

51. *Reclaiming the War Power*

Congress should

- insist that the president obtain prior authorization from Congress for any U.S. military action that does not constitute an urgent case for self-defense;
- insist that the president seek approval from Congress as soon as possible in those instances of urgent self-defense when unilateral military action by the executive was necessary;
- state explicitly that “consultations” or meetings with congressional leaders or committees are insufficient to satisfy the constitutional requirement that Congress make decisions about war and peace; and
- enforce the congressional war power prerogatives by all appropriate legislative means.

In February 1998, when the United States was threatening to use force against Iraq, Secretary of State Madeleine Albright, Secretary of Defense William Cohen, and National Security Adviser Samuel (Sandy) Berger held a “town meeting” at Ohio State University to explain American policy. The gathering was a public relations disaster, as the officials encountered protests reminiscent of the Vietnam War era. When it was over, however, Berger argued that public opinion made no difference. “Ultimately there’s only one man who decides” the question of war or peace, he stressed, “and he decides not based on the polls or on 40 screamers but on our national interest.”

Unfortunately, Berger’s attitude has become all too common in recent decades. President Harry Truman sent hundreds of thousands of U.S. troops to war in Korea in 1950 without ever seeking a declaration of war or any other authorization from Congress. Indeed, throughout the Cold War, chief executives became accustomed to sending American forces on

combat missions, large and small, with scarcely a nod to Congress. That tendency has continued in the post–Cold War era. President Bush deployed nearly a half million troops to the Persian Gulf and threatened offensive operations against Iraq before going to Congress for approval at the 11th hour. Even then, he insisted that he took such action merely as a courtesy, that his powers as commander in chief of the armed forces, combined with a UN Security Council resolution, gave him adequate authority to act on his own.

Such examples of an imperial presidency would have deeply troubled earlier generations of constitutional scholars—and would probably have shocked most Americans. Berger’s position seriously misconstrues the Constitution. That document does not place the power to take the Republic into war in the hands of “one man.” In fact, the Founders would have considered such a doctrine abhorrent.

When the Constitution was being written in Philadelphia, the Framers were very clear about which branch of government controls the war power. “Executive powers,” James Madison argued, according to the notes of Rufus King, “do not include the Rights of war & peace,” for otherwise we should risk “the Evils of elective Monarchies.” When another participant in the convention, Pierce Butler, proposed “vesting the power in the President, who . . . will not make war but when the Nation will support it,” his proposal died for lack of a second, and Elbridge Gerry exclaimed that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” Gerry, along with Madison, formulated the language giving Congress the power to “declare” rather than “make” war, which, Madison noted, left “to the Executive the power to repel sudden attacks.” As Madison explained in a letter to James Monroe on November 16, 1827,

The only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has “been actually” produced by the conduct of another power, and then it ought to be made known as soon as possible to the Department charged with the war power. Such a case was the war with Tripoli during the administration of Mr. Jefferson.

The reasoning behind Madison’s argument was succinctly expressed by Abraham Lincoln in a letter to his law partner, William Herndon, in February 1848:

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons. Kings had

always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us [emphasis in original].

That the war power belonged to the legislature was the common view during the 19th century. “War cannot lawfully be commenced on the part of the United States without an act of congress,” James Kent stressed in his renowned *Commentaries on American Law*, since “such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.” The Supreme Court made it clear that the word “war” was synonymous with any “hostilities,” not just the total war with which it is associated today. “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides,” Chief Justice John Marshall wrote in his opinion for the Court in *Talbot v. Seeman* (1801). “Congress may authorize general hostilities . . . or partial hostilities.”

Over time, however, Madison’s approach to the war power has been displaced by another, favored by Woodrow Wilson, who thought World War I could have been averted if a system of collective security had existed. “The wars that are likely to come are most likely to come by aggression against the weaker nations,” he told the members of the Senate Foreign Relations Committee on August 19, 1919. “The great tragedy through which we have just passed never would have occurred if the Central Powers had dreamed that a number of nations would be combined against them, so I have the utmost confidence that the notice beforehand that the strong nations of the world will in every case be united will make war extremely unlikely.”

