

CATO INSTITUTE

POLICY FORUM

CONGRESS AND THE POWER OF WAR AND PEACE

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Moderator:

John Samples, Director,
Center for Representative Government, Cato Institute

Featuring:

Gene Healy, Author of Cato Institute Study
"Arrogance of Power Reborn: The Imperial
Presidency and Foreign Policy in the Clinton Years";

Louis Fisher, Author,
"Congressional Abdication on War & Spending"; and
Robert F. Turner, Center for National Security Law,
University of Virginia School of Law

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P R O C E E D I N G S

MR. SAMPLES: Good afternoon. I'm John Samples, Director of the Center for Representative Government here at the Cato Institute. I'd like to welcome you all to our policy forum on Congress and the Power of War and Peace.

We commonly think of declaring war and making war as foreign policy matters, and indeed they are. However, the power to make war is a vital question also for representative government. Who should make the decision? The President who has a national mandate and a claim to represent the whole people, or the Congress, the elected authors of the laws?

The Framers of our Constitution sought to divide and control power. They feared a monopoly of power held by any branch or person. Hence, they gave Congress the power to initiate war because they believed the President would be driven by a desire for glory and fame that made war more likely.

Thus, we find James Madison writing to Thomas Jefferson a few years after the Constitution was ratified -- and I quote -- "The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war and most prone to it. It has, accordingly, with studied care, vested the question of war in the legislature."

The Framers notwithstanding, the President has used force many times, especially during the Cold War, often with the approval of the courts. The War Powers Resolution of 1973 may itself have implicitly eroded Congress' power of declaring war. Many observers believe the end of the Cold War would see Congress curbing the President's right to initiate military action. Nonetheless, President Clinton did so on several occasions.

As we begin a new administration and a new era, we have asked three experts here to discuss the desirability and the likelihood that Congress will reclaim its power over war and peace.

Our speaker will be Gene Healy. Gene recently wrote a policy analysis for Cato entitled "Arrogance of Power Reborn: The Imperial Presidency and Foreign Policy in the Clinton Years." Gene is an attorney practicing here in the District of Columbia. He is a 1999 graduate of the University of Chicago Law School and a former managing editor of *Regulation* magazine. Gene?

(Applause.)

GENE HEALY, AUTHOR OF CATO INSTITUTE STUDY
"ARROGANCE OF POWER REBORN: THE IMPERIAL
PRESIDENCY AND FOREIGN POLICY IN THE CLINTON YEARS"

MR. HEALY: Thanks, John, and thanks for inviting me to speak. It's a real honor to be here on a panel with scholars of the caliber of Professor Turner and Professor Fisher.

Apparently the practice here at Cato is for the least distinguished member of the panel to speak first, so with that in mind, I'll try to be as brief as I can.

I gather that Professor Turner and Professor Fisher will have something to say about President George W. Bush and the future of the congressional power to declare war, but my remarks are going to focus pretty much exclusively on President Clinton and his record in that regard. Some of you might find that slightly disappointing. You might feel that you have heard enough over the years about President Clinton. You may suffer from that Clinton fatigue that we heard so much about in the last election cycle.

What you may be unaware of is that there's actually a countervailing phenomenon to Clinton fatigue known as Clinton nostalgia. What this is, apparently, is a sort of melancholy longing for the abundant charms of our 42nd President. Now, I'm not making this up. This is actually a real phenomenon. It was identified in a front page article in the *Washington Post* about a year ago, backed up with social science data from Pew Research Institute, among others. I'm not sure whether Clinton nostalgia syndrome has its own entry in the diagnostic manual of psychiatric disorders, but it is a real phenomenon nonetheless.

These are tough times for sufferers from Clinton nostalgia syndrome. You used to be able to get your Clinton fix on the news every night if you wanted to, but these days you're lucky to catch a 30-second spot towards the end of the news hour about Bill Clinton at home in Chappaqua regrouting the tub or cleaning out the rain gutters or whatever he does these days to keep himself busy.

All this is just by way of prelude to tell you that if you are given to fits of Clinton nostalgia, then today is your lucky day because for the next 10 or 15 minutes or so, I'm going to be focusing exclusively on the object of your affection. I'm going to start with a discussion of President Clinton's expansive view of the powers that the Constitution grants the President over matters of war and peace. I'm going to compare that to the view of the Constitution's Framers on military matters. After

that, I'm going to go through a couple of case studies in the Clintonian approach to unauthorized war. And finally, I'll discuss how all this sought to fit into our view of the Clinton legacy.

Now, early on in his first administration, President Clinton outlined his views of respective roles of Congress and the President in the decision to initiate military force, and he made it clear that in his view Congress had basically an advisory role and that the ultimate decision was to be left to the President. As he put it, "I think that I've a big responsibility to try to appropriately consult with members of Congress and both parties whenever we're in the process of making a decision that might lead to the use of force. I believe that. But I think that clearly the Constitution leaves the President, for good and sufficient reasons, the ultimate decision making authority. Clearly."

Now, Bill Clinton certainly must know better than that. Even at Yale Law School, I have it under reliable authority, they do a better job of teaching constitutional law. In the Framers' Constitution, it's Congress that has the power to initiate war, and this is clear from, among other sources, the records of the debates at the Philadelphia Convention. The original text considered at that convention would have given Congress the power to "make" war, but it was decided that Congress met too infrequently and its proceedings were too slow for that to be a practicable and workable solution.

So, as Madison's notes show, Madison and Elbridge Gerry of Massachusetts moved to insert the word "declare," striking out the word "make" in front of "war" and "leaving to the executive the power to repel sudden attacks." Roger Sherman of Connecticut thought the proposal stood very well, that the executive should be able to repel and not to commence war.

Of course, the Constitution that emerged from the convention does provide that the President shall be commander-in-chief of the army and navy of the United States. But as Alexander Hamilton explained in Federalist No. 69, this means no more than that he is the nation's first or preeminent general and admiral. And as a typical matter, generals and admirals aren't given the authority to decide which countries we go to war with. The Constitution leaves that power to Congress.

Now, one of the main reasons that the Framers settled on this particular allocation of power was their skeptical view of human nature. Men being generally rotten and potentially corrupt as they are, it was the view that no one person could have this much power. As Madison put it, in no part of the Constitution is more wisdom to be found than in that clause which confides the question of war and peace to be to the legislature

and not to the executive department. Were it otherwise, the trust and the temptation would be too great for any one man.

This is quite a contrast to the views of President Clinton in the quote that I read to you moments ago. During his tenure, President Clinton asserted and acted on the view that the Constitution grants the President all of the powers over matters of war and peace. He wasn't the first President to behave in this fashion and maybe he won't be the last, but as I'm going to try to demonstrate in the next few minutes, he did so in a manner that was particularly brazen and in some ways unprecedented.

Now, when it comes to President Clinton's abuses of the Constitution in the foreign affairs arena, there are many different interventions to choose from, the periodic bombings of Bosnia, the similar bombings of Iraq. You've got what I think are the two most striking examples of unauthorized war making, at least in my lifetime, which are the two "wag the dog" bombings, which I think pretty clearly were designed to distract attention from the Lewinsky grand jury testimony and the impeachment debate, respectively.

But given that my time is limited here and I don't want to see the warning life go off, I'm going to focus principally just on two case studies in the Clintonian approach to the war power. Those are Haiti and Serbia.

I'm going to start with Haiti because I think it sets the stage for interventions to come. I think it gave President Clinton an idea of just what he could get away with in terms of unauthorized war making.

As you might remember, the intervention in Haiti came about after the military junta that had ousted President Aristide had refused to step down and after 600 U.S. troops/military engineers were refused access to land on the island. Shortly after that, President Clinton began threatening war. As he put it in a televised address, such action would likely be necessary "to carry out the will of the United Nations." He didn't say anything about the will of Congress which hadn't been properly consulted on the matter, but by September of 1994, he was ready to launch a 20,000-troop invasion, still insisting that no authorization from Congress was necessary.

