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A Challenge to Presidential Wars: *Smith v. Obama*

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ABSTRACT

From World War II to the present time, presidents have exceeded constitutional and statutory authority in exercising the war power. In doing so, they violate the rule of law, the principle of self-government, and the system of checks and balances. The U.S. Constitution expressly rejected the British model that placed with the Executive exclusive authority over external affairs, including taking the country from a state of peace to one of war. The Framers assigned that power solely to Congress. A lawsuit filed in 2016, *Smith v. Obama*, asked a federal district court to decide whether President Obama may engage in war without receiving express authority from Congress.

On May 4, 2016, Captain Nathan Michael Smith sued President Barack Obama over the legality of the war against the Islamic State. In so doing, he challenged the claims by the administration that no new authority was required from Congress. An intelligence officer stationed in Kuwait, Smith supported military action against the Islamic State but wanted a legal judgment from a federal court that the orders he was asked to carry out were legally binding.

The constitutional issue

At issue is the basic question of distinguishing between lawful and unlawful military orders. Captain Smith's complaint sought a declaration that President Obama's war against the Islamic State "is illegal because Congress has not authorized it." Under the War Powers Resolution, when the president introduces U.S. troops into hostilities, or into situations where hostilities are imminent, he must either receive congressional authorization within 60 days to continue the operation or must terminate the operation within 30 days after the 60-day period has expired. Smith's lawsuit noted that, contrary to earlier precedents, President Obama had failed to release an opinion by the Justice Department's Office of Legal Counsel or the White House Counsel to justify the war against the Islamic State.

In the declaration attached to his lawsuit, Smith states that when he was commissioned by President Obama in May 2010, he took an oath to “preserve, protect, and defend the Constitution of the United States.”¹ The Constitution “gives Congress the power to declare war, and the War Powers Resolution prohibits the President from waging war without a declaration of war or specific statutory authorization.”² Those principles led Smith to ask: “How could I honor my oath when I am fighting a war, even a good war, that the Constitution does not allow, or Congress has not approved?”³

In a number of early decisions, the Supreme Court correctly interpreted the relative powers of Congress and the president over the scope of war. When conflicts arose between what Congress set forth as statutory policy and what a president ordered in combat, statutory policy prevailed. From those decisions there developed national policy that presidential orders in time of war do not control if they violate law. Presidential power over external affairs expanded not because of constitutional or statutory grants of power but by multiple judicial errors, beginning with the 1936 case of *Curtiss-Wright*. Additional constitutional violations developed after World War II when presidents claimed they could seek authority for military actions not from Congress but from the UN Security Council and NATO.

How the Framers broke with the British model

In 1690, John Locke spoke of three branches of government: legislative, executive, and federative. By the latter he meant “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.” The powers of executive and federative, he said, “are always almost united” (Locke 1690, Book II, Ch. XII, §§ 146–47). He placed the federative power with the executive because it “is not necessary” that the legislative branch “should be always in being; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made” (Locke 1690, Book II, Ch. XII, § 153).

The British jurist William Blackstone, writing in 1765, endorsed Locke’s decision to place all of external affairs with the executive. In his chapter on the king’s prerogative, Blackstone said that royal character and authority “are rooted in and spring from the king’s political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors [sic], of creating peers, and of making war or peace” (Blackstone 1765, Book the First, 232–33). Other exclusive powers that Blackstone placed with the king include making treaties, sending and receiving ambassadors, coining money, the “sole prerogative of making war and peace,” issuing letters of marque and reprisal, and “the sole power of raising and regulating fleets and armies” (Blackstone 1765, Book the First, 243–45, 249–50, 254, 267). Article I of the U.S. Constitution vests many of those powers expressly in Congress: the power to declare war, grant letters of marque and reprisal, coin money, raise and support armies, and provide and maintain a navy. Other external powers not mentioned by Blackstone are also included in Article I: to regulate commerce

with foreign nations, define and punish piracies and felonies committed on the high seas, make rules concerning captures on land and water, and make rules for the government and regulation of the land and naval forces. The power over treaties and the appointment of ambassadors is shared between the president and the Senate. Nothing in Article II places any exclusive power in the president over external affairs. He is the commander in chief of the army and navy and of the militia of the several states, “when called into the actual Service of the United States.” Article I empowers Congress to call forth “the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions.”

Debates at the Philadelphia Convention on August 17, 1787, underscore the Framers’ determination to reject the British model. On the motion to vest in Congress the power to “make war,” Charles Pinckney objected that the proceedings of the legislative branch “were too slow” and Congress would “meet but once a year.” He suggested it would be better to vest that power in the Senate, “being more acquainted with foreign affairs, and most capable of proper resolutions” (Farrand 1966, 2: 318). Pierce Butler wanted to vest the war power in the president “who will have all the requisite qualities, and will not make war but when the Nation will support it” (Farrand 1966, 2: 318). James Madison and Elbridge Gerry moved to insert “declare” instead of “make,” leaving to the president “the power to repel sudden attacks” (Farrand 1966, 2: 318). Roger Sherman remarked that the president “shd. be able to repel and not to commence war.” Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war” (Farrand 1966, 2: 318). George Mason was “agst giving the power of war to the Executive, because not <safely> to be trusted with it. . . . He was for clogging rather than facilitating war; but for facilitating peace” (Farrand 1966, 2:, 319). The Madison-Gerry amendment passed.

At the Pennsylvania ratifying convention, James Wilson expressed the prevailing view that the American system of checks and balances “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” (Elliot 1836–1845, 2: 528).

Distrust of executive judgments in taking the country to war was underscored by many Framers. In Federalist No. 4, John Jay offered this judgment about executive wars: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Under those motivations, a single executive may “engage in wars not sanctified by justice or the voice and interests of his people” (Wright 2002, 101).

James Madison, in a letter to Thomas Jefferson on April 2, 1798, expressed concern about the judgment of single executives going to war: “The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power

most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl” (Hunt 1906, 6: 312). Advocates of independent presidential power often turn to the writings of Alexander Hamilton, but in doing so they frequently distort his position. That pattern is underscored by the Supreme Court’s decision in *Zivotofsky v. Kerry* (2015), discussed later in the article.

Support for congressional war power

In a major defense of presidential war power, the State Department in 1966 claimed that following adoption of the Constitution “there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the ‘undeclared war’ with France (1798–1800)” (U.S. Department of State 1966: 484). However, President John Adams did not assert that he could, on his own, go to war against France. He urged Congress to pass “effectual measures of defense” (Richardson 1897–1925, 1: 226). Congress passed several dozen bills to support military action. During legislative debate, Rep. Edward Livingston (D-N.Y.) considered the country “now in a state of war; and let no man flatter himself that the vote which has been given is not a declaration of war.”⁴ Because it was not formally declared but instead authorized by many statutes, the first U.S. military action against another country is called the “Quasi-War.”

