

Prof. Moore's National Security Law

Use of Force Under U.S. Law: Background and Theory



Prof. Robert F. Turner



The Modern Conventional Wisdom

Prof. Arthur Schlesinger, Jr.

“[N]o one can doubt that the original intent of the Framers was to assure Congress the major role in the formulation of foreign policy . .

. .



The Modern Conventional Wisdom

Prof. Arthur Schlesinger, Jr.

“Yet the present [Reagan] administration somehow manages to champion a theory of inherent presidential prerogative in foreign affairs that would have appalled the Founding Fathers. The theory of presidential supremacy has only crystallized in recent times”

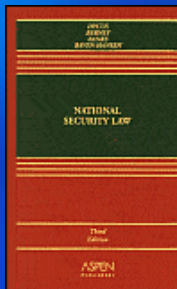
-Testimony before Senate Foreign Relations Committee (1988)

The Modern Conventional Wisdom

Dycus et al., *National Security Law*

How is the responsibility to “provide for the common defence” allocated among the three branches of government?

Judging simply by the proportion of words, the extensive national security powers given Congress in Article I appear to overwhelm the meager listing for the President in Article II. . . . Other provisions, particularly the one for impeachment of the President, also suggest legislative dominance. . . .



The Modern Conventional Wisdom

Dycus et al., *National Security Law*

By contrast, the President is provided only one obvious national security power by being designated the “Commander in Chief.” Moreover, the President is directed to command the armed forces only when they are “called into the actual service of the United States.” . . . The other Article II grants that may concern national security seem modest in comparison to powers conferred upon Congress: to appoint and receive ambassadors and ministers, and to make treaties (both powers shared with the Senate).

- Stephen Dycus *et al.*, *National Security Law* 9-10 (2002).

Is This Serious Scholarship?

(another cheap shot at our competition)

Moreover, the President is directed to command the **armed forces** only when they are “called into the actual service of the United States.”

-Dycus et al.

-National Security Law

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; . .**

-U.S. Const. Art. II, §2

NOTE: Art, I sec. 8 cl.15 empowers Congress to call forth the Militia for various purposes.

No Mention of “Executive Power” Clause

The other Article II grants that may concern national security seem modest in comparison to powers conferred upon Congress: to appoint and receive ambassadors and ministers, and to make treaties (both powers shared with the Senate).

-Dycus et al.,
National Security Law

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and **the power of the Legislature to declare war**, are exceptions out of the general “**executive power**” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

-Hamilton (*Pacificus I*)

Competing Theories

Some points of broad agreement:

- Most recognize president's right to respond to attacks on U.S. territory or armed forces.
- Most agree President needs approval of Congress to launch a major war in a non-defensive (i.e., now illegal under UN Charter) setting.

Competing Theories

Some points of disagreement:

- Some argue the President may use the armed forces as he sees fit anywhere without congressional approval.
- Others argue Congress must approve every use of armed force outside United States unless we are attacked first.
- Many recognize right of president to assist victims of sudden attack until Congress can meet and decide.
- **Prof. Moore:** Commitment of regular armed forces to sustained hostilities requires congressional approval.
- **Prof. Turner:** President may lawfully act defensively but not aggressively with whatever resources Congress has provided, but is prudent policy to get Congress on board.

The Constitutional Convention



Constitutional Convention

August 17, 1787

- Madison and Gerry moved to strike “make War” and give Congress instead the more limited power to “declare War . . . ; leaving the Executive the power to repel sudden attacks.”



— 2 Max Farrand,
Records of the Federal Convention 318.

Constitutional Convention

August 17, 1787

When Rufus King noted that “‘make War’ might be understood to ‘conduct’ it, which was an *Executive function*,” the final vote was 8-1 for Madison’s amendment.

— 2 Max Farrand,
Records of the Federal Convention 319 n.



Constitutional Convention

August 17, 1787

- Even Roger Sherman, who preferred “make War,” contended that “**The Executive shd. be able to repel and not to commence war.**”

— 2 Max Farrand,
Records of the Federal Convention 319.



Constitutional Convention

August 17, 1787

- Pierce Butler then “moved to give the Legislature power of **peace**, as they were to have that of war.”
- After a brief debate, this motion **failed** by a vote of **0-10**.

— 2 Max Farrand,

Records of the Federal Convention 319.



Constitutional Convention

August 17, 1787

It seems an article of faith today that Congress can at any time legislate an end to a war (as it did in Indochina). But given the view that “exceptions” to Executive Power should be construed strictly, and this clear unanimous rejection of giving Congress a role in making “peace” at the end of a war, should that be reconsidered?



Constitutional Convention

August 17, 1787

Remember, Congress
was joined with the
President only in the
decision to “declare War,”
not to conduct or end it.