I think what he was proposing here was a little different and maybe a little more brazen than other recent small scale, undeclared wars, such as the intervention in Grenada in 1983 and Panama in 1989. There, at least in the background atmospherically, there was a constitutional fig leaf of the need for surprise. But here surprise was never an issue. The President had been saying for weeks that an invasion might be necessary, and for weeks every opinion poll that was taken showed that anywhere from 60 to 75 percent of the American people

opposed such action. As *Legal Times* columnist Stewart Taylor put it at the time, as the zero hour for invasion was approaching, if Clinton invaded, it would be the first time a President has launched an invasion without seeking congressional consent solely because he couldn't get it.

Well, as we know, President Clinton didn't cross that particular Rubicon in 1994. At the last minute, thanks to the diplomatic efforts of Colin Powell and Sam Nunn and Jimmy Carter, the invasion was called off.

But what President Clinton's experience with Congress during this time seems to have taught him is that he could wage war, he could get away with crossing that line, he could wage war without congressional authorization and maybe even in defiance of Congress and get away with it. So, he put that theory to the test in 1999 in Serbia.

Now, in Serbia, you had the largest U.S. military operation since the Persian Gulf War, 79 days, 800 U.S. warplanes dropping hundreds of thousands of tons of munitions on the country. And the question I think that arises is: How do you get away with launching a war of that magnitude without a declaration or without any kind of congressional authorization whatsoever? With the Clinton administration, I think the answer is that no political problem is too difficult to solve if you pull together a team of creative lawyers, employ some original use of the English language, and rely heavily on your ability to keep a straight face. In this regard, the strategy seemed to be bomb Serbia into submission, but insist over and over again that we're not at war.

Former Congressman Tom Campbell, who was one of the plaintiffs in a War Powers Act suit against President Clinton, tells kind of an amusing story about his attempt to get a straight answer out of Madeleine Albright about the legal status of our operations in Kosovo. So, he asks Albright, well, if this isn't war, then what is it? And she said, it's an armed conflict. So, as Campbell tells the story, I asked Assistant Secretary of State Barbara Larkin, well, what's the difference? She couldn't tell me but she said that her attorney would. So, the attorney finally said, it becomes war when you call it war.

White House spokesman Joe Lockhart, you probably remember from impeachment, was reading from the same playbook. At one point a reporter asked him at a press conference, is the President ready to call this a low-grade war? Lockhart says, no. Next question. The reporter says, why not? And Lockhart replies, because we view it as a conflict. At this point the reporter is a little bit dumbfounded and says, how can you say that it's not war? And Lockhart replies, because it doesn't meet the definition as we define it.

Now, if you watched President Clinton's testimony before the Starr grand jury, you're probably familiar with this sort of original approach to the English language. It all depends on what the meaning of the word "war" is apparently. If you don't use the magic word, you don't need congressional authorization.

But even some of our NATO allies had more honesty and more respect for constitutional democracy than this. Italy and Germany, for example, the former Axis powers, decided that their legislatures actually had to have a vote before military strikes on Serbia were authorized. But here in the world's oldest and proudest constitutional democracy, the decision was made by one man, which shouldn't be taken to indicate that Congress didn't vote on the matter because it did. The House voted no on declaring war overwhelmingly, 427 to 2. The Senate apparently passed a resolution authorizing the air war, but the House rejected authorization for continued air strikes. So, unlike other undeclared or unauthorized wars in this century, where you generally had congressional silence or congressional acquiescence in many cases, here you had a clear refusal to authorize. But the President in that favorite phrase of his moved on.

I mentioned earlier that although other Presidents had started unauthorized wars, in the 20th century at least, that President Clinton's actions were in some ways unprecedented, and this is a prime example. Here you have in broad daylight, not covertly, a President carrying out a war in the face of a clear congressional repudiation of his authority to do so. It's a terrible precedent, and I think it ought to disturb all of us, whatever our politics.

Finally, it ought to encourage us to reevaluate President Clinton's legacy which, as you know, is a subject of endless fascination to President Clinton himself. Towards the end of last year, it seemed that it was all he could talk about, and he talked a lot about where impeachment fit into that legacy. If you listen to him very much, it became clear that he viewed his fight against impeachment as his own personal chapter in Profiles in Courage. At one point a reporter asked him about impeachment and he replied, "Let me tell you I am proud of what we did there because I think we saved the Constitution of the United States." That's a nice sentiment. Who among us could be against saving the Constitution of the United States?

The problem is I think the question of whether perjury constitutes an impeachable offense is not really what most of us think of as a core constitutional question, but who has the power to start a war? That's a core constitutional question. And the Constitution's answer is that it's Congress that has that power. But that core constitutional value didn't get a lot of respect

from the President who saved the Constitution. Instead, he violated it shamelessly and repeatedly.

Ultimately as we evaluate President Clinton's place in history, I hope that this aspect of the Clinton legacy gets its due attention from historians. I hope that it's not eclipsed by the tawdry little scandals that are so much fun to laugh about sometimes. Because of the sex scandals in particular, some of us tend to view President Clinton as something of a figure of amusement, a sort of Bennie Hill of the Ozarks. But in some ways, that's a shame because many of his offenses are really not a laughing matter. Here, in the topic of my discussion with his unauthorized wars and his abuse of U.S. military power, the man really established a legacy of absolute contempt for the Constitution, and it's really a legacy that's far more shameful than stolen furniture or a soiled dress.

Thank you.

(Applause.)

MR. SAMPLES: Thanks, Gene.

Our next speaker will be Louis Fisher. Lou Fisher is Senior Specialist in Separation of Powers with the Congressional Research Service of the Library of Congress. He's an acknowledged leader in the field of executive/legislative relations. He's an author of many, many books over, I guess, the past two decades on this topic and other constitutional issues. His most recent book is "Congressional Abdication on War & Spending," which appeared last year with Texas A&M. Lou?

(Applause.)

LOUIS FISHER, AUTHOR,
"CONGRESSIONAL ABDICATION ON WAR & SPENDING"

MR. FISHER: I would agree with Gene that the Framers intended that Congress be the branch to initiate war against another country; that is, Congress would decide to take the country from a state of peace to a state of war.

The Framers did have other models to give that power to the executive. Certainly John Locke felt that the federative power, or what is foreign affairs, external relations, would be given to the executive. William Blackstone, in his chapter on prerogative, placed everything with regard to external affairs in the king, whether it was making treaties, whether it was appointing ambassadors, whether it was going to war, all of foreign commerce, letters of mark and reprisal. Everything here would be placed in the executive. So, the Framers were aware of that model.

As Gene discussed it, they allocated powers differently. Not only did they leave the President only with

this residual power to repel sudden attacks, a defensive war, but in other respects, even on matters on letters of mark and reprisal -- and that's a form of war against another country -- that was placed with Congress. Powers over treaties and ambassadors shared between the President and the Senate; foreign commerce, which Blackstone had given to the king, placed in Congress.

There has been some literature, quite a long article in the *California Law Review* in 1996 by John Yu of Berkeley Law School. John Yu is active with the Federalist Society, and one of the awkward things with the Federalist Society is their belief in original intent. Yet, if you think of original intent, it would not be to give the President the power to go to war. John Yu in this article in the *California Law Review* argued precisely that. If you look at original intent, that it was the Framers' intent to give the President precisely that power to initiate war, and John Yu argued that it was the Framers' intent to adopt the British model. If that were the case, if we did adopt the British model or if we did adopt William Blackstone, we wouldn't have written the Constitution the way we did. All you have to do is read Article I and Article II to know that that's not the case.

Now, the initial Presidents understood that the power to take the country from a state of peace to a state of war was a congressional judgment. Washington was very careful with regard to any hostilities, military activities against the Indians. He operated on the basis of statutory authority. Even on the Whisky Rebellion, he relied on a statute to authorize any action, and included in the statute was a provision saying before he could use federal troops against the state, in terms of an insurrection, he had to get a statement either from a federal judge or a Justice of the Supreme Court that the state was unable to take care of the problem. And that's the way it worked. Washington waited, in accordance with the statute, to get that judgment from a Justice of the Supreme Court, and only then did he act on the Whisky Rebellion.

