

# The Use of Military Force by the President

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## DEFENSIVE USES SHORT OF WAR

By JAMES P. TERRY



U.S. Army

Capture of Tete de Pont, Battle of Churubusco, August 1847



U.S. Navy (Tyler J. Clements)

President Bush visits Sailors returning from deployment in support of Operation Iraqi Freedom

**C**urrent military operations in Iraq and Afghanistan follow a long pattern in U.S. history and practice. Congress has exercised its prerogative and declared war as provided in the Constitution on only five occasions: the War of 1812; the War with Mexico in 1846; the 1898 Spanish-American War; World War I in 1917; and World War II in December 1941. In all other military engagements, including our current conflicts, the President has exercised his independent executive responsibility as Commander in Chief pursuant to the authority set forth in Article II, Section 2, of the Constitution to deploy military force on behalf of this nation and in its defense.

While the President has often sought congressional authorization to ensure a consistent funding stream, no congressional declaration of war was requested by the Commander in Chief in the more than 200 military responses the U.S. Armed Forces have made beyond the 5 mentioned above. In this period of terrorist violence, we can expect this trend to continue, as the necessity of immediate action in response to terrorist planning often requires preemptive measures that cannot await the outcome of congressional debate. It is to that Presidential authority,

its history, its development, its present use, and the efforts by Congress to rein in this power that this article is addressed.

### Uses of Force

Under the Constitution, Congress alone has the power to declare war. It is the President, however, who is recognized as the authority within the executive branch to respond to imminent threats to the United States and its citizens as Commander in Chief of all U.S. Armed Forces. In fact, most constitutional scholars recognize the

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President's broad power to use the military without formal authorization from Congress in defense of national interests short of all-out war. As Edward Corwin has stated:

*Under the constitutional scheme, the President needed no specific authorization to use force to defend against a military threat to the United States or to faithfully execute the laws or treaties of the nation in circumstances under which the law of nations would not require a formal declaration.<sup>1</sup>*

Therefore, if the President considered military action essential for the enforcement

of an act of Congress, or to ensure adherence to a treaty, or to protect citizens and territory of the United States from a foreign adversary, he would be obliged by the Constitution to use his power as Commander in Chief to direct our military forces to that end. As this duty rests in the Constitution, it cannot be removed or abridged by an act of Congress. President William Howard Taft made that point succinctly:

*The President is made Commander in Chief of the Army and Navy by the Constitution for the purpose of enabling him to defend the country against invasion, to suppress insurrection and*

*to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the army for any of these purposes, the action would be void.<sup>2</sup>*

In practice, then, the President's discretion to authorize the use of military force is exceedingly broad. Unique opportunities have presented themselves throughout this nation's history for expansion and refinement of this authority. These were notably evident not only in the declared wars identified above, but also in the Presidential determinations to use force in defense of U.S. interests. The status of the United

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States as a world power and guarantor of the peace has also operated to expand the powers of the President and to diminish congressional powers in the foreign relations arena. Thus, President Harry Truman never sought congressional authorization before dispatching troops to the Korean Peninsula (believing the "Uniting for Peace" resolution of the United Nations General Assembly was enough); President Dwight Eisenhower likewise acted on his own in putting troops in Lebanon and the Dominican Republic; and most significantly, President John Kennedy eschewed asking for any guidance in sending thousands of "advisors" into Vietnam in 1962,<sup>3</sup> although President Lyndon Johnson did secure passage of the Gulf of Tonkin Resolution in 1964 before introducing significant ground forces.<sup>4</sup>

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

*His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power*



**President Truman proclaims national emergency to defend against threat of communist imperialism, 1950**

to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus another decision was made.<sup>5</sup>

An even more extensive list of military interventions where the President had not invoked congressional authority was detailed in a 1967 study by the Department of State.<sup>6</sup> In that review, the majority of the instances in which the President acted without congressional authority involved the policing of piracy, landings of small naval contingents to protect commerce, and dispatch of forces across the Mexican border to control banditry. Some incidents, however, involved the significant exercise of Presidential power. Three are of considerable historic interest: President James Polk's use of troops to precipitate war with Mexico in 1846, President Ulysses Grant's attempt to annex the Dominican Republic, and President William McKinley's dispatch of forces into China during the Boxer Rebellion.<sup>7</sup>

Similarly, the early years of the 20<sup>th</sup> century witnessed repeated U.S. incursions, authorized by the President, in Central America and the Caribbean to further national and, in many instances, significant commercial interests. In Panama, for example, the United States intervened on three separate occasions prior to its entry to remove Manuel Noriega in 1989 in Operation *Just Cause*.