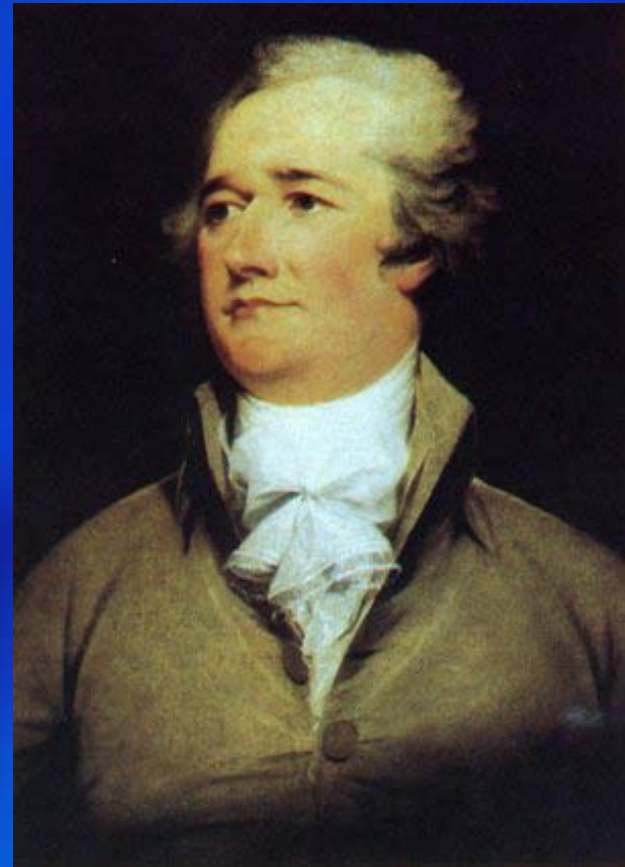


I am *not* questioning the clear power of Congress to undermine a war by refusing new requests for appropriations or troops.

Remember Hamilton's Explanation

First *Pacificus* Essay (1793)

“It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”



Remember Hamilton's Explanation

Thus, it can be *argued* that Congress has no power to legislate an end to an ongoing war (although it clearly has no duty to provide new troops, equipment, or money – and thus as a practical matter Congress can end any major war quickly).

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President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”



Re

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That view would be consistent with Madison's 1789 argument that the Senate had no role in the *removal* of the Secretary of Foreign Affairs since it was only joined in the appointment phase – and as an “exception” to the “executive power” its role should be narrowly construed.



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Congress May Authorize Hostilities Without Formally “Declaring War”

Bas v. Tingy (1800)

Talbot v. Seeman (1801)(Marshall, C.J.)

SFRC Rep’t on National Commitments Res.

- The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to . . . the Gulf of Tonkin are a proper method of granting authority.”

Sen. Rep’t No. 90-797 (1967)

Force Short of War

THROUGHOUT OUR HISTORY,
PRESIDENTS HAVE SENT U.S.
ARMED FORCES INTO HARM'S
WAY ON AVERAGE NEARLY
ONCE A YEAR WITHOUT SEEKING
CONGRESSIONAL APPROVAL.

The “War” Power of Congress

The scholarly debate too often focuses upon the meaning of the term “war”

A better approach may be to begin with these observations:

- Article I, Sec. 8, of the Constitution gives Congress not “the war power” but the power “to **Declare** War”
- The term of art “Declaration of War” was well known to the Founding Fathers, who were well read on the Law of Nations
 - Grotius’ *De Jure Belli ac Pacis* was the second most popular lawbook in Colonial Virginia private libraries
- As an exception to the President’s “Executive” powers, the power to “declare war” was expected to be construed narrowly.

Hugo Grotius on Declarations of War

“[N]o declaration [of War] is required when one is repelling an invasion, or seeking to punish the actual author of some crime.”

—Grotius, *De Jure Belli ac Pacis*, bk. III, Ch. 3

Alberico Gentili on Declarations of War

“[W]hen war is undertaken for the purpose of necessary **defence**, the declaration is not at all required.”

—2 Gentili, *De Jure Belli Libri Tres* 140 (1620 [1933 ed.]).

IS THE POWER “TO DECLARE WAR” AN ANACHRONISM TODAY?

Article I, Section 8, Clause 11 of the Constitution reads:

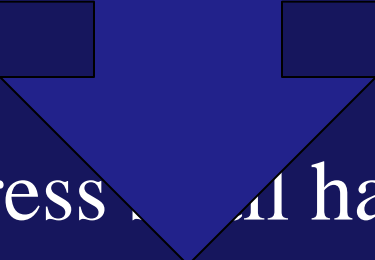
“Congress shall have the Power . . . To **declare War**, grant **Letters of Marque and Reprisal**, and make Rules concerning Captures on Land and Water;”

Letters of Marque and Reprisal
were outlawed by **Pact of Paris** in
1856 and are now an **anachronism**.

Constitution reads:

“Congress shall have the Power . . .
To **declare War**, grant **Letters of
Marque and Reprisal**, and make Rules
concerning Captures on Land and
Water;”

The type of War associated with formal **Declarations of War** was outlawed by Kellogg-Briand and the **UN Charter**. Is that part of Clause 11 now an **anachronism** as well?



“Congress shall have the Power . . .
To **declare War**, grant **Letters of
Marque and Reprisal**, and make Rules
concerning Captures on Land and
Water;”

The type of War associated with formal

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I'm *not* suggesting treaties have altered the Constitution. Should the United States ever decide to issue illegal Letters of Marque and Reprisal or to formally Declare War, Congress would have to approve both actions under the Constitution.

War,

The type of War associated with formal

But no nation in the world has clearly issued a formal “Declaration of War” in more than 60 years.

To **declare War**, grant **Letters of Marque and Reprisal**, and make Rules concerning Captures on Land and Water;”

Jefferson on “Transferring” War Power (1789)

We have already given in example one effectual check to the Dog of war by **transferring** the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

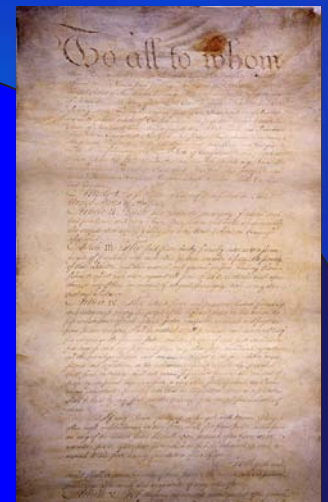
15 Papers of Thomas Jefferson 397

Jefferson on “Transferring”

What did Jefferson mean when he said we had “**transferred**” the power to “declare war” (the language used in his original draft, which he apparently decided produced a mixed metaphor and changed to “letting him [the dog of war] loose”) from the Executive to the Legislative branch?

