**2 positions – War Powers (AP US Gov’t)**

**From "War Making Limits - Presidential Downsizing" (Source: Larry Sabato, *A***

***More Perfect Constitution*, Walker and Co.: New York, 2007)**

A new Constitutional Convention should focus on the increasingly difficult question of war-

making authority, and it ought to consider ways to reduce overweening presidential authority in the awesome arena of war and peace. Even though congressional consideration of foreign

military adventures can be awkward and dilatory, the legislative branch should be given

constitutional opportunities to reclaim its greatly diminished role, in search of a better balance of war powers between the President and Congress.

Few American political observers deny that the Presidency has now absorbed the lion's share of war powers, and fewer still argue that the Founders intended our system to work this way.

The great divide is over the inevitability-or not- that the Chief Executive must be the one to wage war. Even after highly controversial, bloody conflicts in Korea, Vietnam, and Iraq, as well as many shorter-term ―police actions‖ directed primarily by Presidents, most scholars

and practitioners who have focused on the topic are unsure what, if anything, can be done to alter the power equation. At the heart of this uncertainty is an inescapable fact: *The current Constitution has left us with an ambiguous framework since the President is commander-in-*

*chief ―of the Army and the Navy of the United States‖ but the Congress possesses the power to declare war.*

Many scholars convincingly argue that the Framers of the original Constitution wanted the

Congress, not the President, to be the prime mover in initiating military action. As John Hart

Ely notes, ―Only one delegate to either the Philadelphia convention or any of the state

ratifying conventions, Pierce Butler, is recorded as suggesting that authority to make war be

vested in the president.‖ There was no naiveté in the preference shown for Congress, but

rather a belief that if the Executive's call for war were subjected to greater scrutiny by

hundreds of legislators, there would be fewer wars- events that Madison called ―among the greatest of national calamities. The delegates to the Constitutional Convention did change one key phrase in the draft: instead of empowering Congress ―to make War‖, the legislature was given authority ―to declare War. Yet there is little evidence that the delegates intended

this word substitution to shift more authority to the President, as shown by Madison's shrewd

evaluation of an Executive's bias toward war-making: ―The Constitution supposes, what the History of all governments demonstrates, the executive 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

legislature In a more folksy manner, Congressman Abraham Lincoln made much the same

observation in 1848:

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 such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after having given

him so much as you propose

Kings had always been involving and impoverishing their people in

wars, pretending generally, if not always, that the good of the

people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon this.

Madison and Lincoln's view has not prevailed in modern times. During the twentieth

century, America's emergence as a superpower, and the swiftness of decisions required for

waging war in the nuclear age, put the President on the front burner and relegated Congress

to the back, if indeed Congress is even on the stove at all in some conflicts. Resourceful

Presidents gradually assumed more power in the war-making arena, mainly with the assent of Congress. With each new foreign crisis in the twentieth century, beginning with World War I,

Congress gave the Executive additional emergency authority so that the U.S. could prevail in

its conflicts. After World War II, Congress appropriated vast sums of money for the

prosecution of hostilities abroad in the shadowy era of the Cold War, when the U.S. and the

U.S.S.R. fought many proxy battles for influence and control in other nations. Congress

finally took a step back - and reclaimed some of its authority - as the Vietnam War wound

down. The public's unhappiness with this long, savage, undeclared war led to the War Powers

Act of 1973, passed over President Nixon's veto. In essence, the Act mandates that a

President during ‗peacetime' should secure the assent of both houses of Congress before sending U.S. military forces into combat; notify Congress of any deployment of troops to combat on foreign soil within forty-eight hours of the event; and limit the deployment of

troops to sixty days (with an additional thirty days for withdrawal, if needed) unless Congress gives its official sanction for a longer deployment.

While its intent was to divide war-making authority more equitably between the Executive

and Legislative branches, the effect of the Act has been less clear. Some Presidents, beginning

with Nixon, have insisted that the Act is an unconstitutional infringement upon the

Executive's war-making authority, and thus have been inclined to observe the law in the breach. Citing the need for speed and secrecy, Presidents of both parties (Ford, Carter,

Reagan and Clinton) have taken emergency actions' as they saw fit, as President Clinton did

in dispatching troops to Haiti in 1993 in order to restore overthrown President Jean Bertrand

Aristide to power. When President George Herbert Walker Bush sought the support of

Congress for the Persian Gulf War in 1991, he made clear that he believed he had the

constitutional authority to launch the war even if Congress eventually turned him down.