In each of the instances above, the Federal courts largely upheld the expansive nature of the President's authority as Commander in Chief. In fact, it has been the courts that have carefully shaped the President's authority with respect to the nature and scope of that power under Article II, both in terms of the President's inherent authority and the authority to wage and fund armed conflicts, which are interests shared with Congress. For example, the Supreme Court has clearly stated that the President possesses all the power and authority accorded by customary international law to a supreme commander in the field: "He may invade the hostile country, and subject it to the sovereignty and authority of the United States."<sup>8</sup> He may establish and prescribe the jurisdiction of military commissions, unless limited by the Congress, in territory occupied by American forces.<sup>9</sup> He may insert covert agents behind enemy lines and obtain valu-

able information on troop dispositions and strength, planning, and resources.<sup>10</sup> Within the theater of operations, he may requisition property and compel services from American citizens and friendly foreigners, although the United States is required to provide "just compensation."<sup>11</sup> He may also bring an armed conflict to a conclusion through an armistice and stipulate conditions of the armistice. The President, however, may not acquire territory for the United States through occupation,<sup>12</sup> although he may govern recently acquired territory until Congress provides a more permanent governing regime.<sup>13</sup>

In addressing direct threats to the United States, then, there has been little historical opposition to the President's unilateral decisionmaking, and, in fact, it has been recognized as essential. As Supreme Court Justice Joseph Story stated in the early 1800s:

*Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently [sic] defeats every energetic measure.<sup>14</sup>*

### Political-military Crisis

It is in the realm of the political-military crisis, where foreign policy and national defense are intertwined in a decision to use military force, that Congress has exercised its prerogative most effectively vis-à-vis the President's authority. That has not always been the case, however. In fact, the traditional power of the President to use U.S. forces without consulting Congress was the subject of debate on the Senate floor in 1945. Senator Tom Connally (D-TX) remarked:

*The historical instances in which the President has directed armed forces to go to other countries have not been confined to domestic or internal instances at all. Senator [William] Milliken pointed out that in many cases the President has sent troops into a foreign country to protect our foreign policy . . . notably in Central and South America. This was done . . . in order to keep foreign countries out of there. [It] was not aimed at protecting any particular American citizen. It was aimed at protecting our foreign policy.<sup>15</sup>*

This view that the President could exercise his constitutional authority to deploy forces absent congressional blessing continued even after our ratification of the United Nations (UN) Charter. Despite the fact it could be argued that after ratifica-

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tion, the UN Charter provisions *did* become our foreign policy, this was clearly not the view of the U.S. Senate, which continued to espouse an independent authority resident in the President to enforce the laws and found his constitutional power to be impaired in no way. Senator Alexander Wiley (R-WI) stated the position:

*But outside of these agreements, there is the power in our Executive to preserve the peace, to see that the "supreme laws" are faithfully executed. When we become a party to this Charter, and define our responsibilities by the agreement or agreements, there can be no question of the power of the Executive to carry out our commitments in relation to international policing. His constitutional power, however, is in no manner impaired.<sup>16</sup>*

This was buttressed by the statement of Senator Warren Austin (R-VT):

*So I have no doubt of the authority of the President in the past, and his authority in the future, to enforce peace. I am bound to say that I feel that the President is the officer under our Constitution in whom there is exclusively vested the responsibility for maintenance of peace.<sup>17</sup>*

It is with respect to this inherent power in the Executive that President Eisenhower sought to engage Congress and gain its support, not because he needed it but because the political will resident in a united front with that body would be persuasive to any adversary in removing any doubt concerning our readiness to fight. The President was nevertheless careful to point out that "authority for the actions which might be required would be inherent in the authority

of the Commander in Chief. Until Congress can act I would not hesitate, so far as my Constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.”<sup>18</sup>

President Eisenhower believed the Chinese government would be influenced by a united Presidential-congressional initiative clearly indicating our intent to defend Formosa (now Taiwan) from Chinese aggression. In the joint congressional resolution that followed, Congress gave the President authority “to employ the Armed Forces of the United States as he deems necessary for the specific purpose of protecting Formosa and the Pescadores against armed attack.”<sup>19</sup> Eisenhower followed the same process in addressing the 1958 crisis in Lebanon, and President Kennedy did the same during the Cuban Missile Crisis.<sup>20</sup>

While congressional legislation has operated to augment Presidential powers in the foreign affairs field much more frequently than it has to curtail them, disillusionment with Presidential policy in the context of the Vietnamese conflict led Congress to legislate restrictions, not only with respect to the discretion of the President to use troops abroad in the absence of a declaration of war, but also limiting his economic and political powers through curbs on his authority to declare national emergencies.

