7. Reclaiming the War Power

Congress should

- insist that U.S. armed forces not be deployed to areas where hostilities are likely or imminent unless and until both houses of Congress have approved such action,
- defund any such deployment that lacks the prior approval of Congress,
- insist that no aggressive action be taken by U.S. armed forces unless and until Congress has passed a declaration of war, and
- impeach any president who orders aggressive action by U.S. armed forces without a declaration of war.

In affairs of state, no more momentous decision can be made than the decision to go to war. For that reason, in a democratic republic, it is essential that that decision be made by the most broadly representative body: the legislature. That is where our Constitution lodges the power to declare war. As James Madison put it, "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 Original Understanding

That the power to initiate hostilities belongs to Congress and Congress alone is evident from the intent of the Constitution's Framers, the text of the Constitution, and the contemporary understanding of those who ratified the Constitution.

In the Constitution as the Framers designed it, the president lacks the authority to initiate military action. In the Framers' view, absent a congressional declaration of war, the president's war powers were purely reactive; if the territory of the United States or U.S. forces were attacked,

the president could respond. But he could not undertake aggressive actions without prior congressional authorization.

The Constitutional Convention considered the recommendations of the Committee of Detail that the legislature should have sole power "to make war." Only one delegate, South Carolina's Pierce Butler, spoke in favor of granting that authority to the executive. His proposal was not warmly received. "Mr. [Elbridge] Gerry [of Massachusetts] never expected to hear in a republic a motion to empower the Executive alone to declare war." For his part, George Mason of Virginia "was agst. giving the power of war to the Executive, because not to be trusted with it. . . . He was for clogging rather than facilitating war."

However, the delegates did take seriously the objection, raised by Charles Pinckney of South Carolina, that the House of Representatives was too large and unwieldy, and met too infrequently, to supervise all the details attendant to the conduct of a war. For that reason, "Mr. M[adison] and Mr. Gerry moved to insert '*declare*,' striking out '*make'* war; leaving to the Executive the power to repel sudden attacks." Roger Sherman of Connecticut "thought [the proposal] stood very well. The Executive shd. be able to repel and not to commence war." The motion passed.

The document that emerged from the convention assigns an important, but limited, role to the president in war making. The constitutional text vests the bulk of the powers associated with military action with Congress. Among the enumerated powers granted Congress in Article I, section 8, of the Constitution are the powers "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Other important war-making powers include the power "to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years," and the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."

In contrast, the grant of war-related powers to the executive is exceedingly slender: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

Significantly, several of the enumerated powers allocated to Congress involve the decision to initiate military action. Viewed in this light, the marque and reprisal clause and the militia clause inform our understanding of Congress's authority to declare war. For example, a letter of marque and reprisal is a legal device (long fallen into disuse) empowering private

citizens to take offensive action against citizens of foreign countries, usually privateers attacking ships. Since military attacks carried out by American citizens might well be considered acts of war by foreign powers, and accordingly embroil the United States in hostilities, the Constitution vests the important decision to grant this power in the most deliberative body: the legislature. Similarly, under the militia clause, Congress is empowered to decide when domestic unrest has reached the point where military action is required.

In contrast, the grant of authority to the executive in the commander-in-chief clause is entirely supervisory and reactive. The president commands the Army and Navy, should Congress choose to create them, and leads them into battle, should Congress choose to declare war. He commands the militia to suppress rebellions, should the militia be "called into the actual Service of the United States." In this, as Hamilton noted in *Federalist* no. 69, the president acts as no more than the "first General" of the United States.

This view, that Congress alone can authorize the nation to go to war, was the view of the generation that ratified the Constitution. As Constitutional Convention delegate James Wilson explained to the Pennsylvania ratifying convention: "This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power in declaring war is vested in the legislature at large."

Alexander Hamilton, a proponent of a strong executive, reassured New Yorkers that, however strong the president might be, he would not have the monarchical power to unilaterally lead the nation to war: although the president's authority as commander in chief of the armed forces would be "nominally the same as the king of Great Britain, [it would be] in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces . . . while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies."

The Power to Declare War: The Clinton Administration's Abuses

On matters of war and peace, then, the Constitution could hardly be clearer. George Washington, who presided over the Constitutional Convention, put the matter succinctly when he said, "The Constitution vests the power of declaring war in Congress; therefore no expedition of importance

can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure." As a man who came of age during the Vietnam War, and as a member of a political party that had striven since that war to regain congressional control of foreign policy, President Clinton might have been expected to hew closer to the original understanding of the war power than had previous presidents. Instead, he repeatedly and brazenly violated the original understanding, asserting an unchecked, unilateral presidential authority to wage war.

