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CONGRESS MUST PROTECT ITS CONSTITUTIONAL POWER OVER WAR

By Louis Fisher

INTRODUCTION

Beginning with President Truman’s commitment of U.S. troops to Korea in 1950, the constitutional system that vests the war power with Congress has been regularly violated. Subsequent presidents have acted unilaterally in ordering military force against other countries. At times, lawmakers have raised objections but Congress as an institution has not protected its constitutional authority. From 1936 forward, through a series of clear misrepresentations and errors, the Supreme Court has promoted exclusive and plenary presidential power over external affairs. There have been many irresponsible parties in undermining our constitutional system, but Congress has the power and the duty to preserve its powers and the system of self-government.

The Framers recognized that presidents need to repel sudden attacks but insisted that they must come to Congress and seek prior approval for other military actions. The “Quasi War” against France in 1798 was not declared by Congress. Instead, President John Adams urged lawmakers to pass

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“effectual measures of defense”¹ and Congress passed several dozen bills to support military operations. The Quasi War precipitated judicial rulings that underscored the constitutional authority of Congress over military initiatives. In 1800, the Supreme Court agreed that Congress could authorize hostilities either by a formal declaration of war or by statutory action, as against France.² A year later, Chief Justice John Marshall wrote for the Court: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry.”³

In drafting the Constitution, the Framers broke with the British model that placed the war power with the executive. In 1690, John Locke referred to three categories of government: legislative, executive and federative. The latter covered “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.” For Locke, the powers of executive and federative “are always almost united.”⁴ In 1765, the British jurist William Blackstone agreed that external powers had to be placed with the executive: making treaties, sending and receiving ambassadors, the “sole prerogative of making war and peace,” issuing letters of marque and reprisal (authorizing private citizens to engage in military action), and “the sole power of raising and regulating fleets and armies.”⁵

Article I of the U.S. Constitution places these powers expressly in Congress: the power to declare war, grant let-

1. James D. Richardson, ed., *A Compilation of the Messages and Papers of the President* (Bureau of National Literature, 1897-1925), Vol. 1, p. 226 (hereafter “Richardson”).

2. *Bas v. Tinny*, 4 U.S. (4 Dall.) 37, 43 (1800).

3. *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801).

4. John Locke, *Two Treatises of Civil Government* (E. P. Dutton & Co., Inc., 1962), Book II, Ch. XII, §§ 146-47.

5. William Blackstone, *Commentaries on the Laws of England* (Oxford, 2016), Book I, pp. 243-45, 249-50, 254 and 267.

ters of marque and reprisal, raise and support armies, and provide and maintain a navy. Treaties must be approved by the Senate. Article I also empowers Congress to regulate commerce with foreign nations, to define and punish piracies and felonies committed on the high seas, to decide rules concerning captures on land and water, and to make rules for the government and regulation of the land and naval forces.

Nothing in Article II places any exclusive power in the president over external affairs. He is the Commander in Chief of the army and navy and of the militia of the several states, “when called into the actual Service of the United States.” Article I empowers Congress to call forth “the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions.” Congress is empowered by the Constitution to “make Rules for the Government and Regulation of the land and naval Forces.”

THE FRAMERS' INTENT

During debate at the Philadelphia Convention, the Framers placed in Congress many of the powers that Locke and Blackstone had reserved to the executive. Instead of vesting the war power with a single official, collective decision-making would proceed by legislative deliberation. John Rutledge agreed on June 1, 1787, that the executive power needed to be placed in a single person, but “he was not for giving him the power of war and peace.”⁶ James Wilson preferred “a single magistrate” but did not consider “the Prerogatives of the British Monarch as a proper guide in defining the Executive powers.” Some of those prerogatives, he said, were of “a Legislative nature,” including “that of war & peace.”⁷ Edmund Randolph expressed concern about executive power, calling it “the foetus of monarchy.” He did not want America “governed by the British Governmt. as our prototype.”⁸

