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The Suez Crisis of 1956 and Its Aftermath: A Comparative Study of Constitutions, Use of Force, Diplomacy and International Relations

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**THE SUEZ CRISIS OF 1956 AND ITS AFTERMATH:
A COMPARATIVE STUDY OF CONSTITUTIONS,
USE OF FORCE, DIPLOMACY AND
INTERNATIONAL RELATIONS**

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A COMPARATIVE STUDY OF CONSTITUTIONS, USE OF
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PNINA LAHAV*

INTRODUCTION	1298
A. <i>A War of Self-Defense?</i>	1298
B. <i>Motives of the Belligerents</i>	1299
C. <i>U.S. Reaction and Aftermath</i>	1304
I. THREE COUNTRIES (PLUS ONE) GO TO WAR: DIPLOMATIC MANEUVERS AND CONSTITUTIONAL MECHANISMS	1305
A. <i>Egypt</i>	1305
B. <i>The United Kingdom</i>	1308
1. Constitutional Framework	1308
2. The Road to War	1309
3. Aftermath: Modifying the Constitutional Framework of War Powers	1314
C. <i>France</i>	1317
1. Constitutional Framework	1317
2. The Road to War	1318
3. <i>Aftermath: Modifying the Constitutional Framework</i> of War Powers	1325
D. <i>Israel</i>	1326
1. Constitutional Framework	1326
2. The Road to War	1327
3. Aftermath: Modifying the Constitutional Framework of War Powers	1332
II. THE UNITED STATES.....	1338
A. <i>Diplomacy: The U.S. Reaction to the Eruption of War in the Middle East</i>	1338
B. <i>U.S. President's Constitutional Powers in the Service of Diffusing the International Crisis and Avoiding a War</i>	1340
1. The President's Implied Power as "Sole Organ" of Foreign Affairs.	1340
2. The President's Powers as Commander-in-Chief.....	1342
3. Recognition Powers.....	1344
4. Powers as Head of the Vast Federal Bureaucracy	1345
5. The Power Not Used: Interacting with Congress	1348
CONCLUSION.....	1351

“Suez was . . . a crossroads from which everybody drove off in wrong directions, the Americans as much as the British and the French, and the Arabs as well as the Israelis.”¹

INTRODUCTION

A. *A War of Self-Defense?*

Suez was a war of choice. The first step to start such a war begins with the domestic constitutional process. The mobilized constitutional regime of a country drives diplomatic action and military planning, as well as the consciousness of the body politic, into a conclusion that war is the preferred solution. In *Long Wars and the Constitution*² and in *War Powers*,³ Stephen M. Griffin and Mariah Zeisberg respectively devote their considerable scholarly skills to analyze the historical and normative aspects of the American constitutional regime of War Powers. Both Griffin and Zeisberg highlight the interaction between the executive and legislative branches under the American constitution.⁴ Both explore the explicit power of Congress to declare war against the long U.S. experience of heavy executive involvement in opening a war as well as executing it.⁵ Griffin and Zeisberg do not address the option of deploying the same constitutional processes for the purpose of avoiding a war altogether.⁶ Nor do they address the perspective of comparative constitutional law, i.e., how other countries activate their constitutional regimes for the purpose of starting a war. In this Article I introduce these missing aspects. Thus, I add dimensions to Griffin and Zeisberg’s excellent books, using the events surrounding the Suez War to provide a comparative analysis of different constitutional regimes and their interplay with diplomacy.

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¹ MARTIN WOOLLACOTT, *AFTER SUEZ: ADRIFT IN THE AMERICAN CENTURY* 4 (2006).

² STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

³ MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 5 (2013).

⁴ *See id.* at 222 (“The pattern that the Constitution sets in its war politics is not unique. The Constitution does not draw clear boundaries between legislative and executive powers in a variety of policy areas.”).

⁵ U.S. CONST. art. I, § 8, cl. 11.

⁶ ZEISBERG, *supra* note 3, at 21 (“While the Constitution’s allocation of the authority to make war seems to call for some important distinctions, war, repelling attack and defensive actions are capacious categories whose meaning must be politically constructed.”).

The Suez War, a war of choice launched simultaneously by the United Kingdom, France, and Israel against the expressed opposition of U.S. president Dwight Eisenhower, affected international relations and shaped American foreign policy into our own age.⁷ I briefly review how the constitutional regimes of the three countries were mobilized to provide the legal cover for the war. I then discuss the constitutional powers used by President Eisenhower to thwart the plans of the three countries. The President of the United States was not willing to go to war and at the same time invoked his considerable Article II powers to subvert the plans of the other three.⁸ We thus have an interesting case of a crisis in international relations: three countries (one small emerging nation and two European powers, one of which, Britain, has been a close ally of the United States) mobilize their constitutional regimes to launch a war, while the fourth country mobilizes its own constitutional regime to undermine the war efforts and the gains expected to be reaped by the belligerents. The results of these constitutional and political maneuvers had mighty consequences for the world as we know it today.

B. *Motives of the Belligerents*

On October 29, 1956, Israel launched war against Egypt by invading the Sinai Peninsula.⁹ Two days later the French and British governments issued an ultimatum masked as an appeal to both Egypt and Israel to stay clear ten miles of the Suez Canal.¹⁰ They then deployed their military forces to occupy the

⁷ See STEVEN Z. FREIBERGER, *DAWN OVER SUEZ* (1992) (detailing how the collusion between Britain, France, and Israel in the Suez Crisis was a “turning point” in the break between the United States and Britain, and further led to the United States’ growing involvement in the Middle East).

⁸ DAVID A. NICHOLS, *EISENHOWER 1956: THE PRESIDENT’S YEAR OF CRISIS -- SUEZ AND THE BRINK OF WAR 217-67* (2011) (describing the fervent opposition of President Eisenhower to military engagement in Suez and the broad actions taken to compel withdrawal, including cessation of economic, military, and financial assistance); see also FREIBERGER, *supra* note 7, at 189 (“Upon learning of the Israeli attack Eisenhower was firm in his belief that American and British prestige were at stake. He considered it imperative for both nations to honor their pledge given to Israel and the Arab states in the spring: Western support against outside aggression.”).

⁹ *Id.* at 187 (“After two weeks of Israeli military action designed to suggest an imminent attack against Jordan, on October 29, 1956, Israeli paratroopers were dropped deep into the Sinai Desert.”).

¹⁰ *Id.* (“The British reminded the Egyptian government that according to the 1954 Suez Canal base agreement they had the right to intervene if Egypt was attacked. Accordingly, on October 30 Britain and France delivered an ultimatum calling for an end to the fighting and warning Egypt to withdraw to a position ten miles from the canal.” (citation omitted)). The ultimatum was termed an appeal out of deference to Israel because, in fact, Israel was a partner of these two powers rather than an adversary as Egypt was. An ultimatum is a term of art in international law. Avoiding the term was one of the techniques of double speak deployed by the European powers. See *id.* (“Nasser refused, informing the British

Canal Zone.¹¹ The United Kingdom and France attempted to regain control of the Canal, previously nationalized by Egypt, and simultaneously to orchestrate a regime change in Cairo.

It would be hard to argue that this was a war of self-defense, and therefore legitimate under the Charter of the United Nations.¹² More plausibly, it was a preventive war, aimed at restoring the hegemony of the European powers over Egypt and vicariously, over the Middle East.¹³ Israel was in a somewhat different situation. Located in the Middle-East and rejected by its neighbors, it harbored legitimate and serious grievances against Egypt: organized terrorist raids into its territory from the Gaza strip, Egypt's closure of the Canal as well as the Straits of Tiran to Israeli navigation, and Gamal Abdel Nasser's (Egypt's leader) inflammatory rhetoric promising the annihilation of the state.¹⁴ Still, Israeli leaders did understand that while serious, without more these grievances could not provide a valid reason to open war.¹⁵ Israel's invasion came as a result of an agreement between itself and the two European powers.¹⁶ The Europeans were looking for a "pretext" to launch a war.¹⁷ The plan cooked in

ambassador . . . that 'since the Israelis were the aggressors . . . the British and French stand, consisting of the ultimatum and imminent occupation, was an act of aggression against Egyptian rights and dignity and against the Charter of the United Nations.'").

¹¹ *Id.* at 188 ("At dusk on October 31 British and French planes began bombing Egyptian positions.").

¹² See Pnina Lahav, *A Small Nation Goes to War: Israel's Cabinet Authorization of the 1956 War*, 15 ISRAEL STUDIES 61, 64 ("Israel was a party to the UN charter, which outlawed war except for self-defense or pursuant to UNSC (UN Security Council) approval.").

¹³ See *id.* at 64-65 (contrasting the Suez War as a "war of aggression" as compared to the 1948 War of Independence, a war of self-defense).

¹⁴ See *id.* at 66 (outlining David Ben-Gurion's *casus belli* to justify military action, which included violations of international resolutions and terrorist raids in Israeli territory organized by Egyptian forces).

¹⁵ See *id.* at 65 ("Clearly, the [Israeli] cabinet was well aware of the nature of the motion and its grave international ramifications, and was willing to confront the harsh reality. Even those who urged avoiding the terms initiated or preventive war understood that it would likely be interpreted as such, and worried about being labeled as aggressors."). The U.N. Charter prohibits wars of aggression and permits only wars of self-defense. But who decides which is which? There has never been a consensus about the proper name for the Suez War. Most refer to it as "the Suez Crisis." The British called it "Operation Musketeer." The French called it "L'expédition de Suez." CHRISTIAN PINEAU, 1956, SUEZ (1976). The Israelis call it the "Sinai Campaign" or the Kadesh campaign. The reason is clear: none wanted the action to fall under the category of "war" and risk being labeled as violators of the U.N. Charter. After all, both England and France were permanent members of the U.N. Security Council, charged with ensuring the integrity and normative power of the fledgling organization and its Charter, which they themselves helped draft.

¹⁶ See *supra* note 8 and accompanying text.

¹⁷ KEITH KYLE, SUEZ 320 (1991) ("[British leaders] insisted that it would be essential for Britain that Israel carry out a 'real act of war,' so as to avoid any danger of Britain being thought aggressor by Commonwealth and Scandinavian friends when she took action in

Paris and adopted by London was as follows: Israel would invade the Sinai and the United Kingdom and France would pretend to be alarmed and enter the fray in order to restore the peace.

Just three months earlier, in July 1956, Gamal Abdel Nasser, Egypt's charismatic president, had nationalized the Suez Canal, one of the last vestiges of colonial power in the Middle East, and a vital maritime connection between Asia and the Mediterranean.¹⁸ The move alarmed the United Kingdom, the

response. The pretext must be credible.”); *see also* MICHAEL J. TURNER, *BRITISH POWER AND INTERNATIONAL RELATIONS DURING THE 1950S* 227 (2009) (“The Suez crisis had many causes, including Britain’s wish to maintain a strong presence in the Middle East, the mutual hostility between Britain and Egypt, and the lack of confidence between Britain and the United States and Britain and France.”).

¹⁸ The decree offered compensation for shares in accordance with their value on the Paris Stock Exchange on the day preceding the effective date of the decree. *See* U.S. Dep’t of State, *The Suez Canal Problem: July 26-September 22, 1956* 30-32 (1956) (“Stockholders and holders of founders shares shall be compensated for the ordinary or founders shares they own in accordance with the value of the shares shown in the closing quotations of the Paris Stock Exchange on the day preceding the effective date of the present law.”). This action cut short the concession agreement of 1866, under which the Company had the right to operate the Canal until 1968. *Id.* at 9-16 (delineating the terms of the Convention Between the Viceroy of Egypt and the Universal Suez Maritime Canal Company).

Great Britain, France, and the United States protested that the nationalization violated international law and issued a statement on August 2, recognizing Egypt’s general right to nationalize, yet maintaining that the international character of the Suez Canal Company made it immune from nationalization. *Id.* at 34-35 (“In 1888 all the Great Powers then principally concerned with the international character of the Canal and its free, open and secure use without discrimination joined in the Treaty and Convention of Constantinople.”) The western powers’ claim relied in large part on the Constantinople Convention of 1888. *Id.* at 16-20 (“Convention Between Great Britain, Austria-Hungary, France, Germany, Italy, the Netherlands, Russia, Spain, and Turkey, Respecting the Free Navigation of the Suez Maritime Canal”), which guaranteed the freedom and security of the Canal, and which the western powers later alleged had incorporated the Suez Canal Company’s concession. *Id.* at 72-73 (“Thus the decree of February 22nd, 1866 certifying the convention of that date between the Government of Egypt and the Universal Suez Canal Company has been by reference incorporated into and made part of what is called the definite system set up by the 1888 treaty.”). Egypt argued that it did not violate the Constantinople convention because section 14 of the convention provided that “the engagements resulting from the present treaty shall not be limited by the duration of the acts of concession of the Universal Suez Canal Company.” *Id.* at 20. Therefore, the guarantee of free navigation would become the responsibility of Egypt at the end of the concession. Another argument advanced by the western powers was that The Suez Company or the Canal itself had a special international status exempting them from Egypt’s jurisdiction or from the general right to nationalize. Robert Delson, *Nationalization of the Suez Canal Company: Issues of Public and Private International Law*, 57 *COLUM. L. REV.* 755, 771-75 (1957) (“The opponents of nationalization apparently argue that even were the right of nationalization not precluded by incorporation of the concession into the Constantinople Convention, or by the international public character of the Company, it would still be precluded because the

dominant colonial power in the Middle East up to and during WWII.¹⁹ France shared Britain's concerns, but experienced a more immediate distress: Algeria was agitating for independence from French rule, and the Algerian rebels were supported and encouraged by Egypt's government.²⁰ To make matters worse, the Cold War was casting a dark shadow over world affairs.²¹ Nasser had just

'internationalization' of the canal waters subjects the canal to continued operation by the Company or some other international agency." (citation omitted)); *see also* Note, *Nationalization of the Suez Canal Company*, 70 HARV. L. REV. 480, 485-86 (1957) ("[T]he argument has been advanced that, even in the absence of treaty restrictions, there is an exception to the general right of a state to nationalize when a utility of vital importance to the international community is operated by a private company under a concession.").

Egypt further argued that there was no international legal basis for asserting that such right of passage could be guaranteed only by the Company, but Egypt never denied its intention to deny Israel the right of free passage. Whether or not the nationalization was recognized as valid under international law, Egypt's offer of compensation was probably insufficient under the majority view of the time. *See e.g.*, Delson, *supra* at 767 ("With respect to Egypt's obligation to pay compensation for the Suez Canal nationalization, even if it is assumed that the Company was an Egyptian one, its shares were owned by foreigners, and hence the states whose citizens owned such shares may assert a claim against Egypt under public international law for compensation for the nationalization.").

In addition, the offer of compensation was to be paid only after the foreign assets of the company were turned over, which was, from the beginning, unlikely ever to occur. Egypt argued, and at least one scholar agreed, that the validity of the nationalization was not conditioned on whether legal compensation was provided. *See id.* at 764 ("The sounder view . . . would appear to be that the validity of the nationalization is not conditioned upon whether legal, or any, compensation is provided for."). If the nationalization were found to be illegal under international law (e.g., because it violated a treaty), Egypt would have been obliged to make full reparation, which may have included expectancy damages. *See* Note, *supra* at 480 ("Should the matter come in any form before the International Court of Justice or an arbitral tribunal, and should it be decided that Egypt's action was illegal, the tribunal might require the payment of full expectancy damages rather than the more limited compensation that Egypt is now offering."). What was highly unlikely ever to occur was specific reparation, or the return of operational rights to the Suez Canal Company, which is presumably why even the U.S. accepted the nationalization as a *fait accompli* in trying to find a way forward at the Users' Conference. The right of a state to nationalize foreign property within its territory was broadly recognized by the mid-1950s, "unless forbidden by treaty stipulations, or otherwise violative of international law, as in a discriminatory taking or a taking of property or of an entity which is immune from nationalization." Delson, *supra* at 762.

¹⁹ TURNER, *supra* note 17, at 229 (noting that the British media accused Nasser of an "act international brigandage").

²⁰ *See* FREIBERGER, *supra* note 7, at 163 ("Angered over Nasser's increasing presence in North Africa, particularly in Algeria, the French saw the nationalization of the canal as an opportunity to destroy the Egyptian leader once and for all." (citation omitted)).

²¹ *See* KYLE, *supra* note 17, at 30 ("[W]ith the way the 'cold war' was developing in Europe, the overriding consideration for Britain and the United States was to ensure that, no matter how much their analysis of the Palestine situation might differ, they must not find

completed a large arms deal with the Soviet Union, a deal which appeared to turn Egypt into a major military power in the Middle East, and which gave the Soviets an important foothold in the region.²² Britain and France had a history of colonization as well as competition for hegemony in the Middle East.²³ But now they shared grave concerns over the political and economic ramifications of rising Arab nationalism under Nasser as well as the possibility of Soviet ascent in the region.²⁴ Eager to maintain their status as world powers, Britain and France joined forces to reassert their colonial and European hegemony in the Middle East.²⁵

Israel—a small, poor, insecure country created only eight years prior—had its independent grievances against Egypt, as mentioned above.²⁶ Egypt was Israel’s most powerful nemesis, and Israelis were convinced that a second round of war (following the 1948 war of independence) was inevitable given Egypt’s ongoing provocations.²⁷ They only wondered when it would happen.

If it were up to Israel, 1956 would not be the year to start a war, but in Paris the French military command had other plans.²⁸ As will be discussed later, Israel felt it should take the French offer and accepted the dictated timetable.²⁹

themselves fighting a surrogate war against each other.”).

²² See NICHOLS, *supra* note 8, at 27 (“The arms deal was made public on September 27. Egypt would procure Soviet-produced arms from the Czechs, in exchange for Egyptian cotton.”); see also TURNER, *supra* note 17, at 228 (“The West dominated arms supplies to the Middle East at this time. If Nasser turned for weapons to the communist bloc there would be significant shift in the regional balance of power.”).

²³ See NICHOLS, *supra* note 8, at 134 (“Britain and France had owned a controlling interest in the Suez Canal Company . . . for decades. . . . Suez was a lifeline for Britain. . . . Its closing would bring Britain to its knees.” (citation omitted)).

²⁴ *Id.*

²⁵ Lahav, *supra* note 12, at 61 (“[I]t became clear that Britain and France were Israel’s senior partners, and that the central target of the two colonial powers was to restore their hold over the Suez Canal.”).

²⁶ See *supra* note 14 and accompanying text.

²⁷ MOTTI GOLANI, ISRAEL IN SEARCH OF A WAR: THE SINAI CAMPAIGN, 1955-1956, at ix (1998) (“[Israeli military leaders] maintained that Israel’s survival was contingent on its defeating Egypt, the leader of the Arab world, in a ‘second round.’ . . . The Israeli army considered the outcome of the ‘first round’ in 1948-1949 (Israel’s War of Independence) intolerable, a situation Israel could not live with.”).

²⁸ See Lahav, *supra* note 12, at 69 (“As Ben-Gurion conceded . . . but for the allies’ intervention he would not have entertained the idea of launching war ‘tomorrow.’”). See also Guy Laron, *The 1955 Czech-Egyptian Arms Deal, the Egyptian Army, and Israeli Intelligence*, 63 THE MIDDLE EAST J. 69 (2009).

²⁹ *Id.* at 81 n.6 (“Ben-Gurion knew well that his cabinet was skeptical of the idea of war . . . [H]e calculated that the cabinet, facing the decision to ‘go to war tomorrow’ would bend to pressure to approve the motion so as not to upset Britain and France . . .”).

C. *U.S. Reaction and Aftermath*

In the context of world affairs the military invasion of Egypt came at a particularly inopportune moment. The anxiety over the Cold War was escalating as Hungary, behind the Iron Curtain, was signaling its desire to be free while the Soviet government was flexing its muscle.³⁰ Amid the gathering storm, Dwight Eisenhower was in the final weeks of his campaign to win a second term as President of the United States. The United Nations, designed as a world government capable of stopping wanton war and barely a decade old, was struggling to shape a meaningful role for itself as guardian of the rule of international law under the UN Charter.

On October 31 and following the invasion and ultimatum, President Eisenhower did not turn a blind eye as the parties had expected, even though the presidential elections were less than a week away.³¹ Rather, he reacted furiously and resolutely, demanding a halt to the aggression and immediate withdrawal.³² Even though the Cold War was raging, and for reasons unrelated to Eisenhower's, the Soviet leadership quickly echoed his demands.³³ This was the only event in the history of the Cold War where the superpowers collaborated in denouncing a war and insisted on the return of the status quo ante. Meanwhile, Soviet tanks entered Budapest to crush an uprising against the Soviet domination of Hungary.³⁴ Thus, the denunciation of the Western powers invading Egypt came in the midst of a serious and noisy international turmoil about events in Hungary. In New York, Dag Hammarskjöld, Secretary General of the United Nations, in full cooperation with Washington, insisted on an immediate withdrawal by Israel, France, and Britain from Egyptian soil.³⁵ Under the pressure of international sanctions and aggressive diplomatic American maneuvers, the three countries reluctantly agreed to a cease-fire and to withdrawal from Suez. From this perspective, international law, as it was

³⁰ See NICHOLS, *supra* note 8, at 3 (“While the United States emerged from [World War II] stronger than its European allies, the Soviet Union’s postwar actions and development of atomic weapons intensified American perceptions of a worldwide communist threat. . . . This bundle of tensions had spawned a ‘Cold War’ almost immediately after the big war.”).

