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A History of the American War Powers

Civil War to Gulf War

by

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Introduction

When I first set out to write this project, I found myself particularly drawn to the 9/11 attacks. For one thing, the attacks moved me on a very personal level. I have a grandmother who lives in Brooklyn Heights, which is directly opposite lower Manhattan across the east river. Before the attacks, one could see the towers dominating the skyline through windows in her apartment. Every year when I was an adolescent I would go to New York to visit her. On one such visit in March 2001, I had a strong desire to go into the twin towers and see the view from the top. We had originally made reservations to eat at the 'Windows on the World' restaurant at the top of the north tower, but somehow our plans were botched and I ended up visiting the tourist center on the top of the south tower. When I got to the top, I remember heading straight for the windows and standing only inches from the glass with my toes resting against the edge. The experience – the enormity of it all – was completely overwhelming. One could look down to the streets below and seem totally removed the world below – it was if the top of that tower was suspended in midair. But the most striking part of that experience, the part that I will never forget, was the sense of vulnerability that one feels when standing one hundred and seven stories above the ground. Standing there, you could actually feel the building sway ever so gently as the building stood there against gusts of wind – it seemed a wonder to me that a building so tall could ever stand in defiance of gravity and the Earth's elements. Immediately before I left the spot I had found there against the glass, I remember the thoughts that ran through my head. What would happen if a building such as this were ever to fail to support itself? What if the wonders of physics that allowed that

building to stand somehow failed at that moment and all were to come crashing down?

Surely, I remembered those thoughts from that evening in March as the summer rolled through, though they were placed in the background of my memory as I prepared to enter high school - a tumultuous time in anyone's life. On the morning of September 11, I remember sitting in the passenger's seat of my stepfather's S.U.V. on the way to school and listening to the news on National Public Radio, as I generally enjoyed during those long slogs through traffic on the way to school. I remember hearing the first report that an airplane had hit one of the World Trade Center buildings in lower Manhattan. My first reaction was one of utter incredulity. How could an airplane possibly hit the World Trade Center on, as the newscasters were reporting, a supremely clear September morning? I sat there mesmerized by the reports coming in, hoping to hear more about how the plane hit and why (another childhood interest of mine was aviation, so I had a particular interest in thinking about what might have went wrong inside the cockpit). Unfortunately though, my stepdad and I often disagreed about the soundtrack of our morning commute and after growing tired of listening to news reports, he switched to another station. When I arrived at school, I went to my first class of the day – gym class – where I thought it both odd and ironic that during the only class of the day that is supposed to be dedicated to physical activity, everyone was sitting in front of a television screen. But as I drew closer, I realized that the image on the television screen was thick black smoke pouring from the sides of both World Trade Center towers. Suddenly all of those thoughts I had had during the previous March came rushing back to the

foreground or my memory. I was suddenly back in front of that window on the one hundred and seventh floor of the south tower, my face close enough to the glass that I could see the condensation of my breath. As I continued to watch, footage was shown of the second plane flying low and fast over the tops of buildings. The aircraft banked sharply to the left before it drove itself into the mid-section of the south tower – the same tower that I had visited the March before. As I watched the plume of flame erupt from the other side of the building, I could not help but think about the fact that, at that very moment, I was watching people die. And not just death that was instantaneous or unexpected (though for some, this probably was the case), but death that came after the most unimaginable horrors of being trapped with no hope for escape. My thoughts unwillingly drifted towards what it might have been like to be a passenger on that plane. What would it have been like, cornered in the back of the aircraft by men with knives, to look out over the Hudson or the East river and watch the buildings pass by with ever increasing speed and proximity? What might have been one's last ponderings as the engines roared at full throttle and the plane banked sharply left immediately before the most brief and imperceptible jolt of the impact that ceased all thought and consciousness? I continued to watch that morning, both dumbfounded and horrified, as the towers fell before my eyes in orderly cascades. Again, I was starkly aware of the fact that I was watching people – mothers and fathers, son's and daughter's, wives and husbands – die right before my eyes.

These memories from that day, deeply troubling to me and millions of others, remained with me as the months drew on. President George W. Bush, when he addressed the nation on the evening after the attacks, seemed shocked, as we all were,

but also deeply dug into his conviction that this country would defend itself and punish those who were responsible. At that time, I knew little about the man who had entered the White House the previous January. He was a republican, and therefore someone who my parents told me I probably should not agree with. But at this was a time when all Americans needed to feel as though someone was in control, was going to defend us, and was going to punish those who were responsible for the death and destruction that had occurred in New York and Washington. These were causes that we all could identify with and I felt hopeful that he would be able to properly respond to the attacks.

In those early months and years after attack, I poured over literature, learning everything that I could about the attacks and the people behind it. I remember becoming aware of the terrorist network Al Qaeda, its leader Osama Bin Ladin, and how both had pledged to kill Americans and cause widespread destruction wherever Americans existed. I followed the news coverage as the United States military, together with other countries from across the globe, attacked Afghanistan and bombed the camps and caves where it was said that Bin Ladin and his followers were hiding. But as the years went on, I noticed that the actions the Bush Administration began to make less and less sense. This realization came most acutely as I followed the news coverage of the drive for a military action in Iraq. The necessity for invading Iraq was not clear to me as it had been when America attacked Afghanistan. Watching the progression of that conflict, as it played out over the course of 2003 and 2004 and a rebel insurgency began to show its ferocity, it seemed to me that Iraq had been somewhat of a mistake. Gradually it became known that Iraq did not have

WMD at the time of the invasion, nor did it at any time have anything to do with the attacks on 9/11. After that, it seems as though someone had opened the floodgates to revelations about a myriad of things that the government had done in the name of our safety. All of a sudden, Americans were seeing appalling photographs of U.S. Soldier-constructed human pyramids from Abu-Ghraib prison in Baghdad, learning that the N.S.A. was monitoring the domestic calls of American citizens, and hearing that people had likely been tortured in the Guantanamo Bay detention center. These actions, which many American citizens found deplorable, had cost us dearly. The international opinion of Americans had sunk to a bitter low while this country was throwing billions of its dollars into a war that nobody really understood. And the worst of it was that, as all this was occurring, members of the executive branch were saying that they had a right to do these things in the name of our safety and our freedom – the ultimate paradox. It seemed as though all of this had come at great cost, but that, really, we had gained nothing from it.

Taking all of this in, I pondered how all this had happened. How had the attacks on 9/11, as shocking and troubling as they were, coaxed our government into taking such drastic actions? When I began this project, my goal was to answer this question through a critique of the Bush administration and to argue that the actions taken by the Bush administration were uncharacteristically extreme given other times when the country has been faced with grave threat. But as I began working with the material, I found that there is a compelling history behind the way the United States implements its war powers during times of crisis and threat. It became apparent to me that over the course of America's existence, the executive almost always takes full

control over the war powers with the full cooperation and support from the other branches during conflict. This tendency was further highlighted by the fact that this trend had become increasingly more expansive as the threats that the world faced became more dangerous with the passage of time. Indeed, this process of the evolution of the war powers has become the central focus of this narrative. The crises studied here will show there has been a gradual but steady draining of power from congress to the executive. Each new threat that faced the country –whether it be the threat of total war during World War Two, the threat of nuclear attack during the cold war, or the threat of international terrorism – leads to more bold and forceful claims by the president to unitary executive power that is much stronger than the president before him.

The course of this process, from my view, began in 1861 when the first artillery shells flew over Fort Sumter during the Civil War. President Abraham Lincoln decided that the southern rebellion was such that there was no time for the deliberative processes of Congress. He took the collective war powers of the government into his own hand and unilaterally directed the nation's military to combat the Confederacy. But Lincoln's response defines itself through his generally collaborative relationship with Congress. Though initially Lincoln acted without their discretion, Congress ratified his actions *ex post* through the passage of legislation that gave him the ability to act on his own discretion. Throughout the remainder of the war, Lincoln generally did not take bold actions without a legislative authorization. Years later during World War II, President Franklin D. Roosevelt maintained a similarly consultative relationship with Congress, but we see in this case that

Congress is willing to issue authorizations of power to the executive that were much broader than the Congress during the in the Civil war. The dangers that were apparent during World War II persuaded members of the government that the executive must be given expansive power in order to cope with the realities of global mechanized war. Following World War II, the Cold War showed that the war powers of the government had shifted to an even greater degree. During the Korean War, President Truman was unopposed by Congress as committed the American military to active combat engagements without prior approval or authorization During the Cuban missile crisis, Kennedy decided to wholly exclude Congress from both the planning and the execution of the response to Soviet missile in Cuba. In Vietnam, Congress took their prior levels of deference to the executive a step further by passing the Gulf of Tonkin Resolution. This resolution and others like it undermined Congress' role in the war power by giving the President broad and unrestricted power to carry out war efforts *at his discretion*. It was only after the war had made a turn for the worst that Congress made attempts to backtrack through the passage of the War Powers Resolution, but by then it was too late to make any significant impact on the course of the war. Finally, during the Gulf War, Congress finally asserted itself against the executive's control over the war power by placing limits upon the ability of the executive branch to carry out the war. But, as we shall see, the Gulf War differs from the other cases in the way that it was a war of choice. The country was not defending itself during the Gulf War against some threat and thus there was no need for the claims of unilateral executive power that had been made over the course of the previous century.

At the end of the narrative, we will arrive at 9/11 and, through the perspective gained through the history of the American war power, we will discuss speculatively the behavior of George W. Bush during his response to 9/11. At that point, it will be realized that, although Bush II certainly made his own claims to unitary executive power that led to egregious mistakes in the execution of his response to 9/11, his approach to the post-9/11 response really was the product of a long history of the war powers which had aggregated a great deal of power upon the executive branch.

Chapter I

Theoretical and Legal Foundations

What the Founders Thought

Beneath the case studies in this narrative lie intricate theoretical and legal foundations that have molded the development of the U.S. government and its usage of the war powers. We begin by looking towards the founders, whose great challenge it was to create a document which established a strong government while at the same time not making it so strong that the model of representative government wass abandoned for monarchy. This would have been an objective to which the founders were particularly sensitive considering the fact that most of them had taken part in or had memory of the Revolutionary War – a war whose purpose was largely to gain independence from the British monarchy. The national defense, in general, was an issue that they considered to be paramount. As a fledgling nation whose independence was only recently won, defense against threats both domestic and foreign in nature was crucial to survival. Perhaps the most influential Constitution-era text regarding the manner which the government administers the national defense is the Federalist Papers. One of its authors, Alexander Hamilton, took a particular interest in writing about the defense powers of the government. In Federalist Paper No. 23, he outlined what he thought to be the most important elements of national defense.

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to forsee or to define the extent and variety of national emergencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles

can wisely be imposed on the power to which the care of it is limited.[1]

The decision for the founders, therefore, was to figure out how to distribute these powers in a way that most efficiently served their intended purpose. This decision, however, presented the founders with a dilemma. Certainly they did not want to create an American monarchy by allowing any one individual both to declare the situations meet for military force and also to guide and govern their usage once implemented. But with this in mind, the founders nevertheless realized the inefficacy of placing the powers of defense among too many different people. In Federalist Paper No. 70, Hamilton describes how involving too many individuals in the process of the national defense is likely to be too time consuming and difficult to ever stand as an adequate model for guiding the defensive powers of the nation.

> That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. [2]

Additionally, while appraising the attributes of the executive that make it a desirable instrument for the most pressing decision-making that the country requires, Hamilton also explained at great length why any diversion from executive unity – i.e. the interference of members of the legislature – would be less than ideal.

> In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, through they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in their executive department. Here they are pure and unmixed. There is no point at

[1] Rossiter, Clinton ed. *The Federalist Papers* (New York: Penguin, 2003), 149.
[2] Ibid., 423.

> which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive which are the most necessary ingredients in its composition – vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national security, everything would be to be apprehended from its plurality.[3]

Hamilton considered the slow, deliberative processes of the legislature to be generally undesirable when decisions need to be made with swiftly and decisively. But the founders were also particularly sensitive to the fact that reconciling strength and efficiency while at the same time preserving the principles of liberty upon which the nation was founded to begin with. The the principles are often best safeguarded by the processes of republican government which require the active involvement of many. In Federalist 37, James Madison asserts that

> Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form…Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. …[I]t may be pronounced with assurance that the people of this country… will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the state administrations. On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once the difficulty of mingling them together in their due proportions. The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people…[4]

[3] Ibid., 425.
[4] Ibid., 222-3.

Madison here explains how the pursuits of energetic government and liberty are not in themselves mutually exclusive. Those entrusted with the powers of government are ultimately to be held accountable by the people. In this particular case, Madison refers to the ability for citizens to elect their government officials. Hamilton also speaks on this theme in Federalist 26, wherein he discusses the funding and appropriation controls enjoyed by congress over the armed forces.

The way in which these issues were ultimately settled upon illuminates how these theoretical ideas ultimately formed into law. The founders realized that it would be impossible to articulate a comprehensive outline of the national defense within the text of the Constitution itself that would be capable of providing for the varied defense needs of the country. Restricting the government's abilities unnecessarily might place the country in a situation where the government would be unable to respond effectively to a threat because of excessive legal hang-ups and resultant deliberations. Their solution to this issue was to write the laws of the constitution in such a manner that refused to adopt specific rules regarding a large majority of the government's conduct. Instead, they developed the Constitution as a set of vague structural guidelines and incentives that guided the establishment of more specific laws through the federal legislature. But this model, while it has proven to be effective throughout the life of the nation, comes with substantial challenges. Because much of the language in the Constitution is so vague, it is oftentimes very difficult to come to a consensus on the definition if seemingly simple terms. Indeed, there are a wide variety of procedures that are suggested by the constitution to an extent, but the founders intentionally left ambiguous the methods of execution for those procedures.

Most relevant to the narrative at hand, one of the great enduring ambiguities about our constitution is the process by which the Constitution administers the powers of war. The founders obviously did not want to constrict the nation's ability to defend itself by outlining a set of laws which would leave the nation vulnerable to an unknown threat. But similarly, one might just as easily assume that the founders did not intend for the Constitution to allow the leaders in the executive to simply do whatever they want to so long as they argue that the measures they take are in the interests of protecting the nation. The issue of ambiguity will remain in the background of our narrative because of the way that interpretations of the Constitution's ambiguity lead to the actual usage of the war power.

Ultimately, there are only two broad sources of power that legitimize a President's actions: the power he derives from the Constitution and the power he derives from historical precedent. Because the Constitution is particularly vague in its mandate, we will see over the course of the history of the American war power, presidents often take a fair amount of liberty with their interpretations of that mandate. It will be shown also that this process of Constitutional interpretation is confounded by the use of precedent. In other words, when a president expands his interpretation of his powers under the Constitution and that expansion is subsequently legitimized by Congress' explicit or implicit authorization, that precedent is used by future presidents to legitimize similar behavior in the future.

But before delving into the text of the Constitution itself, it is worthwhile to ask about what exactly it means for one to make an inquiry into the nature of the American *war power?* Nowhere in the Constitution is there a provision that defines

the war powers of the United States. Indeed, the term 'war powers' never actually appears within the text of the Constitution itself. Instead, the war powers are an implement constructed by a number of different constitutional provisions that, in the aggregate, dictate how the country goes to war. The fact that the war powers are composed in this way oftentimes makes it difficult for one to come to an understanding about how they are to be implemented in practice. As a result, studying the development of the war powers relies on examination of the way different administrations interpret the relationship between separate constitutional provisions. And as we shall see in what follows, interpreting the provisions in themselves can be a challenging task

The Constitutional Text Relating to the War Powers

Article 1 The Legislative Branch, §8 - Powers of Congress

The Congress shall have Power:

1. *To declare War… and make Rules concerning Captures on Land and Water;*
2. *To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;*
3. *To provide and maintain a Navy;*
4. *To make Rules for the Government and Regulation of the land and naval Forces;*
5. *To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;*

Article 1 §8 is where the powers of congress are enumerated and the sections shown above are those that are commonly construed as pertaining to Congress' powers in defense and war. The first clause gives Congress the power to "declare war" – a term that is famously unclear and has been a common source of struggle between the legislative and executive branch. The "declare war" clause assumes that, somewhere, there is a clear and commonly respected definition of what 'war' means. This,

however, is not the case. For example, after the attacks at Pearl Harbor, Congress issued a formal declaration of war that commenced the mobilization of the armed forces against the Axis powers. Contrast this to the commencement of hostilities in the Vietnam War when Congress never passed a formal declaration of war, but they instead passed the Gulf of Tonkin Resolution, which authorized the president to use the armed forces at his discretion to support the South Vietnamese. In both cases the armed forces were deployed over seas into active combat roles with wide discretion given to the President to appropriate them as he saw fit.

This difference in procedure beckons one to wonder if the founders anticipated that the United States would ever find a means of entering into prolonged armed conflict another country without a formal declaration of war. Does this nullify the structure that the founders set forth in 1787? But perhaps more importantly, does it matter? After all, the U.S. Congress has not issued a formal declaration of war since World War II. In this writers opinion, this point of contention is indicative a couple of possibilities: one, that the vague structure of the Constitution has allowed its meaning to evolve with the passage of time; and two, that such an evolution has the potential to fundamentally reshape the structure of the government. Indeed, the whole point of this narrative is to suggest that the nature of the war powers – in this specific instance, the declaration of war clause – has evolved by draining more and more power away from the legislature to the presidency. This shift, which will be explained more as we progress through the case studies, is only one of the major ways that the war power has evolved over the course of American history.

Returning to the constitutional text above, the second, third, and fourth provisions are fairly clear and have generated little debate over the course of their existence. They simply establish Congress' ability to create a national Army, Navy, and rules to govern both. The fifth provision addresses Congress' powers to call forth "the militia to execute the Laws of the Union, suppress Insurrections and to repel Invasions." That Congress can only do this under conditions of "insurrection" and "invasion" is likely meant to specifically address conflicts that arise between the states. Writing in the late 18th century, the framers were primarily concerned with ensuring that the Union government sustained itself during its infancy. This is a concern reflected by Hamilton in Federalists 26 and 27 where he writes about the security of the federal system and its ability to, as a federation, to quell rebellions by individual states and to preserve the laws of the Union. It is highly unlikely that this was meant to endow any significant power upon the legislature in the realm of the war powers.

<u>Article 2 The Executive Branch, §2 - Civilian Power over Military, Cabinet, Pardon Power, and Appointments</u>

1. *The executive Power shall be vested in a President of the United States of America*
2. *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…*

The above clauses show all of the trademark qualities of vagueness that were indicated in the previous section. Through the ambiguity of these statutes, the framers allowed the president a great deal of discretion for interpretation of powers. It takes a moment for one to fully understand just how broad a stroke was made here by the founders. By saying that "the executive power shall be vested in a President," it

allows the President to make a plausible argument that the executive entitles the holder of the office to take any action which is not already prohibited or restrained by law. The entire system of checks and balances arguably hinges upon this clause because Congress really can only control the President insofar as it passes laws which do so. In other words, the President is constrained only by the laws in place at that time.

Additionally, the second clause listed above refers to the President's powers as Commander in Chief of the Army and Navy. Simply by reading the clause, it is not clear what exactly is meant by this. Could it mean that the President is the nominal chief officer of those respective branches of the military, or is the role of the Commander in Chief something that confers a specific, yet implied set of powers upon the president? Also, is the role of the commander in chief different when the nation is at war or is engaged in an armed conflict? The ambiguity of this clause in particular has been used by presidents to justify the usage of the military without the authorization of Congress. Presidents Lyndon Johnson and Richard Nixon in particular believed that the Commander in Chief title did, in fact, confer a special set of powers upon the President.

The Commander in Chief clause, combined with the clause endowing executive power, has allowed presidents to make aggressive expansions in their abilities, especially in the realm of the war power. One might wonder, in consideration of such broad endowments of power upon the executive, what exactly this implies for the system of checks and balances. In practice, these clauses create a necessity for vigilance on the part of Congress. In all cases where the war power is

exercised, congress must actively seek to check the excesses of the executive branch when appropriate. If congress is complacent and turns a blind eye to the activity of the executive, then they risk giving total control to the executive in a war action. This will be a crucial theme moving forward, especially later in the narrative when we examine presidents who were bolder in their desire to expand the executive branch.

Article 2 The Executive Branch §1 The President

> *Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."*

If, as many have done in the past, one takes the Oath of the President seriously, what exactly is the President prohibited from doing if he does so while arguing that he is preserving, protecting, and defending he Constitution? Can a President, believing that the Constitution (and by extension, the nation) is in danger, commit acts that are unconstitutional or otherwise illegal in the name of protecting the Constitution itself? Lincoln certainly considered this to be the case when he usurped power from Congress by increasing the size of the armies and temporarily suspending *habeas corpus* during the beginning of the Civil War. The real question becomes whether the Oath of the president to protect the constitution supersedes the Constitution itself. Can the president break the laws of the Constitution in order to preserve the Constitution as a whole?

It has been important to briefly overview these constitutional provisions and the dilemmas surrounding them because disagreements over their scope and ability comprise the majority of debate and contention surrounding the usage of the

American war powers. Depending on how one interprets them, these provisions can lead one to think very differently about how the country should behave when it is faced with threats that must be addressed.

The Constitution and the Balance of Power in Relation to the Branches

Crisis and emergency have proven capable of pushing the Constitution up to, and sometimes beyond its limits. Because of the aforementioned ambiguities that relate to the executive office, there has been a great deal of debate over the course of American history about how the President should interact with the Constitution when the nation is threatened. Some argue that the Constitution establishes a body of laws that should stand equally strong both in times of peace and in times of war. Thus, under this rationale, the President is bound to follow the laws of the constitution under all circumstances. Justice David Davis summarized this best in his majority opinion in *Ex Parte Milligan* – a Civil War Supreme Court case that will be discussed later on. Davis wrote that

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false… [5]

He believed that the Constitution was, and continues to be an immutable document that is equally relevant both when the nation is at peace and when the nation is facing its gravest dangers. The strength of this approach is that it ensures that, at all times, the government will be run by a concrete set of laws and procedures which cannot

[5] *Ex Parte Milligan* 71 U.S. 2 (1866).

simply be uprooted on the whim of the president. But while most presidents have generally found no need to act contrary to the Constitution (or at least presidents have made plausible arguments that their actions were not contrary to the constitution), there have been some instances when a president has found it necessary to ignore the Constitution all together in favor of taking measures to repel a certain threat. This approach to law in crisis was most famously articulated by John Locke in his formulation of the prerogative power. In his Second Treatise on Government, Locke wrote the following:

> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative. For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all Persons, that may come in their way, therefore there is latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.[6]…[P]rerogative can be nothing, but the people's permitting their rulers, to do several things of their own free choice, where the law was silent, and sometimes too against the direct letter of the law, for the public good; and their acquiescing in it when done."[7]

Thus, Locke considered it best for an executive officer to be able to do whatever he deems is necessary to ensure the best public outcome. The language of prerogative power might remind the reader of the presidential Oath in Article II, and several presidents in the past have used such claims for taking bold actions to address a given threat.

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[7] Laslett, Peter ed. *Locke: Two Treatises on Government*, (Cambridge: Cambridge University Press, 1988) p,375.

These two methods of interpretation leave us with a fairly confusing conception of the relationship between the President and the Constitution. On one hand, the President is obligated to abide by the laws of the Constitution. But on the other, one might reasonably interpret parts of the Constitution as allowing the President in certain circumstances to violate parts or the whole of the Constitution in order to protect the countr. What will be revealed through the analysis of subsequent studies is that presidents generally exercise their prerogative through the legislative sanction of Congress. Specifically, when the nation is combating a threat, Congress usually passes some law that allows the president to exercise a certain degree of discretion in matters pertaining to the execution of the war effort. During the Cold War, for example, we see Congress pass military force authorizations like the Gulf of Tonkin resolution, which gave the President broad discretion to use military force overseas in the absence of a formal declaration of war.