The State Department list includes a number of minor actions. As noted by presidential scholar Edward Corwin, the examples of presidents unilaterally ordering military action consists largely of “fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like” (Corwin 1951, 16). Beginning with Truman’s decisions to go to war against North Korea without ever seeking or obtaining congressional authority, presidential initiatives have led to much greater commitments of military force.

By prompting several judicial decisions, the Quasi-War underscored the prerogatives of Congress over war and the deployment of military force. In 1800 and 1801, the Supreme Court recognized that Congress could authorize hostilities in two ways: either by a formal declaration of war or by statutes that authorized an undeclared war, as against France. In one case, Justice Samuel Chase noted: “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time.... congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land.”⁵ In a second case, Chief Justice John Marshall wrote for the Court: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry.”⁶ Nothing in those two decisions identified any independent presidential power over war.

In taking office in 1801, President Thomas Jefferson inherited the U.S. practice of paying annual bribes (“tributes”) to four states of North Africa: Morocco, Algiers, Tunis, and Tripoli. Regular payments were made so they would not interfere with

American merchantmen. Jefferson directed that several ships be sent to the Mediterranean to respond to any hostility directed at them. In a message to Congress on December 8, 1801, Jefferson informed lawmakers of U.S. military actions, stating he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.” It was up to Congress to authorize “measures of offense also” (Richardson 1897–1925, 1: 315). Congress proceeded to pass 10 statutes authorizing Presidents Jefferson and Madison to take military actions against the Barbary pirates (Fisher 2013, 35).

In authorizing war, Congress may place limits on what presidents may and may not do in using military force. Part of the legislation on the Quasi-War authorized the president to seize vessels sailing *to* French ports. President Adams exceeded statutory policy by issuing an order directing American ships to capture vessels sailing *to or from* French ports. Captain George Little followed Adams’s order and seized a Danish ship sailing from a French port. Sued for damages, his case came before the Supreme Court. Initially, Chief Justice Marshall assumed an “implicit obedience, which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system.” To Marshall, that system of military hierarchy seemed to justify the actions of Captain Little, “who is placed by the laws of his country in a situation which in general requires that he should obey them.”⁷

After discussing that issue with other Justices, Marshall became “convinced that I was mistaken.” He now agreed with his colleagues that the instructions issued by President Adams “cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”⁸ In other words, congressional policy set forth in a statute necessarily prevails over contrary presidential orders and military actions. For that reason, Captain Little “must be answerable in damages to the owner of this neutral vessel.”⁹

Presidential orders must comply with law

Litigation in the Captain Little case prompted Congress to reconsider the obligation of members of the military to follow orders of their commanders. In 1789, Congress passed legislation for the military. All commissioned and non-commissioned officers and privates were required to take two oaths even though the oaths could conflict. One oath: “I, A. B. do solemnly swear or affirm (as the case may be) that I will support the constitution of the United States.” The second oath: “I, A. B. do solemnly swear or affirm (as the case may be) to bear true allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whatsoever, and to observe and obey the orders of the president of the United States of America, and the orders of the officers over me.”¹⁰ What would happen if the person taking those oaths decided that the orders of the president or commanding officers violated the Constitution?

Legislation in 1799 provided that any officer who shall disobey the orders of his superior “on any pretense whatsoever, shall suffer death, or such other punishment

as a court martial shall direct.”¹¹ Not until 1800, after Captain Little had seized the Danish vessel, did Congress clarify the duty of members of the military. Under the new law, they were not required to carry out any and all commands. Congress now distinguished between lawful and unlawful orders: “No officer or private in the navy shall disobey the lawful orders of his superior officer, or strike him, or draw, or offer to draw, or raise any weapon against him, while in the execution of the duties of his office, on pain of death, or such other punishment as a court martial shall inflict.”¹²

In 1807, Congress passed private bills for the relief of many members of the military, including Captain Little. The bill directed accounting officers to liquidate and adjust with him the account of damages, interest, and charges resulting from the capture of the Danish vessel.¹³ Legislative debate explains the reasons for passing these private bills.¹⁴ The debate states that Captain Little claimed indemnity “on the ground of having in the capture executed the orders given him by the Secretary of the Navy.”¹⁵

Also in 1807, a federal appellate court decided a case that underscored the authority of Congress to limit the power of the president as commander in chief. Colonel William S. Smith was indicted for engaging in military actions against Spain. He claimed that his enterprise “was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government.”¹⁶ The court repudiated the claim that a president or his assistants could somehow authorize military adventures that violated congressional policy, in this case the Neutrality Act of 1794. The court described that statute as “declaratory of the law of nations; and besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government.”¹⁷

Speaking further, the court rejected the proposition that the Neutrality Act allowed executive officers to waive statutory provisions. Assuming Colonel Smith was correct that he received some kind of approval from the executive branch, the president “cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.” The court put the matter bluntly: “Does [the President] possess the power of making war? That power is exclusively vested in congress.”¹⁸

Throughout the 19th century and into the 20th, the Supreme Court and the president recognized that Congress is the branch of government authorized by the Constitution to take the country from a state of peace to a state of war. Initiatives by President Abraham Lincoln at the start of the Civil War are at times cited to claim that in a time of emergency the president is empowered to invoke powers normally accorded to Congress. That was never his argument. When Congress assembled in special session on July 4, 1861, Lincoln did not defend his actions as fully within his Article II powers. He did not claim exclusive or inherent powers nor did he assert some kind of executive prerogative. Instead, he admitted that he had used the powers of Congress: “It is believed that nothing has been done beyond the constitutional competency of Congress” (Basler 1953, 4: 429). In plain words, he stated that he

had exceeded his Article II powers and invaded those of Congress. For that reason, Lincoln understood it was essential that he ask lawmakers to pass legislation authorizing what he had done. Only in that manner could the Constitution be preserved. A bill providing retroactive authority for Lincoln's actions became law on August 6, 1861.¹⁹

In 1863, the Supreme Court upheld Lincoln's blockade of ports in the South.²⁰ That decision is often cited to uphold broad interpretations of the president's power over war (Garrison 2011, 61–69, 81–82, 131, 450). However, both the Lincoln administration and the Court read those powers narrowly. Lincoln's action was purely internal and domestic, having nothing to do with exercising the war power outside the United States. Richard Henry Dana, Jr., serving as Lincoln's lawyer in the case, explained in his brief that the lawsuit did not involve “the right to initiate a war, as a voluntary act of sovereignty... [t]hat is vested only in Congress.”²¹ The Supreme Court developed some of the themes advanced by Dana. Writing for the majority, Justice Grier stated that the President “has no power to initiate or declare a war either against a foreign nation or a domestic State.”²² If war comes by invasion of a foreign power or by states organized in rebellion, the President is authorized to “resist force by force.”²³

Judicial errors that expand presidential power

The pattern of judicial decisions properly understanding the scope and limits of presidential power continued until *United States v. Curtiss-Wright Export Corporation* (1936). Based on multiple errors of history and constitutional analysis, the Supreme Court promoted for the first time a conception of presidential power in external affairs that was plenary and exclusive. The case itself had nothing to do with independent presidential power. It arose when Congress in 1934 authorized the president to prohibit the sale of arms in the Chaco region of South America whenever he found that it “may contribute to the reestablishment of peace” between belligerents.²⁴ In imposing the embargo, President Franklin D. Roosevelt relied entirely on statutory authority. His proclamation prohibiting the sale of arms and munitions to countries engaged in armed conflict in the Chaco began: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority in me by the said joint resolution of Congress...”²⁵ The proclamation did not assert the existence of any inherent, independent, plenary, exclusive, or extra-constitutional presidential power.

