

## Chapter 8

**To Provide for the Common Defense****§ 1. War**

We live in a world divided up into independent nation-states and it has been so since before history began to be recorded. It does not matter if we call these social divisions clans, tribes, city-states, nations, or empires. Each has its own culture, its own classes and divisions among the people living in its geographical community, and its own particular form of government. In all that time no nation-state has ever recognized any rights of any other nation-state to be superior to its own whenever the interests of two or more nation-states came into conflict.

The organized structure of a nation-state makes apt the metaphor of regarding each nation-state as a corporate individual. Between these different corporate individuals the fundamental mutual relation is the state of nature, moderated from time to time by two mechanisms. One, the oldest, is when a common interest persuades their rulers to join in temporary alliances against other nation-states whose rulers' self-interests are deemed threatening to their own. The other mechanism is provided by agreements among groups of nations to form special diplomatic councils, such as the United Nations or the Organization of American States, for the purpose of discussing and attempting to resolve their differences by peaceful means prior to the last resort of armed conflict. These organizations, however, do not constitute governments or even proto-governments and have no powers of enforcement. Thus, the fundamental international relation remains that of the state of nature. In an 1848 speech in the House of Commons Lord Palmerston said,

We have no eternal allies and we have no perpetual enemies. Our interests are eternal and perpetual, and these interests it is our duty to follow.

Gwynne Dyer wrote,

There has accumulated over the millennia a vast body of beliefs, habits, and perspectives about the environment in which states operate and about how best to survive within that merciless environment. Almost all individuals who rise to positions of political power in any country come to share the assumptions of this traditional wisdom to a large extent, however different their political beliefs or their specific national situations – and it is a tradition almost totally dominated by the belief that war is theoretically possible at any time between any of the independent states of the world.

Yet it is glaringly obvious that the kinds of quarrels that occur between individuals and groups in the civil community over land, money, and rights – and the kinds of suspicion and rivalry that cause people to fear or hate their neighbors – are different only in their petty scale from the kinds of disputes that arise between states. There are only a strictly limited number of areas in which human beings are likely to come into serious conflict, and the list stays about the same at every level from individuals to governments (except that states rarely quarrel about sex). In the civil community, however, these conflicts do not normally lead to fatal violence between individuals

or civil war between groups – whereas in the international community they very often lead to war.

However much one might wish for wars to never be fought – and the great majority of all people do wish for this in one degree or another – war or the possibility of war has been with us since the first nation-states were formed and none can foresee the day when perpetual peace might be possible. Even Sir Thomas More's *Utopia* did not dream of this day:

War or battle, as a thing very beastly and yet to no kind of beasts in so much use as to man, they do detest and abhor. And contrary to the custom almost of all other nations, they count nothing so much against glory as glory gotten in war. And therefore, though they do daily practice and exercise themselves in the discipline of war, and not only the men but also the women upon certain appointed days, lest they should be to seek in the feat of arms<sup>1</sup> if need should require, yet they never go to battle but either in the defense of their own country, or to drive out of their friends' land the enemies that have invaded it, or by their power to deliver from the yoke and bondage of tyranny some people that be therewith oppressed, which thing they do of mere pity and compassion. . . For if they find the cause probable, and if the contrary part will not restore again such things as be of them justly demanded, then they be the chief authors and makers of the war[.] – *Utopia*

Clausewitz wrote,

If a state is thought of as a person, and policy as the product of its brain, then among the contingencies for which the state must be prepared is a war in which every element calls for policy to be eclipsed by violence.

Let us be clear that by the word "war" this treatise means nothing else than violent conflict between nations or between a nation and a body politic – such as Al Qaeda – that is not called a nation simply because it lacks a geographical community with definable boundaries. We will not use the word "war" in the metaphorical sense employed by propagandists, e.g. "the war on drugs" or "the war on poverty." War is violent application of deadly force against a specific enemy.

Under the terms of the Social Contract of the American Republic, there are very few occasions when *initiation* of a war by the general government of the Republic is just. All of these few occasions pertain directly to the general purpose and objectives of government: (1) to protect the persons and rightfully possessed tangible properties of citizens of the Republic; (2) to preserve the Union of the Republic; (3) to uphold justice for the citizens of the Republic; (4) to safeguard the domestic tranquility of the body politic of the Republic; (5) to safeguard the general welfare of the citizens of the Republic; and (6) to protect the civil liberty of citizens of the Republic from the actions of any non-citizens of the Republic. There are no other conditions or reasons under or by which the Sovereign people of the Republic grant to their agents of government the authority to initiate the commission of the nation to war. All other causes are the uncivic ends of propagandists and their

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<sup>1</sup> "Be to seek in the feat of arms" means "lack adequate training in armed combat."

masters, the thin mask of which can be unveiled by plain written or spoken words, e.g. as in,

He had grown up in a country run by politicians who sent the pilots to man the bombers to kill the babies to make the world safer for children to grow up in. [Ursula K. Le Guin, *The Lathe of Heaven*, 1971]

It is to safeguard ourselves from the dangers of the state of nature that we form the political community and establish government. John Quincy Adams wrote, in a letter to his father in 1816,

I can never join with my voice in the toast which I see in the papers attributed to one of our gallant naval heroes. I cannot ask of heaven success, even for my country, in a cause where she should be in the wrong. *Fiat justitia, pereat coelum*<sup>2</sup>. My toast would be, may our country always be successful, but whether successful or otherwise, always right.

It is the tragedy of human nature that wars exist, but they do. John F. Kennedy was correct to say that "our destinies are sometimes focused on the small point of a bayonet." The general government is tasked with the awesome responsibility of determining when our *common* destinies, not merely the fortune of a few, are so focused. Only the common cause is the just cause, and any other cause places the government in the *deontological* wrong. Clausewitz wrote,

War is no pastime; it is no mere joy in daring and winning, no place for irresponsible enthusiasts. It is a serious means to a serious end, and all its colorful resemblance to a game of chance, all the vicissitudes of passion, courage, imagination, and enthusiasm it includes are merely its special characteristics.

When whole communities go to war – whole peoples, and especially *civilized* peoples – the reason always lies in some political situation, and the occasion is always due to some political object. War, therefore, is an act of policy. Were it a complete, untrammelled, absolute manifestation of violence (as the pure concept would require), war would of its own independent will usurp the place of policy the moment policy had brought it into being; it would then drive policy out of office and rule by the laws of its own nature . . . But in reality war . . . is not like that. Its violence is not of the kind that explodes in a single discharge, but is the effect of forces that do not always develop in exactly the same manner or to the same degree. . . War is a pulsation of violence, variable in its strength and therefore variable in the speed with which it explodes and discharges its energy. . . If we keep in mind that war springs from some political purpose, it is natural that the prime cause of its existence will remain the supreme consideration in conducting it. That, however, does not imply that the political aim is a tyrant. It must adapt itself to its chosen means, a process which can radically change it; yet the political aim remains the first consideration. Policy, then, will permeate all military operations, and, in so far as their violent nature will admit, it will have a continuous influence on them.

We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. What remains peculiar to war is simply the peculiar nature of its means. . . The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.

As strange as the words sound, war is a moral enterprise. As he writes these words, your author has no difficulty imagining he hears a loud chorus of sincere voices rising in protest. That a great many people hold war to be the most immoral of organized human behavior is due to nothing other than the

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<sup>2</sup> "Let justice be done though heaven may perish."

fact that most people cannot reconcile the tenets of war with a legion of conflicting tenets within either consequentialist or virtue ethics in any satisfactory manner that would permit war to be seen as anything else than organized mass murder. Yet a soldier who kills a declared enemy in wartime is not a murderer. A bomber crew who drop bombs on an enemy city in wartime is not a gang of murderers. When soldiers come home from war we hail the return of heroes, not the return of murderers. Seen in the eyes of both civil and military justice, what distinguishes the moral act of the soldier in wartime from the criminal act of murder is *duty*.

Individuals do not wage war; nation-states wage war. War is therefore inherently a collective action of the political community, and so any objective understanding of duty in warfare must seek its moral understanding deontologically. Understanding the moral nature of war begins nowhere else than with the social compact that forms the political community in the first place. All ends in warfare can seek their *moral* force nowhere else than within the context of the political community itself, as Clausewitz noted:

*War is thus an act of force to compel our enemy to do our will.*

Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the *means* of war; to impose our will on the enemy is its *object*. To secure that object we must render the enemy powerless; and that, in theory, is the true aim of warfare. That aim takes the place of the object, discarding it as something not actually part of war itself.

War is nothing else than an instrument of state policy; if the grounds of that policy are moral, then so is the war serving that policy. If the grounds of the policy are immoral, then so is the war. But its morality or immorality spring from nowhere else than self-imposed obligation with concomitant personal assumption of duties mutually binding between the person and the situation of other persons in a social compact. This is what distinguishes military action from mob action in the state of nature and places military operations within the sphere of civic community.

Any other view, any attempt to contain war within a sphere of either consequentialist or virtue ethics, is doomed to irresolvable antinomies. War can look for its moral standing nowhere else than in its relationship to the Sovereign will of the political community in its social compact. Clausewitz recognized this fundamental character of war:

Up to now we have considered the incompatibility between war and every other human interest, individual or social – a difference that derives from human nature . . . We have examined this incompatibility from various angles so that none of its conflicting elements should be missed. Now we must seek out the unity into which these contradictory elements combine in real life, which they do by partly neutralizing one another. We might have posited this unity to begin with, if it had not been necessary to emphasize the contradictions with all possible clarity and to consider the different elements separately. This unity lies in *the concept that war is only a*

*branch of political activity; that it is in no sense autonomous.*

It is, of course, well known that the only source of war is politics – the intercourse of government and peoples; but it is apt to be assumed that war suspends that intercourse and replaces it by a wholly different condition, ruled by no law but its own.

We maintain, on the contrary, that war is simply a continuation of political intercourse, with the addition of other means. We deliberately use the phrase, 'with the addition of other means' because we also want to make it clear that war in itself does not suspend political intercourse or change it into something entirely different. In essentials that intercourse continues, irrespective of the means it employs. The main lines along which military events progress, and to which they are restricted, are political lines that continue throughout the war into the subsequent peace. How could it be otherwise? Do political relations between peoples and between their governments stop when diplomatic notes are no longer exchanged? Is war not just another expression of their thoughts, another form of speech or writing? Its grammar, indeed, may be its own, but not its logic.

If that is so, then war cannot be divorced from political life; and whenever this occurs in our thinking about war, the many links that connect the two elements are destroyed and we are left with something pointless and devoid of sense. . .

Only if war is looked at in this way does its unity reappear; only then can we see that all wars are things of the *same* nature; and this alone will provide the right criteria for conceiving and judging great designs.

We establish government for the purpose of protecting ourselves and increasing each of our individual powers to resist and overcome the difficulties and dangers that attend life in the state of nature. Among the duties we charge the general government of the American Republic to fulfill is the duty of providing for the common defense, and this is the mandate that authorizes the government to commit the nation to war. But this charge is a *duty* of government, not a *right* of government, and as a duty its discharge is answerable to conditions of civic morality, neither beyond which nor short of which agents of government can go without their actions becoming criminal.

In this chapter we examine these conditions. We shall find long-standing imperfections to exist. The shortcomings we will uncover have the most serious of moral consequences because both the waging of *immoral* war *and* any failure to satisfy government's duty to provide for the common defense bring down upon every citizen all the deadly menaces of living in the state of nature.

## § 2. Commitment of the Nation to War

### § 2.1 War is the Gravest of Moral Commitments

In the American Republic there is no greater or more vile criminal than the agent of government who seeks war as a means of obtaining personal glory, fame, personal revenge, or out of any other motive than that of strictly fulfilling the duty to provide for the common *defense*. There is no greater moral coward than a citizen who knowingly abets the actions of such a criminal by standing by and doing nothing to check his criminal actions. This act of cowardice is in itself a civic crime, regardless of statutes in law books, because every citizen in the political community has taken up the duty of

committing everything in his whole power to the common force in defense of that community:

The voice of protest, of warning, of appeal is never more needed than when the clamor of fife and drum, echoed by the press and too often by the pulpit, is bidding all men fall in and keep step and obey in silence the tyrannous word of command. Then, more than ever, it is the duty of the good citizen not to be silent. [Charles Eliot Norton, *True Patriotism*, 1898]

Our government has led this nation into immoral wars, like the one Norton protested, in the past. Not every war we have fought has been immoral. The Second World War can be seen as nothing else than the best example of waging a *moral* war, in full and complete accord with duty under the Social Contract. This does not mean that no immoral actions occur even within a moral war, but it does mean there are moral wars. But *all* wars are terrible in their very nature, savage in their fundamental character, and must always be the policy of utter last resort. First resort to arms makes the Republic author of its violent and bloody initiation. Deadly force is the ultimate argument in human conflict, and once it is resorted to by one side, the other has no recourse short of surrender but to resort to it in kind. There is no such thing as justice on the battlefield between deadly foes. Clausewitz wrote,

Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. The maximum use of force is in no way incompatible with the simultaneous use of intellect. If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand. That side will force the other to follow suit; each will drive its opponent toward extremes, and the only limiting factors are the counterpoises inherent in war.