Having discussed the theoretical foundations of the case studies, it is now appropriate to proceed to the cases themselves, beginning first with the Civil War.

Chapter II

The Civil War

Lincoln's Response Measures

President Abraham Lincoln had been in office a little over one month before the first volley of Confederate artillery was fired at Fort Sumter on April 12, 1861. Since the ratification of the Constitution in 1787, the nation had only been involved in comparatively minor engagements such as the War of 1812. The Civil War provided the Constitution its first test during a major conflict. And unlike other crisis presidencies that would follow his, Lincoln did not have the luxury of precedent to look toward in guiding his response. Lincoln's response is particularly interesting within the overall narrative of the American war powers because there was very little precedent to which he could look towards for guidance. He was thus forced to take action based solely upon his own interpretation of his powers under the Constitution and not upon the interpretations given by those before him.

Despite his relative uncertainty, Lincoln was quick to take action. Over the months following Fort Sumter, Lincoln took many bold and constitutionally questionable actions in order to combat the threat posed by the Confederacy. Speaking generally about these actions, Lincoln said in an explanatory message to Congress on May 29, 1862 that

> It becomes necessary for me to choose whether, using only the means, agencies, and processes which Congress had provided, I should let the Government fall at once into ruin or whether, availing myself to the broader powers conferred by the constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age and for posterity.[8]

[8]Gross, Oren and Fionnuala Ní Aoláin. "*Law in Times of Crisis: Emergency Powers in Theory and Practice*, (Cambridge: Cambridge University Press, 2006), 48.

Lincoln thus understood the Constitution as endowing him with the duty of protecting the nation by any means necessary. He did not believe that the Constitution restrained him from taking the necessary actions to provide for the national defense. Lincoln's statement above shows his resolve in implementing the broad and undefined executive powers of the government as a means of crisis response. Lincoln demonstrated that the executive powers of the president are indeed expansive, capable, and allow, in certain circumstances, the temporary usurpation of congressional power.

Calling Forth The Militia and Arranging a Special Meeting with Congress - April 15, 1861

Lincoln's first act in response to southern rebellion was to issue a presidential proclamation on April 15, 1861 – three days after the attack on Fort Sumter. The actions taken through this proclamation were twofold. Lincoln first called forth the usage of the armed forces of the States and arranged for a special meeting of Congress to take place on July 4 of that year.

> Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several States of the Union to the aggregate number of 75,000 in order to suppress said combinations and to cause the laws to be duly executed.
> …
> Deeming that the present condition of public affairs presents an extraordinary occasion, I do hereby, in virtue of the power in me vested by the Constitution, convene both Houses of Congress. Senators and Representatives are therefore summoned to assemble at their respective chambers at 12 o'clock noon on Thursday, the 4th day of July next, then and there to consider and determine such measures

> as, in their wisdom, the public safety and interest may seem to demand.[9]

Lincoln's calling forth of the militia of the several states was a usurpation of Congress' powers under Article II §8 which states that Congress shall have the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Consistent with the rationale he gave a year after this presidential proclamation, it was Lincoln's full intention to seize powers from Congress in order to administer an effective response measure. In the absence of an emergency session of Congress, he mobilized the armed forces of the Union in a quick, decisive manner in the absence of any congressional authorization whatsoever. It is important to note also that, in seizing power from Congress, Lincoln used that power likely in the same way that Congress would have if it had been in session. This is an important observation to note of Lincoln's response because it shows that his usage of the executive power is not simply arbitrary, but a calculated measure which embodied the kind of executive actor sought by Hamilton when he argued for an energetic executive capable of concentrating the powers of the country under a single hand. In the time between the attack on Fort Sumter and the July 4 meeting of Congress, Lincoln was temporarily both the giver and the executor of law.

Instituting a Blockade - April 19, 1861

Four days after his initial proclamation, Lincoln issued another proclamation that instituted a blockade of ports in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas until the convention of Congress on July 4, 1861.

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[9] John T. Woolley and Gerhard Peters, "The American Presidency Project." Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). < David Greenberg, "Lincoln's Crackdown," *The Slate*, November 30, 2001, (accessed 2009).>.

> Whereas a combination of persons engaged in such insurrection have threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas and in waters of the United States;
> …
> Now, therefore, I, Abraham Lincoln, President of the United States, … have further deemed it advisable to set on foot a blockade of the ports within the States aforesaid, *in pursuance of the laws of the United States and of the law of nations in such case provided.* For this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. [Italics added][10]

The italics in the second section are particularly interesting because he invokes both the laws of the United States and the law of nations. Lincoln considered the southern rebellion to be simply that – Americans in the south of the United States who are rebelling against the Union government. As such, these citizens would be liable for their act of rebellion under the laws of the United States.

Lincoln also referred to the laws of nations, which runs contrary to his determination of the Confederacy as a group of citizens in rebellion. If Lincoln were to consider them otherwise – perhaps as their own nation-state – he would be implicitly recognizing the southern states as a separate sovereign entity. Given his interest in suppressing the rebellion and returning those states to the Union, it is unlikely that Lincoln was invoking the law of nations against the southern rebellion. Instead, he likely invoked the laws of nations in order to claim the authority to block foreign ships from entering the southern ports and to seize them if appropriate. After the blockade went into effect, several foreign ships were actually seized and their cargo taken. These foreign vessels, together with their domestic counterparts, filed

[10] John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). <http://www.presidency.ucsb.edu/ws/?pid=70101>.

suit against the U.S. government and this dispute later became the substance of *The Prize Cases,* which are discussed later in this chapter.

To a minor degree, this nuance of invoking the laws of war perhaps is another indication of how Lincoln was defining and using his executive power under the Constitution. Through this action, Lincoln asserted that his executive powers allowed him to make some claim of authority against other nations, even if the conflict at hand was of a purely domestic nature.

Suspending Habeas Corpus - April 27, 1861

In response to a protest of approximately 20,000 Confederate sympathizers which was hindering the travel of Union soldiers[11], Lincoln issued the following Executive Order:

> The Commanding General of the Army of the United States:
>
> You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military, line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ.[12]

The Constitution states in Article I §9 that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Because of the fact that this provision is located within the section that defines the powers of the legislature, one might assume that the power to suspend the writ is something to which the legislature has an exclusive right. But

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[11] Greenberg, David. "Lincoln's Crackdown." *The Slate.* November 30, 2001. James D. Richardson, *Messages and Papers of the Presidents*, Vol. VI (Washington, 1897)..

[12] John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). <http://www.presidency.ucsb.edu/ws/?pid=69748>.

this is confounded to some extent by the fact that nowhere in the constitution does it say that the president *cannot* suspend the writ of *habeas corpus* as part of his executive powers. Perhaps also Lincoln could have argued that his powers as commander in chief of the army and navy applied here because he was doing it in order to ensure the efficient passage of troops through the areas in question. Indeed, the latter interpretations would be commensurate with the Hamiltonian conception of the president that was argued before. In this time of great crisis, Lincoln had taken the powers of government into a single hand in order to administer the most robust response. Nevertheless, Lincoln's decision to suspend the writ generated intense debate in the judiciary. Some of the individuals who were arrested under this order subsequently filed petitions for the writ in the Supreme Court, and such is the substance of the cases *Ex Parte Merryman* and *Ex Parte Milligan*, which are discussed later in this chapter.

Activating Volunteer Service and Expanding the Army and Navy - May 3, 1861

The last major component of Lincoln's initial response to the rebellion was both to activate the volunteer service and to expand the size of the army.

> Now, therefore, I, Abraham Lincoln, President of the United States and Commander in Chief of the Army and Navy thereof and of the militia of the several States when called into actual service, do hereby call into the service of the United States 42,034 volunteers to serve for the period of three years, unless sooner discharged, and to be mustered into service as infantry and cavalry…
>
> And I also direct that the Regular Army of the United States be increased by the addition of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery, making altogether a maximum aggregate increase of 22,714 officers and enlisted men…

> And I further direct the enlistment for not less than one or more than three years of 18,000 seamen, in addition to the present force, for the naval service of the United States.[13]

Here again one finds that Lincoln acted on questionable constitutional grounds regarding powers usually exercised by Congress. Article I §8 states that Congress has the power "to raise and support armies," "to provide and maintain a Navy," and to "provide for organizing, arming and disciplining the Militia." By actively recruiting soldiers and by increasing the size of both the army and the navy, Lincoln was again taking actions that in normal circumstances would be exercised by the Congress. Again, from the perspective of the constitution, it is fairly ambiguous as to whether the location of the "power to raise and support armies" vests this power solely within the legislature, or if this power can be available to the executive in such a manner as is done here. This proclamation was the last major executive war action before the July 4 meeting of the Lincoln and Congress. If Congress decided that Lincoln's temporary assumption of power between April and July had been unconstitutional, they would have the opportunity to rebuke him at this time.

The July 4 Congress - July 4, 1861

Lincoln's July 4 address to Congress is an absolutely crucial when considering his response to the southern secession because it proves that he took seriously the opinion of Congress. This meeting took place almost two and a half months after the initial attack. One might argue that perhaps this meeting could have taken place much sooner, but it must be kept in mind that the world moved much more slowly in 1861. It would have taken a rather long time for the members of

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[13] Woolley, John T. and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). http://www.presidency.ucsb.edu/ws/index.php?pid=70123

Congress to all convene in Washington and therefore it would not have been possible to convene at an earlier time. In the interim, Lincoln had taken measures that are generally reserved to the Congress when the government is functioning normally. The objective of this speech was for Lincoln to fully reveal the actions he had taken and to provide the rationale for why he had done so.

Lincoln started his speech by recounting his actions and the specific events that precipitated them. He then moved into the legal-theoretic significance of the problems by arguing the following:

> And this issue embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic, or democracy…can or can not maintain its territorial integrity against its own domestic foes. It presents the question whether discontented individuals, too few in numbers to control administration according to organic law in any case, can always…break up their government, and thus practically put an end to free government upon the earth. It forces us to ask, Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its own people, or too weak to maintain its own existence? So viewing this issue, no choice was left but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation.[14]

Posing these fundamental questions, Lincoln posed himself as a defendant at trial who was forced to take action to defend the Union in the name of all republican democracies – to prove that constitutional democracy is a robust model for statehood. Putting the crisis in this perspective, Lincoln attempts to show his view of the challenge ahead of him. His response was to "call out the war power of the Government." It is crucial to note that Lincoln refers to the war power as being something concrete and capable of being invoked in a time of crisis. The Constitution, however, never articulates any such 'war power,' nor is such a power

[14] Richardson, James D. *Messages and Papers of the Presidents* (Washington, 1897), VI, p23.

vested in the executive or in any other branch. But it is likely Lincoln considered the war powers as being apart of his position as the executive officer of the nation. He believed that the powers of the government are something to be implemented not solely by a particular part of the government, but the government as a whole. And given his powers as President, he took the war powers under his control in order to combat the southern rebellion.

Regarding the question of the legality of his actions, specifically regarding his decision to expand the army and call for volunteers on his own initiative, Lincoln argued the following:

> These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.
> …
> The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by use of the means necessary to their execution by some single law, made in such extreme tenderness of the citizens liberty that practically it relieves more of the guilty than the innocent, should to a very limited extent be violated. To state the question more directly, Are all the laws *but one* to go unexecuted, and the government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?[15]

In the above excerpts, Lincoln's central argument was that, in some cases, the appropriate response to a threat may necessarily require that some portion of the laws be broken if the end is to preserve the rule of law as a whole. This argument, though not unique to constitutional crisis theory, is intriguing because of the way in which he

[15] Ibid., p24-25.

presents it. In the first paragraph, he mentioned that he believed that he has done nothing which was against the public will and that Congress would have readily done the same if they had been in session.

Lincoln continued arguing that he was acting 'in the spirit of Constitutionality' by stating that it is sometimes necessary for government actors to be willing to break certain laws in order to preserve the rule of law and the Constitution. If the President were to be *unwilling* to make such a decision in a situation like the southern rebellion, he would violate the presidential Oath to protect the Constitution. In the final paragraphs of his argument, Lincoln issued an apology of sorts and submits himself to the will of Congress:

> It was with the deepest regret that the Executive found the duty of employing the war power in defense of the Government forced upon him. He could but perform this duty or surrender the existence of the Government. He could but perform this duty or surrender the existence of the Government. No compromise by public servants could in this case be a cure; not that compromises are not often proper, but that no popular government can long survive a marked precedent that those who carry an election can only save the government from immediate destruction by giving up the main point upon which the people gave the election. The people themselves, and not their servants, can safely reverse their own deliberate decisions.
>
> As a private citizen the Executive could not have consented that these institutions shall perish; much less could he in betrayal of so vast and so sacred a trust as these free people had confided to him…In full view of his great responsibility he has so far done what he has deemed his duty. You will now, according to your own judgment, perform yours. He sincerely hopes that your views and your action may so accord with his as to assure all faithful citizens who have been disturbed in their rights of a certain and speedy restoration to them under the constitution and the laws. [16]

This last portion of Lincoln's address is perhaps one of its most significant portions because it captures the broader essence of the meaning the speech itself was meant to

[16] Ibid., p31.

convey. In the first paragraph, he refers to his regret for 'employing the war powers,' which affirms his usage of war powers as an act done on the behalf and in the best interests of the Union government and the Constitution. But more importantly, by prompting Congress to 'perform their duty,' Lincoln called upon the Congress to reassume their control over the implementation of the war powers to combat the southern rebellion. At every step of the way, Lincoln was fairly ambiguous about illegality of his actions, but by explaining the rationale for his actions, Lincoln nevertheless asked for Congress's *ex post* ratification.

Emancipation Proclamation - January 1, 1863

After the July Fourth meeting with Congress, Lincoln worked in much closer concert with Congress than before. On August 6,' 1861, Congress passed the First Confiscation Act, which formally declared that the President may, at his discretion, authorize his officers to seize and capture as prize any property used for the purpose of rebellion against the United States. This act ratified prior actions for which Lincoln did not have Congress' authorization such as his implementation of the blockade and his authorization for authorizations to seize cargoes of southern ships. The First Confiscation act is also fairly typical of the way Congress interacts with the executive branch in times of crisis. It is often the case that, when implementing the war powers, Congress allows the president to use them at his discretion.

On July 17, 1862, Congress passed a similar, but much more robust Second Confiscation Act, which further affirmed and articulated the President's right to seize

property of those participating in the rebellion.[17] Additionally, Section 9 of the Second Confiscation Act authorized the army to free slaves of individuals who were involved in rebellion against the United States – a move which directly contradicted the 1857 *Dred Scott* ruling by the Supreme Court which asserted that Congress was unable to pass laws concerning slavery because slavery was deemed to be an issue of state's rights. The latter fact, in and of itself, is a bold statement regarding the power of the judiciary because it shows that the judiciary is relatively powerless against a determined executive branch. This conflict will become clearer in our examination of *Ex Parte Merryman* later in this chapter.

The Confiscation Acts establish that, indeed, it was of the opinion of Congress that the executive's ability to seize property (and therefore slaves) from the rebels was a necessary capability for the successful prosecution of the war. Subsequent to this, Lincoln used the Second Confiscation Act as legal justification to issue the Emancipation Proclamation on January 1, 1863.

> Now, therefore I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States…do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.[18]

The Emancipation Proclamation is a significant expression of congressionally delegated executive war power because, surely, the act of freeing slaves presented a

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[17] Full text of The First and Second Confiscation Acts can found at the Freedmen and Southern Society Project. University of Maryland. University of Maryland, "The Confiscation Acts," *Freedom and Southern Society Project*, http://www.history.umd.edu/Freedmen/index.htm. *The Prize Cases*, 67 U.S. 635 (1862). *Ex Parte Merryman*, 17 F. Cas. 144 (1861).

[18] Woolley, John T. and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). http://www.presidency.ucsb.edu/ws/index.php?pid=69880

clear military advantage to the Union war effort, but it also shows that the war power can applied broadly towards ends that are not directly related to national security. The Emancipation Proclamation also has direct links to the cause of abolition – something that had been a major point of contention between the southern and northern states in the years before war broke out. Legislative attempts to limit slavery, such as the law that prohibited slavery in federal territories that was overturned in *Dred Scott,* had run into severe obstacles before the outbreak of conflict that rendered it difficult for abolitionists to make headway on this issue. But after the outbreak of war, the political cause of abolition became a military necessity, which allowed Union leaders to implement their cause by force. One can imagine that Lincoln, if he were of another moral persuasion, could just as easily have issued a proclamation stating that all slaves captured by the Union army became property of the United States and used in ways that promoted the northern war effort, but this was not his primary aim. He likely would have allowed slavery to persist after the war, if he had thought that a peaceful solution to the issue could have arose from it. Instead, the act of freeing slaves was effective means of conducting the war effort against the south that also had political benefits that came about as a result.

Judicial Reactions to Lincoln's Response

Lincoln's overall response to southern secession established bold precedents for the behavior of the government during a major war. Both Congress and the President assumed different, but complimentary roles that allowed the Union to effectively combat the rebellion. This response generated a number of important legal issues which prompted the Supreme Court to make several landmark decisions about

the usage of the war powers in crises. The most ardent challenges against Lincoln were his orders authorizing military officers to make seizures of private property and his order to suspend *habeas corpus.* His order authorizing seizures of property was debated in *The Prize Cases*, a set of cases brought before the Court by owners of ships whose cargoes were seized after the institution of the blockade. Lincoln's suspension of *habeas corpus* was debated most significantly in *Ex Parte Merryman* and *Ex Parte Milligan,* which were brought to the Court by individuals who had been arrested and detained without charge.

The Prize Cases (1862)

After Lincoln's April 19, 1861 order to blockade southern ports, a number of ships were seized by the United States Navy and their cargoes were taken as prize. In response, the ship's owners sued, claiming principally that, in order for there to be a just capture of goods as prize, the country must be in an actual state of war. And since Congress, the only body of the government that is constitutionally capable of declaring war, had not issued a formal declaration of war, the seizure of their vessels amounts to illegal piracy. This argument was fundamentally rejected by the majority, who argued that a state of war could exist even in the absence of a formal declaration of war by Congress. On the subject, Justice Grier states the following:

> Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents-the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

> …
> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral."[19]

The existence of war was thus affirmed in the absence of a formal declaration of war by Congress. This ruling by the Court adds legitimacy to our prior interpretation about how Lincoln's use of the war powers was characterized by a temporary assumption of the whole powers of the government when the Congress was unable to respond. Essentially, by saying that a state of war could exist without Congress' formal declaration, the Court supported Lincoln's ability to make such a determination on his own and to administer a response appropriately. Furthermore, as Grier articulates, it is not only the President's ability, but it is his *duty* "to resist force by force." The Court also affirmed "that the President had a right, jure belli, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard."[20] It is worthy to note also Grier's usage of *jure belli* in his affirmation. He is saying essentially that, in accordance with the laws of war, Lincoln was justified for having exercised a war action in attempting to quell armed belligerents.

The second objection made by the petitioners was that some of the owners of the vessels identified themselves as neutrals, and that they were not subject to the seizure according to the laws of war. The Court dismissed this swiftly, arguing:

> Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the

[19] *The Prize Cases.* 67 U.S. 635 (1862).
[20] Ibid.

> illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. The owner, *pro hac vice*, is an enemy.'
>
> The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory.[21]

Therefore, even if the person from whom the property is confiscated is neutral in the conflict, if their property can be construed as contributing to the commerce of the enemy, it can be subject to legal capture. Allowing the seizure of property in such a manner gives expansive power to the executive in determining the kinds of goods that may legally be captured by the executive in a crisis. Surely, it does not take much imagination to consider what kinds of goods may be subject to seizure when the court affirms that the government is justified in capturing "other property engaged in the commerce of the hostile power." This could include farm equipment, shops and stores, private residences, and, of course, slaves, if it was seen to somehow be contributing to the Confederate war effort. In this case, the utility and efficacy of the blockade is fairly straightforward and clear. The southern economy relied on the export of agricultural goods, and by disrupting that commerce the Union forces were able to gain an advantage over their adversaries.

Ex Parte Merryman (1861)

Following Lincoln's April 16,' 1861 order to suspend habeas corpus, Lieutenant John Merryman, a citizen of Maryland, was alleged to have been involved in the training of Confederate soldiers When this was discovered, he was removed

[21] Ibid.

from his home without warrant, detained at Fort McHenry in Baltimore, and held without proof or formal charge. Merryman subsequently filed a petition for a writ of *habeas corpus*. *Habeas corpus* is a constitutionally protected right of citizens that forbids the detainment of citizens by institutions acting without the proper authority. Merryman made the argument that his detention was unlawful because the executive branch has no constitutional authority to authorize such a suspension. Agreeing with Merryman, Justice Taney argued the following:

> [The president] is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person 'shall be deprived of life, liberty or property, without due process of law' that is, judicial process…
>
> The only power, therefore, which the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution ….With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.[22]

The Supreme Court maintained that Lincoln's suspension of the writ was indeed in violation of the Constitution. And, given the circumstances of the case, the rationale for Taney's decision is straightforward enough. The Constitution vests the power of

[22] *Ex parte Merryman*, *17 F. Cas. 144* (1861)

suspending the writ in the legislature and in no other branch. According to the court, Lincoln violated the Constitution when he issued his April 27 executive order. But what is interesting about this case is not its rationale for the decision, but the events that followed it. Lincoln simply ignored Taney's decision and waited until his July 4 address to clarify his actions. The implications of this are dramatic because it shows that even if the Court rules that some presidential activity is unconstitutional, this case suggests that the Court cannot do anything to stop it. This perhaps shows the extent to which the judiciary's restraint over the executive is really minimal in exercises of the war powers. The Court has very little ability to *force* the president to do, or to not do anything. Lincoln refused to obey the Courts ruling and continued suspending the writ of *habeas corpus* throughout the following year.

But perhaps Lincoln was justified in behaving in the way he did, despite Taney's arguments to the contrary. For one, there is nothing in the Constitution that expressly forbids the president from suspending the writ. Lincoln has much the same claim to suspend *habeas corpus* as he does to increase the size of the army or to institute a naval blockade during a time of war. All of these actions can be reasonably construed as legitimate expressions of the executive power at a time when the legislature was unable to address the issue. In essence, the suspension of *habeas corpus*, as exercised by Lincoln in this case, is no different from these actions from the perspective of the executive power of the president. Eventually, on March 3, 1863, Congress passed a law that legalized suspensions of the writ at the discretion of the president, which effectively ended the legal debate over the president's ability to suspend the writ in the context of the Civil War.

