ROGUE PRESIDENTS AND THE WAR POWER OF CONGRESS

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Since World War II we have engaged in overt and covert war and acts of war, often initiated by the president without the authorization of Congress. By presidential directive we have conducted full-scale war; initiated coups; mined harbors; encouraged political assassination; aided insurrection and sabotage; trained, equipped, and set loose our own brigands and terrorists; and responded to terrorist acts against our citizens by executively approved reprisals. We do this in violation of the Constitution, in disregard of the laws and prerogatives of Congress, and in open defiance of international law and morality. Both the scope and the notoriety of such violence conducted by this administration has changed the meaning of covert war from secret war simply to formally unacknowledged war, brazenly supported in contravention of world law and the United States Constitution, in contempt of Congress.

The theme of this conference, suggesting a strong-willed if misdirected Congress treading on presidential foreign policy and war power prerogatives, is wrong on both counts. It reflects the thinking of an era that is dazzled by executive dispatch, frustrated with due process of law, and unfaithful to democratic government.

Perhaps most important of all, we have ignored the dialectic relationship that exists between ends and means. For the means we select to defend our society will profoundly affect its nature. Sure of our own moral superiority, transfixed with our need to defend our society and our economic advantage at all costs, and propelled by fear and by powerful ideology, we have ignored the necessity of congruence between the ends we seek and the means we select to get there. The violence we have unleashed, primarily in proxy wars in the Third World, has not been mitigated by lawful origin or conduct. The Manichaean world view of black and white, moral absolutes of good and bad, has led resolutely to a rejection of legal and moral restraints on our own conduct in our struggle with the Soviet Union. This zealousness, in turn, has led to fatal misjudgment of the nature of political change within Asia, Africa, and Latin America, whether that political change was accomplished by violence or by democratic process. We have interpreted almost all political change

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— whether propelled by processes of decolonization, economic deprivation, or whatever else — as being dominantly motivated and characterized by our struggle with the Soviet Union.

Similarly, this absolutist world view will almost surely lead to some of the same tactics of covert activity being applied to domestic opponents of the government. Our covert actions within the Third World usually begin within the context of intelligence gathering and surveillance. When domestic opposition to our involvement in covert war threatens to obstruct an endeavor seen as a holy crusade, with allegiance given a leader instead of the higher fidelity being given to our law and the Constitution, there will be impatience with restraints of law on our choice of means. Spying, intimidation, and manipulation of domestic political opponents will occur as a government sees itself as defending a higher good against the activities of those who would subvert such a system.

I. THE WAR POWER[1]

The Constitution of the United States grants Congress the power "to declare War" and to "grant Letters of Marque and Reprisal."[2] There is no question that the original intent of the framers of the Constitution was to vest in the Congress the complete power to decide on war or peace, with the sole exception that the president could respond to sudden attacks on the United States without congressional authorization.

President Reagan has repeatedly attempted to distinguish between a congressional power to "declare" war formally and a presidential decision to go to war even though undeclared. Such a facile distinction was never intended by the framers of the Constitution.

Congress exclusively possesses the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, *de jure* or *de facto*. The only exception is the power of the president to respond to sudden attacks on the United States.

The position that Congress possesses the sole power to decide for war or peace is supported with absolute clarity of intent of the Founding Fathers. During the Constitutional Convention, debates in the Committee on Detail centered around an original printed draft of the war power clause providing that "[t]he legislature of the United States shall have the power . . . to make

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1. Portions of this argument were presented in The Reynolds Lecture: Ends and Means in Conflict, given at the University of Utah, Salt Lake City, Utah (Oct. 15, 1987); and in Firmage, *Covert War and the Democratic State: An Essay on Ends and Means*, Present Tense, July-Aug. 1988, at 55, and are used here with permission.

2. U.S. Const. art. I, § 8, cl. 11.

war . . . ."[3] One member of the committee, Charles Pickney, opposed giving this power to Congress, claiming that its proceeding would be too slow.[4] Pierce Butler instead said that "[h]e was 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."[5] Butler's motion received no second.

However, James Madison and Elbridge Gerry were not satisfied with the proposal of the Committee on Detail that the legislature be given the power to make war. Instead, they moved to substitute "declare" for "make," "leaving to the Executive the power to repel sudden attacks."[6] The meaning of this motion, which eventually was carried by a vote of seven states to two, was clear. The power to initiate war was left to Congress, with the reservation from Congress to the president to repel a sudden attack on the United States.[7]

Our history, while checkered with congressional ratification of presidential acts and by presidential abuse and congressional malfeasance on occasion, clearly reveals the norm of congressional control and presidential dependence in the decision for war and peace. This is so through the Indian wars, the Whiskey Rebellion, the Barbary pirates, to the Civil War, and from our endemic preoccupation with intervention in the Caribbean to border crossings into Mexico and Canada. Our pattern continued through two world wars until Korea and Vietnam.

