

THE POWER TO DECLARE WAR

The battle between the Executive and Legislative branches

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The subject of Constitutional War Powers has been at the forefront of many debates over the last two centuries, one side arguing the presidents' constitutional authority as Commander in Chief and the other side asserting Congress' constitutional power to declare war. This argument seems to imply that one side has authority over the other. On the contrary, the Framers of the Constitution intended that there be a proper balance between the legislative and executive branch in decisions on the use of force in the conduct of domestic and foreign policy.¹ The purpose of this paper is to investigate the various ways in which military action was taken since the signing of the Constitution and how the legislative and executive branches worked with or against each other in regards to these actions.

When the Framers of the Constitution came together, distrust of both executive and military power played a key role in advancing the direction the Constitution would ultimately take. The colonists argued that the British Monarch "kept among [them], in times of peace, Standing Armies without the consent of [the peoples] legislature...rendering the military independent of and superior to the Civil Power."² Experiences during the colonial period under the Articles of Confederation had shown the need to strengthen central government. The idea, however, was to create a strong federal system and yet prevent tyranny.³ Seems easy enough, right?

The language that ended up in the Constitution regarding the powers of Congress in its role with respect to war powers are found in Article I, Section 8. Congress is granted a number of specific powers relevant to this discussion, including the power "to provide for the common

¹ Rogers, William P. "*Congress, the President, and the War Powers.*" California Law Review 59.5 (1971): 1194. Web.

² CQ Press. "Chapter 6." The Powers of the Presidency. Washington, DC: CQ Press, 2008. 229. Print.

³ Rogers, William P. "*Congress, the President, and the War Powers.*" California Law Review 59.5 (1971): 1194. Web.

defense; To declare war; To raise and support Armies; To provide and maintain a Navy; To make rules for the Government and Regulation of the land and Naval Forces.”⁴ In addition, Congress has the sole authority to appropriate funds, a vital power given to Congress in the area of war powers and foreign relations. The powers of the president that are relevant to war powers are found in Article II, Sections 1 and 2. The President is vested with the executive power of the government; he is named Commander in Chief of the Army and Navy and is required to “take care that the Laws be faithfully executed.”⁵

In the original draft of the language on war powers, which was presented at the Constitutional Convention, Congress was granted the power to “make war.” This language was later changed on the recommendation of Framers James Madison and Eldridge Gerry to “declare war.” This change in language has been at the heart of many debates over the last 200 years. The reason given by Madison for the change in language was that the president might need to repel sudden attacks on the homeland and would not have the luxury of waiting on Congress.⁶ The interpretation of this change in language proved to serve the executive rather than the legislative branch.

History tells a story of the executive branch using the armed forces without a “Declaration” of war. From the earliest years of the republic we find examples of presidential use of the armed forces without congressional approval. At first, these were very limited in scope. For example, in 1801, President Jefferson sent a squadron of ships on his own authority to

⁴ Ginsberg, Benjamin. Lowi, Theodore J. Weir, Margaret. “Appendix.” *We The People: An Introduction to American Politics*. Tenth Edition New York: W.W. Norton, 2015. A14. Print.

⁵ Rogers, William P. “*Congress, the President, and the War Powers*.” *California Law Review* 59.5 (1971): 1195. Web.

⁶ Thomas, Ann Van Wynen. A.J. Thomas, Jr. “Chapter 1.” *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 6. Print.

protect American vessels from the Barbary pirates; however, he authorized them only to take defensive actions.⁷

The first time Congress made a declaration of war was in 1812. A majority of the sitting Congress convinced President Madison that the war against the British was necessary.⁸ Madison believed that the executive branch would be more likely than Congress to make war, as shown by his desire to change the original language in the Constitution, but it was Congress that forcefully pushed for war with Britain.⁹

In 1861, President Lincoln was faced with balancing the language of the Constitution with the fall of the Union. As a result of this conflict that he did not initiate, Lincoln stretched presidential power to the point of a dictatorship.¹⁰ Lincoln's assertion to justify what he referred to as the "War Powers", which he saw as constitutionally implied by the president's role as Commander in Chief, led to a series of executive orders in the wake of the Civil War. He ordered several actions to be taken in regard to the deployment of the Army and Navy, which in almost every instance were authorized by Congress after the fact.¹¹

During the 19th and early 20th centuries, President Polk sent American forces into the disputed territory near the Rio Grande in January 1846, where they engaged in battle with the Mexicans purely on presidential authority. In 1900, President McKinley sent 5,000 troops to China, without congressional authorization, to protect Americans and help put down the Boxer

⁷ Rogers, William P. *"Congress, the President, and the War Powers."* California Law Review 59.5 (1971): 1198. Web.

