Chapter Nine

Expansion of the President's War Power

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For the first century and a half, the president's exercise of the war power was carefully and deliberately constrained by constitutional text, framers' intent, custom, and the governing principle that, in a republican form of government, the decision to take the country to war rests with the elected representatives in Congress. Since World War II, presidential war power has expanded dramatically with few of the traditional legislative and judicial checks to constrain it. Presidents now announce they can go to war with another country when it is "the right thing to do." These claims, unrelated to legal authority, subordinate republican government to presidential choice, exactly what the framers had hoped to avoid. The terrorist attacks of September 11, 2001 have shifted even greater power to the executive branch.

Principles of a Republic

The framers of the Constitution studied European political models that vested war powers in the monarch. Breaking decisively with that tradition, they vested power to initiate war in the legislature. As the framers completed their labors at the constitutional convention, Thomas Jefferson wrote to his friend, James Madison: "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[1]

The overriding principles endorsed by the framers were collective judgment, shared power in foreign affairs, and "the cardinal tenet of republican ideology that the conjoined wisdom of many is superior to that of one."[2] In deciding on the allocation of war powers, the framers reviewed and rejected the models offered by John Locke and William Blackstone. Locke's *Second Treatise on Civil Government* (1690) spoke of three branches of government: legislative, executive, and "federative." The last consisted of "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth." For Locke, the federative power (what we call foreign policy) was "always almost united" with the executive. Separating the executive and federative powers, he warned, would invite "disorder and ruin."[3]

A similar model appears in Blackstone's *Commentaries*, written in the eighteenth century. Blackstone defined the king's prerogative as "those rights and capacities which the king enjoys alone." Some prerogatives were "rooted in and spring from the king's political person," including the right to make war or peace. The king could also make "a treaty with a foreign state, which shall irrevocably bind the nation," and issue letters of marque and reprisal (authorizing private citizens to undertake military actions), a prerogative "nearly related to, and plainly derived from, that other of making war." The king was "the generalissimo, or the first in military command," with "the sole power or raising and regulating fleets and armies."[4] When America declared its independence from England in 1776, the framers vested *all* executive powers in the Continental Congress. They did not provide for a separate executive.

The Philadelphia debates underscore the framers' intent that monarchical war prerogatives would not apply in America. On June 1, 1787, Charles Pinckney said he was for "a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." John Rutledge wanted executive power placed in a single person, "tho' he was not for giving him the power of war and peace." James Wilson also preferred a single executive, but "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."[5]

Edmund Randolph worried about executive power, calling it "the foetus of monarchy." The delegates to the Philadelphia convention, he said, had "no motive to be governed by the British Government as our prototype." Wilson agreed that the British model "was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it." James Madison later remarked: "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."[6]

Fear that the president would lead the nation into war "in order to achieve personal glory" figured prominently in the framers' thinking.[7] In Federalist No. 4, John Jay cautioned that "absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans."

Although the president was made commander in chief, it was left to Congress to raise and regulate fleets and armies. The extent of the break with Locke and Blackstone is set forth clearly in *The Federalist Papers*. In Federalist No. 69, Hamilton explained that the president has "concurrent power with a branch of the legislature in the formation of treaties," whereas the British king "is the *sole possessor* of the power of making treaties." The royal prerogative in foreign affairs was deliberately shared with Congress, he noted. Hamilton contrasted the distribution of war powers in England and in the American Constitution. The power of the king "extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies."

The Constitution grants to Congress a number of specific powers to control war and military affairs: to declare war; to grant letters of marque and reprisal; to raise and support armies and to provide and maintain a navy; the power to make regulations of the land and naval forces; the power to call forth the militia; and the power to provide for organizing, arming, and disciplining the militia. Moreover, since commercial conflicts between nations were often a cause of war, the Constitution vests in Congress the power to regulate foreign commerce, an area directly related to the war power.

