

## Basic Principles of the War Power

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### INTRODUCTION

The Framers of the U.S. Constitution assigned to Congress many of the powers of external affairs previously vested in the English king. That allocation of authority is central to America's democratic and constitutional system. When decisions about armed conflict, whether overt or covert, slip from the elected members of Congress, the principles of self-government and popular sovereignty are undermined. Political power shifts to an executive branch with two elected officials and a long history of costly, poorly conceived military commitments. The Framers anticipated and warned against the hazards of Executive wars. In a republican form of government, the sovereign power rests with the citizens and the individuals they elect to public office. Congress alone was given the constitutional authority to initiate war.

Legislative control over external affairs took centuries to develop. The English Parliament gained the power of the purse in the 1660s to restrain the king, but the power to initiate war remained a monarchical prerogative. In his *Second Treatise on Civil Government* (1690), John Locke identified three functions of government: legislative, executive, and "federative."<sup>1</sup> The last embraced "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."<sup>2</sup> To Locke, the federative power (what today we call foreign policy) was "always almost united" with the Executive. Any effort to separate the executive and federative powers, he counseled, would invite "disorder and ruin."<sup>3</sup>

The same model of government appears in the writings of William Blackstone. In Book One of the *Commentaries on the Laws of England* (1765), he defined the king's prerogative as "those rights and capacities which the king enjoys alone."<sup>4</sup> Some of those powers he called "direct,"

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1. JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* §§145-146 (1690).
2. *Id.* at §146.
3. *Id.* at §§147-148.
4. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 239 (1765)

referring to powers that are “rooted in and spring from the king’s political person,” including the right to send and receive ambassadors and the power of “making war or peace.”<sup>5</sup> Blackstone recognized other exclusive foreign policy powers for the executive. The king could make “a treaty with a foreign state, which shall irrevocably bind the nation.”<sup>6</sup> He could issue letters of marque (authorizing private citizens to use their ships and other possessions to undertake military actions against another nation) and acts of reprisal (military responses short of war). To Blackstone, those powers were “nearly related to, and plainly derived from, that other of making war.”<sup>7</sup> Also, the king was “the generalissimo, or the first in military command,” and he had “the sole power of raising and regulating fleets and armies.”<sup>8</sup>

The American Framers transferred those “executive” powers over war and foreign affairs either exclusively to Congress or divided them between the President and the Senate (as with treaties and the appointment of ambassadors). At the Philadelphia Convention, Charles Pinckney said he was for “a vigorous Executive” but opposed any changes that would “render the Executive a Monarchy, of the worst kind, towit an elective one.” John Rutledge wanted the executive power placed in a single person, “tho’ he was not for giving him the power of war and peace.” James Wilson supported a single executive but “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”<sup>9</sup>

Edmund Randolph worried about executive power, calling it “the foetus of monarchy.” The delegates at the convention, he said, had “no motive to be governed by the British Governmnt as our prototype.” If the United States had no other choice it might adopt the British model, but “the fixt genius of the people of America required a different form of Government.” Town hall meetings, broad public debate, and years of community service – all directed toward self-government – set Americans apart. Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”<sup>10</sup> Alexander Hamilton looked to the British system with admiration and affection, but in a lengthy speech agreed that the models of Locke and Blackstone had no application

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[hereinafter BLACKSTONE, COMMENTARIES].

5. *Id.* at 239-240.

6. *Id.* at 252.

7. *Id.* at 258.

8. *Id.* at 260.

9. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64-66 (1966) [hereinafter FARRAND].

10. *Id.* at 66.

to America and its commitment to republican government. Hamilton's draft constitution broke free of Blackstone by requiring the Executive to seek the Senate's approval for treaties and ambassadors. In another rejection of Blackstone, the Senate would have "the sole power of declaring war."<sup>11</sup>

The draft constitution dismissed Locke's federative powers and Blackstone's royal prerogatives. The power of initiating war was not left to the solitary action of a single executive. It required full deliberation and authorization by Congress. The President had no exclusive authority to appoint ambassadors and make treaties. Those actions required the approval of the Senate. The power of issuing letters of marque and reprisal, placed by Blackstone in the king, was vested in Congress by Article I. Although the President was Commander in Chief, the authority to raise and regulate fleets and armies (placed by Blackstone with the king) was granted to Congress. Under Article I, Section 8, Clauses 12 and 13, Congress was empowered to raise and support armies and provide and maintain a navy. Clauses 14 through 16 authorized Congress to make regulations for the land and naval forces, call forth the militia, and provide for the organizing, arming, and disciplining of the militia – certainly a far cry from Blackstone's model of the king as generalissimo.

The Constitution vests in Congress the power to regulate foreign commerce, an activity the Framers understood as closely related to the war power. Commercial conflicts between nations were often a cause of war. In 1824 in *Gibbons v. Ogden*, Chief Justice John Marshall said of the commerce power that "it may be, and often is, used as an instrument of war."<sup>12</sup> Guided by history and republican principles, the framers placed that power and responsibility with Congress.

