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NOTE

DOMESTIC AND INTERNATIONAL LAW IMPLICATIONS OF A PRESIDENTIALLY DECLARED BLOCKADE OF CUBA

INTRODUCTION

The deteriorating situation in Central America has injected a growing sense of urgency into the struggle to stem Cuban expansionism.¹ Although efforts are being made to arrive at diplomatic solutions,² the Reagan administration has warned that it would blockade Cuba if necessary to stop the alleged communist backed funneling of arms to Salvadoran revolutionaries.³ This threatened blockade raises two important questions: (1) would such presidential action be constitutional, absent congressional authorization; and (2) even if Congress were to consent to a blockade, what constraints would international law impose upon the United States?

With respect to the first question, this note generally considers the constitutional allocations of the power to regulate foreign affairs, focuses more specifically on the allocations of the war powers, and examines the impact of the 1973 War Powers Resolution⁴ on such a proposed blockade.

Examination of the second question focuses on the customary right of self-defense as recognized by international law, as well as on the provisions of the United Nations Charter⁵ and the Inter-American Reciprocal Assistance Treaty (Rio Treaty)⁶ which are germane to the

1. Mullin, *Groping for Answers in Latin America*, U.S. NEWS & WORLD REP., Dec. 21, 1981, at 25. In the N.Y. Times, Feb. 23, 1981, at A1, col. 2, Edwin Meese 3d, the chief White House policy advisor, renewed warnings that President Reagan would consider a blockade of Cuba if necessary to preserve peace in El Salvador. Secretary of State Alexander Haig has also warned that the United States will "go to the source" if Cuba continues to back the revolution in Central America. *Id.*

2. N.Y. Times, Feb. 24, 1981, at A8, col. 1. A special document, entitled "Communist Interference in El Salvador," has been presented to several allies with the hope of gaining support for the emerging Reagan position. N.Y. Times, Feb. 24, 1981, at A1, col. 1.

3. N.Y. Times, Feb. 24, 1981, at A8, col. 5. In 1981, the guerillas themselves admitted to killing over 6,000 persons including non-combatant "informers" and military and government authorities. N.Y. Times, Feb. 24, 1981, at A8, col. 2.

4. War Powers Resolution, 50 U.S.C. § 1541 (1973).

5. U.N. CHARTER art. 1, para. 1.

6. Inter-American Reciprocal Assistance, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (1947) [hereinafter cited as Rio Treaty].

determination of the legality of a blockade, should one be implemented against Cuba.

FOREIGN AFFAIRS POWERS

The presidential exercise of broad powers in the field of foreign relations has become quasi-monopolistic in nature⁷ and is frequently effectuated via the "fait accompli."⁸ In a world imminently capable of self-destruction,⁹ the potentially disastrous consequences of an international misstep is generating inquiry into the wisdom and constitutionality of investing one individual with the sole discretion to exercise such powers.¹⁰

The text of the Constitution, however, sheds little explicit light on who is ultimately to bear the burden and privilege of directing the course of the United States in foreign affairs.¹¹ Despite its extensive allocations of powers capable of affecting our foreign relations, the Constitution simply distributes those powers among the Senate, the Congress as a whole, and the Executive without indicating which organ shall have the final voice.¹² Case law has established that the federal

7. Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972). Lengthy Senate procedures have done much to advance the nearly unilateral presidential control of foreign affairs. Even avid supporters of greater congressional involvement, such as Berger, admit the need for legislative reform if its participation is to be effective. *Id.*

8. E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS* 185 (4th ed. 1957). Presidential guidance is the paramount factor in shaping American foreign policy, and the fait accompli is a potent tool for getting Congress to conform to the wishes of the Executive. *Id.* President Theodore Roosevelt illustrated this point when Congress declined to finance an around the world cruise of the United States fleet. D. ABSHIRE, *FOREIGN POLICY MAKERS: PRESIDENT VS. CONGRESS* 74 (The Washington Papers vol. vii, No. 66, 1979). Undaunted in the face of this recalcitrance, Roosevelt said that if he sent the fleet halfway, Congress would have to pay to get it back. *Id.* While it is true that no presidentially created diplomatic policy can survive for long without the support of Congress, this has generally not posed a serious barrier to presidential initiative in the past. See E. CORWIN, at 185.

9. Modern technology has produced tools of destruction capable of obliterating states with incredible speed from even more incredible distances. See McDougal, *The Soviet Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600 (1963).

10. Schlesinger, Jr., *Who Makes War—and How*, 63 A.B.A. J. 78 (1977). Controversy over the presidential exercise of broad powers in the field of foreign relations resurfaced in the wake of the American involvement in the Indochina War. *Id.*

11. E. CORWIN, *supra* note 8, at 171. The Supreme Court has held that although the powers of Congress are limited to those enumerated in the Constitution, the powers of the presidency are not thus limited and can be implied at least insofar as they properly fall within the executive range and are not expressly forbidden by the Constitution. See *Meyers v. United States*, 272 U.S. 52, 118 (1926).

12. E. CORWIN, *supra* note 8, at 171. Since the Constitution is completely silent as to

government has exclusive control over foreign relations independent of affirmative constitutional grants.¹³ Where those grants lie, internally, is not clear.¹⁴ The standing¹⁵ and political questions doctrines¹⁶ have effectively eliminated the Judiciary as a serious contender for power in this arena. The constitutional allocations that do affirmatively appear,¹⁷ combined with the doctrine of concurrent powers,¹⁸ have, how-

many powers asserted by both the President and Congress, it is argued that the Constitution is the mediate rather than the immediate source of the external powers of the national government. *Id.* at 172.

13. See, e.g., *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54 (1795); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1889); *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-17 (1936).

14. As noted by Justice Frankfurter, "the fact that power exists in the government does not vest it in the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 604 (1952) (concurring opinion).

15. The doctrine of standing rests on the article III requirement that the plaintiff himself must be injured. See, e.g., *Tileston v. Ullman*, 318 U.S. 44, 45 (1943) (doctor did not have standing to sue on behalf of his patients). The question of standing is particularly important with regard to issues touching on foreign policy since general interest, as a citizen, is not adequate even when no one may qualify to sue under the actual injury test. See, e.g., *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

16. Any plaintiff who passes the standing barrier will still be faced with the long established political questions doctrine if contested acts are related to foreign affairs. E. CORWIN, *supra* note 8, at 176. The standards for identifying political questions are not clear, but issues which are in the area of foreign relations are generally regarded by the courts as more appropriately left to the judgment of a political department. See *Baker v. Carr*, 369 U.S. 186, 211 (1962). As stated by one Court, "certainly it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). It is argued by some commentators that when courts refuse to entertain a political question, they are, in fact, deciding that the choices made were within the zone of discretion accorded the political branches and therefore legal. See Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 894 (1972).

17. Article II, § 2 provides that "[t]he President shall be Commander in Chief of the Army and Navy . . ." and that "[h]e 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 . . ." Article II, § 3 states that "he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed . . ." Article I, § 8 provides that

[t]he Congress shall have Power To . . . provide for the common Defense and general Welfare of the United States . . . To regulate Commerce with foreign Nations . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations; To declare war . . . To raise and support Armies . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .

Article I, § 9 provides that "[n]o money shall be drawn from the treasury, but in Consequence of Appropriations made by Law . . ."

18. As noted in E. CORWIN, *supra* note 8, at 175, the doctrine of concurrent powers is

ever, spurred the political branches of the federal government into an intermittent struggle for control.¹⁹ Who, if anyone, will emerge victorious remains for events to resolve.²⁰ American history has shown, thus far, that the predominant power to determine the substantive content of American foreign policy is exercised by the President.²¹ Although the source of this power has been primarily political,²² it also has support in judicial precedent.²³

Early resistance to executive primacy in this realm fell to pragmatism and presidential initiative.²⁴ As John Jay noted, the President's

sometimes called the doctrine of "co-ordinate powers," and it stands for the principle that neither the House nor the Senate can be constitutionally bound by anything done previously by the President in his capacity as representative of the United States in foreign affairs. It is noteworthy, however, that this constitutional freedom has little effect in the face of practical realities. *Id.*

19. E. CORWIN, *supra* note 8, at 177. For the periods of congressional ascendancy, see generally D. ABSHIRE, *supra* note 8.

20. E. CORWIN, *supra* note 8, at 171.

21. *Id.*

22. Hamilton and Madison battled over this issue under the respective noms de plumes of "Pacifcus" and "Helvidius". See E. CORWIN, *supra* note 8, at 179-80. Madison argued that the presidential powers in foreign affairs were instrumental only, involving no greater discretion than determination of "matters of fact." *Id.* at 180. He reasoned that if it were otherwise, Congress would be constitutionally bound by the President's acts and thus stripped of its power to declare war. *Id.* at 181. Hamilton contended that while the President could not control the war-declaring powers, he could affect its use by the legislature by determining the conditions of the nation through the exercise of the inherent foreign affairs powers that are executive in nature. *Id.* at 179. The vindication of Hamilton's argument shaped constitutional interpretations in two important respects: 1) the "executive power" clause became a respectable depository for unassigned powers relating to foreign affairs; and 2) presidential powers in the diplomatic sphere were treated as policy forming powers, constitutionally independent of Congress, though potentially limited by it. *Id.* at 181.

23. Early political statements cited with approval by the Supreme Court have raised to the level of dogma the propriety of presidential claims to power in the diplomatic sphere. See Berger, *supra* note 7, at 15, 16. Chief Justice Taft, for example, accepted the theory that the President, unlike Congress, could exercise powers that are not enumerated by the Constitution as long as they were not forbidden by it. See *Myers v. United States*, 272 U.S. 52 (1926). Henkin refers to this power to affect foreign relations as the "unenumerated foreign affairs power." L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 68 (1972).