The framers recognized that in emergency situations the president might have to use military force to repel sudden attacks without first obtaining authority from Congress. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year. Madison and Elbridge Gerry moved to insert "declare" for "make," leaving to the president "the power to repel sudden attacks." Their motion carried seven to two. After Rufus King explained that the word "make" would allow the president to conduct war, which was "an Executive function," Connecticut changed its vote and the final tally was eight to one.[8]

The war power was clearly intended to be defensive, not offensive. Reactions to the Madison-Gerry amendment reinforce this viewpoint. Pierce Butler argued that the president "will have all the requisite qualities, and will not make war but when the Nation will support it."[9] Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war."[10] George Mason spoke "aqst giving the power of war to the Executive, because not safely to be trusted with it … He was for clogging rather than facilitating war."[11]

Similar statements were made at the state ratifying conventions. In Pennsylvania, James Wilson expressed the prevailing sentiment that the system of checks and balances "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large."[12] In North Carolina, James Iredell pointed out that the king of Great Britain had the power to raise fleets and armies and to declare war, whereas the U.S. Constitution vested those powers "in other hands."[13] In South Carolina, Charles Pinckney assured his colleagues that the president's powers "did not permit him to declare war."[14]

The title commander in chief implied the duty to repel sudden attacks, but beyond that responsibility the president had to await congressional authority. The title also represents an important method for preserving civilian supremacy over the military. The person leading the armed forces would be the civilian president, not a military officer. Attorney General Edward Bates explained in 1861 that the president is commander in chief not because he is "skilled in the art of war" but to keep the army "subordinate to the civil power."[15]

The constitutional framework adopted by the framers is clear in its basic principles. The authority to initiate war lay with Congress. The president could act unilaterally only in one area: to repel sudden attacks. Over the next two centuries, however, a number of incidents helped expand the president's power to *make* war over the formal power of Congress to *declare* war.

Presidential Power Expands

Aside from Polk's initiatives in Mexico and Lincoln's emergency actions during the Civil War, the power of war in the nineteenth century remained basically in the hands of Congress. Presidents recognized the rule of legislative supremacy in matters of going to war. Congress declared war against Spain in 1898 and again in World Wars I and II.

In 1936, the Supreme Court issued *United States v. Curtiss-Wright Corp.*, a decision that did much to elevate the president as an independent force in foreign affairs. The Court was asked to decide whether Congress could delegate more broadly when legislating for international affairs. The issue was never the existence of independent presidential power. But the author of *Curtiss-Wright*, Justice George Sutherland, decided to use a delegation case to discover inherent powers for the president. He claimed that the exercise of presidential power does not depend solely on an act of Congress because of the "very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations."[16] The magic term "sole organ" suggests that when it comes to foreign policy, the President is the exclusive policymaker. The language carries special weight because John Marshall used it in a speech in 1800 while serving in the House of Representatives.

In fact, Sutherland wrenched Marshall's statement from context to imply a position Marshall never advanced. The full context of the debate in 1800 makes clear that Marshall argued that foreign policy is formulated and announced through a collective effort by the executive and legislative branches (by treaty or by statute), and only after that point does the president emerge as the "sole organ" in *implementing* national policy. It was here that Marshall said that the president "is the sole organ of the nation in its external relations and its sole representative with foreign nations."[17] As sole organ the president *announces* policy; he does not *make* it. Even though Sutherland's opinion is filled with historical and conceptual inaccuracies, *Curtiss-Wright* became a popular citation for Court decisions upholding presidential power in foreign affairs. The case is frequently cited to support not only broad delegations of legislative power to the president but even the existence of independent, implied, and inherent powers for the president.[18]

Shortly after *Curtiss-Wright*, President Franklin D. Roosevelt took steps to lead the country from a state of neutrality to one of war. In June 1940, when France requested additional assistance from the United States, he pledged continuing assistance but cautioned: "I know that you will understand that these statements carry with them no implication of military commitments. Only the Congress can make such commitments."[19] However, when Prime Minister Winston Churchill pressed Roosevelt for used destroyers, Roosevelt announced on September 3, 1940, an agreement to exchange fifty "over-age" destroyers with Britain in return for the right to use British bases in the Atlantic and the Caribbean.[20] Made solely by executive agreement, the destroyers/bases deal circumvented congressional control. Attorney General Robert Jackson defended the constitutionality of the agreement, relying in part on Sutherland's opinion in *Curtiss-Wright*.[21]

The Korean Conflict

The constitutional meaning of the war power changed abruptly in June 1950 when President Harry Truman involved the nation in war with North Korea, acting solely

on his interpretation of executive power and seeking no authority from Congress. The legality of his action is subject to debate. What is not debatable is the fact that the president, for the first time, had committed U.S. troops abroad to a major conflict on what he considered to be adequate executive authority. He acted without a declaration of war or specific legislative authorization. Unlike Lincoln, he did not express uncertainty about the legality of his actions and seek retroactive authority from Congress.