This is how the matter must be seen. It would be futile – even wrong – to try and shut one's eyes to what war really is from sheer distress at its brutality.

The counterpoises of which Clausewitz speaks are really nothing more and nothing less than maxims of prudence a nation follows *in its own enlightened self interest* in its conduct of war. If a nation eschews slaughtering prisoners it takes on the battlefield, it is primarily so the enemy will not slaughter its own captured soldiers. If a nation eschews the torturing of prisoners, it is so the enemy will not torture theirs. However, the violence, cruelty, passions, and hatreds that spring out of deadly conflict, the uncertainties that enshroud warfare in what has aptly been called "the fog of war," easily and often overcome self-enlightenment. The notion that once battle has joined "cooler heads" might come to prevail on both sides is a dangerous and irresponsible delusion. Writing in the days of the Cold War between the Western Allies and the Soviet Block, and in the days before the reunification of Germany, Dyer noted,

The [NATO] doctrine does attempt to interpose a phase of "theater nuclear war," restricted to the Central European region and to battlefield nuclear weapons, between the point at which conventional defense fails and the final escalation to strategic nuclear weapons fired at the homelands of all the great powers. . . There is no point in pursuing the military logic of a limited nuclear war in Central Europe any further. Whichever side initiated the use of tactical nuclear

weapons, the other would immediately have to respond in kind or else lose the war, and within a few days several thousand nuclear weapons would probably be exploded over Germany. This would almost certainly result in the virtual extermination of both armies and the decimation of the German nation – but it probably wouldn't stop there. . .

In Wintex '83, NATO's annual command and staff exercise conducted in early 1983, the Warsaw Pact forces crossed the border into West Germany on 3 March. On 8 March, NATO's commanders requested nuclear release, and the first nuclear strike against the Warsaw Pact was ordered on 9 March. The conventional war lasted six days.

To imagine that war can be rationally managed, as if its operations were little different from running a grocery store; that it can be controlled and limited once cities have been bombed and blood has been shed; that one side can be driven to capitulation by terror or by rational calculation; to indulge quack psychology in pretending the response of a foreign people to an invading army can be reliably predicted; to engage in any of these rationalizations is to engage in the most dangerous and irresponsible of fantasies. History utterly and consistently refutes all these theses. Unpredictability is one of war's most prominent characteristics. Clausewitz correctly cautioned,

If one has never personally experienced war, one cannot understand in what the difficulties constantly mentioned really consist, nor why a commander should need any brilliance and exceptional ability. Everything looks simple; the knowledge required does not look remarkable, the strategic options are so obvious that by comparison the simplest problem in mathematics has an impressive scientific dignity. Once war has actually been seen the difficulties become clear; but it is still extremely hard to describe the unseen, all-pervading element that brings about this change of perspective.

Everything in war is very simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war. . . Countless minor incidents – the kind you can never really foresee – combine to lower the general level of performance, so that one always falls short of the intended goal. . .

Friction is the only concept that more or less corresponds to the factors that distinguish real war from war on paper. The military machine – the army and everything related to it – is basically very simple and therefore seems easy to manage. But we should bear in mind that none of its components is of one piece: each part is composed of individuals, every one of whom retains his potential of frictions. . . The dangers inseparable from war and the physical exertions war demands can aggravate the problem to such an extent that they must be ranked among its principal causes.

This tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance. . .

Moreover, every war is rich in unique episodes. Each is an uncharted sea, full of reefs. The commander may suspect the reefs' existence without ever having seen them; now he has to steer past them in the dark.

The political decision to commit the nation to the initiation of war is always and at the same time a political decision to risk the utter obliteration of the nation. War is always waged in a thick fog.

This is why the decision to commit the nation to the initiation of a war always and in every instance carries in its essence, quite literally, the gravest moral implications. War always presents the potential

for escalation beyond any *a priori* estimation of its limits and always presents the potential to engage the full technological capacities, including the nuclear ones, held by any nation in its arsenal *regardless of whether that nation is an initial combatant or not*. Nothing proved this fact better than World War I. Nuclear weapons increase this probability of utter annihilation. Dyer wrote:

We know, as surely as we know that we are alive, that the whole human race is dancing on the edge of the grave. We most of us believe in our hearts that it can never really happen – just as we do not really believe we are going to die. We use the soothing, anesthetic formulas of deterrence theory to smother our doubts. We hold these mutually opposed beliefs in separate compartments of our minds and only rarely look in the compartment containing the darker conclusions, because to act on them would be too difficult and too painful.

## § 2.2 The Authority to Commit the Republic to War

After what has just been said, it might seem at first reaction that it is the obvious duty of the general government to forsake war utterly and absolutely. Yet this cannot be done without it being a fundamental breach of the social compact. Every nation in every age has had its portion of people who would surrender everything from fear and prefer enslavement to death. But every nation in every age has also always had its portion of people who will sacrifice everything – including not only their own lives but the lives of everyone else – to remain free, to uphold personal honor or self-respect, or to stand on principles they hold to transcend every other consideration. For as long as independent nation-states exist in mutual state-of-nature relationships, there will be occasions in which the general government has a moral duty to wage war. The *only* question of any practical relevance is: How shall these occasions be known so the decision to wage war is a just and moral expression of the Sovereign general will?

There are exactly three distinct and general circumstances under which a moral justification for war exists. These correspond to the three distinct forms of duty in the deontological relations of obligation in which the corporate person (body politic) of the nation can exist. These relations are:

1. duty the nation owes to itself immediately in regard to the persons of its citizens;
2. duty the nation owes to itself mediately in regard to its external situation; and
3. duty the nation mediately owes in regard to reciprocity between itself and the situation of other nations.

The first two of these relations consider the corporate person of the nation in the state of nature. The third pertains to the corporate person of the nation in relationship with other nations insofar as these nations have entered into formal associations through alliances by means of formal treaties. We will call these, respectively, the categorical, hypothetical, and reciprocal duties of war. The moral basis of duties in regard to these three relations are deontological and are deduced from the objective considerations discussed by Kant regarding the individual's determination of moral free will in



*Critique of Practical Reason*. The deduction is carried out by applying these individual considerations to the case of the political community regarded in its corporate person. We must next discuss the conclusions to which these deontological considerations lead us.

### § 2.2.1. The Categorical Duty for Commitment to War

The circumstance for the categorical duty to war is the clearest of all. The circumstance arises during the occasion when the nation or any of its citizens, lawfully conducting their private lives and affairs, are physically attacked or threatened with imminent danger of physical attack by a corporate body of persons who are not citizens of the Republic. Three examples of the categorical circumstance are: (1) the Japanese attack on Pearl Harbor on 7 December, 1941; (2) the Al Qaeda attack on New York City and the Pentagon on 11 September, 2001; and (3) the Cuban Missile Crisis in October of 1962. The first two of these were incidents of actual attacks upon the Republic. The third was an example of imminent danger of such an attack.

It is of the gravest importance that the conditions *during the occasion* and *lawfully conducting their private lives and affairs* are stressed here. This is because the categorical duty is the single war-duty of government where the power to commit the nation to war is vested under the Constitution in the hands of a single person, namely the President of the United States. The President is not a king and the distinction between the office of President and that of a king includes this distinction: that the king of a nation is considered to be the sovereign of the nation holding the authority and power to make decisions regarding peace and war, while the President of the United States is not granted this power under the Constitution. The President *is* charged with the *duty* of safeguarding the citizens of this nation during emergencies *when time is of the essence* in fulfilling this duty. Had the Japanese forces been detected prior to the actual bombing of Hawaii in time for military countermeasures to be effected, had the Al Qaeda attack been detected in time for countermeasures to prevent it, the President would have had the authority *and the duty* to order these countermeasures to be carried out at once regardless of the probability that his actions would result in an all-out major war. The actions of President Kennedy were an example of the proper fulfillment of this constitutional duty, just as his act in authorizing the Bay of Pigs operation in 1961 was an example of transgression of duty.

The language of the Constitution is regrettably and dangerously vague in specifying the power and duty of the President insofar as the war powers of that office pertain to initiating actions that can lead to committing the nation to war. It can be reasonably concluded that the Framers of the Constitution viewed the state of war through the simpler political lenses of the eighteenth century. In *The Federalist*, no. 69, Hamilton wrote,

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 confederacy: while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all of which, by the constitution under consideration, would appertain to the legislature.

It can hardly be made clearer than this that the President does not have the constitutional authority to declare war either explicitly or implicitly by *instigating* de facto circumstances involving the nation in armed conflict.

This is in marked difference-in-fact to the situation when the nation or its citizens are *subjected to* attack. It only takes one party to initiate a war. The President does not have the constitutional authority to be an initiator but does have the constitutional authority to be a responder when acts of war are initiated by another party. That this authority should be vested in a single pair of hands was, to the Framers, nothing more than good common sense. In *The Federalist*, no. 74, Hamilton wrote,

The President of the United States is to 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." The propriety of this provision is so evident, and it is, at the same time, so consonant to the precedents of the state constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength: and the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority.

The power to direct the common strength is one thing. *When* the authority to execute this power exists is another thing altogether. The power to grant this authority has a twofold source: (1) the Sovereign itself in establishing the duties of government; and (2) the representatives of the citizenry in fulfilling their duty to govern in the name of the Sovereign. In *The Federalist*, no. 41, Madison wrote,

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing confederation establishes this power in the most ample form. . .

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit in like manner the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain: because it plants in the constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations, who may be within reach of its enterprises, to take corresponding precautions.

It is important to note that the entire tone of this note is defensive and non-aggressive insofar as the

initiation of war is concerned. A declaration of war, regardless of how it is phrased, is nothing else than the authorization for and direction *to* the President *by* Congress to employ the armed forces of the Republic against a specifically identified enemy. Does this mean the Congress itself has the granted authority to be warlike and an initiator of hostilities? *This the Congress can do with justice and moral authority only as an expression of the will of the Sovereign itself under the social compact.*

We will take up the topic of Congressional duty in this regard in the following sections of this chapter. For the immediate present, let us return to the authority granted to the President since it is this authority alone that falls under the categorical duty of government. The Framers *saw no need* to make the war powers provisions of the office of President more explicit because, as Madison put it, those power were established "in the most ample form" by "the existing confederation," i.e., the specific was already set down in writing in the Articles of Confederation. The specific statement is found in the sixth article:

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Under the Articles of Confederation, the executive authority for military action was determined by the individual State constitutions; the United States as a whole had no standing army or navy. In passing from the Articles to the new general government, the transfer of military authority was made from the States' executive authority to the President of the United States. However, the only occasions in which existed the old executive authority – and, by transferal, the authority of the President – to take military action was upon the occasion of actual or imminent danger and only for so long as this danger persisted or Congress could assume regulative control by means of a declaration of war. The intent and design of the Framers could not be more explicitly clear: *The President of the United States has no constitutional authority to initiate acts of war other than upon occasions of actual or imminent danger to the United States or any part thereof.* Upon such occasions, and only upon such occasions, the President has not only the authority but the *duty* to act.

As Hamilton said, "little need to be said to explain" this; as Madison said, "it would be superfluous . . . to enter into a proof of the affirmative." Explanations and proofs are needed only when demagogues attempt to unconstitutionally usurp the war power of the Congress and transfer this power

to the Executive Branch. This brings us to the topics of Congressional duties in regard to war.

### § 2.2.2. The Hypothetical Duty for Commitment to War

It takes either the most egregious naivety, amounting to stupendous folly, or else the most dark and sinister designs of despotism to argue that the body politic of the Republic would ever consent to the proposition that the extinction of the human race is in the common interest of the political community. Whatever leeway the fog of politics might have been said to grant ambitious men of an earlier time – in undertaking imperial adventures, private venture brigandage, or pseudo-religious fanaticism – was burned away at the Alamogordo Bombing Range in New Mexico at 5:30 in the morning on 16 July, 1945. Physicist and eyewitness Otto Frisch said,

And then without a sound, the sun was shining; or so it looked. The sand hills at the edge of the desert were shimmering in a very bright light, almost colorless and shapeless. This light did not seem to change for a couple of seconds and then began to dim. I turned round, but that object on the horizon which looked like a small sun was still too bright to look at. I kept blinking and trying to take looks, and after another ten seconds or so it had grown and dimmed into something more like a huge oil fire, with a structure that made it look a bit like a strawberry. It was slowly rising into the sky from the ground, with which it remained connected by a lengthening stem of swirling dust; incongruously, I thought of a red-hot elephant standing balanced on its trunk. Then, as the cloud of hot gas cooled and became less red, one could see a blue glow surrounding it, a glow of ionized air . . . It was an awesome spectacle; anybody who has ever seen an atomic explosion will never forget it. And all in complete silence; the bang came minutes later, quite loud though I had plugged my ears, and followed by a long rumble like heavy traffic very far away. I can still hear it. [Peter Goodchild, *J. Robert Oppenheimer: Shatterer of Worlds*, Boston, MA: Houghton Mifflin Company, 1981.]

This was the moment when the technological capability of humankind to end its own existence came into the world.

