a “very strong part of his sales job and he used points like that everytime we had a congressional leadership meeting.”⁹⁷³ The administration understood that they “could not have gotten support for that resolution in October-November,” as Frederick McClure reflected.⁹⁷⁴

The United Nations Security Council Resolution 678 had made the crucial difference in winning over Democratic members of Congress. Secretary Baker said, the resolution “made it possible for us to bring [the Congressmen] across.”⁹⁷⁵ Brent Scowcroft described a “weight” to the United Nations resolution “clearly helped with Congress.”⁹⁷⁶ Similarly, John Bolton recalled that “for those who would otherwise be opposed to force” the administration pulled out the UN resolution as a form of “leverage” that persuaded many to reluctantly support the resolution.⁹⁷⁷ Fred McClure even referred to the Congressional resolution as “the United Nations thing that we did that was short of a declaration of war, but allowed us to do the UN stuff.”⁹⁷⁸ The United Nations resolution was a resource the administration was using to quell Congressional dissent. In

⁹⁷¹ Baker, comments at *ibid*.

⁹⁷² Baker, “Oral History,” BOHUA.

⁹⁷³ Mullins, “Oral History,” Princeton University.

⁹⁷⁴ McClure, “Oral History,” BOHUA.

⁹⁷⁵ *Ibid*.

⁹⁷⁶ Scowcroft, interview with author.

⁹⁷⁷ Bolton, interview with author.

⁹⁷⁸ McClure, “Oral History,” BOHUA.

conceptualizing the Congressional resolution and securing the necessary votes from the Congressmen, the United Nations resolution formed the essential backbone.

While reaching out to Congress, the administration continued to downplay the significance of Congressional criticism of the President's Constitutional power. In responding to an earlier protest letter from Congressional Democrats, Frederick McClure, the director of the Office of Legislative Affairs, told the Congressmen that the administration "values your insights" and that the Congressional letter had been given to Bush's "national security and foreign policy advisors so that they, too, are aware of your perspective."⁹⁷⁹

Even as they pressed the Congress for support, the Bush administration was refusing to acknowledge Congressional protests. They were dealing with the war powers question as a political issue rather than as a legal one. At a broader level, the push within the administration for Congressional approval was seen as a means to assert the President's political power over the Congress. Stuart Gerson recalled that the administration was willing to "ask for congressional authorization because they [knew] that congress lacks the coherency or backbone to stand up to the executive and thus the executive can inoculate himself against future congressional criticism."⁹⁸⁰ Going to Congress did not mean diminishing the administration's claims of executive power, rather, it meant asserting them in a new manner.

With the deadline approaching and the prospects for a Congressional resolution still in question, the administration began to develop a legal case for using force without Congressional approval. At the State Department and the Department of Justice, last-minute memoranda were generated by high-level lawyers at the Justice and State Departments to argue that the President would still maintain the power to use military force even without the Congressional resolution.

⁹⁷⁹ Frederick McClure, "Letter to Congressman Miller," 7 January 1991. George Bush Library: Nelson Lund Papers, War Powers/Iraq, File 7.

⁹⁸⁰ Email correspondence from Gerson, 02 november 2011. (on file with author.)

At the State Department, Philip Bobbitt drafted a last-minute memorandum defending the Constitutionality of the use of force without Congressional authorization. “The Korean War” he argued, “was prosecuted by the President pursuant to the United Nations Charter, which had, of course been ratified by the Senate and, while the Congress can always modify U.S. adherence by statute, the Charter has the same constitutional legitimacy as any of the other lawful routes to war.”⁹⁸¹ At the Department of Justice, Mike Luttig, the Assistant Attorney General at the Office of Legal Counsel, confirmed that the President could use force without authorization. While Bobbitt pointed to the U.N. Security Council authorization, Luttig instead argued that because Congress had already provided funding they had “effectively authorized the President to engage in hostilities.”⁹⁸² Luttig suggested that there would be “advantages” to “having as clear and categorical an approval from Congress as possible,” but he assured the administration’s leaders that they could use force without any Congressional authorization.⁹⁸³ With only days until the 15 January deadline, the Bobbitt and Luttig memoranda provided an important reminder to policy-makers that if the last minute negotiations did not prove successful, they could still rely on the United Nations resolutions to use military force without Congressional authorization.

IV. Competing Drafts and Last Minute Negotiations

With just a few days to go until the vote on the resolution, there were a number of different versions being touted. A more liberal Democratic group was supporting a resolution that would call for more time for economic sanctions to work, while a more hawkish group of Democrats was pushing for a resolution that would call on the President to obey the War Powers

⁹⁸¹ Philip Bobbitt, untitled correspondence, 8 January 1991. George Bush Library: Nelson Lund Papers, War Powers/Iraq, 3.

⁹⁸² Michael Luttig, “Summary of Arguments Concerning the War Power,” 9 January 1991. University of Pittsburgh; Richard Thornburgh Papers, Box 770.

⁹⁸³ Ibid.

Act if military force was deemed necessary.⁹⁸⁴ The administration decided to exploit this split within the Democratic caucus. It enlisted Congressmen William Broomfield and Stephen Solarz, a Republican and Democrat respectively, to draft a resolution authorizing the use of force that included some discussion, albeit vaguely, of the War Powers Act. An administration official said that the decision to include a reference to the War Powers act “was accepted [by the administration] to curry favor with lawmakers protective of congressional war-making power.”⁹⁸⁵ This concession was sufficient to draw in a large swath of Democrats to support the resolution.

The decision to allow the War Powers Act in the resolution was a tactical success for the Bush administration. Nelson Lund, a lawyer at the White House Counsel’s Office, had originally tried to confine the War Powers Act reference to only requirements that the President comply “with respect to consultation and reporting.”⁹⁸⁶ However, the Congressmen refused to accept this narrow interpretation of the War Powers Act and the edit was never included in the legislation. Rather than fight this, the White House adopted a divide-and-conquer strategy; they could split off the moderate Democrats from the rest of their party and prevent Democratic leadership from maintaining the consensus necessary to pass a Democratic-supported bill.

While acknowledging the War Powers Act in the resolution was something the administration had finally accepted as a political necessity, they were already downplaying its significance. “We acknowledge the law's existence” a Bush administration official said, “but we are not conceding its constitutionality.”⁹⁸⁷ Even as they sought to persuade Democrats to support the resolution, they were positioning themselves to be able to act without Congressional

⁹⁸⁴ Major Garrett and Paul Bedard, “Bush strokes House; OKs War Powers Act,” *The Washington Times*, 10 January 1991.

⁹⁸⁵ Quoted; *ibid.*

⁹⁸⁶ Congressman Fascell, “Draft of Congressional Resolution,” undated. George Bush Library: Nelson Lund Papers, War Powers/Iraq, File 1.

⁹⁸⁷ Quoted; Garret and Bedard, “Bush Strokes House.” “

authorization. They had to accept the resolution as the Democrats put it forward because “we couldn’t afford the time and the struggle to change” that part of the resolution, as Brent Scowcroft recalled, but they were preparing to interpret the resolution as merely political support.⁹⁸⁸

The failure on of Secretary of State Baker’s peace talks with Iraqi Foreign Minister Tariq Aziz on 9 January made war all but inevitable and this helped turn several House Democrats towards supporting the resolution. The administration had decided to hold this meeting, despite the objection of many allies in the international coalition, as a last minute effort to bolster domestic support in the Congress. Baker had proposed the idea to Bush as a proposal “on how to win domestic support, now that we’ve got international support.”⁹⁸⁹ Baker did not expect the meeting to succeed and when it failed he felt that it had accomplished its purpose of “going the last mile” to “show Congress, the American people, and history that we were still looking for ways to avert a war, not start one.”⁹⁹⁰ With the positive press generated by the administration’s efforts to meet with Aziz, Democrats could no longer claim that the administration was rushing the nation into war. The press conference Baker gave helped him win 20 votes in the House, as one Democratic aide said.⁹⁹¹ “The closer you come to the reality of this [15 January] deadline, people view this less as an abstraction,” a Democratic Congressional aide said regarding the Democratic shift to supporting the resolution.⁹⁹²

As the vote approached, the Bush administration was uncertain how it would turn out. The lobbying effort came to a close with a large breakfast held in the White House for over 120 Congressmen on 11 January. President Bush pleaded that, “The last best chance for Saddam

⁹⁸⁸ Scowcroft, interview with author.

⁹⁸⁹ Baker, “Politics of Diplomacy,” 346.

⁹⁹⁰ Ibid, 344.

⁹⁹¹ Lawrence Freedman and Efraim Karsh, *The Gulf Conflict: Diplomacy and War in the New World Order*, (Princeton: Princeton UP, 1995), 292.

⁹⁹² Quoted; *ibid*, 292.

Hussein to get the message is in your hands.”⁹⁹³ Throughout the day, Bush and other administration officials called Democrats who they thought could be persuaded to support the resolution. There was a high level of concern amongst administration officials that they would lose the vote in the Senate.⁹⁹⁴ The Democrats controlled the Senate with 55 members, versus the 45 Republicans. To win the Senate, Bush needed to convince at least six Democratic Senators to vote for the resolution while losing no Republican votes.

It wasn't until 11 January that the administration finally could tally enough votes in the Senate to pass the resolution. In early January, Chief of Staff John Sununu called up his old friend, Mike O'Callaghan, a former Democratic Governor of Nevada. O'Callaghan was a veteran of the Korean War, where he had lost a leg, and was a strong supporter of using force in the Gulf. Sununu asked him to use his position as the editor of the *Las Vegas Sun* to help sway Nevada's two Democratic Senators, Harry Reid and Richard Bryan, to vote for the war.⁹⁹⁵ O'Callaghan had served as Reid's high school history teacher and his political mentor and used his influence both in private conversations and as the paper's editorial writer to try and pressure the Senators to vote for the war. On 11 January, after weeks of unrelenting work, O'Callaghan called Sununu to let him know that Reid and Bryan would vote for the resolution.⁹⁹⁶ For the first time, the administration had more than 50 votes pledged to vote for the resolution in the Senate. At the same time, they couldn't be sure that all of the votes would come through. Brent Scowcroft “stayed up half the night to call Senators” as the final hours to the vote ticked away.⁹⁹⁷

⁹⁹³ R.A. Zaldivar and David Hess, “Bush Applies Pressure for Gulf War Resolution,” *The Philadelphia Inquirer*, 12 January 1991.

⁹⁹⁴ Gray, interview with author.

⁹⁹⁵ John Sununu, “Oral History,” BHOVA.

⁹⁹⁶ Ibid.

⁹⁹⁷ Scowcroft, interview with author.

On 12 January, the Congress was committed to voting on the resolutions that they had vigorously debated in the past week. The Senate voted to defeat the Nunn-Mitchell bill that vested authority to use force in the Congress. Their bill had stated that, “The Constitution of the United States vests all power to declare war in the Congress of the United States” and it pledged that “Congress will expeditiously consider any future Presidential request for a declaration of war or for authority to use military force against Iraq.”⁹⁹⁸ The bill would have forced Bush to wait on Congressional authorization and, in effect, keep sanctions on the table for months and delayed the war. With his resolution defeated, Nunn turned to Senate Majority Leader George Mitchell to say that he was going to vote for the Bush-backed bill authorizing the use of force.⁹⁹⁹ Mitchell told him that he could not “switch” because he had led many Democrats into firm opposition of the war.¹⁰⁰⁰ When the vote on the Bush-backed resolution came, Nunn voted against it even though he feared that it could cost him his Presidential aspirations.¹⁰⁰¹

Later that afternoon, the House of Representatives voted on the Bush-supported resolution. The Bush administration had wanted the bill to be introduced by Democrats and they had Congressman Dante Fascell, a Democrat from Florida who had introduced the War Powers Act in 1973, and Congressman Stephen Solarz, a Democrat from New York who had been a leading critic of Reagan’s foreign policy, as the lead co-sponsors of the resolution. The resolution passed decisively in the House of Representatives on a vote of 250 to 183 and passed in the Senate on a much closer margin of 52 to 47.¹⁰⁰² As the military made final preparations to launch airstrikes against Saddam’s forces, the Congress had finally come around to offering clear

⁹⁹⁸ Senate Joint Resolution, “Regarding United States policy to reverse Iraq’s occupation of Kuwait,” 10 January 1991; <http://thomas.loc.gov/cgi-bin/query/z?c102:S.J.RES.1:>

⁹⁹⁹ Walters, “Nunn Looks Back.”

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ Quayle, interview with author.

¹⁰⁰² The Persian Gulf War Resolution, 12 January 1991; <http://thomas.loc.gov/cgi-bin/query/z?c102:S.J.RES.1:>

support for the President's policy in the Persian Gulf. Nevertheless, George Mitchell bemoaned the passage of a resolution that he saw as, "an unlimited blank check to initiate war."¹⁰⁰³

V. The Meaning of the Resolution: Between Politics and Law

From the time that the Bush administration chose to approach Congress for a resolution there were competing interpretations over the meaning of a resolution. The administration sought to design a resolution that would merely be political support for the President's authority to use military force through the United Nations, whereas many Senators were framing the resolution as a Constitutional necessity in which the Congress would authorize the President to use military force.

The resolution was designed by the administration to establish that the Congress was merely lending its support to the President's authority to utilize force under the U.N. resolutions, particularly UNSC Resolution 678. Establishing the *casus belli*, House Joint Resolution 77 stated: "the U.N. Security Council in Resolution 678 has authorized member states of the United Nations to use all necessary means, after January 15, 1991, to uphold and implement all relevant Security Council resolutions and to restore international peace and security in the area."¹⁰⁰⁴ In furtherance of this principle, the Congress supported the President to "use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677."¹⁰⁰⁵ The resolution was framed as an endorsement of the United Nations' authority.

¹⁰⁰³ Adam Clymer, "Confrontation in the Gulf," *The New York Times*, 11 January 1991.

¹⁰⁰⁴ The Persian Gulf War Resolution, 12 January 1991.

¹⁰⁰⁵ Ibid

When Bush signed the bill into law on 14 January, he also issued a ‘signing statement’ that sought to clarify that the resolution was merely political support for military action rather than a binding piece of authorization. The administration saw this as a significant distinction because they had “asked Congress not for authority but for support,” as Brent Scowcroft recalled.¹⁰⁰⁶ The signing statement was to curtail any later invocation of the act by members of Congress to limit the President’s authority to conduct operations. While the Bush administration had sent a version of the bill expressing Congressional support, the bill that was passed was a form of authorization. In the signing statement, the Bush administration could have the final word on the matter by asserting that the resolution was merely supportive of, rather than authorizing, the use of force.

A signing statement is a Presidential decree issued in conjunction with the President’s signature of a bill that states how the President constructs the meaning of the law. While Presidents dating back to James Monroe had utilized signing statements on rare occasions to clarify laws, the Reagan administration sharply increased their use and used them as a central aspect in the expansion of executive power.¹⁰⁰⁷ Samuel Alito, as Deputy Assistant Attorney General at the Office of Legal Counsel and a future Supreme Court Justice, urged that “Presidential signing statements assume their rightful place in the interpretation of legislation.”¹⁰⁰⁸ Alito wanted the signing statement to “address questions of interpretation” in order to “increase the power of the Executive to shape the law.”¹⁰⁰⁹ Alito’s proposal was propelled by support from Attorney General Edwin Meese and the Reagan administration came

¹⁰⁰⁶ Scowcroft, interview with author.

¹⁰⁰⁷ Christopher Kelley, “A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision,” *William and Mary Bill of Rights Journal*, 16 (2007), 287.

¹⁰⁰⁸ Samuel Alito, “Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law,” 5 February 1986; <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>

¹⁰⁰⁹ Ibid.

to massively increase the use of signing statements and, more importantly, came to rely on them as a tool to denude laws of any potential limitations on executive power. The signing statement was a tactic continued in the Bush White House with C. Boyden Gray regularly calling for their use against legislation that was perceived as limiting Presidential power.¹⁰¹⁰

The signing statement utilized by Bush for the Gulf War Resolution was only two paragraphs long but it carried a massive assertion of executive power. Bush described the Congressional resolution as an “expression of resolve” and “the best hope for peace.”¹⁰¹¹ This was not meant to be a resolution with any legal significance, instead Bush stated: “As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.”¹⁰¹² While members of Congress had pushed the resolution as an attempt to reign in the President’s assertions of executive power, the signing statement afforded the President an opportunity to solidify the administration’s position that the Congress could not limit the President’s authority to use force. The signing statement meant to convey the sentiment, as Richard Haass noted, “‘Thank you very much for your support for our policy,’ i.e., we don’t need your authority to do this, we’d love to have your support.”¹⁰¹³ The signing statement conveyed the principle to Congress that the administration would use force under its own authority.

In public statements, Bush continued to press the message that the resolution had no legal significance. In responding to a question from a reporter on whether he could order military

¹⁰¹⁰ Lewis, “Turning Loyalty.”

¹⁰¹¹ George Bush, “Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq,” 14 January 1991; <http://www.presidency.ucsb.edu/ws/index.php?pid=19217#axzz1VCwryDVO>

¹⁰¹² Ibid.

¹⁰¹³ Haass, “Oral History,” UVA.

action if Congress defeated the resolution, Bush stated: “I still feel that I have the constitutional authority, *many attorneys having so advised me.*”¹⁰¹⁴ The executive branch lawyers, not Congress, had taken on the role of the authorizing agent for the President to take military action. With the administration in its final stages of preparing for the invasion, they had gone to Congress to secure a resolution and then had turned around to suggest that the resolution had no legal significance.

At the same time, they were willing to call the resolution legally significant when it could advance executive power to do so. The Department of Justice used the resolution as a legal basis for finally getting the Dellums case entirely dismissed.¹⁰¹⁵ The Bush administration was above all committed to preserving executive power. It did not want to let the courts or the Congress have any role in constraining the President’s power to use military force.

VI. The Counter-Factual: Losing Congress and Using Force

The counter-factual question of whether the administration would decide to use force after losing the Congressional vote had been actively contemplated by the administration. The administration’s decision to use force even without Congressional authorization illuminates the administration’s belief that the United Nations authorization was a full substitute for Congressional authorization. All along, as James Baker said, the administration was “always prepared to bypass Congress if necessary and go to war under Article 51 of the UN Charter and a

¹⁰¹⁴ George Bush, “President’s News Conference,” 9 January 1991; <http://www.presidency.ucsb.edu/ws/index.php?pid=19202#axzz1gXycDfrS>

¹⁰¹⁵ Richard Thornburgh, “The Rule of Law: At Home and Abroad,” a Speech at the Pepperdine University School of Law, 2 February 1991, 13-14; <http://digital.library.pitt.edu/cgi-bin/t/text/pageviewer-idx?c=thornspeeches;cc=thornspeeches;idno=AIS9830.13.01.0158;frm=frameset;view=image;seq=15;page=root;size=s>

UN resolution authorizing the use of force.”¹⁰¹⁶ The administration had always held this view and as the Congressional vote neared, this path was under consideration.

With the invasion set to begin in only a few days, the Bush administration had decided that they would use military force even if the Congress rejected the resolution. Richard Cheney recalled that had the vote been lost, “I would have recommended we go forward anyways. From a legal standpoint, [we had] all of the authority we needed.”¹⁰¹⁷ General Powell had approached Bush on the matter and he called that even before the Congressional vote the “President had already made up his mind.”¹⁰¹⁸

The administration had decided that the stakes of inaction were too high. Richard Cheney, the leading skeptic of going to Congress, made clear that it “we were absolutely committed to getting Saddam Hussein out of Kuwait one way or the other, no matter what we had to do. [Even] without the authorisation of the Congress, we were prepared to go ahead. I argued in public session before the Congress that we did not need Congressional authorisation.”¹⁰¹⁹ With CIA reports coming in regarding Saddam’s WMD programs, there was a growing understanding amongst administration officials that his military capacity needed to be decimated. “People were looking at each other,” Philip Zelikow recalled, and “saying holy shit we need to have this war to get at this stuff [the WMDs].”¹⁰²⁰ The administration had contemplated the extreme consequences of this; the Supreme Court may take up the case and there certainly would be impeachment resolutions, but they were prepared to go forward anyways.¹⁰²¹ Though there was no official meeting on this matter, this was something, as Vice

¹⁰¹⁶ Baker, “Politics of Diplomacy,” 339.