For legal footing, Truman cited resolutions passed by the United Nations Security Council. But how could the UN machinery serve as a legal substitute for congressional action? The history of the United Nations makes it clear that all parties in the legislative and executive branches understood that the decision to use military force through the UN required prior approval from both Houses of Congress.[22] Much of the Senate debate in 1945 on the UN Charter centered on whether American troops could be sent to the UN solely by presidential action or would require congressional consent. In the midst of this debate President Truman wired a note to Senator Kenneth McKellar (D-TN), making this pledge: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."[23] With that understanding, the Senate approved the UN Charter by a vote of eighty-nine to two.

Having approved the Charter, Congress now had to pass additional legislation to implement it and to determine the precise constitutional mechanisms for the use of force. The UN Charter called for each nation to ratify agreements to lend military support "in accordance with their respective constitutional processes." The specific procedures for the United States are included in Section 6 of the UN Participation Act of 1945. Without the slightest ambiguity, this statute requires that the agreements "shall be subject to the approval of the Congress by appropriate Act or joint resolution."[24] Statutory language could not be clearer.

With these safeguards supposedly in place to protect congressional prerogatives, how could Truman act unilaterally in ordering U.S. air and sea forces to give South Korea assistance? The short answer is that he ignored the "special agreements" that were the vehicle for assuring congressional approval in advance of any military action by the president. Congressional reaction to Truman's usurpation of the war power was largely passive. Rather than express outrage, some members offered the weak and historically inaccurate justification that "history will show that on more than 100 occasions in the life of this Republic" the president had ordered American troops to do certain things without seeking congressional consent.[25] These precedents for unilateral presidential action do not come close to the magnitude of the Korean War. As Edward S. Corwin noted, the list consists largely of "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like."[26]

Truman was eventually checked by the Supreme Court, not Congress. In the midst of a nationwide strike in 1952, President Truman ordered the seizure of the steel mills to help prosecute the war in Korea. He decided to forgo the statutory option available to him: a cooling-off period of eighty days. That procedure had been included in the Taft-Hartley Act of 1947, a measure vetoed by Truman. Newspapers

from around the country published editorials that condemned Truman's theory of inherent and emergency power. The editorials ripped him for acting in a manner they regarded as arbitrary, dictatorial, dangerous, destructive, high-handed, and unauthorized by law.[27]

At a news conference, Truman was asked by reporters whether he could also seize newspapers and radio stations. He replied: "Under similar circumstances the President of the United States has to act for whatever is for the best of the country. That's the answer to your question."[28] That definition of executive power so offended the public that he soon found himself backpedaling, acknowledging various legal and constitutional limits that operate on the president. He pointed out that Congress could act legislatively to check his action.[29]

The steel companies took the matter to court, where the Justice Department presented a remarkable argument that the judiciary had no power to constrain the president. According to the Department of Justice, only two checks operated on the president: impeachment and the ballot box.[30] In response, District Judge David A. Pine released a blistering opinion that repudiated this theory of inherent presidential power. In holding Truman's seizure of the steel mills to be unconstitutional, Pine admitted that a nationwide strike could do extensive damage to the country, but believed that a strike "would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power, which would be implicit in a failure to grant the injunction."[31]

Pine's opinion resonated with the nation. A Gallup Poll taken afterwards showed dwindling support for the seizure. "This popular reaction ... as a practical matter became an important element in the legal decision-making process."[32] In a six to three ruling, the Supreme Court declared the seizure unconstitutional. With Congress and the nation opposing the seizure, the Court had little difficulty in rejecting Truman's assertion of plenary war making authority.[33]

Eisenhower to Vietnam

The Korean War helped put an end to twenty years of Democratic control of the White House. "Korea, not crooks or Communists, was the major concern of the voters," writes Stephen Ambrose.[34] The high point of the 1952 campaign came on October 24, less than two weeks before the election, when Dwight D. Eisenhower announced that he would "go to Korea" to end the war. Dissatisfaction with the war destroyed Truman's popularity and led to Eisenhower's victory.

Although Eisenhower initially believed that Truman's decision to intervene in Korea was "wise and necessary,"[35] he came to realize that it was a serious mistake—politically and constitutionally—to commit the nation to war in Korea without congressional approval. Eisenhower thought that national commitments would be stronger if entered into jointly by both branches, stressing the importance of *collective* action by Congress and the president.

In 1954, when Eisenhower was under pressure to intervene in Indochina to save beleaguered French troops, he refused to act unilaterally. He told reporters in a news conference: "there is going to be no involvement of America in war unless it is a

result of the constitutional process that is placed upon Congress to declare it. Now, let us have that clear; and that is the answer."[36] Eisenhower told Secretary of State John Foster Dulles that in "the absence of some kind of arrangement getting support of Congress," it "would be completely unconstitutional & indefensible" to give any assistance to the French.[37] Eisenhower's attitude about covert operations was different. On a number of occasions he approved covert actions in Iran, Guatemala, and Cuba without seeking congressional support or authority.