⁸ CQ Press. "Chapter 6." *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 232. Print.

⁹ Thomas, Ann Van Wynen. A.J. Thomas, Jr. "Chapter 1." *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 10. Print.

¹⁰ CQ Press. "Chapter 6." *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 235. Print.

¹¹ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." *Presidential Power*. New York: W.W. Norton & Company, Inc., 2007. 220-221. Print.

Rebellion. President Theodore Roosevelt, on his own authority, dispatched gunboats to the Canal Zone area. Also, Presidents T. Roosevelt, Taft, Wilson and Coolidge intervened and temporarily occupied other Latin American and Caribbean countries without prior congressional approval.¹²

These events in history did not prove to be a challenge to the language in the Constitution. These presidents were acting in the context of a nationally popular consensus that the United States should assume a posture consistent with its emerging power. Also, as a large majority of the 19th and early 20th century presidential actions took place in the Caribbean, where America's power was so predominant, there was little or no chance these actions would lead to a full-scale conflict. Therefore, the risks Article I, Section 8 were designed to reduce never arose. In short, being there was no risk of major war, there was no violation of Congress' power to declare war.¹³

In the case of World War I, President Woodrow Wilson sought legislative authority and Congress fulfilled its role in their declaration of war in 1918. Congress did not just give Wilson broad discretion in implementing the war; it essentially gave him legislative power. Congress gave Wilson the authority but left it up to him how to proceed with that authority.¹⁴ In the aftermath of WWI, the U.S. Supreme court upheld almost all of President Wilson's actions as well as Congress' decision to hand over large amounts of authority to the executive branch.¹⁵ However, the Treaty of Versailles, which ended WWI, would largely come to be seen as a failure for Wilson. Congress, which had supported most (if not all) of Wilson's decisions during the

¹² Rogers, William P. "*Congress, the President, and the War Powers.*" California Law Review 59.5 (1971): 1199. Web. – This paragraph contains historical reference material

¹³ Rogers, William P. "*Congress, the President, and the War Powers.*" California Law Review 59.5 (1971): 1200. Web.

¹⁴ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 238. Print.

¹⁵ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 223. Print.

war, failed to ratify the treaty. Congress was concerned about conceding individual power to be a part of the League of Nations.

World War II would be the next event that would see America thrust into military conflict after the attack on Pearl Harbor on December 7th, 1941. Days after the attack, Congress declared war. Presidential powers reached their apex and like Wilson, President Franklin D. Roosevelt was delegated wide powers by Congress to manage the economy and direct the war effort.¹⁶ But the facts reveal that President Roosevelt was already engaged in WWII without congressional authorization. He had ordered the Navy to fire upon Axis vessels in the Pacific as well as brokered a deal with the British; trading Navy destroyers for bases in the Americas through executive agreement.¹⁷ These and other actions caused certain commentators to remark that the congressional declaration of war was simply recognition of a war, which in reality was brought about by the President and his conduct of foreign policy.¹⁸

Several events took place that influenced the executive and legislative branches of Congress during the early days of the Cold War. The Cold War had an enormous impact upon presidential power. The Charter of the United Nations was signed in June of 1945 at the conclusion of the United Nations Conference on International Organizations.¹⁹ The enactment of the Foreign Service Reform Act in 1946, which merged the State Department and the Foreign Service into a single organization, as well as the National Security Act in 1947, were seen as a

¹⁶ CQ Press. "Chapter 6." *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 238. Print.

¹⁷ Thomas, Ann Van Wynen. A.J. Thomas, Jr. "Chapter 1." *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 18. Print.

¹⁸ Thomas, Ann Van Wynen. A.J. Thomas, Jr. "Chapter 1." *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 18. Print.

¹⁹ <http://www.un.org/en/charter-united-nations/index.html>

way for Congress to pull back the reigns of the Presidency. The result of these legislative acts would ultimately prove to create the basis for what critics would later call the “Imperial Presidency.”²⁰

In the summer of 1950, North Korean troops invaded South Korea. This was the first time the United Nations Charter had come into the equation regarding America’s involvement in a conflict. The UN condemned the invasion and all members of the UN Security Council were called upon to defend South Korea.²¹ President Truman committed air, naval, and land forces numbering over a quarter of a million to a war in Korea without congressional authorization. The Truman administration based its authority to commit these troops squarely on the president’s constitutional power claiming, “the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof.” Citing past instances of presidential use of armed force in the broad interests of American foreign policy, the administration asserted that there was “traditional power of the President to use the armed forces of the United States without consulting Congress.” His confidence was based on the fact that the action was taken under the United Nations Charter, a part of both the treaty and international law which the president is constitutionally empowered to execute.²²

The period following the Korean War saw the passage of several congressional resolutions aimed to acknowledge the president’s authority to protect the country and to make clear that the U.S. Government was united against Communism. President Dwight D. Eisenhower put forth the Eisenhower Doctrine in January 1957, and Congress approved it. Under

²⁰ Crenson, Matthew. Benjamin Ginsberg. “Chapter 6.” Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 246-247. Print.