¹⁰¹⁷ Cheney, comments at “20th Anniversary of the Persian Gulf War,” Conference at Texas A & M University.

¹⁰¹⁸ Powell, comments at *ibid*.

¹⁰¹⁹ Cheney, “Oral History,” PBS Gulf War Collection.

¹⁰²⁰ Zelikow, interview with author.

¹⁰²¹ Haass, “Oral History,” BOHUA.

President Quayle said, “we all understood about the way we were going to handle the situation,” and the answer was to ‘go ahead anyways.’”¹⁰²²

Moreover, the administration believed that the war would be popular with the public and so Congress would have no room to critique them. First, in the weeks before the invasion, the White House kept close track of the polls showing that the public overwhelmingly approved the use of force. Ede Holiday, an assistant to the President, wanted to make sure that all of the cabinet members saw a poll that “shows strong support for the President’s actions in the Persian Gulf.”¹⁰²³ The ABC poll showed that 82% of the American public supported the use of force if Iraq did not withdraw from Kuwait by the 15 January deadline.¹⁰²⁴ With such broad public support, the administration would have been willing to use force without Congressional authorization. Second, the administration believed that the war would be decisive and the U.S. would suffer few casualties. General Powell assured Secretary Baker that he was not only “confident [the war] can be won” but that it “can be won in 2-3 weeks with 2-3000 killed.”¹⁰²⁵ These assurances contributed to a belief by the administration that they would have the support of the Congress later on if they used force without authorization. With the belief that the war would be popular and victorious, the administration was prepared to move forward in the war without Congressional authorization.

Of course, President Bush would have the final word on the decision to go without Congress. Bush told Quayle, who was leading the push for going to Congress, “I don’t care what they say, you need to know,” because “I’m going to do it, whether Congress gives me authority

¹⁰²² Quayle, interview with author.

¹⁰²³ Ed Holiday, “Memorandum for the Cabinet and Agency Heads,” 4 January 1991. University of Pittsburgh; Richard Thornburgh Papers, Box 770.

¹⁰²⁴ Ibid.

¹⁰²⁵ Jim Baker, “Notes on Conversation with General Powell,” 27 November 1990. Princeton University: Jim Baker, Box 109.

or not.”¹⁰²⁶ Bush later wrote that “even had Congress not passed the resolutions I would have acted and ordered our troops into combat. I know it would have caused an outcry, but it was the right thing to do. I was comfortable in my own mind that I had the constitutional authority. It had to be done.”¹⁰²⁷ The Congress would be asked to come onboard but the war would not wait for them.

In building the legal case for launching the attack after a potential defeat in Congress, the administration’s authorization from the United Nations presented a strong substitute for Congressional authorization. Cheney, while a skeptic of the utility of the United Nations was prepared to invoke the U.N. authorization as a functional substitute for Congressional authorization. By the time of the Congressional vote, “the UN Security Council had [already] authorised the use of force back in November saying that we could do it by January 15th if he wasn’t out by then and that legally and from a constitutional stand point we had all the authority we needed.”¹⁰²⁸ Though the legal community within the executive had urged the President to go to Congress, they were prepared to “rely on the United Nations authorization in defending a war,” as Edwin Wilkinson said.¹⁰²⁹ The U.N. authorization, at minimum, ameliorated the administration’s concern about receiving Congressional authorization.

J. Beginning the Attack: The Haphazard Congressional Notifications

As another day of rain pummeled Washington D.C. on the early morning of 16 January, Secretary of Defense Cheney walked along the Vietnam memorial. Later that day he would give the launch orders that would move the world’s most powerful military into battle, but in that

¹⁰²⁶ Quayle, “Oral History,” BHOUVA.

¹⁰²⁷ Bush and Scowcroft, “A World Transformed,” 446.

¹⁰²⁸ Cheney, “Oral History,” PBS Gulf War.

¹⁰²⁹ Williamson, interview with author.

solitary moment he found time for reflection. “I just felt a need to visit as a reminder of the cost when we screw up major policy decisions,” he recalled.¹⁰³⁰ For Cheney, this sense that the executive branch was ultimately responsible for the potential failure had been central to his insistence on executive power. If the operation failed, Cheney felt that “it wouldn’t matter how Congress voted. No member of Congress was going to stand up and say I voted for [the war].”¹⁰³¹ As the military action was set to commence with a limited sense of Congressional support, the administration still felt that this was an undertaking of the executive branch. If this war became a disaster like Vietnam, the administration was prepared to face the political fallout.

Later that afternoon, Secretary of State Baker telephoned Senator Jesse Helms and told him the crucial news; “The balloon is up.”¹⁰³² After five months of contestation over the extent to which Congress would authorize U.S. military action, Baker was using a pre-arranged code to tell the Chairman of the Senate Foreign Relations Committee that the military operation was underway. By the time that Baker spoke to Helms, American newscasters in Baghdad had been showing footage of American bombers for almost an hour.¹⁰³³ Two dozen Congressional leaders were notified by the White House of the commencement of military operations, but many “learned the news the same way the rest of America did- from television.”¹⁰³⁴ As the hostilities were commencing, the CIA and Defense Department officials charged with notifying Congress haphazardly tracked down Congressmen for notification from finding Speaker of the House Thomas Foley shopping in a mall to paging House Intelligence Committee Chairman Dave

¹⁰³⁰ Cheney, interview with author.

¹⁰³¹ Cheney, interview with author.

¹⁰³² Chuck Alston, “Bombers Heading for Baghdad as Hill Leaders got Word,” *Congressional Quarterly*, 19 January 1991.

¹⁰³³ Ibid.

¹⁰³⁴ Alston, “Bombers Heading for Baghdad.”

McCurdy's wife as they were en route to a party.¹⁰³⁵ The Congressional leaders returned to their offices as the National Security Council sent a liaison, Virginia Lampley, to brief them on the operations that were already underway.¹⁰³⁶

These calls and briefings were the culmination of executive branch control over the path to the use of military force. "It was one more reminder," wrote Chuck Alston, "that while Congress authorizes war, the executive branch makes it. These calls were merely protocol-designed to notify, not consult."¹⁰³⁷ With bombs raining down on Baghdad, the debate over the extent of executive power to use force became a bygone issue.

In a top secret memorandum distributed to administration officials, Bush outlined the legal basis and objectives of the mission. The administration was acting, Bush argued,

pursuant to my responsibilities and authority under the Constitution as President and Commander in Chief, and under the laws and treaties of the United States, and pursuant to [the House Joint Resolution], and in accordance with the rights and obligations of the United States under international law, including UN Security Council resolutions [pertaining to Iraq].¹⁰³⁸

While Bush was invoking his powers as Commander in Chief, the emphasis on the "obligations" created by the United Nations Security Council Resolutions represented the administration's argument that the legal basis for the intervention went beyond the President's traditional powers and was enhanced by the enactment of the Security Council resolutions.

After the repulsion of Saddam Hussein from Kuwait, there were continued concerns that he might launch another attack. The Bush administration had decided not to pursue the Iraqi army into Iraq and had not gone to Baghdad, as some advisers had urged them to. Concerns

¹⁰³⁵ Ibid.

¹⁰³⁶ Ibid.

¹⁰³⁷ Ibid.

¹⁰³⁸ George Bush, "National Security Directive 54," 15 January 1991; <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39/document4.pdf>

about the Iraqi chemical, biological and nuclear weapons programs came to dominate the debate over how to approach Iraq in the aftermath of the conflict.

K. Debating a Second Resolution

On the one-year anniversary of the Iraqi invasion of Kuwait, the Senate considered an amendment to a defense bill that would “supports the use of all necessary means to achieve the goals of Resolution 687.”¹⁰³⁹ The purpose of the amendment, as Senator Bob Dole framed the matter, was to put the Congress “squarely behind the President in sending the message to Saddam in the loudest and clearest possible terms: you are out of wiggle room; you are out of bluffs; you are out of time.”¹⁰⁴⁰ The resolution had little practical effect but the scope of the debate illustrated the shift towards supporting the President once the war was underway.

Though forty-seven senators had voted against the authorizing resolution for the war in January, only two Senators (Wellstone and Hatsfield) voted against this resolution. With the war ongoing, political leaders were increasingly unwilling to take the political risk of potentially being seen as challenging the Commander-in-Chief. Though some Congressional Democrats had been willing to stake out a claim for Congressional war powers before the war, once Bush had led the nation into conflict, the political will to assert Congressional power disappeared. The Bush administration “barely paid attention” to the debate in Congress over the conduct of the war, as Jim Dyer, the Deputy Assistant to the President for Legislative Affairs, recalled.¹⁰⁴¹ By then, the administration had already “shifted its focus onto domestic affairs” and could count on

¹⁰³⁹ Senate Amendment 1040 to National Defense Authorization Act, 2 August 1991; <http://thomas.loc.gov/cgi-bin/query/D?r102:7:./temp/~r102H3BA87::>

¹⁰⁴⁰ Quoted: John Goldman and Michael Ross, “Rigid Control on Iraqi Arms Sought,” *The Los Angeles Times*, 3 August 1991.

¹⁰⁴¹ Jim Dyer, phone interview with author, 14 November 2011.

the continued support of Congress without much thought.¹⁰⁴² Though many scholars focus on the possibility of Congress defunding a war once it has begun as their true vestige of war power, this was not the case. Once the war began, the administration had greater control than ever over ensuring that the Congress followed their lead.

L. Conclusions and Analysis: The Gulf War and Executive Power

I. The March to War

Bush's legal actions in the lead-up to the Gulf War represented a significant expansion of executive power. Constitutional Scholar L. Gordon Crovitz argued that this was nothing less than the "creat[ion of] a new constitutional principle: if a president dispatches troops against a dictator, tells Congress he's going to order them to battle regardless of what Congress does or fails to do, the congress will pass a resolution approving what the president already said he was going to do anyway."¹⁰⁴³

While Bush had eventually gone to Congress, by the time that he did there was no alternative for the Congress except to approve the decision. Once Bush had already sent 400,000 troops into the region through operation Desert Shield and set 15 January as a deadline through the United Nations resolutions, Bush had committed the United States to use force well before Congress had the opportunity to consider the issue. Logistically, keeping the force in Saudi Arabia through the summer would have been unfeasible and non-action would have been politically unacceptable. Secretary of Defense Richard Cheney admitted as much: "once you've got 500,000 troops out there in the desert is you can't leave them there indefinitely, you cannot

¹⁰⁴² Ibid.

¹⁰⁴³ L. Gordon Crovitz, "How Bush Outflanked Iraq and Liberated the Constitution," *The Wall Street Journal*, 6 March 1991.

sustain that kind of deployment over time.”¹⁰⁴⁴ The use of force had become a *fait accompli* before the Congress took up a position. By the time the bill reached the Congress, “a no vote risked looking like a vote for what the President had defined as defeat,” as Anthony Lewis noted.¹⁰⁴⁵

II. The Korean War Precedent

The administration embraced the theory that the United Nations authorization acted as a substitute for the need for Congressional authorization, a precedent that they saw as emanating from Truman’s decision in the Korean War.

The analogy to the Korean War held a personal resonance for Secretary Baker. Baker had enlisted in the Marine Corps during the war and saw it as a valiant war.¹⁰⁴⁶ He brought the matter up in his notes preparing for how he would sell Congressmen on the war; “I served in the Marine Corps at the height of the Korean War. (I didn’t have to fight but many of my buddies did and they lost their lives.)”¹⁰⁴⁷ For Baker, who undoubtedly shared his views with Bush in their frequent informal talks, Korea had provided the model for how the United States could take military action to protect a small state that had been unjustly attacked. This proposition contributed to Baker’s dictum: “don’t base policy on polls- but here we’re doing what’s right.”¹⁰⁴⁸

In addressing the legal issues surrounding UN authorization and Congressional authorization, the precedent from the Korean War was particularly important. When he began looking into the “use of force issues,” in August 1990, State Department Legal Adviser Edwin

¹⁰⁴⁴ Richard Cheney, “Oral History,” PBS; <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/cheney/1.html>

¹⁰⁴⁵ Anthony Lewis, “Abroad at Home: Presidential Power,” *The New York Times*, 14 January 1991.

¹⁰⁴⁶ Baker, “Politics of Diplomacy,” 368.

¹⁰⁴⁷ James Baker, “notes re appearance to Senate Foreign Relations Committee,” 5 December 1990. Princeton University: James Baker Papers, Box 109.

¹⁰⁴⁸ Ibid.

Wilkinson turned to Acheson's memoir, *Present at the Creation*.¹⁰⁴⁹ Acheson's defense of acting through the United Nations rather than Congress was important for Wilkinson, who took "tremendous comfort in the fact that they did not receive congressional authorization," and the Truman administration's action in the Korean War provided Wilkinson with the "model for UN authorization," that he would urge Secretary of State James Baker to take instead of going for Congressional authorization.¹⁰⁵⁰ In the midst of the controversy over the President's war power, Michael Luttig, the director of the Office of Legal Counsel, had advised the White House that that they should look to Dean Acheson's account of the Korean War in which Truman saw "his great office [as] as a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige."¹⁰⁵¹ Like Acheson had advised Truman, Luttig was now advising Bush that the administration could rely on a United Nations resolution, without Congressional authorization, as the legal basis for the use of large-scale military force. Expanding on this, Ronald Vonlembke of the White House Counsel's Office would author an entire memorandum on the "comparisons between Korean War and Iraq/Kuwait conflict."¹⁰⁵² Vonlembke noted that "Truman did not request a resolution or a declaration of war from Congress" and while some Republicans protested this they "almost unanimously support[ed] Truman's requests for further appropriations and authorities to conduct the war."¹⁰⁵³ Vonlembke brought to Gray's attention the memoranda drafted by Adrian Fisher in July 1950 establishing Truman's power to conduct the Korean War without Congressional authorization.

¹⁰⁴⁹ Williamson, interview with author.

¹⁰⁵⁰ Williamson, interview with author.

¹⁰⁵¹ Michael Luttig, "Bracketed Paragraph from book 'Present at the Creation' by Dean Acheson," 3 December 1990. George Bush Library: C. Boyden Gray Papers, War Powers/Kuwait, File 2.

¹⁰⁵² Ronald Vonlembke, "Comparisons Between Korean War and Iraq/Kuwait Conflict." 11 January 1991. George Bush Library: C. Boyden Gray Papers, War Powers/Kuwait, File 3

¹⁰⁵³ Ibid.

As the administration contemplated taking action without Congressional authorization, the Korean War provided a useful precedent to look to. As the 15 January deadline approached, Secretary of Defense Cheney defended the use of force without Congressional authorization because “we had the Truman precedent from the Korean crisis of 1950 that the Senate and all [sic] ratified the United Nations charter.”¹⁰⁵⁴ The precedent established by Truman and Acheson in the Korean War had guided the administration in relying on the United Nations over Congress throughout the lead-up to the use of force.

III. Making History

While they were utilizing the Korean War for a precedent on how the United Nations authorization could substitute for Congressional authorization, the administration was also focused on the precedent they would be creating and its place in history. President Bush saw his actions in historical terms, and was concerned with the implications of his actions for future Presidents. In responding to a letter from retired Senator Barry Goldwater on war powers, Bush hand-wrote in the margins “these are the times that try men’s souls.”¹⁰⁵⁵ This was the famous opening to Thomas Paine’s book, *The Crisis*, advocating that Americans take up arms against the British in 1776.¹⁰⁵⁶ Bush invoked one of America’s foremost Founding Fathers in this note because he saw himself, like Paine, not only acting in the current struggle but also shaping the American nation for generations to come through the precedent he set in that moment. Bush certainly identified with the second half of Paine’s opening line as well: “The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of his country; but he that

¹⁰⁵⁴ Cheney, “Oral History,” PBS Gulf War.

¹⁰⁵⁵ George Bush, “Letter to Barry Goldwater,” 30 November 1990. George Bush Library: C. Boyden Gray Papers, War Powers/Kuwait, File 3

¹⁰⁵⁶ Thomas Paine, *The Crisis*, 23 December 1776; <http://www.ushistory.org/paine/crisis/index.htm>

stands by it now, deserves the love and thanks of man and woman.”¹⁰⁵⁷ Bush was a student of history and he tended to see his actions, though they may be vilified at the time, as being justified by their historical implications. “The precedent we were setting” was a foremost concern for Boyden Gray.¹⁰⁵⁸ While the administration felt they had sufficient precedent from the Korean War to act without Congressional authorization, they wanted to set a precedent that would enable future Presidents to continue to use military force without Congressional authorization.

In order to protect the President’s power to use military force, the administration wanted to demonstrate that the President could utilize the United Nations as the basis for using force. “We had ample precedent” Cheney argued, with “Truman in Korea [and the] UN Charter. The Kuwaitis, a UN member had come and asked us for assistance. The Senate had already ratified the UN Charter by a two-thirds vote [in 1945] and had made provisions for that.”¹⁰⁵⁹ With that, he argued that the administration was “perfectly justified in going forward with the forces we had at our command without any additional authorization by the Congress.”¹⁰⁶⁰

Once the administration had obtained United Nations authorization, and argued that this was a sufficient basis for using military force, they used it for ‘political posturing’ to pressure Congress to pass a last-minute authorizing resolution. The administration’s strategy of ‘United Nations first’ meant that they could press Congress into joining into an established international coalition. To question the Congressional resolution would be to question the President’s leadership of a broad international coalition. The administration used the United Nations resolution, as Secretary of State James Baker put it, to “shame” the Congress into quickly

¹⁰⁵⁷ Ibid.

¹⁰⁵⁸ Gray, interview with author.

¹⁰⁵⁹ Cheney, “Oral History,” BHOUVA.

¹⁰⁶⁰ Cheney, “Oral History,” BHOUVA.

passing the resolution.¹⁰⁶¹ All the while, the administration knew that this would be an American war: “From the start, this had been our show; we had assembled the coalition and the President had sent America’s sons and daughters into the Gulf,” as James Baker reflected.¹⁰⁶² Though the Congressional resolution was robust, the administration had been only been able to achieve it through using the United Nations resolution as a basis for posturing against Congress.

M. Aftermath: The Intervention in Somalia

As the United States forces were preparing to invade Kuwait, the administration was simultaneously evacuating its staff from the embassy in Somalia.¹⁰⁶³ Just a few months later, when the administration intervened in Somalia, they again looked to authorization from the United Nations to buttress their claims that the intervention was Constitutional even without Congressional authorization. Assistant Attorney General Thomas Flanigan justified the Constitutionality of the intervention on the precedent of “President Truman's decision to support the United Nations in repelling the invasion of South Korea” and he argued that, like Truman, the administration did not need Congressional authorization because the intervention was

maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations... [which] can be considered a vital national interest, and will promote the United States' conception of a 'new world order.'¹⁰⁶⁴

By 9 December 1992, the United States had deployed over 20,000 soldiers to support the United Nations mission there without any Congressional authorization.¹⁰⁶⁵ Again, the administration had utilized the United Nations authorization but this time they did not bother to

¹⁰⁶¹ Baker, “Politics of diplomacy,” 332.

¹⁰⁶² Ibid, 325

¹⁰⁶³ Ibid, 380.

¹⁰⁶⁴ William Barr, “Memorandum: Authority to United States Military Forces in Somalia,” 4 December 1992; <http://www.justice.gov/olc/presiden.8.htm>

¹⁰⁶⁵ Ryan Hendrickson, *The Clinton Wars: The Constitution, Congress, and War Powers*, (Nashville: Vanderbilt UP, 2002), 23.

obtain any Congressional approval. This was a case of ‘total substitution’ in which United Nations authorization was utilized by the executive to justify the lack of any Congressional authorization.