³¹ See NICHOLS, *supra* note 8, at 209-15 (outlining Eisenhower’s “emphatic protest” to the British-French ultimatum); see also Lahav, *supra* note 12, at 74 (noting the belief that the United States would be distracted by the upcoming Presidential election).

³² See NICHOLS, *supra* note 8, at 209-15.

³³ *Id.* at 208 (“[T]he British and the French vetoed the American-sponsored Security Council resolution calling for a cease-fire between Israel and Egypt. Ironically, the Soviet Union supported the measure.”).

³⁴ *Id.* at xx (“The morning of November 4, the Soviet Union had sent 200,000 troops and four thousand tanks into Budapest, Hungary, to put down a revolt.”).

³⁵ *Id.* at 247 (detailing the demands from the United Nations that “Britain, France and Israel implement a cease-fire within twelve hours and withdraw from Egypt within three days or be faced with the prospect of American and Soviet military assistance”). The veto powers of Britain and France in the U.N. Security Council were of no avail as the United States moved the deliberations to the General Assembly.

embedded in the UN Charter, prevailed.³⁶ But the history of the Cold War and that of the Middle East shows that, in fact, the aftermath of these events were replete with much violence and very little rule of law. In more than one way, Suez was a war to make more wars.

The big losers of the Suez adventure were the United Kingdom and France.³⁷ Both had to abandon their dreams of restoring their colonial glory. Among other things, they turned their energy towards the idea of a united Europe.³⁸ Israel, like its collaborators, also had to withdraw from Egyptian soil, and in this sense its military victory also turned into a diplomatic defeat.³⁹ But unlike its senior collaborators, Israel also emerged with a few substantial gains in hand. The Straits of Tiran, closed by Egypt to Israeli navigation were now opened for all;⁴⁰ the first international UN force was created and placed in the Sinai Peninsula as a buffer between Egypt and Israel;⁴¹ and Israel began to attract attention and recognition for its military capabilities.⁴²

I. THREE COUNTRIES (PLUS ONE) GO TO WAR:
DIPLOMATIC MANEUVERS AND CONSTITUTIONAL MECHANISMS

A. *Egypt*

1. Constitutional Framework

³⁶ *Id.*

³⁷ See KYLE, *supra* note 17, at 549 (denoting British Prime Minister Anthony Eden the “loser” of Suez); GOLANI, *supra* note 27, at 187 (“British policy in the Middle East had sustained a series of humiliations in the early 1950s . . .”); MORDECHAI BAR-ON, THE GATES OF GAZA: ISRAEL’S ROAD TO SUEZ AND BACK, 1955-1957, 321 (1994) (“France emerged from the war utterly defeated; its position as a world power had been seriously assailed and its control of North Africa was ultimately lost.”).

³⁸ BRUNO LEPRINCE, CHRISTIAN PINEAU DE BUCHENWALD AUX TRAITES DE ROME 107 (2004).

³⁹ See GOLANI, *supra* note 27, at 191 (“The Israeli withdrawal . . . was preceded by a general decline in the euphoria which prevailed in Israeli during the war [T]he downfall was swift and hard, and completely incomprehensible to anyone who was not privy to the legions of secrets which surrounded this war.”).

⁴⁰ *Id.* at 197 (“The Straits of Tiran were open to Israeli navigation and remained open until May 1967.”); see BAR-ON, *supra* note 37, at 320 (“The withdrawal from the Straits of Tiran was made conditional on formal guarantees ensuring its freedom of navigation . . .”).

⁴¹ See GOLANI, *supra* note 27, at 196-99 (stating that the “tranquility along Israel’s border with Egypt” was due at least in part to “the presence of UN peacekeeping forces,” and further explaining that “with the exception of Nasser’s downfall, Israel emerged with everything it wanted”).

⁴² *Id.* at 196 (“Generally speaking, Israel’s value as a strategic asset in the Middle East was at last recognised by the West.”).

Though Egypt was the target of attack by Britain, France, and Israel, it is worthwhile to take a look at the Egyptian political and constitutional scene before discussing the three countries that initiated military engagement in Suez. Egypt deliberately took that fateful step of nationalizing the Suez Canal that within six months culminated in a war. What were the constitutional mechanisms that led Egypt to nationalize the Suez Canal, thus setting in motion the events precipitating the Suez conflict?

Egypt's modern history was dominated by British colonial presence, with strategic British military bases established on Egyptian soil as early as the late 19th century.⁴³ This state of affairs was fortified by the Anglo-Egyptian Treaty of Alliance of 1936, which resulted in the presence of up to 80,000 British military personnel in Egypt.⁴⁴

Until 1952 Egypt was a monarchy with a liberal constitution modeled after the Belgian constitution. In July 1952, a group of Egyptian military officers overthrew the King and established Egyptian military rule.⁴⁵ Of these officers the most charismatic and ambitious was Gamal Abdel Nasser. By 1954 he appointed himself prime minister and by 1956 he introduced a new constitution stipulating a one party rule in Egypt. In the June 1956 elections he was the only candidate for president and won by a resounding landslide.⁴⁶ Now Nasser was in full control of both domestic and foreign affairs. Soon he would become leader of the Arab world and a welcomed figure among the non-aligned nations.⁴⁷ Nasser harbored considerable hostility against the Western powers, especially against Britain. He often spoke of a "hateful trinity" comprised of "social injustice, political oppression, and British occupation."⁴⁸

2. The Road to War

The decision to nationalize the canal was met with a wave of enthusiastic support in Egypt as well as in the larger Arab world.⁴⁹ From the perspective of

⁴³ KIRK J. BEATTIE, *EGYPT DURING THE NASSER YEARS: IDEOLOGY, POLITICS, AND CIVIL SOCIETY* 18 (1994) ("Great Britain's occupation began in 1882, and although Egypt gained formal independence in 1922, the continued presence of British administrative advisers and troops severely curtailed Egyptian sovereignty.").

⁴⁴ JAMES JANKOWSKI, *NASSER'S EGYPT, ARAB NATIONALISM, AND THE UNITED ARAB REPUBLIC* 12 (2002) ("The British position was put on a more formal basis in 1936 with the conclusion of an Anglo-Egyptian Treaty of Alliance that linked Egypt and Great Britain in a twenty-year alliance, thereby regularizing but also perpetuating the positioning of British military forces in Egypt.").

⁴⁵ *See id.* at 14-19 (describing the "Free Officers Movement" which overthrew the monarchy and became the governing authority in Egypt in 1952).

⁴⁶ *See id.* at 65-70 (describing Nasser's ascent to political power).

⁴⁷ *See id.*

⁴⁸ *See id.* at 42.

⁴⁹ *Id.* ("Nasser's announcement . . . stunned but also electrified the huge crowd present at his address; he received a spontaneous ovation, which in the view of one observer reached

constitutional design, the important point was that Nasser's decision was unitary. He did not consult any other institution in Egypt, including his own cabinet.⁵⁰ Even the Egyptian Foreign Minister was not consulted.⁵¹ Thus this decision, which constituted the single event triggering the War of 1956 and which was characterized as the "most dramatic [Egyptian] foreign policy decision of the mid 1950's,"⁵² was taken by one man, with neither checks nor balances. Egypt's rulers made many statements concerning their devotion to the [Arab, Egyptian] public interest and their commitment to the welfare of the people.⁵³ They also enjoyed considerable popular support.⁵⁴ But Egypt's rulers were new in their job—Nasser seized power the same year—and Egypt had no tradition of parliamentary rule and little solid administrative law to channel and process political decisions.⁵⁵ The actual decision to nationalize and thereafter to escalate the diplomatic confrontation, even to risk war, was made by Gamal Abdel Nasser alone, rather speedily and without collective deliberation.⁵⁶

Would the war have taken place without Nasser's nationalization of the canal? Perhaps. France and Israel had independent reasons to unsettle Nasser. Still, France was eager to have Britain on its side, and it is very questionable whether Britain would have gone to war if nationalization did not take place. Following WWII, the Suez War was the first instance in which Britain acted in opposition to an express U.S. wish in such critical matters as war and peace.⁵⁷ It is doubtful that Prime Minister Anthony Eden would have taken such an unconventional step if he did not believe that the challenge to the British national interest should be squarely met.⁵⁸

'hysteria levels.'" (citation omitted)).

⁵⁰ *Id.* ("The later testimony of Nasser's associates is unanimous in that the most dramatic foreign policy decision of the mid-1950's, the nationalization of the Suez Canal in July 1956, was Nasser's decision alone, revealed to the cabinet only to the surprise, and in some cases, the consternation of its members.").

⁵¹ *Id.* ("Foreign Minister Mahmud Fawzi was a 'respected technician' who had 'only a small role as policy maker.'").

⁵² *Id.* at 67.

⁵³ See BEATTIE, *supra* note 43, at 117 (describing Arab nationalism as a "key ideal of the Nasser regime").

⁵⁴ See *id.* at 116 ("[The] assertion of national independence and open defiance of the [West] . . . earned Nasser tremendous popularity in Egypt and the Arab world. Indeed, his spurning of Western threats with his own verbal taunts sent much of the public into gleeful delirium.").

⁵⁵ See *id.* at 142 (describing the implementation of new policies as an exercise of "learning by trial and error").

⁵⁶ See *supra* notes 50-52 and accompanying text.

⁵⁷ See FREIBERGER, *supra* note 7, 159-86 (outlining the deterioration of the Anglo-American alliance); W. SCOTT LUCAS, *DIVIDED WE STAND* (1991).

⁵⁸ See FREIBERGER, *supra* note 7, at 161 ("The British reaction to nationalization of the canal was predictable. After meeting with American and French officials, Eden immediately summoned his cabinet. They characterized Nasser's act as a callous betrayal of the Suez

B. *The United Kingdom*

1. Constitutional Framework

Historically, the monarchic constitutional structure of England has democratized, providing for checks and balances, popular representation, and a growing awareness of the need for political and civil liberties.⁵⁹ However, this structure has left intact matters of foreign affairs and particularly of war powers. Issues related to war have been long recognized as royal prerogatives, solidly vested in the hands of the executive (the crown).⁶⁰ This was precisely the model that the framers of the U.S Constitution decided to reject.⁶¹ The British arrangement contained several implicit assumptions further highlighted through a brief comparison with the American constitutional model:

1. As long as the prerogative was not superseded by statute, the executive had the complete power to launch a war without consulting Parliament or any of its committees.⁶²
2. The presumption was that the sovereign acted in the public interest, i.e., “for the honour and interest of the nation” and not for “inglorious or improper” reasons.⁶³ The guarantee to ensure that the

Canal base treaty and an intolerable threat to Western economic interests.”). But note, too, that Eden was quite ill and probably unable to manage soberly the affairs of state. *See id.* at 177 (“By the beginning of October Eden had reached his physical breaking point. After two years of intense pressure from a myriad of crisis situations, the Suez problem may have put him over the edge.”).

⁵⁹ *See* PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM* 1-4 (2012).

⁶⁰ 1 HERBERT BROOM, EDWARD HADLEY & SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 200 (1875) (“[T]he sovereign has . . . the sole prerogative of making war and peace.”).

⁶¹ *See* YASUO HASEBE, *War Powers*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 468 (Michel Rosenfeld & András Sajó eds., 2012) (“[T]he Founders clearly intended to divorce the power to initiate war from the power to prosecute it, and hence, endorsed a limited commander in chief power.”). The power vested was to “declare war,” not to “make war.” The framers recognized that if the country were attacked, and therefore the war was a war of self-defense, time would be of the essence, and consultation with the legislative branch not necessarily feasible. However, they thought that when it comes to aggressive war, or a war of choice, the decision should be taken the legislative branch to ensure appropriate deliberations and collective responsibility. This arrangement was put in place despite, or maybe because of, its size (bicameral, quite slow to make decisions). We know that this model has not worked very well, and the executive has been quite dominant, in making the decision to go to war. The War Powers Act was meant to structure this situation and restore the balance between Congress and the President, but the most recent experience in Libya shows that this has not been that simple.

⁶² *See id.* at 466 (“The United Kingdom exemplifies the state in which war powers are vested solely in the executive. That the British Parliament has no formal role in the deployment of the armed forces makes the United Kingdom exceptional among contemporary democracies.”).

⁶³ BROOM ET AL., *supra* note 60, at 201 (“[T]he same check of parliamentary

sovereign indeed intended to pursue the public interest resided in the process of Parliamentary impeachment or in a parliamentary vote of no confidence (see below).⁶⁴

3. Like their American counterparts, British commentators recognized the distinction between “making war” and “declaring war,” but their theory justifying the distinction was different. In England, a declaration of war served “not so much that the enemy may be put upon his guard (which is a matter rather of magnanimity than right), as that *it may be certainly clear that the war is undertaken not by private persons, but by the will of the whole community.*”⁶⁵ Again, the premise was that the executive branch was pursuing the public interest and was articulating the “voice of the people.”
4. Unlike the United States, where a strict separation of powers obtained, and the president served his full term regardless of the level of Congressional support, the British executive drew its legitimacy from the support of Parliament. The mechanism to control an executive decision to go to war was a parliamentary vote of no-confidence in the cabinet. The expectation was that the cabinet would take Parliamentary opinion into account prior to taking a decision to go to war.
5. The British constitutional system provides that the cabinet is collectively beholden to Parliament; in contrast, the U.S. President embodies the executive branch, and the cabinet has no formal constitutional power or responsibility.⁶⁶

2. The Road to War

What precipitated the British decision to attack Egypt in late 1956 and try to reassert its prominent role in the Canal Zone? The Suez Canal was constructed between 1858 and 1869, and following its completion was operated by the

impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.”).

⁶⁴ See Jenny S. Martinez, *Horizontal Structuring*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 468 (Michel Rosenfeld & András Sajó eds., 2012) (“In parliamentary systems, the prime minister typically may be removed during office by a no-confidence vote in the legislature, while in a presidential system the president’s tenure in office does not depend on legislative support.”).

⁶⁵ BROOM ET AL., *supra* note 60, at 201 (emphasis added).

⁶⁶ See Martinez, *supra* note 64, at 553 (“[I]n a presidential system, the president is independent of the legislature, and indeed may be from a different political party than the majority of the legislature. In a parliamentary system, on the other hand, whichever party or coalition of parties controls the legislature also controls the executive branch.”).

Suez Canal Company.⁶⁷ In the beginning, the company's shares were owned by French and Egyptian investors, but later the British government (under Disraeli's tenure as prime minister) purchased 40% of the shares and became a major investor.⁶⁸ At the time that Nasser nationalized the Canal, two-thirds of Europe's oil was passing through that waterway.⁶⁹ While the nationalization was perceived as a bold defiance of the already fading colonial world order, it was also viewed as placing in jeopardy the smooth supply of oil to Europe, oil vital to the European economy.⁷⁰

British Prime Minister Anthony Eden considered military action as soon as he received news of Nasser's decision to nationalize the canal.⁷¹ Eden ordered his military command to prepare contingency plans for the restoration of the status quo ante.⁷² Simultaneously, Eden established an Egypt Committee within the cabinet to monitor the crisis and make recommendations to the Cabinet.⁷³ From the British constitutional perspective, Eden's Cabinet had the authority to decide to launch war against Egypt; the establishment of the Egypt Committee was a step in this direction.

The jurisdiction of the Egypt Committee extended to military efforts as well as diplomatic negotiations (spurred by the United States) to resolve the matter through peaceful means.⁷⁴ Eden used his prerogative as Prime Minister to

⁶⁷ See KYLE, *supra* note 17, at 12 (detailing the creation of the Suez Canal).

⁶⁸ *Id.* at 12-14.

⁶⁹ See FREIBERGER, *supra* note 7, at 251 n.2 ("Of the total of seventy million tons of oil which passed from the Persian Gulf through the Suez Canal, sixty million tons were destined for Western Europe and represented two-thirds of its oil supplies.").

⁷⁰ See LUCAS, *supra* note 57, at 44 (1991) ("[The Canal's] importance as an international waterway . . . increased with the development of the oil industry and the dependence of the world on oil supplies."). This context is further complicated by the Cold War, where the West suspected the Soviet Union of supporting Nasser and attempting to gain economic leverage against (or even to smother) Western Europe and Britain. See *id.* at 50 (discussing the effect of Moscow's weapons sales to Egypt on Western policy). Indeed, oil was the weapon Eisenhower used to force Britain to withdraw from the canal region. See *infra* Part "United States."

⁷¹ But the UK had been contemplating military action against Egypt since the spring of 1956. LUCAS, *supra* note 57, at 97 (stating that in March 1956, Eden "spoke of Egypt as 'the main threat to [British] interests' in Iraq and the Persian Gulf").

⁷² Colin Seymour-Ure, *British 'War Cabinets' in Limited Wars: Korea, Suez and the Falklands*, 62 PUB. ADMIN. 181, 184 (1984) (explaining that while the crisis was still diplomatic at this point, Eden consulted the Chief of Staff).

⁷³ *Id.* ("The Egypt Committee was set up by the Cabinet on the morning after Nasser nationalized the Canal."). The idea of a 'war cabinet' within the larger cabinet was modeled after Prime Minister Winston Churchill's WWII administration. See *id.* at 182 (describing the failure of larger cabinets to "run wars" and the success of the specialists on Churchill's WWII War Cabinet).

⁷⁴ *Id.* at 191-92 (stating the work of the Egypt Committee included discussing economic sanctions and making "arrangements for a conference of maritime nations").

handpick the members of the Egypt Committee on an ad hoc basis and also to change the membership as he saw fit.⁷⁵ Thus, the Egypt Committee could not develop a consistent or a coherent view of the crisis but was rather used as a springboard for Prime Minister Eden's developing policy.⁷⁶ In other words, the Egypt Committee could neither function as a bona fide check and balance on Prime Minister Eden's policies, nor could it ensure meaningful deliberations. The final decision to invade Egypt and orchestrate a coup replacing Nasser with a president more sympathetic to the colonial powers, and regain control of the Canal, was taken by Prime Minister Eden without the benefit of too much consultation.⁷⁷ That does not mean that members of the Cabinet did not have views and disagreements. The Minister of Defense, Walter Monckton, resigned a few weeks before the attack because he opposed military measures.⁷⁸ Others had their doubts but decided to keep their views to themselves.⁷⁹ Eden did not seek out legal counsel in the initial stages of the process because Eden considered the matter purely political and unencumbered by a legal dimension.⁸⁰

Eden was swayed when, in mid-October, French Prime Minister Guy Mollet and his Minister of Foreign Affairs, Christian Pineau, persuaded Eden that the military option was preferable to negotiations, and that the two European powers should use Israel to provide a pretext for an attack.⁸¹ Eden did not feel

⁷⁵ *Id.* at 184 (suggesting that characterizing the Egypt Committee as a single, well defined entity is misleading).

⁷⁶ *Id.* at 185 (describing the fluctuating membership of the Egypt Committee as having political significance because its fluctuating membership strengthened Prime Minister Eden's "personal position").

⁷⁷ *See id.* at 184-85. Eden was one of the brave politicians who opposed the Munich agreement between Prime Minister Chamberlain and Adolf Hitler. *See* LUCAS, *supra* note 57, at 23 (explaining that Eden resigned as Foreign Secretary in 1938 and aligned himself with opponents of appeasement). As Eden faced Nasser's violation of Egypt's agreement with Britain, he thought of Nasser as the new Mussolini, if not the new Hitler. *Id.* This assumption fed his determination to resist Nasser's nationalization. This view could be interpreted as tunnel vision, an act of "fighting the last war." *Id.*

⁷⁸ *Id.* at 254 (explaining that Monckton resigned because he "believed the use of force against Egypt would be a 'great blunder'").

⁷⁹ *See id.* at 249 ("A dissenter could have resigned, at the cost of his career.").

⁸⁰ Evidently, Eden did not doubt his constitutional power to launch the war. What Eden was trying to avoid was the effect of international law on the question of the legality of the war. For example, Eden objected to the briefing of the Foreign Office Legal Adviser, Sir Gerald Fitzmaurice, saying: "That's the last person I want consulted. The lawyers are always against our doing anything. For God's sake, keep them out of it. This is a political affair." *Id.* at 238. For a different view, see D.R. THORPE, EDEN: THE LIFE AND TIMES OF ANTHONY EDEN, FIRST EARL OF AVON, 1897-1977 (2004).

