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# The Founders, Executive Power, and Military Intervention

Christopher A. Preble\*

During the long periods of peace in the nineteenth century and the early twentieth century, the United States maintained a small standing army, mobilized additional personnel to fight the few wars declared by Congress, and then sent most of the men home when the war was won. This pattern was established during the earliest days of the Republic and was driven by the Founders' ambivalent view of military power.

James Madison conceived of warfare as a kind of petri dish for the expansion of state power at the expense of the individual. "Of all the enemies to public liberty," he wrote in 1795, "war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other."<sup>1</sup> "No nation," Madison continued, "could preserve its freedom in the midst of continual warfare."<sup>2</sup> He was hardly alone. As one scholar explained, "[t]he vast majority of America's landowning aristocracy had an almost congenital distrust of standing armies, which their ancestors for generations had identified with despotism . . . . They glorified instead the yeoman militiamen, linked to the land and closely tied to local interests."<sup>3</sup>

This philosophy came up against a bitter truth. On the one hand, the Founders realized that their ability to prevail militarily against the British during the Revolution had been

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1. JAMES MADISON, *Political Observations, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON* 485, 491-92 (J.B. Lippincott & Co. ed., 1865).

2. *Id.* at 492.

3. BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS* 250 (1994).

instrumental to securing their independence. On the other hand, the presence of British troops in their midst was among the list of particulars that Thomas Jefferson cited in the Declaration of Independence for wanting to be free of the mother country in the first place. The Constitution resolved the tension between the necessity for a military for self-defense, and the fear that a large military would undermine the delicate balance between the citizens and the state, by establishing clear criteria for limiting the likelihood that the nation would become engaged in foreign wars.

This Article explores the evolution of American military and foreign policy over the past two centuries by highlighting a departure from what the Founders had envisioned and intended. The end result—a massive military and an interventionist foreign policy—has created a persistent imbalance between the different branches of government. This Article will follow this course of development by highlighting the crucial points where America's national security policy shifted, and by analyzing the political and social consequences of these changes. I will then proceed to draw parallels between the current policy of the United States and the Founders' original fears concerning where military interventionism would take the country. I will argue that an interventionist foreign policy is *not* necessary within the context of a contemporary international political economy. I will demonstrate the shortcomings of the few unsuccessful attempts to correct the imbalance of power that exists among the branches of American government. As a solution to this imbalance, I will reevaluate the proper role of the military in American society and propose the establishment of four new criteria concerning the use of force. The United States military should be deployed abroad only when: 1) the United States' national security interests are at stake; 2) there is a clear, national consensus behind the mission after the public is made aware of both the costs and the benefits of intervening militarily; 3) clear and obtainable military objectives have been defined prior to intervening; and 4) all reasonable steps to resolve the problem have been exhausted (i.e., force is used only as a last resort).

I will conclude by demonstrating how the implementation of such criteria would pave the way for a new international order that is less dependent upon American military

dominance. This order would be characterized by a more equitable distribution of responsibility among nations regarding security challenges and a military role for the United States that better aligns with our national interest and our political culture.

### I. Intent of the Founders

Understanding the political philosophy of the Founders provides the necessary context for interpreting their actions and motivations during the early days of the Republic. This section analyzes the framework put into place by the Founding Fathers and their intentions regarding the young nation's military structure. It will also explain the Founders' fears regarding warfare and militarism, and the precautions they took to protect liberty in response. The most important of these precautions was the steps they took to impede the Government's capacity for waging war. The Founders enacted measures to prevent the growth of permanent armies and focused their efforts on limiting the power of the one branch of government that they feared would be most warlike—the Executive.

#### A. *Stemming Military Buildup*

The Founders' deep skepticism toward standing armies manifested itself in the United States Constitution, which granted Congress the power “to *provide and maintain* a Navy,”<sup>4</sup> but stipulated that armies would be *raised* and *supported* as needed,<sup>5</sup> essentially implying that there would be *no* standing army. This was not so radical a provision at the time. Most countries in the late eighteenth century chose to rely on a small number of professional soldiers, including mercenaries for hire, who would then be augmented by private citizens as conditions required. For countries such as England, there was no great need for *any* army because it had a relatively small population

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4. U.S. CONST. art. I, § 8, cl. 13 (emphasis added).

5. *Id.* § 8, cl. 12. The Constitution also stipulated that appropriations for the Army would not be for more than two years; no similar restrictions applied to the Navy. *Id.* § 8, cl. 12-13.

resting comfortably and securely on an island abundant in natural resources and it was protected from foreign invasion by water on all sides,

Bolstered by their personal experiences, the American colonists inherited their forefathers' skepticism of standing armies. They also drew on traditions reaching back to antiquity. The underlying logic embedded within the precautions imposed by the new Constitution was that standing armies and the endangerment of liberty went hand-in-hand. While addressing the Constitutional Convention, James Madison declared:

A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence against foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.<sup>6</sup>

Madison's words were echoed by his contemporaries in numerous State conventions and constitutions. For instance, Patrick Henry lamented the difficulty of holding a standing militia legally accountable by asking "[w]ill your mace-bearer be a match for a disciplined regiment?"<sup>7</sup> Additionally, the state constitutions of Virginia and North Carolina explicitly affirmed the belief that "standing armies in time[s] of peace are dangerous to liberty" and provided for the "strict subordination" of the military to the civil power.<sup>8</sup> Moreover, in

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6. James Madison, Address to the Constitutional Convention (June 29, 1787), *in* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (Max Farrand ed., 1911).

7. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN'S LETTER, YATES'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION 51 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1907) (1845).

8. *Ratification of the Constitution by the State of Virginia* (June 26,

his farewell address, George Washington warned his countrymen to “avoid the necessity of . . . overgrown military establishments.”<sup>9</sup>

B. *Distribution of War Powers among Branches of Government*

Critical to avoiding the need for such “overgrown military establishments” was the Constitution’s provision that Congress—not the Executive—would have the authority to declare war.<sup>10</sup> With memories of George III’s abuses fresh in their minds, and fearing that an American king would be similarly inclined to infringe upon individual liberties, the Founders took particular care to limit the President’s war-making powers. Madison explained the rationale in a letter to Thomas Jefferson, when he declared that “[t]he constitution supposes, what the History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the [Legislature].”<sup>11</sup> In the Pennsylvania Ratifying Convention, James Wilson explained that “[t]his system 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 . . . .”<sup>12</sup> Madison later deemed this provision as perhaps the most important one of the entire document, asserting that “[i]n no

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1788), in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 380 (Wash., D.C., Dep’t of State 1894), available at [http://avalon.law.yale.edu/18th\\_century/ratva.asp#1](http://avalon.law.yale.edu/18th_century/ratva.asp#1). Subsequent state constitutions which echoed these words include Vermont, Ohio, Kansas, and Nevada.

9. George Washington, Farewell Address (Sept. 17, 1796), available at [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp).