There are various statements that Jefferson had the power to go to war against the Barbary pirates in the Mediterranean. Gene talked about the business with Haiti. In 1994, one of the Senators said, of course, Clinton can go to war against Haiti because look what Jefferson did against the Barbary pirates. Well, Jefferson did take some initial actions in the Mediterranean when Congress out at recess. When Congress came back, he said, I took these actions, but beyond this line I cannot go. Anything of an offensive nature is for you. He asked for authority, and Congress passed 10 statutes authorizing

Jefferson and later Madison to take military action against the Barbary pirates.

John Adams, when he thought it was necessary to go to war against France in 1798, the so-called quasi-war, never took the position he could go to war. He knew that he had to come to Congress, and he did. He presented the case to Congress. This is the situation. I need authority, and Congress passed about 20 statutes authorizing the quasi-war.

So, either through a declaration of war in 1812 and the subsequent war over the Barbary wars and the quasi-war, Congress could pass authorization.

It's true that once Presidents had a standing army. Someone like Polk could put those troops into harm's way and into disputed territory and create a situation. There would be hostilities. But even Polk, as bold as he was, never claimed that he could go to war without Congress. He presented the matter to Congress. He said, war exists. Congress debated it.

No matter whether war exists or hostilities exist, you must present it to Congress because although there are hostilities, there may not be a necessity for war. There may be other ways to handle it. So, it's for Congress to make the judgment to go from whatever hostilities might exist to whether there should be a declaration of war or an authorization of war.

Lincoln took a number of emergency actions without any authority with Congress out. He never thought he had full constitutional authority for this. In fact, he had a lot of doubts about the legality of what he did. Therefore, he came to Congress and said, I've taken these actions while you were away. You're the only branch that can legitimize what I did and he asked for authority. Congress in the debate, if you read it, took the position that there was no legal authority for what Lincoln had done. Therefore, it was necessary for Congress to pass the statute retroactively authorizing what Lincoln did.

Very interesting, within a year or two, in the *Prize* cases, Justice Grier made the statement in that decision that whatever Lincoln did in the Civil War, a domestic matter, the power to take the country from a state of peace to a state of war was not presidential, it was congressional. And the person handling that case for the administration, Dana, D-a-n-a, the person who wrote "Two Years before the Mast" -- you remember the name? Dana. He was the one handling it for the administration. He made exactly the same comments. So, there was no confusion at that point. Both the Supreme Court Justices and people from the administration knew that the decision to take the country from a state of peace to a state of war was legislative, not executive.

You can go from 1789 up to 1950. You can find in that period examples against Greytown and other matters or chasing

bandits into Mexico, examples of Presidents using military force without congressional authority. But those are all very small matters. Much of those we'd not be proud to look at today, such as Greytown in Nicaragua.

What has changed matters is really the last 50 years from Korea on. What changed matters was the U.N. Charter. When the Senate was debating the U.N. Charter, there was the issue of how countries would make available to the Security Council military troops to take some concerted action if there's aggression. While the Senate was debating the U.N. Charter, Truman sent a cable to Senator McKellar saying that if I were ever to commit U.S. troops to the Security Council for military action, I would first come to Congress to get prior approval by a bill of joint resolution. With that understanding, the U.N. Charter was passed.

Now, the U.N. Charter says that if countries do submit troops to the Security Council, it will be done in accordance with constitutional processes of each country. So, each country had to decide that. In that same year, 1945, Congress passed the U.N. Participation Act, and it has exactly same language that Truman has said in his cable. At any time there is a special agreement between the United States and the Security Council to use military forces with other nations, there will be a bill of joint resolution of approval first.

Yet, five years later with Korea, Truman goes to war without authority, and the reason is that we've never had a special agreement and probably never will have a special agreement. Whatever you want to say about Truman's boldness in 1950 and the arguments that Dean Acheson said, it was still the fact that Congress failed to protect itself. The Framers expected each branch to fight off encroachments. That's part of the assumption, and if one does not, and in fact if some of the leaders in Congress -- Scott Lucas was the Senate Majority Leader and Truman wondered whether he should get authority from Congress. And Scott Lucas said, don't bother. You've got all the authority you need. So, that's of some interest. But any comment by Scott Lucas, whether he was the Senate Majority Leader or anything else, doesn't change the Constitution. It doesn't change the allocation of powers. It's just an example of weakness by a particular legislator for partisan or nonpartisan reasons.

From 1950 on, Eisenhower was probably the best example of a President who understood that the country is safer, not only constitutionally but politically, when both branches act in concert in taking military action, that that sends the right message to allies, that we are cooperating here within the United States, and it sends the right message to enemies that you are

facing force not just of the President, but of the President operating with Congress.

Eisenhower understood that. John Kennedy did not. Lyndon Johnson followed in a sense what Eisenhower had done, to come to Congress and get a resolution, as he did with the Tonkin Gulf. But here Congress failed to protect itself. It failed to do any independent analysis. There were two attacks in the Tonkin Gulf. For all we know, the second one never happened. The first one was not a cause to go to war against Vietnam.

Within a few years, Congress realized it had failed to protect itself. The Senate passed the National Commitments Resolution in 1969. There's a great mea culpa there about Congress had made a mistake in making a personal judgment about how Johnson would use that authority instead of making an institutional judgment that you shouldn't give that power to any President.

They passed the War Powers Resolution in 1973. I think it's a fraud. There's nothing in the resolution to reassert legislative authority. In fact, it's the opposite; it allows the President to go to war on his own for 60-90 days at least without any congressional authority. Because of the clumsiness of the statute, the clock for 60-90 days runs only when the President reports under a particular provision, not section 4, not section 4(a), but section 4(a)(1). Only then does the clock run, which means the clock never runs because the only one who ever reported under 4(a)(1) was Gerald Ford with the Mayaguez incident after it was over.

So, we're now in a position where under the War Powers Resolution there's no endpoint, there's no limitation on what a President may do single-handedly, and there's no indication that Congress collectively understands its institutional duties on what it has to do to act on a co-equal basis on the war powers, not just co-equal but superior.

Gene has mentioned several things that Clinton did. Whatever we've said in the past, people can always say, oh, Grenada. There were American students there. Or with Panama, there was an American couple that was roughed up and American lives and so forth. With Yugoslavia, there was not one possible justification other than it was pure aggressive action by the United States.

Interestingly, although Clinton went to the Security Council in 1994 to get a Security Council resolution to act against Haiti, he knew he couldn't get that against Yugoslavia. So, he goes to NATO. The same legislative record I mentioned on the U.N. Charter, not reallocating powers at all, applies also to NATO. I've gone through all the hearings, reports, debates,

everything. No one ever thought that they were giving the President any power to single-handedly take the country to war.

What other factors have changed to put the Presidents in the driver's seat? A lot of things have changed. I think the volunteer army has strengthened the President. In Vietnam, you had protests on college campuses and throughout the cities in the country against the war. Once you go to a volunteer army, all the pressure from parents as to their sons and daughters, what's happening to them at risk, there are very few demonstrations in recent years, partly for that reason.

Another factor that's played in the hands of independent presidential power is the incredible capacity to wage war with few or no casualties. In December 1998, Clinton bombed Iraq four straight days. No casualties either by the United States or by Britain. No casualties from war from the 79 days in Yugoslavia. So, that's quite remarkable. I think it's obvious that with Vietnam the protests had a lot to do with how many casualties and how many deaths.

Another factor is I think campaign finance. To the extent that members of Congress have to spend several days a week raising money, they're not here in town working with each other, talking about their prerogatives, talking about their institutional duties, forming coalitions, ready to challenge the President. I think that has weakened Congress.

John mentioned I've been here a couple of decades. I actually came in 1970. At that time, of course, I was younger, but at that time, working with Senators and members, I certainly knew a lot of people at that time who seemed to have a good understanding of constitutional duties. Even until recent years, I knew a lot of them, and many of them have gone. David Skaggs of Colorado was excellent in that regard. Lee Hamilton of Indiana. There were others I knew. They've left in recent years and I know very, very few now in the House or the Senate who are very concerned about this.

