THE WAR POWERS: RIPE FOR REVIEW

In creating the Constitution of the United States, it was the desire of the framers to ensure that they did not give rise to tyranny by way of mob rule or by institution of a monarchy. Mindful of history and wary of concentrated power, they employed a multi-branched government agreeing that a bicameral legislature should reflect the voice of the people, not the state, and recognized the need, ultimately, for a single executive. One of the central components of government power debated was that of the war powers. From the time the Constitution originated in 1789 until today, it is clear that the war power has drifted inexorably towards the executive. This Article examines the philosophy of the origins of the war power and identifies through the historical record how this power has been applied in practice, as well as how time, technology, and changing perceptions of power and politics have affected it.

THE FOUNDING POLITICAL PHILOSOPHY

When the framers met in Philadelphia in 1787 to draft the Constitution, "existing models of government in Europe placed the war power securely in the hands of the monarch. The framers broke decisively with that tradition."[1] Power to control a standing army was recognized by the framers as the single largest impetus to tyranny. Fearful of investing such powers in a single executive, lest it render the office that of a simple monarch, Alexander Hamilton broke with the Blackstonian and Lockean models used in England and proposed "that the President would have 'with the advice and approbation of the Senate' the power of making treaties, the Senate would have the 'sole power of declaring war,' and the President would be authorized to have 'the direction of war when authorized or begun.'"[2] This is the separation of the war powers as we know them today. Initially, however, the framers were reluctant to grant even these powers to the executive.

[1] LOUIS FISHER, PRESIDENTIAL WAR POWER 1 (University Press of Kansas 1995).
[2] Id. at 5.

When independence from England was initially declared, all powers, including a king's traditional executive powers, were vested solely in a Continental Congress. Experience with this extremely progressive system of governance, however, indicated that modification was necessary. An executive and judicial branch were formed in addition and the separation of powers was incorporated because, as James Madison famously noted, "ambition must be made to counteract ambition."[3] "The power to go to war was not left to solitary action by a single executive, but in collective decision making through parliamentary deliberations."[4]

Accordingly, an early draft of the Constitution included a phrase that said Congress shall have the power to "make" war. Hamilton differentiated the president's power as Commander in Chief from the war power held by England's king in Federalist 69: unlike the king of England, the president "will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union."

The Constitution thus granted to the Congress many specific powers to control military affairs: to declare war; to raise and support armies; to provide and support a navy; the power to regulate the land and naval forces; and the powers of raising, organizing, disciplining and calling forth the militia.[5] Additionally, the power to regulate commerce, a power that "may be, and often is, used as an instrument of war,"[6] was granted to the congress.[7] In the words of James Madison: "The constitution supposes, what the history of all governments demonstrates, that the

[3] James Madison, *Federalist No. 51*, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments,* ¶ 4 (1788), *at* http://www.constitution.org/fed/federa51.htm.
[4] LOUIS FISHER, PRESIDENTIAL WAR POWER 4 (University Press of Kansas 1995).
[5] *See* U.S. Const. art. I, § 8, cl. 11 - 16.
[6] Gibbons v Ogden, 22 U.S. (9 Wheat.) 1, 192 (1824).
[7] *See* U.S. Const. art. I, § 8, cl. 3.

executive is the branch of power most interested in war and most prone to it. It has accordingly with studied care, vested the question of war in the legislature."[8]

Yet, there were also fears that so many checks could be perilous to the safety of the new republic in some circumstances. The debate spoke of the concern that, since the new Congress was to meet but once a year, "legislative proceedings 'were too slow' for the safety of the country in an emergency."[9] In response to this concern, the language of the draft Constitution was changed from permitting Congress to "make" war to permitting them to "declare" war. This subtle change of language would leave to the President "the power to repel sudden attacks."[10] This concept of "imminent danger" has remained central to a modern interpretation of the war powers as well.

It was thus established that Congress would be responsible for both the appropriation of funds and the declaration of war but that the president would retain the right to use the armed forces as Commander in Chief to protect the republic from harm when time became the critical element. It was felt that this was a necessary construction because "those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether a war ought to be *commenced, continued or concluded*."[11] The novel political philosophy of checks and balances had clearly been made real in the structural configuration of our new government.

It was also considered extremely important to the framers that the head of the armed forces be civilian in rank. A civilian commander would place the ultimate authority outside of any military structure that may harbor ideas differing from the stated policies of the elected government. "Designating the President as Commander in Chief represented an important

[8] 6 THE WRITINGS OF JAMES MADISON 312 (Gaillard Hunt ed. 1900-1910)(letter of April 2, 1798, to Thomas Jefferson).
[9] LOUIS FISHER, PRESIDENTIAL WAR POWER 6 (University Press of Kansas 1995).
[10] Id.

technique for preserving civilian supremacy over the military."[12] This was a direct response to the complaint made in the Declaration of Independence that King George III had "affected to render the Military independent of and superior to the Civil power."[13]

Separation of the war powers was an attempt, above all, to prevent the birth of a monarchy in the new government. Granting to the executive the power to conduct foreign policy via treaty and Executive Agreement, as well as the assignment of Commander in Chief powers, came dangerously close to acknowledging the executive as the sole organ of power in foreign affairs, as Justice Sutherland would claim as late as 1936. While wanting to limit this unbounded power, the framers recognized that foreign policy and the direction of war "most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[14] Thus, a delicate and somewhat idealized balance was desired.

THE PHILOSOPHY IN PRACTICE: THE EIGHTEENTH CENTURY

This idealized balance was adhered to quite precisely by the county's early presidents. This is attributable, in part, because many of the early executives were themselves founders, framers, and their contemporaries, and looked upon the office and their place in history from that perspective. Their interest was in the success of the republic as a system of government that was, in essence, an experiment that gave no outward assurance of success. Indeed, upon exiting a day of debate during the Constitutional Convention, Benjamin Franklin, in responding to a query as to what the delegates had wrought, famously responded: "a republic, if you can keep it."

In their attempts to ground the new republic in success, the first executives paid close attention to the spirit as well as the letter of the Constitution. In the first instances of invoking

[11] 6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed. 1900-1910) (emphasis in the original).
[12] LOUIS FISHER, PRESIDENTIAL WAR POWER 10 (University Press of Kansas 1995).
[13] The unanimous Declaration of independence of the thirteen united States of America, (1776), *at* http://www.archives.gov/national_archives_experience/charters/declaration_transcript.html.

the war powers in our nation's history, George Washington, as Commander in Chief, demonstrated executive discretion in the application of military force. Authorized by Congress to protect settlers at the frontiers of the country against certain Indian tribes, President Washington authorized the governor, Arthur St. Clair, to call up nearby militia as needed. At one point, these troops suffered a disastrous loss. This began one of the first congressional inquiries relating to the use of force. President Washington, showing considerable foresight, explored the concept of executive privilege in considering which of his papers to make available for scrutiny, then promptly decided, in the best interests of the public and the country, to release any and all requested. He thus established executive reticence towards second guessing Congress in the matter of war by setting an example of voluntary cooperation.

