Timeline of American Constitutional War Powers: Interpretation and Application

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Undeclared French Naval War (1798 - 1800)

Background: Following the Revolutionary War, the United States had been closely allied with France. However, in 1778 France underwent its own revolution and declared war on several European nations, including Great Britain. The United States sought to remain uninvolved in European wars and signed a favorable treaty with Great Britain proclaiming neutrality in the European conflict. The revolutionary government of France was outraged by this perceived betrayal.[1] The French retaliated by seizing American merchant vessels and sailors. A series of diplomatic negotiations between President Adams and the French Directory accomplished little, and the subsequent uproar over France's demands and insults prompted Adams, and then Congress, to authorize defensive measures in order to prevent further French attacks.[2]

Conflict and Outcome: Despite the breakdown in negotiations, neither side wanted a full-scale war with the other. The small, newly constructed American navy continued to conduct

[1] "Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate," 19 Nov. 1794, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, The Library of Congress,http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=129.

[2] Act of June 25, 1798, ch. 60, 1 Stat. 572.

operations against the French as both sides returned to negotiations. At the Convention of 1800, the United States and France agreed to resume peaceful relations, ending the Quasi War.[3]

Constitutional Issues: The Quasi War, though undeclared and taking place entirely at sea, nevertheless served as one of the first tests of the separation of war powers. Although Congress fully backed military action following a series of French insults during the XYZ affair, in practice President Adams had the sole role of providing for the defense of United States property and seamen. Congress attempted to significantly impede his actions. When Adams decided to permit the arming of merchant vessels, the issuing of letters of marque, James Madison wrote that this decision should have been left to Congress, because "the regulation being a Legislative, not an Executive one, belongs to the former."[4] While the power to issue letters of marque is traditionally considered to be an executive act, the Constitution specifically grants this power to Congress. Much of Congress denounced the very limited actions taken by Adams as an overreach of executive authority. Congress only authorized Adams to defend American merchant ships and engage the French militarily once public opinion regarding this conflict had changed.[5] However, for much of the Quasi War, Congress and the President acted in unison to defeat the French naval threat. Congress' initial reaction to Adams' attempts to arm merchant ships could easily be seen as partisan bickering, rather than an indication of its interpretation of the concept of separation of powers.

What the Quasi War did reveal was that Congress had the power to limit the scope of military operations in the event of an unofficial war, not just a declared one. Justice Chase wrote shortly after the conclusion of the war in *Bas v. Tingy* that "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and, in time."[6] This ruling, and the Quasi War itself, further developed the war powers doctrine as it applies to the legislature, but did not clarify how it applies to the executive branch.

First Barbary War (1801 – 1805)

Background: During the Presidency of Washington and Adams, the United States paid tribute to the Barbary pirates based along the North African coast, from Morocco to Tripoli.[7] Upon taking office, Thomas Jefferson decided to eliminate the tribute payments and protect American shipping. He directed a squadron of ships to the region to protect American vessels in the event that any of the Barbary States declared war against the United States. When Tripoli did declare war, Jefferson asked Congress in December of 1801 for authority to defend American interests in the region.[8] While never officially declaring war, Congress passed several statutes authorizing both the arming of American merchant ships (issuing

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[3] "The XYZ Affair and the Quasi-War With France, 1798-1800," Milestones: 1784-1800, Office of the Historian, U.S. Department of State, http://history.state.gov/milestones/1784-1800/XYZ.

[4] Madison to Jefferson, Apr. 2, 1798. *Writings of James Madison*, VI, 313. *Cf. Constitution,* Art. I, Sec 8, Cl. 10.

[5] Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578.

[6] Bas V. Tingy, 4 U.S. (4 Dall.) 37, 37 (1800).

[7] Louis Fischer, *Presidential War Power* (Lawrence, Kansas: University Press of Kansas, 1995), 27.

[8] Kenneth B. Moss, *Undeclared War and the Future of U.S. Foreign Policy* (Baltimore: The Johns Hopkins University Press, 2008), 51.

letters of marque—a power granted to Congress in the Constitution), and the use of "warlike operations against the regency of Tripoli."[9]

Conflict and Outcome: Initially the war consisted of American squadrons patrolling the coast of Tripoli. After pirates captured the USS *Philadelphia*, Commodore Stephen Decatur raided the Tripoli harbor to destroy the ship. The navy subsequently stepped up pressure against the pirates.[10] By June of 1805, the United States reached a peace settlement with Tripoli. In 1815 the United States would return to the region and exact another favorable treaty from Algeria, officially ending the obligation to pay tribute to any of the Barbary States.

Constitutional Issues: Like the Quasi War, the First Barbary War epitomized the type of limited military engagement envisioned by the Framers. Jefferson believed that while the President could authorize defensive measures, only Congress could authorize "measures of offense…"[11] However, once a state of war exists, the president has the power to direct the military as he pleases, including engaging in offensive maneuvers. Jefferson sent warships to North Africa before asking Congress, but his subsequent actions showed his continued deference to the legislature's role in the war process. Other leading politicians, such as Alexander Hamilton, criticized Jefferson for acting too cautiously and for not sufficiently relying on executive power. Writing as Lucius Crassus, Hamilton stated that "when a foreign nation declares…war upon the United States…any declaration on the part of Congress is nugatory; it is at least unnecessary."[12] Hamilton insisted that because a state of war already existed, the President was well within his authority to take engage the enemy as the Commander in Chief of the Army and Navy. Neither man, however, believed that the President had the power to start an offensive war unprovoked. The invasion of Tripoli only took place after Congress had specifically authorized offensive military measures and granted Jefferson the power to send troops. The President could take limited independent action in response to an outside threat, but the Framers wanted in general for Congress to have a role in most military actions. Editor's Note: [The capture of the USS Philadelphia would have created a state of war, putting Jefferson in the position of fighting a defensive war. Therefore the invasion of Tripoli would not be an offensive measure.]