So, I think if anything is going to change, it's not going to come inside Congress. It's going to have to come outside by citizens at town hall meetings, of people being able to ask their member what is your position on any military action. Why are you allowing a President to do that when it's a legislative judgment on going to war? And people have to be challenged that way. Otherwise, I don't see anything changing the allocation and the position we've been in since 1950.

So, I'll stop with that. Thank you.

(Applause.)

MR. SAMPLES: Thanks.

Our final panelist is Professor Robert F. Turner, from the Center for National Security Law at the University of

Virginia Law School. Professor Turner was educated at Indiana, Stanford, and Virginia, and holds both professional and academic doctorates from the University of Virginia Law School. His 1,700-page dissertation was entitled "National Security and the Constitution." 1,700 pages. That's amazing.

A Vietnam veteran and former fellow at Stanford's Hoover Institution on War, Revolution and Peace, Professor Turner has served extensively in the government. He spent five years in the mid-1970's as National Security Advisor to a member of the Senate Foreign Relations Committee, and during the Reagan administration served in the Pentagon, the White House, and as Principal Deputy Assistant Secretary of State for Legislative Affairs. His final government service was as the first President of the U.S. Institute of Peace. He's a former Stockton Professor of International Law at the Naval War College, a distinguished lecturer at West Point, and has authored or edited more than a dozen books. He's also testified often before Congress on the issues we're discussing today.

Last month he was in the papers again when a commission of Jefferson scholars he chaired released a 600-page report concluding, by a vote of 12 to 1, that Thomas Jefferson probably did not father any children by Sally Hemmings. Professor Turner?

(Applause.)

ROBERT F. TURNER, PH.D.,
CENTER FOR NATIONAL SECURITY LAW,
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DR. TURNER: If you didn't get one when you came in, I've got a handout out on the table. I'm going to go very quickly to try to keep within my 20 minutes. I'm going to present a view of separation of powers that most of you have probably never heard.

My first reaction to Mr. Healy's paper was it's well researched, well written, persuasive, and I think wrong. And it's not his fault it's wrong because what he writes about is exactly the conventional wisdom that's being taught in almost every law school and government department in the country today. It is as if this country had a hard disk crash about the time of the Vietnam War and we forgot the true history of our national security powers.

Very important, the Framers did want a balanced government with lots of checks and balances, but they understood in foreign affairs and war that is a prescription for failure. You have to have unity of design, speed and dispatch, secrecy. And without those elements, you cannot succeed, and they learned that. They learned it from reading Locke and they learned it

from watching Washington struggle with Congress during the Revolutionary War. We almost lost the war because Congress couldn't make decisions. Washington talked about his greatest frustrations being trying to get decisions out of Congress. It would take them months, and committee memberships would change and there was no unity of plan.

So, the Framers modified Locke and came up with a system that let the President manage the business of intelligence, as prudence might suggest, as John Jay said in Federalist 64, but checked the President on final decisions, on major decisions. The Senate was given a veto over a concluded treaty. The Congress was given a veto over a decision to declare war, which had a very special meaning to the Founding Fathers. The Senate was given a veto over diplomatic appointments. But beyond that, all of this business was understood as being the province of the executive.

John Locke, in talking about his federative power, the power of war, peace, leagues, and alliances, said, though this power and the management of it be of great moment to the commonwealth -- indeed, it might affect the survival of the state -- it is much less capable to be directed by antecedent standing positive laws and, thus, must necessarily be left to the prudence and wisdom of those whose hands it is in to be managed for the public good.

The argument is, especially in those days, it took months sometimes to find out what was happening. You could not have Congress sitting down in advance and map out every possible contingency in a foreign cabinet, on a battlefield, and whatever. So, this business was entrusted to the President exclusively, save for the very important checks.

Like Locke, Montesquieu and Blackstone argued that foreign affairs was an executive power. Every government at the time followed this theory. John Jay in Federalist 64 is largely paraphrasing Locke.

Now, if you want to understand the distribution of powers, you have to go to a clause that's not even discussed in most law school case books that discuss this. Article II, section 1 says, the executive power shall be vested in the President of the United States of America. I did about a 70-page article on this clause that was in the *Virginia Journal of International Law* a few years back. There's a cite to it in the handout if you're interested in seeing more on it.

Madison, in the first session of the first Congress, said, the executive power being in general terms vested in the President, all powers of an executive nature, not particularly taken away, must belong to that department, and that exceptions

to these general propositions were to be taken strictly. Madison is not considered a champion normally of a strong executive.

Jefferson, as our first Secretary of Foreign Affairs, in a memo to Washington said, the Constitution has given the President the executive power. The transaction of business with foreign nations is executive altogether. It belongs in the head of that department except as to such portions as are specially submitted to the Senate, and exceptions are to be construed strictly.

Washington notes three days later in his diary he had some conversations with Madison. His opinion coincides with John Jay, his Chief Justice, and Jefferson's; to wit, they, the Senate, have no constitutional right to interfere, their powers extending no further than an approbation or a disapprobation of the nominee, all the rest being executive and vested in the President by the Constitution. Where by the Constitution? By Article II, section 1.

Alexander Hamilton, in his first Pacificus Letter, the general doctrine of our Constitution is that the executive power is vested in the President, subject only to exceptions and qualifications expressed in the instrument. Hamilton's view is tremendously important. Why? Because he wrote Article II, section 1. He was one of the five members on the committee that wrote that. And he produced that language to Madison months earlier, in discussing his ideal Constitution. He says:

"It deserves to be remarked that as the participation of the Senate in the making of treaties and the power of the legislature to declare war are exceptions out of the general executive power vested in the President, they are to be construed strictly and not to be extended no further than is essential to their execution."

By the Executive Power Clause, the President was given the general management of foreign relations. Congress and the Senate were given very important checks, but it was understood those checks were to be construed narrowly. In terms of controlling military operations, the entire conduct of military operations was presidential or executive. There was no disagreement with that in the Federal Convention. Everybody understood Congress can't conduct a war, and they watched the failure of that effort during the Revolution.

But without the approval of Congress or the Senate, there could be no army to command unless Congress raised an army. There's no money to spend unless Congress appropriated funds, and Congress was given a one-house veto over a decision to declare war. Further, the Senate had a veto over generals and admirals and diplomats and so forth.

Now, we hear a lot of debate about what did war mean to the Founding Fathers, and I suggest to you that that is not the issue. Congress was not given the power of war. It was given the power to declare war. And as an exception to the President's general grant of executive power, this was to be narrowly construed.

What did "declare war" mean? It was a term of art from the Law of Nations, and the Framers were extremely well read men. They had read Grotius, Vattel, Locke, and others. And all of these great writers said that you don't need to declare war except when you are committing what today would be called an aggressive war. You have some political or economic grievance with another country. You want to resolve it by invading them, by committing to war. Then before the President of the United States could do that, he had to get the approval of both houses of Congress. Short of that, no declaration of war was required. The Framers understood the concept of force short of war and in the Philadelphia debates, they frequently emphasized the President's power to use force defensively. He cannot initiate war when the country is at peace, but he can use force for other purposes.

Gentili, writing on the law of war, when war is undertaken for the purpose of defense, the declaration is not required.

Hugo Grotius, the father of modern international law, no declaration is required when one is repelling an invasion -- and this next part is interesting -- or seeking to punish the actual author of some crime. Because I'm going to suggest to you that a lot of recent use of force situations are in fact law enforcement. They are the President working with other countries to enforce rules of international law that did not exist when the Framers were around, but the Framers would love the idea that the world community could outlaw things like piracy and genocide and so forth.

Washington -- I'm teasing Gene with this. He cites a secondary source, and one of the risks of that is that your secondary source may drop a word. Washington said, the Constitution vests the power of declaring war in Congress. Therefore, no offensive expedition of importance can be undertaken without their approval. Two elements here. Magnitude. It has to be a major military operation, and second, offensive, by which he means aggressive.