Ex Parte Milligan (1866)

After the end of the war, another *habeas* petition was filed by Lambdin B. Milligan of Indiana, a member of a group sympathetic to the Confederacy called the Knights of the Golden Circle. Milligan was arrested on October 5, 1864, tried by a military tribunal, and sentenced to death on charges of conspiracy, affording aid to rebels, inciting insurrection, disloyal practices, and violation of the laws of war.[23] This case is a bit different than the case of *Ex Parte Merryman* because the central question was not specifically about the writ, which had been suspended by the law passed on March 3, 1863, but the use of military commissions to try, convict, and sentence citizens in a situation where the civil courts were open and functioning. Milligan filed a petition of *habeas corpus*, arguing along these lines that the military commission that tried him had no jurisdiction over his case. The majority agreed with him, on that point and Justice Davis, speaking for the majority, argued the following:

> Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of judicial power of the country was conferred on them…
>
> [I]t is said that the jurisdiction is complete under the 'laws and usages of war.' It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. … One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained

[23] "The Milligan Case" *The New York Times*. June 5, 1871 http://query.nytimes.com/mem/archive-free/pdf?res=9501E6D91739E43BBC4D53DFB066838A669FDE

> and established by Congress, and not composed of judges appointed during good behavior.[24]

The argument made here is essentially that, because the courts of Indiana were open at the time of Milligan's arrest, there was no constitutionally justifiable reason for Milligan's case to be adjudicated by a military commission. Milligan's status as a citizen of Indiana, in addition to the fact that he was neither an active belligerent in arms against the Union nor was he a resident of any of the states in rebellion, render him ineligible for trial by military commission. The government attempted to justify its actions by arguing that "in a time of war the commander of an armed force has the power… to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will."[25] But the Court replied that this is a wholly untenable proposition, that the laws are in effect and have influence even during a time of war, and that, were the opposite to be true, it would mean that republican government "is a failure."[26] The court made no issue of the fact that *habeas corpus* had been suspended.

The crucial lesson to be learned from *Milligan* is the argument made by Justice Davis regarding the applicability of laws during both times of peace and times of war. Davis makes one of the strongest and most ambitious arguments regarding the function of the Constitution in times of crisis. He states,

> [The founders] knew - the history of the world told them - the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty

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[24] *Ex Parte Milligan* 71 U.S. 2 (1866) John George Nicolay and John Hay, *Abraham Lincoln: A History*, Vol. VI (New York, 1890). Michael Howard, *The First World War* (Oxford: Oxford University Press, 2002). *U.S. v. Curtiss-Wright*, 299 U.S. 304 (1936).
[25] *Ibid.*
[26] *Ibid.*

> reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.[27]

Justice Davis is adamant that the Constitution has certain provisions within it that, in a time of crisis, are vital to the survival of the nation as a free republic based on liberal values. In this case, it seems that the inviolable right was the right of citizens to be tried and sentenced by the proper judiciary body. But, as noble and beautifully crafted as Davis's argument is, one must ask, is it persuasive? Perhaps he is right that there are very few instances that would justify outright violation of the Constitution. But our exploration of the war powers thus far seems to indicate that, through vigorous assertions of the executive power, constitutional provisions can be relaxed and bent to a great deal. After all, we have outlined a two and a half month period where Lincoln assumed the powers of the whole government upon himself. Nowhere in the Constitution is such an approach condoned, mentioned, or even vaguely referred to. Lincoln's approach to the war powers was derived almost solely upon the Article II §1 clause that states "the executive Powers of the government shall be vested in a President of the United States of America." Therefore, while Davis maintained that the Constitution is at all times applicable, one might agree with it in principle, but add that under different circumstances, the Constitution is applicable to varying degrees. As Lincoln demonstrated and Grier affirmed in *The Prize Cases*, the president is sometimes bound to use whatever means necessary to repel that force even if those means are constitutionally questionable. Thus, certain constitutional rights, such as the right to be free from undue search and seizure of property and the

[27] Ibid.

right to *habeas corpus*, may be temporarily suspended in such grave instances in order to protect the Constitution as a whole.

An Interesting, Yet Relevant Aside to the Milligan Case

Milligan' sentence was ultimately commuted on June 2, 1865 and he was released by the direction of the War Department. Milligan, likely angry about his imprisonment and near-hanging, sued the officers and soldiers who had made the arrest. The court overseeing that case demanded that the military officers produce some kind of evidence that their arrest was made in a theater of conflict – the only way that their action would have been justified. The officers predictably could not provide any and Milligan won the case and was awarded a settlement of $5.[28] This result provoked a very interesting commentary in the *New York Times* that may seem strikingly similar to what one might hear in present times as justification for the actions of military officers acting supposedly in the cause of duty:

> Northern sympathy with the cause of the rebels had strengthened rebellion and prolonged the war. Strong measures were needed to crush this dangerous sentiment. It was as necessary, in order to conquer the rebellion, that this sympathy should be paralyzed as that the slaves should be emancipated. An example was needed in Indiana to prevent the success of a powerful conspiracy. Gen. Hovey wisely chose for this example one of the principal offenders and with equal wisdom the Military Commission, when satisfactory proofs of the offenses charged against Milligan had been made, sentenced him to death. This prompt action and severe sentence crushed the conspiracy, saved the life of Gov. Morton, prevented the release of the rebel prisoners from being attempted, and gave Indiana security against future rebel raids. If the plans of Milligan and his confederates had succeeded, a rebel army would have been admitted into the north-western States through the gate of Indiana, thousands of lives would have been sacrificed, and millions of property destroyed. This scheme was rendered impossible by the vigilance and decision of Gen. Hovey and his military associates. These officers acted in the line of their

[28] "The Milligan Case" The New York Times. June 5, 1871

> duty and in obedience of their superiors. If for this they are liable to be dragged before Courts, mulcted in fines, and, perhaps, imprisoned, then the country is without power for self-preservation, and treason can be plotted, enemies aided, and assassinations of faithful public officers contrived on the outer edge of the circle of war without fear of punishment.[29]

This is an interesting perspective into the sentiments surrounding both the *Milligan* case and, more generally, the North's handling of the Civil War. Much of this language is familiar to the contemporary reader – mentions of pervasive existential threat, swift action provoked by necessity, and justice administered in an unusual but appropriate manner within the context of the larger crisis. The writer of this article adamantly supported Milligan's trial by military commission and its subsequent verdict both as a means of administering justice as well as setting an example for other groups sympathetic to the Confederacy. Additionally, the writer vigorously defended the immunity of the military officers for acting with 'vigilance' in response to the situation despite the fact that trial in civil courts by constitutionally prescribed methods is a guarantee to all citizens. This writer willingly supported the violation of that guarantee in the interests of security. The South seceded and threatened the solvency of the Union, but was reigned in by strong and capable actors who were willing to do everything possible to assure victory and reestablish security. In this case, it seems that some were willing to accept the fact that laws were bent, if not broken and certain civil liberties were constrained in the interest of obtaining victory and maintaining security.

One finds that a general acceptance of stiff measures against a threatening enemy is common during a conflict. In this and later cases, we see that people are

[29] Ibid.

often eager to administer punishment against those who are deemed to be the source of the threat against them. Indeed, the desire to vigorously punish one's enemies is human nature. There is, however, a danger of using the government as an instrument of retaliation or as a means of 'setting an example,' because sometimes the desire to administer strict punishment against enemies oversteps its purpose. This becomes especially true when we examine the Japanese internment during World War II, when the attacks on Pearl Harbor led to a great deal of paranoia and even resentment among people who considered Japanese-Americans living on the west coast to be a threat to national safety in the absence of evidence indicating such.

Aftermath of the Civil War

As mentioned at the beginning of this section, the Civil War was America's first experience with a major war, and much can be learned from the way the Union government responded. First, President Lincoln consolidated the powers of government under his own hand and unilaterally directed the response to the southern rebellion between April 15 and July 4, 1861 without the authorization or approval of Congress. After July 4, he worked collaboratively with congress by exercising powers given to him by new legislation. As our first examination of the use of the American war power, what impression does Lincoln leave on the legacy of its usage?

One finds that the first sentence of Article I §1 of the Constitution – "that the executive Power of the government shall be vested in a President of the United States of America" – was remarkably influential to Lincoln's approach to the war power. He believed that it was his duty to respond to the threat in whatever way he thought to be both effective and necessary even without the prior authorization of Congress.

Indeed, it that Lincoln reasoned that that the executive power of the constitution enabled him to take the collective war powers of the government into his own hand and to administer them appropriately so as to best mitigate the threat. Lincoln himself said that "As Commander in Chief of the Army and Navy in time of war I suppose I have a right to take any measure which may best subdue the enemy."[30] Lincoln is a powerful example of executive management of the war power that firmly establishes the executive as the branch of government most suited to responding to violent conflicts. But it is important to note also that Lincoln accorded the Congress a great deal of respect in his exercise of the war powers. His July 4 request for Congress to do their duty and implement the war powers prompted a generally compliant response from Congress. They passed legislation such as the Confiscation Act and the act authorizing suspensions of *habeas corpus.* These allowed Lincoln to act much as he did before July 4, but his actions were much more legitimate once they were sanctioned of law. The difference between this Congress and the congresses that will be examined later is that the Lincoln-era Congress made it's authorizations one by one. This is much different than the laws of later Congresses that made broad authorizations which placed a great deal of power upon the discretion of the president. A good example of this is the Gulf of Tonkin Resolution passed in 1964, which allowed the president to take all necessary measures to carry out the war effort in south Vietman. The authorization acts of the Civil War were much more specific in nature, which allowed congress greater control of the president's behavior as a result. By authorizing activities one by one, Congress is able to more carefully examine the activity proposed and to deliberate over its efficacy and prudence.

[30] Nicolay and Hay. *Abraham Lincoln, a History* (New York, 1890), VI, p. 155-156.

On a related note, one finds also that Congress was very supportive of the Lincoln's initiatives and was generally forthcoming with authorizations for proposed actions. This is a theme that will be pervasive throughout our narrative of the war powers. It is a very rare occasion that Congress denies the president of a certain ability during a time of war. Perhaps in agreement with Hamilton's conception of the energetic executive, Congresses prefer to give the president the ability to act decisively in response to threats against the nation or its interests. This trend is especially prevalent in the next section to which we now turn our attention, World War II.

Chapter III

World War II

The Prewar Actions

Moving forward some eighty years, we now turn to the Second World War. Much had changed since Lincoln's time, particularly with respect to the kinds of crises and threats that the world then faced. The most obvious difference between the climate of the Civil War and the climate of World War II was the fact that the latter was an overseas conflict. The implications of global conflict are profound in relation to the Constitution and the exercise of war powers because while the executive branch has great deal of control when repelling domestic threats such as the southern rebellion, the executive has even more control over fighting threats abroad. In the Constitution, the only powers which are mentioned in Article I §8 about Congress's role in foreign affairs are those clauses which assert that Congress has the power to regulate commerce with other nation and that Congress has the power to declare war. The only other mention of Congress in foreign affairs in the Constitution is in Article II §2 where it says that two thirds of the senate must agree with the President when the nation enters a treaty. Primarily though, the majority of the powers given to Congress in the Constitution are powers that give them control over domestic affairs. Of course, as was seen in the last chapter and will also be seen extensively in this chapter, Congress does have a role in foreign affairs insofar as they pass laws that authorize the president to carry out the war powers of the government.

Also, the nature of warfare in the World War II era was markedly different than it was during Civil War. The invention of aircraft, armed naval fleets, and machine guns had rendered armed conflict much different than it had been during the Civil War. This beckons one to ask whether armed conflict in its faster paced,

broader, and more lethal form renders the role of the Constitution fundamentally different than at the time of the Civil War. One will find that the relationship between the legislature and the executive remained similar during World War II, but that the Congress was noticeably more willing to delegate power to the president than the Lincoln-era Congress. This is likely due to the sheer fact that the nature of World War II conflict required a much more able executive because the nature of warfare was faster-paced and more lethal. Within the general scope of the evolution of war powers, World War II was a conflict that cemented the preference in American government for an energetic executive and a deferential legislature in the realm of foreign armed conflict.

Before beginning the discussion World War II, it is worth mentioning the historical context from which it arose. Obviously, the most serious crisis faced by the United States after 1865 was World War I. Unlike the Civil War, which was precipitated by a singular attack on Fort Sumter, U.S. entry into World War I was slow, reluctant, and precipitated by a series of smaller incidents which, together, constituted a necessity for involvement in the already two-year old conflict. By the time of American entry into the war, Russia had been defeated, and Germany was making significant advances along the western front in France. It was understood then that, without American involvement, the conflict would see to the defeat of America's strategic allies. However, the nature of World War I, from the standpoint of the war powers, was much less pressing than either the Civil War or World War II. Other than perhaps the German torpedo attack on the RMS Lusitania, a British luxury liner on which many Americans were killed, there was no single strike upon Americans or

American interests that shocked the country into action. Indeed, most citizens were content to remain out of the conflict altogether. This lack of urgency can perhaps best be seen in then President Woodrow Wilson's general posture toward the war powers. Regarding the question of obtaining congressional authorization for instituting 'armed neutrality,' the arming of American merchant vessels traveling in the Atlantic before the U.S. entered the war,[31] Wilson asserted that he already had the authority to do this

> …by plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and the power of Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it.[32]

If the situation had been more pressing, one might imagine that Wilson would have invoked his executive authority as he suggests in the first sentence. Instead, he felt that there was time enough to consult Congress and allow them to give him the proper authority. During the World War I era, Wilson seems to have been generally eager to maintain a rapport with Congress and to obtain their blessing before acting.

After World War I, the United States sought isolation from world affairs and strictly to remain out of armed conflict. Cordell Hull, Franklin D. Roosevelt's Secretary of State, was quoted as saying that United States foreign policy was centered around one maxim: "keeping this country out of war."[33] One historian has claimed that "Americans had been deeply affected by the experience of intervention in the First World War which they came to see as an unnecessary sacrifice on behalf of an ungrateful Europe."[34] Additionally, Roosevelt was promoting and implementing

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[31] Howard, Michael. *The First World War*. (Oxford: Oxford University Press, 2002), p.94.
[32] Schlesinger, Arthur. *The Imperial Presidency.* (Boston: Houghton Mifflin Co., 1973), 92.
[33] Overy, R.J. *Origins of the Second World War.* (New York: Longman, 1998), p22.
[34] Ibid.

his New Deal, which turned America's focus inward and away from world affairs. But the turmoil brewing in Europe, just as in the past, would grow to proportions that made it an unavoidable issue. Indeed, unlike World War One, the conflict exploded violently in the faces of the American people on December 7, 1941 at Pearl Harbor in Hawaii. What was felt was a sense of urgency in the face of severe threat even greater than that posed by the Civil War. Roosevelt acted boldly and Congress was unwaveringly compliant throughout. One also sees that the posture of the judiciary is much more supportive of the president during this conflict. Over the course of several landmark cases, one sees the judiciary generally supporting the right of the executive to take firm control over the government in the exercise of the war powers in a time of conflict. We now turn our attention to the first of those cases.

U.S. v. Curtiss Wright Corp (1936)

While the U.S. seemed bent on asserting that it would be indifferent to world affairs during the interwar years, it nevertheless seem interested in promoting peace in various world conflicts. On May 28, 1934, Congress thought it prudent to pass a resolution which gave the President the power to prohibit the sale of arms and munitions to South American countries involved in the Chaco War. Days later, the president issued a proclamation which made effective the prohibition of arms sales to affected countries. Such prohibition was effective until November 14 of the following year, when, by proclamation, Roosevelt lifted the prohibition. The Curtiss-Wright Corporation (CWC), was indicted on the grounds that it had violated the prohibition against sales of arms by selling weapons to Bolivia, and that it was subject to

appropriate punishment. CWC appealed, arguing principally that Congress had unconstitutionally delegated its powers (specifically, the Article I §8 clause that allows Congress to regulate commerce with foreign nations) to the executive. The court disagreed with CWC's rationale, arguing that the President has an exclusive right to be the sole representative of the federal government in foreign affairs and that he has a right to prohibit such transactions at his discretion. Justice George Sutherland, writing for the majority, argued the following.

> The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs…
>
> [W]e 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… It is quite apparent that if, in the maintenance of our international relations, embarrassment - perhaps serious embarrassment - is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.[35]

The argument put forth by Justice Sutherland in these excerpts is somewhat complicated, but really is quite breathtaking in its implication. The end result of the case was that the Court affirmed the right of Congress to delegate to the President the power of instituting a prohibition on the sales of arms to foreign countries for any

[35] *U.S. v. Curtiss-Wright Corp.* 299 U.S. 304 (1936).

purpose he deems necessary. The rationale for this decision begins in the first paragraph, which asserts that the federal government is limited only to those actions which are enumerated in, and implied by the Constitution *in the realm of internal affairs only*. Foreign affairs, Justice Sutherland argues, constitute an entirely different realm of governmental jurisdiction. Justifying this rationale, Sutherland quotes the Senate Committee on Foreign Relations in 1816, which asserted that the President is "the constitutional representative of the United States with regard to foreign nations.… The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch."[36] With this as his foundation, the second paragraph quoted above affirms the Court's conviction that the President maintains *plenary* power in regards to foreign affairs.

This decision has important implications for the use of war powers because it gives the President judicial legitimacy to act boldly when he has legislative authority to do so. Perhaps the power of this is not seen very well in this case because the legislative authority given in this case to FDR was relatively limited in scope. But if one thinks about this ruling in the context of later, broader authorizations by Congress such as the 1941 declaration of war, it becomes apparent that this is actually a very strong assertion by the judiciary. This ruling places a substantial burden on Congress to take care when drafting laws which authorize presidential action by his discretion because if the text of a law is not specific about what actions it is authorizes, the President can ultimately use that law to justify a wide range of actions which Congress may not actually approve of. This is something that becomes much more apparent in the following chapter, but noting the observation now is helpful for

[36] Ibid. Gilbert Martin, *Churchill and America* (New York: Simon & Schuster, 2005).

understanding the relationship between the legislature and the executive in World War II. Congress ultimately does make broad authorizations to the president during this time, but it does not generate the same kinds of problems that it does in later years.

Roosevelt's Destroyer Deal and the Lend-Lease Act – September 1940 and March 1941

Four years after Sutherland delivered the *Curtiss-Wright* decision, conflict again arose in Europe as Hitler invaded Poland. In response, President Roosevelt issued a number of proclamations in September 1939 that both established the neutrality of the United States and enforced certain prohibitions – such as the prohibition of arms sales by the United States to belligerent powers – that helped to uphold and defend the country's neutral status.[37] The specter of World War I had indeed remained at the forefront of many Americans' thoughts, and as Roosevelt's proclamations indicate, the prevailing desire was for the country to stay out of the war.

By 1940, however, the conflict in Europe had gone further than perhaps some had anticipated. France had fallen, and the only country left to stand against Germany's onslaught was the lone isle of Britain. Much of Britain's merchant fleet had been decimated by Hitler's U-boats and the British soon understood that, as in the last world conflict, they would need to elicit the help of the United States in order to survive. Winston Churchill requested a loan of around fifty of America's older destroyers. He is quoted as saying in July of 1940 that the

[37] See Presidential Proclamations 2348, 2349, 2352 available at <http://www.presidency.ucsb.edu/proclamations.php?year=1939&Submit=DISPLAY>

> need of American destroyers is more urgent than ever, in view of losses and the need of coping with invasion threat as well as keeping Atlantic approaches open and dealing with Italy…There is nothing that America can do at this moment that would be of greater help than to send fifty destroyers, except sending a hundred."[38]

Britain thus communicated that its situation was indeed dire and that, without the help of the United States, perhaps the whole of Europe would fall into the hands of the Axis powers. This faced Roosevelt with a dilemma. On the one hand, Roosevelt had pledged the nation's neutrality, and such a distribution of arms would violate that pledge. But on the other, Roosevelt saw the alarming implications of a Europe that was fully under Axis control. He said that allowing Great Britain to fall and cede control over the eastern hemisphere to Germany, which would create a situation in which

> all of us in the Americas would be living at the point of a gun—a gun loaded with explosive bullets, economic as well as military. We should enter upon a new and terrible era in which the whole world, our hemisphere included, would be run by threats of brute force. To survive in such a world, we would have to convert ourselves permanently into a militaristic power on the basis of war economy.[39]

His initial response was to tell the British that he thought Congress would be unwilling to allow those destroyers to be lent to the British. But despite these pledges of neutrality, Roosevelt had indicated in June 1940 his inclination to ally with Britain and the Soviet Union. A later State Department document notes a June 10, 1940 speech, wherein Roosevelt

> declared that we as a nation-and likewise all the other American nations-were convinced that "military and naval victory for the gods of force and hate would endanger the institutions of democracy in the western world" and that all of our sympathies were with those nations

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[38] Gilbert, Martin. *Churchill and America*. (New York: Simon & Schuster, 2005), p,199-200.

[39] Radio Address delivered by President Roosevelt from Washington, December 29, 1940 *available at* U.S. Department of State, *Peace and War: United States Foreign Policy 1931-1941* (U.S. Government Printing Office, 1983). Robert H. Jackson, "Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases," *American Journal of International Law* 34 (1940): 728-736.

> that were giving their lifeblood in combat against these forces. He stated that two obvious and simultaneous courses would be followed: "We will extend to the opponents of force the material resources of this nation and, at the same time, we will harness and speed up the use of those resources in order that we ourselves in the Americas may have equipment and training equal to the task of any emergency and every defense.[40]

Thus, as the dire nature of the situation became more apparent and the British became more desperate in their appeals, Roosevelt had already begun contemplating executive action in providing the destroyers in question. He subsequently wrote to then Attorney General Robert Jackson asking a legal judgment on such an action. Jackson wrote back in an official opinion responding to the three main legal questions presented by Roosevelt's proposal:

- May such an acquisition be concluded by the President under an executive agreement or must it be negotiated as a treaty subject to ratification by the Senate?
- Does authority exist in the President to alienate the title to such ships and obsolescent materials, and if so, on what conditions?
- Do the statutes of the United States limit the right to deliver…the over-age destroyers by reason of the belligerent status of Great Britain?[41]

Jackson was thus charged with the difficult task of making a determination over questions that had enormous implications both for the handling of the immediate conflict and for the future of the executive war power. Should he interpret the law too strictly and determine that such an action was illegal, Britain would be forced to face Hitler's onslaught with ever-dwindling resources. However, should Jackson construe the law too broadly and give the President sweeping power to appropriate resources

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[40] U.S. Department of State. *Peace and War: United States Foreign Policy 1931-1941*. (U.S. Government Printing Office, 1983), p.76.
[41] Jackson, Robert H. "Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases." American Journal of International Law, Vol. 34, pps. 728-736.

to a foreign belligerent power, he risked setting a dangerous precedent in which the President is fully empowered to make whatever foreign agreements he wishes in the absence of congressional consent. Thus, Jackson's challenge was to form an opinion that struck the balance of legality and expediency that we have seen quite often throughout the course of this narrative.

