

Arrogance of Power Reborn The Imperial Presidency and Foreign Policy in the Clinton Years

by Gene Healy

Executive Summary

In his classic 1973 book *The Imperial Presidency*, historian Arthur Schlesinger Jr. warned that the American political system was threatened by “a conception of presidential power so spacious and peremptory as to imply a radical transformation of the traditional polity.” America’s rise to global dominance and Cold War leadership, Schlesinger explained, had dangerously concentrated power in the presidency, transforming the Framers’ energetic but constitutionally constrained chief executive into a sort of elected emperor with virtually unchecked authority in the international arena.

As William Jefferson Clinton came to power in January 1993, there was some reason to hope that the imperial presidency would be scaled back. Clinton, after all, was the first post-Cold War president and a member of a political party that had in the wake of the Vietnam War striven to restrain presidential aggrandizement in foreign policy.

Such hopes proved illusory. Throughout his administration, President Clinton has adopted a view of his executive power that is positively Nixonian in its breadth and audacity. The administration insists that the Comprehensive Test Ban Treaty still binds the United States under international law, even though the Senate explicitly declined to ratify that agreement. Administration

officials likewise insist that the Anti-Ballistic Missile Treaty is still in effect even though one of the contractual parties (the Soviet Union) no longer exists. The administration has attempted to implement provisions of the Kyoto Protocol on the environment while continuing to refuse even to submit the treaty to the Senate for ratification. Those actions demonstrate that President Clinton has routinely abused the treaty power.

In addition to the abuse of the treaty power, the president has repeatedly usurped the congressional war power. In Haiti, Iraq, Sudan, and Bosnia, the Clinton administration displayed its contempt for the constitutional process and asserted a unilateral power to wage war without congressional approval. The most flagrant example was the 78-day air war conducted against Serbia in 1999 despite Congress’s adamant refusal to approve the action.

As we approach the end of President Clinton’s second term, the imperial presidency is as unconstrained and as menacing as it has been at any time since the Vietnam War. Bold congressional action is needed to reclaim legislative authority over the war power and the treaty power. Only then will America have an executive branch that comports with republican principles of government and the original constitutional design.

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Introduction

Odd as it might now seem, opponents of the imperial presidency had reasons for cautious optimism upon William Jefferson Clinton's accession to the presidency in January 1993. The first Democrat elected to the nation's highest office in 12 years, the new president belonged to a political party that had since Watergate and the Vietnam War sought to rein in the executive's ability to conduct foreign policy without congressional authorization and oversight. The imperial presidency's major *raison d'être* had vanished with the collapse of Soviet Communism in 1989–91. During the Cold War, executive war making in Korea, Vietnam, and elsewhere had been rationalized as necessary to contain an enemy of unprecedented strength and menace: the Soviet Union. That enemy had vanished by the time President Clinton took office. In addition, various factors in the new president's personal and political background suggested that one might expect a retrenchment of the Caesar principle in foreign affairs.

Clinton had come of age, literally and politically, during the Vietnam War, a war that he had vehemently opposed. In his youthful letter to Arkansas ROTC commander Col. Eugene Holmes, Clinton explained: "I worked for two years in a very minor position on the Senate Foreign Relations Committee. I did it for the experience and the salary but also for the opportunity, however small, of working every day against a war I opposed and despised with a depth of feeling I had reserved solely [sic] for racism in America."¹ As Clinton later explained, his opposition to American involvement in Vietnam rested in part on the fact that it was an "undeclared war."²

Moreover, as the letter to Holmes indicated, the new president had begun his political career by working for Sen. J. William Fulbright (D-Ark.), chairman of the Senate Foreign Relations Committee and the imperial presidency's most forceful critic during the Vietnam era. Early in his career, Fulbright

was a rather conventional Southern hawk and a reliable supporter of presidential prerogative in foreign affairs. As chairman of the Foreign Relations Committee, he even helped President Lyndon B. Johnson shepherd through Congress the Gulf of Tonkin Resolution, which Johnson then treated as a declaration of war on North Vietnam, licensing whatever military action the president deemed necessary.

By 1966, when then-Georgetown undergraduate Bill Clinton came to work for Fulbright, the senator had utterly broken with the administration's war policy.³ Angered by what he saw as presidential deceit about Vietnam, Fulbright had concluded that the conflict in Vietnam was "a civil war—one that we really had no business getting involved with."⁴ Fulbright's reexamination of the Vietnam War led him to a broader critique of America's increasingly imperialistic foreign policy. As he wrote to President Johnson: "Greece, Rome, Spain, England, Germany and others lost their preeminence because of a failure to recognize their limitations, or, as I call it, the arrogance of power. . . . My hope is that this country, presently the greatest and most powerful in the world, may learn by the mistakes of its predecessors."⁵ In his book of the same name, Fulbright later described the "arrogance of power" as "the morality of absolute self-assurance, fired by the crusading spirit."⁶ That hubristic certitude combined with imperial overreach, Fulbright argued, brought with it a contempt for constitutional process and republican forms of government. If America's slide toward empire continued, Fulbright warned:

Whatever lip service might be paid to traditional forms, our Government would soon become what it is already a long way toward becoming: an elective dictatorship, more or less complete over foreign policy and over those vast and expanding areas of our domestic life which in one way or another are related to or dependent upon the military establish-

ment. If, in short, America is to become an empire, there is very little chance that it can avoid becoming a virtual dictatorship as well.⁷

Upon Fulbright's death in 1995, President Clinton reflected on the time he'd spent as a young man working for the senator: "If it hadn't been for him, I don't think I'd be here today."⁸ But whatever influence Fulbright may have had on the upward trajectory of his young protégé's political career, as president, Clinton seems to have absorbed little of Fulbright's critique of the modern presidency. Whereas Fulbright advocated a constitutionally constrained chief executive, Clinton asserted a presidential prerogative to wage war without congressional authorization. Whereas Fulbright viewed the Senate as an equal partner in the treaty-making process, Clinton refused to accept the Constitution's mandate that no treaty is binding without the approval of two-thirds of the senators present.⁹ In this, Clinton, more than any president in the post-Vietnam era, resembled Fulbright's aggrandizing adversaries: Lyndon Johnson and Richard M. Nixon. As a review of the administration's record will show, by the end of the Clinton era, the imperial presidency is stronger and more menacing than it has been at any time since the Vietnam War.

Recoiling from a forceful denunciation of the United Nations earlier this year by Sen. Jesse Helms (R-N.C.), Secretary of State Madeleine Albright told the UN Security Council on January 24: "Let me be clear. Only the president and the executive branch can speak for the United States."¹⁰ That, in essence, is the Clinton administration's view of the president's role in the foreign relations arena: the executive alone determines America's international commitments and diplomatic posture with respect to other nations. And, although dissenting views from particular senators—or even the Senate itself—are perhaps to be tolerated, those views certainly can have no impact on the president's unilateral authority to "speak for the United States."

The Clinton administration's view that the executive's authority to conduct foreign relations is unilateral and expansive has been particularly pronounced with respect to the treaty power. The administration has announced that the Comprehensive Test Ban Treaty, which was voted down by the Senate, is binding on the United States. The administration asserts that the Anti-Ballistic Missile Treaty remains in force, despite the fact that the other signatory to that treaty, the Soviet Union, has vanished and the Senate has not ratified ABM agreements with the Soviet Union's successor states. And the administration refuses to submit the Kyoto agreement on the reduction of greenhouse gases to the Senate for ratification, choosing instead to explore the possibility of implementing that agreement without the advice and consent of the Senate. Such imperious unilateralism is a far cry from what the Framers of the Constitution had in mind. They wholeheartedly rejected the idea that only the executive branch could "speak for the United States." Instead, they viewed the Senate and the president as partners in the formation of binding agreements with other countries.

The Treaty Power: The Original Understanding

Article II, section 2, of the Constitution provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors." Section 3 also empowers the president "to receive Ambassadors." Thus, in the arena of diplomatic relations, the president has three powers, only one of which is unilateral: the power to receive ambassadors.¹¹ In the making of treaties and the appointment of ambassadors, he shares power with the Senate, and the Senate's power here is more than ministerial or perfunctory. As constitutional historian Raoul

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Berger put it: “The Framers borrowed the words ‘advice and consent’ from parliamentary practice. They were words of art, reaching deep into history, which were descriptive of *participation in lawmaking*.” He continues, “When . . . those words were employed in the ‘treaty’ phrase, they connoted full participation in the making of a treaty, as the history of the treaty clause clearly demonstrates.”¹²

Berger’s argument is borne out by James Madison’s notes of the Constitutional Convention. Indeed, the convention’s Committee of Detail initially recommended that the Senate alone “shall have the power to make treaties.” When that proposal was initially put forward, Madison suggested to the convention that “it was proper that the president should be *an agent* in Treaties.”¹³ That is, the president should play a role, but not an exclusive or even a dominant role, in the making of treaties. That recommendation was eventually adopted and approved by the convention.

Discerning the intent of a multimember body, of course, is always a messy business. Moreover, the people, through their state legislatures, ratified not Madison’s notes of the convention but rather the document that the convention generated. For those and other reasons, originalist constitutional scholars rightly give the greatest interpretive weight to the text of the Constitution.¹⁴ But if the text is ambiguous, Thomas Jefferson’s advice is apt: the meaning of a constitutional provision can best be discerned “in the explanations of those who advocated it” upon which the ratifiers relied.¹⁵ In that respect, the *Federalist Papers*, as highly public explications of the Constitution’s meaning, are invaluable—especially because they were written by Framers. The discussions of the treaty power in the *Federalist Papers* unequivocally demonstrate that the president does not have unilateral power to bind the United States to agreements with foreign governments.