### Power of the Purse

One of the major factors shaping and restricting Presidential decisionmaking with respect to the commitment of forces abroad has been congressional power and authority to fund military activities under Article I of the Constitution. It is for this pragmatic reason that Presidents have sought to keep Congress engaged and involved with the Executive in joint decisions to commit forces to combat. In Vietnam, for example, President Johnson gained congressional approval and funding for the war through the 1964 Gulf of Tonkin Resolution,<sup>21</sup> which was approved unanimously (414–0) by the House and by a margin of 88 to 2 in the Senate.<sup>22</sup> Coupled with

The administration also claimed a second prong of authority to respond to the threat to Saigon:

*[It is] not necessary to rely on the Constitution alone as the source of the President’s authority, since the [Southeast Asia Treaty Organization] treaty—advised and consented to by the Senate and forming part of the law of the land—sets forth a United States commitment to defend South Vietnam against armed attack, and since the Congress—in the Joint Resolution of August 10, 1964, and in the authorization and appropriation acts for support of the U.S. military effort in Vietnam—has given its approval and support to the President’s actions.*<sup>25</sup>

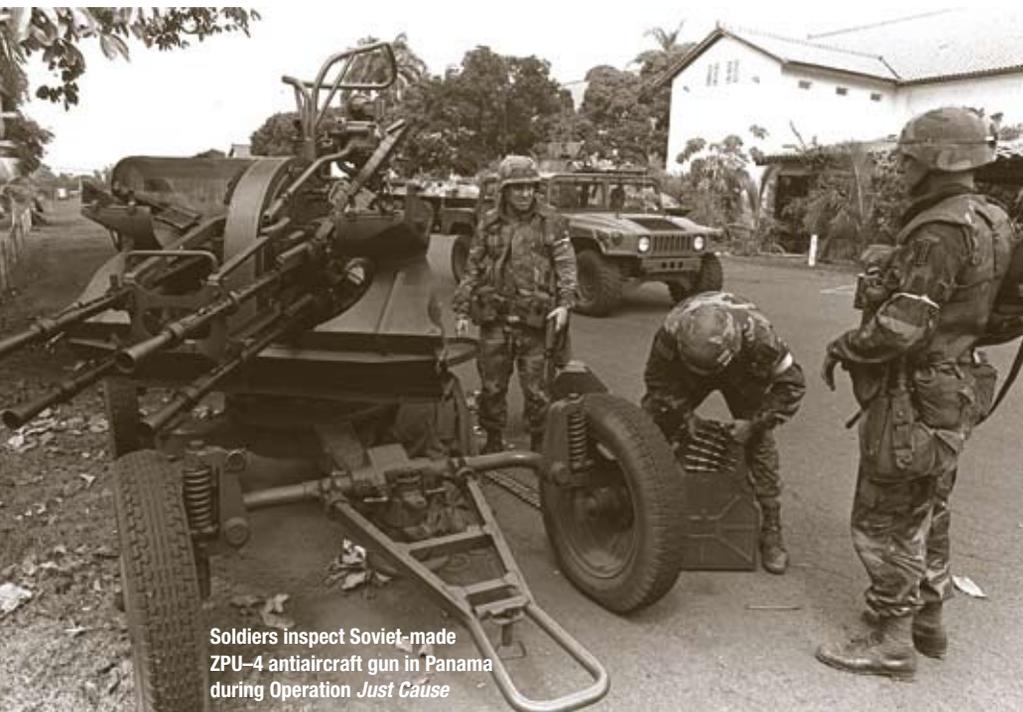
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this congressional imprimatur was parallel funding for the war—\$400 million initially, although Johnson only requested \$125 million to implement the resolution.<sup>23</sup>

As criticism of the war in Vietnam grew, however, the Johnson administration, concerned that the Gulf of Tonkin Resolution could be rescinded at any time, argued that the President had full authority to authorize “the actions of the United States currently undertaken in Vietnam.”<sup>24</sup>

In December 1972, a bombing campaign north of the 17<sup>th</sup> parallel was initiated by President Richard Nixon to drive the North Vietnamese to the negotiating table. It was successful, and on January 23, 1973, the President announced the signing of the Paris Peace Accords to end U.S. involvement in the Vietnam War. When attacks by the Khmer Rouge in Cambodia continued, however, the United States responded by a resumption of bombing in that nation, arguing that it had to retain freedom of action if it was to preclude the North Vietnamese or its communist allies from violating the accords.<sup>26</sup>

Despite the President’s strong opposition, Congress, after the resumption of bombing in Cambodia, passed amendments to pending Defense Department funding legislation that had the effect of cutting off funds, after August 15, 1973, for any combat activities by U.S. military forces in, over, or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.<sup>27</sup> With no American forces to contend with, the North Vietnamese then sent their entire army—absent one division reserved to protect Hanoi—into Laos, Cambodia, and South Vietnam. During the next 2-year period, in which Hanoi’s forces established military and political control over previously noncommunist Indochina, more people were killed by the new communist regimes in these three countries than in the entire period of U.S. involvement in Southeast Asia.