Now, I'm going to save till questions if you want to talk about Jefferson, but Jefferson basically lied to Congress on December 8, 1801. If you go back and read his handwritten notes at his cabinet meeting, it's very clear that his cabinet decided and he followed up by sending two-thirds of the American Navy

halfway around the world with orders to search out, sink, and burn Tripolitan ships, and he didn't even tell Congress he had done it for about seven months. But that's another issue.

Now, it's very important that we not confuse launching an offensive war with using offensive tactics in a defensive setting. Declarations of war are governed by what we call "jus ad bellum," the law governing the initiation of coercion. How hostilities are conducted is governed by "jus in bello," a very different legal regime. So, when MacArthur had the Inchon landing or Schwartzkopf had the Operation Desert Storm, that was not an aggressive act. That was a defensive use of force under the U.N. Charter in both cases by an offensive attack. It's very much like the cops who raid the bank because there are hostages being held or criminals inside. That doesn't make them the aggressors or the illegal force.

Now, what's the role of Congress in the modern era? You have to look at the U.N. Charter. First of all, all military operations that historically would have required a formal declaration of war are now illegal. The Kellogg-Briand treaty in 1928 and the U.N. Charter in 1945, article 2-4 of the U.N. Charter clearly outlaws the aggressive use of military force. No country has clearly declared war in more than 50 years. There are two or three arguable exceptions. I don't find them very persuasive. The power to declare war is in fact as much an anachronism as the power to grant Letters of Marque and Reprisal.

The unanimous House Foreign Affairs Committee in 1945, considering the U.N. Participation Act, wrote, the basic decision of the Senate in advising and consenting to ratification of the U.N. Charter, resulted in the undertaking by this country of various obligations which will actually be carried out by the President. The ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill our commitments under the Charter.

Again, this time a unanimous report of the House committee quoting the unanimous report of the Senate Foreign Relations Committee: preventive or enforcement action by U.S. forces, upon the order of the Security Council, would not be an act of war, but would be international action for the preservation of peace. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war. And the committee feels further that any reservation of congressional action would violate the spirit of the Constitution under which the President has well established powers to use our armed forces without specific approval of Congress.

Senator Burton Wheeler introduced an amendment during Senate consideration of the U.N. Participation Act that said

there can be no U.S. troops sent off to U.N. peace operations, under Article 42, without the affirmative approval of Congress in the specific case in which the council proposes to take action. The leaders of the Senate stood up, one after another, and denounced this as being totally contrary to the obligations we had already accepted. Even Bob Taft said this was a violation of the understandings we had already taken. In the end, the Wheeler amendment got nine votes and lost by a 7 to 1 margin. The fact is that the Senators and Congressmen who approved the U.N. Participation Act and the Senators who approved the Charter by a 90-some-odd, I think, to 2 vote understood they were giving the President the power to carry out our obligations under the U.N. Charter to try to keep a peaceful world.

Post-Charter peacekeeping. There were many references in the 1945 debates to the President's Article II, section 3 duty to take care that the laws be faithfully executed and to the fact that a treaty is part of the supreme law of the land. There were several references to the fact that the Presidents over the years have sent U.S. forces abroad more than 100 times to protect U.S. citizens, U.S. property, to enforce treaty rights, and so forth. This is what was known as force short of war. It was absolutely clear that Congress intended that the President would act for the United States in peacekeeping under the U.N. Charter.

Now, it's also important to understand the Constitution hasn't been changed. I hear a lot of talk about how we're surrendering our sovereignty. One of the most fundamental principles of sovereignty is the ability to make agreements. And we made an agreement in 1945 that we would give up our right to aggressive war if other states would do the same thing. If a President decided to launch an aggressive war, he would violate the U.N. Charter, but he also would have to go to Congress or else he would violate the Constitution. There's no question about that. Korea, Vietnam, Grenada, Haiti, and Kosovo don't fit that description. They were not acts of aggression. They were efforts to enforce international law, most of them multilateral.

Panama is the one exception that I can come up with. I think it was below the threshold for war, but it certainly was not legal under international law, and I think it constituted an act of aggression. It may have been a good idea. That's another issue.

Now, this shocked me. I did some research a few years ago, and there's an article that I'll tell you about in a minute if you want more information. Truman was not an imperial presidency. Truman played it by the book. He came back from Missouri, immediately said, I want to go before a joint session of Congress. Acheson, put your best minds to work at drafting a resolution for Congress to consider. He twice met with the joint

leadership of Congress in the first week, and to a man, they went around the room and supported what he was doing, and nobody said, you need a declaration of war.

He called Monday morning, right after he got back. He called Tom Connally, the Foreign Relations Committee chairman, and he said, do I need to come to you for a declaration of war if I decide to send U.S. combat troops to Korea? And Connally said, no, you don't. You have authority under the Charter and under the U.S. Constitution. And that was exactly the position that Connally had taken in 1945, very consistent.

Still, Truman wasn't happy. So, when Congress took off for a 10-day Fourth of July recess in the early days of the war, one leader was left behind, Scott Lucas, the Majority Leader, who had been a major player in the U.N. debates as a Foreign Relations Committee member. Truman called him in and showed him this resolution that Acheson had drafted and said, as soon as you guys get back, I want to come before a joint session of Congress and so forth. Like everybody else he talked to, Scott Lucas said, no, this could easily pass, but stay away from Congress. I've talked to other members. They're sick and tired of the two or three people who are saying we need to declare war. We're going to back you. We're with you. Why don't you make this speech as a fireside chat to the American people?

Truman said, well, I just didn't want to be seem to be trying to do anything extra-constitutional or get around the Constitution. And he was told, don't worry about that. We're behind you. So, he said, well, it's up to you guys. If you don't feel we should do this, I won't push it.

William Nolan, a conservative Senator from California, got up on the Senate floor and said we don't need a declaration of war. The President is finally doing the right thing. We're all behind him. As soon as the public turned against the war, Nolan and others stood up and denounced him as a lawbreaker for having committed the country against the will of Congress to an unpopular war. It was a lie. It was very effective politically. The Democrats reciprocated in Vietnam. Same principle.

If you're interested, I have a piece in the Harvard Journal of Law and Public Policy. The cite is in the handout.

LBJ was not an imperial President. He may have been a slug, but he was not an imperial President. There is a distinction. If anything, Congress dragged LBJ into war in Vietnam. LBJ did not want to go to war, but he was under tremendous pressure from the Hill. Congress passed a law, by a vote of 504 to 2, after Senator Fulbright said that that law would authorize the President to "use such force as could lead into war." The Hill more than doubled LBJ's appropriations request. Public opinion shot up at the time of the initial

commitment in Vietnam 34 points. John Hart Ely and many others have noted the Tonkin Resolution was an authorization to wage war. Senator Javits in March of 1966 said, whether we like it or not, by virtue of having approved that resolution, we, Congress, are a party to current policy. Eagleton said, the Tonkin Resolution didn't make the war any smarter, but it did make it legal under the Constitution.

Lou Fisher is right in saying the War Powers Resolution was a fraud, but it was a fraud because Congress was trying to deceive the voters into thinking that Nixon and the Presidents had done this all along without any approval from Congress. That simply is not true. We can talk about that, if you'd like, more.

Now, what about Bill Clinton? Well, first of all, he has no sense of honor, and he's done incredible damage to this country. If I were ranking our Presidents in terms of the good and bad they've done, he'd be pretty close to the bottom of my list.

But it's very important that as scholars we not change the Constitution because we don't happen to like the incumbent in the White House. Henry Hyde and Newt Gingrich used to call me for advice. All of a sudden, we've got a Democratic President, and I stopped hearing from them. He's gone over to the Democrats now.

The point is the constitutional powers of the President are his until the people take them away by constitutional amendment. I agree the article is excellent in talking about how he abused the treaty power with the Comprehensive Test Ban, Kyoto, and so forth. But at the same time, the Senate was also abusing the treaty power by attaching all sorts of non-germane conditions to treaties and telling the President to give up your other powers or we're not going to approve the treaty you want.