In *Federalist* 69 Alexander Hamilton refuted the argument that the treaty power conferred monarchical powers on the office of the president. Whereas the British king was

“the sole and absolute representative of the nation in all foreign transactions,” the American president would merely share in the treaty power, needing to secure the advice and consent of the Senate. Thus, “there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature.” In *Federalist* 75, Hamilton elaborated on the rationale for dividing the treaty power between two branches of the federal government: “However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years duration.” Why “unsafe and improper”? The answer lies in the Framers’ cautious, skeptical view of human nature; Hamilton continues, “The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.”

The Treaty Power: The Clinton Administration’s Understanding

Despite the clarity of the constitutional text and the historical record, the executive power to make treaties as interpreted by the Clinton administration has more in common with the monarchical view that the *Federalist Papers* argued against than it has with the limited and divided power that the Framers envisioned. The former perspective—manifestly unconstitutional—is reflected unmistakably in the administration’s actions with regard to the Comprehensive Test Ban Treaty.

The CTBT

Signed by the president in 1996, the CTBT would, if ratified, bind the United States to refrain indefinitely from underground testing of nuclear weapons. (Above-ground testing has been banned by treaty since 1963.) The following year President Clinton sent the treaty to the Senate for ratification, where it stalled for two years in the Foreign Relations Committee—primarily because of the vehement opposition of the chairman, Senator Helms. But by 1999, when Senate Majority Leader Trent Lott (R-Miss.) scheduled a vote on the CTBT, the administration, fearing that the treaty did not have the votes, strenuously opposed bringing it to the floor. The administration's fears were accurate. On October 13, 1999, the CTBT was voted down; at 51 to 48, it failed even to gain a simple majority, much less the two-thirds required by Article II for ratification.

And yet—astoundingly—the administration asserted that, despite the Senate's rejection of the CTBT, the treaty still had the force of law. In a letter dated October 18, 1999, Secretary of State Albright wrote to a host of foreign ministers of other signatory nations to say that, “despite this setback, I want to assure you that the United States will continue to act in accordance with its obligations as a signatory under international law.”¹⁶

Secretary Albright was mistaken: the United States has no obligations as a signatory to the treaty. Under the Constitution, the United States has no obligation to abide by a treaty that the Senate has rejected. International law cannot penetrate the sphere of U.S. sovereignty except through the processes delineated in the Constitution. As the Supreme Court noted in *Reid v. Covert*, a 1957 case discussing the limitations of the treaty power: “The United States is entirely a creature of the Constitution. Its power and authority have no other source.”¹⁷

What possible constitutional source can the administration rely on for Secretary Albright's proposition that the president can bind the United States to international agreements that the Senate decisively rejected?

Perhaps the administration rests its extravagant claim, as other aggrandizing administrations have rested similar claims in the past, on Article II's stipulation that “the executive Power shall be vested in a President.” But if the grant of “executive power” in Article II were broad enough to do what Albright suggests, then the treaty power's requirement of advice, consent, and ratification would be mere surplusage—nullified at the will of the president.

Certainly the president is well within his constitutional authority to maintain a moratorium on underground nuclear testing. It is entirely proper and advisable that he do so. No one would suggest that the failure of the CTBT requires the United States to resume testing. But the proposition that the president has the authority to bind the United States to international agreements in perpetuity and unilaterally can find no constitutional warrant. Such a broad conception of presidential power would be “utterly unsafe and improper.”

The ABM Treaty

The president's handling of the ABM Treaty, signed with the former USSR and ratified by the Senate in 1972, further showcases this administration's disturbingly broad conception of executive power in foreign affairs. That treaty was designed to codify the logic of mutual assured destruction and to prevent the arms race between the superpowers from escalating because of the potentially destabilizing impact of defensive systems. The ABM Treaty barred either signatory nation from deploying a national missile defense (NMD) system. In the post-Cold War era, however, the strategic environment undergirding the need for the ABM Treaty has fundamentally changed. Moreover, the other signatory to the agreement, the Soviet Union, no longer exists. Yet, despite that fact, the president continues to insist that the treaty remains binding on the United States.

As a matter of international law, the ABM Treaty is no longer binding on the United States. It became void because of the impos-

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sibility of performance when the other signatory to the agreement, the Soviet Union, dissolved into 15 successor states in 1991. When a signatory nation to an international agreement dissolves, its treaty obligations dissolve with it unless there is a successor state that (1) succeeds to its predecessor's international legal personality and (2) can perform its treaty obligations according to the agreement's original terms. In a comprehensive memorandum of law from the Washington, D.C., law firm of Hunton & Williams, the authors make a compelling case that the obligations enshrined in the ABM Treaty are particular to the Soviet Union and cannot be carried out by Russia, the other former Soviet republics, or any combination thereof.¹⁸

The Clinton administration implicitly recognized that fact when it attempted in 1997 to renegotiate the ABM Treaty with several of the Soviet Union's successor states. In New York, on September 26, 1997, Secretary Albright signed a series of agreements with Russia, Ukraine, Belarus, and Kazakhstan that purport to multilateralize the ABM Treaty, extending its obligations to the republics that made up the former Soviet Union. In a letter to Rep. Benjamin A. Gilman (R-N.Y.), chairman of the House Committee on International Relations, explaining the September agreements, President Clinton admitted that "neither a simple recognition of Russia as the sole ABM successor (which would have ignored several former Soviet states with significant ABM interests) nor a simple recognition of all [New Independent States] as full ABM Treaty successors would have preserved fully the original purpose and substance of the Treaty, as approved by the Senate in 1972."¹⁹ The president indicated his intention to submit the September agreements to the Senate for ratification, in accordance with the Constitution; but, he continued, "If however, the Senate were to fail to act or to disagree and disapprove the agreements, succession arrangements will simply remain unsettled. The ABM Treaty itself would clearly remain in force."

The president seemed oblivious to, or

unconcerned by, the contradiction implicit in those two statements. If new agreements are necessary to preserve the ABM Treaty's substance, how could the Senate's rejection of the new agreements be legally ineffectual? In a response letter, Gilman and Helms declared that, "if it is unclear as a matter of law whether Russia or any other country that emerged from the Soviet Union is today bound by the ABM Treaty, then it also should be unclear whether the United States is so bound."²⁰ As Gilman and Helms saw it, without Senate ratification of the multilateral agreements, the ABM Treaty would pose no obstacle to the development of an NMD system. To date, the president has not submitted the September agreements to the Senate for ratification.

Is NMD a good idea? There are reasons to believe it isn't. It might end up at best an enormous, ineffectual boondoggle or at worst a dangerously destabilizing initiative. Despite the expenditure of more than \$60 billion on the development of NMD technology, it is far from clear that NMD is technologically feasible.²¹ Given new developments in the technology of terror, even a functioning NMD might be a sort of 21st-century Maginot Line, providing a false sense of security but easily bypassed. More disturbing still is the fact that many of NMD's most vocal proponents view it as a sort of offensive weapon—a means of perpetuating America's role as global policeman.²² Since that role is a major source of terrorist and rogue state enmity toward the United States,²³ NMD may exacerbate the very problem it seeks to solve.

Ultimately, whether NMD is a good idea is quite beside the point. The ABM Treaty is no longer in force. If President Clinton wants to replace it with a series of multilateral agreements, he needs to secure the advice and consent of the Senate. His attempt to bypass the Senate on such an important matter is presumptuous and unconstitutional.

The Kyoto Protocol

As with the CTBT and the ABM Treaty, the administration's actions with respect to the

Kyoto Protocol, an international agreement aimed at the reduction of greenhouse gases, suggest a dangerous disregard for the constitutional requirements attendant to treaty making. The Kyoto Protocol, the negotiations for which concluded on December 10, 1997, was devised as a means of implementing the UN Framework Convention on Climate Change, which the Senate ratified in 1992. The Kyoto Protocol is problematic for many reasons, not the least of which are the unresolved scientific questions about global warming, and the extent of human responsibility for that phenomenon, as well as the diminishing likelihood that developing nations—which produce an increasingly large share of carbon dioxide emissions—will agree to it. Mindful of those concerns, in July 1997 the Senate passed—by a 95-0 vote—the Byrd-Hagel resolution, which expressed reservations about the yet unsigned Kyoto agreement. In its resolution, the Senate declared that it would not ratify any agreement that imposed excessive costs on the U.S. economy and that did not include restrictions on developing nations. Ignoring the concerns expressed in the Byrd-Hagel resolution, the administration in December 1997 acceded to an agreement that, if approved by the Senate, would bind the United States to reducing CO₂ emissions to 7 percent below 1990 levels by 2012. On November 12, 1998, nearly a year after the Kyoto Protocol was negotiated, administration representatives signed it.

Pursuant to the terms of the UN Framework Convention on Climate Change, out of which the Kyoto Protocol emerged, no protocol would become legally binding on a signatory state until ratified. Thus, according to the agreement and, more important, according to Article II of the Constitution, ratification by the Senate is a precondition for such an agreement to be legally binding.²⁴ To date, despite repeated entreaties by Senators Helms and Lott and others, the administration has refused to submit the Kyoto Protocol to the Senate for ratification. Instead, the administration has explored ways to implement the agreement outside the constitutional process.