²¹ Thomas, Ann Van Wynen. A.J. Thomas, Jr. “Chapter 1.” The War-Making Powers of the President. Dallas: SMU Press, 1982. 20-21. Print.

²² Rogers, William P. “*Congress, the President, and the War Powers.*” California Law Review 59.5 (1971): 1201. Web.

this doctrine, a country could request American economic assistance and/or aid from U.S. military forces if it was being threatened by armed aggression from another state or country. Eisenhower singled out the Soviet threat in this doctrine by authorizing the commitment of U.S. forces “to secure and protect the territorial integrity and political independence of such nations, requesting such aid against overt armed aggression from any nation controlled by international communism.”²³ In 1958, President Eisenhower sent 14,000 troops into Lebanon without seeking approval of Congress and without basing his authority on the Eisenhower Doctrine. He stated that the troops were sent to “protect American lives.”²⁴

Several presidents waged the Vietnam War in different and escalating ways. The first signs of North Vietnamese aggression happened under Eisenhower’s presidency. Eisenhower offered economic and military aid, which amounted to a small number of military advisors, but avoided extensive U.S. military involvement.²⁵ President Kennedy, fearing the collapse of the government in South Vietnam, sent the first substantial number of troops into Vietnam without seeking congressional approval.²⁶ At the time of Kennedy’s assassination, there were upwards of 16,500 military personnel on the ground in Vietnam. Like Truman and Eisenhower before him, Kennedy continued U-2 spy plane surveillance of Russia and Cuba without seeking congressional approval.²⁷

²³ <https://history.state.gov/milestones/1953-1960/eisenhower-doctrine>

²⁴ Thomas, Ann Van Wynen. A.J. Thomas, Jr. “Chapter 1.” *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 23. Print.

²⁵ CQ Press. “Chapter 6.” *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 241. Print.

²⁶ Thomas, Ann Van Wynen. A.J. Thomas, Jr. “Chapter 1.” *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 25. Print.

²⁷ Thomas, Ann Van Wynen. A.J. Thomas, Jr. “Chapter 1.” *The War-Making Powers of the President*. Dallas: SMU Press, 1982. 23. Print.

President Lyndon Johnson, who was sworn into office after Kennedy's assassination, continued troop escalations. The Gulf of Tonkin incident in 1964 provided Johnson with a resolution from Congress supporting the President to take action to combat the North Vietnamese.²⁸ It was not until this event that President Johnson even sought congressional approval. He believed, based on post-WWII precedent and practice that there was no need for Congress to 'authorize the use of troops abroad if their use was to be constitutional'.

The Vietnam War proved different than previous wars in its overwhelming lack of support from the American people. The cost in both lives and money played a role in attempts to curb the president's war powers. This would all come to a head under the Nixon administration. President Nixon had continued to escalate America's involvement in the war. His decision, in 1970, to bomb Cambodia on the grounds that the North Vietnamese troops were using the country to build up forces was extremely unpopular with the American people and Congress. Nixon's based his decision to bomb Cambodia on his role as Commander in Chief to defend the American military. In 1973, the War Powers Resolution was enacted as a push back mechanism against what Congress saw as an overreach by the president in matters of waging war. The resolution limited presidential control over deployment of military forces.²⁹ There were, however, critics of the War Powers Resolution who claimed that although it forced the president to confer with Congress after 90 days of troop deployments, it left open any use of the military within those 90 days. This seemed to enhance rather than restrict presidential war power.³⁰ It should be noted that every president that followed the enactment of the War Powers Resolution

²⁸ CQ Press. "Chapter 6." *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 241. Print.

²⁹ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." *Presidential Power*. New York: W.W. Norton & Company, Inc., 2007. 264. Print.