10. U.S. CONST. art. I, § 8, cl. 11.

11. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON 1790-1802: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 311, 312 (Gaillard Hunt ed., 1906).

12. James Wilson, Address to the Pennsylvania Ratifying Convention (Dec. 11, 1787), in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 417 (John Bach McMaster & Frederick Dawson Stone eds., Lancaster, Hist. Soc’y of Pa. 1888), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch7s17.html>.

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.”<sup>13</sup>

Even so strong an advocate of executive authority as Alexander Hamilton conceded that the legislature alone possessed the power to initiate wars, whereas the President’s powers were confined to “the direction of war when authorized or begun.”<sup>14</sup> When anti-Federalists claimed that Hamilton and other advocates of the new federal Constitution were attempting to create an office of the executive with the powers of a king, Hamilton responded with emphasis:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.<sup>15</sup>

Several years later, Hamilton and Madison were locked in a bitter debate over a particular exercise of executive power: Washington’s declaration of impartiality in the war between England and France. Madison forcefully reminded his interlocutor that “the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any

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13. James Madison, *Helvidius, Letter No. 4*, GAZETTE U.S., Sept. 14, 1793, reprinted in THE WRITINGS OF JAMES MADISON, *supra* note 11, at 171, 174.

14. GENE HEALY, THE CULT OF THE PRESIDENCY: AMERICA’S DANGEROUS DEVOTION TO EXECUTIVE POWER 24 (2008) (internal quotation marks and citation omitted).

15. THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (emphasis in original).

case, to decide the question, whether there is or is not cause for declaring war.”<sup>16</sup> The President’s sole role was to call Congress into session and inform it of the circumstances so that the legislature—not the President—could make a decision on the wisdom or imprudence of war.<sup>17</sup>

Such sentiments strike many today as unnecessarily unwieldy, and perhaps even dangerous; perhaps some in the late eighteenth century believed much the same thing. By fortunate circumstances as much as by design, however, a foreign and military policy founded on—in Jefferson’s immortal words from his first inaugural address—“peace, commerce, and honest friendship with all nations, entangling alliances with none,” survived and thrived in North America.<sup>18</sup>

## II. Patterns of Change in American Foreign Policy

For much of the first 140 years of the nation’s history, Americans were rather successful at staying out of unnecessary wars. In accordance with the hopes of the Constitution’s Framers, America therefore had little need for a large military. When Congress saw fit to declare war, as on the few occasions from the War of 1812 to World War II, it did so while simultaneously making provisions to raise the necessary numbers of men and materials. It was not simply ideology and a commitment to adhering to the letter and spirit of the Constitution that enabled this pattern to persist for so long. The United States was also blessed by a dearth of powerful enemies. In the span of twenty years at the dawn of the nineteenth century, the United States had convinced three European powers to largely quit their respective portions of North America: Jefferson bought off the French with the Louisiana Purchase, the Americans outlasted the British in the War of 1812, and the Spanish ceded Florida in the Adams-Onís Treaty of 1819. On December 2, 1823, President James

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16. Madison, *supra* note 13, at 174 (emphasis in original).

17. Notably, although Alexander sided with Washington and the executive, and nominally against Madison and the Congress, in this dispute, he never challenged the fundamental premise that the power to initiate war rested solely with the legislature.

18. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), available at [http://avalon.law.yale.edu/19th\\_century/jefinau1.asp](http://avalon.law.yale.edu/19th_century/jefinau1.asp).

Monroe declared that the European powers were not to interfere in the affairs of any independent nation of the Western Hemisphere.<sup>19</sup> In return, the Monroe Doctrine pledged that the United States would remain neutral in disputes between the European states.<sup>20</sup>

Monroe's bold stand against further colonization in the Americas would not have stood if tested. The United States Government lacked any formal authority to be the guarantor of independence for the new nations in the Western hemisphere. Still small, the country lacked the power to back up Monroe's claim to such authority, had any European power sought to challenge it. But Europe generally left the Americas alone. Exhausted by the Napoleonic Wars, and fearful of domestic disturbances that might overturn the established social and political order, the Europeans set their eyes on conquests in Africa and Asia; Europe generally left the Americas alone.<sup>21</sup> The good fortune for the United States was that the young nation developed during this peculiar period in human history, and that it had a few wise leaders who had the sense to take advantage of this "splendid isolation" to build an enduring nation-state. The greatest threat to the Republic in the nineteenth century therefore came not from foreign threats but rather from the Civil War, which remains the costliest war in our history.

#### A. *The Exceptions*

There were a few exceptions to the United States' lack of involvement in foreign affairs. Congress declared war on Mexico in 1846, and again on Spain in 1898. From the former, the nation acquired California and Texas, along with parts of five other states; from the latter, the United States acquired the Philippines.

The experience in the Philippines, where the U.S. Army struggled to subdue a stubborn insurgency, was consistent with

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19. See WALTER A. McDOUGALL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776*, at 57-75 (1997).

20. See *id.*

21. In another fortunate twist of fate, British policy generally coincided with United States' preferences in the Western Hemisphere.

a pattern.<sup>22</sup> Throughout the United States' history, we can see a pendulum swing of enthusiasm for, swiftly followed by disgust with, war. Such shifting attitudes reflect Americans' collective ability to learn—and then over time forget—the high costs of combat and conquest. Indeed, the bitter experience in the Philippines soured Theodore Roosevelt, one of the most fervent advocates of military adventurism. In 1897, he told a friend “I should welcome almost any war, for I think this country needs one.”<sup>23</sup> Within a year, Roosevelt got his war, as the United States battled the decrepit and dying Spanish Empire.<sup>24</sup> Roosevelt's enthusiasm for expanding the nascent American Empire, however, cooled considerably after he became President in September 1901. Urged to seize the Dominican Republic, Roosevelt quipped, “I have about the same desire to annex it as a gorged boa constrictor might have to swallow a porcupine wrong-end-to.”<sup>25</sup> The formerly outspoken booster of the American Empire, Roosevelt became disillusioned with foreign conquests. This demonstrates how the realities of warfare and subsequent occupation inevitably dampened American enthusiasm for foreign military intervention.

Nearly every generation in American history had some experience with war. In each case, ambition and optimism about the likelihood of quick success was eventually replaced with humility and pessimism, an appreciation of the costs, and of the possibility of failure. Once these lessons sunk in, Americans generally returned to the core underlying philosophy—espoused by the Founders—that free nations possess small professional militaries and strive to avoid foreign wars. Americans, however, were happy to profit from foreign trade and to otherwise serve as an example to the world by upholding the highest ideals of liberal governance.

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22. On the U.S. Army in the Philippines, see BRIAN MCALLISTER LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899-1902* (2000).