Bush won the vote in both the Democratic-controlled houses, though there was substantial

opposition. More recently, after the terrorist attacks on September 11, 2001, Congress simply

ceded its powers to the Presidency without a fight. President George W. Bush was granted a

joint congressional resolution permitting all necessary military action against ―those

responsible‖ for 9/ll and waiving the sixty-day limit- a more sweeping resolution than his

father had received in 1991. Similarly, both the House and the Senate voted by wide margins in October 2002 to let Bush use military force in Iraq ―as he determines to be necessary and appropriate‖, in other words, carte blanche authority.

In the unsettled aftermath of the Iraq War, the President's basic justification for the war

(destroying the apparently nonexistent weapons of mass destruction) was highly

questionable, and not thoroughly examined by Congress in advance. Perhaps that will always be the case even if Congress were less inclined to give up its rights under the War Powers Act.

The natural tendency in a frightening era, when the nation is under threat, is to defer to a

tough-talking President who can take swift action- even if the action is unwise or poorly

thought out. And yet, as war-powers scholar Louis Fisher has argued, ― The Framers also lived

in a dangerous time, possible more hazardous than today, as they faced the superpowers of

their era (England, France and Spain) with few military advantages. Contemporary

Presidential judgments need more, not less, scrutiny, wrote Fisher, and Iraq surely proves

the point. While the press can supply some of the scrutiny, there is not substitute for

Congress. Its powers of the purse, subpoena, and Article II's Senate approval of ambassadors and treaties entitle it to a full share of authority in this most important sphere.

An enduring lack of will in Congress may be at the heart of this dilemma, and there is no

constitutional fix for that. Remarkably, the leaders of Congress often appear less interested in protecting the powers of their branch than Presidents seem determined to do in their sphere.

But since Presidents have often insisted that the provisions of the War Powers Act are

unconstitutional or should be waived- a claim that is a pretext for ignoring them when they are inconvenient- the major provisions of the Act should be made a part of the Constitution.

In a hair-trigger world, Presidents need to be able to take decisive action quickly. But real

consultation with congressional leaders of both parties ought to be an unavoidable part of the process. The advise and consent' mandate that refers to federal court nominations ought also to apply in reasonable fashion to the most awesome power of the Presidency.

Most important of all, there should be time limit on unilateral war-making- 90 days appears

reasonable- at which time Congress would need to either give its assent or , through a

resolution of disapproval, cause the orderly withdrawal of American forces. Understanding the Congress, especially the Senate with its unlimited debate rule, can be dilatory, this new

constitutional provision should mandate a congressional vote on military action in both

houses, up or down, by the end of the ninety-day period. The legislative resolution power of approval ought also to set a time limit on the grant of war-making power for any conflict-six months, or a year at most. By the end of that time period, Congress should vote either for a

continuation of the conflict, or by its disapproval, direct that our military forces be withdrawn on a reasonable timetable. Such a resolution would not be subject to the presidential veto.

This resolves the problem of congressional approval, once given, being interpreted by

Presidents as an endless blank check for years of war-precisely what Lyndon Johnson did after the 1964 Gulf of Tonkin Resolution with respect to Vietnam, and George W. Bush did

after the 2002 Congressional vote on the Iraq War. New information comes to light, and new

conditions develop-and Congress should regularly review the situation, checking the President in this life-or-death realm of constitutional power.

The era of open-ended, unilateral war-making by Presidents should be brought to an end, and it will not happen without a remedy such as the once discussed here. If this be ‗hamstringing a President,' as critics might charge, it is time to use a little string- and the Vietnam and Iraq wars show why. Should combat be in the American national interest, it ought to find favor in

both elective branches, not just one, for we will surely fail to win the battle eventually if the nation is not substantially behind the war effort. Thomas Jefferson wrote, ―In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the

chains of the Constitution.‖

All Americans understand that this is not an arcane debate about a few phrases in the

Constitution. The most awesome authority contained in the text of our basic document of

states is the war-making power. How it is described and allocated determines the fate of

millions of our sons and daughters- those who wear the American military uniform. Just as

vital, America's decisions to wage war affect our ability to survive and succeed in a dangerous

world. It is long past time to re-think the inadequate constitutional arrangement that was well

suited to the eighteenth century but is out of step with the twenty-first.

**From "War Powers Belong to the President" (Source: John Yoo, American Bar**

**Association Law Journal, February 1, 2012)**

In announcing the intervention in Libya, Mr. Obama told Congress that he was acting

―pursuant to my constitutional authority to conduct U.S. foreign relations and as commander

in chief and chief executive.‖ As the Libyan war reached its 60th day at the end of May 2011,

President Obama sent a letter to Congress that reported on progress but did not seek any authorization. . . .

