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Powers of War: President Versus Congress

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CLAREMONT McKENNA COLLEGE
POWERS OF WAR: PRESIDENT VERSUS CONGRESS

SUBMITTED TO
PROFESSOR ANDREW BUSCH

AND
DEAN GREGORY HESS

BY
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Chapter 1

Introduction

“The power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature...the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war.” James Madison, 1793¹

Where does the power of the president to command the military forces end and the actual requirement for action by Congress begin? What actions must Congress take? The United States Constitution delegates the power to declare war to Congress but the War Powers Resolution of 1973 allows the president 60 days before requiring him or her to submit to Congress a request to authorize the use of military force. Congress does not even have to declare war in order to authorize force, and the only option Congress has to stop a president from continuing military action is to defund the military, which is an unpopular move. Is it a war if Congress does not declare war? Or perhaps the declaration of war, as historically understood, is obsolete.

This thesis takes a deeper look into the world of war and the powers of both Congress and the President of the United States in declaring war. It examines the creation of war powers, debate by founding fathers, and the evolution of the war powers

¹ “The Founding Fathers on the Constitution’s War Power,” *War and Law*. Access Online. Internet. <<<http://warandlaw.homestead.com/files/foundin2.html>>>. November 22, 2011.

through multiple armed conflicts. Next, this thesis observes the trend of powers transferring from the legislative branch to the executive branch.

What was once feared by the founders, that the executive would gain too much power, is happening today. There are many implications of this shift of control from the legislative to executive branch, both good and bad. Perhaps the executive needs this power in order to react to threats to our nation's security in this contemporary operating environment. Perhaps debate in Congress during an information age that would transfer decisions across worldwide networks to our allies and enemies, and thus would put more lives in jeopardy. Perhaps the founders made the wrong decision by vesting the power of the declaration of war in the hands of many instead of the hands of one head of state. Over time, power will naturally flow from the hands of the many to the hands of the few, and while the founders created a system that would avoid frivolous wars, it would be too inefficient to survive the test of time allowing for the shift to occur.

Chapter 2

History of War Powers

“A government's most momentous decision is to take its people to war. In the American political system, the president is at the center of the movement toward war. The Constitution confers upon him the power to define and implement foreign policy, which gives him wide latitude in determining relations with other nations...Woodrow Wilson, the scholar who became president, wrote: 'One of the greatest of the President's powers is his control, which is very absolute...The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely.'” Gary Hess¹

The United States Constitution states that “Congress shall have the power...To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water...”² and that “The President shall be the 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...”³ The president’s authority to seize industry or stop strikes in advancement of the war effort, and to suspend *habeas corpus* is also included in this clause. The Founders created this split in powers in order to stop any one branch from having too much control over the military and using this control as a backing for a dictatorship. But how much autonomous power the president should have

¹ Gary R. Hess. *Presidential Decisions for War: Korea, Vietnam, and the Persian Gulf*. Baltimore: Johns Hopkins University Press (2001), 8.

² *U.S. Constitution*, Art. I, Sec. 8.

³ *U.S. Constitution*, Art. II, Sec. 2.

over the military is still debated. Some presidents took a large amount of control and even ignored Congress in some cases, when it came to their limits as Commander-in-Chief.

There has been much debate about the amount of power that the president should have when it comes to going to war. The founders battled back and forth over the amount of power the executive would have both during the construction of the Constitution as well as afterwards when many of them would eventually take the office of President themselves and be faced with the situations they had debated previously. James Madison argued that “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war to the Legislature.”¹ Simply put, since the executive branch would be tempted to use its army more than necessary it has given itself a check by transferring that power to Congress. In a message to the Pennsylvania ratifying convention, James Wilson, a framer and ratifier, said “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large...”² Indeed it was a widely held opinion by many that the power to declare war should be in the hands of Congress, allowing for thoughtful discourse regarding the subject prior to intervention.

But once Congress has declared war, what if any powers does this vest in the legislative branch? That question was met with more debate than the declaration of war

¹ Madison, in a Letter to Jefferson in 1798. *War and Law*.

² James Wilson, Letter to the Pennsylvania ratifying convention, 1787. *War and Law*.

itself. Alexander Hamilton offered one opinion in 1801 stating, ““The Congress shall have the power to declare war’; the plain meaning of which is that it is the peculiar and exclusive duty of Congress, when the nation is at peace, to change that state into a state of war.”³ The role of the president would be to command the troops as the highest military officer in the command structure. Many other framers and important players in the early days of the United States held a similar opinion. It would be the duty of Congress to change the status of the country from a time of peace to a time of war. But once the status of the country was of one at war it was in the hands of the president to control the military and to declare victory or surrender. Hamilton wrote in *Federalist 69* “The President is to be the commander-in-chief of the army and navy of the United States...It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy...”⁴

In the 20th century, Congress has allotted the President additional powers during times of war. During World War II, Congress, with the First and Second War Powers Acts, increased the president’s war powers. The First Act gave the President the power to reorganize the executive branch, independent government agencies, and government corporations for the war cause, as well as the ability to censor mail and other communications between the United States and foreign countries.⁵ The Second Act allowed the acquisition, under condemnation if necessary, of land for military and naval purposes and created methods for war-related production contracting. It also repealed the

³ Hamilton, 1801. *War and Law*.

⁴ Hamilton, *The Federalist 69*, 1788. *War and Law*.