⁸¹ LUCAS, *supra* note 57, at 239 (stating that the British Minister of Foreign Affairs, Lloyd, made a "final attempt to save negotiations with Egypt," but the French found this "quite unsatisfactory").

he needed the approval of his cabinet. He called his Minister of Foreign Affairs, Selwyn Lloyd, to return from New York (where he was attending the United Nations sessions and negotiating a deal with the Egyptians) and sent him to France to finalize war plans.⁸²

Present at the top-secret meeting were French Prime Minister Guy Mollet and his Ministers of Defense and Minister of Foreign Affairs, Israel's Prime Minister David Ben Gurion (who also served as Minister of Defense), his Chief of Staff Moshe Dayan, and Shimon Peres, Director General of the Ministry of Defense.⁸³ A contract ("Sèvre Protocol") was hurriedly negotiated, typed (by the only woman present, a secretary) and signed by Britain, France, and Israel.⁸⁴ In the Sèvre Protocol, Israel's Prime Minister Ben-Gurion committed Israel to engage in "acts of war" against Egypt, thereby providing the British and French governments a pretext to issue an ultimatum to both Israel and Egypt (thus maintaining the appearance of even-handedness) and shortly thereafter launch their war on Egypt.⁸⁵ The ultimatum amounted to a decision to launch a war because it was clear that war would follow; because Egypt was not expected to obey the ultimatum.⁸⁶ The record shows that a few key ministers deliberated the proposal to go to war, but that Prime Minister Eden dominated the process and his will prevailed.⁸⁷

On October 25, the British envoys returned from Paris and Prime Minister Eden assembled his cabinet.⁸⁸ Eden presented the plan of attack, disclosing that an Israeli attack was expected, but did not reveal the full content of the Sèvre Protocol.⁸⁹ The inner circle of cabinet ministers voted in favor of the plan and

⁸² *Id.* at 239 (discussing Lloyd's return from New York and the subsequent trip to Paris to negotiate with the French).

⁸³ See Seymour-Ure; *supra* note 72, at 192 (describing the membership of meetings that led to "Anglo-French-Israeli collusion").

⁸⁴ See LUCAS, *supra* note 57, at 247 (describing the contents of the Sèvre Protocol and stating that the document "called for the endorsement of 'the three governments'"). See also Avi Shlain, *The Protocol of Sevres, 1956: Anatomy of a War Plot*, 73 INT'L AFF. 509 (1997).

⁸⁵ See *id.* ("The British and French agreed that if Israel attacked Egypt, they would intervene 'to protect the Canal.'"); IZHAK BAR-ON, "AN UMBRELLA IN A RAINY DAY . . ." FRENCH-ISRAELI SECURITY RELATIONS, 1948-1956 at 548-51 (2010) (reproducing the Sèvre Protocol).

⁸⁶ See LUCAS, *supra* note 57, at 247 (describing the Egyptian refusal as "inevitable").

⁸⁷ See Seymour-Ure, *supra* note 72, at 191-93 (describing the Egypt Committee as a "partial Cabinet" led by Eden that often times made decisions without prior discussion with the full cabinet).

⁸⁸ *Id.* at 192 ("The Cabinet agreed with the recommendation to intervene with the French in the event of an Israeli attack.").

⁸⁹ See LUCAS, *supra* note 57, at 249 (suggesting that Eden refrained from mentioning the Sèvre Protocol in order to "minimise the possibility of division within the Cabinet"). But see THORPE, *supra* note 80 (writing that Eden did disclose the fact of the Protocol to his cabinet).

the rest followed suit.⁹⁰ At this stage, legal advice concerning the perspective of international law was sought, but Eden avoided his own Attorney General and instead commissioned a memorandum from the head of the Judiciary, whom he knew would support his position.⁹¹ The process was honored but substance was lacking.

On October 30, 1956, following the Israeli invasion of the Sinai, Prime Minister Eden led his cabinet to invoke the royal prerogative and issue an ultimatum/appeal to Egypt and Israel in behalf of Her Majesty, the Queen.⁹² The ultimatum presented the British attack as a means to restore the peace rather than as an aggressive act meant to achieve regime change. The story both Eden and Mollet hoped the world would buy was that the Israeli “surprise” conquest of the Sinai threatened the operations of the Suez Canal and therefore necessitated British and French intervention to restore peace.⁹³ What was planned behind closed doors as a preventive war, a war of choice, was to be presented to the public as a peace-loving intervention. The British cabinet viewed Eden’s announcement as a *fait accompli* and approved the measure.⁹⁴

At four-thirty in the afternoon, accompanied by Secretary of the Foreign Office Selwyn Lloyd, Prime Minister Anthony Eden entered the House of Commons and announced the issuance of the British-French ultimatum.⁹⁵ The

⁹⁰ LUCAS, *supra* note 57, at 249 (“Given the agreement between senior ministers to proceed, Monckton [the former Minister of Defense] and other junior Ministers could not upset Eden’s strategy. A dissenter could have resigned, at the cost of his career, but, as of 25 October, he had no cause to present to the Commons or to the public.”).

⁹¹ In 2006, declassified British documents revealed further manipulation of the constitutional process by Prime Minister Eden in order to secure the approval of his cabinet. Instead of requesting the advice of Attorney General, Sir Reginald Manningham-Buller, as was the norm in matters related to foreign affairs, Eden requested Lord Kilmuir, the Lord Chancellor (or head of the judiciary), to craft a memorandum justifying the war under international law. Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 INT’L & COMP. L.Q. 773, 777 (1988) (stating that Lord Kilmuir believed the United Kingdom was legally entitled to use military force against Egypt as a form of self-defense).

⁹² The ultimatum to Israel was a part of the collusion between the three countries. *See supra* text note 85. Israel expected the ultimatum and, in any event, was in no need of being warned, as Israel had been encouraged to invade Egypt by the U.K. and France.

⁹³ *See* 558 PARL. DEB., H.C. (5th ser.) (1956) 1275 (U.K.) (“[A]ny fighting on the banks of the Canal would endanger the ships actually on passage.”); LUCAS, *supra* note 57, at 249 (describing intervention as a means to “prevent interference with the free flow of traffic through the Canal”).

⁹⁴ Seymour-Ure, *supra* note 72, at 192 (discussing the full cabinet’s approval of the war measure). At the meeting of the full cabinet authorizing the war ultimatum leading to the British invasion, Eden is supposed to have said, “A lot of my present colleagues never served in a War Cabinet,” to which one of the ministers retorted, “We didn’t know we were at war.” *Id.* at 185.

⁹⁵ 558 PARL. DEB., H.C. (5th ser.) (1956) 1275 (U.K.) (“Her Majesty’s Government and

Sèvres Protocol was not mentioned.⁹⁶ A lively debate ensued, led by members of the opposition Labour Party who vigorously criticized the fact that Parliament was not consulted.⁹⁷ Still, the House of Commons supported Eden by fifty-two votes.⁹⁸

From the perspective of constitutional design, the striking fact is that there was no constitutional process of checks and balances and no mechanism in place to assess the pros and cons of Eden's decision to go to war. It is one thing to vest the decision to go to war in the executive branch. It is quite another to avoid the administrative mechanisms within the executive branch designed to provide assessment and quality control. Additionally, Eden made sure that the civil service at the Foreign Office, the Ministry of Defense, and the Treasury Department were not informed of the impending actions.⁹⁹ Also, Eden's Egypt Committee was not encouraged to voice dissent. Not subjected to challenging input, Eden also persuaded himself that the United States, while unhappy, would go along with Britain's actions.¹⁰⁰ After all, the United Kingdom was a loyal ally, the Cold War was raging, and Washington was well aware of Nasser's flirtation with the Soviets and considered Nasser a menace to world order. Significantly, Eden also assumed that the structure of the United Nations would play into his hands. The United Kingdom had a veto power at the UN Security Council and a British veto, he calculated, would prevent an escalation of the conflict. As we shall see, Washington's reaction surprised Eden and dramatically upset his expectations. Had Eden allowed his cabinet and upper echelons of the civil service to brainstorm the war plans freely, he may well have anticipated some of the developments that eventually brought about his demise.

3. Aftermath: Modifying the Constitutional Framework of War Powers

In the 21st Century the United Kingdom began rethinking the royal prerogative in the context of proper governance. In 2011, the Cabinet Manual "pointed out that the Coalition government had in 2011 'acknowledged that a

the French Government have accordingly agreed that everything possible should be done to bring hostilities to an end as soon as possible.").

⁹⁶ Eden continually denied any "collusion" between the UK, France and Israel. *See* LUCAS, *supra* note 57, at 248 (explaining that Eden "instructed Dean and Logan to return to Paris to destroy all copies of the agreement").

⁹⁷ 558 PARL. DEB., H.C. (5th ser.) (1956) 1283 (U.K.) (expressing concern that members of the House "may be denied the opportunity" to express their views on the issue).

⁹⁸ The vote was 270:218 (listing "ayes" and "noes"). *See* 558 PARL. DEB., H.C. (5th ser.) (1956) 1377-82 (U.K.).

⁹⁹ *See* LUCAS, *supra* note 57, at 249 (stating that Eden "limited the details of Sèvres to an inner circle of Ministers").

¹⁰⁰ TURNER, *supra* note 17 at 264-65 (suggesting that Eden "underestimated the influence of Eisenhower" on United States' foreign policy).

convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter”¹⁰¹

In 2003 Prime Minister Tony Blair requested Parliamentary approval for ensuring “the disarmament of Iraq’s weapons of mass destruction.”¹⁰² Thereafter, Parliament deliberated the need to restructure the royal prerogative,

¹⁰¹ MARK RYAN & STEVE FOSTER, UNLOCKING CONSTITUTIONAL & ADMINISTRATIVE LAW 280 (Routledge ed., 3d ed. 2014) (discussing the use of the United Kingdom’s military abroad). Clare Short, MP, submitted a private member bill in 2005 that led to the crystallization of the convention. *See id.* at 280 (explaining the rationale behind the bill as the need to ensure decisions to use the military were “effectively scrutinized”); THE GOVERNANCE OF BRITAIN: WAR POWERS AND TREATIES: LIMITING EXECUTIVE POWERS, 2007, CP26/07, at 24-58 (U.K.) (discussing the issues involved in deploying armed forces abroad). The Report explores the question of whether “new arrangements should be contained in a freestanding convention, or in a resolution of the House, or in legislation?” *Id.* at 3. The report also contains a brief survey of the constitutional arrangements from a comparative perspective. *Id.* at 66-68 (detailing parliamentary involvement in decisions to deploy troops in Australia, Canada, France, Germany, Italy, the Netherlands, Spain, and the United States). *See also* MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN – CONSTITUTIONAL RENEWAL, 2008, Cm. 7342-I (U.K.); HASEBE, *supra* note 61 at 466-68 (comparing the process of mobilizing troops in the United Kingdom with the process in the United States). In the late 20th century the British government continued to deploy the prerogative but the Suez experience made it more sensitive to the political and legal ramifications of its decisions. *See* 2 SIR LAWRENCE FREEDMAN, THE OFFICIAL HISTORY OF THE FALKLANDS CAMPAIGN 21-9 (2005) (recounting the various stages of the British war in the Falklands in 1982, in which much attention was invested in governance procedures and legal advice). Prime Minister Margaret Thatcher did not seek the explicit authorization of Parliament for the armed conflict in the Falklands and yet she did enjoy Parliamentary support since the early days of the crisis. *See id.* at 19 (“With the Labour leadership’s support, and from the centre parties as well, there was no serious organized opposition in Parliament to sending the Task Force.”). In accordance with previous custom, Thatcher established a war cabinet. *Id.* at 21 (describing the War Cabinet as “the critical instrument of crisis management”). The Foreign Office’s legal counsel advised the Government that British action would amount to a war of self-defense. *Id.* at 90 (explaining the legality behind the British decision to declare war). Furthermore, the United Kingdom secured support from the United Nations Security Council. *Id.* at 43 (“The Security Council . . . Determining that there exists a breach of the peace in the region of the Falkland Islands . . . Demands an immediate withdrawal of All Argentine forces from the Falkland Islands.”). Additionally, there was close consultation with the United States as well as with other Western powers. *Id.* at 157 (describing the United States’ role in helping to find a “peaceful solution”). As expected, “Suez . . . [was] the constant reference point on how not to manage great crises.” *Id.* at 26. “[The] Suez Debacle [was] a powerful memory for all those contemplating the way in which such ventures [could] go horribly wrong.” *Id.* at 93. Additionally, the British Government did not seek Parliamentary authorization for the military intervention in Yugoslavia (1999) nor in Afghanistan. HASEBE, *supra* at 467 (stating that it has not been general practice to ask for parliamentary permission to deploy military forces).

¹⁰² 401 PARL. DEB., H.C. (6th Ser.) (2003) 760 (U.K.) (stating that “it is right that the House debate this issue and pass judgment”).

recognizing that it was an antiquated constitutional arrangement in need of democratic reform.¹⁰³ A 2004 House of Commons report recommended legislation that would require Parliamentary authorization prior to the deployment of forces.¹⁰⁴ A 2006 House of Lords report recommended a softer version. The House of Lords report proposed a parliamentary convention, formalized by a House of Commons resolution, but not legislation.¹⁰⁵

In 2007, Prime Minister Gordon Brown's Government issued a Green Paper titled "The Governance of Britain," endorsing the House of Lords' recommendations and conceding that the royal prerogative was outdated.¹⁰⁶ Brown lost power 2010. So far, Prime Minister David Cameron's Government has not pushed forward any legislation, but has followed the practice of consulting Parliament introduced by Tony Blair in 2003, thereby conceding the emergence of a constitutional convention.¹⁰⁷ In August 2013, Prime Minister Cameron brought a motion to Parliament asking for the endorsement of the introduction of United Kingdom's forces into hostilities in Syria. The motion failed 285-272 and Cameron proceeded to assure Parliament that he would not use military action in Syria under the royal prerogative before another vote in the Commons.¹⁰⁸ It has been suggested that a convention modifying the

¹⁰³ 401 PARL. DEB., H.C. (6th Ser.) (2003) 760 (U.K.) (characterizing parliamentary debate as "the democracy that is our right").

¹⁰⁴ PUB. ADMIN. SELECT COMM., TAMING THE PREROGATIVE: STRENGTHENING MINISTERIAL ACCOUNTABILITY TO PARLIAMENT, 2003-4, H.C. 422, at 31-33 (U.K.) (suggesting a draft bill that would "require Parliament's approval to be obtained for the exercise of certain [executive powers]").

¹⁰⁵ SELECT COMM. ON THE CONSTITUTION, WAGING WAR: PARLIAMENT'S ROLE AND RESPONSIBILITY, 2005-6, H.L. 263-I, at 26-38 (U.K.) (describing possible methods for increase Parliament's involvement in the decision to deploy forces). The Committee's very thoughtful report recommended that parliamentary approval be sought prior to engagement in military conflicts, specifying that the Government should provide to Parliament "the deployment's objectives, its legal basis, likely duration and, in general terms, an estimation of its size." *Id.* at 43.

¹⁰⁶ THE GOVERNANCE OF BRITAIN, 2007, at 19 (U.K.) ("The Government will propose that the House of Commons develop a parliamentary convention that could be formalised by a resolution. In parallel, it will give further consideration to the option of legislation."). The March 2008 report, "The Governance of Britain - Constitutional Renewal," includes the Government's recommendations, and presents a Draft Detailed War Powers Resolution. MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN - CONSTITUTIONAL RENEWAL, 2008, Cm. 7342-I, at 50 (U.K.) ("While not ruling out legislation in the future, the Government believes that a detailed resolution is the best way forward.").

¹⁰⁷ In 2011, Cameron's Foreign Secretary committed to "enshrine in law for the future the necessity of consulting Parliament on military action." POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE PARLIAMENT'S ROLE IN CONFLICT DECISIONS: AN UPDATE, 2013, H.C., *available at* <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/649/64903.htm>.

¹⁰⁸ *Syria crisis: Cameron loses Commons vote on Syria action*, BBC NEWS (Aug. 30, 2013), <http://www.bbc.com/news/uk-politics-23892783> (detailing Parliament's rejection of

prerogative has been solidified and that future United Kingdom Governments are likely to seek Parliament's consent prior to any military action.¹⁰⁹

C. France

1. Constitutional Framework

France emerged from the Second World War demoralized, even angry. The grim and hasty defeat of its military forces as well as the experience of the Vichy regime bore hard on its people. The Fourth Republic, inaugurated after the liberation, was unstable and ungrounded.¹¹⁰ The Fourth Republic's constitution placed the locus of political power in the National Assembly and expected the representatives of the people to closely monitor executive actions.¹¹¹ The cabinet ("Conseil de Ministres") was headed by a prime minister ("President de Conseil") approved by and accountable to the National Assembly.¹¹² Through the 1950s, the French were not only trying to recover from the trauma of World War II, but were also confronting the intractable political questions of the current moment: What should be done about Indochina, hitherto a French colony? How should the French think about Algeria? Was Algeria indeed "French soil," or did it belong to the Algerian people?¹¹³ These questions, in addition to contentious social and

a motion to introduce military forces into Syria and Cameron's "ruling out" of "joining US-led strikes"); RYAN & FOSTER, *supra* note 101, at 280 (explaining Prime Minister Cameron's promise not to deploy military forces in Syria before another vote).

¹⁰⁹ Further reports by the House of Commons' Political and Constitutional Reform Committee ("PCRC") and the House of Lords' Constitution Committee repeated the recommendations of the 2004 and 2006 reports by the same institutions. See Catherine Haddon, *Parliament, the Royal Prerogative and decisions to go to war*, INSTITUTE FOR GOVERNMENT (Sept. 6, 2013), <http://www.instituteforgovernment.org.uk/blog/6589/parliament-the-royal-prerogative-and-decisions-to-go-to-war/> ("A strong political convention has therefore been set. It will be politically very difficult for governments . . . to take significant military action without clear (and potentially prior) approval from Parliament.").

¹¹⁰ See generally GEORGETTE ELGEY, *HISTOIRE DE LA IV^E RÉPUBLIQUE (1954-1959)* (1992).

¹¹¹ MAURICE DUVERGER, *CONSTITUTIONS ET DOCUMENTS POLITIQUES* 286 (1982) (reproducing the Fourth Republic's constitution); 1946 CONST. 7 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1946-ive-republique.5109.html> (stating that the executive could not declare war without a vote of the National Assembly).

¹¹² 1946 CONST. 45-48 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1946-ive-republique.5109.html> (describing the relationship between the Council of Ministers, the Prime Minister, and the National Assembly).

¹¹³ See generally ELGEY, *supra* note 110 (cataloging the history and issues of the Fourth Republic).

political issues, led to severe instability. One government after another fell as a result of the National Assembly's dissatisfaction and votes of no confidence.¹¹⁴

In the twelve years from 1946, when the Fourth Republic was inaugurated, to 1958, when the Fourth Republic collapsed, France had twenty governments. Socialist Prime Minister Guy Mollet was the 17th Prime Minister in ten years, and came to power on January 1, 1956, six months before the nationalization of the Canal.¹¹⁵ In June 1957, shortly after the Suez debacle, Maurice Bourges-Maunoury, the hawkish Minister of Defense, replaced Mollet.¹¹⁶ Bourges-Maunoury, a central figure in hatching the plans for the Suez War, lasted five months as prime minister.¹¹⁷ Mollet and Bourges-Maunoury were both rather inexperienced in matters of foreign affairs and in navigating the ship of state in their respective roles as they propelled France to war.

France had two more prime ministers before Charles de Gaulle took office. In 1958, the Fourth Republic gave way to the Fifth Republic. De Gaulle insisted that France adopt a new constitution bearing similarity to the United States' model of an independent and all-powerful president.¹¹⁸

2. The Road to War

Article Seven of the Fourth Republic's Constitution placed the power to go to war in the National Assembly, contingent upon the recommendation of the executive branch (the cabinet).¹¹⁹ It was thus somewhat similar to the United States' requirement that Congress declare war, but different in that the Fourth Republic's constitution did implicitly recognize the role of the executive in the matter. Article 7 stated: "La guerre ne peut être déclarée sans un vote de l'Assemblée Nationale et l'avis préalable du Conseil de la République"¹²⁰ (in English, "[W]ar can not be declared without a vote of the National Assembly and the notice of the Council of the Republic").¹²¹ "Without the vote" implied

¹¹⁴ See generally *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.* During Bourges-Maunoury's short term, France signed the Treaty of Rome, paving the way to the European Community. See generally LEPRINCE, *supra* note 38, at 107 (2004).

¹¹⁷ See ELGEY, *supra* note 110.

¹¹⁸ 1958 CONST. 5 (Fr.) (outlining the power of the president).

¹¹⁹ See *supra* note 111 (describing Article 7 and the distribution of power between the executive and the National Assembly).

¹²⁰ *Constitution de la IV^e République*, DIGITHÈQUE MJP (1999), <http://mjp.univ-perp.fr/france/co1946-0.htm#2>. By contrast, the Constitution of the Third French Republic placed the power to declare war in the Executive Branch subject to parliamentary approval. 1874 CONST. 9 (Fr.) ("The President of the Republic cannot declare war except by the previous assent of the two chambers.").