In 1789, Thomas Jefferson made this statement of insight: "We have already given . . . one effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay."[8]

James Madison noted that "[t]he executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."[9] Hamilton, the advocate of presidential power in the Philadelphia Convention, nevertheless recognized that the president's power "would amount to nothing more that the supreme command and direction of the mili-

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3. 2 The Records of the Federal Convention of 1787, at 318 (M. Farrand rev. ed. 1966).

4. *Id*

5. *Id.*

6. *Id.*

7. *See* 2 The Records of the Federal Convention of 1787, at 313, 318 (M. Farrand rev. ed. 1937); *See also* F. Wormuth & E. Firmage, To Chain the Dog of War: The War Power of Congress in History & Law 17-18 (1986).

8. 15 Papers of Thomas Jefferson 397 (J. Boyd ed. 1978), *quoted in* F. Wormuth & E. Firmage, *supra* note 7, at 67-68.

9. J. Madison, Letters and Other Writings 611, 643 (1884), *quoted in* F. Wormuth & E. Firmage, *supra* note 7, at 179.

tary forces," since the president lacked the British Crown's authority to declare war and raise armies.[10]

The power given Congress rests upon the constitutional text that Congress be empowered to "declare War and grant Letters of Marque and Reprisal." This entails the power to decide to wage war, declared or undeclared, fought with regular public forces or by privateers under governmental mandate. While letters of marque and reprisal originally covered specific acts, by the eighteenth century letters of marque and reprisal referred to sovereign use of private and sometimes public forces to injure another state. It was within this context that the constitutional framers vested Congress with the power to issue letters of marque and reprisal.[11] Clearly, only Congress has the constitutional power to wage war by private parties as well as by the armed forces of our country.

Although Lincoln in the Civil War used that crisis to push original constitutional intent to the limit, he did so with theories of constitutional empowerment and congressional acts, prospective and retrospective. As Harold Hyman noted, clearly he rejected European notions of état de siège.[12] Franklin Roosevelt would do the same in moving us from isolation and neutrality into alliance and war. The theme before Korea and Vietnam could be summarized by the opposition of Illinois Whig Representative, Abraham Lincoln, to President Polk's adventures into Mexico. Polk asserted a presidential right to invade another nation as an act of self-defense as commander in chief. "Allow a President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at his pleasure." The framers gave this singular power to Congress, not one person, Lincoln said, so that "no man should hold the power of bringing this oppression upon us."[13]

It was in Korea and Vietnam that presidents, their counselors, and some academics would assert a presidential power apart from congressional act to wage war under whatever name. The State Department in 1950 attempted to justify President Truman's entry into the Korean War by referring to the President's executive power, his power as commander in chief, his power to conduct foreign relations of the United States, and the United Nations Charter.

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10. *Id.*

11. J. Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035 (1986).

12. H. Hyman, Quiet Past & Stormy Present?, American Hist. Ass'n (1986).

13. 1 The Collected Works of Abraham Lincoln 451-52 (R. Basler ed. 1953), *quoted in* F. Wormuth & E. Firmage, *supra* note 7, at 56.

Perhaps the closest we came to proposing that foreign crisis or war produced extra-constitutional executive power was the government's position during the Korean War in the *Steel Seizure*[14] case, a position rejected most purely by Justice Black, most pragmatically and practically by Justice Jackson, and most narrowly by Justice Frankfurter.[15]

The abuses of congressional prerogatives in foreign affairs during the Korean and Vietnam Wars proved these constitutional provisions alone to be insufficient. Congress responded to this realization by passing the War Powers Resolution of 1973[16] and the Intelligence Authorization Act for Fiscal Year 1981[17], in order to provide a means of congressional control and oversight over the power to initiate hostilities and over the intelligence gathering process.[18]

In asserting presidential power as commander in chief to initiate hostilities with the Armed Forces of the United States, President Reagan has referred to numerous occasions when acts of war were begun by executive act rather than by congressional authorization. In fact, our history tells quite a different story.

In 1967 the State Department compiled an official list of 137 instances where it asserted that the president, as the commander in chief of the armed forces, committed acts of war on his own authority beyond the borders of the United States. Careful scrutiny of the examples provided by the government belies this assertion: eight of the acts involved enforcement of the law against

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14. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951).