Haiti

The administration's 1994 incursion into Haiti gave Americans an early glimpse of President Clinton's approach to war making and constitutionalism. Clinton ordered a blockade and, when met with intransigence, stepped up his rhetorical attack on the Haitian junta, threatening a U.S. invasion. Clinton also warned Congress against interfering with what he saw as his authority to decide whether to commit troops. In response to a proposal by then–senate minority leader Robert Dole (R-Kan.) to restrict the president's ability to invade Haiti without congressional approval, Clinton admonished, "I would strenuously oppose such attempts to encroach on the president's foreign policy powers . . . the president must make the ultimate decision" about whether to use U.S. armed forces.

In an odd contrast to his apparent view that congressional authorization of an invasion was optional, President Clinton seemed to view UN approval as a necessary prerequisite. He sought and obtained authorization for an invasion from the UN Security Council on July 31, 1994. However, Clinton refused to seek authorization from Congress. In a news conference on August 2, 1994, President Clinton said, "I have not agreed that I was constitutionally mandated to get [congressional approval]."

By early September Clinton stood ready to launch a 20,000-troop invasion. In the weeks leading up to the planned invasion, opinion polls showed that anywhere from 60 to 73 percent of Americans opposed such action. That fact undoubtedly contributed heavily to Clinton's refusal to seek congressional authorization for the invasion. As Stuart Taylor of the *Legal Times* noted on September 19, as the zero hour approached, 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*" (emphasis in original).

As it turned out, forcible entry was made unnecessary, and large-scale violence averted, by last-minute diplomatic efforts. But the violence to

the Constitution had already been done by Clinton's assertion that he was not "constitutionally mandated" to get congressional approval for a 20,000-troop invasion of a tiny island nation that represented no threat, imminent or otherwise, to America's security. Indeed, his assertion of unilateral presidential war-making authority lacked even the constitutional fig leaf of the need for surprise with which Presidents Reagan and Bush had justified their respective invasions of Grenada and Panama.

Bosnia

On January 11, 1994, at the NATO summit in Brussels, alliance leaders threatened air strikes against Serbian positions around Sarajevo. That threat was soon carried out, with U.S. planes shooting down several Serbian fighters and bombing Serbian positions around Gorazde and a Serbian airfield in Croatia.

As with the intervention in Haiti, Clinton declined to secure congressional authorization for those attacks. Instead, he reported U.S. military involvement as a fait accompli to Congress, noting that U.S. forces "participate in these actions pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief."

In mid-1995 NATO launched another series of air strikes against Bosnian Serb targets, and corresponding Croatian and Muslim forces' gains helped spur negotiations on a peace accord. The resulting Dayton Accords provided for a multinational peacekeeping force in Bosnia, a force that would contain a large number of American soldiers. Before implementation of the accords, the U.S. House of Representatives voted against the deployment of U.S. forces, while the Senate voted on and rejected a resolution opposing the deployment.

Again, Clinton treated congressional approval as nonobligatory. On December 15, 1995, he ordered the deployment of 22,000 U.S. ground troops to Bosnia. As he explained in a letter to Congress, the decision was taken pursuant to his "constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive."

The Clinton Administration's War on Serbia

Although the foreign interventions outlined above were significant, and the president's refusal to seek prior congressional authorization flagrant and unlawful, it was President Clinton's war on Serbia in 1999 that brought

into boldest relief his administration's staggering view of executive war-making authority.

On March 24, 1999, President Clinton announced that U.S. armed forces, operating in conjunction with NATO, had begun air and missile strikes against Yugoslavia. Two days later, President Clinton, in letters to the Speaker of the House and the president pro tem of the Senate, repeated a by-then-familiar refrain: U.S. armed forces were ordered into battle "pursuant to [the president's] constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive."

The air war carried out over Serbia from March 24, 1999, to June 10, 1999, represented the largest commitment of American fighting men and materiel since the Gulf War. The U.S.-led NATO air forces flew a total of 37,465 sorties during the conflict, an average of 486 missions per day. And yet, throughout the conflict, administration officials steadfastly refused to admit that the president had unilaterally engaged the United States in war.

It Depends on Your Definition of "War"

As the war against the regime of Slobodan Milosevic went on, the president's cabinet secretaries and spokespeople played language games on matters of war and peace. As cruise missiles and cluster bombs rained down on Serbia, administration officials assiduously avoided calling the war a war. Euphemism and evasiveness were the order of the day for Clinton appointees charged with explaining American involvement in Serbia.