Jackson ultimately decided that Roosevelt did have the power to provide the destroyers to Britain through an executive agreement that would have allowed Britain to obtain the destroyers in exchange for a British grant of naval bases in Canada and in the Caribbean. He asserted that if the President wanted to make the deal without the authorization of Congress, he very well could have done so based on his powers as Commander in Chief, which are conferred upon the President by the Constitution but are "neither limited nor defined."[42] And although his ultimate rationale for justifying the destroyer deal did not at all rely on the President's power as Commander in Chief, Jackson did articulate the reasons for why such a course of action could be constitutionally legitimate. Jackson argues that the President's function as the Commander in Chief

> places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable.[43]

Thus, the *quid pro quo* basis of the destroyer deal would have allowed Roosevelt to execute the deal without Congressional approval as a matter of promoting the interests of U.S. foreign affairs. Such an approach would have been

[42] Ibid.
[43] Ibid.

affirmed by Justice Sutherland's opinion in *Curtiss Wright,* which affirmed the President's plenary power over foreign affairs. Consultation with Congress, using this rationale, would not be required

Jackson ultimately decided to base his claim in the law that was already in place at the time of the opinion. He cites the Act of March 3, 1883,[44] which is a statute through which Congress restricts the sale of ships. Within that statute, however, there is a provision which states that

> no vessel of the Navy shall hereafter be sold in any other manner than herein provided or for less than such appraised value, *unless the President of the United States shall otherwise direct in writing.* [Italics added][45]

Jackson points out that this statute already supports the kind of action proposed by Roosevelt in this case. The only limitation to this ability is lodged within Section 14 of an Act passed on June 28, 1940.[46] This provision states that the sale of old military property must be certified by the uniformed chief of the appropriate branch (the Chief of Naval Operations, in this case). Given that the vessels in question had already been stricken from the naval registry, Jackson felt that he would run into minimal resistance regarding these vessels in particular and that the Chief of Naval Operations would readily make such a certification. Thus, Jackson argued that this action could be legitimated through unilateral executive power with legislative sanction. Not only did he find statutes that allowed Roosevelt to take such an action, but he reasoned that

> So far as concerns this statute, in my opinion it leaves the President as Commander and Chief of the Navy free to make such disposition of naval vessels as he finds necessary in the public interest, and I find nothing that would indicate that the Congress has tried to limit the

[44] C. 141, 22 Stat. 582, 599-600 (U.S.C., title 34, Sec. 492)
[45] Jackson, Robert H. "Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases." American Journal of International Law, Vol. 34, pps. 728-736.
[46] Public Law No. 671

> President's plenary powers to vessels already stricken from the naval registry.[47]

Jackson reasoned that, in addition to the stated capacity of his powers as Commander in Chief and the statutory legality of the action, there is. While he does affirm the right of Congress to make prohibitions on the President's plenary powers, he sees no indication from Congress that might hint towards their opposition to the lending of old destroyers to Britain in exchange for naval bases. And in the absence of any constitutional provision that expressly denies the president the ability to perform such action, Jackson finds no reason why the President should be restrained in this case

After Jackson delivered his opinion on the destroyer deal, Roosevelt announced its implementation to the public. In his announcement, asserted that

> Preparation for defense is an inalienable prerogative of a sovereign state. Under present circumstances this exercise of sovereign right is essential to the maintenance of our peace and security.[48]

In this statement, Roosevelt publicly proclaimed the necessity to make such a transaction by framing it within the necessity of the national defense. By this time, it was clear to many that the conflict in Europe was burgeoning and isolation began to seem less and less a viable security policy for the United States. Roosevelt's rationale for the destroyer deal hearkens back to Locke's assertion of prerogative power, in which the executive takes action upon his own discretion in the interests of the public good. Before the deal was made, the official United States policy *vis a vis* the European conflict was indifference and neutrality. It is significant that Roosevelt was to make the first significant break with this policy and to take a stance firmly on one

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[47] Jackson, Robert H. "Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases." American Journal of International Law, Vol. 34, pps. 728-736.
[48] Schlesinger. *The Imperial Presidency,* 108.

side because it reaffirms the President's role as the nation's foremost representative in the realm of foreign affairs. He could have waited for Congress to pass a law or make a treaty to execute the transaction, but he decided to use the power of his office to do it unilaterally.

However, the destroyer deal was only one action and one stance in a conflict that would likely call for continuous support and involvement. The same State Department document quoted above recalls that, in a December 29, 1940 radio address, Roosevelt warned that the country must increase its production of war materials to support the war needs of Britain and the other free nations resisting aggression because of the danger posed by Axis aggression. In response to this appeal by Roosevelt, Congress drafted the Lend Lease Act in March, 1941. The key function of this Act was to enable the President to make sales of U.S. military equipment and to call American resources into use for the purpose of aiding the allies and promoting American defense interests. As Arthur Schlesinger notes, many in Congress gave their support to this bill not on the ground that the U.S. was about to get more involved in the war, but that this program would be a way for the U.S. to remain out of the war.[49] The idea was that by providing the allies with weapons and other services, they would be able to fight the war effectively without American boots on the ground. The Lend Lease Act served as a congressional ratification of Roosevelt's destroyer deal and formalized the process by which similar actions would take place. This is very similar to the way Lincoln's Congress responded to his spring 1861 proclamations – every step taken upon questionable legal grounds that the President

[49] Ibid. 110.

saw as legitimate and necessary in the situation was ratified, formalized, and placed into a process approved by Congress.

An important component of this Act is a proviso located in Section 3(5)(c) that both imposed a sunset and gave Congress the ability to nullify the Act by concurrent resolution.

> (c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a) except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1,1943, or before the passage of such concurrent resolution, whichever is the earlier.[50]

The Lend Lease Act was effective because it allowed for the executive to act quickly and decisively to respond to the needs of the situation while also giving Congress ultimate oversight over the President's usage of the war power. Should the President overstep his bounds and use his Lend Lease powers in a manner that Congress deemed inappropriate, they were able to take away those powers at their will. The implementation of limits on this, and any authorization bill crucial to ensuring that Congress maintains some degree of control over the President's handling of the conflict. One might think that such limiting provisions are common sense whenever grants of authority are given to the President, but we will see later how this is not the case. Particularly in the Gulf of Tonkin Resolution and the Authorization for the Use of Military Force after 9/11, such limitations are not imposed. In the absence of limitations such as those seen in the Lend Lease Act above, it is only by the slow

[50] Lend Lease Act (Public Law 77-11) *full text available at* http://www.history.navy.mil/faqs/faq59-23.htm

process of repeal that Congress can nullify the act. As the nation's experience with the Gulf of Tonkin resolution will show later, this process is sometimes too slow to prevent harms from occurring.

Declaring an Unlimited National Emergency - May 27, 1941

With Congress now having officially condoned and supported the policy of siding with Britain, America fervently executed and expanded the Lend-Lease program to supply allied forces with war materials. But conditions in Europe were not improving. The Axis had control over the large majority of central and western Europe, as well as key portions of North Africa. Tensions were also increasing between the Soviet Union and Germany, as the latter was amassing forces along its eastern borders for what would later become Hitler's Operation Barbarossa. Given these circumstances, the potential danger to the United States from this conflict seemed less and less remote. On May 27, 1941, Roosevelt issued a proclamation that declared the existence of an unlimited national emergency wherein he argued that the Axis had taken steps that made clear their ambitions for world domination. Furthermore, he noted that inaction on the part of the United States

> would be perilous, and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of predatory incursion by foreign agents into our territory and society:
>
> NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, … do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of

> aggression directed toward any part of the Western Hemisphere. I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.[51]

This is another example of Roosevelt taking the initiative to speak about and to define the exigencies of a foreign crisis and to call for action. Though Roosevelt did not use this proclamation as an exercise war powers, he did use his position as the chief executive officer of the United States to declare that the country faces a grave crisis and that continued security would require vigilance and preparation on the part of all Americans. The evening after this proclamation was issued, Roosevelt made a radio address to the nation in which he explained the aim and the rationale of actions that had been taken and the actions that would follow. He described his proclamation as reinforcing two main objectives that were already in play. The first was to actively resist Hitler and any attempt made by him to dominate the Western Hemisphere. Keeping Hitlerism away from places from which an attack against the United States could be launched was deemed to be a crucial national security objective. The second was to give every possible assistance to Britain and to all nations that were already engaged in the fight against Hitler. This included the deployment of supplies as well as the necessary military support that was needed to ensure that those supplies safely reached Britain or any other destination.[52] Through his declaration of these objectives, Roosevelt was asking the all Americans to prepare for war. But the warfare to be waged in 1941 was an economic and defensive war – American industry and defense material was mobilized in support of the allied war effort against

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[51] Proclamation No. 2487 (1941), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=16121
[52] Radio Address Delivered by President Roosevelt From Washington, May 27, 1941 *available at* http://www.ibiblio.org/pha/paw/210.html.

the Axis in Europe so that the fight would never reach the U.S. homeland. Roosevelt also made a point of addressing the critics of the supply effort by articulating the rationale behind mobilizing the defense effort. Regarding his order to increase the intensity and numbers of patrols in the North and South Atlantic, he argued

> Nobody can foretell tonight just when the acts of the dictators will ripen into attack on this hemisphere and us. But we know enough by now to realize that it would be suicide to wait until they are in our front yard. When your enemy comes at you in a tank or a bombing plane, if you hold your fire until you see the whites of his eyes, you will never know what hit you.… Anyone with an atlas and a reasonable knowledge of the sudden striking force of modern war, knows that it is stupid to wait until a probable enemy has gained a foothold from which to attack. Old-fashioned common sense calls for the use of a strategy which will prevent such an enemy from gaining a foothold in the first place.[53]

In explaining the rationale for defense, Roosevelt affirmed that even though his actions seemed to be escalating towards war – and as mentioned before, in some ways, they were– he nevertheless remained committed to do everything in his power to keep the country out of war.

But there is something else. The main significance of this proclamation from a war powers perspective was that it untied Roosevelt's hands and signified, for reasons outlined in his above statement, that he may implement the war powers of the executive branch. Declaring such a state of *unlimited national emergency* bestows a status upon the situation which Roosevelt could use as justification for using the war powers. And while this proclamation in itself does not actively call any particular power into effect, it sets the stage for executive action as the likely method of threat response.

[53] Ibid.

Having traced the brief outline of United States actions in the defense of the country from the threat of Axis aggression, what should be noted is Roosevelt's perpetual candor and openness regarding his intent and the extent of his actions. Very little was done covertly and every action was announced in public for all to see. Initially, Roosevelt took action as a unitary executive, but he was reaffirmed by Congress at nearly every juncture. Such openness and candor is a very important and admirable part of Roosevelt's approach to the defense of the country. As shall be shown later, Roosevelt is arguably the last president to act in such a manner. Subsequent presidents were much less open, and much less willing to subject their decisions to Congressional scrutiny. Roosevelt, in contrast, did a superb job of keeping his activity out in the open, which encouraged public debate and increased awareness of the threat at hand. This candor is perhaps why Lend Lease was as effective as it was and why America was ready for what was to come.

American Lend Lease efforts continued into late 1941. By the end of that year, the U.S. had set up a naval defensive network as part of a policy of defending the waters of the western hemisphere. But as the last month of 1941 began, the greatest threat to the United States was not in the Atlantic, but was already steaming eastward in the Pacific toward Hawaii to commit the most shocking violent attack upon U.S. in the twentieth century.

Subsequent to the Day of Infamy - Roosevelt's War Actions

Pearl Harbor Attacks - December 7, 1941

In 1941, relations with Japan were supremely tenuous. Over the course of the summer and autumn, a flurry of agreements were proposed back and forth between

U.S. diplomats and their Japanese counterparts in an attempt to convince the Japanese away from their imperialist ambitions. However, these agreements were half-hearted and - especially after Japan occupied Indochina in July 1941 - revealed that the two sides had fundamentally different agendas. Japan was unwilling to renounce its attempt to expand its Asian empire in much the same way that the U.S. was unwilling to allow them to do so.

As early as January 1941, American officials had begun receiving indications of the possibility of an attack at Pearl Harbor. In a telegram from the American ambassador in Japan to the Secretary of State, Joseph Grew mentioned that he had heard rumors from multiple sources around his embassy that the Japanese had planned a mass attack "in case of trouble between Japanese and the United States."[54] But as the month of December 1941 began, few expected that a Japanese carrier fleet was on its way across the Pacific to execute such a strike. On the morning of December 7, 1941, the Japanese launched an air attack on American military forces at Pearl Harbor which resulted in a heavy loss of ships and war material, as well as thousands of American lives.

The following day, President Roosevelt made his famous "day of infamy" address, during which he asked Congress to immediately declare war against Japan. He said

> There is no blinking at the fact that our people, our territory, and our interests are in grave danger. With confidence in our armed forces, with the unbounded determination of our people, we will gain the inevitable triumph, so help us God. I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and

[54] *The Ambassador in Japan (Joseph Grew) to the Secretary of State* [Telegram: Paraphrase], Tokyo, January 27, 1941 *available at* http://www.ibiblio.org/pha/paw/196.html.

> the Japanese Empire.[55]

Roosevelt chose to address Congress as his first response to the Pearl Harbor crisis. As an act in and of itself, this is indicative of a greater theme that Roosevelt had already established in the previous years – a general desire to show that expediency does not always need to come at the cost of unilateralism and secrecy. Though Roosevelt had taken steps alone in certain cases – as was shown during the destroyer deal – he generally maintained a consultative rapport with Congress throughout his war presidency. Congress, in turn, was generally compliant with his requests. Schlesinger notes of his approach that

> like Lincoln's case of the Civil War, Roosevelt's case had substantial public backing and the electorate (and therefore the courts) sustained his use of emergency power. Roosevelt knew where he wanted to go and where he believed the nation had to go. But he did not want – and this was why he was one of the greatest Presidents – to go there alone.[56]

Pearl Harbor and Congress' subsequent declaration of war against the axis undoubtedly expanded Roosevelt's' use of his Commander in Chief power, but at no point before this did he claim that the title conveyed upon him a status that entitled him to unchecked unilateral action. Yet, even though Roosevelt chose to be generally cooperative and had the general sanction of the public, his candor did not render him immune to the temptation to be overzealous with his usage of the war power. His authorization for the internment of Japanese-Americans – one of the most egregious violations of civil liberties in American history - showed that dialogue is never a guarantee for proper action. Civil liberties are safeguarded only when they are

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[55] Address Delivered by President Roosevelt to the Congress, December 8, 1941 *available at* Franklin D. Roosevelt, "Address Delivered by President Roosevelt to Congress," December 8, 1941, http://www.ibiblio.org/pha/paw/267.html. Weider History Group, *Japanese Submarines Prowl the Pacific Coastline in 1941*, http://www.historynet.com/japanese-submarines-prowl-the-us-pacific-coastline-in-1941.htm..

[56] Schlesinger, *The Imperial Presidency,* 114.

advocated for by the people. But when no one does so, invasive and overzealous actions can be taken that nevertheless go virtually unchecked by critical review.

Japanese Internment - 1942

Two months after Pearl Harbor, the Roosevelt embarked on an aggressive course of action to combat the Axis powers. The Pearl Harbor attacks revealed that the United States was vulnerable. An entire Japanese naval fleet could sail unnoticed to a point from which it was capable of launching a devastating attack on American soil. And while Hawaii is but an archipelago of islands in the middle of the Pacific, there was little reason to believe in early 1942 that the Japanese were incapable of making a similar attack on the U.S. homeland. Indeed, in late 1941, a number of Japanese submarines menaced the west coast of the United States. (Stafford 2000) (DeWitt 1943)[57] To American military strategists, subsequent attack seemed inevitable.

After Congress had formally declared war against the Axis, Roosevelt had taken a decisively different stance in regard to his powers as Commander in Chief. Before the outbreak of war, he was consistent in maintaining that his Commander in Chief power conferred upon him no special powers or abilities during peacetime. But in a wartime setting, his approach was summarized in his September 7, 1942 address to Congress. He told them that

> The President has the powers under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.… [These powers will be implemented] with a full sense of my responsibility to the

[57] Weider History Group. "Japanese Submarines Prowl the Pacific Coastline in 1941." http://www.historynet.com/japanese-submarines-prowl-the-us-pacific-coastline-in-1941.htm

> Constitution… [W]hen the war is won, the powers under which I act automatically revert to the people – to whom they belong.[58]

Clearly, Roosevelt intended to explain that his behavior was perhaps abnormal in relation to the peacetime activity of the president, but nevertheless within his constitutional abilities during a time of war. This approach to the presidency led to varied actions, but no action taken by Roosevelt in the early months of the war has been more disputed than his decision to allow the internment of American citizens of Japanese decent in 1942.

In February 1942, military commanders were still reeling from the massive blow that had been dealt by Pearl Harbor as well as the incidents with Japanese submarines on the Pacific Coast. These were traumatic experiences for civilians and government officials alike. There was an overwhelming feeling that something must be done, action must be taken, to prevent such an attack from occurring once more on U.S. soil. Chief among those voices was Lieutenant General John L. DeWitt, who was at the time assigned the Western Defense Command. In February 1942, General De Witt was adamant that the major weakness that allowed the Pearl Harbor attacks to cause so much devastation was the presence of Japanese aliens and Japanese descendants whose loyalty remained with their homeland. During this month, he is noted as having admitted that there was nothing that had been proved against Japanese Americans, but that "a Jap is a Jap," and the lack of proof only provided "a disturbing and confirming indication that such action *will* be taken."[59] In a 1943 report, De Witt explained his concern as follows:

> More than 115,000 persons of Japanese ancestry resided along the

[58] Schlesinger, *Imperial Presidency,* 115-116.
[59] Stafford, David. *Roosevelt and Churchill: Men of Secrets.* (Woodstock, NY: Overlook Press, 2000), p.147.

> coast and were significantly concentrated near many highly sensitive installations essential to the war effort. Intelligence services records reflected the existence of hundreds of Japanese organizations in California, Washington, Oregon and Arizona which, prior to December 7, 1941, were actively engaged in advancing Japanese war aims. These records also disclosed that thousands of American-born Japanese had gone to Japan to receive their education and indoctrination there and had become rabidly pro-Japanese and then had returned to the United States. Emperor-worshipping ceremonies were commonly held and millions of dollars had flowed into the Japanese imperial war chest from the contributions freely made by Japanese here. The continued presence of a large, unassimilated, tightly knit and racial group, bound to an enemy nation by strong ties of race, culture, custom and religion along a frontier vulnerable to attack constituted a menace which had to be dealt with. Their loyalties were unknown and time was of the essence. The evident aspirations of the enemy emboldened by his recent successes made it worse than folly to have left any stone unturned in the building up of our defenses. It is better to have had this protection and not to have needed it than to have needed it an not to have had it – as we have learned to our sorrow. On February 14, 1942, I recommended to the War Department that the military security of the Pacific Coast required the establishment of broad civil control, anti-sabotage and counter-espionage measures.[60]

Such was the prevailing sentiment of many in the military – that people of Japanese decent presented a threat to U.S. security because, as De Witt claimed, they maintain their loyalty to the Japanese and their war aims. In response to such arguments, Roosevelt was faced with the task of evaluating these claims and determining whether they were worth acting upon. One must keep in mind that this was only two months after the attacks at Pearl Harbor. American warships - the pride of the Pacific fleet - were lying on the bottom of the harbor with the bodies of American sailors entombed within their hulls. American officials still did not fully understand how the Japanese were able to arrive unnoticed and to attack U.S. forces

[60] Final Report from Lt. Gen. J.L. DeWitt regarding the Japanese Evacuation from the West Coast in 1942. June 5, 1943 *available at http://sfmuseum.org/war/dewitt0.html*

when their guard was down. Given the strained atmosphere of these times, Roosevelt had to act with caution and a bias toward ensuring security.

In meeting those demands, Roosevelt decided to support DeWitt's convictions and, on February 19, 1942, he issued Executive Order 9066, which authorized military and executive officers to provide for the exclusion of persons from any areas deemed militarily prudent.

> Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order…
>
> I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.[61]

Executive Order 9066 is a robust expression of the executive war power that has many attributes common to other examples of crises response. In the interest of promoting security in the United States, the president authorized those in charge of the nation's military to modify or temporarily suspend the rights of citizens – which

[61] Executive Order No. 9066 *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=61698.

in this case, were one's right to be secure in their person and to not be detained without reason. And at the time, such an order was judged to be militarily expedient and necessary for national security because military officers like DeWitt were adamant about the danger posed by individuals of Japanese decent.

Using his authority under Executive Order 9066, DeWitt issued a series of public proclamations in March 1942 which divided up the west coast of the United States into military zones from which any citizen or alien (principally of Japanese, Italian, or German decent) could be excluded. To justify his action, DeWitt again invoked the argument that the Japanese were particularly likely to commit acts of sabotage and thus it was required to exclude them from areas which are particularly vulnerable to attack. DeWitt did issue one more public proclamation in late March 1942, which imposed a curfew on all alien Japanese, Germans, Italians, and all persons of Japanese ancestry in the military areas. The last executive action that effectuated the Japanese internment was Executive Order 9102 given on March 18, 1942, which created the public offices that would carry out the relocation of Japanese-Americans.

During these few weeks, Congress had been more or less silent on the matter. But on March 21, 1942, Congress assumed a role similar to the Congress in Lincoln's time and affirmed and legalized the actions of the executive. On that day, it passed a bill which established that noncompliance to the exclusion and relocation orders would be punishable by law.

> [W]hoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to

> the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.[62]

By this act, the actions of the executive were legitimized as a unified measure of the President and the Congress in the interest of keeping the nation secure. Such a progression was pretty much in keeping with the precedent of Lincoln's use of the war power. But this example of the war power is unique in the way that, despite its being justified and legitimated by Congress, the decision to intern Japanese citizens has been overwhelmingly criticized as having been an unnecessary, imprudent, and egregiously racist policy brought about by national paranoia. This encroachment upon the civil liberties of citizens goes much further than Lincoln had gone during the Civil War when he suspended the *habeas corpus*. During the course of that war, 10,000-15,000 people were arrested and held without prompt trial.[63] But this was done during a time when an active war was occurring on the soil of the United States among a population where a significant number of people were actively participating in the southern rebellion. Contrast this to the Japanese internment, when 115,000 people – ten times the amount of people effected during the civil war - were rounded up and relocated all along the west coast of the United States. Whole families, young and old, men and women, were rounded up *en masse* and placed into camps when there was little or no reason to justify it other than the fact that they looked similar to the

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[62] Act of Congress, of March 21, 1942, 56 Stat. 173 *available at* "Act of Congress, 56 Stat. 173," March 21, 1942, http://academic.udayton.edu/race/02rights/intern01.htm#The%20Act%20of%20March%2021,. *Hirabayashi v. United States*, 320 U.S. 81 (1943). *Korematsu v. United States*, 323 U.S. 214 (1944). *Ex Parte Endo*, 323 U.S. 285 (1944). University of Utah, *Japanese-Americans Internment Camps During World War II*, J. Willard Mariott Library.http://academic.udayton.edu/race/02rights/intern01.htm#The%20Act%20of%20March%2021,

[63] Greenberg, David. "Lincoln's Crackdown: Suspects jailed. No charges filed. Sound familiar?" *The Slate*. November 30, 2001. http://www.slate.com/id/2059132/

men operating the submarines in the Pacific. The internment program was of a fundamentally different, far more expansive nature that constituted a much more egregious infringement upon the civil liberties of citizens than the suspension of *habeas corpus*.

As we have seen in the last chapter, citizens affected by the actions of the executive often take their complaints to the judiciary, where some relief might be found. The decision to intern Japanese citizens produced several landmark cases in the Supreme Court.