Chapter 8:

Legacies in the Clinton, Bush 43 and Obama Presidencies

During the course of the Clinton, Bush 43 and Obama Presidencies, the executive has continued to utilize ILFs as means to protect and expand executive power to use military force. With the end of the Cold War, the United States could turn to the United Nations with far more regularity to obtain Article VII resolutions authorizing the use of force. Similarly, without the threat from the Soviet Union, there was a push to utilize NATO for humanitarian missions. In the Clinton administration, the executive pursued a strategy of ‘total substitution’ to use ILF authorization to replace the need for Congressional authorization. In the Bush administration’s approach to Iraq, the executive pursued a strategy of ‘political posturing’ in which ongoing negotiations with the United Nations were used to pressure Congress into quickly passing Congressional authorization. In the Obama administration’s approach to Libya, the executive pursued a strategy of ‘total substitution’ to argue that authorization from the United Nations meant that they did not need Congressional authorization. While the administrations pursued foreign policies that were significantly distinct, they shared a commitment to protecting executive power to use military force and they engaged ILFs in that task.

A) Clinton’s Humanitarian Interventions: an Era of ‘Total Substitution’

The Clinton administration’s approach to war powers built on the Bush administration’s success at asserting executive power to use military force. At first, there was concern amongst some advisers that the administration would not do enough to protect executive power. The Clinton administration was entering the White House as the first Democratic administration since Jimmy Carter and few of its officials had experience working in the executive branch. There was

a concern amongst the incoming legal staff that, as Assistant Attorney General Walter Dellinger of the Office of Legal Counsel said, the “administration would be willing to give away the whole house because they were so accustomed to being in Congress.”¹⁰⁶⁶ Instead, the administration took a hard position on maintaining and expanding executive power. In taking over the Office of Legal Counsel, Dellinger had long meetings with the departing staff from the Bush administration on how to best protect executive power.¹⁰⁶⁷ Though he had opposed the Gulf War as unconstitutional, Dellinger was now accepting the need to protect executive power. He embraced the “long tradition of Executive Branch [lawyers] defending the President's authority to deploy U.S. forces.”¹⁰⁶⁸ Matthew Matheson, the Deputy State Department Legal Adviser in both the Bush and Clinton administrations, noted that there was “little difference in how they approached war powers” with “both [Bush and Clinton] trying to protect Presidential power.”¹⁰⁶⁹ There was “fairly limited turnover” in the staff with many of the lawyers focused on war powers, such as Matheson himself, continuing on to serve in the Clinton administration.¹⁰⁷⁰ Even at the highest levels of the administration, there was a focus on protecting executive war power.

Secretary of State Warren Christopher was a lawyer who was a firm supporter of Executive war power. In 1965, Christopher was a young Department of Justice attorney who drafted the crucial memorandum on Presidential war power in Vietnam.¹⁰⁷¹

The administration was prepared to tackle the war powers debate head-on. Building on President Bush’s constitutional doctrine, President Bill Clinton continued to turn to international organizations as a means to bypass Congressional authorization of the use of force.

¹⁰⁶⁶ Walter Dellinger, interview with author, 27 September 2010. Washington, D.C.

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Walter Dellinger, comments at “Separation of Powers and Foreign Policy,” hosted by the Federalist Society, 1 March 2000; http://www.fed-soc.org/publications/pubid.1563/pub_detail.asp

¹⁰⁶⁹ Mathew Matheson, telephone interview with author 9 November 2011.

¹⁰⁷⁰ Ibid.

¹⁰⁷¹ Warren Christopher, “Memorandum for the Honorable Larry Temple,” 16 March 1968. 1968. Lyndon Johnson Library: National Security File, Vietnam, Box 97.

The administration's first major use of force came in 1994 with a deployment to stabilize Haiti. Security Council resolution 940 used Chapter VII of the U.N. Charter to empower member states to forcefully overthrow the Raoul Cedras junta that had seized power in a coup in 1991. The resolution declared: "Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership."¹⁰⁷² The Clinton administration ordered the deployment of U.S. troops in September 1994 to oust the Cedras regime and reinstate the democratically elected Aristide administration.

As the administration prepared for the use of force, Republican leaders, particularly Senator Robert Dole, challenged the President's Constitutional authority to carry out a mission in Haiti.¹⁰⁷³ With the looming possibility of a Congressional vote against the use of force, the administration decided to rely on the United Nations authorization. In responding to a formal inquiry from Congressional Republicans, Walter Dellinger laid out the case for the Constitutionality of the President's actions. He wrote, "the deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country involved," and also was in accord with United Nations Security Council Resolution 940 authorizing the intervention.¹⁰⁷⁴ The legal authorization, as Dellinger constructed it, was from the invitation of the Haitian regime and the United Nations authorization. With these, Congressional authorization was not needed. Though Dellinger had said that the Gulf War was unconstitutional, his views now accorded with the needs of the administration. "We were actually moving a lot of these soldiers to Haiti from Korea and actually bringing them closer to home," Dellinger recalled

¹⁰⁷² United Nations Security Council Resolution 940; 31 July 1994.

¹⁰⁷³ Norman Kempster, "U.S. Has Authority to Launch Haiti Invasion," *Los Angeles Times*, 18 July 1994; http://articles.latimes.com/1994-07-18/news/mn-17080_1_haiti-invasion

¹⁰⁷⁴ Walter Dellinger, "Deployment of United States Armed Forces into Haiti," 27 September 1994; <http://www.justice.gov/olc/haiti.htm>

and with that kind of “world-wide military presence,” he didn’t believe there was a need to go to Congress.¹⁰⁷⁵

The Republican stance against humanitarian interventions became a critical issue in the 1994 mid-term election campaign. As part of his “Contract with America,” Newt Gingrich promised: “No U.S. troops under UN command and restoration of the essential parts of our national security funding to strengthen our own national defense and maintain credibility around the world.”¹⁰⁷⁶ With a decisive Republican victory, they attempted to reign in executive power vis-a-vis the United Nations. In the National Security Revitalization Act, the Republican Congress attempted to prohibit Presidential utilization of the United Nations for peacekeeping missions. The bill would have mandated that any Presidential action at the Security Council to participate in a peace-keeping mission subject to Congressional approval.¹⁰⁷⁷ The bill was passed by the House of Representatives but failed to get a vote in the Senate. Nonetheless, it was clear that the Republicans would not sign off on any use of force for a humanitarian intervention without great protest. There was widespread belief, as Senate Majority Leader Robert Dole said, that “we need to rein in the [President’s] blank check on UN peacekeeping.”¹⁰⁷⁸

In response to this rising level of protest from Congress, Clinton defended the position of utilizing force through the United Nations with limited Congressional authorization. In May 1995 the administration completed “Presidential Decision Directive 25,” a secret memorandum that articulated how the administration viewed U.S. participation in multilateral uses of force. “The administration realizes that peace operations and war powers issues can overlap,” the

¹⁰⁷⁵ Dellinger, interview with author.

¹⁰⁷⁶ Ibid, 243.

¹⁰⁷⁷ “An Act to Revitalize the National Security of the United States,” 22 February 1995;

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:h7rfs.txt.pdf; section IV

¹⁰⁷⁸ Quoted: Ryan Hendrickson, “War Powers, Bosnia and the 104th Congress,” *Political Science Quarterly*, 113 (1998), 246.

memorandum stated.¹⁰⁷⁹ Yet, the administration's only response was an attempt to "expand its consultations" with the Congress while choosing not to seek authorization from Congress when the U.S. used force in a multilateral framework.¹⁰⁸⁰ PDD-25 outlined how the administration would approach American participation in multilateral uses of force and it made clear that participation would remain a priority as would the avoidance of Congressional authorization.

In the summer of 1995, the Clinton administration defied the Republican Congress with the use of force in Bosnia. As they had in Haiti, the Republican leaders in Congress protested the Constitutionality of the use of force for a humanitarian intervention.¹⁰⁸¹ Senate Majority Leader Robert Dole was successful in passing a non-binding Senate resolution declaring that Clinton should obtain Congressional authorization for any use of force.¹⁰⁸²

Despite this Congressional opposition, the Clinton administration went forward with the intervention. Though the U.S. commitment was originally tied to assisting with occasional NATO bombing campaigns against the Serbs, the July massacre at Srebrenica changed the decision-making. As it became clear that this had been a massacre, the administration decided that they would scale up bombings at a much higher level.¹⁰⁸³ With some allied peace-keepers taken hostage, there was a sense that "we have to fight our way in to get our allies out safely," as Gregory Treverton, then the Vice-Chairman of the National Intelligence Council, recalled.¹⁰⁸⁴ In carrying out these missions, Clinton did not go to Congress but instead said that they he had "authorized these actions in conjunction with our NATO allies to implement the relevant U.N.

¹⁰⁷⁹ Bill Clinton, "Presidential Decision Directive 25," 3 May 1994;
http://www.clintonlibrary.gov/_previous/Documents/2010%20FOIA/Presidential%20Directives/PDD-25.pdf

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Paul Richter, "Republicans Balk at Sending U.S. Troops to Bosnia," *Los Angeles Times*, 30 September 1995;
http://articles.latimes.com/1995-09-30/news/mn-51604_1_senior-republican

¹⁰⁸² Ibid.

¹⁰⁸³ Ivo Dallder, "Decision to Intervene: How the War in Bosnia Ended," *Foreign Service Journal*, December 1998;
http://www.brookings.edu/articles/1998/12balkans_daalder.aspx

¹⁰⁸⁴ Gregory Treverton, telephone interview with author, 31 October 2011.

Security Council resolutions and NATO decisions.”¹⁰⁸⁵ Clinton acted as part of a NATO-authorized mission without Congressional authorization. By that point, the Congress could do little. Congressman Henry Hyde lamented; “the dye is cast, now we have to fall in line.”¹⁰⁸⁶

In deploying over 20,000 soldiers as peace-keepers, Clinton relied on ILFs rather than Congress. As the administration had done in Haiti, it turned to Walter Dellinger to defend the Constitutionality of using military force without Congressional authorization. In his legal memorandum, Dellinger noted that the United States had “initiated an intensive diplomatic effort that produced a peace agreement among the warring parties in Bosnia” which now “depends on the presence of an international military force that would maintain the cease-fire and the separation of forces.”¹⁰⁸⁷ The United States had, as Dellinger argued, already made a pledge that the President now had the power to uphold. Continuing the position from the Bush administration, Dellinger argued that the President could use force because “maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest.”¹⁰⁸⁸ With this legal framework in place, the Clinton administration deployed over 20,000 troops to Bosnia. There was no authorization from Congress and the administration relied solely on the U.S. obligations emanating from ILFs as the Constitutional basis for deploying military force.

In 1999, Clinton relied on NATO authorization to carry out air-strikes in Yugoslavia without Congressional authorization. With rising levels of violence against the Albanian minority, Clinton threatened Milosivic with military retaliation. Though Clinton originally

¹⁰⁸⁵ Bill Clinton, "Letter to Congressional Leaders on Bosnia," 1 September 1995; <http://www.gpo.gov/fdsys/pkg/WCPD-1995-09-11/pdf/WCPD-1995-09-11-Pg1473.pdf>

¹⁰⁸⁶ Quoted: Hendrickson, 252.

¹⁰⁸⁷ Walter Dellinger, “Proposed Deployment of United States Armed Forces into Bosnia,” 30 November 1995; <http://www.justice.gov/olc/bosnia2.htm>

¹⁰⁸⁸ Quoted; *ibid.*

attempted to obtain United Nation authorization, “when he could not get U.N. support for military action in Kosovo, he relied entirely on NATO,” as historian Julian Zelizer noted.¹⁰⁸⁹ Clinton told the American people that he had “decided that the United States would vote to give NATO the authority to carry out military strikes against Serbia if President Milosovic continues to defy the international community.”¹⁰⁹⁰ Once airstrikes had already begun, the Congress took up the issue but the House of Representatives defeated a resolution that would have authorized the airstrikes.¹⁰⁹¹ Frustrated by the Congress’s inability to stop the use of force, Congressman Tom Campbell, a Republican from California, sued the administration for violating the War Powers Resolution but his case was dismissed. While *Dellums v. Bush* had maintained that Congress did have standing to challenge the President over the use of force when a claim was “ripe,” this ruling was far more restrictive. The Judges from the District of Columbia Circuit Court of Appeals ruled that under no circumstances would Congressmen have the standing to sue the President on war powers.¹⁰⁹² The Judges were cutting off the possibility of a judicial intervention and instead reminded the Congressmen that there “always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.”¹⁰⁹³ In other words, the Judges were instructing the Congressmen that there would be no judicial review of war powers.

With the judicial decision to support them, the Clinton administration developed a legal rationale for the use of force without Congressional authorization. The Office of Legal Counsel took the position that because the Congress had appropriated funds for American participation in

¹⁰⁸⁹ Julian Zelizer, *The American Congress: The Building of Democracy*, (New York: Houghton Mifflin, 2004), 697.

¹⁰⁹⁰ Ibid, 697.

¹⁰⁹¹ Ibid, 698.

¹⁰⁹² Campbell v. Clinton, U.S. Dc Circuit Court of Appeals, Case No 99-5214; <http://caselaw.findlaw.com/us-dc-circuit/1177126.html>

¹⁰⁹³ Ibid.

NATO, the President could order the continuation of airstrikes at his discretion.¹⁰⁹⁴ In this, Clinton utilized NATO authorization to carry out a military action without Congressional authorization. “President Clinton asked many nations to agree to attack Yugoslavia,” commented the Republican Congressman Ernest Istook, “but he failed to get permission from one crucial country; America.”¹⁰⁹⁵

Throughout his eight years in office, Clinton had regularly turned to ILFs as a substitute for Congressional authorization. Clinton made the argument that “predecessors in both parties have clearly maintained that they did not require, by Constitution, did not have to have congressional approval for every kind of military action,” and Clinton embraced this fully.¹⁰⁹⁶ He had fought back attempts from the Republican Congress to limit his ability to use force through the United Nations and he had consistently been able to use ILFs to expand executive power.¹⁰⁹⁷ The ILFs were regularly invoked as ‘total substitutes’ for the need for Congressional authorization.

B) The Bush Administration and Iraq: a Case of ‘Political Posturing’

In October 2002, President George W. Bush obtained Congressional authorization to use force in Iraq.¹⁰⁹⁸ Bush was able to obtain the resolution on an overwhelming vote.¹⁰⁹⁹ This was a major accomplishment considering that Democrats held 48 votes in the Senate. I argue that the

¹⁰⁹⁴ Randolph Moss, “Authorization for Continuing Hostilities in Kosovo,” 19 December 2000; <http://www.justice.gov/olc/final.htm>

¹⁰⁹⁵ Quoted; Zelizer, “The American Congress,” 698.

¹⁰⁹⁶ Bill Clinton, “President’s News Conference,” 19 September 1994; <http://www.presidency.ucsb.edu/ws/index.php?pid=49110#axzz1hxcaosr5>

¹⁰⁹⁷ Walter Dellinger, “Placing of United States Armed Forces Under Nations Operational or Tactical Control,” 8 May 1996; <http://www.justice.gov/olc/hr3308.htm>

¹⁰⁹⁸ Public Law 107-243; <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/html/PLAW-107publ243.htm>

¹⁰⁹⁹ The vote in favor of the resolution 296 to 133 in the House of Representatives and 77 to 23 in the Senate.

Bush administration used a strategy of “political posturing” in which ongoing negotiations at the United Nations were utilized as the basis to pressure Congress into passing the resolution.¹¹⁰⁰

In defining the legal basis to use force, the Bush administration had claimed expanded powers of the President while abdicating the Clinton administration’s position that authorization from an ILF could directly enhance Executive power. John Yoo, the administration’s primary lawyer on war powers questions at the Office of Legal Counsel, had long denounced the idea that United Nations or NATO authorization could enhance executive power to use force.¹¹⁰¹ As the administration began to consider invading Iraq in early 2002, executive branch lawyers such as Yoo argued that the President could do so without Congressional authorization.¹¹⁰² However, in September 2002 Bush decided that for political reasons he wanted Congressional authorization for the use of force in Iraq.¹¹⁰³ When the administration decided to obtain Congressional authorization, they wanted it immediately.

Bush utilized his attempt to obtain a resolution at the United Nations as a means to pressure Congress into quickly passing the resolution without significant debate. In rolling out the Congressional resolution, the administration sent officials to Sunday talk shows where “administration officials abandoned the unilateralist rhetoric and began building a case for a broad coalition.”¹¹⁰⁴ The administration was in the midst of attempting to obtain a major United Nations Resolution condemning the Iraqi WMD program and the administration used their

¹¹⁰⁰ This fits with second framework under political posturing: “posturing during negotiations.”

¹¹⁰¹ John Yoo, “Kosovo, War Powers, and the Multilateral Future,” *University of Pennsylvania Law Review*, 148, (2000), 1673.

¹¹⁰² See:

Mike Allen and Juliet Eilperin, “Bush Aides Say Iraq War Needs no Hill Vote,” *Washington Post*, 26 August 2002. Ron Fournier, “White House Lawyers Give Bush OK on Iraq,” *Washington Times*, 26 August 2002.

¹¹⁰³ Louis Fisher, “Deciding on War Against Iraq: Institutional Failures,” *Political Science Quarterly*, 118, (2003), 395.

¹¹⁰⁴ Fisher, 395.

ongoing work at the United Nations to demand that Congressional Democrats support the resolution.

The Bush administration utilized his attempt to obtain a UN resolution to push the resolution through Congress. On 12 September, Bush delivered a major address in the United Nations in which he called on them to pass a resolution condemning Iraq and moving forward the case for the use of force.¹¹⁰⁵ “If Iraq's regime defies us again” Bush declared that, “the world must move deliberately and decisively to hold Iraq to account.”¹¹⁰⁶ While he pledged to work through the United Nations, Bush also made clear that the U.S. would go forward without the United Nations: “The Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable, and a regime that has lost its legitimacy will also lose its power.”¹¹⁰⁷ Bush’s speech was popular within the United States and Bush used this political momentum to introduce a resolution in Congress. Bush demanded that Congress act quickly, before going on its recess, and Robert Byrd complained that “war hysteria has blown in like a hurricane” as the Bush administration pressed the Congress to pass the resolution.¹¹⁰⁸

In making the case for Congress to pass the resolution quickly, Bush argued that this was necessary to move forward with his case at the United Nations. “Supporting this resolution will,” Bush argued, “show the resolve of the United States, and will help spur the United Nations to act.”¹¹⁰⁹ In the days leading up to the vote he continued to press this argument: “The [Congressional] resolution will tell the United Nations, and all nations, that America speaks with

¹¹⁰⁵ George W. Bush, “Address to the United Nations,” 12 September 2002; http://www.undemocracy.com/generalassembly_57/meeting_2

¹¹⁰⁶ Ibid.

¹¹⁰⁷ Ibid.

¹¹⁰⁸ Quoted: Fisher, “Deciding on War,” 396.

¹¹⁰⁹ George W. Bush, “The President’s Radio Address,” 5 October 2002; <http://www.gpo.gov/fdsys/pkg/PPP-2002-book2/html/PPP-2002-book2-doc-pg1735.htm>

one voice and is determined to make the demands of the civilized world mean something.”¹¹¹⁰

Bush was making a clear point to Congress; the authorizing resolution is necessary for the United States to be able to secure backing from the United Nations. The argument was brought into the Senate by Bush’s allies. Senator Trent Lott, the minority leader, said, "I think it's vital for Congress to show the world that we back this president and we'll give him the authority he needs to protect the American people in the world community" and with the President going to the United Nations, "we must vote to show support to the president right now."¹¹¹¹ The administration’s turn to the United Nations provided the Republican Senator with a basis for demanding that Democrats pass the authorizing resolution without resistance.

On 10-11 October, the resolution passed in the House of Representatives and the Senate. The resolution stated that the President is “authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate” in Iraq to “defend the national security of the United States against the continuing threat posed by Iraq; and “enforce all relevant United Nations Security Council resolutions regarding Iraq.”¹¹¹² The resolution vested the power to determine when and whether force was necessary solely in the President. Shortly thereafter, John Yoo wrote a secret Office of Legal Counsel memorandum for the White House advising that the President had more than sufficient Constitutional authority to use force at anytime of his choosing¹¹¹³

In justifying why they passed the resolution, the Democrats conceded that they felt that they had to so as to not undermine the Bush administration’s outreach to the United Nations.

¹¹¹⁰ George W. Bush, “Case for Action,” 7 October 2002;

<http://abcnews.go.com/US/story?id=91159&page=1#.Tvzc-2B5G2w>

¹¹¹¹ Quoted: David Stout, “GOP Presses Democrats to Act Quickly on an Iraq Vote,” *New York Times*, 12 September 2002; <http://www.nytimes.com/2002/09/12/politics/12CND-CONG.html>

¹¹¹² Public Law 107-243.