Litigation focused on legislative power because, during the previous year, the Supreme Court in two cases struck down the delegation by Congress of domestic power to the president.²⁶ A district court, holding that the joint resolution on the arms embargo represented an unconstitutional delegation of legislative authority, said nothing about any reservoir of inherent or free-standing presidential power.²⁷

The district court decision was taken directly to the Supreme Court. None of the briefs on either side discussed the availability of independent or exclusive powers

of the President in external affairs. To the Justice Department, the question for the Court went to “the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose.”²⁸ The government’s brief consistently regarded the source of authority as legislative, not executive.

Writing for the Supreme Court, Justice George Sutherland reversed the district court and upheld the delegation of legislative power to the President. In dicta, he then proceeded to commit numerous errors that would greatly expand presidential power in the field of external affairs. First, he said the two categories of external and internal affairs are different “both in respect of their origin and their nature.”²⁹ The principle that the federal government is limited to either enumerated or implied powers “is categorically true only in respect of our internal affairs.”³⁰ Sutherland’s argument that sovereign authority after 1776 traveled directly from Great Britain to the United States at the national level has been thoroughly discredited by scholars (Goebel 1938: 571–73). American states after 1776 freely entered treaties. The eventual peace treaty with Great Britain described the United States in terms of New Hampshire, Massachusetts Bay, Rhode Island, and others as “free, sovereign and independent States.”³¹

A second Sutherland error concerned his statement that the president “alone negotiates” treaties and into that field “of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”³² In his book published in 1919, drawing on his 12 years as a U.S. Senator from Utah, Sutherland recognized that Senators did in fact participate in the negotiation phase and that presidents often acceded to this “practical construction” (Sutherland 1919, 122–24). Presidents frequently invited not only senators but also representatives to engage in treaty negotiations. House members were involved to build political support for authorizations and appropriations needed to implement treaties (Fisher 1989).

Sutherland’s third error consists of quoting entirely out of context a speech that John Marshall gave in 1800 when he served as a member of the House of Representatives. Marshall said during debate: “The President is the sole organ of the nation in external relations, and its sole representative with foreign nations.”³³ The term “sole organ” is ambiguous. “Sole” means exclusive or plenary, but what is meant by “organ”? A president who communicates with other nations after policy has been decided by both branches, either by statute or treaty? Sutherland interpreted the remark to attribute to the president not merely “an exertion of legislative power,” as delegated by Congress in the arms embargo legislation, but “an authority [granted by the legislature] plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”³⁴ Citing Marshall seemed an ideal source of authority because the next year he became Chief Justice of the Supreme Court.

Evidently Sutherland and the Justices who joined his opinion never read the full speech by Marshall. Anyone who does would understand that Marshall did not promote independent, plenary, and exclusive power for the president in external affairs. Given the express language in Articles I and II of the Constitution, that position would be absurd. Instead, he merely explained that when President John Adams transferred to Great Britain an individual charged with murder he did so on the basis of an extradition provision in the Jay Treaty. That is, he acted on the basis of authority granted him by both branches through the treaty process.³⁵ Although Sutherland committed plain error, the sole-organ doctrine continued to expand presidential power beyond constitutional limits from one decade to the next, with no correction by the Supreme Court.

Zivotofsky v. Kerry

In a case involving Jerusalem passports, the D.C. Circuit on July 12, 2013, held that congressional legislation in 2002 “impermissibly infringes” on the president’s power to recognize foreign governments.³⁶ On five occasions the court relied on the erroneous sole-organ doctrine from *Curtiss-Wright*.³⁷ It recognized that the doctrine was dicta, but reasoned that an inferior court must “carefully” consider language of the Supreme Court “even if technically dictum” and “generally must” treat the dictum as “authoritative.”³⁸

On July 17, 2014, I submitted an amicus brief to the Supreme Court in the case of *Zivotofsky v. Kerry*, explaining the three errors by Sutherland and asking the Court to correct them because they pushed presidential power beyond constitutional boundaries and damaged the system of checks and balances.³⁹ In a decision issued on June 8, 2015, the Supreme Court partially corrected the sole-organ doctrine but left in place the erroneous dicta concerning external and foreign affairs being transferred directly to the national government and the President possessing exclusive power over treaty negotiation.⁴⁰

The decision marked a significant victory for independent presidential power in external affairs (Fisher 2016). As Chief Justice Roberts noted in his dissent: “Today’s decision is a first: Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.... For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.”⁴¹ As to the majority’s reliance on *Curtiss-Wright*, Roberts correctly observed that *Curtiss-Wright* “did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation.”⁴²

In one passage, the majority in *Zivotofsky* appeared to express appreciation for a strong and resourceful Congress: “In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks and balances merely because foreign affairs are at issue.... It is

not for the President alone to determine the whole content of the Nation's foreign policy."⁴³ That kind of generalization is obvious to anyone who reads the text of the Constitution and understands its history.

Turning to the Court's holding, the majority held for the first time an exclusive presidential power to recognize foreign governments. In doing so, it struck down legislation that Congress had passed in 2002. In the passage above, the Court cited the important decision of *Little v. Barreme* (1804), which held that when the president's action conflicts with statutory policy, the position of Congress prevails. Yet in *Zivotofsky*, involving another collision between presidential claims and statutory policy, the position of the president prevailed. Far from recognizing and reaffirming the key constitutional principle in *Little v. Barreme*, the Supreme Court undermined it.

In the course of its decision, the Court chose to repeat and give further life to other errors from *Curtiss-Wright*. It stated: "The President has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936)."⁴⁴ Turn to *Curtiss-Wright* all you like and there will be no basis in history and precedent to support the view that every treaty entered into by the United States is negotiated solely by the president. The Court's abstract announcement should be absurd on its face. The Court chose to manufacture an exclusive presidential power in external affairs that lacks any plausible grounds. Perhaps one could point to President Woodrow Wilson's determination to negotiate the Versailles Treaty by excluding members of Congress, but his misjudgment led to a failed treaty and represents a model that all presidents should avoid (Bruff 2015, 215–18).