Rep. Tom Campbell (R-Calif.) described his frustration in attempting to secure a straight answer from administration officials about the legal status of U.S. operations in Serbia and Kosovo. Campbell asked Secretary of State Madeleine Albright: "'Well, if this isn't war, what is it?' And she said, 'It's an armed conflict.' So I asked [Assistant] Secretary [of State Barbara] Larkin, 'Well, what's the difference?' She couldn't tell me, but she said her attorney would. So the attorney finally said, 'It becomes war when you call it war.'"

But it was perhaps White House spokesman Joe Lockhart, his verbal agility honed in the crucible of impeachment, who provided the most enlightening insights into the Clinton administration's definition of "war":

> Q: Does this situation constitute war?
> Lockhart: No. And we believe that the United States objectives here are not offensive or aggressive in aim, and constitute the limited use

> of force to meet clear objectives. We certainly do not consider ourselves to be at war with Serbia or its people.

In an earlier press conference, Lockhart explained how the administration had arrived at its oddly subjective definition of war:

> Q: Is the President ready to call this a low-grade war?
> Lockhart: No. Next question.
> Q: Why not?
> Lockhart: Because we view it as a conflict.
> Q: . . . How can you say that it's not war?
> Lockhart: Because it doesn't meet the definition as we define it.

This does Lewis Carroll one better; in *Through the Looking Glass,* Carroll had Humpty Dumpty declare that "when I use a word, it means what I choose it to mean." The Clinton administration's view was that actions mean what the administration decides they mean; cruise missiles, cluster bombs, and civilian casualties don't constitute war until someone in power lets the magic word slip. From the Clinton administration's standpoint, there was a compelling policy rationale behind the verbal legerdemain of Lockhart, Albright, Cohen, and the others. The administration clearly recognized that there were legal consequences to calling a war a war. Rep. Campbell recognized that as well, which is why he attempted to force the issue on the floor of the House and in federal court.

Campbell v. Clinton

On April 28, 1999, the House voted no on declaring war 427-2, no on authorizing the use of ground troops, 249-180, and no on authorizing the president to continue air strikes, 213-213. Reacting to the votes, National Security Council spokesman David Leavy said: "The House is obviously struggling to find its voice. It voted 'No' on declaring war, 'No' on sending in ground troops, and it tied on whether to support an air campaign. They sent a mixed message as to what their stance is. But we've got to press ahead. There's broad support for this campaign among the American people, so we sort of just blew by" the House votes. For the record, as Mr. Leavy must know, a tie vote means that the measure failed to pass; thus, the House's message was far from "mixed." But his statement is indicative of the Clinton administration's view of constitutional constraints: they're optional, to be "blown by" when inconvenient.

Two days after that series of congressional rejections, Campbell and 16 other members of Congress filed suit against the president under the

War Powers Resolution. That resolution, passed in 1973 over President Richard Nixon's veto, attempts to institutionalize a mechanism for restraining executive war making. In essence, it provides that, if the president introduces U.S. armed forces into hostilities or "situations where imminent involvement in hostilities is clearly indicated by the circumstances," he must remove them absent a congressional declaration of war, specific statutory authorization for the action, or a situation where Congress is physically unable to meet because of an armed attack on the United States.

Unfortunately, Rep. Campbell's lawsuit ran aground on judicial timidity. On June 8, 1999, Judge Paul L. Friedman of the U.S. District Court for the District of Columbia dismissed *Campbell v. Clinton,* holding that plaintiffs lacked standing.

As is often the case in interbranch disputes, the court in *Campbell v. Clinton* was loath to step between Congress and the president and resolve the disputed issue. But that sort of timidity was not necessary here. Campbell and the other plaintiffs were not asking Judge Friedman to issue an injunction grounding the bombers or ordering the troops home. Rather, they sought a declaratory judgment that the president did not have the authority to wage war on Serbia absent congressional authorization. Campbell and his fellow plaintiffs would then use that decision to motivate Congress to take action.

Nonetheless, Judge Friedman sought to avoid the issue by holding that plaintiffs' injury was "not sufficiently concrete or particularized" to legally entitle them to bring suit. Citing *Raines v. Byrd,* a 1997 case in which the Supreme Court denied legislative standing to challenge the line-item veto act, Friedman held that the plaintiffs were required to demonstrate that there was a "true 'constitutional impasse' or 'actual confrontation' between the legislative and executive branches" before they could garner standing. For example, "if Congress had directed the President to remove forces from their positions and he had refused to do so . . . that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs." But in seeking to avoid the constitutional issue, Friedman actually resolved it—incorrectly. If Congress is required to *act* (over the president's veto?) to stop the president from waging war, then it does not have the power "to declare War"; rather, it has a limited ability to veto the *president's* power to declare war. This turns the constitutional war power on its head.