15. *Id.* at 587. *See also* F. Wormuth and E. Firmage, supra note 7, at 171.

16. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. 1541-1548 (1982)).

17. Pub. L. No. 96-450, 94 Stat. 1975 (1980) (codified in scattered sections of Titles 10, 22, & 50 U.S.C. (1982)).

18. The Intelligence Authorization Act for Fiscal Year 1981, Pub L. No. 96-450, 94 Stat. 1975 (1980) (codified in scattered sections of 10, 22, and 50 U.S.C. (1982)), imposes duties on executive branch officials, in particular the Central Intelligence Agency: (1) to keep the congressional intelligence committees fully and currently informed of intelligence activities; (2) to provide prior notification of significant anticipated intelligence activities, chiefly covert operations; (3) to furnish any information or materials requested by the intelligence committees concerning intelligence activities; and (4) to report in a timely fashion on any illegal intelligence activities or significant intelligence failures. *See* 50 U.S.C.A. § 413 (Supp. 1988).

The Neutrality Act, an additional restriction on executive military discretion, has existed since 1794. Congress passed the Neutrality Act to prevent foreign interference in United States affairs and to strengthen the authority of the central government in respect to its citizens. The Act was also designed to further the war powers of Congress. The Act accomplishes this by denying the executive the power unilaterally to authorize hostile expeditions and foreign recruiting, and the discretion not to enforce the statute's prohibitions. By doing this, the Neutrality Act reaffirms the original constitutional intent of collegiality, ensuring that no individual is allowed to threaten the peace by unilateral acts of warfare. *See also* 18 U.S.C. § 960 (1982); J. Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in the United States Foreign Policy*, 24 Harv. Int'l L.J. 1 (1983).

piracy for which no congressional authorization is required, sixty-nine were landings to protect American citizens many of which were statutorily authorized, twenty concerned illegal invasions of foreign or disputed territories which were not acts of war since the United States claimed the territory, six were minatory demonstrations without combat, another six involved protracted occupations of various Caribbean states that were authorized by treaty, and at least one was an act of naval self-defense which is justified by both international and municipal law. Even in the one or two dozen instances when the president has acted without congressional authorization, he has done so by relying falsely on either a statute, a treaty, or international law, never on his power as the commander in chief or the chief executive. Clearly, neither the Constitution nor historical precedent empowers the president to initiate a state of war or engage in an act of war on his own authority beyond the borders of the United States. The presidential war-making power is strictly limited to defending against sudden attack.[19]

II. POWER OVER FOREIGN RELATIONS

The power of Congress within foreign relations rests upon many constitutional statements of sweeping empowerment. Congress may lay and collect taxes for the common defense, regulate commerce among the nations, define and punish offenses against the law of nations, declare war and grant letters of marque and reprisal, raise and support armies, provide and maintain a navy, make rules for the government of land and naval forces, provide for organizing and calling out the militia, and establish forts and arsenals[20]. The Senate as well has a collegial responsibility with the president in making treaties.[21] Finally, Congress has the power to make all laws necessary and proper to accomplish these enumerated objectives.[22]

Presidential text is limited to three statements: he is commander in chief,[23] he possesses executive power,[24] and he is to "take care" that the laws of the Congress are faithfully executed.[25] As commander in chief the president was intended simply to be Congress's general. No new power was conveyed by the constitutional statement on executive power. The "take care" clause simply obligated the president to execute congressional laws. The latter

19. *See* F. Wormuth & E. Firmage, *supra* note 4, at 133-49.
20. U.S. Const. art. I, § 8.
21. *Id.* at art. II, § 2, cl. 2.
22. *Id.* at art. I, § 8, cl. 18.
23. *Id.* at art. II, § 2, cl. 1.
24. *Id.* at art. II, § 1, cl. 1.
25. *Id.* at art. II, § 3.

has been asserted to be an executive "necessary and proper" clause by ironic, if not cynical, bootstrapping.

Under these provisions Congress not only possesses sole power to decide for war, establish and govern our military forces, determine rules for their governance and use, and establish our commercial relations with other states, but also Congress with the president should establish and direct the strategy of our foreign relations. As Professor Louis Henkin observed, the treaty power invested in the president and the Senate gives the tip-off to the framers' intent.[26] Since foreign relations were conducted primarily by treaty in the eighteenth century, the bestowal upon the Senate and the presidency of the treaty power reveals the determination that our foreign relations should be governed collegially.