In *Zivotofsky*, the Court justified its support for independent presidential power in external affairs by relying on Hamilton's Federalist No. 70, who said it would not be disputed that "unity is conducive to energy." The Court said with unity comes the ability to exercise what Hamilton identified as "[d]ecision, activity, secrecy, and dispatch."⁴⁵ The majority assumed that those four qualities would yield positive results, meriting automatic support for unilateral presidential actions abroad. However, history offers many examples where presidential decisiveness, activity, secrecy, and dispatch led to great harm to the nation and its constitutional system, including Harry Truman's decision to go into North Korea, resulting in intervention by the Chinese and a costly stalemate; Lyndon Johnson's escalation of the Vietnam War; Richard Nixon's Watergate; Ronald Reagan's Iran-Contra; George W. Bush going to war against Iraq on the basis of six false claims that Saddam Hussein possessed weapons of mass destruction; and Barack Obama using military force to remove Muammar Qaddafi from office, turning Libya into a failed state and a breeding-ground for terrorists.

After relying on Hamilton's Federalist No. 70, the Court ignored his warning in Federalist No. 75 about excessive presidential power. He noted that several writers had placed the power to make treaties "in the class of executive authorities," but to Hamilton "it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of

them” (Wright 2002, 476). Speaking more broadly about the realm of foreign affairs, he cautioned: “The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States” (Wright 2002, 477).

Claiming “authority” outside of Congress

From 1789 to 1950, presidents who wanted to engage in military actions against other nations came to Congress either for statutory authority or a declaration of war. From Presidents Truman to Obama, they began to accept as substitutes for legislative action support they received from the UN Security Council or NATO allies. Such claims are unconstitutional. The Senate through the treaty process may not transfer the Article I powers of Congress to international and regional organizations.

In 1945, during Senate debate on the UN Charter, President Truman was aware of disagreements about which branch would control the sending of U.S. forces to the United Nations. From Potsdam he wired a note to Senator Kenneth McKellar (D-Tenn.) on July 27, 1945, pledging: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”⁴⁶ In asking “Congress” for legislation, Senators understood that Congress “consists not alone of the Senate but of the two Houses.”⁴⁷ With that understanding, the Senate approved the UN Charter by a vote of 89 to 1.⁴⁸

Congress now had to pass legislation to implement the Charter and determine the precise mechanism for the use of force. The Charter directed each nation to decide how they would authorize military action. Under the Charter, all UN members would make available to the Security Council, “on its call and in accordance with a special agreement or agreements,” armed forces and other assistance for the purpose of maintaining international peace and security. Those agreements “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes” (Fisher 2013, 88).

The constitutional processes of the United States are set forth in the UN Participation Act of 1945. Without the slightest ambiguity, the statute requires that agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”⁴⁹ Statutory language could not be more clear. The legislative history reinforces the need for advance congressional approval (Fisher 2013, 91–94). President Truman signed the bill without expressing any constitutional or policy objections.

Limits on presidential power to use armed force were further clarified by amendments to the UN Participation Act adopted in 1949, allowing the president on his own initiative to provide military forces to the UN for “cooperative action.” However, presidential authority to deploy such forces is subject to stringent conditions: they can serve only as observers and guards, can perform only in a noncombatant capacity, and cannot exceed 1,000 in number.⁵⁰

With those constitutional and statutory safeguards in place, President Truman on June 26, 1950, announced to the American public that the Security Council had ordered North Korea to withdraw its forces from South Korea.⁵¹ At that point he made no commitment of U.S. military forces. On the following day, he announced that North Korea had failed to cease hostilities and he had ordered U.S. air and sea forces to give South Korea cover and support. The United States, he said, “will continue to uphold the rule of law.”⁵² He made no mention of violating the explicit and unambiguous language of the UN Participation Act. With the Soviet Union absent, the Security Council voted 9 to zero to call upon North Korea to withdraw their forces from South Korea. Secretary of State Dean Acheson claimed that Truman acted in “conformity with the resolutions of the Security Council of June 25 and 27, giving air and sea support to the troops of the Korean government” (U.S. Department of State 1950: 43, 46). But Truman never requested nor did he receive authority from Congress as stipulated in the UN Participation Act.

At a news conference on June 29, a reporter asked Truman if the country was at war. He responded: “We are not at war.” Asked whether it would be more correct to call the conflict “a police action under the United Nations,” he agreed: “That is exactly what it amounts to.”⁵³ During Senate hearings in June 1951, Acheson conceded the obvious by admitting “in the usual sense of the word there is a war.”⁵⁴ In deciding disputes over insurance policies and other matters, federal and state courts had no difficulty in defining the hostilities in Korea as war. A federal district court in 1953 remarked: “We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war.”⁵⁵

President Truman’s precedent of circumventing Congress and seeking “authority” from the Security Council was later followed by President Clinton in Haiti and Bosnia. When Clinton could not obtain UN authority for military action in Kosovo, he reached out to NATO allies for support. At no time did he seek authority from Congress for those actions. In 2011, in preparing to use military force in Libya, President Obama sought authority not from Congress but from the Security Council. Whether relying on the UN or NATO, treaties may not shift constitutional authority from Congress to outside bodies (Fisher 1997).

The North Atlantic Treaty, signed by the United States and other nations on April 4, 1949, was agreed to by the Senate on July 21, 1949, and ratified by President Truman on July 25, 1949.⁵⁶ Under Article 5, the parties agreed that “an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” If an armed attack occurs, each nation, “in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations,” shall assist the party or parties so attacked.⁵⁷ As with the UN Charter, Article 11 of the NATO treaty provides that the treaty “shall be ratified and its provisions carried out by Parties in accordance with their respective constitutional processes.”⁵⁸ Congress defined the constitutional processes of the United States when it passed the UN Participation Act.

When President Obama reported to Congress on March 21, 2011, he stated that U.S. forces operating under the UN resolution had begun a series of strikes against Libyan air defense systems and military airfields “for the purposes of preparing a no-fly zone.” He said the strikes “will be limited in their nature, duration, and scope.”⁵⁹ The term “no-fly zone” might sound like something so constrained it should not be considered as war. However, it requires destroying the capacity to act against the United States and its allies. No matter how officials seek to downplay or minimize a no-fly zone, the use of military force against another country that has not threatened the United States is, as former Secretary of Defense Robert Gates has said, an “act of war” (Gates 2015, 513). The no-fly zone in Libya began with an attack on its system of air defenses.