Article 9 of the **Articles of Confederation** provided:

“The United States in **Congress** assembled, **shall have the sole and exclusive right and power of determining on peace and war**”



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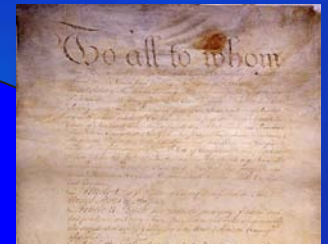
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Article 9 of the **Articles of**



I submit that the most logical explanation for Jefferson's comment is that he was conceding that, "in nature" (as reflected in the practice of every major country at the time, and in the writings of the major publicists) the power to declare and wage war was vested in the king or other executive.

Article 9 of the **Articles of**



I submit that the most logical explanation for Jefferson's comment is that he was conceding that, "in nature" (as reflected in the practice of every major country at the time, and in the writings of the major publicists) the power to declare and wage war was vested in the king or other executive.

If this is true, then – like his rival Hamilton – Jefferson believed that the "exception" to the "executive power" given to Congress to "declare war" was to be construed strictly.

George Washington on Offensive vs. Defensive Force (1793)

“The Constitution vests the power of declaring war with Congress. Therefore, no **offensive** expedition of **importance** can be undertaken until after they have deliberated upon the subject, and authorized such a measure.”

George Washington on Offensive vs. Defensive Force

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“Offensive” here is used in
its *jus ad bellum* sense, and in
today’s language would mean
“non-defensive” or
“**aggressive.**”

Such expeditions today
would be in violation of Art.
2(4) of the UN Charter.

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An important caveat

I am discussing the issue of **when the Constitution *requires* legislative consent** to resort to the use of armed force abroad.

An important caveat

I am discussing the issue of when the Constitution *requires* legislative consent to resort to the use of armed force abroad.

As a matter of wise **public policy**, I strongly believe getting Congress on board early makes great sense even when not required.

A Misleading Precedent

Jefferson and the Barbary Pirates

Jefferson's First Annual Message to Congress (8 December 1801)

“One of the Tripolitan cruisers having fallen in with, and engaged the small schooner Enterprise, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after heavy slaughter of her men, without the loss of a single one on our part.

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries.”

Navy Secretary's Instructions to Captain Richard Dale (20 May 1801)

“I am . . . instructed by the President to direct, that you proceed with all possible expedition, with the squadron under your command, to the Mediterranean. . . . Should you find on your arrival at Gibraltar that . . . the Barbary Powers, have declared War against the United States, you will then distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence—**by sinking, burning or destroying their ships & Vessels wherever you shall find them.**”

—1 Office of Naval Records and Library, *Naval Documents Related to the United States Wars with the Barbary Powers* 465, 467 (GPO 1939).

Captain Dale's Orders to Lt. Sterett

(off Tripoli, 30 July 1801)

“Sir: On the receipt of this, you will please to proceed with the United States Schooner under your Command, with all possible dispatch for the Island of Malta, there to take in [a]s much water as you can possibly bring back. ...In your Passage to and from Malta you will not chace out of your way particularly in going, as you have not much water on board. ...[S]hould you fall in with any of the Tripolian Corsairs that you are confident, you can Manage, **on your Passage to Malta you will heave all his Guns Over board Cut away his Masts, & leave him In a situation, that he can Just make out to get into some Port, but if coming back you will bring her with you if you think you can doe it with safety.**”

—1 Office of Naval Records and Library, *Naval Documents Related to the United States Wars with the Barbary Powers* 465, 467 (GPO 1939).

Jefferson's May 15, 1801 Cabinet Meeting Notes—1

May 15, 1801

Shall the squadron now at Norfolk be ordered to cruise in the Mediterranean

What shall be the object of the cruise

Lincoln. our men of war may repel an attack on individual vessels, but after the repulse, may not proceed to destroy the enemy;...

Gallatin. to declare war & to make war is synonymous. **The Exve. can not put us in a state of war, but if we be put in that state either by the decl. of Congress or of the other nation, the command & direction of the public force then belongs to the Exve.**

Jefferson's May 15, 1801 Cabinet Meeting Notes—2

Smith. if a nation commences war, the Exve is bound to apply the public force to defend the country.

Dearborne. the expedition should go forward openly to protect our commerce against the threatened hostilities of Tripoli.

Madison. that the cruise o't to be undertaken, & the Subject openly declared to every nation.

all concur in the expediency of cruise.

Whether the captains may be authorized, if war exists, to search for & destroy the enemy:...wherever they can find them? all except mr. L. agree they should, M.G.&S. think they may pursue into the harbours, but M. that they may not enter but in pursuit.

The Real Jefferson Precedent

In reality, President Jefferson ordered two-thirds of the new American Navy half-way around the world with orders to sink and burn enemy ships without even formally notifying Congress until more than six months after they left port. And no one in Congress complained.

Alexander Hamilton on Defensive War

“[The Constitution provides that] ‘The Congress shall have power to declare War;’ the plain meaning of which is that, it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received; in other words, it belongs to Congress only, to go to War. But **when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary.**

25 The Papers of Alexander Hamilton 455-56

The Prize Cases (1866)

“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 none the less a war, although the declaration of it be ‘unilateral.’...The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.”