## I. INITIATING WAR

At the Philadelphia convention, Pierce Butler wanted to give the President the power to initiate war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it."<sup>13</sup> In that sentiment he stood alone. James Madison and Elbridge Gerry moved to change the draft language from "make war" to "declare war," leaving to the President "the power to repel sudden attacks," but not to initiate war. Roger Sherman added: "The Executive shd be able to repel and not to commence war." Gerry expressed shock at Butler's position. He "never expected to hear in a republic a motion to empower the Executive

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11. *Id.* at 292. For his admiration of the British Constitution, see *id.* at 288-289, 299-300.

12. 22 U.S. (9 Wheat.) 1, 192 (1824).

13. 2 FARRAND, *supra* note 9, at 318.

alone to declare war.”<sup>14</sup> 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.”<sup>15</sup> The motion to insert “declare” in place of “make” was agreed to.<sup>16</sup>

Some interpret this debate as empowering Congress to “declare” war but giving the President the liberty to “make” war. That was never the understanding. Such an interpretation would defeat every intent the Framers expressed about Congress being the only political body authorized to take the country from a state of peace to a state of war. The President has authority to “repel sudden attacks”: *defensive* actions. Anything of an offensive nature, including *making* war, is reserved solely to Congress. Hamilton, a strong defender of presidential power in external affairs, acknowledged that it was up to Congress “to declare or make war.”<sup>17</sup>

The Framers placed in Congress the authority to initiate wars because they believed that executives, in their search for fame and personal glory, have a natural appetite for war. Moreover, their military initiatives are destructive to the interests of the people.<sup>18</sup> In Federalist No. 4, John Jay expressed his opposition to executive wars. If anyone could have been sympathetic to executive power in foreign affairs it would have been Jay, whose duties during the Continental Congress gave him special insights into the need for executive discretion in carrying out foreign policy. But to Jay, initiating war was fundamentally different from general foreign policy duties: “[A]bsolute 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. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”<sup>19</sup>

At the Pennsylvania ratifying convention, James Wilson expressed a prevailing sentiment that the 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.”<sup>20</sup> In

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14. *Id.*

15. *Id.* at 319.

16. *Id.*

17. 21 THE PAPERS OF ALEXANDER HAMILTON 461-462 (Harold Coffin Syrett ed., 1974).

18. William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695 (1997).

19. THE FEDERALIST NO. 4, at 101 (Benjamin F. Wright ed., 2002) [hereinafter THE FEDERALIST].

20. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (5 vols., Jonathan Elliot ed., 1836-1845) [hereinafter DEBATES].

North Carolina, James Iredell noted that the king of Great Britain “is not only the commander in chief but has power, in time of war, to raise fleets and armies. He has also authority to declare war.” By contrast, the President “has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands.”<sup>21</sup> In South Carolina, Pinckney assured his colleagues that the President’s power “did not permit him to declare war.”<sup>22</sup>

Article II designates the President as Commander in Chief, but that title does not carry with it an independent authority to initiate war or act free of legislative control. Article II provides that 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.” Congress, not the President, does the calling. Article I grants Congress the power to provide “for calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel invasions.” Presidential use of the militia depends on policy enacted by Congress.

The Commander in Chief Clause is sometimes interpreted as an exclusive, plenary power of the President, free of statutory checks. It is not. Instead, it offers several protections for republican, constitutional government. Importantly, it preserves civilian supremacy over the military. The individual leading the armed forces is an elected civilian, not a general or admiral. Attorney General Edward Bates in 1861 concluded that the President is Commander in Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He possesses that title for a different reason. Whatever military officer leads U.S. forces against an enemy, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”<sup>23</sup> Congress is an essential part of that civil power.

The Framers understood that the President may “repel sudden attacks,” especially when Congress is out of session and unable to assemble quickly, but the power to take defensive actions does not permit the President to initiate wars and exercise the constitutional authority of Congress. President Washington took great care in instructing his military commanders that operations against Indians were to be limited to defensive actions.<sup>24</sup> Any offensive action required congressional authority. He wrote in 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.”<sup>25</sup>

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21. 4 DEBATES, *supra* note 20, at 107.

22. *Id.* at 287.

23. 10 Op. Att’y Gen. 74, 79 (1861) (emphasis in original).

24. LOUIS FISHER, PRESIDENTIAL WAR POWER 17-19 (2d ed. 2004).

25. 33 THE WRITINGS OF GEORGE WASHINGTON 73 (John Clement Fitzpatrick ed., 1939).