George Mason University law professor William H. Lash III cites a number of measures taken by the administration with the hope of “creeping towards Kyoto.” According to Lash, starting in October 1997

the EPA targeted \$6.3 billion over a five-year period to reduce greenhouse gas emissions by providing incentives to consumers and businesses. In the FY 1999 budget, \$3.6 billion in tax credits over five years are directed towards Kyoto compliance goals. . . . Such market distorting subsidies are designed to promote the agenda of the unratified treaty by shifting market behavior.²⁵

Rep. David McIntosh (R-Ind.), chairman of the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, worries that stronger measures may be on their way. McIntosh has asserted that he has reviewed not yet publicly available documents from the administration’s Council on Environmental Quality that show that the administration is contemplating the implementation of the Kyoto agreement “through the backdoor.” According to McIntosh, the contemplated measures include (1) annual increases on fuel economy standards for cars, (2) fees and taxes on less fuel efficient cars, (3) heightened performance standards for power facilities, and (4) a host of taxes targeted at reducing carbon dioxide emissions.²⁶

Indeed, the EPA has asserted that it is empowered to take such measures even in the absence of Senate ratification of the Kyoto Protocol. In congressional testimony given March 11, 1998, EPA administrator Carol Browner claimed that the EPA already had the authority to regulate carbon dioxide emissions. Challenged by members of Congress about the basis for her assertion, Browner had then-EPA general counsel Jonathan Z. Cannon produce a legal opinion on the subject. The Cannon memo asserts that the Clean Air Act—a statute aimed at reducing “air pol-

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lutant[s]”—can be read broadly enough to allow the EPA to regulate CO₂. Cannon defined “air pollutant” as “any physical, chemical, biological, or radioactive substance or matter that is emitted into or otherwise enters the ambient air.”²⁷

Does the Clean Air Act allow regulation of a ubiquitous gas that is not only benign but also essential to life on earth? Common sense would say no as would normal tools of statutory interpretation, administrative law, and the Constitution’s nondelegation doctrine.²⁸ The EPA’s interpretation of its own authority is more staggering even than the FDA’s attempt to regulate cigarettes as a “medical device” and would be likely to fail in the courts for the same reason.

Thankfully, to date, the administration’s ability to implement the Kyoto Protocol without ratification has been constrained by congressional resistance. Representative McIntosh has held hearings on the matter, and Sen. Thad Cochran (R-Miss.) has striven to block funds for energy efficiency programs aimed at reducing CO₂. However, the administration’s sweeping assertion of authority demonstrates that continual vigilance is necessary.

The Unauthorized Appointment of Amb. James Hormel

In its treatment of the CTBT, the ABM Treaty, and the Kyoto Protocol, the Clinton administration has shown itself ominously dismissive of the constitutional requirement for senatorial advice and consent. But with the appointment of Amb. James Hormel, a matter of comparatively minor diplomatic significance, that dismissiveness manifested itself in even stronger form: as outright contempt for the Senate’s constitutional role.

In October 1997 President Clinton nominated James Hormel, heir to the Hormel food fortune and a major Democratic contributor, to be ambassador to Luxembourg. Hormel, a former dean of the University of Chicago Law School and delegate to the UN Human

Rights Commission, is openly homosexual. That fact raised the ire of conservative religious groups, such as the Family Research Council, which claimed that Hormel had been involved with groups critical of the Catholic Church. Though Hormel’s nomination was approved by the Senate Foreign Relations Committee, the Senate leadership refused to bring the nomination to the floor.

Whatever the merits, or lack thereof, of the Christian Right’s opposition to Hormel’s appointment, one thing was clear beyond cavil: Hormel could not and did not garner ratification by the Senate. But President Clinton was not about to let a constitutional command stand in the way of social progress. The president seized on the recess appointments clause to do an end run around the ratification process. On June 4, 1999, while Congress was in recess, President Clinton gave Hormel the job that the Senate had denied him. As Press Secretary Joe Lockhart put it: “This came down to a couple of senators who thought [Hormel] shouldn’t be ambassador to Luxembourg because he’s gay. And the President thinks that’s wrong and discriminatory, and that’s why he moved ahead.”²⁹

The Constitution’s recess appointments clause, which appears in Article II, section 2, reads: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” As congressional scholar Ilona Nickels notes, the original rationale behind the recess appointments clause was to circumvent “a practical problem,” namely, that “the early Senate would routinely be in recess from March through December.”³⁰ The clause was emphatically not designed to allow the president to bypass the Senate with regard to nominations that did not survive the confirmation process. In fact, before President George Washington made the first recess appointments, he wrote to the Senate leadership asking for its permission.³¹

But such solicitude for the Senate and respect for the Constitution are not the Clinton administration’s style. With the

Hormel appointment, President Clinton repeated the tactics he used to appoint Bill Lann Lee to the post of assistant attorney general for civil rights after the Senate's refusal to confirm him in 1998. In Lee's case, the president misused the Vacancies Act (a federal statute designed to allow temporary appointments pending Senate confirmation) and the recess appointments clause to allow Lee to serve for the rest of the administration's tenure, despite concerns over his support of racial quotas that led the Senate to refuse its consent. The president chose an interesting turn of phrase to describe his decision to bypass the Senate on the Lee appointment: "I have done my best to work with the United States Senate in an entirely constitutional way. But we had to get somebody into the Civil Rights Division, . . . so I decided we needed to go on and do what I thought was right for the country."³² That brazen formulation sums up the administration's attitude toward the rule of law: the Constitution certainly has its place, but it takes second place to what the president thinks is "right for the country." And if the president's objective can't be achieved in a manner that's "entirely constitutional," well then, blame senatorial partisanship, invoke "progress," and, as Lockhart put it, "move ahead." The president's shameful handling of the Hormel appointment demonstrates that, in the arena of foreign affairs, the Clinton administration is constrained not by constitutional processes but by what it cannot get away with.³³

The War Power: The Original Understanding

Over the past eight years, President Clinton's disdain for constitutional processes has manifested itself in his abuse of authority as commander in chief of the U.S. armed forces. In affairs of state, no more momentous decision can be made than the decision to go to war. For that reason, in a democratic republic, it is essential that the decision to go to war

be made by the most broadly representative body: the legislature. That, of course, is where our Constitution lodges the power to declare war. As Madison put it, "In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department."³⁴

That the power to initiate hostilities belongs to Congress and Congress alone is evident from the intent of the Constitution's Framers, the text of the Constitution, and the contemporary understanding of those who ratified the Constitution.³⁵

The Framers' Intent

In the Constitution as the Framers designed it, the president lacks the authority to initiate military action. In the Framers' view, absent a congressional declaration of war, the president's war powers would be purely reactive; if the territory of the United States or U.S. forces were attacked, the president could respond. Barring that, he could not act without congressional authorization. Madison's notes of the deliberations at the Constitutional Convention amply demonstrate that.

On August 17, 1787, the Convention considered the recommendation of the Committee of Detail that the legislature be vested with the sole power "to make war." Only one delegate, South Carolina's Pierce Butler, spoke in favor of granting that authority to the executive. His proposal was not warmly received. "Mr. [Elbridge] Gerry [of Massachusetts] never expected to hear in a republic a motion to empower the Executive alone to declare war." For his part, George Mason of Virginia "was agst. giving the power of war to the Executive, because not to be trusted with it. . . . He was for clog-ging rather than facilitating war."³⁶

However, the delegates did take seriously the objection, raised by Charles Pinckney of South Carolina, that the House of Representatives was too large and unwieldy, and met too infrequently, to supervise all the details attendant to the conduct of a war. For this reason, "Mr.

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M[adison] and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Roger Sherman of Connecticut "thought [the proposal] stood very well. The Executive shd. be able to repel and not to commence war."³⁷ The motion passed.

The Constitutional Text

The document that emerged from the Convention reflects an important, but limited, role for the president in war making. The constitutional text vests the bulk of the powers associated with military action with Congress. Among the enumerated powers granted Congress in Article I, section 8, of the Constitution are the powers "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Other important war-making powers include the power "to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years" and the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."

In contrast, the grant of war-related powers to the executive is exceedingly slender: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."³⁸

Significantly, several of the enumerated powers allocated to Congress involve the decision to initiate military action. Viewed in that light, the marque and reprisal clause and the militia clause inform our understanding of Congress's authority to declare war. For example, a letter of marque and reprisal is a legal device (long fallen into disuse) empowering private citizens to take offensive action against foreign governments. Since military attacks carried out by American citizens might well be considered acts of war by foreign powers, and accordingly could embroil the United States in hostilities, the Constitution vests the important decision to grant that power in the most deliberative

body: the legislature. Similarly, with the militia clause, Congress is empowered to decide when domestic unrest has reached the point at which military action is required.

By way of contrast, the grant of authority to the executive in the commander in chief clause is entirely supervisory and reactive. The president commands the Army and the Navy, should Congress choose to create them, and leads them into battle, should Congress choose to declare war. He commands the militia to suppress rebellions, should the militia be "called into the actual Service of the United States." In this, as Hamilton noted in *Federalist* 69, the president acts as no more than the "first General" of the United States.³⁹

Contemporary Understanding

The generation that ratified the Constitution understood that Congress alone can authorize the nation to go to war. As Constitutional Convention delegate James Wilson explained to the Pennsylvania ratifying convention: "This system [if adopted] will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power in declaring war is vested in the legislature at large."⁴⁰ Hamilton, himself a proponent of a strong executive, reassured New Yorkers that the president, however strong he might be, would not have the monarchical power to unilaterally lead the nation to war: Though the president's authority as commander in chief of the armed forces would be "nominally the same as the king of Great Britain, [it would be] in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces . . . while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies."⁴¹

Two early judicial decisions well illustrate the original understanding that Congress, and only Congress, could initiate hostilities by declaring war. In *Talbot v. Seeman*, Chief Justice