For overt actions, Eisenhower invited Congress to enact area resolutions that would authorize presidential action. He did that with Formosa and in the Middle East. In 1954, conditions in the Formosa Straits threatened to deteriorate into a military confrontation between the United States and China. In a memorandum, Secretary of State Dulles noted that "it is doubtful that the issue can be exploited without Congressional approval."[38] One issue was whether Eisenhower could order an attack on airfields in China. He said that would require "Congressional authorization, since it would be war. If Congressional authorization were not obtained there would be logical grounds for impeachment. Whatever we do must be in a Constitutional manner."[39]

The next year, Eisenhower appealed to Congress for joint action. He believed that the situation merited "appropriate action of the United Nations," but unlike Truman he did not go to the UN and exclude Congress. Instead of waiting for the UN to act, he urged Congress "to participate now, by specific resolution, in measures designed to improve the prospects for peace." The resolution would contemplate the use of U.S. armed forces "if necessary to assure the security of Formosa and the Pescadores."[40] Congress responded quickly: the House passing the resolution 410 to 3 and the Senate supporting it 85 to 3. Eisenhower followed the same process in 1957 with an area resolution for the Middle East to forestall Soviet ambitions. He emphasized the importance of executive–legislative coordination: "I deem it necessary to seek the cooperation of the Congress. Only with that cooperation can we give the reassurance needed to deter aggression."[41]

In his memoirs, Eisenhower explained the choice between invoking executive prerogatives and seeking congressional support. On New Year's Day in 1957 he met with Secretary of State Dulles and congressional leaders of both parties. House Majority Leader John McCormack (D-Mass.) asked Eisenhower whether he, as commander in chief, already possessed authority to carry out actions in the Middle East without congressional action. Eisenhower replied that "greater effect could be had from a consensus of Executive and Legislative opinion, and I spoke earnestly of the desire of the Middle East countries to have reassurance now that the United States would stand ready to help. ... Near the end of this meeting I reminded the legislators that the Constitution assumes that our two branches of government should get along together."[42]

Eisenhower's position on the war power was extremely perceptive. He knew that lawyers and policy advisers in the executive branch could always identify a multitude of precedents to justify unilateral presidential action. It was his seasoned judgment, however, that a commitment by the United States would have much greater impact on allies and enemies alike because it would represent the collective judgment of the president and Congress.

Eisenhower's experiment with inter-branch cooperation was short lived. Unlike Eisenhower, President John F. Kennedy was prepared to act during the Cuban missile crisis solely on his own constitutional authority. At a news conference on September 13, 1962, Kennedy warned of a Communist buildup (with Soviet assistance) in Cuba. A series of Soviet "offensive missile sites," he said, were in preparation.[43] However, he did not request a joint resolution from Congress. Under his power as commander in chief, he claimed to have "full authority now to take such action."[44] The Cuba Resolution, passed by Congress on October 3, did not authorize presidential action. It merely expressed the support of Congress to resist "the Marxist-Leninist regime in Cuba."

By the time Lyndon Johnson entered the White House, three American presidents had taken decisive steps to involve the nation in Vietnam. Truman and Eisenhower provided substantial economic and military assistance to aid the French in Indo-China. Under Truman, the United States paid for between one-third and one-half the cost, and American aid climbed to about 75 percent during the Eisenhower years.[45] Eisenhower made the first commitment of soldiers, sending 200 military personnel to assist the French.[46] Under Kennedy, U.S. military advisers rose from 700 to 16,000.

On August 3, 1964, President Lyndon B. Johnson ordered the Navy to take retaliatory actions against the North Vietnamese for their attacks in the Gulf of Tonkin.[47] He acted following an attack on the U.S. destroyer *Maddox* by Communist PT boats. An August 4 report provided further details on the incident and described a second attack, this one against two American destroyers. Subsequent studies indicate that this second "attack" probably never occurred.[48]

Johnson met with the leaders of both parties in Congress and asked for a resolution making clear "our determination to take all necessary measures in support of freedom and in defense of peace in Southeast Asia."[49] Congress spent little time debating the resolution. Senate debate started on August 6 and concluded the next day, endorsing the resolution by a margin of eighty-eight to two. The House passed the measure on August 7 without a single dissenting vote, 416 to 0. The Tonkin Gulf Resolution approved and supported the determination of the president, as commander in chief, to take "all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."[50]