¹¹¹³ Jay Bybee, “Authority of the President Under Domestic and International Law to Use Military Force Against Iraq,” 23 October 2002; <http://www.justice.gov/olc/2002/iraq-opinion-final.pdf>

Senate Majority Leader Tom Daschle, who had been the crucial vote in mobilizing Democratic Senators to support the resolution, said that, “For me, the deciding factor is my belief that a United Congress will help the President unite the world, and by uniting the world, and by uniting the world we can increase the world’s chances of succeeding in this effort and reduce both the risks and the costs America may have to bear.”¹¹¹⁴ Daschle viewed United Nations authorization as crucial for the United States and he was unwilling to oppose the resolution at the risk that this would undermine Bush’s strength at the United Nations. While Daschle “didn’t accept the administration’s argument that Iraq presented an imminent threat to the United States” and “heard nothing in intelligence briefings that suggested that anything had changed significantly during the past year,” the United Nations dimension was crucial for him.¹¹¹⁵ He had gone on the record that United Nations backing would be crucial to win a war and he couldn’t step back to undermine Congressional authorization that was necessary to win in the United Nations.¹¹¹⁶ If there was to be war, Daschle wanted the U.N. onboard. Counter-factually, had the Bush administration not been engaged in obtaining United Nations resolutions, the administration would not have been able to persuade Daschle to support the resolution. Without the United Nations diplomatic effort, Senate would not have approved the resolution.

The leadership of the House of the Representatives offered a similar explanation for their position supporting the resolution. The House International Affairs Committee noted in their bipartisan report supporting the resolution that “the best way to persuade members of the Security Council and others in the international community to join us in bringing pressure on

¹¹¹⁴ 148 Congressional Record, 20385

¹¹¹⁵ Elizabeth Drew, “War Games in the Senate,” *New York Review of Books*, 7 November 2002; <http://www.nybooks.com/articles/archives/2002/dec/05/war-games-in-the-senate/?pagination=false>

¹¹¹⁶ Tom Daschle, “The Newshour with Jim Lehrer,” 17 September 2002; http://www.pbs.org/newshour/bb/congress/july-dec02/daschle_9-17.html

Iraq or, if required, in using armed force against it.”¹¹¹⁷ To authorize the use of force was, as they saw it, a means to support the President at the United Nations.

In other instances the President had utilized ILF authorization as a replacement for Congressional authorization, Bush was using the attempt to obtain ILF authorization as a means to obtain Congressional authorization with ease. Though the Senate and the House of Representatives were controlled by Democrats, the resolution passed with overwhelming support. If there was to be a war, the Democrats wanted to have the United Nations onboard and they were unwilling to take a stance that would undermine Bush’s ability to obtain such authorization.

The domestic dimension of Bush’s United Nations strategy has been overlooked in the scholarship. In *Channels of Power*, Alexander Thompson dismisses the possibility that the turn to the United Nations had a significant domestic motivation.¹¹¹⁸ Though the Bush administration would ultimately fail in obtaining a final authorization from the United Nations after Colin Powell’s speech on the Iraqi WMD program, the administration had already succeeded in using their United Nations engagement in pressing Congress into quickly passing an authorizing resolution. The Democratic leadership’s refusal to endanger the Bush strategy at the United Nations gave Bush a free pass in Congress.

C) The Obama Administration and Libya: A Return to ‘Total Substitution’

In the 2011 intervention in Libya, the Obama administration acted within the framework of a United Nations Security Council Resolution while avoiding a request for Congressional

¹¹¹⁷ Quoted; Fisher, “Deciding on War,” 404.

¹¹¹⁸ Alexander Thompson, *Channels of Power: The UN Security Council and US Statecraft in Iraq*, (Ithaca, New York: Cornell University Press, 2009), 156.

authorization.¹¹¹⁹ Obama adopted a strategy of “Total Substitution” in which the administration argued that United Nations authorization replaced the need for any level of Congressional authorization for the use of force in Libya. Immediately before the intervention, the United States worked to secure a resolution at the United Nations that authorized the establishment of a no-fly zone.¹¹²⁰ Shortly thereafter, the United Nations, with the backing of the United States, passed a resolution that “authorizes Member States... to take all necessary measures to enforce compliance with the ban on flights,” and to enforce the “arms embargo.”¹¹²¹

The Obama administration’s decision to intervene in Libya led to calls from Congressional leaders for Obama to seek Congressional authorization.¹¹²² Instead, Obama issued a letter to Congressional leadership articulating why he would not be seeking any such authorization. The mission, he argued, was “authorized by the United Nations Security Council” and American strikes “support an international coalition as it takes all necessary measures to enforce the terms” of the resolution.¹¹²³ While Obama cited his “Constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive,” he was utilizing the United Nations resolutions as a basis for dismissing the relevance of Congress.¹¹²⁴ In the more robust defense of the administration’s position that followed from the Office of Legal Counsel, Caroline Crass vehemently defended the administration’s position. She argued that the Constitutionality of the action was bolstered by the “longstanding U.S. commitment to

¹¹¹⁹ My coverage of war powers issues in the Obama administration only covers the intervention in Libya. With the drone program ongoing and the debate over an intervention in Syria unresolved as of this writing, only the Libya intervention is suitable for academic analysis at this time.

¹¹²⁰ United Nations Security Council Resolution 1970, 26 February 2011; <http://www.icc-cpi.int/NR/rdonlyres/2B57BBA2-07D9-4C35-B45E-EED275080E87/0/N1124558.pdf>

¹¹²¹ United Nations Security Council Resolution 1973, 17 March 2011, <http://daccess-ods.un.org/TMP/1282784.93881226.html>

¹¹²² Charlie Savage, “Attack Renews Debate Over Congressional Consent,” New York Times, 21 March 2011.

¹¹²³ Barack Obama. “The President regarding the commencement of operations in Libya,” 21 March 2011; <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>

¹¹²⁴ Ibid.

maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security” and that the “credibility and effectiveness [of the UNSC] as an instrument of global peace and stability were at stake in Libya once the UNSC took action to impose a no-fly zone and ensure the safety of civilians.”¹¹²⁵ To bolster the historical basis for this claim, the memorandum explicitly cited Adrian Fisher’s 1950 memorandum on the Korean War wherein he argued, “the continued existence of the United Nations as an effective international organization is a paramount United States interest.”¹¹²⁶ Much like the Truman administration in the Korean War, the Obama administration was arguing that the authorization from the United Nations Security Council could buttress the Constitutional basis for the intervention and, in effect, the United Nations could stand in for Congress in authorizing the intervention.

As demands for Congressional authorization grew, the administration sent the State Department Legal Adviser, Harold Koh, to defend the administration’s position in Congress. Koh had been one of the leading legal critics of Bush’s war on terrorism and his activism against executive power dated back to his work on *Dellums v. Bush*. However, Koh was now working in an official capacity articulating a different interpretation of Executive power. Within the administration’s internal debates, Koh had been a leading advocate for the President’s power to use force in Libya without Congressional authorization and he had persuaded Obama to his position.¹¹²⁷ Speaking to the Congress, he argued that the President had the authority to use

¹¹²⁵ Carole Krass, “Authority to Use Force in Libya,” 1 April 2011; <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>

¹¹²⁶ Ibid.

¹¹²⁷ Savage, “Attack Renews Debate.”

military force in the circumstance as a means to “supporting the credibility and effectiveness of the U.N. Security Council.”¹¹²⁸

Many found this surprising; Koh had been a leading skeptic of Congressional power since the 1990s. “Where is the Harold Koh I worked with to ensure that international law, human rights and the Constitution were honored during the Bush years,” asked Mary Ellen O’Connell of Notre Dame Law School.¹¹²⁹ Koh had not changed his worldview so much as he had been forced to choose between priorities; upholding a United Nations Security Council Resolution designed to limit human rights violations was more important than limiting Presidential power.

Koh had always shared dueling commitments to limiting executive power and to U.S. participation in international humanitarian interventions. This was an instance where his commitments came in conflict and he chose his latter commitment; the United Nations authorization would be interpreted to mean that the President did not need Congressional authorization. Koh acknowledged that there was a tension in the Libyan operation “between preventing atrocities and staying true to the letter and spirit of the War Powers Resolution,” and his dedication to supporting human rights drew him to favoring the former.¹¹³⁰ Koh had not been forced into lying because he was a government lawyer, as many had suggested, but he had decided that upholding human rights was the top priority.¹¹³¹

In the Libyan intervention, the Obama administration, with Koh at the helm had turned to the ‘total substitution’ framework to argue the United Nations authorization replaced the need for any Congressional authorization.

¹¹²⁸ Harold Koh, “Libya and War Powers,” Testimony to Senate Foreign Relations Committee, 28 June 2011; http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf

¹¹²⁹ Paul Storbin, “A Moral Flip-Flop? Defining a War,” *New York Times*, 6 August 2011; <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?pagewanted=print>

¹¹³⁰ Ibid.

¹¹³¹ Carrie Johnson, “Human Rights Defender Now Fights for US Policy,” *NPR*, 28 June 2011; <http://www.npr.org/2011/06/28/137454984/human-rights-defender-now-fights-for-u-s-policy?ft=1&f=1001>

D) ILFs and Executive Power: Clinton, Bush and Obama

Albeit in different ways, the Clinton, Bush and Obama administrations have all embraced ILFs as a framework for protecting and expanding executive power to use military force. In the war against Iraq, the Bush administration utilized the ongoing negotiations with the United Nations for ‘political posturing’ to pressure Congress into passing Congressional authorization for the use of force in Iraq. In using force through ILF authorization in lieu of Congressional authorization, the Clinton and Obama administrations adopted a strategy of ‘total substitution.’ Despite the substantial differences between the foreign policies of these administrations, and the Bush administration’s much greater assertions of Executive power in other realms, the administrations shared an emphasis on utilizing ILFs as a means to augment executive power to use force without going to Congress. While these are preliminary analyses of these administrations, greater historical insight will have to wait until the documentary evidence becomes available.

Chapter 9:

Conclusions, Implications and a New Research Agenda

A) Overview

I offer three major conclusions in this chapter. First, I argue that ILFs have been a crucial resource in how the executive has expanded its war power in the twentieth century. Unlike the technological or temporal explanations, this is part of an overlooked ‘international-institutional’ dimension in the evolution of executive war powers. Second, I argue ILFs have been ‘democracy-undermining’ in U.S. war-making because they allow the executive to circumvent domestic limitations on the use of military force. Third, I argue that this research should spur a larger comparative study on the relationship between executive power and ILFs. Such a research agenda would look at other policy areas in the United States and also compare war powers debates at an international level.

B) ILFs and Executive War Power: A New Interpretation of the Imperial Presidency

I. An International-Institutional Perspective on the Imperial Presidency

In 1973, Arthur Schlesinger declared that the United States was living in an age of the *Imperial Presidency* in which the President could use force freely without Congressional authorization. Today the United States exists in an age of what some have called the “New Imperial Presidency.”¹¹³² Schlesinger identified a fundamental shift in the pre-WWII aid to Great Britain as a defining moment in which the President’s power moved beyond small military incursions in Latin America to grander expeditions without Congressional authorization. Since

¹¹³² Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate*, (Ann Arbor, Michigan: University of Michigan Press, 2005).

then, the President has regularly used force abroad with limited or no Congressional authorization.

The executive's willingness to assert the power to use military force without Congressional authorization is an institutional feature of the "Imperial Presidency" that is constant regardless of whether the President is a Democrat or Republican. The executive branch, as an institution, seeks to preserve the power to use military force. The nature of the use of force may shift, for instance Democrats tend to favor the use of force for humanitarian interventions, but each Presidential administration seeks to assert the power to use force as part of an attempt to preserve and enhance executive power. This executive's continual claim of the power to use military force without Congressional authorization, by both Democratic and Republican administrations, has produced the massive expansion of executive power that Arthur Schlesinger described as the "Imperial Presidency."

With this research, I return to the original three paradigms in the literature for explaining the growth of the Imperial Presidency: the technological, temporal and institutional explanations.

First, the temporal explanation is gravely flawed. Mary Dudziak has pioneered this approach in *War Time*, in which she argues that the executive's construction of 'war' on a permanent bases, such as in the Cold War or the War on Terrorism, has been at the root of the expansion of executive power. For Dudziak, 'war' is an omnipresent construction that the executive wields to enhance its power to deploy military force. She argues that Presidents invoke a notion of wartime because "some burdens are more tolerable because we think of war as important and exceptional."¹¹³³ For Dudziak, the executive seeks to invoke "war" as a means to invoke a state of exception and expand its power to use military force and to regulate the

¹¹³³ Dudziak, "War-Time," 15.

American people.¹¹³⁴ This argument is flawed because it focuses on ‘war’ as Presidential rhetoric and a cultural object while ignoring the Constitutional dimension in which ‘war’ is a crucial term.

Rather than expanding its power by labeling peacetime as wartime, the executive has expanded its power by labeling wartime as peacetime. By using language from ILFs, the President has constructed large-scale uses of military force as a police action, a commitment, or a humanitarian intervention. It is in this shift away from recognizing the use of force as war that the executive has been able to maneuver around Congress’s unique power to declare war.

While the American people have understood themselves as engaged in many wars in the post-WWII era, the temporal model has entirely overlooked how the Constitutional dimension of executive power has been a retreat from wartime. While the cultural dimension has some import to the rise of the Imperial Presidency, the legal infrastructure of the Imperial Presidency rests on the shrinking of wartime.

Second, the technological explanation has limited importance. In the latest incarnation of this model, Gary Wills argues that the nuclear bomb was central to the rise of executive power because it gave the President direct access to an overwhelming power to use force that Congress had no control over. This interpretation ignores a number of critical factors in the growth of the Imperial Presidency. The key juncture of the destroyers for bases deal occurred before the advent of the nuclear bomb. Wills’ emphasis on the late 1940s as a period for expanding executive power ignores that the push for executive power by the Roosevelt administration dated to the pre-WWII aid to Great Britain. Moreover, none of these conflicts involved the use or the serious

¹¹³⁴ Ibid; 21-26.

consideration of the use of nuclear bombs by the executive. Nina Tannenwald's work on the 'nuclear taboo' ably demonstrates how the executive could not contemplate the use of nuclear weapons.¹¹³⁵ With these conflicts lacking a strong nuclear dimension, the nuclear bomb did not become a major tool for expanding executive power. Lastly, this conclusion is reinforced by the lack of any discussion of the nuclear bomb in the critical meetings between the executive and Congressmen during these conflicts. If Wills' theory were true, we would expect that the President would utilize his control over the nuclear bomb to garner some leverage over the Congressional leaders. In Truman's meetings at the outbreak of the Korean War, in Johnson's meetings with Congressional leaders throughout the Vietnam war and in Bush's meetings with Congressional leaders during the lead-up to the Gulf War, the President's possession of the nuclear arsenal was never once mentioned.

At most, the nuclear bomb can be understood to provide a context for the rise of the Imperial Presidency but it is not a cause. Wills' work is noticeably flawed for its lack of any specific instance in which the President invoked the nuclear arsenal to expand executive power. The executive and Congress understood these conflicts to be non-nuclear and therefore the nuclear bomb, at most, was a limited context in which the Presidential-Congressional negotiation over war powers took place. The more significant basis for the Imperial Presidency is the legal infrastructure where the struggle over war powers actually took place and the ILFs are a foremost factor in that struggle.

Third, the institutional explanation is upheld in the historical record more than the technological or temporal arguments but it offers an insufficient explanation. Particularly, the

¹¹³⁵ Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, (New York: Cambridge UP, 2007).

executive's accumulation of an institutional structure for the elite lawyering that allows it to assert executive power has been an essential component in the expansion of executive war power. In the destroyer for bases deal and in the Korean War, only a few executive branch lawyers were tasked with defending executive power. By the Vietnam War, and particularly the Gulf War, a sophisticated and expansive infrastructure existed within the executive to protect and expand executive power. In particular, the expansion of the Office of White House Counsel and the Department of Justice's Office of Legal Counsel allowed the executive to retain legal expertise on promoting and expanding war powers claims.¹¹³⁶ Though traditional 'institutionalist' literature on executive war power has emphasized the executive's expertise in the general field of foreign relations, the research in this thesis offers a more specific accounting of the growth of executive power.

I argue that the 'international institutionalist' dimension is crucial to the rise of executive war power. The President is uniquely situated to construct and interpret ILFs as a mechanism to create power over the Congress. For example, the President can order the Ambassador to the United Nations to support a binding resolution and then argue that the executive is bound by that resolution. This is an institutional advantage for the executive but it is "international institutionalism" because it is derived from the President's institutional standing within ILFs. While institutionalist interpretations, as exemplified in the work of Posner and Vermuele, have focused on the President's domestic strengths over Congress this account offers an important new dimension by highlighting the President's unique access to international institutions.

Over time, it has become more difficult for Congress to challenge the President's use of ILFs to legitimize Presidential uses of military force. First, in the pre-WWII aid to the United

¹¹³⁶ Bruce Ackerman, *The Decline and Fall of the American Republic*, (Cambridge: Harvard UP, 2010).

Kingdom, the executive's utilization of ILFs was in an experimental phase. The argument had never been deployed before and its successful utilization by the Roosevelt administration laid the groundwork for its later use. Second, in America's accession to the United Nations and NATO in the post-WWII period, the argument was in a formalization phase as the executive asserted that it would be able to use force in these ILFs without Congressional authorization. With each successful utilization, the argument gained a greater degree of Constitutional legitimacy because historical precedent serves to legitimize the executive's Constitutional interpretation. The argument was developed vis-a-vis its utilizations in various conflicts.

When President Obama claimed that he could order an intervention in Libya under United Nations authorization without Congressional authorization, the claim had far greater Constitutional legitimacy as compared to when President Truman first deployed that argument in the Korean War. Indeed, Obama relied on the precedent from the Korean War in developing his administration's legal position.

As more Presidents engage in the practice of using ILFs to expand executive war power, it becomes increasingly difficult for the Congress to challenge this position and the chance of a judge intervening on the issue diminishes. While the War Powers Act sought to halt the ability of the President to utilize a treaty obligation to circumvent Congress, this effort was ineffective. If the Congress seeks to halt the executive's continued use of ILFs to usurp the Congress's power to declare war, the Congress will have to make a renewed effort to target the President's utilization of ILFs. While the National Commitments Resolution and the War Powers Act were propelled by the political will to respond to the expansion of executive power in the Vietnam War, there is little political will to take such an action today. Even as President Obama embraced an expansive interpretation of executive war power in the use of force in Libya, his Republican

challengers have sought to outdo him by offering more aggressive embraces of executive war power.¹¹³⁷

With the bipartisan embrace of executive war power, there is no political will for the type of aggressive reform that would be needed to limit the President's ability to use ILFs to circumvent Congress.

II. How and When the Executive Will Turn To ILFs: Towards a Generalizable Model

While the focus of my research has been to understand the role of ILFs in the historical expansion of executive power, this holds a sufficient basis for drawing some generalizable inferences on how and when the executive invokes an ILF to circumvent Congress in the use of force. The President is most likely to turn to an ILF to circumvent Congress when there is an adversarial executive-legislative relationship. When the President believes that it would be difficult to obtain the resolution he desires from Congress without significant protest, he will be more likely to seek authorization from an ILF to circumvent Congress. Though the 'adversarial' nature of the relationship may be due to a partisan divide, at a more fundamental level it is based on whether the Congress supports or has reservations about the use of force. For instance, in the Vietnam War, it was Democratic Senators who led the push against President Johnson's use of force without Congressional authorization. When some members of Congress has reservations regarding the use of force they will push for the President to seek binding Congressional authorization and may even request a Declaration of War. In such a circumstance, the President is more inclined to circumvent Congress through an ILF. The greater the degree of opposition from the Congress, the higher level of circumvention the President is likely to pursue.