⁵ *First War Powers Act*, 55 Stat. 838 (1941).

confidentiality of census data. These two acts were to become defunct six months after the end of the war.⁶

Recently, presidents used the armed forces as a “police force,” citing that they were not acting in war, but as a regulatory authority. Based on Constitutional interpretation, both by the executive branch and the courts, authorization from Congress was not necessary in these cases. Congress fought back and passed the *War Powers Resolution* in 1973 despite a Presidential Veto against it. This resolution states that the president must notify Congress within 48 hours of committing armed forces to military action and forbids those forces from remaining more than 60 days, with an additional 30 days are allowed for withdrawal, without an authorization for the use of military force or a declaration of war.⁷

Once Congress authorizes force “it cannot go back and rescind or amend that authorization,” and “its sole power is to choose to either fund or de-fund an ongoing conflict.”⁸ But this ability to fund or not fund does allow Congress some control. The authorization of force is flexible. It creates a need on the part of the executive branch to keep Congress apprised of the status of United States troops and progress, if any, that is made. But to defund the troops is widely unpopular and creates re-election issues when a member of Congress’ voting record appears to not support the American Soldier. A lot of decisions have to be made when authorizing force about what the projection of American opinion about the action will be in the future. On the other hand, “a Declaration of War

⁶ *Second War Powers Act*, 56 Stat. 176 (1942).

⁷ *War Powers Resolution*, 87 Stat. 555 (1973).

⁸ Denis McDonough and Mara Rudman, “Congressional War Powers: Too many Options to Forget,” *Center for American Progress* (March 7, 2007).

by its very nomenclature comes to closure with a declaration of victory.”⁹ This is most likely the greatest reason why Congress has not declared war since World War II. It would be a public relations nightmare to deal with a war that was not going well and became unpopular to the populace. Additionally, if there is another option that would allow them to save approval ratings, they will use it. The authorization of force allows Congress to place the sole responsibility of the military action on the president if it does not go well. Congress will authorize force if the president deems it is necessary and if we do not do well then it is the president’s fault for not considering all of the consequences and possibilities. If Congress were to declare war, then Congress’ decision would be up for public criticism, as Congress instructed the president to go to war. Members of Congress want to maintain the ability to change their minds and to adjust authorization according to those changed views.

The ability of Congress to change its mind once it has authorized force is still debated. The only power that Congress has once use of force is authorized is either to provide the money requested by the president or withhold it. However, Congress has created ways of examining the effectiveness of a president in his use of force. Congress has created committees to examine the president and the wars and have utilized “investigations, reports, hearings of oversight to legislative mechanisms such as troop caps, [and] funding limitations, or authorization restrictions or prescriptions.”¹⁰ In this way Congress maintains some control over the actions available to the president. Whether or not this Congressional oversight impedes on the presidential duties of Commander-in-Chief is a different question. However, if Congress were to make

⁹ *Ibid.*
¹⁰ *Ibid.*

provisions in their authorization of force requiring the president to submit to certain congressional restrictions should they create them, then that could create a bridge between the two branches of government.

Another debated issue is what constitutes a declaration of war. The War Powers Clause, read strictly, reveals that “Congress's power does not extend to 'undeclared' conflicts...”¹¹ For example, in the eighteenth century, a declaration of war was not only limited to formal declarations of war by Congress, but also included “initiating a state of war by public act, and it was understood that this could be done either by a formal declaration *or* by commencing armed hostilities.”¹² If this is the definition of a declaration of war, then when considering the powers of Congress during a time of war, it would appear that Congress's ability to limit the war powers of a president is constricted to a continuation to a conclusion, meaning funding the war all the way to the end or not. This would create a dilemma for Congress. The declaration of war and the authorization of force would ultimately be considered the same thing from the perspective of the Constitution.

Congress attempted to solve this issue by passing a War Powers Resolution in 1973. It created a formula for “congressional-executive co-determination in the area of troop involvement abroad.”¹³ Section 3 of the War Powers Resolution directly addresses the consultation of Congress prior to the initiation of armed conflict. It states that “the President, in every possible instance, shall consult with Congress before introducing

¹¹ Michael D. Ramsey, “Textualism and War Powers,” *The University of Chicago Law Review* Vol. 69 No. 4 (Autumn 2002), 1545.

¹² *Ibid.*

¹³ Eileen Burgin, “Congress, the War Powers Resolution, and the Invasion of Panama,” *Polity* Vol. 25 No. 2 (Winter 1992) 217.

United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated.”¹⁴ But the actions available to Congress in situations of noncompliance would be to turn the national spotlight onto the issue if the president did not follow the rules of the War Powers Resolution.¹⁵ Most likely nothing would come of it unless the American people agreed with Congress and there was not a larger pressing issue of the moment to divide American attention.

In addition, implications of a declaration of war under international law must be taken into consideration. There are different consequences to the declaration of war and the authorization of the use of force. With a declaration of war, the traditional laws of war engage. A 2003 report to Congress stated that “Enemy combatants may be killed, prisoners of war taken, the enemy's property seized or destroyed, enemy aliens interned, and other measures necessary to subdue the enemy and impose the will of the warring state taken. Moreover, the existence of a state of war traditionally has been deemed to terminate diplomatic and commercial relations and most of the treaty obligations existing between the warring States. A state of war also has brought into play the law of neutrality with respect to relations between belligerent and non-belligerent States.”¹⁶

The authorization for the use of force, on the other hand, has not been seen as “automatically creating a state of war under international law.”¹⁷ The U.S. Court of Claims helped to describe the differences between a state of war and the authorization of the use of force: “If war existed, why authorize our armed vessels to seize French armed

¹⁴ *War Powers Resolution* 1973.

¹⁵ Burgin, 215.

¹⁶ David M. Ackerman and Richard F. Grimmett. *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, updated January 14, 2003. 21.

¹⁷ *Ibid*, 22.

vessels? War itself gave that right, as well as the right to seize merchantmen which the statutes did not permit. If war existed why empower the President to apprehend foreign enemies? War itself placed that duty upon him as a necessary and inherent incident of military command...There was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended...but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of the one became the enemy of every citizen of the other.”¹⁸ In this instance, Congress authorized use of force instead of declaring war because of commerce implications of the actions of these French vessels, though they did not want to commit all of their troops to war with France, since the armed hostilities being committed were limited to sea-faring vessels.¹⁹

That interpretation by the Claims Court came in the late 18th Century. Since that time clarity has been lacking regarding consequences of a state of war. Most countries, since 1945, have not described armed conflicts as war. They have not ended diplomatic or commercial relations. Because of these consequences, the declaration of war is all but unused in modern time. Since 1945 there has not been a formal declaration of war by one state on another. The United States last declared war in 1942 against Romania and since that time the United States has only authorized the use of force in conflicts, which essentially allows the same privileges of war with fewer international consequences.²⁰

¹⁸ *Ibid*, 23.