John Marshall declared that, “the whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body alone can be resorted to as our guides.”⁴² Marshall’s view is strong evidence of contemporaneous understanding, given that he had been a participant in the Virginia Ratifying Convention. The views of Supreme Court Justice William Paterson, who had served as a New Jersey delegate to the Constitutional Convention are also authoritative. In *United States v. Smith* (1806), Paterson unequivocally held that, under the Constitution, Congress holds sole authority over the question of war and peace. In *Smith*, the defendant, U.S. Army colonel William S. Smith, stood accused of violating a federal statute by aiding a rogue expedition against the Spanish province of Caracas. In his defense, Colonel Smith attempted to call the secretary of state and the secretary of the Navy to show that the expedition “was begun, prepared and set on foot with the knowledge and approbation of the president of the United States.” Justice Paterson, riding circuit, held that the secretaries could resist the subpoenas, their testimony being irrelevant: “The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. . . . Does he possess the power of making war? That power is exclusively vested in Congress.”⁴³

The War Power: The Clinton Administration’s Understanding

On matters of war and peace, then, the Constitution could hardly be clearer. George Washington, who presided over the Constitutional Convention, put the matter succinctly: “The Constitution vests the power of declaring war in Congress; therefore no expedition of importance can be undertaken until after Congress shall have deliberated upon the subject, and authorized such a measure.”⁴⁴ As a man who came of age during the Vietnam War, and as a member of a political

party that has striven since that war to regain congressional control of foreign policy, President Clinton might have been expected to have hewn closer to the original understanding of the war power than had previous presidents. Instead, he has repeatedly and brazenly violated the original understanding, asserting an unchecked, unilateral presidential authority to wage war. As constitutional scholar Louis Fisher has noted: “The Clinton Administration [has taken] the position that whenever the president decides something is in the national interest, he can do it. That’s an extraordinary definition. I don’t know of any president in the past who has talked that way.”⁴⁵ Those are strong words; however, as a review of President Clinton’s conduct as commander in chief will show, the administration’s record bears them out entirely.

Early Interventions

This section begins by surveying two of President Clinton’s earliest unauthorized military operations: Haiti and Bosnia. They were preludes to Clinton’s undeclared war in Kosovo and his surprise missile strikes on Sudan, Afghanistan, and Iraq during the yearlong impeachment crisis. The Kosovo intervention represents the broadest post-Vietnam assertion of executive war-making authority, while the “anti-terrorism” strikes on Sudan, Afghanistan, and Iraq represent the most disturbing exercise of that authority. For those reasons, each deserves special attention.

Haiti. The administration’s 1994 incursion into Haiti gave Americans an early glimpse of President Clinton’s approach to war making and constitutionalism. Unlike the Somalia intervention, which Clinton had inherited from his predecessor, George Bush,⁴⁶ the Haiti entanglement was entirely Clinton’s project.

In September 1991, Haitian military leaders overthrew Haitian president Jean-Bertrand Aristide. Under sustained international pressure, including a UN embargo, junta leader Raoul Cedras on July 30, 1993, signed the Governors Island agreement, which was to

Clinton has repeatedly and brazenly violated the original understanding of the war power, asserting an unchecked, unilateral presidential authority to wage war.

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allow Aristide to resume the presidency by October 30 of that year. President Clinton offered to send 350 troops to Haiti to help ease the transition by “professionalizing” the Haitian military and building infrastructure. The first detachment of troops landed successfully, but the second was blocked on October 12, 1993, by a group of armed civilians apparently backed by the Cedras regime.

The next day, in response to the Cedras regime’s apparent determination not to comply with the Governors Island agreement, the UN Security Council voted to restore economic sanctions against Haiti. Shortly thereafter, President Clinton informed Congress that U.S. naval forces had begun enforcing the UN embargo. That was, in itself, an act of war, which the Constitution reserves to Congress exclusively. Clinton implicitly recognized that when, in an October 14 press conference, he refused to use the word “blockade” to describe the actions that would be carried out by the Navy:

Q: Would you support a blockade?
 Clinton: I strongly support enforcing the sanctions and—
 Q: Wait, wait, wait—
 Clinton: I want to answer that. I support strongly enforcing these sanctions.
 Q: Is that a yes or a no?
 Clinton: Well, the word blockade is a term of art in international law which is associated with a declaration of war, so I . . . I have to be careful in using that word.⁴⁷

The belief that acts of war become such only when the president so identifies them is a recurring theme in the Clinton administration’s foreign policy.

Clinton did order a blockade and, when met with further intransigence, stepped up his rhetorical attack on the Haitian junta, threatening a U.S. invasion. Clinton also warned Congress against interfering with what he saw as his authority to decide whether to commit troops. In response to a

proposal by then-Senate Minority Leader Robert Dole (R-Kan.) to restrict the president’s ability to invade Haiti without congressional approval, Clinton admonished: “I would strenuously oppose such attempts to encroach on the president’s foreign policy powers. . . . The president must make the ultimate decision” about whether to use U.S. armed forces.⁴⁸

In odd contrast with his apparent view that congressional authorization of an invasion was optional, President Clinton seemed to view UN approval as a necessary prerequisite. He sought and obtained authorization for an invasion from the UN Security Council on July 31, 1994. However, Clinton refused to seek authorization from Congress. In a news conference on August 2, 1994, President Clinton said, “I have not agreed that I was constitutionally mandated to get [congressional approval].”⁴⁹

By early September, Clinton stood ready to launch a 20,000-troop invasion. In a heated September 15 address to the nation, he denounced the Cedras regime for “executing children, raping women, and killing priests.” Clinton announced that he had called up the military reserves and ordered two aircraft carriers to the vicinity. “Your time is up,” Clinton declared, “leave now, or we will force you from power.”⁵⁰

In the weeks leading up to the planned invasion, opinion polls showed that anywhere from 60 to 73 percent of Americans opposed such action.⁵¹ Those poll results undoubtedly contributed heavily to Clinton’s refusal to seek congressional authorization for the invasion. As *Legal Times* columnist Stuart Taylor noted on September 19, in a column written as the zero hour approached, if Clinton invaded, “it would be the first time a president has launched an invasion without seeking congressional consent *solely because he couldn’t get it*.”⁵²

As it turned out, forcible entry was made unnecessary, and large-scale violence averted, by last-minute diplomatic efforts. The administration sent a negotiating team led by former president Jimmy Carter, Sen. Sam

Nunn (D-Ga.), and Gen. Colin Powell. The delegation secured the Cedras clique's agreement to step down, and American troops entered without opposition.

But the violence to the Constitution had already been done by Clinton's assertion that he was not "constitutionally mandated" to get congressional approval for a 20,000-troop invasion of a tiny island nation that represented no threat, imminent or otherwise, to America's security. Indeed, his assertion of unilateral presidential war-making authority lacked even the constitutional fig leaf of the need for surprise with which Presidents Reagan and Bush had justified their respective invasions of Grenada and Panama.

Clinton offered no justification for his view that the president could commit U.S. forces to war without so much as a by-your-leave to Congress. That unenviable task fell to Walter Dellinger, then head of the Justice Department's Office of Legal Counsel. After the crisis had passed, and peaceful deployment of U.S. forces had begun, Dellinger concocted a series of post hoc rationales for the planned invasion of Haiti. In response to a request from Senator Dole and others, Dellinger, on September 27, 1994, released a letter attempting to legally justify the planned undeclared war in Haiti.

The Dellinger letter gave three grounds for the president's ignoring the constitutional mandate to secure a declaration of war: first, the president had received prior congressional authorization in the form of a defense appropriations bill; second, the War Powers Resolution granted the president the authority unilaterally to carry out military actions of short duration; and third, the planned invasion was not a "war" in the constitutional sense.

Each rationale was specious. First, the appropriations bill in question had expired before the president's action and did not authorize the president to engage U.S. forces in hostilities. Nor could an appropriations bill substitute for the constitutional prerequisite of a declaration of war. Second, the War Powers Resolution, passed in 1973 to

restrain executive war making, expressly states that it must not be "construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities." Furthermore, Congress could not delegate away its authority to declare war any more than it could properly delegate away its power to tax. Finally, the third rationale, that a planned 20,000-troop invasion was not a "war" in the constitutional sense, was baseless. Dellinger's argument rested largely on the idea that the planned invasion was to be undertaken at the "request of the recognized democratically elected government." As a group of law professors including Yale's Bruce Ackerman and Harvard's Laurence Tribe dryly noted in a response letter, "Presumably, at the outset of World War II, General [Charles] de Gaulle could not have nullified the Constitution's requirement of congressional approval by 'inviting' the United States to invade occupied France."⁵³

But the Dellinger letter, issued when the Clinton presidency was comparatively young and timid, rested on far narrower grounds than would be asserted for military interventions later on.

Bosnia. Armed conflict in the fragmenting multiethnic state of Yugoslavia heated up during Bill Clinton's first campaign for president. In April 1992, civil war erupted in the break-away republic of Bosnia-Herzegovina, and insurgent Serbian forces seized more than 70 percent of the nascent state's territory. The bloody conflict was accompanied by extensive civilian casualties and "ethnic cleansing."

In August 1992, the UN Security Council adopted a resolution calling on all nations to take "all measures necessary" to deliver humanitarian relief to Sarajevo, the Bosnian capital. In the early days of the Clinton administration, U.S. planes participated in that effort, airlifting nonmilitary relief supplies to Muslims surrounded by Serbian forces in Bosnia. From this point forward, U.S. involvement gradually escalated toward actual hostilities, despite the lack of congressional authorization.

Clinton's assertion of unilateral presidential war-making authority lacked even the constitutional fig leaf of the need for surprise.

It was President Clinton's war on Serbia in 1999 that brought into boldest relief this administration's staggering view of executive war-making authority.

On March 31, 1993, the Security Council declared a ban on military flights over Bosnia. On April 12, 1993, Clinton allowed U.S. planes operating under NATO command to enforce the Security Council ban. Shortly thereafter, U.S. troops entered Macedonia as part of a UN peacekeeping force whose stated purpose was to prevent the war from spreading.