On Aug. 17, 1787, the Framers offered a number of reasons to reject the British model. On a motion to vest in Congress the power to “make war,” Charles Pinckney objected that the proceedings of the legislative branch “were too slow” and Congress would meet “but once a year.” In his judgment, it would be better to vest that power in the Senate, “being more acquainted with foreign affairs, and most capable of proper resolutions.”⁹ Pierce Butler wanted to vest the war power in the president “who will have all the requisite qualities, and will not make war but when the Nation will support it.”¹⁰

6. Max Farrand, ed., *The Records of the Federal Convention of 1789* (Yale University Press, 1966), Vol. 1, p. 65.

7. *Ibid.*, pp. 65-66.

8. *Ibid.*, p. 66.

9. Max Farrand, ed., *The Records of the Federal Convention of 1789* (Yale University Press, 1966), Vol. 2, p. 318.

10. *Ibid.*

During subsequent debate, James Madison and Elbridge Gerry recommended that the language be changed from “make war” to “declare war,” leaving with the president “the power to repel sudden attacks.”¹¹ Roger Sherman supported their proposal, insisting that the president “shd. be able to repel and not to commence war.” Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” George Mason was “agst giving the power of war to the Executive, because not <safely> to be trusted with it [...] He was for clogging rather than facilitating war; but for facilitating peace.”¹² The amendment by Madison and Gerry was accepted.

Objections to presidential wars were also voiced at state ratifying conventions. In Pennsylvania, James Wilson offered his view 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.”¹³ In South Carolina, Charles Pinckney explained that the president’s power “did not permit him to declare war.”¹⁴

John Jay developed these constitutional values in *Federalist* No. 4, which issued this warning: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it.” Absolute monarchs, he said:

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.

Those and other motives, he said, “which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”¹⁵

IMPLEMENTING CONSTITUTIONAL PRINCIPLES

In the years following ratification of the Constitution, the three branches understood that presidential military initiatives were limited to repelling sudden attacks. All other actions required congressional support either by express declaration or statutory support. An interesting example of a president stepping over the line and being forced to

11. *Ibid.*

12. *Ibid.*, p. 319.

13. Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836-1845), Vol. 2, p. 528.

14. Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836-1845), Vol. 4, p. 287.

15. Benjamin F. Wright, ed., *The Federalist* (Metro Books, 2002), p. 101.

retreat was the Neutrality Proclamation issued by President Washington on April 22, 1793. In it, he instructed citizens to remain neutral in the war between England and France, and warned that a failure to abide by his policy could result in prosecution.¹⁶

The check in this case came not from Congress or the judiciary but from jurors, who rebelled against the idea of convicting someone for a crime established by an executive proclamation. Making it clear that criminal law in the United States could be made only by Congress, not by the president, they vowed to dismiss all charges brought by the administration.¹⁷ Faced with this blunt challenge, the administration dropped plans to prosecute. Washington told lawmakers that it rested with “the wisdom of Congress to correct, improve, or enforce” the policy set forth in his proclamation, recommending that the legal code be changed to give federal courts jurisdiction over issues of neutrality.¹⁸ The Neutrality Act of 1794 gave the administration authority to prosecute violators. On this issue, jurors had a better understanding of the Constitution than Washington and his circle of legal advisers. Private citizens were willing to uphold self-government and constitutional principles.

The Quasi War helped clarify the limits of presidential power during military operations. In passing legislation to support military action against France, Congress authorized the president to seize vessels sailing to French ports. Yet, President John Adams issued an order directing American ships to capture vessels sailing *to or from* French ports. In a unanimous decision in 1804, Chief Justice John Marshall held that Adams exceeded his statutory authority.¹⁹ This demonstrated that presidential actions were subject to limits imposed by Congress and those limits were enforced in court.