The president is the executor of a foreign policy to be determined by the Congress and the president together. Congress, as lawmaker, clearly can and should influence the strategy of our foreign policy. The president, as executor, should be respected as such by the Congress. Intelligence, including sensitive intelligence, should be shared by the executive with appropriate elements of Congress, from leadership within the committees of Congress to the entire body.

During two centuries under the Constitution, great power to determine as well as to execute our foreign policy has accrued to the president. This power of determination and direction of foreign policy is not necessarily undesirable or unconstitutional. But Congress possesses strong textual and historical empowerment in the determination and the direction of foreign policy as well. Without consensus between the political branches, our foreign policy will be more troubled and less successful.

Consensus between Congress and the president, a commodity not found in abundance during the past two decades, can hardly form without full respect shown Congress by the president. Collegial dialogue is essential. Presidential governance of foreign policy, without full congressional participation, cannot result in consensus. Attempts by the Reagan administration to conduct private war in Nicaragua, for example, in defiance of congressional statute, will engender hostility from Congress, not consensus.

Particularly when covert actions are contemplated, consensus is vital. When covert action goes beyond intelligence gathering and approaches acts of violence and war, the president is obliged not only to seek congressional consensus but approval. Without such approval the president is forbidden by the Constitution to initiate acts of covert war.

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26. L. Henkin, Foreign Affairs and the Constitution (1972).

III. COVERT WAR[27]

The existence of nuclear weaponry and the threat of the use of such weaponry in general war have discouraged all-out war between the two giants who emerged from World War II. However, the intensity of the ideological and geopolitical rivalry between them resulted in war nevertheless, albeit covert war.

By extra-constitutional and illegal means, we initiated the fall of the legitimate government of the populist nationalist Mohammed Mossedegh in Iran and unseated the land-reforming government of Jacobo Arbenz Guzman of Guatemala. We experienced disastrous failures in our attempts to prevent Baath Party control in Syria. We employed Sumatran pirates in our attempted coup against Sukarno in Indonesia for the sin of nonalignment. We carried on paramilitary operations in Tibet from the 1950s into the 1970s, prolonging and exacerbating the agonies of a subject people without the slightest hope of affecting the government of the People's Republic of China. We invaded Cuba at the Bay of Pigs, overthrew the government of Patrice Lumumba in the Congo and were complicit in his death. In Laos, the CIA secretly supported a right-wing faction in the military against the legitimate but neutralist government, forcing the incumbent into alliance with the Communists. In Vietnam we waged clandestine war under Kennedy before and during the time of our open involvement, bombing supply lines of the Viet Minh, dropping toxic chemicals and defoliants. We made league with Southeast Asian drug ringleaders and have a country awash with heroin and marijuana to show for it. After 1968 Nixon escalated secret warfare across the Vietnamese border into Cambodia. Hundreds of cross-border operations occurred in 1967 and 1968 and over one thousand during the next two years. B-52 carpet-bombing commenced in 1969. Pentagon records were falsified to indicate that the raids occurred in South Vietnam. Our support of the Kurds of Kurdistan at the urging of the Shah of Iran in his dispute with Iraq ended in Kurdish disaster when we abandoned them after the Shah made temporary peace with Iraq.

In Chile we were successful in ending a century of democratic tradition by our covert operations that aided in the overthrow and murder of Salvador

27. The factual conclusions of this portion of the paper relating to covert war are drawn from numerous sources, most particularly from J. Prados, Presidents' Secret Wars: CIA and Pentagon Covert Operations Since World War II (1986); L. Cockburn, Out of Control: The Story of the Reagan Administration's Secret War in Nicaragua, the Illegal Arms Pipeline, and the Contra Drug Connection (1987); and G. Treverton, Covert Action: The Limits of Intervention in the Postwar World (1987).

Allende Gossens and the earlier assassination of the commander of the Chilean armed forces, a Constitutionalist who vigorously opposed any coup who was killed as he resisted being kidnapped. General Augusto Pinochet, chief of staff, led the coup that overthrew and killed Allende.

After the hey day of CIA covert war in Vietnam, Laos, and Cambodia, a rapid decline in covert actions occurred under Presidents Ford and Carter. By 1980 covert action received less than five percent of the CIA's budget. Under the Reagan administration covert actions tripled in number. By the mid-1980s, covert action accounted for about one-third of the CIA's budget.