Confusing the “Offensive” vs. “Defensive” Distinction in *Jus Ad Bellum* and *Jus in Bello*

From Jefferson’s 1801 cabinet debate to Operation Desert Storm, there has been confusion about the meaning of the terms “offensive” and “defensive” in deciding whether congressional approval is necessary. A “Declaration of War” is governed by the *jus ad bellum*, or the international law governing the initiation of coercion. How a State defensively responds to aggression (whether by “blocking punches” or by launching a massive counterattack) is governed by the *jus in bello*—a different set of legal rules. **The key test in assessing the need for a Declaration of War is not *how* a military operation is to be conducted, but *why* it is to be conducted.**

Removing Troops from Europe

Congressional Record (December 27, 1922)

“Mr. Reed. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?”

Mr. Borah. I do. ...[But] [y]ou can not bring them home, nor can I.

Mr. Reed. We could make the President do it.

Mr. Borah. We could not make the President to it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know if any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.

Mr. Reed. I wish to change my statement. We can not make him bring them home.”

John Bassett Moore on the 1928 Kellogg-Briand Pact

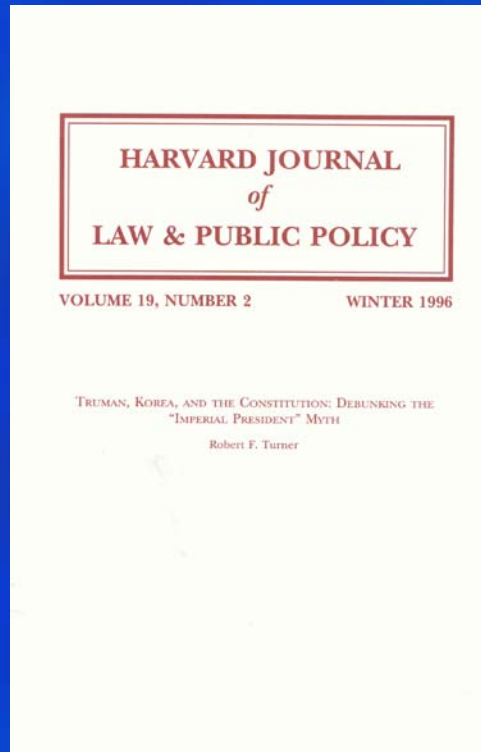
“Self-defense by a nation is not war.
When once you have outlawed war,
do not use the word war any more.”

[Thus many talk today of the Law of Armed Conflict
rather than the Law of War]

United Nations Charter (1945)

- Signed June 26
- Approved by Senate July 28 by a vote of 89-2
- (four absent Senators announced support)

For further information . . .



19 Harv. J. L. & Pub. Pol. 533 (1996).

The Charter Obligation

Senate Debate on Consenting to Ratification of the United Nations Charter (1945)

SFRC Chairman Tom Connally on “War” and UN Charter

“As to declaring war, that is not a question which is involved here at all. These forces are not exacted to make war. They are exacted as peace forces, to undertake to preserve peaceful nations against aggression and attack....I am convinced that the Presidential use of armed forces in order to participate in the enforcement action under the Charter would in no sense constitute an infringement upon the traditional power of Congress to declare war.”

—91 *Cong. Rec.* 10968 (1945).

Unanimous SFRC Report on UN Charter (1945)

Preventative or enforcement action by these [US] forces upon the order of the Security Council **would not be an act of war** but would be international action for the preservation of the peace and for the purpose of preventing war.

Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war.

The committee feels that a reservation or other congressional action...would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress.

—Senate Foreign Relations Committee Report recommending consent to ratification of UN Charter (1945).

HFAC Report on UN Participation Act (Unanimous • 1945)

The basic decision of the Senate in advising and consenting to ratification of the Charter resulted in the undertaking by this country of various obligations **which will actually carried out by and under the authority of the President** as the Chief Executive, diplomatic, and military officer of the Government. Among such obligations is that of supplying armed forces to the Security Council concerning which provision is made in section 6.

...[T]he ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill the commitments assumed by the United States thereunder....

—House Foreign Affairs Committee Rep't No. 79-1383 (1945).

Congressional Expectations on UN Military Operations

The Wheeler Amendment to the 1945 UN Participation Act

The Wheeler Amendment to the UNPA (December 4, 1945)

“[T]he President shall have no authority, to make available to the Security Council any armed forces to enable the Security Council to take action under article 42 of said charter, unless the Congress has by appropriate act or joint resolution authorized the President to make such forces available...in the specific case in which the Council proposed to take action.”

Senate Action on the Wheeler Amendment

The Wheeler Amendment was
defeated by a margin of more
than **7 to 1**

(9 yeas, 65 nays).

[UNPA then passed 65-7 (9:1 margin)]

The Myth of “Presidential Wars”

The Korean Conflict Did Truman Ignore Congress?

SFRC Chairman Tom Connally on Truman's Phone Call (June 26, 1950)

He [Truman] hadn't as yet made up his mind what to do....

“Do you think I'll have to ask Congress for a declaration of war if I decide to send American forces into Korea?” the President asked.

“If a burglar breaks into your house,” I said, “you can shoot at him without going down to the police station and getting permission. You might run into a long debate by Congress, which would tie your hands completely. **You have the right to do it as commander-in-chief and under the U.N. Charter.**”

—*My name is Tom Connally* 246 (1954).

Senate Majority Leader's Advice to President Truman on Korean War—1

[After Sec. Acheson recommended that the President go before a joint session of Congress to seek a formal resolution endorsing his actions]

“Senator [Scott] Lucas said that he frankly **questioned the desirability of this**. He said that things were now going along well....He said that the President had very properly done what he had to without consulting the Congress. He said the resolution [proposed by Acheson] was satisfactory and that it could pass. He suggested as an alternative [to going before a joint session of Congress] that the President might deliver this message as a fireside chat with the people of the country....”