The ABM issue is very complex. I've written a 200-and-some-odd-page monograph on it, if anybody is interested in it. You have to keep in mind, George Bush, the elder, and Secretary of State Baker started the succession issue, which the Clinton people came in and got onto. We signed a memorandum of understanding, which was a treaty in 1997, that also created some new obligations. They did not bind us completely to the treaty, but they did bind us under Article 18 of the Vienna Convention and the Law of Treaties not to defeat the object or purpose of the ABM Treaty. So, we needed to give notice under that.

It's important again that we not allow our dislike for Clinton to change the Constitution. Mr. Healy says Madeleine Albright told the Security Council: "Let me be clear. Only the President and the executive branch can speak for the United States." That, in essence, is the Clinton administration's view of the President's role in the foreign relations arena. Well, I

wish that were their only view because in that case they're exactly right.

The U.S. Supreme Court, in by far the most cited foreign policy decision, said, into the vast, external realm of its important, complicated, delicate, manifest problems, the President alone has the power to speak or listen as a representative of the nation. 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 itself is powerless to invade it.

The Logan Act was passed in 1798. Originally this was a resolution that said, resolved, that a committee be appointed to inquire into the expediency of amending the criminal code to extend the penalties, if need be, to all persons, citizens of the United States -- and I think Senators are persons and citizens -- who shall usurp the executive authority of this government by commencing or carrying on any correspondence with the governments of any foreign prince or state relating to controversies or disputes which exist between the prince and the United States.

I would argue that for a United States Senator or a member of the House to communicate views to a foreign government that are contrary to the views of the United States government -- and by that, I mean the views of the President and his ambassadors -- is a greater violation than for Joe Smith on the street to do it because there you are not only taking the power of one branch, but you are putting it in another branch. It's a threat to separation of powers.

It used to be Congress would not meet officially with foreign leaders. Now, of course, Chairman Jesse has his own set of rules. This is not a good idea. We need to have one voice for the United States in time of crisis. That voice is, under the Constitution, the President of the United States and is well recognized.

I don't like Clinton, but the reality is some of his behavior was arguably self-defense. Now, arguing that you can violate the Constitution because the other guy does is a weak case, although sometimes you have to, to try to provoke a case or controversy to get some judicial resolution.

Some of you know James Hormel, former dean of Chicago Law School. He was far better qualified. Most of Clinton's political appointees were people that gave a lot of money or had good-looking wives or some other offsetting virtue. This guy was a very intelligent man. His only down side was he was openly gay. Well, the Republicans didn't like that. Well, maybe that's good, maybe that's bad. I don't care.

What I do care about is this practice of the Senate allowing one member, be it Jesse Helms or the Majority Leader or

any single member, to stop votes on nominations. My sense of the Constitution is the appointment process is executive in nature. The Senate is given a veto over it, but it's a veto that can only be exercised by half the Senate or more. And for the Senate, by its own internal rules or principles of comity, to allow a single member of that body to block the President's appointment I think is inconsistent with the theory of the Constitution. I'll pass that on to you and let you think about it.

Jefferson talked about the possibility the Senate would use its lawful powers in an abusive way. He said, the Senate doesn't have the power to tell the President where to send ambassadors or what grade, whether they should be called minister or ambassador or counsel or whatever. Those were all executive. The Senate's limited role in diplomacy was to pass on the approbation of the individual involved, to try to keep the President from appointing his brother Attorney General or something like that. But noting that their role was an approbation or disapprobation of a nominee, Jefferson speculated they might, by continually turning down the President's choice, try to compel the President to give control over his discretion. But Jefferson added, but this would be a breach of trust, an abuse of the power confided in the Senate, of which that body cannot be supposed capable.

In a similar dispute to this, Washington said, well, if they tried that, then government would be at an end. They were far more principled in those days than they are now.

I think I'm still in my time, and I think we're now ready for questions for everybody, so let me sit down.

(Applause.)

MR. SAMPLES: Thanks very much, Professor Turner.

Indeed, we will now turn to our question period. Our topic today has been very well debated on both sides, and anyone who has a question, please hold up your hand, wait for the microphone, and please identify yourself, your institutional affiliation, and please be sure to ask a question.

MR. KOBER: Stanley Kober with the Cato Institute. A question for Professor Turner.

By saying that the war powers were offensive war only and defining offensive war as aggressive war, the logical conclusion is that the Founders were debating the legal mechanism for conducting what is ultimately an illegal act, an act of aggression, which I find very hard to understand. Moreover, I have a practical problem. Who begins a war by saying I will start an aggressive war?

DR. TURNER: You're missing a point. The law has changed tremendously. When the Constitution was written, international law held that the supreme entity in international

law was the sovereign state. Earlier they said the prince or the king. There was no higher authority. There was no international court. One of the ways that states enforced what they saw to be their rights was through what we call self-help. If somebody did something you didn't like, you'd go to war against them. If somebody had something you wanted -- they had a pretty daughter you wanted your son to marry, they had gold or they had an island you wanted, you wanted all their territory -- it was perfectly legal to invade.

There was a big debate among international lawyers about whether you had to give prior notice. Some of the more compassionate international lawyers said you need to give them a declaration of war and a moratorium; that is, say, if you don't give me what I want within 30 days, I'm going to destroy and kill all of your people. The idea there was if they'll give it to you, why go in and kill all their people and so forth. But the right of states, the legal right under international law of states to commit aggression, was firmly recognized.

Now, there was a countervailing theory growing up primarily within the Catholic Church arguing that you should only use force for just war purposes and so forth, which could be aggressive or not. That is, you could invade another country because they didn't belong to your religion and you were saving them from Satan or something like that. But the general rule, until 1928, was that it was the sovereign prerogative of kings and states to use military force for whatever reason they wanted.

Jefferson had so many great lines, but one of them was if there be one principle more firmly fixed than any other, it is that this nation should have nothing to do with conquest. He made one exception. He thought maybe we should take Cuba, but that was an interesting issue. It was that primarily they were trying to guard against.

There's a wonderful column from Hamilton attacking Jefferson's December 8, 1801 first annual message to Congress, which was a total distortion of what Jefferson, in fact, had done in his cabinet meeting on May 15th. Hamilton said, if the country is at peace, if we want to start a war for some reason, it has to be approved by Congress. But if another country declares war or makes war against us, we are therefore already at war and any act of Congress is nugatory, to use his words. And that language was paraphrased by the Supreme Court in the *Prize* cases, well established, the right of the United States to act defensively.

Now, Jefferson's argument, the reason he sent two-thirds of the navy to the Med, was if you get there and find they have declared war against us, then you will so deploy your force to search out and sink their ships wherever you can find

them. The argument in his cabinet was you don't need approval of Congress if they declare war against you first, and that was Jefferson's argument. He made a different case to Congress. It was not nearly as nefarious as it may sound. He was very much of a gentleman in dealing with Congress and very proper and so forth.

Congress looked at it and said, what the hell is he talking about? You don't declare war against pirates. He doesn't need any authority from us for this. Well, if he wants it, go ahead and give it to him. And they did. Nobody in Congress expressed outrage that Jefferson had sent two-thirds of the navy halfway around the world without telling Congress about it. There was not a single person saying he's usurping our power to declare war. Their attitude was, what is all this about? These are pirates. Go out and destroy them or what have you.

Go ahead, Lou.

MR. FISHER: The point is that Jefferson, regardless of what happened in the cabinet discussion, went to Congress, asked for authority, got authority. There were 10 statutes. And that's exactly what Clinton did not do.

DR. TURNER: But he didn't do it until after the navy had been over there sinking ships for a few months. You're right. He did do that.

MR. FISHER: No. You've got a President who goes to Congress for authority, and Clinton didn't do it. There's a big difference.

DR. TURNER: Yes. Well, you're a very persuasive man, but you're not going to get me to defend Bill Clinton.

MR. KOBER: May I follow up with another question in that regard then? You mentioned 1928. Why then did President Roosevelt go to Congress for the declaration of war after Pearl Harbor?