Within weeks of his inauguration, President Reagan prepared for war in Nicaragua by a presidential "finding" that authorized covert war. After creating the Contras from the remnants of former dictator Somoza's National Guard and arranging for their training from our own CIA or under Argentine trainers fresh from their own "dirty war" against their own countrymen, we sent the Contras into Nicaragua against "soft targets" such as power plants, schools, transportation, and people. This guaranteed a protracted war of attrition marked by terrorism and atrocity, disproportionate civilian casualties, and enormous suffering. In late 1983 and early 1984, before Congress temporarily turned off the money spigot with the Boland Amendment, Reagan and CIA Director Casey laid plans for alternative funding of the Contras. This was done through subterranean channels with aid from Brunei, Saudi Arabia, and Israel. Private funds were tapped in the United States, South Korea, Taiwan, and Latin America. Primarily, however, governmental support continued under cover of private means used to distract the press and our own citizens.

Old CIA hands and covert warriors from adventures in Laos, Vietnam, the Bay of Pigs, Guatemala, and Chile returned to take part in the sale of weapons to the Ayatollah Khomeini in Iran and to wage war in Nicaragua, including Casey, Singlaub, Secord, and others. Lieutenant Colonel Oliver North coordinated the gathering of money and armaments and the training and direction of the forces we created: the Contras.

What have we to show for all this? Perhaps we made the world safe for the United Fruit Company in Guatemala, for the moment. Concommitantly, however, we unleashed a ruthless militarist government and guerilla opposition which together have killed thousands of their own countrymen.

In Iran and throughout much of the Middle East, we are roundly hated. British and American interests are gone. Latin American movements toward economic and social reform and democratic government can hardly look to America for support. We have initiated coups against elected governments and supported ruthless military governments who wage war against their own people. Our efforts have exacerbated, if not precipitated, massive death and dislocation of millions of people in Asia. We are directly responsible for

thousands of deaths and great suffering, including the dislocation of tens, if not hundreds, of thousands of people: Meo tribesmen from Laos and thousands from Cambodia, Vietnam, El Salvador, Guatemala and Chile.

In our own country, we pay a price. Our laws governing war and violence, found in the Constitution, in statutes of Congress, and in international law, are shredded by an administration driven by an intense ideological zealousness unmatched in this century.

We have created thousands of mercenaries, modern brigands, who fight for the highest bidder in Africa, Asia, and Latin America. Trained by the CIA or special forces, these men kill and corrupt for a fee.

Congressional control of the war power, to decide for war or peace, absent a sudden attack on our country, was meant by the framers to be complete. This control has been lost by congressional default as much as by presidential usurpation.

We are naive indeed if we believe that our domestic politics will not be affected by these methods and these practitioners of subversion. If our assurance of the righteousness of our goals is so complete that our means, however brutal, can be ignored, why should questions of law and morality stop the application to those in our own country who would obstruct our course? If, as Oliver North eloquently and starkly stated, our allegiance is to the leader who shares the end vision rather than to the constitutional system of democratic means, why not apply the same tactics to those of our fellow citizens who stand in the way? The participation by CIA agents Howard Hunt and James McCord in Watergate points the way.

Our culture, already drenched with drugs, is subjected to new sources of cocaine and the criminal activity it spawns as sources in Laos and Thailand find their way here through the same murky channels that supply guns and money. Now we have as well Central American sources in Colombia, Costa Rica, Panama, and Nicaragua.

We have, indeed, suffered an appalling loss of virtue. How did we get here? By what failure of leadership do we find ourselves initiating and supporting war, massive death, and suffering?

The ferocity of our ideological struggle with the Soviets since World War II has blinded us to the dialectical relationship that always exists between ends and means. Perhaps the initiation of the Cold War with Russia so soon after the truly unique war against Hitler's Germany, coupled with the enormity of Stalin's crimes against his own people, seduced us into continuing our belief in a Manichaean world of moral black and white. We therefore continued

O.S.S.[28] activity, operating at the margin of law even during wartime, through the CIA into a time of peace.

World War II has been called the last just war. We came close, at least, to objective good and evil in opposition to each other in that war, which was characterized by naked aggression and war crimes including the greatest crime against humanity of all time, the Holocaust. Within this mental paradigm of absolutes we continued the crusade, blinded to the dialectic between ends and means.

With atomic and then hydrogen bombs in possession of an enemy who dominated Eastern Europe, then allied with a communist giant on the Asian continent, that we thought was behind much of the violence in the Third World, we felt we must act; yet, overt, acknowledged war was too dangerous.

A passage from the Doolittle Report of Covert Operations, commissioned by President Eisenhower, reveals the powerful ideological zealousness of the time: "Another important requirement is an aggressive covert psychological, political and paramilitary organization more effective . . . and, if necessary, more ruthless than that employed by the enemy . . . . There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply."[29]

Somehow we forgot, for a time, that such savage means — the world of car bombs and terrorism, paramilitary action, intentionally killing and maiming civilians, subverting legitimate government, corrupting mass media in other countries and in our own — would inevitably affect the end we sought: peace and justice in our own land.