It seems the great majority of people in the world do not understand something very fundamental about nuclear weapons: it is not necessary for a single nuclear bomb to explode on your home soil in order for *every* person in your country to be killed in a nuclear war. Depending on where and over what time period nuclear weapons are exploded, the best estimate by qualified scientists places the minimum nuclear yield sufficient to cause the extinction of humankind at as little as 100 megatons. This is *less* than the warhead yield delivered by *twelve* of the Titan II ICBMs deployed by the U.S. from 1962 until 1987. Warhead yields in the current U.S. nuclear arsenal are smaller; it would take 26 to 35 Trident II SLBMs or 100 Minuteman III ICBMs to deliver 100 megatons. In comparison, the operationally deployed U.S. arsenal can deliver 1,172 megatons within a few hours notice. Warhead yields in the Russian arsenal are even larger. *No one* will be left to write the history of World War III.

The cause of the extinction of our species in the event of nuclear war is called "nuclear winter." This is the catastrophic climate change caused by the effects of nuclear explosions. These effects include, in part, utter pitch dark covering the entire world for up to six months, a global drop in

temperature on the order of about 100 degrees Fahrenheit in continental interiors for this same period, and the destruction of the earth's ozone layer, which would increase the amount of ultraviolet radiation reaching the surface of the earth by two- or three-fold – levels that cause lethal sunburn in less than thirty minutes and blindness within a few minutes. The physics and biology involved in nuclear winter are not in the least doubt; the only scientific doubt is how long it would take for a nuclear war to end all human life on earth. Would it only take a month, or might it take six? But there is *no doubt whatsoever* that *everyone everywhere* on earth *would* die. There would be *no* survivors, period.

The genie is out of the bottle; there is no putting it back. The only nuclear secret of any fundamental importance whatsoever was the secret that nuclear weapons *could* be built. Once that secret was exposed at Alamogordo, that was it. On 16 July, 1945, the equation of government and of every social science was changed forever, but few people seem to comprehend this. Dyer remarked,

There is a terrifying automatism in the way we have marched straight toward scientific total war over the past few centuries, undeterred by the mounting cost and the dictates of reason and self-interest. We do know what is going to happen, and we are frightened, but we do none of the seemingly obvious things that might let us alter our course away from oblivion. We resemble a column of intelligent lemmings, holding earnest meetings to denounce the iniquity of cliffs during halts in the march. Everybody agrees that falling off cliffs is a bad idea, many have noticed that the cliff edge is getting steadily closer, and some have come to the heretical conclusion that the column's own line of march is causing this to happen. But nobody can leave the column, and at the end of each halt it sets off again in the same direction.

Even if there were no specter of nuclear war, there are still very important reasons for reformations of government to address the duty of providing for the common defense. The real possibility of nuclear war merely makes these reformations vital and essential.

The hypothetical duty to war pertains strictly to the direct *common* interests of the *citizens* of the Republic, irrespective of treaties or agreements with other nation-states and irrespective of factors affecting agents of government acting in the capacity of agents of government. This is a crucial point. The posturing and passive aggressions that characterize governments' attempts to deal with one another in the international state of nature are carried out by agents acting on behalf of government. From time to time, these actions misfire and result in violence, but not every such incident is a moral *casus belli*. The constitutional authority and duty for determining which cases do (and which cases do not) constitute grounds for going to war lies squarely and solely with *Congress*.

In the hours following Pearl Harbor on 7 December, 1941, it was already too late for President Roosevelt to take actions to prevent the Japanese attack (although, of course, not too late for Roosevelt to order other defensive actions and mobilize the armed forces of the U.S.). From that point on, the constitutional authority to decide if this nation was at war with Japan reverted to the Congress. Although in the case of Pearl Harbor there was no chance that Congress would decide other than to declare war against Japan – or to reciprocate the declaration of war on 11 December when Germany

and Italy declared war on the U.S. – there have been many incidents where the war decision was much less open-and-shut. Here are a few examples:

- (1). On 2 August, 1964, three North Vietnamese torpedo boats attacked the U.S.S. *Maddox*, a destroyer operating in the Gulf of Tonkin thirty miles offshore from North Vietnam. The attack on the *Maddox* took place thirty-six hours after South Vietnamese gunboats had attacked North Vietnamese garrisons on the islands of Hon Me and Hon Nieu. The *Maddox* was in those waters carrying out a surveillance mission; officially it was not "operationally connected" with the South Vietnamese raid, although Pentagon analyst Daniel Ellsberg later claimed the *Maddox* and other intelligence-gathering destroyers in the Gulf of Tonkin were providing covert backup to the South Vietnamese at the time. On 4 August, there was an unconfirmed night-action report by these destroyers of a second North Vietnamese attack upon them – which allegedly took place at the same time South Vietnamese boats were again attacking North Vietnamese installations. It was never determined whether or not this second attack ever actually happened. At 11:00 AM on 5 August, 1964, the United States entered the war in Vietnam, by Presidential order and without a declaration of war, by bombing North Vietnamese oil storage and port facilities in Vinh.
- (2). On 23 January, 1968, the intelligence-gathering ship U.S.S. *Pueblo*, operating sixteen miles offshore from North Korea, was intercepted, fired upon, and seized by two North Korean subchasers and four North Korean PT boats. The North Koreans claimed the *Pueblo* had been operating within their territorial waters and charged all the crewmembers of the *Pueblo* with spying. The men were coerced into confessing they had been spying by torture or the threat of torture. The U.S. government later secured their release by signing an official confession that the *Pueblo* had been on a spy mission. No further military actions were pursued.
- (3). On 4 November, 1979, Iranian militants stormed the U.S. Embassy in Tehran and seized 52 members of the Embassy staff as hostages. The militants demanded the U.S. turn over the deposed Shah of Iran (who was then in the U.S. receiving treatment for cancer). A short time later the government of Iran officially took possession of the hostages and the incident became an officially sanctioned action of the Iranian government. Iran held the hostages prisoner until 20 January, 1981 – releasing them minutes after President Reagan had been sworn into office.
- (4) On 23 October, 1983, a suicide bomber bombed a U.S. Marine Corps barracks in Beirut, Lebanon. The Marines were present in Lebanon as part of a U.N. peacekeeping force. President Reagan responded by withdrawing U.S. forces from the peacekeeping operation in Lebanon.
- (5) On 25 October, 1983, the U.S. and a few Caribbean allies invaded and conquered the island nation of Grenada. The stated purpose of the action was to protect U.S. citizens in Grenada.
- (6) On 8 January, 1988, President Reagan froze all Libyan assets in the United States. On 14 April, 1988, U.S. warplanes conducted an air raid on a number of Libyan targets characterized by the Reagan administration as terrorist centers. The action was taken as a retaliation against Libya for allegations that Libya had supported and participated in various acts of terrorism committed against U.S. citizens.
- (7) On 4 January, 1989 (following several days of bellicose sword-rattling by Libyan dictator Muammar al-Qaddafi), Libyan planes attacked U.S. Navy warplanes over international waters in the Mediterranean Sea. The U.S. planes shot down two Libyan fighters; there were no U.S. casualties and no further hostile actions took place afterwards.
- (8) On 20 December, 1989, U.S. troops invaded Panama seeking to capture Panama's dictator, Manuel Noriega, on the grounds that he was responsible for trafficking of illegal drugs being smuggled into the United States. Noriega surrendered on 3 January, 1990.
- (9) On 2 August, 1990, Iraq invaded Kuwait. Anticipating further moves by Iraq to invade Saudi

Arabia that threatened U.S. oil supplies – and at the official request of the Saudi government – the U.S. and a coalition of U.N. allies undertook military actions in the First Gulf War on 15 January, 1991. The war ended on 3 April, 1991, with the expulsion of Iraqi troops from Kuwait.

There have been other incidents as well, but these serve to illustrate the point being made here: in not one single case was there a declaration of war by the U.S. Congress. Without arguing the merits or demerits of the government actions in these specific examples, what we wish to note is that, with the exception of case (7), all U.S. military actions were initiated by the President of the United States on claims of presidential authority to act, and all these actions reflect a dangerous and on-going power struggle between the Executive and Legislative branches of the government over war powers.

It is not difficult to pinpoint the moment in history when this began: 25 June, 1950. That morning, at dawn local time, North Korea invaded South Korea and started the Korean War. Because the time in Washington DC is fourteen hours earlier than Seoul time and because of the International Date Line, word of the invasion reached Washington around 9:30 PM on Saturday, June 24. Within a few hours of this, President Truman ordered the use of "U.S. air and sea forces to give the ROK<sup>3</sup> government troops support and cover." The most immediately pressing concern of the United States was the evacuation of American nationals endangered by the invasion, and this was accomplished swiftly. Nonetheless, President Truman's orders, from the very start, went well beyond this concern. Years later he told biographer Merle Miller,

The flight [back to Washington from Missouri] took about three hours, and on the way I thought over the fact that what the Communists, the North Koreans, were doing was nothing new at all. I've told you. The only thing new in the world is the history you don't know about.

And it was always the same, always had the same results. Hitler and Mussolini and the Japanese were doing exactly the same thing in the 1930's. And the League of Nations had let them get away with it. Nobody had stood up to them. And that is what led to the Second World War. The strong got away with attacking the weak, and I wasn't going to let this attack on the Republic of Korea, which had been set up by the United Nations, go forward. Because if it wasn't stopped, it would lead to a third world war, and I wasn't going to let that happen. Not while I was President.

The social science of history can only record what did happen and cannot speak with any authority on what might have happened if things had been decided differently. Was Truman right in his assessment? We can never really know the answer to this question. His immediate decisions, like those of any leader, had to be made on the basis of his best judgment and, in this case, his initial commitment of the armed forces in the state of emergency was consistent with both the intent of the Constitution and with his duty as President. It was what followed afterward that overstepped the President's constitutional authority: namely, the President's decision to not seek a declaration of war from Congress.

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<sup>3</sup> Republic of Korea, i.e., South Korea.

Within hours of the invasion, at the urging of the U.S., the U.N. Security Council condemned the North Korean invasion with UNSC Resolution 82. This was followed on 27 June by UNSC Resolution 83, which, among other things, recommended that U.N. member nations furnish "such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security." That same day, President Truman ordered U.S. air and sea forces to help South Korea. This was, officially, the start of what came to be called the U.N. "police action" in Korea. Officially, U.S. involvement in Korea was not a "U.S. war" but, rather, a "U.N. action." This was the argument formally used by the Executive to claim a declaration of war by Congress was superfluous.

It was not. In point of fact, the U.N. resolutions were more or less authored by the Truman administration, and there was and is disagreement over the legality of the Security Council's actions (owing to a boycott of the Council being carried out by the Soviet Union at the time). Dean Acheson, who was then Secretary of State, told Miller years later,

Toward the end of our meeting on Tuesday with the Congressional leaders, Senator Alexander Smith of New Jersey, who was a member of the Senate Committee on Foreign Relations, asked the President whether or not he thought it would be a good idea if the Congress would pass a resolution approving what the President was doing in Korea or what the United States was doing in Korea. The President said he would take that under advisement.

After the meeting broke up, he asked me to consider it and meet with him later and discuss it. I gave it a good deal of thought and then gave the President this advice, which he followed. It seemed to me that this should not be done. At the moment the troops of the United States were engaged in a desperate struggle in and around Pusan. Hundreds, thousands of them were being killed. The outcome of the battle was not at all clear. It seemed to me if, at this time, action was pending before the Congress, by which hearings might be held, and long inquiries were being entered into as to whether or not this was the right thing to do, or whether the President had the authority to do it, or whether he needed Congressional authority for matters of that sort – we would be doing about the worst thing we could possibly do for the support of our troops and for their morale.

I felt that we were in this fight – and it was a desperate fight – and we had better concentrate all our energies in fighting it and not in trying to get people to formally approve what was going on.

Your author does not doubt Secretary Acheson was sincere in his concern. But his sincerity is wholly irrelevant. He may or may not have been underestimating the patriotism and commitment to duty by members of the Armed Forces of the United States but that, too, is irrelevant. The President of the United States does not have the authority to commit the Republic to war without Congressional declaration and transgresses his duty when he takes upon himself the monarch's prerogative of committing to war. The decision whether or not to go to war belongs to the Sovereign, through the actions of its elected representatives in Congress, and *nothing whatsoever in any consideration overrules the authority of the Sovereign in this*. Acheson's action was criminal.

Nonetheless, it must also be acknowledged: *The Federalist* slightly muddies the waters on



precisely this critical issue. In no. 41, Madison writes,

Next to the effectual establishment of the union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the constitution has prudently added. I will not repeat here the observations, which I flatter myself have placed this subject in a just and satisfactory light.

In a number of places in *The Federalist*, its authors bring up the point that Congress can check the power of the President in regard to his use of the armed forces through the Congressional power of appropriations. It has been argued that if Congress should disapprove of a President's actions in regard to the employment of the Armed Forces, it can enforce its disapproval by cutting off the funding for these forces. If, therefore, Congress does not choose to do so then this choice, it is argued, is a tacit approval of the President's actions and a confirmation of his war powers.

This argument is a legalistic sophism. In *The Federalist*, no. 28, Hamilton writes,

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishment in time of peace, to say, that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, the only efficacious security for the rights and privileges of the people, which is attainable in civil society.

If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government; and which, against the usurpations of the national rulers, may be exerted with an infinitely better prospect of success, than against those of the rulers of an individual state.