¹⁹ *Ibid*, 7.

²⁰ *Ibid*, 24-25.

Chapter 3

Presidents Past

“The great rule of conduct for us, in regard to foreign nations, is in extending our commercial relations to have as little political connection as possible...Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalships, interest, humor, or caprice?...It is our true policy to steer clear of permanent alliances with any portion of the foreign world.” George Washington.¹

Abraham Lincoln was a strong president in terms of seizing his war powers and exercising them. On April 27, 1861, the writ of *habeas corpus* was suspended from Pennsylvania to the District of Columbia. Later, during the suspension, the United States Supreme Court held that the power to suspend the writ was a Congressional Power, not an Executive power. But President Lincoln did not obey the ruling and twice expanded the territory that was covered by the suspension.² In 1862, President Lincoln authorized U.S. Marshals to “arrest and imprison 'any person or persons who may be engaged by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any disloyal practice against the United States.’”³ Lincoln also issued a proclamation stating that “persons 'discouraging volunteer enlistments,

¹ George Washington, as quoted by Nancy Salvato, “The Right to Defend Sovereignty,” *Borderfire Report* (Accessed on December 6, 2010).

² Francis P. Sempra, “Presidential War Powers in Historical-Legal Context,” *American Diplomacy* (October 28, 2008).

³ *Ibid.*

resisting militia drafts, or guilty of any disloyal practice affording comfort to rebels' were subject to 'trial and punishment by courts martial or military commissions.'"¹ By today's standards, President Lincoln would be considered a tyrannical military president. Under his command, 13,000 civilians were arrested and tried in military courts. President Lincoln summarized his actions when he said, "My oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving, by every indispensable means, that government—that nation, of which the Constitution was organic law. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."²

Another strong war powers president was President Franklin Roosevelt, who placed the United States Navy in aggressive war positions extending the reach of American Convoys into hostile waters and ordered the fleet to aggressively eliminate any threat of hostile attacks from German Naval Forces.³ This all occurred six months before the attack on Pearl Harbor. In the spring of 1940, President Roosevelt authorized warrantless wiretapping. He did this against the advisement of his attorney general. He was quoted as saying, "I am convinced that the Supreme Court never intended any dictum...to apply to grave matters involving the defense of the nation." The wiretapping

¹ *Ibid.*

² *Ibid.*

³ *Ibid.*

was justified, in Roosevelt's eyes, because it would be “too late to do anything about it after sabotage, assassinations and fifth column activities are completed.”⁴

After the attacks on Pearl Harbor, President Roosevelt used the power of Executive Orders to authorize curfews for Japanese people living on the west coast and their interment in camps inland. One hundred thousand people were impacted by these orders and Congress made no attempt to counter the orders. The Supreme Court upheld the orders as “proper exercises of presidential (and congressional) war powers.”⁵

But President Roosevelt did not have any issues with conflicting with Congress. He made an arrangement with the British to send American destroyers to Britain to help defend them against Nazi submarines. Anti-interventionists were not pleased with this decision, but that did not faze President Roosevelt. He said, “Congress is going to raise hell about this, but even another day's delay may mean the end of civilization...but if Britain is to survive, we must act.”⁶ And act he did. President Roosevelt sent the destroyers to Britain to help defend the British against the German submarines.

This was all after President Roosevelt signed the Neutrality Acts during the 1930s. The Neutrality Acts prohibited Americans from dealing in arms or other economic ventures with countries that were at war with each other.⁷ President Roosevelt chose to deal with these acts when he felt that it suited his needs, though when the Sino-Japanese war began at the beginning of World War II, he chose not to declare the actions a war, so that he could deal with the Chinese to support them against the Japanese. He

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Warren F. Kimball, “Franklin D. Roosevelt and World War II,” *Presidential Studies Quarterly* Vol. 34 No. 1 (March 2004) 87.

⁷ “Neutrality of the United States,” *The American Journal of International Law* Vol. 34 No. 1 (January 1940), 21-22.

also utilized a loop-hole that allowed for the British and French to deal American arms and supplies to other countries so that American Interests could be served abroad.⁸

President Harry Truman dealt with a constitutional issue of sending troops into combat in Korea after hostilities began. Truman had already sent troops into Korea before Congress had considered the issue of engaging in combat. He had done so under the pretense of his authority as Commander-in-Chief and under a U.N. Charter.⁹ Once Truman and his allies in Congress decided to approach the matter of authorization, Congress worked behind the scenes on a resolution supporting President Truman's actions. To help make his case to Congress, the State Department cited 85 instances in which presidents dispatched troops abroad without congressional authorization between the years 1812 and 1932. President Truman also expressed his action as “police action,” hoping to take away Congressional control over the matter.¹⁰ In Truman’s eyes, the authorization of Congress really was not necessary beyond the formality it carried under the Constitution, but that he could use the military in this instance without violating the Constitution.

But Truman's case was constitutionally weak. It was written by constitutional historian Edward Corwin wrote that Truman had done nothing but compile a list of “fights with pirates and bandits.”¹¹ The cases mentioned by the State Department involved mostly cases that were for minor purposes and did not directly engage other armies. There was not an established precedent for sending U.S. Troops to resist an act

⁸ Henry J. Brajkovic. “The Foreign Policy of Franklin D. Roosevelt to the Entry of World War II.” Available Online. Internet. <<<http://www.yale.edu/ynhti/curriculum/units/1978/3/78.03.05.x.html>>>. November 27, 2011.

⁹ Gary R. Hess. *Presidential Decisions for War: Korea, Vietnam, and the Persian Gulf*. Baltimore: Johns Hopkins University Press (2001), 34.

¹⁰ *Ibid*, 36.

¹¹ *Ibid*, 37.

of aggression by a force as large as the North Koreans without congressional authorization. President Truman established this precedent.