Senate Majority Leader's Advice to President Truman on Korean War—2

Senator Lucas said that most of the members of Congress were sick of the attitude taken by Senators Taft and Wherry....Senator Lucas said that he felt he knew the reactions of Congress. He thought that only Senator Wherry had voiced the view that Congress should be consulted. **Many members of Congress had suggested to him that the President should keep away from Congress and avoid debate.** . . . He did not think that Congress was going to stir things up.”

—Top Secret MemCon by Amb. Phillip Jessup of 3 July 1950 Blair House Meeting, in *VII Foreign Relations of the United States 1950—Korea* 286-91 (1976).

President Truman's Response to Senate Majority Leader Scott Lucas

“The President said that it was necessary to be very careful that he would **not appear to be trying to get around Congress and use extra-Constitutional powers**....The President said that it was up to **Congress** whether such a resolution should be introduced, that he would not suggest it.”

—Top Secret MemCon by Amb. Jessup of 3 July 1950 Blair House Meeting, in VII *Foreign Relations of the United States 1950—Korea* 286-91 (1976).

The Myth of “Presidential Wars”

The Vietnam Conflict: Was Congress Bypassed?

Rep. Paul Findley (1961)

(*Congressional Record*, May 23, 1961—p. 8587)

“U.S. combat forces are the most effective deterrent to aggression, and we should publicly offer such forces to South Vietnam without delay. ... **No patriotic American will ever criticize President Kennedy for committing combat forces to protect freedom-loving people from aggression.** Every patriot has the right and duty to criticize ineptitude and the too-little, too-late policies which invite aggression.”



Congress and Vietnam

The Gulf of Tonkin Resolution (August 1964)

The Gulf of Tonkin Resolution

“Sec. 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.**”

in Resolution

The SEATO “Protocol States” were [South] Vietnam, Laos, and **Cambodia.**

...as vital to its national maintenance of in southeast Asia. of the United States and in accordance with its the United Nations and in accordance with its obligation 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.”

Senate Debate on Tonkin Resolution

Mr. Cooper. Does the Senator consider that in enacting this resolution we are satisfying that requirement [the “constitutional processes” requirement] of Article IV of the Southeast Asia Collective Defense treaty? In other words, are we not giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

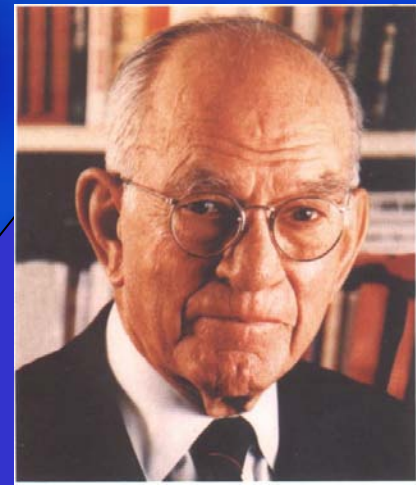
Mr. Fulbright. I think that is correct.

Mr. Cooper. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

Mr. Fulbright. That is the way I would interpret it. If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution.

110 Cong. Rec. 18049 (1964).

Senate Debate on Resolution



Mr. Cooper. ... resolution v... processes" re... Collect...

“Particularly disilluisioning over the years was the performance of Senator J. William Fulbright.”

... need... respect... Mr. Fulbright. Mr. Cooper...

... Stanford Dean John Hart Ely, *War & Responsibility* 16. ... into **war**, we v...

Mr. Fulbright. The... wo... **pret it...** ... situation later developed in... we th... ne approval... could be withdrawn, it could be v... own by co... rent resolution.

110 Cong. Rec. 18049 (1964).

Public Opinion and the Tonkin Gulf Response

“In early 1964, a majority of Americans expressed dissatisfaction with Johnson’s handling of the war in Vietnam. However, after Johnson called for a resolution to permit him to respond to the alleged attacks on U.S. ships in the Gulf of Tonkin, his support zoomed to **85 percent.**”

- *The Lessons of the Vietnam War* 175
(Jerold M. Starr, ed, 1991)

Senator Russell Long on Tonkin Gulf Resolution

“I think it is time for the Hanoi regime to know that so far as we are concerned **we have declared the war** we are fighting. We declared a limited war. We did that at the time of the Gulf of Tonkin incident.”

112 Cong. Rec. 15519 (1966).

Senator Thomas Eagleton (1970)

“Although the existence of the **Tonkin Gulf Resolution** did not make the war we have waged in South Vietnam any wiser or any more explicable, it **did make it a legitimate war** authorized by the Congress.”



Prof. John Hart Ely on the Legality of the Vietnam War

“[A]s the constitutional requirement of congressional authorization has historically been understood, Congress does indeed appear (years of denial and doubletalk notwithstanding) to have authorized each of these phases of the war.”

—Ely, *War & Responsibility* 12 (1993)

Early Congressional Support for Vietnam

1955: Senate approved SEATO Treaty with 2 dissents

1964: Tonkin Resolution approved **504-2**

- (Appropriated more than three times LBJ's request for Vietnam along with enacting resolution)

1966: \$13 billion supplemental appropriation passed 389-3 in House and 87-2 in Senate

1967: \$12 billion supplemental passed 385-11 in House and 77-3 in Senate

- (House rejected amendment to prohibit funds for combat over North Vietnam 77-3)

Senator Jacob Javits on Vietnam

1966: “It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy.”

1966: “In my own thinking there can no longer be any doubt about the legality of our assistance to the people of South Vietnam. ...I have never doubted the lawfulness of U.S. assistance to the Republic of Vietnam.”