24. See E. CORWIN, *supra* note 8, at 178. Early presidential assertions of foreign affairs powers appear timid in light of modern understanding. Washington's unilateral declaration of neutrality in 1793 with respect to the war between France and England and his later refusal to submit to the House of Representatives his papers relative to the Jay Treaty negotiations were, however, important first steps in the Executive's gathering of power in the sphere of foreign affairs. Even Jefferson, who had previously supported

office has certain natural advantages with respect to the conduct of foreign affairs, as for example, the executive's unity of office, capacity for secrecy and dispatch, and superior sources of information.²⁵ In comparison to the houses of Congress, which are in recess much of the time, the President is always available and ready for action.²⁶

Perhaps the biggest boon to the executive claim to power in the area of foreign affairs was John Marshall's declaration that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁷ When this theme was adopted by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*,²⁸ the imprimatur of the Supreme Court, albeit by way of dicta, was stamped on the all pervasive presidential power over foreign relations.²⁹ At issue in *Curtiss-Wright* was a joint resolution enacted by Congress that authorized the President to declare the provision of arms to nations involved in the Chaco conflict illegal, if it were his opinion that such action would contribute to the establishment of peace in the area. The sole question before the Court was whether this was an improper delegation of power to the President.³⁰ Nonetheless, Justice Sutherland seized the opportunity to advance his theory that the national foreign affairs powers were inevitable incidents of a claim of sovereignty and "did not depend upon the affirmative grants of the

Madison's "Helvidius" writings, allowed no deviation from the President as the only channel of communication between the United States and foreign nations. *Id.* at 182. Although the earlier presidents did not expressly claim an inherent power to initiate military actions, Congress deferred to their wishes and gave them broad delegation of authority to carry out their foreign policies. See Schlesinger, *supra* note 10, at 79. When Congress did attack the constitutional basis for such authority in the realm of foreign affairs, the President emerged with his power intact. See Rostow, *supra* note 16, at 894. Abraham Lincoln's assumption of semi-dictatorial powers at crucial times during the Civil War obliterated any trace of presidential timidity that may have lingered and set the stage for expanded powers in the twentieth century. See D. ABSHIRE, *supra* note 8, at 29.

25. THE FEDERALIST NO. 64 (J. Jay), quoted in E. CORWIN, *supra* note 8, at 171.

26. E. CORWIN, *supra* note 8, at 171.

27. 10 ANNALS OF CONG. 613 (1800). There is substantial disagreement as to the intended significance of this statement. One school of thought is emphatic in its assertion that the statement simply reflects Marshall's conception of the President's role as an instrument of communication with other governments subject to congressional control. E. CORWIN, *supra* note 8, at 178. The opposition, however, argues that this same statement in context indicated the constitutional basis for direct executive agreements consummated by the President to the exclusion of the Senate. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 535 (1945).

28. 299 U.S. 304 (1936).

29. See Berger, *supra* note 7, at 26.

30. 299 U.S. 304.

Constitution."³¹ Echoing the famous words of John Marshall, he asserted the special role of the President

as the sole organ of the federal government in the field of international relations—a *power which does not require as a basis for its exercise an act of Congress*, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.³²

Despite the considerable criticism that has followed this case,³³ *Curtiss-Wright* has long been cited with approval for the proposition that the field of foreign affairs is the President's exclusive domain.³⁴

It is clear from the development of the United States foreign relations power that certain areas have been entrusted to the President exclusively: the power to recognize and negotiate with foreign nations; the power to deploy troops and to command them in hostilities; and the power to conclude an armistice.³⁵ The various shadings of the war powers, however, comprise a "delicate fabric of checks and balances"³⁶ wherein the powers of the President and Congress are intimately bound together.

WAR POWERS

Justice Jackson stated in *Woods v. Miller Co.*:³⁷

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influ-

31. 299 U.S. at 315-17. See also Berger, *supra* note 7, at 26-27.

32. 299 U.S. at 320 (emphasis added).

33. See, e.g., Berger, *supra* note 7, at 26; Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

34. Berger, *supra* note 7, at 26. Although some like Raoul Berger bemoan the extent to which *Curtiss-Wright* has become the foundation for subsequent decisions buttressing Executive claims to broad powers in foreign affairs, others find merit in its holding. See, e.g., E. CORWIN, *supra* note 8, at 172; L. HENKIN, *supra* note 23, at 24; McDougal & Lans, *supra* note 27, at 255-58. For a case citing *Curtiss-Wright* with approval, see *United States v. Pink*, 315 U.S. 203, 229 (1942).

35. E. CORWIN, *supra* note 8, at 171. Some powers, like the authority to issue a declaration of neutrality, are shared with Congress. Rostow, *supra* note 16, at 864.

36. *Davi v. Laird*, 318 F. Supp. 478, 482-83 (W.D. Va. 1970).

37. *Woods, Housing Expediter v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

ence of the same passions and pressures.³⁸

As with foreign affairs powers generally, the complete constitutional scheme for the allocation of the "vague, undefined and undefinable 'war power'"³⁹ is difficult to discern.⁴⁰ Only Congress can declare war; provide for calling up the militia; make rules concerning capture on land and water; raise, support and regulate the armed forces; and appropriate the funds necessary for the financing of war.⁴¹ On the other hand, the President has a constitutional duty that goes beyond defending against sudden attacks.⁴² The President is the Commander in Chief of the Army and Navy⁴³ and in that capacity might threaten or even provoke war by ordering military actions short of war that are not authorized by Congress.⁴⁴ As Chief Executive, the duty to "take care that the laws be faithfully executed" falls on him.⁴⁵ Since those laws include international law, it has devolved on the President, from the outset, to protect American rights and discharge American duties under the law of nations.⁴⁶ Presidential authority to exercise duties during wartime is unquestioned but delineation of the peacetime command power is problematic.⁴⁷ The Commander in Chief clause does not distinguish between war and peace but peacetime command is necessarily limited by the congressional war-declaring power.⁴⁸

The Constitution does not, however, preclude congressional delegation of authority to the President.⁴⁹ The Supreme Court has suggested that delegations that facilitate the conduct of foreign affairs may be broad indeed.⁵⁰ Should Congress fail to indicate its position vis-a-vis a particular subject over which it has ultimate control, the President arguably has adequate power to act until Congress restrains or directs him.⁵¹ Any other conclusion could operate to seriously under-

38. *Id.* at 146 (Jackson, J., concurring).

39. *Id.*

40. King & Leavens, *Curbing the Dogs of War: The War Powers Resolution*, 18 HARV. INT'L L.J. 55, 64 (1977).

41. U.S. CONST. art. I, § 8.

42. Rostow, *supra* note 16, at 865.

43. U.S. CONST. art. II, § 2.

44. King & Leavens, *supra* note 40, at 57.

45. U.S. CONST. art. II, § 3.

46. E. CORWIN, *supra* note 8, at 194.

47. King & Leavens, *supra* note 40, at 60.

48. U.S. CONST. art. I, § 8. *See also* Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970). *See generally* King & Leavens, *supra* note 40.

49. *See* A.D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 4, 5 (1976).

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321-22 (1936).

51. *Youngstown*, 343 U.S. at 637. As Justice Jackson stated in his now famous exami-

mine the nation's security. The legitimacy of such action may be grounded on the President's effective control of foreign affairs, his duty to execute the law and the power implicit in his role as Commander in Chief.⁵² Thus the President may and often has ventured into the twilight between purely peacetime deployments of military force and those deployments demanded by a sudden and grave emergency.⁵³ This results in occasional showdowns between Congress and the President, usually stemming from situations involving congressional delegation or congressional silence.⁵⁴ It is then that the seeming incompatibility of congressional control of the declaration of war and presidential control of armed forces manifests itself in political struggle.⁵⁵

Such political struggle may well have been the intent of the Framers. Giving Congress the power to declare war was a radical departure from the sovereign monarch model,⁵⁶ but the power was restricted to "declaring" war, not "making it" as originally denominated in the draft Constitution.⁵⁷ Debate records indicate the change was intended to

nation of presidential powers:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of the events and contemporary imponderables rather than on abstract theories of law.

Id.

52. A.D. SOFAER, *supra* note 49, at 5. The President could further argue that, as the embodiment of the national sovereignty, he may exercise its rights under the law of nations if there were no legislative direction to the contrary. *Id.*

53. See *Mora v. McNamara*, 389 U.S. 934, 936 (1967) (Douglas, J., dissenting).

54. A.D. SOFAER, *supra* note 49, at 4.

55. See *Davi v. Laird*, 318 F. Supp. 478, 483 (W.D. Va. 1970). This political struggle must continue if our foreign policy is to remain under effective democratic control. With regard to all decisions relating to major and sustained hostilities, it should manifest itself by means of continuous, albeit strenuous, consultation between Congress and the President. See Rostow, *supra* note 16, at 842.