The Truman Administration argued that membership in the United Nations gave the president the authority to send troops to combat lacked legs. Congress had addressed this issue when passing the United Nations Participation Act. According to the Act, “U.S. Troops could be committed to support United Nations-sanction military actions only if authorized by Congress...There is no authority to use armed forces in support of the United Nations in the absence of some previous action by Congress dealing with the subject and outlining the general circumstances and the amount of force that can be used.”¹²

These three presidents—Lincoln, Roosevelt, and Truman—all shared something in common. They made decisions regarding their war powers that did not mesh with the restrictions placed on the executive branch by the Constitution. They did so in what they believed was the country's best interests. Lincoln did so to preserve the unity of the United States, Roosevelt to protect the United States from national invasion, and Truman to preserve American security from a communist threat.

Each of these decisions was controversial. Their legitimacy could also be questioned, but these actions are in the past. It is more important to examine these decisions not on their outcomes but on their implications for the future.

Many similar actions have been taken in a contemporary context. The current conflicts in Iraq and Afghanistan have often been paralleled with Vietnam. The wiretapping by President Roosevelt is similar to the wiretapping allowed by the

¹² *Ibid.*

PATRIOT Act, where the justification of wiretapping to preserve national security is used today. Detainees taken prisoner as a result of the conflict are tried via a military tribunal. Though they do not have a nation-state that they are fighting for specifically, they fight for an army that threatens American defense. And American involvement in Iraq could be seen as a parallel to the police action used by Truman in Korea. With these precedents, the powers that presidents would have in the future in regards to war had changed forever. Congress had made concessions, either through direct action or a lack of it. From time to time Congress has tried to take that power back, but the authority of the president as Commander-in-Chief would prove difficult to overcome as historical would lend legitimacy the president's authority.

Chapter 4

Bill Clinton

“[T]he President...is once again releasing American military might on a foreign country with an ill-defined objective and no exit strategy. He has yet to tell the Congress how much this operation will cost. And he has not informed our nation's armed forces about how long they will be away from home. These strikes do not make for a sound foreign policy.” Senator Rick Santorum, 1999.¹

On March 23, 1999, the Secretary General of NATO directed the Supreme Allied Commander of Europe, United States General Wesley Clark, to initiate air operations in the Federal Republic of Yugoslavia.² The bombing lasted from March 24th to June 11th. It involved 1,000 aircraft and extensive use of Tomahawk missiles.³ The goal of NATO was to get the Serbs out of the Kosovo region and to put in peacekeepers and bring back the refugees. Initially the attacks were limited to destroying Yugoslav air defenses and high-value military targets. As the attacks continued, the Serbs stepped up their ethnic cleansing.

NATO forces stepped up their game as well and initiated ground operations in addition to their strategic bombardment of targets. The increased action proved beneficial. There were some instances of civilian deaths, most likely at the hands of

¹ Rick Santorum, 1999. “GOP Quotes from Kosovo,” *Savingadvice.com*. Access Online. Internet. <<<http://www.savingadvice.com/forums/general-discussion/9564-off-topic-gop-quotes-kosovo.html>>>. 22 November 2011.

² Noam Chomsky. “A Review of NATO’s War over Kosovo,” *Z Magazine* (April-May 2001).

³ *Ibid.*

NATO bombings and human rights watch-dogs expressed serious concern in American involvement in Kosovo. But in April, the conflict began to turn in favor of NATO forces. Clinton refrained from utilizing American troops on the ground and limited involvement to the bombardment of Yugoslav targets.

There was much criticism of the United States' involvement in Kosovo. Complaints were registered regarding President Clinton going against the wishes of the United Nations Security Council. The death toll of ethnic Albanians skyrocketed after NATO involvement.¹ Prior to NATO intervention, other than being an unusually bloody conflict, Kosovo was not subjected to wide-spread civil war, though the United States Department of Defense claimed that as of June 2, 1999, 99.6% of 20,000 bombs and missiles used hit their targets.² But the bombs that were used, including technologies such as depleted uranium ammunition and cluster bombs, were controversial. Additionally, oil refineries and chemical plants were targeted, turning the conflict into 'environmental warfare.' The conflict was moving along at a slow pace as well; it lasted longer than NATO initially anticipated and was well beyond the 60-day limit imposed by the War Powers Resolution of 1973. None of this changes the fact that President Clinton still involved the United States in a war that was widely unpopular. Kosovo may not have garnered the same anti-war protests that actions in Iraq would receive in 2003, but the American populace was unhappy about this action, which was exhibited by President

¹ *Ibid.*

² Herbert N. Foerstel. *From Watergate to Monicagate: Ten Controversies in Modern Journalism and Media*. Westport, Connecticut: Greenwood Press, 2001. 132.

Clinton's approval rating dropping between five and ten percentage points during the conflict.³

Despite the fact that the conflict in Kosovo was unpopular, it created a new model for armed hostilities in which the United States participated. It was the belief of the Clinton Administration that, "[i]f the costs were low enough, the public would accept the police work needed to maintain order in the provinces and allow Washington to advance longer-term U.S. goals of political and economic openness around the world. U.S. military involvements should be limited to air power, any action should be cloaked in multinational coalitions to lend legitimacy and spread responsibility, and public scrutiny should be limited through careful control of information. Using ground forces, which are more susceptible to casualties and more difficult to withdraw, was to be avoided."⁴ This same model was used in Iraq in 1999, when British and American aircraft dropped 2,000 bombs and missiles. The campaign in Afghanistan from 2001-2002 was also a descendent and reaction to the military model used in Kosovo.⁵ While the model was not perfect, it held true to its form. The Clinton Administration had assumed that a couple of weeks of bombing would end the hostilities in Kosovo; it took more than two months to accomplish victory. In the end, though, it showed that air power alone could win wars at minimal cost. This model has been adopted as conventional wisdom for war-planning by many commentators.⁶

³ Edwin Chin. "Clinton Approval Rating Drops," *Los Angeles Times*, May 1, 1999.