¹¹³⁷ Charlie Savage, "In GOP, Broad View of Presidential Power Prevails," *New York Times*, 29 December 2011; <http://www.nytimes.com/2011/12/30/us/politics/gop-field-has-broad-views-on-executive-power.html?ref=charliesavage>

Thus, the President will be most inclined to invest the political capital in obtaining authorization from the United Nations Security Council when there is a highly adversarial Presidential-Congressional relationship concerning the use of force. Of course, this is not to suggest that the United States will *only* pursue United Nations Security Council in that circumstance. There are a variety of compelling international reasons having to do with channeling intent and garnering international legitimacy that drive the United States to seek United Nations Security Council authorization for the use of force. However, this Presidential-Congressional dimension is an important factor in shaping when and how the United States will engage ILFs in the context of the use of force.

As a constraint on this tendency, the lack of availability of an ILF can force the executive to rely on his powers as Commander-in-Chief to circumvent Congress. For instance, in bombing Cambodia, President Nixon was forced to rely on his powers as Commander-in-Chief because Cambodia had already withdrawn from SEATO. While the Nixon administration could have carried forward Johnson's reliance on SEATO, they instead found themselves having to undercut that very argument because SEATO was no longer an available ILF in which they could base the use of force. When the feasibility of utilizing an ILF is removed because of actions of an IO or other states, the domestic legitimacy of that argument can be undermined. In that situation, a President will have to invoke their powers as Commander-in-Chief to use force without Congressional authorization. However, that argument is subject to increased scrutiny and has higher political costs because the Commander-in-Chief power is understood as a limited power. In that case, the lack of an available ILF may lead the President into seeking Congressional authorization for the use of force.

III. Beyond Epiphenomenon: The Importance of ILFs to Executive War Power

In response to this emphasis on the legal shift away from ‘Declarations of War’ towards executive reliance on ILFs, many scholars have argued that the legal arguments advanced by the executive are epiphenomenal and unworthy of scholarly attention. Peter Spiro, a leading Constitutional scholar, has dismissed attention to executive branch legal interpretation of war power by arguing that; “it is actions that count, not words; mere assertions of executive or legislative authority are largely irrelevant in the long run, the chaff of institutional bravado.”¹¹³⁸ Bruce Ackerman has even argued that the study of executive branch legal interpretation can be dangerous because it leads to taking these claims seriously.¹¹³⁹

Throughout this historical research, I have demonstrated the close relationship between executive branch legal interpretation and executive branch use of force. When executive branch lawyers instruct the President that there is no Constitutional basis for using force, this can significantly constrain their willingness to take action. This was the case when Attorney General Robert Jackson told Roosevelt that he could not donate the mosquito boats to Great Britain. At minimum, the lack of a strong defense from executive branch lawyering can significantly raise the political costs for taking military action.¹¹⁴⁰

Legal support is a crucial enabling factor in Presidential decision-making. Abram Chayes, a scholar and former State Department Legal Adviser, noted that support from a legal perspective enables policy-makers to use force because policy-makers believe that “the ultimate judgment of history [depends] in significant degree on the reality and coherence of the case in

¹¹³⁸ Peter Spiro, “Book Review: War Powers and the Sirens of Formalism,” *New York University Law Review*, 68 (1993), 1358.

¹¹³⁹ Ackerman, “Fall and Decline,” 219-220.

¹¹⁴⁰ I am grateful to Trevor Morrison for suggesting this idea in a conversation at Columbia Law School.

law for [military] action.”¹¹⁴¹ Shifts in a legal doctrine can *enable* new types of action that were previously impossible. “A legal tradition,” as Robert Cover notes, “is part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos/narrative in which the corpus juris is located by those whose wills act upon it.”¹¹⁴² The law is not only a constraint but an enabling device for those who hold power.

The executive’s employment of ILFs enabled a new discourse surrounding the use of force in which the language of a ‘war’ could be replaced with other terms for using force. The United States, as Richard Haass notes, no longer wages ‘war’ because “we never declare it. We have interventions, we have deployments and all that sort of stuff, but we never have war.”¹¹⁴³ The turn is towards language rooted in the international legal framework such as ‘peace-keeping,’ a term that Haass critiques for being “a word that envelops all sorts of things, many of which are quite violent.”¹¹⁴⁴ The language of the law is embedded within broader normative frameworks. It is precisely in such “ordinary legal doctrine at work in mundane affairs,” that the “normative meaning” of the law may be located.¹¹⁴⁵ In the disappearance of the Declaration of War, and the rise of a language rooted in ILFs, the United States has lost the discourse to conceptualize its use of force as war. George Kennan, reflecting on his involvement in the Korean War, noted precisely this point: the “existence of the U.N. resolution, it seems to me, creates a presumption of law and order that perhaps inclined [the public] towards us [the administration] and presupposes [military] action.”¹¹⁴⁶ Replacing the language of ‘war’ with a language of ILFs allows the executive to construct the use of force as something outside of

¹¹⁴¹ Quoted: Edward McWhinney, *Conflict and Compromise: International Law and World Order in a Revolutionary Age*, (New York: Holmes Press, 1992), 35.

¹¹⁴² Robert Cover, “Nomos and Narrative,” *Harvard Law Review*, 97 (1983), 9

¹¹⁴³ Quoted, E.J. Dionne, “Name, Rank and BDAs,” *Washington Post*, 15 March 1998.

¹¹⁴⁴ Quoted, *ibid.*

¹¹⁴⁵ Cover, “Nomos and Narrative,” 9.

¹¹⁴⁶ Kennan, “Princeton University Seminar,” 13 February 1954.

Congress's realm to issue a "Declaration of War." The ILFs are not just window-dressing for the executive's use of force. They are important enabling devices that allow the executive to speak of the use of force as something other than a 'war' that would require robust Congressional authorization.

C) Understanding the Relationship Between IOs and US Democracy in War-Making

I. The President at the Intersection of Two Legal Orders

The American President is situated between two legal orders: the international legal framework, a complex set of treaties and commitments to international institutions, and the domestic legal framework, emanating from the Constitution. While the President's ability to engage the international legal framework is limited by the Constitutional restrictions on Presidential power, such as the need to have treaties ratified by the Senate, the ability to engage the international legal framework can also be a way to expand the President's Constitutional power.

Fundamentally, the two legal systems are at odds on the legal framework concerning the use of force. The international legal framework is designed so that member-states, will be willing and able to quickly utilize military force. It is a system that favors commitment and speediness. Without the rapid use of force, the system appears ineffectual and weak. The Constitution, by contrast, requires that the United States only slowly move into using large-scale military force as the President must wait to obtain Congressional authorization. It is a system that favors caution and delays.

The executive has, throughout American history, sought to expand its power to use force without Congressional authorization. However, it traditionally had to rely on its power as “Commander-in-Chief” and this was understood as a limited power. The advent of America’s participation in international legal frameworks afforded the President a different avenue to establish the Constitutional legitimacy to use force without Congressional authorization. Supporters of executive power and supporters of American multilateralism have found themselves in odd ideological alliances during these crises. Advocates of executive power have openly opined that decision-making in crises is far too complex for input from the democratic process vis-à-vis Congress. This is a strand of Constitutional thinking that runs from Alexander Hamilton through Richard Cheney. By contrast, advocates of American participation in international legal infrastructure have been far more oblique in this argument but they make it as well. For the United States to reliably participate in international organizations, the President must have the unfettered power to deploy the U.S. military in missions authorized by international organizations and compelled by treaties. This is a strand of thinking that runs from Woodrow Wilson’s advocacy of Senate ratification of the League of Nations without ratification through Harold Koh’s work as State Department Legal Advisor. Yet, this is more than ‘politics making strange bedfellows’ because there is an ideological cohesion to the positions. “To support international law is to support fundamental constraints on democracy,” argues Jed Rubenfeld, because “international law is by design a constraint on popular sovereignty.”¹¹⁴⁷ While the international legal institutions do not seek to expand executive power, the international system they envision relies on it.

The advocates of executive power and American participation in international institutions found a unique point of overlap in these instances, particularly in the Korean War and Gulf War

¹¹⁴⁷ Jed Rubenfeld, “Unilateralism and Constitutionalism,” *New York University Law Review*, 79 (2004), 2020.

in which there was explicit U.N. authorization. For advocates of executive power, the objective has been the maintenance of American security and hegemony in the belief that only an unencumbered executive will be able to carry out the military missions necessary for American preeminence.¹¹⁴⁸ For advocates of international organizations, the objective has been the maintenance of international order in which the United States is a willing and effective agent in ensuring that rogue states are disallowed from violating international law.¹¹⁴⁹ For both groups their weariness of Congressional involvement in American decision-making to use military force reflects an ideological commitment to decisive action that is viewed as necessary for upholding America's place in the international order.

This ideological symmetry underscores the potential that, in the American context, the executive can usurp the legitimacy afforded by authorization from international organizations to circumvent Congressional limitations on the use of force. These risks have generally been underappreciated by IR scholars. While scholars have considered how states strategically utilize international organizations and how the United States conducts such a strategy, there has been little scholarship oriented on how an institution within a state can utilize an international legal framework to expand its power to control foreign policy. Anne Marie-Slaughter and William Burke-White have warned of the “significant danger” arising from “the potential of national governments to co-opt the force of international law to serve their own objectives” and the way in which “the international legal system may undermine local democratic processes.”¹¹⁵⁰

However, they state that states with “strong constitutional frameworks” will be largely immune

¹¹⁴⁸ For example, Paul Kennedy argues that American hegemony is contingent on strong Executive power, see; Paul Kennedy, *The Rise and Fall of Great Powers*, (New York: Vintage Press, 1989), 525.

¹¹⁴⁹ For example, Thomas Franck and Faiza Patel argued that US participation in IOs was too important for the President to have to obtain Congressional authorization, see; Franck and Patel, “UN Police Action in Lieu of War.”

¹¹⁵⁰ Anne-Marie Slaughter and William Burke-White, “The Future of International Law is Domestic,” in Andre Nolkaemper and Janne Nijman, eds., *New Perspectives on the Divide Between International and National Law*, (New York: Oxford UP, 2007), 128.

to any risks.¹¹⁵¹ Their original argument is stronger than the caveat. The danger, which is the logical extension of their primary argument, is that the executive can utilize the international legal framework to undermine the “strong constitutional framework.” The developed democracies, such as the United States, are not immune to democracy-undermining utilizations of the international legal framework.

II. Democracy-Undermining Multilateralism

This undermines the claim that participation in international legal frameworks will make member-states *more* democratic at a domestic level. This argument, in its most recent incarnation, was made by Andrew Moravcsik, and Stephen Macedo and Robert Keohane (hereinafter MMK). In one of the most important IR articles concerning the relationship between the United States and IOS, these scholars argue that international legal frameworks improve the democratic functioning of member-states by bringing new voices into the policy debate and that, particularly when the use of force is being considered, “the Security Council can perform a screening function, alerting politicians and publics at home and abroad whether an international consensus exists in favor of a particular military intervention.”¹¹⁵² This places the benefits of multilateralism on the assumption that the member-state will “abide by its decisions” yet it ignores the far larger endangerment of the democratic process.¹¹⁵³ When a member-state, particularly the United States, goes to an ILF to obtain authorization, it can then turn that framework in a domestic space into a justification to expedite the path towards war-making, as the case studies have demonstrated. The politicians will not be “alerted” to international dissent; domestic dissent will be stifled once the executive can hold up some authorization from an

¹¹⁵¹ Ibid, 128.

¹¹⁵² Keohane, Macedo and Moravcsik, “Democracy-Enhancing Multilateralism,” 20.

¹¹⁵³ Ibid, 20.

international body. MMK assume that the only consideration is the intention of the international organization but they ignore that the legitimacy the international legal framework confers on an actor can be manipulated by the actor for strategic reasons. In making the case for war, the executive has a strong incentive to manipulate any authorization from an international legal framework into a case that the executive has an obligation to use force that necessitates an end to domestic debate.

At a more fundamental level, MMK have misread American democratic theory to argue that bolstering Presidential power, which they concede international law can do, is conducive to democracy. MMK posit that international agreements have “enhanced Presidential power” yet treat this as a form of democracy enhancement because “national executives have represented the more diffuse interests” against Congress’s “entrenched domestic protectionist factions.”¹¹⁵⁴ In this they argue that the executive “represents a broader national constituency than individual members of U.S. House of Representatives and Senate,” and is therefore a more democratic actor.¹¹⁵⁵ MMK seek to invoke the argument advanced by James Madison in Federalist Number 10 against the rise of ‘faction’ to argue that “the suppression of faction” is a “normative important objective.”¹¹⁵⁶ Executive power, argue MMK, supports policies made by “an agent not directly answerable to the public” that, by transcending the limits of “faction,” become more democratic than “policies enacted through more directly majoritarian processes.”¹¹⁵⁷

In the context of war-making, this argument is flawed because ILFS expand executive war power. While MMK seek to hold their argument about the role of ILFs in expanding executive power to the realm of trade while also holding the view that ILFs slow the path to war,

¹¹⁵⁴ The authors make this point in discussing trade policy;

Ibid, 10.

¹¹⁵⁵ Ibid, 11.

¹¹⁵⁶ Ibid, 5.

¹¹⁵⁷ Ibid, 7.

they can't have it both ways. ILFs will be used by the executive to expand its power to make war just as it is used by the executive to expand its power to facilitate trade. MMK misread Madison when they argue that he would have believed in placing power in the hand of the executive. While Madison did warn against 'factions,' MMK take this argument out of context when they extrapolate from this that he believed that the United States should vest power in the executive over the Legislative branch. MMK's vision of democracy involves the removal of power from the Congress. Madison was the leading critic of executive power precisely because he understood the risks of Presidential war. MMK misread Madison in this and the reality is that American participation in ILFs concerning the use of force are democracy-undermining rather than democracy-enhancing.

The purpose in this argument is not to state at a normative level that the preference should always be for democracy over multilateral use of force. Some scholars have argued that America's multilateral commitments should take precedence over a Constitutional system that they view as outmoded. Indeed, Paul Kennedy has advocated America's participation in a multilateral framework for using force and cautioned that the United States "may not always be assisted by its division of constitutional and decision-maker powers deliberately created when it was geographically and strategically isolated from the rest of the world."¹¹⁵⁸ The United States will, Kennedy argues, have to accept that now that it has "become a global superpower" the United States will "often [be] called upon to make swift decisions vis-a-vis countries which enjoy far fewer constraints."¹¹⁵⁹ Kennedy questions whether the restraints imposed by the Constitution are valuable in light of America's condition as a superpower. The objective of this

¹¹⁵⁸ Kennedy, "Rise and Fall," 525.

¹¹⁵⁹ Ibid, 525.

dissertation has not been to resolve that conflict but to establish that the conflict has been central to the history of Presidential power in U.S. foreign relations.

In sum, rising participation in ILFs will empower the executive and limit the Congress's ability to authorize the use of force. A strict adherence to the Constitution's vesting of the power to use force in Congress would prevent the executive from robustly participating in ILFs concerning the use of force. Only through understanding that the relationship is adversarial, rather than the positive-sum system depicted by MMK, can policy-makers and the public begin a constructive dialogue on the costs and benefits surrounding how the United States structures the legal framework concerning the use of force. To indulge in the wishful thinking promulgated by MMK in which the United States can improve its Constitutional order by participating in ILFs when using military force will hamper the ability of scholars, policy-makers and the American public to adequately weigh out the costs and benefits of the different approaches. After outlining this competition, I leave the task to future lawyers and policymakers to engage the normative grounds of the debate and offer the best synthesis of Constitutional and international legal frameworks surrounding the use of force.

C) Looking Forward: A Research Agenda on ILFs and Executive Power

This dissertation has demonstrated that the American executive has utilized ILFs as a resource to protect and expand executive war power from 1940 to present. It has argued that the relationship between ILFs and the American Constitutional order is competitive and, therefore, U.S. utilization of ILFs in the context of the use of force tends to be 'democracy-undermining.' This makes an important contribution to IR and Constitutional scholarship concerning the use of force yet it also offers a foundation for a broader research agenda. For scholars seeking to

understand American executive power, further research should be conducted on the executive's utilization of ILFs to assert power over Congress in fields other than war and on the executive's utilization of ILFs to assert power over individual U.S. states. For scholars seeking to study the relationship between domestic authorizations to use force and ILFs, further research should be conducted in a comparative framework on the impact of ILFs on executive power to use force in other democratic states.

I. Beyond The War Power: ILFs and American Executive Power

While this dissertation has focused on how the American executive has employed ILFs to expand the executive's power to initiate the use of military force, this opens a new research agenda concerning the relationship between ILFs and executive power in the United States. This research agenda should address both the ability of the executive to use ILFs to expand power over Congress in areas other than war and the ability of the executive to use ILFs to expand power over the individual states on matters that relate to foreign affairs.

First, further research should address the capacity of the executive to utilize ILFs to increase its power over Congress in other policy areas such as environmental regulation and trade policy. Keohane, Moravcsik and Macedo themselves argue that "the use of bilateral and multilateral forums to negotiate trade liberalization shifts control over the domestic trade agenda into the hands of the executive branch."¹¹⁶⁰ The President has traditionally had somewhat limited power over domestic policy matters but in transitioning these matters into the subject of international negotiation the President can increase his control over these areas. While this used to require the consent of a super-majority of the Senate through treaty ratification, Oona Hathaway has pointed to the rise of Presidents concluding international agreements on matters

¹¹⁶⁰ MMK, "Democracy-Enhancing Multilateralism," 11.

ranging from air traffic regulation to food safety as executive agreements.¹¹⁶¹ This poses a rich area for further research on the relationship between executive power and ILFs. While this dissertation has demonstrated the ability of the executive to utilize ILFs to increase executive war power, “very little commentary has seriously considered the constitutional difficulties posed by international organizations” in this wide array of issue areas.¹¹⁶² A research agenda in this area will reveal the variety of areas in which ILFs are resources of executive power over Congress.

Second, further research should address the capacity of the executive to utilize ILFs to increase its power over the individual states in matters that are of disputed power between the state and federal governments. The 10th Amendment to the U.S. Constitution states that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹⁶³ This has created an ongoing tension in American history between the power of the federal government and the power of the state governments. This is particularly true when the executive claims that a state policy infringes on the executive’s capacity to conduct foreign relations.

Recent court decisions illustrate how the executive seeks to invoke ILFs as a means to assert power over the individual states. In a case where the state of Texas wanted to execute a Mexican citizen who had not been informed of his consular rights under the Vienna Convention, President George W. Bush argued that the execution could not be carried out because this would interfere with the executive’s ability to adhere to the Vienna Convention and it would undermine U.S.-Mexican relations. The court ruled for the state of Texas and allowed the execution to

¹¹⁶¹ Oona Hathaway, “Presidential Power Over International Law: Restoring the Balance,” *Yale Law Journal* 119 (2009), 140.

¹¹⁶² Julian Ku, “The Delegation of Federal Power to International Organizations: New Problems with Old Solutions,” *Minnesota Law Review*, 85 (2001), 73.

¹¹⁶³ U.S. Constitution: Amendment X.

proceed; the case illustrated how the executive can attempt to utilize ILFs to exercise power over a state and the limits of such attempts.¹¹⁶⁴ In an ongoing case concerning Arizona's anti-immigration law (SB 1070), the State Department has supported the Obama administration's challenge to the law by arguing that the state law would undermine America's treaty commitments and "the United States would undoubtedly be criticized for [Arizona's law] S.B. 1070 by the UN human rights treaty monitoring bodies in the context of U.S. human rights treaty" commitments.¹¹⁶⁵ The 9th Circuit Court of Appeals relied on the State Department's argument to overturn Arizona's law on the grounds that it "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs."¹¹⁶⁶ The executive was able to use an argument grounded in ILFs to assert its ability to control a state's policy. Further research should address the ways in which the executive seeks to utilize ILFs to assert power over the individual states and to what degree such strategies are effective.

This dissertation opens up new ground for research in American political development. It demonstrates the effectiveness of executive utilization of ILFs in one arena over Congress and points to the need for further empirical research on how the executive protects and expands its power over the Congress and the states through utilization of ILFs.