56. E. CORWIN, *supra* note 8, at 416 n.1. Locke, Blackstone and Montesquieu were in accord with the standard practice that the king, as "executive," direct the course of foreign affairs, including the initiation and conduct of hostilities. *Id.*

57. Emerson, *War Powers: An Invasion of Presidential Prerogative*, 58 A.B.A. J. 809, 810 (Aug. 1971). The Framers were well aware that countries frequently engaged in hostilities without a declaration of war. Yet they chose the word "declare," which had a limited meaning at the time, rather than the word "make," which was then defined as "to create" and "to bring into any state or condition." *Id.* The custom of engaging in hostilities without any formal recognition of a state of war or belligerency continues, perhaps with the hope of limiting hostilities and thereby diminishing the likelihood of degenerating into a general nuclear war. Schindler, *State of War, Belligerency, Armed*

give the President the power to introduce the military into hostilities without prior consultation with the legislative branch.⁵⁸ This was in recognition of the President's superior ability to repel sudden attacks while legislative deliberation could, under certain circumstances, jeopardize the security of the country.⁵⁹ Hamilton, writing as Lucius Crassus, would put the whole conduct of war exclusively in the hands of the President.⁶⁰ But it does not appear that the Framers intended for the President to "make" undeclared war given that the Constitution gave Congress control over those military actions short of formal war that were in use at that time.⁶¹ It is not possible to know the Framers' original intent absolutely, but the principles that motivated them, viz., the principles of democratic responsibility, the theory of checks and balances in the exercise of shared powers and civilian control of the military, are still crucial to the continuance of a democratic society.⁶² With these key factors in mind, the Framers distributed the war powers in such a way as to make them adaptable to changing world politics.⁶³

This realistic approach has enabled the Constitution to endure while the war powers have been allocated to those most able to command them.⁶⁴ By 1836, John Quincy Adams stated: "However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power."⁶⁵

As the independent and direct administrator of the international rights and duties of the United States, the President has taken military action based on his own interpretation of international law and thereby aggrandized his powers.⁶⁶ During the nineteenth century such

Conflict, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 4 (A. Cassese ed. 1979). Of all the armed conflicts since World War I, World War II has been the most notable exception to this pattern. *Id.*

58. A.D. SOFAER, *supra* note 49, at 31.

59. *Id.* at 31-32. The framers clearly believed that the major weakness of the Articles of Confederation was the absence of a strong, independent Executive and considered it a paramount goal to cure this defect. Rostow, *supra* note 16, at 840-41.

60. *THE FEDERALIST* No. 73 (A. Hamilton).

61. A.D. SOFAER, *supra* note 49, at 4.

62. Rostow, *supra* note 16, at 843-45.

63. *Id.* at 841. The essence of the Constitution was not to bind a nation forever to a particular foreign policy but, as indicated in *McCulloch v. Maryland*, 5 U.S. (4 Wheat.) 316 (1819), to build a framework for a democracy that could last for ages regardless of the vagaries of world circumstances. *Id.*

64. For a discussion of congressional ascendancy, see D. ABSSHIRE, *supra* note 8, chs. I & IV.

65. Emerson, *supra* note 57, at 811.

66. E. CORWIN, *supra* note 8, at 196-97.

actions were generally restricted to suppressing piracy and slave trade, pursuing of criminals across frontiers and protecting American lives and property in areas where government had broken down.⁶⁷ By the twentieth century, the use of armed forces against sovereign nations without authorization of Congress was commonly practiced.⁶⁸ Although experts differ as to exact numbers, among an estimated 201 incidents of foreign hostilities involving the United States, only five were actually declared to be war by Congress, and more than half occurred outside the Western Hemisphere.⁶⁹

It was widely believed by the late 1940's that the President, in his capacity as Commander in Chief, could use the armed forces as he saw fit to carry out the broad foreign policy of the United States.⁷⁰ Consequently, the concept of congressional authorization of the presidential power to use armed forces was dropped altogether in the Middle East Resolution of 1957,⁷¹ the Cuba Resolution of 1962⁷² and the Gulf of Tonkin Resolution⁷³ of 1964.⁷⁴ Congress, focusing on the problems at hand and the need to resolve them, accepted and supplemented the

67. G. GUNTHER, *CONSTITUTIONAL LAW* 415 (10th ed. 1980).

68. *Id.* Roosevelt, Taft and Wilson, building on the Executive's increase in power during the nineteenth century, expanded the scope of presidential power by conducting hostilities against sovereign states rather than against mere pirates or bandits, while Truman, Eisenhower, Kennedy and Johnson held office at a time when the real power to commit United States armed forces was wielded by the President as Commander in Chief. See SEN. REP. No. 797, 90th Cong., 1st Sess. 12-13 (1967).

69. Emerson, *supra* note 57, at 813. Various Presidents, including Monroe, sought to buttress their actions by invoking a statute in partial justification of their use of armed force, but frequently those statutes were only vaguely and imperfectly linked to the event. Rostow, *supra* note 16, at 863.

70. G. GUNTHER, *supra* note 67, at 419. See also D. ABSHIRE, *supra* note 8, at 37. When the Japanese attacked Pearl Harbor, the powers of the Commander in Chief were expanded in a way that was unparalleled since Lincoln. Senator Taft complained that Congress had become "a mere shell of a legislative body." *Id.* Somewhat later, President Kennedy's announcement that the United States was "willing to defend freedom anywhere in the world" prepared the ideological framework for its involvement in the Vietnam war with the Commander-in-Chief as the instrument of the worldwide preservation of democracy. *Id.* at 46. Despite this steady aggrandizement of war powers in the Executive, Congress never passed a law attempting to block or halt a presidentially authorized hostility prior to the passage of the War Powers Resolution in 1973. Emerson, *supra* note 57, at 813.

71. Middle East Resolution, Pub. L. No. 85-87, 71 Stat. 5 (1957), amended by Pub. L. No. 87-195, 75 Stat. 424 (1961).

72. Cuba Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962).

73. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).

74. See G. GUNTHER, *supra* note 67, at 415-16. The language used implied that the President already had the power to employ the armed forces as proposed in the resolution and that Congress was merely expressing its sentiments of national unity and support. *Id.*

substantial body of precedent that justified Presidential initiative even when that initiative threatened to bring about major warfare.⁷⁵

By the late 1960's, however, growing hostility towards this pattern of presidential initiative and ex post facto congressional acquiescence marked the beginning of the end of the Commander in Chief's power to command at will, unfettered by the assertion of the will of Congress.⁷⁶ This situation was largely precipitated by the President's commitment of American troops to combat in Viet Nam, an action that involved the United States in major and increasingly unpopular warfare.⁷⁷ As a result, the country found itself in the midst of a critical foreign policy crisis,⁷⁸ compounded by a crisis of trust in the President⁷⁹ that culminated in the passage, over President Nixon's veto, of the War Powers Resolution of 1973.⁸⁰

WAR POWERS RESOLUTION

The War Powers Resolution represents an attempt by Congress to reduce what it regarded as the disproportionate presidential exercise of the use of force, by maximizing congressional control over United States military activity.⁸¹

Section 2(a) of the Resolution provides:

It is the purpose of this joint resolution to fulfill the intent of

75. *Id.*

76. D. ABSHIRE, *supra* note 8, at 47. Congress began to curtail presidential authority to commit armed forces to combat by changing its policy from rubber stamping appropriation requests to restricting military and security operations by effectively exercising the power of the purse. *Id.* at 58.

77. King & Leavens, *supra* note 40, at 55. See also D. ABSHIRE, *supra* note 8, at 47. Abshire discusses how others pinpoint the deterioration of the President's power in 1965 when Johnson sent 22,000 troops into the Dominican Republic without prior congressional consultation. As the United States became more deeply involved in Vietnam, Americans watched nightly as the horrors of war were graphically televised. At the same time, public attention focused on "The Hill" as unprecedented legislative debates raged over the proper allocations of war powers. *Id.* at 47, 53.

78. Rostow, *supra* note 16, at 897. See also D. ABSHIRE *supra* note 8, at 53-54. As popular faith in the Vietnam crusade flagged, anti-war forces in the Senate moved with greater momentum. The Senate Foreign Relations Committee Hearings signaled a new epoch of constraints on the President. *Id.*

79. D. ABSHIRE, *supra* note 8, at 55. Regardless of the fact that trust in the President in foreign affairs was undermined during the Johnson administration and despite the massive efforts of Congress and anti-war forces to shift the balance of power over foreign affairs out of the President's hands, it was not until 1973, when United States troops were already out of Vietnam, that the tide seriously turned against the President as the result of critical Watergate revelations. *Id.* at 53.

80. 50 U.S.C. § 1541 (1973).

81. King & Leavens, *supra* note 40, at 76, 77.

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 the 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.⁸²

Although the terms "hostilities" and "situations where imminent involvement in hostilities is clearly indicated by the circumstances" are not defined in the Resolution itself, the legislative history indicates that these terms are meant to signify all military activity involving even a "clear potential" for a "state of confrontation in which there is a clear and present danger of armed conflict."⁸³ Military activity described in such broad terms would certainly encompass a blockade against Cuba, since the potential for armed conflict under such circumstances is clear.

Section 2(c) provides:

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.⁸⁴

These severe restrictions on the President's authority to use force short of war pose serious constitutional questions.⁸⁵ They are arguably in contravention of the Framers' intent,⁸⁶ incontrovertibly opposed to years of precedent⁸⁷ and rebutted by the few judicial decisions that have been handed down on the subject.⁸⁸

82. War Powers Resolution, *supra* note 4, § 2(a).

83. King & Leavens, *supra* note 40, at 78.

84. War Powers Resolution, *supra* note 4, § 2(c).

85. King & Leavens, *supra* note 40, at 80.

86. See Rostow, *supra* note 16, at 840-44.

87. Corwin observes that "dozens and scores of episodes have occurred in our history in which Presidents have done this very thing." E. CORWIN, *supra* note 8, at 198.

88. In *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800), Justice Chase noted that although Congress is empowered to declare a general war, Congress may wage a limited war that requires no such declaration. *Id.* at 43. Justice Marshall later confirmed that hostilities could be authorized by means other than a declaration of war. In *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 27-29 (1801). Cases brought in reaction to the Vietnam war have held

A rare court consideration of the executive's power to deploy armed forces arose in the *Prize Cases*,⁸⁹ which stemmed from the blockade of Southern ports declared in 1861 by President Lincoln without a congressional declaration of war. The Court allowed that:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war though the declaration of it be "*unilateral*." . . .

. . . .
Whether the President . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.⁹⁰

The Court thus acknowledged the authority of the President to declare a blockade, even in advance of congressional authorization, based on his own determination that the gravity of the situation requires it.⁹¹ Any congressional attempt to limit that power by an exhaustive enumeration of what constitutes a national emergency would therefore be unconstitutional⁹² and impermissibly tie the President's hands in an

that the President may take the initiative to introduce American forces into hostilities without congressional approval when a grave emergency exists. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 613-14 (D.C. Cir. 1973).