Up to this point, Washington had regarded his military options as limited to defensive operations only. He acknowledged the need for Congressional approval to proceed with any offensive operation by stating: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject and authorized such a measure."[15] This sensitivity to Congressional prerogatives is reflected in other writings of the era.

For example, in a message to Congress on November 16, 1818, President Monroe reviewed the military conflicts involving the Indians of Florida. "He described a number of battles, constituting self defense, and why it was sometimes necessary to exceed boundaries while pursuing the enemy. He went to great pains to emphasize that in any of the excursions into Spanish territory, it was never his intention to display hostility toward Spain." [16] In other words,

[14] Alexander Hamilton, *Federalist No. 74*, The Command of the Military and Naval Forces, and the Pardoning Power of the Executive, , ¶ 1 (1788), *at* http://www.constitution.org/fed/federa74.htm.
[15] LOUIS FISHER, PRESIDENTIAL WAR POWER 15 (University Press of Kansas 1995).
[16] Id.

offensive operations were not motivating factors for these forays. Monroe's belief that only Congress could move the country from a state of peace to a state of war was explicit.

In the quasi-war with France in 1798-1800, an undeclared war that began with Congressionally debated, carefully considered bills permitting the raising of arms for defensive purposes, congressional prerogatives were scrupulously adhered to. With the seizure of French ships being made legal, it became evident that the country was at war.

During the debates in 1798, Congressman Edward Livingston (D-N.Y.) considered the country "now in a state of war; and let no man flatter himself that the vote which has been given is not a declaration of war."[17] In 1800 and 1801, the Supreme Court "recognized that Congress could authorize hostilities in two ways: either by a formal declaration of war or by statutes that authorized an undeclared war, as had been done against France."[18] In another case, Justice John Marshall wrote, "the whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."[19] These court decisions validated the idea that the Congress alone could move the country from a state of peace to a state of war by not only declaration, but also by degree.

These degrees included undeclared war, limited war, partial war, imperfect war and all shades in between.[20] Further, court decisions in regard to the actions of a Captain Little, who followed Presidential orders to seize ships sailing *from* French ports, in addition to those sailing *to* French ports, the latter being expressly authorized by Congress, resulted in the clarification that "Presidential orders, even those issued as Commander in Chief, are subject to restrictions

[17] Id. at 18.
[18] Id.
[19] Talbot v Seeman, 5 U.S. 1, 28 (1801).
[20] *See* Bas v Tingy, 4 U.S. 37, 43 (1800).

imposed by Congress."[21] This decision went to reinforce the principle that even the Commander in Chief, while prosecuting a lawful war, could issue unlawful orders if they went against the will of Congress.

THE NINETEENTH CENTURY

When Thomas Jefferson assumed the presidency in 1801, one of the problems he inherited was with the Barbary Coast states of Morocco, Algiers, Tunis and Tripoli and their interference with U.S. commerce in the Mediterranean. There was a custom of paying these states a "tribute" so they would not interfere with United States shipping. Jefferson had considered various options for dealing with the Barbary State chieftains during his earlier service as Secretary of State. All of his recommendations at that time involved policies established by Congress and executed by the president.

Just prior to Jefferson taking office as president, Congress passed legislation establishing a "naval peace establishment," with six ships officered and manned by direction of the President. Jefferson sent these ships to the Mediterranean to defend U.S. interests.[22] In December of 1801, the Pasha of Tripoli declared war on the United States. Jefferson informed Congress of the development and asked for further guidance, saying he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense."[23]

Hamilton, a Federalist fond of pushing the limits of presidential power and writing under the pseudonym Lucius Crassus, the great Roman orator, thought Jefferson had deferred excessively to congressional prerogatives for wanting additional authority to respond. Hamilton made the point that while Congress is the exclusive body able to move the nation to a state of war when the nation is at peace, he felt that when a state of war is existing, which has been

[21] Little v Barreme, 6 U.S. (2 Cr.) 169, 179 (1804).
[22] 2 Stat. 110, Sec 2 (1801).

brought to us externally, then congressional sanction of action is "nugatory; it is at least unnecessary."[24] Hamilton's argument was not that a president had full power to make war on other nations, but that when a foreign nation declares war on the United States, the president may respond to that fact without waiting for congressional authority.

Even Jefferson had to later agree that fidelity to the written law is "doubtless one of the high duties of a good citizen, but it is not the highest. To lose our country by scrupulous adherence to written law, would be to lose the law itself…thus absurdly sacrificing the ends to the means."[25] Here, Jefferson spoke of dangers that imminently threatened the survival of the nation. These are critical distinctions, as in later times presidents have sought to justify military action in areas such as Grenada, Libya, Nicaragua and Haiti that posed no genuine threat to our national security and without seeking sanction from Congress.

On at least one occasion, it has been asserted during congressional debate that Jefferson acted in the offensive against the Barbary Coast states without congressional authority.[26] In fact, there were several statutes that explicitly enabled him to act. One such statute authorized seizure of ships ("Tripolitan cruisers") belonging to the Bey of Tripoli.[27] Another allowed for the spoils to be shared by whomever seized them.[28] Yet, other statutes explicitly allowed for warlike operations against the Regency of Tripoli, or any other of the Barbary powers.[29] Only for purely defensive operations did Jefferson permit action based solely on presidential

[23] LOUIS FISHER, PRESIDENTIAL WAR POWER 25 (University Press of Kansas 1995).
[24] Id. 26
[25] 5 THE WRITINGS OF THOMAS JEFFERSON 542 (H.A. Washington, ed. 1861) (emphasis in the original).
[26] 140 Cong. Rec. S 10666 (comments of Senator McCain)(1993).
[27] 2 Stat. 129 (1802).
[28] 2 Stat. 291 (1804).
[29] Id. at 292, § 2; Annals of Cong., 8th Cong., 1st Sess. 1203, 1210-24 (1804). *See also* 2 Stat. 206 (1803); 2 Stat. 391 (1806); 2 Stat. 436 (1807); 2 Stat. 456 (1808); 2 Stat. 511 (1809); 2 Stat. 614 (1811); 2 Stat. 675 (1812); 2 Stat. 809 (1813).

prerogative and even then sought congressional approval afterwards. Still, Jefferson concluded from experience that war was, in fact, the true nurse of executive aggrandizement.