War of 1812 (1812 – 1815)

Background: During Jefferson and Madison's administrations, war with Britain became increasingly likely. Britain's refusal to vacate territory in the western United States and its attacks against American shipping eventually led to the War of 1812. The United States wanted Britain to acknowledge the rights of the American government, both on land and at sea.[13] In the year leading up to the declaration of war, President Madison called on Congress

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[9] 2 Stat. 291 (1804).

[10] "Barbary Wars," Military, GlobalSecurity.org, http://www.globalsecurity.org/military/ops/barbary.htm

[11] Thomas Jefferson, "First Annual Message," 8 Dec. 1801, The Forum, The Online Library of Liberty, http://oll.libertyfund.org/index.php?Itemid=264&id=1062&option=com_content&task=view.

[12] Alexander Hamilton, "The Examination, No. 1 17 Dec. 1801," quoted in *The Founders' Constitution*, vol. 3, *Article 1, Section 8, Clause 5, through Article 2, Section* 1, eds. Phillip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), 101.

[13] Moss, *Undeclared War,* p. 53.

to increase the size of the army and navy and to request an embargo against Britain. It is debatable as to what extent Madison or the so-called "War Hawks" members of Congress sought an actual war. Madison, in his message to Congress before a vote to declare war, stated that war was "a solemn question which the Constitution wisely confides to the legislative department of the Government."[14] Congress then proceeded to narrowly approve a declaration of war against Britain.

Conflict and Outcome: The War of 1812 was fought on several fronts, including Canada, the Great Lakes region, the Atlantic Coast, and in the South. From the start, the war went badly for the United States. A British embargo crippled the nation's economy, and British forces easily rebuffed American incursions into Canada. After the concurrent war with Napoleon in Europe had ended, seasoned British troops invaded and burned Washington, D.C. Although the Americans scored victories against British warships on Lake Erie, and in New Orleans under the command of Andrew Jackson, the war eventually ended in a stalemate.[15] The two nations declared peace after signing the Treaty of Ghent, and both nations returned to the status quo.[16]

Constitutional Issues: Madison's actions before the war, including requesting the military buildup and embargo, indicate that he was instrumental in moving the country into a state of war prior to Congress' declaration.[17] However, it is also evident that Madison, one of the principal framers of the Constitution, did not believe he had the authority to commence an offensive war without the approval of Congress. He left significant foreign policy and economic decisions entirely up to Congress, which resulted in the United States being poorly prepared for the eventual conflict.[18] As a relatively weak executive, Madison delegated significant power to Congress and strengthened its position as the leading branch for war powers. The War of 1812, as with the earlier limited wars, revealed many of the framers' thoughts on war powers. The nation had only a small standing army and navy, limiting the powers of its Commander in Chief. Presidents consulted with Congress before most actions involving the military, and they were extremely reluctant to pursue any military action without Congress' approval.

Mexican-American War (1846 – 1848)

Background: As the United States expanded westwards throughout the 19th century, many citizens viewed it as their "Manifest Destiny" to bring all of North America into the United States.[19] Continued expansion westwards into Mexican territory led to the creation of the

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[14] James Madison, "War Message to Congress, June 1, 1812," Historic Speeches, Presidential Rhetoric.com, http://www.presidentialrhetoric.com/historicspeeches/madison/ warmessage.html.

[15] John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing), 142.

[16] Yoo, *Crisis and Command*, p. 142.

[17] J.C.A. Stagg, "James Madison and the "Malcontents": The Political Origins of the War of 1812," *The William and Mary Quaterly* 33, no. 4 (1976), ***http://www.jstor.org.libproxy.wustl.edu/stable/1921716?seq=4***.

[18] Yoo, *Crisis and Command,* p. 140.

[19] John C. Pinheiro, *Manifest Ambition: James K. Polk and Civil-Military Relations during the Mexican War* (Westport, Ct.: Praeger Security International), 37.

Republic of Texas in 1836. Almost immediately the United States attempted to annex the new country. James K. Polk became President in 1845 with intentions of fulfilling America's "Manifest Destiny" by annexing both Texas and California. The most significant obstacle to this annexation was the disputed border between Texas and Mexico. Texas claimed territory all the way to the Rio Grande, while Mexico insisted that the border was the Nueces River. Polk's initial attempts to buy the territory from Mexico were rebuffed by the Mexican government. Polk responded with a series of military maneuvers calculated to increase pressure on Mexico, including placing the Pacific Fleet in a position to seize California, and ordering American troops south to the Rio Grande.[20] On April 25th, a fight with Mexican soldiers broke out in the disputed territory between the Rio Grande and Nueces River.[21] In a statement to Congress, Polk used the incident to show that a state of war "exists by the act of Mexico herself." Congress, which was comprised of many pro-expansionists who shared the President's ambitions, found itself having to act quickly to provide support for troops already positioned for battle. Shortly after Polk's address, Congress declared war on Mexico on May 13.[22]

Conflict and Outcome: Armed with the support of Congress and a powerful military, the U.S. army quickly took control of California and New Mexico. General Taylor won a series of battles against the Mexican army, eventually capturing Monterey and Buena Vista, and defeating the army of Santa Anna.[23] General Winfield Scott also led an invasion into Mexico, landing at Veracruz before eventually capturing Mexico City. In 1848 the United States and Mexico signed the treaty of Guadalupe Hidalgo, ending the war. Mexico ceded to the United States territory that would become the future states of California, Arizona, New Mexico, Nevada, Utah, and parts of Texas.[24]

