TUG OF WAR: THE CASE FOR REFORMING WAR POWERS

By Vance Trefethen and Chris Jeub

***Resolved: On balance, the current Authorization for Use of Military Force gives too much power to the president.***

The legal scholars we quote in this case say the enacts the recommendations of certain legal scholars who say the solution to the current imbalance of war powers is to change the “rules of the house” for both the House and Senate. The Constitution gives both houses of Congress the right to set their own rules (without veto by the President). Each house will pass a rule declaring that all future war authorizations have a default 2-year expiration date, and that future military war funding appropriations expire at the same time as the war authorization (unless Congress provides otherwise in the text of the legislation). The President will now be forced to come back to Congress to explain the war and justify the ongoing US military commitment of lives and money, or else, by default, his war will be defunded. The burden shifts to the President to prove the need for the war, rather than a ⅔ majority of Congress to prove we “don’t” need it.

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The Founding Fathers originally made a clear separation of war powers in the Constitution. They gave Congress the power to decide to commit American troops to foreign combat, and they gave the President the power to command the troops to carry out the objectives Congress voted for. Unfortunately, in the two centuries since, that balance of power is now out of balance, with serious implications for our country and the troops we send into harm’s way. Please join my partner and me as we affirm that: The United States Federal Government should substantially reform its foreign military presence and/or foreign military commitments. Our case today will not be about indicting any one particular President or party, nor any particular war. Instead we will be looking at reform of the institutional process to restore respect for what the Constitution says about our foreign military commitments so that our future military engagements and their outcomes will be improved.

OBSERVATION 1. We offer the following DEFINITIONS

**Substantial**: “3 *a* **:** possessed of means **:** well-to-do *b* **:** considerable in quantity **:** significantly great <earned a *substantial* wage>” *(Merriam-Webster Online Dictionary 2012.* [*http://www.merriam-webster.com/dictionary/substantially*](http://www.merriam-webster.com/dictionary/substantially))

**Reform**: “2: to put an end to (an evil) by enforcing or introducing a better method or course of action” *(Merriam-Webster Online Dictionary 2012.* [*http://www.merriam-webster.com/dictionary/reform*](http://www.merriam-webster.com/dictionary/reform) *(parentheses in original))*

**Military**: “2 : ARMED FORCES” *(Merriam-Webster Online Dictionary 2012. parentheses in original,* [*http://www.merriam-webster.com/dictionary/military*](http://www.merriam-webster.com/dictionary/military)*)*

**Commitment**: “1 [mass noun] the state or quality of being dedicated to a cause, activity, etc.:” *(Oxford Dictionary online 2012. Oxford University Press, brackets in original;* [*http://oxforddictionaries.com/definition/commitment?q=commitment*](http://oxforddictionaries.com/definition/commitment?q=commitment)*)*

**Presence**: “[mass noun] the state or fact of existing, occurring, or being present” *(Oxford Dictionary online 2012. Oxford University Press,* [*http://oxforddictionaries.com/definition/presence?q=presence*](http://oxforddictionaries.com/definition/presence?q=presence)*, brackets in original)*

OBSERVATION 2. INHERENCY: The balance of power between Congress and the President.

Realize A. WPA fails. The War Powers Act fails, and Presidents start wars without Congress

Dr. Steve Frank 2011. (Ph.D. in American history from the Univ of Michigan, National Constitution Center’s Vice President of Education & Exhibits) The Fog of the War Powers Act: Why We Should Embrace the Constitution’s Ambiguity, <http://blog.constitutioncenter.org/the-fog-of-the-war-powers-act-why-we-should-embrace-the-constitutions-ambiguity/>

In the aftermath of the Vietnam War, the country and Congress engaged in a loud debate about the issue, which led to the War Powers Act of 1973. The measure was designed to give Congress more say about whether to commit troops to the battlefield, but it’s generally considered a failure. No president, Democrat or Republican, has accepted its constitutionality, and Congress hasn’t tried to enforce it. Numerous U.S. military actions since – including Grenada in 1983, Panama in 1989, Bosnia in 1995, and now Libya and Yemen – have been conducted without express congressional approval.