The nineteenth century saw the expansion of the president's potential for making war over the Congress's power to declare war. Use of military force was justified for protecting American lives and property and the concept of the "defensive war" was fully developed.[30] Presidents gradually claimed the power to initiate war and to determine its magnitude and duration. Hamilton's remarks about the powers of the executive as regards the Barbary pirates would be later echoed by the courts in *The Prize Cases* in 1863, giving Lincoln the authority to proceed to war without advance congressional sanction. But first, there was congressionally declared war.

In 1812, after two decades of congressionally authorized but undeclared wars against Indians, France and the Barbary pirates, Congress declared its first war.[31] President Madison left the declaration of war to Congress as well as, thirty months later, the declaration of peace. Regardless, a legal dispute reached the Supreme Court in 1827 regarding Madison's calling up the state militia as part of the East Coast war effort. As he had congressional authority to do so, the Court found in his favor. In doing so, the Court ruled that "the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons."[32] This decision validated the concept that the president derived his authority from legislation that allowed him to repel invasion from abroad or to suppress internal resurrection. In the next confrontation, the Mexican - American War, President Polk exhibited a new level of executive caprice and demonstrated how a standing army can entice a Commander in Chief to action.

[30] "Lives and property" was the ostensible reason for the bombardment of the Nicaraguan port of Greytown, in 1845.
[31] 2 Stat. 755 (1812).
[32] Martin v Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).

When Texas won her independence from Mexico in 1836, President Jackson was hesitant to acknowledge the fact because he felt it might lead to war with Mexico. This, he felt, would invade the prerogatives of Congress: "It will always be considered consistent with the spirit of the Constitution, and most safe that the power of recognition should be exercised, when probably leading to war, with the previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished."[33] By 1845, Texas was annexed to the United States and soon thereafter, President Polk used the military to gain additional territory from Mexico. The president feared that Great Britain had her eye on the territory owned by Mexico that annexed the state of Texas and formed the West Coast of our continent. In order to force the issue, Polk ordered U.S. troops to provoke a clash along the border and thus justify military action against Mexico on the basis that war then existed.

Knowing that Mexico could not afford a war, Polk's plan was to settle for peace and obtain California and other such parts of Mexican territory in return. While Congress did debate the issue, in the end they voted 40-2 that a state of war existed. Polk offered some interesting arguments to buttress his position, but the fact remains that he used his Commander in Chief power and the standing army to initiate hostilities and pulled Congress along into declaring war on Mexico. "Polk's action was censured by the House in 1848 on grounds that the war had been 'unnecessarily and unconstitutionally begun by the President.'"[34] This was Congress protesting their being made to be secondary actors. It would not be the last time.

Among those signing the censure was Abraham Lincoln, who stated that to "Allow the president to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for

[33] LOUIS FISHER, PRESIDENTIAL WAR POWER 30 (University Press of Kansas 1995).
[34] Id. at 35.

such purpose - and you allow him to make war at pleasure…This, our Convention understood to be the most oppressive of kingly oppressions; and they resolved so to frame the Constitution that *no one man* should hold the power of bringing the oppression upon us."[35] These words are poignantly applicable today as well.

Lincoln's actions during the Civil War may make him seem hypocritical. In 1861, with Congress in recess, Lincoln responded to insurrection by calling forth the state militia, suspending the writ of habeas corpus, and blockading southern ports. He also expanded the army and navy beyond the limits set by statute, pledged the credit of the United States without congressional authority to do so, closed the mails to "treasonous correspondence," and arrested persons suspected of disloyalty. There are differences between the actions of Polk and Lincoln however.

Polk used the army to provoke a war while Lincoln called up the militia to handle a genuine rebellion. Polk had discretion and Lincoln faced a confrontation. The most important difference though, is that "Lincoln had genuine doubts about the legality of his actions…and openly requested statutory authority from Congress."[36] In acting first and requesting sanction afterwards, Lincoln invoked John Locke's presidential prerogative theory of government where the executive acts first to preserve the country, even if he must act illegally. As Jefferson noted earlier, to let the country fail in the name of the law would be to lose the ends for the means. In such circumstances, it is the state of urgency that becomes the essential issue.

Regarding Lincoln's blockade of the southern ports, there came to the court the issue of whether or not it was fair for ships captured prior to an official war declaration to lose the right to maintain their cargo, which was normally a prize of war. The issue became a Constitutional

[35] 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 451-452 (Roy Basler, ed. 1953) (emphasis in the original).
[36] LOUIS FISHER, PRESIDENTIAL WAR POWER 38 (University Press of Kansas 1995).

question of the validity of Lincoln's right to institute a blockade before Congress could act. The Court found by a 5-4 majority that, by a number of measures, war existed and Lincoln had a casus belli. The Court found that in times of invasion, the president was "bound to resist by force. He does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority."[37] Unlike many twentieth century presidents, Lincoln never claimed he possessed full authority to act as he did. He openly admitted to exceeding the constitutional boundaries set for the president and requested congress's sanction as soon as was possible.

In the end, while causing considerable debate, Lincoln, earned the approval of Congress for his actions with the exception of judicial opposition to his suspension of the writ of habeas corpus. This particular action was found unconstitutional in *Ex parte v Merryman,* though the Court could not enforce its findings at that time.[38] As the union was in a fragile state and confrontation could be ill afforded, the Court let Lincoln prevail until after his death when it found Lincoln's use of military tribunals, in otherwise judicially functioning states, unconstitutional in *Ex parte v Mulligan*.[39]

THE CHANGING PRESIDENCY: THE TWENTIETH CENTURY

In the 1900s, there were several unique developments regarding the office of the president in general and the use of the war powers specifically. The office of the presidency began to undergo a modern revolution, the so-called "rhetorical presidency." The president became a much more public figure and learned to use the media to his advantage. The effect was to take his agenda directly to the American people and, by doing so, control the national agenda regardless of congressional desire. This new role, that of "Chief Legislator," is a modern

[37] Brig Amy Warwick, 67 U.S. 635, 668 (1863).
[38] *See* Ex parte Merryman, 17 Fed. Case No. 9, 487 (1861).

outgrowth of the president's former power of negative legislative leadership in the form of the office's veto power. The problem with this direct approach is that, while popular when the people agree, there is no recourse or accountability when the people disagree except elections. This moves government toward the whim of the electorate and away from the considered deliberation the founders had envisioned. There is the danger that "a Congress of buck passers is one of the results of the electorate's tendency to reward politicians who are responsive to its immediate wants, not Congress's considered constitutional duties."[40]

In the twentieth century, America intervened regularly in other countries to protect American lives and property. Mutual security treaties became new platforms for presidents to claim expanded unilateral authority, despite legislative history to the contrary. While "lives and property" became the announced reason for intervention, there was always a larger purpose involved. Later, Theodore Roosevelt would send troops abroad to promote American foreign policy, not even employing the guise of the defense of lives and property. This was known as the Roosevelt corollary to the Monroe doctrine, itself a general warning of U.S. military power to other nations, which did not mention Congress. In Panama, for example, the president used a treaty as a vehicle to justify his using the military to force the issue and claim the right to advance on the canal. The Congress, brought along after the fact, was compelled to make amends to Columbia for the heavy-handed way in which Panama was originally created.