In 1801, President Jefferson directed that a squadron be sent to the Mediterranean to safeguard American interests against the Barbary pirates. On December 8, he informed Congress of his actions, asking lawmakers for further guidance. He said he was “[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense . . . .” It was up to Congress to authorize “measures of offense also.”<sup>26</sup> In 1805, after conflicts developed between the United States and Spain, Jefferson issued a public statement that articulates fundamental constitutional principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war.”<sup>27</sup> In the *Smith* case of 1806, a federal circuit court acknowledged that if a foreign nation invades the United States, the President has an obligation to resist with force. But there was a “manifest distinction” between going to war with a nation at peace and responding to an actual invasion: “In the former case, it is the exclusive province of congress to change a state of peace into a state of war.”<sup>28</sup>

The second value that the Founders embraced in the Commander-in-Chief Clause is accountability. Hamilton in Federalist No. 74 wrote that the direction of war “most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” The power of directing war and emphasizing the common strength “forms a usual and essential part in the definition of the executive authority.”<sup>29</sup> Presidential leadership is essential but it cannot operate outside legislative control. The President is subject to the rule of law, including statutory and judicial restrictions.

## II. ASSERTIONS OF INHERENT POWERS

The Framers understood that all three branches exercise not only powers enumerated in the Constitution but also implied powers that can be reasonably drawn from enumerated powers. Beginning at least with the Truman administration, claims have been made for “inherent” executive powers: powers that are beyond and independent of enumerated and implied powers. These presidential powers are said to “inhere” in the office and operate beyond legislative and judicial controls. *Black’s Law Dictionary* defines “inherent powers” as “authority possessed without its being derived from another. . . . powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.”<sup>30</sup>

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26. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 327 (James D. Richardson ed., 1896) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS].

27. *Id.* at 389.

28. *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

29. THE FEDERALIST, *supra* note 19, at 473.

30. BLACK’S LAW DICTIONARY 703 (5th ed. 1979).

The Framers recognized only two sources of constitutional power: enumerated and implied. Congress has the express power to legislate. To legislate in an informed manner, it has an implied power to investigate, issue subpoenas, and hold uncooperative witnesses in contempt. The President has the express duty to see that the laws are faithfully carried out. If a senior executive official (such as a department head) prevents a law from being carried out, the President has an implied power to remove that individual.

The Framers did not recognize powers that inhere in the Executive. That concept is found in such writers as Blackstone, and the prerogatives he recognized as the king's. He defined the king's prerogative as "those rights and capacities which the king enjoys alone." He spoke of powers that are "rooted in and spring from the king's political person," including the power "of making war or peace."<sup>31</sup> Justice Department memos written during the administration of George W. Bush claimed the existence of presidential war powers that could not be limited by Congress. Assistant Attorney General Jay Bybee wrote on August 1, 2002: "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."<sup>32</sup> His memo claims that Congress "lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war."<sup>33</sup> Here Bybee seems to derive plenary presidential power from an express power, the Commander in Chief Clause. But Congress, especially in the area of war power, has its own express powers to counterbalance and check that clause. In other arguments, the Justice Department looked solely to inherent and unexpressed presidential power.

The concept of inherent power for the President (or any branch) is alien to the U.S. constitutional system, which depends on limited powers and checks and balances. The claim of presidential inherent powers did not surface until the early 1950s, when the Truman administration argued that the President possessed inherent, emergency powers to seize steel mills to prosecute the war in Korea. The Supreme Court rejected that doctrine.<sup>34</sup> President Nixon's assertion that, the Fourth Amendment notwithstanding,

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31. 1 BLACKSTONE, COMMENTARIES, *supra* note 4, at 239-240.

32. Memorandum from Jay S. Bybee, Asst. Att'y Gen., to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*, at 39 (Aug. 1, 2002) [hereinafter Bybee Memo], available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>, *superseded by* Legal Standards Applicable Under 18 U.S.C. §§2340-2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm>.

33. Bybee Memo, *supra* note 32, at 34-35.

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

he had inherent authority to conduct warrantless domestic surveillance, was similarly dismissed by the Court.<sup>35</sup>

During the litigation of *Hamdan v. Rumsfeld*, the Bush Justice Department advised a federal appellate court: “Throughout this country’s history, Presidents have exercised their inherent authority as Commander-in-Chief to establish military commissions, without any authorization from Congress.”<sup>36</sup> Strangely, the Department reached back to the 1780 trial of John André, a British spy. In three amicus briefs in the *Hamdan* litigation, I pointed out that in 1780 the office of president did not exist, and that the military trial of André proceeded entirely on the basis of legislative authority.<sup>37</sup> The Court in 2006 found no merit in the argument for inherent authority, requiring President Bush to comply with statutory policy established by Congress and seek additional statutory authority if he needed it.<sup>38</sup>

At the time of the Quasi-War, the first U.S. war under the Constitution against another country, Hamilton discussed his broad theory of executive power. However, when Congress passed legislation on May 28, 1798, authorizing the President to seize armed French vessels,<sup>39</sup> Hamilton was asked what ship commanders could do prior to the enactment of that bill. Hamilton was “not ready to say that [the President] has any other power than merely to employ” ships with authority “to *repel* force by *force*, (but not to capture), and to repress hostilities within our waters including a marine league from our coasts.” Any actions beyond those measures “must fall under the idea of *reprisals* & requires the sanction of that Department [Congress] which is to declare or make war.”<sup>40</sup>

In the greatest crisis ever experienced by America, President Lincoln did not claim inherent power. At the start of the Civil War, he took extraordinary actions with Congress out of session, issuing proclamations calling forth the state militia, suspending the writ of habeas corpus, and placing a blockade on rebellious states. In his book on crisis government,

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35. *United States v. U.S. Dist. Ct.*, 407 U.S. 297 (1972).