Judicial Responses to Roosevelt's War Actions

Hirabayashi v. United States (1943)

Gordon Hirabayashi was a student at the University of Washington when he was charged of having violated the curfew order that was instated by DeWitt's Public Proclamation No. 3. He ultimately took the case to the Supreme Court, arguing principally that Congress's Act of March 21 that authorized the President to carry out the internment program was unconstitutional. He also argued that his selection for curfew based upon his racial identity violated his Fifth Amendment rights to due process. The opinion, delivered by Chief Justice Stone, opened by stating first that the Court deemed this case to raise the question of whether Congress and the Executive, acting in cooperation, can impose a curfew order upon citizens for the "protection against espionage and against sabotage to national defense materials, premises and utilities." The Court stated at the outset that such an action was constitutional and, furthermore, that there is no reason to consider whether the President himself is

authorized to issue such a curfew since Congress had already passed legislation that had made the restrictions into law. Perhaps the more interesting parts of this opinion are Chief Justice Stone's meditations on 'what the war power is' as well as how the issue of racial discrimination stands in relation to those war powers. Stone argued the following:

> The war power of the national government is 'the power to wage war successfully'… It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war…
>
> The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage. As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion…We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.[64]

This argument is immensely important for the legacy of the war powers because it is one of the first times the federal courts tried to outline and define the amorphous and vague nature of those powers. And interestingly, Chief Justice Stone does not seem to want to err on the side of caution in allowing broad scope for action taken under the war powers. He says the war powers embrace *every* phase of the national defense. It

[64] *Hirabayashi v. United States*, 320 U.S. 81 (1943)

takes no great degree of imagination to envision just how far one could regulate or restrict in exercising the war powers. A government could, as the Roosevelt government did, restrict and direct nearly all aspects American life to the degree that was thought appropriate. Stones characterization of the war powers legitimates broad and bold action in the interest of the national defense. It also cannot be ignored that this is a definitive statement coming from the judiciary – the branch of government which is supposed to deliberate over issues in the context of their legality *vis a vis* the Constitution. Their assertion of the broad scope of the war power, in this case, adds to the decision to intern Japanese-American citizens a degree of c*onstitutional* sanction which both the executive and the legislative branches could not have given it. Essentially, the Court was saying that nationally administered discrimination by the federal government is just when it is deemed to be necessary for the defense of the country. Stone continues his argument, directly addressing the issue of race and the war power.

> Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.… The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.[65]

Here Chief Justice Stone accepted that, in most cases, discrimination based on race is unallowable. But when the nation faces a crisis, actions that discriminate, so

[65] Ibid.

long as they can be construed as necessary to the defense of the nation, are allowable only when racial discrimination is necessary to combat the threat at hand.

One question that arises from this assertion is that if the Court upholds the right of the federal government to racially discriminate when it is militarily necessary, to what extent can the government do so? Is there a form of discrimination that is unallowable even if it is militarily necessary? Here, the Court is *unanimous* in asserting that a curfew for people of certain racial groups is a constitutionally legitimate and expression of the war power in an attempt to promote the broader public safety. Does this also mean that the court supports more extensive restrictions upon racial groups? Perhaps the government may take their actions a step further and commit all Japanese-Americans to house arrest for an indefinite period of time, or to limit their purchases of food and materials, or perhaps to remove them from their homes altogether and place them into camps. What might the Court say then? Such was the subject matter of the cases *Korematsu v. United States* and *Ex Parte Endo,* to which I now turn.

Korematsu v United States (1943)

Upon hearing of DeWitt's order for Japanese-Americans in the military areas to report to assembly centers for relocation to internment camps further inland, Fred Korematsu refused to comply and went into hiding in Oakland, California. He was arrested in May 1942 for his refusal to obey the order. After being charged and found guilty of breaking federal law, Korematsu appealed and the case wound up in the Supreme Court late in 1944. His argument challenged the rationale of the

Hirabayashi case regarding the extent to which the government may place restrictions on its people and under what circumstances. He additionally made the argument that by the time DeWitt had issued the exclusion order, the danger of attack by the Japanese had subsided.[66] The Court, in a 6-3 decision, disagreed with Korematsu's contentions and reaffirmed its rationale in the *Hirabayashi* decision. The opinion, given by Justice Black, argues the following:

> In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.… [E]xclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas. We uphold the exclusion order as of the time it was made and when the petitioner violated it… [H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. …
>
> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders - as inevitably it must - determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot - by availing ourselves of the calm perspective of hindsight - now say that, at that time, these actions were unjustified.[67]

[66] Korematsu v. United States. 323 U.S. 214 (1944)
[67] Ibid.

Thus, in answering the question posed at the end of our analysis of the *Hirabayashi* case, the court indeed was willing to go far in supporting the exercise of the war power at the expense of citizens' liberty. Far enough, anyway, to support removing citizens from their homes and moving them to camps in remote places across the American west. Justice Black argued that the basis of the exclusion order was analogous to the basis of the curfew order, in that they were both "reasonable" and necessary actions to provide for the defense of the country. Defending this assertion, Justice Black simply says that in a time of war people suffer hardship, and citizens should be willing to absorb sacrifices that do not exist in peacetime. He then moved to a rebut of the accusation that Korematsu was being interned because of racial bias. The exclusion order, he argued, was simply a necessary action to prevent unidentifiable individuals of Japanese decent from committing acts of sabotage.

But this is not to say that there were not audible voices that made such argument clear. There were three separate dissenting opinions in this case, submitted by three who, in the *Hirabayashi* case, all had supported the Court's rationale. All three were critical of the necessity for and the grounds upon which such exclusion action was made, but the dissent submitted by Justice Jackson makes the most compelling legal argument that the Japanese internment falsely applies principles from *Hirabayashi* - which upheld the constitutional legality of minor infringements upon citizen's civil liberties to promote national security - to a case in which the rights of citizens were being severely impeded upon.

> A military order, however unconstitutional, is not apt to last longer than the military emergency.… But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather

> rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes… A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution…
>
> [I]n spite of our limiting words [in the *Hirabayashi* case], we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones.…The Court is now saying that, in *Hirabayashi,* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely, and if that, we are told they may also be taken into custody for deportation, and, if that, it is argued, they may also be held for some undetermined time in detention camps…[68]

Justice Jackson's dissent in this case is of a fundamentally different nature than the other dissents in *Korematsu* because unlike the dissents submitted by Justices Roberts and Murphy, he chooses not to attack the merits of the decision to exclude the Japanese, but the legal implications of the decision made by the court as well as the process by which they drew their conclusion. Though he implied it, at no point did he say explicitly that the exclusion order itself was unconstitutional. He admits elsewhere in his dissent that military officers operate under a set of conditions that is wholly different than those of a federal court and he understands that those who protect the country must inevitably be accorded some discretion over their method of protecting the country. Jackson does not even go so far as to say that the military should not have carried out the exclusion order, even if the pretenses upon which it

[68] Ibid.

was made were constitutionally questionable. He instead argued that the Court, by affirming the military's right to take constitutionally questionable actions, sets a dangerous precedent for those in the future for those who seek similar courses of action. Those in the future who seek to take actions which infringe upon citizens' civil liberties or otherwise potentially violate their constitutional rights will look to the *Korematsu* decision for justification – it thus becomes, as Jackson words it, a doctrine of the Constitution.

Jackson additionally criticized the way in which the rationale from *Hirabayashi* was extended to this case. In *Hirabayashi,* the court upheld the constitutionality of a curfew order that prevented Japanese-American citizens from leaving their home at night. But Jackson notes that the constitutionality of that action cannot be extended to *Korematsu*, which upheld an order forced the removal of Japanese-Americans from their homes and communities for an indefinite period of time. He believed that the arguments that had upheld the curfew order are not coextensive to upholding the exclusion order due to the fact that the consequences to those effected are of a much more severe nature than in the previous case. Overall, the language of the second paragraph quoted above suggests that Jackson would have preferred that the majority looked at the exclusion order as fundamentally different than the curfew order instead of regarding the cases as being fundamentally similar in nature.

At the end of his dissent, Jackson presents his own version of an observation made elsewhere in this narrative of the war powers. Namely, that it is the people

themselves who are to be responsible for ensuring that those who are in control of the war powers use them responsibly, and in a manner consistent with the constitution.

> If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.[69]

He further asserted that there is practically no remedy that the Court can deliver if those in control of the war power commit actions which are unconstitutional – such remedy must be sought by the people themselves.

In this case, however, it was considered both by Congress and members of the executive that the Japanese internment program was a military necessity, and the Court supported their combined discretion by 6-3 vote. The *Korematsu* case is one that shows just how strong the temptation can be for the other branches of government to defer their judgment to the executive branch in a time of great national threat. Even in a case where the civil liberties of over one hundred thousand citizens were violated, the interests of expediency and effectiveness were considered to be paramount. *Korematsu* also shows just how far a combined exercise of the war powers can go in the interests of repelling threat. The exclusion order forced Japanese-Americans to make a great sacrifice of civil liberty in order to ensure the security of the nation. Individuals in all three branches of government nevertheless supported a demand for such sacrifice. At a time where the country faced a potential onslaught from the Axis powers, it seemed to be the consensus that this sacrifice should be made readily if it was an effective means of protecting the country.

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[69] Ibid.

Ex Parte Endo (1944)

There was one other case which was delivered on the same day as *Korematsu*. This case concerned a California resident named Mitsuye Endo, who, after being relocated by American authorities to the Tule Lake War Relocation center, filed for a writ of habeas corpus.[70] In her petition, it was argued that Endo was a loyal and law-abiding citizen of the United States and that her petition by the War Relocation Authority (WRA) was illegal. Justice Douglas, writing for the unanimous majority, argued the following:

> It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge, or that she is even suspected of disloyalty. Moreover, they do not contend that she may be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation…
>
> We conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure...
>
> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is, by definition, not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.[71]

Here we do have an example of the Court indeed standing up for the right of a citizen whose potential guilt had already been disproved by the government. Essentially, they ruled that because the government had already conceded Endo's loyalty, that there was no longer any justifiable pretense for subjecting her to any detention measures.

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[70] Ex parte Endo, 323 U.S. 285, (1944)
[71] Ibid.

But one should note that this was a determination made after Endo had been detained at a War Relocation Center. All this case affirms is that, after determination has been made that an individual poses no threat to national security, the WRA can no longer detain that individual.

When looking at this case in comparison to *Hirabayashi* and *Korematsu*, it can be seen that *Endo* does not provide much resolution to our inquiry into the extent and capacity of the war powers. All the Court has said here is that one who has already been proven not to be a threat cannot be detained. If the government were really interested in keeping citizens detained, as was pointed out by Jackson in *Korematsu,* the Court could do little about it. The point of the relocation centers, of course, was not to ascertain loyalty, but to move citizens away from the military areas. No tribunals were set up and, for some citizens, such a definitive statement of loyalty would not be come by so easily.

Ultimately, the fate of the internment camps was up to the executive. President Roosevelt Rescinded Executive order 9066 in 1944, but the last of the internment camps was in operation until March 1946.[72] This again shows just how firmly the executive had held the war power during World War II. The utmost deference was given to the executive by Congress and the Courts, and the war powers were relinquished only when the executive was ready to do so.

Aftermath of World War II

The lasting effects of World War II are substantial. In a similar progression to the Civil War, the nation watched as the tensions and threat grew until they finally

[72] "Japanese-Americans Internment Camps During World War II" Special Collections Department, J. Willard Marriott Library, University of Utah. http://web.archive.org/web/20070619073757/http://www.lib.utah.edu/spc/photo/9066/9066.htm

culminated in the attack at Pearl Harbor. That attack itself fundamentally changed America's perception of its place in the world. It was as if the nation had been roused from the isolationist dreams that it had constructed for itself in the 1920s and 1930s. The United States could no longer afford to pretend that it could sequester itself away from global affairs because, as Pearl Harbor proved, the capabilities of war were now such that a nation could plan and execute a devastating attack upon the United States homeland without warning. This reality ushered in a new era of threat that demanded that a new level of vigilance and preparedness be maintained perpetually.

President Roosevelt harkened back to the precedent set by Lincoln during the Civil War by reestablishing the right of the executive to act boldly and on his own in response to crisis. Both before and after active hostilities had taken place, Congress and the judiciary embraced a deferential role to the President in the realm of national defense. And while being deferential, both branches seemed committed to active support of the president's initiatives. When steps were taken unilaterally by the president, such as with the destroyer deal, Congress was generally supportive and ratified his actions through the passage and subsequent expansion of the Lend-Lease program. And on the occasion that the combined actions of the executive and legislative branches came under fire in the courts, as occurred in *Hirabayashi*, the judiciary strongly upheld their constitutional legitimacy. And indeed, it seems that, given the circumstances, there would have been no reason for the branches to act otherwise. The country was faced with a situation that required swift and decisive actions, and Roosevelt met that challenge through an overall competent usage of the

war power. He was able to successfully rally the other branches of government behind him in a manner that enabled the United States to emerge from World War II

However, as will be shown in later analysis, the precedent set by this is misleading. Perhaps Roosevelt's example rendered Americans *too* willing to relinquish their power to the executive. Arthur Schlesinger explains how Roosevelt's war actions

> gave Americans in the postwar years an exalted conception of presidential power. This conception was strengthened by the vivid memory of the poor congressional performance in the years between Versailles and Pearl Harbor – a performance generally regarded as compounded of presumption, ignorance and folly…War had accustomed those in charge of foreign policy to a complacent faith in the superior intelligence and disinterestedness of the executive branch.[73]

Roosevelt indeed had done an impressive job handling his executive post and directing the war powers of the government. It seemed to set in motion an idea that within the realm of the national defense, the executive can continue to be trusted to act in the interest in the country in the same open manner that Roosevelt had done during World War II. But this idea assumes incorrectly that all presidents are equal in ability, reason, and prudence. Indeed, as history shows, later presidents would use Roosevelt's example as license to act boldly and commit war actions that were much more extensive, and, most importantly, much less subject to the scrutiny of other branches. All of a sudden, much more was done in secret without the awareness or the approval of the rest of government. This led to fundamental problems in the development and the usage of the war power from this point forward. Especially as weapons became more advanced and the U.S. entered a nuclear arms race with the

[73] Schlesinger, *Imperial Presidency,* 123.

Soviet Union, the use of the war powers was accelerated into a much more paranoid and misguided forms than Roosevelt had himself exercised.

The other major development in the war power that occurred in World War II was its usage as an implement of *defensive* war. In the Civil War, for example, actions were taken primarily as a response to the attack on Fort Sumter; however, in contrast, Roosevelt initiated defensive measures even before it was totally clear that the conflict abroad posed a direct threat to U.S. security. In both instances, each president's first step was taken without congressional approval and similarly, both actions were subsequently ratified by Congress at a later point in time. The defensive war element is important because it expands the abilities of the war power beyond combating direct threats. In its new form, the war powers could be used to deter or to prevent threats before they arose (recall Roosevelt's language about it being imprudent to allow the enemy to gain a foothold when action can be taken to prevent it). Lincoln laid the foundation of the war power when he responded to the attack on Ft. Sumter, showing that the President can and should act in whatever way he can to defend the nation while under direct attack. Roosevelt took this precedent a step further, demonstrating that the President can and should act in whatever way he can to defend the nation, even if there has not yet been a direct attack. Indeed, as was the case in the run-up to Pearl Harbor, actions were taken both as defensive and as proactive measures to prevent a threat from growing abroad. In this role, Roosevelt both affirmed and expanded the Lincoln/Locke assertion of prerogative power *vis a vis* the war power – namely, that the executive may do whatever necessary, and now whenever necessary, to preserve the security of the nation.

This is all not to say, of course, that this was the first time in American history that the country took action abroad to mitigate threat. But in the context of mid-century conflict, the idea of defensive war took on a new meaning given Hitler's explosive takeover of Europe and the surprise attack at Pearl Harbor by the Japanese. Unlike before, the world was a place where debilitating strikes could occur at any time and at any place. Defensive war was now seen by many countries as a necessary implement of foreign policy. Augmented by this reality, and in combination with the newly exalted status of the executive in times of crisis, the war power became much larger and much more powerful than ever before as a result of the World War II crisis.

Chapter IV

The Cold War

The Nuclear Age and the War Powers

Before the world had finished licking its wounds after the catastrophe of the Second World War, America had become engaged in yet another foreign crisis. The Cold War pitted the victorious superpowers – the United States and the Soviet Union – against each other in a battle that was as much a competition of ideologies as it was a race to achieve global dominance. Perhaps the most striking difference between this analysis of the Cold War and our previous analysis of the Civil War and World War Two eras is that the Cold War lacks a definitive catalyzing attack such as the attacks on Fort Sumter and Pearl Harbor. The response to those attacks generally corresponded to the particular nature of the initial attacks. Fort Sumter established that there existed a state of domestic war between states loyal to the Union and the states allied to the rebellion. Similarly, Pearl Harbor established that the war in Europe and Asia had now become a global war in which the United States was both a key player and a potential target. These attacks established definitive parameters to which the government actors could respond to directly. The enemies, the conflicts, and the circumstances were all fairly well known. When one compares the Cold War to these former cases, one finds that the Cold War lacks the same sense of definition, and indeed it seems an amorphous conflict. Who exactly were the players? What exactly is the level of threat posed to the United States? The answers to these questions, which were practically given in the previous two conflicts, were largely unknown in this case. Nevertheless, the Cold War motivated a fascinating evolution of the war powers over its approximate fifty-year duration. One shall see that the legacy of World War Two - specifically the rise of the idea that America then existed

in a world where an attack could occur at any time and from anywhere – provoked the Cold War presidents to adapt to the ambiguity of the situation. Beginning during the Cold War, presidents expanded the war power to include direct combat actions taken as a measure of proactive defense. Direct foreign intervention was seen not only as necessary for national security interests, but it was also seen as the direct responsibility of the United States to promote democratic capitalism around the world. Additionally, the ambiguities surrounding the Cold War conflicts motivated presidents to interpret the Commander in Chief clause of the Constitution more robustly. As Truman and Nixon fervently argued, the Commander in Chief clause conveys upon the President a special set of implied powers that sometimes allow for presidents to ignore or downplay the system of checks and balances in the pursuit of some foreign policy end. But ultimately, just as in the earlier two cases, one finds that when the president takes the lead in using the war powers, the other branches generally conform to his will and find ways to support the initiative

Greece, Turkey, and the Birth of the Truman Doctrine

As mentioned at the end of the previous chapter, World War Two had left the American government with a sense of being in a state of persistent external danger. American foreign policy had turned its attention from East Asia and Western Europe toward the massive, nuclear-armed Soviet Union. However, the country was largely conflict averse in the late 1940's. Perhaps the last thing that anybody wanted was to see the world descend yet again into global armed conflict. This motivation is perhaps what drew the attention of the Republican congress to appeals for aid by Greece and Turkey in 1946. Among U.S. officials, it was feared that the Soviets were working to

expand the Soviet Union by destabilizing the new governments arising in Central and Eastern Europe. The governments in both Greece and Turkey had approached the United States with appeals for aid. Their failure to survive would leave both countries vulnerable to encroachment by the Soviet Union. This was an outcome that, from the perspective of American foreign policy, was unacceptable. One historian notes that

> By 1947 the Truman administration was convinced that even though the Soviet Union had adopted a set of tactics short of outright military aggression, its ultimate objective was world control. Whether Stalin sought security or expansion, the two motives had meshed to present a formidable challenge for the United States. In this new style of confrontation, the Soviets posed threats on every front – the social, political, and economic, as well as the military. Based on these assumptions, the administration would interpret the many troubles in the world as Soviet-inspired and believe that the United States, as leader of the Free World, had the responsibility of coping with them.[74]

Whether or not the Soviets had the capacity to expand in such a manner remains unclear, but suffice it to say that the shapers of American foreign policy believed this to be true based on the best information they had available to them at the time. To ignore the possibility of such a reality would have seemed perilous, as if the U.S. were sitting back to watch the next Nazi Germany arise out of the ashes of yet another global armed conflict. American leaders were not willing to do this. Instead, they took an aggressive interest into the goings on of countries abroad, of whom many could make a plausible argument that their country would soon be overrun by communists. Many countries ultimately did make such appeals and accordingly, America did its best to respond.

Such was the state of American foreign affairs in 1947 when Truman decided to approach Congress with an appeal to send financial and material aid to Greece and

[74] Jones, Howard, *"A New Kind of War."* (Oxford: Oxford University Press, 1989), 13.

Turkey. Both governments were struggling against rebel communists who were attempting to overthrow the fledgling democracies that had barely taken hold in those countries after the war. On March 12, 1947, Truman made his appeal to Congress, during which he declared his famous doctrine:

> At the present moment in world history nearly every nation must choose between alternative ways of life. The choice is too often not a free one. One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression. The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio; fixed elections, and the suppression of personal freedoms.
>
> I believe that it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.
>
> I believe that we must assist free peoples to work out their own destinies in their own way.
>
> I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes.[75]

It was this speech that established the directive for the remainder of the Cold War. Numerous Presidents after him would pass in and out of off (Leffler 1992) (Hess 2001)ice administering these principles day by day. At this point, it is unlikely that Truman thought that his doctrine would necessarily lead to American soldiers fighting abroad, but the way in which he formulated his doctrine certainly allowed for the occurrence of such a possibility. Congress ultimately agreed with the president's stated intentions regarding the situation in Greece and Turkey and on May 22, 1947, the Greek-Turkish aid bill became law by wide margins in both the House and

[75] Harry S. Truman's Address Before A Joint Session of Congress, March 12, 1947. *The Avalon Project*. (Yale Law School) *available at* http://avalon.law.yale.edu/20th_century/trudoc.asp.

Senate. Public Law 75, as it was then called, authorized $400 million to be appropriated to help the governments Greece and Turkey overcome opposition.[76] This, in itself is not an example of a usage of the war power during the Cold War because this was purely a foreign policy venture in which there was no military involvement. Because Congress has control of government funds, Truman could not have done it another way. However it is important to discuss the circumstances in which the Truman doctrine came into being in order to understand how that doctrine evolved into a national commitment to armed foreign intervention against communists.

Truman In Korea

But this approach becomes all the more perplexing when one looks at the Greek/Turkish situation in comparison to American involvement in the Korean War a few years later, when Truman decided that consultation of Congress was *not* necessary in order to put troops on the ground in an active combat role. On June 25, 1950, after hearing that North Korea had invaded South Korea, Truman was faced with yet another situation where a communist force was attempting to quell a fledgling democracy. Surely, the invasion of South Korea had occurred much more rapidly and perhaps in a more hostile manner than the rebellions in Greece and Turkey, which may have contributed to the sudden alarm felt in the United States. As late as early June 1950, ambassador John Muccio reported that he believed the South Korean military to be as least as well prepared as the North Koreans, but with

[76] Jones. *"A New Kind of War."*, 61.

superior training and leadership (as it turned out, this was hardly the case). [77] So when reports came in that the South Korean army was in increasingly dire straits, the American leadership was massively shocked. On June 25, Truman approved the first shipment of supplies to the South Korean army, and in subsequent days he authorized the use of American air and naval power against North Korean armor. Finally, after General Douglas MacArthur advised Truman of the necessity for an American troop deployment, on June 30 Truman approved the shipment of two Army divisions into active combat to support the South Korean troops. It is evident, however, that Truman's principal concern was not the sovereignty of South Korea, but the possibility that the North Korean incursion was a direct challenge orchestrated by Moscow. As historian Melvyn Leffer explains, Truman and his advisors did not consider seriously the possibility that North Korea could be acting on its own initiative to unify the Korean people. [78] Nikita Khruschev, who at the time was a leading member of the Central Committee of the Communist Party in Moscow (the Soviet near-equivalent to parliament), wrote a letter to Truman in which he said that "I must stress, that the war wasn't Stalin's idea, but Kim Il-song's. Kim was the initiator."[79] But perhaps due to a latent degree of mistrust of words coming from members of the Communist leadership in Moscow, the Americans were not apt to take these words at face value. Instead, Truman and his cabinet believed that while the Soviet Union may have been trying to test the determination of the United States in its resolve to carry out the policy of containment, the Soviets were nevertheless

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[77] Leffl *Yougstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Harry S. Truman, *Memoirs of Harry S. Truman* (Garden City, NY: Doubleday & Co., 1956).er, Melvyn P. *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (Stanford: Stanford University Press, 1992), 365.
[78] Ibid., 366.
[79] Ibid.,367.

unprepared for a full-scale global war. They were confident that if the United States pushed back and repelled this supposed act of Soviet aggression, the Soviets would back down in North Korea and would think twice before they committed another such action. On this rationale, Truman and his advisors acted vigorously in Korea in an attempt to prove America's resolve in preventing the spread of communism.