Woodrow Wilson held non-intervention as one of his guiding principles. Yet, this was put aside in order to promote a more pressing Wilsonian principle, American constitutionalism

[39] *See* Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
[40] LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 253 (Fourth ed., CQ Press 2001).

abroad.[41] He furthered the practice of presidents using unilateral authority for military deployment against weak countries, such as Veracruz, in 1914. In subsequent action against Mexico, ostensibly because they disrespected the U.S., the Congress chose to deliberate for a single day before granting authority for military action. This proved too long for President Wilson, who ordered landing operations by the Marines. Again, the Congress was dragged along behind events. The question now suggested itself: would Congress be responsive and willing to uphold its Constitutional duty to be responsible in cases of armed conflict or would they permit a popular or bold executive to lead the way without them?

From 1900 to 1950, two major war power related developments merit attention: rejection of the concept of the "self-executing" treaty, which led to the failure of the League of Nations, and a court decision that attempted to redefine the origin of our sovereignty written by Justice Sutherland in 1936.

At the end of World War I, President Wilson submitted the Versailles Treaty to Congress for ratification. Attached was the Covenant of the League of Nations. In it, Wilson provided for an assembly that, automatically and alone, would "use economic and military sanctions against nations that threatened war."[42] Senator Henry Cabot Lodge (R-MA) listed a series of "reservations" over the treaty including one that stated that "nothing in the league could take from Congress its 'sole power' under the Constitution to declare or authorize the use of military force against other nations."[43] This "reservation" caused the failure of the League of Nations and established that no treaty could bypass the constitutional process. This no-bypass standard would form the heart of the debate later, during formation of the United Nations. Consequently,

[41] Wilson unilaterally sent troops to Haiti and the Dominican Republic to retain American hegemony in the Caribbean as well as Mexico.
[42] LOUIS FISHER, PRESIDENTIAL WAR POWER 71 (University Press of Kansas 1995).
[43] LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR & SPENDING 36 (Texas A&M Press 2000).

it became necessary to define "Constitutional process." This was accomplished by the U.N. Participation Act, which stated clearly that agreements shall be subject to the approval of Congress by bill or joint resolution. This reinforcement of congressional prerogative in 1945 followed a swing towards executive power that surfaced in 1936, after the League of Nations' repudiation of executive ability to forge foreign policy without Congress. The case in question centered around a justice who had a unique interpretation of history and who felt compelled to assert it: Justice George Sutherland.

The case came at a time when presidents were claiming unprecedented powers due to the Great Depression. It involved a challenge by the Curtiss-Wright company alleging that the president had too much discretionary power in ordering the company to cease doing international business because of a presidential arms embargo against South America. Courts were generally reticent to grant the executive these huge discretionary powers and had struck down the delegation of domestic power to the executive in two prior cases.[44] At issue in *United States v Curtiss-Wright Corp.* was the same concept: broad congressional delegation, in this case, as applied to international affairs. Unfortunately, Justice Sutherland took the opportunity to define, by his interpretation of history, the extent of independent presidential power instead of attempting to determine congressional authority to delegate.

Sutherland postulated that sovereignty passed from the Crown directly to the eldest male heir, which in our case he saw as the executive, by the Treaty of Paris. He felt that there were no relations between foreign entities and the several, independent and sovereign states but only between our federal government and foreign entities. Thus, he makes a distinction between domestic and international issues, each having a distinct standard for congressional ability to

[44] *See* Panama Refining Co. v Ryan, 293 U.S. 388 (1935); Schechter Corp. v United States, 295 U.S. 495 (1935).

delegate powers to the executive. This distinction derives from the concept of the "inherent powers" clause of the Tenth amendment.

Many scholars find fault with this analysis as there was, in 1776, no federal government or executive to initiate the independence movement from the British Crown. Many states did indeed consider themselves sovereign entities and did not act "as a unit." "More relevant here, however, is the argument that the entire notion of 'inherent powers' cannot possibly conform with theories underlying the Constitution."[45] This refers to the intent of the Tenth Amendment and its applicability to state power over domestic versus foreign affairs. Justice Sutherland argued powerfully for the former, resisted the latter, and thus granted to the federal government considerable power regarding executive discretion in foreign affairs. The case is still cited to support broad delegation of legislative power to the President as well as the existence of implied and inherent powers.[46]

As mentioned earlier, formation of the United Nations after World War II formalized and defined again the role of the "Constitutional process" in foreign affairs where the war powers were concerned. Presidential action from 1950 onward reveals a new willingness by the executive to adamantly declare his independence from the legislature in determining valid circumstances for employing troops while seeking the legislature's sanction nonetheless. Justice Jackson codified this interplay between the executive and the legislature in the use of war or emergency powers in his opinion written for *Youngstown Sheet & Tube Co. v Sawyer*, in 1952. However, the Korean conflict occurred first.

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[45] LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL Law FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 177 (Fourth ed., CQ Press 2001).

[46] *See* Ex parte Endo, 323 U.S. 283 (1944); Zemel v Rusk, 381 U.S. 1, 17 (1965), and Goldwater v Carter, 444 U.S. 996, 1000 (1979) for broad delegation arguments. *See also* United States v Pink, 315 U.S. 203, 229 (1942), Knauff v Shaughnessy, 338 U.S. 537, 542 (1950), and Dames & Moore v Regan, 453 U.S. 654, 661 (1981) for discussions of inherent powers.

During the protracted debate that went into formulating the U.S. position as regards United Nations participation, many theories were proposed. Generally, it was agreed that approval by both houses of Congress would be required for the U.S. to be permitted to use military force even under the auspices of the U.N. charter.[47] Additionally, it was established that membership in any collective security organization or world body could never force a nation into committing troops to a particular scenario nor void the internal constitutional process of that nation, which would always have precedence.[48] In 1943, Senator Claude Pepper (D - FL) introduced the concept and language of the use of forces without prior approval from the Senate in the form of a "police force" to combat aggression in small wars.[49] Although President Truman supported the idea of full Senate approval of military action via "Special Agreement" whenever the U.N. was involved, he heard the Pepper concept when he was a senator himself, and would use the idea successfully to initiate action against North Korea in 1950. In fact, the use of a "police action" would become a favored way of executives starting "small" wars without explicit Congressional approval in subsequent years.