Soldiers inspect Soviet-made ZPU-4 anti-aircraft gun in Panama during Operation Just Cause

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The congressional actions vis-à-vis Southeast Asia were followed in 1974 when Congress placed restrictions on U.S. funding provisions of the 1972 Trade Agreement with the former Soviet Union, leading to Soviet disavowal of the agreement. This was followed in 1976 by congressional curtailment of funds (the Clark Amendment) for Angolan factions fighting Cuban troops supported by Soviet training and equipment. In 1983, Congress limited President Ronald Reagan's authority to fund intelligence activities in support of the anti-Sandinistas, and in 1987, after the Central American governments signed a peace accord, it cut off all military aid to the Nicaraguan Contras.

These lessons were not lost on President George H.W. Bush when Iraq invaded Kuwait in August 1990. Although his advisors urged that he was not required to obtain congressional authorization to assist the United Nations in implementing UN Security Council Resolution (UNSC) 678, which called upon member states to use all necessary means to implement prior Security Council resolutions, President Bush formally requested a resolution of approval from Congress to support the UN call for assistance. In January 1991, the Senate, by the narrow and highly partisan vote of 52 to 47, gave the President that authority.<sup>28</sup> In doing so, however, Congress refused to authorize President Bush to use force beyond ejecting Iraqi forces from Kuwait. The other provisions of UNSC 678, which U.S. Ambassador to the UN Jeane Kirkpatrick and the administration had supported in order "to restore international peace and security in the area," were not supported in the joint resolution that passed Congress, and thus President Bush was limited solely to actions designed to restore the status quo ante in Kuwait.

President Bill Clinton was even more harshly treated by the Congress in 1993, when the loss of Pakistani lives in Somalia in June 1993 and then the further loss of 18 U.S. lives in Mogadishu in October 1993 delivered the death knell to U.S. support for UN peace operations (unless led by U.S. officers and with a preponderance of U.S. forces). In passing the Byrd amendment to the fiscal year (FY) 1994 Defense Appropriations Act, Congress sent a strong message that the President's enhanced authorities to deploy forces without congressional approval in circumstances where no vital national interest is implicated

were not unlimited. Using the power of the purse, Congress was quick to restrict Defense funding where it determined U.S. interests were not well served. When the Byrd legislation lapsed on September 30, 1994, Congress quickly passed the Kempthorne amendment to the FY95 Defense Authorization Act, which continued funding limitations.

Congress likewise showed itself entirely willing to dictate to President Clinton when it considered that he was not doing enough in a peace enforcement effort. Senator Robert Dole (R-KS), leading the charge, attempted to legislatively compel U.S. actions to lift the arms embargo unilaterally for the Bosnian Muslims in early 1994 and thus vitiate the UN resolution establishing the embargo. Senators Sam Nunn and George Mitchell, attempting to moderate this effort through compromise, drafted the Nunn-Mitchell amendment to the FY95 Defense Authorization Act. This provision, which was enacted, did not lift the arms embargo unilaterally, but rather precluded enforcement against the Bosnian Muslims while continuing U.S. obligations as they related to the other parties to the conflict. Even though not as severe as Senator Dole's proposal, this amendment undoubtedly contributed to an earlier-than-planned withdrawal from Bosnia by the UN Protection Force.

Two other initiatives in 1994, both of which failed passage, were efforts by Congress to interject itself into military affairs long thought the sole province of the President. In S. 5, the Peace Powers Act, and in H.R. 7, the National Security Revitalization Act, Congress attempted to restrict the President's authority as Commander in Chief and limit U.S. involvement in future peace operations.

In the Peace Powers Act, Senator Dole's initiative would have prohibited U.S. forces from serving under foreign operational control, even where it might be in the U.S. interest, as in Operation *Desert Storm*. Similarly, in the National Security Revitalization Act, then-Speaker of the House Newt Gingrich's bill would have limited the use of Defense funds for peacekeeping activities and would have restricted the sharing of intelligence with the United Nations. In each case, had these measures passed, the President's constitutional prerogatives would have been severely impacted. Despite the failure of passage of these measures, there remained a bipartisan concern in the Congress after the United Nations Operation in Somalia II that

the President (and succeeding Presidents) had to exercise greater stewardship with regard to operations managed by the United Nations.

### The Threat of Terrorism

The attacks by al Qaeda terrorists on the World Trade Center in New York and on the Pentagon in Washington, DC, on September 11, 2001, presented new challenges to the Presidency and the effective exercise of Commander in Chief powers. Because these attacks or threats of attack are often inchoate and depart significantly from traditional

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warfare between states adhering to the law of armed conflict, the sharing of information with Congress and the American people must sometimes be delayed as the release of information prematurely may preclude the effective response to an impending threat.