Constitutional Issues: The Mexican War illustrates how effectively the President, as Commander in Chief of a standing army, can move the country toward war without having to rely on Congress to officially declare it. Once hostilities had begun, Congress had little choice but to declare war and continue funding troops already in harm's way. Interpreting Polk's actions in the most innocent light, his provocative maneuvers taunted Mexico into starting a war, to which he had the authority to respond defensively. At worst, Polk is guilty of beginning an offensive war without waiting for a declaration from Congress. Some Congressmen, such as Garret Davis and Abraham Lincoln, questioned whether U.S. troops had really been attacked on American soil, and if that was not the case, how Polk could constitutionally justify his war?[25] Likewise, John C. Calhoun told Congress, "If we have declared war, a state of war exists, and not till then."[26] Calhoun believed any offensive military actions by Polk would be illegal without prior Congressional approval. However, this view ignores the fact that Polk moves his troops into genuinely disputed territory, and the Mexican troops may very well have fired first. At the close of the war, the House of

[20] Moss, *Undeclared War*, p. 60.
[21] Pinheiro, *Manifest Ambition*, p. 26.
[22] Moss, *Undeclared War*, p. 61.
[23] Yoo, *Crisis and Command*, p. 194.
[24] Yoo, *Crisis and Command,* p. 196.
[25] "Teaching With Documents: Lincoln's Spot Resolutions," The National Archives, http://www.archives.gov/education/lessons/lincoln-resolutions/.
[26] Cong. Globe, 29th Cong., 1st Sess. 784 (1846).

Representatives censured Polk for the Mexican War because it interpreted it as being "unnecessary and unconstitutionally begun by the President of the United States."[27]

President Polk's actions during the Mexican War marked a noticeable shift in the balance of power between Congress and the Executive. Polk exercised executive power more than any other President since Washington, and he did so largely through his role as Commander in Chief of a standing army and navy. Although Congress would reassert its authority in the latter half of the 19th century, Polk showed what a forceful executive alone could accomplish. He was able to successfully manipulate political and military events to coerce Congress into declaring war, and faced only minor political consequences due to his triumph in battle.

American Civil War (1861 – 1865)

Background: The causes of the Civil War were complex and manifold, but the question of slavery was the primary issue of the time. The framers of the Constitution had compromised and postponed the resolution of this highly contentious issue that divided North and South. Throughout the early 1800s a series of partial solutions were enacted to maintain a balance between free and slave states.[28] The Missouri Compromise, the Compromise of 1850, and the Kansas Nebraska Act of 1854 all served to maintain a balance of power, while the economies and ideologies of North and South drifted further apart. Clashes over the expansion of slavery into the new territories, and disagreements over the role of the federal government and states' rights, continued to raise tensions as violence broke out in places like Kansas and Harper's Ferry.[29] The stress over the slavery issue caused the Democratic Party to splinter, and paved the way for the recently formed Republican Party's candidate, Abraham Lincoln, to win the Presidency in 1860. The southern states perceived Lincoln's anti-slavery stance as a potential threat and attempted to secede from the Union in 1860 and 1861. Following an attack on federal property at Fort Sumter by South Carolina forces, Lincoln issued a call for 75,000 volunteers to put down the rebellion. The four upper Southern states refused to comply with this order and promptly declared secession as well, setting the stage for the bloodiest struggle in American history.[30]

Conflict and Outcome: The Union began the war with an enormous advantage in resources and manpower. This would prove initially insufficient for victory in the face of superior Southern generalship and military training. The South routed the newly created Union army during the First Battle of Bull Run in 1861, and simultaneously erased any hope that the war would be a short one.[31] During the next four years the North would blockade the South and work to ensure its political and economic isolation from the rest of the world. Eventually, after running through a series of inept Union generals, Lincoln selected Ulysses S. Grant to command the Northern forces. Grant successfully used the North's superior numbers to drive

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[27] Cong. Globe, 30th Cong., 1st Sess. 95 (1848).

[28] John Keegan, *The American Civil War: A Military History* (New York: Alfred A. Knopf 2009), 26-29.

[29] Keegan, *American Civil War*, pp. 29-30.

[30] Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (Ann Arbor: University of Michigan Press, 2005), 30-31.

[31] Richard Shenkman, *Presidential Ambition: How the Presidents Gained Power, Kept Power, and Got Things Done* (New York: HarperCollins, 1999), 166.

into Virginia and force the surrender of the Confederate army at Appomattox.[32] Hundreds of thousands of men on both sides were killed over the course of the war, from both battle and disease. Lincoln himself was assassinated in the last days of the Civil War, and the South endured military government and many years of reconstruction.[33]

Constitutional Issues: The Civil War presented the gravest challenge to the war powers provisions in the Constitution in the history of the United States. Many of Lincoln's exercises of power throughout the war were controversial, and many greatly exceeded the traditional role of the Executive during war-time. The timing of the secession crisis, with Congress being in recess at the time, forced Lincoln to respond quickly, and without first seeking legislative authorization. Among his many actions immediately following the attack on Fort Sumter, Lincoln blockaded the South, raised an army, and suspended the writ of habeas corpus in order to prevent more states from seceding. Despite his dramatic use of executive power, Lincoln still claimed that Congress had a decisive role to play in overseeing and authorizing his actions. After Congress returned, it retroactively approved all the orders Lincoln had issued to deal with the crisis, in an attempt to maintain its primacy in military matters.[34] One occasion on which Lincoln did ignore Congress was when he issued the Emancipation Proclamation. In this document, Lincoln ordered that all slaves in the South were to be considered free, "by virtue of the power in me vested as Commander-in-Chief…as a fit and necessary war measure for suppressing said rebellion."[35] Lincoln believed that freeing the slaves was a legitimate action taken by the Commander in Chief in wartime to defeat the enemy by denying the rebelling states of slave labor. He also engaged in other acts, the authority for which is specifically granted to Congress in the Constitution, which he viewed as legitimate under his Commander in Chief powers, such as blockading the South and suspending habeas corpus.