36. Brief for Appellants at 59, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004).

37. I wrote three amicus briefs in the *Hamdan* case – in the D.C. Circuit, when the plaintiffs sought certiorari from the Supreme Court, and after the Court granted review.

38. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006). The Court stated in a footnote: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” *Id.* at 593 n.23. For further analysis of inherent powers, see Louis Fisher, *The “Sole Organ” Doctrine*, THE LAW LIBR. OF CONG. (August 2006), available at <http://loufisher.org/docs/pip/441.pdf>; Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRES. STUD. Q. 1 (2007), available at <http://loufisher.org/docs/pip/440.pdf>.

39. 1 Stat. 561 (1798).

40. 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 17, at 461-462 (emphasis in original).

published in 1948, Clinton Rossiter included a section called “The Lincoln Dictatorship.” He claimed that Lincoln was “the sole possessor of the indefinite grant of executive power in Article II of the Constitution.”<sup>41</sup> Yet at no point did Lincoln invoke inherent powers to defend his actions. When Congress came back into session in July 1861, he described the emergency steps he had taken, adding this qualification: “whether strictly legal or not.”<sup>42</sup> Through that language he made clear he did not act fully within the law, stating frankly he had exceeded his Article II powers. That point came across plainly when he told lawmakers that he believed his actions were not “beyond the constitutional competency of Congress.”<sup>43</sup> With those words he admitted he had exercised both Article I and Article II powers. Instead of claiming unchecked inherent powers, Lincoln understood that the only branch of government capable of making his acts legal was Congress. That is not the language of a dictator. Lawmakers debated his request for retroactive authority and granted it, with the explicit understanding that his acts had been illegal.<sup>44</sup> Congress passed legislation “approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”<sup>45</sup>

### III. THE EMPTY “SOLE ORGAN” DOCTRINE

In defending the secret warrantless surveillance program that President Bush authorized after the terrorist attacks of 9/11, the Justice Department relied in part on the “sole organ” doctrine. The Department claimed that the activities of the National Security Agency “are supported by the President’s well-recognized inherent constitutional authority as Commander-in-Chief and sole organ for the Nation in foreign affairs.”<sup>46</sup> In a Department memo written on September 25, 2001, Deputy Assistant Attorney General John Yoo reached out to the sole organ doctrine: “As future Chief Justice John Marshall famously declared [in 1800]: ‘The President is the sole organ of the nation in its external relations, and its sole

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41. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 225 (1963 ed.)

42. 6 MESSAGES AND PAPERS OF THE PRESIDENTS (1897), *supra* note 26, at 24.

43. *Id.*

44. CONG. GLOBE, 37TH CONG., 1ST SESS. 393 (1861) (statement of Sen. Timothy Howe).

45. 12 Stat. 316 (1861). See Louis Fisher, *Abraham Lincoln: Preserving the Union and the Constitution*, 3 ALBANY GOV’T L. REV. 503 (2010), available at <http://loufisher.org/docs/wi/431.pdf>.

46. Memo from Alberto R. Gonzales, Att’y Gen., to the Maj. Leader of the U.S. Senate, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 1 (Jan. 19, 2006) [hereinafter Gonzales Memo], available at <http://www.justice.gov/olc/2006/nsa-white-paper.pdf>.

representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation.’ 10 Annals of Cong. 613-14 (1800).” On that ground, Yoo argued, “it has not been difficult for the executive branch to assert the President’s plenary authority in foreign affairs ever since.”<sup>47</sup>

The sole organ doctrine was popularized and misrepresented by Justice George Sutherland in the 1936 decision of *Curtiss-Wright*. The case had nothing to do with presidential power, whether plenary or inherent. It involved only legislative power – How much could Congress delegate *its* power to the President in the field of international affairs? In upholding the delegation, Sutherland added pages of dicta that were wholly irrelevant to the issue before the Court. He claimed that the principle that the federal government is limited to enumerated and implied powers “is categorically true only in respect to our internal affairs.”<sup>48</sup> In arguing for independent and exclusive presidential powers in the field of foreign affairs, he relied on Marshall’s speech in 1800.

What Sutherland (and Yoo) failed to do is to put Marshall’s speech in proper context. When that is done, it is clear that Marshall never made a case for inherent, plenary, or independent powers for the President in foreign affairs.<sup>49</sup> Some members of the House of Representatives were prepared to censure or impeach President John Adams for turning over to Great Britain a British subject charged with murder. Marshall took the floor to explain why no grounds existed to rebuke Adams. The Jay Treaty provided for extradition in cases involving the charge of murder. Adams was therefore not acting on the basis of any plenary or inherent power but rather on the express language in a treaty, with treaties under Article VI of the Constitution included as part of the “supreme Law of the Land.”<sup>50</sup> Adams was thus acting on the basis of authority granted him by law.<sup>51</sup> Marshall’s sole organ speech had everything to do with express powers and a President acting under authority granted by Congress, whether by treaty or by statute. It had nothing to do with inherent or plenary powers.