1973: “[The War Powers Resolution is] a bill to end the practice of presidential war and thus to prevent future Vietnams. ...The War Powers Act would assure that any further decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.”

Senator Jacob Javits on Vietnam

1966: "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to the war in Vietnam."

1966: "In my own mind, there is no doubt about the legality of the war in Vietnam. I am a strong supporter of the assistance to the South Vietnamese."

1973: "[The practice of] the Vietnam War... further decision to warmaking must be lawful."

**And thus was born
the 1973 War Powers
Resolution.**

Reconciling the War Powers of Congress and the President

May Congress Direct the Conduct of Military Operations?

C.J. Chase in *Ex parte Milligan* (1866)

“But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . **Congress cannot direct the conduct of campaigns**”

[Deciding to bring up reinforcements from the rear [the “surge”] is at the *core* of command decisions in the conduct of campaigns.]

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This passage was quoted with favor by Justice Stevens for the Supreme Court majority in the 2006 *Hamdan* case.

This Exclusive (but Conditional) Presidential Power Includes Far More than “Day-to-Day Munitia”

The Commander in Chief has no force to Command unless provided by Congress, and no money to spend without appropriations.

But all strategic and tactical decisions about the *conduct* of war are vested in the Executive. Congress may *not* tell him what to negotiate or how to fight the war.

THE 1973 WAR POWERS RESOLUTION

War Powers Resolution (1973)

Overview

- § 1 - name of act (“War Powers Resolution”)
- § 2 - purpose & policy (“fulfill intent of framers”)
- § 3 - **consultation** (“in every possible instance”)
- § 4 - **reporting**
 - (a)(1) - “into hostilities/imminent involvement in” etc.
 - (a)(2) - “equipped for combat”
 - (a)(3) - “substantially enlarge” existing force deployment
- § 5 - Congressional action
 - (b) must **withdraw in 62-92 days** if no Cong. action.
 - (c) Cong. may order withdrawal by **concurrent resolution**
- §§ 6&7 - congressional procedures (reports and votes expected)
- § 8 - interpretation: no war by treaty, **doesn't change const. powers.**

Watergate and the War Powers Resolution

“[Watergate] had a tremendous impact on the pending War Powers Act. Congressional anger over the Cox firing was still apparent when the vote to override...was taken on November 7. One Senator reported such comments as these from his colleagues: ‘This is not the time to support Nixon;’ ‘We simply have to slap Nixon down, and this is the vote to do it on;’ and ‘**I love the Constitution, but I hate Nixon more.**’ As a result of this high degree of animosity...the House voted 284 to 135 in favor of the Act. Thus, by the slim margin of **four votes** the House overrode the President’s veto.”

—John C. Cruden, *The War Making Process*, 69 Mil. L. Rev. 35, 75 (1975).

War Powers Resolution: The Proper Constitutional Standard?

“[applies to] the introduction of United States Armed Forces **into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.**”

=

“Congress shall have the power...**to declare War**”

Question to Ponder

Would the War Powers Resolution have prevented the Vietnam conflict if it had been enacted prior to the August 1964 Tonkin Gulf incident?

War Powers Resolution

Section 2(c)

“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) **specific statutory authorization**, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”

QUESTION:

Does This Permit the President to Rescue American Civilians Abroad From Terrorists?

“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) **a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.**”

Footnote



*In December 1984 I was on a panel with Senator Jacob Javits at the annual meeting of the American Section of the International Law Association in New York. To my surprise, when I asserted that Section 2(c) of the WPR unconstitutionally limited the President's independent constitutional power to rescue endangered civilians abroad, the Senator *agreed* with me.

The “Silent Veto”

War Powers Resolution § 5(b)

“Within **sixty days** after a report is submitted or is required to be submitted pursuant to section 4(a)(1) [Rep’t due in 48 hours], whichever is earlier, the **President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization** for such use of United States Armed Forces, (2) has extended by law such sixty day period, (3) is physically unable to meet as a result of an armed attack upon the United States . . . “

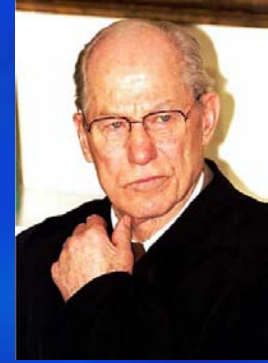
[President may extend another 30 days to protect troops while withdrawing.]

The *Chadha* Problem War Powers Resolution § 5(c)

“Notwithstanding subsection (b), at any time that the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, **such forces shall be removed by the President if the Congress so directs by concurrent resolution.**”

I.N.S. v. Chadha

426 U.S. 919 (1983)



Justice WHITE, dissenting.

“Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as **war powers** and agency rulemaking, some of which concern the independent regulatory agencies.”

Senate Majority Leader George Mitchell (1988)



“Although portrayed as an effort “to fulfill”—not to alter, amend or adjust—“the intent of the framers of the U.S. Constitution,” the War Powers Resolution actually expands Congress’ authority beyond the power to declare war to the power to limit troop deployment in situations short of war....

By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, **the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.**

Senate Majority Leader George Mitchell (1988)



...[T]he War Powers resolution does not work, because it **oversteps the constitutional bounds** on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

The War Powers Resolution therefore **threatens** not only **the delicate balance of power established by the Constitution**. It potentially undermines America's ability to effectively defend our national security.”

Congressional Record, 19 May, 1988.

National War Powers Commission

In July 2008 the bipartisan National War Powers Commission *unanimously* concluded the War Powers Resolution is UNCONSTITUTIONAL and should be REPEALED.