Several court cases around the time of the Civil War help shed light on the separation of war powers between the Executive and Congress. One such ruling occurred very early in the war as a result of Lincoln's suspension of habeas corpus. Lincoln sought to prevent Confederate sympathizers from committing sabotage or any other harmful act against the North. Union soldiers arrested John Merryman, a suspected secessionist and saboteur, for destroying a railroad.[36] Chief Justice Taney, who wrote the opinion for the circuit court that heard the case, held that Lincoln had acted unconstitutionally by suspending habeas corpus. Because the Suspension Clause appears in Article I of the Constitution, which outlines the powers of Congress, Lincoln could not have acted as he did. Taney decried Lincoln's actions, declaring that, "the people of the United states are no longer living under a government of laws."[37] Lincoln responded by simply ignoring Taney's demand for the release of Merryman and by asking Congress to retroactively approve his actions. While this case did not

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[32] "Chapter 12: The Civil War, 1864-1865," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-12.htm.

[33] "Chapter 12: The Civil War, 1864-1865," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-12.htm.

[34] 12 Stat. 326 (1861).

[35] Abraham Lincoln, "The Emancipation Proclamation," Featured Documents, National Archives and Records Administration, http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html.

[36] Fischer, *War Power*, p. 39.

[37] Ex parte Merryman, 17 Fed. Case No. 9,487 (1861), 152.

successfully curb Lincoln's exercise of power, it did create precedent for future Supreme Court cases recognizing the right to habeas corpus for U.S. citizens suspected of terrorism.[38]

The Supreme Court did issue a ruling on the constitutionality of Lincoln's actions in *The Prize Cases*. A critical part of the North's strategy involved blockading the South. Owners of seized vessels sued the government and argued that, as the conflict was considered an insurrection and not a war, Lincoln could not issue a blockade without first receiving a declaration of war from Congress.[39] In a 5-4 decision, the Court ruled in favor of the government. The Supreme Court held that the insurrection was sufficiently expansive in scope and danger that it constituted a war, even absent a declaration from Congress. Furthermore, the Court declared that the President, as Commander in Chief, had sufficient authority to determine if a conflict constituted an act of war. This decision gives the President enormous flexibility in responding to any attack on U.S. interests.[40]

Only after the war, and Lincoln's death, did the judiciary find significant fault with the President's response to secession. Another Supreme Court case, *Ex Parte Milligan*, occurred after Milligan, an Indiana resident who conspired to raid federal military facilities in Union territory, was convicted by military commission and sentenced to death.[41] At the time, the civilian courts were fully operational, Milligan had acted in a Union state, and he was not a member of the Confederate armed forces. Due to these circumstances, the Court ruled that it was improper for Milligan to have been tried by a military court. Habeas corpus could only be suspended if civilian courts could not function, not merely at the whim of Congress or the President.[42]

Lincoln provided a model for future Presidents in times of crisis. He took decisive and legally questionable action in order to prevent the collapse of the Union. Congress and the Courts did not always agree with him, and both took steps after his death to reclaim some of the authority they had failed to exercise. Yet during the war, both had consistently supported Lincoln, who demonstrated how a strong Executive could temporarily shift the balance of war powers.

Spanish-American War (April 25–August 12, 1898)

Background: Following the Civil War, Congress moved to reassert its authority and once again tried to tilt the balance of war powers towards the legislative branch of government. Presidents deferred to Congress when deploying the military abroad. It was Congress, therefore, and not the President, that was largely responsible for instigating the Spanish-American War. The cause rested on the status of Cuba, a colony of Spain and a close trading partner with the United States. When a rebellion broke out on the island in 1895, Congress and the public supported the rebels and called for an independent Cuba.[43] Despite the determination of some in Congress to declare war immediately, President Cleveland refused to endorse this option while diplomatic options remained open. The issue lapsed until 1898 when the American battleship *Maine*, docked in Havana harbor, exploded, and killed 266

[38] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[39] Yoo, *Crisis and Command*, p. 212.
[40] Prize Cases, 67 U.S. 2 Black 635 (1862).
[41] Yoo, *Crisis and Command,* p. 233.
[42] *Ex parte Milligan*, 71 U.S. 2 (1866).
[43] 28 Con. Rec. 2256-57 (1896).

crewmen.[44] President McKinley reluctantly sought to increase pressure against Spain after an investigation determined that the country was responsible for the explosion, but he did not seek outright war. In April, Congress declared Cuba independent of Spain and authorized the President to "use the entire land and naval forces of the United States" to enforce that independence.[45] Congress officially declared war on April 25, 1898.

Conflict and Outcome: The U.S. strategy initially consisted of blockading Cuba, supporting rebels on the island, and dispatching the Pacific Fleet to the Spanish-controlled Philippines. Soon afterward, an American naval squadron completely destroyed the Spanish Pacific fleet. With support from insurgent groups in Manila the US soon captured the Philippine islands as well. The United States then invaded Cuba unopposed, and launched an attack against the city of Santiago, Cuba. American troops, including Theodore Roosevelt's "Rough Riders" seized Kettle and San Juan Hill outside the city, eventually resulting in the capture of the city itself. When the Americans sunk the Spanish fleet in the Caribbean shortly thereafter, Spanish forces on the island surrendered on July 16th. Puerto Rico, then a Spanish colony, also fell to American forces a month later, with few casualties.[46] The war ended on December 10, and along with securing Cuban independence, the United States acquired Guam, Puerto Rico, and the Philippines. Despite the ending of the war, a long and bloody insurgency broke out in the Philippines and lasted until 1906.[47] Nevertheless, the United States had defeated Spain with relatively few casualties and created a new colonial empire that stretched from the western Pacific to the Caribbean.

Constitutional Issues: In contrast to many of the conflicts of the 20th century, the Spanish-American War featured a reluctant President, urged to war by Congress. Despite Congress' eventual success in declaring war, the crisis raised the issue of which branch has the authority to actually start a war. President Cleveland and President McKinley both believed that while Congress had the constitutional authority to declare war, it could not force the Executive to act. When representatives from Congress informed President Cleveland that they intended to declare war against Spain, he told them that, as Commander in Chief, he would simply "not mobilize the army."[48] Congress had the authority to create a state of war, but in practice they could not force the President, the commander of the U.S. military, to pursue the conflict. In effect, the President remained firmly in control of both defining the United States' foreign policy and of choosing whether to exercise his war powers.