In light of the significant threat to democratic values represented by this form of nontraditional warfare, several Presidents, most recently President Bush in late 2003, have articulated a right to respond "preemptively" when evidence exists of an imminent threat of terrorist violence.<sup>29</sup> This suggests that prior consultation with congressional leadership may be limited in such circumstances.

The Reagan administration issued the seminal "preemption" doctrine in 1984. In the words of former Defense Department official Noel Koch, President Reagan's National Security Decision Directive (NSDD) 138, issued April 3, 1984, "represent[ed] a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps [were] needed."<sup>30</sup> Although NSDD 138 remains classified to this day, Robert McFarlane suggested at the Defense Strategy Forum on March 25, 1985, that it included the following key elements: The practice of terrorism under all circumstances is a threat to the national security of the United States; the practice of international terrorism must be resisted by all legal means; the United States has the

responsibility to take protective measures whenever there is evidence that terrorism is about to be committed; and the threat of terrorism constitutes a form of aggression and justifies acts in self-defense.<sup>31</sup>

While moral justification for this U.S. policy may be obvious, the more difficult problem is defining which state support or linkage warrants a President's military response, which legal framework supports such a proactive policy, and which reasonable force alternatives are responsive to the threat. It is the link between the terrorist and the sponsoring state that is crucial to providing the President with the justification for response against a violating state. Covert intelligence operatives are necessary for identifying and targeting terrorist training camps and bases and for providing an effective warning of impending terrorist attacks. Unfortunately, as noted by former Secretary of State George Shultz in 1984, "we may never have the kind of evidence that can stand up in an American court of law."<sup>32</sup>

The question, then, from several perspectives, is how much information is enough. Former Defense Secretary Caspar Weinberger has underscored the very real and practical difficulties military planners face in attempting to apply a relatively small quantum of force, over great distance, with uncertain intelligence. He has accurately noted the difficulty of ensuring success without accurate information and has echoed the relationship between public support and demonstrable evidence of culpability in any resort to force by the United States in defending against terrorist attack.<sup>33</sup>

Although no U.S. President has been able to define adequately "how much evidence is enough," the demand for probative,

or court-sustainable, evidence affirming the complicity of a specific sponsoring state is an impractical standard that contributed to the impression—prior to the articulation of NSDD 138 in 1984—that the United States was inhibited from responding meaningfully to terrorist outrages. This view was certainly reinforced in 1979 when the U.S. Government allowed 52 American citizens to remain hostage to Iranian militants for more than 400 days. As Hugh Tovar has noted, "There is a very real danger that the pursuit of more and better intelligence may become an excuse for non-action, which in itself might do more harm than action based on plausible though incomplete intelligence."<sup>34</sup>

An examination of authorized responses to state-sponsored terrorism available to a President requires an understanding that terrorism is a strategy that does not follow traditional military patterns. In fact, a fundamental characteristic of terrorism is its violation of established norms. The conduct of warfare is governed by carefully defined norms that survive despite their frequent violation. The sole norm for terrorism is effectiveness. International law requires that belligerent forces identify themselves, carry arms openly, and observe the laws of war. Principal among the laws of war are the principles of discrimination (or noncombatant immunity) and proportion. Terrorists, however, do not distinguish between the innocent (noncombatants) and the armed forces of the country in which the attack is directed.

Other considerations in addressing terrorist violence include the fact that the real-time relationship between threat and threat recognition is often compressed in the terrorist conflict arena. Strategy development

be of little utility in responding to a state whose actions are denied and whose practices are ultimately designed to eliminate normal, lawful intercourse between nations.

In a democratic society, then, the range of options open to a President desiring to protect the Nation's citizens and resources from terrorism is limited. One of the best things a democratic government can do is educate the public and its military about the realistic options available in any crisis. Professor Abraham Miller suggests:

*The image of an invincible and omnipotent America that can rescue hostages under any circumstance is patently unrealistic. It is a mindset that comes from a failure to realize how lucky the Israelis were at Entebbe and from the charges and countercharges of the 1980 election campaign, during which the Iranian hostage crisis was played to the hilt.<sup>35</sup>*

These valid concerns underscore the need to weigh other long-term values, besides countering the immediate terrorist threat, when determining an appropriate policy. George Shultz was correct when he stated that our policy "must be unambiguous. It must be clearly and unequivocally the policy of the United States to fight back—to resist challenges, to defend our interests, and to support those who put their lives on the line in a common cause."<sup>36</sup>

While the President should use military power only if conditions justify it and other means are not available, there will be instances, as occurred after September 11, 2001, when the use of force is his only alternative. In that circumstance, President Bush's actions were fully justified as necessary defensive measures to eliminate a continuing threat to the United States.