Are there any questions?



National Security Law Institute

The War Powers Resolution in Practice: Case Studies



Prof. Robert F. Turner



Implementation of the War Powers Resolution

- Has been **motivated** more by **political expediency** than by constitutional principle
- Has **undermined deterrence** by promoting divisive domestic debate during periods of crisis
- Has **jeopardized peace** and endangered the **lives** of American fighting men and women.



The War Powers Resolution and the April 1975 Evacuations from Indochina

- Da Nang
- Phnom Penh
- Saigon



1975 Da Nang Evacuation: Pres. Ford's Effort to "Consult"



“Not a single leader of either party remained in the capital [during Easter recess]. Three of them were in Greece, two in the PRC, two in Mexico, one in Europe, and another in the Middle East. The rest were in twelve widely scattered locations in the United States.”

—Ford, *A Time to Heal* 245

Pres. Ford's Request for Statutory Authority



“And now I ask the Congress to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by insuring their evacuation, if this should be necessary. ...

I hope that this authority will never have to be used, but if it is needed, there will be little time for congressional debate. Because of the gravity of the situation, I ask the Congress to complete action...**not later than April 19.**”

—Pres. Ford to Joint Session of Congress, April 10, 1975

“Speed and Dispatch” and the Congressional Response to President Ford’s Request

April 10—President Ford requests statute

April 12—Administration Submits Draft Bill

April 19—Deadline Passes

April 23—Senate approves one bill

April 24—House approves a different bill

April 25—Conference reports a compromise bill
(House adjourns for weekend)

April 30—Last people evacuated, Saigon falls

May 1—House rejects compromise bill 246-162...

“Speed and Dispatch” and the Congressional Response to President Ford’s Request

As one of the Americans in South Vietnam in late April 1975, I am personally grateful that President Ford decided to act on his own without waiting for Congress to enact new legislation.

This was an excellent illustration of why Congress is not institutionally suited to be entrusted with business that requires “speed and dispatch.”

S.S. *Mayaguez* Rescue

(May 1975)



- “Consultation” involved notifying congressional leaders after operation underway
- No authority recognized in War Powers Resolution to rescue endangered **civilians**
- Cooper-Church Amendment barred funds for combat operations on the ground, in the air, or off the shores of Cambodia (*all were done*)
- Operation perceived by public as a success
- Foreign Relations Committee passed *unanimous* resolution praising rescue as fulfilling the “spirit” of the War Powers Resolution

Iran Rescue Attempt (April 1980)



- No “Cooper-Church”-type prohibition on using force in region
- Greater need for secrecy than during *Mayaguez*
- Rescue failed (8 Americans died)
- Senate Foreign Relations Committee held press conference *denouncing* President Carter for violating War Powers Resolution

BERUIT 1982-1983

**A PARTISAN CONGRESS
PLACES A BOUNTY ON
AMERICAN LIVES**

Beirut Deployment - 1 (1982-83)

- U.S. was part of multinational peace keeping force
- Initial consultation called “excellent” by SFRC Counsel Fred Tipson
- Reagan reported deployment under “equipped for combat” language rather than “imminent involvement in hostilities” provision
 - This led to Hill criticism, but
 - consider what would have happened in region if president said U.S. was “going to war”
- Mission was non-combat “presence” designed to reassure parties they could negotiate in safety
- Every government and major military force in region originally welcomed MNF.

Continued on next slide

Beirut Deployment - 2

- Virtually no congressional criticism on merits; but widespread criticism for not complying with the War Powers Resolution
 - HFAC Chmn. Zablocki said Reagan threatened “constitutional crisis”
 - Sen. Cranston said Hill would approve if President told them “**exactly how and when we propose to extricate them.**” Sen. Byrd demanded to be told “specifically how long the Marines will be there.”
 - For what the *Washington Post* said appeared to be politically partisan reasons, Hill Democrats insisted on a vote on a resolution of approval
 - SFRC Report included “Minority Views of All Democratic Committee Members”

Continued on next slide . . .

Beirut Deployment - 3

- Gen. P.X. Kelley warned partisan debate was endangering lives of Marines
- Senate voted 54-46 to (2 Democrats supported President Reagan) to continue mission
- Even SFRC Chairman Percy said publicly that if there were further casualties Congress could “reconsider” the vote at any time.
- Syrian Foreign Minister said “The United States is short of breath”
- Radical Moslem forces told to “kill 15 Marines” to force U.S. to go home
- 23 October truck bomb killed 241 Marines and sailors (more than in Gulf War)
- Congress demanded that P.X. Kelley produce the head of the Marine who was responsible for the tragic loss.

Congress Ignores Caution on Lebanon

“The White House yesterday suggested that congressional Democrats’ efforts to put some time limit on the deployment of U.S. Marines in Lebanon may be endangering the troops there.

‘To suggest...that congressional insistence that the law be lived up to is somehow giving aid and comfort to the enemy is totally unacceptable,’ said Sen. Thomas F. Eagleton (D-Mo.).

...

‘The administration has thrown out a red herring,’ Eagleton said, with ‘an attempt to intimidate the Congress and frighten the American people with this kind of ludicrous argument.’...

When the anonymous White House comment implying danger for the Marines was reported on Capitol Hill, Democratic leaders were infuriated and, if anything, hardened their position.”

Washington Post, 17 Sept. 1983, A1

Congress Signals Weakness

“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressman would immediately reconsider their support.”

Knickerbocker & Southerland, “Congress: A Wary ‘Aye’ on Marines,”
Christian Science Monitor, 22 Sept. 1983, p. 1.