Invasion of Panama (November 1903)

Background: Theodore Roosevelt's administration greatly expanded the role of the United States in global affairs, particularly in the western hemisphere. Roosevelt, and subsequent administrations, deployed the military on numerous occasions to reinforce American

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[44] Fischer, *War Power*, p. 42.
[45] 30 Stat. 738-39 (1898).
[46] "Chapter 15: Emergence to World Power 1898-1902," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-15.htm.
[47] Fischer, *War Power,* p. 44.
[48] Fischer, *War Power,* p. 42.

hegemony over the region and to protect U.S. property and interests.[49] U.S. policy in the area had previously been guided by the Monroe Doctrine, which sought to curb European influence in the western hemisphere. Under the new Roosevelt Corollary, defined in Roosevelt's 1904 Annual message to Congress, any nation that "had violated the rights of the United States or had invited foreign aggression," could be subject to American intervention, militarily or diplomatically.[50] In this speech, Roosevelt signaled his intent to greatly expand the President's ability to use the military abroad without waiting for the approval of Congress.

Roosevelt tested this policy in Panama, then a rebellious province of Colombia. Roosevelt hoped to build a canal through the Isthmus of Panama, and decided that because of Colombian interference, an independent nation of Panama would facilitate the process.[51] Without waiting for permission from Congress, Roosevelt sent in Marines to prop up the new government and remove any Colombian influence.[52]

Conflict and Outcome: The Marines Roosevelt had dispatched quickly prevented the Colombian forces from suppressing the Panamanian rebellion. Once the United States recognized the newly independent republic on November 6, Colombia had little choice but to back down.[53] As a result of Roosevelt's actions, the U.S. secured the rights to construct and control the Panama Canal while guaranteeing Panama's independence from Colombia.

Constitutional Issues: Roosevelt initially claimed authority to act under the Treaty of New Granada, which guaranteed the United States certain rights to the future Panama Canal. Legally, the treaty did not give the President the authority to act without the consent of Congress, but Roosevelt declared his indifference to this legal limitation, stating, "I took the canal zone and let Congress debate, and while the debate goes on the canal does also."[54] Later defenders of the invasion argued that it was an act of "interposition," consisting of an effort to protect lives and property, rather than an overt act of war.[55] The President, as Commander in Chief, is not required to consult with Congress when using the military in maneuvers that fall short of war, such as engaging in peacekeeping missions, or rescuing US citizens abroad. Roosevelt's successor, President Taft, likewise argued that the Commander in Chief could deploy troops anywhere he wished, so long as Congress had appropriated the money by creating the "means of transportation."[56] The presence of a standing military meant the President, acting under the Roosevelt Corollary, had significant discretion in conducting foreign policy through use of the military, so long as his actions fell short of creating a state of war. Congress' only option for objecting would be to cut off funding, in many cases when troops had already been put in harm's way. The 20th century would continue to see the Executive Branch exercising more war powers, all beginning with Roosevelt's interventions in South America.

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[49] Moss, *Undeclared War*, p. 66.
[50] Fischer, *War Power,* p. 47.
[51] Fischer, *War Power,* p. 48.
[52] Moss, *Undeclared War*, p. 67.
[53] Shenkman, *Presidential Ambition*, p. 268.
[54] Fischer, *War Power*, p. 49.
[55] Moss, *Undeclared War*, p. 68.
[56] Moss, *Undeclared War*, p. 70.

World War I (August 1914 to November 11, 1918)

Background: President Wilson continued to follow the Roosevelt Corollary during his Presidency, intervening in Mexico and Haiti to enforce U.S. interests and maintain American dominance in the western hemisphere. These actions included raids, such as General Pershing's expedition to capture Pancho Villa in Mexico, and were conducted without explicit permission from Congress or the Mexican government.[57] Other actions, such as those in Haiti and the Dominican Republic, toppled governments and installed new leaders. These were carried out to maintain U.S. control over the region and were initiated without the express approval of Congress.[58] During this time period the President displayed an increased willingness to influence foreign policy and an overall readiness to send the military abroad.

Against this backdrop, war broke out in Europe amongst the great powers of the era. The German, Austria-Hungarian, and Ottoman empires positioned themselves against the Russians, French, and British forces. A long history of military and industrial competitiveness, along with an ever-shifting tangle of alliances defined the political climate preceding the outbreak of war.[59] At the time, the U.S. attitude towards Europe had remained relatively unchanged since the nation's founding. An isolationist mindset, including a desire to avoid alliances with European powers and to remain aloof from European wars and affairs, gripped American politics.[60] President Wilson acknowledged this isolationist attitude by immediately communicating a policy of neutrality, and making offers to mediate an end to the war. This promise of neutrality would prove difficult to maintain, especially after the British initiated a blockade of Germany in an effort to starve the Germans into submission. When the Germans retaliated by launching submarine warfare against merchant ships destined for Britain, American citizens were caught in the crossfire. The Germans torpedoed the *Lusitania*, a British ship, killing 124 Americans onboard. This helped turn an already pro-British public firmly against the Germans.[61] At the same time that President Wilson was running an ultimately successful reelection campaign with the rallying cry of "He Kept Us Out of War," he began building up the armed forces in preparation for future U.S. involvement in Europe.[62] When Germany indicated that it would continue its unrestricted submarine warfare, Wilson broke off diplomatic relations and asked Congress to declare war on April 2nd, 1917.

Conflict and Outcome: By the time the United States declared war on Germany, the situation in Europe had grown extremely dire for both sides. The Russian Empire had undergone the tumultuous Bolshevik Revolution and pulled out of the war after signing a peace treaty with the Germans. On the Western front, trench warfare had dominated the battlefield for years and the casualty rates on both sides were in the millions.[63] When the

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[57] Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin 1973), 92.