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is thus limited with respect to the preattack, nonmilitary initiatives that must always be the President's option of choice. Traditional means of conflict resolution, authorized by law and customary practice, are precluded because terrorism by definition is covert in execution, unacknowledged by its state sponsor, and practiced with violent effectiveness. Thus, diplomacy and conciliation may

Causal connectivity or linkage, the most important element in justifying the use of force in response to terrorist violence, can be established only if effective intelligence operatives are positioned to discover who the terrorists are, where they are, and who supports them. While U.S. intelligence did not preclude the attacks on the World Trade Center and Pentagon, it did quickly establish critical link-



George Bush Presidential Library and Museum

Presidents Ford, Nixon, Bush, Reagan, and Carter in Oval Office

ages. The perpetrators of the September 11 violence, al Qaeda, were protected and given safe haven in Afghanistan by the Pashtun Taliban militia.

Nor was September 11 the first time the United States had been subjected to attack by terrorists so clearly linked to a state sponsor. The 1979 attacks on the American Embassy in Tehran and the Consulates at Tabriz and Shiraz occurred just 1 week after the Shah came to the United States for medical treatment. On November 4, 1979, approximately 300 demonstrators overran the U.S. Embassy compound in Tehran and took 52 U.S. citizens hostage for 444 days.

As in most developing countries, there were few internal constraints—whether from opposition parties, a critical press, or an enlightened public—to pressure Ayatollah Khomeini, the Iranian leader, into upholding the law. In the atmosphere of fervent nationalism that accompanied Khomeini's sweep to power, forces for moderation were depicted as tools of foreign interests. In such an atmosphere, the militant supporters of the clerical leadership fomented domestic pressure to violate other recognized norms as well—in areas such as property ownership, religious freedom, and judicial protection. This combination of revolution and nationalism yielded explosive results—a reordering of both Iranian domestic society and its approach to foreign affairs. Unfortunately, the situation in Iran has not greatly improved.

President Reagan's pledge upon taking office of "swift and effective retribution" in case of further threats to Americans abroad was clearly meant to deter future attacks as well as reassure a concerned Nation. Given the profusion of incidents throughout the world since (to include the 1993 World Trade Center bombing and the attacks of September 11), however, it is clear that President Reagan's warnings have not turned back the tide of disorder.

It is clear that the painful lessons of the Iranian hostage crisis have spurred subsequent administrations to review the entire range of alternatives available for protecting limited—but highly visible—national interests, such as the safety of American diplomatic personnel and property. For example, NSDD 62 and 63, approved in the Clinton administration, clearly identified specific U.S. interests and critical infrastructure for protection in a more defined way.<sup>37</sup> The Bush administration, after the September 11 attacks, established the

Department of Homeland Security to address these threats on an institutional basis. From these actions, it is obvious that there is a more heightened sensitivity and increased alertness to the possibility of terrorism against Americans in 2008 than in 1979. These actions will go far in preparing our Presidents to more effectively address future attacks, while at the same time promoting responsive contingency planning.

### Observations

The elements of the President's authority as Commander in Chief under Article II and the successful exercise of this authority in periods short of declared war have clearly been affected by a continuum of congressional and public influence, dictated by the immediacy of the threat to national security. The intensity of the political, legal, and funding debate concerning a President's decision to commit forces has been directly related to the actual threat to the Nation or its people and, conversely, by the level of political discretion the President has sought to inject into the decision to use the military instrument.

When the threat to the United States is clear and immediate, Congress has expressed no objection to decisive action by the President and has placed few restrictions on his use of public funds and the commitment of military forces. It is important to note that actions taken where the Nation has been directly subjected to attack, such as after September 11 in Afghanistan, have provided the President the greatest latitude and freedom of action, while those in which a strong policy interest but a lesser or more attenuated defensive requirement, such as in Iraq, have offered the President a much narrower opportunity to exercise his discretion as Commander in Chief. The debate in the House and Senate on the situation in Iraq in February 2007 clearly put the President on notice that continued funding was tied to performance in the war on the insurgents, political effectiveness of the Nouri al-Maliki government, and the ability of the Iraqi armed forces to exercise greater responsibility in the fight.

Where Congress has determined that the use of the Nation's military power no longer reflects the interests of their constituents, it has *not* been reluctant to terminate that funding. In Vietnam in 1973, Congress cut off all funding not only for Vietnam but also for Cambodia and Laos. This was

followed in 1976 by the Clark amendment cutting off funds for support to forces fighting Cuban troops, supported by the Soviet Union, in Angola. In 1983, funding was cut for the anti-Sandinistas, and in 1987, all support for the Nicaraguan Contras was eliminated. It is likely that Congress, in light of the debate on Iraq in February 2007 in both houses, will seek to do the same for Iraq after the elections in 2008. The impact of this use of the authority of the purse has forced Presidents to be mindful of congressional interests in each case and recognize that a protracted conflict quickly wears thin with both the American people and their representatives.