Thomas Jefferson understood constitutional limits when he became president in 1801. He had to pay annual bribes (“tributes”) to four states of North Africa: Morocco, Algiers, Tunis and Tripoli. In receiving those payments, they pledged not to interfere with American merchantmen. However, on May 14, 1801, the Pasha of Tripoli insisted on a larger sum of money and declared war on the United States. Jefferson informed Congress about this demand and said he had sent a small squadron of vessels to the Mediterranean to protect against attacks but asked Congress for further guidance, stating he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.” It was

necessary for Congress to authorize “measures of offense also.”²⁰

In 1805, with new military conflicts developing, Jefferson advised Congress about the problem and spoke clearly about legal principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war.”²¹ According to subsequent studies by the Justice Department and statements by members of Congress, Jefferson acted militarily against the Barbary powers without seeking statutory authority.²² Yet, Congress passed at least ten statutes authorizing military action by Presidents Jefferson and Madison and against the Barbary powers.²³ In 1812, Congress declared its first war, responding to a series of actions by England.

A second declared war against Mexico in 1846 led to congressional sanctions against President James Polk. Tensions along the border led to military conflicts between American and Mexican forces, prompting Polk to tell Congress that Mexico “has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil.” He notified Congress that “war exists.”²⁴ Part of the boundary, however, was subject to dispute. Senator John Middleton Clayton rebuked Polk for his actions:

I do not see on what principle it can be shown that the President, without consulting Congress and obtaining its sanction for the procedure, has a right to send an army to take up a position, where, as it must have been foreseen, the inevitable consequence would be war.²⁵

On May 23, 1846, Congress declared war on Mexico.²⁶ Two years later, Polk’s action was censured by the House of Representatives on the ground that the war had been “unnecessarily and unconstitutionally begun by the President of the United States.”²⁷ One of the members voting for censure was Abraham Lincoln, who later wrote that allowing the president “to invade a neighboring nation, whenever *he* shall deem it necessary to repel 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.”²⁸

16. Henry Steele Commager, ed., *Documents of American History* (Seventh edition: Appleton-Century-Crofts, 1963), p. 162.

17. *Henfield’s Case*, 11 Fed. Cas. 1099 (C.C. Pa. 1793) (No. 6,360).

18. *Annals of Congress*, 3d Cong., 1-2 Sess. 11 (1793).

19. *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804).

20. Richardson, Vol. 1, p. 315.

21. *Annals of Congress*, 9th Cong., 1st Sess. 19 (1805).

22. 4A Op. O.L.C. 185, 187 (1980); 140 Cong. Rec. 19809 (1994).

23. Louis Fisher, *Presidential War Power* (Third edition: University Press of Kansas, 2013), pp. 35-37.

24. Richardson, Vol. 5, p. 2292.

25. *Cong. Globe*, 29th Cong., 1st Sess. 786 (1846).

26. 9 Stat. 9 (1846).

27. *Cong. Globe*, 30th Cong., 1st Sess. 95 (1848).

28. Roy Basler, ed., *The Collected Works of Abraham Lincoln* (1953), Vol. 1, pp. 451-52. (Emphasis in original.)

In April 1861, with Congress in recess, President Lincoln responded to the internal rebellion by issuing proclamations to call forth the state militia, suspend the writ of habeas corpus and place a blockade on the southern states. He did not claim full authority to act as he did. When Congress returned, he explained that his actions, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.”²⁹ The superior body was therefore Congress, not the president. Members of Congress supported legislation with the explicit understanding that his acts were illegal.³⁰

Congress declared war a third time in 1898 against Spain. The next two declared wars were worldwide conflicts: in 1917 and 1941. There soon developed the notion of independent presidential power in external affairs. A big step in that direction came in 1936 when the Supreme Court upheld a delegation of legislative power to the president to place an arms embargo in a region in South America. The decision went far beyond the necessities of the case by describing the president as “sole organ” in external affairs, equipped with “plenary and exclusive” power. Anyone reading the constitutional text of Articles I and II would understand the Court’s errors, but the sole-organ doctrine survived from one decade to the next until it was finally jettisoned by the Court in 2015.