[58] Fischer, *War Power*, p. 51.

[59] "Chapter 17: World War I: The First Three Years," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-17.htm.

[60] J.A. Thompson, "Woodrow Wilson and World War I: A Reappraisal," *Journal of American Studies*, 19, no. 3 (1985), http://www.jstor.org.libproxy.wustl.edu/stable/pdfplus/27554645.pdf?acceptTC=true.

[61] Fischer, *War Power*, p. 55.

[62] Fischer, *War Power*, p. 56.

[63] "Chapter 17: World War I: The First Three Years," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-17.htm.

United States entered the war in 1917, it placed its forces under the command of General Pershing. The American Expeditionary Force, eventually amounting to over a million men, arrived in time to meet the last German offensive in March of 1918. Over three million German soldiers attacked the Allied lines in an attempt to break through the trenches to end the war. In the Second Battle of the Marne the extensive use of American forces delivered a crippling blow to the German army. French, British, and American armies beat back the exhausted German forces, and the allied forces counterattacked with a series of offensives that successfully compelled the Germans to surrender on November 11, 1918.[64]

Constitutional Issues: The last time Congress had declared war, the Spanish-American War, the President had been extremely reluctant to become involved. This time, there was no question that foreign policy and the decision to go to war was President Wilson's. When Wilson had earlier asked to arm American merchant ships to ward off submarine attacks, he stated, "No doubt I already possess that authority," but "I wish to feel that the authority and the power of the Congress are behind me."[65] The power to arm civilian ships during wartime, the power of issuing letters of marque and reprisal, is one granted specifically to Congress in Article 1, Section 8, Clause 11 of the Constitution. After Congress hesitated to pass the bill, Wilson armed the ships without them. The President made the decision as to when the United States should shift its foreign policy from neutrality to hostility without consulting Congress. Under the Constitution, the President has the power to define the nation's foreign policy as part of his Executive power, but he must defer to Congress should he wish to initiate war. However, this limitation does not apply if a state of war already exists, since the President has unlimited power to respond to attacks and fight a defensive war. It is unclear whether the ongoing war in Europe created a state of war for the United States, but the attacks on US shipping vessels helped build the case that it did. However, despite the ambiguity, Wilson still insisted on asking Congress to make the official declaration, signaling America's entry into the war. He took the nation to war, but did so mindful of Congress' role in the matter.

World War II (December 8, 1941 to August 14, 1945)

Background: American forces returned victorious from Europe following the armistice ending the First World War. However, many began to question the propriety of the United States' involvement in European affairs. In the early 1930s, the United States, and subsequently the rest of the world, suffered severe economic turmoil and decline during the Great Depression. The intense problems at home further strengthened earlier isolationist sentiment and a desire for a policy of strict neutrality in future European conflicts.[66] Meanwhile, in Europe, the devastating economic downturn led to the overthrow of many democratic governments and the rise of new fascist dictatorships. In particular, Adolph Hitler sought both to improve Germany's economy and to restore its lost status, while Benito Mussolini attempted the same for Italy.[67] Japan also initiated an aggressive expansion in

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[64] "World War I: The U.S. Army Overseas," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-18.htm.

[65] Fischer, *War Power*, p. 56.

[66] Moss, *Undeclared War*, p. 71.

[67] "Chapter 19: Between World Wars," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/amh-19.htm.

Asia, taking over parts of China and other regions throughout the Pacific, including colonies of the U.S. and European countries.[68]

By the mid to late 1930s, the aggressive actions undertaken by Germany, Italy, and Japan began to draw the attention and concern of Congress and President Franklin Roosevelt. Roosevelt sought to prepare the United States for a future war in Europe and the Pacific, while Congress and much of the nation still wished to stay out of any foreign conflict. Congress sought to prevent the United States from selling weapons to belligerents, and attempted to keep the United States from getting involved in foreign wars with Neutrality Acts passed in 1935, 1937, and 1939.[69]

World War II began when Germany (temporarily allied with the Soviet Union) invaded Poland. Britain and France declared war, but were unable to prevent Germany from conquering much of mainland Europe. In time, the German army would defeat France, threaten Britain with invasion, and catch the Soviet Union off-guard with a surprise assault that would nearly reach Moscow, its capital. Japan, now allied with Germany and Italy, would attack European colonies throughout the South Pacific in an attempt to maintain enough resources to continue its campaigns in China and elsewhere.[70] In response to this conflict, the United States provided aid to Britain, France, and the Soviet Union, while also cutting off vital oil shipments to Japan. Japan responded on December 7, 1941, by launching a surprise attack against the American naval base at Pearl Harbor, Hawaii. Germany also declared war on the United States, and America responded in kind, entering into the largest, deadliest war in history.[71]

Conflict and Outcome: By the time the United States entered the war, it had already been providing material assistance to the other allied powers, Britain and the Soviet Union, through the Lend Lease program.[72] The European situation looked grim, with the German army achieving massive success in Russia and North Africa. Meanwhile, the United States required months to build up its own armed forces. Roosevelt decided to focus the military's attention primarily on Hitler and Germany, a greater threat at the time than Japan. The key to Allied success in Europe rested on the capacity of the Soviet Union to inflict massive damage on the German military, while Britain and the United States gradually opened up more fronts in North Africa, Italy, and finally the northern coast of France. The Allies gradually gained the advantage with superior numbers and materials, and they initiated intense bombing campaigns against Germany while pushing Hitler's overextended armies back across Europe. Despite massive casualties on both sides, the war in Europe ended with Hitler's suicide, followed by Germany's surrender on May 8, 1945.[73]

In the Pacific theatre of war, the United States halted Japanese expansion after it prevailed in a series of battles in 1942. The United States military then began the long process of recapturing islands throughout the Pacific, slowly making their way closer to the

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[68] Yoo, *Crisis and Command*, p. 294.

[69] Fischer, *War Power,* p. 74.