¹²¹ 1946 CONST. 7 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1946-ive-republique.5109.html>.

that the initiative would come from the executive who would bring the measure to parliamentary approval.

When Nasser announced the nationalization of the Suez Canal, some high officers of the French military command, as well as a few cabinet ministers, were already at work planning his overthrow.¹²² Nasser, who recently acquired vast quantities of arms from the Soviet Union, was turning his old arms over to the Algerian rebels.¹²³ Nasser was also providing military training and other support to the Algerian rebellion and embraced the Algerian cause as a part of the grand vision of pan-Arab liberation.¹²⁴ Nasser's rhetoric was intoxicating to Arabs as well as to the group of non-aligned developing nations. It was quite alarming to Western ears, especially to the French and the British, who experienced Nasser's words as a call to shatter the world order as the French and British had known it.¹²⁵

While consulting with officials of the British government about the various options of dealing with the crisis, the French were separately exploring collaboration with Israel.¹²⁶

A short diversion to explain the growing closeness with Israel is in order. On May 25, 1950, the United States, Britain, and France imposed an embargo on arms sales to the Middle East in an effort to prevent another conflagration of war in the area.¹²⁷ Following the 1955 Egypt-Soviet arms pact, as Israel felt

¹²² See ELGEY, *supra* note 110. The French were not alone. Britain and the United States were also planning either a coup or an assassination, finding Nasser irritable and untrustworthy. See LUCAS, *supra* note 57, at 111 (describing Operation OMEGA, developed in March 1956, which was "the cornerstone of Anglo-American co-operation against Nasser").

¹²³ See *id.* at 122 (stating that Nasser "refused to halt arms supplies" to the Algerian rebels).

¹²⁴ See *id.* at 121 (discussing Nasser's support for the Algerian rebels); TURNER, *supra* note 17, at 228 (describing Nasser as "the self-proclaimed champion of Arab nationalism").

¹²⁵ See LUCAS, *supra* note 57, at 149 ("The whole Western position in the Middle East would be jeopardized if Nasser gets away with this action.").

¹²⁶ FREIBERGER, *supra* note 7 at 180-81 (1992) ("Paris began seriously to consider joining Israel in a military venture against Egypt."). The French did not initially report their negotiations with the Israelis because Britain had close ties with the Arab world, and a defense treaty with Iraq and Jordan. *Id.* at 182 (suggesting that Israel also had concerns about British involvement because of the British Anglo-Jordanian defense treaty); Laurie Milner, *The Suez Canal: History*, BBC (Mar. 3, 2011), http://www.bbc.co.uk/history/british/modern/suez_01.shtml ("In an attempt to strengthen security in the Middle East against Soviet influence, Britain, Turkey, Iraq, Iran and Pakistan signed a treaty known as the Baghdad Pact in 1955."). Israel had been left out of this Pact. At that time Britain had no interest in collaborating with the Israelis. M. BAR-ON, *OF ALL THE KINGDOMS, ISRAEL'S RELATIONS WITH THE UNITED KINGDOM DURING THE FIRST DECADE AFTER THE END OF THE BRITISH MANDATE IN PALESTINE 1948-1958*, 164 (2006).

¹²⁷ FREIBERGER, *supra* note 7, at 20-21 ("[The agreement] called for 'formal assurances' from Middle East nations receiving Western military equipment that it would not be used against other states in the area. On May 25 the U.S., U.K., and France issued the Tripartite

increasingly threatened and was frantically looking for weapons to defend itself in the event of a second round of war, France decided to abandon the embargo, and agreed to sell arms to Israel.¹²⁸

A part of the budding French friendship towards Israel was rooted in the sympathy that members of the French government felt for the Jewish people.¹²⁹ French politicians and military officers who had been active in the Resistance were very familiar with the horrors of the Holocaust and felt a special responsibility towards the Jewish state.¹³⁰ Others identified with Israel's socialist ideology.¹³¹ But no one should underestimate the mighty role of real politik. The French identified Israel as a useful instrument in implementing their plans for a new/old order in the Middle East.¹³² The more exasperated the French became with Nasser, and the more frustrated they were with current events in Algeria, the cozier their relations with Israel were becoming.¹³³

Secrecy and compartmentalization kept the rapidly developing friendship between the two nations in a cocoon.¹³⁴ France's military and diplomatic relations with Israel were largely held behind closed doors. Talks between Israel and France were confined to the Ministry of Defense, where Minister Maurice Bourges-Maunoury, a former leader of the resistance, as well as the leading generals under his command were particularly friendly towards Israel.¹³⁵ Socialist Prime Minister Guy Mollet also supported the intensifying relationship, and Minister of Foreign Affairs, Christian Pineau (who was kept

Declaration to that effect.”).

¹²⁸ FULLICK, ROY & POWELL, GEOFFERY, SUEZ: THE DOUBLE WAR 6 (1979) (“Israel . . . needed arms, and France supplied them.”) France was motivated, among other things, by the need for money. All arms to Israel at that time were sold for cash and at market value. GOLANI *supra* note 27, at 26-27 (French sale of arms to Israel was “subject to . . . payment in cash, of course”).

¹²⁹ FULLICK, *supra* note 128, at 6 (“[France] had discovered that she had much in common with Israel. The people of both countries had similar memories of Hitler’s persecutions.”).

¹³⁰ *Id.* at 6 (discussing the connection and sympathy French felt to Israel regarding their suffering at the hands of Hitler).

¹³¹ *Id.* at 6-7 (“Guy Mollet, the post-war premier of . . . France, was a socialist in sympathy with Israeli socialism.”).

¹³² GOLANI, *supra* note 27, at 26 (“As France’s troubles in Algeria were becoming more aggravated by the day, Israel managed to persuade the French that it could be quite useful to them.”).

¹³³ *Id.* at 45 (“France’s already close relations with Israel grew even closer as the crisis progressed.”).

¹³⁴ Milner, *supra* note 126 (in months before the attack, “[t]he French government had been meeting secretly with Israel”).

¹³⁵ GOLANI, *supra* note 27 at 45 (“[Quite a few French leaders at the time (such as Mollet, Bourges-Maunoury and Abel Thomas, the director-General of the Ministry of Defense) had not long before been the Resistance leaders, and therefore were sympathetic now to the Jewish state.]”).

as a Minister of Foreign Affairs in the subsequent Bourges-Maunoury government) joined Mollet in approving a scenario under which Israel would trigger an international military crisis that would precipitate Nasser's demise.¹³⁶ Like Anthony Eden, his British counterpart, Mollet insisted that Pineau refrain from sharing the information with the Quai D'Orsay (France's foreign ministry), and so it was.¹³⁷ French foreign officers were perceived to be either pro-Arab, uncomfortable with the interaction between Israel and France, or unhappy about the unusual plans for a preventive war and its cover-up.¹³⁸ It was therefore decided that it would be better to keep them uninformed of any developments. Once the matter had ripened into a solid plan, it went out of the hands of the military command and into the domain of the civil government; an inner cabinet (*gouvernement interne*) was established headed by Prime Minister Mollet) and four other ministers.¹³⁹

All through September and the first half of October 1956, the French were following two tracks simultaneously. They were discussing with the British government the prospects of military action against Egypt¹⁴⁰ and they were separately exploring military collaboration against Egypt with Israel.¹⁴¹ It appears that initially the British were adamantly opposed to Israeli involvement.¹⁴² It also appears that the Israeli government itself (as distinct from its zealous military command) was not too warm to the French plan.¹⁴³ In September 1956, a secret delegation led by Minister of Foreign Affairs Golda Meir (one of the few women in this story) visited Paris to discuss military options.¹⁴⁴ She returned with the report that "the discussions ended with no concrete results."¹⁴⁵ However, General Maurice Challe, who conceived the military plan, continued to work out the details of the military attack with Israel's military command as well as with Shimon Peres, the Director General

¹³⁶ GOLANI *supra* note 27, at 110 ("Mollet and Pineau . . . agreed on the 'Israeli pretext' idea.").

¹³⁷ SKARDON, C. PHILIP, A LESSON FOR OUR TIMES: HOW AMERICA KEPT THE PEACE IN THE HUNGARY-SUEZ CRISIS OF 1956, at 89 (2010) ("The Suez intervention was . . . a foreign policy-operation conducted outside of the Quai d'Orsay.").

¹³⁸ DAVID TAL, THE 1956 WAR: COLLUSION AND RIVALRY IN THE MIDDLE EAST 53 (2013) ("[T]he hostility of the Quai d'Orsay . . . dictated a highly covert series of meetings and conversations.").

¹³⁹ See M. BAR ZOHAR, SUEZ ULTRA-SECRET 146 (1964).

¹⁴⁰ FREIBERGER, *supra* note 7, at 177 (referencing the continuation of "Anglo-French military planning").

¹⁴¹ *Id.* at 181 (detailing discussions between France and Israel of a joint attack).

¹⁴² FULLICK, *supra* note 128, at 82-83 (stating that at first, it seemed "impossible to reconcile differences" between Israeli and British approaches to Suez).

¹⁴³ GOLANI, *supra* note 27, at 77 stating that Ben-Gurion's instructions to a delegation headed to France indicated "his apprehensions about an Israeli-initiated war."

¹⁴⁴ *Id.* at 77-78 (detailing the SIDON delegation's travels to Paris to discuss the possibility of a joint military operation).

¹⁴⁵ *Id.* at 79. Meir was thereafter excluded from the war plans.

of the Ministry of Defense. Finally, on October 14, the French arrived in London to offer Eden collaboration with France and the Israelis.¹⁴⁶ They relied on encouragement they received from Israeli military officers and civilian appointees, not elected officials. The essence of the plan was that Israel would commit an act of aggression (tantamount to ‘real war’ as distinct from a limited armed conflict) thereby providing the UK and France with the necessary cover to intervene militarily without appearing to be aggressors and violators of international law.¹⁴⁷

In London, Prime Minister Eden, aware that time was running out on the feasibility of military attack, quelled his reservations and accepted a collaboration with Israel.¹⁴⁸ He recalled his Minister of Foreign affairs, Selwyn Lloyd, from New York and sent him to Paris to finalize the war plans.¹⁴⁹

The meeting in Sèvres between the French, the British, and the Israelis ended with the signing of the deal known as the Sèvre Protocol, or the “collusion.”¹⁵⁰ Everyone present understood that the agreement was to be kept in total secrecy.¹⁵¹

In his memoirs, French Minister of Foreign Affairs Christian Pineau recalled that in the middle of the Sèvre discussions he left to inform President Rene Coty of the developments. Coty, who disapproved of these plans, is reported to have responded: “If the Israelis are willing to play a part in this comedy it is not up to us to dissuade them.”¹⁵²

The next day, Prime Minister Anthony Eden dispatched a letter to Prime Minister Guy Mollet. The letter did not mention the protocol, but stated that “Her Majesty’s Government has been informed of the course of the conversation held at Sèvres . . . They confirm that in the situation there envisaged they will take the action described.”¹⁵³ The letter was addressed only

¹⁴⁶ FULLICK, *supra* note 128, at 77 (1979) (detailing the planning meeting between France and Britain).

¹⁴⁷ *Id.* at 77-78 (“Challe outlined the French proposals. They were that Israel should be persuaded to attack Egypt across the Sinai and that Britain and France . . . should then invite both sides to withdraw . . . so that an Anglo-French force could land to protect the waterway . . . Then, on excuse of separating the combatants, the allies would take control of both Canal and installations.”).

¹⁴⁸ *Id.* at 78 (“At last Eden had been shown a way in which the war could be started. It was the excuse for which he had been long searching.”).

¹⁴⁹ *Id.* (stating that Eden telephoned Lloyd “[w]ithin minutes of the two Frenchmen’s departure”).

¹⁵⁰ *Id.* at 78 (“[On] 24 October, the secret protocol of Sèvres was ready for signature.”).

¹⁵¹ KYLE, *supra* note 17, at 330 (stating that the protocol “pledged total secrecy”). For a long time it has been believed that the only copy left was that kept by Ben-Gurion because the British destroyed theirs and the French insisted that they had lost it. However, Anthony Eden’s biographer reproduced a copy in his book, stating that it was found in the French archives. See THORPE, *supra* note 80. See also *supra* notes 82-84 and accompanying text.

¹⁵² PINEAU, *supra* note 15, at 141.

¹⁵³ Letter from Guy Mollet, French Prime Minister, to Anthony Eden, British Prime

to Mollet, and did not mention Ben-Gurion, in keeping with Eden's determination to avoid any mention of collaboration with Israel.¹⁵⁴ Mollet then composed a letter to Ben-Gurion ratifying the agreement to go to war with Eden's letter attached to it.¹⁵⁵

Following Israel's invasion of Egypt, Mollet called his cabinet to an emergency meeting to approve the appeal/ultimatum to Israel and Egypt. The ministers, who were not members of the inner cabinet, were not privy to the plans and were not expecting a war against Egypt, but they agreed to give it a chance.¹⁵⁶ After some deliberation, the measure received unanimous approval.¹⁵⁷ Mollet and Pineau then flew to London to meet with Eden, who had by then secured his own cabinet's endorsement of the ultimatum.¹⁵⁸ The two prime ministers had concerns about the timing of the ultimatum because of Eisenhower's opposition, but overcame their hesitation.¹⁵⁹ British General Keightly was ordered to occupy the Canal Zone as soon as Egypt rejected the ultimatum.¹⁶⁰

Returning to Paris in the evening, Mollet headed to the National Assembly. He presented the French and British ultimatum issued to Israel and Egypt earlier that afternoon and asked for "a massive vote of support, one that will send the message of the resolve and peaceful intentions of the French people."¹⁶¹ Indeed, he got just the support he was hoping for. Unlike the

Minister (Oct. 25, 1956), reprinted in Troen, S. Ilan, *The Protocol of Sevres: British/French/Israeli Collusion Against Egypt, 1965*, 1:2 ISRAELI STUDIES 122, 137 (1996), available at <http://www.brandeis.edu/israelcenter/about/troen1/TheProtocolOfSevres.pdf>.

¹⁵⁴ *Id.* (full text of the letter).

¹⁵⁵ Letter from Guy Mollet, French Prime Minister, to Ben-Gurion, Israeli Prime Minister (Oct. 25, 1956), reprinted in 11 DOCUMENTS ON THE FOREIGN POLICY OF ISRAEL 821-22 (Baruch Gilead, 2008) ("Mon cher Premier Ministre: Je vous confirme l'accord du gouvernement Français sur le résultat des conversations de Sévres et les termes du protocole final auquel ils ont donné lieu."). See also GOLANI, *supra* note 27, at 374 (1997). Eden sent emissaries to get French and Israeli copies of the agreement destroyed, but "by then Ben-Gurion's copy was hidden deep in his breast pocket." BAR-ON, *supra* note 37, at 243.

¹⁵⁶ Bar-Zohar, *supra* note 139, at 174.

¹⁵⁷ *Foreign Relations of the United States 1955-1957*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN n.2, <http://history.state.gov/historicaldocuments/frus1955-57v16/d422#fnref1> (last visited Mar. 19, 2015) ("French Cabinet that morning had unanimously approved French military intervention in the Suez Canal Zone.").

¹⁵⁸ *Id.* ("The Embassy . . . noted that Pineau had left for London at 9:30 a.m. . . and Mollet at 11:30 a.m.").

¹⁵⁹ FULLICK, *supra* note 128, at 92 ("Eden had taken the precaution of delaying his cable to Eisenhower telling him about the ultimatum . . . [thus]avoiding the danger of the President bringing last minute pressure on him to withhold it.").

¹⁶⁰ The French had already prepared bills designed to replace the Egyptian money in the occupied Zone. Other plans for the occupation were also completed.

¹⁶¹ Council of the Republic, Parliamentary Debates, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], October 30, 1956, p. 2109-

British public, the French were eager to see an energetic government ready to do what it took to quell the rebellion in Algeria.¹⁶² Many saw Nasser as directly responsible for the trouble in Algeria and therefor approved of action against Egypt.¹⁶³ The French National Assembly voted in favor by a margin of 368 and 182 against.¹⁶⁴ In France's upper chamber, the Sénat, Mollet's Minister of Justice François Mitterrand (to be France's President decades later) presented the motion. Mitterrand was not privy to the war plans, but went along with the plan.¹⁶⁵ The Senate vote was even more enthusiastic: 289 were in favor and only 19 opposed.¹⁶⁶ It is clear that the constitutional check on a trigger-happy executive was missing. The French Prime Minister did not feel that Article Seven of the French Constitution, which requires a declaration of war prior to issuing the ultimatum, should be literally followed. Rather, he probably believed that a formal endorsement after the ultimatum was issued and French Forces already engaged would suffice. The Prime Minister was likely confident that the Assembly would give him retroactive support. Needless to say, the Sèvres Protocol was not mentioned. In the protocol France had specifically agreed to provide the Israel air support until the Egyptian air force was destroyed.¹⁶⁷ This provision, written in an appendix to the Protocol, was kept secret from the British, and withheld from the French Parliament as well.¹⁶⁸ It is however doubtful that knowledge of the Appendix would have affected the majority of French Parliamentarians. For them, the legal niceties could not be held as barriers to what they considered a necessary and imperative action.

38. See also BARALE, JEAN, *LA CONSTITUTION DE LA IVÈ RÉPUBLIQUE À L'ÉPREUVE DE LA GUERRE 184-85* (1964). According to Barale, members of the assembly regretted the quick approval they gave the prime minister, once they realized the dimensions of the debacle. *Id.* at 186.

¹⁶² KHOURI, FRED JOHN, *THE ARAB-ISRAELI DILEMMA* 211 (3d ed. 1985) (asserting that since the French blamed Egypt for the uprising in Algeria, "public opinion gave very strong support for the use of armed power in order to save French pride.").

¹⁶³ *Id.* ("France blamed Egypt's material and moral support for the persistence of the Algerian rebellion.").

¹⁶⁴ ELGEY, *supra* note 110.

¹⁶⁵ SALLY BAUMANN-REYNOLDS, *FRANÇOIS MITTERRAND: THE MAKING OF A SOCIALIST PRINCE IN REPUBLICAN FRANCE* 53 (1995).

¹⁶⁶ National Assembly, Parliamentary Debates, *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, October 30, 1956, p. 4421-26.

¹⁶⁷ KYLE, *supra* note 17, at 566 ("The French Government undertakes to . . . ensure the air defense of Israeli territory.").

¹⁶⁸ *Id.* at 566 (suggesting that France and Israel, "did not mention [the appendix] to the British representatives"). DAVID CARLTON, *Great Britain, France and the Suez Crisis*, in *LA FRANCE ET L'OPÉRATION DE SUEZ DE 1956*, at 63-64 (Ministre de la Défense, centre d'études d'histoire de la défense).

3. *Aftermath*: Modifying the Constitutional Framework of War Powers

In 1958, Charles de Gaul came to power.¹⁶⁹ He insisted that a new form of government be established for France.¹⁷⁰ The new French Constitution inaugurated the Fifth French Republic in place today. At first, Article 35 of the Constitution of the Fifth Republic deviated only slightly from the arrangement obtained during the Fourth Republic. It required that a declaration of war be made by parliament, thereby implying that the government should bring forth a proposal upon which parliament would deliberate, before the vote.¹⁷¹ In the twenty-first century, following the two Iraq wars, France, like Britain, reconsidered its constitutional arrangement regarding war powers.¹⁷² It was felt that in the twenty-first century a declaration of war was too archaic to control the practice of sending troops abroad for purposes of “exterior operations,” or military ventures that would not involve the homeland.¹⁷³ Still, French legislators thought that the financial burden of a war as well as the need for the legitimacy of the use of force necessitated parliamentary debate and approval.¹⁷⁴ Two Commissions, one in the National Assembly and one in the Senate studied the matter.¹⁷⁵ The prevailing sentiment was that the traditional discretion granted the executive in war matters should be maintained, but that legislative deliberations based upon timely information was imperative. In 2008 Article 35 was amended as follows:¹⁷⁶

A declaration of war shall be authorized by Parliament. The Government shall inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of said intervention. It shall detail the objectives of the said intervention. This information may give rise to a debate, which shall not be followed by a vote.

Where the said intervention shall exceed four months, the Government shall submit the extension to Parliament for authorization. It may ask the National Assembly to make the final decision.

¹⁶⁹ 1958: *De Gaulle Returns to Tackle Algeria*, BBC, news.bbc.co.uk/onthisday/hi/dates/stories/june/1/newsid_2995000/2995283.stm (last visited Mar. 23, 2015) (detailing de Gaul’s political career, including his return to power in 1958).

¹⁷⁰ *Id.*

¹⁷¹ 1958 CONST. 35 (Fr.) (“La declaration de guerre est autorisee par le Parlement”). According to Debbasch the text of the government’s proposal must refer to Article 35. *See* DEBBASCH ET AL., DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 919 (3rd ed., 1990); *see also* DUVERGER, M, CONSTITUTIONS ET DOCUMENTS POLITIQUES (10th ed., 1987).