THE PRESIDENT AS A “SOLE ORGAN”

In 1934, Congress passed legislation to authorize the president to prohibit the sale of military arms in the Chaco region of South America whenever he found “it may contribute to the reestablishment of peace” between belligerents.³¹ When President Franklin Roosevelt imposed the embargo, he relied exclusively on statutory authority. In his proclamation prohibiting the sale of arms and munitions, he stated: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting and by virtue of the authority conferred in me by the said joint resolution of Congress...”³² Nothing in the statutory language, legislative history or executive statements said anything about the existence of plenary and exclusive power for the president in external affairs.³³ None of the briefs submitted to the courts in this case said anything about the availability of such powers for the president.³⁴ The source of authority was plainly legislative.

29. Richardson, Vol. 7, p. 3225.

30. Cong. Globe, 37th Cong., 1st Sess. 393 (1861) (Senator Howe).

31. 48 Stat. 811 (1934).

32. *Ibid.*, 1745.

33. For details on this statute and the *Curtiss-Wright* case, see Chapter 6 of Louis Fisher, *Reconsidering Judicial Finality: Why the President is the Not the Last Word on the Constitution* (University Press of Kansas, 2019), pp. 101-20.

34. *Ibid.*, p. 104, Notes 24-27.

Writing for the Court, Justice George Sutherland upheld the delegation but the inclusion of extensive extraneous matter (“dicta”) introduced numerous errors and misconceptions. Scholars immediately criticized him for twisting historical and constitutional precedents.³⁵ For example, Sutherland claimed that the Constitution commits treaty negotiation exclusively to the president: “He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress is powerless to invade it.”³⁶ That was pure dicta. Nothing in the case before the Supreme Court had anything to do with treaties or treaty negotiation. Moreover, it was *erroneous* dicta. The record demonstrates that presidents have often invited not only Senators to engage in treaty negotiations but members of the House as well. The purpose was to build legislative support for authorization and appropriation bills needed to implement treaties.³⁷

If one wants a particularly devastating critique of the belief that presidents possess exclusive power over treaty negotiation, it would be a book published in 1919 by someone who reflected on his twelve years as a U.S. senator. He acknowledged that his colleagues participated in the treaty negotiation phase and that presidents regularly agreed to this “practical construction.” The right of senators to participate in treaty negotiation “has been again and again recognized and acted upon by the Executive.” The author of this book? George Sutherland.³⁸ How could he insert into his decision such a plain error? It is likely that he was persuaded to incorporate that material by Chief Justice Charles Evans Hughes, who served as Secretary of State under President Warren Harding and in various speeches endorsed the notion of the president as sole negotiator of treaties.³⁹

Justice Sutherland’s major error in *Curtiss-Wright* was to completely misrepresent and misinterpret a speech that John Marshall delivered in 1800 as a member of the House of Representatives. With Thomas Jefferson in that election year attempting to defeat President John Adams, Jeffersonians in the House urged that Adams be either impeached or censured for turning over to England an individual charged with murder. Jeffersonians thought the individual was an American under the name of Jonathan Robbins, but in fact he was Thomas Nash, a native Irishman.⁴⁰

35. Louis Fisher, “The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*,” *Constitutional Commentary* 31 (Summer 2016), pp. 149, 186-99.

36. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319. (Emphasis in original.)

37. Louis Fisher, “Congressional Participation in the Treaty Process,” *University of Pennsylvania Law Review* 137 (1989), pp. 1511-22.

38. George Sutherland, *Constitutional Power and World Affairs* (Columbia University Press, 1919), p. 123.

39. *Reconsidering Judicial Finality*, p. 106.

40. *Ibid.*, p. 107.

In his speech, Marshall rejected the move for impeachment or censure by explaining that President Adams was not acting in some illegal or unconstitutional way. Instead, he was carrying out a provision of the Jay Treaty with England that authorized each country to deliver up to each other any person charged with murder or forgery.⁴¹ Nash, being British, would be turned over to England for trial. President Adams was not acting unilaterally with regard to external affairs or claiming some type of independent executive power. He was fulfilling his Article II, Section 3, authority to take care that the laws, including treaties, be faithfully executed.