Realize B. Constitutional balance upset. In a reversal of the Constitution’s original war powers, today Presidents start wars, and we wait in vain for Congress to stop them. Dr. James Lindsay explained in 2011:

Dr. James M. Lindsay 2011. (PhD from Yale; senior vice president, director of studies, and Maurice R. Greenberg chair at the Council on Foreign Relations; former director of the Robert S. Strauss Center for International Security and Law at Univ of Texas at Austin) 5 Apr 2011 Is Operation Odyssey Dawn Constitutional? Part V (ellipses in original) <http://blogs.cfr.org/lindsay/2011/04/05/is-operation-odyssey-dawn-constitutional-part-v/>

The effect of the Court’s reticence in recent years, however, is to turn the constitutional structure the Framers created on its head. At least it does if you agree with Alexander Hamilton that “the Legislature have a right to make war” and that “it is…the duty of the Executive to preserve Peace till war is declared.” How so? The Framers put the burden of effort in going to war on presidents. Presidents could not act *until* they had persuaded Congress to agree. That meant assembling winning coalitions in both the House and Senate. As I noted in an earlier post, some nineteenth century presidents tried and failed to secure congressional approval for hostilities they hoped to initiate. By contrast, if presidents are free to act *unless* Congress stops them—as the judge suggested in *Dellums v. Bush—*then the burden of effort shifts to the other end of Pennsylvania Avenue. Congress can stop the president only by passing a law that commands him to do so. But that law is subject to a presidential veto. As long as a president can get thirty-four senators to back him, and almost every president can, he carries the day even if the other 501 members of Congress are opposed. Facing those daunting odds, most members of Congress don’t see the point in challenging the White House. Why waste valuable legislative energy tilting at windmills? Moreover, political incentives reinforce the urge that lawmakers have to head to the sidelines. After all, laying oneself open to charges of refusing to support U.S. troops in the field is hardly a recipe for electoral success. So the war power gravitates to the White House, in practice if not in law.

OBSERVATION 3. We have a PLAN. Congress will adopt the following plan through any necessary constitutional means:

1. Both houses of Congress change their procedural rules to set a default 2-year limit on all authorizations for the use of military force if no other deadline is specified in the legislation. All war funding authorization automatically expires at the same time as the force authorization, except for money needed to withdraw forces from any military engagement for up to 1 year after the authorization expires.

2. Enforcement through the federal courts to issue injunctions ordering the President to comply and Congressional impeachment for any President not in compliance.

3. Funding through existing budgets, no increase needed.

4. Plan takes effect the day after an Affirmative ballot.

5. All Affirmative speeches may clarify the plan.

OBSERVATION 4. Experts recommend our PLAN because it solves the Constitutional imbalance.

A. Congress takes control of war funding

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

The new rules will work proactively through a three-stage process. The rules first require all new authorizations for the use of force to state clearly whether they contemplate an open-ended conflict or a limited war. In the absence of a clear statement, the rules will create a presumption for limited war; they will presume a two-year sunset unless the House or Senate specifies a different time period. Second, the rules permit the House or Senate to reauthorize the war for another period before the expiration date arrives. If the two houses fail to take affirmative action, the third and final stage kicks into operation: the rules prohibit all further appropriations for the conflict once the time limit has elapsed, with the exception of a one-year appropriation of funds for the orderly withdrawal of troops and other forces from the battle zone. During this withdrawal period, the president remains free to try to convince Congress and the public that a more extended war is in the national interest. But there is only one way for him to press onward: he must gain the explicit consent of both houses to another military authorization, which once again will be governed by a two-year sunset unless Congress provides otherwise. In the meantime, withdrawal must proceed in a responsible fashion. Congress has ample authority to take these steps. The Constitution gives each house the power to “determine the Rules of its Proceedings.” Because the Constitution grants the House and Senate the sole authority to make their rules, each chamber can act without the threat of a presidential veto.

B. Congress regains power over war decisions

Prof. Bruce Ackerman & Prof. Oona Hathaway 2011. (Ackerman - Professor of Law and Political Science, Yale Law School; Hathaway - Professor of International Law, Yale Law School) LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY, MICHIGAN LAW REVIEW Vol 109, Feb 2011 <http://www.michiganlawreview.org/assets/pdfs/109/4/ackermanhathaway.pdf>

To sum up: The operation of the rules during Period Two generates negligible risks but promises two very large constitutional gains: enhancing the power of Congress and forcing greater deliberation. These two features are analytically independent of one another. Presidents will tend to collaborate with Congress even if the reauthorization debate turns out to be a shouting match. And in the unlikely event that the president cuts the House and Senate out of key decisions, Congress may still succeed in catalyzing a broad ranging public debate over the war. Nevertheless, power-enhancing and deliberation-forcing will typically reinforce one another. The president’s need to win future roll-call votes will induce him to reach out to congressional leaders beforehand. And once members of Congress have greater access and influence, they will be in a better position to lead a more informed debate on the presidential requests for reauthorization.