The initial objective was to protect innocent civilians, particularly those living in Benghazi. According to Obama, military initiatives were taken “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”⁶⁰ A memo released by the Office of Legal Counsel on April 1 concluded that the military actions against Libya did not constitute “war” because of the limited “nature, scope, and duration” of the planned military operations.⁶¹

In a statement on March 21, 2011, Obama explained that the United States was taking military action in Libya to enforce Security Council Resolution 1973, anticipating that operations would conclude “in a matter of days and not a matter of weeks.”⁶² Military force would last seven months, exceeding the 60–90-day limit of the War Powers Resolution, discussed in the next section. Having received OLC’s memo that “war” did not exist, Obama now wanted a legal judgment that “hostilities” did not exist. OLC declined to produce that memo. It would have been difficult to do so. Its April 1 memo repeatedly mentioned the use of military “force” and the “destruction of Libyan military assets.” Jeh Johnson, General Counsel in the Defense Department, also refused Obama’s request. He could not deny the existence of hostilities in the form of Tomahawk missiles, armed drones, and NATO aircraft bombings. Eventually, White House Counsel Robert Bauer and State Department Legal Advisor Harold Koh agreed to state that no hostilities existed in Libya (Savage 2011). The Obama administration made many efforts to deny the existence of hostilities in Libya (Fisher 2012).

War Powers Resolution

After decades of debate, Congress passed legislation in 1973 in an effort to limit presidential war power. As with other measures adopted by Congress, it represented a mix of House and Senate values, but the differences were substantial. Senator Tom Eagleton (D-Mo.) remarked that the two chambers “marched down separate and distinct roads, almost irreconcilable roads.”⁶³ Instead of trying to define the precise conditions under which presidents may act, the House opted for procedural safeguards: requiring the president (“whenever feasible”) to consult with lawmakers before sending troops into combat, reporting the circumstances that necessitated

the action, citing authorities that justified military force, and explaining why congressional authorization was not requested in advance.⁶⁴

The Senate attempted to identify circumstances under which presidents could act unilaterally. Armed force could be used in three situations: (1) repel an armed attack upon the United States and its territories and possessions, retaliate in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) repel an armed attack against U.S. armed forces located outside the United States and its territories and possessions, and forestall the direct and imminent threat of such an attack; and (3) rescue endangered American citizens and nationals in foreign countries or at sea. The first situation (except for the final clause) agrees with the understanding reached at the Philadelphia Convention. The other situations reflect changes in presidential power that developed later, including the broad concept of defensive war and actions taken to protect American lives and property.

Efforts to codify presidential war powers carried a number of risks. Because of ambiguity in language, legislation might have the effect of broadening presidential power instead of restricting it. Executive officials could give expansive interpretations to such concepts as appropriate retaliatory actions, imminent threat, and endangered citizens. President Nixon vetoed the bill because he believed it encroached upon the president's constitutional responsibilities as commander in chief. He told Congress that the "only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force."⁶⁵ In fact, President Truman had altered the Constitution by taking the country to war against North Korea without either formal declaration or statutory authorization, relying instead on resolutions passed by the UN Security Council.

Both Houses overrode Nixon's veto, the House narrowly (284 to 135) and the Senate by a more comfortable margin (75 to 18). Some Democrats in the House expressed concern that the conference report tilted power dangerously toward the president (Fisher and Adler 1998, 5). Senator Eagleton, a principal sponsor of the resolution, denounced the bill that emerged from conference as a "total, complete distortion of the war powers concept."⁶⁶ Instead of the three exceptions specified in the Senate bill, the conference version gave the president "carte blanche" authority to use military force for up to 90 days. He charged that the bill, after being nobly conceived, "has been horribly bastardized to the point of being a menace."⁶⁷

Section 2(a) of the War Powers Resolution states that its purpose is "to fulfill the intent of the framers of the Constitution of the United States and insure... the collective judgment" of both branches when U.S. forces are introduced into hostilities. For the period of 60 to 90 days, it does neither. Under Section 3, the president is to consult with Congress "in every possible instance," leaving full discretion to the president. After introducing forces into hostilities, the president is required to report to Congress within 48 hours.

Section 2(c) attempts to define the president's constitutional power to introduce U.S. forces into combat. Troops may be ordered into hostilities 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 its armed forces. Those three conditions are fairly much in accord with the Constitution and the Framers' intent, but Section 4 governing reports to Congress is broader than the language in Section 2(c). It speaks of hostilities or "into situations where imminent involvement in hostilities is clearly indicated by the circumstances." Other language in Section 4 appears to sanction presidential use of military force in situations wholly unrelated to attacks against U.S. territory and troops.

There is also uncertainty about what starts the 60–90 day clock. It does not begin ticking unless the president reports under a very specific section: Section 4(a)(1). Presidents may decide to report more generally. For example, when President Reagan reported to Congress on his air strikes against Libya in 1986, he reported "consistent with the War Powers Resolution."⁶⁸ The clock never started. Yet even if the clock does not appear to tick, executive officials often behave as though it does. Military operations in Grenada by President Reagan and in Panama by President Bush I were conducted as though the 60-day limit was enforceable—if not legally, then politically. President Clinton's military operations in Kosovo lasted 78 days, the first time the 60-day clock was exceeded (Hendrickson 2002, 117). Obama's military actions in Libya went beyond 90 days.

Challenges to Smith's lawsuit

On July 11, 2016, the Justice Department filed a brief asking the district court to dismiss the case brought by Captain Smith. Four broad reasons were offered: (1) his claims raised non-justiciable political questions, (2) he lacked standing to assert his claims, (3) there was no waiver of sovereign immunity that permitted his claims to proceed, and (4) he could not obtain equitable relief against President Obama.⁶⁹

With regard to the first point, the Justice Department noted that following enactment of the War Powers Resolution, "nearly every President has committed U.S. armed forces into combat operations overseas."⁷⁰ That is quite true, but those operations generally ceased within 60 days. Military intervention in Libya lasted seven months. With regard to air strikes against the Islamic State, they began in August 2014 and executive officials predicted that military operations would continue well beyond the Obama administration, possibly lasting up to 10 years or more. The government's brief in the Smith case pointed out that previous deployments had prompted lawsuits seeking judicial determination of the division of war powers between Congress and the president, and "[n]ot one of these suits has prevailed," with "virtually all of them" dismissed on jurisdictional grounds.⁷¹ That is correct.

To the Justice Department, the political question doctrine barred judicial review of Smith's claims because the Constitution "leaves it to the political branches to decide, generally through the give and take of the process, under what circumstances the President can use military force overseas." Judicial review would be "inappropriate absent a clear conflict between the political branches over the President's authority to act."⁷² According to the government's brief, no such conflict existed because Congress had appropriated "billions of dollars in support of the military

operation.”⁷³ That issue will be analyzed later in this section. For the government, the political question doctrine barred judicial review in this case because the issue was one in which “courts are particularly ill-equipped to venture” and lack “relevant expertise or access to the type of information necessary to render an informed decision.”⁷⁴

As for standing, the government claimed that courts “repeatedly have rejected the proposition that swearing an oath to support and defend the Constitution can transform such a generalized interest into a concrete form.”⁷⁵ The government cited the 2015 case of *Crane v. Johnson*, but that involved the challenge of an immigration agent who objected that the administration’s decision to protect undocumented aliens from deportation conflicted with the duty of enforcement officers to carry out statutory policy.⁷⁶ The oath of office by immigration agents has little to do with the well-developed history of military officers required to carry out orders that are consistent with law and the Constitution. The experience of Captain Little during the Quasi-War prompted Congress to pass legislation in 1800 distinguishing between lawful and unlawful orders issued by military commanders.