In the course of delivering his speech, Marshall included this sentence: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁴² The phrase “sole organ” is susceptible to different interpretations. “Sole” means exclusive but what is “organ?” Is it merely the president’s duty to communicate to other nations U.S. policy established by the elected branches? Reading the entire speech makes clear that Marshall intended that meaning. He was merely defending Adams for carrying out the extradition provision of the Jay Treaty. After he completed his speech, the Jeffersonians considered his argument so well reasoned that they dropped efforts to either impeach or censure Adams.

Nevertheless, in his opinion for the Court, Justice Sutherland announced that the president possessed “plenary and exclusive” power over foreign policy and served as the “sole organ” in external affairs.⁴³ In doing so, he completely misrepresented Marshall’s speech. Nevertheless, executive officials from one decade to the next relied on *Curtiss-Wright* to expand presidential power. In 1941, Attorney General Robert Jackson described the opinion as “a Christmas present to the President.”⁴⁴ Executive branch attorneys relied heavily on the opinion. As explained by Harold Koh, Justice Sutherland’s “lavish” description of presidential power in external affairs was quoted with such frequency that it came to be known as the “*Curtiss-Wright*, so I’m right cite.”⁴⁵

CHALLENGES TO ERRONEOUS DICTA

Starting in the George W. Bush administration, litigation led the Supreme Court to review some of the *Curtiss-Wright* dicta that greatly expanded presidential power in external affairs. In 2002, Congress passed legislation covering passports to U.S. citizens born in Jerusalem. In his signing state-

ment, President Bush objected that some provisions “impermissibly interfere with the constitutional functions of the presidency in foreign affairs.” By referring to the president’s constitutional authority to “speak for the Nation in international affairs,” he implicitly, if not explicitly, relied on *Curtiss-Wright* dicta.⁴⁶

Legal challenges preoccupied all levels of the federal judiciary, starting in 2004 and reaching the Supreme Court in 2012, which rejected the position that the case presented a non-justiciable political question.⁴⁷ At that point, the D.C. Circuit held on July 23, 2013, that the president “exclusively holds the constitutional power to determine whether to recognize a foreign government,” and that language in the 2002 statute “impermissibly intrudes on the President’s recognition power and is therefore unconstitutional.”⁴⁸ On five occasions, the D.C. Circuit relied on the sole-organ doctrine in *Curtiss-Wright*, claiming that the Supreme Court “echoed” the words of John Marshall by describing the president as the “sole organ of the nation in its external relations.”⁴⁹

Thus, echoing Marshall’s words but not his meaning, the D.C. Circuit demonstrated no understanding that the sole-organ doctrine was not merely dicta but erroneous dicta. To them, Supreme Court dicta was especially authoritative if “reiterated.”⁵⁰ However, dicta can be repeated many times and still be false, as with the sole-organ doctrine. The D.C. Circuit opinion prompted me to file an amicus brief with the Supreme Court on July 17, 2014, analyzing a variety of erroneous dicta in *Curtiss-Wright*.⁵¹ While the Supreme Court is in session, the *National Law Journal* runs a column called “Brief of the Week,” selecting a particular brief out of the thousands filed each year. On Nov. 3, 2014, it chose mine. The story carried a provocative title: “Can the Supreme Court Correct Erroneous Dicta?”⁵²

On June 8, 2015, the Supreme Court rejected the erroneous sole-organ dicta that had magnified presidential power in external affairs for seventy-nine years.⁵³ The Court never explained how the statutory issue at question had anything to do with the president’s recognition power; nor did the Court acknowledge that the D.C. Circuit relied five times on

41. 8 Stat. 129 (1794).

42. 10 Annals of Congress 613 (1800).

43. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936).

44. Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (Vintage Books, 1941), p. 201.

45. Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale University Press, 1990), p. 94.

46. *Public Papers of the Presidents* (2002), Vol. II, pp. 1697-99.