Conclusions can be drawn and lessons learned from our experience with covert action since World War II. The first is an observation about the tension between a democratic society and covert operations. A democratic state is built on decisions made openly in public debate. This is a compelling necessity when questions of war and peace, life and death are at issue. Consensus, vital in the establishment and the conduct of foreign policy, cannot be achieved in secret. Consensus between the president and Congress can hardly occur when the Congress is deliberately kept ignorant of covert actions of the government. By nature and definition, covert actions cannot be preceded by public debate and public consensus. Nostalgic reminiscence of the Vandenburg era consensus by supporters of so-called "strong" presidential leadership in the conduct of foreign policy is understandable. And the goal, consensus between the political branches in the conduct of foreign policy, is desirable. However, the proponents of a strong presidential leadership in foreign policy must

28. Office of Strategic Services.

29. Report of the Special Study Group on the Covert Activities of the Central Intelligence Agency (the "Doolittle Report") (Sept. 30, 1954) (declassified April 1, 1976).

understand the relationship between covert action kept secret from the target of such action and covert action kept secret from Congress. Consensus between the political branches becomes impossible by definition. Covert action possesses limitations yet more devastating to real consensus. For consensus between the political branches in reality only mirrors consensus achieved among the electorate. The nature of covert action makes this impossible, at least before the fact.

By definition, debate, legitimization, and wisdom from the electorate are unavailable. Critical flaws that would be apparent in the light of day do not appear. No debate occurs within government generally. Congress plays almost no role: "notification" at best going to a select few, dangerously close to an "old boy" network of senior committee chairmen and party leadership. Even debate between the White House and the Departments of State and Defense may be dangerously limited or nonexistent. Crucial parts of the Iran-Nicaragua affair, for example, saw White House control over the operations of clandestine activity go directly from the National Security Council to the CIA, excluding or ignoring the advice of cabinet officers at State and Defense.

Even within the CIA, the "need to know" division between intelligence evaluation and clandestine operations may make the assessment of the former without any impact on decisions and operations of the latter. Treverton concludes, for example, that Allende in Chile was not toppled by a rogue elephant CIA that really believed that Allende was a threat to the United States. As his regime governed for a few years, CIA estimates as to the survival of democracy in Chile became more and more optimistic. Yet pressure from the Nixon White House on CIA operations was unrelenting, possessing a life of its own, powered by ideological zeal rather than political facts. Once on track, this operation ground to its conclusion, however brutal, self-defeating, and unnecessary, much like the disaster, one would think the obviously foreseeable disaster, at the Bay of Pigs. Failure at the Bay of Pigs cost hundreds of lives, crippled our influence in Latin America, and began a chain of events that almost led to nuclear war in the Cuban missile crisis. "Success" in Chile meant the death of thousands of Chileans and a few citizens of the United States under a bloodthirsty tyranny. It also meant the death of a century of democratic tradition in Chile, a commodity in short supply in Latin America. It is not obvious how our own national security was advanced.

Of course, there is not simply a failure of the system if constitutional checks are available but are ignored. In supplying large numbers of our most lethal weapons to Iranian fanatics and terrorists, if the CIA is directed by the president not to comply with the law and inform Congress, and the objections of the administration's most senior cabinet officers in State and Defense are ignored, we pass the point where law and government may help. No system can protect us entirely from fools.

Second are some conclusions of law. Our Constitution commits the war power, the power to decide for war or peace, entirely to the Congress, not to the president, with but one exception. If a sudden attack on our country occurs, we are at war and the president may act in self-defense with no authorization from Congress, but in every other circumstance, the power of war and peace is with Congress.

The war clause grants Congress alone the power "to declare War" and "grant Letters of Marque and Reprisal." The "Letters of Marque and Reprisal" clause of the constitutional empowerment of Congress covers the determination for acts of war, whether covert or overt.

The war clause in its completeness, then, grants all power to decide on war to Congress, only a response to sudden attacks on this country being excepted. This includes public or private war, declared or undeclared, fought with public forces or by mercenaries or other brigands operating under authority of the state. This includes individual acts of war or sustained hostilities.[30]

No statute of Congress authorizes covert war or acts of war. The National Security Act of 1947[31], usually relied on by presidents for their illegal acts, makes no mention of covert action or paramilitary operations. While providing for intelligence acquisition and analysis, this statute authorized the CIA to "perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." On its face, this is not authorization for any paramilitary action and is most certainly no authorization for covert actions, unrelated to the acquisition of intelligence.