II. Beyond the United States: Comparative Research on ILFs and Executive Power

The United States is not the only state in which the executive has sought to utilize ILFs to augment its power to use military force. While this research has been confined to the United States and its theoretical contribution is at the level of interpreting U.S. foreign policy, further

¹¹⁶⁴ *Medellin v. Texas*; 552 U.S. 491 (2008)

¹¹⁶⁵ James Steinberg, "Declaration," in *U.S. v Arizona*; <http://www.scribd.com/doc/33977183/U-S-v-Arizona-Exh-1-to-Motion-for-Preliminary-Injunction-Affidavit-of-James-Steinberg>

¹¹⁶⁶ *U.S. v Arizona* 9th Circuit, 2011; http://www.ca9.uscourts.gov/datastore/general/2011/04/11/10-16645_opinion.pdf

research should seek to understand the relationship between participation in ILFs concerning the use of force and executive power in other democracies. Charlotte Ku and Harold Jacobson identify nine democratic nations where the relationship between democratic accountability and the use of force through ILFs should be examined.¹¹⁶⁷ In addition to the United States, these include the United Kingdom, Canada, France, Germany, India, Japan, Norway and Russia. Each state has contributed to uses of force under authorization from an international institution and has a contested relationship concerning the executive's power to use force. While each nation's democratic system is unique and the democracies are of various levels of strength, the research agenda should be broad enough to investigate the role of ILFs in relation to executive power in an array of democratic states. While there "are differences between presidential and parliamentary systems" there is, to some degree, "a tension between commitments the executive has made to international institutions and its own domestic accountability procedures."¹¹⁶⁸ Research is needed to identify under what circumstances the executive in these various nations uses ILFs as a means to promote executive war power. While an examination of the Constitutional issues raised by ILFs in these nations is beyond the scope of this dissertation, I illustrate the complexities of the issue through comparative analysis of the British and French cases.

In the United Kingdom, the Prime Minister has not utilized ILFs to expand Executive power. While Truman circumvented Congress in the Korean War, Prime Minister Attlee went to Parliament to "request permission for the UK representative to the United Nations to vote in a

¹¹⁶⁷ Charlotte Ku and Harold Jacobson, "Broaching the Issues," in Charlotte Ku and Harold Jacobson, eds., *Democratic Accountability and the Use of Force in International Law*, (Cambridge, UK: Cambridge UP, 2003,) 5.

¹¹⁶⁸ Ibid, 27.

manner that would obligate the nation to send troops into combat,” as they note.¹¹⁶⁹ In a parliamentary system such as the United Kingdom, the Prime Minister is constantly susceptible to a vote of no confidence and therefore has less latitude to act without Parliamentary approval.

By contrast, the executive branch in France has utilized ILFs to exercise its war power without oversight from Parliament. Under Article 5 of the French Constitution, the President is the “guarantor” of the “observance of Community agreements and of treaties.”¹¹⁷⁰ In the Gulf War, President Francois Mitterand utilized authorization from the United Nations Security Council to construct the use of French forces in *Opération Daguet* as part of his Presidential authority. When some members of the National Assembly demanded that Mitterand obtain a Declaration of War, as the Constitution required, he turned to the United Nations authorization to argue that this was not a war but a lesser use of force, which fell entirely within his Constitutional authority.¹¹⁷¹ Like the situation in the United States, the National Assembly passed a resolution in support of the use of force but the President insisted that this was merely political support rather than direct authorization.¹¹⁷²

This discrepancy in the nature of the relationship between ILFs and executive power to use military force in France and the United Kingdom demonstrates the need for further research in this area. This research agenda will be able to internationalize the findings from this dissertation’s analysis of the United States. While the work pioneered by Harold Jacobson and Charlotte Ku was important in putting this comparative study into the literature, there is a need for a more in-depth analysis on the relationship between ILFs and executive war power in these various nations.

¹¹⁶⁹ Nigel White, “The United Kingdom: Increasing Commitment requires greater parliamentary involvement,” in *ibid*, 310.

¹¹⁷⁰ French Constitution; Article V.

¹¹⁷¹ Yves Boyer, Serge Sur and Olivier Fleurence, “France: Security council legitimacy and executive primacy,” in Ku and Jacobson, 294.

¹¹⁷² *Ibid*, 294.

III. A Concluding Note: Deepening Our Understanding of the Imperial Presidency

Since Arthur Schlesinger published *The Imperial Presidency* in 1973, scholars of Constitutional Law, American foreign relations, and International Relations have accepted as common parlance that the United States has entered an age where the President can use military force without significant Congressional restraint. Almost forty years since its publication, the concept has only become more deeply entrenched into the parlance of describing the President's war power.¹¹⁷³ In seeking to find a language to critique the most recent Presidential use of force without Congressional authorization, Obama's actions in Libya, Bruce Ackerman turned to the concept to describe Obama's actions as "breaking new ground in its construction of an imperial presidency."¹¹⁷⁴ While the concept rightfully remains the centerpiece of understanding executive war power in the modern American state, scholars have failed to dig deeply into the infrastructure of the Imperial Presidency to discover what supports the apparatus. Schlesinger's book, as he said, "was written in the latter days, hectic and ominous, of the Presidency of Richard M. Nixon" yet the scholars that followed him have failed to open up the Imperial Presidency to carefully study its sources.¹¹⁷⁵ The main interpretations- the temporal, technological and institutional- have failed to capture the scope of the President's assertions of executive power.

While all of these theories can describe a dimension that enables the Imperial Presidency, this dissertation demonstrates that the President's ability to engage international legal frameworks provided the President with the ability to expand its war power. This "International-

¹¹⁷³ For example, see;

Rudalevige, "The New Imperial Presidency."

Donald Wolfensberger, "The Return of the Imperial Presidency," *Wilson Quarterly*, 26 (2002).

¹¹⁷⁴ Bruce Ackerman, "Foreign Policy: The Imperial Presidency of Obama," *NPR*, 25 March 2011; <http://www.npr.org/2011/03/25/134848072/foreign-policy-the-imperial-presidency-of-obama>

¹¹⁷⁵ Arthur Schlesinger, *War and the American Presidency*, (New York: W.W. Norton, 2004), 45.

Institutional” interpretation provides a missing dimension in the scholarly interpretation of the Imperial Presidency. Through in-depth archival research and extensive interviews, the dissertation demonstrates the centrality of Presidential strategies using ILFs for total substitution, political coercion, and political posturing as a means to enhance executive war power.

In demonstrating that ILFs have been an important component in the rise of the Imperial Presidency, this demonstrates a deep tension between ILFs and the American Constitutional order in the context of the use of force. Rather than serving as a ‘democracy-enhancing’ influence, as leading scholars have argued, ILFs have a ‘democracy-undermining’ influence on the American Constitutional order by enabling the expansion of executive war power. The dissertation offers a deeper understanding of the rise of America’s Imperial Presidency and provides a new vantage point on how the American state goes to war.

Bibliography

Interviews by Author

(Titles refer to position held as relevant to interview.)

Professor Antonia Chayes, email correspondence with author. 2-4 December 2011.

National Security Adviser Brent Scowcroft, telephone interview; 21 November 2011.

White House Counsel C. Boyden Gray telephone interview; 3 October 2011.

Deputy State Department Legal Advisor Carl Salans, telephone interview; 09 March 2011.

Vice President Dan Quayle, telephone interview; 25 October 2011.

State Departmental Legal Advisor Edwin Williamson, telephone interview; 29 October 2011.

CIA General Counsel Elizabeth Parker, telephone interview; 07 October 2011.

JSOC General Counsel Fred Green, telephone interview; 29 August 2011.

Assistant to the President George Elsey. Interview; 6 August 2010. Irvine, California.

Vice Chairman of the NIC Gregory Treverton, telephone interview; 31 October 2011.

State Department Assistant Legal Adviser Jared Carter, telephone interview; 29 September 2010.

Assistant to the President Jim Dyer, telephone interview; 14 November 2011.

Assistant Secretary of State John Bolton, telephone interview; 16 November 2011.

Professor John Norton Moore, telephone interview; 16 November 2011.

Assistant to the President Ken Hechler, telephone interview; July 2010.

State Department Legal Adviser Mathew Matheson, telephone interview; 9 November 2011.

Deputy White House Counsel Nelson Lund, telephone interview; 31 July 2011.

Attorney General Nicholas Katzenbach, interview with author; 23 September 2010. Princeton, New Jersey.

State Department Adviser Philip Zelikow, telephone interview; 17 October 2011.

Secretary of State Richard Cheney, interview; 01 February 2012. Mclean, Virginia.

State Department Adviser Richard Haass, telephone interview; 17 August 2011.

Attorney General Richard Thornburgh telephone interview; 19 October 2011.

Deputy Secretary of State Robert Kimmitt, telephone interview; 27 October 2011.

Assistant Attorney General Stuart Gerson, telephone interview; 26 August 2011 and email correspondence.

Assistant Attorney General Walter Dellinger, interview with author, 27 September 2010. Washington, D.C.

Archives and Collections

Harry Truman Presidential Library. Independence, Missouri.

Truman Library Online Collection; http://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/index.php

Lyndon Johnson Presidential Library. Austin, Texas.

Gerald Ford Presidential Library. Ann Arbor, Michigan.

George H.W. Bush Presidential Library. College Station, Texas.

George H.W. Bush Presidency Oral Histories at the Miller Center of Public Affairs at the University of Virginia, 2011; <http://millercenter.org/president/bush/oralhistory>

PBS Gulf War Oral History Collection; <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/cheney/1.html>

Amherst College; Leonard Meeker Papers. Amherst, Massachusetts.

Library of Congress; Manuscripts Collection. Washington, D.C.

Department of Justice; Office of Legal Counsel Archives. Washington, D.C.

University of Pittsburgh; Richard Thornburgh Papers. Pittsburgh, Pennsylvania.

Princeton University; James Baker Papers. Princeton, New Jersey.

Yale University Archives; Dean Acheson Papers. New Haven, Connecticut.

Works Cited

- “20th Anniversary of the Persian Gulf War,” Conference at Texas A & M University, 20 January 2011; <http://www.c-spanvideo.org/program/297623-1>
- 91 Congressional Record, (1945).
- “A Strong But Risky Show of Force,” *Time Magazine*, 26 May 1975.
- Acheson, Dean and Charles Burlingham, Tom Thacher & George Rublee, “Letter to the Editor: No Legal Bar Seen to Transfer of Destroyers,” *New York Times*, 11 August 1940.
- “Speech to the National Press Club,” Washington D.C., 12 January 1950.
- *Among Friends: Personal Letters of Dean Acheson*, David McLellan and David Acheson, ed. (New York: Dodd, Mead & Company, 1980), 41.
- *Morning and Noon*, (Boston: Houghton Mifflin, 1962), 156.
- *Present at the Creation: My Years at the State Department*, (New York: W.W. Norton, 1987).
- Ackerman, Bruce “Foreign Policy: The Imperial Presidency of Obama,” *NPR*, 25 March 2011; <http://www.npr.org/2011/03/25/134848072/foreign-policy-the-imperial-presidency-of-obama>
- *The Fall and Decline of the American Republic* (Cambridge: Harvard UP, 2010).
- Alito, Samuel. “Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law,” 5 February 1986; <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>
- Allen, Mike and Juliet Eilperin, “Bush Aides Say Iraq War Needs no Hill Vote,” *Washington Post*, 26 August 2002.
- Alston, Chuck. “Bombers Heading for Baghdad as Hill Leaders got Word,” *Congressional Quarterly*, 19 January 1991.
- Alstyne, William W Van. “Letting Slip the Dogs of War,” *The Washington Post*, 23 December 1990.
- An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers;” February 1802. http://avalon.law.yale.edu/19th_century/bar03.asp.

- “An Act to Revitalize the National Security of the United States,” 22 February 1995; http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:h7rfs.txt.pdf
- Apple, R.W. “U.S. Reported Ready to Ask U.N. to Back a Gulf Assault,” *The New York Times*, 16 November 1990.
- Assignment of Ground Forces of the United States to Duty in the European Area, Hearings before the Senate Foreign Relations and Armed Services Committees, 82d Congress, 1st sess. (1951).
- Baker, James. *The Politics of Diplomacy: Revolution, War and Peace, 1989-1992*, (New York: G.P. Putnam’s Sons, 1995).
- Barr, William. “Memorandum: Authority to United States Military Forces in Somalia,” 4 December 1992; <http://www.justice.gov/olc/presiden.8.htm>
- Barron, David and Martin Lederman. “The Commander in Chief at the Lowest Ebb: A Constitutional History Part II,” *Harvard Law Review*, 941 (2008).
- Bedard, Paul and Major Garrett. “Bush strokes House; OKs War Powers Act,” *The Washington Times*, 10 January 1991.
- Beisner, Robert. *Dean Acheson: A Life in the Cold War*, (New York: Oxford UP, 2006).
- Berdahl, Clarence. *War Powers of the Executive in the United States*, (Champagne, Illinois: University of Illinois Press, 1921).
- Berger, Henry. “Bipartisanship, Senator Taft, and the Truman Administration,” *Political Science Quarterly*, 90 (1975).
- Berman, William. *William Fulbright and the Vietnam War: The Dissent of a Political Realist*, (Kent, Ohio: Kent State University Press, 1988).
- Beverly Smith, “The White House Story: Why We Went to War in Korea,” *Saturday Evening Post*, 10 November 1951.
- Bork, Robert. “Comments on Legality of U.S. Action in Cambodia,” *The American Journal of International Law*, (65), 1971.
- Bose, Meena. “Leading Through Multilateralism,” in Robert Watson, Michael Devine & Robert Wolz, eds., *The National Security Legacy of Harry Truman*, (Kirkville, Missouri: Truman State UP, 2005).

Brinkely, Douglas and Townsend Hoopes. *FDR and the Creation of the UN*, (New Haven: Yale UP, 1997).

Brinkley, Douglas. *The Unfinished Presidency: Jimmy Carter's Journey Beyond the White House*, (New York: Viking, 1998).

Bundy, McGeorge. "National Security Action Memorandum 273," 26 November 1963; <http://www.lbjlib.utexas.edu/johnson/archives.hom/nsams/nsam273.asp>

Bundy, William. "Interview," *WGBH Vietnam Collection*;
<http://openvault.wgbh.org/catalog/vietnam-0a7751-interview-with-william-p-bundy-1981>

Burke, John and Fred Greenstein, "Presidential Personality and National Security Leadership: A Comparative Analysis of Vietnam Decision-making," *International Political Science Review*, (10) 1989.

Burr, William, ed., "First Strike Options and the Berlin Crisis, September 1961," *National Security Archive Electronic Briefing Book*, (56) 2001, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB56/>

Bush, George H.W. "Address Before a Joint Session of Congress," 11 September 1990; <http://millercenter.org/president/speeches/detail/3425>

——— "Address on Iraq's Invasion of Kuwait," 8 August 1990; <http://millercenter.org/president/speeches/detail/5529>

——— "Address to the Nation Announcing United States Military Action in Panama," 20 December 1989; <http://www.presidency.ucsb.edu/ws/index.php?pid=17965&st=panama&st1=#axzz1Zs7UoB7E>

——— "National Security Directive 45," 20 August 1990; <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39/document2.pdf>

——— "National Security Directive 54," 15 January 1991; <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39/document4.pdf>

——— "President's News Conference," 9 January 1991; <http://www.presidency.ucsb.edu/ws/index.php?pid=19202#axzz1gXycDfrS>

——— "Remarks at the Texas State Republican Convention," 20 June 1992; <http://www.presidency.ucsb.edu/ws/index.php?pid=21125#axzz1cItmZakZ>

——— “The President’s News Conference on the Persian Gulf Crisis,” 8 November 1990; <http://www.presidency.ucsb.edu/ws/index.php?pid=19019#axzz1gXycDfrS>

——— “Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate On United States Military Action in Panama,” 21 December 1989; <http://www.presidency.ucsb.edu/ws/index.php?pid=17973&st=panama&st1=#axzz1Zs7UoB7E>

——— “Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq,” 14 January 1991; <http://www.presidency.ucsb.edu/ws/index.php?pid=19217#axzz1VCwryDVO>

Bush, George H.W. and King Fahd, “Memorandum of Telephone Conversation,” 31 December 1990; http://bushlibrary.tamu.edu/research/pdfs/memcons_telcons/1990-12-31--Fahd.pdf

Bush, George W. “Address to the United Nations,” 12 September 2002; http://www.undemocracy.com/generalassembly_57/meeting_2

——— “Case for Action,” 7 October 2002; <http://abcnews.go.com/US/story?id=91159&page=1#.Tvzc-2B5G2w>

——— “The President’s Radio Address,” 5 October 2002; <http://www.gpo.gov/fdsys/pkg/PPP-2002-book2/html/PPP-2002-book2-doc-pg1735.htm>

Bush, George with Brent Scowcroft, *A World Transformed*, (New York: Knopf, 1998), 333.

Bybee, Jay. “Authority of the President Under Domestic and International Law to Use Military Force Against Iraq,” 23 October 2002; <http://www.justice.gov/olc/2002/iraq-opinion-final.pdf>

Campbell v. Clinton, U.S. Dc Circuit Court of Appeals, Case No 99-5214; <http://caselaw.findlaw.com/us-dc-circuit/1177126.html>

Caro, Robert. *The Years of Lyndon Johnson: Master of the Senate*, (New York: Knopf, 2002).

Cardozo, Michael. “Oral History,” 29 May 1975, <http://www.trumanlibrary.org/oralhist/cardozom.htm>

Carpenter, Ted Galen. “United States’ NATO Policy at the Crossroads: The ‘Great Debate’ of 1950-1951,” *The International History Review*, (8) 1986.

Carr, E.H. *What Is History*, (New York: Penguin, 1967).

Carter, Stephen. “Going to War Over War Powers,” *The Washington Post*, 8 November 1990.

Center for Constitutional Rights Press Conference, "Lawsuit on Congressional War Powers," 20 November 1990; <http://c-spanarchives.org/program/Lawsui>

Chace, James. *Acheson: the Secretary of State Who Created the American World*, (New York: Simon & Schuster, 1998).

Churchill, Winston. in *Churchill & Roosevelt: Their Complete Correspondence, Volume I*, ed. Warren Kimball, (Princeton: Princeton UP, 1984), 37.

——— *The Second World War, Volume 1: The Gathering Storm*, revised edition, (New York: Rosetta Books, 2002).

——— *Their Finest Hour*, revised edition, (New York: Houghton Mifflin, 1976).

Clinton, Bill. "Letter to Congressional Leaders on Bosnia," 1 September 1995; <http://www.gpo.gov/fdsys/pkg/WCPD-1995-09-11/pdf/WCPD-1995-09-11-Pg1473.pdf>

——— "President's News Conference," 19 September 1994; <http://www.presidency.ucsb.edu/ws/index.php?pid=49110#axzz1hxcaosr5>

——— "Presidential Decision Directive 25," 3 May 1994;

Clymer, Adam. "Confrontation in the Gulf," *The New York Times*, 11 January 1991.

——— "War in the Gulf: Public Opinion, Poll Finds Deep Backing While Optimism Fades," *The New York Times*, 22 January 1991.

——— *Woodrow Wilson: A Biography*, (New York: Knopf, 2009), 247-249.

——— *The Memoirs of Cordell Hull*, Volume II (New York: Macmillan, 1948).

"Congressmen Generally Support Occupation," *Los Angeles Times*, 8 July 1941.

Cortell, Andrew and James Davis. "How Do International Institutions Matter: The Domestic Impact of International Rules and Norms," *International Studies Quarterly*.

Corwin, Edward Samuel. *The Constitution and World Organization*, revised edition, (Freeport, New York: Books for Libraries Press, 1970).

——— *The President: Office and Powers 1787-1957*, (New York: New York UP, 1957).