Neither House bothered to independently verify what happened in the Gulf of Tonkin. In the midst of a presidential election year, only two members of Congress were willing to challenge the president. One of the dissenters in the Senate, Wayne Morse (R-Ore.), displayed an uncanny gift for prophecy: "Unpopular as it is, I am perfectly willing to make the statement for history that if we follow a course of action that bogs down thousands of American boys in Asia, the administration responsible for it will be rejected and repudiated by the American people. It should be."[51] Four years later, after heavy casualties in a war that seemed to have no end and no possible victory, Johnson was driven from office.

Richard Nixon, elected in 1968 to end the war in Vietnam, actually widened it to include Cambodia and Laos. His "incursion" into Cambodia in 1970 triggered nationwide protests and provoked Congress to enact restrictive amendments in 1971 to forbid the introduction of U.S. ground combat troops or advisers into Cambodia.

By denying funds for all combat activities in Southeast Asia in 1973, Congress finally brought the war to an end.

The War Powers Resolution

After years of hearings and lengthy debate, Congress passed the War Powers Resolution in 1973 in an effort to limit presidential war power. Under the resolution, the president is to consult with Congress "in every possible instance," and after introducing forces into hostilities is required to report to Congress within 48 hours. Congress anticipated that the president could use military force without congressional authorization for 60 days (with the option of extending this period to 90 days), but longer military engagements would require legislative approval.

The resolution was vetoed by President Nixon on the ground that it encroached upon the president's constitutional responsibilities as commander in chief. He told Congress the "only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force."[52] Both Houses overrode the veto, with the House narrowly obtaining the two-thirds (284 to 135) and the Senate in wide support (seventy-five to eighteen).

Although the War Powers Resolution overcame a veto, it did not survive doubts about its effectiveness and motivation. Some of the congressional support relied on party politics: efforts to score some short-term political points at the cost of long-term institutional and constitutional interests. Many legislators took comfort in the resolution's symbolic value rather than its contents. Consider the voting record of fifteen members of the House.[53] Initially they voted against the House bill and the conference version because they thought the legislation transferred legislative power to the executive. To be consistent, they should have voted to sustain Nixon's veto to prevent the bill from becoming law. Instead, they switched sides and delivered the votes for enactment.

These members reversed course for several reasons. Some feared that a vote to sustain the veto would lend credence to the views of presidential power advanced in Nixon's veto message.[54] Others thought that an override might be a step toward impeaching Nixon. Representative Bella Abzug (D-NY) voted against the House bill and the conference version because they expanded presidential war power. As she noted during debate on the conference report: "[It] gives the President 60 to 90 days to intervene in any crisis situation, or any pretext, while Congress merely asks that he tell us what he has done."[55] Yet she strongly supported a veto override: "This could be a turning point in the struggle to control an administration that has run amuck. It could accelerate the demand for an impeachment of the President."[56]

The thought of overriding a Nixon veto was tempting. Eight times during the 93rd Congress he had vetoed legislation; eight times the Democratic Congress came up short on the override. Some legislators regarded the override vote on the War Powers Resolution as an essential means of reasserting congressional power, particularly in the midst of the Watergate scandals.[57] The Saturday Night Massacre, which sent Special Prosecutor Archibald Cox, Attorney General Elliot Richardson, and Deputy Attorney General William Ruckelshaus out of government, occurred just

four days before Nixon's veto of the War Powers Resolution. Ten days before the Saturday Night Massacre, Vice President Spiro Agnew's resignation in disgrace further heightened the cry for partisan and institutional blood.

The partisan climate did not prevent some members of Congress from recognizing that the conference product tilted power dangerously toward the president. William Green, Democrat from Pennsylvania, remarked that the War Powers Resolution "has popularly been interpreted as limiting the President's power to engage our troops in war." Yet a careful reading of the bill indicated that it "is actually an expansion of Presidential war making power, rather than a limitation."[58] Other legislators also saw that the bill represented an abdication of congressional power.[59] Senator Thomas Eagleton, a principal sponsor of the Senate bill, denounced the version that emerged from conference as a "total, complete distortion of the war powers concept."[60] Instead of the three narrowly defined exceptions specified in the Senate bill, the conference product gave the president carte blanche authority to use military force for up to ninety days.