⁴ Stephen Biddle. "The New Way of War? Debating the Kosovo Model," *Foreign Affairs Vol. 81 No. 3* (May-Jun 2002), 139.

⁵ *Ibid.*

⁶ *Ibid.*, 140.

But Kosovo was not the first time that the air model of warfare was used. During World War II the Allies firebombed German and Japanese civilians in great numbers without creating any political pressure on them to end the war. Half of the urban area in 18 of North Korea's 22 largest cities was destroyed. But the Kosovo model was different. It was more strategic, which was possible due to advances in technology. NATO forces focused on strategic infrastructure instead of urban neighborhoods.⁷ They were not always successful in their endeavors, but the political impact was much more bearable. It allowed for the possibility of a fifth column movement by the civilians, focusing their energy in opposing the regime rather than “searching for food or fuel among fields of rubble.”⁸

President Clinton embraced the expanded powers of Commander-in-Chief that he was able to utilize and that had already been in motion from the presidencies prior to his own. There was a new doctrine following the Clinton Administration. The Clinton doctrine can be found in the 1995 and 1996 National Security Strategy Document, which was written in response to the disaster in Somalia: “When vital interests are at stake, the nation must do whatever is necessary to achieve quick victory with low casualties; when important but not truly vital interests are at stake and when the projected costs and risks of military action are commensurate with those interests, limited military means may be used for limited political objectives. In all cases political leaders should provide military commanders with clear political objectives that can be translated into clear and attainable military missions. Before forces are committed to action, there should be a clear measure

⁷ *Ibid*, 141.

⁸ *Ibid*.

for accomplishment as well as an exit strategy. There should also be reasonable assurance of congressional and public support.”⁹

Clinton never received authorization to use force in Kosovo. In fact, an attempt to receive authorization after the fact from Congress failed to pass the vote.¹⁰

⁹ Colin Campbell and Bert A. Rockman, editors. *The Clinton Legacy*. New York: Chatham House Publishers (2000), 247.

¹⁰ John C. Yoo. “Kosovo, War Powers, and the Multilateral Future.” Available Online. Internet. <<http://www.law.berkeley.edu/faculty/yooj/courses/forrel/reserve/Penn%20LR%202.html#_Toc470489097>> November 27, 2011.

Chapter 5

George W. Bush

“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.” War Powers Resolution September 14, 2001¹

Following the terrorist attacks on the United States in 2001, Congress authorized an expansion of Presidential War Powers using the above resolution. With this action, Congress authorized “all necessary and appropriate force,” which is not specifically defined. Many have spoken out against President Bush's use of War Powers now that ten years have passed following 9/11. Interestingly, the same people who authorized force are quick to pass the blame. Many people often use the excuse of war as the justification of the use of powers associated with war. However war could be used as more of a context than a justification for their use.²

Bush's Justice Department was creative in ways of avoiding Judicial Review, using creative ways of expressing constitutional theories as a sword and a shield: a sword

¹ George W. Bush. *Decision Points*. New York: Crown Publishing Group (2010), 154.

² Julian E. Zelizer ed. *The Presidency of George W. Bush: A First Historical Assessment*. Princeton: Princeton University Press (2010), 39.

to further conservative objectives and a shield to protect executive autonomy.¹ Examine, now, the powers that George W. Bush used in Iraq and Afghanistan.

The Bush administration came into office believing that the presidency and its executive powers had been weakened by Clinton and others in the post-Watergate days. After September 11th, the Bush administration was able to protect executive prerogative arguing national security as its rationale.²

The USA PATRIOT Act was passed soon after 9/11. Until the PATRIOT Act, a 'wall' had existed between intelligence agencies that prevented agencies from communicating information back and forth that could help in coordinating efforts to eliminate the threat that faces the country every day. With passage of the PATRIOT Act, the law that prevented agencies from communicating with each other was eliminated. In his memoir, President Bush noted that there were portions of the act that created uneasiness amongst law makers. The PATRIOT Act allowed the government to “seek warrants to examine the business records of suspected terrorists, such as credit card receipts, apartment leases and library records...the intelligence community had serious concerns about terrorists using library computers to communicate.” Bush said, “The last thing I wanted was to allow the freedom and access to information provided by American libraries to be utilized against us by al Qaeda.”³

The Bush Administration was happy that these measures were passed quickly (the PATRIOT Act and the 2001 War Powers Resolution) but also wanted to establish that

¹ *Ibid*, 40.

² *Ibid*.

³ Bush, 161.

they did not need Congressional support. John Yoo, President Bush's legal advisor in the Office of Legal Counsel, wrote soon after the 2001 War Powers Resolution that Congress had recognized the president's response to terrorism but they could not “place any limits on the president's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.”⁴ He also argued that the Geneva Conventions did not apply to the conflict in Afghanistan, since the enemy that America was fighting was not an enemy fighting for a state. Since they were individual actors rules governing their treatment were different. Yoo would go on to write a very controversial memo that authorized 'enhanced interrogation techniques' that some would call torture. The basic justification was that the Constitution granted broad executive power to the president and that Congress and courts could do little to undermine it. This was all based on a justification of a reading of Article II of the Constitution which stated “the executive power shall be vested in the President of the United States of America,” and that “the President shall take care that the laws be faithfully executed.”⁵ The way this was being interpreted was that all power, executive in nature, was solely in the hands of the president and that any attempt to intrude on these powers was unconstitutional.⁶

President Bush also ran into the issue of not being legally able to use wiretaps to intercept conversations between terrorists abroad and on American soil. There were no legal restrictions to monitoring conversations between two suspected terrorists on foreign soil but if one terrorist was on American soil there were constitutional protections that

⁴ Zelizer, 43.