89. *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

90. *Id.* at 668, 670 (emphasis in original).

91. *Id.* at 670.

92. See Rostow, *supra* note 16, at 896. King & Leavens, *supra* note 40, at 78 suggest that:

[W]ithin our recent history, President Eisenhower's deployment of troops to Lebanon, President Kennedy's blockade of Cuba, President Johnson's deployment of troops to the Dominican Republic as well as the initial advisory activity in Viet Nam and President Nixon's activities in Cambodia would have all fallen within the broad coverage of the War Powers Resolution, and thus subject to congressional control.

Id. Abshire states that, "President Ford partially implemented the Resolution four times in 1975 by reporting to Congress about actions taken in connection with the evacuation of the United States and foreign nations from Vietnam and the rescue of the *Mayaguez*." D. ABSHIRE, *supra* note 8, at 55.

The report to Congress on the *Mayaguez* incident concluded that "[t]he operation was conducted pursuant to the President's constitutional power and his authority as

age when the President must act quickly, and often alone, to preserve the nation's security.⁹³

Despite the foregoing, sections 2(a) and 2(c) of the War Powers Resolution must be read to assert that President Reagan may not constitutionally institute a blockade against Cuba to stop the flow of arms to El Salvador absent a congressional declaration of war, unless such action falls within one of the narrow exceptions contained in sections 2(c)(2) and 2(c)(3).⁹⁴

With respect to a future blockade against Cuba, the Inter-American Reciprocal Assistance Treaty,⁹⁵ commonly known as the Rio Treaty, and the Cuba Resolution⁹⁶ should be considered for their applicability under section 2(c)(2). Both were enacted prior to the War Powers Resolution and both seem to empower the President to make war without further congressional authorization.⁹⁷ The Cuba Resolution specifically states that the United States is determined to prevent any Cuban aggression in the Western Hemisphere "by whatever means necessary, including the use of arms."⁹⁸ The Rio Treaty, a multilateral mutual defense treaty signed by both the United States and El Salvador, provides in article 3 that:

[A]n armed attack by any State against an American State shall be considered as an attack against all American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.⁹⁹

The terms of these two enactments indicate a clear intent to con-

Commander-in-Chief of the United States Armed Forces." G. GUNTHER, *supra* note 67, at 416. Finally, in 1980, President Carter argued that, "the failed attempt to rescue the American hostages held in Iran was not subject to the War Powers Resolution because it constituted a humanitarian effort." *Id.*

93. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973). See also Rostow, *supra* note 16, at 896. Particularly in the circumstances of modern life, it is imperative that the President have the diplomatic power to make a credible threat to use force in order to deter a confrontation which might escalate. *Id.*

94. See *supra* text accompanying note 84.

95. Rio Treaty, *supra* note 6.

96. Cuba Resolution, *supra* note 72.

97. The Cuba Resolution, *supra* note 72, passed less than a month before Kennedy's quarantine of Cuba, states "[t]hat the United States is determined . . . to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or threat of force, its aggressive or subversive activities to any part of this hemisphere."

98. Cuba Resolution, *supra* note 72, cl.(a).

99. Rio Treaty, *supra* note 6, art. 3.

fer war making power upon the President. The interpretative provisions of the War Powers Resolution, sections 8(a)(1) and 8(a)(2), however, interpret the Resolution as requiring more before these documents can be given the effect intended at the time they were signed.¹⁰⁰ Thus, the Cuba Resolution would fail as justification for a blockade against Cuba since section 8(a)(1) interprets the "specific statutory authorization" provision of section 2(c)(2) of the War Powers Resolution to require that the legislation not only be specific, but also that it explicitly refer to the War Powers Resolution.¹⁰¹ The Cuba Resolution fails to meet the second part of this two-pronged test.

The Rio Treaty must undergo a similar analysis. Section 8(a)(2) of the War Powers Resolution requires that the treaty be implemented by legislation that specifically authorizes the use of armed force and, if it is to confer war-making powers, refer explicitly to the War Powers Resolution.¹⁰² The Rio Treaty also fails to meet the second part of the test. It may still serve, however, as a basis for a legitimate blockade under the terms of the War Powers Resolution since section 8(d)(1) states that the Resolution is not intended to alter the provisions of existing treaties.¹⁰³ As such, the Rio Treaty, which authorized war-

100. War Powers Resolution, *supra* note 4. Section 8(a) of the War Powers Resolution states that:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and *states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution*; or

(2) from any treaty heretofore or hereafter ratified *unless such treaty is implemented by legislation specifically authorizing the introduction of the United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution*.

Id. (emphasis added).

101. There may be some sort of general latitude here since it is not clear from the language or the legislative history of the War Powers Resolution just how specific the "specific statutory authorization" must be. Regardless of how specific the statutory authorization is, it will not contain a reference to the War Powers Resolution if enacted prior to it. King & Leavens, *supra* note 40, at 93.

102. This provision was to ensure that the House of Representatives participated in the authorization process and that the grants of authority to make war in the treaties indicated the same clear intent as similar grants in legislation. King & Leavens, *supra* note 40, at 94.

103. War Powers Resolution, *supra* note 4, § 8(d)(1).

making by the President prior to the Resolution, should be unaffected by the implementing legislation and specific authorization requirements of section 8(a)(2).¹⁰⁴

Under section 2(c)(3) of the War Powers Resolution, the President may employ armed force when a national emergency is created by an attack on the United States, its territories or possessions, or its armed forces. Under the terms of the Rio Treaty, an attack on El Salvador is to be considered as an attack on the United States.¹⁰⁵ If this treaty is to be given effect under section 8(a)(2), then section 2(c)(3) may also be operative and give further support to the President's right to act. If the treaty is denied effect under section 8(a)(2) the President might still lay claim to a section 2(c)(3) exception. The Resolution does not require that the attack on the United States be a direct and armed one, but only that the attack create a national emergency.¹⁰⁶ The integrity of El Salvador and of the whole of the American continents has historically been regarded as of the utmost importance to the security of the United States.¹⁰⁷ Support for this can be found in the admonitions of the Monroe Doctrine that the Western hemisphere is to be free from colonization.¹⁰⁸ This idea is also forcefully expressed in the Rio Treaty¹⁰⁹ and the Cuba Resolution.¹¹⁰ A successful Soviet-backed coup in Central America would greatly enhance Russia's strategic position against the United States.¹¹¹ Should the machinations of the Soviet Bloc alleged by the Reagan Administration prove a sufficiently serious threat to the political independence and sovereignty of El Salvador,¹¹²

104. There are some who claim that no existing United States treaties empower the President to make war without further authorization from Congress. Therefore, the War Powers Resolution's implementing legislation and specific authorization requirements leave existing treaties intact. See, e.g., King & Leavens, *supra* note 40, at 94. For the view that the President was already authorized to use force as proposed, see Rostow, *supra* note 16, at 839-40 n.12. See also G. GUNTHER, *supra* note 67, at 420.

105. Rio Treaty, *supra* note 6, art. 3.

106. War Powers Resolution, *supra* note 4, § 2(c).

107. McDougal, *supra* note 9, at 601.

108. Monroe Doctrine (Am. State Papers, Class 1; Foreign Relations. 15th through 19th Cong., 1st Sess., CIS Serial Set, No. 5, Fiche 4, 1897). The Monroe Doctrine was inspired, at least in part, by the struggle of the South American states for independence. C. FENWICK, INTERNATIONAL LAW 170 (2d ed. 1934). More importantly, the need to prevent hostile powers from entering the Western Hemisphere was considered a question of urgent self-defense. Hence, the need for increased defensive armaments and possibly conflicting alliances. *Id.*

109. Rio Treaty, *supra* note 6, arts. 3, 8.

110. Cuba Resolution, *supra* note 72, cl.(a).

111. McDougal, *supra* note 9, at 601.

112. Thus far, direct military intervention in El Salvador has not been considered necessary, but the United States has been steadily increasing military and economic aid

the President would be justified in claiming a state of national emergency. One may conclude, therefore, that even if the War Powers Resolution were found constitutional, under certain circumstances the President would have the authority to lawfully institute a blockade without prior congressional authorization.

While the President has more power to control the use of the armed forces than a cursory reading of the War Powers Resolution would indicate, any President would be ill-advised to proceed in disregard of the opinion of his co-equal branch.¹¹³ In circumstances such as those alleged to exist in El Salvador, the closest collaboration should prevail in that "constitutional pattern of enforced cooperation between President and Congress, for all the friction it inevitably generates."¹¹⁴ Should the President thereafter insist on a course that is anathema to Congress, it could close its purse¹¹⁵ or even consider impeachment.¹¹⁶ Recent Presidents who have not listened to the voice of public opinion have paid a high price.¹¹⁷ While bearing these real political limitations in mind, the words of Justice Jackson should be recalled:

We should not use this occasion to "circumscribe", much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.¹¹⁸

to that country. The United States is also backing free elections in El Salvador in an attempt to undermine support for the revolutionaries. Mullin, *supra* note 1, at 25.

113. Rostow, *supra* note 16, at 842. Neither the President nor the Congress can carry out a successful foreign policy unless, in fact, they work together. *Id.*

114. *Id.* The great advantage of such a course is the stimulation of public discussion of all the issues involved and the checking and questioning of the President's judgment by independent critics. See McDougal & Lans, *supra* note 27, at 556.