DR. TURNER: Yes. That's a more complex issue, and you really have to look at all of our declarations of war. The United States has probably declared war in an international law sense once, and that was the War of 1812, which arguably was a war of aggression. If you really study the votes in Congress, you find it was not the New Englanders who were worried about seizing of U.S. merchant seamen and so forth by the Brits, but rather the people in the western states who saw possibilities of getting the Brits out and expanding and so forth.

A declaration of war really is a statement by one state to another state saying, you have something I want, you've done something I don't like. I'm going to send my army in and slaughter all your people or take your treasury or get what I want unless -- you're normally supposed to include, unless you give in to what I want.

What we did instead, our declarations of war were congressional joint resolutions or statutes saying because of the war that exists by the attack of Japan on Pearl Harbor, by the attack on the Lusitania and so forth, the United States is going to respond so and so. That is a branch off the international law concept of declaration of war.

It is true we have on several occasions. Of course, in those cases, Vietnam was just as much authorized by Congress as World War II was. The Gulf War was just as much authorized by Congress as World War II was.

The argument in Grenada is well established. I had a debate with Jacob Javits back in 1984 in which he admitted that the President had a constitutional right to use military force to defend American citizens abroad, even though the War Powers Resolution denies that. Certainly the President had a right to use force in Grenada in a setting where there was a shoot-on-sight curfew, the bishop had been murdered, a Cuban faction was in control, and we had hundreds of Americans there and no way to assure their safety. I don't have a problem with that at all. I think it's the President's call. Of course, the American people overwhelmingly supported it, and so Congress backed off very quickly.

MR. SAMPLES: Anything else up here? More questions?

QUESTION: Are you saying then that, for example, what Franklin Roosevelt did, the various authorizations with the Navy prior to World War II, which most people think were to at least lead to our getting involved with Germany were simply defensive measures?

DR. TURNER: I think you can argue that. I think Roosevelt is another one that played right up at the edge.

A very important point. I'm arguing what the Constitution says. It is a separate issue of good politics and prudence. I'm a strong believer in getting Congress on board if they'll behave responsibly. At the time of the Gulf War, I wrote an op-ed that never got published that said the President ought to immediately go to Congress and get a resolution and say, okay, vote. If you don't think that we should stand up to this massive international aggression, if you're willing to impose upon your constituents the fuel prices and so forth if this man is allowed to go unchecked, just tell me that before the election. He would have gotten the resolution he wanted.

One of the things I've learned over the years in dealing with Congress is if you give them an easy out, they're politicians and they're going to take the easy out. And if they're too stubborn to do that, they don't usually survive as politicians. On the other hand, if you put them between a rock

and a hard place, they can be very principled. And you've got to play a little more hard ball with them.

Congress had passed a series of, I think, unconstitutional laws, one of them called the War Powers Act, trying to prevent the President from doing anything to try to stop the Nazis, the Japanese, and so forth. Most historians today I think understand that Congress was a significant player in causing World War II. One of the things that you need to understand in looking at these debates that took place in 1945, these men that made these laws had lived through two world wars and they understood that their effort to keep the United States out of World War II had encouraged Hitler, not kept the United States out of the war. And they were determined.

In this article in the Harvard Journal of Law and Public Policy, I actually track the public opinion polls. Where at one point there were about 18 percent of the American people who said let's join some international league that has peacekeeping or police enforcement powers, by 1945 the figure was 81 or 82 percent. The American people wanted us to join something like a U.N. that would have the power to go out early and stop aggression because they were tired of having our kids come back in body bags, having to stop war once it got out of hand. And that was the theory behind the United Nations.

MR. SAMPLES: Let's have some more questions.

DR. TURNER: Go ahead. Ask a question. Who's got a question for Lou?

MR. MCGUIRE: Yes, Roger McGuire, ex-State Department.

I'd like to leap ahead to the present time and ask the opinion of the panel their views on how the Bush/Cheney administration will deal with the problem which Mr. Healy has addressed in his paper.

Just by way of introduction, I would like to say I think Dick Cheney does have a record already on things like Iran Contra and obviously the Persian Gulf War.

Thank you.

MR. SAMPLES: Gene?

MR. HEALY: I think Cheney actually testified before the Senate Foreign Relations Committee during the Gulf War or prior to the Gulf War that no approval of Congress was necessary. There was also a Washington Post piece that described this was the advice that he had given to the first President Bush. So, in that respect, I don't see a lot of reasons for confidence that the Bush approach will be significantly different. I think it probably will be different along the lines of humanitarian interventions. In a policy sense I don't see as much of the sort of profligate intervention in areas such as Somalia and Haiti and Serbia.

MR. SAMPLES: Lou?

MR. FISHER: Yes, I would agree that George W. Bush made a lot of interesting comments during the election, talking a lot about the United States needing to be more humble, language like that. I think he was getting at the number of interventions by the United States. We lose two embassies in Africa and we're suddenly sending Cruise missiles into Afghanistan and one into Sudan without knowing that the factory actually makes pharmaceuticals. You have a \$30 billion intelligence budget. They don't even know what the factory is doing that we bombed. So, it was all those sort of actions I think Bush was reflecting on.

What his understanding is on the allocation of powers, I don't think it is very deep. I think Gene is correct that Cheney not only in 1990 testified that they didn't need any authority from Congress, and I believe if you look at Cheney's role in the Iran Contra Committee, it was not a strong position for Congress. I don't know about other people inside the administration. I don't think regardless of what their views are on allocation of powers, that they're going to use intervention as Clinton was. I don't know how long it's going to take us to realize what led Clinton into so many military activities around the globe without any limits and without, many times, any purpose, in the United States' strategic purpose. But I hope this administration is more cautious and more respectful of constitutional limits.

MR. SAMPLES: Bob?

DR. TURNER: I tend to think that individuals are less important than institutions in this kind of thing. When Jefferson and Madison made some pro-Congress at various points, as soon as they became President, they shifted and became very powerful executives.

The reason we intervened in settings, in part, is because the American people started seeing starving kids on their TV sets and said, what's going on. We call it the CNN factor. It's going to continue to play.

The world does not know the United States' role in Somalia. The massacre that took place in Somalia belongs, first, at the hands of the butchers and, second, at the hands of the Clinton administration which not only refused to intervene but pressured the rest of the United Nations not to do anything. Several experts have told me that a couple of companies --

VOICE: You mean Rwanda.

DR. TURNER: Rwanda. I'm sorry. You're right.

A couple of companies or a small unit could have made a tremendous difference in that setting, and the United States,

after the Somalia situation, didn't want to get involved in anything else again.

Now, this administration, this last group, I think did a horrible job in foreign policy. They had no philosophy of foreign policy. I don't think President Bush understands this stuff at all. I think Cheney is by far the heavier hitter in this area. I don't know what he'll do, but I hope they will not just turn inward and allow the world to start falling apart around us.

The problem is, if you look at these things, it's not that we did it, it's that we did it badly. Kosovo was maybe a good idea, maybe a bad idea. But if you want to do it, do it right. Kosovo was worse than Vietnam in terms of civilian mismanagement and hitting softly and so forth.

MR. SAMPLES: Ivan?

MR. ELAND: Ivan Eland, Cato Institute.

I think I agree with Mr. Fisher and Mr. Healy on the constitutional question, but I have a question for them. How do you get congressional power back? Because it seems to me that the Founders may have made a mistake in that they assumed that each branch of government would stick up for its prerogatives, but it seems that the incentives of individual members to run for the bushes whenever there's a crisis conflicts with the institution's interest in sticking up for itself, its powers, et cetera, vis-à-vis the President. Is that a right way of thinking or not?

MR. FISHER: No. I think you present it the right way. You have someone like George Mitchell in January 1991 taking a very strong position that Bush was required under the Constitution to come to Congress for authority, and yet two years later with Clinton in office, as to what role Congress should have in Bosnia, there was no such position by Mitchell. And you can go down the line of party leaders changing their positions.

I work with a lot of committees and members, and I talk with a lot of Republican members and Republican staff who feel that their members had so supported presidential power under Reagan and Bush that when Clinton began to use military power the way he did, they felt it very awkward to now change sides even though they felt that Clinton was violating the Constitution.