Perhaps as a result of the above rationale, Truman approached the Korean War initiative in a manner that was markedly different than his approach to his actions in Greece. On the advice of his Secretary of State Dean Acheson, Truman decided not to ask for a joint resolution from Congress and instead to simply rely on the President's powers as Commander in Chief. He was backed heartily by the State Department, which released a memo on July 3. The State Department argued that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof," that there was a "traditional power of the President to use the armed forces of the United States without consulting Congress," and that this had often been done in "the broad interests of American foreign policy."[80] With this claim, Truman took the war power to a new level. Certainly this was not the first time that a president had used his Commander in Chief power to commit troops to armed conflict, but this was the first time a president used the Commander in Chief power *by itself* to legitimize sending troops into armed conflict without the country being in a formal state of war. This breaks with the precedent Roosevelt had set during World War Two because, as one might recall, Roosevelt went to great lengths to prevent claiming any inherent executive power when acting unilaterally and instead found ways to legitimize his authority through existing law. It was only after the formal

[80] Schlesinger, *The Imperial Presidency,* 133.

declaration of war by Congress that Roosevelt sought to utilize the capacities as Commander in Chief of the armed forces. Truman's argued that his usage of the Commander in Chief power in this instance was somewhat legitimized by the 1945 ratification of the U.N. charter, which stated that the Security Council – of which the U.S. was a founding member - "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[81] Truman thus argued that by defending South Korea, he was promoting the mission of the U.N., which was largely the product of the efforts of his own administration. This rationale was accordingly received with mixed reviews. One Senator, Ohio Republican Robert Taft, became a voice for criticism of Truman's approach. He maintained that Truman's

> Action unquestionably has brought about a *de facto* war with the government of northern Korea. He has brought that war about without consulting Congress and without congressional approval….[This] seems to me… a complete usurpation by the President of authority to use the Armed Forces of this country. If the incident is permitted to go by without protest… we would have finally terminated for all time the right of Congress to declare war, which is granted to Congress alone by the Constitution of the United States.[82]

Thus, there were two principal arguments about Truman's approach. On the one hand, one can accept Truman's authority under the Commander in Chief power to conduct the war by arguing that Congress' acceptance of the U.N. Charter in 1945 constituted implicit authorization of actions of this. But the opposing view would be to say that there is no inherent Commander in Chief power unless Congress issues either a formal declaration of war or an authorization of military force. One could also argue that the Senate's ratification of the U.N. Charter does not, by implication,

[81] Hess, Gary. *Presidential Decisions for War.* (Baltimore: Johns Hopkins University Press, 2001), 35.
[82] Ibid., 26.

justify the commencement of a major war without requesting congressional authorization. In any case, it was not until the July 7, 1950 passage of U.N. Security Council Resolution #84 that the U.N. actually made the request for Security Council members to intervene in Korea. Ultimately, neither side of the argument prevailed. Truman simply got away with it because Congress chose not to stop him from taking action. Nobody knew for sure the extent the Soviet Union was involved and it was generally agreed that the United States, through a show of force, might be able to prevent further assaults on democracies worldwide and thus reduce the need for future American military involvement.

There remains the central fact that the Korean War itself was being prosecuted without a formal declaration of war or authorization for military force by Congress. Surely, as Truman argued, the troops were fighting under the U.N. mandate after the July 7, 1950 passage of U.N. Security Council Resolution #84. But this mandate comes after the United States was already fully implementing its military machinery in a combat scenario without the approval of Congress. This is especially poignant when one considers that Truman sent troops to Korea on June 30 – a week before the passage of Resolution #84. It was not the U.N., but Truman who was responsible for the initial deployment of troops to Korea (which was, as he termed, a "police action"), and this commitment was made without the approval of Congress. Essentially, Truman was conducting a war by a different name. This in itself presents unique challenges to Congress, because the fact that the country is not engaged formally in a "war" limits Congress's abilities to control or to end the conflict. And indeed, there were attempts made by members of Congress to curb Truman's

initiatives by denying him the authority to commit any more troops to the Korean conflict. On, January 3, 1951, Republican Congressman Frederic Coudert, Jr from New York, introduced a resolution which asserted that "no additional military forces" could be sent abroad "without the prior authorization of the Congress in each instance."[83] The resolution instigated a series of heated debates in Congress which tried to determine what branch ultimately had control of the nation's armed forces. Some, such as Democratic Senator Wayne Morse of Oregon, argued for the necessity of presidential prerogative by submitting the full text of the *Curtiss-Wright* to support "a discretionary power which I believe is inherent in the President of the United States in the field of foreign policy."[84] Others, such as Senator Taft, argued that "the President simply usurped authority, in violation of the laws and the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war."[85] Ultimately, the debate resulted in a stalemate, the war continued, and no particular action was taken by Congress to curb the war effort. The fact that the debate resulted in a stalemate and the war effort went unopposed meant that, as a precedent, Truman's deployment of troops in Korea was legitimized. Through their inaction, Congress gave its tacit consent (which is wholly distinct from approval, in this case) of the Korean War effort.

But there was another aspect of Truman's conduct during the Korean War that has yet to be mentioned, namely, the extent to which Truman claimed war powers to deal with domestic issues. In the absence of a formal declaration of war from Congress, what constitutional powers does the president maintain to carry out a war

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[83] Schlesinger, *The Imperial Presidency, 136.*
[84] *Congressional Record,* August 30, 1951, 11075.
[85] Schlesinger, *The Imperial Presidency, 138.*

effort on the home front? Such was the question raised by *Youngstown Sheet & Tube Co. v. Sawyer.*

Youngstown Sheet & Tube Co. v. Sawyer (1952)

In 1952, workers represented by the United Steel Workers of America planned a labor strike against American steel factories that was to begin on April 9, 1952. Such a strike, as Truman understood, would have done severe harm to the American war effort. Without the steel to manufacture supplies for troops abroad, forces on the ground faced the danger of being underequipped to fight the hostile North Korean forces. In response, Truman issued an executive order on April 8, which asserted the following.

> [B]y virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:
>
> The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation…[86]

Truman attempted to block the effect of the strike by authorizing the Secretary of Commerce to seize strategic steel mills and to force their continued production. Note that Truman made no claim to any particular constitutional authority, but only to broad powers under the Constitution as Commander in Chief. This provides evidence of the way in which Truman interpreted the Commander in Chief power, namely, that it endows a scope of abilities upon the President that goes much further and is much

[86] Executive Order 10340 - Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies, April 8, 1952. *Available at* http://www.presidency.ucsb.edu/ws/index.php?pid=78454.

more expansive than just simply being the top officer of the army and navy. These plant seizures were seizures of private companies on domestic soil in the absence of a formal declaration of war or a declaration of a state of martial law. There seems to be no constitutional sanction for such behavior on the behalf of the President. The steel companies placed under seizure by the executive order protested on these grounds and the Supreme Court, in an opinion written by Justice Black, agreed with them. Writing for the 5-3 majority, Black asserted that,

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure…
>
> It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President…[W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities…
>
> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute…The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.[87]

The court thus rejected Truman's usage of executive power to seize private property in this instance. Additionally, Justice Black rejected the notion that the title of

[87] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

Commander in Chief of the armed forces gives the President the ability to undertake broad defense measures which pass beyond the realm of the military and into the civilian. Such actions can only be authorized by an act of Congress, as is explained in the last cited paragraph above.

The result of this ruling was that Truman ordered Secretary of State Acheson to return the steel mills to their original owners. Truman himself was particularly disappointed with the findings of the Court, which were announced on June 2. He notes in his memoirs that he thought Chief Justice Vinson 'hit the nail on the head' when he said that the views of the majority lack reverence for precedent and show "complete disregard of the uncontroverted facts showing the gravity of the emergency..."[88] Truman conferred with his cabinet and sought other means of seizing the steel mills. On June 10, he approached Congress and asked for legislation that would permit him to make the seizures, but that power was denied. Meanwhile, steel mills around the country remained idle until the labor dispute was resolved on July 24 – fifty-three days after it had begun. Total losses from this labor shortage were estimated to be in excess of $2 billion.[89] The strikes also proved to have a perceptible negative impact on the supplies for troops abroad. One general, after having returned from Korea in March 1953, complained to Truman that his troops had been short of certain types of ammunition in the summer and early fall of 1952.[90]

Resolution and Aftermath of the Korean War

The legacy of *Youngstown v. Sawyer* is one of the Court issuing a stern check on an expansive definition of executive power. But one must ask whether or not it

[88] *Memoirs of Harry S. Truman* Volume 2. (Garden City, NY: Doubleday & Co., 1956), 476.
[89] Ibid., 477.
[90] Roger Hilsman, *The Cuban Missile Crisis* (Westport, CT: Praeger, 1996).

meant much within the context of the Korean War. Surely, the ruling delivered on June 2 did not end the war. Nor did it necessarily prevent Truman's expansive usage of the Commander in Chief power from prevailing in other areas of the war. Ultimately, it was only after Truman had left office that a cease-fire was brokered with North Korea under the auspices of the U.N. and the conflict ceased without much influence from Congress. Truman's execution of the Korean War put Congress firmly into the background in the context of the Cold War. He chose to assert that, for conflicts arising out of the broad mandate of the Truman Doctrine, congressional approval was not needed. Keeping Communism at bay overseas, as Truman understood it, was a task for the executive. Some historians, like Arthur Schlesinger Jr. have argued that Truman's precedent in Korea did massive harm to the proper legacy of the war power. Schlesinger states that

> By insisting that the presidential prerogative alone sufficed to meet the requirements of the Constitution, Truman did a good deal more than pass on his sacred trust unimpaired. He dramatically and dangerously enlarged the power of future Presidents to take the nation into major war.[91]

Indeed, there are some who blame the later calamities of the Cold War in Vietnam on the aggressively unilateral precedent set by Truman's measures. This is partially true, because Truman charted a course for aggressive posturing against the spread of communism abroad. By establishing such a foreign policy stance, the United States would find itself under increasing obligation to meet a wide variety of threats abroad in circumstances where the benefit to the country itself would be minimal. But it is important not to forget that many in Congress were also supportive of the initiative itself. One Democrat, in an argument similar to that of Lincoln before the July 4

[91] Schlesinger, *The Imperial Presidency,* 135

meeting with Congress, defended Truman by saying that "with tanks, airplanes, and the atom bomb, war can become instantaneous and disaster can occur while Congress is assembling and debating."[92] Many believed or had been convinced of the necessity for United States intervention abroad as it was thought that this course of action would be the most effective at preventing another global conflict such had occurred in the previous world wars. But while there was no substantial congressional resistance to the initial deployment of troops, this does not mean that one should accept the legitimacy or the rationale behind Truman's initiative at face value. In all exercises of the war power by the executive, it is imperative that all branches – Congress especially – work to ensure that they are not placed into a position of impotence as they were during the Korean War. Their own complacence at the beginning of the conflict put them in a position where they could do nothing to stop the course of the war.

Of course, in being critical of both Congress and Truman himself, one must keep in mind that this analysis benefits from the clarity of hindsight. As mentioned before, nobody knew for sure whether or not the North Korean incursion represented a broader effort by the Soviet Union to undermine democracies and free market states worldwide. In the interest of trying to prevent the occurrence of another global war, Truman's actions likely seemed like the lesser of two evils. Nevertheless, these actions would stand as an example for later presidencies such as Johnson and Nixon, who took these same precedents and applied them to the Vietnam conflict. The lessons of the Korean War – namely how the broad mandate of standing against communism where it threatens democracies led to a long and inconclusive conflict –

[92] Ibid

were not well learned. As we shall see in the following pages, the usage of the war power continued to become bolder and more robust in the face of threats that were increasingly ambiguous.

Kennedy and the Missile Crisis

One might question the rationale for discussing the Cuban missile crisis in the context of a broader narrative on the war powers because, after all, the missile crisis itself was not a war, nor was it an event that precipitated a subsequent war effort. The reason for including the missile crisis here is that it was a case in which President John F. Kennedy made decisions almost exclusively without the consultation of Congress. The primary deliberations for the response strategy were conducted between the days of October 15 and October 22. During that time, the presence of nuclear missiles in Cuba (the first of which were considered to be operational by the 17th) was completely unknown outside of the executive branch. But as we detail Kennedy's response to the missile crisis, perhaps what is most important is not Kennedy's response to the crisis itself, but the way that his response would leave behind a legacy that further legitimized unilateral executive action in matters pertaining to war. Indeed, as shall be shown later, Kennedy's response was understood by later presidents as the rule and not the exception.

The crisis began after months of growing suspicions that the Soviet-sympathetic Cuban government might acquire nuclear weapons from the U.S.S.R. Cuba's proximity to the U.S. mainland obviously made this a dangerous possibility because it gave the Soviet Union a greater capacity to make a 'first strike' against the United States with a larger variety of short and medium range missiles, in addition to

the intercontinental ballistic missiles which they maintained in Europe. On October 14, 1962, the scenario feared by American foreign and military strategists became a reality as a U-2 spy plane flew over western Cuba and shot photos of several installations capable of delivering up to forty intermediate-range missiles capable of carrying nuclear munitions to major American cities.[93] At the time, this discovery caused the utmost alarm by those in the executive branch. Was this simply a foreign policy power play against the U.S.? Or did this represent Soviet preparation for an assault on the U.S. homeland in the same way that the Japanese had clandestinely prepared for and carried out the attack on Pearl Harbor? Neither possibility could be ascertained for sure, but those in the executive agreed that the removal of those missiles from Cuba was a paramount objective both for U.S. foreign policy and national security.

Kennedy understood these dangerous realities of the situation. Unlike the invasion of South Korea, the presence of nuclear missiles in Cuba presented a direct threat to the United States because of its close proximity to the American homeland. On October 16 ordered that a meeting be arranged with fourteen heads of various executive offices pertaining to the national defense. That committee was henceforth known as the Executive Committee of the National Security Council, or "EXCOMM." The veil of secrecy surrounding the activities of EXCOMM was thick in the days following the initial discovery of the missiles. The executive branch did its best to make it seem as though nothing was amiss. One historian notes how, in the first days of the crisis, Kennedy continued to attend campaign events and even the

[93] Hilsman, Roger. *The Cuban Missile Crisis.* (Westport, CT:Praeger, 1996), p.77.

military carried out long-scheduled amphibious military exercises in the Caribbean.[94] Various approaches were discussed, which ranged in severity from all-out invasion of Cuba (a potential catalyst to World War III) to a diplomatic agreement with the Soviet government to remove all missiles on both sides stationed outside each country's borders (which would include the United States giving up strategic missile installations in Turkey and Italy).[95] But the scales weighed indecisively for any single course of action. Both courses of action had their weaknesses and the potential consequences were great. At this time, however, the crisis was still fully unknown to Congress and rest of the world. It seems that Kennedy simply did not trust the members of Congress with a secret of such proportions, nor did he particularly value the extra perspective they might have given. This is likely due to the fact that he felt as though he had already allowed for a diversity of opinions in his creation of EXCOMM – comprised of experts on military and foreign policy – and that additional views would have been redundant and would have increased the potential of the crisis leaking to the public. This approach is generally in keeping with the pre-eminence of the President in the realm of foreign affairs that had been established in 1939 by the *Curtiss-Wright* decision.

After a few days of debate among the members of EXCOMM, it was ultimately decided that the U.S. would institute a naval 'quarantine' (read 'blockade') against both Soviet and non-Soviet ships sailing to the island of Cuba.[96] A plan was made to meet with leaders of Congress and make them aware of the crisis on the morning of October 22, a full week after the initial discovery of the missiles had been

[94]Ibid, 75-77.
[95] Ibid., 99.
[96] Ibid., 100.

made. And the point of this meeting, as Schlesinger notes, was not to "consult them, but to inform them."[97] The decision to institute the blockade had already been made and Kennedy, at that time, was not open to further debate of the issue. The reaction by the congressional leadership, as Schlesinger notes, was not overwhelmingly approving, but their contention was not with their exclusion but with the particular course of action that had been chosen. Schlesinger goes on to point out that even if Kennedy had included members of Congress in the initial meetings of EXCOMM, that they "might have made a marginal political difference if the policy had not worked, but it would have made no constitutional difference, since the presence of selected members of Congress on an executive council was no substitute for formal congressional action."[98] Indeed, it is doubtful that if a member were sitting on EXCOMM, it would have made any difference. Even if there was a member of Congress on the committee, he would have been sworn to the same secrecy as the other members of EXCOMM. This secrecy would have barred that person from consulting other members of Congress and Congress obviously cannot pass a law to respond to an issue that they do not know about. Having a member of Congress on EXCOMM would not have had an important effect on the deliberations of that committee. If anything, his presence there would simply be to give another perspective that, unlike the other sitting members of EXCOMM, had no valuable military or intelligence information to share and would also have been unable to provide any meaningful indication as to the feelings of Congress.

Ultimately, the situation was resolved after the Soviets removed their missiles

[97] Schlesinger, *The Imperial Presidency,* 175.
[98] Ibid.

from Cuba without precipitating conflict. The sentiment on the Soviet side is perhaps best summarized by an excerpt from the cable sent by Khrushchev to Kennedy on the evening of October 26:

> Mr. president, we ought not to pull on the ends of the rope in which you have tied the knot of war because the more the two of us pull, the tighter that knot will be tied, and the moment may come when it will be tied so tight that we will not have the strength to untie it and then it will be necessary to cut the knot, to doom the world to the catastrophe of nuclear war.[99]

Congress was fully left out of the response actions but, as we have seen before, took a deferential role towards the executive and raised little issue when the executive took unilateral action to promote the interests of national security. One can imagine that a Congress of a different nature might have taken issue with their exclusion. They could, for example, have made an argument against the institution of a blockade without their approval because, if the outcome of the crisis had been different, such an action could reasonably be construed as having led the nation into a war against Cuba and/or the Soviet Union. But no such argument was made, and in any case, it is highly likely that Congress would indeed have made a war declaration if the crisis had evolved to that degree. Congress was fully willing to take a deferential role to the will of the executive and, fortunately for us all, a peaceful resolution to the conflict was reached as a result.

Executive leadership in the missile crisis did, however, come at a high cost to the constitutional balance of powers in relation to war actions. By leaving Congress out of the deliberations over a response during the missile crisis, Kennedy gave later presidents such as Lyndon Johnson and Richard Nixon the sanction of precedent to

[99] Hilsman.. *The Cuban Missile Crisis,* 122.

commit similar actions. As shall be examined in the following section, later presidents would use Kennedy's example to make claims on executive privilege regarding foreign policy and national security initiatives. Kennedy's example reinvigorated executive claims to Locke's prerogative power in the Cold War. But unlike presidents previously examined, claims to prerogative power made by Johnson and Nixon were made towards ends where perhaps the level of threat did not warrant those claims. Indeed, the course of the Vietnam War – the conflict to which we now turn our attention – was driven by a necessity perceived by some to implement strong military action abroad in situations where there was little threat of harm to U.S. interests or national security. And Congress, while sanctioning these activities just as in this case, would soon find that broad sanction of executive action is not always a good idea.

The Vietnam War

In 1964, American foreign policy looked much the same as it did in 1950. Lyndon Johnson has succeeded Kennedy after the latter's assassination in November 1963, but Truman's containment policy was alive, well, and vigorously fixed upon conditions in Vietnam. Relations with the Soviet Union had remained tense since the missile crisis and other communist powers in the region – namely China – had asserted their presence there. To many in the American government, it seemed that communists were still seeking to over throw fledgling democracies in key international battlegrounds. Should the U.S. allow such takeovers to succeed in Vietnam or elsewhere, Johnson thought, it would cause a chain reaction in the collapse of democracies throughout the region and it would "say to the world… that

we don't live up to treaties and don't stand by friends."[100] Vietnam was therefore a primary foreign policy concern and the survival of the South Vietnamese government was seen as a legitimate foreign policy goal. In the years running up to 1964, tensions between North and South Vietnam had grown increasingly strained. The North was becoming increasingly hostile towards the South. A communist insurgency had made chaos out of the South's government, which was showing a decreasing ability to cope with that pressure in the absence of help from the U.S. Johnson had pressed the South Vietnamese to set a harder line against the insurgency by instituting a much more vigorous military course. He additionally sent experienced military advisors to aid the South Vietnamese in their military planning. One advisor, General William Westmoreland, upon his arrival in Saigon soon requested the addition of 4200 advisors over the spring and summer of 1964. This increase, which Johnson quickly approved, would bring the total number of American advisory personnel in Vietnam to 22,000.[101]

This relationship changed drastically on August 4, 1964, when reports reached Johnson that an American destroyer, the *Maddox*, had been fired upon by three North Vietnamese patrol boats in the Gulf of Tonkin. The *Maddox*, with aid from other ships and aircraft in the area at the time, quickly returned fire which damaged two patrol boats and sank another. Later that evening, the *Maddox* reported again being under threat of imminent attack, though that threat ultimately dissipated. This was enough, however, to convince Secretary of Defense Robert McNamara that there was a palpable threat to U.S. military personnel in the area and that the threat should be

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[100] Hess, Gary. *Presidential Decisions for War Korea, Vietnam, and the Persian Gulf.* (Baltimore: The Johns Hopkins University Press, 2001), p.80.
[101] Ibid., 85.

met with a retaliatory aerial bombing campaign. That evening, Johnson addressed the public on television, saying that

> The determination of all Americans to carry out our full commitment to the people and to the government of South Vietnam will be redoubled by this outrage. Yet our response, for the present, will be limited and fitting. We Americans know, although others appear to forget, the risks of spreading conflict. We still seek no wider war.[102]

But while he said this, the reality of the situation was that the nature of the conflict had been fundamentally changed. American military forces were now waging a combat offensive against North Vietnamese installations. In the context of other conflicts, the same actions would be considered to be acts of war. It is likely that few would have questioned the authorization of military forces to fire when fired upon – as was done by the crew of the *Maddox* with sanction from military leaders – but the country had now committed itself to broad bombing campaign which seemed to be more than a response, but an offensive *retaliation*.

The following day, on August 5, Johnson approached Congress with a draft for a joint resolution that would later be called the Gulf of Tonkin Resolution (GOTR). In its support, Johnson appealed with a request to "…resolve and support…action to deal appropriately with attacks against our Armed Forces and to defend freedom and preserve peace in southeast Asia…"[103] He further framed the conflict as having direct implications for national safety when he asserted that "[a] threat to any nation in that region is a threat to all, and a threat to us."[104] Initially, there were some notable voices that did question the implications of the GOTR for the war power and the Constitution. Senator Morse of Oregon, who ironically was

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[102] Lyndon B. Johnson, Speech on the Gulf of Tonkin Incident, August 4, 1964. *Available at* http://www.presidentialrhetoric.com/historicspeeches/johnson_lyndon/gulfoftonkin.html
[103] Lyndon B. Johnson's Message to Congress, August 5, 1964 *available at* http://www.mtholyoke.edu/acad/intrel/tonkinsp.htm
[104] Ibid.

quoted earlier supporting the prerogative of President Truman to commit military forces in Korea, was perhaps the most outspoken against the powers given by the GOTR. Morse said "that history will record that we have made a great mistake in subverting and circumventing the Constitution of the United States…. We are in effect giving the president….war-making powers in the absence of a declaration of war. I believe that to be a historic mistake."[105] Ultimately, however, this line of thinking did not prevail. Both houses unanimously (416-0 in the House; 88-2 in the Senate) approved the resolution as it is reproduced below.