115. This power over the purse may, in fact, be regarded as the most complete and effective weapon bestowed on the immediate representative of the people by the Constitution, and by which means they may obtain redress for every grievance and carry into effect every just and salutary measure. THE FEDERALIST No. 58, at 377 (A. Hamilton or J. Madison). The effectiveness of such action is evidenced by events in our recent history. Direct United States participation in the Indochina War was ended on May 31, 1973 when the Senate voted to cut off all appropriations to Laos and Cambodia. D. ABSHIRE, *supra* note 8, at 55. This method for overriding executive use of military force has been recognized by the courts as both effective, valid and controlling. See *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973).

116. U.S. CONST. art. I, § 3.

117. Divisiveness over the war in Vietnam toppled one President and created difficulties for another, at least partly because public opinion was not really considered. Berger, *supra* note 7, at 57 n.305.

118. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

THE LEGALITY OF A BLOCKADE UNDER INTERNATIONAL LAW

May the United States lawfully impose a blockade against Cuba premised on the circumstances in El Salvador as alleged by President Reagan?¹¹⁹

When Russia attempted to introduce strategic missiles into Cuba in 1962, President Kennedy, without prior authorization of the United Nations Security Council, responded by ordering a limited naval operation designed solely to prevent further Soviet strategic buildup.¹²⁰ Careful not to imply a state of war or belligerency, President Kennedy referred to this military action as a defensive quarantine¹²¹ and grounded its justification on two legal structures of major world importance: the Rio Treaty of 1947 and the Charter of the United Nations.¹²² These same structures, as well as the rights of self-defense as recognized by traditional international law, invite consideration in determining the legality of any similar presidential action that may be proposed in the future.

I. THE RIO TREATY

Signed at a time when countries around the world were acutely aware of the need for unity in order to effectively check the spread of communism,¹²³ all the American Republics, including Cuba, joined together in the Rio Treaty "to assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American state and . . . deal with threats of aggression

119. See *infra* notes 236-41 and accompanying text.

120. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 524 (1963).

121. *Id.* at 515.

122. *Id.* at 516. There is some disagreement as to whether the Cuba Resolution was a satisfactory basis for Kennedy's quarantine during the Missile Crisis of 1962. See Rostow, *supra* note 16, at 840 n.12. Although clause (a) of the Cuba Resolution authorized the President to use force if necessary to prevent Cuba from expanding its influence to any part of the hemisphere by the use or threat of force (and might, therefore, indicate a basis for a blockade under the circumstances existing in El Salvador), it did not mention the use of arms when announcing the United State's determination to prevent the creation or use of an externally supported military capability in Cuba that endangered the peace and security of the United States. For this reason, it is better to disregard the Cuba Resolution as a basis for Kennedy's action. *Id.*

123. The Russians in Eastern Europe at the close of World War II, the fall of Nationalist China, the Czechoslovakian coup in 1948, the attack on South Korea and the fear of expansion by Communist China into Southeast Asia, and the increased concern over security from communist takeovers in the United States, Europe and Southeast Asian countries led to eight such treaties involving 43 nations. Rostow, *supra* note 16, at 878.

against any of them."¹²⁴

As discussed earlier in connection with the War Powers Resolution,¹²⁵ article 3, paragraph 1 of the Rio Treaty grants the parties to the treaty the authority to exercise their inherent right of individual or collective self-defense by meeting an armed attack against any of the treaty signatories.¹²⁶ This right to self-defense has, arguably, been activated by the activities of Cuba in El Salvador.¹²⁷

Article 3, paragraph 2, provides in part: "On request of the State or States directly attacked . . . each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity . . ."¹²⁸

The United States has issued warnings that it will consider instituting a blockade against Cuba if the funneling of arms or the communist provoked state of attack continues.¹²⁹ El Salvador, however, has not been, and may not be, inclined in the future to request such military aid.¹³⁰

Although paragraph 2 of the Rio Treaty reads, "[o]n the request of the State . . . directly attacked," "on request" should not be read as "on request and only on request."¹³¹ The underlying purpose of the treaty indicates that paragraph 2 should be read together with paragraph 1 of the same article which states that "an armed attack . . . against one American State shall be considered as an armed attack against all the American States . . ."¹³² This provision recognizes the interdependent nature of the security of the American countries and

124. Rio Treaty, *supra* note 6, 62 Stat. at 1699, 1700.

125. See *supra* text accompanying notes 94-105.

126. See *supra* text accompanying notes 98-99.

127. See *infra* text accompanying notes 234-41.

128. Rio Treaty, *supra* note 6, art. 3, para. 2, 62 Stat. at 1700.

129. See *supra* note 3 and accompanying text.

130. The possibility of excessive United States intervention in Latin America has always been a concern of Latin American countries. See J. HOUSTON, *LATIN AMERICA IN THE UNITED NATIONS* 112 (1956).

131. See M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 237 n.261 (1961).

A proposition that 'if A, then B' is *not* equivalent to, and does *not* necessarily imply the proposition that 'if, and only if, A, then B.' To read one proposition for the other, or to imply the latter from the former, may be the result of a policy choice, conscious or otherwise, or of innocent reliance upon the question-begging Latinism *inclusio exclusio alterius*; such identification or implication is assuredly not a compulsion of logic. If a policy choice is in fact made, it should be articulated as to permit its assessment.

Id. (emphasis in original).

132. Rio Treaty, *supra* note 6, art. 3, para. 1, 62 Stat. at 1700.

the need for the right of collective self-defense.¹³³ Consequently, an attack on El Salvador may be construed as an attack on the United States. When the United States is under such an attack, the President should not be restrained from exercising this right of self-defense until El Salvador requests him to act. Such restraints could seriously impede a quick and effective solution. Further, the existence of restraints is contraindicated by article 51 of the Charter of the United Nations, which recognizes the need for a state to act quickly and on its own initiative when the necessity arises.¹³⁴

This interpretation is further supported by article 6 of the treaty. Article 6 provides for collective action through the Organ of Consultation to determine the appropriate response to an unarmed attack which threatens the integrity or inviolability or political independence or sovereignty of any American state.¹³⁵ This response is to be determined irrespective of the target state's request if two-thirds of the signatory states who have ratified the treaty agree.¹³⁶ If a resolution recommending action on the Salvadoran problem were to issue by such a process, it would provide an alternative basis for President Reagan's authority to act in advance of any request by El Salvador.¹³⁷ It may be reasonably inferred from these observations that effective defensive measures to preserve the American States are not to be foregone in the absence of a formal request by the target state. It is conceivable that the target state could be paralyzed by internal conflict or otherwise be unable or unwilling to act in the best interests of the American States as a whole.

Should outside aggressors against El Salvador discontinue their armed attack, but continue as a viable threat within the contemplation of article 6, a lawful blockade is still possible. Under article 8, the "use of armed force" is explicitly included among the possible appropriate responses that the Organ of Consultation may recommend.¹³⁸ President Kennedy's 1962 action provides an excellent example of how this may be accomplished.

133. See J. HOUSTON, *supra* note 130, at 9.

134. U.N. CHARTER art. 51.

135. Rio Treaty, *supra* note 6, art. 6, 62 Stat. at 1701.

136. "The Organ of Consultation shall make its decisions by a vote of two-thirds of the signatory states which have ratified the treaty." Rio Treaty, *supra* note 6, art. 6, 62 Stat. at 1700.

137. Article 6 expressly provides that, when so warranted, the Organ of Consultation shall meet immediately to determine what measures are necessary to assist the victim of the aggression "or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent." Rio Treaty, *supra* note 6, art. 6, 62 Stat. at 1701.

138. Rio Treaty, *supra* note 6, art. 8, 62 Stat. at 1701.

After repeated acknowledgements that Soviet intervention in Cuba was posing threats to the American States, the Provisional Organ of Consultation met informally on October 23, 1962. After consideration of the evidence of the secret introduction of Soviet strategic missiles into Cuba, it concluded that it was confronted with a situation that might, within the meaning of article 6,¹³⁹ endanger the peace of the American States. The Organ issued a resolution recommending that the individual and member states use whatever force necessary, including armed force, to prevent the missiles in Cuba from becoming an active threat to the peace and security of the continent.¹⁴⁰ The United States government interpreted this resolution, formulated in accordance with articles 6 and 8 of the Rio Treaty, as a clear authorization of the defensive quarantine of Cuba.¹⁴¹

The Rio Treaty, therefore, offers two possible methods by which President Reagan might execute his threat, should the facts warrant it: (1) independently, based on the fact of armed attack, via article 3; and (2) through the collective action of the Organ of Consultation via article 6.

THE UNITED NATIONS CHARTER

Would a blockade based on article 3 of the Rio Treaty conform to the requirements of the United Nations Charter?

A central purpose of the United Nations is to maintain world peace, through collective efforts, by suppressing both actual acts of aggression and threats to international security.¹⁴² Article 52(1) of the United Nations Charter explicitly recognizes regional organizations and assigns them a prominent role in implementing this purpose.¹⁴³ This article provides:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.¹⁴⁴

That the Rio Treaty and its activities are consistent with the pur-

139. See Meeker, *supra* note 120, at 517.

140. *Id.*

141. *Id.* at 518.

142. U.N. CHARTER art. 1.

143. See A. RIFAAT, INTERNATIONAL AGGRESSION 193 (1979).

144. U.N. CHARTER art. 52, para. 1.

poses and principles of the United Nations is generally accepted.¹⁴⁵ When the framers of the Charter met in San Francisco in 1945, collective security systems at the regional level had already been established.¹⁴⁶ But the goal of harmonizing "regionalism" with "universality" grew out of the great determination of the Latin American participants to assure a large degree of autonomy for the Inter-American system as proposed by the Act of Chapultepec.¹⁴⁷ This Act recommended the conclusion of a treaty to create a regional arrangement and specifically stated that the "use of armed force to prevent or repel aggression" was "regional action which might appropriately be taken by regional arrangements."¹⁴⁸

Judging from the debates of the framers of the Charter, article 52 was approved in order to accommodate this particular regional arrangement as envisioned by the Act of Chapultepec and as later created by means of the Rio Treaty.¹⁴⁹ It is thus reasonable to conclude

145. See Meeker, *supra* note 120, at 519.

146. See A. RIFAAT, *supra* note 143, at 193. Before the Framers of the Charter of the United Nations met in San Francisco in 1945, the Conference of the American Republics had already approved the Act of Chapultepec which outlined the most significant regional arrangement to date, viz., the Inter-American system. See Meeker, *supra* note 120, at 518.