On January 11, 1994, at the NATO summit in Brussels, alliance leaders threatened airstrikes against Serbian positions around Sarajevo. That threat was soon carried out, with U.S. planes shooting down several Serbian fighters and bombing Serbian positions around Gorazde and a Serbian airfield in Croatia.

Clinton made no attempt to secure congressional authorization for those attacks. Instead, he reported U.S. military involvement as a fait accompli to Congress, noting that U.S. forces "participate in these actions pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief."⁵⁴

In mid-1995 NATO launched another series of airstrikes against Bosnian Serb targets, and corresponding Croatian and Muslim forces' gains helped spur negotiations toward a peace accord. The resulting Dayton Accords provided for a multinational peacekeeping force in Bosnia that would contain a large number of American soldiers. Prior to the implementation of the accords, the U.S. House of Representatives voted against the deployment of U.S. forces, while the Senate voted against a resolution *opposing* the deployment.

Again, Clinton treated congressional approval as nonobligatory. On December 15, 1995, he ordered the deployment of 22,000 U.S. ground troops to Bosnia. As he explained in a letter to Congress, the decision was taken pursuant to his "constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive."⁵⁵

The Clinton Administration's War on Serbia

Although the foreign interventions out-

lined above were significant, and the president's refusal to seek prior congressional authorization flagrant and unlawful, it was President Clinton's war on Serbia in 1999 that brought into boldest relief this administration's staggering view of executive war-making authority. For that reason, the administration's conduct during that war bears detailed examination.

Throughout 1998 and early 1999, the United States and its NATO allies applied strong diplomatic pressure against the Federal Republic of Yugoslavia (Serbia and Montenegro), seeking resolution to civil conflict in the formerly autonomous region of Kosovo. Despite their efforts, in January 1999 that conflict heated up, with Yugoslav forces killing several dozen Kosovar Albanians. Shortly thereafter, peace negotiations began in Rambouillet, France. The Serbian government refused to sign the Rambouillet Accords, which would have allowed an international force with diplomatic immunity to operate unimpeded throughout all of Yugoslavia. On March 24, after the failure of a last-ditch effort by Amb. Richard Holbrooke to secure Serbian agreement to Rambouillet, President Clinton announced that U.S. armed forces, operating in conjunction with NATO, had begun airstrikes and missile strikes against Yugoslavia. Two days later, President Clinton, in letters to the Speaker of the House and the president pro tem of the Senate, justified his actions with a familiar refrain: U.S. armed forces were ordered into battle "pursuant to [the president's] constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive."

The air war carried out over Serbia from March 24, 1999, to June 10, 1999, represented the largest commitment of American fighting men and materiel since the Persian Gulf War. The U.S.-led NATO air forces flew a total of 37,465 sorties during the conflict, an average of 486 missions per day.⁵⁶ And yet, throughout the conflict, administration officials steadfastly refused to admit that the president had unilaterally engaged the United States in war.

It Depends on What Your Definition of "War" Is. The president's evasive answers during his 1998 grand jury testimony have entered popular consciousness as paradigms of lawyerly language games—especially his statement: "It depends on what the definition of 'is' is." As the war against the regime of Serbian president Slobodan Milosevic went on, the president's cabinet secretaries and spokespeople played similar language games on far weightier matters of war and peace. Cruise missiles and cluster bombs rained down on Serbia, yet administration officials assiduously avoided calling the war a war. Euphemism and evasiveness were the order of the day for Clinton appointees charged with explaining American involvement in Serbia. Thus, Secretary of Defense William Cohen, in a press conference on April 1, 1999, refused to use the "W" word in referring to the three American soldiers captured by the Serbs:

Q: Do you consider them prisoners of war?

Cohen: At this point their status is that of being illegally detained, and so they are illegal detainees at this point.

Gen. Henry Shelton also followed the administration's line even when discussing the possibility of American casualties: "There is no such thing as a risk-free *military operation*."⁵⁷

Rep. Tom Campbell (R-Calif.) described his frustration in attempting to secure a straight answer from administration officials about the legal status of U.S. operations in Serbia and Kosovo. Campbell asked Secretary of State Albright:

"Well, if this isn't war, what is it?" And she said, "It's an armed conflict." So I asked [Assistant] Secretary [of State Barbara] Larkin, "Well, what's the difference?" She couldn't tell me, but she said her attorney would. So the attorney finally said, "It becomes war when you call it war."⁵⁸

But it was perhaps White House spokesman Joe Lockhart, his verbal agility honed by the crucible of impeachment, who provided the most enlightening insights into the Clinton administration's definition of "war." The existence or nonexistence of "war," it seems, turns entirely on the intent of the aggressor. Lockhart offered a definition of "war" as subjective in its own right as Clinton's definition of sexual relations before the Starr grand jury:

Q: Does this situation constitute war?

Lockhart: No. And we believe that the United States objectives here are not offensive or aggressive in aim, and constitute the limited use of force to meet clear objectives. We certainly do not consider ourselves to be at war with Serbia or its people.⁵⁹

In an earlier press conference, Lockhart explained how the administration had arrived at its oddly subjective definition of war:

Q: Is the President ready to call this a low-grade war?

Lockhart: No. Next question.

Q: Why not?

Lockhart: Because we view it as a conflict.

Q: How can you say that it's not war?

Lockhart: Because it doesn't meet the definition as we define it.⁶⁰

That does Lewis Carroll one better; in *Through the Looking Glass*, Carroll had Humpty Dumpty declare that, "when I use a word, it means what I choose it to mean." The Clinton administration's view is that actions mean what the administration decides they mean; cruise missiles, cluster bombs, and civilian casualties don't constitute war until someone in power lets the magic word slip. From the Clinton administration's standpoint, there was a compelling policy rationale behind the verbal legerdemain of Lockhart, Albright, Cohen, and others. The administra-

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tion clearly recognized that there were legal consequences to calling a war a war. Representative Campbell recognized that as well, which is why he attempted to force the issue on the floor of the House and in federal court.⁶¹

Campbell v. Clinton. On April 28, 1999, the House voted no on declaring war, 427 to 2; no on authorizing the use of ground troops, 249 to 180; and no on authorizing the president to continue airstrikes, 213 to 213. Reacting to the votes, National Security Council spokesman David Leavy said: "The House is obviously struggling to find its voice. It voted 'No' on declaring war, 'No' on sending in ground troops, and it tied on whether to support an air campaign. They sent a mixed message as to what their stance is. But we've got to press ahead. There's broad support for this campaign among the American people, so we sort of just blew by" the House votes.⁶² For the record, as Leavy must know, a tie vote means that the measure failed to pass; thus, the House's message was far from "mixed." But his statement is indicative of this administration's view of constitutional constraints: they're optional, to be "[blown] by" when inconvenient.

Two days after that series of rejections for the administration, Campbell and 16 other members of Congress filed suit against the president under the War Powers Resolution.⁶³ That resolution, passed in 1973 over President Richard Nixon's veto, attempts to institutionalize a mechanism for restraining executive war making. In essence, it provides that, if the president introduces U.S. armed forces into hostilities or "situations where imminent involvement in hostilities is clearly indicated by the circumstances," he must remove those forces within 60 days absent a congressional declaration of war, specific statutory authorization for the action, or a situation in which Congress is physically unable to meet because of an armed attack on the United States. Until 1999 the War Powers Resolution had never found much favor with Republican conservatives. In fact, on June 7, 1995, the House had voted down a bill introduced by Rep. Henry

Hyde that would have repealed the War Powers Resolution. In endorsing the measure, then-Speaker Newt Gingrich urged the House Republicans to "increase the power of President Clinton. . . . I want to strengthen the current Democratic President because he is President of the United States."⁶⁴

Campbell, however, was not interested in "increas[ing] the power of President Clinton"; he wanted to restrain the president's ability unilaterally to wage war. As Campbell put it, "I came of age during Vietnam; [like that war,] this war is unconstitutional and I should do everything I can to stop an unconstitutional war as early as I can."⁶⁵

Unfortunately, Representative Campbell's lawsuit ran aground against judicial timidity. On June 8, 1999, Judge Paul L. Friedman of the U.S. District Court for the District of Columbia dismissed *Campbell v. Clinton*, holding that the plaintiffs lacked standing. That decision was affirmed on appeal by the D.C. Circuit Court of Appeals on February 18, 2000.

As is often the case in interbranch disputes, the court in *Campbell v. Clinton* was loath to step between Congress and the president to resolve the disputed issue. Generally speaking, there is a sound practical reason for that reluctance. Advised by a Western dignitary to go easy on Eastern bloc Catholics because of the influence of the pope, Joseph Stalin is said to have replied, "The Pope! How many divisions has he got?" Analogously, the exercise of judicial review has always been tempered by the possibility that the political branches might refuse to obey the Court, giving a version of Stalin's answer: "How many divisions does the Supreme Court have?" The judiciary's power is thus limited not only by the Constitution but also by real-world conditions quite apart from the text of the document. Accordingly, federal courts have developed various judicial escape hatches, such as the political question doctrine and heightened scrutiny for standing, that allow them to husband their power by avoiding the resolution of interbranch fights.

But that sort of timidity was not necessary here. The plaintiffs were not asking Judge Friedman to issue an injunction grounding

the bombers or ordering the troops home; rather, they were seeking a declaratory judgment that the president did not have the authority to wage war on Serbia absent congressional authorization. Campbell and his fellow plaintiffs would then use that decision to motivate Congress to take action.