Covenant of the League of Nations; Article 10. http://avalon.law.yale.edu/20th_century/leagcov.asp

- Cover, Robert. "Nomos and Narrative," *Harvard Law Review*, 97 (1983).
- Crovitz, Gordon L. "How Bush Outflanked Iraq and Liberated the Constitution," *The Wall Street Journal*, 6 March 1991.
- "Lawsuit Offensive Against the Commander in Chief," *The Wall Street Journal*, 5 December 1990.
- D'Amato, Antony. "Massachusetts In The Federal Courts: The Constitutionality Of The Vietnam War," *Journal of Law Reform*, (11) 1970.
- Dallder, Ivo. "Decision to Intervene: How the War in Bosnia Ended," *Foreign Service Journal*, December 1998; http://www.brookings.edu/articles/1998/12balkans_daalder.aspx
- Dallek, Robert. *Flawed Giant: Lyndon Johnson and His Times, 1961-1973*, (New York: Oxford UP, 1998).
- *Kissinger and Nixon: Partners in Power*, (New York: Harper, 2007).
- Daschle, Tom. "The Newshour with Jim Lehrer," 17 September 2002; http://www.pbs.org/newshour/bb/congress/july-dec02/daschle_9-17.html
- David Golove. "From Versailles to San Francisco: The Revolutionary Transformation of the War Powers," *University of Colorado Law Review*, 70 (1999).
- Davis, John and WW. Grant, Philip Jessup, George Rublee, James Shotwell, and Quincy Wright. "Congress May Authorize Extraterritorial Use of Force, but Constitution Is Held to Place Responsibility for Prompt Action Directly Upon the Executive," *New York Times*, 5 November 1944.
- Dean Acheson. "Speech to American Newspaper Guild," 29 June 1950. State Department Bulletin (23).
- Dean, Arthur. "The Bricker Amendment and Authority over Foreign Affairs," *Foreign Affairs*, October 1953.
- Dellinger, Walter. "Deployment of United States Armed Forces into Haiti," 27 September 1994; <http://www.justice.gov/olc/haiti.htm>
- "Placing of United States Armed Forces Under Nations Operational or Tactical Control," 8 May 1996; <http://www.justice.gov/olc/hr3308.htm>
- "Proposed Deployment of United States Armed Forces into Bosnia," 30 November 1995; <http://www.justice.gov/olc/bosnia2.htm>
- "Destroyers for Britain," *New York Herald Tribune*, 5 August 1940.

- Dingman, Roger. "John Foster Dulles and the Creation of the South-East Treaty Organization in 1954," *The International History Review*, (11) 1989.
- Dionne, E.J. "Name, Rank and BDAs," *Washington Post*, 15 March 1998.
- Divine, Robert. *Second Chance: The Triumph of Internationalism in American During World War II*, (New York: Atheneum, 1967).
- Donovan, Robert. *Tumultuous Years: The Presidency of Harry S. Truman*, (Columbia, MO: University of Missouri Press, 1996).
- Dore, Benjamin. "Senator Wayne Morse and War Powers," *Wayne Morse Historical Park Research Series*; March 2010, 23; http://pages.uoregon.edu/morse/_pdfs/publications/dore_monograph.pdf
- Douglas, William. "Dissent," in *Holmes v. United States*, 391 U.S. 936.
- Doyle, Edward and Samuel Lipsman. *Fighting for Time*, (Boston: Boston Publishing Company, 1983).
- Drew, Elizabeth. "War Games in the Senate," *New York Review of Books*, 7 November 2002; <http://www.nybooks.com/articles/archives/2002/dec/05/war-games-in-the-senate/?pagination=false>
- Dudziak, Mary. *Wartime* (New York: Oxford UP, 2012).
- Eaton, William and Michael Ross, "Bush Says War is Not Imminent," *The Los Angeles Times*, 15 November 1990.
- Edward McWhinney, *Conflict and Compromise: International Law and World Order in a Revolutionary Age*, (New York: Holmes Press, 1992).
- Elman, Colin and Miriam Fenius Elman, eds. *Bridges and Boundaries: Historians, Political Scientists and the Study of International Relations*, (Cambridge: Harvard UP, 2001).
- Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton: Princeton UP, 1993).
- Evans, Rowland and Robert Novak, "Vietnam and Congress," *Washington Post*, 2 January 1966.
- Farrand, Farrand. *The Records of the Federal Convention of 1787*.
- Feldman, Noah. *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, (New York: Twelve Press, 2010).

- Fellmeth, Aaron. "A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941," *Buffalo Journal of International Law*, 413 (1996-1997).
- Finch, George. "The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits," *The American Journal of International Law*, (48) 1954.
- Finney, John. "Senate Unit Sees War Power Peril," *New York Times*, 22 November 1967.
- "Senate Votes Again for Tonkin Repeal," *The New York Times*, 11 July 1970.
- Fisher, Adrian. "Authority of the President to Repel the Attack in Korea," *State Department Bulletin*, 23 (1950).
- Louis Fisher, *Congressional Abdication on War and Spending*, (College Station, Texas: 2000).
- "Deciding on War Against Iraq: Institutional Failures," *Political Science Quarterly*, 118, (2003).
- "Sidestepping Congress: Presidents Acting under the UN and NATO," *Case Western Law Review* 47 (1997).
- "The Korean War: On What Legal Basis Did Truman Act," *The American Journal of International Law*, 89 (1995).
- "The Law: Scholarly Support for Presidential Wars," *Presidential Studies Quarterly*, 35 (2005).
- *The War Power: Original and Contemporary*, (Washington, D.C.: American Historical Association, 2008).
- Foreign Relations of the United States: Vietnam, 1964, Volume I*
- "Formal War Is Opposed By Taylor," *The Washington Post*, 13 December 1965.
- Franck, Thomas and Faiza Patel. "UN Police Action in Lieu of War: The Old Order Changeth," *American Journal of International Law*, 85 (1991).
- Franck, Thomas. "Declare War? Congress Can't," *The New York Times*, 11 December 1990.
- Freedman, Lawrence and Efraim Karsh. *The Gulf Conflict: Diplomacy and War in the New World Order*, (Princeton: Princeton UP, 1995).
- Friedman, Lawrence. *Kennedy's Wars: Berlin, Cuba, Laos, and Vietnam*, (New York: Oxford UP, 2000).

———. *Debating Vietnam: Fulbright, Stennis and their Senate Hearings*, (New York: Rowman, 2006).

“Fulbright Move is Timely,” *Los Angeles Times*, 2 August 1967.

Gaddis, John Lewis. *Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy*, (New York: Oxford UP, 1982).

Gaddis, John Lewis. *We Now Know: Rethinking the Cold War*, (New York: Oxford UP, 1997).

George, Alexander. “The ‘Operational Code’: A Neglected Approach to the Study of Political Leaders and Decision-Making,” *International Studies Quarterly*, 13 (1969).

Gerstenzang, James and Norman Kempster, “U.S. Buoyed by Impact of Economic Embargo,” *The Los Angeles Times*, 14 August 1990.

Gibbons, William Conrad. *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships*, Part IV, revised edition, (Princeton: Princeton UP, 1995).

Gleason, Sarell and William Langer. *The Challenge to Isolation: 1937-1940*, (New York: Harper, 1952).

Glendon Schubert, “Politics and the Constitution: The Bricker Amendment During 1953,” *The Journal of Politics*, (16) 1954.

Glennon, Michael. *Constitutional Diplomacy* (Princeton: Princeton UP, 1991).

Goldman, John and Michael Ross, “Rigid Control on Iraqi Arms Sought,” *The Los Angeles Times*, 3 August 1991.

Goodhart, Goodhart. *Fifty Ships That Saved the World*. (London: Heinemann Press, 1965).

Gordon, Michael. “Confrontation in the Gulf,” *The New York Times*, 17 August 1990.

Gourevitch, Peter. “Second Image Reversed: The International Sources of Domestic Politics,” *International Organization*, 32 (1978).

Grant, Rebecca. *Operation Just Cause and the U.S. Policy Process*, (Santa Monica: RAND, 1991), 39. <http://www.rand.org/pubs/notes/2007/N3265.pdf>

Green, Fred. “Oral History,” US Army Judge Advocate General’s Legal Center and School, December 2010.

Green, L.C. “The Nature of the ‘War’ in Korea,” *The International Law Quarterly*, (4) 1951.

- Greene, Harold. "Ron Dellums v. George Bush," 752 F. Supp. 1141; 1990 U.S. Dist. Lexis 16611, 13 December 1990; http://www.personal.psu.edu/faculty/m/c/mcw10/Download/Dellums_V_Bush.htm
- Griffin, Stephen. "Reconceiving the War Powers Debate," *Tulane University Public Law And Legal Theory Working Paper Series*, Working Paper 11-06, (2011), 1. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652
- Griffin, Stephen. "The Legal Justification for the Vietnam War: Backwards and Forwards with Nicholas deB. Katzenbach," presented at the U.S. Department of State Conference, "The American Experience in Southeast Asia," 30 September 2010.
- Grimmett, Richard. "The War Powers Resolution: After Thirty Years," 11 March, 2004, 24; http://www.fas.org/man/crs/RL32267.html#_1_24
- "Gulf of Tonkin Measure Voted In Haste and Confusion in 1964," *The New York Times*, 25 June 1970.
- Gulf of Tonkin Resolution: Public Law 88-408.
- Gwertzman, Bernard. "President Assails Congress Over Use of Force," *New York Times*, 7 April 1984.
- Haass, Richard. *War of Necessity, War Of Choice: A Memoir of Two Iraq Wars*, (New York: Simon & Schuster, 2009).
- Halchin, Elaine and Harold Relyea. *Informing Congress: The Role of the Executive Branch in Times of War*, (Hauppauge, New York: Novinka Books, 2003).
- Hamilton, Alexander. "Pacificus," June 1793; http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html
- Hamowsy, Ronald. *Government and Public Health in America*, (Northampton, MA: Edward Elgar Publishing, 2007).
- Hansen, Peter Raven. "Nuclear War Powers," *American Journal of International Law*, 83 (1989).
- Hathaway, Oona. "Presidential Power Over International Law: Restoring the Balance," *Yale Law Journal* 119 (2009).
- Hay, Douglas. "Archival Research in the History of the Law: A User's Perspective," *Archivaria* 24 (1987).
- Haynes, Richard. *The Awesome Power: Harry S. Truman as Commander in Chief*, (Baton Rouge, LA: Louisiana UP, 1973).

- Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate, "Treaties and Executive Agreements," 83d Congress, 1st session, on S. J. Res. 1 and S. J. Res. 43, (February 18, 19, 25, March 4, 10, 16, 27, 31, April 6, 7, 8, 9, 10, and 11, 1953)
- Hechler, Ken. *Working with Truman: A Personal Memoir of the White House Years*. (Kansas City, MO: University of Missouri Press, 1996).
- Hendrickson, Ryan. "War Powers, Bosnia and the 104th Congress," *Political Science Quarterly*, 113 (1998).
- . *The Clinton Wars: The Constitution, Congress, and War Powers*, (Nashville: Vanderbilt UP, 2002).
- Hess, David and R.A. Zaldivar. "Bush Applies Pressure for Gulf War Resolution," *The Philadelphia Inquirer*, 12 January 1991.
- Hess, David and R.A. Zaldivar. "Bush Applies Pressure for Gulf War Resolution," *Philadelphia Inquirer*, 12 January 1991; http://articles.philly.com/1991-01-12/news/25818813_1_gulf-war-resolution-vote-military-force
- Hess, Gary. *Presidential Decisions for War: Korea, Vietnam and the Persian Gulf War*, (Baltimore: Johns Hopkins UP, 2001).
- Hilderbrand, Robert. *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security*, (Chapel Hill: University of North Carolina Press, 1990).
- Holmes, James. *Theodore Roosevelt and World Order: Police Power in International Relations*, (Washington, D.C.; Potomac Books, 2006).
- House Foreign Relations Committee, "Relations in a multipolar world : hearings before the Committee on Foreign Relations, United States Senate, One Hundred First Congress, second session," November 1990, (Washington, D.C.: Government Printing Office, 1991).
- House Resolution 658, "United States Policy on Iraqi Aggression," 1 October 1990; <http://www.wjopc.com/site/historical/HJRes658-101.pdf>
- Hoyt, Edwin. "The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making." *The American Journal of International Law*, 55 (1961).
- Husain, Aiyaz. "The United States and the Failure of UN Collective Security: Palestine, Kashmir and Indonesia," *The American Journal of International Law*, 101 (2007).

Issacson, Walter and Evan Thomas. *The Wise Men: Six Friends and the World They Created*, (New York: Simon & Schuster, 1986).

Issacson, Walter. "Who Declares War," *New York Times*, 21 January 2010. <http://www.nytimes.com/2010/01/24/books/review/Isaacson-t.html?n=Top/Reference/Times%20Topics/People/Y/Yoo,%20John%20C.?ref=johncyoo&pagewanted=all>

Jackson, Robert. "Address at the Conference of the Inter American Bar Association," 27 March 1941; <http://www.justice.gov/ag/aghistorical/jackson/1941/03-27-1941.pdf>

——— "Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases," 27 August 1940; <http://www.roberthjackson.org/the-man/speeches-articles/articles/a-presidential-legal-opinion/opinion-on-exchange-of-over-age-destroyers-for-naval-and-air-bases/>

——— *That Man: An Insider's Portrait of Franklin D. Roosevelt*, ed. John Barrett. (New York: Oxford UP, 2003).

——— "Special Concurrence," http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZC2.html

Jacobson, Harold and Charlotte Ku, eds. *Democratic Accountability and the Use of Force in International Law*, (Cambridge, UK: Cambridge UP, 2003).

Jessup, Philip. "Should International Law Recognize an Intermediate Status Between Peace and War," *The American Journal of International Law*, 48 (1954).

Johns, Andrew. *Vietnam's Second Front: Domestic Politics, the Republican Party and the War*, (Lexington, Kentucky, University Press of Kentucky, 2010).

Johnson, Carrie "Human Rights Defender Now Fights for US Policy," *NPR*, 28 June 2011.

Johnson, Lyndon. "Address to Joint Session of Congress," 27 November 1963; <http://millercenter.org/president/speeches/detail/3381>

——— "Address at Johns Hopkins University," 7 April 1965; <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650407.asp>

——— "National Security Action Memorandum 308," 22 June 1964; <http://www.lbjlib.utexas.edu/johnson/archives.hom/nsams/nsam308.asp>

- “Press Conference,” 18 August 1967; <http://millercenter.org/president/speeches/detail/5919>
- “Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin,” 4 August 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26418#axzz1fy07g0MY>
- “Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin,” 4 August 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26418#axzz1fy07g0MY>
- “Remarks on Foreign Affairs at the Associated Press Luncheon in New York City,” 20 April 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26168#axzz1gRDCGaBB>.
- “Remarks Upon Signing Joint Resolution of the Maintenance of Peace and Security in Southeast Asia,” 10 August 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26429#axzz1gRDCGaBB>
- “State of the Union Address,” 12 January 1966; www.presidency.ucsb.edu <http://www.presidency.ucsb.edu/ws/index.php?pid=28015#ixzz1YjNbUV00>
- “Statement to Congress,” 6 August 1964; http://avalon.law.yale.edu/20th_century/tonkin-g.asp
- “The President’s News Conference,” 1 April 1965; <http://www.presidency.ucsb.edu/ws/index.php?pid=26859#axzz1gRDCGaBB>
- “The President’s News Conference,” 2 June 1964; <http://www.presidency.ucsb.edu/ws/index.php?pid=26286#axzz1fy07g0MY>
- “The President’s News Conference,” 28 July 1965; <http://www.presidency.ucsb.edu/ws/index.php?pid=27116#axzz1dcb4Byv3>
- Jones, Howard. “One World: An American Perspective,” in Wendell Wilkie: Hoosier Internationalist, ed. James Madison, (Indianapolis: Indiana UP, 1992), 103.
- Kaplan, Lawrence. *NATO 1948: The Birth of the Transatlantic Alliance*, (Lanham, Maryland: Rowman & Littlefield, 2007).

- Kassop, Nancy. "The Bush Administration's Approach to Separation of Powers: An Invitation to Struggle," in Leslie Feldman & Rosanna Perotti, *Honor and Loyalty: Inside the George H.W. Bush White House*. (Westport, CT: Greenwood Publishing, 2002)
- Kelley, Christopher. "A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision," *William and Mary Bill of Rights Journal*, 16 (2007).
- Kempster, Norman. "U.S. Has Authority to Launch Haiti Invasion," *Los Angeles Times*, 18 July 1994; http://articles.latimes.com/1994-07-18/news/mn-17080_1_haiti-invasion
- Kennedy, Paul. *Parliament of Man: The Past, Present and Future of the United Nations*, (New York: Vintage Books, 2006).
- Kennedy, Paul. *The Rise and Fall of Great Powers*, (New York: Vintage Press, 1989).
- Kenworthy, E.E., "Congress Backs President on Southeast Asia Moves," *The New York Times*, 7 August 1964.
- Keohane, Robert and Gary King and Sidney Verba, *Designing Social Inquiry: Scientific Method in Qualitative Research*, (Princeton: Princeton University Press, 2004).
- Keohane, Robert, Stephen Macedo, and Andrew Moravcsik. "Democracy-Enhancing Multilateralism," *International Organization*, (Winter 2009).
- Kessel, John. "Richard Neustadt's Intellectual Contributions," *Presidential Studies Quarterly*, (34) 2004.
- Kessler, Ronald. *Inside the CIA*, (New York: Pocket Books, 1992).
- Kimmitt, Robert. in "Providing Intelligence to Policymakers," a panel at "US Intelligence and the End of the Cold War," at Texas A & M University. (transcript on file with author). Summary at; <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/summer00/art02.html>
- Kissinger, Henry. "Memorandum for the President: War Powers Legislation," *Foreign Relations of the United States: 1969-1976, Volume II*; <http://history.state.gov/historicaldocuments/frus1969-76v02/d392>
- Koh, Harold, et al. "Memorandum Amicus Curiae of Law Professors," 1990; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932883
- "Libya and War Powers," Testimony to Senate Foreign Relations Committee, 28 June 2011; http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf
- "Presidential War and Congressional Consent: The Law Professors' Memorandum in *Dellums v. Bush*," *Yale Law Faculty Scholarship Series*, Paper 2074.

- . *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, (New Haven: Yale UP, 1990).
- Krass, Carole. "Authority to Use Force in Libya," 1 April 2011; <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>
- Ku, Julian. "The Delegation of Federal Power to International Organizations: New Problems with Old Solutions," *Minnesota Law Review*, 85 (2001).
- Lasser, William. *Benjamin Cohen: Architect of the New Deal*, (New Haven: Yale UP, 2002).
- Lawrence, David. "Nixon Views Must Be Seen in Perspective," *Lewiston Daily Sun*, 7 July 1970; <http://news.google.com/newspapers?nid=1928&dat=19700707&id=gpwgAAAAIBAJ&sjid=JmgFAAAAIBAJ&pg=3660,595770>
- Lebow, Richard Ned. *A Cultural Theory of International Relations*, (New York: Cambridge UP, 2008).
- Lebow, Richard Ned. *Forbidden Fruit*, (Princeton: Princeton UP, 2010).
- Lewis, Anthony. "Abroad at Home: Presidential Power," *The New York Times*, 14 January 1991.
- Lewis, Neil. "Turning Loyalty and Service to Bush into Power as Presidential Counsel," *New York Times*, 12 December 1990.
- Lindley, Ernest. "Analyzes, the President's Dilemma -- Mr. Roosevelt Wants to Safeguard U.S. Interests But Avoid Formal Declaration of War Against Germany," *The Washington Post*, 13 July 1941.
- Lobel, Jules. *Success Without Victory: Lost Legal Battles and the Long Road to Justice in America*, (New York: New York University Press, 2003).
- Lodge, Henry Cabot. "Reservations with Regard to the Treaty,"
- Madison, James. "Helvidius," August-September 1793; http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s15.html
- Mason, George. "The Debates in the Federal Convention," 6 June 1787; http://www.constitution.org/dfc/dfc_0606.htm
- Massachusetts v. Laird, 400 U.S. 886 (1970); <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=400&invol=886>

Matthews, Geoffrey. "Robert A. Taft: The Constitution and American Foreign Policy, 1939-1953," *Journal of Contemporary History* (17) 1980.

May, Ernest and Philip Zelikow, eds., *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis*, revised edition (New York: W.W. Norton, 2002), 163-183.

McCarthy, Joseph. "Speech in Wheeling, West Virginia," 9 February 1950; <http://historymatters.gmu.edu/d/6456/>

McCullough, David. *Truman*, (New York: Simon & Schuster, 1993).

McDougall, Walter. "The Constitutional History of U.S. Foreign Policy," *Foreign Policy Institute Research Series*, September 2010, 1.