23. *Crucible of Empire: The Spanish-American War* (PBS television broadcast 1999). See also *Crucible of Empire*—PBS Online, [http://www.pbs.org/crucible/frames/\\_film.html](http://www.pbs.org/crucible/frames/_film.html) (last visited Dec. 26, 2009).

24. See, e.g., *Crucible of Empire: The Spanish-American War*, *supra* note 23; *Crucible of Empire*—PBS Online, *supra* note 23.

25. John B. Judis, *Imperial Amnesia*, 143 *FOREIGN POL'Y* 50, 54 (2004).

## III. Foreign Policy in the Twentieth Century

This model persisted in the first half of the twentieth century, even as the United States became involved in far larger wars in distant lands. World War I claimed 116,000 American lives; World War II more than three-and-a-half times that number.<sup>26</sup> Attitudes toward a standing military began to change in the years after World War II, and a new model took root that has endured since the collapse of the Soviet Union in 1991. This part of the Article will evaluate the effect that the Red Scare and the subsequent rise of the Cold War had upon America's grand strategy. In addition, this part will further consider the political, economic, and societal changes brought about by this strategic transformation.

The process began within a few years after the end of World War II. The nation had barely completed its demobilization after Japan surrendered when it found itself at war again, this time in a former Japanese colony and against a new enemy, the People's Republic of China. Nearly six million Americans served in the military during the Korean War, without Congress ever having actually declared war.<sup>27</sup> By 1960, the United States seemed to have settled into a permanent state of near-war against Communist regimes in the Soviet Union and China. America's leaders waged bloody proxy wars in Southeast Asia and conducted murky covert operations from Iran to Guatemala. Most importantly, the United States conscripted millions of men into an enormous standing army and mobilized millions more to design and build the implements of war.

This development greatly disturbed President Dwight David Eisenhower. He shared the Founders' concerns that a constant state of war would alter the nation's character in profound ways. As he prepared to leave the White House after two successful terms, Eisenhower took to the airwaves to warn his countrymen to be on guard against a "military-industrial

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26. ANNE LELAND & MARI-JANA OBOROCEANU, CONG. RESEARCH SERV., AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: TABLES AND STATISTICS 2 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL32492.pdf> (citing 116,516 total deaths in World War I and 405,399 total deaths in World War II).

27. *Id.* at 3 (citing 5,720,000 serving troops).

complex” acquiring “unwarranted influence” in the halls of power.<sup>28</sup> He continued as follows:

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted only an alert and knowledgeable citizenry can compel the proper meshing of huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.<sup>29</sup>

Eisenhower correctly recognized that, whereas America’s economic interests had once broadly favored peace, by the time he left office, crucial segments of industry and entire regions of the country had become heavily dependent on the sales of arms and equipment to the United States military.<sup>30</sup>

Eisenhower reminded his countrymen that the “conjunction of an immense military establishment and a large arms industry” was a new development in the nation’s history.<sup>31</sup> He implored them to be on guard against it even as its influence was “felt in every city, every state house, every office of the Federal government.”<sup>32</sup> That such a vast and permanent arms industry was necessary, as Eisenhower believed it was, did not mean that the country should merely accept it as a given. On the contrary, he explained, “we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.”<sup>33</sup> However, only after the Cold War had ended would the United States learn how right Eisenhower had been.

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28. Dwight D. Eisenhower, Farewell Radio and Television Address (Jan. 17, 1961) (transcript available at <http://www.eisenhowermemorial.org/speeches/19610117%20farewell%20address.htm>).

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.*

33. *Id.*

A. *Transitioning to a Unipolar World*

When the Soviet Union ceased to exist, the United States enjoyed a modest peace dividend and cut defense spending by more than twenty-six percent.<sup>34</sup> By 1999, defense spending as a share of the Gross Domestic Product had fallen to three percent, its lowest level since 1940.<sup>35</sup> Some companies transitioned away from the manufacture of arms; others simply disappeared. Some of the monies that had once gone to the military were redirected elsewhere—to reduce the federal deficit, to provide for modest tax relief, and to provide for similarly modest increases in total non-defense spending.

One might have expected far deeper cuts in military spending. After all, the great threat of global communism was gone, and nearly everything that the United States military had been preparing to do during the Cold War had been overcome. Building weapons, however, was a lucrative business and continued to be lucrative during the 1990s for those companies that survived the first few rounds of cuts. Political pressures and bureaucratic inertia—precisely the military-industrial complex that Eisenhower had warned of three decades earlier—kept military spending much higher than necessary. Instead, the United States military machine remained largely intact, albeit as a leaner, more focused version of its prior self. Equally important, the United States kept many of its overseas bases and retained, even expanded, security commitments under alliances ostensibly created to contain a now defunct Soviet Empire.

B. *Changes on the Home Front*

As Eisenhower had predicted, the creation of a permanent armaments industry during the Cold War created similarly permanent political constituencies that objected to cuts in the military, or at least to cuts in the particular part of the military that happened to affect them directly. Whereas Americans had

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34. See OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOV'T: HISTORICAL TABLES 118-25 (2008), available at <http://www.gpoaccess.gov/usbudget/fy08/pdf/hist.pdf>.

35. Total defense outlays in constant (2000) dollars were \$382.7 billion in 1990 and bottomed out at \$282.4 billion in 1998. See *id.*

once armed for war and then returned to peaceful pursuits when the wars ended, they now armed for the sake of arming. Every weapons system had its defenders in Congress, and every community could come up with a dozen reasons for why *their* military base should not be cut. Meanwhile, policymakers in Washington who were in possession of this great power, and who were no longer dependent upon public support for such missions, looked for places to use America's military power. Unconstrained by the fear that was so rampant during the Cold War, that even small-scale wars might spiral into a full-on confrontation with the other superpower, the United States was suddenly free to engage in military interventions that only a few years earlier would have seemed, if not impossible, at least highly risky. For many in Washington, the temptation to use this power became nearly impossible to resist.

### C. *Ad Hoc Interventionism*

Possessing enormous military power, the United States could decide whether or not to get involved in a new conflict based on a number of different factors, including the domestic political mood or an especially effective media outreach campaign. Sometimes a particular interest on the part of the President alone was sufficient, and these feelings were subject to change.<sup>36</sup>

The occasions in which the U.S. military was deployed abroad thus had an ad hoc quality about them; they seemed purely reactive to world events, rather than part of a broader

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36. See FRED KAPLAN, DAYDREAM BELIEVERS: HOW A FEW GRAND IDEAS WRECKED AMERICAN POWER 140-41 (2008). For example:

In his first few years as president, Bill Clinton justified staying out of Slobodan Milosevic's brutal war in Yugoslavia by citing Robert Kaplan's book *Balkan Ghosts*, which argued that ethnic wars had consumed the region for centuries and there was nothing we could do about them. Later, . . . [Clinton] justified intervening after all by citing Michael Sells' *The Bridge Betrayed: Reform and Genocide in Bosnia*, which argued that ethnic conflict had ebbed and flowed through the ages and that Western help might make a difference.