¹⁷² *See* Assemblée Nationale No. 890, at 15-22 (2008).

¹⁷³ *Id.* at 16.

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *See* Assemblée Nationale No. 890 (2008); Senate No. 388 (2008).

¹⁷⁶ July, 9, 2008, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.]; Senate Report, June 19, 2008, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.].

If Parliament is not sitting at the end of the four-month period, it shall express its decision at the opening of the following session.¹⁷⁷

Thus, the new French arrangement is somewhat similar to the recommendations put forward in Britain and closer to the arrangement provided by the U.S. War Powers Resolution.¹⁷⁸ It requires that notification to parliament be submitted rather quickly—within three days. However, it gives the Executive enough rope to pursue military action because it does not require a parliamentary vote that might embarrass the executive or cause a governmental crisis. That rope, however, lasts for four months. After that, a parliamentary authorization is required.¹⁷⁹

D. *Israel*

1. Constitutional Framework

With the end of the British Mandate over Palestine in 1948, a ferocious war erupted.¹⁸⁰ The Jewish population in Palestine declared an independent Jewish state and named it Israel.¹⁸¹ The United Nations endorsed the idea of a Jewish state but neither the Palestinians nor Israel's Arab neighbors accepted the new state as a legitimate fait accompli.¹⁸² Israel's Arab neighbors invaded the state, openly calling for its annihilation.¹⁸³ From the Israeli perspective, this was a classic war of self-defense.¹⁸⁴ Since 1948, Israel has fought many wars: wars of self-defense, preventive wars, and preemptive wars.¹⁸⁵ The second war in

¹⁷⁷ *Assemblée Nationale*, REPUBLIC OF FR., www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly (last visited Mar. 23, 2015).

¹⁷⁸ War Powers Resolution, 50 U.S.C. § 1541-1548 (2012) (“It is the purpose of this chapter to . . . insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”).

¹⁷⁹ Note that like the British proposal, the French constitutional amendment addresses the issue of executive action when parliament is not in session. The entire structure is more flexible than the U.S. War Powers Resolution and tries to strike a delicate balance between the needs of war and the needs to impose democratic oversight.

¹⁸⁰ ANITA SHAPIRA, *ISRAEL: A HISTORY* 155-76 (2012).

¹⁸¹ Shimon Shetreet, *The Grey Area of War Powers: The Case of Israel*, 45 *JERUSALEM Q.* 27, 27 (1988) (citing Israel's establishment as a self-proclaimed independent state in 1948).

¹⁸² BAR-ON, *supra* note 37, at 23 (explaining that in 1949 a major Arabic radio station announced: “We shall never stop planning . . . for the second round in which the Jews will be driven from our land”)

¹⁸³ KYLE, *supra* note 17, at 29-30 (detailing the response of Arab states when Israel declared itself an independent nation).

¹⁸⁴ GOLANI, *supra* note 27, at vi (describing Israel's view of war with her Arab neighbors as, “defensive . . . undertaken reluctantly in response to an Arab attack”).

¹⁸⁵ Shetreet, *supra* note 181 at 27 (observing that since 1948, Israel “has been involved in six wars”).

this never-ending chain of wars took place in 1956, and is known as the Sinai, or the Kadesh, Campaign.¹⁸⁶

Israel's Declaration of Independence explicitly expected a constitution to be adopted after the first popular elections.¹⁸⁷ Following the elections in 1949, however, the assembly changed its name to the "Knesset," and the constitution writing project was shelved.¹⁸⁸ A Knesset resolution stated that a series of Basic Laws would be passed, which together would form a constitution.¹⁸⁹ No timetable for the project was set. By 1956 no Basic Law had yet been passed, but two Basic Laws, one regulating the Knesset and one regulating the executive branch, were being drafted and discussed.¹⁹⁰ None of these statutes addressed the matter of war powers.¹⁹¹ Should war be declared? By whom? In what process? It is interesting to reflect on the question why such a central issue, particularly vital in the case of Israel, was met with silence.¹⁹²

2. The Road to War

It may well be that the Prime Minister was taking his cue from England, rather than from the United States or France.¹⁹³ The Israeli equivalent of the

¹⁸⁶ The title "Kadesh" harked back to the biblical epic of the Israelites' exodus from Egypt. According to the Bible, the Israelites camped in Kadesh before embarking on their journey to the land of Israel. 13 *Numbers* 26 ("They came back to Moses and Aaron and the whole Israelite community at Kadesh."). Between 1948 and 1956 Israel engaged in numerous military "raids", some of them bearing certain features of war. Shetreet, *supra* note 181, at 27 (suggesting that even when Israel was not at war, the interim periods were marked by continued conflict.) The Sinai Campaign, while designated as a campaign to distinguish it from an act of war, bore many features of war.

¹⁸⁷ THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (May 14, 1948), available at <http://mfa.gov.il/MFA/Pages/default.aspx> ([T]he Constitution . . . shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948.").

¹⁸⁸ A. RUBINSTEIN & B. MEDINA, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 80 (6th ed., 2005).

¹⁸⁹ AVNER YANIV, *A Question of Survival: The Military and Politics Under Siege*, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 96 (Avner Yaniv ed., 1993) (asserting that the governing body agreed to work out a constitution in a piecemeal fashion, comprised of multiple 'basic laws').

¹⁹⁰ RUBINSTEIN & MEDINA, *supra* note 188 at 713, 821.

¹⁹¹ Shetreet, *supra* note 181, at 28 (lamenting that even after a *Basic Law* titled *The Army* was passed, "there remained many undefined areas, including the powers of the government, its relationship to the defense minister and the ways to put into effect civilian authority over the army."); YANIV, *supra* note 189, at 96 ("The key question of who decides what, when, and how remains in abeyance.").

¹⁹² Matters of security and statutes related to military conscription and other aspects of national security were vigorously debated and legislated throughout the period. It is interesting that the one canonical tome on Israeli constitutional law, Rubinstein and Medina, does not include a discussion of the procedures to declare or make war.

¹⁹³ In general, Israelis like to think of their constitutional model as based upon the Westminster model. A closer look shows a pastiche of various influences, from the Ottoman

English royal prerogative was presumably, and impliedly, vested in the Israeli cabinet.¹⁹⁴ It is safe to expect that not much thought was given to the subject, as Israel was expecting to fight only wars of self-defense, making a military response imperative and in keeping with the U.N. Charter.¹⁹⁵ Such wars needed swift and decisive execution, and could therefore be rationally placed in the hands of the Executive. The decision concerning a preventive or preemptive war of choice was not contemplated and thus, one may theorize, did not require a legal arrangement. The Israeli pattern, therefore, appears to have been unfolding haphazardly and ad hoc.

Prime Minister David Ben-Gurion was familiar with and committed to constitutional governance. Ben-Gurion was eager to model Israel after the Western Democratic example, including its component of the rule of law.¹⁹⁶ He understood well that he could not be the sole decision maker when it came to acts of war.¹⁹⁷ This is why he brought the decision regarding Suez to the Cabinet on October 28, 1956.¹⁹⁸ The debate in the Cabinet was lively and ended in an approval of the motion to launch “an action of several raids.”¹⁹⁹

to the French and the German. The term Basic Law is borrowed from the procedure adopted in West Germany after WWII. DANA ZARTNER, *COURTS, CODES, AND CUSTOM* 93 (2014) (referencing Germany’s post-WWII reorganization via their “basic laws”).

¹⁹⁴ Because the original Basic Law: The Government did not address the issue of war powers, it appears that section 32 of the *Basic Law* applied. This section stated: “The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority.” BASIC LAW: THE GOVERNMENT, 5761-2001, 23 LSI 32 (Isr.), available at <http://www.mfa.gov.il/MFA/MFA-Archive/2001/Pages/Basic%20Law-%20The%20Government%20-2001-.aspx>. See Shetreet, Shimon, *Democracy Under Conditions of War in Israel*, in *PEOPLE AND STATE – ISRAELI SOCIETY* 158- 160 (S. Stampfer ed., 1989).

¹⁹⁵ Indeed Israel publicly considered the Suez War to have been one of self-defense, even though a substantial percentage of the population understood it as a war of choice, or “milhama yezuma.” For an excellent discussion of this see Golani, Motti, *Did Ben Gurion Support or Oppose Dayan? Israel on the Road to a Preemptive War*, 81 *CATHEDRA* 123 (1996) [hereinafter *Golani Dayan*].

¹⁹⁶ NIR KEDAR, *MAMLAKHTIYUT, DAVID BEN-GURION’S CIVIC THOUGHT* 152-65 (2009)

¹⁹⁷ See generally *id.* (explaining Ben Gurion’s political thought). The precedent to introducing the Israeli armed forces into hostilities was set in 1955, when Ben Gurion presented the cabinet with a motion to invade the Gaza strip. ZACH LEVEY, *ISRAEL AND THE WESTERN POWERS* 20 (1997) (documenting that on March 29, 1955 Ben Gurion suggested Israel invade Gaza). The motion failed. *Id.* at 20 (stating that Prime Minister Sharett mustered a majority cabinet vote to defeat the proposal to invade Gaza). Thereafter, motions to open hostilities (or a preventive war) were brought to the cabinet for approval. Golani, *Dayan, supra* note 195, at 128.

¹⁹⁸ Lahav, *supra* note 12 (“On Sunday 28 October 1956, Israel’s cabinet held its regular weekly meeting. Ben-Gurion placed on the table a motion ‘to perform an action of several raids.’”).

¹⁹⁹ *Id.* at 69. Note that despite the British and French insistence that Israel perform “war like acts” the prime minister avoided the term war and stuck to the description of “several

Two ministers, both members of the left-wing Mapam Party, dissented, warning the cabinet that it was approving a preventive war the end of which could not be foreseen.²⁰⁰ However, like Lord Walter Monkton, the British Secretary of Defense, they did not resign in protest.²⁰¹ They stayed and assumed collective responsibility. Thereby, a pattern and a precedent had been set: the Prime Minister should bring a motion to launch a war before the entire cabinet and seek their approval by majority vote.²⁰²

The cabinet's decision was like a cover hiding the contents of a boiling pot. The unarticulated constitutional standard was not actually followed. By the time Ben-Gurion convened his cabinet, the Chief of Staff had already declared an emergency mobilization of the reserves.²⁰³ The engine of the war machine was ignited and running. Even more importantly, the State of Israel, in utmost secrecy and through its prime minister, had already committed in writing to perform an act of aggressive war. The question whether the Israeli cabinet could, at that moment, vote against the motion was merely rhetorical. In theory, maybe yes. But in practice, the tiny and vulnerable Israel could not turn the tables on France and Britain, the big frogs in the pond, nor would the cabinet vote against Israel's revered and powerful prime minister.

Upon arriving in Tel Aviv from Sèvres with the Sèvres Protocol in his breast pocket and the cabinet meeting two days away, Ben-Gurion engaged in a marathon of meetings with cabinet ministers representing the different coalition parties, persuading each, one-by-one, to support the motion.²⁰⁴ On Sunday, October 28, he arrived at the meeting confident that a majority of the ministers would vote for the motion.²⁰⁵

raids." *Id.* at 64 ("He used the term raid or raids to designate the military action on the table, repeating it ten times during his presentation.") He was thereby signaling alignment with Britain and France who called their own planned acts of aggression "operation" or "expedition".

²⁰⁰ *Id.* at 63 ("Mapam, whose members opposed the motion, was represented by ministers Mordechai Bentov . . . and Israel Barzilai.").

²⁰¹ *Id.* at 66 ("Following approval, the two dissenters stated that they would remain in the cabinet rather than resign.").

²⁰² *See id.* In his book *The Gates of Gaza: Israel's Road to Suez and Back, 1955-1957*, Mordechai Bar-On reports a strong disagreement with Ben-Gurion by several cabinet members before the cabinet meeting after the prime minister return from France. BAR-ON, *supra* note 37. *See also* MICHAEL BRECHER, *DECISIONS IN ISRAEL'S FOREIGN POLICY 275-76* (1975) (stating that Ben-Gurion also informed two members of the Knesset Committee of Foreign Affairs and Security as well as leaders of the opposition).

²⁰³ BAR-ON, *supra* note 37, at 298.

²⁰⁴ *See* Lahav, *supra* note 12, at 63 n.6 ("Ben-Gurion returned from Sèvres late on Wednesday 24 October. As minister of defense, he had four days to prepare his military for the attack and to persuade his cabinet for launching the war."). The consultations continued throughout the Sabbath. Golani, *supra* note 27, at 398.

²⁰⁵ *Id.* at 193 ("[T]he formal Cabinet decision was made only one day in advance [of the attack], on October 28, without significant opposition.").

The Israeli cabinet, just like the British and French cabinets, was approving a deal already done, a plan already put into motion by the Prime Minister.²⁰⁶ But the structure of the Israeli Cabinet was different. Ben-Gurion served as both Prime Minister and Minister of Defense.²⁰⁷ Therefore, he did not need to persuade another central decision maker, an expert in matters of defense who enjoyed the confidence of Parliament, that this action was necessary and legitimate.²⁰⁸ Nor did Ben-Gurion have a strong Minister of Foreign Affairs to evaluate the scene from the perspective of international relations, not to mention international law.²⁰⁹ Until June 1956, the Minister of Foreign Affairs was Moshe Sharett, a man known for preferring diplomatic rather than military solutions.²¹⁰ In 1955, Sharett had led the cabinet to derail a plan by Ben-Gurion to launch major raids or small-scale wars.²¹¹ In anticipation of a war against Egypt, Ben-Gurion decided to dispose of this skilled and powerful troublemaker and dissenting voice.²¹² In June 1956, Ben-Gurion maneuvered Sharett out of the cabinet and appointed his close confidante, Golda Meir, in his stead.²¹³ As we saw above, Golda Meir did not support the proposal that Israel play the role of aggressor and was unhappy about a war fought behind Eisenhower's back, but her loyalty to Ben-Gurion trumped her reservations.²¹⁴ Following her expression of doubt concerning the French plans, Meir was excluded from the inner circle of men planning the war. She was not invited to

²⁰⁶ *Id.* (“Ben-Gurion had no problems obtaining public acceptance for the decision.”).

²⁰⁷ *See* KYLE, *supra* note 17, at 79 (“On 2 November [1955] Ben-Gurion was confirmed in office as Prime Minister and Minister of Defence.”).

²⁰⁸ Recall that Lord Walter Monkton, Eden's Secretary of Defense, resigned from his position because of his doubts about the plan but stayed in the cabinet; French Minister of Defense Bourges-Maunoury was actually the mastermind of the plan.

²⁰⁹ French Minister of Foreign Affairs Christian Pineau was an early supporter of the plan. *See* GOLANI, *supra* note 27, at 117 (describing how Pineau urged the Israelis that “the opportunity for a joint operation against Nasser should not be missed”). British Minister of Foreign Affairs Selwyn Lloyd was skeptical and tried to negotiate a compromise with the Egyptians, but he ultimately deferred to his Prime Minister. *Id.* at 118 (remarking that Lloyd's arrival at Sèvres surprised the French, “since they knew the depth of his objections to collaboration with Israel”).

²¹⁰ *See* KYLE, *supra* note 17, at 118 (“On the day after the Chantilly conference opened [June 24, 1956], Moshe Sharett . . . was suddenly and brutally forced to resign.”).

²¹¹ “Operation Omer” was designed to forcibly open the Straits of Tiran shut off by Nasser in violation of international law. *See* GOLANI, *supra* note 27, at 14 (describing Operation Omer). The Cabinet decided to postpone an Israeli-initiated war and ultimately cancel Operation Omer. *Id.* at 16-17 (discussing the Cabinet's decision).

²¹² *See* KYLE, *supra* note 17, at 66 (stating that the “disharmony . . . between Ben-Gurion and Sharett was no secret”).

²¹³ *Id.* at 118 (stating that Sharett “was suddenly and brutally forced to resign”).

²¹⁴ *See* FREIBERGER, *supra* note 7, at 181 (“Pineau was pleased when Israeli Foreign Minister Golda Meir agreed to pursue joint action with the French even if the British should refuse to take part.”).

the Sèvres conference.²¹⁵ The relative weakness of the Minister of Foreign Affairs in the Israeli cabinet was somewhat similar to that obtaining in the United Kingdom. In both cases the Minister of Foreign Affairs, despite substantial reservations, adhered to the Prime Minister's plan and supported him in the final cabinet meeting that approved the motion to go to war.²¹⁶ On the other hand, the French Minister of Foreign Affairs, Christian Pineau, was an active player in bringing the military plans to fruition.²¹⁷ He remained a Minister of Foreign Affairs after Guy Mollet had stepped down and the hawkish Bourjès-Maunoury was sworn in as Prime Minister.²¹⁸ Just like in France, the Israeli actors who relentlessly pushed for and implemented the war plan were the high echelons of the military and appointed officials in the Ministry of Defense.²¹⁹ Two Israelis were particularly decisive: Chief of Staff Moshe Dayan and Director General of the Ministry of Defense Shimon Peres.²²⁰ Even at Sèvres, Ben-Gurion kept entertaining doubts about the plan hatched by the French, who were pushing him to accept the idea that Israel be the chief law violator.²²¹ Dayan and Peres, working in tandem, vigorously and assiduously pushed Ben-Gurion to make the fateful decision.²²² This state of affairs breached one of the cardinal elements of basic constitutionalism: the separation of the civilian and military command.²²³ Dayan and Peres, the first a

²¹⁵ See KYLE, *supra* note 17, at 314-323 (discussing important figures at the Sèvres conference).

²¹⁶ Lahav, *supra* note 12, at 75 ("Meir, whose cabinet role should have required analysis of the international scene, and who was savvy about international affairs, defended the plan in generalities, 'the world' would condemn Israel, but 'we shall overcome.'").

²¹⁷ FULLICK & POWELL, *supra* note 128, at 80-84 (describing Pineau's participation in the discussions and planning at Sèvres).

²¹⁸ See KYLE, *supra* note 17, at 548 (discussing how Bourjès-Maunoury emerged as Prime Minister).

²¹⁹ *Id.* at 316 (stating that "[a]part from Ben-Gurion himself there were no [Israeli] politicians" at Sèvres, but there were several military advisors).

²²⁰ Besides supplying Israel a substantial amount of arms and recognizing Israel as a major ally in the international arena, the French also assisted Israel in building its nuclear power plant in Dimona. See Uri Bialer, *Top Hat, Tuxedo and Cannons: Israeli Foreign Policy from 1948 to 1956 as a Field of Study*, 7 ISRAELI STUD. 1, 68-69 (2002) (remarking on Israel's "success in forming a strategic tie with France that included assistance in developing nuclear weapons"). Rumors have been circulating for years that the nuclear plant was a quid pro quo for the Israeli acquiescence to take the role of aggressor and invade the Sinai. BAR-ON, *supra* note 85, at 514. At Sèvres, Prime Minister Guy Mollet made it clear to Prime Minister Ben-Gurion that the nuclear deal was tied to Israel's willingness to play the part of the aggressor in the Suez War.

²²¹ See FULLICK & POWELL, *supra* note 128, at 81 ("To him [Ben-Gurion] it was an abomination to see Israel condemned as an aggressor.").

²²² *Id.* at 84 (describing how Peres and Dayan persuaded Ben-Gurion to agree to the plan).

²²³ In 1976, following the Yom Kippur War, the Knesset finally addressed this lacuna.

military commander of great charisma and the second an ambitious civilian appointee with no accountability to Parliament, prevailed upon the Prime Minister to accept the offer.²²⁴ The brakes—checks and balances—expected from a war cabinet representing various perspectives and public interests stood out in their absence.²²⁵ When Ben-Gurion brought the motion to his cabinet on October 28, the matter had already been decided. Indeed, a spirited debate ensued, but the end result was not in doubt.²²⁶ The troops were ready and the orders delivered.²²⁷ Israel was on its way to war.

3. *Aftermath*: Modifying the Constitutional Framework of War Powers

The pattern established by Ben-Gurion slowly crystallized into dogma. Wars were generally perceived as matters of self-defense, to be decided by the Prime Minister and the Minister of Defense (until 1967 the same person) upon the advice of the higher military echelons.²²⁸ When the Knesset passed Basic Law: The Government (with the expectation that eventually the basic laws would be collected into a constitution), not much thought was given to the question

Basic Law: The Military, 5736-1976, SH No. 1197, p. 418 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic11_eng.htm (“The Army is subject to the authority of the government.”). For Dayan’s zealous commitment to go to war, see MORDECHAI BAR-ON, MOSHE DAYAN: A BIOGRAPHY 1915-1981 (2014)(Isr.). Bar-On concludes: “It is hard to exaggerate Dayan’s role in finalizing the decision to launch the war in the Sinai. The decision was ultimately in the hands of Ben-Gurion, but Dayan knew how to handle his actions and his proposals in a way that will allow Ben-Gurion to reach a positive conclusion.” *Id.* at 155. Michael Bar-Zohar, the biographer of Shimon Peres and a Suez War enthusiast, emphasizes Peres’s pivotal role in bringing the idea of a war to fruition. MICHAEL BAR-ZOHAR, SHIMON PERES: THE BIOGRAPHY 194-209 (2006) (Isr.). For a general overview of the separation of civilian and military command, see also YORAM PERI, GENERALS IN THE CABINET ROOM: HOW THE MILITARY SHAPES ISRAELI POLICY (2006), particularly chapter 1 (discussing the civil-military relations in Israel). See also *infra* note 229.