The Hughes-Ryan Amendment[32] forbids clandestine operations other than intelligence activity unless the president "finds" that such an operation is important to the national security and reports a description of the operation to Congress "in timely fashion." While it could be argued that this provision authorizes covert actions where the above specifications are met, the statutory language is in the negative, forbidding certain acts.

The commander in chief clause gives the president no power to commit forces of the United States to war or to acts of war when the nation is at peace. Only Congress is empowered to change this condition unless we are attacked. In any event, public forces of the United States would not usually be

30. *See* F. Wormuth & E. Firmage, *supra* note 7.

31. National Security Act, ch. 343, 61 Stat. 495 (1947) (codified as amended in scattered sections of 5 and 50 U.S.C. (1982)).

32. A rider to Intelligence Authorization Act for Fiscal Year 1981, Pub.L. No. 96-450, 94 Stat. 1975 (1980) (codified in scattered sections of 10, 22, and 50 U.S.C. (1982)).

involved in covert activity. More often, CIA officers and contracted agents, not under the commander in chief clause, would be used.

International law has been flagrantly violated by several administrations since the end of the Second World War in the conduct of covert actions. International law calls on states to resolve disputes by peaceful means, demands the protection of noncombatants, places severe limitations on acts of reprisal, denies the right of political assassination, brands terrorism a violation of the laws of war, forbids torture and mutilation, calls on all states to extend recognition and peaceful relations to other states. These and many other provisions of law are violated as a matter of course by covert war.

The term "covert action" could be used to include at least three categories of activity. First, and clearly within presidential power under an authorizing statute of Congress, is the acquisition and interpretation of intelligence. Some of this activity will occur by covert means. Short of war and acts of war, or violence and illegality prohibited by international law and acts of Congress, this activity is within presidential power.

The second and most troubling area conceptually is covert action beyond intelligence gathering but short of war, acts of war, or violence and illegality prohibited by statutes of Congress and by international law. Such activities might include some degree of manipulation of another country's media, their electoral, and governmental processes, or their economy. As such covert action approaches acts of reprisal, acts of war, or violence threatening the property or the integrity of another state, Congress should authorize such action before the president possesses clear authority to act.

The third category is clearer, more serious, and is equally clearly within the war power of Congress. This includes covert war and acts of war, reprisals, and other acts of violence. These acts usually share one or both of two criteria: violence at such a level as to be forbidden by municipal and international law and direct intervention in another state designed to affect its sovereign autonomy. Such activity is prohibited from presidential undertaking without congressional authorization. Even with congressional sanction a large part of such activity is nevertheless prohibited by international law.

The president's approval of covert CIA activities directed at overthrowing the Nicaraguan government without full disclosure to Congress and without congressional empowerment and covert activities conducted by administration officials, with or without express presidential approval, raise serious constitutional, statutory, and political questions about the president's capacity to administer his office properly, as does the apparent "disinformation" campaign aimed at Mr. Khadafy of Libya. Consider, for example, the earlier covert mining of Nicaraguan harbors and now the Iran-Contra scandal in light of the following statement by James Iredell, a member

of the Constitutional Convention in Philadelphia and later a Justice of the Supreme Court:

> [The President] must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them — in this case, I ask whether, upon an impeachment for . . . such an account, the Senate would probably favor him.[33]

Third are some philosophical conclusions. There is indeed a dialectic relationship between ends and means. Warlike means, however covert, will come back to haunt us in many ways. Most importantly, we are distinguished most realistically from our adversaries not by the ends we seek but by the limitations we are willing to place on the means we employ to obtain them.[34] We all seek peace and security in a just state, however defined. Only a tyranny largely unaffected by a morality that places enormous value on human life could justify the initiation of murderous violence other than in the most compelling circumstances of self-defense when no choice of peaceful means are available. That simply is not the record of our own experience with covert actions.

Our system of constitutional government is violated by the means of covert war and acts of violence and war. No reformation of those murderous means seems possible that might change this conclusion.

Fidelity to our own process is a compromise that humans who lead make with each other and with those they lead as an institutional reflection of our common fallibility. Government itself is a recognition of such fallibility. Those who break this bond demonstrate an arrogance that makes them unsuitable for governmental responsibility.[35]

Few goals of foreign policy are so valuable that we should do such violence to our system of government to achieve them. Our terrorists are not physically or spiritually distinguishable from their terrorists. The only thing that stops our terrorists from running away with the state is our deeply rooted constitutional system. This system is dominated almost entirely by the defi-

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33. The Debates in the Several State Conventions on the Adoption of the Federal Constitution 127 (J. Elliot ed. 1907); *See also* F. Wormuth & E. Firmage, *supra* note 7, at 277; Firmage, *The Law of Presidential Impeachment*, 1973 Utah L. Rev. 681 (1974); Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law and Impeachment*, 1974 Duke L.J. 1023 (1974).