The Constitution specifies the power to declare war as belonging to Congress. Without such a declaration, the war powers of the President extend no farther than to what is immediately necessary for defense of *this* nation. As Hamilton said, *the whole power of the proposed government is to be in the hands of the representatives of the people* as regards its military establishment. The President has certain war powers he may exert at his discretion during emergencies *until Congress has made a determination of what the national policy will be* but the assignment of making this determination is not at anyone's discretion – not the President, not the members of Congress. Regardless of whether or not the President brings the matter to the Congress, *the Congress itself has the duty of acting to determine what the national policy is to be*. Senator Smith was quite wrong to *ask* President Truman if he thought the Congress needed to "approve" the President's actions in Korea. Secretary Acheson was wrong to think seeking the consent of the people was unnecessary. It wasn't up to Truman, and it wasn't up to Acheson, to decide; the duty to decide whether America went to war or not *is mandated to Congress by the Sovereign*. Truman overstepped his authority and Congress failed to do its duty. *This was an unconstitutional usurpation equal to claiming a power of government agents to rule*.

The war in Vietnam eventually brought this issue into a more urgent focus. Nonetheless, it cannot be said that the issue has been resolved even up to today. We will deal separately with issues attending

the War Powers Act of 1973 and other Congressional actions since then at a later point in this chapter. For purposes of the present section, the point has, I think, been made: Commitment to war under the hypothetical duty of government belongs to one and only one branch of government, and that branch is the Congress *speaking for the people*.

### § 2.2.3. The Reciprocal Duty for Commitment to War

The first two duties pertain directly to the Republic in its state-of-nature relationships with other nation-states (or with non-geographical bodies politic such as al Qaeda). The situation changes, and becomes even more difficult, when treaties and alliances between the Republic and other nation-states are injected into the situation. A treaty or an alliance constitutes a limited social compact entered into freely by two or more nation-states. The Constitution clearly gives the general government the power to negotiate and establish treaties and alliances on behalf of the whole political community. The specific clause is found in Article Two, section 2:

[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, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law[.]

Every treaty and every alliance made by treaty carries inherent in its political nature a potential to both promote international peace and provoke armed conflict. The potentials are more clearly apparent in cases of treaties of alliance, but they are nonetheless present in trade agreements and in all other types of treaties. The making of a treaty, of any kind, is the free acceptance of a *national obligation* and is as binding on every citizen as it is on the general government itself. Every treaty is an assumption of duty owed reciprocally, and in principle spelled out explicitly, between nation-states.

There is one moral ground of justification – again, a deontological ground – for every treaty: to fulfill the duties mandated by the six objectives of the general government specified in the Preamble of the Constitution. This moral ground *limits the just power of government* in its authority to make treaties, and no treaty that does not explicitly serve at least one of the six objectives is a *just* treaty. Any treaty that contradicts or opposes any one or more of the six general objectives is an *unjust* treaty and making it constitutes a moral transgression committed jointly by the President and the Senate.

Treaties of alliance always have the most direct pertinence for the constitutional objective of providing for the common defense. Because of this, these are the most serious of all types of treaties and should never be entered into without the most penetrating reflection and serious policy development beforehand. A treaty of military alliance is always an *a priori* declaration that commits the nation to war under specific circumstances. It is the one case where the authority of the President

of the United States to *initiate* commitment of the nation to war *without further approval by Congress* is granted and *required* by Congress. For this reason, no such treaty should ever be established without the clear moral justification for the treaty *first* being fully, firmly and explicitly established, and without the treaty itself clearly delimiting the duties required of each signatory and the conditions under which these duties apply. No such treaty should ever be established without a clear and penetrating examination of its effects in regard to *all six* objectives of the general government.

George Washington wrote in his Farewell Address,

Observe good faith and justice towards all nations; cultivate peace and harmony with all. . . In the execution of such a plan nothing is more essential than that permanent, inveterate antipathies against particular nations and passionate attachments for others should be excluded; and that in place of them just and amicable feelings toward all should be cultivated. The Nation which indulges towards another an habitual hatred or an habitual fondness is in some degree a slave. . .

Europe has a set of primary interests, which to us have none, or a very remote relation. – Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence therefore it must be unwise in us to implicate ourselves, by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites us to pursue a different course. . . . 'Tis our true policy to steer clear of permanent alliances, with any portion of the foreign world. . . Taking care always to keep ourselves, by suitable establishments, on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.

Time and military technology have decreased "our detached and distant situation" in regard to the rest of the world, but they have in no way eliminated it altogether. Temporary alliances "for extraordinary emergencies" will always be prudent and needful from time to time, but permanent ones will never be congruent with the general will of the Sovereign of this nation. The military alliance most familiar to the largest number of Americans is NATO – that child of the Cold War that for half a century was the central consideration in all U.S. foreign policy. Today the Warsaw Pact alliance no longer exists, the threat of the Stalinist Soviet Union is gone, and it is time to consider how to justly bring to an end this nation's role in NATO. It is no part of the objectives of the general government to be the world's policeman and, indeed, such a role is contrary to the duty of the general government. The only universal moral code possible for men is a deontological code, and in this code no precept of virtue ethics or consequentialist ethics, no matter how keenly felt by those who hold with the precepts of such a *personally subjective* sense of ethics, can bind the Sovereign will of the Republic.

Seen in the light of the social compact, there is a curiously contrary character to Article Two, section 2, inasmuch as it grants no power to the House of Representatives in treaty matters, although the power to control appropriations that might be needed in fulfilling treaty duties does lie squarely with the House. A treaty commits the Republic to an objective hypothetical imperative of duty in foreign relations, and in this the *ex post facto* power granted the House to object by means of the purse string sets up the possibility of moral dilemma in government. We see this in those instances where the

House refuses to commit funds this nation obliged itself to provide by its treaty commitment to the United Nations. As Constitutional matters presently stand, such actions by the House constitute a transgression of moral duty by that body. Yet the number of congressmen seated in the House who would full-heartedly protest this state of affairs – on the ground that the House was not consulted in the treaty-making process – would not be insignificant. Here we find a need and a reason for the Senate and the House to treat *with each other*, establishing moral grounds for Senate deliberations on treaty matters. Among people possessing the moral character necessary to serve as good agents of the people, such an *understanding* is not an impossible thing to achieve; failure to come to just accord on this matter reveals nothing else than the lack of this *prerequisite* good moral character.

The central important conclusion we must reach in regard to the third duty to war is that the moral ground necessitated by the Social Contract requires a much different attitude and practice on the part of Congress in regard to treaties and alliances. Again, a treaty of alliance is nothing else than an *a priori* declaration of occasions and situations when the Republic must find itself at war, and lurking always in the background of possibilities in every modern war is the danger that *any war could*, through Clausewitz' fog of miscalculations and unforeseeable events, become a nuclear war. Nuclear war is, by any rational standard, nothing else than the ultimate crime.

### § 3. The Civic Duties of Congress in Providing for the Common Defense

A dispassionate and deontological analysis of the actions of Congress over the past half century, and continuing as these words are being written, can come to only one objective conclusion: Congress has been and is guilty of transgression of duty in regard to its exercise of the power entrusted to it for providing for the common defense. Many of its actions must be called moral faults. Some of its actions must be called criminal. This is not to say presidents have not transgressed their duty as well. Many have: Truman and the Korean War; Kennedy and the Bay of Pigs; Johnson and the Vietnam War; Nixon and the Vietnam War; Nixon and the military resupply of Israel in the Yom Kippur war; Carter and the failed hostage rescue raid; Reagan and the Grenada war and also the Libyan air raid; G.H.W. Bush and the Panama invasion; Clinton and Operations Desert Fox and Allied Force; G.W. Bush and a suite of tyrannical actions under a propaganda umbrella labeled "war on terrorism."

Some will argue against the fairness or the correctness of this author's analysis of these Presidential actions, but even so this is beside the point. The point emphasized in this treatise is: that all of these Presidential actions were aided and abetted by *Congressional* transgression of duty. We do not speak here of Republican or Democratic transgressions; both political parties have committed them. We speak here of Congressional transgressions of duty that the corrupting influence of political parties promotes. It is the Congress we must reform because that is where the root problem lies.

### § 3.1 The Tonkin Gulf Resolution

The 1950 omission of action by Congress in regard to Korea was a transgression of duty and constituted *at the least* a moral fault. It is difficult to provide a strongly conclusive historical analysis of an act of omission, owing to the absence of historical data when a body does *nothing* that would put itself into the record of history. It can be argued that Congress regarded National Security Council Report 68 (NSC-68) as appropriate national foreign policy – despite its pre-Korean misgivings about this report – and if so, its inaction on Korea arguably is a moral fault rather than a criminal act. We will therefore forego speculation about Congress' inaction in this case and proceed directly to a case where Congressional action and inaction can be better analyzed: the Tonkin Gulf Resolution of 1964 and its aftermath.

The Southeast Asia Resolution, Public Law 88-408 – better known as the Tonkin Gulf Resolution – passed the House of Representatives on August 7, 1964, by a vote of 416-0 and passed in the Senate by a vote of 88-2. It was signed by President Johnson on August 10, 1964. The Tonkin Gulf Resolution was a bill requested by President Johnson and the draft was jointly finalized by Assistant Secretary of State William Bundy and Senator William Fulbright (then Chairman of the Senate Foreign Relations Committee). It read:

To promote the maintenance of international peace and security in southeast Asia.

Whereas naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and

Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

Whereas the United States is assisting the peoples of southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in peace to work out their own destinies in their own way: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by actions of the

United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

Fulbright would later claim, "I don't think anyone considered it a declaration of war. I don't think anyone thought of it as an authorization to wage the kind of war that Johnson waged." He claimed he and Congress regarded it as a "show of strength" with which South Vietnam would be able to win its war – at that time primarily but not entirely a guerilla war – with the north. "And that," Fulbright said, "was the way it was sold to us – it was never sold as a declaration of war."

Bundy retorted that, "the Congress understood what was being asked of them and participated fully in the framing of the resolution." Success, it is said, has many fathers but failure is an orphan. Whether members of Congress were misled or whether they went into it in full knowledge of the consequences of their action, in point of fact the Tonkin Gulf Resolution was not presented as a declaration of war to the American public. What, one is led to ask, did Congress think the phrase "including the use of armed force" meant if it did not think it meant war? Did the members of Congress really believe that the actions of three small torpedo boats constituted "a serious threat to international peace"? If they really believed these things, one can only conclude that the members of Congress were a collection of the most stupid and unfit men any nation could possibly assemble as its representatives of the people. If they knew better, and were aware of the consequences of their action, then they were guilty of committing a crime against the Republic by lying to and misleading the public about the nature of what the Tonkin Gulf Resolution was committing this nation to do. The justification clauses of the Resolution (the "Whereas" clauses) are nothing but propaganda, not moral grounds for war.

Furthermore, the argument that "the United States" – meaning all of us – "desires only that these peoples should be left in peace to work out their own destinies in their own way" is not a constitutional ground for this nation to go to war, even if the claimed sentiment had not been false. To put it bluntly, the people of other nation-states are not associates in the body politic of this Republic, and how they work out their own destinies, in whatever manner they work them out so long as that manner does not directly threaten us, is not our concern *nor should it be, nor can it be* under our social compact.

It is a stronger argument to justify the war in Vietnam as an act of duty by treaty obligation – in this case the Southeast Asia Collective Defense Treaty. If so, the House at least can be absolved of responsibility for committing the nation to war in Vietnam. The wisdom of the Senate, on the other hand, in ratifying that treaty is thereby cast in the most serious doubt. But when, within a few years after the passage of the Tonkin Gulf Resolution, it became clearly apparent, from widespread breakdown in domestic tranquility, that the united body politic of the Republic did *not* approve of the war, Congress was derelict of duty in not acting in accordance with section 3 of the Resolution and ordering an end to the United States' involvement in the war in Vietnam. From its beginning on

August 10, 1964, until its end on 27 January, 1973, the actions of the President and the Congress in regard to the war in Vietnam were deontologically immoral and an injustice perpetrated against the Republic. Two American Presidents and the Congress from 1964 to 1973 acted in violation of their oaths to preserve, protect, and defend the Constitution of the United States.

The wounds inflicted on the body politic of America by the Congressional transgression of duty are deep and have not healed to this day. The most serious chronic injury has been that done to the civic morality of the political community. Something Mill wrote in regard to the injury done to civics when government is in the hands of a despot applies equally when representative government, by deceit of the public, seeks political cover and deniability for its un-American actions. Mill wrote,

What sort of human beings can be formed under such a regimen? What development can either their thinking or their active faculties attain under it? On matters of pure theory they might perhaps be allowed to speculate, so long as their speculations either did not approach politics, or had not the remotest connection with its practice. . . . A person must have a very unusual taste for intellectual exercise in and for itself, who will put himself to the trouble of thought when it is to have no outward effect, or qualify himself for functions which he has no chance of being allowed to exercise. . . . It does not follow that the nation will be wholly destitute of intellectual power. The common business of life, which must necessarily be performed by each individual or family for themselves, will call forth some amount of intelligence and practical ability, within a certain narrow range of ideas. . . . But the public at large remain without information and without interest on all greater matters of practice; or, if they have any knowledge of them, it is but a dilettante knowledge, like that which people have of the mechanical arts who have never handled a tool.