Even those who continued to support the War Powers Resolution and urged the override of Nixon's veto admitted the broad sweep of presidential power conferred by Congress. Senators Jacob Javits and Ed Muskie, in a "Dear Colleague" letter distributed to other legislators, conceded that nothing in the bill would have prevented President Nixon from sending U.S. troops to the Middle East to assist Israel against Egyptian threats. The bill, they said, "would have required the President only to report to the Congress within forty-eight hours in writing with respect to the deployment of U.S. Armed Forces in foreign territory, airspace and waters."[61] The president could commit U.S. troops to the volatile Middle East with no nod to Congress other than have aides prepare a written report. Eagleton confessed to being "dumbfounded." With memories so fresh about presidential extension of the war in Southeast Asia, "how can we give unbridled, unlimited total authority to the President to commit us to war?" He charged that the bill, after being nobly conceived, "has been terribly bastardized to the point of being a menace."[62]

Military Initiatives From Ford to Clinton

The War Powers Resolution has failed to achieve the purpose announced in Section 2(a): "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." In fact, the resolution undermines the intent of the framers and has not insured collective judgment. Instead, it gives a green light to unilateral presidential action.

From Ford through Clinton, presidents have used military force on numerous occasions by citing their power as commander in chief. Although they have challenged the constitutionality of the War Powers Resolution, the record since 1973 has been fairly uniform. Presidents have acted unilaterally when using force for short-term operations in areas of the world that are relatively isolated, with little chance of the conflict spreading. For military operations in regions that pose extreme danger of involving other nations, such as in the Middle East, they have sought congressional

approval in advance (without fully admitting that they needed it). This pattern changed abruptly with President Clinton's multi-year, unilateral commitment of ground troops to Bosnia and his air war against Yugoslavia.

During the first few years after enactment of the War Powers Resolution, under Presidents Gerald Ford and Jimmy Carter, the executive branch did little to flex its muscles in making war. Both understood the need to heal the wounds from the Vietnam War. But the record from Ronald Reagan to Bill Clinton revealed an increasing use of presidential war power, with Congress progressively marginalized. Reagan introduced U.S. troops to Lebanon, invaded Grenada, carried out air strikes against Libya, and maintained naval operations in the Persian Gulf. In none of these actions did he ask Congress for authority. Congress eventually passed legislation in the fall of 1983 to authorize military action in Lebanon for a period of eighteen months.

In 1989, President George H.W. Bush relied on independent executive power to invade Panama and only at the last minute did he come to Congress for support in acting offensively against Iraq. Clinton used military force repeatedly without congressional authority: launching missiles against Baghdad in 1993, carrying out combat operations in Somalia, threatening to invade Haiti, conducting air strikes in Bosnia followed by the dispatch of 20,000 ground troops, authorizing repeated air strikes against Iraq, sending cruise missiles into Afghanistan and Sudan, and initiating an air war against Yugoslavia. At no point did he feel obliged to obtain authority from Congress.

Instead of challenging these military initiatives and reclaiming legislative power, members of Congress generally defended presidential prerogatives. This pattern prevails regardless of whether the president is from the legislator's party or not. In backing Clinton, for example, Bob Dole (R-KA), John McCain (R-AZ), and Newt Gingrich (R-GA), all invoked the president's "authority under the Constitution" "regardless of what Congress does," for the "daily leadership [of the military] has to be an executive function."[63]

Further limiting lawmaker prerogatives, presidents have seized upon a glaring deficiency in the War Powers Resolution. The resolution is written in such a way that the sixty-to-ninety day clock begins ticking only if the president reports under a very specific section of the statute: Section 4(a)(1). Not surprisingly, presidents do not report under 4(a)(1). They report, for the most part, "consistent with the War Powers Resolution." The only president to report under 4(a)(1) was Ford in the rescue of the U.S. merchant ship *Mayaguez*, which had been seized by Cambodians. But his report had no substantive importance because it was released after the operation was over. The true meaning of the War Powers Resolution, then, was that presidents could unilaterally use military force for as long as they liked, until Congress got around to adopting some statutory constraint.