Compared with earlier presidents and their desire to seek congressional sanction and authority for war actions, Truman was a renegade. Truman ignored the Special Agreement provision, as well as the Security Council agreement, and deployed troops in Korea unilaterally. After deployment, the Security Council successfully passed a resolution authorizing force, but only because the Soviet Union had abstained. Meanwhile, Truman used the aegis of the U.N. to

[47] The agreement finally came after Truman assured the Senate that he would always seek appropriate Senate authorization before using force under the auspices of the U.N.

[48] 59 Stat. 621, § 6 (1945): Congress must give explicit consent for any presidential commitment of troops, facilities, or assistance. This was modified in 1949 by 63 Stat. 735-36, § 5 (1949) which allows use of troops on Presidential authority alone if used as observers, guards, performance in non-combative capacity and cannot exceed 1000 in number.

[49] LOUIS FISHER, PRESIDENTIAL WAR POWER 75 (University Press of Kansas 1995).

justify his actions to Congress. The whole affair was sleight of hand, and Truman never did ask for congressional authorization for his "police action."

One would think that, in light of the lengthy debate that preceded creation of the United Nations in 1945, that the legislature would have much to say about this flagrant disregard for their deliberative abilities and constitutionally mandated authority to commit troops, but such was not the case. "After Truman dispatched troops to Korea, Senator James P. Kem (R-MO) asked: 'Does that mean that he has arrogated to himself the authority of declaring war?' Senator Majority Leader Scott Lucas (D-IL) responded, 'I do not care to debate that question…I do not believe that it means war but the Senator can place his own interpretation on it.'"[50] Here we see one of the first instances of a passive Congress permitting the executive to usurp the war power essentially unchallenged. There was the notion put forward by many Senators that going to the Congress prior to taking action would result in a lengthy debate that would exacerbate the situation and so, as Commander in Chief, it was wise to permit, and later sanction, unilateral action by the executive. Of course, the executive, seeking to expand his influence and ability to affect foreign policy, would welcome such a notion.

In 1952, President Truman attempted to seize a steel mill embroiled in a labor dispute to ensure continued output in the name of the war effort. Although the Taft-Hartley Act provided a mechanism for dealing with such disputes in the form of an eighty-day cooling off period, Truman decided to bypass the statute and take direct action. Congress did not support the action, as it could have, by passing emergency legislation strengthening the executive decision. The owner of the mill acquiesced to the order but then brought suit in federal court seeking to find the president's action unconstitutional. The issue ultimately went to the Supreme Court, who found for the steel industry. In his opinion for the Court, Justice Black repudiated the executive's

ability to issue such orders against private property absent an act of Congress or direct linkage to the Constitution itself.[51]

Justice Jackson wrote a concurring opinion that codified the strength of executive power as a function of its level of compatibility with that of the legislature. He listed three discrete conditions of presidential and legislative conformance and sought to quantify the strength inherent in each condition as applicable to the strength and legitimacy of a presidential initiative. The first, "when the president acts pursuant to an express or implied authorization of Congress," brings the highest level of fidelity as it contains all the president's own will as well as all that may be delegated by Congress.[52]

The second is when the "president acts in absence of either a congressional grant or denial of authority."[53] In this case, the president acts on his own independent powers and exists in a "zone of twilight" between maximum and minimum authority. Justice Jackson foresaw several reasons why this may happen, all the doing of Congress by their inertia, indifference, or acquiescence. Indeed, during future war power activities we shall see presidents either looking for these excuses to remain in that zone of twilight or seeking clarification and maximum power by illuminating and exhorting Congress to become engaged.

The third level is "when the president takes measures incompatible with the expressed or implied will of Congress."[54] At such times the executive's power is at a minimum for it consists of the president's inherent power minus any congressional power.

Justice Jackson's pragmatic balancing of authority stands in stark contrast to Justice Sutherland's historically based and undiluted source of presidential power. Jackson's definition

[50] LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR & SPENDING 42 (Texas A&M Press 2000).
[51] Yougstown Co. v Sawyer, 343 U.S. 579 (1952).
[52] Id. at 635.
[53] Id.

integrates the will of the legislature deeply into the fidelity of any executive decision. For indecision to remain as to the strength of an executive action or decision, the legislature would have to, purposely or otherwise, fail to provide direction and authority in support of, or against, that action. Unfortunately, as we will see, this occurs as often out of political cowardice or expediency as it does as a calculated response to practical matters.

After the freewheeling Truman, President Eisenhower tried to set the opposite tone by seeking congressional sanction in most of his foreign policy initiatives. He clearly saw the wisdom of attaining Justice Jackson's first level of presidential power wherever possible. Furthermore, the Senate had held a series of debates where they questioned the desirability of abdicating the war powers to the executive. Senator Robert Taft (R-OH) led these debates. Many felt that Congress could only debate policy as the executive formulated it while others felt that they had delegated all foreign policy authority to the executive through a series of New Deal acts. Eisenhower sought to reverse this trend of legislative resignation and "imperial presidency" thinking, noting that "national commitments would be stronger if entered into jointly by both branches and therefore asked Congress for specific authority to deal with national security crises."[55]

To project the image of a nation united was a fundamental component of Eisenhower's strategy to combat communism. When tensions in the Formosa Straits escalated, Eisenhower went to the Congress first, believing that to do otherwise would leave him alone and unsupported by the nation and the free world. When communist Chinese initiated hostilities on islands in the area, Eisenhower urged Congress to support action "by specific resolution" and declared that he did not anticipate the need to expand defensive obligations beyond this area.

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[54] Id.
[55] LOUIS FISHER, PRESIDENTIAL WAR POWER 103 (University Press of Kansas 1995).

This language did two things. First, it established Eisenhower's desire to include the Congress in even what he defined as defensive operations. Second, it was clear notice that the United States, formerly an isolated continental power protected by vast oceans, now considered activity on the other side of the globe to be considered defensive in nature. This alluded to the interconnected nature of our economy and a new generation of weapons that could threaten our interests even when located far from our shores. Congress gave the president exactly what he requested.

In 1957, the president requested a joint resolution in response to Soviet ambitions in the Middle East. This time there were complications; a debate ensued that attempted to determine the most effective way to ensure that Congress could end military action at some point in the future. After months of debate, a convoluted arrangement resulted that Eisenhower tolerated but largely ignored when actual deployments occurred. It is widely interpreted that he was using the solidarity effect of the resolutions to lend weight to his actions although, in the end, he acted in a way that ignored much of the statutory detail. His reluctance to act single handedly seemed wise as a political strategy.