Nor is it only in their intelligence that they suffer. Their moral capacities are equally stunted. Wherever the sphere of action of human beings is artificially circumscribed, their sentiments are narrowed and dwarfed in the same proportion. The food of feeling is action: even domestic affection lives upon voluntary good offices. Let a person have nothing to do for his country, and he will not care for it. It has been said of old, that in a despotism there is at most but one patriot, the despot himself; and the saying rests on a just appreciation of the effects of absolute subjection, even to a good and wise master.

The aftermath of the war in Vietnam, coupled with the aftermath of the criminal actions of Nixon during the Watergate crisis and its related crimes, was the creation of a large Toynbee proletariat within the political community of the Republic. Most Americans living today are too young to be able to contrast from their own experiences the difference between the civic climate in America today and that which existed in the late 1950s and early 1960s. Your author lived through this change, and it was and remains a deep, profound and grievous rent in the fabric of the social compact.

### § 3.2 The War Powers Act of 1973

On November 7, 1973, the 93rd Congress overrode a veto by President Nixon and passed Public Law 93-148, known as the War Powers Resolution (H.J. Res. 542), officially entitled "Joint resolution concerning the war powers of Congress and the President"; it is more widely known as the War Powers Act of 1973. It came after nine years of Congressional acquiescence to Presidential claims of

Executive war powers alleged to be granted by virtue of the President's duty as Commander in Chief, and it came after the end of U.S. participation in the war in Vietnam. Section 2(a) of the War Powers Act states the purpose of this law:

It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

The stated intent of the Act could hardly be more laudable inasmuch as accomplishing the stated purpose would clarify the legal ambiguities and sophisms that had developed since the Korean War over the too-brief wording of Article One, section 8, of the Constitution. Had it in fact done this, the Act would be commendable. In point of fact, it did not achieve this purpose when judged against the standard of the Social Contract and with regard to the constitutional objectives of the general government. The first deliberate loophole in the Act appears in section 2(c):

The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

The loophole is clause (2) of this section. This clause makes the implicit statement that there exists some state of affairs falling short of actual war where military action in circumstances other than clauses (1) or (3) is constitutionally justified. This can only be argued from a false premise.

This premise is a sophist's argument over the constitutional meaning of the word "war." Legal scholar Philip Bobbitt argued that "declaration of war" only meant commitment to something he called "total war." He argues that it is a mere contemporary notion that "to declare" war means "to commence war." He bases this argument primarily on the "precedent" of what some call the Quasi-War with France from 1798 to 1800.

To put it bluntly, this argument is hogwash. First, it is nothing else than a lawyer's habit to presume that constitutional duties of government are defined by "precedents." The entire basis of government in all its duties does not come from the Constitution but from the Social Contract. To argue precedent is to argue that not rebuking an actual transgression of duty by agents of government *ipso facto* makes the transgression not a transgression. It is equivalent to saying "the government does no wrong when it gets away with wrong-doing." It is the deeply uncivic fallacy that law, not justice, is the object of government. We are a nation of laws only when those laws are *just*. Justice is not measured against the standard of law but against the civic standard of the social compact. To argue otherwise is to argue the citizens of America are not its Sovereign. *Laws serve justice; they do not define it.*



Second, to draw any distinction between "total war" and what would then have to be called "limited war" is not only a legalistic fiction but a mark of dangerous ignorance about the nature of war. In contemporary practice, attempts to uphold this fiction are portrayed by pious-sounding propaganda that somehow war is not waged against the people of another nation but only against "their leaders." Thus "collateral casualties" among the civilian population during military actions are to be decried as contrary to the intent of the action. The fiction that there is somehow a *real essential difference* between "total war" and any other form of violent military conflict is so ludicrous that it would be ridiculous were not the real consequences to human life so brutal and tragic. From this false premise the impractical Platonic theorist walks step by step into all the deadly delusions about theoretical war that Clausewitz took pains to expose for what they are. Bobbitt's "total war" is Clausewitz' "absolute war," and this "absolute war," he showed, is nothing but the paper model of an extreme:

[We] showed how factors inherent in the war-machine itself can interrupt and modify the principle of enmity as embodied in its agent, man, and in all that goes to make up warfare. Still, that process of modification is by no means adequate to span the gap between the pure concept of war and the concrete form that, as a general rule, war assumes. Most wars are like a flaring-up of mutual rage, when each party takes up arms in order to defend itself, to overawe its opponent, and occasionally to deal him a blow. Generally it is not a case in which two mutually destructive elements collide, but one of tension between two elements, separate for the time being, which discharge energy in discontinuous, minor shocks.

But what exactly is this nonconducting medium, this barrier that prevents a full discharge? Why is it that the theoretical concept is not fulfilled in practice? The barrier in question is the vast array of factors, forces and conditions in national affairs that are affected by war. No logical sequence could progress through their innumerable twists and turns as if it were a simple thread that linked two deductions. Logic comes to a stop in this labyrinth; and those men who habitually act, both in great and minor affairs, on particular dominating impressions or feelings rather than according to strict logic, are hardly aware of the confused, inconsistent, and ambiguous situation in which they find themselves. . .

It follows that war is dependent upon the interplay of possibilities and probabilities, of good and bad luck, conditions in which strictly logical reasoning often plays no part at all and is always apt to be a most unsuitable and awkward intellectual tool. It follows, too, that war can be a matter of degree. . .

Would Prussia in 1792 have dared to invade France with 70,000 men if she had had an inkling that the repercussions in case of failure would be strong enough to overthrow the old European balance of power? Would she, in 1806, have risked war with France with 100,000 men if she had suspected that the first shot would set off a mine that was to blow her to the skies?

Would President Johnson have undertaken the war in Vietnam if he had had any inkling that the United States would lose this war, or that it would demolish his Great Society Program and tear the political union of America into shreds, producing violence, murder, and riots on the streets of America? War is war. The eventual scope of its violence is never predictable. The form its violence will take on cannot be foreseen. War is unlike every other organized human enterprise. Even the generals, history has shown, are really only prepared to re-fight the last war, rarely to fight the current one. Is a mere legal scholar a better general than a general? That proposition is *prima facie* absurd.

The War Powers Act goes on in section 3 to impose what seems at first glance to be a reasonable restriction on the President's authority as Commander in Chief, but which upon closer examination proves to be simultaneously impractical and a failure to "fulfill the intent of the framers." It reads,

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

What does "consult with Congress" mean? We already know from the actual practices since the passage of the Act what it does *not* mean; it does not mean a Presidential address to both houses of the Congress. In practice it has meant consultation with some small group of congressmen, who are sometimes described as being "tasked" with "oversight responsibility." The "every possible instance" clause can only apply to the hypothetical and reciprocal duties situations since the categorical case occurs in real time, under emergency conditions, *and this duty falls exclusively to the President*. We must also note that "to consult with Congress" is not at all the same thing as "to obtain the advice and consent" of Congress. If there is one single tooth in this clause, it can subsist only in the possibility that the consulted congressmen might be immediately moved to rouse the rest of Congress in opposition to what the President plans to do. And even here we must ask: who is the determiner of when "imminent involvement in hostilities is clearly indicated by the circumstances"? It is obvious that whoever this person is, he will be an agent of the Executive Branch because prior to consultation Congress would not even know an action was being contemplated. All the clause accomplishes is to provide political cover for Congress in second guessing the President after the fact. It is little wonder that U.S. Presidents sometimes treat this clause with the contempt it deserves.

But by far the worst thing about the War Powers Act is found in section 5(b), for it is here that Congress inserted a clause that is nothing but an outright transgression of duty. The section reads:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

The transgression lies in the phrase "or has enacted a specific authorization for such use of United States Armed Forces." The premise is that an "authorization" can take the place of a declaration of war. There is *no* constitutional authority granted to Congress to "authorize" the employment of the

Armed Forces in hostile actions short of an actual declaration of war. The clause does nothing else than provide the Congress with a convenient political cover to collude with the President in starting a war without declaring explicitly, in a manner unmistakable to every citizen, that a war is being initiated. It permits and perpetuates the same transgression of congressional duty that was committed in passing the Tonkin Gulf Resolution nine years earlier. Since Korea the United States has engaged in eight wars, not one of them declared. In light of the Social Contract the "authorization clause" is nothing else than a statement of intent by Congress to be purposively derelict in its constitutional duty; it is an unjust law and its passage was a *crime*. Inasmuch as it also provides a convenient political cover for Congress and the political parties to shift the sole blame for a war gone badly over onto the President, it is also an act of deontological moral cowardice.

### § 3.3 The On-going Dereliction of Duty by Congress

The situation created by the War Powers Act is no mere theoretical shortcoming. Actions of Congress since 1973 bear out the on-going dereliction of duty by Congress under cover of the Act. The 2001 Authorization for Use of Military Force Against Terrorists Act (Public Law 107-40, enacted on 18 September, 2001) states in section 2,

(a) IN GENERAL – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

(b) War Powers Resolution Requirements –

(1) SPECIFIC STATUTORY AUTHORIZATION – Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS – Nothing in this resolution supercedes (sic) any requirement of the War Powers Resolution.

The Constitution does not grant Congress the authority to turn over to the President of the United States its duty of specifically identifying who the Republic is waging war upon. This Act gives the President *carte blanche* to wage war against anyone he chooses provided only that he can present a plausible argument that he has "determined" that "nation, organization, or persons planned, authorized, committed, or aided" the 11 September, 2001, attack upon the United States. This is the war power of a king. It is an open invitation to tyranny. *By the letter of the law*, it authorizes the President to wage war against the city of Chicago if he "determines" Chicago aided the terrorists. The President of the United States does not have the constitutional authority to wage his own private *jihad*, but this Act sanctions precisely that.

The War Powers Act has likewise been used to grant the President *carte blanche* war-making authority against Iraq in the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107-243). This is found in section 3(a), with a toothless reporting requirement being provided in section 3(b). It is small consolation that at least this law limited the President's discretion to just one specifically identified country. Section 3(a) reads,

Authorization – The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to –

- (1) defend the national security of the United States against the continuing threat posed by Iraq; and
- (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

Clause (1) was unnecessary; clause (2) is not a declaration of war. We need not belabor an obvious fact: Congress is and has for a long time been acting in perpetuated breach of the Social Contract. Its derelictions of its hypothetical and reciprocal duties in regard to the commitment of the Republic to war are serious, contrary to civic morality, and exhibit moral cowardice. The Congress, as the representative body responsible to the citizens and the states, is broken and requires repair.

#### § 4. Economics and the Duty to Provide for the Common Defense

Gwynne Dyer wrote a quarter-century ago,

Unfortunately, though wars can still be won, the peace settlements are rarely satisfactory, at least if the implication is that they will bring lasting peace. The Israelis have "won" all of their wars militarily, but after half a dozen of them they still live in an atmosphere of permanently impending war. Elsewhere it is the same: India and Pakistan have fought three wars but make constant military provisions for a fourth. Korea remains an armed camp over three decades after the shooting ended. Argentina refuses to declare hostilities at an end after the Falklands war, and Britain finds itself building a large permanent garrison in the islands. Wars are not nearly as effective in settling things as they once were.

Some of the reasons have to do with the nature of modern states. Since nationalism has become the basic source of legitimacy for states, the emotional involvement of the populace in the international fortunes of the state has made it far more difficult for governments to accept a defeat, write it off, and go on to other matters. The popular perception is that the insult to national honor must be avenged, and so the sacred cause – Kashmir, the Falkland Islands, or whatever – is cherished by millions of people who have no personal interest in the outcome.

Modern states, moreover, are enormously rich and competent organizations by any previous historical standards. Late twentieth-century Pakistan, for example, has a more efficient centralized government, greater disposable total wealth, and far more educated people than any of the seventeenth-century European great powers, and it also has access to all the technological and scientific capabilities of the era it lives in. The consequence is that a modern state defeated in war has enormous reserves of human and material resources to draw upon. In order to ensure that the next round will not come out the same way, it can escalate the scale of the conflict. In the end, it will probably lose the next round too, for resources are only meaningful in relative terms and its opponent will also be escalating[.]

War has always commanded the highest technological resources a nation-state has at its disposal. The

allied city-states of Greece in the fifth century BC were able to defeat Xerxes I – despite the fact that the Persian Empire possessed a totally lop-sided advantage in wealth and in population – because, first, it won a decisive naval victory at Salamis that nullified Xerxes' numerical advantage, and, second, because Greece possessed superior weapons technology for its land forces that proved decisive at the battle of Plataea in August of 479 BC despite being outnumbered on the battlefield by a factor of almost three-to-one.<sup>4</sup>

Prior to the nineteenth century there was very little immediate relationship between a nation's military power and its power of industrial production. Gunpowder, muskets, and muzzle-loading cannon were not difficult to obtain by trade. In 1776 Adam Smith was not wrong when he wrote:

To give the monopoly of the home market to the produce of domestic industry, in any particular art or manufacture, is in some measure to direct private people in what manner they ought to employ their capitals, and must, in almost all cases, be either a useless or a hurtful regulation. If the produce of domestic can be bought there as cheap as that of foreign industry, the regulation is evidently useless. If it cannot, it must generally be hurtful. It is the maxim of every prudent master of a family never to attempt to make at home what it will cost more to make than to buy. . . .