The complexity of addressing the terrorist threat to the United States adds another layer of intelligence, training, equipment, and logistic concerns for the President, as Commander in Chief, in considering when and how the military instrument should be used. Clearly, military response to terrorist violence against our citizens and our nation has traditionally been strongly supported by Congress and the American people. Because of the inordinate risk to our forces in these more recent conflicts, however, where the terrorist threat does not directly impact vital national interests, this support, monetary and political, will likely be more difficult to obtain and maintain.

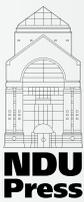
The role of the President as Commander in Chief is the most loosely defined section within Article II of the Constitution. In wartime, Congress has gladly delegated its responsibilities to the President. In periods of conflict or terrorist threats short of declared war, it has retained that level of control, through funding restrictions and other legislative enactments, necessary to ensure that our vital national interests are reflected in the actions of the Commander in Chief. **JFQ**

### NOTES

<sup>1</sup> See, for example, Edward S. Corwin, *The President, Office and Powers, 1787–1957: History and Analysis of Practice and Opinion*, 4<sup>th</sup> rev. ed. (New York: New York University Press, 1957), 198–201.

<sup>2</sup> President William Howard Taft, quoted in Quincy Wright, *The Control of American Foreign Relations* (New York: Macmillan, 1922), 309.

<sup>3</sup> See discussion in the Senate Committee on Foreign Relations, Report on the National Commitments Resolution, S. Rept. No. 91–129, 91<sup>st</sup> Cong., 1<sup>st</sup>



## NEW from NDU Press



### Strategic Forum 231

#### *China's Rising Influence in Asia: Implications for U.S. Policy*

"The balance of power in East Asia is stable and favors the United States, but the balance of influence is tipping toward China," according to coauthors Ellen L. Frost, James J. Przystup, and Phillip C. Saunders of National Defense University's Institute for National Strategic Studies in their opening assertion. They proceed to explore the economic, political, military, and diplomatic factors they see as increasing Chinese influence in Asia. The authors argue that a perceived U.S. neglect of the region, coupled with American pre-occupation with the war on terror, is accelerating this trend. They call for a concerted effort to refocus and enhance U.S. engagement with China, to include high-level participation in regional diplomacy, increased cooperation on nontraditional security issues, welcoming of a constructive Chinese regional role, and development of a comprehensive strategy to pursue the full range of U.S. regional objectives.

### Defense Horizons 63

#### *The Role of Medical Diplomacy in Stabilizing Afghanistan*

Donald F. Thompson, a colonel and senior flight surgeon in the U.S. Air Force, served as command surgeon for Combined Forces Command–Afghanistan. In this analysis, he examines the health sector as a microcosm of the larger problems facing the United States and its allies in stabilizing Afghanistan. He finds that efforts to rehabilitate the health sector there suffer from many of the interagency coordination defects that have plagued the broader U.S. approach to postconflict stabilization. He argues that the solution to successful stability operations rests in unity of command and access to resources sufficient to make a difference, and recommends specific actions to provide a foundation for essential health care services and a catalyst for other reconstruction efforts as well.

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## COMMENTARY | The Use of Military Force by the President

sess. (1969); U.S. Commitments to Foreign Powers, Hearings before the Senate Committee on Foreign Relations, 90<sup>th</sup> Cong., 1<sup>st</sup> sess. (1967), 16–19.

<sup>4</sup> Gulf of Tonkin Resolution, H.R.J. Res. of August 10, 1964, Pub. L. No. 88–408, 78 Stat. 384.

<sup>5</sup> Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: Norton, 1969), 414, 415.

<sup>6</sup> See Department of State, Historical Studies Division, *Armed Actions Taken by the United States without a Declaration of War, 1789–1967*, Res. Proj. No. 806A, Washington, DC, 1967, available at <<http://fpc.state.gov/documents/organization/101751.pdf>>.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Fleming v. Page*, 9 How. (50 U.S.) 603, 615 (1850).

<sup>9</sup> *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952).

<sup>10</sup> *Totten v. United States*, 92 U.S. 105 (1876).

<sup>11</sup> *Mitchell v. Harmony*, 13 How. (54 U.S.) 115 (1852); *United States v. Russell*, 13 Wall. (80 U.S.) 623 (1871); *Totten v. United States*; 40 Ops. Atty. Gen. 250, 253 (1942).

<sup>12</sup> *Fleming v. Page*, 603, 615.