Where Eisenhower sought to re-institute inter-branch cooperation, President Kennedy "was prepared to act during the Cuban Missile Crisis solely on his own Constitutional authority."[56] Kennedy did not request a joint resolution to take responsive action. Rather, he stated that while he thought it would "be useful" for Congress to pass a resolution sanctioning his actions, he felt no requirement to seek out such a resolution. A case could be made that the immediacy of the threat was indeed a clear and present danger to the nation, an imminent threat, and so the executive reacted in defense. His response of quarantine and of declaring that any attack from Cuba would be the equivalent to an attack by the Soviet Union were seen as measured and

proportional to the threat, and so Congress passed a resolution which expressed the sentiment of support without granting express authority for action. In this case, "Senators deferred broadly to the President's supposed authority in foreign affairs and the war power."[57]

This was another case where, out of either fear of taking any position at all or acquiescence to the actions of a decisive executive, Congress seems to have been ignorant of their Constitutional obligation regarding use of military force. Such acceptance of presidential power sets a dangerous precedent as to Constitutional interpretation for all such future incidents. The fact that, even in retrospect, the Congress refused to consider and sanction the actions taken, even as successful as they were, is evidence that congressional prerogatives were considered of little relative importance during this time. While Dean Acheson, a member of the Kennedy administration's team exploring various options, may have thought, "there was no time…to worry about legal formalities,"[58] one should recall that the U.S. is a nation of laws and such formalities are the basis of our political existence. This easy aversion to legal responsibility would become the cause of one of the worst periods of U.S. history and an example of civil strife caused by foreign policy: the Vietnam War.

Based on what turned out to be specious information regarding attacks on American vessels in the Gulf of Tonkin in 1964, the Congress passed the Tonkin Gulf Resolution, "a massive grant of authority to President Johnson" that was "a key step in the escalation of the Vietnam war, a conflict that eventually drove Johnson from office and prepared the way for the War Powers Resolution of 1973."[59] The Tonkin Gulf Resolution was the clearest abdication of responsibility

[56] Id. at 111.
[57] Id. at 112.
[58] Id. at 113.
[59] Id.

by the Congress to date. It essentially provided the executive a "blank check" in prosecuting the war in Southeast Asia. This came after a minimum of deliberation on the part of Congress.

While President Johnson gave the public every indication of limiting the war, he used the resolution to widen the war tremendously. Troop numbers rose from less than 10,000 originally to over 500,000 at its peak in 1967. Without Congressional supervision, the executive and the military falsified reports to bolster their performance in the public eye, leading to appallingly inaccurate casualty figures and expenditures. Actual war costs prevented Johnson from pursuing his ambitious domestic "Great Society" programs and eventually prevented him from seeking reelection.

The war bitterly divided the country as well. The people became deeply distrustful of their government as the lies mounted. Johnson's use of Free World Forces, troops that other nations sent supposedly at their own expense while, in reality, the U.S. subsidized their deployment in a grossly inefficient manner, was a way to fund the war expansion covertly.[60] Johnson's method of routing funds by supplemental bills was inefficient and intellectually dishonest. The spirit of civil war, first sparked in England from similar fiscal abuses by the monarchy, reasserted itself in America by virtue of an executive who acted like a monarch with a war power granted by an irresponsible and naive Congress. Finally, in 1973, under a new executive, and by reasserting the power of the purse, Congress ended the war by denying all funds for combat activities.

The error of the Tonkin Gulf Resolution was in basing a decision on a belief in President Johnson's personal ability to handle the situation as opposed to a more measured act of making an institutional decision. An institutional decision would have removed personality from the equation and forced an assessment of whether the power existed in the first place for Congress to

grant or concede such authority. Additionally, courts during this period refused to rule on the issue calling it a non-justiciable political question better handled by the political branches.[61] However, this lack of engagement by the courts was interpreted as tacit approval. This is an inherent danger whenever the judicial branch chooses inaction. Have these lessons been assimilated?

THE WAR POWERS RESOLUTION

In 1973, Congress passed, over President Nixon's veto, the War Powers Resolution.[62] This resolution was intended to delimit presidential prerogative and calls for "collective judgement" between the president and Congress before troops could be sent into combat. The Act is recognition that the president has become the usual initiator of action while the role of Congress is to either limit or endorse. Basically, the War Powers Resolution seeks to enumerate the powers that the framers originally intended to be part and parcel of the Constitution's divided war powers but that, through a process of executive caprice and Congressional abdication, have been seriously eroded. Yet, the Act actually legitimizes presidential powers never intended. One unintended consequence of the wording of the document is that it has allowed presidents to engage in unilateral, short-term "wars" of up to 90 days, an agonizingly long time given current levels of U.S. military power.

The act generally requires that the president consult with Congress in "every possible instance" and that he may not commit armed forces unilaterally unless there is a "declaration of war, specific statutory authorization or national emergency created by an attack on the U.S. or its

[60] "UNITED STATES SECURITY AGREEMENTS AND COMMITMENTS ABROAD" 91st Cong., 1st Sess. 255, 358 (1969) (the White House had created a false impression that the Philippines, Thailand, and South Korea were contributing troops on their own. Hearings in 1969 and 1970 showed quid pro quo assistance from the United States).
[61] *See* Drinan v Nixon, 364 F.Supp. 854 (D. Mass. 1973); Holtzman v Schlesinger, 484 F.2d 1307 (2d Cir. 1973).
[62] 50 U.S.C. § 1541-1548.

armed forces."[63] Specifically, it requires a "written report to Congress within 48 hours of a commitment" and requires "ending the commitment within 60 days unless authorized by Congress." If the president certifies to Congress that the action is necessary, it may be extended for another 30 days but, ultimately, it provides for Congress, through concurrent resolution, an ability to order to disengage these forces, not subject to presidential veto, before the end of the first 60 days.[64] Alternatively, a simple lack of subsequent congressional authorization requires the automatic removal of troops.

Requiring a president to consult Congress "in every possible instance" is a weak re-application of the framer's bestowing on the executive the ability to "make," but not "declare," war. It recognizes the ability to repel sudden attack and is inclusive of the developed definition of defensive actions in a modern world, as well as the desire and need to protect interests and citizens abroad. Should such consultation not be possible, forced reporting and justification is a cynical attempt to enforce Lockean prerogative theory of seeking approval, in good faith, after the fact. Not one military initiative desired by a president after 1973 has been canceled or restricted because of this legislation, though it has caused presidents to come to Congress asking support for commitments of troops where there was a danger of wider war. In other instances, the conflict was resolved within the 90-day limit.