[70] "Chapter 19: Between World Wars," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/amh-19.htm.

[71] "Chapter 19: Between World Wars," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/amh-19.htm.

[72] Rudalevige, *New Imperial Presidency*, p. 49.

[73] Helen Cleary, "VE Day," World Wars in-depth, BBC, http://www.bbc.co.uk/history/worldwars/wwtwo/ff7_veday.shtml.

Japanese mainland. After deadly campaigns in the Philippines, Iwo Jima, and Okinawa, the United States was prepared to invade the Japanese home islands in an effort to finally end the war. This invasion never occurred, however, because President Truman authorized the use of atomic weapons against the Japanese cities of Hiroshima and Nagasaki. These actions, coupled with the Soviet Union entering the war in the Pacific, led to Japan's surrender and the end of the Second World War[74]

Constitutional Issues: Prior to the outbreak of World War II, Congress had attempted to regain supremacy over war powers. During the 1930s, it passed a series of Neutrality Acts designed to prevent interference in foreign wars. The Neutrality Act of 1935, for instance, banned the sale of arms and ammunition to warring powers.[75] However, Congress proved unable to prevent the President from entangling the United States in foreign conflicts. The President could still deliver other resources to countries at war, and he still maintained control over U.S foreign policy with his Executive power, and over the military as Commander in Chief of the Army and Navy. Congress' attempt to take back some of the control over foreign affairs it had enjoyed in the previous half of the 20th century did not stop Roosevelt from moving the nation toward involvement in World War II.

While the situation in Europe continued to deteriorate, Roosevelt took actions to prepare the United States for war and to assist the Allies, despite Congress' preference for isolation. After Germany had conquered much of Europe and threatened to invade Britain, Roosevelt undertook a series of unilateral actions to aid the Allies. He gave Britain 50 U.S. destroyers in exchange for military bases in the Western Hemisphere through an executive agreement.[76] The facially temporary nature of such an agreement means that it would be not subject to the advice and consent of the Senate as is the President's treaty-making power. Existing law prohibited the President from disposing of the armed forces in this way, and the deal clearly showed the United States' support for Britain, rather than its self-proclaimed neutrality. However, the constitutionality of such a law is highly questionable, since it impinges on the President's Executive power to define foreign policy, and limits his power as Commander in Chief to command the military in maneuvers that fall short of war. Roosevelt also reached agreements with Denmark and Iceland to occupy Greenland and Iceland, and later authorized American naval vessels to fire on Axis ships in United States waters.[77] Congress did not authorize this "shoot on sight" principle for American convoys in the Atlantic, a policy that may have amounted to an unauthorized offensive act of war by the President.[78] Throughout the early 1940s, Roosevelt pressed ahead with these legally ambiguous actions because he believed that war with Germany was inevitable. By taking advantage of loopholes in Congressional legislation and his own power as Commander in Chief, Roosevelt was able to shift American foreign policy and public opinion significantly in favor of helping the Allied powers while officially remaining neutral. However, once

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[74] "Chapter 23: World War II: The War Against Japan," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-23.htm.

[75] Stuart L. Weiss, "American Foreign Policy and Presidential Power: The Neutrality Act of 1935," *The Journal of Politics,* 30, no. 3 (1968): 691, http://links.jstor.org/stable/pdfplus/2128800.pdf.

[76] Frank Freidel, "FDR vs. Hitler: American Foreign Policy, 1933-1941," *Proceedings of the Massachusettes Historical* Society, 99, (1987): 35, http://links.jstor.org/stable/pdfplus/25080976.pdf.

[77] Ann Van Wynen Thoms and A.J. Thomas, Jr., *The War Making Powers of the President* (Dallas: SMU Press, 1982), 18.

[78] "FDR vs. Hitler," p. 39, http://links.jstor.org/stable/pdfplus/25080976.pdf.

Germany officially declared war against the United States, and Japan attacked Pearl Harbor, there was no longer any need for the President to seek the permission of Congress to engage in war, since he only needed Congress' permission to *initiate* war. Either Germany's official declaration, or Japan's attack would have been enough to create a state of war, and the president has unlimited power to fight a defensive war, subject to Congress' willingness to fund it.

Korean War (June 25, 1950 to July 27, 1953)

Background: Unlike at the close of other wars throughout American history, there was no steep demobilization or severe cuts in defense spending at the end of World War II. Following the defeat of Germany and Japan, the United States saw the Soviet Union and the spread of communism as the new threat to American national security. While the United States did not declare war on the USSR, it did proceed with a policy of containment and military buildup, attempting to halt the spread of communism to other parts of the world.[79] This policy, outlined in NSC-68, called for an increase in military spending for conventional and nuclear weapons, and a commitment to defend American interests throughout the world. This radical change in policy came in sharp contrast to the isolationism that had dominated American foreign policy for much of its history.[80]

The end of World War II also spurred the creation of the United Nations, an international organization created in part to foster peace between nations and prevent further global conflicts. The UN Charter authorized nations to deploy military forces through "special agreements" with other member-states through Security Council Resolutions. Any of the five permanent members of the UN Security Council, the USSR, USA, United Kingdom, France, and China, could veto the deployment of any military force.[81]

On June 25, 1950, the United Nations faced one of its first major crises when North Korea invaded South Korea. The Security Council, minus the Soviet representative who had boycotted the meeting, issued UNSC Resolution 82 condemning the invasion.[82] On June 27, it issued UNSC Resolution 83, calling for military assistance to South Korea in order to repel the invasion and "restore international peace and security in the area."[83] President Truman responded by declaring on June 27 that the United States would provide sea and air support to the South Korean military. When asked whether he would characterize the deployment as a "police action under the United Nations," rather than a war, Truman agreed.[84] By June 29, Truman ordered American ground troops to help the South Koreans, leading to a military commitment that would last three years.

Conflict and Outcome: After Truman decided to defend South Korea, U.S. forces based in Japan were quickly deployed to help in the struggle. The North Korean army initially pushed

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[79] Yoo, *Crisis and Command*, p. 330.