The senators were especially troubled by one aspect of Wilson’s scheme, however: For the deterrent to be effective, the response would have to be automatic. But if that were the case, Congress would, to all intents and purposes, lose its control over the war power. Wilson assured them that that would not be the case, but his argument left them confused. Because this aspect of the debate over the League of Nations has been all but forgotten, it is useful to repeat excerpts of the discussion:

Senator KNOX: Mr. President, allow me to ask this question: Suppose that it is perfectly obvious and accepted that there is an external aggression against some power, and suppose it is perfectly obvious and accepted that

it can not be repelled except by force of arms, would we be under any legal obligation to participate?

The PRESIDENT: No, sir; but we would be under an absolutely compelling moral obligation. . . .

. . . Now a moral obligation is of course superior to a legal obligation, and, if I may say so, has a greater binding force; only there always remains in the moral obligation the right to exercise one's judgment as to whether it is indeed incumbent upon one in those circumstances to do that thing. In every moral obligation there is an element of judgment. In a legal obligation there is no element of judgment. . . .

Senator McCUMBER: Mr. President, I think, due to my own fault, I do not fully comprehend your distinction between a moral and a legal obligation in a treaty. . . .

The PRESIDENT: You see we are speaking of two different fields, and therefore the language does not fit. In international law the word "legal" does not mean the same as in national law, and the word hardly applies.

It is generally believed that the League of Nations was rejected by the Senate because of "isolationist" sentiment. As this exchange reveals, however, there was growing unease that Wilson's arguments were muddled. Indeed, it is very strange to urge support for a treaty by arguing that in international affairs the concept of legality "hardly applies." Most important, however, members of Congress wanted to be sure that approval of the treaty did not mean Congress would surrender control over the war power. But when they proposed a reservation to that effect, Wilson described it as "a rejection of the Covenant" because it represented "an absolute refusal to carry any part of the same responsibility that the other members of the League carry." At the same time, however, he derided the reservation as superfluous because "every public man, every statesman, in the world knows, and I say that advisedly, that in order that the United States should go to war it is necessary for the Congress to act."

Today, however, what "everyone" knew then is no longer the common view, as Berger's comment illustrates. To maintain the deterrent effect of automatic response that underpins the attraction of collective security, power has shifted from the legislature to the executive, just as the senators back then feared.

The actions of Truman in Korea and Bush in the Persian Gulf crisis—both under the auspices of the United Nations—confirmed that point with a vengeance. During the Clinton administration, NATO's use of force in Bosnia and the threat of a similar intervention in Kosovo illustrated the same process. We have become so accustomed to such presidential war

making under the banner of collective security that we have forgotten what a revolutionary change in American constitutional doctrine it represents.

The legal rationale for this shift is frequently justified by some inherent presidential power, with the Supreme Court's decision in the 1936 *Curtiss-Wright* case invoked as a definitive legal basis. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation," Justice George Sutherland wrote. "We are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."

Those who would rely on Sutherland, however, should also pay attention to what he wrote before he joined the Court: "A declaration of war, for example, is generally a matter for the executive," he noted in 1919 in *Constitutional Power and World Affairs*. But then he added:

The framers of our Constitution, however, concluded, and I think wisely, that such a power in the hands of a single person was not consonant with the genius and spirit of a republic such as ours. They, therefore, provided that Congress, and not the President, should have the sole power to declare war. . . .

. . . *The Constitution confers no war powers upon the President as such. . . .*

The office of President has grown in potency and influence to an extent never dreamed of by those who framed and adopted the Constitution. . . . There is a popular, ever-increasing disposition to regard the President as a superior officer. . . . In times of public danger or disorder this tendency is greatly accentuated, and it is under all conditions a matter for serious concern, fraught with grave suggestions of peril. In great crises, the people not only turn to him as their natural leader, which he is, but they are coming more and more to regard him as the sole repository of their power which, very decidedly, he is not. . . . The advice and counsel of the President should be given great weight, but the acceptance of the President's recommendations must be the result of intelligent approval and not of blind obedience. Any other course involves a double betrayal of official trust—usurpation of power by the President and abdication of duty on the part of Congress [emphasis in original].