One of the byproducts of the War Powers Resolution is the frequency with which legislators turn not to their colleagues to challenge the president, through the many institutional powers that are available, but rather to the courts. On four occasions during the 1980s, members of Congress went to court to charge President Reagan with violations of the War Powers Resolution. The position of the legislators was weakened by two facts: they came as a small group unable to represent what

Congress intended as an institution and they were often opposed by legislators who defended the president. Standing in the middle of this crossfire, federal judges told the legislators complaining of executive aggrandizement: "Don't come in here and expect us to do your work for you."[64] Because Congress would not stake out an institutional position contrary to the president's, the courts saw no reason to defend a Congress that was unwilling to defend itself. As then appellate court judge Ruth Bader Ginsburg put it: Congress "has formidable weapons at its disposal—the power of the purse and the investigative resources far beyond those available in the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress."[65]

A more interesting case occurred in 1990, when members of Congress challenged President Bush's contemplated use of military force against Iraq. A district judge ruled that the issue was not ready for judicial determination, but decisively rejected many of the sweeping claims for presidential war making prerogatives advanced by the Justice Department. The court concluded that if Congress confronted the president, and the president refused to accept a statutory restriction, the issue might be ripe for the courts.[66] Of particular significance, the court dismissed the Justice Department's claim that the president could engage in any type of offensive military operation so long as it was not "war making." For the court, this reasoning marked an exercise in semantics that would leave the war power in the hands of the president.[67]

After Clinton began bombing Yugoslavia, Congressman Tom Campbell and several other members of the House brought a suit in district court seeking a declaration that Clinton had violated the War Powers Clause of the Constitution and the War Powers Resolution. The court held that the lawmakers lacked standing since the injury they identified was not sufficiently concrete and specific. The fact that Congress had not confronted Clinton with statutory restrictions was crucial: "If Congress had directed the president to remove forces from their positions and he had refused to do so or if Congress had refused to appropriate or authorize the use of funds for the air strikes in Yugoslavia and the president had decided to spend that money (or money earmarked for other purposes) anyway, that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs."[68] The D.C. Circuit agreed that Campbell lacked standing.[69]

Military Action After 9/11

Following the terrorist attacks of 9/11, President George W. Bush came to Congress to seek statutory authority for a military response. In requesting congressional authority, he broke ranks with Harry Truman, George H. W. Bush, and Bill Clinton, all of whom claimed they could order large-scale military operations in Korea, Iraq, and Yugoslavia without requesting authority from Congress. The result of negotiations between the executive and legislative branches in 2001 was the Use of Force Act, which authorized the president to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the 9/11 attacks. On the basis of that statute, Bush used military force against terrorist structures in Afghanistan.

A year later, President Bush considered military action against Iraq. Initially, the administration concluded that Bush did not need authority from Congress. The White House Counsel's office gave a broad reading to the president's power as commander in chief, and argued that the 1991 Iraq Resolution provided continuing military authority to the president.[70] The White House also claimed that Congress, by passing the Iraq Liberation Act of 1998, had already approved U.S. military action against Iraq for violations of Security Council resolutions.[71] However, by its explicit terms, the statute did not authorize war.[72] Other legal arguments from the White House Counsel's office were strained and unconvincing.[73]

For one reason or another, Bush decided in early September 2002 to seek authorization from Congress. Unlike the situation in 1990, Congress was expected to act *before* the November elections. In 1990, after Iraq had invaded Kuwait, the administration first went to the Security Council to request a resolution authorizing military operations, and only in January 1991, after the elections, did lawmakers return to debate and pass legislation to authorize war. In 2002, the White House pressured Congress to pass the authorizing bill before members returned home for reelection.

During this compressed period, lawmakers heard conflicting claims on whether a connection existed between Iraq and Al Qaida, and whether Iraq possessed weapons of mass destruction. Some legislators, such as Senator Robert C. Byrd, did not find the threat from Iraq "so great that we must be stampeded to provide such authority to the president just weeks before an election."[74] And yet Congress chose to vote under partisan pressures, without adequate information, to pass an authorizing resolution.[75] As with the Tonkin Gulf Resolution, Congress acted hurriedly in the middle of an election without the facts it needed. The Iraq Resolution did not decide either for or against military action. It left that decision solely with the president, precisely what the framers argued against.

Six members of Congress, along with soldiers and parents, filed a lawsuit to challenge Bush's legal authority to wage war under the Iraq Resolution. A district court in Massachusetts held that the dispute involved political questions beyond the authority of the judiciary to resolve: "Absent a clear abdication of this constitutional responsibility by the political branches, the judiciary has no role to play."[76] Only if the political branches were "clearly and resolutely in opposition as to the military policy to be followed by the United States" would the issue pose a question that could be resolved by the courts.[77] Whatever the ambiguity of the Iraq Resolution, "it is clear that Congress has not acted to bind the President with respect to possible military activity in Iraq."[78]

The First Circuit affirmed the district ruling, but not on the political question doctrine, which it found "famously murky."[79] Instead, it based its analysis on ripeness: "Diplomatic negotiations, in particular, fluctuate daily. The President has emphasized repeatedly that hostilities still may be averted if Iraq takes certain actions."[80] Although the First Circuit agreed that the "amalgam of powers" involved in war envisage "the joint participation" of Congress and the president in determining "the scale and duration of hostilities,"[81] it found no evidence of the president acting "without apparent congressional authorization, or against congressional opposition."[82]

After receiving statutory authority for Iraq, the Bush administration prosecuted a successful military campaign but failed to plan adequately for the occupation.