Nonetheless, Judge Friedman sought to avoid the issue by holding that the plaintiffs' injury was "not sufficiently concrete or particularized" legally to entitle them to bring suit. Citing *Raines v. Byrd*, a 1997 case in which the Supreme Court denied legislative standing to challenge the line-item veto act, Friedman held that the plaintiffs were required to demonstrate that there was a "true 'constitutional impasse' or 'actual confrontation' between the legislative and executive branches" before the plaintiffs could garner standing. For example, "If Congress had directed the President to remove forces from their positions and he had refused to do so . . . that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs." But in seeking to avoid the constitutional issue, Friedman actually resolved it and resolved it incorrectly. If Congress is required to act (over the *president's* veto?) to stop the president from waging war, then it does not have the power "to declare War"; rather, it has a limited ability to veto the president's power to declare war. That turns the constitutional war power on its head.

The Collapse of the Anti-War Left. The judiciary was not alone in shirking its civic duty during the constitutional crisis brought about by President Clinton's undeclared wars. The political left had long been the most dependable source of anti-war sentiment and opposition to the imperial presidency. But during the war over Kosovo and the months leading up to it, American liberals largely abandoned their traditional opposition to presidential wars.⁶⁶

Liberal-leaning newspapers that had helped turn public sentiment against the war in Vietnam showed little interest in challenging the Clinton administration's purportedly

humanitarian crusades. The *New York Times*, the paper that had been such a thorn in the side of the Nixon administration during the Vietnam War, hardly saw fit to mention President Clinton's violation of the War Powers Resolution and the Constitution in waging war against Serbia.⁶⁷ And, despite an editorial expressing concern at the lack of justification for the earlier Sudan airstrikes, the *Washington Post* relegated its most detailed coverage of the first "Wag the Dog" bombing to its "Style" section, next to horoscopes, comics, and celebrity puff pieces.⁶⁸

That moral climb-down occurred in Congress as well. Of the House Democratic caucus, only Gene Taylor (D-Miss.) voted to declare war; everyone else who supported the president's action and voted against the declaration in effect declared that the president can bomb other countries without a declaration of war. Among those congressmen were such anti-war stalwarts as John Conyers (D-Mich.), Charles Rangel (D-N.Y.), Bernie Sanders (I-Vt.), and Henry Gonzalez (D-Tex.). The fact that Conyers and Gonzalez supported the war was particularly ironic. Less than 10 years previously, Representative Gonzalez had introduced a resolution to impeach George Bush for waging the Persian Gulf War without a declaration, even though, unlike President Clinton, Bush had at least secured a joint resolution supporting his actions.⁶⁹ For his part, Representative Conyers had introduced an article of impeachment against Richard Nixon for the secret bombing of Cambodia. That article, which did not make it into the final articles of impeachment, read in part: "On and subsequent to March 17, 1969, [President Nixon] authorized, ordered, and ratified the concealment from the Congress of the facts and the submission to the Congress of false and misleading statements concerning the existence, scope and nature of American bombing operations in Cambodia *in derogation of the power of the Congress to declare war.*" (Emphasis added.) When is unauthorized war making not an impeachable offense? For Conyers and Gonzalez and many of their liberal Democratic

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In Kosovo, the administration asserted the authority to wage the largest and most destructive military campaign since the Gulf War, despite Congress's outright refusal to grant such authority.

colleagues, the answer, apparently, is this: when you like the president who is waging the war.

Why Executive Usurpation Matters

The Clinton administration has espoused a view of executive war-making authority that is as unconditional and unconstrained as that claimed by any president in American history. In the Haiti campaign, the administration asserted the authority to carry out a large-scale invasion without a prior declaration of war, despite the fact that exigent circumstances, such as the need for surprise, were not present.⁷⁰ In Kosovo, the administration asserted the authority to wage the largest and most destructive military campaign since the Gulf War, despite Congress's outright refusal to grant such authority.

For some commentators, it's not immediately clear why that should be troubling. The policy reasons that proponents of an unfettered executive invoked during the Cold War can be said to have survived that war's demise. The chief executive is still, as proponents of presidential prerogative like to point out, the highest national officer elected by the nation as a whole and is better situated than is Congress to respond quickly to international crises.

But when the Framers gave Congress the authority to declare war, they did not focus solely on considerations of expediency. They also took human nature and the dangers of unchecked power into account. In his "Helvidius" letters, arguing with Hamilton, Madison stated his view that, had the power to declare war been vested in the executive, "the trust and the temptation would be too great for any one man."⁷¹ Two Clinton administration interventions, smaller in scale than, and prior to, the war in Serbia illustrate Madison's point.

President Clinton's eve-of-impeachment decision to bomb Iraq came shortly after he learned that he did not have the votes to pre-

vail. In that respect, the bombing was of a piece with the August 1998 "anti-terror" attacks on Sudan and Afghanistan, which came three days after the president's grand jury testimony and in the midst of a media firestorm over his televised nonapology. Given the chronology, many Americans could not help but wonder whether the president was applying a literal version of Clausewitz's dictum that war is the continuation of politics by other means. And indeed, the closer we look at those actions, the harder it becomes to put that suspicion aside.

Sudan and Afghanistan

On August 20, 1998, without warning, American armed forces fired Tomahawk cruise missiles at targets in Sudan and Afghanistan. As its justification, the Clinton administration stated that it had "convincing evidence" that the targeted sites—a pharmaceutical factory in Sudan and terrorist "training facilities" in Afghanistan—were linked to Osama Bin Laden, an Islamic terrorist the administration believed was behind the August 7 bombings of the American embassies in Nairobi, Kenya; and Dar es Salaam, Tanzania.

The administration declined to share that "convincing evidence" with the public. Little is known about the administration's justifications for selecting the Afghan targets. But when questions were raised about the bombing of the target in Sudan, the administration was forced to back off rather quickly from several assertions of fact on which it had based the attack.⁷² First, the Clinton administration claimed that the factory destroyed in Sudan did not produce any medicines; rather, it was a heavily guarded chemical weapons plant. It soon became clear, however, that the factory made painkillers and other drugs and repackaged imported pharmaceuticals for resale in Sudan. It was in fact the major producer of medicine in that Third World country and was visited regularly by foreign dignitaries and representatives of the World Health Organization. Westerners intimately familiar with the plant, including a British engineer

who served as technical manager during the plant's construction, emphatically denied that it was used for the manufacture of chemical weapons.

Second, the administration claimed that a soil sample collected outside the factory contained EMPTA, a chemical precursor to nerve gas. Independent tests conducted by the chair of the chemistry department at Boston University confirmed that no nerve-gas precursors were present in the soil around the factory. As the report put it, "To the practical limits of scientific detection, there was no EMPTA" in soil samples taken from around the factory.⁷³ To date, the CIA has refused to release or subject to independent testing the sample it claims to have relied on.

Finally, Secretary of Defense Cohen asserted that Osama Bin Laden was financially linked to the plant, but the available evidence fails to establish that the plant's owner, Salah Idris, had any connection with Bin Laden. Idris's property had been destroyed—and his assets seized—on that pretext. When Idris filed suit, however, the U.S. government summarily issued an order unfreezing his assets instead of coming forward with its evidence in open court.⁷⁴

Iraq: Operation Desert Fox

The course of the Clinton administration has been punctuated by fairly regular bombings of Iraq, some of which, like the June 1993 missile attack on Baghdad in retaliation for an alleged Iraqi plot to assassinate former president Bush, have been widely reported in the press, others of which have taken place below the media radar screen. In the former category is President Clinton's eve-of-impeachment missile strike on Iraq. The timing and circumstances of that attack are every bit as suspicious as those surrounding the strikes on Sudan and Afghanistan.

In late October 1998, Saddam Hussein announced that he would no longer cooperate with ongoing UN Special Commission (UNSCOM) arms inspections for chemical, biological, and other weapons of mass destruction. The administration announced

its determination to ensure that the inspections would continue. In this effort it had the support of the international community to take military action. The UN Security Council voted to condemn Saddam's actions. Surprisingly, even Russia and China withdrew their opposition to the use of force to restore arms inspections. Thus, by mid-November, the stage was set for punitive airstrikes on Iraq. (Of course, the president did lack a declaration of war, but by this point there was no reason to expect him to take that constitutional command any more seriously than he had previously.) However, just as the airstrikes were about to take place, President Clinton reversed course and called a halt to military action.

A little over a month later, it was becoming increasingly clear that, despite Republican losses in the midterm elections, the president was not going to be able to avoid impeachment. At that point, the administration seized on a report by UNSCOM chairman Richard Butler that the Saddam regime was not fully complying with UN arms inspections. As the House prepared to debate impeachment, and the Security Council was about to meet to discuss the UNSCOM report, President Clinton ordered airstrikes on Iraq. Whereas in November the president had enjoyed the support of the UN Security Council, including Russia and China, and the tacit, if not constitutionally expressed, support of Congress, by December he had support from none of those sources.