47. *Reconsidering Judicial Finality*, p. 112.

48. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).

49. *Ibid.*, 211.

50. *Ibid.*, 212.

51. “Brief Amicus Curiae of Louis Fisher in Support of Petitioner,” *Zivotofsky v. Kerry*, No. 13-628, U.S. Supreme Court, July 17, 2014, p. 2. www.loufisher.org/docs/pip/Zivotofsky.pdf. For a summary of my brief, see *Reconsidering Judicial Finality*, pp. 114-15.

52. Jamie Schuman, “Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?,” *National Law Journal*, Nov. 3, 2014. www.loufisher.org/docs/pip/fisherbrief.pdf.

53. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2089 (2015).

the erroneous sole-organ dicta in *Curtiss-Wright*. The Court offered no explanation how Justice Sutherland flagrantly misinterpreted John Marshall's speech. Moreover, it left in place the erroneous dicta about the president possessing sole power to negotiate treaties, and even added its blessing to this error, stating that the president "has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936)."⁵⁴

After finally jettisoning the sole-organ doctrine, the Court proceeded to create a substitute that promotes exclusive presidential power in external affairs. It insisted that recognition of foreign nations requires the federal government to "speak . . . with one voice" and that voice "must be the President's."⁵⁵ In the Court's judgment, between the two elected branches "only the Executive has the characteristic of unity at all times."⁵⁶ Evidently that claim has little to do with the record of presidents. Administrations regularly display inconsistency, conflict, disorder and confusion. One need only read memoirs of top officials who, upon retirement, chronicle the infighting and disagreements within an administration, including in foreign affairs.

The Court decided to add four other characteristics for the president: decision, activity, secrecy and dispatch, borrowing those qualities from Alexander Hamilton's *Federalist* No. 70. On what possible grounds would the Court assume that unity plus those four qualities are inevitably positive, constructive and consistent with constitutional government? Certainly decisions, activity, secrecy and dispatch can produce negative consequences. Consider these presidential initiatives from 1950 to the present time: Truman allowing U.S. troops in Korea to travel northward, provoking Chinese troops to enter in large numbers and result in heavy casualties to both sides; Johnson's decision to escalate the war in Vietnam; Nixon and Watergate; Reagan's involvement in Iran-Contra; Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction, with all claims found to be erroneous; and Obama ordering military action against Libya in 2011, leaving behind a country damaged legally, economically and politically, providing a fertile ground for terrorism.⁵⁷

Three Justices issued strong dissents in the Jerusalem passport case. Chief Justice John Roberts, joined by Justice Samuel Alito, began with this critique:

Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of

54. *Ibid.*, 2086.

55. *Ibid.*

56. *Ibid.*

57. *Presidential War Power*, pp. 100-03, 132-37, 209-32 and 238-47.

foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "or what is at stake is the equilibrium established by our constitutional system."⁵⁸

Roberts pointed out that for the first 225 years "no President prevailed when contradicting a statute in the field of foreign affairs." Moreover, he noted that the statute at issue before the Court "*does not implicate recognition.*"⁵⁹

A dissent by Justice Antonin Scalia, joined by Roberts and Alito, agreed that the statute had nothing to do with recognizing foreign governments.⁶⁰ To Scalia, the Court's decision:

does not rest on text or history or precedent. It instead comes down to "functional considerations" – principally the Court's perception that the Nation "must speak with one voice" about the status of Jerusalem [...] The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs.⁶¹

Scholars also criticized the Court in this case for promoting independent and exclusive presidential power in external affairs.⁶²

PRESIDENTIAL MILITARY INITIATIVES FROM TRUMAN FORWARD

In a public statement on July 27, 1945, President Harry Truman pledged that if agreements were ever negotiated with the U.N. Security Council to use military force against another country "it will be my purpose to ask the Congress for appropriate legislation to approve them."⁶³ Under the U.N. Charter, when nations agree to contribute troops, equipment and financial support to a U.N. military action, they must act in accordance with the "constitutional processes" of each country. The U.S. meaning of "constitutional processes" is contained in the U.N. Participation Act of 1945, which requires presidents to seek congressional support before involving the nation in a U.N. war.⁶⁴

58. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2113.