147. J. HOUSTON, *supra* note 130, at 47. The dramatic shift in the balance of power following World War II, particularly the sudden increase in power wielded by the Soviet Union, was a great source of alarm to the Latin American countries. *Id.* at 15. The Latin Americans already considered the growing infiltration of National Socialism and Fascism a menace by the late thirties with the result that the Monroe Doctrine was revived and cooperative self-defense was considered priority business at conferences in Mexico City and Havana. U. SCHWARZ, *CONFRONTATION AND INTERVENTION IN THE MODERN WORLD* 162 (1970). Convinced wholeheartedly that the threat to the security of the world, as well as to their own security, emanated from Russia and not the West, they sought to protect themselves by strengthening the familiar structure of their own regional security system. J. HOUSTON, *supra* note 130, at 15.

148. Meeker, *supra* note 120, at 518. When the framers debated the issue of regional organization, it was this inter-American system that served as the principal context for the discussions. *Id.*

149. At the time article 52 was being debated in San Francisco, the Chairman of the committee to consider regional arrangements made the statement that:

The Act of Chapultepec provides for the collective defense of the hemisphere and establishes that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed by the sub-committee yesterday, is legitimate for all of them. Such action would be in accord with the charter, by approval of the article, and a regional arrangement may take action, provided it does not have improper purposes, as for example joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.

Id. When the Rio Treaty was concluded, it incorporated into its terms the purposes and

that the purposes and activities of the regional agency created by the Rio Treaty are within the purposes and principles of the United Nations.¹⁵⁰

Article 2, paragraph 4, is the Charter limitation on the threat or use of force when inconsistent with the purposes of the Charter of the United Nations.¹⁵¹ The only kind of war conducted by individual states that is cognizable under the United Nations Charter is a war of self-defense.¹⁵² Unprovoked armed attacks are proscribed by this article and constitute a violation of international law.¹⁵³ A necessary blockade in defense of such aggression, designed solely to restore international security and to prevent further unwarranted attack, would, however, be wholly consistent with the major purpose of the United Nations, which is to minimize unauthorized violence and coercion across state lines.¹⁵⁴ For this reason, President Reagan's proposed blockade, although itself a threat and a potential use of force, would not be subject to the constraints of article 2(4) if it were, in fact, both necessary and properly delimited.¹⁵⁵ Article 51 supports this interpretation by explicitly recognizing that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations."¹⁵⁶

Although Cuba has been charged with armed aggression against El Salvador,¹⁵⁷ just what constitutes aggression has been difficult to discern. The expression "armed attack" demonstrates the same stubborn

the exact language of the Act of Chapultepec. *Id.*

150. U. SCHWARZ, *supra* note 147, at 175.

151. U.N. CHARTER art. 2, para. 4 states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independency of any state, or in any other manner inconsistent with the purposes of the United Nations."

152. Schindler, *supra* note 57, at 5.

153. *Id.*

154. See McDougal, *supra*, note 9, at 600-01.

155. See Meeker, *supra*, note 120, at 523.

156. U.N. CHARTER art. 51. The text of that article states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way effect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

157. N.Y. Times, Feb. 24, 1981, at A8, col. 5.

resistance to being categorized.¹⁵⁸ In San Francisco, attempts by the framers to define aggression were discontinued after much debate and little agreement.¹⁵⁹ Delegates considered indirect aggression to be the most dangerous type of aggression and were, therefore, fearful of creating a definition that might later be regarded as exclusive of unforeseen circumstances.¹⁶⁰ Instead, the framers gave the Security Council, under article 39, the authority to determine whether aggression had occurred and what responses would be appropriate.¹⁶¹

This has proved to be an unhappy solution¹⁶² since, under article 27 of the Charter, each of the permanent members of the Security Council may, by its single vote, override any decision reached by the majority of the other members.¹⁶³ Consequently, a veto can, and has, facilitated the destruction of the independent governmental life of a nation by blocking Security Council action when most desperately needed.¹⁶⁴ Faced with this reality, the futility of requiring the Security Council to determine an aggressor in the Salvadoran situation by means of article 39 is apparent.¹⁶⁵

This quandry does not leave the United States without lawful recourse. Despite the absence of formal guidelines, under article 51 the determination of an armed attack belongs, in the first instance, to the target state until the Security Council takes steps to restore international peace and security.¹⁶⁶

158. A. RIFAAT, *supra* note 143, at 124-25.

159. *Id.*

160. *Id.* Panama proposed that aggression be defined as

the threat of force by a state or government against another state, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or purpose other than individual or collective self-defense in pursuance of a decision or recommendation by a competent organ of the United Nations.

J. HOUSTON, *supra* note 130, at 151-52. The other Latin American countries, with the sole exception of Mexico, opposed this definition as dangerously restrictive. *Id.* The Rio Treaty provides an open-ended definition of aggression in article 9 which includes as non-exclusive examples of aggressive situations involving improved armed attacks and armed invasions. Rio Treaty, *supra* note 6, art. 9. The characteristics which distinguish such attacks or invasions, however, are not illuminated either in article 9 or elsewhere in the treaty.

161. A. RIFAAT, *supra* note 143, at 122.

162. *See id.*

163. U.N. CHARTER art. 27.

164. A. RIFAAT, *supra* note 143, at 220. This is evidenced, for example, by the facts of the Czechoslovakian coup d'état in 1948, when the Soviet veto prevented the Security Council from investigating charges that the coup was only successful because of the threat of the use of force by Russia, whose troops were standing ready for action on the north-west boundaries of Czechoslovakia. *Id.*

165. *Id.* at 123.

166. *Id.* at 125. The competence to make such a determination must be conceded at

This condonation of provisional autointerpretation in no way precludes a state's unilateral decision from being reviewed by the international community for its adherence to the requirements of necessity and proportionality.¹⁶⁷ When later judging a state's determination that an armed attack has occurred, however, certain critical changes in aggressive techniques must be borne in mind.¹⁶⁸

In order to maintain a formal compliance with the United Nations' obligation to abstain from illegal force, while at the same time pursuing their former national policies, certain states have developed sophisticated methods of covert or indirect aggression.¹⁶⁹ By means of subversion, fomenting civil strife, sending irregulars to assist armed rebel groups in the target state or aiding armed bands, the independent existence of a state can be crushed as effectively as by the classical means of external aggression.¹⁷⁰ Various instruments issuing from the United Nations condemning indirect aggression have supported this conclusion that the traditional concepts of aggression and armed attack must be expanded.¹⁷¹

When one state has taken positive action against another state through the use of armed force, an act of aggression may be said to have occurred,¹⁷² regardless of whether this action was taken directly, or indirectly by means of giving aid to armed bands planning invasion or attack.¹⁷³ If the attack is of such a serious nature that it threatens the inviolability of the target state, it qualifies as an "armed attack."¹⁷⁴

These criteria are useful in determining whether an armed attack

least until we have attained a more viable world public order. See M. McDUGAL & F. FELICIANO, *supra* note 131, at 218.

167. McDougal, *supra* note 9, at 599. Necessity requires that military responses made in self-defense "should be limited to initiating coercion that is so intense as to have created in the target state reasonable expectations . . . that a military action was indispensably necessary to protect such consequential bases of power as 'territorial integrity' and 'political independence.'" M. McDUGAL & F. FELICIANO, *supra* note 131, at 259. Proportionality requires that the responding states use of force does not exceed the intensity and magnitude reasonably necessary to promptly effect its self-defense. McDougal, *supra* note 9, at 598.

168. See A. RIFAAT, *supra* note 143, at 217.

169. *Id.*

170. *Id.* at 217-18.

171. U. SCHWARZ, *supra* note 147, at 175.

172. See A. RIFAAT, *supra* note 143, at 118.

173. *Id.* at 64.

174. *Id.* at 125. Some commentators have argued that subversive intervention by means of infiltration or propaganda and supplying arms cannot be answered by force. See Wright, *United States Intervention in Lebanon*, 53 AM. J. INT'L L. 878 (1947). Other scholars have interpreted article 51 to give the right of self-defense a broader scope. See M. McDUGAL & F. FELICIANO, *supra* note 131, at 235.

threatening the security and inviolability of El Salvador has been launched by Cuba. If it has, the foregoing analysis leads to the conclusion that the institution of a defensive blockade, legal under the terms of article 3 of the Rio Treaty, would not contravene the relevant provisions of the United Nations Charter.

Further provisions must be considered to determine if, under the Charter, President Reagan could base his actions on the recommendations of the Organ of Consultation issued in accordance with article 6 of the Rio Treaty. Article 6 is the provision relevant to situations involving unarmed attacks which, according to article 8 of the Rio Treaty, may be rebuffed by the use of armed force.¹⁷⁵

It should be noted here that the Charter of the United Nations specifically recognized and preserved the traditional, customary right of self-defense¹⁷⁶ through the unanimous approval and adoption of article 51.¹⁷⁷ Under traditional international law principles, acts of self-defense were cognizable in situations that posed threats to the political independence or territorial integrity of a state, independent of actual armed attacks.¹⁷⁸ These rights have in no way been limited by the insertion of article 51 into the Charter of the United Nations.¹⁷⁹ On the contrary, it was the intent of the framers to preserve and safeguard these traditional rights.¹⁸⁰ Committee reports, approved by both Commission I and the Plenary Conference, stressed that the use of armed force in legitimate self-defense was accepted and unimpaired by the Charter.¹⁸¹ That article 2(4) refers explicitly to both the threat and the use of force as impermissible coercion, as well as other coercive measures inconsistent with the purpose of the Charter, also supports a reading of article 51 that gives states an equally comprehensive right to defend themselves against such action.¹⁸² The subsequent conduct by the parties to the agreement, and official utterances most relevant to the subject, confirm this interpretation.¹⁸³

It appears that the motivation for the hotly debated language of article 51¹⁸⁴ was only to allay the fears of the Latin American states that their regional enforcement system could be paralyzed by the arbi-

175. Rio Treaty, *supra* note 6, arts. 6, 8.

176. See McDougal, *supra* note 9, at 599.

177. J. HOUSTON, *supra* note 130, at 49.

178. C. FENWICK, *supra* note 108, at 164.

179. McDougal, *supra* note 9, at 599.

180. M. McDougal & F. FELICIANO, *supra* note 131, at 235.

181. *Id.* at 235-36.