*Id.*

American campaign to shape the world order to suit its interests. Moreover, the use of the military seemed oddly discriminating, albeit according to criteria that defied simple explanations. There had been interventions in Africa, the Western Hemisphere, Europe, and Southwest Asia, as the United States military had gone into Somalia in 1992, Haiti in 1994, Bosnia in 1995, and Kosovo in 1999. But Washington chose to stay out of Rwanda in 1994 and refused to step into the middle of a dispute between Eritrea and Ethiopia from 1998 to 2000. It also passed on intervening in the Central African Republic in 1996, in Albania in 1997, and in Sierra Leone in 1999. As some in Washington belatedly came to recognize, with great power also came a plethora of ethical dilemmas regarding the use or non-use of that power.

#### IV. A Persistent Imbalance within our System of Government

Military intervention has, in turn, created a permanent imbalance between the different branches of government, with the Executive clearly dominant over Congress and the Judiciary. The Founders worried that wars would give rise to an overgrown military establishment that would upset the delicate balance between the three branches of government, as well as between the Government and the People. Their careful reading of history, as well as their own personal experiences, confirmed their worst fears. A government instituted to preserve liberties could swiftly come to subvert them. This Section will show how the system that the Founders put into place failed to live up to their hopes, and it details the unsuccessful attempts that have been made to remedy the resulting imbalance within our Government.

##### A. *Prophecy Fulfilled*

A gloomy Thomas Jefferson once opined, “[t]he natural progress of things is for liberty to yield & government to gain ground.”<sup>37</sup> The evidence to support Jefferson’s dour claim is

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37. Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), in JEFFERSON: POLITICAL WRITINGS 363, 364 (Joyce Appleby & Terence Ball eds., 1999).

irrefutable. Throughout human history, government has grown during wartime or other periods of great anxiety, and it rarely surrenders these powers when the crisis abates. For instance, the government instituted federal income tax withholding during World War II, which remains in effect today;<sup>38</sup> it took over 108 years to effectively repeal the federal excise tax on long-distance telephone calls, a tax ostensibly enacted to pay for the Spanish-American War, which lasted less than six months;<sup>39</sup> and New York City rent controls, which were enacted in 1943 out of fear of war-related housing shortages, continue to burden both landlords and tenants.<sup>40</sup> Considering the question more holistically, “the *nonmilitary* sectors of the federal government actually grew at a faster rate in World War II than under the impetus of the New Deal!”<sup>41</sup> All aspects of state power expand during times of war, including those that have nothing to do with actually fighting and winning battles on land or sea.

### B. *Systemic Shortcomings*

In retrospect, the Founders’ intention that Congress would control the power to declare war might have been doomed from the outset. Madison may have genuinely believed that Congressional control over the war powers was the most important provision within the entire Constitution, but one of his successors recognized Congress’s relative powerlessness in this department rather well. In 1846, President James K. Polk

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38. Pub. L. No. 78-68, ch. 120, 57 Stat. 126 (1943).

39. Pub. L. No. 55-133, ch. 448, 30 Stat. 460 (1898). Although the law was never formally repealed, the Internal Revenue Service ceased collection of the tax in 2006. Press Release, Internal Revenue Service, Government to Stop Collecting Long-Distance Telephone Tax (May 25, 2006), available at <http://www.irs.gov/newsroom/article/0,,id=157706,00.html>.

40. Emergency Price Control Act of 1942, Pub. L. No. 421, ch. 26, 56 Stat. 23 (repealed 1947). See also Walter Block, *Rent Control*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 442, 444 (David R. Henderson ed., 2d ed. 2008) (stating that such policies have “led to decay and abandonment throughout the entire five boroughs of the city”). For a historical account of rent control in New York City, see Guy McPherson, Note, *It’s the End of the World As We Know It (And I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 FORDHAM L. REV. 1125 (2004).

41. PORTER, *supra* note 3, at 280 (emphasis in original).

sent American troops into territory claimed jointly by Mexico and the United States. Congress declared war when Mexican forces attacked a contingent under General Zachary Taylor's command,<sup>42</sup> thereby handing Polk the conflict he sought. Two years later, Congress formally censured Polk for exceeding his constitutional authority,<sup>43</sup> but by then the damage had already been done. In a letter to his law partner in Illinois, Republican Abraham Lincoln noted:

Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. . . .

The provision of the Constitution giving the war making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.<sup>44</sup>

That was the intention, and yet Polk prevailed. Since the end of World War II, a succession of American Presidents stretching from Harry Truman to George W. Bush have involved the United States in wars, often without so much as a nod to Congressional authority. Moreover, they sometimes did so in direct opposition to the public's wishes.

For instance, on rare occasions, Congress has passed

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42. Act of May 13, 1846, ch. 16, 9 Stat. 9.

43. 43 J. HOUSE OF REPRESENTATIVES 1, 184 (1848) (30th Cong., 1st Sess.).

44. Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), *in* LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 175, 175-76 (Don E. Fehrenbacher ed., 1989) (emphasis in original).

resolutions objecting to the introduction of American troops into a particular conflict, only to be summarily ignored. In November 1995, the Republican-controlled Congress voted by a margin of 243 to 171 to prevent President Bill Clinton from sending American forces to Bosnia-Herzegovina as part of the Dayton Peace Agreement.<sup>45</sup> Clinton sent them anyway. Congress mounted no serious campaign to bring the troops home, and it is difficult to see how it would have succeeded. Efforts in recent years by the Democratic-controlled Congress to bring an end to the war in Iraq repeatedly failed. Ironically, the Iraqi Parliament appears to have had more influence over the disposition of American troops in Iraq than the United States Congress. Iraqi Prime Minister Nouri al-Maliki submitted the United States-Iraq Status of Forces Agreement to the Iraqi Parliament for ratification and to the Presidency Council for unanimous approval.<sup>46</sup> The agreement, however, was negotiated and signed by President George W. Bush with hardly any Congressional involvement, ostensibly because it did not rise to the level of a formal treaty requiring Senate ratification.<sup>47</sup> Thus, Madison's system for constraining executive power has failed to live up to his expectations.

### C. *Addressing the Imbalance*

Madison's concerns, meanwhile, have proved prescient. Our responses to recurring crises—both real and imagined—have fundamentally altered the balance of power. This pattern of behavior has been challenged along the way, but the Judiciary and Congress are both less capable of checking presidential power precisely because of the existence of a large and permanent military establishment. In the past, when

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45. The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A: Agreement on the Military Aspects of the Peace Settlement, art. 1, ¶ 1(a), U.N. Doc. S/1995/999 (Dec. 14, 1995).

46. Agreement on the Withdrawal of United States Forces From Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, available at [http://www.acq.osd.mil/log/PS/p\\_vault/SE\\_SOFA.pdf](http://www.acq.osd.mil/log/PS/p_vault/SE_SOFA.pdf). See also generally, e.g., Sean Foley, *The Iraqi Status-of-Forces Agreement, Iran, and Guantanamo Bay*, 34 RUTGERS L. REC. 39 (2009).