A main argument in the Justice Department brief against Captain Smith concerns “an unbroken stream of appropriations” passed by Congress supporting military actions against the Islamic State.⁷⁷ This funding support “is by itself sufficient to foreclose any conceivable role for the courts” in a challenge to the Obama administration’s use of military force against the Islamic State.⁷⁸ According to the government’s brief, the reliance on appropriations “is not disturbed by section 8(a) of the War Powers Resolution, which purports to bar Congress from authorizing military operations through an appropriations measure unless that measure ‘states that it is intended to constitute specific statutory authorization within the meaning of this chapter.’”⁷⁹

The Justice Department did not explain why Congress adopted Section 8(a). During the early 1970s, the Nixon administration and congressional leaders differed on whether appropriation bills are instruments for setting congressional policy. Officials in the Johnson administration had argued that Congress authorized the escalation of the Vietnam War by appropriating funds. Initially, federal courts accepted appropriation statutes as sufficient authority and rejected any claim to the contrary. Said one judge: “That some members of Congress talked like doves before voting with the hawks is an inadequate basis for a charge that the President was violating the Constitution in doing what Congress by its words had told he might do.”⁸⁰

Experts challenged that reasoning, advising the judiciary that appropriations bills do not encompass major declarations of legislative policy. They cited House and Senate rules that are designed to prevent substantive legislation from being included in appropriations bills.⁸¹ However, some courts continued to endorse the theory that Congress could indirectly assent to war by appropriating the necessary funds.⁸² After learning about congressional procedures that carefully distinguished between authorization and appropriation bills, judges began to change their minds. In a 1973 decision, federal appellate judge Charles E. Wyzanski commented:

This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the action that placed them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent.⁸³

Similarly, federal appellate Judge Arlin Adams argued that it would be impossible to decide whether Congress, through its appropriations, meant to authorize the military activities in Vietnam: "to explore these issues would require the interrogation of members of Congress regarding what they intended by their votes, and then synthesis of the various answers. To do otherwise would call for a gross speculation in a delicate matter pertaining to foreign relations."⁸⁴

Section 8(a) of the War Powers Resolution was adopted to prohibit presidents from claiming that appropriations or treaties provide indirect legislative authority for military operations. The language is quite clear: "Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution."⁸⁵

Smith's response to the government

On August 18, 2016, attorneys for Captain Smith filed a response to the government's motion to dismiss. Their brief argued that the district court had jurisdiction to hear the case, Smith had standing, and it was his duty as a military officer to disobey orders that are beyond the president's authority as commander in chief. Regarding the harm that Smith faced, the brief explained that if he disobeyed an order he regarded as illegal, he faced the prospect of a court martial and lengthy imprisonment, as well as a dishonorable discharge. As to the government's claim that the case represented a political question unfit for the courts, Smith's attorneys responded: "This is a garden-variety statutory construction case," pointing to language in Section 8(a)(1) of the War Powers Resolution.⁸⁶ Similarly, they asked the court to determine whether President Obama could rely for legal support on two other statutes: the Authorization for Use of Military Force enacted after 9/11 ("2001

AUMF”) and the Authorization for Use of Military Force enacted on October 16, 2002, to support military action against Iraq (“2002 AUMF”).

Attorneys for Captain Smith argued that the WPR required President Obama to withdraw U.S. forces involved in hostilities with the Islamic State within 60 days unless Congress had declared war or given the president “specific statutory authority” to continue. No such legislation was enacted to support the war against the Islamic State. The government’s central claim is that the “specific authorization” required by Section 5(b) of the WPR can be established by appropriations bills that have funded military actions against the Islamic State. However, Section 8(a)(1) of the WPR requires an appropriations bill to specifically authorize the introduction of U.S. armed forces into hostilities. Initially, the government did not argue that military operations against the Islamic State were authorized by appropriations bills. Instead, it pointed to 2001 AUMF and 2002 AUMF.

On September 23, 2014, President Obama reported to Congress on the deployment of U.S. armed forces to Iraq and Syria to combat the Islamic State. He identified this legal authority: “I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107–40 and Public Law 107–243 [the AUMFs of 2001 and 2002] and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States.”⁸⁷

Captain Smith concluded that neither AUMF authorized the war against the Islamic State. As for 2002 AUMF, it authorized the president to use armed forces to “(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”⁸⁸ In a speech in April 2015, Stephen Preston, General Counsel of the Defense Department, argued that the 2002 AUMF provided support for military action against the Islamic State. While admitting that Saddam Hussein’s regime in Iraq posed the major threat in 2002, he said the purpose of the 2002 AUMF was to establish “a stable, democratic Iraq” and address “terrorist threats emanating from Iraq.”⁸⁹

Under that interpretation, U.S. Presidents would be authorized to take military action for decades to come whenever necessary to protect Iraq. In passing 2002 AUMF, members of Congress had no such intention. Moreover, as the brief for Captain Smith notes, the 2002 AUMF lacked the “specific authorization” required by the WPR.⁹⁰ A further problem resulted from inconsistent executive arguments about 2002 AUMF. On July 25, 2014, National Security Advisor Susan Rice notified Congress that the administration no longer relied on the 2002 AUMF as authority for “any U.S. government activities” in Iraq and “fully supports its repeal.”⁹¹

As for 2001 AUMF, the brief for Captain Smith points out that after the 9/11 terrorist attacks, President George W. Bush submitted legislation to Congress that would have, had it been adopted in full, “authorized President Obama’s current assertion of power” against the Islamic State.⁹² Bush recommended language that does appear in 2001 AUMF: “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.”⁹³ However, Congress deleted language proposed by Bush, authorizing the president “to deter and pre-empt any future acts of terrorism or aggression against the United States.”⁹⁴ Senator Robert C. Byrd remarked during debate that it was not the intent of Congress to give the president “unbridled authority” to wage war against terrorism “writ large without the advice and consent of Congress.”⁹⁵

Moreover, Congress added to 2001 AUMF language that relates directly to the WPR, declaring that the 2001 AUMF is “intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”⁹⁶ Language proposed by President Bush after 9/11 made no mention of the WPR. This change by Congress was done with the specific intent to protect legislative prerogatives and to block future efforts by presidents to wield the war power single-handedly.