What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage. The general industry of the country, being always in proportion to the capital which employs it, will not thereby be diminished . . . but only left to find out the way in which it can be employed with the greatest advantage. It is certainly not employed to the greatest advantage when it is thus directed towards an object which it can buy cheaper than it can make.

This passage of *Wealth of Nations* is a favorite among propagandists advocating unrestricted free market (state of nature) "capitalism." The propaganda takes the phrase "in almost all cases" and quietly refrains it as "in all cases."

But that is not what Smith said, and the propagandists never include in their propaganda something else Smith wrote in *Wealth of Nations*:

In time of a general war, it is natural to suppose that a movement and direction should be impressed upon [the circulating money of a great mercantile republic] different from what it usually follows in profound peace; that it should circulate more about the seat of the war, and be more employed in purchasing there, and in the neighboring countries, the pay and provisions of the different armies. But whatever part of this money of the mercantile republic Great Britain may have annually employed in this manner, it must have been annually purchased, either with British commodities, or with something else that had been purchased with them; which still brings us back to commodities, to the annual produce of the land and labor of the country, as the ultimate resources which enabled us to carry on the war. . . .

The commodities most proper for being transported to distant countries, in order to purchase

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<sup>4</sup> According to Herodotus, the Persian army numbered three hundred thousand "barbarians" plus an unknown number of Greeks who had thrown in with the Persians. Against this, the Greeks fielded an army of one hundred and ten thousand men, of which approximately 38,700 were "Hoplites, or heavy-armed soldiers."

there either the pay and provisions of an army, or some part of the money of the mercantile republic to be employed in purchasing them, seem to be the finer and more improved manufactures; such as contain a great value in a small bulk, and can, therefore, be exported to a greater distance at little expense. A country whose industry produces a great annual surplus of such manufactures, which are usually exported to foreign countries, may carry on for many years a very expensive foreign war without either exporting any considerable quantity of gold and silver, or even having any such quantity to export. . . The manufacturers, during the war, will have a double demand upon them, and be called upon, first, to work up goods to be sent abroad, for paying the bills drawn upon foreign countries for the pay and provisions of the army; and, secondly, to work up such as are necessary for purchasing the common returns that had usually been consumed in the country. In the midst of the most destructive foreign war, therefore, the greater part of manufactures may frequently flourish greatly; and, on the contrary, they may decline on the return of peace. . .

No foreign war of great expense or duration could conveniently be carried on by the exportation of the rude produce of the soil. . . It is otherwise with the exportation of manufactures. The maintenance of the people employed in them is kept at home, and only the surplus part of their work is exported. Mr. Hume frequently takes notice of the inability of the ancient kings of England to carry on, without interruption, any foreign war of long duration. The English, in those days, had nothing wherewithal to purchase the pay and provisions of their armies in foreign countries, but either the rude produce of the soil, of which no considerable part could be spared from the home consumption, or a few manufactures of the coarsest kind, of which . . . the transportation was too expensive. This inability did not arise from the want of money, but of the finer and more improved manufactures.

Put rather more briefly, the ability of a nation-state to prevail or even to hold what it has in a major war is crucially *and economically* dependent upon its manufacturing capability. Today the "provisions of the armies" of which Smith wrote would include the "provision" of the highly technical weapon systems used to fight modern wars. And, in the end, the availability of these "provisions" in time of war rests upon the manufacturing power of the nation. As Hilaire Belloc wrote in 1898,

Whatever happens we have got  
The Maxim Gun, and they have not.  
*The Modern Traveller* (1898)

For forty years large private sector companies, often called "multinational corporations," have been exporting *the manufacturing capacity* of the United States to foreign countries. Economists have tended to characterize – and sometimes to hail – this as "a move to a service economy." The behaviors that have been displayed by the private sector, in the environment of uncivic free enterprise, are not in the least economically mysterious. In a college freshman level economics textbook published in 1969, Lipsey and Steiner wrote,

[Many] service industries have encountered income elasticities that are well in excess of unity and rising over time. We do not expect these elasticities to drop suddenly to very low levels, and we are thus able to predict that, unless service industries achieve rates of productivity growths very much in excess of the national average, there will be a continuing pressure coming from the price system for more resources to move into the service industries.

"Income elasticity" is a technical term in economics that means the percentage change in quantity

demand divided by the percentage change in income that produces this demand. A service industry is an industry that produces *intangible* goods. Banking, insurance, business services (e.g., consultants), and communications (e.g. a telephone company or an Internet service provider) are all examples of service industries. A service industry is typically characterized by being more labor intensive than a manufacturing enterprise and by making a much smaller contribution to exporting. One particular class of service occupation we wish to especially note here is the class that includes scientists, engineers, and mathematicians.

When the manufacturing capital of a country is exported to another nation – which is exactly what happens when companies relocate their manufacturing enterprise to a foreign country – the effect is the loss of this capital in the home nation. One immediate consequence of this loss is a shift in the labor capacity of the country out of the division of labor skilled in manufacturing and into other types of enterprises – of which the divisions of service labor are the among the most common. Once the loss of labor skill devoted to manufacturing occurs, it cannot be rapidly rebuilt because of the specialized nature of the knowledge required for it. As the economy shifts away from manufacturing into service enterprises, it loses its ability to produce exportable goods which, as Smith pointed out above, is *injurious to the nation's capacity for achieving a successful outcome in the event of a major war*.

This is not restricted to those enterprises commonly called "the defense industry"; the economics of war are considerably broader than this because these considerations *bear on the wealth of the nation as a whole* in waging war. Great Britain, which found itself forced to rely upon America – Roosevelt's "great arsenal of democracy" – during the second world war emerged from that conflict both victorious and bankrupt. On September 1, 1939, it was true that "the sun never sets on the British Empire"; at the war's end John Maynard Keynes told his countrymen, "We are a poor nation, and we must learn to live accordingly." Over the next few years Great Britain lost her empire piece by piece.

Without in any way depreciating the heroism of America's soldiers, sailors, and airmen who fought in the second world war, America's triumph and emergence from that war as the world's richest and strongest economic power was due to her manufacturing power. On the *battlefield* the allied victory was much more due to the Soviet Union – which bore the largest share of the actual fighting in destroying the Nazi military machine – than to the considerable but still lesser direct combat engagements of the United States. Without American manufacturing aid, the fate of the Russians would, very likely, have come out far differently; it was this aid, much more than the battlefield achievements of the United States, that determined the outcome in Europe. History records that Japan's Admiral Yamamoto opposed going to war with the U.S. because he knew Japan could never hold out against the *industrial* might of America. "If I am told to fight regardless of the consequences," he told Japan's Premier Konoye in 1941, "I shall run wild for the first six months or a year, but I have utterly

no confidence for the second and third years of the fighting."

Anyone who thinks that the nation's industrial capacity can be readily recalled to our shores, once manufacturing capacity has been relocated to a foreign nation and the people of that nation have acquired the expertise of manufacturing, betrays both a great deal of ignorance about human nature or the nature of governments and a great deal of naivety in underestimating the nationalism of other people for their homeland. This is the hard lesson to be had from the 1970s ventures of the Detroit automakers after they moved many of their manufacturing operations to Japan because labor costs were then much lower there than in the United States. The Japanese learned how to make cars, learned what the American automakers' production errors and weaknesses were, and exploited them. Quite simply, once they had acquired the technology and the expertise in auto manufacturing, they no longer needed the Big Three. Michigan today is suffering from the crushing legacy of this lesson.

But is not the American "defense industry" – which is, after all, under much tighter regulation and watch by the general government – immune from these easily predictable economic effects? Again, the answer is no. Not only are private sector companies in these industries fundamentally dependent upon goods purchased from "non-defense" manufacturing enterprises – the supply of which now cannot be guaranteed during political crises potentially leading to war, much less during a war – but they are also dependent upon a very specialized division of labor – namely, the supply of trained scientists, engineers, and mathematicians. There are significant barriers presented to the person who chooses to enter any of these occupations. Competency requires long, diligent and high-priced training in some of the most intellectually difficult fields of knowledge that exist. Very few people are willing to pay this cost of entry unless the prospects of employment afterwards are exceptionally favorable.

The moves to export America's manufacturing power over the past decade have had another easily predictable effect: enrollments in science, in engineering, and in mathematics are down significantly across the length and breadth of this nation as a direct and immediate consequence of the private sector's well publicized "outsourcing" of its scientific and engineering jobs to foreign countries. No practical person – and college students as well as parents of college students are eminently practical people – is going to undertake the arduous work of learning physics or electrical engineering in order to flip hamburgers at a McDonald's restaurant after graduation. The private sector "defense industry" companies are therefore faced with a twofold economic crisis that will, if the situation is not reversed, eventually make itself felt with brutal effect when this nation is confronted by some future war. This will be so *even if not one single "defense" job is ever "outsourced" to another country.*

In chapter 7 it was pointed out that this nation's tradition of tolerating outlaw behavior by private sector enterprise is directly contrary to promoting the general welfare of the Republic. In this chapter, the accompanying conclusion is: this same tolerance of outlaw enterprise in an economic environment



of uncivic free enterprise is contrary to providing for the common defense of the Republic.

It is an absurdity – and deontologically groundless – to suppose tolerance of outlaw economic enterprise domestically is not simultaneously a tolerance of outlaw enterprise internationally. Indeed, the characterization of "multinational" corporations as "multinational" is well spoken. An outlaw enterprise truly belongs to *no* nation. It is mere empty talk to say the actions of these companies in divesting the Republic of vital elements of its defense capacity is treasonous because treason cannot be committed by any outlaw – or any "corporate" outlaw – because an outlaw has never put himself – or itself – under any obligation to the political community. Treason is, by its very nature, a criminal action and only a citizen can commit it. There are very few corporate citizens in America.

The conclusion here is the same as in chapter 7. Only *civic* free enterprise is congruent with the Social Contract of the American Republic. Uncivic outlaw enterprise is a direct threat to the common defense. Civic enterprise, in contrast, incurs civic duties in regard to the common defense.

### **§ 5. The Common Defense and Objectivity in War**

Again, we live in a world of independent nation-states that coexist in the outlaw relationship of the state of nature. Each has some body politic of people whose state it is and many also include in the geographical community of the nation-state some body of people who are subjugated by the rulers of that nation or constitute a Toynbee proletariat within its borders. A few nations are republics, many are ruled by a despot or an oligarchy of despots. Cultures, local mores and folkways, traditions, and religions ideologically separate most nations. Most nations form the corporate equivalent of friendships with some usually small group of other nations; such groups are called allies and they exist where their respective political communities share some common interest better served by a limited alliance than by strict independence. The social dynamics of the world of nation-states often resembles that of a group of small boys on a playground with the national equivalents of bullies, thugs, gangs, and a majority that simply try to get along with the others, unless forced into a confrontation, and behave in whatever manner they think best serves their own interests. Unlike boys on the playground, there are no adults to supervise, protect and discipline them or control their disruptive behaviors.

In this state war is always possible. War is, as Clausewitz wrote, a political instrument, the continuation of policy by other means. Specifically, again as Clausewitz wrote, war is an act of force to compel an enemy to do our will. This act is always an act of deadly violence. As much as we might wish for a world in which no nation ever resorted to war for any reason, the hard reality is that it only takes one side to start a war. As long as this is true – and it has been true for at least six millennia – it will remain a principal duty of the general government of the Republic to provide for the common defense of the political community. This cannot be doubted. All of the ambiguity that attends the war

powers of the general government settle and rest upon nothing else than what is implied and meant by the phrase "the common defense."

Under the Social Contract of the American Republic, the significance of the word "common" in this phrase cannot be overstressed. It is no duty of the general government to protect the special private interests of any singular group of persons. If an oil company operating a well in a foreign country suffers the loss of that property because the local government decides to seize it (or, as the language of our times puts it, "nationalize" it), that is not a *casus belli* because, quite frankly, it is not a matter of the least real concern to the political community as a whole. If a company chooses to take the risks of conducting its operations in the outlaw environment of international affairs, it also chooses to take the risk of having its venture turn out badly. In the state of nature there are no civil rights, there is no such thing as justice, and an insult delivered to an outlaw is not an insult to a Republic.

If, on the other hand, that operation is under the protection of a treaty between our nation and the other, then it might well be the case that the common interest of the Republic is threatened by this hypothetical seizure – not because an oil company suffered a financial loss but because acquiescence to a treaty violation undermines *all* peaceful means of diplomacy. Without treaties and diplomacy, war becomes the *sole* means of settling grievances between nations. An agreement between a private company and a foreign government is no concern of the political community as a whole; a treaty between a foreign government and our government *is* the common concern of the political community because the general government represents *all* of us. This, not coincidentally, is a fact that both the President and the Senate are duty-bound to keep in mind in the making of every treaty. Treaty violations are serious matters, must be redressed, and if diplomacy fails to be able to do so, the ultimate step in the redress of international grievances is war.