In his later service as Secretary of State and Chief Justice of the Supreme Court, Marshall never advanced any notion of inherent, plenary,

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47. Memorandum opinion from John C. Yoo, Dep’y Asst. Att’y Gen., for Timothy Flanigan, Dep’y Counsel to the President, *The President’s Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) [hereinafter Yoo Memo], reprinted in *THE TORTURE PAPERS* 9 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

48. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936).

49. 10 ANNALS OF CONG. 596, 613 (1800).

50. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

51. See Fisher, *The “Sole Organ” Doctrine*, supra note 38, at 7-9; Louis Fisher, *Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRES. STUD. Q. 139 (2007).

exclusive, or independent powers of the President in external affairs. As explained in the next section, Chief Justice Marshall looked solely to Congress in matters of war and understood that when a conflict arose between what Congress provided by statute and what a President announced by proclamation, in time of war, the statute represents the law of the nation.

The Supreme Court continues to cite the sole organ doctrine with some regularity to uphold broad definitions of presidential power in foreign relations and to support extensive delegations of legislative power to the President.<sup>52</sup> Those citations have a routine, mechanical quality, as though whoever wrote them never read Marshall's speech. Although some Justices in concurrences have described the President's foreign relations powers as "exclusive,"<sup>53</sup> the Court itself has never denied to Congress its constitutional authority to enter the field and limit, reverse, or modify presidential decisions in the area of national security and foreign affairs.

#### IV. JUDICIAL RULINGS, 1800 TO 1863

Beginning in 1800, the Supreme Court accepted and decided a large number of war power cases, with few examples of efforts to sidestep them.<sup>54</sup> Federal courts understood that the decision to initiate war lay solely with Congress, not with the President, and that if a conflict arose between statutory limitations in time of war and what the President had ordered during those hostilities, the legislative judgment necessarily prevailed as national policy.

The Quasi-War of 1798 underscored the primary authority of Congress over war. Congress did not declare war against France. Instead, it passed a number of statutes that authorized military preparation, with the clear understanding that it was going to war. During debate in the House, Representative Edward Livingston 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."<sup>55</sup> Attorney General Charles Lee, after reviewing the laws that Congress had passed, advised President John Adams that "there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations."<sup>56</sup> In

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52. Fisher, *The "Sole Organ" Doctrine*, *supra* note 38, at 23-27.

53. See, e.g., *Webster v. Doe*, 486 U.S. 592, 605-606 (1988) (O'Connor, J., concurring in part and dissenting in part).

54. The major period of courts avoiding war power cases was during the Vietnam War. Louis Fisher, *National Security Law: The Judicial Role*, in *FREEDOM AND THE RULE OF LAW* 203-226 (Anthony Peacock ed., 2010); Louis Fisher, *Judicial Review of the War Power*, 35 *PRES. STUD. Q.* 466 (2005), available at <http://loufisher.org/docs/wp/422.pdf>.

55. 9 *ANNALS OF CONG.* 1519 (1798).

56. 1 *Op. Att'y Gen.* 84 (1798) (emphasis in original).

Federalist No. 25, Hamilton had earlier acknowledged that the “ceremony of a formal denunciation [declaration] of war has of late fallen into disuse.”<sup>57</sup>

In 1800 and 1801, the Supreme Court decided its first two cases involving the Quasi-War. It held in the first case, *Bas v. Tingy*, that Congress has a constitutional choice when it initiates wars. It can issue a formal declaration, consistent with language in the Constitution, or pass authorizing statutes, as it did with the Quasi-War. The latter type of military conflict would be “limited,” “partial,” and “imperfect.”<sup>58</sup> Justice Samuel Chase recognized that Congress had authorized for the Quasi-War “hostilities on the high seas” but not “hostilities on land.”<sup>59</sup> Congress was fully empowered by the Constitution to set statutory limits and President Adams was bound by them. By law, Congress controlled the scope of the war power carried out by the Commander in Chief. A year later, Chief Justice Marshall announced the decision in *Talbot v. Seeman*, the second case involving the Quasi-War. In clear language he underscored the primary role of Congress over war: “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 enquiry.”<sup>60</sup>

In 1804 the Court decided a third Quasi-War case, *Little v. Barreme*. While Congress had authorized President Adams to seize vessels sailing to French ports, the President had issued a proclamation directing American ships to capture vessels sailing *to or from* French ports. Could his powers as Commander in Chief supersede the direction that Congress by statute had provided? Writing for a unanimous Court, Chief Justice Marshall held that the order by Adams “cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”<sup>61</sup> The policy decided by Congress in a statute necessarily prevailed over conflicting presidential orders. Congress not only initiated wars but through statutory action could define their scope and purpose.