⁵ *Ibid.*

⁶ *Ibid.*

must be considered. In order to tap these conversations the CIA would need to get a FISA warrant. However, after the White House counsel's office and the Justice Department looked into the matter, they determined that “conducting surveillance against our enemies in war fell within the authorities granted by the congressional war resolution and the constitutional authority of the commander in chief.”⁷ President Bush cites historical precedent in this matter: Abraham Lincoln wiretapped telegraph machines during the Civil War, Woodrow Wilson ordered virtually every telephone and telegraph message going into or out of the United States during World War I intercepted, and Franklin Roosevelt allowed the military to read and censor communications during World War II. This would come to be known as the Terrorist Surveillance Program.

Some wished to challenge President Bush's authority to make these decisions regarding warrantless wiretapping. But, they found that the government was able to escape judicial scrutiny because the data that they needed to bring a lawsuit against the government was unattainable as a government secret. The secrecy undermined the ability of those targeted to challenge the executive branch's expanding powers.⁸

Another hotly contested use of War Powers by President Bush came with the decision he made on the rights that detainees would have and would not have. Richard Reid, better known as the Shoe bomber, was captured after a terrorist plot of his was foiled on December 22, 2001. After Reid was arrested he was quickly put into the United States criminal justice system which entitled him to the same constitutional protections as other criminals, including the right to remain silent. President Bush was worried by the fact that terrorists who could be the most valuable asset were protected by the veil of

⁷ Bush, 163.

⁸ Zelizer, 51.

constitutional power. Bush was troubled by a statement Reid made two days before he attempted his attack: “What I am doing is part of the ongoing war between Islam and disbelief.”⁹ A distinction between citizen and soldier had to be made. Was this man just a person who committed a crime or a foot soldier in the war against terror. The decisions that George W. Bush made at this point would be critical. These issues included where to hold captured enemy combatants, how to determine their legal status and how to reach justice, and how to learn about future attacks before they happened.

The first issue, where to hold enemy combatants, centered on a question of security and humane treatment. Initially, these combatants were held in battlefield prisons in Afghanistan. This was followed by a riot that led to the first American casualty in the War on Terror, and highlighted the fact that a more secure location to hold the prisoners was necessary. Holding enemy combatants prisoner on American soil raised possibilities of initializing Constitutional rights which would significantly reduce American ability to determine new threats against the American people. After some consideration, Guantanamo Bay was selected as the new housing for enemy detainees. Guantanamo Bay is a naval station on Cuban soil, so it allowed for American's to work freely in the area, but was removed enough from American soil to remove conflict about Constitutional rights.¹⁰

The next decision that had to be made was the legal status of these detainees and how to try these detainees. The question about Geneva Conventions and how they applied to al Qaeda soldiers became a hot topic. The Geneva Conventions were created by nations to provide an incentive to fight wars within a set of guidelines. But al Qaeda

⁹ Bush, 165.

¹⁰ Bush, 166.

never signed these conventions and has no nation-state to call home. President Bush and his staff decided to follow these conventions to an extent. In November of 2001, President Bush signed an executive order to have the enemy combatants tried by military tribunal.¹¹ Every detainee would be entitled to the presumption of innocence, representation by counsel, and the right to present evidence that would have probative value to a reasonable person showing their innocence, except in cases where research of that information would compromise national security. A conviction would require two thirds of the military tribunal counsel and enemy combatants have the right to an appeal to the Secretary of Defense and the President of the United States.¹²

Most of this Executive Order rooted in President Bush's moral compass. An August 2002 memorandum from the Office of Legal Counsel regarding interrogation stated that “Any effort by Congress to regulate the use of interrogation of battlefield detainees would violate the constitution's sole vesting of Commander-in-Chief Authority in the President.”¹³ This resulted in the President being the sole authority for determining the appropriate interrogation policy. All federal statutes were interpreted in a very broad manner. For example, a federal statute banning torture was seen to only include the most extreme acts of torture. Physical pain thresholds for torture had to be “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹⁴ All efforts to keep interrogation actions secret only furthered the executive's ability to do as he pleased.¹⁵

¹¹ Bush, 167.

¹² *Ibid.*

¹³ Zelizer, 43.

¹⁴ *Ibid.*, 43-44.

¹⁵ *Ibid.*, 44.

This, however, was just one interpretation. The Bush Administration went out of its way to avoid Judicial Review as much as possible. Bush's Executive Order authorizing the construction of Guantanamo Bay and the detention of detainees there, as well as their trial by military tribunal, were exercises of executive powers. The administration decided it was best to avoid the courts as much as possible in this regard. In fact, some in the White House feared that “cooperation and compromise signaled weakness and emboldened the enemies of America and the executive branch.”¹⁶

The administration did not suspend *habeas corpus*, though, and eventually, lawyers for the cause of the detainees would invoke that writ to have their cases heard by United States Courts. Initially, arguments were framed around the idea that war time was temporary and eventually we would return to a period of calm and normalcy. But towards the end of his Presidency, Bush and his administration were able to make the argument that war is not necessarily bound by time, affecting the Court's willingness to put a limit on executive power.¹⁷ The United States Supreme Court, after all, had addressed wartime detention during World War II in *Korematsu v. United States*, in which it held that though the detention posed hardships on the detainees, “hardships are part of war.”¹⁸ The difference now is that the definition of war is in flux and the United States has had to keep adjusting to fit the changing operational environment in the Middle East. While it did seem likely that the Supreme Court would soon have to deal with the prospect of endless detention, the Iraq and Afghanistan conflicts still fit within conventional understandings of military conflict that were bound by time as there were

¹⁶ *Ibid*, 45.

¹⁷ *Ibid*, 47.

¹⁸ *Ibid*.

“active combat operations' against the Taliban in Afghanistan” and it was appropriate to detain enemy combatants “for the duration of these hostilities.”¹⁹ The Supreme Court decided to allow the Bush Administration some leeway in their ability to detain enemy combatants but asserted their authority by stating that the detention was subject to judicial review. Justice O'Connor, writing for the Plurality, stated “We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens.”²⁰

In 2005 Congress did what they could to assist the President in keeping these matters out of the courtroom. The Republican dominated Congress introduced “jurisdiction-stripping” legislation that was specifically aimed at limiting the Court's ability to intervene and reasserting executive autonomy.²¹ As long as Congress supported President Bush this would serve well and the executive would be able to have great control over the operating environment.