59. *Ibid.*, 2113, 2114. (Emphasis in original.)

60. *Ibid.*, 2118.

61. *Ibid.*, 2123. (Emphasis in original.)

62. See, e.g., Jack Goldsmith, "Zivotofsky II as Precedent in the Executive Branch," *Harvard Law Review* 129 (2015), p. 112; and Esam Ibrahim, "The Dangers of Zivotofsky II: A Blueprint for Category III Action in National Security and War Powers," *Harvard Law and Policy Review* 11 (2017), p. 585.

63. 91 Cong. Rec. 8185 (1945).

64. *Presidential War Power*, pp. 90-94

With statutory safeguards in place to protect constitutional principles and congressional authority, in June 1950, Truman ordered U.S. air and sea forces to defend South Korea against aggression by North Korea. At a news conference on June 29, he was asked whether the country was at war. He replied: “We are not at war.” He was then asked whether it would be more correct to call the conflict “a police action under the United Nations.” He agreed: “That is exactly what it amounts to.”⁶⁵ Federal and state courts had no difficulty in defining the hostilities in Korea as war.⁶⁶ During hearings in June 1951 regarding military actions in Korea, Secretary of State Acheson conceded the obvious by admitting “in the usual sense of the word there is a war.”⁶⁷

Truman’s decision to violate his own personal pledge in 1945 and the U.N. Participation Act met with little resistance from members of Congress. Senator Scott Lucas (D-Ill.) offered the following defense:

history will show on more than 100 occasions in the life of this Republic the President as Commander in Chief has ordered the fleet or the troops to do certain things which involved the risk of war without seeking congressional consent.⁶⁸

Those precedents provide no justification for Truman’s initiative in Korea. As Edward S. Corwin observed, the list by Senator Lucas consisted largely of fighting with pirates, chasing bandits or cattle rustlers across the Mexican border, and other similar actions.⁶⁹

The Korean War proved costly to President Truman and the Democratic Party. Although General Douglas MacArthur predicted on Nov. 24, 1950, that allied troops would be home by Christmas, his decision to direct troops north of the 38th parallel prompted Chinese troops to enter in large numbers, pushing allied troops south of the 38th parallel. The war continued for several years, resulting in heavy casualties on both sides. 53,000 Americans died in the Korean War.⁷⁰ And for this reason, a decisive point in the 1952 presidential campaign was the pledge by Dwight D. Eisenhower that he would “go to Korea” to end the war.⁷¹ The war marked an important step in putting an end to 20 years of Democratic control of the White House. As Stephen Ambrose explained,

65. *Public Papers of the Presidents*, p. 504.

66. *Presidential War Power*, p. 114.

67. “Military Situation in the Far East” (Part 3), hearings before the Senate Committees on Armed Services and Foreign Relations, 82d Cong., 1st Sess. 2014 (1951).

68. 96 Cong. Rec. 9229 (1950).

69. Edward S. Corwin, “The President’s Power,” *New Republic*, Jan. 29, 1951, p. 16.

70. James P. Terry, *The Commander in Chief* (Carolina Academic Press, 2015), p. 52.

71. Stephen Ambrose, *Eisenhower: Soldier, General of the Army, President-Elect 1890-1952* (Simon & Schuster, 1983), Vol. 1, p. 569.

“Korea, not crooks or Communists, was the major concern of the voters.”⁷²

Congress enacted the War Powers Resolution (WPR) in 1973, allowing the president to take military action for up to 60 days without any statutory authority. The WPR reflected a compromise between a relatively strong Senate bill and a weak House version. The Framers recognized the need for presidents to repel sudden attacks but certainly not to independently use military force throughout the world for up to 60 days.