So, how you get it back is a big question, and I don't think it's going to come internally. It wouldn't take much. It would take four or five leading members, a chairman of a committee, a chairman of appropriations, and so forth to take a principled position. They would totally turn the institution, but we haven't had it.

MR. HEALY: I agree with Professor Fisher on how disappointing it is that so often it depends in Congress on which side of the aisle you're on and whose ox is being gored.

Two particular examples of that. Representative John Conyers, a Democrat, way back during Watergate introduced an article of impeachment against President Nixon for unauthorized war making in Cambodia. I think the late Representative Henry Gonzalez also introduced one against George Bush, the first, for contemplating the Gulf War without congressional approval. Yet, when it came to the Clinton interventions, neither of them really were anywhere to be heard from. So, it really does look as though it's going to depend heavily on what side of the aisle any individual member is on.

As far as any institutional solutions, I'm not sure. I know Professor Fisher at one point had suggested a sort of War Powers Act with teeth based on the appropriations power. I thought that was in your book, *Presidential War Power*.

MR. FISHER: Yes, it can be done that way, and there was an effort a couple of years to do that. It almost got out of the House, but it never did. It did get out of the House and the Senate didn't act on it. But the power of the purse would be the big instrument.

MR. SAMPLES: Last question. Bill Niskanen.

MR. NISKANEN: Bill Niskanen, Cato.

Professor Turner, you seem to imply that individual U.S. military interventions may have been right or wrong, but none of them were unconstitutional. Would you please describe the nature of the military action by the U.S. President that you would regard as unconstitutional?

DR. TURNER: Yes. I think the test is does it, under international law, as that was understood by the Framers, require a declaration of war. The closest one I can think of in recent years would be Panama. The escape clause for Panama is it probably was below the threshold, a few hundred people killed, and so forth.

If the President of the United States were to get angry at the Soviets over some -- no. Let's use somebody besides the Soviets. Let's say Canadians. Their foreign minister goes over to Rome and rams through this Rome International Criminal Court in a spirit of let's stick it to the Americans, and then they come back and sort of go like this. Well, if the American President said, I'm going to fix them and send the 82nd Airborne up to occupy all of Canada, that obviously would require the approval of the Congress.

If, on the other hand, the President is acting to enforce a clearly established principle of international law in a law enforcement way, particularly with the authority of the

United Nations Security Council, but also arguably with the cooperation of NATO, then what he's doing instead is seeing the laws of the United States faithfully executed, that is to say, our treaties. Some of these things that are done to stop ethnic cleansing and so forth strike me as being very much international law enforcement.

I don't know what Madison would have thought about it. I think probably he would have said, hey, wouldn't it be wonderful if we could get all the civilized countries of the world to agree that piracy and the slave trade will no longer be allowed and we're all going to take turns.

Jefferson actually proposed an international conglomerate, if you will, against the Barbary pirates in which he said either all of the countries that are their victims will contribute some ships or they'll take turns patrolling the Med to protect shipping and prevent this piracy. That is sort of international law enforcement. It may be a good idea or a bad idea, but it doesn't require a declaration of war when what you're doing is preventing somebody else from committing aggression or committing egregious human rights violations.

Now, it has only been in the last 25 or 50 years that international human rights have reached the status that we can now say that when somebody goes out and commits genocide, he is committing an international crime against ergo omnis we say, against all nations. In that setting, if the U.N. Security Council says we're going to put a stop to it, that's legal under international law and for the U.S. as a part of the body to contribute to enforcing it is not what the Founding Fathers were worried about.

Now, maybe it's something we ought to be worried about. There's a big issue here. Maybe we ought to be pulling back. I know a lot of libertarians are isolationist, and there's a strong argument there. Maybe we need a constitutional amendment to clarify. Maybe we need to get out of the United Nations. There are a lot of issues here.

But as the Charter is written, as the Constitution is written, the check given to Congress was to be a narrow one and it was based upon is this a setting where you need to declare war. That meant is it a large scale act of aggression against a country that is not threatening you or attacking you or something like that.

Now, the biggest problem comes up, what if they're attacking your neighbor, collective security and so forth. I don't think the Framers dealt with that, but if you accept the principle that Madison, Jefferson, Jay, John Marshall, all of them accepted that these exceptions were to be construed narrowly, then you would not give Congress a check over that

either. It was a check over a decision by the American President to engage in an aggressive war over, say, a political or economic grievance. That may be the narrowest reading you'll find in this town outside of rubber walls. I don't know.

But it strikes me that you ought to interpret it narrowly and declarations of war are an anachronism. The role of Congress has basically been Congress has a tremendous role. The President can't do anything without money. I don't agree Congress can put conditions under appropriations that usurp the President's discretion, but they can say, no, we won't give you the supplemental appropriation for Kosovo or something like that. They could have stopped Vietnam almost any week they wanted to. They didn't want to. They were voting money for it by 90 percent margins until the public was out in the streets screaming about it. You don't need this for Congress to have a check on executive excess.

MR. SAMPLES: Lou?

MR. FISHER: Yes. I don't agree that anytime the President decides there's been some violation of international law, he can use force on his own.

DR. TURNER: I'm sorry. If I said that, I apologize. Certainly if it's not one that involves threat to life. He cannot do it if somebody violates an airline treaty or something like that, but if they're violating the use of force provisions, then certainly under Security Council authorization, I think he can. Lou disagrees. That's all right.

MR. FISHER: I don't agree just because the Security Council passes a resolution authorizing something, that has any binding impact on the United States at all. If you believe that, then what you would be concluding is the Truman and the Senate could take away constitutional powers from the House of Representatives. There's nothing in that whole debate that ever indicated that the United States is giving up its sovereign powers over war and peace to the Security Council.

Even on Haiti that Gene talked about, when the Security Council passed it, all that the resolution said is it authorizes countries, particularly in that region, to use force against Haiti. There was nothing that the U.N. could do to compel us. It was a sovereign act by the United States deciding what to do, and of course, they acted with Jamaica and heaven knows what else as this multilateral force.

But, no, we have not given the power of war and peace to the President to decide what's an international violation. We haven't given it to the Security Council.

Gene, do you have any thoughts on that?

MR. HEALY: Not on that particular issue, but just on sort of a one step removed, little larger picture. I wonder. I

hear the pro-executive scholars, and it seems to me that in their view what started as a presidential power to repel sudden attacks over the 20th century has almost become a presidential power to launch sudden attacks.

I wonder how a delegate to a ratifying convention in 1788 and 1789, transported to the year 2001, would view this and whether they would feel like the bargain that they had made had been respected. I'm familiar with the arguments of Professor Yu and others and this very narrow reading of the "declare war" clause.

But it does seem that there are contemporaneous statements and assurances given in some cases at the ratifying conventions that the power to declare war, the fact that it's lodged in Congress, would actually be a significant check on executive war making. You have the James Wilson statement before the Pennsylvania ratifying convention that this system will not hurry us into war. It's 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.

I just wonder how important a check could that have been if really what the pro-executive scholars are telling us is true, that the President has all the authority necessary to initiate war and the congressional power is sort of left to declare that a state of war exists posthumously, after the President has already started. And I wonder how a delegate to the ratifying conventions would feel, and whether they would feel that the assurances that they relied on and the bargain that they had made had been respected.

DR. TURNER: What they were trying to guard against primarily, though, has now been outlawed. They would be delighted to believe that the world has now outlawed aggressive war. Because their primary concerns, really, were they didn't want a President taking us to war over some economic or political grievance that might waste our treasury and kill off our kids. And that thing has now been guarded by the U.N. Charter, to the extent we obey it.

MR. HEALY: I would doubt that they would be happy with the idea that the President could take us into war for humanitarian reasons at any time.

MR. SAMPLES: The debate will continue upstairs. I would like to thank our three speakers today. They have been excellent. And I would like to invite everyone upstairs.

(Applause.)

(Whereupon, the Cato Policy Forum was adjourned.)