34. *See* Firmage, Ends and Means in Conflict: The Reynolds Lecture, *supra* note 1.

35. *Id.*

nition of means: the jurisprudence of due process of law and democratic government.

The Mafia reputedly began as a patriotic movement dedicated to Italian national unity. The Ku Klux Klan began, ostensibly at least, to temper Reconstructionist excess. Their choice of violent means, coupled with massive assurance of their own virtue and omniscience, led to a fatal perversion of their own essence.

Intelligence gathering in our imperfect world may well be necessary. But the huge majority of our intelligence comes through means both open and legal. The CIA and other parts of government read thousands of documents from other lands. Individuals, private and public actors, cross increasingly porous borders. Professional groups conduct exchanges and read each other's literature. Formal governmental relations provide vital contacts. Electronic devices, more exotic but not unambiguously illegal, allow us to see each other and hear each other almost without the capacity to interdict. Foreign operatives, "spies," see, hear, sniff.

This is enough. Our record of covert war and acts of war is one of short-term embarrassment and long-term disaster. The advantages we achieve are overwhelmed by the violence we do to others and to ourselves. No system of congressional oversight realistically can meet this challenge. If acts of violence and war are contemplated, let us debate this possibility in the open. I prefer the obvious risks this would entail, to the corruption of our government and our souls that is unavoidable in covert decisions to engage in covert war.

IV. CONCLUSION

> The more I reflected on the experiences of history, the more I have come to see the instability of solutions achieved by force and to suspect even those instances where force has had the appearance of resolving difficulties.
>
> Sir Basil Liddell Hart[36]

The framers of our Constitution separated the power to decide for war from the power to conduct it. The power to initiate war, except for sudden attack upon our country, was lodged exclusively in the Congress. The president was confined to conducting war once Congress had decided upon such a course.

The assumptions behind this separation of war power are as vital to us two hundred years later as they were when these ideas were penned in Philadelphia. The executive or monarchial inclination to make war impul-

36. Sir Basil Liddell Hart, Why Don't We Learn From History? 72 (1971).

sively, without deliberate debate among a sizeable and varied body of people, was thought by many to have contributed to decades of war that ravaged Europe. War came almost to be the natural condition, interrupted rarely by periods of peace.

The framers thought that by denying to the president the monarchial power of raising armies and deciding for war, and by placing such powers in the Congress, the sensitivities of the people who had to fight such wars and pay for them would be reflected through their representatives. In other words, the condition of peace, not war, was considered to be normal. The biases and presumptions of law and government, the inertia factor, were placed on the side of peace. Those who were for war had the burden of persuasion. Only after open debate in a deliberative body, a process intentionally meant to prevent precipitous, cavalier action, would the state move from peace to war.

A number of factors have eroded these constitutional checks against war. Two world wars and a depression in this century have moved much power in government from the deliberative body, Congress, to the executive. Certain advantages of administration and dispatch are obvious, but the costs of executive abuse, such as Watergate, Iran, and Nicaragua, and executive war in Korea and Vietnam, have been devastating. Perhaps government based upon an assumption of perpetual crisis fulfills its own presumption.

More than half of our people now living in a very real sense have not known peace. We have been subject to a Cold War since World War II ended. Previous generations have enjoyed peace at least between wars. Now almost every problem, domestic and foreign, is considered within a matrix of a cold war. Hatreds that in times past were intentionally set loose in time of war were mercifully confined to the periods of war, 1914 to 1918 and 1941 to 1945. Now endemic fear is maintained through generations.

Administrations preach hatred and suspicion of foreign foes for domestic political advantage as much as for preparedness to meet an enemy. A military-industrial complex has become a permanent part of an economic structure that has become addicted to massive military spending. With the government officers who all too often join the companies with whom they dealt while in government, these industries perpetuate themselves without regard for the national interest. In decades past, a peacetime economy would change temporarily to build instruments of war and then quickly revert to the productivity of peace. Now our scientists and engineers are increasingly drawn into producing the technology of war while the infrastructure of our economy, from our factories to our transportation systems, erodes and our spending for social needs is squeezed below the minimal requirements of social justice.

It is time to renew our commitment to a condition of peace and to our institutional structures that preserve it.