To reconcile those two statements, it is necessary to recognize, as Sutherland did, that the American form of government was fundamentally new. When it was established, foreign leaders were uncertain about who

spoke with authority for the United States. When, for example, the king of France sent a message to both Congress and the president, George Washington wrote back that “by the change which has taken place in the national government of the United States, the honor of receiving and answering your Majesty’s letter of the 7th of June [1789], to ‘the President and Members of Congress’ has devolved upon me.” But to say that the president alone *speaks* for the United States in foreign affairs is not to say that the president alone can *decide* for the United States, let alone commit it to a course of action that leads to war. As Secretary of State Henry Clay instructed the U.S. chargé d’affaires in Buenos Aires in 1828, the Monroe Doctrine “was made by the President as the head of the executive government, and, although there was every reason to believe that the policy which it announced was in conformity with the opinion both of the nation and of Congress, ‘the declaration must be regarded as having been voluntarily made, and not as conveying any pledge or obligation, the performance of which foreign nations have a right to demand.’”

The debate on the locus of the war power, in short, is not between isolationists and internationalists. It is between those who see a strong executive as a cause of war and those who see it as a cause of peace. This is how James Madison saw it in 1793: “In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. . . . The executive is the department of power most distinguished by its propensity to war; hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.” Scoffing at a proposal for a European collective security system put forward by Jean-Jacques Rousseau, Madison replied that “instead of beginning with an external application, and even precluding internal remedies, he ought to have commenced with, and chiefly relied on, the latter prescription,” that is, putting the monarchs of Europe under the control of legislatures. “As the first step towards a cure [for war], the government itself must be regenerated,” he explained. “Its will must be made subordinate to, or rather the same with, the will of the community.”

The Clinton administration has promoted democracy abroad as the cure for war, but our Founders did not define democracy as the election of a single individual who would then alone determine the national interest of the United States on such fundamental questions as the use of force. As Madison put it, by the Constitution, “the legislature is made the organ of the national will, on questions, whether there be or be not a cause for

declaring war.” Even Alexander Hamilton, widely regarded as the foremost proponent of presidential power among the Founders, thought the president’s powers in foreign affairs should be strictly circumscribed. “The history of human conduct,” he stressed in *Federalist* no. 75, “does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumscribed as would be a President of the United States.”

For too long, the debate over the war power has been distorted. The logic of deterrence and collective security, which has been the underpinning of the growth of executive power in this century, was that the prospect of war with the United States would deter aggression. That was the focus of the debate over the League of Nations, and that is the “lesson” some have learned from its failure. But if aggressors were to be deterred by the certainty of war with the United States, as Wilson argued, why did both Germany and Japan *initiate* war with the United States? In other words, it is more accurate to say that World War II was the result of political systems rooted in unaccountable executive power in Germany and Japan, even when the executive, like Adolf Hitler, came to power by competing in elections. Madison, with his warnings about executive aggrandizement and elective monarchies, got it right.

Unfortunately, efforts by Congress to reclaim the war power have proved ineffective. The tragedy of the Vietnam War produced the War Powers Resolution, but according to a senator who had introduced legislation to restrict presidential power, the resolution actually made things worse. “What had finally been agreed to in conference . . . turned the Constitution on its head,” lamented Thomas Eagleton of Missouri. “By failing to define the President’s powers in legally binding language, the bill provided a legal basis for the President’s broad claims of inherent power to initiate war. . . . Rather than tying the President’s hands—as the White House surprisingly claimed—the bill would tie *Congress’* hands” [emphasis added].

Presidents now feel they fulfill the requirements of the resolution if they merely consult with members of Congress. Moreover, even that gesture of compliance has been frequently little more than a formality. “There has been very little consultation with Congress under the War Powers Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops,” notes a 1993 study by the Congres-

sional Research Service. “Presidents have met with congressional leaders after the decision to deploy was made but before the commencement of operations.” That is not consulting; it is informing.

The United States has a special legacy. It is no exaggeration to say that our Founders were obsessed with the problem of war, and they were intent on creating a system that would safeguard America’s security and keep the Republic at peace. Just as important, they wanted to create a model of government for a more peaceful world. And they succeeded, for although it is not commonly recognized, the American model played a critical role in ending the Cold War. “Most acts of aggression have been committed by expansionist countries under the pretext of acquiring ‘lebensraum’,” a 1988 article in *Izvestia* explained. “It is difficult now to imagine a government in any highly developed country with an effectively operating parliamentary system of control over executive power being politically capable of such actions.”

It is a tragic commentary that we have forgotten what the Russians learned through their painful experiences. By failing to follow our own principles, we are not only failing ourselves, we are also failing those who, at the end of the Cold War, looked to us with such hope. If Congress wants to set a good example for the fledgling democracies abroad, as well as preserve a core feature of democracy at home, it must reclaim the war power.

Recommended Readings

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