The brief for Captain Smith makes an important point about legal analysis by the Obama administration in support of presidential authority to use military force against the Islamic State. Nothing was issued by the Justice Department, the Office of Legal Counsel, or the White House Counsel, all of which spoke publicly when President Obama used military force in Libya in 2011. Instead, legal arguments came in the form of Preston’s speech in 2015 to the Association of International Law Scholars and from anonymous “senior administration officials.”⁹⁷

On August 19, 2016, the Constitution Project filed an amicus brief opposed to the government’s motion to dismiss the case for want of jurisdiction. The brief provides detailed analysis on the background and purposes of the War Powers Resolution, concluding that President Obama violated the WPR by using force against the Islamic State in excess of 90 days without congressional authorization. Orders given to Captain Smith to assist in that use are therefore unlawful.⁹⁸

District court’s decision

On November 21, 2016, U.S. District Judge Colleen Kollar-Kotelly granted the government’s motion to dismiss Smith’s complaint, concluding that he had not alleged an injury sufficiently concrete or particularized to establish Article III standing. Moreover, she held that his claims presented non-justiciable political questions unsuitable for a court. On page 11 of her opinion, it is stated that Smith “has no qualms about participating in a fight against ISIL.” While it is true that Smith supported military action against the Islamic State, he certainly had legal and constitutional reservations that led him to file his lawsuit.

On page 24 of her decision, Judge Kollar-Kotelly cites a federal court opinion from 2006 that disputes “involving foreign relations, such as the one before [the Court], are ‘quintessential sources of political questions.’”⁹⁹ However, disputes involving foreign relations are regularly accepted and decided in federal courts. In 2009, in the Jerusalem passport case, the D.C. Circuit held that the

issue of whether the State Department could lawfully refuse to record a U.S. citizen's place of birth as "Israel" on a passport for a child born in Jerusalem was nonjusticiable under the political question doctrine.¹⁰⁰ Three years later the Supreme Court reversed, holding that the dispute was not a political question but rather a constitutional issue to be decided by the courts.¹⁰¹ Further litigation resulted in the Supreme Court on June 8, 2015, deciding the case on the merits to hold that the President has exclusive power to recognize foreign nations and governments.¹⁰²

Judge Kollar-Kotelly recognized on page 25 of her decision that questions of "statutory construction and interpretation... are committed to the Judiciary," but concluded on the next page that Smith's efforts to analogize his case to the Jerusalem passport case "are strained." She therefore declined to analyze the statutes involved in Smith's case, including the War Powers Resolution, the 2001 AUMF, and the 2002 AUMF. On page 29, she noted that President Obama's proposed budget for 2016 requested funds to conduct military operations against the Islamic State "and Congress again appropriated the vast majority of the requested funds." This misses the point that the Section 8(a) of the WPR requires that funds be specifically authorized by Congress for a particular military operation.

In response to the district court decision, Smith's attorneys filed a brief on April 3, 2017, stating that Smith had standing to bring the suit. As to the political question doctrine, Smith's brief points out that the district court "ignored" the Steel Seizure Case in *Youngstown v. Sawyer* and "is flatly inconsistent" with the Supreme Court's decision in that case.¹⁰³ The brief notes: "No controversial fact finding is needed to establish that the AUMFs enacted by Congress in 2001 and 2002 cannot serve as the 'specific authorizations' required by the WPR for the President's decision to initiate 'hostilities' against ISIL in 2014."¹⁰⁴ It underscores that "Congress's rules prohibit the use of appropriations as vehicles for substantive legislation."¹⁰⁵

Conclusion

The Framers understood the dangers of allowing a single executive to take the country from a state of peace to a state of war. Such power was implicit in the British model developed by John Locke and William Blackstone, a model the Framers explicitly rejected. In 1793, James Madison offered this judgment: "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*" (Hunt 1906, 6: 148). That constitutional structure was followed from 1789 to 1950, when Truman became the first president to take the country to war without receiving congressional authority. That violation has been followed by other presidents, including Clinton and Obama, without limits imposed by Congress or the judiciary. Part of this unconstitutional conduct has been promoted by the Supreme Court with its rulings from *Curtiss-Wright* in 1936 to *Zivotofsky v. Kerry* in 2015, endorsing exclusive and independent powers of the president with regard to external affairs (Fisher 2017).

Acknowledgments

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Notes

1. Exhibit A to Complaint for Declaratory Relief, *Smith v. Obama*, May 4, 2016, at 2.
2. *Ibid.*
3. *Ibid.*
4. 8 Annals of Cong. 1519 (1798).
5. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).
6. *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1, 28 (1801).
7. *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804).
8. *Ibid.*
9. *Ibid.*
10. 1 Stat. 96, sec. 3 (1789).
11. 1 Stat. 711, sec. 24 (1799).
12. 2 Stat. 47, Art. XIV (1799).
13. 6 Stat. 63 (1807).
14. 16 Annals of Cong. 247–64, 276–89 (1807).
15. *Ibid.*, 260.
16. *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).
17. *Ibid.*
18. *Ibid.*, 1230.
19. 12 Stat. 326 (1861).
20. *The Prize Cases*, 67 U.S. 635 (1863).
21. R. H. Dana, Jr., “Brief for the United States and Captors,” *The Prize Cases*, reprinted in Kurland and Casper 1978, 3: 495.
22. *The Prize Cases*, 67 U.S. 635, 668 (1863).
23. *Ibid.*
24. 48 Stat. 811 (1934).
25. *Ibid.*, 1745.
26. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
27. *United States v. Curtiss-Wright Exp. Corp.*, 14 F. Supp. 230 (S.D.N.Y. 1936).
28. Brief by Martin Conboy, Special Assistant to the Attorney General of the United States, reprinted in Kurland and Casper 1975, 32: 898.
29. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936).
30. *Ibid.*, 316.
31. 8 Stat. 55 (1782).
32. *United States v. Curtiss-Wright*, 299 U.S. 319.
33. *United States v. Curtiss-Wright*, 299 U.S. 319.
34. *Ibid.*, 319–20.
35. 10 Annals of Cong. 602, 606–07, 613–14 (1800).
36. *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).
37. *Ibid.*, 211 (twice), 213, 215, 219.
38. *Ibid.*, 212.
39. Brief *Amicus Curiae* of Louis Fisher, *Zivotofsky v. Kerry*, No. 13–628, July 17, 2014; <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>.
40. *Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015).