Many often criticize the reasons for engaging in hostilities with Iraq. Let us ignore for one moment that President Bush received Congressional Authorization for the use of force in Iraq. However, President Bush utilized many of the same reasons for intervention that his predecessor and his successor would use to engage in hostilities in Kosovo and Libya respectively. On January 23, 2003, Paul Wolfowitz, the Deputy Secretary of Defense, said: “Disarming Iraq and the war on terror are not merely related. Disarming Iraq of its chemical and biological weapons and dismantling its nuclear

¹⁹ *Ibid*, 49.

²⁰ *Ibid*.

²¹ *Ibid*, 50.

weapons program is a crucial part of winning the war on terror.”²² The evidence that the United States and other countries had regarding the likeliness of Iraq having chemical or biological weapons, the ability to create nuclear weapons, or their attempts to obtain nuclear materials was shaky at best. But it was still the primary reason that the Bush Administration used for justification in beginning hostilities in Iraq.

The argument for military action in Afghanistan was much less difficult. There was a direct tie-in with Taliban support to al Qaeda and their attack on the World Trade Center. Congress quickly authorized the use of force against all those nations, organizations or people that either committed the terrorist acts or aided the terrorists that committed those acts.²³ The Congressional Authorization gave President Bush a lot of leeway in what constituted support of those terrorists, including the provision that it is up to the President as to what constitutes support. The length of time that we remain involved with Afghanistan is still a matter of debate as we pass the ten-year mark, but as history shows, once force has been authorized there is often little that Congress can do to stop the president from using force without defunding him or her

²² James P. Pfiffner. “Did President Bush Mislead the Country in His Arguments for War with Iraq?” *Presidential Studies Quarterly* Vol. 34 No. 1, *Going to War* (March 2004), 30.

²³ Zelizer, 66.

Chapter 6

Barack Obama

“I am the Commander-in-Chief of a nation in the midst of two wars. One of these wars is winding down. The other is a conflict that America did not seek, in an effort to defend ourselves and all nations from further attacks. Still, we are at war, and I am responsible for the deployment of thousands of young Americans to battle in a distant land...We must begin by acknowledging the hard truth that we will not eradicate violent conflict in our lifetimes. There will be times when nations—acting individually or in concert—we will find the use of force not only necessary but morally justified...For make no mistake: evil does exist in the world.” Barack Obama, Nobel Peace Prize Acceptance Speech, December 2009.¹

Barack Obama, 44th President of the United States, is not removed from the list of presidents who stretched the limits of their war powers. During his term in the United States Senate, President Obama was a strong member of the opposition of the wars in Iraq and Afghanistan. As a member of Congress he was upset with the lengths that the President of the United States was going to in order to fight the war. But soon, President Obama was faced with a situation similar to that which President Bush faced in Iraq. Libya, too, had a ruthless dictatorship and posed little to no threat to America or its allies

¹ Barack Obama. Nobel Peace Prize Acceptance Speech. Access Online. Internet. <<http://www.issues2000.org/2012/Barack_Obama_War+_Peace.htm>>. November 22, 2011.

and neighbors. But there are some differences that Obama took in his approach to removing Muammar Gaddafi from his position of power.

When President Obama took Office in January 2009 he inherited a large military action in Iraq and Afghanistan. He has taken some strides in reducing the impact that the United States is having on the rest of the world by reducing the number of troops in Iraq and Afghanistan as a matter of principle. Though that does not mean he is not willing to see how far he can push Congress in regards to military action.

President Obama, during his campaign, took a strong stance against President Bush's use of military force in Iraq and Afghanistan calling it unconstitutional in the way he went about military action. During his campaigning in 2007, Obama said, "the president does not have any power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."¹ When justifying his actions in Libya, President Obama did not refer to it as a 'war,' rather he called it a "time-limited, scope-limited military action."² He had to be careful because President Obama was aware that there was not strong support in Congress to intervene in Libya. In fact, on June 3, 2011, the House of Representatives passed a resolution declaring that "the President shall not deploy, establish, or maintain the presence of units and members of the United States Armed Forces on the ground in Libya." Ten members even attempted to file suit against the President in Federal Court seeking a court order declaring the 'war' in Libya "without a declaration of Congress

¹ Ralph Nader. "Waging Another Unconstitutional War," *Politizine*. August 8, 2011.

² *Ibid.*

with the use of funds never approved for such a war” unconstitutional.³ But the courts have sided with the president on issues like this in the past stating that they really have no standing to sue on political matters, meaning that the courts will most likely be of little assistance to the politicians in Congress on this matter.⁴

President Obama found a way which he believes circumvents the necessity to seek Congressional Authorization for actions in Libya. The White House sent a message to Congress when asked why no authorization had been sought after the 60 day limit established by the 1973 War Powers Resolution that stated that United States Armed Forces are not participating in sustained hostilities against Gadhafi’s troops, but were instead acting in a supporting role for NATO-led forces.⁵ He used the UN Resolution and the NATO-forces taking the lead as an excuse to get his hand in on the actions in Libya and to take part in overthrowing Gadhafi in Libya. There is precedence for this: Truman did this very same thing in Korea. He justified his actions in Korea stating that the UN Resolution against Korea justified entrance into hostilities.⁶

President Obama continued to use the same reasons that President Bush used in justification for military intervention; he drew a lot from the Clinton Doctrine as well. Prior to his actions in Iraq, President Bush gained Congressional Authorization for the use of force. President Obama, on the other hand, did nothing of the sort, instead acting more in line with President Clinton in Kosovo. He justified this by expressing that with a

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Gary R. Hess. *Presidential Decisions for War: Korea, Vietnam, and the Persian Gulf*. Baltimore: Johns Hopkins University Press (2001), 34.

lack of ground troops and the speed and efficiency that the hostilities would end that it did not qualify as a use of force.⁷