182. McDougal, *supra* note 9, at 600.

183. *Id.*

184. For the view that article 51 is limited in scope to situations involving "actual Armed attack", see Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 560 (1963).

trary exercise of a Security Council veto.¹⁸⁵ Precisely by admitting unimpaired the traditional right of individual and collective self-defense, article 51 provided the formula necessary to reconcile a global security system with the Inter-American system.¹⁸⁶ At the same time it neutralized the threat of the veto to the satisfaction of those delegates who expressed the greatest concern over the dangerous character of covert methods of aggression.¹⁸⁷

It may be recalled that even though President Kennedy had adequate grounds to justify his quarantine against Cuba as a self-defense measure within the contemplation of article 51, he chose instead to base it solely on the collective judgment and recommendations of the Organ of Consultation executed in conformity with the demands of the United Nations.¹⁸⁸ Under the appropriate circumstances, President Reagan could adopt a similar course of action.

Article 54 requires that regional agencies, such as the one in question, keep the Security Council fully informed of activities undertaken or contemplated for the maintenance of international peace and security.¹⁸⁹ To this end, in 1962 the Organ of Consultation directed the contents of the October twenty-third resolution be made known to the Security Council.¹⁹⁰ Similar reporting should be made in the event that the recently threatened blockade becomes a reality.

Article 53 is somewhat more problematic. It states in part: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."¹⁹¹

When this article was approved, it was intended that the Security Council would assume primary responsibility for the effective settlement of international crises on behalf of the members of the United

185. According to the Dumbarton Oaks Proposals, section C of chapter VIII recognized regional agencies and their role with respect to regional action, but forbade them from taking defensive measures until authorized by the Security Council. J. HOUSTON, *supra* note 130, at 47. Latin Americans, greatly concerned that the veto could stymie action by their regional agency and the Council itself, brought great pressure to bear on the United States delegation to circumvent this outcome. *Id.* at 49. Their efforts paid off in the formulation of article 51, designed specifically to accommodate the inter-American system as envisaged by the Act of Chapultepec. *Id.*

186. *Id.*

187. *Id.* at 151-52.

188. Meeker, *supra* note 120, at 523.

189. U.N. CHARTER, art. 54.

190. Meeker, *supra* note 120, at 518.

191. U.N. CHARTER, art. 53, para. 1.

Nations.¹⁹² Experience has made it clear that the Security Council is incapable of fulfilling this function of maintaining world peace and security.¹⁹³ To enforce this provision in view of these shortcomings would defeat the major purposes and demands of the international community, deny threatened countries effective recourse to self-defense, and force them "to assume the posture of 'sitting ducks.'"¹⁹⁴

To avoid this intolerable result, article 53 can no longer be read to preclude action by other mechanisms provided for in the Charter that are capable of assuming this increased responsibility.¹⁹⁵ One alternative mechanism that served this purpose in 1962 was the regional agency created by the Rio Treaty.¹⁹⁶ This agency must continue to fulfill the function of maintaining peace in the region through collective action. Its authority derives from necessity, the major purposes and demands of the signatories of the United Nations Charter, and the 1962 precedent.¹⁹⁷

In sum, President Kennedy claimed that the Rio Treaty created a regional organization within the meaning of article 52 of the United Nations Charter, with the Organ of Consultation as its voice.¹⁹⁸ He justified his blockade of Cuba on the basis of the resolution issuing from that agency and contended that his action conformed to the purposes of the relevant United Nations provisions despite the fact that the Security Council had not given its authorization.¹⁹⁹ This interpretation was not refuted by either the terms of the United Nations Charter consistent with then-current interpretation,²⁰⁰ or by any formal declaration in derogation of his action issuing from the United Nations.²⁰¹ We may, therefore, conclude that blockades under appropriate circumstances and of proper design, grounded on article 6 of the Rio Treaty, qualify as lawful actions under the applicable provisions of the United Nations Charter.

The foregoing arguments are supportive of a similar blockade in

192. Meeker, *supra* note 120, at 519.

193. A. RIFAAT, *supra* note 143, at 192-93. Even the Soviet delegate to the United Nations complained of the procedural ruses and stalling techniques which are used to prevent the Security Council from acting effectively. J. HOUSRON, *supra* note 130, at 109.

194. McDougal, *supra* note 9, at 601.

195. Meeker, *supra* note 120, at 519.

196. *Id.*

197. McDougal, *supra* note 9, at 601.

198. Meeker, *supra* note 120, at 523.

199. *Id.*

200. McDougal, *supra* note 9, at 599.

201. Wright, *supra* note 184, at 564. The overwhelming conclusion of relevant comments has been to support the lawfulness of the 1962 quarantine. See, e.g., McDougal, *supra* note 9, at 603.

the future if, after consideration of the evidence of necessity, the Organ of Consultation were to find such a threat to the peace and security of the continents as to warrant a resolution comparable to that issued in 1962.

CUSTOMARY RIGHT OF SELF-DEFENSE

Apart from the rights granted under the provisions of the United Nations Charter and the Rio Treaty, President Reagan might rest his action on the customary right of self-defense as recognized under traditional international law principles.²⁰²

Prior to the creation of the League of Nations, collective responsibility on the part of the international community for the defense of individual states was nonexistent.²⁰³ States organized themselves, sometimes collectively, sometimes individually, to defend their integrity under color of an inherent right of self-defense.²⁰⁴ This right was firmly entrenched in traditional international law and justified the use of force to counter a wide range of situations including actual armed attack, indirect attack,²⁰⁵ and the threat of injury from attacks which had not yet occurred.²⁰⁶ Moreover, the initial determination of the intensity of the threat, and the method of self-protection to be used under the particular circumstances, was left by international law to the discretion of the injured party.²⁰⁷

Time and again, the right of self-defense legitimized the use of coercive measures in cases that went beyond the confines of defending against direct armed attacks.²⁰⁸ It has, under certain circumstances, justified the interference of one state in the domestic affairs of another in order to suppress revolutionary movements that threatened the security of the intervening state.²⁰⁹ It also justified the use of force to

202. See McDougal, *supra* note 9, at 600.

203. C. FENWICK, *supra* note 108, at 159. In attempting to organize a common defense, the League suffered a series of failures beginning with Manchuria, and by 1939 collective action was no longer possible. J. HOUSTON, *supra* note 130, at 9.

204. C. FENWICK, *supra* note 108, at 159.

205. *Id.* at 160.

206. Wright, *supra* note 184, at 560.

207. C. FENWICK, *supra* note 108, at 166.

208. *Id.* at 168. Indeed, in more than one case a nation has been applauded for demanding redress based on the right to self-defense for insults to its national honor. *Id.*

209. *Id.* at 164. In the absence of international judicial institutions for the settlement of disputes and executive agencies for the protection of rights and the enforcement of obligations, this right was occasionally alleged as a smoke screen to exercise illegal political control over weaker states. *Id.* This potential for abuse should be diminished by the structures for review created by the United Nations Charter. See McDougal, *supra* note 9, at 599.

eliminate the menace of lawless conduct, perpetrated by one state against another, on the generally accepted principle that serious and unpunished transgressions would undermine the international community and result in widespread anarchy.²¹⁰

Even if the acts of aggression or threats to security were not caused by the state *per se*, but rather by groups of irresponsible individuals within the state, that state might be legally invaded in the exercise of the right of self-defense if the necessity to do so were posed by the gravest danger, and if the host state were either unable or unwilling to prevent the threatened act.²¹¹

The Monroe Doctrine, acquiesced in by the leading nations of the world, rests on the right of self-defense against indirect attack and was formulated in the context of the threat posed by the Quadruple Alliance, in the event that the Alliance established its system in the American hemisphere.²¹² This doctrine has been reflected in the foreign policies of numerous other nations.²¹³

Many times in the history of the United States, the President has used force abroad and justified it as a defense of the rights and interests of person and property, so that it would not be considered as either an act of war or a legitimate reason for a warlike response.²¹⁴ This principle was recognized by the United States in circumstances similar to those inspiring President Reagan's threats to blockade Cuba.²¹⁵ During the Canadian Rebellion of 1837, the United States condoned the action of Great Britain in invading American waters and destroying the *Caroline*, a ship employed by Americans, in an attempt to supply arms to the Canadian revolutionaries.²¹⁶ This condonation implicitly

210. C. FENWICK, *supra* note 108, at 166. Interventions based on humanitarian grounds are firmly rooted in traditional international law and continue to be condoned today. *Id.* at 168. See also Note, *Humanitarian Intervention: The Invasion of Cambodia*, 2 N.Y.J. INT'L & COMP. L. 143 (1980).

211. C. FENWICK, *supra* note 108, at 167.

212. *Id.* at 169-70.