And, there is a problem, an inherent contradiction, with this "forced comity": the act of making reporting and reply mandatory creates, in effect, a legislative veto, a mechanism that has been found, under other circumstances, to be unconstitutional.[65] Courts have consistently upheld the essential rule that before any measure can become law under the Constitution, it must be

[63] Id.
[64] Id.
[65] *See* INS v Chadha, 462 U.S. 919 (1983).

presented to the president.[66] Legislating that lack of congressional action or use of concurrent resolution, alone, to terminate the use of forces is, by any definition, a legislative veto and a possible violation of the presentment clause.[67]

Alternatively, if Congress chose to use a joint resolution to stop the use of forces abroad, such resolution would be subject to presidential veto. Thus, it would require a two-thirds-plus-one vote to be overridden, making the limiting of presidential war making go even beyond the requirement for impeachment. This asymmetry would make it easier to go to war than to stop war, or even to impeach a president. Certainly, this current arrangement requires attention and correction.

Presidents do not like this Act, considering it to be unconstitutional as it interferes with the their ability, as Commander in Chief, to exercise the "take care" clause.[68] Since Congress attempts to control the president by timed action or inaction, presidents simply avoid notifying under the 60 day contingency, and starting the clock, in the first place. Presidents have made a number of reports to Congress since the Act's passage but, except for one instance, have avoided starting the 60 day clock by claiming that the reports themselves constitute the required "consultation" with Congress to have been fulfilled. However, is this really the fault of the executive? No, not exclusively.

In point of fact, one has only to look at presidential action subsequent to the War Powers Resolution to see the difficulty presidents have had in trying to reintegrate the Congress in making tough decisions regarding the use of military force abroad. President Ford attempted, in seemingly good faith, to include Congress in his 1975 decision to use force to evacuate American citizens from South Vietnam and Cambodia. Given nine days to come up with

[66] U.S. Const. art. I, § 7, cl. 2.
[67] Id.

language to permit the requested action, Congress, fearful of unwittingly permitting an expansion of hostilities, debated the issue for weeks, never managing to pass any authoritative language at all. The president went ahead and performed the evacuations, in spite of the lack of "clarifying authority" from Congress.

After the fact, the Congress still did not pass a resolution authorizing the action taken. Some members of Congress felt such a resolution would be moot given that the action was over, while others worried that any language would be construed as authorization to use troops generally in South East Asia. It would have been proper to retroactively legalize the president's action. Doing so would have preserved the Congress' intent, expressed in the War Powers Resolution, of remaining relevant in foreign policy and prevented any new gloss being attributed permanently to interpretation of the Constitution. Congress can stand against the president or stand beside him, but it should never stand aside.

In the late twentieth century, these issues have again been debated in the well of the Senate. The contemporary view emerged that those who believed in the application of congressional deliberation prior to the use of discretionary force, the pro-Congress view, were "weak" on national defense. Those who believed that the executive must have the power to act unilaterally in the interests of foreign policy, the pro-executive view, feel that the "Declare War" clause does not exclude initiating war by other means. Pro-executive adherents believe that the power of the purse alone is sufficient to check the executive.

THE TWENTY-FIRST CENTURY

Scholars have long disagreed whether the term "Commander in Chief" only confers a title as first among all other commanders or if it implies additional powers to the president. Whatever scholars may muse, the text and history of the framing tilt decisively toward Congress, and that

[68] U.S. Const. art. II, § 3.

the only unilateral action of the president is to repel sudden attack. This would mean that the president never received a general power to deploy troops or to mount an offensive attack against another nation. Mere repetition of an action cannot make Constitutional that which is unconstitutional.

After the United States was attacked on September 11, 2001, President George W. Bush and his cabinet of mostly neo-conservatives published "The National Security Strategy of The United States of America." In it, the administration, in what may be called the "Bush doctrine," rejected the policy of deterrence and articulated its policy of preemption, a declaration that caused considerable debate and consternation. One cause for these concerns are the twin aims of acting against "emerging threats before they are fully formed" while simultaneously declaring that we will do so while "proceeding with deliberation."[69] The document mixes concepts that previously had been kept distinct, such as declaring an intention to "exercise our right of self defense by acting preemptively" and "our best defense is good offense."[70] While international law recognizes many legitimate preemptive activities based on, for example, an enemy's mobilizing their offensive forces, this new policy stretched those concepts to new limits. What role does imminence play in an executive's decision? Does this doctrine unquestionably expand authority beyond response to sudden attack? The anticipatory self-defense alluded to in the Bush doctrine is, at best, constitutionally ambiguous.

When the Bush administration announced its intention to invade Iraq, a conflict arose that crystallized the differences between the pro-Congress and the pro-executive adherents. The pro-Congress faction filed a federal lawsuit to enjoin the executive from the initiation of war with

[69] George W. Bush, *The National Security Strategy of The United States of America*, ¶ 5 (2002), *at* http://www.whitehouse.gov/nsc/nssintro.html.
[70] George W. Bush, *The National Security Strategy of The United States of America*, ¶ 9 (2002), *at* http://www.whitehouse.gov/nsc/nss3.html.

Iraq.[71] The plaintiffs in *Doe v Bush*, members of Congress, military personnel, and their family members, made the arguments of many pro-Congress adherents: that the Constitution requires joint legislative and executive action to initiate war. They also claim that none of the legislation passed since September 11, 2001, including House Resolution 114, confers sufficient authority for the initiation of hostilities. House Resolution 114 authorizes the president to "(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."[72] The plaintiffs asserted that, based on this vague language and the legislative history, unless narrowly construed, the resolution would be tantamount to congressional abdication of its non-delegable trigger power and would impair separation of powers. They also asserted that a narrow construction was not only possible but also obligatory before the use of full military force was initiated. After all, there was time and alternate means to achieve the stated goals called into play by the U.N resolution and U.S. policy.

In defending against the lawsuit, the Bush administration brushed plaintiff's argument aside and made the broad claim that the Constitution is no bar to the White House making war on Iraq without congressional assent.

> In doing so, the Government has, apparently for the first time in litigation, embraced the most extensive assertions of presidential power marked out by pro-executive academics. Under this view, the President can unilaterally launch a premeditated, preemptive all-out war, whenever, in his sole judgment, he deems it necessary to defend the country's national security interests. The President's power to make war is not, the White House argues, limited to repelling hostilities nor it need be commensurate with the immediacy or the magnitude of the threat. Rather, it can be in pursuit of long term policy objectives.[73]

[71] Doe v Bush, 240 F.Supp.2d 95 (Mass. 2002).
[72] H.J. Res. 114, § 3 (2002)
[73] Margaret Burnham, *War Powers: Towards Unchecked Executive Authority?,* ¶ 4 (2003) *at* http://jurist.law.pitt.edu/forum/forumnew99.php.