³⁰ CQ Press. "Chapter 6." *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 244. Print.

has argued that it is unconstitutional and have made decisions on military force without complying with the terms of the resolution.³¹

President Reagan argued that the War Powers Resolution was unconstitutional when he deployed Marines into Lebanon in 1982. Even so, Congress forced his hand and pressured Reagan into signing a joint resolution that began the 90-day grace period stipulated in the War Powers Resolution. In this joint resolution however, Reagan was also given authorization to keep Marines in Lebanon for 18 months; a clear compromise that favored the president and showed that Congress was reluctant to force strict adherence of the War Powers Resolution.³² Reagan continued to act without congressional approval when he ordered troops into Grenada and the bombing of Libya in 1986. Both actions were popular with the American people, which helped the president outmaneuver Congress; claiming all along that his authority for these actions came straight from the Constitution.³³

President George H. W. Bush fell right in line with his predecessor when sending U.S. forces into Panama (a sovereign country) arguing the move was to protect American lives and property. Although Bush had kept Congress apprised of his actions, he asserted that the War Powers Resolution was unconstitutional. As with Reagan, Bush did confine his military actions to under 90 days which prevented any action by Congress. When Saddam Hussein invaded Kuwait in 1990, Bush initiated a massive build up of troops in the Middle East without consulting Congress. During the build up, Bush claimed that the troops were in the Middle East as a defensive force but it was clear that this build up was for offensive purposes. Instead of

³¹ CQ Press. "Chapter 6." The Powers of the Presidency. Washington, DC: CQ Press, 2008. 245. Print.

³² CQ Press. "Chapter 6." The Powers of the Presidency. Washington, DC: CQ Press, 2008. 246. Print.

³³ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 272-273. Print.

seeking congressional approval for the use of military force against Iraq, Bush turned to the UN and organized an international coalition in response to the aggression against Kuwait and secured a UN Security Council Resolution. He claimed that this resolution, along with his role as Commander in Chief, gave him the authority to act. Bush did eventually go to Congress for support of “Operation Desert Storm” which he received under the War Powers Resolution; yet all along denying the constitutionality of the War Powers Resolution.³⁴

When President Bill Clinton was sworn into office in 1992, he inherited the ongoing situation in Somalia that had seen American involvement with the introduction of troops in response to the civil war that was ravishing that country. American troops were originally sent into Somalia to help with the ever-growing humanitarian crisis. That situation changed in 1993 when 23 UN peacekeepers were killed. Clinton, with the support of the UN, changed the mission of the American troops to a more offensive posture. Although the troops in Somalia were now actively engaged in combat, Congress was not consulted.³⁵ Between 1993 and 1998, claiming authorization to act under UN and NATO, the Clinton administration conducted several military operations in Haiti, Bosnia and Kosovo without consulting Congress. In the case of the engagement of military action in Kosovo, England’s Prime Minister, Tony Blair, used his relationship with Clinton to persuade him to commit American troops there ultimately pushing Milosevic to sign a treaty ending hostilities there. By the end of the Clinton administration, it was no longer clear what war powers, if any, remained in the hands of Congress. Along with

³⁴ CQ Press. “Chapter 6.” The Powers of the Presidency. Washington, DC: CQ Press, 2008. 247-248. Print.

³⁵ CQ Press. “Chapter 6.” The Powers of the Presidency. Washington, DC: CQ Press, 2008. 248. Print.

Reagan and George H. W. Bush, Clinton had ordered military forces into combat outmaneuvering, bullying and sometimes ignoring Congress.³⁶

In the wake of the attacks of September 11th, 2001, President George W. Bush vowed to move swiftly to bring to justice those responsible for the deaths of nearly 3,000 Americans. At this point in history, Congress had not declared war since WWII. The enormous impact of this attack on American soil was different than any other hostile act against America before 9/11. The enemy was not a state or a country but an ideology of an organization called Al-Qaeda under the leadership of Osama Bin Laden. Al-Qaeda based their operations in Afghanistan under the protection of the Taliban. The American people, Congress and even international allies were all in support of retaliation for the 9/11. Within 3 days after the attack, looking to invade Afghanistan and remove the Taliban and Al-Qaeda fighters who were based in that country, Congress passed a joint resolution authorizing Bush “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11th, 2001, or harbored such organizations or persons.”³⁷ The result of this resolution was, in essence, a blank check for the president. Congress had relinquished much of its authority to the president, which was barely mentioned in the press and ignored by the public. This resolution enabled the president to draft the USA Patriot Act that Congress quickly enacted, expanding the power of the Government to engage in many forms of domestic surveillance. The president also drafted the plan, which Congress approved, for the

³⁶ Crenson, Matthew. Benjamin Ginsberg. “Chapter 6.” Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 274. Print

³⁷ CQ Press. “Chapter 6.” The Powers of the Presidency. Washington, DC: CQ Press, 2008. 249. Print.