President Obama has the Constitution about right. His exercise of war powers rests firmly in

the tradition of American foreign policy. Throughout our history, neither presidents nor

Congresses have acted under the belief that the Constitution requires a declaration of war

before the U.S. can conduct military hostilities abroad. We have used force abroad more than

100 times but declared war in only five cases: the War of 1812, the Mexican-American and Spanish-American wars, and World War I and II.

Without any congressional approval, presidents have sent forces to battle Indians, Barbary

pirates and Russian revolutionaries; to fight North Korean and Chinese communists in Korea;

to engineer regime changes in South and Central America; and to prevent human rights

disasters in the Balkans. Other conflicts, such as the 1991 Persian Gulf war, the 2001 invasion

of Afghanistan and the 2003 Iraq war, received legislative ―authorization‖ but not

declarations of war. The practice of presidential initiative, followed by congressional

acquiescence, has spanned both Democratic and Republican administrations and reaches

back from President Obama to Presidents Abraham Lincoln, Thomas Jefferson and George Washington.

Common sense does not support replacing the way our Constitution has worked in wartime

with a radically different system that mimics the peacetime balance of powers between

president and Congress. If the issue were the environment or Social Security, Congress would enact policy first and the president would faithfully implement it second. But the Constitution

does not duplicate this system in war. Instead, our framers decided that the president would play the leading role in matters of national security.

Those in the pro-Congress camp call upon the anti-monarchical origins of the American

Revolution for support. If the framers rebelled against King George III's dictatorial powers,

surely they would not give the president much authority. It is true that the revolutionaries

rejected the royal prerogative, and they created weak executives at the state level. Americans

have long turned a skeptical eye toward the growth of federal powers. But this may mislead

some to resist the fundamental difference in the Constitution's treatment of domestic and

foreign affairs. For when the framers wrote the Constitution in 1787 they rejected these failed

experiments and restored an independent, unified chief executive with its own powers in national security and foreign affairs.

The most important of the president's powers are commander in chief and chief executive. As Alexander Hamilton wrote in *Federalist 74*, ―The direction of war implies the direction of the

common strength, and the power of directing and employing the common strength forms a

usual and essential part in the definition of the executive authority.‖ Presidents should

conduct war, he wrote, because they could act with ―decision, activity, secrecy and dispatch.‖

In perhaps his most famous words, Hamilton wrote: ―Energy in the executive is a leading

character in the definition of good government. ... It is essential to the protection of the

community against foreign attacks.

The framers realized the obvious. Foreign affairs are unpredictable and involve the highest of

stakes, making them unsuitable to regulation by pre-existing legislation. Instead, they can

demand swift, decisive action—sometimes under pressured or even emergency

circumstances—that is best carried out by a branch of government that does not suffer from

multiple vetoes or is delayed by disagreements. Congress is too large and unwieldy to take the

swift and decisive action required in wartime. Our framers replaced the Articles of

Confederation, which had failed in the management of foreign relations because they had no single executive, with the Constitution's single president for precisely this reason. Even when

it has access to the same intelligence as the executive branch, Congress' loose, decentralized structure would paralyze American policy while foreign threats grow.

Many point to the Vietnam War as an example of the faults of the ―imperial presidency.‖

Vietnam, however, could not have continued without the consistent support of Congress in

raising a large military and paying for hostilities. And Vietnam ushered in a period of

congressional dominance that witnessed American setbacks in the Cold War and the passage

of the ineffectual War Powers Resolution. Congress passed the resolution in 1973 over

President Richard Nixon's veto, and no president, Republican or Democrat, George W. Bush

or Obama, has ever accepted the constitutionality of its 60-day limit on the use of troops

abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it.

Presidents, of course, do not have complete freedom to take the nation to war. Congress has

ample powers to control presidential policy, if it wants to. Only Congress can raise the military, which gives it the power to block, delay or modify war plans. Before 1945, for

example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. Since World War II,

it has been Congress that has authorized and funded our large standing military, one

primarily designed to conduct offensive, not defensive, operations (as we learned all too

tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military.

Congress' check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president's decisions, all it need

do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink

or eliminate units, or freeze supplies. Using the power of the purse does not even require

affirmative congressional action. Congress can just sit on its hands and refuse to pass a law

funding the latest presidential adventure, and the war will end quickly. Even the Kosovo war,

which lasted little more than two months and involved no ground troops, required special funding legislation.

The framers expected Congress' power of the purse to serve as the primary check on

presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the

Constitution for failing to limit executive militarism. James Madison responded: ―The sword

is in the hands of the British king; the purse is in the hands of the Parliament. It is so in

America, as far as any analogy can exist.‖ Congress ended America's involvement in Vietnam

by cutting off all funds for the war.

Our Constitution has succeeded because it favors swift presidential action in war, later

checked by Congress' funding power. If a president continues to wage war without

congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has

chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution.

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