Medellin v. Texas; 552 U.S. 491 (2008)

Meeker, Leonard. "The Legality of United States Participation in the Defense of Viet Nam," *Yale Law Journal*, (75) 1966.

Merrill, Dennis, ed. *Documentary History of the Truman Presidency: Volume 18*, (Bethesda, MD: University Publications of America, 1996.)

Miller, Merle. *Plain Speaking: An Oral History of Harry S. Truman*, (New York: Berkley Press, 1986.)

Moss, Randolph. "Authorization for Continuing Hostilities in Kosovo," 19 December 2000; <http://www.justice.gov/olc/final.htm>

Moynihan, Daniel Patrick, *Daniel Patrick Moynihan: A Portrait in Letters of an American Visionary*, and Steven Veisman, ed. (New York: PublicAffairs Press, 2010).

——— "The Gulf War: Collective Security, War Powers, and Laws of War," 17 April 1991, in *Proceedings of the Annual Meeting of the American Society of International Law*, (85) 1991.

——— *On the Law of Nations*, (Cambridge: Harvard UP, 1990).

Mueller, John. "The Polls: a Review," *The Public Opinion Quarterly*, (57), 1993.

Nalty, Bernard. *Air War Over South Vietnam*, (Washington, D.C., Air Force History and Museum Program, 2000).

Neustadt, Richard. *Presidential Power and the Modern Presidents*, revised edition. (New York: Free Press, 1991).

Newhouse, John. "The Tactician," *The New Yorker*, 7 May 1990

- Nijman, Janne and Andre Nolkaemper, eds., *New Perspectives on the Divide Between International and National Law*, (New York: Oxford UP, 2007), 128.
- Nixon, Richard. "Address to the Nation on the Cambodia Sanctuary Operation," 3 June 1970; <http://www.presidency.ucsb.edu/ws/?pid=2530#axzz1fy07g0MY>
- Nixon, Richard. "Veto of the War Powers Resolution," 24 October 1973; <http://www.presidency.ucsb.edu/ws/index.php?pid=4021>
- Obama, Barack. "The President regarding the commencement of operations in Libya," 21 March 2011; <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>
- Paine, Thomas. *The Crisis*, 23 December 1776; <http://www.ushistory.org/paine/crisis/index.htm>
- Parker, Elizabeth. *Intelligence Oversight in a Democracy*, *Houston Journal of International Law*, (21), 1988.
- Parment, Herbert. *George Bush: the Life of a Lone Star Yankee*, revised edition, (New Brunswick, New Jersey: Transaction Publishers, 2001), 9.
- Parment, Herbert. *Eisenhower and the American Crusades*, (New York: Transaction Publishers, 1998).
- Patterson, James. *Mr. Republican: A Biography of Robert A. Taft*, (New York: Houghton Mifflin, 1972).
- PBS Frontline, "'Excerpts from Iran-Contra Minority Report,'" <http://www.pbs.org/wgbh/pages/frontline/darkside/themes/ownwords.html#1>
- Perlmutter, Oscar. "Acheson vs. Congress," *The Review of Politics* (22) 1960, 6.
- Pierson, Paul. *Politics in Time: History, Institutions and Social Analysis*, (Princeton: Princeton UP, 2004).
- Pincus, Walter. "2 Key Democrats Back Bush in Threat of Force Against Action," *The Washington Post*, 11 December 1990. (Emphasis added)
- Pincus, Walter. "Bush is Said to Want UN Assent on Force Before Seeking Hill's," *The Washington Post*, 21 November 1990.
- Pincus, Walter. "Hill Split over When and How to Deal With UN resolution," *The Washington Post*, 30 November 1990.
- "Policing Palestine," *Washington Post*, 24 April 1948.

Pollak, Franklin. "Power of the President to Send Troops Abroad," April 1951, 1. Department of Justice: Office of Legal Counsel Archives.

Posner, Eric. and Adrian Vermeuele, *The Executive Unbound*, (New York: Oxford UP, 2010).

Preston, Andrew. *The War Council: McGeorge Bundy, the NSC, and Vietnam*, (Cambridge: Harvard UP, 2006).

Protocol to the SEATO Treaty, 8 September 1954; <http://vietnam.vassar.edu/overview/doc4.html>

Public Law 107-243; <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/html/> PLAW-107publ243.htm

Putnam, Robert. Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization*, 42 (1988).

Reagan, Reagan. "Address to the Nation on Events in Lebanon and Grenada," 27 October 1963;

Reagan, Reagan. "Address to the Nation on the United States Air Strikes Against Libya," 14 April 1986; <http://www.reagan.utexas.edu/archives/speeches/1986/41486g.html>

Rehnquist, William. "The President and the War Power: South Vietnam and the Cambodian Sanctuaries," *Opinion of the Office of Legal Counsel*, 21 May 1970; <http://www.lawfareblog.com/wp-content/uploads/2011/03/rehnquist.cambodia.pdf>

"Reagan Urges Johnson to Tell Vietnam Facts," *Los Angeles Times*, 21 October 1965.

Reston, James. "Washington: The Republicans on Vietnam," *New York Times*, 19 November 1965.

Richter, Paul. "Republicans Balk at Sending U.S. Troops to Bosnia," *Los Angeles Times*, 30 September 1995; http://articles.latimes.com/1995-09-30/news/mn-51604_1_senior-republican

Rogers, James Grafton *World Policing and the Constitution*, (Boston: World Peace Foundation, 1945).

Ron Fournier, "White House Lawyers Give Bush OK on Iraq," *Washington Times*, 26 August 2002.

Roosevelt, Franklin. "Message to Congress on Iceland," 7 July 1941; <http://www.mtholyoke.edu/acad/intrel/WorldWar2/iceland.htm>

——— "Message to the Congress," 3 September 1940; <http://www.mtholyoke.edu/acad/intrel/WorldWar2/fdr22.htm>

——— “Radio Address at a Dinner of the Foreign Policy Association,” 21 October 1944; <http://www.presidency.ucsb.edu/ws/index.php?pid=16456#axzz1chMcU6tc>

Rosegrant, Susan and Michael Watkins, “The Gulf Crisis: Building a Coalition for War,” *Kennedy School Case Studies Series*, (Number 1264), 1994, 3

Rosenau, James. *Along the Domestic-Foreign Frontier: Exploring Governance in A Turbulent Time*, (New York: Cambridge UP, 1997), 4.

Rosenman, Samuel. *Working with Roosevelt*, (London: R. Hart-Davis, 1952), 439.

Rostow, Eugene. “Once More Unto the Breach: The War Powers Resolution Revisited,” *Yale Law Faculty Scholarship Series*, (Number 2115), 1986.

Rothschild, Matthew. “Foray for Panama’s Democracy Wounds Constitution Here,” *Los Angeles Times*, 21 December 1989; http://articles.latimes.com/1989-12-21/local/me-693_1_constitutional-government

Rubinfeld, Jed. “Unilateralism and Constitutionalism,” *New York University Law Review*, 79 (2004).

Rudalevige, Andrew *The New Imperial Presidency: Renewing Presidential Power After Watergate*, (Ann Arbor, Michigan: University of Michigan Press, 2005).

Rusk, Dean. *As I Saw It*, (New York: Penguin Press, 1990).

Savage, Charlie. “Attack Renews Debate Over Congressional Consent,” *New York Times*, 21 March 2011.

——— “In GOP, Broad View of Presidential Power Prevails,” *New York Times*, 29 December 2011; <http://www.nytimes.com/2011/12/30/us/politics/gop-field-has-broad-views-on-executive-power.html?ref=charliesavage>

——— *Power Wars: Unmasking National Security Legal Policy Deliberations Under Bush & Obama*, Kindle Single, (Amazon: 2011).

Schlei, Norman. “Re: Blockade of Cuba,” 19 October 1962. Department of Justice: Office of Legal Counsel Archives.

Schlesinger, Arthur. *The Imperial Presidency*, revised edition, (New York: Mariner Books, 2004).

——— *War and the American Presidency*, (New York: W.W. Norton, 2004).

- Schmitz, David. *Brent Scowcroft: Internationalism and Post-Vietnam War American Foreign Policy*, (New York: Rowman & Littlefield, 2011).
- Schultz, Kenneth. "Tying Hands and Washing Hands: The U.S. Congress and Multilateral Humanitarian Intervention," in *Locating the Proper Authorities: The Interaction of Domestic and International Institutions*, ed. Daniel Drezner (Ann Arbor: University of Michigan Press, 2003).
- Sciolino, Elaine. "As U.S. Warms to U.N., It Finds Unpaid Debts Embarrassing," *The New York Times*, 13 September 1990.
- Senate Amendment 1040 to National Defense Authorization Act, 2 August 1991; <http://thomas.loc.gov/cgi-bin/query/D?r102:7:./temp/~r102H3BA87::>
- Senate Concurrent Resolution 147, 2 October 1990; <http://thomas.loc.gov/cgi-bin/query/D?c101:3:./temp/~c101NZLMcG::>
- Senate Foreign Relations Committee, "U.S. policy in the Persian Gulf : hearings before the Committee on Foreign Relations, United States Senate, One Hundred First Congress, second session," September/October 1990, (Washington D.C.; Government Printing Office, 1990).
- Senate Joint Resolution, "Regarding United States policy to reverse Iraq's occupation of Kuwait," 10 January 1991; <http://thomas.loc.gov/cgi-bin/query/z?c102:S.J.RES.1:>
- Senate Judiciary Committee, "War Powers and the UN Charter: Constraints on the President's Power to Commit US Armed Forces to Combat Under the Authority of the UN Security Council," 8 January 1991, (Washington D.C., Government Printing Office, 1991).
- "Senate Resolution 15," in U.S. Senate Committee on Foreign Relations, "Hearings on U.S. Commitments to Foreign Powers," 90th Congress, August/September 1967.
- "Separation of Powers and Foreign Policy," hosted by the Federalist Society, 1 March 2000; http://www.fed-soc.org/publications/pubid.1563/pub_detail.asp
- Shesol, Jeff. *Supreme Power: Franklin Roosevelt vs. the Supreme Court*, (New York: W.W. Norton, 2010)
- Shogan, Robert. *Hard Bargain: How FDR Twisted Churchill's Arm, Evaded the Law and Changed the Role of the American Presidency*, (New York: Scribner, 1995).
- Silverstein, Gordon. *Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford UP, 1996).
- Sloan, Stanley. "Negotiating Article 5," *NATO Review*, Summer 2006; <http://www.nato.int/docu/review/2006/issue2/english/art4.html>

- Smith, Richard. *Thomas E. Dewey and His Times*, (New York: Simon & Schuster, 1982).
- Sofaer, Abraham. *War, Foreign Powers and Constitutional Power*, (Boston: Ballinger Publishing, 1976).
- Sorensen, Ted. *Counselor: a Life at the Edge of History*, (New York: Harper, 2008), 288.
- Southeast Asia Collective Defense Treaty, 9 September 1954; http://avalon.law.yale.edu/20th_century/usmu003.asp
- Spiro, Peter. "Book Review: War Powers and the Sirens of Formalism," *New York University Law Review*, 68 (1993), 1358.
- Standard, William. "United States Intervention in Vietnam is Not Legal," *American Bar Association Journal*, (52) July 1966, 632
- Stanton, Gregory. "Law of the Land," *The New York Times*, 29 December 1990.
- State Department Position Paper, "The Question of a Formal Declaration of War in Vietnam," 19 November 1965; <http://www.virtual.vietnam.ttu.edu/cgi-bin/starfetch.exe?z71ptvCEvDuX0k@akFIK2KxhhbL9gNn4Vzo@GoIXOFK@pNVISBnA7dXk.7uchB2TTVWVfi5RVWNQlyXxJu9r29nOUBMsHQ5eBcLHDLILyDA/2184810014.pdf>
- Steinberg, James "Declaration," in *U.S. v Arizona*; <http://www.scribd.com/doc/33977183/U-S-v-Arizona-Exh-1-to-Motion-for-Preliminary-Injunction-Affidavit-of-James-Steinberg>
- Steven Casey, *Selling the Korean War: Propaganda, Politics, and Public Opinion in the United States, 1950-1953*. (New York: Oxford UP, 2010).
- Storbin, Paul. "A Moral Flip-Flop? Defining a War," *New York Times*, 6 August 2011; <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?pagewanted=print>
- Stout, David. "GOP Presses Democrats to Act Quickly on an Iraq Vote," *New York Times*, 12 September 2002; <http://www.nytimes.com/2002/09/12/politics/12CND-CONG.html>
- Stromseth, Jane. "Rethinking War Powers: Congress, the President and the United Nations," *Georgetown Law Journal* 81 (1993).
- Stuckey, Mary. "FDR, the Rhetoric of Executive Authority and the Development of American Global Hegemony," *APSA 2011 Annual Meeting Paper*; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903200.

Stuhler, Barbara. *Ten Men of Minnesota and American foreign policy, 1898-1968*, (Minneapolis: Minnesota Historical Society, 1973), 140-141.

——— “A Minnesota Footnote to the 1944 Presidential Election,” *Minnesota History*, (52) 1990.

Taft, Robert. *A Foreign Policy for Americans*, (New York: Doubleday, 1951).

——— *The Papers of Robert A. Taft Volume 4: 1949-1953*, Clarence Wunderlin, ed. (Kent, OH: Kent State UP, 2006), 167-168.

Tannenwald, Nina. *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, (New York: Cambridge UP, 2007).

"Trojan Horse or Don Quixote's Windmill," both printed in Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Congress, 1st session, on S. J. Res. 1 and S. J. Res. 43, *Treaties and Executive Agreements*, (February 18, 19, 25, March 4, 10, 16, 27, 31, April 6, 7, 8, 9, 10, and 11, 1953)

"The Case Against Declared War," *Los Angeles Times*, 23 November 1965.

"The Fulbright Resolution," *The Boston Globe*, 2 August 1967.

The Persian Gulf War Resolution, 12 January 1991; <http://thomas.loc.gov/cgi-bin/query/z?c102:S.J.RES.1>

Public Law 107-243.

The White House, "Meeting with Gulf Coalition Financial Contributors," 21 December 1990; http://bushlibrary.tamu.edu/research/pdfs/memcons_telcons/1990-12-21--Gulf%20Coalition%20Financial%20Contributers.pdf

Thompson, Alexander. *Channels of Power: The UN Security Council and US Statecraft in Iraq*, (Ithaca, New York: Cornell University Press, 2009), 156.

Thornburgh, Richard. "The Rule of Law: At Home and Abroad," a Speech at the Pepperdine University School of Law, 2 February 1991, 13-14; <http://digital.library.pitt.edu/cgi-bin/t/textpagevieweridxc=thornspeeches;cc=thornspeeches;idno=AIS9830.13.01.0158;frm=frameset;view=image;seq=15;page=root;size=s>

Tocqueville, Alexis. *Democracy in America*, (New York: Edward Walker Press, 1850).

Torbert, H.G. "Letter to William Fulbright," 4 December 1969, in Senate Foreign Relations Committee, "Termination of Southeast Asia Resolution Report," 15 May 1970;

Truman, Harry. "Address to Congress," 19 July 1950.

——— "Press Conference," 11 January 1951; <http://www.presidency.ucsb.edu/ws/index.php?pid=14050#axzz1gRDCGaBB>

——— "Statement by the President;" 26 June, 1950. American Presidency Project;

——— "The President's News Conference," 29 June 1950; <http://www.presidency.ucsb.edu/ws/index.php?pid=13544>

——— *Truman Speaks*, (New York: Columbia UP, 1960).

"Truman Says He Has Power To Send Force," *The Washington Post*, 23 April 1948.

Turner, Robert. "Constitutional Controversy: Continued," *The Washington Post*, 29 December 1990.

Turner, Robert. "Truman, Korea and the Constitution: Debunking the 'Imperial President' Myth," *Harvard Journal of Law and Public Policy* 19 (1995-1996).

Tuttle, William. "Aid-to-the-Allies Short-of-War versus American Intervention, 1940: Reappraisal of William Allen White's Leadership," *the Journal of American History*, 56 (1970).

U.S. Constitution.

"U.S. Death toll from Korean War Revised Downward," *CNN*, 04 June 2000; http://articles.cnn.com/2000-06-04/us/korea.deaths_1_death-toll-battlefield-fatalities-korean-war?_s=PM:US

"U.S. Marines Occupy Iceland," *Los Angeles Times*, 8 July 1941.

"U.S. Offers Its Soldiers to Back Palestine Plan," *Los Angeles Times*, 21 April 1948.

U.S. Senate Armed Services Committee, "Crisis in the Persian Gulf region : U.S. policy options and implications," September-December 1990, 136.

U.S. Senate Foreign Relations Committee, "Report on United Nations Participation Act," in *Problems of World War II and its Aftermath*, Volume 1, (Washington D.C., U.S. Government Printing Office, 1976).

U.S. v Arizona 9th Circuit, 2011; http://www.ca9.uscourts.gov/datastore/general/2011/04/11/10-16645_opinion.pdf

United Nations Charter.

United Nations Participation Act of 1945.

United States Senate Historical Office, "Pat Holt Oral History: Interview 7," November 1980;
http://www.senate.gov/artandhistory/history/resources/pdf/Holt_interview_7.pdf

United States v Bolton. 2nd Circuit; 1951.

Van Evera, Stephen. *Guide to Methods for Students of Political Science* (Ithaca: Cornell University Press, 1997).

Vandenberg, Arthur. "American Foreign Policy," 10 January 1945, 603; <http://www.senate.gov/artandhistory/history/resources/pdf/VandenbergSpeech.pdf>

——— *The Private Papers of Arthur Vandenberg*, Joe Morris, ed. (Charlottesville: Greenwood Press, 1974).

Walters, Nolan. "Nunn Looks Back on the Persian Gulf War and Forward to Life in the Private Sector," *The Macon Telegraph*, 30 December 1996.

"War Declaration Suggested," *The New York Times*, 6 August 1965.

Washington, George. "Farewell Address," 1796 http://avalon.law.yale.edu/18th_century/washing.asp

Watson, Tom. "The Legal Machine Behind the War Machine," *The Legal Times*, 14 January 1991.

Wells, Tom. *The War Within: America's Battle Over Vietnam*, revised edition (New York: Author's Guild, 2005).

"Who Can Declare War," *The New York Times*, 15 December 1990.

Wildavsky, Aaron. "The Two Presidencies," *Trans-Action*, 4 (1966).

Wilentz, Sean. *Age of Reagan: A History, 1974-2008*, (New York: HarperCollins, 2009).

Willkie, Wendell. *One World*, (New York: Simon & Schuster, 1943).

Wills, Gary. *Bomb Power: The Modern Presidency and the American State* (New York: Penguin, 2010).

Witt, John Fabian. "Law and War in American History," *The American Historical Review*, (115) 2010.

Wolfensberger, Donald. "The Return of the Imperial Presidency," *Wilson Quarterly*, 26 (2002).

Wollbert, Robert. "Review of The Constitution and World Organization," *Foreign Affairs*, July 1944: <http://www.foreignaffairs.com/articles/108573/edward-s-corwin/the-constitution-and-world-organization>

Woods, Randall. *Fulbright: A Biography*, (New York: Cambridge UP, 1995).

Woodward, Bob. *The Commanders: The Pentagon and the First Gulf War, 1989-1991*, paperback edition (New York: Simon & Schuster, 2005).

Yoo, John. "Kosovo, War Powers, and the Multilateral Future," *University of Pennsylvania Law Review*, 148, (2000), 1673.

Young, Marilyn. "Limited War, Unlimited," Library of Congress, 8 July 2009; http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=4683

Youngstown Sheet & Tube. Co v. Sawyer, 343 U.S. 579;
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZS.html

Zasloff, Jonathan. "More Realism About Realism: Dean Acheson and the Jurisprudence of Cold War Diplomacy," *UCLA School of Law Research Paper*; Number 07-01.

Zelizer, Julian. "How Conservatives Learned to Stop Worrying and Love Presidential Power," in *The Presidency of George W. Bush: A First Historical Assessment*, ed. Julian Zelizer, (Princeton: Princeton UP, 2010).

——— *Arsenal of Democracy: The Politics of National Security from World War Two to the War on Terrorism*, (New York: Basic Books, 2009).

——— *The American Congress: The Building of Democracy*, (New York: Houghton Mifflin, 2004).