Yet even here there is another nuance. Treaties are efforts to inject some limited social compact into the relationships between nations. They are attempts to moderate the jungle law of the state of nature and arrive at civic relationships between nations. It follows from this that a *just* treaty is one in which both sides enter into the compact *as the assumption of an obligation*. If a more powerful nation bullies a weaker one into signing a treaty, this does not constitute the taking up of obligation; it merely forces the weaker side into an act of prudence with no underlying commitment to an obligation. This is the difference between a *just* treaty and a merely *legal* treaty. The practical reality is that a merely legal treaty without reciprocal justice subsisting in its making is just a scrap of paper and produces nothing but the continuation of an outlaw relationship.

Almost all peace treaties are of this merely legal character. That is why wars very rarely settle anything once and for all. Clausewitz wrote,

Lastly, even the ultimate outcome of a war is not always to be regarded as final. The defeated

state often considers the outcome merely as a transitory evil, for which a remedy may still be found in political conditions at some later date.

In the twentieth century probably nothing illustrated this point better than the Treaty of Versailles. Had justice rather than vengeance been the basis of that treaty there might never have been a Nazi party of any political significance or importance. Any political community who thinks the purpose of war is to settle things once and for all through raw force must face a harsh and brutal reality: if you want to be absolutely certain war produces a final resolution, the only certain way to do that is to kill or enslave every person in the defeated nation and destroy that nation itself. This was the method the Mongols used from 1258-60 AD in what is now modern day Iraq. The slaughter that took place there was so total that it was not until the twentieth century that the population level there again matched what it was before the Mongol invasion. Historian Will Durant notes,

This ferocity was part of the military science of the Mongols; it sought to strike a paralyzing terror into the hearts of later opponents, and so leave no possibility of revolt among the defeated. The policy succeeded. . .

Never in history had a civilization suffered so suddenly so devastating a blow. The barbarian conquest of Rome had been spread over two centuries; between each blow and the next some recovery was possible; and the German conquerors respected, some tried to preserve, the dying Empire which they helped to destroy. But the Mongols came and went within forty years; they came not to conquer and stay, but to kill, pillage, and carry their spoils to Mongolia.

Earlier, in 680 BC, the city of Babylon fell to Sennacherib of Assyria. He subsequently boasted,

I leveled the city and its houses from the foundations to the top. I destroyed them and consumed them with fire. I tore down and removed the outer and inner walls, the temples and the ziggurats built of brick, and dumped the rubble in the Arahtu canal. And after I had destroyed Babylon, smashed its gods and massacred its population, I tore up its soil and threw it into the Euphrates so that it was carried by the river down to the sea.

[James Wellard, *By the Waters of Babylon*, London: Hutchinson, 1982]

In regard to Clausewitz saying, "the outcome of war is not always to be regarded as final," this is the sort of thing that does make the outcome final. Anyone who thinks there is anything glorious or noble about war ought to reflect upon this and upon Chaka's dictum: "Never leave an enemy behind you."

There have been nation-states in the past, there are nation-states today, and there will be nation-states in the future whose rulers are driven by a desire for conquest and power. They are the predators in the state of nature, in contrast to the relatively larger number of nation-states whose rulers comprise the petty thieves and highwaymen of the world. The history of our own Republic is not without its faults in this regard, as any Native American will not hesitate to remind us. But international brigandage was not the principal reason our ancestors fought the Revolutionary War, although it is an historical fact that westward expansion – at the expense of the Indian nations – was always a factor lurking in the background of the picture even in 1776.

Nonetheless, outlaw deeds perpetrated by men long dead against other men long dead can have no practical standing for those living today or those who will be living tomorrow. Liberty with justice *today*, including *justly accomplished* redress of injustices still present that originated in the past, must be the standard of the *living* Republic if the Republic is not to gradually amass an internal Toynbee proletariat that will one day bring it down. Again, the Ideal of the American Republic is not found as a state-of-being but subsists in acting to make life in our political community more perfectly approach the Idea. A single step made in this direction is sublimely better than all the bemoaning of the imperfections of the world. Mill wrote,

It is not much to be wondered at if impatient or disappointed reformers, groaning under the impediments opposed to the most salutary public improvements by the ignorance, the indifference, the intractableness, the perverse obstinacy of a people, and the corrupt combinations of selfish private interests armed with the powerful weapons afforded by free institutions, should at times sigh for a strong hand to bear down all these obstacles, and compel a recalcitrant people to be better governed. But (setting aside the fact, that for one despot who now and then reforms an abuse, there are ninety-nine who do nothing but create them) those who look in any such direction for the realization of their hopes leave out of the idea of good government its principal element, the improvement of the people themselves. One of the benefits of freedom is that under it the ruler cannot pass by the people's minds, and amend their affairs for them without amending them. If it were possible for the people to be well-governed in spite of themselves, their good government would last no longer than the freedom of a people usually lasts who have been liberated by foreign arms without their own co-operation. It is true, a despot may educate the people; and to do so really, would be the best apology for his despotism. But any education which aims at making human beings other than machines, in the long run makes them claim to have the control of their own actions. . . . Whatever invigorates the faculties, in however small a measure, creates an increased desire for their more unimpeded exercise; and a popular education is a failure if it educates the people for any state but that which it will certainly induce them to desire, and most probably to demand. . . .

There is no difficulty in showing that the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government, by the personal discharge of some public function, local or general. . . .

Its superiority in reference to present well-being rests upon two principles, of as universal truth and applicability as any general propositions which can be laid down respecting human affairs. The first is, that the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them. The second is, that the general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies in promoting it.

Putting these two propositions into a shape more special to their present application: human beings are only secure from evil at the hands of others in proportion as they have the power of being, and are, self-protecting; and they only achieve a high degree of success in their struggle with Nature in proportion as they are self-dependent, relying on what they themselves can do, either separately or in concert, rather than on what others do for them.

*This* is the goal of civic morality inherent in true representative government founded upon the idea of liberty. It is also the moral ground and basis for the duty of government to promote the common *defense*. From this, it follows that "the common defense" is at root nothing else than *the defense of the*

*civil liberty of all citizens of the Republic*. Nothing that does not serve this purpose can find legitimacy for the general government's actions. It then follows immediately from this that the Republic may never, from duty, be the first aggressor in the policy of war because no one particular disadvantage of peace threatens the liberty of all, whereas war *always* poses such a threat. Clausewitz wrote,

It is now quite clear how greatly the objective nature of war makes it a matter of amassing probabilities. Only one more element is needed to make war a gamble – chance . . . No other human activity is so continuously or universally bound up with chance. And through the element of chance, guesswork and luck come to play a great part in war. . .

If we now consider briefly the *subjective nature* of war – the means by which war has to be fought – it will look more than ever like a gamble. The element in which war exists is danger. . . Now courage is perfectly compatible with prudent calculation but the two differ nonetheless, and pertain to different psychological forces . . .

In short, absolute, so-called mathematical factors never find a firm basis in military calculations. From the very start there is an interplay of possibilities, probabilities, good luck and bad that weaves its way throughout the length and breadth of the tapestry. In the whole range of human activities, war most closely resembles a game of cards.

Unfortunately, although our political community can determine itself to not be the first aggressor, it cannot prevent another nation from taking this course. Thus, we must acknowledge the necessity of defense, and this necessity has in its basic nature the necessitation of acting as a *secondary* aggressor because when the event of war does arise it must be waged aggressively until the occasioning threat is removed. The 1988 bombing of Libya is an example of this sort of act of defense; the uncivic element of that action does not arise from the action itself but, rather, from the way in which the nation was improperly committed to it, namely by an Executive action when the duty to commit was vested in Congress through *both* declaration and determination of the national policy.

Here is a case where Bobbitt's position – i.e., that "war" means "total war" – is shown to be the dangerous fallacy of an amateur's inadequate understanding of what war is. In reading *On War*, one can almost sense Clausewitz' contempt for this sort of thinking:

Thus in the field of abstract thought the inquiring mind can never rest until it reaches the extreme, for here it is dealing with . . . a clash of forces freely operating and obedient to no law but their own. From a pure concept of war you might try to deduce absolute terms for the objective you should aim at and for the means of achieving it; but if you did so the continuous interaction would land you in extremes that represented nothing but a play of the imagination . . . Any such pronouncement would be an abstraction and would leave the real world quite unaffected. . .

But move from the abstract to the real world and the whole thing looks quite different.

Now, it is certainly a fact that, as a body, Congress is no congregation of generals. The typical congressman is a rank amateur insofar as knowledge of war is concerned, and this consideration might therefore seem to be an argument for the wisdom of leaving the war-making decision in the hands of the President – were it not for the fact that most Presidents are also amateurs and leaving such an

awesomely dangerous decision in the hands of one amateur is far more dangerous than leaving it in the hands of a squabbling many. In all but the categorical case of committing the nation to war, we find much wisdom in the maxim of Caesar Augustus: *festina lente* – make haste slowly.

War is the continuation of policy by other means. Because no policy of first aggression has any just standing under the Social Contract, war policy therefore always requires sober war objectives that the best human judgment of the actual requirements for the common defense can reach, and determined as carefully as the circumstances and unpredictability of war permit. Few things are as dangerous and contrary to providing for the common defense as the spectacle of politicians figuratively pounding their chests like some circus of silverback gorillas in calling for war unless it be the spectacle of a gaggle of politicians – pale faced and quaking from discovering too late that when they chose to seek their offices they were also choosing to assume responsibility for decisions of wholesale life and death – desperately trying to find a way to shirk responsibility for these deadly decisions. Hawks and doves belong in a zoo, not in the Congress.

Again, war is war. Excepting the categorical case – where the real situation is an emergency and is for that reason of a relatively clear nature – committing the nation to war must be declared, not "authorized," and the declaration must be based on four considerations: (1) is this a case where the common defense applies? (2) what is the specific *casus belli*? (3) who is the specific enemy? and (4) what is the aim of the war policy of the Republic? If the cause really is just the Sovereign will support it and the war aims, and will do so without despotic resort to the deceptions of political propaganda. If this practice of *festina lente* leads to fewer wars so much the better because in most cases war is not necessary. It is no part of the Social Contract that the Republic take upon itself the role of world police force and, to put it bluntly, most of the conflicts in the world are none of our common business.

## **§ 6. The Objectives of Reformation in Providing for the Common Defense**

### **§ 6.1 The Purpose of the Reformation**

Since 1950 the Republic has been in a state of constitutional crisis in regard to the war powers vested in the specific branches of the general government. This crisis is characterized by two primary factors: (1) usurpations by the Executive branch in committing the Republic to war; and (2) abdication by the Congress of its responsibility for declaring war in favor of the unconstitutional act of turning over its responsibility to the President by means of an "authorization." Both factors are contrary to the express intentions of the Framers of the Constitution.

The war clause in Article I, sec. 8, of the Constitution was debated at the Constitutional Convention on August 17, 1787. It is important to note a few facts about this brief debate. First, the original draft of the Constitution stated the war power of Congress in the following way:

The Legislature of the United States shall have the power . . . To make war [.]

This is documented in Volume II (pp. 181-182) of Farrand's *Records of the Federal Convention of 1787*. When the delegates took up the war powers clause in debate on August 17, the focus of the debate centered around three principal considerations: (1) the distinction between *declaring* war vs. *conducting* war; (2) where the war declaration authority should be vested; and (3) whether or not the concluding of *peace* should likewise be vested in that same body. Madison's notes for August 17 sketch out for us the principal discussion points<sup>5</sup>:

Mr. Pinkney<sup>6</sup> opposed the vesting of this power in the Legislature. Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one – authority to make war, and another peace.

Mr. Butler<sup>7</sup>: The Objections against the Legislature lie in a great degree against the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.

The oppositions both men raised were over the clause empowering Congress "to make war." Making war, to the delegates, meant not merely declaring war but actually conducting its operations. The practical objection to having Congress declare *and* also conduct a war was well taken by the Framers. Madison and Elbridge Gerry (delegate from Massachusetts) then introduced an amendment:

Mr. Madison and Mr. Gerry moved to insert "*declare*," striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.

Mr. Sherman<sup>8</sup> thought it stood very well. The Executive should be able to repel and not to commence war. "Make" [is] better than "declare," the latter narrowing the power too much.

Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

. . . Mr. Madison was against giving the power of war to the Executive because [he could] not safely be trusted with it; or to the Senate, because [it was] not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "*declare*" to "*make*".

The motion to change the wording to "declare" from "make" passed by a vote of 7 in favor, 2 against, and 1 absent. The debate and vote clearly left the power to declare war in the hands of Congress, but the power of conducting the war in the hands of the President (without subjecting him to

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<sup>5</sup> Madison's notes contain a number of abbreviations, which is an understandable necessity for a note-taker who is also a participant in a live debate. In this quotation your author has taken the liberty of spelling out Madison's abbreviated words in full. He has also taken the liberty of correcting Madison's misspellings of delegate names.

<sup>6</sup> Charles Pinkney, delegate from South Carolina.

<sup>7</sup> Pierce Butler, delegate from South Carolina.

<sup>8</sup> Roger Sherman, delegate from Connecticut.

backseat driving by the Congress in regard to *how* he conducts it). The debate also decisively settled any question about the President's duty to "repel" attacks, which is the categorical duty named earlier in this chapter.