A circuit court decision in 1806 further demonstrates the broad understanding that Congress is preeminent in matters of war. The government prosecuted Colonel William S. Smith under the Neutrality Act for engaging in military actions against Spain. In defense, he claimed that his military enterprise “was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government” (the Jefferson administration).<sup>62</sup> How could a court check his story? Subpoena administration officials and have them testify under oath?

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57. THE FEDERALIST, *supra* note 19, at 211.

58. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40, 43 (1800).

59. *Id.* at 43.

60. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

61. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

62. *United States v. Smith*, 27 Fed. Cas. 1192, 1229 (C.C.N.Y. 1806) (No. 16,342).

The court decided that was not necessary. It ruled that a President or his assistants could not authorize military adventures that violated congressional policy. The court described the Neutrality Act 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.”<sup>63</sup> Neither the President nor executive officials had any authority to waive or ignore the Neutrality Act: “The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”<sup>64</sup> The court asked: “Does [the President] possess the power of making war? That power is exclusively vested in congress.”<sup>65</sup>

The Supreme Court’s decision in *The Prize Cases* (1863), upholding Lincoln’s blockade on the South at the start of the Civil War, is often cited as recognizing an independent and inherent presidential power over war. On January 19, 2006, the Bush Justice Department released a 42-page “white paper,” providing legal arguments in support of a secret surveillance program conducted by the National Security Agency (NSA). The program violated the Foreign Intelligence Surveillance Act (FISA), which requires a FISA Court authorization for electronic surveillance in most instances, and certainly in the NSA operation. Among other authorities, the Department referred to *The Prize Cases* as support for independent presidential authority to use military force to resist an invasion even in the absence of congressional approval.<sup>66</sup> A September 25, 2001, Justice Department memo by Deputy Assistant Attorney General John Yoo, stated that Lincoln’s blockade, as upheld in *The Prize Cases*, “was a question ‘to be *decided by him*’ and which the Court could not question, but must leave to ‘the political department of the Government to which the power was entrusted,’”<sup>67</sup> the President.

If Lincoln’s decision “could not be questioned” by the Court, why was it litigated, why did his lawyers have to mount a defense, and why did the Court split 5 to 4 on the merits? The ruling did not sanction independent presidential actions to initiate war. In upholding the blockade, Justice Robert Grier said that in the event of foreign invasion the President was 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

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63. *Id.*

64. *Id.* at 1230.

65. *Id.*

66. Gonzales Memo, *supra* note 46, at 9, 40.

67. Yoo Memo, *supra* note 47, at 5-6 (emphasis in original).

legislative authority.”<sup>68</sup> His observation merely restates the Framers’ understanding that the President may “repel sudden attacks.”

*The Prize Cases* had nothing to do with a foreign invasion of the United States or a U.S. offensive action against another country. Lincoln’s blockade was a measure taken in time of civil war. Justice Grier carefully limited the President’s power to defensive action: “Congress alone has the power to declare a national or foreign war.” The President “has no power to initiate or declare a war against either a foreign nation or a domestic State.”<sup>69</sup> Richard Henry Dana, Jr., who represented the government in this case, took exactly the same position during oral argument. He said the blockade had nothing to do with “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.”<sup>70</sup>

#### V. BYPASSING CONGRESS ENTIRELY

After World War II, Presidents began going to war without ever coming to Congress for authority. Lawmakers have tolerated this with little protest and little understanding of their constitutional duties. Nor has there been much in the way of public debate or scholarly concern. The two major examples of Presidents bypassing Congress (and public control) are Korea in 1950 and Kosovo in 1999. Another precedent was added in 2011 with Libya.

In June 1950, President Truman ordered U.S. troops to Korea without first requesting or receiving congressional authority. Secretary of State Dean Acheson advised Truman not to ask Congress for a joint resolution supporting the decision to use American troops against North Korea.<sup>71</sup> Nor did Truman return to Congress after he had taken his initiatives and request authority at that time, as Lincoln had done during the Civil War. Instead, Truman cited what he considered to be treaty commitments reflected in resolutions passed by the U.N. Security Council as sufficient authority to use military force against North Korea.<sup>72</sup> U.N. resolutions are not a legal substitute for congressional authority. They cannot be. If they were, the President and the Senate through the treaty process could strip from the House of Representatives its constitutional role in deciding questions of war, and in fact strip the same authority from future House and Senate control. That process would radically amend the Constitution and undermine its commitment to a republic, self-government, public participation, Congress as a coequal branch, and the system of checks and balances.

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68. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

69. *Id.*

70. *Id.* at 660 (emphasis in original).

71. GLENN D. PAIGE, *THE KOREAN DECISION*, June 24-30, 1950, at 187 (1968).

72. *PUBLIC PAPERS OF THE PRESIDENTS*, 1950, at 491-492.