When this controversy reached the court, the court declined to engage, instead dismissing the suit as a non-justiciable political question. As events tumbled forward, a petition was made to the appeals court, but to no avail.[74] The Court of Appeals claimed that, "Congress has taken no action which presents a 'fully developed dispute between the two elected branches.' Thus the case continues not to be fit for judicial review."[75] Of course, the political question doctrine used by the Court is meant to keep the court from entering political thickets and to preserve its political capital. The problem remains one of tacit approval being attributed to a decision to not engage.

Executives claim the evidence of the power to initiate hostilities is that it has done so many times before, without congressional authority, and without judicial interference. "This is a win-win syllogism for unchecked executive authority: its use of the power is an unreviewable political prerogative and, *ipso facto*, proof of its legitimacy, and so the evidence in its favor is infinitely cumulative."[76]

There is some precedence for the Court to insert itself into matters that should be the exclusive province of the political branches, but, as Justice Jackson once lamented, "a judge may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[77] Still, if the Court is to maintain its position that it has the undiluted authority and ultimate responsibility to "say what the law is," then perhaps, on this particular subject at this particular time, it should begin doing so.[78]

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[74] Doe v Bush, 322 F.3d 109 (1st Cir. 2003).
[75] Id.
[76] Margaret Burnham, *War Powers: Towards Unchecked Executive Authority?,* ¶ 9 (2003) *at* http://jurist.law.pitt.edu/forum/forumnew99.php.
[77] Youngstown Co. v Sawyer, 343 U.S. 579, 592 (1952).
[78] Marbury v Madison, 5 U.S. (1 Cranch) 172, 177 (1803).

What is most interesting is that the Court is now taking on a conservative bent. President Bush may have the opportunity to name more than one new justice to the Supreme Court and will likely further tilt the Court in a conservative direction. The Court's most conservative justices now tend to be partial to an originalist's reading of the Constitution. How this originalist's view of the Constitution will mesh with the political conservative's embrace of the pro-executive war power is an interesting mental exercise and may produce a display of Constitutional relativism.

Again it may be asked: can all of this be blamed on the courts alone? Congress, after all, did simply acquiesce to the President's request with minimal debate. And, as Justice Jackson once advised, it was "up to congress to see that its war powers did not slip away."[79] Shouldn't Congress therefore bear the brunt of responsibility regarding this issue?

In most instances since the Korean War, unilateral acts by presidents have resulted in less than optimal results and all eviscerate the powers of Congress as articulated in the Constitution. In situations where Congress has been given opportunities for input, more often than not they defer to the executive or simply fail to have relevant input at all. What lesson does this teach the executive? It teaches him to use the Congress only for political cover when an action has a large chance of producing a politically damaging outcome.

Concurrently, lack of congressional action provides the same political cover for Representatives and Senators. Deferring a decision, letting the War powers Resolution sit dumbly by, while executive action carries forth provides an ability to assign blame for failure, should it develop, as well as to claim party to any success. This situation is a kind of corollary to the executive's win-win syllogism: the legislature's action is an unreviewable political

[79] Youngstown Co. v Sawyer, 343 U.S. 579, 592 (1952).

prerogative and so action legislated by inaction becomes, *ipso facto*, an unreviewable form of action. This is not as the framers had intended.

It is a widely accepted fact that the War Powers Act does not work as was intended. Presidents resist it, constitutional scholars debate it, Congress allows it to be manipulated, and the judiciary defers addressing it. So, why doesn't Congress just go ahead and amend the War Powers Act? Unfortunately, the reason seems to be that the Act has provided effective advantage for an articulated congressional desire to affect foreign policy while allowing simultaneous cover in case an ultimately bad decision is made by the executive. In other words, it has up to now "worked" to Congress' benefit, even if not in the manner originally intended. As far as the body politic is concerned, the end result is that foreign policy is carried out, wars get funded, and the business of the republic marches on. So what if the underlying method is somewhat mangled? The concern is that the War Powers resolution subverts even the final check on governmental power left to the citizenry: elections.

One of the cornerstones of democratic elections is that those asking for the vote of the governed have a certain degree of accountability associated with their decision making. When selecting a representative to vote for, it is required to know that candidate's record. By making inaction an affirmative act, the War Powers removes accountability from the process. This may violate the Constitution and be an entry point for a Supreme Court review of the legislation.[80] Effective republican forms of government require accountability.

Additionally, amending the Act would be difficult politically and may be expensive in terms of time, prestige, and power to key individuals. In short, ignoring its problems has been far easier than fixing them.

[80] U.S. Const. art. 1, § 5.

The problem with this approach is that, eventually, the conditions that prove to trigger all the weak points of this legislation will occur, probably in a manner currently unforeseen. This will lead to a round of "who made the last decision" finger pointing that will not the serve the interests of the country. The War Powers Act allows the executive to begin something that may become intractable. If this were to occur, the legislature may find itself in the unenviable position of using inaction as a denial of responsibility or, alternatively, causing an outright confrontation.

If this ultimate confrontation occurs between the two political branches and then the judiciary is called upon to intervene, it may cause further division within the three branches at just the moment that maximum cohesion is required. Mandating that someone "take the fall" for a probably innocent, if tragic, error will only compound the problem when legislation is needed most to help avoid problems. In addition, through it all, the electorate is less powerful, less informed, and less able to self-govern.

These sorts of accidents, beginning with seemingly small and unrelated events which then branch to the ultimate, unforeseen in the present but clearly seen in hindsight, result, are just the types of accidents that are the cause of tragic outcome in even the most well thought out of human schemes. Given the inherent flaws in the procedural and substantive provisions called for, as well as those actually used in practice, in the War Powers Act is akin to asking for eventual, major consequences. It is therefore irresponsible of our elected officials, despite the tremendous inconvenience it would cause, to evade the problem, as is now the case. Indeed, the Court has found in earlier times that "public discussion is a political duty,"[81] and so it should be incumbent on our elected officials to promote this discussion, not evade it. Importantly, it would

[81] Whitney v California, 274 U.S. 357, 375 (1927).

seem that the inverse is also true, that political discussion is a public duty, one that is often neglected by the harried citizen-consumer.

Inefficiency within the three branches may have been the guiding principle designed to prevent tyranny, but it will not prove to be a wise method of maintaining inter-branch relations when foreign threats test our limits. It would be far wiser and more stabilizing to our system to fix these problems at their root while time and circumstance permits it. As history has shown, there is a real danger to our continued inaction as citizens, for "[T]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[82] That day has never been closer.

[82] Youngstown Co. v Sawyer, 343 U.S. 579, 594 (1952) (J. Frankfurter, concurring).