213. *Id.* at 170, 172. Some examples of the doctrine of self-defense which parallel the Monroe Doctrine include the following: Great Britain's opposition to the establishment of Russian and German naval bases near the Suez Canal; France's declaration of war against Germany in 1870 to guarantee that France would not be menaced by a Hohenzollern on the throne of Spain; Italy's desire to hold unrivaled control of the Adriatic after World War I; and Japan's war against Russia based on the belief that the Russian presence in the Liaotung peninsula threatened the defense of the Empire and its interests in Manchuria. *Id.* at 172-73.

214. E. CORWIN, *supra* note 8, at 198.

215. C. FENWICK, *supra* note 108, at 198.

216. E. CORWIN, *supra* note 8, at 198. This incident dealt with the right to defend against an anticipated but as yet unexecuted attack. *Id.* See also M. McDUGAL & F. FELICIANO, *supra* note 131, at 231. Although the test formulated in the nineteenth cen-

recognized that giving lawful effect to the right of self-defense, even against indirect or imminent attack, serves to reduce international aggressions.²¹⁷

To prevent abuse of this right, self-defense condoned by the general community was traditionally limited by the requirements of necessity and proportionality.²¹⁸ Proportionality requires that the responding state's use of force does not exceed the intensity and magnitude reasonably necessary to promptly effect its self-defense.²¹⁹ Necessity requires that military responses made in self-defense "should be limited to initiating coercion that is so intense as to have created in the target state reasonable expectations . . . that a military action was indispensably necessary to protect such consequential bases of power as 'territorial integrity' and 'political independence.'"²²⁰ In the modern context this translates into reasonableness under the particular circumstances.²²¹

Although other world organizations dedicated to the goal of minimizing international coercion have been formed since the decline of the League of Nations, to require the target state to postpone defensive action until authorized by the general community would reflect an unrealistic view of the current abilities of organized society to protect its individual members and it would spell disaster for the victims of aggression.²²² Therefore, the traditional customary right of self-defense continues to be indispensable if even a modicum of world order is to be maintained.²²³ The recognition of authority to act independently in the first instance, however, does not preclude general community review of the claims of necessity and proportionality made by the original target state.²²⁴ This sort of review is readily available through the authority structures of the United Nations.²²⁵

CONCLUSION

The claim of countering an illegal attack, disguised as internal change, is one of the most serious and difficult claims of self-defense to

ture was cast in highly restrictive language, it did not require that a state actually be attacked to invoke its right of self-defense. *Id.*

217. See McDougal, *supra* note 9, at 598.

218. M. McDougal & F. Feliciano, *supra* note 131, at 217-18.

219. *Id.* at 242.

220. *Id.* at 259.

221. McDougal, *supra* note 9, at 598.

222. M. McDougal & F. Feliciano, *supra* note 131, at 218-19.

223. McDougal, *supra* note 9, at 598.

224. *Id.* at 599.

225. *Id.*

review,²²⁶ requiring a careful contextual analysis of the necessity and proportionality of the measure taken.²²⁷ Such a claim of self-defense might be invoked as a justification for a future blockade of Cuba, especially if the United States Government can substantiate its claim that Cuba, with Soviet backing, is coordinating and heavily influencing the arming, organization and political direction of rebel activities in El Salvador.²²⁸ In conclusion, therefore, this paper will note some of the more obvious features of the alleged threat and proposed response in the context of this potential confrontation.²²⁹

The interest of the United States in promoting an essentially homogenous and democratic character in the nations occupying the Western Hemisphere continues undiminished since its formal declaration by means of the Monroe Doctrine in 1823.²³⁰ That this sentiment is shared by El Salvador and other American states is evidenced by a long history of multilateral arrangements organized to perpetuate this goal.²³¹ Concomitantly, the advent of communism by revolution and subversive movements anywhere within this zone of interest, is historically regarded as a grave and ominous threat to the peace and security of both the United States and the Americas as a whole.²³²

When Cuba embraced communism in 1960, it alienated itself from participation in certain aspects of the economic and political life of the American states.²³³ Thereafter, charges were leveled on several occasions that Cuba was attempting to expand its influence among the Car-

226. M. McDUGAL & F. FELICIANO, *supra* note 131, at 192.

227. *Id.*

228. N.Y. Times, Feb. 24, 1981, at A8, col. 5. Although the rebels are themselves Salvadorans, Washington has called the situation a "textbook case of indirect armed aggression," due to its external support and organization. N.Y. Times, Feb. 24, 1981, at A8, col. 5. If the indigenous rebels are being used as the tools of an external aggressor, it only adds a new dimension to the threat to El Salvador, and neither that country nor the general community need make too fine a distinction as to whether the threat comes "from the outside versus the inside." M. McDUGAL & F. FELICIANO, *supra* note 131, at 192 n.164.

229. Before critical decisions are made, a serious analysis from general community perspectives of necessity and proportionality requires examination of the major features of the context of the threat and responses including the "participants, objectives, situation, base values, strategies and outcomes." McDougal, *supra* note 9, at 601.

230. Wright, *supra* note 184, at 552.

231. See J. HOUSRON, *supra* note 130, at 15.

232. Wright, *supra* note 184, at 563 n.61. Senate subcommittee reports as far back as 1963 cite "overwhelming" evidence of subversive and communist revolutionary movements throughout the Western Hemisphere which are supported, aided and abetted by Castro. *Id.*

233. *Id.* at 546.

ribean republics.²³⁴ Once again the United States has levied accusations against Cuba, this time alleging that they have mounted a major campaign to promote revolution in El Salvador.²³⁵

It has been specifically alleged that:

1) Cuba unified disparate groups of Salvadoran insurgents and participated in the formulation of a strategy for a general offensive against the present government of El Salvador.²³⁶

2) Cuba orchestrates the delivery to rebel groups of arms gathered from the Soviet Union, East Germany, Vietnam and other communist states²³⁷ which reach Salvadoran rebels via underground networks in Nicaragua, Honduras and Cost Rica.²³⁸

3) Cuba conducts intensive three month training courses for Salvadoran guerrillas, arranges for radical Arab States, such as Iraq, to finance and train Salvadoran insurgents and engages in global propaganda to facilitate its subversive objectives.²³⁹

4) Cuba's objective, with the aid of the Soviet Union and other communist and radical states, is to overthrow the established government of El Salvador and impose a communist regime in its place, regardless of the will of the Salvadoran people.²⁴⁰

5) As a direct result of these and other communist backed efforts, members of both the government of El Salvador and the civilian population have been killed.²⁴¹

Castro's continued public alignment with the Soviet Union has provided Cuba with the economic and military resources that transform it from a small third world nation into a highly sophisticated and organized revolutionary base.²⁴² Assuming, *arguendo*, that the allegations of the Reagan administration are true, Cuba, by operating from such a position of power and by using the same strategies as those used

234. *Id.* at 553 n.29. In 1959, for example, a State Department bulletin announced that Castro initiated invasions of Panama, Nicaragua, the Dominican Republic and Haiti. 44 DEP'T ST. BULL. 107 (1961).

235. *See supra* note 2 and accompanying text.

236. *The Case Against Castro: Official Report*, U.S. NEWS & WORLD REP., Dec. 21, 1981, at 24-25.

237. N.Y. Times, Feb. 24, 1981, at A8, col. 1.

238. U.S. NEWS & WORLD REP., *supra* note 236, at 25.

239. *Id.*

240. N.Y. Times, Feb. 24, 1981, at A8, col. 1.

241. *Id.* The rebels are charged with conducting a campaign of terrorism that encompasses bombings, assassinations, kidnappings and seizing embassies. They have admitted to killing over 6,000 non-combatants, government authorities and military personnel in 1980 alone. *Id.*

242. *See* U.S. NEWS & WORLD REP., *supra* note 236, at 24.

so effectively in Angola and Ethiopia,²⁴³ is engaged in activities that pose a serious threat to the political independence of the government of El Salvador and to the peace and security of the Western Hemisphere.²⁴⁴

Thus far the Reagan administration is pursuing solutions designed to bypass the use of force.²⁴⁵ If diplomacy fails, a blockade has been tentatively proposed as the next step. Should adoption of this option be necessary, it must be immediately reported to the Security Council.²⁴⁶ It should then be carefully examined for its adherence to the requirements of necessity and proportionality.²⁴⁷

A blockade is traditionally regarded as an application of least force applied on the high seas, with minimal interference in the internal domain of any state.²⁴⁸ A blockade has been considered to be an acceptable method of gaining relief when attempts at non-coercive settlements of a dispute failed and when its objectives were commensurate to the injury.²⁴⁹

A blockade against Cuba would survive the scrutiny of the world community if it is limited to the defensive goals of stopping the proscribed behavior, is free of any covert or expansionist objectives, and avoids threatening the political independence of any country.²⁵⁰ It should not cause any unnecessary, irremediable destruction and the force used must be limited in intensity and magnitude to that necessary to prevent subversive activity that poses a serious threat to international peace.²⁵¹ Once these defense objectives have been achieved, the blockade should be discontinued.²⁵²

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243. See A. RIFAAT, *supra* note 143, at 220-301.

244. See N.Y. Times, Feb. 24, 1981, at A8, col. 2. Counter allegations from respected quarters abound as to the horrific violations of human rights by the Salvadoran government, the complications and spurious role played by the United States military, and the extent of the actual threat posed by the insurgents. There exists a chronic lack of access to information from sources proven to be reliable. See TIME, Feb. 22, 1982, at 30.

245. Mullin, *supra* note 1, at 25. These efforts have primarily included warnings to Russia and Cuba of the consequences of continued aggression against El Salvador, the solicitation of free world support for the United States' position and the backing of free elections in El Salvador with the hope of undercutting support for the insurgents. *Id.*

246. U.N. CHARTER, art. 51.

247. McDougal, *supra* note 9, at 599.

248. *Id.* at 602.

249. Wright, *supra* note 184, at 554.

250. See McDougal, *supra* note 9, at 602-03.

251. *Id.*

252. *Id.*