47. U.S. Const. art. II, § 2, cl. 2 (stating that the President “shall have the power, by and with the advice and consent of the Senate, to make treaties”).

given the power to launch military action—at any place, and at any time—Presidents have regularly seized the opportunities. The vast majority of cases in which the United States military has been deployed abroad since the end of World War II have not come about by virtue of Congressional action following months, or even weeks, of public debate.

In 1973, Congress attempted to recover some of its prerogatives in the War Powers Act,<sup>48</sup> but it has ultimately failed to constrain the President's ability to wage war. The pattern is familiar: the President as Commander-in-Chief sends the military into a particular hot spot, the news cameras capture footage of the troops landing, and then the White House notifies Congress that action has been taken. Long before the provisions of the War Powers Act took effect, Congress either endorsed the mission, or it came to an end.<sup>49</sup>

In a few cases, Congress has passed wartime authorizations, ostensibly granting the President the right to wage war at his discretion,<sup>50</sup> but these actions merely reveal the depths of Congressional weakness. Members of Congress take an oath of office not so dissimilar to that of the President because all pledge to uphold the Constitution.<sup>51</sup> Senators or representatives cannot in good conscience vote to unilaterally abrogate their duties and responsibilities to declare war as

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48. Pub. L. No. 93-148, § 2, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (2006)).

49. In July 2008, a commission led by former Secretaries of State James Baker and Warren Christopher recommended changes to the War Powers Act, but Congress has not taken action as of yet. *See generally* Karen DeYoung, *Ex-Secretaries Suggest New War Powers Policy*, WASH. POST, July 9, 2008, at A10. For a critical view of the Baker-Christopher recommendations, see Louis Fisher, *The Law: The Baker-Christopher War Powers Commission*, 39 PRESIDENTIAL STUD. Q. 128 (2009).

50. *See, e.g.*, H.R.J. Res. 77 (1991) (enacted as Pub. L. No. 102-1, 105 Stat. 3) ("Joint Resolution to authorize the use of United States Armed Forces pursuant to United Nations Security Council Resolution 678") (first Gulf War); H.R.J. Res. 114 (2002) (enacted as Pub. L. No. 107-243) ("Joint Resolution to Authorize the use of United States Armed Force against Iraq") (2002 Iraq War).

51. U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the execution of his office, he shall take the following oath or affirmation: I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."); U.S. CONST. art. VI ("The Senators and Representatives before mentioned . . . shall be bound by oath or affirmation, to support this Constitution . . .").

stipulated in the Constitution any more than they can hand over to the President any of the other powers listed in Article I, Section 8, including the right to levy taxes,<sup>52</sup> establish rules for the United States armed forces,<sup>53</sup> and regulate interstate commerce and trade with foreign nations.<sup>54</sup>

## V. Costs of a Modern Military

This subtle shift in the character of our system of government is one of the many costs of our military power. It is a cost that is harder to measure than what we spend every year on our military, or on our wars, but is far more significant over the long term. In this part, I will evaluate two arguments in favor of a large military establishment in light of the modern international context. I will conclude that these arguments underestimate the costs of such an apparatus in terms of liberty. Furthermore, I will assert that a presumption against using force would make America more secure and would ultimately produce a more peaceful international order.

### A. *A Necessary Evil?*

Many Americans who favor a large military engaged in numerous missions around the world concede that executive power grows during periods of crisis and threat. Times, however, have changed so dramatically since the founding of the Republic that Americans need no longer be concerned with the Founders' warnings. Robert F. Turner, co-founder of the University of Virginia's Center for National Security Law, makes the case that Congress's war powers are a "moribund anachronism" because the world community has since outlawed the "adventuristic policies" which motivated the Founders to create this check in the first place.<sup>55</sup> As others have noted, the Constitution is not a suicide pact.<sup>56</sup> The world is a dangerous

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52. U.S. CONST. art. I, § 8, cl. 1.

53. U.S. CONST. art. I, § 8, cl. 14.

54. U.S. CONST. art. I, § 8, cl. 3.

55. Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War"*, 25 HARV. J.L. & PUB. POL'Y 519, 537 (2002).

56. See generally, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT, at v

place. There are people out there who wish to do us harm, and we must kill them before they kill us. In effect, such arguments presume that political leaders are entitled to selectively circumvent the Constitution in order to confront imminent threats.

B. *An Evil at All?*

Others contend that the accumulation of power into the hands of a single person—more specifically, the President’s ability to wage war unencumbered by Congress—is not only necessary, but is in fact a positive power. Some go so far as to argue that the Founders never really intended for Congress to control the war powers in the first place.

For example, John Yoo, a law professor at the University of California, Berkeley, who served in the Justice Department’s Office of Legal Counsel during the George W. Bush administration, has consistently argued that the President’s inherent power to wage war is essentially unlimited.<sup>57</sup> Yoo does not, however, appear to understand the motivations, hopes, and fears that informed the federalist experiment. He essentially ignores the concern that war was a vehicle whereby governments infringed upon individual liberty, and he therefore misapprehends why the Founders sought to limit their new government’s propensity to wage war.

Ultimately, Yoo’s interpretation reveals a particular philosophy of governing and of the utility of military force that the Founders explicitly rejected. Yoo seems well aware of this fact. The confluence of “rogue states,” terrorist organizations and weapons of mass destruction, he explains, requires a very different conception of warfare and war powers than the one the Founders envisioned.<sup>58</sup> Although he does not necessarily concede that there are constitutional limits on the President’s war powers, to the extent that such restrictions do exist, Yoo

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(2006) (explaining that the phrase derives from Supreme Court Justice Robert H. Jackson’s dissenting opinion in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), and was repeated in Justice Arthur Goldberg’s majority opinion in the case *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

57. See generally JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at x (2005).

58. See YOO, *supra* note 57, at 1-29.

would remove them. Given the threats of the twenty-first century, Yoo writes that “we should not adopt a warmaking process that contains a built-in presumption *against* using force abroad.”<sup>59</sup>

### C. *Undermining Liberty, Jeopardizing Security*

Actually, such a presumption against using force abroad would keep America reasonably prosperous and secure. United States policymakers have the capacity to intervene in dozens of places around the world, but our recent experience has shown that such interventions often undermine U.S. security. Military intervention is usually irrelevant when dealing with non-state actors such as al-Qaeda. In many cases, it is actually worse than irrelevant—it is counterproductive. Although there may be occasions when military force is required to eliminate an urgent threat to national security, and we must therefore maintain a strong military to deal with such threats, our capacity for waging war far exceeds that which is required for such contingencies.