As with Truman, President Bill Clinton saw no need to seek congressional approval for his military actions abroad. Instead, he sought support from the Security Council and NATO allies. He used military force in Iraq, Somalia, Haiti, Bosnia, Afghanistan, Sudan and Kosovo without once receiving statutory support for his initiatives.⁷³ In 1995, he explained that his bombing attacks in Bosnia had been “authorized by the United Nations.”⁷⁴ An analysis by the Office of Legal Counsel (OLC) concluded that his military initiatives did not require statutory authority because they did not constitute “war.”⁷⁵ After a peace agreement was reached, Clinton announced that “America’s role will not be about fighting a war.”⁷⁶ With full inconsistency he added: “Now the war is over,” describing the conflict in Bosnia as “this terrible war.”⁷⁷

President Barack Obama followed the same practice of using military force abroad by seeking support not from Congress but from the United Nations and NATO allies. On March 21, 2011, he explained that the United States was taking military action in Libya to enforce U.N. Security Council Resolution 1973, anticipating that operations would conclude “in a matter of days and not a matter of weeks.”⁷⁸ In fact, that military force would last seven months, thereby exceeding the 60-90 day limit of the War Powers Resolution.

In a message to Congress on March 21, Obama stated that U.S. forces operating under the U.N. resolution had begun a series of strikes against Libyan air defense systems and military airfields in order to prepare “a no-fly zone.” He predicted that the strikes would “be limited in their nature, duration, and scope.”⁷⁹ No matter how executive officials attempt

72. *Ibid.*

73. Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (University Press of Kansas, 2017) pp. 221-36.

74. *Public Papers of the Presidents* (1995), Vol. II, p. 1353.

75. 19 Op. O.L.C. 327, 329 (1995).

76. *Public Papers of the Presidents* (1995), Vol. II, p. 1784.

77. *Ibid.*, pp. 1785, 1787.

78. *Public Papers of the Presidents* (2011), Vol. I, pp. 266, 271.

79. *Ibid.*, p. 280.

to interpret and minimize a no-fly zone, the use of military force against another country that has not threatened the United States should be called in straight terms what former Secretary of Defense Robert Gates has called it: an “act of war.”⁸⁰

A memo by the Office of Legal Council on April 1, 2011 concluded that the operations against Libya did not constitute “war” because of the limited “nature, scope, and duration” of the military actions.⁸¹ By early June, however, having exceeded the 60-day limit of the War Powers Resolution, Obama now wanted another memo from the OLC stating that “hostilities” did not exist, but it declined to provide that memo. Jeh Johnson, General Counsel for the Defense Department, also refused to comply with Obama’s request.⁸²

It is argued at times that when a president receives a Security Council resolution providing support for military action, there is compliance with international law. Nothing in that procedure, however, satisfies the Constitution. Through the treaty process (as with the U.N. Charter and NATO), the Senate may not transfer the Article I authority of Congress to international and regional organizations. Put simply, it may not unilaterally amend the Constitution, and thus the authorizing body for military actions against other countries must be Congress.

CONCLUSION

From President Truman forward, presidents have engaged in numerous unilateral military actions, including Eisenhower’s covert operations in Iran and Guatemala. With the ill-fated Bay of Pigs, Kennedy supported a unilateral invasion of Cuba. Reagan became involved in Iran-Contra, directly against statutory policy. Acting independently, Trump bombed Syria after its use of nerve gas, assisted Saudi Arabia with its military actions in Yemen and claimed the right to use military force against Iraq if it bombed Saudi oil facilities. All of these actions involve authority that the Constitution places in both elected branches, not the executive alone.

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80. Robert M. Gates, *Duty: Memoirs of a Secretary at War* (Vintage Books, 2015), p. 513.

81. Office of Legal Counsel, “Authority to Use Military Force in Libya,” U.S. Dept. of Justice, April 1, 2011. <https://www.justice.gov/olc/opinion/authority-use-military-force-libya>.

82. For further details on military operations against Libya, see *Supreme Court Expansion of Presidential Power*, pp. 287-91.