²²⁴ FULLICK & POWELL, *supra* note 128, at 84 (describing how Peres and Dayan persuaded Ben-Gurion to agree to the plan).

²²⁵ Although still shrouded in secrecy, it may well be that the French offer could be categorized as an offer “one could not refuse.” Rumors are that the French willingness to help Israel establish a nuclear reactor in Dimona was attached to Israel’s willingness to start a war. Another important military consideration was France’s willingness to sell Israel more sophisticated arms, willingness tied to Israeli cooperation in a war against Egypt. See ELGEY, *supra* note 110, at 173 (describing how the nuclear deal between Israel and France was reached).

²²⁶ See generally Lahav, *supra* note 12 (describing in detail the structure of the Cabinet’s deliberations and the concerns raised during the meeting).

²²⁷ FULLICK & POWELL, *supra* note 128, at 84-85 (summarizing the terms of the Sèvres Protocol, which included that Israel would launch a “strong attack” on October 29, 1956 near the Canal Zone).

²²⁸ See Lahav, *supra* note 12, at 64 n.10 (“[T]he policy of Israel’s government was to conduct ‘raids’ or limited combat operations, justifying them as acts of ‘self-defense.’”).

under whose authority should the country decide to go to war and how that decision should be made. Following the Yom Kippur War and public outcry concerning the vague relationship between the top military command and the Minister of Defense (Moshe Dayan, mastermind of the Suez War), the Knesset enacted Basic Law: The Army, which formally subordinated the military forces to the civilian cabinet.²²⁹ In 1982, Prime Minister Menachem Begin and his Minister of Defense, Ariel Sharon (a young officer during the Suez War), led Israel in an invasion of Lebanon that was first presented as an act of self-defense but soon unraveled as a war of choice.²³⁰ A year later, as the public became increasingly critical of the government's handling of the war, Professor Shimon Shetreet of the Hebrew University submitted a proposal to the Knesset to amend Basic Law: The Government and for the first time regulate the war powers.²³¹ This initiative led to the present Section 40 to Basic Law: The Government, which provides:

40. (a) The state may only begin a war pursuant to a Government decision.

(b) Nothing in the provisions of this section will prevent the adoption of military actions necessary for the defence of the state and public security.

(c) Notification of a Government decision to begin a war under the provision of subsection (a) will be submitted to the Knesset Foreign Affairs and Security Committee as soon as possible; the Prime Minister also will give notice to the Knesset plenum as soon as possible; notification regarding military actions as stated in subsection (b) will be given to the Knesset Foreign Affairs and Security Committee as soon as possible²³²

²²⁹ Basic Law: The Military, 5736-1976, SH No. 1197, p. 418 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic11_eng.htm ("The Army is subject to the authority of the Government. . . . The Minister in charge of the Army on behalf of the Government is the Minister of Defence."). For discussion of the constitutional responsibility of the civilian and military echelons in the aftermath of the Yom Kippur War, see PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 229-37 (1997) (discussing how the Agranat Commission was tasked with investigating the war and it "considered two distinct loci of responsibility: the government and the military command").

²³⁰ See Dan Horowitz, *The Israeli Concept of National Security*, in NATIONAL SECURITY & DEMOCRACY IN ISRAEL, 11, 41 (Avner Yaniv ed., 1993) (examining the distinction between "wars of no choice" and "wars of choice" in the Lebanon War context).

²³¹ DK (1992) 2071 (Isr.) (documenting deliberations on amendments to Basic Law: The Government).

²³² Basic Law: The Government, 5761-2001, SH No. 1780 p. 158 (Isr.), available at https://www.knesset.gov.il/laws/special/eng/basic14_eng.htm. This section mirrors the replaced Section 51 of Basic Law: The Government. It came into effect in 2003. *Id.* ("law entered into effect with the January 2003 Knesset elections"); Basic Law: The Government, 5752-1992, SH No. 1396 p. 214 (Isr.) (repealed 2001), available at

Section 40(a) captures the constitutional situation as applied by Prime Minister Ben-Gurion in the Suez Crisis. The Government, presumably its plenum rather than its “war cabinet,” is expected by law to make the decision to go to war.²³³ Section 40(b), however, provides the Executive with a safety valve that may facilitate the circumvention of the legal requirement to have the cabinet vote on a decision to go to war.²³⁴ By providing that “nothing in the provisions of this section will prevent the adoption of military actions necessary for the defense of the state and public security,” this subsection in fact allows the introduction of Israeli forces into hostilities without a full cabinet approval if it is decided that such action is necessary for the defense of the State.²³⁵ This subsection both proves the enormous significance of the word “nothing” (if war is a matter of life and death then *everything* may hinge on that “nothing”) and the firm conviction that various forms of war acts cannot be squeezed into any legal formula.²³⁶ Subsection (b) does not indicate who may make such fateful decisions. Is it the Prime Minister? The war cabinet? The Chief of Staff? Any military officer or perhaps even a rabbi? This arrangement captures another aspect of the Suez crisis history. Indeed, the cabinet voted on the motion to go to war on October 28, 1956. But the contract between Israel, France and the United Kingdom under which Israel formally committed itself to go to war was signed at Sèvres, France on October 24. Prime Minister Ben-Gurion, jostled by Moshe Dayan, his Chief of Staff and Shimon Peres, the Director General of the Ministry of Defense, made that decision.²³⁷ From the perspective of constitutional authority, one elected official (albeit revered and central) took it upon himself to commit the country to war. It appears that this state of affairs, consciously or not, stands behind Section 40(b). Thus, the pattern developed during the Suez Crisis has remained as the model followed by Israel’s decision makers.

http://www.knesset.gov.il/laws/special/eng/basic7_eng.htm.

²³³ Section 6 of the Government Law, 2001 provides that within the government there shall be a “national security committee” (similar to the British inner cabinet?) whose members shall be the Prime Minister, the Deputy Prime Minister, if one is appointed, the Minister of Defense, the Minister of Justice, the Minister of Foreign Affairs, the Minister of Internal Security and the Minister of the Treasury. Section 6 further provides that the number of committee members may be expanded, provided it does not reach more than half of the number of the members in the cabinet itself. One may expect the initial decision to go to war to be made by the inner cabinet, but clearly Section 40(a) requires a vote by the entire cabinet to make the decision to go to war legal. Note that the Government Law should be distinguished from Basic Law: The Government and is designed to include technical arrangements.

²³⁴ Basic Law: The Government, 5761-2001.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *supra* notes 82-85 and accompanying text.

Section 40(c) delineates the role of the people's representatives—the legislature—in the context of the war powers.²³⁸ The executive branch is expected to notify the Knesset's Foreign Affairs and Security Committee and the Prime Minister is expected to also give notice to the Knesset plenum.²³⁹ The timing contemplated by Section 40(c) structures the relationship between the executive and the legislature in matters of war powers: the notification is expected to take place “as soon as possible”—an ambiguous term that may indicate that when it comes to matters of war, the Knesset is secondary to the Executive and its schedule is controlled by the Executive.²⁴⁰ Action under Section 40(b)—confirming the legitimacy of a range of actions not authorized by the cabinet and yet valid—ignores the Knesset's plenum altogether and provides only for a notification to the Knesset's Foreign Affairs and Security Committee.²⁴¹ The term “notification” in this context is also significant. It does not call for a reasoned explanation of why the action was necessary “for the defense of the state or the public security” but only (presumably) for a statement that such action had been taken.²⁴² This arrangement should be compared with the U.S. expectation expressed in the War Powers Resolution as well as with the British and French efforts to enact the expectation of legislative deliberations in a timely manner (or, better, recognizing that time is of the essence) into the war powers paradigm.²⁴³

The history of Section 40 reveals the attachment of Israeli policymakers to the extreme flexibility granted the Executive in matters of war powers and the reluctance of legislators to demand a more meaningful share of this power. In 1992, following a lengthy campaign to change Israel's electoral system in the context of which the war powers were considered, the chair of the Judiciary Committee conceded that the matter of war powers had to be dropped because otherwise support for the electoral reform would fail.²⁴⁴ The year 1992 was one

²³⁸ Basic Law: The Government, *supra* note 234.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Note that the Minister of Defense at the time (Moshe Arens) opposed the requirement of notification, insisting it was not necessary. Of course, the full set of parliamentary oversight options are implicitly assumed to remain in place, from a vote of non-confidence to a parliamentary questioning. However, it is quite likely that Cicero's famous dictum “*Inter arma enim silent leges*” is particularly applicable in this context.

²⁴³ For a discussion of the relationship between time and war, see MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012). For example, most Americans believe that the United States entered World War II upon the attack on Pearl Harbor, but Dudziak shows that the nation's entry into that war demonstrates “the use of executive branch war-related powers outside of a declared war.” *Id.* at 40.

²⁴⁴ 1 MISHPAT UMIMSHAL: LAW & GOV'T IN ISRAEL 165 (1992) (discussing an interview with Uriel Lynn, Chair of the Judiciary Committee of the 12th Knesset) (Isr.). The electoral reform—direct popular elections of the Prime Minister (some variation on the U.S. presidential model) was a disappointment, and in 2003 Basic Law: The Government

of constitutional rejuvenation in the Israeli political climate. Not only were discussions of a new electoral system submitted to the Knesset, but for the first time, two Basic Laws entrenching some basic liberal rights were enacted.²⁴⁵ In this context and because of the contentious history of the 1982 Lebanon War, there were expectations that a more structured arrangement in the matter of the war powers could be enacted into law.²⁴⁶ The deliberations of the members of the Judiciary Committee prior to the passage of Section 40 reveal two contending camps. On the one hand were those who wished to specify in the law that any preventive, initiated, or aggressive war would require a decision by the plenum of the cabinet while other military acts be subjected to a variety of lesser institutional approvals.²⁴⁷ In addition, this camp wanted legal obligations placed on the Prime Minister or the Minister of Defense to appear personally before the Foreign Affairs and Security Committee when subpoenaed to discuss the security situation.²⁴⁸ On the other hand were those who preferred the status quo, arguing that Israel's dire situation and need for immediate, decisive action required vesting in the government a large measure of freedom of action.²⁴⁹ The Ministry of Justice, representing the government, made clear its lack of enthusiasm for any legislation on the matter. Ultimately, the language of Section 40 mirrored the status quo ante, but made it more

restored the previous electoral system.

²⁴⁵ Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.), available at http://knesset.gov.il/laws/special/eng/basic3_eng.htm; Basic Law: Freedom of Occupation, 5752-1992, SH No. 1387 p. 60 (Isr.), available at http://knesset.gov.il/laws/special/eng/basic5_eng.htm. These Basic Laws eventually led the way to judicial review.

²⁴⁶ See Horowitz, *supra* note 230, at 40-44 (discussing the Lebanon War and its effects on how the Arab-Israeli conflict was perceived).

²⁴⁷ The original Section 39(a) in the bill for the Basic Law stated: "The state will not declare war and will not initiate war." The proposal also subjected any executive decision to the approval of the Foreign Affairs and Security Committee. See, e.g., DK (1992) 2073 (Isr.); DK (1991) (Isr.) (on file with author) (documenting the deliberations of the Judiciary Committee on March 5, 1991, 12th Knesset); see also Shetreet, *supra* note 181, at 42-47 (calling for Israel to reform its war powers and reviewing proposals to that effect); ISRAELI LABOR PARTY, NEW DIRECTIONS: REFORM IN THE EXECUTIVE AND LEGISLATIVE OVERSIGHT OVER MILITARY ACTIONS (Shimon Shetreet, ed.) (on file with author). This report contains substantive proposals for subjecting a preventive war to the decision of the cabinet plenum and various requirements for less stringent forms of approval for a variety of other military actions.

²⁴⁸ See DK (1992) 37 (Isr.) (on file with author) (statement of M.K. M. Shachal during deliberations of the Judiciary Committee, Protocol 354, 12th Knesset on March 3, 1992). A representative of the Ministry of Defense opposed the idea of any mandatory reporting by the Minister of Defense. *Id.* at 34.

²⁴⁹ See, e.g., DK (1991) (Isr.) (documenting the deliberations of the Judiciary Committee, protocol 238 on March 5, 1991, 12th Knesset). The examples of the Entebbe Operation, the attack on the nuclear plant in Iraq, and the Six Day War were frequently raised by those supporting a free hand to the government. *Id.*

explicit as discussed above.²⁵⁰ A private bill to amend Section 40 and oblige the government to make its announcement related to the opening of hostilities “no later than forty eight hours” instead of “as soon as possible,” was shelved.²⁵¹

Efforts to engage the court in the interpretation of Section 40 were unsuccessful. In July 2006, after the beginning of the Second Lebanon War, a petition was brought before the High Court of Justice to require the government to invoke Section 40(a) and declare war.²⁵² A panel consisting of Chief Justice D. Beinisch, Justice A. Procaccia, and Justice E. Arbel, all women, rejected the petition. Israel has indeed gone a long way since 1956 to include women on the high court and thereby include women in making decisions related to war. But the parameters of the debate remained the same. The Government argued that it was acting on the basis of Section 40(b) rather than Section 40(a).²⁵³ Speaking for the Court, the Chief Justice held that “under the circumstances the government could decide that the military action referred not to starting a war but rather military action for self defense in reaction to aggression.”²⁵⁴ At the same time, the Court also held that Section 40(a) was in fact followed because the plenary of the government made the decision and reported its decision and actions to the Foreign Affairs and Security Committee.²⁵⁵ The opinion ended by stating that “[t]he way by which the government acted. . . fits its authority and the range of discretion vested in it

²⁵⁰ The language of Section 40 was incorporated into a proposal for a constitution for Israel by Professor Ariel Bendor, published in 5 MISHPAT UMIMSHAL: LAW & GOV'T IN ISRAEL 23 (1999) (Isr.), thereby giving it additional scholarly support.

²⁵¹ Private bill submitted on May 6, 2002. Operation Defensive Shield in the context of the Second Palestinian Intifada started a few weeks earlier. Evidently the nineteen legislators who proposed the bill sought some interaction with the executive. P/15/3701. A long discussion in the judiciary committee concerning the meaning of Section 40 took place in 2003. The Judiciary Committee, appointing itself as a “committee to pass a constitution based on nation-wide consensus, assembled an array of high level legal counsel and scholars to discuss who is the more appropriate branch of the government to make the decision to open a war. Some insisted that only the executive could make fast and efficient decisions and that “legal niceties” should not obstruct its ability to act. On the other hand, the scholars included in the committee leaned more towards parliamentary approval of decisions to go to war. It does not appear that the committee reached any conclusions and the matter appears to have been dropped. Protocol 112, December 15, 2003, 16th Knesset (on file with author).

²⁵² HCJ 6204 / 06 Beilin v. Prime Minister (2) IsrLR 99 [2006] (Isr.). Professor Beilin, a political scientist, served in several labor governments from 1995 through 2001.

²⁵³ *Id.* at 106 (“[T]he government saw no reason in the present situation why it should make use of its power under s. 40(a) of the Basic Law: the Government; according to its outlook, it is carrying out military operations in accordance with s. 40(b) of the Basic Law: the Government . . .”).

²⁵⁴ *Id.* at 108 (author’s translation).

²⁵⁵ *Id.* at 108 (“Even though the government decided that the military activity in Lebanon falls within the scope of the provisions of s. 40(b) of the Basic Law, de facto it also carried out all of the procedures stipulated in the law that are relevant to a decision under s. 40(a).”).

and therefore there is no cause for our intervention.”²⁵⁶ It should not be surprising to see the Court avoid the constitutional questions and refuse to take a stand in such matters. Yet, it is encouraging to see the Government reflect awareness of its limits and make an effort to reason its actions in terms of the law. Israel does not appear to be ready to follow the United States, the United Kingdom, or France and provide for substantial legislative involvement in the matters of war powers, but it does appear that some measure of parliamentary involvement has been achieved.

II. THE UNITED STATES

A. *Diplomacy: The U.S. Reaction to the Eruption of War in the Middle East*

As stated above, once Egypt nationalized the Suez Canal, the United States was intent on trying to achieve a diplomatic solution to the crisis.²⁵⁷ Secretary of State John Foster Dulles largely engineered the diplomatic effort in cooperation with the United Nations.²⁵⁸ American intelligence closely monitored the movement of forces in the area around the canal and documented British, French, and Israeli military maneuvers of a character indicating preparations for an impending war.²⁵⁹ President Eisenhower and his administration strongly warned the parties numerous times to refrain from any aggressive action.²⁶⁰ From the American perspective, the fact that the three belligerents succeeded in keeping their impending attack plans secret must have been experienced as a serious intelligence failure and a devastating betrayal of friendship, at least on the part of the British government.²⁶¹ To add

²⁵⁶ *Id.* at 108-09 (“[T]he manner in which the government acted in making the decisions under discussion is consistent with its powers and the scope of discretion given to it, and it does not give rise to any ground for our intervention . . .”).

²⁵⁷ There is voluminous literature on U.S./Egypt relations since Nasser’s rise to power. *See, e.g.*, Peter Hahn, *National Security Concerns in U.S. Policy Toward Egypt, 1949-1956*, in *THE MIDDLE EAST AND THE UNITED STATES: A HISTORICAL AND POLITICAL REASSESSMENT* 91, 97 (David W. Lesch, ed., 1996) (“Eisenhower sought to use diplomacy to delay a British attack, on the calculation that time would cool British tempers and avert war.”); JEAN EDWARD SMITH, *EISENHOWER IN WAR AND PEACE* 694-95 (2012) (discussing Eisenhower’s insistence that “Egypt was within its rights” and that war should be avoided).

²⁵⁸ *See, e.g.*, FREIBERGER, *supra* note 7 at 164 (1992) (discussing Dulles’s trip to London for an international conference in August 1956 to discuss international control of the Canal); SMITH, *supra* note 257, at 698 (describing Dulles’s presentation of the United States’ cease-fire resolution to the U.N. General Assembly).

²⁵⁹ FREIBERGER, *supra* note 7, at 184-86 (“Eisenhower administration officials were well aware that something serious was about to occur . . .”).

²⁶⁰ SMITH, *supra* note 257, at 695-97 (describing Eisenhower’s efforts to avert war).

²⁶¹ *Id.* at 697 (“[Eisenhower] felt he had been betrayed by [British Prime Minister] Eden and was furious.”).

injury to insult, the attack took place one week before the presidential election.²⁶²

Following the Israeli invasion but before the issuance of the ultimatum by Britain and France, President Eisenhower suspended much of his political campaign and focused on international affairs. His demand that Israel withdraw amounted to an ultimatum.²⁶³ Two days later, when he realized the British and French involvement, he immediately suspected collusion among the two European powers and Israel and was torn between two reactions.²⁶⁴ Britain had been the United States' most trusted and closest ally during WWII. It was also a senior member of NATO and a staunch ally in the Cold War.²⁶⁵ There is evidence that had the British implemented their plans of attack swiftly and come to control the Canal, the President might have turned a blind eye to the invasion.²⁶⁶ But Prime Minister Eden decided to stall military action.²⁶⁷ He thought that if the United Kingdom appeared as a responsible world power simply trying to restore order in the region (rather than as an active partner in the operation aimed at restoring the status quo ante), its prestige and legitimacy would be preserved.²⁶⁸ Recall that the Sèvres agreement stipulated that Israeli forces would approach the Canal, thereby appearing to threaten its safety.²⁶⁹ That was the pretext Eden believed he needed in order to issue an ultimatum and make the United Kingdom appear to be interfering solely in order to restore peace.²⁷⁰ Eden was determined to show the world that the British and French intervention was motivated by a desire to uphold the rule of international law. This was his reason to delay the British assault in the Canal area.²⁷¹ But from Eisenhower's perspective the delay was fatal.²⁷² As the hours

²⁶² *Id.* The 43rd presidential elections took place on November 6, 1956.

²⁶³ BRECHER, *supra* note 202, at 286-88.

²⁶⁴ NICHOLS, *supra* note 8, at 207 ("Ike was . . . arguing with himself whether to be tough or diplomatic with the allies who had double-crossed him.").

²⁶⁵ *See id.* at 203 (recalling that the Tripartite Declaration of 1950 stated that America, Britain, and France "would support any victim of aggressions in the Middle East").

²⁶⁶ LUCAS, *supra* note 57, at 265 ("Even Eisenhower was prepared to accept a fait accompli if intervention was quick and successful.").