The history of the U.N. Charter makes it very clear that all parties in the U.S. legislative and executive branches understood that the decision to use military force through the United Nations required prior approval from both Houses of Congress. If the United Nations found it necessary to use military force against aggressors under Chapter VII of the Charter, U.N. members would make available to the Security Council, “in accordance with a special agreement or agreements,” armed forces and other assistance for the purpose of maintaining international peace and security. The agreements were to be concluded between the Security Council and member states and “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.” At the time the Senate debated the Charter, Truman wired a cable from Potsdam to Senator Kenneth McKeller on July 27, 1945, making this pledge: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>73</sup> His request would go to *Congress* – both Houses – not just the Senate. With that firm understanding, the Senate approved the Charter by a vote of 89 to 2.<sup>74</sup>

Under the Charter, each member state of the United Nations had to decide how to fulfill its “constitutional processes.” Initially, Secretary of State John Foster Dulles thought that special agreements would need the approval only of the Senate and not the full Congress.<sup>75</sup> Several senators, citing language from Article I that vests war powers in Congress, not the Senate, disagreed with Dulles.<sup>76</sup> Dulles backtracked a bit. The central point he wanted to make, he said, was that the use of force “cannot be made by exclusive Presidential authority through an executive agreement.” Whether Congress should act by treaty (Senate) or by joint resolution (both houses) he was less sure about.<sup>77</sup> It was in response to this debate that Truman sent his wire from Potsdam, stating he would seek approval of the full Congress.

Congress did not depend on the Potsdam cable. To determine by law how the United States would fulfill its commitment to provide military assistance to the Security Council, Congress passed the U.N. Participation Act of 1945. In the clearest possible language, Section 6 of the Act states that the commitments “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”<sup>78</sup> What Truman had pledged with his

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73. 91 CONG. REC. 8185 (1945).

74. *Id.* at 8190.

75. *The Charter of the United Nations: Hearing Before the S. Comm. on Foreign Rel.*, 79th Cong. 1st Sess. 298 (1945).

76. 91 CONG. REC. 8021 (1945) (statement of Sen. Lucas); *id.* at 8021-8024 (statements of Senators McClellan, Hatch, Fulbright, Maybank, Overton, Hill, Ellender, and George).

77. *Id.* at 8027-8028.

78. 59 Stat. 621, sec. 6 (1945). Section 6 offers the President some flexibility in other situations, but they do not negate the requirement for express approval from Congress for special agreements authorizing military action under Chapter VII.

Potsdam message was now law. The restrictions on the President's power under Section 6 were modified somewhat by amendments adopted in 1949, allowing the President on his own initiative to provide military forces to the U.N. for "cooperative action." However, presidential discretion to deploy those forces was 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.<sup>79</sup> In providing these forces to the United Nations, the President shall assure that the troops not involve "the employment of armed forces contemplated by Chapter VII of the United Nations Charter."<sup>80</sup>

After this extensive debate and statutory action, supposedly adopting safeguards to protect congressional authority and the Constitution, Truman in 1950 went to war against Korea without seeking congressional authority, either before or after his commitment of troops. He violated his Potsdam pledge, the U.N. Charter, the U.N. Participation Act, and the Constitution, yet few members of Congress raised any objections. Truman told the nation that the U.N. Security Council had acted to order a withdrawal of North Korean forces to positions north of the 38th parallel and that "in accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace."<sup>81</sup> More injurious was Truman's breach of the Constitution.<sup>82</sup>

Another unconstitutional war occurred with Kosovo in 1999. President Clinton was unable to follow the Truman model of getting "authority" from the U.N. Security Council because it refused to endorse military action in Yugoslavia. In 1998, Clinton decided to turn to NATO countries to authorize military action. Like the U.N. Charter, NATO is a treaty. Like the U.N. Charter, the NATO treaty does not allow the President and the Senate through the treaty process to transfer the constitutional powers of the House and the Senate to NATO countries.<sup>83</sup> Moreover, Section 8(a) of the War Powers Resolution of 1973 expressly states that authority to introduce U.S. forces into hostilities shall not be inferred "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing" the introduction of American troops.<sup>84</sup>

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79. 63 Stat. 735-736, §5 (1949).

80. *Id.*

81. PUBLIC PAPERS OF THE PRESIDENTS, 1950, *supra* note 72, at 491.

82. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995), available at <http://loufisher.org/docs/wp/425.pdf>.

83. Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237 (1997), available at <http://loufisher.org/docs/wp/424.pdf>.

84. 87 Stat. 555, 558, §8(a) (1973).

Clinton's foreign policy advisers consulted with members of Congress, but not to obtain their approval.<sup>85</sup> Remarkably, Clinton was willing to seek the approval of each NATO country (Belgium, Denmark, Luxembourg, etc.) but saw no reason to seek approval from the elected members of Congress who had Article I constitutional authority. Legislatures in some NATO countries, including Italy and Germany, were forced to take votes to authorize military action in Yugoslavia.<sup>86</sup> The war against Yugoslavia began, on March 24, 1999, without any statutory or constitutional support.