Questions were raised about the quality of information from intelligence agencies and whether Bush had been forthcoming with the public about the length and cost of the war. U.S. casualties continued to mount after President Bush on May 1, 2003 addressed the public beneath a banner saying "Mission Accomplished." As with Vietnam, the administration discovered that military dominance does not assure political success.

Conclusions

The drift of the war power from Congress to the president after World War II is unmistakable. The framers' design, deliberately placing in Congress the decision to expend the nation's blood and treasure, has been radically transformed. Over time, because of expectations that have developed about the president's responsibilities in the areas of foreign affairs and the war power, president's seem to believe that their future claim to a "strong presidency" can be secured by unilaterally launching military strikes. Presidents now regularly claim that the commander in chief clause empowers them to send American troops anywhere in the world, including into hostilities, without first seeking legislative approval. Instead of seeking authority from Congress, presidents are likely to appeal to international and regional institutions for support, particularly the United Nations and the North Atlantic Council.[83]

The record is not simply one of executive aggrandizement. In the face of repeated presidential initiatives, Congress has failed to protect its prerogatives. The shift of war power from Congress to the president belies a core belief by the framers that each branch would protect its interests. A powerful motive of institutional self-defense would supposedly safeguard the system of separation of powers. Instead, "unwilling to take responsibility for setting foreign policy," Congress almost always "prefer[s] to leave the decision—and the blame—with the president."[84]

Congress's ever diminishing role in war powers comes at substantial cost to the nation and the Constitution. The system of checks and balances applies as much to military policy as to domestic policy. We cannot expect foreign policy and national security to be formulated well in the hands of an unchecked executive. Lee Hamilton, who served for years as a Congressman from Indiana, explained the value of joint action by Congress and the president: "I believe that a partnership, characterized by creative tension between the President and the Congress, produces a foreign policy that better serves the American national interest—and better reflects the values of the American people—than policy produced by the President alone."[85]

The constitutional position of Congress has deteriorated for a number of reasons. One is the volunteer army. During the Vietnam War years, citizens protested by burning their draft cards, refusing induction, fleeing to Canada, and participating in mass demonstrations. With the current volunteer army, the passions and outlets for civil disobedience are muted. College campuses, once hotbeds of opposition to the Vietnam War, are now largely silent. As Joseph Califano has noted, an all-volunteer army "relieves affluent, vocal, voting Americans of the concern that their children will be at risk of going into combat."[86]

Second, military technology now enables presidents to wage wars with few casualties. During the four days of bombing Iraq in December 1998, not a single

U.S. or British casualty resulted from 70 hours of intensive air strikes involving 650 sorties against nearly hundred targets.[87] The following year, President Clinton waged war for eleven weeks against Yugoslavia without a single NATO combat casualty

Third, the growing cost of running for office means that legislators have less time to tend to their institutional and constitutional duties. As Lee Hamilton observed in 1998: "Members today must spend a disproportionate amount of time fund-raising, which means less time with constituents discussing the issues and less time with colleagues forging legislation and monitoring federal bureaucrats."[88] Less time in Washington, DC, means less time understanding legislative prerogatives, less time working with colleagues on like-minded issues, and less time forging alliances to fight off executive encroachments.

In surrendering its powers to the president, Congress has little reason to expect assistance from the courts. Judges are unlikely to intervene unless Congress, as an institution, exercises the powers available to it. With no meaningful resistance to presidential initiatives, the Constitution's war-making provisions have given way to a political dynamic that clearly favors the executive. But White House supremacy comes at a cost. Truman and LBJ paid a heavy price for their military intervention in Korea and Vietnam. Iran-Contra severely damaged Reagan's second term. For George W. Bush, the risks are high that the quick military "liberation" of Afghanistan and Iraq will give way to an economically costly and politically divisive occupation, likely to last for years with no clear advantage to his presidency or party.

Notes

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14. Id. at 287.
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16. 299 U.S. (1936): 304, 320.
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