> Section 1. That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.
>
> Section 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.
>
> Section 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.[106]

Similar resolutions had been passed in previous years, most notably in the Formosa Resolution of 1955, which pledged that the U.S. would defend Taiwan against invasion from China. Formosa also supported the executive with similar

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[105] Hess. *Presidential Decisions for War: Korea, Vietnam, and the Persian Gulf*. 87

[106] Gulf of Tonkin Resolution, August 7, 1964 *available at* http://www.hbci.com/~tgort/tonkin.htm Leonard C. Meeker, "The Legality of United States Participation in the Defense of Viet Nam," *State Department Bulletin*, 1966: 474, 484-485.

language that allowed them to "take all necessary measures" to achieve the targeted objective. The same approach was used here, allowing the executive to do whatever necessary to repel attack *and* to prevent further aggression. Such broad allowances of authority indicate a monumental amount of trust on the part of Congress. It is likely that Congress took Johnson at his word when he asserted that there would be no 'wider war' and if conditions arose such that a wider war were necessary, Johnson would again approach them for approval. But unlike similar resolutions in the past whose conflicts were resolved relatively quickly, conflict in Vietnam, as it would later prove, would not be so easily fought and ended. Few in either the executive or Congress likely could have anticipated the sheer determination and resistance on the part of the North Vietnamese. It is also likely that, with the aforementioned presuppositions, few approving members of Congress could have anticipated that by passing the GOTR, they were giving the President the ability to wage war on a grand scale. One striking attribute of the GOTR is its utter vagueness, especially in Sections 1 and 3. Section 1 essentially states that Congress gives its approval to the President to do anything necessary to repel attack and to "prevent further aggression." The latter phrase is crucial because it gives sanction not only to defensive actions, but also to offensive actions which might well be considered to be preventing further aggression. Section 1 legitimates anything from small-scale material support of local forces to full-scale deployment and use of the army, navy, and air force. The latter is much more like the way the Resolution actually came to be used.

Section 3 also places loose restrictions on these newly endowed capabilities. There is no fixed sunset or measure of achievement that might terminate the

resolution. The only way this resolution would expire was by the will of the President, or by concurrent resolution (meaning a resolution immune to presidential veto) of Congress. As shall be argued later in the section, the latter solution is much more complicated than it may seem. Essentially, the GOTR endows the President with broad capabilities, but it shies away from issuing a full-scale declaration of war. One must ask, however, what the substantive difference is between the GOTR and a formal declaration of war. The GOTR allows the president to "take all necessary measures" to repel a threat in much the same way as a declaration of war would give such powers. Indeed, one could even go so far as to say that force authorizations like the GOTR are more robust than formal declarations of war because they are much less precise both in defining the nature, the extent, the scope, and the sufficient conditions for the termination of a conflict. The President is arguably able to go further in taking war measures under the GOTR because it fails to set limits or to set conditions of his usage of the war power. He is fully enabled under this resolution to do practically all that he wishes in a manner that is legal, and has the pre-approval of Congress.

Unfortunately, the conditions in South Vietnam were deteriorating rapidly by late 1964. The South Vietnamese were being subjected to increasing levels of hostilities by the communist Viet Cong insurgency as well as the North Vietnamese military. In an attempt to improve conditions on the ground, Johnson authorized the commencement of sporadic bombing raids into North Vietnam on December 1, 1964. Johnson and his military strategists thought that what was needed in Vietnam was a scaled strategy that called for small-scale operations that could increase gradually in

cases where more intense action was needed. But still, by early 1965, the situation did not improve and the North Vietnamese refused to back down as U.S. military planners had anticipated. As a result, more and more air strikes were ordered on North Vietnamese targets in an attempt to intimidate them through a show of military might. In February 1965, however, there arose a growing fear that the North Vietnamese might make retaliatory attacks against American air bases, and a request was made by General Westmoreland to send two Marine battalions to protect them. The request was quickly approved by Johnson and two fully-outfitted Marine battalions arrived on Vietnamese shores on March 8. This would prove to be the point of no return for American involvement in the Vietnam. The gradual escalation of hostilities had trapped the U.S. into a cycle of support and resupport. American military strategists had come to the realization that they could not fight a limited war when their enemy was prepared to fight a total war. They could not simply send in a small force when that force risked being overrun by an entire army, and thus it became necessary to deploy forces on the large scale.

This trap – a Catch 22, of sorts – illustrates the fatal flaw in the GOTR and other resolutions like it. Now the conflict had evolved to become not only a fight to preserve democracy in South Vietnam, but a fight to protect American troops. On February 7, 1965, after an American Army barracks was dynamited by Viet Cong troops at Pleiku, Johnson described the conflict as follows:

> We have kept our gun over the mantel and our shells in the cupboard for a long time now and what was the result? They are killing our boys while they sleep in the night…. We have no choice now but to clear the decks and make absolutely clear our continued determination to back South Vietnam in its fight to maintain its independence.[107]

[107] Hess. *Presidential Decisions for War Korea, Vietnam, and the Persian Gulf.* 91.

And of course, such an action was perfectly in line with what had been provided in the GOTR. Johnson was "taking a necessary action" – which in this case was to commit American military forces to an all-out combat role – to "repel armed attack against American forces and to prevent further aggression." For all practical purposes, by passing the GOTR, Congress waived its right to decide whether and when a total war began. They gave Johnson the power to initiate military operations of any size in any place at his discretion. Additionally, as long as the resolution remained in effect, Congress also lost ground in its ability to inquire and investigate the President's activity because, at any time, he could retort with the argument that Congress had already given its prior consent to actions taken under his discretion. The GOTR was thus an enabling act of legislation that allowed Johnson to lead the country toward a great national sacrifice.

Johnson, in addition to using the GOTR, justified the extent of his actions through a unique conception of the executive power as endowing the President with the right to partake in defensive war without the consent of Congress. Over the course of American history, it has generally been accepted that the President has the power to repel sudden attacks. Such would be the precedent set by Lincoln's actions after the attack on Fort Sumter, which was later legitimated by Congress. In this case, Johnson took this precedent and expanded it dramatically by applying that concept to situations abroad that could be construed as presenting a threat to the U.S. In a speech to the Senate Foreign Relations Committee, Johnson said in 1966 that

> In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores

> can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States.
>
> Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures.".[108]

This statement is full of logical leaps and bounds on Johnson's part and represents a clear expansion of the interpretation of the executive war power. In the second paragraph, not only does he assert that he has legislative authorization, but that the Constitution itself gives the President the ability both to decide when an attack has occurred and to determine the proper response measures. The point upon which his argument hinges is that he is the one who, under the Constitution, is to determine when an attack on the nation has occurred. What is most tenuous here is his definition of "an attack on the nation." First, it is highly doubtful that the founders assumed that the president may conclude that invasions of sovereign foreign allies by another foreign country constitutes an attack on the United States. One might attempt to skirt this interpretation of the Vietnam events by saying that Johnson was not responding to the invasion (which he indeed said on numerous occasions), but to the attack that occurred in the Gulf of Tonkin. And even if one were to assume that this was true, it would not explain why Johnson conducted the war in the manner that he did. By mid-1965, the U.S. was not simply attacking patrol boats and North Vietnamese naval installations (which would have seemed an apt response for the minor attack on the

[108] Meeker, Leonard C. The Legality of United States Participation in the Defense of Viet Nam, 54 Dept. State Bull. 474, 484–485 (1966).

Maddox). The U.S. was then carrying out a full-scale ground war accompanied by intense aerial bombardment in all areas of Vietnam – coast and shore alike. Thus, it seems particularly difficult to justify his claim of "an attack on the nation," in this case. But despite these criticisms, Johnson denied the right of anyone else to check his determination of an attack on the nation. This reading places a monumental amount of discretion on the President which, I would argue, is problematic. His second major assumption is that the founders, unable to foresee the technological and tactical advances of warfare in the twentieth century, *probably* would claim that the President has an exclusive right to contest an attack on the nation without congressional approval. It seems highly unlikely that had the founders been able to see the kind of conflict being carried out in Vietnam by the United States – a military effort involving a full-scale mobilization of the Army, Navy, and Air Force into active combat – they would consider it to be anything less than a war. It seems that, overall, Johnson's claim to unilateral action in Vietnam seems to be based heavily upon a stretched and contorted interpretation of his powers under the Constitution. Indeed, it seems as though he reinvented the constitutional balance of power in matters of war in favor of loosely checked unilateral executive action. But perhaps what is most surprising about this process is that Congress allowed these shifts in the balance of power to occur unchecked. They did this first through their passage of the GOTR, which enabled him to make such broad claims initially.

Throughout the late 1960's and into the early 1970's, the conflict in Vietnam continued to escalate as more and more troops were committed to the area until finally America was involved in an all out war. At home, criticism of the war was

growing ever more intense, which forced lawmakers to rethink their previous support for the GOTR. In the Oval office, Johnson was replaced by Richard Nixon, who upheld Johnson's interpretation of the executive war power. Nixon also believed that there were implied powers endowed upon the President by the Commander in Chief Clause. In 1970, after making the decision to invade Cambodia, Nixon said that

> The legal justification [for the invasion]…is the right of the President of the United States under the Constitution to protect the lives of American men.…As Commander in Chief, I had no choice but to act to defend those men. And as Commander in Chief, if I am faced with that decision again, I will exercise that power to defend those men.[109]

As a result of this expansion of the war and the growing popular sentiment against the war effort, Congress formally repealed the GOTR in early 1971 as part of the Defense Procurement Authorization Act. But even though they issued this repeal its effect was marginal at best. The repeal had no operating language that could have put pressure on Nixon to end hostilities in Vietnam. There was no provision, for example, that prohibited funding or refused the additional shipment of troops. At first glance, it seems perplexing why Congress chose not to take more forceful measures. But further thought reveals that the most potent weapons the legislature has against the executive – Congress's control over funding for the armed forces – is bound tightly to an enormous moral dilemma. Congress can choose to cut funding to the war, but this decision comes with no guarantee that hostilities will end as a result. A president could theoretically choose to leave troops in the area until the last dollar was used, which would leave American troops stuck in a hostile situation with no money to fund either their ability to leave or fight back against the enemy. And with Nixon inheriting Johnson's view that the war effort in Vietnam was a matter of presidential

[109] Schlesinger, Arthur. *The Imperial Presidency*. 188.

prerogative, it was likely that members of Congress felt that Nixon very well might forced a continuation of hostilities if they were to cut funding. Such a consequence would be an unacceptable result for the voting members of the legislature. This realization, coupled with the fact that there were probably still members of the legislature who believed in the war effort to some degree, likely led Congress to revoke their sanction of the conflict, but to nevertheless make no concrete refusals of further funding or troop deployments.

Nixon understood Congress's predicament and used it to his advantage. In response to the 1971 Defense Procurement Authorization Act, he dismissed it by saying simply that this act "did not represent the policies of this Administration," was "without binding force or effect," and that "my signing of the bill will not change the policies I have pursued."[110] Nixon continued to wage the war in Vietnam as he had before, even as public opinion had fallen to a dismal low. Congress' later attempts to regain control over the war effort were a bit more successful. In 1973, Congress passed the War Powers Resolution (WPR), which attempted to rein in the executive war power by placing restrictions upon the President when sending troops into conflict. The WPR asserted that the President must alert Congress of any deployment of troops within forty-eight hours and to withdraw them within sixty days absent the explicit endorsement of Congress. The WPR also restricted the President's powers as commander in chief, which had expanded significantly over the course of the Cold War. It asserted that the President can exercise his powers as commander in chief "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a

[110] Ibid., 194.

national emergency created by attack upon the United States."[111] This resolution, combined with the Watergate scandal that decimated the nation's confidence in Nixon, was a bold and necessary rearticulation of the presidential war power after it had undergone rapid expansion during the Cold war and the nuclear age. Vietnam had done substantial damage to the world's opinion of the U.S., and it is unlikely that the country could have afforded to engage in another similar conflict. This resolution, however, was too little, too late to help change the course of the war. Most of the damage – the loss of life, the massive expense of resources and funds, he harm to America's image abroad - had already been done by 1973. Weary with the struggles of war, the United States finally pulled out of Vietnam under President Gerald Ford's administration with a final helicopter retreat from Saigon in 1975 - a full ten years after Johnson's first bombs dropped over North Vietnam.

The situation in Vietnam in the later years of the war illustrates how the decision to de-escalate a war is much more complicated than just simply leaving when the idea of war is no longer attractive. It often requires a much more scaled approach that involves willing action by members of the executive and the legislature. A conflict begun by the executive must be ended by the executive as well. Any unilateral scaling back of resources by Congress will only be to the detriment of the forces on the ground. Vietnam is yet another example of Congress conforming to the will of the executive in a matter of the national defense. But unlike previous occurrences of this phenomenon during the Civil War and World War Two, the United States was left without any real sense of accomplishment or jubilation. The

[111] War Powers Resolution 1973 Sec 2 (c) *available at* The Avalon Project. http://avalon.law.yale.edu/20th_century/warpower.asp

war had been costly and Americans paid dearly. The result was a serious post-war reconsideration of the nature of the war powers and the role of the branches in ensuring that they are better contained in future engagements.

Persian Gulf War

At the beginning of the 1990's, roughly fifteen years after the end of the Vietnam War, the prevailing attitude in government towards the war powers had been somewhat different than it had been during the earlier years of the Cold War. During the mid-1980's the United States continued to be involved in the suppression of communist regimes in Latin America in a series of small-scale military interventions. In 1983, President Ronald Reagan issued National Security Decision Directive Number 75, a secret document that outlined three basic principles regarding the relationship of the U.S. with the Soviet Union. One of these spoke directly to what would later be called the Reagan Doctrine. It proposed

> To contain and over time reverse Soviet expansionism by competing effectively on a sustained basis with the Soviet Union in all international arenas – particularly in the overall military balance and in geographical regions of priority concern to the United States. This will remain the primary focus of U.S. policy toward the USSR.[112]

Put simply, this meant that President Reagan asserted a similar desire to prevent the spread of Soviet influence internationally as presidents had before him. But the nature of the initiatives that resulted from this doctrine was generally more cautious and they were done on a much smaller scale. In Nicaragua, for example, Reagan used the CIA to aid the Contras, who were fighting the socialist Sandinista regime. Their involvement, however, was mostly limited to the sending of funds and

[112] National Security Decision Directive Number 75, "U.S. Relations with the USSR." President Ronald Reagan. *Available at http://www.fas.org/irp/offdocs/nsdd/23-1956t.gif.* Lawrence Freedman and Efraim Karsh, *The Gulf Conflict: 1990-1991: Diplomacy and War in the New World Order* (Princeton, NJ: Princeton University Press, 1993).

military activity on the very small scale. But when this activity was discovered, it generated a serious rebuke from Congress in a series of resolutions called the Boland amendments, which explicitly banned sending funds to Nicaraguan Contras by any agency of the government. This led some members of the executive to secretly attempt to channel funds to the Contras through Iran in what is popularly known as the Iran-Contra Affair. But this too was discovered and what resulted was a sizeable scandal that caused a great deal of embarrassment to the Reagan administration. Overall, however, American support of the Contras did not compare with other actions taken in the cases studied elsewhere in this narrative, and the incident has only a loose relation to the American war power. Indeed, there were small instances where troops were deployed in combat, such as in Grenada after a communist coup in late 1983. The U.S. landed Army Ranger and Marine divisions on the ground and overturned the coup without congressional support. But this action, while severely rebuked on the international scene, created no significant domestic turmoil due to the fact that the conflict was brief, successful, and conformed with the War Powers Resolution of 1973. Additionally, the rescue of a number of American medical students caught in the midst of the coup bolstered the legitimacy of the action in the minds of the American public, which further mitigated any uproar over the action. These were the kinds of conflicts that filled the void between Vietnam in 1990. While Americans still seemed willing to continue to oppose Soviet influence, the nation's approach was much more timid than it had been earlier in the Cold War. Many Americans were afraid of "the next Vietnam" and, for the most part, the actions of the government reflected that.

But on August 2, 1990, the United States was confronted with a conflict abroad that was of a distinctly different nature than those that it had faced in the recent past. 140,000 Iraqi troops, 1,800 Iraqi tanks, and two full divisions of Iraq's elite Republican Guard suddenly invaded Kuwait, America's tiny Persian Gulf ally.[113] The Iraqi forces quickly took control of the country and declared that Iraq had decided to annex Kuwait. From an American perspective, this conflict was fundamentally different in its nature than had been the Cold War invasions of South Korea and South Vietnam by their neighbors, because it did not involve the now-familiar struggle between communism and democracy that obliged the U.S. to take sides with the latter. This instead was generally understood both in the U.S. and by the international community as an unprovoked act of aggression that constituted an overt abuse of a nation's sovereignty. Such an action by itself was seen as posing a challenge to international political and economic stability. On the political side, allowing such an act of aggression to go unpunished might send a message around the world that the United Nations - the body charged with serving a peacekeeping role in international affairs – was impotent and unwilling to take serious action to repel violations of international peace. The United States, as a sitting member of the Security Council, certainly had a role to fulfill in this mission. But perhaps more important to United States interests was the economic dimension of the invasion. By invading Kuwait, Iraq had availed itself to control of 20% of the world's oil resources.[114] Indeed, if Iraq were to have taken its aggression one step further and invaded another U.S. ally, Saudi Arabia, it could potentially have controlled almost

[113] Freedman, Lawrence and Efraim Karsh. *The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order*. (Princeton: Princeton University Press, 1993), p. 67.
[114] Ibid. 75.

double that amount. If access to these resources were to be encumbered in any way, those economies dependent on oil imports (e.g. the American Economy) were sure to suffer.

Thus, this conflict was not one of ideological commitment, such as it was during the height of the Cold War, but one that demonstrated serious direct implications for United States interests. Also different from the Cold War was the virtually universal condemnation of the Iraqi action by from the international community. Even states like Cuba and Yemen joined the Security Council in condemning the annexation of Kuwait.[115] In response to the invasion, the U.N. issued Resolution 660, which asserted the official condemnation of Iraq's actions and demanded a full and unconditional withdrawal.[116] Not surprisingly, Iraqi troops ignored the call for withdrawal and instead, satellite photos showed that three Iraqi armored divisions were making their way toward the neutral zone on the Saudi-Iraqi border. This obviously caused a great deal of concern among the Saudi leadership and soon they entered into talks with U.S. military planners regarding the possibility of an American troop deployment to Saudi Arabia to discourage further movement. This operation to protect the Saudi Border, later known as Operation Desert Shield, called for a gradual deployment of 250,000 men and equipment to Saudi Arabia beginning on August 6, 1990.[117] This plan was put into action without the formal approval of Congress, but neither was there any outright prohibition to the deployment. Many in Congress were unsure about the potential for war in Iraq. Many questioned whether or not a war with Iraq was worth the potential sacrifice and many worried about the

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[115] Ibid., 212.
[116] U.N. Resolution 660. August 2, 1990. *Available at* United Nations, *U.N. Resolution 678*, November 28, 1990.*http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510.pdf?OpenElement*
[117] Freedman and Karsh. *The Gulf Conflict 1990-1991*, 88.

potential for this to become another Vietnam.

Over the course of those months in late 1990, much of the international community including Britain, France, Germany, Japan, and the Soviet Union, had joined the U.S. through pledges of financial and/or military support in order to protect Saudi Arabia. But even after these countries pledged their support and the U.N. had placed severe economic sanctions upon Iraq, there was still no sign of withdrawal from Kuwait. This stubbornness provoked the eventual passage of U.N. Resolution 678 on November 28, 1990, which authorized

> Member states co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements [unconditional withdrawal and restoration of Kuwaiti sovereignty], to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area…[118]

This resolution sanctioned the use of force against Iraq for its aggression, and signaled to President George H.W. Bush and others in the American government that war was becoming ever more likely.

But war, at this point, was not a foregone conclusion. After the passage of Resolution 678, President Bush was faced with the same question that many other presidents had faced before conflicts – do I, or do I not seek the approval of Congress for this action? Lawrence Freedman and Efraim Karsh's account of the decision-making process indicates that Bush was generally resentful of the strictures created by the War Powers Resolution, but he was also mindful of the fact that many congressmen were of an opposite opinion and that going to war without their approval could potentially undermine the war effort despite the fact that a majority of

[118] U.N. Resolution 678, November 28, 1990. *Available at Authorization for Use of Military Force Against Iraq Resolution*, January 3, 1991.

Congress was generally supportive of an war against Iraq. [119] One representative, Democrat Stephen Solarz of New York, warned Bush of potential impeachment by saying "It would be a hell of a thing to have a half a million Americans fighting the war in the Gulf to get Saddam Hussein out of Kuwait while a serious effort was being made at home to get George Bush out of the White House."[120] There would have been valid arguments for both courses of action. President Bush theoretically could still have sent troops without Congress' approval, so long as he notified them of his decision within forty-eight hours after it was made and troops were committed for no longer than sixty days in the absence of their approval. But this would likely have compromised his position by constraining himself to the sixty-day deployment limit stipulated upon unauthorized troop deployments by the War Powers Resolution. This could have potentially limited his ability to carry out the war successfully if no Congressional endorsement was obtained. Additionally, the latter would have been made much more difficult because of his decision to alienate the Congress by acting without their prior approval. Many sitting congressmen and congresswomen were particularly attuned to the lessons of Vietnam, and demonstrated a preference for preventing a unilateral executive war action. Nevertheless, it was speculated by Bush's advisors that a majority of the Congress would likely have approved an Iraq war effort anyway, which would have made circumventing them an unnecessary encumbrance upon the war effort.

Thus, the issue was eventually brought to Congressional debate in January 1991. Many were generally supportive of the idea of an Iraq war and found that the

[119] Freedman and Karsh. *The Gulf Conflict 1990-1991*, 290.
[120] Ibid.

risks of not going to war in Iraq outweighed those of going to war. But there were some critics of the effort who were particularly sensitive to the risks involved in such an action. Senator George Mitchell enumerated the risks, saying that

> [This could potentially become a] war in which Americans do the fighting and dying while those who benefit from our effort provide token help and urge us on… [The United States risks] an unknown number of casualties and deaths, billions of dollars spent, a greatly disrupted oil supply and oil price increases, a war possibly widened to Israel, Turkey or other allies, the possible long-term American occupation of Iraq, increased instability in the Persian Gulf region, long-lasting Arab enmity against the United States, [and] a possible return to isolationism at home.[121]

Thus, the perceived risks were indeed formidable and at least some members of Congress were fully aware of the potentially dangerous consequences involved in such an action. Ultimately, however, these risks were deemed to be lesser than the risks of allowing Saddam Hussein to go unpunished, and Congress approved the Authorization for Use of Military Force Against Iraq Resolution on January 3, 1991. It stipulated the following:

> *Section 2. Authorization for use of United States Armed Forces.*
> (a) The President is authorized, subject to subsection (b), to use United States Armed Forces…
> (b) Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that:
>
> (1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions cited in subsection (a); and
>
> (2) that those efforts have not been and would not be successful in obtaining such compliance.

[121] Ibid., 293.