On March 21, 2011, President Barack Obama reported to Congress that he had ordered military action in Libya pursuant to a Security Council resolution. Later he justified his participation as authorized by NATO allies. Libya had not threatened or attacked the United States and therefore no grounds existed for "defensive" action. Constitutional authority to take the country from a state of peace to a state of war does not come from the Security Council or NATO. It comes from Congress.<sup>87</sup>

## VI. PARAMILITARY OPERATIONS

In 1973, Congress passed the War Powers Resolution in an attempt to define the relative war powers of Congress and the President. The resolution focused on the introduction of "United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."<sup>88</sup> The term "United States Armed Forces" appears repeatedly throughout the resolution.<sup>89</sup>

During legislative debate, Senator Thomas Eagleton recognized that the term covered only the uniformed military forces available to the Defense Department. It did not cover civilian combatants engaged in paramilitary operations supervised by the Central Intelligence Agency. Eagleton was aware that hearings by the Senate Subcommittee on United States Security Agreements and Commitments Abroad "had exposed the 'secret war' in Laos," where employees of the CIA in the early 1960s were used, in what was called "the Phoenix program," in a combat role to organize "indigenous Laotian forces to engage in hostile actions."<sup>90</sup> William E. Colby, during his

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85. Helen Dewar & John M. Goshko, *Hill Signals Support for Airstrikes*, WASH. POST, Oct. 2, 1998, at A35.

86. FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 24, at 199.

87. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (June 28, 2011) (statement of Louis Fisher, The Constitution Project), available at <http://loufisher.org/docs/wplibya/libyasenfr.pdf>; Louis Fisher, *Military Operations in Libya: No War? No Hostilities?* PRESIDENTIAL STUD. Q. (forthcoming March 2012).

88. 87 Stat. 555, §2(a) (1973).

89. *Id.* at §§3, 4, 5, 8.

90. THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF*

confirmation hearing in 1973 to be CIA Director, explained the reason for covert actions in Southeast Asia through the Phoenix program: “It was important that the U.S. not be officially involved in that war.”<sup>91</sup> Unless the War Powers Resolution applied to paramilitary operations, Eagleton was concerned that “we may see an even more wide-ranging use of civilian combatants in lieu of uniformed personnel whose activities will be circumscribed by this bill . . . .”<sup>92</sup> Nevertheless, he was unable to secure a sufficient number of votes for his amendment to apply the War Powers Resolution to paramilitary activities.

In a February 12, 1980, memo on the war power, the Justice Department’s Office of Legal Counsel (OLC) analyzed the debate over the Eagleton Amendment. It summarized the position of Senator Jacob Javits, who argued that CIA activities should not be within the resolution “because the CIA lacks the appreciable armed force that can commit the Nation to war.”<sup>93</sup> That memo was modified by OLC on October 26, 1983, when it held that the Eagleton Amendment covered potential use of civilian personnel, not military personnel, for combat operations.<sup>94</sup> When Javits opposed the amendment, he said an important consideration was that other than the uniformed armed forces there is “no agency of the United States which has any appreciable armed forces power, not even the CIA. They [the CIA] might have some clandestine agents with rifles and pistols engaging in dirty tricks, but there is no capability of appreciable military action that would amount to war.”<sup>95</sup> The debate in 1973 occurred long before the CIA began acquiring control over armed drones, used extensively in Pakistan and most recently greatly strengthened in the region around Yemen.<sup>96</sup>

#### CONCLUSION

The principles originally established for the war power would be difficult to recognize in precedents established after World War II, beginning with the Korean War. The Framers vested in Congress the power to declare or authorize all military initiatives, big and small. They assigned to Congress power not only to declare major wars but to authorize “reprisals,” defined as military actions short of war intended to retaliate for injuries committed by another nation. Presidents retained the authority to “repel sudden attacks,” but the scope of that defensive power has largely

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CONGRESSIONAL SURRENDER 187 (1974).

91. *Id.* at 188.

92. *Id.* at 194.

93. 4A Op. O.L.C. 185, 192 (1980).

94. *Id.* at 197, 198-199 (1983).

95. *Id.* at 200.

96. Greg Miller, *CIA Will Direct Yemen Drones: Turmoil Spurs Escalation*, WASH. POST, June 14, 2011, at A1.

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displaced the power of reprisals constitutionally committed to Congress. Misconceptions and misuse of the U.N. Charter and NATO have further shifted power to the President to initiate war. Executive power has further expanded because the intelligence community now possesses not only the capacity to topple foreign governments but is equipped with armed drones. Congress has done little to combat these erosions of its constitutional power. The result is a weakening of representative government, separation of powers, and the system of checks and balances.

Presidents play a powerful card when they accuse opponents of lacking in patriotism, especially in times of emergencies and external threats. If lawmakers and the public swallow their misgivings about presidential military initiatives, the Constitution and national security are put at risk. Patriotism does not mean mechanical deference to the President. Democracy depends on the power of reason, open debate, and the courage to speak out. A constructive response came from German born Senator Carl Schurz in 1872 when some Senators attacked his opposition to a pending amendment as unpatriotic. His response brought applause from the gallery: "My country, right or wrong; if right, to be kept right; and if wrong, to be set right."<sup>97</sup>

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97. CONG. GLOBE, 42d Cong., 2d Sess. 1287 (Feb. 29, 1872).