41. *Ibid.*, 2113.
42. *Ibid.*, 2115.
43. *Ibid.*, 2090.
44. *Ibid.*, 2086.
45. *Ibid.*
46. 91 Cong. Rec. 8185 (1945).
47. *Ibid.* (Senator Donnell).
48. *Ibid.*, 8190.
49. 59 Stat. 621, sec. 6 (1945).
50. 63 Stat. 735–36, sec. 5 (1949).
51. Public Papers of the Presidents, 1950, 491.
52. *Ibid.*, 492.
53. *Ibid.*, 504.
54. “Military Situations in the Far East” (Part 3), hearings before the Senate Committees on Armed Forces and Foreign Relations, 82d Cong., 1st Sess. (1951), 2014.
55. *Weissman v. Metropolitan Life Ins.*, 112 F. Supp. 420, 425 (S.D. Cal. 1953).
56. 63 Stat. 2241 (1949).
57. *Ibid.*, 2244.
58. *Ibid.*, 2246.
59. Public Papers of the Presidents, 2011, I, 280.
60. *Ibid.*, 281.
61. Office of Legal Counsel, “Authority to Use Military Force in Libya,” April 1, 2011; <http://www.whitehouse.gov/olc/2011/authority-military-use-in-libya.pdf>.
62. Public Papers of the Presidents, 2011, I, 266, 271.
63. 119 Cong. Rec. 33555 (1973).
64. 116 Cong. Rec. 37398–408 (1970); 117 Cong. Rec. 28870–78 (1971).
65. Public Papers of the Presidents, 1973, 893.
66. 119 Cong. Rec. 36177 (1973).
67. *Ibid.*, 36178.
68. Public Papers of the Presidents, 1986, I, 478.
69. <https://assets.documentcloud.org/documents.2991414/Smith-v-Obama-Govt-Motion-to-Dismiss.pdf>.
70. *Ibid.*, 1.
71. *Ibid.*
72. *Ibid.*, 1–2.
73. *Ibid.*, 2.
74. *Ibid.*
75. *Ibid.*, 3.
76. *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).
77. Government’s motion to dismiss, *Smith v. Obama*, July 11, 2016, 25
78. *Ibid.*
79. *Ibid.*, 29, n.47.
80. *Berk v. Laird*, 317 F. Supp. 715, 724 (E.D. N.Y. 1970), *aff’d sub nom. Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971).
81. *Berk v. Laird*, 317 F. Supp. 718, 721 (testimony of Professors Richard F. Fenno Jr. and Don Wallace Jr.).
82. *Orlando v. Laird*, 317 F. Supp. 1013, 1018–19 (E.D. N.Y. 1970); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971); *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970); and *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971).
83. *Mitchell v. Laird*, 476 F.2d 533, 538 (D.C. Cir. 1973). This decision was later withdrawn by court order.

84. *Atlee v. Laird*, 347 F. Supp. 689, 706 (E.D. Pa. 1972) (three-judge court), aff'd, *Atlee v. Richardson*, 411 U.S. 911 (1973).
85. 87 Stat. 558 (1973).
86. Plaintiff's Memorandum in Opposition to Motion to Dismiss," *Smith v. Obama*, Civ. No. 16-843 (CKK), U.S. District Court for the District of Columbia, Aug. 18, 2016 (hereafter Plaintiff's Memo, Aug. 18, 2016).
87. Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria, 2014 Daily Comp. Pres. Doc. 697 (Sept. 23, 2014).
88. 116 Stat. 1501, sec. 3(a) (2002).
89. Plaintiff's Memo, Aug. 18, 2016, 35.
90. *Ibid.*
91. *Ibid.*, 21.
92. *Ibid.*, 36.
93. 115 Stat. 224, sec. 2(a) (2001).
94. Plaintiff's memo, Aug. 18, 2016, 37; 147 Cong. Rec. 18136 (2001).
95. 147 Cong. Rec. 18136 (2001).
96. Plaintiff's memo, Aug. 18, 2016, 37.
97. *Ibid.*, 36, 39.
98. Motion for leave to file an amicus curiae brief in opposition to Defendant's motion to dismiss for want of jurisdiction, *Smith v. Obama*, Civ. No. 16-843 (CKK), Aug. 19, 2016.
99. *Smith v. Obama*, Civil Action No. 16-843 (D.D.C. (Nov. 21, 2016), citing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010).
100. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009).
101. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012).
102. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076 (2015).
103. Brief of Appellant, *Smith v. Trump*, No. 16-5377, April 3, 2017, at 7; <https://www.lawfareblog.com/brief-captain-nathan-smiths-challenge-presidential-war-making>.
104. *Ibid.*, 7-8.
105. *Ibid.*, 46.

References

- Basler, Roy P., Marion Dolores Pratt, and Lloyd A. Dunlap, eds. 1953. *The Collected Works of Abraham Lincoln*. New Brunswick, NJ: Rutgers University Press.
- Blackstone, William. 1765. *Commentaries on the Laws of England*. Oxford, UK: Clarendon Press.
- Corwin, Edward S. 1951. "The President's Power," *New Republic*, January 19.
- Bruff, Harold H. 2015. *Untrodden Ground: How Presidents Interpret the Constitution*. Chicago, IL: University of Chicago Press.
- Elliot, Jonathan, ed. 1836-1845. *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution*, 5 vols. Washington, DC.
- Farrand, Max, ed. 1966. *The Records of the Federal Convention of 1787*, 4 vols. New Haven, CT: Yale University Press.
- Fisher, Louis. 1989. "Congressional Participation in the Treaty Process," *University of Pennsylvania Law Review*, 137: 1511-22.
- _____. 1997. "Sidestepping Congress: Presidents Acting Under the UN and NATO," *Case Western Reserve Law Review*, 47: 1237-79.
- _____. 2012. "Military Operations in Libya: No War? No Hostilities?" *Presidential Studies Quarterly*, 42: 176-89.

- _____. 2013. *Presidential War Power*, 3rd ed.. Lawrence, KS: University of Kansas Press.
- _____. 2016. "The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*," *Constitutional Commentary*, 31: 149–219.
- _____. 2017. *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings*. Lawrence: University of Kansas Press.
- Fisher, Louis, and David Gray Adler. 1998. "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly*, 113: 1–20.
- Garrison, Arthur H. 2011. *Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War*. Lanham, Md.: Lexington Books.
- Gates, Robert M. 2015. *Memoirs of a Secretary at War*. New York, NY: Vintage Books.
- Goebel, Julius, Jr. 1938. "Constitutional History and Constitutional Law," *Columbia Law Review*, 38: 555–77.
- Hendrickson, Ryan C. 2002. *The Clinton Wars: The Constitution, Congress, and War Powers*. Nashville, TN: Vanderbilt University Press.
- Hunt, Gaillard, ed. 1906. *The Writings of James Madison*, 9 vols. New York, NY: G. P. Putnam's Sons.
- Kurland, Philip B. and Gerhard Casper, eds. 1978. *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*. Bethesda, Md.: University Publications of America.
- Locke, John. 1690. *Two Treatises of Civil Government*. New York, NY: E. P. Dutton & Co., Inc., 1962 ed.
- Hunt, Gaillard, ed. 1906. *The Writings of James Madison*, 9 vols. New York, NY: G. P. Putnam's Sons.
- Richardson, James D., ed. 1897–1925. *A Compilation of the Messages and Papers of the Presidents*, 20 vols. New York, NY: Bureau of National Literature.
- Savage, Charlie. 2011. "2 Top Lawyers Lose Argument on War Powers," *New York Times*, June 18.
- Sutherland, George. 1919. *Constitutional Power and World Affairs*. New York, NY: Columbia University Press.
- U.S. Department of State. 1950. *Department of State Bulletin*, 23: 43, 46.
- _____. 1966. *Department of State Bulletin*, 54: 474.
- Wright, Benjamin F., ed. 2002. *The Federalist*. New York, NY: Metro Books.