President Obama used other justifications for use of force in Libya. He decided not to deploy any forces into Libya without a UN resolution. He used similar arguments to the Clinton Administration in their justification of action in Kosovo. He said, “It is true that America cannot use our military wherever repression occurs. And given the costs and risks of intervention, we must always measure our interests against the need for action. But that cannot be an argument for never acting on behalf of what is right.”⁸ This is a clear following of the Clinton doctrine. He cemented this when he also said, “It was not in our national interest to let that [failure of the rebel forces] happen. I refused to let that happen.”⁹ And, like President Roosevelt, the speed that was needed to act to intervene in Libya made it necessary to act before authorization could be sought.¹⁰

President Obama was using American military forces as a police force in Libya: limited action but intervening because of injustices. Contrary to his own actions, Obama outlined future involvement on behalf of the United States, “reserving the right to act in the nation’s ‘interests and values’” and argued that “Americans ‘should not be afraid to act.’ But he also cautioned against unilateral action that would result in bloody, protracted conflict and pronounced the country’s days as the world’s police force to be over.”¹¹

⁷ Steve Chapman. “‘Victory’ in Libya,” *Creators Syndicate*. August 24, 2011.

⁸ Glenn Thrush. “Obama: Libya is no Iraq,” *Politico.com*. March 28, 2011.

⁹ *Ibid.*

¹⁰ Chapman.

¹¹ *Ibid.*

There are a lot of critics of President Obama's actions in Libya. Some criticize the use of force at all. His more conservative critics are more concerned with the fact that he could have removed Gadhafi from power weeks prior to intervention if he had not hesitated, a critique that President Obama shares with President Clinton. All critics are upset about the fact that President Obama failed to "articulate a clearly-defined doctrine for future U.S. policy in the turbulent Mideast."¹²

President Obama may not have created a doctrine of his own with this military action, but he did follow the Clinton doctrine. He limited his use of force based on calculations of risk versus reward, refrained from using ground forces, and had an exit strategy, citing that the primary actions that American forces would be taking would be "intelligence, logistical support, search and rescue assistance and capabilities to jam regime communications."¹³

¹² *Ibid.*

¹³ *Ibid.*

Chapter 7

Conclusion

“If we desire to avoid insult, we must be able to repel it; if we desire to secure peace, one of the most powerful instruments of our rising prosperity, it must be known, that we are at all times ready for War.” George Washington, Fifth Annual Address to Congress, December 13, 1793.¹

When the Constitution of the United States was debated, written, and ratified the world operated under a different set of rules governing war. Information did not travel as quickly; technology was not nearly as advanced as it is today. We, as a nation, have been forced to adapt, but at what costs? Congress has willingly reduced its role in military action by authorizing the use of force instead of declaring war. Congress has not declared war since World War II, and even with that in mind, Congress has only declared war on eleven nations on five different occasions. Every United States military action since World War II has either been on an authorization of the use of force by Congress, or the President acting on his own accord, essentially ignoring Congress’ Constitutional right to declare war.

President Lincoln wrote in a letter in 1848, “[a]llow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion...you allow him to make war at pleasure. If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You

¹ George Washington, Fifth Annual Address to Congress, December 13, 1793. Available Online. Internet. <<http://www.notable-quotes.com/w/war_quotes_ii.html>>. November 27, 2011.

may say to him, ‘I see no probability of the British invading us’; but he will say to you, ‘Be silent: I see it, if you don’t.’”¹ In a similar vein, President Eisenhower said, “[p]reventative war was an invention of Hitler. Frankly, I would not even listen to anyone seriously that came and talked about such a thing.”²

But things have changed. We don’t live in the same world that Presidents Lincoln and Eisenhower did. We live in a world where information is available at the drop of a hat. We live in a world where seconds, not days, or even hours, are the deciding factors in the security of our nation. President Bush, when addressing the Class of 2002 at the United States Military Academy in West Point, New York, said “Our security will require transforming the military you will lead—a military that must be ready to strike at a moment’s notice in any dark corner of the world. And our security will require all Americans to be...ready for preemptive action when necessary to defend our liberty and to defend our lives.”³

To answer the questions that began this thesis, this author believes it is war even if Congress does not declare it. If it looks like a war, sounds like a war, and acts like a war then it is a war. The majority of the world refers to these “undeclared” conflicts as wars, because from the perspective of a person in the midst of such an “action,” it is a war. They involve two sides using militaries to fight against each other. The difference is semantics. Different levels of force are used in each instance; sometimes troops are used

¹ Abraham Lincoln in an 1848 Letter. “Presidents on Preemptive War,” *Peoples Geography* July 29, 2007. Access Online. Internet. <<<http://peoplesgeography.com/2007/07/29/presidents-on-preemptive-war/>>>. November 23, 2011.

² *Ibid.*

³ *Ibid.*

on the ground and others it is limited to aerial bombardment. But in the end each side is trying to push some sort of agenda using force and killing those on the other side.

The authorization of force only allows Congress the ability to remove itself from responsibility of the action if the resolution is open-ended or leaves the discretion to act in the hands of the president. The debate that the founders had to ensure that one man would not carry the power to conduct war may no longer be relevant. The United States has shifted that power from the many to the few. Congress still plays a vital role in the use of the military as an intervening force abroad. But, we, as a nation, have allowed the shifting of that power from the many to the few. History has also shown that once we give power to the executive, attempts to retrieve it are often futile. The declaration of war as it has been understood throughout United States history is obsolete. Congress does not need it anymore in order to accomplish the same result. Once the United States accepts that fact we can address the issue of holding the President accountable for his or her military actions as the leader of the military. War will never go away. We can call it whatever we like—a conflict, police action, or anything else—it’s still a war. As Shakespeare wrote in *Romeo and Juliet*, “What’s in a name? That which we call a rose/By any other name would smell as sweet.”⁴ This rose, whether or not one calls it war, involves quite a bit more bloodshed, and never really smelled sweet to begin with. War is war; its declaration may be obsolete, but its consequences will not die with the formal declaration.

⁴ William Shakespeare. *Romeo and Juliet*, Act II, Scene II, Lines 1-2.

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