Why It Matters

As illustrated above, the Clinton administration espoused a view of executive war-making authority that is as unconditional and unconstrained

as that claimed by any president in American history. In the Haiti campaign, the administration asserted the authority to carry out a large-scale invasion without a prior declaration of war, despite the fact that exigent circumstances, such as the need for surprise, were not present. In Kosovo, the administration asserted the authority to wage the largest and most destructive military campaign since the Gulf War, despite Congress's outright refusal to grant authority to do so.

Worse still were what have come to be known as the "Wag the Dog" bombings. The first came in the form of surprise missile strikes on Sudan and Afghanistan three days after the president's testimony before the Starr grand jury and in the midst of a media firestorm over his televised nonapology. The administration refused to release the evidence it claims to have relied on for its assertion that the Sudanese pharmaceutical plant manufactured nerve gas. In fact, it summarily issued an order unfreezing the plant owner's assets, rather than come forward with evidence supporting the owner's purported connection to terrorist Osama Bin Laden.

The second "Wag the Dog" bombing occurred on the eve of the House impeachment debate when the president ordered air strikes on Iraq. Attempting to explain the suspicious timing of the attack, President Clinton asserted that "we had to act and act now [because] without a strong inspections system, Iraq would be free to retain and begin to rebuild its chemical, biological, and nuclear weapons programs—in months, not years." Oddly enough, as a direct result of the president's action, we've gone many months without *any* weapons inspection system, strong or otherwise. The inspectors withdrew shortly before the bombing and have not been back since. The urgent need to reestablish inspections seems to have vanished with the threat of impeachment.

The timing of President Clinton's actions inevitably gave rise to suspicion about his motives. That sort of suspicion was by no means alien to the Framers. When they gave Congress the authority to declare war, they did not focus solely on considerations of expediency. They also took human nature and the dangers of unchecked power into account. In his Helvidius letters, arguing with Alexander Hamilton, James Madison stated his view that if the power to declare war had been granted to the chief executive, rather than the legislature, "the trust and the temptation would be too great for any one man."

What Is to Be Done?

How can Congress reclaim what the Constitution grants it: the power to declare war? The War Powers Resolution offers little hope. Since its

passage, it has run aground on presidential intransigence and judicial unwillingness to enforce it. Moreover, by allowing the president the ability unilaterally to place U.S. forces in hostilities for at least 60 days, it cedes more power to him than the Constitution allows. But there are two constitutional measures available to a Congress determined to recapture authority over the war power. One was suggested most recently by a dedicated supporter of the president, former White House counsel Abner Mikva. According to Mikva, Congress can reassert its supremacy in foreign policy by bold use of the appropriations power. As Mikva wrote in the *Legal Times* early in the Kosovo conflict: "If Congress doesn't wish the president to engage in a particular military initiative, it simply cuts off the funds he needs to do so. This is how the English Parliament used to control the military adventures of English kings, and it works equally well under our system. Congress, not the president, has the key to the Treasury."

The other avenue open to Congress is the impeachment power. In a justly celebrated 1990 law review article, "The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About," Stanford law professor John Hart Ely argued that impeachment was the proper remedy for unauthorized war making: "[A] serious and willful violation of the separation of powers [such as an undeclared war] constitutes an impeachable 'high crime or misdemeanor.'" In regard to President Nixon's secret bombing in Cambodia, Ely concludes:

> I'd have impeached him for it. Surely it would have been a more worthy ground than the combination of a third-rate burglary and a style the stylish couldn't stomach. As Congressman William Hungate put it: "It's kind of hard to live with yourself when you impeach a guy for tapping telephones and not for making war without authorization."

With the notable exception of Rep. Campbell and a handful of others, the possibility of such congressional profiles in courage is unlikely. A Congress burned once for shutting down the federal government will be loath to cut off appropriations when U.S. troops are in harm's way. And after the dramatic failure to remove the president from office, future Congresses are likely to balk at the prospect of impeaching a president for abuse of his authority as commander in chief.

Congressional courage of the kind needed will not be forthcoming unless and until American citizens demand it. Unless Americans rediscover their reverence for constitutional limits, and vote accordingly, the slide toward empire will continue. Judge Learned Hand put it best: "Liberty lies in the hearts of men and women; when it dies there, no constitution,

no law, no court can save it. No constitution, no law, no court can even do much to help it."

Suggested Readings

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—Prepared by Gene Healy