<sup>13</sup> *Santiago v. Nogueras*, 214 U.S. 260 (1909). Within occupied territory, see *Dooley v. United States*, 182 U.S. 222, 230–231 (1901).

<sup>14</sup> Joseph Story, *Commentaries on the Constitution of the United States* (Durham: Carolina Academic Press, 1833, rpt. 1987), 546–547.

<sup>15</sup> Cong. Rec., 79<sup>th</sup> Cong., 1<sup>st</sup> sess., vol. 19, pt. 8, November 26, 1945, at 10967.

<sup>16</sup> Cong. Rec. 79<sup>th</sup> Cong., 1<sup>st</sup> sess., vol. 91, July 27, 1945, at 8127–8128.

<sup>17</sup> Cong. Rec. 79<sup>th</sup> Cong., 1<sup>st</sup> sess., vol. 91, July 26, 1945, at 8065.

<sup>18</sup> Special Message to the Congress Regarding United States Policy for the Defense of Formosa, January 24, 1955, in *Public Papers of the Presidents: Dwight D. Eisenhower, 1955*, vol. 3 (Washington, DC: U.S. Government Printing Office, 1999), 209–210, available at <[www.presidency.ucsb.edu/ws/index.php?pid=10355](http://www.presidency.ucsb.edu/ws/index.php?pid=10355)>.

<sup>19</sup> *Ibid.*, 209; Pub. L. 4, 84<sup>th</sup> Cong. (69 Stat. 7) (1955).

<sup>20</sup> See discussion in William M. Goldsmith, *The Growth of Presidential Power: A Documented History*, vol. 3 (New York: Chelsea House, 1974), 1872–1874.

<sup>21</sup> Pub. L. No. 88–408, 78 Stat. 384 (1964).

<sup>22</sup> *Ibid.*

<sup>23</sup> See Robert Turner, "The Authority to Use the Armed Forces," in *National Security Law*, 2<sup>d</sup> ed., ed. John Norton Moore and Robert F. Turner (Durham: Carolina Academic Press, 2005), 871.

<sup>24</sup> See Memorandum by the State Department Legal Advisor Leonard C. Meeker, "The Legality of the United States Participation in the Defense of Viet-Nam," March 4, 1966.

<sup>25</sup> *Ibid.*

<sup>26</sup> See discussion in Richard E. Grimmett, "Foreign Policy Roles of the President and Con-

gress," June 1, 1999, available at <<http://fpc.state.gov/6172.htm>>.

<sup>27</sup> Pub. L. No. 93–52, 87 Stat. 130 (1973).

<sup>28</sup> S. J. Res. 2 (1990).

<sup>29</sup> President Clinton issued Presidential Decision Directive (PDD) 62, "Combating Terrorism," on May 22, 1998, available at <[www.fas.org/irp/offdocs/pdd-62.htm](http://www.fas.org/irp/offdocs/pdd-62.htm)>.

<sup>30</sup> Quoted in Robert C. Toth, "Preemptive Anti-Terrorism Raids Allowed," *The Washington Post*, April 16, 1984, A19.

<sup>31</sup> Robert C. McFarlane, "Terrorism and the Future of Free Society," speech delivered at the National Strategic Information Center, Defense Strategy Forum, Washington, DC, March 25, 1985, and later printed in *Terrorism* 8, no. 4 (1986), 315–326.

<sup>32</sup> George P. Shultz, "Terrorism and the Modern World," speech delivered at Park Avenue Synagogue, New York City, October 25, 1984.

<sup>33</sup> See Phillip Taubman, "The Shultz-Weinberger Feud," *The New York Times Magazine*, April 14, 1985, 3.

<sup>34</sup> Hugh Tovar, "Low Intensity Conflict: Active Responses in an Open Society," paper prepared for the Conference on Terrorism and Other "Low Intensity" Operations: International Linkages, Fletcher School of Law and Diplomacy, Medford, MA, April 1985, 24.

<sup>35</sup> Abraham Miller, "Terrorism and Hostage Taking: Lessons from the Iranian Crisis," *Rutgers-Camden Law Journal* 13 (1982), 523.

<sup>36</sup> George P. Shultz, "Low-Intensity Warfare: The Challenge of Ambiguity," address before the Low-Intensity Warfare Conference at the National Defense University, January 15, 1986.

<sup>37</sup> See Presidential Decision Directive 62, "Combating Terrorism," available at <[www.fas.org/irp/offdocs/pdd-62.htm](http://www.fas.org/irp/offdocs/pdd-62.htm)>; Presidential Decision Directive 63, "Critical Infrastructure Protection," available at <[www.fas.org/irp/offdocs/pdd-63.htm](http://www.fas.org/irp/offdocs/pdd-63.htm)>.