What made it imperative that airstrikes be launched precisely on December 16? As with Sudan and Afghanistan, the administration's explanations left much to be desired. The central complaint mentioned in the Butler report, and highlighted by the president in his airstrike announcement, was that, when UN weapons inspectors showed up at the ruling Baath Party headquarters in Baghdad to search for ballistic missile components, the Iraqis would allow only four inspectors to enter.⁷⁵ Because of such intransigence, the president explained, "We had to act, and act now." Why? Because "without a strong inspections system, Iraq would be free to

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Did Clinton think the Muslim world would be offended if bombing were “initiated” during Ramadan but untroubled by the fact that it continued into the holy month?

retain and begin to rebuild its chemical, biological, and nuclear weapons programs—in months, not years.” And given that “the Muslim holy month of Ramadan” would begin that weekend, “for us to initiate military action during Ramadan would be profoundly offensive to the Muslim world.”⁷⁶

At least two things about that explanation strike one as curious. First, the bombing did not conclude until Saturday, December 19, after the start of Ramadan. Did Clinton think the Muslim world would be profoundly offended if bombing were “initiated” during Ramadan but untroubled by the fact that it *continued* into the holy month? Second, and more important, if continuation of the UN inspections regime was essential to prevent the development of Iraqi weapons of mass destruction “in months, not years,” why then did the administration pursue a policy designed to put an end to any weapons inspections whatsoever? For an entire year, as a direct result of the December airstrikes, not only were there no international arms control inspections in Iraq, there was no plan in place for resuming such inspections. In December 1999, the UN Security Council finally created a new arms inspection commission, but it still remains unclear whether Iraq will allow the inspectors to enter.⁷⁷

The frailty of the president’s rationale for bombing, coupled with the timing of the act, inevitably gives rise to suspicion. That suspicion was described most succinctly by Scott Ritter, the former UNSCOM arms inspector who had quit over what he described as the administration’s lack of seriousness about UNSCOM’s mission: “You have no choice but to interpret this as ‘Wag the Dog.’”⁷⁸

Pundits across the political spectrum rejected the “Wag the Dog” scenario as distressingly cynical. In an op-ed, “Hard Faces of Partisanship,” *Washington Post* columnist David Broder professed to be shocked that Senate Majority Leader Lott would question the timing of President Clinton’s attack on Iraq.⁷⁹ William Safire could not “bring [him]self to think” that a U.S. president would “stoop to risking lives to cling to

power.”⁸⁰ And in the *Chicago Tribune*, columnist Stephen Chapman called speculation about the president’s motives “preposterous,” a hallucination from “Oliver Stone land.”⁸¹ But the Framers didn’t think that such suspicions were irrational. Indeed, the Framers designed a Constitution to prevent such “paranoid fantasies” from becoming a reality.

What Is to Be Done?

How can Congress reclaim what the Constitution grants it: the power to declare war? The War Powers Resolution offers little hope. Since its inception, it has run aground on presidential intransigence and judicial unwillingness to enforce it. Moreover, by allowing the president the ability unilaterally to place U.S. forces into hostilities for at least 60 days, the act cedes more power to him than the Constitution allows. But there are two constitutional measures available to a Congress determined to recapture authority over the war power. One was suggested most recently by former White House counsel Abner Mikva, a dedicated supporter of the president: bold use of the appropriations power. As Mikva wrote in *Legal Times* early in the Kosovo conflict: “If Congress doesn’t wish the president to engage in a particular military initiative, it simply cuts off the funds he needs to do so. This is how the English Parliament used to control the military adventures of English kings, and it works equally well under our system. Congress, not the president, has the key to the Treasury.”⁸²

The other avenue open to Congress is the impeachment power. In a justly celebrated 1990 law review article, Stanford law professor John Hart Ely argues that impeachment is the proper remedy for unauthorized war making: “A serious and willful violation of the separation of powers [such as an undeclared war] constitutes an impeachable ‘high crime or misdemeanor.’”⁸³ Of President Nixon’s secret bombing in Cambodia, Ely concluded:

I'd have impeached him for it. Surely it would have been a more worthy ground than the combination of a third-rate burglary and a style the stylish couldn't stomach. As Congressman William Hungate put it: "It's kind of hard to live with yourself when you impeach a guy for tapping telephones and not for making war without authorization."⁸⁴

With the notable exception of Representative Campbell and a handful of others in Congress, the possibility of such congressional profiles in courage is hardly apparent in Congress as currently constituted. Congress burned once for shutting down the federal government will be loath to cut off appropriations when U.S. troops are in harm's way. And after the dramatic failure to remove the president from office, Congress in the future is likely to balk at the prospect of impeaching a president for abuse of his authority as commander in chief.

Congressional courage of the kind needed to reclaim the war power will not be forthcoming unless American citizens demand it. Unless Americans rediscover their reverence for constitutional limits, and vote accordingly, the slide toward empire will continue. Judge Learned Hand put it best: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it. No constitution, no law, no court can even do much to help it."⁸⁵

Conclusion

In the twilight days of his presidency, last spring, William Jefferson Clinton responded heatedly to a reporter's question about impeachment and how it fits into his legacy: "Let me tell you: I am proud of what we did there, because I think we saved the Constitution of the United States."⁸⁶ Reverence for the Constitution is certainly to be applauded in a chief executive, and a passionate desire to "save" our national charter all

the more so. But an aspirant savior of the Constitution might choose firmer ground than a narrow interpretation of that document's impeachment clause. The entire nation can—and did—debate for a year about whether "high crimes and misdemeanors" include perjury and obstruction of justice. But when it comes to the treaty power and the war power, the Constitution itself cuts off much of the debate: treaties are *void* without the ratification of the Senate, and wars are *illegal* without a congressional declaration. Article II, section 2, and Article I, section 8, will bear no other interpretation. But during the last eight years, neither provision has gotten much deference from the president who "saved" the Constitution.

The men who midwived the birth of the national government rejected executive absolutism in foreign affairs. They knew too much of history and of human nature to do otherwise. When Hamilton wrote in the *Federalist Papers* that "the history of human conduct does not warrant that exalted opinion of human virtue" that would allow Americans to entrust one man with the power to control the nation's foreign affairs, he spoke to the lived experience of a generation that had fought to free itself from a king.⁸⁷ Our experience over the past eight years has given us little reason to adopt a more "exalted opinion of human virtue." Indeed, President Clinton's abuses of presidential authority reaffirm the founding generation's skeptical view of human nature. As Jefferson put it, "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."⁸⁸ The Clinton years have underscored our need to reforge those chains. If republican government is to survive, the imperial presidency cannot. Restoring the country's chief executive to its limited, constitutional role is a difficult task, but a necessary one, for those Americans who think that the Constitution and the Republic are worth saving.

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Notes

1. William Jefferson Clinton, Letter to Col. Eugene Holmes, December 3, 1969, quoted in the *New*

York Times, February 13, 1992, p. A25.

2. On August 10, 1992, then-candidate Clinton said of the letter to Colonel Holmes, "Well if you read the whole letter . . . I was talking about there—we were fighting with a draft in an undeclared war, and I think at least Congress ought to have to declare a war . . . before drafting large numbers of people." CBS, *This Morning*, CBS News transcripts, August 10, 1992. A cynic might note that this explanation leaves open the question of whether undeclared wars are acceptable if fought by a volunteer army, a question that Clinton would later, through his actions, answer in the affirmative.

3. As Fulbright later said: "The biggest lesson I learned from Vietnam, is not to trust government statements. I had no idea then that you could not trust [the] government." Jonathan Alter, "Remembrance: Sen. J. William Fulbright, 1905–1995," *Newsweek*, February 20, 1995, p. 76.

4. Quoted in Richard H. Curtiss, "U.S. Obituaries on Senate Leader J. William Fulbright Omit His Mideast Views," *Washington Report on Middle East Affairs*, April–May 1995, www.washington-report.org/backissues/0495/9504049.html.

5. Quoted in Alter, p. 76.

6. J. William Fulbright, *The Arrogance of Power* (New York: Random House, 1966), pp. 245–46.

7. Quoted in Arthur Schlesinger Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), pp. 298–99.

8. Quoted in Alter, p. 76.

9. U.S. Constitution, art. II, sec. 2.

10. Quoted in Dafna Linzer, "Albright Disavows Helms' Statement," *Washington Times*, January 25, 2000.

11. As Hamilton noted in *Federalist* 69, this power "is more a matter of dignity than of authority. . . . It was far more convenient . . . than that there should be a necessity of convening the legislature . . . upon every arrival of a foreign minister."

12. Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, Mass.: Harvard University Press, 1974), p. 122. Emphasis in original.

13. Quoted in Leonard Levy, *Original Intent and the Framers of the Constitution* (New York: Macmillan, 1988), p. 38. Emphasis added.

14. Antonin Scalia, *A Matter of Interpretation* (Princeton, N.J.: Princeton University Press, 1997), pp. 16–18.

15. Quoted in Berger, p. 138.

16. Quoted in Bill Gertz, "Albright Says U.S. Bound by Nuke Pact," *Washington Times*, November 2, 1999, p. A1.

17. 354 U.S. 1, 5–6 (1957).

18. David B. Rivkin, Jr., Lee A. Casey, and Darin R. Bartman, "The Collapse of the Soviet Union and the End of the 1972 Anti-Ballistic Missile Treaty: A Memorandum of Law," www.heritage.org/nationalsecurity/legalbrief/legalbrief.html.

19. Quoted in *ibid*.

20. Quoted in Craig Cerniello, "Administration, Congress Continue Debate over Membership, Future of ABM Treaty," *Arms Control Today*, May 1998, www.armscontrol.org/ACT/may98/cc3my98htm.

21. Most recently, the Pentagon's chief weapons tester conceded that missile defense tests conducted thus far have "significant limitations," given that the Pentagon knows the type of rocket launching the target as well as the nature of the target, where the missile is coming from, and when it is being launched. See "Time Investigation Shows That This Week's \$100 Million Space Shield Test Is All but Fixed," *Time*, July 2, 2000, www.time.com/time/pr/missiles.html.

22. For example, Robert Kagan of the Carnegie Endowment for International Peace and the *Weekly Standard* supports NMD because "nothing is more likely to push the United States toward an isolationist foreign policy than our increasing vulnerability to missile attack." Robert Kagan, "A Real Case for Missile Defense," *Washington Post*, May 21, 2000. See also George Will, "Missile Defense Charade," *Sacramento Bee*, June 11, 2000 (arguing that NMD is necessary so that the United States can defend Taiwan, Kuwait, and South Korea without risking missile attack).

23. See Ivan Eland, "Protecting the Homeland: The Best Defense Is to Give No Offense," Cato Institute Policy Analysis no. 306, May 5, 1998, www.cato.org/pubs/pas/pa-306es.html.