OBSERVATION 5. We offer several JUSTIFICATIONS for restoring the Constitutional balance of war powers

JUSTIFICATION 1. Human rights and human lives. The expansion of Presidential war power has had a staggering human cost.

Center for Constitutional Rights 2009. (non-profit legal and educational organization, includes attorneys who litigate for civil rights issues. The material in this quote was written by: Annette Warren Dickerson, Qa’id Jacobs, C. Lynne Kates, Jules Lobel, Sara Miles, Nicholas Modino, Jen Nessel, Alison Roh Park, Michael Ratner, Vincent Warren (national senior staff attorney with the American Civil Liberties Union ; monitored South Africa's historic Truth and Reconciliation Commission hearings and worked as a criminal defense attorney for the Legal Aid Society in Brooklyn) and Peter Weiss) “Restore. Protect. Expand. Amend the War Powers Resolution” <http://ccrjustice.org/files/CCR_White_WarPowers.pdf>

The last 8 years saw an expansion of executive power unprecedented in American history. The consequences for constitutional rights and our system of government are grave. But in no area have the consequences been more devastating than in the area of war-making. The cost in lives, human rights and long-term strategic interests is staggering.

JUSTIFICATION 2. Better decision-making. Congressional approval means better decision-making about going to war

War Powers Initiative Committee of The Constitution Project, Co-Chaired by former Representative Mickey Edwards and former Representative David Skaggs, 2005. (Mickey Edwards - Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton Univ.; former Member of Congress (R-OK); David Skaggs - former Member of Congress (D-CO): Member of the Appropriations Committee and Permanent Select Committee on Intelligence; Peter Raven-Hansen - professor of law, George Washington Univ.; Louis Fisher - Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress; Thomas Franck - Professor of Law Emeritus at N.Y. Univ School of Law; Michael J. Glennon - Prof. of International Law, Fletcher School of Law & Diplomacy at Tufts Univ.; Dr. Morton Halperin, former high-level official in the National Security Council, State Department, and Defense Department; Harold Hongju Koh, former Assistant Sec. of State for Democracy, Human Rights & Labor; Dr. Susan E. Rice, former Assistant Secretary of State for African Affairs; James R. Sasser - Former senator from Tenn.; Jane Stromseth - Prof. of law at Georgetown Univ.; Patricia M. Wald - former Chief Judge, US Court of Appeals for the D.C. Circuit; Don Wallace Jr. - Prof of law, Georgetown Univ.; R. James Woolsey - former director of the CIA; Michael K. Young - former Dean of the George Washington Univ. Law School), FORCE ABROAD: WAR POWERS in a System of CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>

In short, the framers insisted on a collective judgment for war because it was likely that a collective judgment would be superior to an individual judgment, would help assure that the United States would not go to war without a political consensus, and, by requiring a President to persuade Congress, would effectively make him or her explain why war was necessary to the public who would ultimately bear its cost. These reasons for insisting on a collective judgment for war are still valid today.

JUSTIFICATION 3. Better protection of civil rights

Prof. Seth Weinberger 2009. (Associate Professor of Politics and Government at the Univ of Puget Sound) Restoring the Balance: War Powers in an Age of Terror, <http://books.google.fr/books?id=Risls8Z-dMsC&pg=PA47&lpg=PA47&dq=restore+%22balance+of+power%22+congress+president+%22war+powers%22&source=bl&ots=T1wKP6RMx1&sig=RZ2TBIqqgtoMGcUI7yQXLCAPXjc&hl=en&sa=X&ei=jXtrT8nCKsWwhAfqsciyBw&redir_esc=y#v=onepage&q=restore%20%22balance%20of%20power%22%20congress%20president%20%22war%20powers%22&f=false>

Thus, it is clear that the congressional power to declare war stands as a powerful and meaningful check on presidential war powers, even if it does not include control over the initiation of conflict or the deployment of troops. The greatest potential threat to civil liberties and democracy is the potential for the chief executive, in times of national emergency, to claim powers normally forbidden to him in a manner that upsets the fragile balance of government. Understanding the relevance and import of a declaration of war prevents this from happening. While the mechanism must exist by which the president can see his powers expanded to deal with a war that threatens the survival of the nation, the decision of when to activate that mechanism cannot be up to the president alone.

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