## VI. The Proper Role of the Military in Modern American Society

Here again, the Founders’ wisdom is apparent. They were deeply skeptical of warfare’s capacity for effecting good ends. Benjamin Franklin declared that “there never was a good war, or a bad peace.”<sup>60</sup> They held such views despite the fact that they had all lived through a war that gave them what they most desired—the freedom to construct a new political order apart from the British monarchy. These patriots, to a person, would have much preferred that the same ends be achieved by other means. Today, although America’s power is ostensibly intended to keep its people safe, the fact that it has more power than it needs actually makes the country less safe. Given this paradox, the United States should reduce its military power

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59. *Id.* at x (emphasis added).

60. Letter from Benjamin Franklin to Sir Joseph Banks (July 27, 1783), in 9 THE WRITINGS OF BENJAMIN FRANKLIN: 1706-1790, at 73, 74 (Albert Henry Smyth ed., MacMillan 1907).

and adopt a new, more circumspect attitude toward the use of force in order to better protect its homeland and way of life.

A. *Advancing U.S. Security Interests*

The United States should shrink its military and use it less often because the costs do not match the benefits derived from having a large military force. The costs are particularly unappealing when contrasted with the realistic alternatives. The best of these alternatives from the United States' perspective is a new global order in which other countries assume a greater responsibility for defending themselves and for dealing with regional security challenges before they become global challenges. Reducing our military power, therefore, will advance broader U.S. interests by precipitating a more equitable distribution of risks and responsibilities across the international system.

Reducing the United States' power would constrain its ability to intervene militarily in international conflicts and may begin to rectify the imbalance of power between the Executive and the other two branches. Congress regularly adds, changes, and deletes items from the White House's proposed budget for the Department of Defense. Such ad hoc circumventions, however, do not always result in better policies. The United States needs a more comprehensive approach to limiting its propensity to intervene, and it should create a military that better conforms to a new, more restrained grand strategy.

Righting the imbalance between the acquisition of, and application of, force will not be easy. As this Article has shown, America's capabilities often dictate its strategies. Given that there are domestic constituencies that favor various forms of military spending, these interest groups have often exerted an important influence over how much military power America has and how it should be used.

It should operate the other way around, however. To build and sustain a massive military, and to then consider where to use it, puts the military cart before the strategic horse. I favor the opposite approach: putting the strategic horse before the military cart. Policymaking entails making choices and a willingness to explicitly consider trade-offs between the

irrelevant and the urgent, as well as between the nice-to-do and the must-do. These choices also apply to America's force structure, both the total size of its military, and the mix of planes and personnel, ships and submarines, within that military.

B. *Security, Liberty, and National Interests*

In an ideal world, the government would be able to provide security for individuals while simultaneously affording them considerable freedom to pursue their own ends, provided of course that those pursuits did not infringe on the security and liberty of others. In the real world, preserving such liberties must exist in constant tension with the government's obligation to preserve and protect the Republic.

As explained above, the Founders feared the costs of military power.<sup>61</sup> Even George Washington, the taciturn General who led U.S. forces to victory, and in the process, forever established himself as the father of the new nation, would have much preferred for the United States to be a nation at peace. Washington especially hoped that the United States would remain aloof from other countries' wars. Historian Joseph Ellis describes Washington's approach to foreign policy as grounded in a skeptical, some might even say pessimistic, view of an essentially immutable human nature that tended inexorably toward conflict.<sup>62</sup>

This desire to avoid foreign entanglements with other nations combined with the Founders' inherent skepticism about the utility and efficacy of state action. The Founders measured the costs of war not only in blood and treasure, but also in the character of the fledgling Republic—recall Madison's warning that war was the greatest enemy of liberty.<sup>63</sup> They therefore defined national interests in ways that further constrained the nation's propensity to wage war. They feared that government power, mobilized for foreign policy aims, could just as easily be directed to stifling liberty at

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61. See discussion *supra* Part I(A).

62. JOSEPH J. ELLIS, *HIS EXCELLENCY GEORGE WASHINGTON* 235-36 (2005).

63. See *supra* notes 1-2 and accompanying text.

home. These doubts and fears led them to cast a skeptical eye on war, and to adopt a very stringent standard for when and whether to go to war.

## VII. A New Global Order

A similarly high standard would serve the United States well today. The Founders' concerns that wars—and an enormous and permanent military to prosecute these wars—would impose huge costs on our system of government, shift the balance between the branches, and expand the government's authority over the citizenry, have proved prescient. Likewise, we have learned that the costs of waging wars are rarely offset by the benefits that derive from them. This does not mean that military intervention is never warranted; it does, however, mean that we need to more clearly define situations in which American military involvement is the appropriate course of action.

Because the preservation of both America's physical security and way of life depend upon its participation in the international system, the United States must remain engaged in the world. Yet it is wrong to assume that the United States can only do so from a position of global military dominance. The international system exists in spite of—not because of—the power of any one state. It is the height of arrogance and folly to presume that the world will descend into chaos if the United States shapes its military to advance its vital national interests and adopts a more discriminating approach toward the use of force when those interests are not engaged.

### A. *New Rules: Four Criteria for Military Intervention*

It will be difficult to transition from a current, unipolar order to a new, multipolar one. Other countries will be expected to bear additional costs, and many will resist. Resistance will also come from within the United States, especially from that cadre of Americans who are enamored with the idea that it is in the best interest of the United States to dominate the global order. The risks that the United States' security will be undermined during this transitional period, however, can be mitigated by establishing clear and stringent

standards, such as those that follow, concerning when and whether to use force.

### 1. U.S. National Security Must be at Stake

A smaller U.S. military focused on defending core national interests cannot be in the business of defending other countries that should be defending themselves. The same principle applies to interventions seen as serving a higher humanitarian purpose. Therefore, the United States should only commit to a particular military mission overseas if there is a compelling U.S. national security interest at stake.

At first glance, this would seem to be a rather broad mandate, but U.S. national security has rarely been threatened over the past two decades. It should be noted that this criteria is more stringent than that set forth by the Weinberger-Powell Doctrine, which held that U.S. combat forces should not be sent overseas “unless the particular engagement or occasion is deemed vital to our national interest *or that of our allies.*”<sup>64</sup>

Whereas the Weinberger-Powell Doctrine presumed that allied interests were essentially synonymous with America’s, one should be extremely wary of equating the two. The United States should revisit its obligations to each and every ally, and establish clear criteria for why, under what circumstances, and, crucially, by whose authority these obligations might translate into the commitment of U.S. military personnel.

### 2. Clear National Consensus

The United States should be particularly on guard against those situations that separate its own public from decisions of whether and when to go to war. The reason why is quite simple, and it relates directly to the second criterion governing the use of force: the U.S. military should not be engaged in combat operations unless there is a clear national consensus behind the mission.