(c) War Powers Resolution Requirements-

(1) Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Section 3. Reports to Congress

At least once every 60 days, the President shall submit to the Congress a summary on the status of efforts to obtain compliance by Iraq with the resolutions adopted by the United Nations Security Council in response to Iraq's aggression.[122]

Congress thus gave President Bush the authority to initiate a war in Iraq, but this is particularly striking when one thinks of it in comparison to the Gulf of Tonkin Resolution discussed in the previous section. Particularly in §2(b) and (c), one sees a firm assertion by Congress to set conditions and place limitations on the Presidents ability to carry out the war effort. §2(b) places a condition upon the authority given by §2(a) by forcing the President to prove both that conflict is necessary in this case and that all other diplomatic measures have been tried and have failed in their purpose to provide a resolution to the conflict. §2(c) also affirmed that Congress still believed in maintaining oversight over presidential war efforts, as was stipulated by the War Powers Resolution. Therefore, the President could make no argument that the authority provided in §2(a) overrides other congressional oversight measures that had been installed in the past. Finally, §3 institutionalized a reporting procedure that forced the President to keep members of Congress abreast of the progress of the war, which ensures a reasonable amount of information flow between the executive and

[122] Authorization for Use of Military Force Against Iraq Resolution, January 3, 1991. *Available at http://thomas.loc.gov/cgi-bin/query/D?c102:3:./temp/~c102DnlHOj* RAND Corporation, *Stress Reactions to 9/11 Attacks Felt Across the Country*, November 15, 2001.

the legislature.

These provisions provide stark contrast with the Gulf of Tonkin Resolution and suggest that Congress had perhaps learned a lesson from its experiences during Vietnam and had, in this case, chosen to assert itself into a role of vigilant oversight in the Iraq war. This is not to say, however, that had the Iraq War gone awry and become a long, drawn out conflict, President Bush could not simply have invoked presidential prerogative and disregarded this and other provisions of U.S. law. But by structuring the Authorization in this manner, Congress made it significantly more difficult to do so legitimately. First, any action contrary to the Authorization can and likely would have been construed as a violation of U.S. law. This would have disabled arguments like those we have seen in the past where presidents have argued that, in the absence of specific provisions that make an action illegal, that action itself cannot therefore be considered illegal. Second, §3 puts Congress into an oversight role which cannot be denied by the President. This increases the potential for members of Congress to be fully and appropriately informed about the most important issues surrounding the conflict, which itself can lead to better congressional decision-making.

This authorization gave power to the president to initiate the war, which he did do on January 16 with an initial salvo of air raids. Fortunately, the war was over rather quickly, as Saddam's forces were no match for the American military, and a cease-fire was negotiated on March 3, 1991.[123] The prosecution of the Gulf War lies in stark contrast to conflicts of the Cold War era. It seemed that Congress had finally understood after the Vietnam War calamity that it needed to assert itself if it desired

[123] Freedman and Karsh. *The Gulf Conflict 1990-1991*,

to have influence over the execution of war actions. Unfortunately for our narrative, but perhaps fortunately for the course of history, the Gulf War does not provide us with a demonstration of its oversight assertions beyond the language of the war authorization bill. However the fact that this language was installed in the first place, in this writer's opinion, suggests that the balance of power among the branches in the realm of the war power had shifted back to the way it was before the Cold War, when the opinion and consent of Congress was accorded some degree of importance. Unfortunately, though, the legacy of the Gulf War process does not indicate that the U.S. has arrived at some final telos, wherein the legislative and executive branches enshrined the consultative balance that had existed between them in the past. Because, in perspective with other cases examined in this narrative, the Gulf War was fundamentally different. It is likely that, in the eyes of many Americans, both in the public and in the government, the Iraqi invasion of Kuwait presented no threat to their sense of personal safety. During the Civil War, the Confederacy directly attacked a Union fort; during World War Two, the Japanese launched a surprise attack on American soil; in the Cold War, there was a persistent worry about the possibility of nuclear missiles landing in American cities; but during the Gulf War, there was no apparent threat of this nature. Perhaps by contrast, the Gulf War really was not a conflict that showed real development in the American war power, but the particular aspects of the situation allowed the government to initiate hostilities through a deliberate process. Ultimately, we cannot fully know whether or not the Gulf War actually demonstrated real change in the government's exercise of the war powers due to the relatively recent occurrence of the conflict. But there is evidence given by

the nation's response to 9/11 that allows us to speculate that, indeed, whatever calm and deliberate processes had been exercised during the Gulf War were nowhere to be found in the beginning of the new millennium.

Chapter V

9/11 and Concluding Remarks

We now turn our attention to current times, and to this nation's most recent and most poignant violent crisis – the attacks on the World Trade Center towers in New York and the Pentagon in Washington D.C. on September 11, 2001. Early that morning, few could have imagined the horrors that would take place that day. Unlike other attacks on the nation like those on Ft. Sumter or at Pearl Harbor, which occurred at the end of a long, tenuous, and quickly deteriorating circumstance of diplomatic jostling, 9/11 came with very little warning. Other than the occasional mutterings and vague messages broadcast by small groups of armed men in desolate places across the globe, there was no real indication or warning that an attack would take place at this point in time – it seemed to come out of nowhere. And even once the attack had begun, after the first plane drove itself into the top portion of the north tower, few would have concluded that the nation was indeed under attack. That morning, news channels televised images of large plumes of black smoke rising from lower Manhattan. One could see the occupants in the above floors desperately waving their shirts from windows above the flames and hoping that someone would save them from the spreading flames. Some ultimately chose to end their own lives by leaping out into the open air and onto the streets below in full view of the circling television cameras. But by this point, it still seemed only a tragic accident, a horrible calamity that had befallen the southern tip of Manhattan inexplicably. Why and how, on a clear and cloudless morning, could an airliner go off course and out of control in such a way that it would drive itself through the most prominent landmark in southern Manhattan? But when those same news cameras captured the image of a Boeing 767 descending and banking left directly before it slammed into the South tower cast a

severe shadow of doubt over the possibility that this event was an accident. And indeed, when reports that another airplane had rammed itself into the Pentagon in Washington, it was understood that this was indeed an attack on the U.S. homeland through the nefarious use of its own infrastructure. These attacks, because of their highly televised nature, were an event which traumatized not just those in New York, D.C., and Pennsylvania, but people everywhere. The act of watching the towers fall while knowing thousands were losing their lives at that very instant caused significant psychological harm to all who witnessed those events that morning. A study done in the months after 9/11 found that 44% of American Adults experienced one or more symptoms of a substantial stress reaction (lost sleep, thoughts doubt for one's personal safety, etc.)[124]. The effect of the attack stretched perhaps more broadly than any other attack in U.S. history.

In many ways, 9/11 was different than other attacks on the nation. For one, it was perpetrated by an independent terrorist organization, Al Qaeda, which is comprised of individuals intermixed with innocent populations worldwide. This presented obvious problems to those whose job it was to respond and to protect the country because, unlike before, the U.S. could not direct its military power against one specific area or group of people. Pinpointing exactly who did what and how to go about retaliation was much more complicated than it had ever been. 9/11, however, is indeed similar to the other cases we have studied in this narrative because it sparked the initiation of a war of necessity. In each of the wars we have studied so far, save for the exception of the Gulf War, one finds that they were wars of necessity and not

[124] Rand Corporation, "Stress Reactions to 9/11 Attacks Felt Across the Country," November 15, 2001. http://www.rand.org/news/Press/stress.html

wars of choice. Specifically, in each case, the war had been precipitated by an attack or was in danger of disillusionment of its foreign ends. In contrast, one finds that the Gulf War, was indeed not a war of necessity, but a war of choice. The U.S. could surely have decided not to go into Iraq and it might indeed have incurred some harm. But at no point during the Gulf war was the U.S. in direct danger of attack. What differs these two kinds of cases is that wars of choice usually do not require the same kinds of claims to urgency and to robust action. Usually in wars of choice, as happened in the Gulf War, there is time for deliberation regarding the action in question. Both members of the executive and members of congress knew that no war would occur before the U.N. mandated January 15, 1991 deadline. One can put this into contrast with any of the other situations – the decision to go to war after the attack on Ft. Sumter in 1861, on Pearl Harbor in 1941 and the decisions to intervene in Korea in 1950 and Vietnam in 1964 for fear of seeming internationally impotent – where there was a direct sense that the U.S. itself might be in direct danger. In each of these cases, the desire for retaliation was great and American's sense of safety was in question. Thus, many of those presidents deemed it necessary to act unilaterally in advance of the deliberative processes of Congress. 9/11 and its subsequent response fits perfectly into this second category of circumstances and if this author had more time for this project, the specifics of its relation to this history of American war powers could be more properly drawn. Nevertheless, the our understanding of the war powers as it had developed up to the end of the Gulf War allows us to look speculatively on the components of the 9/11 response. And when one looks at this history as a whole, one finds that there has been a long process occurring over the

course of American history in which the executive has progressively drained more and more power from the Congress in matters of war.

This process began in the same place that this narrative began with Lincoln's handling of the Civil War. In the nation's first-ever usage of the war power since the nation had been founded, Lincoln decided that the conditions of the time were such that there was no time for the deliberative processes of Congress. Instead, he issued a series of executive orders, that consolidated the war powers of the government under his hand with the later sanction of Congress. President Roosevelt acted similarly when he saw the necessity to provide aid to Britain despite the fact that he believed that Congress would not have supported the loan of American military equipment at the time. Roosevelt found a way to do so, which was later ratified by an act of Congress. After that point in time, the Congress was largely supportive of the goals he wanted to accomplish and backed up the initiatives on which he embarked. The Cold War showed this phenomenon to an even greater degree. For Truman, Congress remained practically silent throughout the Korean War effort. Heated debate over the issue in Congress only led to a stalemate and Truman conducted the Korean War effort virtually unopposed. During the Cuban Missile Crisis, Congress had no role whatsoever in either the planning or the execution of the blockade. And in Vietnam, Congress took their prior levels of cooperation a step further by passing the Gulf of Tonkin Resolution (GOTR) that gave broad and unrestricted power to the president to carry out the war effort. It was only after the war had made a turn for the worst that Congress made attempts to backtrack, but by then it was too late to make any significant impact on the course of the war. The Gulf War perhaps stands as the only

instance in this long history where Congress really asserted itself by placing limits on the executive's control over the war power. And in that case, as has already been discussed, it was a war of choice in which the country was not placed in direct threat. Therefore, one should consider it to be an exception in an otherwise lengthy trend of congressional conformance to executive will.

9/11 lies at the end of this long series of events both in terms of chronology and thematic significance. The response to the attacks proves to some extent just how little has changed since 1964 and the passage of the Gulf of Tonkin resolution. Just one week after the attacks, Congress unanimously passed the Authorization for Use of Military Force (AUMF) whose operating language is as follows:

> *Section 2 – Authorization for the Use of Military Force*
>
> (a) That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.
>
> (b) War Powers Resolution Requirements-
> (1) Consistent with section 8(a)(1) of the War (Authorization for the Use of Military Force 2001) Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
> (2) Nothing in this resolution supersedes any requirement of the War Powers Resolution.[125]

The section that stands out most vividly in this resolution is Sec. 2(a) which authorizes the president to use "all necessary and appropriate force" against anybody that the president deems to have been involved with the 9/11 attacks. And, at first

[125] Authorization for the Use of Military Force. September 18, 200l. *Available at* Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Co., 2007).

look, one might see §2(b) and argue that the AUMF is far different than the Gulf of Tonkin Resolution because it is restricted in part by the War Powers Resolution (WPR). But §2(b) simply clarifies that the AUMF constitutes explicit congressional authorization for use of the military force in the context required by the WPR. In other words, consistent with WPR §5(b), AUMF §2(b) actually relaxes certain constraints set in place by the WPR. But perhaps more important than this relaxation of WPR constraints in this case again lies in AUMF §2(a)'s authorization of "all necessary means." It does not take long for one to realize that there are many ways that the executive can, and has abused its power without actually using combat troops. "All necessary means" can authorize and *has* authorized everything from extraordinary rendition and torture to domestic wiretapping. In effect, the AUMF gave more power to the executive than any prior war authorization passed by Congress because, by its very nature, it places enormous emphasis on the personal discretion of the president. One might imagine that a shortened, lamens version of the AUMF would assert that "the president may do anything and everything he wants to whomever he wants so long as those individuals can reasonably be construed as potentially having something to do with the 9/11 attacks."

Why did Congress do this? In this writer's opinion, they did this because they were afraid. 9/11 came out of nowhere. Twenty people who had gone unnoticed in our society used mundane, everyday objects to kill thousands of people in a most violent fashion. It was likely that the members of Congress felt like everyone else felt. "Without bold action of some kind, what, if anything, is there to prevent a similar group of people from exploiting yet another defense loophole and killing another

thousand people? It is possible that I, or someone I know will be there the next time it happens?" These questions were almost certainly on the minds of the members of Congress in the days after the attacks. But unlike normal citizens, the burden was placed upon them to figure out a way to defend the country and to prevent a similar attack from ever happening again. Additionally, coming down on the wrong side of this issue could potentially cost someone their career. Members of Congress were forced to walk the fine line between prudence, patriotism and outright safety. And in this case, members of Congress chose to err on the side of the latter two.

Of course, one must also consider the mentality of those in the executive branch who were charged with the immense task of finding the culprits and ways to disable them from committing further attacks. One member of the executive branch, Jack Goldsmith wrote about his experiences as head of the Office of Legal Council (OLC) in his book *The Terror Presidency*. OLC is responsible for making important legal determinations for the executive branch. Goldsmith himself was charged with, for example, determining whether the Fourth Geneva Convention protects terrorists in Iraq. But this process, as Goldsmith explained, was done through a relatively perfunctory process. He says that

> It may seem off that an obscure office of two dozen Justice Department lawyers rather than a court was deciding so momentous a question. But in fact most legal issues of executive branch conduct related to war and intelligence never reach a court, or do so only years after the executive branch has acted. In these situations, the executive branch determines for itself what the law requires, and whether its actions are legal. In theory, the President himself must construe the law, for he must know what the law requires before he can enforce it. But the President and Congress have always delegated this power to the Attorney General, who has a duty to give his advice and opinion on questions of law when required by the President of the United States.

> And since the middle of the twentieth century, an increasingly busy Attorney General has delegated his legal advisory function to OLC. [126]

Goldsmith observed how indeed the executive is largely responsible for making its own legal determinations. This, of course, is not atypical. Many administrations have indeed operated in this way. But Goldsmith also observed that there were fundamental differences about the OLC under George W. Bush than under other presidents. One crucial difference he notes is how Bush II invoked aggressive presidential military powers towards security ends instead of humanitarian ends (such as was done under Clinton in Kosovo). Additionally, OLC under Bush II was generally less cautious and relied less on congressional authorization than his predecessors.[127]

Another fundamental difference between Bush II's administration and those before it is the unwavering desire on the part of executive officers to expand the role of the presidency in American government.

> [Vice President Richard] Cheney and the President told top aides at the outset of the first term that past presidents had eroded presidential power, and that they wanted to restore it so that they could hand off a much more powerful presidency to their successors. After 9/11, [Attorney General Alberto] Gonzalez and [Chief Council to the Vice President David] Addington would invoke these words like a mantra when we were deciding how aggressive to be in the war on terrorism. Vice President Cheney and David Addington – and through their influence, President Bush and Alberto Gonzalez… shared a commitment to expanding presidential power that they had long been anxious to implement. ... [T]heir unusual conception of presidential prerogative influenced everything they did to meet the post-9/11 threat. [128]

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[126] Goldsmith, Jack. *The Terror Presidency: Law and Judgment Inside the Bush Administration.* (New York: W.W. Norton & Co., 2007), p.32.
[127] Ibid., 37.
[128] Ibid, 89-90.

Goldsmith's observations reveal that those making the important legal decisions of the Bush presidency – a small group of like-minded lawyers - had a very different conception of the state of the executive at the beginning of the millennium. They somehow felt constrained by the limited oversight measures that did constrain their decisions while simultaneously neglecting the fact that, over the course of the history of the American war power, as this narrative has shown, there have been very few instances where either Congress or the judiciary has prevented the executive from doing anything that it wants to do in the interest of national security or the war powers. As we have seen above, the War Powers Resolution is really a fairly loose stricture when taking into account the variety of other defense actions that can be taken that do not involve sending troops over seas.

But it is important to note that, generally, members of Congress and the public were generally very supportive of the way the Bush administration was handling the post-9/11 threat even through the beginning of the Invasion of Iraq. The Bush administration only began to encounter resistance after it was found that the major premise for the Iraq war – their alleged possession of weapons of mass destruction – turned out to be false. It was then that the public began to question their original approval and Congress was awoken from their fear-induced coma of overeager consent and compliance. Sure, one can place a great deal of blame on members of the executive for the way they handled the post-9/11 response. All of their most egregious oversteps – the secret domestic surveillance programs, the military commissions, the secret rendition and torture programs – were done with a conception of presidential prerogative that likely extends far beyond anything the

framers intended. But the unfortunate, raw fact of the matter is that Congress *allowed* them to do this. With the AUMF, they gave the Bush administration unquestionable sanction to do all of the things that, now disclosed, have caused both domestic and international outrage. Members of Congress had learned nothing from the Vietnam experience and the nation is now worse off for it. As has been said many times before in this narrative, if Congress wants to promote a better course for this country, especially in exercises of the war power, it *must* be vigilant in ensuring that it does not write itself out of the process or inadvertently sanction egregious behavior through careless legislation. Congress could easily had taken more time with the AUMF and made it a much more cautious piece of law. They did not need to issue an authorization for the use of force at the time they did. Instead they could have stated as a matter of policy that the Congress generally supports the idea of disabling those persons and organizations responsible for the 9/11 attacks, but that it withholds specific authorization for response measures until the executive makes specific proposals. Such legislation would have prevented Congress from giving its sanction to a wide range of activities and initiatives taken by the Bush administration that they later would regret. This is not to say that the Bush administration would not have done the things that it did anyway, but their legal claim to those actions would have been severely compromised and members of the executive would have been more accountable to law.

The same argument can also be made for Congress' approval of the Iraq war. Had they taken more time to analyze the fact of the situation, they might have realized that the case given by the Bush administration for war was not as solid as it

seemed. The administration's argument for war lied on two key premises. One, that Iraq was in possession of WMDs; and two, that the regime of Saddam Hussein was linked to Al Qaeda. But, As late as January 2003, Chief UN weapons inspector Hans Blix stated that while there was still a possibility that Iraq had WMD, there had been no evidence found thus far that proved, or even suggested that Iraq had WMD in an operational condition that would have allowed them to use them in an attack.[129] Against the second premise, it was known very early on that Iraq had nothing to do with 9/11. On September 18, 2001, a report was delivered on the desk of National Security Advisor Condoleezza Rice titled "Survey of Intelligence Information on Any Iraq Involvement in the September 11 Attacks." The 9/11 Commission Report describes the memo as having said the following:

> The Memo found no 'compelling case' that Iraq had either planned or perpetrated the attacks…Arguing that the case for links between Iraq and Al Qaeda was weak, the memo pointed out that Bin Ladin resented the secularism of Saddam Hussein's regime. Finally, the memo said, there was no confirmed reporting on Saddam cooperating with Bin Ladin on unconventional weapons.[130]

Even despite the fact that there was compelling information, which ran contrary to the Bush administration arguments, they made these arguments anyway. And it is not as though these counter arguments were imperceptible. Indeed, much of the world was not convinced of the U.S. drive for war. Unlike the previous Iraq War, which had widespread international sanction, the U.S. found few nations willing to support its leadership in this war effort. Except for Britain and Turkey, no other countries were willing to contribute significantly to an invasion of Iraq. But despite all these

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[129] Blix, Hans. *Report Concludes no WMD in Iraq*, BBC. "Transcript of Hans Blix's Remarks to the U.N.," CNN, January 27, 2003, http://www.cnn.com/2003/US/01/27/sprj.irq.transcript.blix/index.html.
[130] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States.* (New York: W.W. Norton & Co., 2004), p.334

mitigating factors, Congress took the Bush administration's arguments at face value and in October 2002 authorized the use of force in Iraq, which too place in March of 2003. And indeed, as the war was carried out, the early counter-facts to the Bush administration's argument began to show through more strongly. Inspector Blix's findings were affirmed as early as October 2004 when the Iraq Survey Group concluded that Iraq did not have WMD at the time of the 2003 invasion and that "Iraq's nuclear capability had decayed [and] not grown since the 1991 war."[131] Also in 2004, it was settled conclusively by the 9/11 commission that there was no link between Al Qaeda and Iraq.[132] Perhaps one cannot fault Congress for conforming with the will of the president in this case. The executive leadership made convincing arguments at the U.N. for why the U.S. should go to war in Iraq and the members of congress, again faced with the task of balancing prudence and patriotism, chose to support the Bush administration's initiative. But while one may not be able to fault the members of Congress for their decision, their decision can be understood as an indicator of the current state of the war powers. The executive, perhaps more than ever, has pushed Congress out of the American war power. In this case, and in practically all the cases before this, Congress has proven unable to serve as a substantial check against the executive in times of crisis and war. This particularly poignant case of Iraq – a case where even in the face of evidence mounted against the executive's argument – shows the executive generally does what it wants with the war power.

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[131] BBC, Report concludes no WMD in Iraq, < http://news.bbc.co.uk/2/hi/middle_east/3718150.stm>.
[132] Pincus, Walter and Dana Milbank. "Al-Qaeda Hussein Link Dismissed." *The Washington Post.* June 17, 2004. http://www.washingtonpost.com/wp-dyn/articles/A47812-2004Jun16.html

It seems that, at the beginning of the 21st century, the executive has full control over the war powers of the United States. The developments in the war power, especially in the latter half of the twentieth century have practically done away with the traditional power of congress to declare war and have diminished their ability to control a war once it has begun. Since World War II, Congress has preferred to pass vague legislation that authorizes the President to use the armed forces. And as we have seen, often these authorizations are loosely constrained and generally allow the president to act upon his own discretion. At this juncture, one can reflect over the history of the war powers and ponder what exactly the founders really did intend the war power. Would they have condoned unilateral executive control of the war powers in response to severe threats to national security or other national interests abroad? Of course, we can never know what they really intended. As we have seen, the constitution really provides very little guidance on this matter. It has been more than two hundred years since our constitution was ratified, but we still do not seem to understand the meaning of some of its most simple but crucial terms. What does it mean to declare war? What can the Commander in Chief of the armed forces do? Is that title different during a time of war than in peace? Perhaps, due to the lack of their concreteness, the founders never intended for any American government to be able to derive a concrete definition of any of these terms, but that these terms were to meant to find definitions for their own time. Certainly, one of their goals in founding the constitution was for it to be a flexible document. And if this is so, then it is possible that the founders have handed us a dangerous legacy. Because while they surely anticipated that the nature of the world would change dramatically over the life of the

country, perhaps they could not have anticipated the behavior of a government when it is faced with the threat of hijacked airliners flying into buildings or the threat of sudden nuclear and/or chemical attacks against American population centers. These threats have led our country to give the powers of war and peace to one body of the government. Our national fate rests within the prudence and the decision-making abilities of the executive when the country is threatened. And while this phenomenon has not yet dealt us with any great calamity or national destruction – we have yet to have a major international war or attack on U.S. soil wherein cities have been leveled and American infrastructure and government have been crippled – the risk of such an event happening has not diminished and will not diminish in the foreseeable future. The technology behind warfare and weapons is ever advancing and is becoming available to a wider proportion of the world than ever before. Our ability to protect our country from these realities will depend largely on our ability to be effective while at the same time being prudent. This does not always require the entire deliberative capacities of the government, but if we preclude ourselves from such deliberation, we place ourselves at higher risk for making costly mistakes. Hopefully the day will never come when such a mistake leads to our destruction as a nation. But if we are to ignore the risk of placing our fate within one unchecked executive branch – a branch that has time and time again proven its fallibility – we do so at our own peril.

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