Unfortunately, the Framers did leave hanging the issue of declaring peace, i.e. ending a declared war. With the hindsight of history, this was probably a mistake since it leaves unresolved the specific authority to decide upon the cessation of hostilities once war has been declared. The Framers' debate on this question was surprisingly brief:

Mr. Ellsworth<sup>9</sup>: There is a material difference between the cases of making *war*, and making *peace*. It should be more easy to get out of war than into it. War also is a simple and overt declaration. Peace [is] attended with intricate & secret negotiations.

. . . Mr. Butler moved to give the Legislature power of peace, as they were to have that of war.

Mr. Gerry seconds him. Eight Senators may possibly exercise the power if vested in that body, and 14 if all should be present<sup>10</sup>; and may consequently give up part of the United States. The Senate are more liable to be corrupted by an Enemy than the whole Legislature.

However, the motion to add the peace-making clause to the Constitution was voted down by a vote of 10 against to 0 in favor<sup>11</sup>. As a consequence, the ending of a war has historically been brought about by one of two means: (1) with the unconditional surrender or destruction of the enemy, a state of affairs reported to the Congress by the President; or (2) by means of a peace treaty, which is undertaken in the usual Constitutional manner involving the President with the advice and consent of the Senate. The War Powers Act of 1973 attempts to give Congress the power to order cessation of hostilities by requiring the President to withdraw the Armed Forces from hostilities at Congress' directive; this has, quite understandably, been opposed by the Presidents as an unconstitutional usurpation of the President's war powers.

Because the Constitution itself is silent on this matter and historical precedent has only come in the two ways noted above, a very crucial aspect of war – namely, ending it – is left in a dangerously ambiguous state. Among other things, one can note that the general government is not given any constitutional authority to *surrender* the Republic other than by means of a negotiated peace treaty in which the President and the Senate concur that surrender is the proper action to take in the conduct of the war. If the President refuses to concur with such an action, he has the constitutional authority to wage a *declared* war to the point at which the Republic is annihilated by an enemy, much as Hitler attempted to do in Germany during World War II.

Pierce Butler's judgment that a President "will not make war but when the Nation supports it" now seems, with the benefit of historical hindsight, to have been naively optimistic. The Korean War, the

<sup>9</sup> Oliver Ellsworth, delegate from Connecticut.

<sup>10</sup> With 13 states, each with 2 senators, the vote of 14 senators would be a simple majority.

<sup>11</sup> Vote tallies at the Convention were by state, not by individual delegate.



war in Vietnam, and the 2002-2010 war in Iraq all illustrate this quite vividly. It has proven to not be difficult for the political parties to engender an initial enthusiasm for military adventurism through propaganda. The tactics involved rely at root on the well-noted willingness of the Sovereign to present a united front behind the President when war suddenly threatens the interests and well-being of the Republic. It has also been demonstrated by history that, once committed, a later disaffection for the war on the part of a large *fraction* of the Sovereign is all too easy for the general government to ignore for a protracted period of time. The endings of the Korea and Vietnam wars were driven by the power of the ballot, and only then has the general government proven to be responsive to the divisiveness of a civically unjust war that has become unpopular.

It is not difficult to trace this very human factor back to some very personal characteristics found in human nature. John Adams wrote in *Discourses on Davila* (1790),

National rivalries are more frequently the cause of wars than the ambition of ministers or the pride of kings. As long as there is patriotism, there will be national emulation, vanity, and pride. It is a national pride which commonly stimulates kings and ministers. National fear, apprehension of danger, and the necessity of self-defense, is added to such rivalries for wealth, consideration, and power. The safety, independence, and existence of a nation depend upon keeping up a high sense of its own honor, dignity, and power in the hearts of its individuals, and a lively jealousy of the growing power and aspiring ambition of a neighboring state. . .

The increase and dissemination of knowledge, instead of rendering unnecessary the checks of emulation and the balances of rivalry in the orders of society and constitution of governments, augment the necessity of both. It becomes the more indispensable that every man should know his place, and be made to keep it. Bad men increase in knowledge as fast as good men; and science, arts, taste, sense, and letters are employed for the purposes of injustice and tyranny as well as those of law and liberty; for corruption as well as for virtue. . .

Americans! Rejoice that from experience you have learned wisdom; and instead of whimsical and fantastical projects, you have adopted a promising essay towards a well-ordered government. Instead of following any foreign example, to return to *the legislation of confusion*, contemplate the means of restoring the decency, honesty, and order in society by preserving and completing, if any thing should be found necessary to complete, the balance of your government. In a well-balanced government, reason, conscience, truth, and virtue must be respected by all parties and exerted for the public good. Advert to the principles on which you commenced that glorious self-defense, which, if you behave with steadiness and consistency, may ultimately loosen the chains of all mankind.

The lessons of history amply demonstrate that we do have things "found necessary to complete the balance of" the government of the American Republic. The ethical terms Adams used underline the moral factor that is always and inevitably a part of the war and peace deliberations that a well-balanced government must find itself undertaking in the outlaw world of nation-states. Thus, the purpose of reformation in regard to the government's duty to provide for the common defense is: ***To insure the general government fulfills its duty to provide for the common civil defense.*** Here it is important to lay stress on the key distinction of the *civil* defense; the duty of government is to defend *all* in their *common* interests, not the interests of an outlaw few, and *utterly not at all* the private

interests of political parties.

## § 6.2 The Objectives of Reformation

The basis and the ground for the Constitution is the Social Contract of the Republic. In regard to providing for the common defense of the Republic, two duties of government must be delineated and the mechanisms of government needed to properly insure these duties are fulfilled must be improved. Both duties can and should be regarded as articles under the general duty of providing for the common defense.

The first is the duty to insure the Republic has adequate resources for its self-defense. Mechanisms of government empowering this so far as the raising and maintenance of the Armed Forces of the Republic are already in place in the constitutional structure of the general government; here the primary concern is insuring that force levels and the equipment and logistics of the Armed Forces are adequate to the task of defense. Where corruptions of intent do exist in this sphere, they center upon inter-service rivalries among the branches of the Armed Forces and upon the self-interests of uncivic private sector enterprises – and, as well, on the inclinations of congressmen to curry favor with the voters – in pressing for piecemeal funding appropriations that often serve nothing but some special interest. As President Eisenhower warned in his Farewell Address on January 17, 1961,

This conjunction of an immense military establishment and a large arms industry is new in the American experience. We must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

But a second factor, new to the closing decades of the twentieth century, must likewise be noted. This is the unregulated and unrestrained actions of *uncivic* free enterprise in corroding the economic ability of the Republic to defend itself through the exportation of the nation's manufacturing power. In chapter 7 the harm done to the promotion of the general welfare by uncivic enterprise was noted; in this chapter the harm this same unregulated, unrestricted, and uncivic enterprise does in endangering the economics of the common defense was brought out. Again, the prosperity and success of the Republic has never turned upon the actions of uncivic enterprise but, rather, on *civic* free enterprise. Outlaw organizations cannot and do not serve the needs of the Social Contract of the Republic, and it is the Republic that provides the safety and security from which these corporations benefit and which alone makes possible their economic success. The citizens of the Republic *have the civil right to not merely expect but require* corporate citizenship and the taking up of duties to the Republic and its citizens by *all* economic enterprises. All *outlaw* enterprise must be ended and *civic* free enterprise established in its place.

Thus, under *the prime objective of empowering the government to provide for the common*

*defense* we come to the **first objective of reformation: To empower and establish mechanisms by which the general government can fulfill its duty to insure an economic system by which the Republic can safeguard and maintain the capacity for its common defense.** Propagandists have used Adam Smith's *Wealth of Nations* as the basis for their persuasions that the good of the Republic is only served by the ideology of an economically *laissez-faire* government. But, as pointed out earlier, Smith's doctrine of *laissez-faire* economics was not unregulated and he also pointed out the need and basis for exception to this policy in the arena of the common defense of the nation.

The second urgently needed reform is that of addressing the unconstitutional actions of the general government over the past half-century in the manner in which it has been committing the Republic to the waging of wars. There are three principal factors working in conjunction here. The first is the usurpation of the war-commitment duties of Congress by the Executive. The Executive is empowered to act unilaterally only under the categorical duty identified earlier. The war-initiating power of the President must be restricted to this duty and denied in the other two cases.

The second is the abdication by the Congress of its duties under the hypothetical and reciprocal cases. This moral transgression must be redressed.

The third is the inability of the Supreme Court to adjudicate this constitutional matter owing to the ambiguity of the Constitution itself in regard to the war powers of the other two branches. War is a far too serious and deadly matter to allow this dangerous state of confusion to persist.

War is a political phenomenon and it is nothing else than the continuation of national policy by means of violent and deadly force. The decision to wage war is a moral decision, and the moral nature of war can find an *objective* basis, capable of universal application, only under deontological ethics. Consequentialist ethics and virtue ethics are both fundamentally subjective ethical systems and, as such, are incapable of providing the objectivity needed to assess the *common* interests of the Sovereign of a Republic. Equally, under the Social Contract *there can be no duty of government for committing the Republic to war whatsoever except on an objective understanding of the Republic's social compact.* All duty is essentially moral in its primitive character, and only an understanding of this moral character on objective grounds can be suitable in serving the Social Contract. As presently constituted, the powers and mechanisms of the general government can at best be no more than amoral and, as history reveals, have been *immoral* on too many occasions.

Again in *Discourses on Davila*, Adams wrote:

The essence of a free government consists in an effectual control of rivalries. The executive and the legislative powers are natural rivals; and if each has not an effectual control over the other, the weaker will ever be the lamb in the paws of the wolf. The nation which will not adopt an equilibrium of power must adopt a despotism. There is no other alternative. Rivalries must be controlled or they will throw all things into confusion; and there is nothing but despotism or a balance of power which can control them. . .

It has been said, that it is extremely difficult to preserve a balance. This is no more than to say that it is extremely difficult to preserve liberty. To this truth all ages and nations attest. . . A balance, with all its difficulty, must be preserved or liberty is lost forever. Perhaps a perfect balance, if it ever existed, has not been long maintained in its perfection; yet, such a balance as has been sufficient to liberty, has been supported in some nations for many centuries together; and we must come as near as we can to a perfect equilibrium, or all is lost. When it is once widely departed from, the departure increases rapidly, till the whole is lost. If the people have not understanding and public virtue enough, and will not be persuaded of the necessity of supporting an independent executive authority, an independent senate, and an independent judiciary power, as well as an independent house of representatives, all pretensions to a balance are lost, and with them all hopes of security to our dearest interests, all hopes of liberty.

The discussions in this chapter on the civic moral responsibility of government in regard to the committing of the Republic to war has brought into the open the following six requirements that are presently not being met:

1. The general government can have neither the duty nor the power to commit the Republic to war as the party of *first* aggression;
2. The war-initiating powers of the President must be confined to the sphere of the categorical duty of committing the Republic to war;
3. This confinement in (2) must not hamper the President's power of action as Commander in Chief of the Armed Forces acting under the categorical duty of immediate defense while Congress has not begun or is still in deliberations regarding its hypothetical and reciprocal duties for committing the Republic to war;
4. Congress must be required and made to fulfill its hypothetical and reciprocal duties to determine the national policy of war, including the determination of the policy on conditions for its conclusion;
5. Treaties must be justified by the President and by the Senate on clear grounds from the six general objectives of government before they are ratified;
6. The House of Representatives must have a role in the making of treaties, and this role must be that of *ratifying the moral ground* of a treaty without, by this power, being allowed to ratify the terms of the treaty itself; this is to say that the Senate must be required to obtain the *moral* advice and consent of the House in its processes of treaty ratification.

Commitment of the Republic to war is a moral commitment of the entire political community, bringing with it commitments to duties on the part of every individual citizen. But the ground of all duty is obligation under the Social Contract, and it follows that deliberate commitment to war must satisfy four specific judgments of civic morality:

1. The *casus belli* for a relationship in a state of war between the Republic and any foe must be clear and specific;
2. The specific enemy must be identified;
3. There must be established a specific and determined understanding why the situation confronting the Republic is truly one affecting the common defense of the Republic; and

4. The specific aims of the Republic's war policy, including conditions for ending the war, must be established and agreed upon by the Congress with the advice and consent of the President in his role as the agent responsible for the conduct of the war.

The duty and responsibility for all of these lies with Congress and nowhere else. This duty and this responsibility cannot be delegated by Congress in any way, and especially not by turning this duty over to the judgment and power of the President through a sophist's recourse to an alleged power to commit to war through an act of authorization, a power Congress is not granted by the Constitution.

This brings us to the **second objective of reformation: *To delineate and specify the duties of Congress in its power to commit the Republic to war, and to provide the mechanisms by which this power is to be exercised.*** The delineation, clarification, and the provisions of the mechanisms required for the war powers of Congress must be such as to satisfy the six requirements that must be met and the four moral judgments that must be satisfied to establish the justness of the Republic's commitment to war.

Let us all understand very clearly: upon these necessary reformations the preservation of liberty hangs in the balance and with it, perhaps, even the continued existence of humankind. If this Republic is ever to serve as the example for an outlaw world to emulate in hopes of perpetual peace, the example it sets must be and can only be through deontological moral leadership and by moral example. Might never has and never will make right. Its only produce are slavery and death.

## § 7. References

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