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64. Caspar W. Weinberger, Sec’y of Def., Address Before the National Press Club: The Uses of Military Power, (Nov. 28, 1984), *in* CASPAR WEINBERGER, FIGHTING FOR PEACE: SEVEN CRITICAL YEARS IN THE PENTAGON 441 (1990) (emphasis added).

a. *Utilizing Existing Institutions*

It is not necessary to create new mechanisms for ascertaining public attitudes on such crucial questions; it is only necessary to use the tools provided by the Founders. This would entail reasserting Congress's constitutional authority over the war powers and restoring balance between the Executive and Legislative branches of government.

The Founders did not create a democracy. They did not anticipate, nor did they desire, that important decisions would be settled by plebiscite. They did, however, intend that the public would communicate their wishes through their elected representatives. They expected that it would be difficult to build a consensus around any particular policy, and they deliberately constructed a system aptly described as an “invitation to struggle” over important decisions between the Executive and Legislative branches.<sup>65</sup> At the top of the list was the decision to take the country to war—recall Madison's assertion that the most important passage of the Constitution was the assignment of the war power to the legislature, as opposed to the Executive branch.<sup>66</sup> This crucial provision, however, runs counter to modern impulses in United States-foreign relations.

The inclination to play a more active international role—promulgated after World War II and expanded upon during successive rounds of the North Atlantic Treaty Organization (“NATO”) expansion in the post-Cold War period—obligates the United States to become involved in foreign military conflicts without the explicit authorization of Congress.<sup>67</sup> Indeed, a key objection to the League of Nations charter, one that ultimately contributed to the Senate's refusal to ratify that treaty, was precisely this constitutional concern—that a collective security

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65. Ted Galen Carpenter, *Global Interventionism and a New Imperial Presidency*, 71 CATO POLY ANALYSIS, May 16, 1986, [http://www.cato.org/pub\\_display.php?pub\\_id=937&full=1](http://www.cato.org/pub_display.php?pub_id=937&full=1) (quoting EDWARD S. CORWIN ET AL., *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 201 (5th rev. ed. 1984)).

66. Madison, *supra* note 13, at 174.

67. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

organization would supplant Congress's authority as stipulated by the Founders.<sup>68</sup>

That such constitutional concerns are "now typically derided as 'isolationist,'" notes the Cato Institute's Stanley Kober, "merely indicates how far we have come from the founding vision of the United States."<sup>69</sup> In short, Kober explains that "the pursuit of alliances has the effect of undermining what Madison regarded as the single most important characteristic of American democracy."<sup>70</sup>

b. *Accurate Estimation of Costs*

Restoring Congress's proper role in determining whether and when to go to war will not be enough.<sup>71</sup> Renegotiating security treaties with key allies and terminating trip-wire missions around the world that are designed to draw the United States into other nations' conflicts will not prevent a future President or future Congress from choosing to send troops into such conflicts. Cutting the military will not, by itself, constrain the government's propensity to wage war. The public's occasional enthusiasm for war must be tempered by ensuring that the related costs are understood.

Popular support must be built around reasonable expectations, as opposed to best-case scenarios. This consensus must be durable enough to survive temporary setbacks, and history shows that it is impossible to sustain domestic support when the mission does not advance vital national interests. The American people offered lukewarm support for the humanitarian mission in Somalia in 1993; they demanded a change of course when they saw the costs played out in the

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68. See, e.g., Arthur Schlesinger, Jr., *Back to the Womb? Isolationism's Renewed Threat*, 74 FOREIGN AFF., July-Aug. 1995, at 2, 3 (noting that "Wilson's fight for the League of Nations foundered in the Senate" over constitutional and power concerns that the organization would create).

69. Stanley Kober, *James Madison vs. Madeleine Albright: The Debate Over Collective Security*, in NATO ENLARGEMENT: ILLUSIONS AND REALITY 253, 257 (Ted Galen Carpenter & Barbara Conry eds., 1998).

70. *Id.*

71. See *id.* at 257-58 (discussing some of the arguments against NATO enlargement that were offered over a decade ago, but which are still relevant today).

streets of Mogadishu.<sup>72</sup> The same can be seen with respect to the Iraq War: the advocates for war told Americans that the war would be cheap and easy.<sup>73</sup> The George W. Bush administration marketed the war as a mission to overthrow a dictator with ties to al-Qaeda and who ran a functioning nuclear weapons program.<sup>74</sup> Support for the Iraq venture evaporated when the public learned the truth.<sup>75</sup>

This idea of transparency regarding the price of conflict also found favor among some of the Founders. Whereas some people today speak blithely of a “democratic peace” whereby democratic states are supposedly less warlike than undemocratic ones,<sup>76</sup> James Madison was not so naive. He recognized that democracy was no panacea for curing man’s

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72. See ERIC V. LARSEN & BOGDAN SAVYCH, AMERICAN PUBLIC SUPPORT FOR U.S. MILITARY OPERATIONS FROM MOGADISHU TO BAGHDAD 30-36 (2005), which describes a study of public attitudes toward foreign military operations in Somalia, and which demonstrates that two-thirds of poll respondents favored withdrawal from Somalia *before* the incident where a U.S. Black Hawk helicopter was shot down in the Somali capital of Mogadishu in October 1993. The bloody firefight that followed resulted in eighteen U.S. Army Rangers killed, and another seventy-six wounded. The story is told in the book (later a movie), MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (2000).

73. Before the war began, White House Budget Director Mitch Daniels suggested that the war could be prosecuted for a reasonable \$20 billion. MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 194-195 (2006). Iraq war advocate Ken Adelman predicted that the entire affair would be a “cakewalk.” Ken Adelman, Op-Ed., *Cakewalk in Iraq*, WASH. POST, Feb. 13, 2002, at A27.

74. See ISIKOFF & CORN, *supra* note 73.

75. See Ben Arnoldy, *US Public’s Support of Iraq War Sliding Faster Now*, CHRISTIAN SCI. MONITOR (Boston), Mar. 20, 2007, at 1 (including a timeline showing changing public attitudes toward the war in Iraq juxtaposed against major events there).

76. See generally, e.g., Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*, 19 INT’L SECURITY, Autumn 1994, at 5 (explaining that the notion positing that democracies are inherently less warlike than autocracies does not survive close scrutiny). See also CHRISTOPHER LAYNE, PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT 121-22 (2006) (concluding the same); TONY SMITH, A PACT WITH THE DEVIL: WASHINGTON’S BID FOR WORLD SUPREMACY AND THE BETRAYAL OF THE AMERICAN PROMISE 96-114 (2007) (same). See also generally EDWARD D. MANSFIELD & JACK SNYDER, ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR (2005) (endorsing the broad notion of a democratic peace and pointing out that immature democracies are no less prone to war than autocracies).

propensity to wage war.<sup>77</sup> He worried that wars of passion—precipitated by the public’s desire for revenge, honor, or national pride—were every bit as dangerous to liberty as wars initiated by princes and kings.<sup>78</sup> Madison also sought, therefore, ways to restrain the popular impulses that might drive the new government toward war.