formation of the Department of Homeland Security that brought together 22 federal agencies into one huge new cabinet department.³⁸

In 2002, President Bush, enjoying extremely popular support for his response to the 9/11 attacks, made it clear to Congress and the American people in his State of the Union address that he intended to commit troops into Iraq. Although Iraq was not directly implicated in the attacks of 9/11, Bush used the powers that were granted to him to make the case that the existence of chemical weapons in that country were a clear and present danger to America and that the potential use of these chemical weapons fell under his authority to protect the country from its new enemy, terrorism. Like his father, Bush sought UN support. He argued that the enforcement of the UN Council Resolutions already in place against Iraq as well as the dangers of possessing large stockpiles of chemical weapons were all the justification he needed. Although Congress, with the attacks of 9/11 fresh in their minds, approved the action, the UN ultimately did not draft a resolution for the invasion of Iraq.³⁹ By 2007, the country and the democratically held Congress grew weary of the ongoing conflict in Iraq and tried several measures to force the president's hand in ending the conflict. None of these measures were successful and President Barack Obama inherited the Iraq conflict, as well as the Afghanistan conflict, when he took office in 2008.

An important component to the discussion of war powers is the fact that after Vietnam, the military was developed into a more professional, centralized organization. Military services began to explore and develop technology to wage war while limiting American casualties. Both the legislative and executive branches understood that the cost of lives on the battlefield was a

³⁸ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." *Presidential Power*. New York: W.W. Norton & Company, Inc., 2007. 274-275. Print

³⁹ CQ Press. "Chapter 6." *The Powers of the Presidency*. Washington, DC: CQ Press, 2008. 250. Print.

political liability and a restraint on the use of military force.⁴⁰ The use of new technology is at the center of President Obama's counterterrorism policy with the expanded use of the CIA's drone program. American proponents of the drone program contend that the drone program is lawful. In 2001, Congress authorized the use of force "against those responsible for the recent attacks launched against the United States," thus classifying terrorists as enemies, rather than criminals, and creating a domestic legal basis for targeting them. As for international law, proponents of the program argue that killing al Qaeda-linked terrorists is a legitimate response in an armed conflict that was initiated by the 9/11 attacks.⁴¹ Although Obama took office on the platform of ending hostilities in the Middle East, he had merely changed the way those wars were being waged. President Obama, following through with campaign promises, technically ended both the Iraq and Afghan wars but continues to deal with the ramifications of withdrawing troops from the Middle East with the rise of DAESH and ISIL. It would appear that the future of the war on terrorism and the possibility of larger engagements will be passed off to the next president. It will be interesting to see how the future administrations will deal with the ambiguity and questions revolving around war powers.

FDR is often credited with the creation of the modern Presidency but in regards to the expansion of foreign security powers, it was President Truman who laid the foundation for the supremacy of the executive branch that all presidents after him have fought to maintain.⁴² The Cold War, as with the war on terrorism, have created a new type of situation that the Founding Fathers could never have anticipated. Because the war on terrorism is not a war against a state or

⁴⁰ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 267. Print

⁴¹ Ofek, Hillel. "The Tortured logic of Obama's Drone War." The New Atlantis 27 (2010): 39. Web.

⁴² Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." Presidential Power. New York: W.W. Norton & Company, Inc., 2007. 277. Print

country, it is more akin to international policing rather than a war. The growth of presidential power has expanded; not simply because of the new era of conflict, but because presidents did not submit passively to legislative authority. The Executive branch continually introduces institutional innovative language intended to maintain and enhance the authority of the Oval Office. The war on terror has no end in sight, and has the possibility of becoming a permanent part of American political life. This will have profound implications on the future of the both the legislative and executive branches of Government due to the continued uneasiness and suspicion of the American public.⁴³

In conclusion, I think the last paragraph of Chapter 6 in *'Presidential Power'* by Crenson and Ginsberg sums up the outlook on the future. "The politics of presidential power can result in disastrous policy decisions.... efforts to limit the political fallout of military mobilization can cripple the effective use of force. In the case of Iraq, the result has been the biggest failure of American power and diplomacy since Vietnam, maybe the worst ever. Will it undermine the power of the Presidency? Probably not. President's fail, but the Presidency adapts.

Unfortunately, the adjustments that strengthen the presidency do not reliably produce policies that strengthen the country." In my opinion, the ever-growing chasm between the legislative and executive branches of Government in decisions of war and peace only widens the gap between what the people want and what the Government ultimately decides to do.

⁴³ Crenson, Matthew. Benjamin Ginsberg. "Chapter 6." *Presidential Power*. New York: W.W. Norton & Company, Inc., 2007. 278. Print