²⁶⁷ *Id.* ("Britain's only possible salvation was delaying the passage of an Assembly resolution long enough to take control of the Suez Canal Zone, possibly provoking the Egyptians to overthrow Nasser.").

²⁶⁸ FREIBERGER, *supra* note 7, at 184 ("The Sevres plan created an option [for the British] to remove Nasser with the possibility of retaining world opinion.").

²⁶⁹ *See* NICHOLS, *supra* note 8, at 188 (describing the plan set forth in the agreement at Sèvres).

²⁷⁰ *Id.* ("The plan was that once the Israelis began to advance toward the Suez Canal Zone, Britain and France would issue an ultimatum to Israel and Egypt to cease fighting and accept Anglo-French occupation of the Canal Zone. If Egypt, as expected, rejected the ultimatum, Britain and France would begin bombardment on October 31, followed by troop landings.").

²⁷¹ Both France and Israel were extremely frustrated by Eden's decision but had to defer

passed, delay in the Anglo-French assault tilted the pendulum. Already furious at being betrayed, he decided to take the moral high ground, emphasize the supremacy of the United Nations' Charter, and coerce the Europeans to abort their mission.²⁷³ Only at that moment, then, did the United States decide to abandon the path of real politick and embark on the path of moralism.

B. *U.S. President's Constitutional Powers in the Service of Diffusing the International Crisis and Avoiding a War*

What were the constitutional mechanisms through which the President accomplished his plan to subvert the Suez War? He actively used four powers and refrained from using a fifth.²⁷⁴

1. The President's Implied Power as "Sole Organ" of Foreign Affairs²⁷⁵

In public, President Eisenhower, as well as his Secretary of State, John Foster Dulles, condemned Britain and France for a gross violation of the United Nations Charter.²⁷⁶ He ordered his ambassador to the United Nations, Henry Cabot Lodge, to call an emergency meeting of the Security Council

to him, as among the three, the United Kingdom was the superior military power. *See* GOLANI, *supra* note 27, at 185-87 (explaining that Israel needed France to supply it with arms, and that "France, for all its military readiness, felt itself dependent on Britain in every aspect of a possible strike against Egypt").

²⁷² "Eisenhower, as a military man, was harshly critical of the Anglo-French military operations saying that 'there was no excuse for the long delay in the landing of . . . troops . . . once they had made the decision to do so.'" NICHOLS, *supra* note 8, at 261 (quoting Eisenhower's statement at a National Security Council meeting on November 8).

²⁷³ *See* Smith, *supra* note 257, at 697. Both sides to the conflict emphasized their moral loyalty to the rule of law, evidently an indeterminate concept.

²⁷⁴ Question not addressed: If Eisenhower lost and Adlai Stevenson were elected president on November 6, 1956, and if Stevenson indicated his preference to support the European Powers, would Eisenhower's constitutional powers, which he could use until inauguration in January, be less potent? Note, too, in this context that following the 1956 elections both houses of Congress were in the hands of the Democrats. *See* Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 *Hastings L.J.* 303, 305, 335 (2001) ("[L]ame ducks have typically commanded little ability to conduct foreign affairs even if they desired to. That is, once an administration has lost an election, foreign governments usually shift their focus to the incoming administration." (Footnote omitted)); *see generally* Jack M. Beermann, *Presidential Power in Transitions*, 83 *B.U. L. REV.* 947 (2003) (discussing administrative law issues regarding presidential power during transitions).

²⁷⁵ *See* *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (discussing the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

²⁷⁶ *See* FREIBERGER, *supra* note 7 at 192 (1992) (explaining the United States' position as encapsulated in the "American-sponsored resolution calling for a cease-fire, the withdrawal of Israeli, French, and British forces, and the reopening of the canal").

where a strongly worded resolution condemning the invasion was proposed.²⁷⁷ Britain and France, foreseeing this move, used their power as Security Council members and vetoed the resolution.²⁷⁸ They expected their veto to put the matter to rest.

Eisenhower was adamant not to let the matter go and had more tricks in his bag to accomplish his plan. Thus, the expectation that the veto mechanism would put the matter to rest was thwarted by another structural process enabled by the Charter.

In 1950, during the crisis in Korea, the United States led the United Nations General Assembly in passing the Uniting for Peace resolution, enabling the General Assembly to consider security matters vetoed by one of the five permanent members of the Security Council.²⁷⁹ This resolution was passed by the Western powers against the invocation of a veto in the Security Council by the Soviet Union.²⁸⁰ Now it was invoked against two of NATO's most senior members.²⁸¹ In public, Eisenhower's justification for this quite startling and unexpected move was the equal protection of the laws.²⁸² All United Nations members are bound by its charter and none shall be allowed to violate its

²⁷⁷ *Id.*

²⁷⁸ U.N. Charter art. 27, para. 3 ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members."). It should be noted that this was the first time that the United Kingdom exercised its veto power. *See* S.C. Res. 119, U.N. Doc. S/1956/3721 (Oct. 31, 1956) ("The Security Council, considering that a grave situation has been created by action undertaken against Egypt, taking into account that the lack of unanimity of its permanent members at the 749th and 750th meetings of the Security Council has prevented it from exercising its primary responsibility for the maintenance of international peace and security, decides to call an emergency special session of the General Assembly, as provided in General Assembly resolution 377 A (V) of 3 November 1950, in order to make appropriate recommendations.").

²⁷⁹ Uniting for Peace Resolution, G.A. 377 (V) A (Nov. 3, 1950) ("[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter immediately.").

²⁸⁰ *See* KYLE, *supra* note 17, at 365.

²⁸¹ *See id.* ("Only on the morning of 29 October, just before news of the Israeli attack came through to New York, Henry Cabot Lodge had been speaking to his French and British colleagues of using the procedure for the first time against the behavior of the Soviet forces in Hungary. Now it was to be used, not against Russia but against Britain and France.").

²⁸² *See* NICHOLS, *supra* note 8, at 226 ("In a rare rhetorical flourish, he expanded the core principle of the Fourteenth Amendment, 'equal protection of the laws,' to apply to international affairs: 'As there can be no second-class citizens before the law in America,' he asserted, 'there can be no second-class nations before the law of the world community.'"). The fingerprints of *Brown v. Board of Education*, 347 U.S. 483 (1954) are quite evident.

principles.²⁸³ The General Assembly convened immediately following the veto's invocation, the Soviet Union joined the United States in condemning the aggressors (while its tanks were occupying Budapest), and a variety of sanctions were considered.²⁸⁴ The Assembly remained in session between November 1 and November 10 and, with vigorous American leadership and Soviet support tightened the noose around the two European powers until they accepted defeat and announced withdrawal.²⁸⁵

2. The President's Powers as Commander-in-Chief

Eisenhower immediately declared that the British and French attack amounted to a violation of the tri-partite agreement of 1950.²⁸⁶ The President understood well that relying on the tri-partite agreement might lead to U.S. intervention to restore the status quo ante. Eisenhower ordered the Sixth Fleet, stationed in the Mediterranean, to be on high alert.²⁸⁷ While he was contemplating further action, Soviet Prime Minister Bulganin issued a statement condemning the Suez invasion and threatening military intervention to defend Egypt's sovereignty.²⁸⁸ These warnings, interpreted to mean a Soviet threat to use nuclear weapons against the European powers,²⁸⁹ placed Eisenhower in a terrible dilemma.²⁹⁰ The United States had an obligation under the tri-partite agreement, but now it was experiencing a conflicting obligation under the NATO treaty to defend Britain and France against Soviet

²⁸³ See U.N. Charter art. 2, para. 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.").

²⁸⁴ The United States and the Soviets found themselves to be unlikely allies in the Security Council. See FREIBERGER, *supra* note 7, at 192 ("In the Security Council the United States found itself awkwardly and uncomfortably in agreement with the Soviet Union . . .").

²⁸⁵ See *id.* at 192-96 (suggesting that because of American and Soviet efforts in the Security Council, the British "cabinet agreed to open negotiations with the United Nations commander to transfer British-occupied areas to his control [and] [t]he British succumbed to American coercion").

²⁸⁶ See NICHOLS, *supra* note 8, at 203-04 (discussing Eisenhower's concerns that French and British intervention would force America to intervene under the Tri-Partite Declaration of 1950 because "America could not afford to appear like 'we are a nation without honor.'").

²⁸⁷ See *id.* at 246-47 ("The [Joint Chiefs of Staff] viewed the situation as the closest they had come to war with the Soviet Union since World War II, so the entire Navy was directed to 'maintain readiness to implement emergency war plans.'").

²⁸⁸ See *id.* at 244 (describing Soviet statements that they intended "to crush the aggressor and reestablish peace in the [Middle] East by using force").

²⁸⁹ These warnings also threatened Israel's very survival.

²⁹⁰ See *id.* at 245 (explaining that Bulganin proposed that the United States and the Soviet Union work together in the Middle East by issuing "an ultimatum to the combatants, announce a readiness to intervene, and jointly mobilize their naval fleets").

aggression.²⁹¹ Matters soon got much more complicated. Rumors began to circulate that Soviet intervention on behalf of Egypt was imminent.²⁹² In Washington, on November 6, Election Day, the Joint Chiefs convened, made plans “to improve readiness for a general war,” and informed the President that he should immediately return to the White House from his stay in Gettysburg.²⁹³ Once the President returned the meeting at the White House was “nothing less than a council of war.”²⁹⁴ Using his powers as Commander-in-Chief, Eisenhower issued an order to put “the Sixth Fleet and the Atlantic and Pacific fleets on battle-ready alert, deploying additional ships, submarines, and tactical air resources, and placing heavy troop carrier wings on the twelve-hour alert.”²⁹⁵ Once the orders were in place, the President drove to the Sheraton Park Hotel, to watch the election returns.²⁹⁶ He won by a wide margin.²⁹⁷ It is a part of the nature of war that it is often earnestly justified, even in the minds of the decision-makers themselves, as a means to defend peace. As the United States was preparing for war, the President-elect told the American people that he would continue to work “for peace in the world.”²⁹⁸

²⁹¹ See *id.* at 247 (describing the United States’ response to Soviet aggression, where the joint chiefs moved American ships into a position “where they would be interspersed with the British and French navies—a move designed to say to the Soviet Union, in the words of a subsequent top secret study by the Navy, that ‘an attack on one would be an attack on all.’”).

²⁹² See *id.* at 247 (explaining the Soviet’s warning messages “demanding that Britain, France, and Israel implement a cease-fire within twelve hours and withdraw from Egypt within three days or be faced with the prospect of American and Soviet Union military assistance to Egypt”).

²⁹³ See NICHOLS, *supra* note 8, at 252-53 (“[E]veryone agreed it was essential to ask the president, without fanfare, to come back as quickly as possible.”). Eisenhower and his wife drove to Gettysburg to vote in the elections. *Id.* at 250.

²⁹⁴ *Id.* at 253. In attendance were eighteen men, the vice president and the top leadership of the Defense and State departments, including the Joint Chiefs. *Id.*

²⁹⁵ *Id.* at 257 (citing President Dwight D. Eisenhower, Joint Chiefs to Certain Commanders (Nov. 6, 1956) in DEP’T OF STATE, OFFICE OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, SUEZ CRISIS, JULY 26-DECEMBER 31, 1956, VOLUME XVI, at 1035-36 (Nina J. Noring & John P. Glennon eds., 1990).

²⁹⁶ See *id.* at 253 (“About ten that evening, the Eisenhowers, friends, and family traveled to the Sheraton Park Hotel, where a suite had been reserved for watching the election returns.”).

²⁹⁷ See *id.* (“Even though it had become apparent earlier in the evening that the president had won reelection by a huge margin, Eisenhower did not go downstairs to address supporters until 1:45 a.m.”).

²⁹⁸ *Id.* at 257 (citing President Dwight D. Eisenhower, Radio and Television Remarks Following the Election Victory (Nov. 7, 1956) in DWIGHT D. EISENHOWER, PUBLIC PAPERS OF THE PRESIDENTS, 1956, at 1089-91 (1999) (“I conclude with a pledge: with whatever talents the good God has given me, with whatever strength there is within me, I will continue—and so will my associates—to do just one thing: to work for 168 million Americans here at home—and for peace in the world.”). An experienced war general, he

3. Recognition Powers

Eisenhower was simultaneously handling the Suez Crisis and the Soviet invasion and occupation of Hungary on November 4, 1956, which unfolded precisely as the Suez Crisis was escalating.²⁹⁹ It was not easy to commit the United States' forces to the rule of international law against its own allies while simultaneously ignoring the flagrant violation of the same principles by its Moscow archrival.³⁰⁰ In other words, it was awkward to apply moralism when it came to Suez and *realpolitik* when it came to Hungary. Eisenhower considered breaking off diplomatic relations with Moscow.³⁰¹ He had full power to do so under Article II's recognition powers and such a move would have demonstrated a more even treatment of both crises and all perpetrators.³⁰² But the President decided it would be a futile gesture. The United States had long accepted Soviet domination of Eastern Europe. Thus the policy based on moralism was applied against America's historic friends while the policy of *realpolitik* was applied against its declared enemies.³⁰³

must have known that while his battle ready order could act as a mere deterrent, preventing the Soviets from starting a war, the order could still ignite violence between the superpowers.

²⁹⁹ *See id.* at 238 (describing the "perfect storm" brewing on November 4, 1956 as the Suez crisis "mixed with the growing crisis in Eastern Europe).

³⁰⁰ *See id.* at 239 (illustrating the gravity of Soviet actions on November 4, 1956 when "the Soviets delivered a four-hour ultimatum to the Hungarians stating that if their government did not capitulate, Soviet forces would bomb Budapest. Later that day, the Russians sent 200,000 troops and four thousand tanks into Hungary").

³⁰¹ *See id.* at 261 (highlighting that although Eisenhower called Soviet actions in Hungary "a bitter pill for us to swallow," he ultimately concluded that "breaking off diplomatic relations with Moscow would accomplish nothing").

³⁰² *See* U.S. CONST. art. II, § 3 (stating that the President "shall receive Ambassadors and other public Ministers); U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 011, at 1 (2015) ("The Constitution vests in the President the power to make treaties and appoint ambassadors, other public ministers, and consuls, by and with the advice and consent of the Senate. By derivation from these Constitutional provisions, the President exercises primary authority and responsibility for the formulation and execution of foreign policy."). President Eisenhower did not believe breaking off relations with Moscow was a viable solution. *See* NICHOLS, *supra* note xx, at 261 ("By this time, thousands of Hungarians had died and more than 200,000 refugees were pouring across Hungary's borders into neighboring states. Ike had concluded that breaking off diplomatic relations with Moscow would accomplish nothing").

³⁰³ But note persistent indications that had Britain swiftly and resolutely occupied the Canal Zone, Eisenhower may have accepted the move and avoided the steps described herein. *See* NICHOLS, *supra* note 8, at 233 (describing the United States' position that Britain should either "comply with the goddamn cease-fire or go ahead with the goddamn invasion. Either way, we'll back 'em up if they do it fast. What we can't stand is their goddamn hesitation waltz while Hungary is burning").

4. Powers as Head of the Vast Federal Bureaucracy

The reference to “politics” as distinct from “war” in Von Clausewitz’s famous maxim is fully illustrated in the economic pressures placed on Britain during the crisis.³⁰⁴ Historians agree that political and economic pressures indeed led to the collapse of the Anglo-French operation in Suez.³⁰⁵ These pressures were expressed in two ways: monetary pressure and the manipulation of oil supply.³⁰⁶ In the financial markets, the pound sterling had been weakening since the nationalization of the Canal in July 1956. However, immediately following the invasion there occurred a “run on the pound.”³⁰⁷ In the first two days of the British invasion of Egypt, Britain lost \$50 million in currency reserves, and “speculation accelerated against the pound in currency markets.”³⁰⁸ Therefore, the British Chancellor of the Exchequer (minister of the treasury) asked the International Monetary Fund (“IMF”) to return British funds previously paid into the fund.³⁰⁹ The U.S. Treasury Department declined the request.³¹⁰ There was little doubt that that action by the U.S. Department of Treasury was orchestrated by the White House and was not based on strict rules.³¹¹ Rather, the Treasury Department’s decision was based upon executive

³⁰⁴ See CARL VON CLAUSEWITZ, ON WAR 12 (J. J. GRAHAM trans., 3d German ed. 1873) (“War is a mere continuation of policy by other means.”); Henry H. Perritt, Jr. *Lessons from the Balkans for American Foreign Policy: Building Civil Society Within a Multilateral Framework*, 3 CHI. J. INT’L L. 229, 235 n.6 (2002) (noting that other translations commonly render Von Clausewitz’s maxim as “war is the continuation of politics by other means”).

³⁰⁵ See FREIBERGER, *supra* note 7, at 195 (“The British were now faced with the U.S. Federal Reserve Board selling British currency, Washington’s refusal to advance a temporary loan, and American obstruction to withdraw money from the IMF.”).

³⁰⁶ See *id.* at 197 (“For the duration of the crisis, two issues dominated British policy: the mechanics of British withdrawal, and the clearing of the canal to permit the resumption of oil shipments.”).

³⁰⁷ See *id.* at 194 (“The next day a run on the pound developed, and the British situation grew increasingly critical.”).

³⁰⁸ NICHOLS, *supra* note 8, at 251; see also FREIBERGER, *supra* note 7, at 190-92 (“By November 2 the United Kingdom had lost \$50 million in gold reserves, and confidence in sterling was declining.”).

³⁰⁹ NICHOLS, *supra* note 8, at 251 (“Harold Macmillan, the chancellor of the exchequer . . . had anxiously asked the International Monetary Fund to return the British quota—the funds his government had previously paid into the fund.”); FREIBERGER, *supra* note 7, at 196 (describing the United States’ warnings “that if the United Kingdom pulled its gold and dollars out of the IMF, the British could be heading toward bankruptcy”).

³¹⁰ See *id.* at 194 (describing that the U.S. Treasury Department declined to extend assistance to Britain until “a cease-fire were arranged”).

³¹¹ See NICHOLS, *supra* note 8, at 251 (“While the British cabinet was in session the morning of November 6, Macmillan learned that the American Treasury Department—no doubt following Eisenhower’s orders—had vetoed the return of the IMF funds until Great Britain agreed to a cease-fire.”).

discretion.³¹² Following Britain's decision to fully withdraw, the IMF reciprocated by abiding by the British request to withdraw funds from the IMF.³¹³ Throughout November, Harold Macmillan, the British Secretary of the Treasury, urged George Humphrey, his American counterpart, to release IMF funds to Britain to no avail.³¹⁴ Once the British decision to abide by all the United States conditions was announced, the Treasury Department reversed its position.³¹⁵ Something must have happened during the meeting between the U.S. Secretary of the Treasury and the British delegation:

At the beginning of their meeting on December 3, Humphrey continued to insist that his government could not support a large-scale support operation from the IMF. Then, quite abruptly and to the astonishment of his visitors, he swept aside those worries and proposed that the British should draw \$561 million immediately and take out a stand-by arrangement for another \$739 million, a massive total package of \$1.3 billion (100 percent of the U.K. quota in the IMF).³¹⁶

³¹² See *id.* See also KYLE, *supra* note 17, at 500-03 (discussing tensions between the United Kingdom and the United States during the UK's attempts to obtain financing from the IMF); HAROLD MACMILLAN, *RIDING THE STORM 1956-1959*, at 163-68 (1971) (reporting the U.S. Government's opposition to allowing Great Britain to draw on IMF funds "as a breach of spirit, and even of the letter of the system under which the Fund is supposed to operate"); TURNER, *supra* note 17, at 255-58 (discussing the tension between the American government, including President Eisenhower, and the British government over the withdrawal of IMF funds). Nichols reports that "the denial of that request nurtured suspicions among British leaders that the rampant speculation on the pound 'was being stimulated by the United States Treasury.'" NICHOLS, *supra* note 8, at 251. For an analysis of the monetary crisis, see Adam Klug & Gregor W. Smith, *Suez and Sterling, 1956* (Queen's Econ. Dep't, Working Paper No. 1256), available at <http://core.kmi.open.ac.uk/download/pdf/6494165.pdf>.

³¹³ See FREIBERGER, *supra* note 7, at 203 (explaining that once Britain complied with the United States' requests, "[t]he financial aid which the British required was granted as well as a new loan with satisfactory terms for repayment").

³¹⁴ See NICHOLS, *supra* note 8, at 194 ("On the morning of the 6th [of November] Macmillan telephoned U.S. Secretary of the Treasury George Humphrey seeking assistance.").

³¹⁵ See James M. Boughton, *Was Suez in 1956 the First Financial Crisis of the Twenty-First Century?*, 38 FIN. & DEV. (2001), available at <http://www.imf.org/external/pubs/ft/fandd/2001/09/boughton.htm> (discussing the causal link between Britain's agreement to withdraw and the IMF's approval of funding. The IMF approved Britain's funding request "and Britain immediately made the drawing of \$561 million to replenish its reserves and announced that it had another \$739 million available on stand-by").