The best mechanism, Madison surmised, would be to subject “the will of the society to the reason of the society.”<sup>79</sup> People must be made aware that their actions have consequences; they must be cognizant of the trade-offs inherent in pursuing a military versus non-military course.

The Federal Government tends to avoid such hard choices. Deficit spending enables politicians in Washington to write checks today that will be paid for far into the future. Such expenditures may be justifiable in periods of great emergency, but nothing that has occurred in the recent past qualifies as such an emergency. A complete reset is needed. The United States should return to Madison’s preferred solution that “each generation should be made to bear the burden of its own wars, instead of carrying them on, at the expence of other generations.”<sup>80</sup> In other words, there should be no more waging wars on credit. Forcing the advocates for war to consider the costs of war ahead of time, including an explicit accounting of how it will be paid for and what other expenditures will be cut or what taxes will be raised, will help to frame the decision to go to war as a choice against competing priorities.

### 3. Clear and Obtainable Military Objectives

The third criterion that should constrain our interventionist impulses is closely related to the second, because the likely costs of military intervention cannot be established without knowing what the troops will do. The government should not involve the United States military in foreign operations without clear and obtainable military objectives. Further, every plan for getting into a war must

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77. See generally James Madison, *Universal Peace*, NAT’L GAZETTE, Feb. 2, 1792, reprinted in THE WRITINGS OF JAMES MADISON, *supra* note 11, at 88.

78. See generally *id.*

79. *Id.* at 89.

80. *Id.* at 90. See also Kober, *supra* note 69, at 258.

have an equally detailed plan for getting out.

Such questions are practically irrelevant when a country's very survival is at stake; the British and the Soviets did not ask for an exit strategy when the Nazis were bearing down on them, for example. The criteria discussed here, however, pertain to wars of choice—initiated because they will advance national security. Once the advocates for war have shown how the nation's interests will be served by military intervention, and once the public has signaled its willingness to support the cause, including agreeing to pay for it, the military's role should be limited to achieving military objectives. Non-military objectives, including attempting to fashion a new political order that would bring contending factions together, or engaging in post-conflict reconstruction projects to repair physical infrastructure damaged, not by the war, but by years of neglect by previous governments, are costly and unnecessary missions for a military focused on fighting and winning wars.

Colin Powell was speaking to the problem of post-conflict reconstruction in his famous “Pottery Barn” principle: “[y]ou break it, you buy it.”<sup>81</sup> What Powell actually said to President Bush in August 2002, according to Bob Woodward's account of the exchange, was even more perceptive: “[y]ou are going to be the proud owner of 25 million people.”<sup>82</sup> Powell warned the President, “[y]ou will own all their hopes, aspirations and problems. . . . It's going to suck the oxygen out of everything.”<sup>83</sup>

Another prominent military leader, Major General David Petraeus, had similar concerns about the tendency of wars to drag on for years. As he prepared to lead the 101st Airborne Division across the border separating Kuwait from Iraq in March 2003, Petraeus was haunted by a nagging question. Despite the fact that Saddam Hussein's days in power were clearly numbered, Petraeus asked aloud “[t]ell me how this ends?”<sup>84</sup>

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81. BOB WOODWARD, *PLAN OF ATTACK* 150 (2004).

82. *Id.*

83. *Id.*

84. Rick Atkinson, *A Long and Blinding Road to Battle in Iraq: Unexpected Challenges Tested Commander of 101st Airborne*, WASH. POST, Mar. 7, 2004, at A1. See also LINDA ROBINSON, *TELL ME HOW THIS ENDS: GENERAL DAVID PETRAEUS AND THE SEARCH FOR A WAY OUT OF IRAQ* (2008); Christopher Dickey, *The Story of O*, N.Y. TIMES, Apr. 4, 2004, at A12.

Petraeus and Powell understood that it is rather easy to start wars, but awfully difficult to end them. Policymakers must explicitly account for this when choosing to send United States troops to war.

#### 4. Use of Force as a Last Resort

The first three criteria are not sufficient to establish the wisdom and legitimacy of military intervention. The American people will support the use of force when national security interests are at stake, but that does not by itself make intervention acceptable. After all, the United States has the ability to incinerate any place on earth in a matter of minutes. That obviously does not imply a right to do so. This leads to the fourth and final rule governing foreign military intervention: force should only be used as a last resort, and only after other measures for dealing with the particular national security threat have been exhausted.

Civilized societies abhor warfare. Even wars initiated for the right reasons, and waged with due respect for international norms, represent, in a real sense, a failure to resolve matters by peaceful means. America's current policymakers must remember this timeless rule, even—or perhaps especially—when the capacity for waging war seems nearly limitless.

### VIII. Conclusion

George Washington, in his Farewell Address, and Thomas Jefferson, in his First Inaugural Address, both admonished their countrymen to steer clear of the internal affairs of foreign powers, and both were anxious for the United States to avoid unnecessary wars. Such comments did not imply a disregard for human rights; only that their greatest concern was for maintaining their new nation as a shining example of freedom for the world. These sentiments were perhaps best expressed on July 4, 1821, by John Quincy Adams who declared, “[America] goes not abroad in search of monsters to destroy. She is the well-wisher to the freedom and independence of all. She is the champion and vindicator only of her own.”<sup>85</sup>

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85. John Quincy Adams, Address Delivered at the Request of the

Though the advocates of benevolent global hegemony scorned Adams's vision as synonymous with "cowardice and dishonor,"<sup>86</sup> we can see—given that *their* strategy has sapped the United States' strength and undermined its security—what a wise standard it was. Americans would be richer, freer, and safer if they adhered more closely to standards such as those proposed in this Article.

These criteria are hardly revolutionary; as already discussed, they mirror the precepts of the Weinberger-Powell Doctrine from the Reagan era, as well as aspects of just-war theory that have been around for centuries. America, however, has lost sight of them in recent years. Its capacity for waging war has enabled the country to avoid discussions of whether a particular intervention was truly necessary. In solving its power problem and by adapting its military to meet the changing security needs of the twenty-first century, it is imperative that the United States reduce and reshape its military to focus on vital national security interests. Americans can no longer afford to be distracted by challenges that can and should be handled by others. Accordingly, America's default position should be one of non-intervention and the burden of proof should shift, as the Founders had intended, to the advocates of military intervention. Exercising greater restraint in American foreign policy will help restore balance between the Executive and Legislative branches and return the nation to its founding principles.

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Committee of Arrangements for Celebrating the Anniversary of Independence, at the City of Washington on the Fourth of July 1821: Upon the Occasion of Reading the Declaration of Independence (July 4, 1821) (on file with University of Missouri Columbia Libraries Fourth of July Orations Collection).

86. William Kristol & Robert Kagan, *Toward a Neo-Reaganite Foreign Policy*, 75 FOREIGN AFF., July-Aug, 1996, at 31.