Terrorists Told To Kill Marines

“[U.S. intelligence intercepted]...a radio message between two Moslem militia units: ‘If we kill 15 Marines, the rest will leave.’”

“Marines Draw a Bead on Snipers,” *U.S. News & World Report*,
31 October 1983, p. 13.

Why did they think this?

Congress Had (Unintentionally) Placed a **Bounty** on Our Forces

At dawn on Oct. 23, 1983, a terrorist truck loaded with explosives killed 241 sleeping marines at the BLT Headquarters in Beirut, Lebanon.

Shortly thereafter, the remaining marines were withdrawn.



Osama bin Laden drew *lessons* from Beirut about U.S. “will” and courage that helped bring us 9/11

In 1998 Osama bin Laden told ABC News that America’s retreat following the Beirut bombing proved we were “paper tigers.”



Osama bin Laden drew *lessons* from Beirut about U.S. “will” and courage that helped bring us 9/11

A 2003 Knight Ridder account observed: “The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation.”





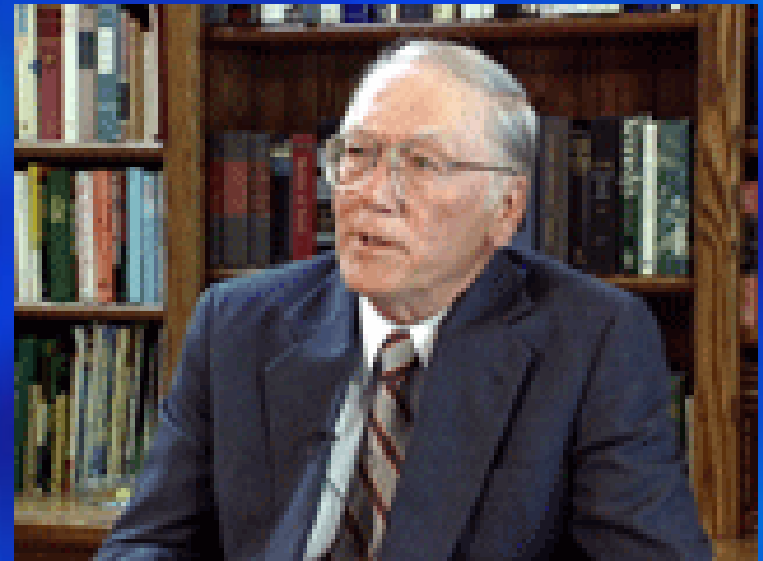
Senator Arthur Vandenberg

Feb. 10, 1949

“It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water’s edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don’t will serve neither their party nor themselves.”

More than 30 years ago . . .

The day after Jimmy Carter won the election as President, I wrote a memo to my boss, Asst. Senate Minority Leader Robert P. Griffin (R. Mich) — the original is on the wall in my office.



“Memorandum for Senator Griffin”

3 Nov. 1976

“The voters have selected Jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years.

So long as Carter’s policies are reasonable -- even though they might not conform to our own views on how best to get the job done -- I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn’t is no excuse for our not trying.)

If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session?”

Conclusions

- Sen. George Mitchell was correct in 1988 when he observed that the War Powers Resolution “unduly restricts the authority granted by the Constitution to the President as Commander in Chief.”
- Sadly — in the guise of asserting that the President must “obey the law” — the WPR has usurped presidential constitutional power.
- It has also been used as a political tool by *both* parties to mislead the public, undermine our security, and place our forces at unnecessary risk.

Conclusions

➤ It probably contributed at least indirectly to the 9/11 attacks by persuading bin Laden we would fold our tents if hit hard.

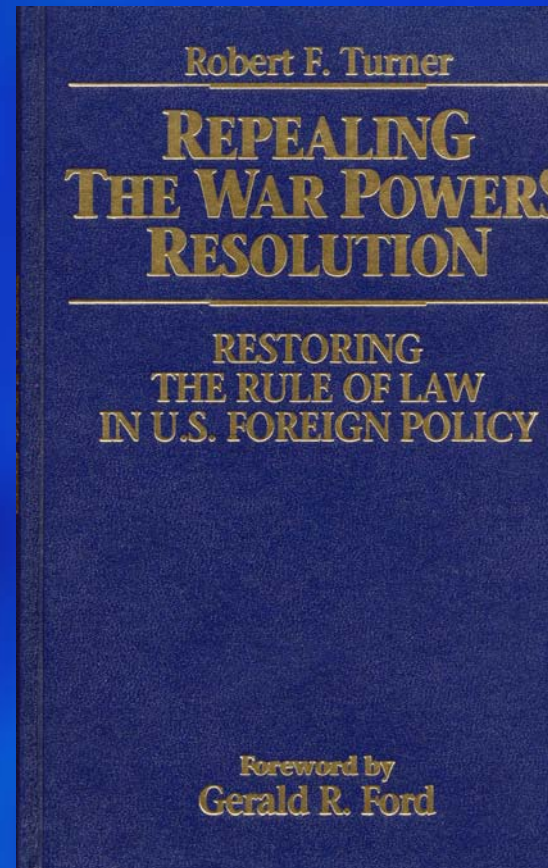


Conclusions

- Neither Korea nor Vietnam were “presidential wars” initiated against the will of Congress.
- The WPR would not have stopped Vietnam, which was specifically authorized by statute as permitted by §5(c)(3).
- For nearly 25 years, Dr. Lou Fisher and I debated whether the War Powers Resolution should be repealed.
- Writing in *Political Science Quarterly* in 1998, Dr. Fisher finally came out for the repeal of the War Powers Resolution.

Conclusions

That would in my view be a *great* step in the right direction.



Are there any questions?