³¹⁶ *Id.*

Humphrey also announced that his department would recommend that Congress immediately waive \$143 million in interest payments on a World War II loan due December 31.³¹⁷

The other matter of critical importance was oil. The Suez crisis shut off two of the three major oil supply routes to Europe: the Canal itself, blocked by eight or nine ships sunk there by Egypt, and the Iraq pipeline.³¹⁸ As a result, Europe was facing a serious oil shortage and winter had already entered the gate.³¹⁹ The threat to the European economies was evident. The United States could and eventually did help, but it exacted the same price it was demanding in relation to the monetary crisis: unconditional British withdrawal.³²⁰ United States help took the form of encouraging U.S. oil companies to increase oil production.³²¹ But Eisenhower feared that an open decision to increase oil production might exacerbate Arab rage at the invasion and might result in an Arab oil embargo.³²² Deceptive tactics and secrecy came to the rescue. The White House “approved the movement of U.S. Gulf Coast oil to the East Coast in foreign-flag tankers, a move designed to camouflage preparations for sending it to Europe.”³²³ In addition, on November 30 the U.S. Office of

³¹⁷ See Memorandum of a Telephone Conversation Between the President in Augusta, Georgia, and the Secretary of State in Washington (Dec. 3, 1956), in DEP’T OF STATE, OFFICE OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, SUEZ CRISIS, JULY 26-DECEMBER 31, 1956, VOLUME XVI, at 1240 (Nina J. Noring & John P. Glennon, eds., 1990) (stating that “George Humphrey was prepared to give clearance to” Macmillan’s statement to “the House of Commons that the U.S. Treasury would recommend to the U.S. Congress that it waive \$143 million interest payment on a World War II loan, due on December 31”).

³¹⁸ See Memorandum of Discussion at the 303d Meeting of the National Security Council (Nov. 8, 1956), available at <http://slantchev.ucsd.edu/courses/nss/documents/eisenhower-suez-hungarian-crises.html> [hereinafter NSC Memorandum] (explaining that the “Suez Canal was now thoroughly blocked by at least eight or nine ships which had been sunk in it. The Iraq pipeline had been sabotaged and three of its pumping stations destroyed. The Aramco tapline was still intact, but it was touch-and-go as to how long it would remain”); see also TURNER, *supra* note 17, at 249 n.49 (citing reports from *The Times of London* and *The Economist* that discussed the oil routes from the Middle East and the effects that the closure of the Suez Canal had on these routes).

³¹⁹ See TURNER, *supra* note 17, at 249 n.49 (noting that as of November 1956, Europe faced a loss of 94 million tons of oil that would normally come from the Suez Canal and the Northern Pipeline).

³²⁰ See NICHOLS, *supra* note 8, at 262-63 (discussing Eisenhower’s requirement of “the equivalent of unconditional surrender from the British and French” before providing their “needed supplies of oil”).

³²¹ See *id.* at 261 (discussing the United States’ support of Britain through American oil production).

³²² See *id.* (“Eisenhower asked . . . if American oil production could be increased without appearing to the Arab nations to be ‘bailing out the British and the French.’”).

³²³ See *id.* at 261 (citing NSC Memorandum, *supra* note 318, which explained that the President approved “[a]uthoriz[ing] the movement of U.S. Gulf Coast oil to the U.S. East

Defense Mobilization “released a statement that, ‘with the approval of the President,’ the Interior Department had been requested to authorize fifteen American oil companies to coordinate efforts to provide oil to compensate for” the shortage resulting from the crisis.³²⁴

5. The Power Not Used: Interacting with Congress

Eisenhower refrained from using his power under Article II, section 3 to “on extraordinary occasions, convene both Houses, or either of them.”³²⁵ Article II section 3 clearly gives the President discretion to convene both or either house, but does not require him to do so. There is evidence that Eisenhower considered calling Congress for a special session, but he ultimately decided against it³²⁶ Congress only came into play a month later in January 1957.³²⁷ The Congress was in the hands of the Democrats, and Eisenhower might have thought that it would not be entirely supportive of his determination to abandon a major Western Power and thereby support two hostile powers, Egypt’s leader Nasser and the Soviet Union.³²⁸ Domestic politics also play a part in mighty decisions related to matters of war and peace.³²⁹

Coast in foreign-flag tankers”). Compare this “camouflage operation” to the French camouflaging its troops and airplanes as Israeli at the beginning of the Suez operation. See KYLE, *supra* note 17, at 343-44 (“In accordance with the bilateral section of the Protocol of Sèvres, the two French squadrons—thirty-six Mystères and F84s—took up their position on Israeli airfields on the eve of battle.”).

³²⁴ NICHOLS, *supra* note 8, at 273 (citing Circular Telegram From the Department of State to All Diplomatic Missions, Legations, and the Mission at the United Nations (Nov. 29, 1956), in DEP’T OF STATE, OFFICE OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, SUEZ CRISIS, JULY 26-DECEMBER 31, 1956, VOLUME XVI, at 1214 (Nina J. Noring & John P. Glennon, eds., 1990) that the Director of the Office of Defense Mobilization with the President’s approval “today requested the Secretary of the Interior to authorize fifteen US oil companies to coordinate the efforts they have been making individually to assist in handling the oil supply problem resulting from the closing of the Suez Canal and some pipelines in the Middle East”).

³²⁵ U.S. CONST. art. II, § 3.

³²⁶ See KYLE, *supra* note 17, at 527 (stating that since Congress had not met since the elections, there were “dramatic secret meetings of the Committee’ [that] were held ‘after dark one evening before Congress was even organized, in an atmosphere of suspense and urgency’”). This may be compared to both British and French concern for activating war power when parliament is not in session. Compare *supra* note 64 and accompanying text (describing that although the power to declare war does not require consulting Parliament, Parliamentary votes of no confidence are a method to control the Executives’ use of the war powers), with *supra* note 111 and accompanying text (discussing Article 7 of the French Constitution which requires a vote of the National Assembly before war powers are activated).

³²⁷ See NICHOLS, *supra* note 8, at 275-77 (“As 1957 dawned, Eisenhower launched a legislative offensive that, by any measure, was breathtaking.”).

³²⁸ See *id.* at 265 (“While he had won a second term with 57 percent of the vote and 457-73 in the Electoral College, Ike still faced a Democratic Congress with a two-seat majority

With the defeat of the two European-Colonial powers, brought about through the deft deployment of his Article II powers, the President confronted a vacuum created by his own actions. Because the Middle East was understood in the West strictly in terms of the Cold War, the concern was to chiefly prevent the Soviet Union from further benefitting from that change.³³⁰ It was thus that the United States escalated its involvement in the Middle East. This could not have been accomplished through Article II powers, as potent as they were. Money had to be allocated and further powers to act had to be authorized.³³¹ Here Griffin's cycle of accountability³³² and Zeisberg's relational theory³³³ come into play. On January 5, 1957, President Eisenhower

in the Senate and a thirty-three-seat margin in the House.”).

³²⁹ See GRIFFIN, *supra* note 2, at 258 (“There is a reasonable amount of evidence that presidents have made decisions for war based in part on considerations of domestic politics.”).

³³⁰ See NICHOLS, *supra* note 8, at 278 (“A Middle East split into two armed camps, one committed to the West and the other to the Soviet Union, could set the stage for Armageddon. To Eisenhower, this meant heading off any Soviet effort to gain a significant foothold in the region.”).

³³¹ The history of the relationship between Congress and the Executive in the area of foreign policy (including war making) powers are beyond the scope of this article. It is worth taking account of the ebb and flow of this relationship during the 20th century and beyond. By the mid-1950s Executive power to form foreign policy and introduce U.S. forces into hostilities was somewhat beyond its WWII peak but was still quite potent. See ROBERT DAVID JOHNSON, *CONGRESS AND THE COLD WAR* xvii (2006) (describing in the 1950s the “post war constitutional revolution, characterized by the dramatic decline of congressional power over war and treaties”). It would take Congressional leaders more time to infuse power and influence into Congress’ potential foreign policy powers. See *id.* at 71 (“Over the next several years, however, various members [of Congress] would discover alternative ways of marshaling the institution’s powers: focusing on foreign policy issues related to appropriations, using the proliferation of subcommittees to influence policy, or highlighting issues or areas of the world neglected by the administration.”). As historian Robert David Johnson observed in his “Congress and the Cold War,” these constitutional powers were more subtle and went beyond the salient power to approve treaties and declare war. See *id.* at xxiii (“Understanding the congressional response to the Cold War, however, requires looking beyond instances when Congress did (or did not) declare war or approve treaties.”). Instead, other facets of legislative power become important: “the spending measures [appropriations power]; the internal workings of a Congress increasingly dominated by subcommittees; and the ability of individual legislators to affect foreign affairs by changing the way that policymakers and the public thought about international questions—qualities inherently more difficult for historians to measure.” *Id.*

³³² See Griffin, *supra* note 2, at 5 (discussing the “cycle of accountability” as inter-branch interaction between the executive and legislative branches where “each branch knows that its decisions will be reviewed by the other” and a “pattern of mutual testing and deliberation results”).

³³³ See ZEISBERG, *supra* note 3, at 13-19 (“I argue that the branches’ powerful governance and epistemic capacities can be used to support constructions of constitutional war powers that are well adapted to the security context of their own time.”).

delivered a special message to Congress.³³⁴ He announced what came to be known as the Eisenhower Doctrine, which initiated American presence in the Middle East.³³⁵ The doctrine provided that a country could request American economic and/or military aid if it was being threatened by armed aggression from another state.³³⁶ It was expected that threats will come from the Soviet Union.³³⁷

Inter-branch negotiations ended with a more moderate and balanced bill than Eisenhower had wanted.

On January 1, 1957, [the President] . . . invited a bipartisan legislative delegation to the White House. In a four-hour conference, he outlined a draft resolution giving him authority to send troops to any Middle Eastern nation that requested assistance against a Communist threat, on the grounds “that modern war might be a matter of hours only . . . Under a closed rule, the resolution sailed through the House, whose institutional structure prevented forcefully challenging the executive against the leadership’s wishes. In the Senate, the president received overwhelming Republican support . . . A wide array of Democrats, on the other hand, questioned the resolution’s constitutional, policy, and pragmatic necessity, but they struggled to reconcile their positions with their previous expansive interpretations of presidential power.”³³⁸

This joint resolution was “a vaguely worded resolution targeted at a region the administration could not precisely define to meet a threat that the administration could not specifically identify.”³³⁹

Counterfactuals come into play. Had Congress been fully consulted earlier, could American involvement in the Middle East look different? Is this a story that supports the idea that at least when it comes to war, collective judgment,

³³⁴ See NICHOLS, *supra* note 8, at 276 (describing Eisenhower’s address on January 5 to a joint session of Congress where he requested “economic and military assistance to friendly Middle East states” and advance authorization for “the use of American military forces to thwart aggression or head off communist subversion”).

³³⁵ See KYLE, *supra* note 17, at 527 (“Eisenhower . . . was, therefore, asking Congress to agree in advance to military action in support of the territorial integrity and political independence of states in the Middle East.”).

³³⁶ For an excellent discussion of Foreign States and their potential claims under the United States Constitution, see Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 495-96 (1987) (“In foreign affairs cases, as elsewhere, the federal courts have forged a doctrine favoring consistent application of constitutional norms even when the claimant is nontraditional—a foreigner rather than a citizen, or a juridical person rather than a natural one.”).

³³⁷ See KYLE, *supra* note 17, at 527-28 (asserting that the Eisenhower Doctrine was motivated by fears of “International Communism” and Russia’s focus on “power politics” in the Middle East).

³³⁸ JOHNSON, *supra* note 331, at 70 (2006).

³³⁹ *Id.* at 71; see also WOOLLACOTT, *supra* note 1, at 129-48 (analyzing the effects of the Suez war on the wars fought by the U.S. in Iraq in the 1990s and the 21 century).

as messy as it is, may be superior to a fast, decisive and vigorous unitary decision-making? Griffin and Zeisberg's recommendations concerning increasing accountability and better interaction between the two branches of the government are useful for assessing the effort to avoid a war as well as for evaluating a decision to go to war.³⁴⁰

CONCLUSION

What constitutional lessons may be drawn from the Suez War and its aftermath? Certainly it appears to have been a war to make more wars. After the Suez events each of the belligerents engaged in many a war, which they were mostly, but not always, careful to characterize as an "armed conflict" not rising to the level of war. The brakes, checks and balances available in the belligerents' constitutional regimes as well as the compromises between morality and power embedded in the Charter of the United Nations were honored in the breach. The Suez war was one of the major events in the 1950s that chilled the aspirations of the post war era and permitted a manipulable and manipulated conception of law—both international and domestic—to grow. It thus served to encourage, rather than deter, more wars.

The United States while playing the role of Diplomat in Chief almost got involved in a war as a result of the crisis, and in the aftermath it got more and more tangled in the periodic conflagrations in the Middle East.³⁴¹ Soon enough the United States stepped into the French boots and led the bloody war in Vietnam.³⁴²

Each of the parties to the Suez story had a previously set legal process, which governed the decision to engage in military conflicts. No party engaged in a bona fide implementation of this process. Secrecy played a major part in the belligerents' decision to go to war. The fragile separation between the civil and military chain of command greatly shaped France's decision to go to war. Given the close relationship between the French and Israeli military command, France also had a decisive influence on the Israeli decision to go to war. The concentration of power in the hands of the Israeli prime minister and the lack

³⁴⁰ See GRIFFIN, *supra* note 2, at 4 (explaining the importance of accountability and institutional structures with war powers because of the risk of "policy catastrophe" if the nation goes to war without "the meaningful deliberation and consent of the legislative and executive branches of government"); ZEISBERG, *supra* note 3, at 18 ("I argue that the branches' powerful governance and epistemic capacities can be used to support constructions of constitutional war powers that are well adapted to the security context of their own time.").

³⁴¹ See NICHOLS, *supra* note 8, at 286 ("Eisenhower's historic contribution following the Suez crisis was the commitment of the United States to maintaining the stability and security of the Middle East.").

³⁴² See JOHNSON, *supra* note 331, at 67 (discussing the evolution of the executive's power as both events in the Middle East under Eisenhower and the Vietnam War in 1964 "established a precedent for significantly eroding the legislative role in intentional affairs").

of compartmentalization between Israeli civil and military command also propelled Israel to abide by the French plan to assign to Israel the role of aggressor. In defense of Israel, one may point to the fact that the Israeli leadership had no tradition to draw on, and the example it was getting from its two senior partners was that constitutional arrangements may and should be circumvented in order to achieve goals determined by realpolitik. Even the United States, whose President proclaimed devotion to morality and the rule of law, appeared to have been willing to turn a blind eye to the honored principles had the belligerents shown more resolve and proficiency in achieving their goals. It is also interesting to reflect on the complex web inside the executive branch. The three prime ministers who came together to plan the war engaged in massive compartmentalization inside their cabinets, marginalizing their ministries of foreign affairs and silencing the voice of diplomacy.³⁴³

The paradigm of executive control to determine whether or not to go to war appears to have been solidly entrenched among all the partners to the conflict, regardless of what their Constitution or constitutional traditions required.³⁴⁴

³⁴³ Christian Pineau was an exception. See KYLE, *supra* note 17, at 316 (highlighting Christian Pineau's contributions to the secret negotiations at Sèvres preceding the Suez Crisis). However, he too made sure to keep the French ministry of foreign affairs in the dark. See *id.* at 331 (describing the small number of French government officials who knew about France's plan and the Sèvres agreement, which meant that "the entire Quai d'Orsay [France's foreign ministry] was cut out of the circuit of those who knew about Sèvres"). By contrast, the U.S. secretary of state John Foster Dulles was actively involved in the Suez Crisis. NICHOLS, *supra* note 8, at 203 (highlighting Dulles' active role as he attempted to prevent the Suez Crisis and action once the Crisis began). However, he fell ill and was not as influential or deft as he could have been had he been in good health. See *id.* at 232-33 (describing Dulles cancer treatments and hospitalization in November 1956).

³⁴⁴ Finally, one should ask what significance should attach to "the body"—the body politic, the body social, and the personal body of the politicians (men, women, healthy, sick, handsome, ugly, young, old, sexy, vulnerable, experienced, and manipulative) in the conflicts and intrigues which formed the Suez crisis. British Prime Minister Anthony Eden was extremely ill from the period leading to the Suez invasion until his resignation a few weeks later. See NICHOLS, *supra* note 8, at 268 ("By November 19, rumors abounded that Anthony Eden was ill."). So was Israeli Prime Minister David Ben-Gurion, who was confined to bed all through the week of the actual invasion. See KYLE, *supra* note 17, at 344 ("Ben-Gurion was . . . looking tired, his voice weak and his temperature high."). French Foreign Minister Christian Pineau, another central player, was also ill. British Foreign Minister Selwyn Lloyd was "exhausted and confused." See *id.* at 302 ("I have seldom seen . . . a man more confused and unhappy than Lloyd was on that occasion."). U.S. Secretary of State John Foster Dulles was fighting cancer, and in November, 1956, was hospitalized. See NICHOLS, *supra* note 8, at 233 (describing Dulles cancer treatment on Saturday November 3 where "the surgeons at Walter Reed Hospital had removed a cancerous tumor from the secretary's colon"). Perhaps Dulles would have behaved differently if he were not so ill. How did the condition of these important figures affect their decision-making processes? Should domestic constitutional law, shaping the body politic, be aware of or ignore these conditions? What should one make of the fact that the British considered France to be "the

But one should ask if matters were likely to be fundamentally different had the respective Parliaments been more genuinely involved, and would a different result be more likely? Certainly not in the case of France and Israel where public opinion (perhaps shaped by the Executive, which brings us to the question of a free press and freedom of expression in democracies) leaned quite heavily in favor of war.³⁴⁵ Even in England, it is not clear that Anthony Eden would have been so solidly defeated had the military operations been carried out successfully within the time frame originally contemplated.³⁴⁶

And yet, the decades since the Suez War have edged toward a change of paradigm. The legislative branches of all four countries have made a serious effort to change the norms and give legislative deliberation more influence over the decision to go to war.³⁴⁷ Only Israel lags behind, its parliament not yet

sick man' of Europe," and that Eisenhower called France a "helpless, hopeless mass of protoplasm"? See William I. Hitchcock, *Crisis and Modernization in the Fourth Republic: From Suez to Rome*, in *CRISIS AND RENEWAL IN FRANCE, 1918-1962*, at 222 (Kenneth Moure & Martin S. Alexander eds., 2002).

In the British Parliament, following the invasion, members protested that John Bull (symbol of Great Britain) was seduced by Marianne (symbol of France). I suggest that a role reversal had occurred in the French-Israeli relations. See KYLE, *supra* note 17, at 293. There, France played not the beguiling woman, but rather the powerful seductive older male to the vulnerable and needy Israeli maiden. France offered Israel material and moral support (in this order) in exchange for compliance and obedience. See *id.* at 218 ("[A] stream of French landing-craft was delivering the tanks, planes and guns which the Israelis desperately needed in secret landings at dead of night, often attended by Ben-Gurion and a few especially privileged observers."). French arms, in large quantities, were the glittering diamonds that intoxicated Israel and encouraged it to perform the role assigned to it by the European power. See *id.* (detailing political and military interactions between France and Israel culminating in France delivering Israel needed military supplies). Perhaps Prime Minister David Ben-Gurion understood this dynamic at some level, and this is the reason why he developed a high fever as Israeli troops charged into Egypt. See *id.* at 344 (describing Ben-Gurion's health as he was "[o]bviously suffering from fever"). This was not a good situation for a proud man to find himself in.

³⁴⁵ See TURNER, *supra* note 17, at 259 ("The French legislature passed a vote of confidence in Mollet, and he boldly defended the Suez operation, linking it with the need to combat terrorists in French Algeria and to protect western democracy against dictators like Nasser.").

³⁴⁶ See *id.* at 288-89 ("Eden's view was that the real mistakes occurred *after* the ceasefire, not before it, and they occurred because other world leaders acted in an unexpected and unreasonable manner.").

³⁴⁷ Compare War Powers Resolution, 50 U.S.C. § 1541 (2012) ("It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."), and Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541) ("That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."), with *supra* note 60 and

confident enough to assert a more active role in matters of security because it is fearful of compromising security imperatives. Still, a review of the action taken by the legislatures of all countries involved, even Israel, reflects recognition that leaving matters to an unregulated executive decision is a bad way to guarantee the well being of the country. Even though Griffin and Zeisberg address only the U.S. constitutional regime, their books reflect this more general trend. The paradigm is in the process of shifting, but what a genuine change will look like and whether it will happen is yet unclear.

accompanying text (explaining that within the United Kingdom, “[i]ssues related to war have been long recognized as royal prerogatives, solidly vested in the hands of the executive (the crown)”), and *supra* notes 111, 119-120 and accompanying text (exploring France’s lack of a “constitutional check on a trigger happy executive” who may circumvent constitutional requirements of a declaration of war).