24. See "Global Climate Change: Selected Legal Questions about the Kyoto Protocol," Congressional Research Service Report for Congress 98-349, November 24, 1998.

25. William H. Lash III, "Kyoto Climate Treaty Advocates Act to Circumvent Senate Approval," Legal Opinion Letter, Washington Legal Foundation, April 2, 1999.

26. David McIntosh, "Will the Administration Implement the Kyoto Protocol through the Back

- Door?" Nonline News Center, October 9, 1998, <http://www.nonline.com/procon/topics/1998/November/16Nov-10.asp>.
27. Theresa Sotto, "House Members Assert EPA Cannot Regulate CO₂ under the Clean Air Act," *WeatherVane*, March 20, 2000, www.weathervane.rff.org/features/feature090.html.
28. See Deborah Simpson and Steven Simpson, "The Power to Make Law: Can the EPA Regulate CO₂ under the Clean Air Act?" *Institute for Research on the Economics of Taxation, Studies in Social Cost, Regulation and the Environment*, no. 2, September 1999; and Legal Affairs Committee, "CO₂: A Pollutant?" Report to the National Mining Association Board of Directors, October 12, 1998.
29. Quoted in Joanne Kenen, "With Congress Away, Clinton Names Ambassador," *Philadelphia Inquirer*, June 6, 1999.
30. Ilona Nickels, "Capitol Questions," www.cspan.org/questions.
31. Steven J. Duffield and James C. Ho, "The Illegal Appointment of Bill Lann Lee," *Texas Review of Law & Politics* 2 (1998): 335.
32. Quoted in *ibid.*
33. Indeed, in the closing months of his administration, Clinton has used the recess appointments clause to appoint three more ambassadors without Senate approval. All three were big-dollar contributors to the Democratic Party. See Sean Scully, "Clinton Quietly Installs 3 Envoys," *Washington Times*, August 29, 2000, p. A1.
34. James Madison, *Writings of James Madison*, vol. 6, ed. Gaillard Hunt (New York: Putnam's, 1906), p. 74.
35. See, especially, Berger; Levy; and Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War* (Dallas, Tex.: Southern Methodist University Press, 1986).
36. *Debates in the Federal Convention of 1787, as Reported by James Madison, August 18*, vol. 3 of *Elliot's Debates*, ed. James McClellan and M. E. Bradford (Richmond, Va.: James River Press, 1989), pp. 451-52.
37. *Ibid.* Emphasis in original.
38. Quoted in Wormuth and Firmage, pp. 27-28.
39. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), p. 418.
40. Quoted in Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 2d ed., vol. 2 (Washington: U.S. Congress, 1836), p. 528.
41. *Federalist* 69, quoted in Hamilton, Madison, and Jay, p. 418. Emphasis in original.
42. 5 U.S. (1 Cranch) 1, 28 (1801).
43. Quoted in Wormuth and Firmage, pp. 27-28.
44. Quoted in Stuart Taylor Jr., "A Betrayal of the Constitution," *Legal Times*, September 19, 1994, p. 25.
45. Quoted in Jason Sherman, "Clause and Effect," *Armed Forces Journal*, September 1998, p. 14.
46. See Ted Galen Carpenter, "Setting a Dangerous Precedent in Somalia," *Cato Institute Foreign Policy Briefing* no. 20, December 28, 1992.
47. White House Briefing, Federal News Service, October 14, 1993.
48. Quoted in Ruth Marcus and Helen Dewar, "Clinton Tells Congress to Back Off," *Washington Post*, October 19, 1993.
49. Quoted in *Congressional Record*, August 5, 1994, 140, S10,663.
50. Quoted in George J. Church, "Destination Haiti," *Time*, September 26, 1994.
51. *Ibid.*
52. Taylor. Emphasis in original.
53. Dellinger's letter and the law professors' response are reprinted in *American Journal of International Law* 89 (January 1995): 122-30.
54. 30 Weekly Compilation of Presidential Documents 2417.
55. 31 Weekly Compilation of Presidential Documents 2144.
56. Nick Cook, "A War of Extremes," *Jane's Defence Weekly*, www.janes.com/defence/news/kosovo/jdw990707_01_n.shtml.
57. Charles Lane, "TRB: Something to Declare," *New Republic*, May 17, 1999, www.tnr.com/archive/0599/051799/trb051799.html. Emphasis added.
58. Quoted in Jake Tapper, "Declaring War on Undeclared War," *Salon*, May 6, 1999, www.salonmag.com/news/Feature/1999/05/06/war.

59. USIS Washington File, "Transcript: White House Daily Briefing," April 19, 1999, www.usinfo.org/wf/990419/epf101.htm.
60. Quoted in Lane.
61. For Campbell's account of his legal battle with the administration, see Tom Campbell, "Kosovo—An Unconstitutional War," *Mediterranean Quarterly* 11, no.1 (Winter 2000): 1–7.
62. Quoted in Tapper.
63. Fourteen more members joined the suit after it was filed.
64. Quoted in "Separation of Powers and Foreign Policy," Panel discussion held at Federalist Society's 1999 National Lawyers' Convention, November 11–13, 1999, www.fed-soc.org/foreign-fedv3i3.htm.
65. Quoted in E. Michael Myers, "Ghosts of Vietnam Led Rep. Campbell to Force Balkan Votes," *The Hill*, May 5, 1999, p. 7.
66. Interestingly, the historian who popularized the phrase "the imperial presidency," Democratic partisan Arthur Schlesinger Jr., announced the death of the imperial presidency early on in the impeachment drama: "The fall of the Soviet Union completed the revolt against the abuse of Presidential power. Because it was the creation of international crisis, the imperial Presidency collapsed once that crisis came to an end." Arthur Schlesinger Jr., "So Much for the Imperial Presidency," *New York Times*, August 3, 1998. As this paper attempts to show, contra Schlesinger, reports of the demise of the imperial presidency have been greatly exaggerated.
67. Fairness and Accuracy in Reporting, "New York Times Ignores Violation of the War Powers Act," May 28, 1999, www.fair.org/activism/war-powers.html.
68. Vernon Loeb, "A Dirty Business," *Washington Post*, July 25, 1999, p. F1.
69. *Resolution of Impeachment of President George Bush*, H.R. 34, January 17, 1991, <http://thomas.loc.gov/>.
70. Which is not to concede that those particular exigent circumstances obviate the need for a declaration of war. They merely underscore that the administration here went further even than Reagan did with Grenada and Bush with Panama.
71. Madison, p. 174.
72. Odder still were the circumstances surrounding the decision to launch the attack. Apparently, the four service chiefs of the Joint Chiefs of Staff were not informed of the raid. Gen. Henry Shelton, chairman of the Joint Chiefs, was presented with the decision as a fait accompli and was ordered not to inform the other members. See Tracy Connor, "Top U.S. Brass Kept Out of Loop on Missile Raid: Mag," *New York Post*, October 5, 1998.
73. James Risen and David Johnston, "Experts Find No Arms Chemicals at Bombed Sudan Plant," *New York Times*, February 9, 1999, p. A3.
74. See Vernon Loeb, "U.S. Unfreezes Assets of Saudi Who Owned Plant Bombed in Sudan," *Washington Post*, May 4, 1999; and "What Terrorist Link?" Editorial, *Washington Post*, May 7, 1999.
75. Robert Novak, "Wagging Saddam," Creators Syndicate, December 21, 1998. When the president described that incident in his address to the country, however, he did not give the full story, stating merely that Iraq had "shut off access to the headquarters of its ruling party." "Transcript: President Clinton Explains Iraq Strike," <http://www.cnn.com/ALLPOLITICS/stories/1998/12/16/transcripts/clinton.html>.
76. Quoted in Kim Wilsher, "Moon Rose and Ramadan and Final Blitz Began," *Mail on Sunday*, December 20, 1998, p. 7.
77. "Despite Baghdad's Opposition, U.N. Still Planning Arms Inspections," May 24, 2000, CNN.com, <http://cnn.org/2000/WORLD/meast/05/24/un.iraq/index.html>.
78. Quoted in Christopher Francescani, "Whistle-Blow Inspector: It's Wag the Dog," *New York Post*, December 17, 1998.
79. David Broder, "Hard Faces of Partisanship," *Washington Post*, December 19, 1998.
80. William Safire, "On Impeachment Eve," *New York Times*, December 17, 1998, p. A33.
81. Stephen Chapman, "Bombing of Iraq Expanding the Limits of Cynicism," *Chicago Tribune*, December 20, 1998.
82. Abner Mikva, "If Congress Really Wants to Stop the Kosovo War, It Can," *Legal Times*, May 3, 1999, p. 23.
83. John Hart Ely, "The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About," *Stanford Law Review* 42 (May 1990): 1133.
84. *Ibid.*, p. 1093.
85. Learned Hand, *The Spirit of Liberty* (New York: Knopf, 1952), p. 144.

86. Quoted in Terence Hunt, "Clinton Won't Ask for Pardon," *Detroit News*, April 13, 2000, <http://detnews.com/2000/nation/0004/13/04140014.html>.

87. It's true that Hamilton later recanted many of the views on presidential power that he expressed in the *Federalist Papers*. In his 1793 debates with Madison under the nom de plume "Pacificus," Hamilton argued for broad executive latitude in foreign affairs. Madison answered his arguments under the name "Helvidius," arguing for the limited view of executive power under which the

Constitution was ratified. As John Quincy Adams judged it, Madison "scrutinized the doctrines of Pacificus with an acuteness of intellect never perhaps surpassed," refuting them with quotes from Hamilton himself. See Berger, pp. 135–38.

88. Quoted in David Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), pp. 2–3. Mayer cites Paul Leicester Ford, ed., *The Writings of Thomas Jefferson* (New York: G. P. Putnam's, 1892–99), vol. 7, p. 304.

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