[80] Ernest R. May, ed., *American Cold War Strategy: Interpreting NSC 68* (Boston: Bedford/St. Martin's 1993), 69.

[81] Moss, *Undeclared War*, p. 77.

[82] UN Security Council, *Resolution 82 (1950) of 25 June 1950*, 25 June 1950, S/RES/82 (1950), http://www.unhcr.org/refworld/docid/3b00f15960.html.

[83] UN Security Council, *Resolution 83 (1950) of 27 June 1950*, 27 June 1950, S/RES/83 (1950), http://www.unhcr.org/refworld/docid/3b00f20a2c.html.

[84] Gerald Astor, *Presidents At War: From Truman to Bush, the Gathering of Military Power to Our Commanders in Chief* (John Wiley & Sons, 2006), 38.

the UN and South Korean forces to the edge of the peninsula. General MacArthur, one of the top U.S military commanders during World War II, staged a landing at Inchon that completely surprised the North Korean army. UN forces subsequently routed the North Koreans and recaptured most of South Korea. By October, Truman authorized MacArthur to pursue an offensive operation across the 38th parallel that divided the two Koreas. MacArthur managed to overtake nearly the entire peninsula up to the Chinese border before the Chinese army decided to intervene. This opened a new phase of the war, in which the two sides fought around the 38th parallel in an increasingly gridlocked contest with high casualties. In 1953 all parties except South Korea signed an armistice, resulting in a cease-fire.[85]

Constitutional Issues: President Truman's actions during the Korean War established a precedent for Executive use of the military that has endured up to the present day, and the legality of his actions is still hotly debated. Truman justified his decision to use military force on two grounds: the UN Security Council Resolution requesting military support for South Korea, and Truman's inherent authority to deploy the military for any reason short of war as Commander in Chief. These decisions sparked a debate in Congress over the constitutionality of the war, but this did not affect the operation of the armed forces, and Congress did not significantly question the decision of the President to become involved. Senator Robert Taft argued that, while the President could deploy troops at the request of the Security Council, he could only do so if authorized under a previous agreement with the Security Council. Such an agreement would be subject to the Constitution's limitations on the President's treaty-making power, which requires him to seek the advice and consent of two-thirds of the Senate. Furthermore, Congress argued that it had the right to approve or deny any such arrangement with the UN, as provided in its United Nations Participation Act of 1945.[86] However, since the Constitution provides a clear rule for entering into treaties, it is questionable whether Congress can alter this obligation through legislation. Nevertheless, the United Nations Charter created a framework for using the military forces of other nations, but that framework relied on each nation's formal approval.

Certain members of Congress also took issue with Truman's claim that he could send troops to Korea by virtue of his position as Commander in Chief. Under this line of reasoning, the President was not only acting under UN authority, but rather "in support of the authority of the United Nations," which was considered vital to U.S. interests at the time.[87] Since the President, as Commander in Chief of the Army and Navy, has the authority to freely deploy the military in any maneuvers short of war, calling this action a peace-keeping mission, or police action, would circumvent the Constitution's requirement for the legislative branch to initiate war. Senator Paul Douglas defended this position when he argued that "[I]t may be desirable to create a situation which is half-way between complete peace, or the absence of all force, and outright war."[88] This idea of limited military act was as old as the United States, but now the Truman Administration insisted it could carry out this limited "war" without Congress' involvement.

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[85] Astor, *Presidents At War*, pp. 40-48.

[86] Charles A. Lofgren, "Mr. Truman's War: A Debate and its Aftermath," *The Review of Politics* 31.2 (Apr., 1969), http://www.jstor.org.libproxy.wustl.edu/stable/pdfplus/1406021.pdf.

[87] "Mr. Truman's War," p. 231, http://www.jstor.org.libproxy.wustl.edu/stable/pdfplus/1406021.pdf.

[88] Moss, *Undeclared War*, p. 78.

Aside from the Congressional debate over war powers, the Korean War also exposed two other controversies relating to Executive control of the military. The first was the Supreme Court's ruling in *Youngstown Sheet & Tube Co. v. Sawyer*. After a strike at the nation's steel mills threatened to shut down production, Truman ordered the Department of Commerce to seize the mills in order to continue arms production for the duration of the war. Truman justified his actions through his authority as Commander in Chief, stating that a strike would undermine "our efforts to support our armed forces and to protect our national security."[89] The Supreme Court disagreed with this argument, ruling that the seizure violated Congress's control over interstate commerce. This seemed to limit Presidential powers to some extent. The case is also known for the concurring opinion of Justice Jackson, which theorized on the possible criteria for defining Presidential power.[90] Jackson created a three-pronged test to determine whether presidential powers were dominant, subservient to powers of Congress, or existed in a "zone of twilight" of shared authority. In such a "twilight" situation, Congress might cede power to the Executive Branch through inaction or by its own acknowledgment. Tellingly, Jackson added that, "only Congress itself can prevent power from slipping through its fingers."[91] However, the legality of this standard is questionable, as it did not receive a majority of votes to support it.

The Korean War represented a significant shift in the exercise and interpretation of war powers. Nearly every President since Truman has relied on the Commander in Chief clause to deploy troops into combat situations, with or without the approval of Congress.[92] Many have relied on UN resolutions instead of declarations of war. However, the intense criticism that Truman endured throughout the course of the Korean War also encouraged future Presidents to request Congressional support for large-scale military ventures. Eisenhower requested resolutions authorizing him to deploy troops to the Middle East and China, although he denied that they were necessary in order for him to act. Lyndon Johnson likewise wished to "eliminate a [Korean-type] debate," by seeking passage of the Tonkin Gulf resolution authorizing him to initiate broader U.S. involvement in Vietnam.[93] Regardless, it was widely agreed upon that in a time of continuous crisis, like the Cold War, the President has to respond swiftly to perceived threats to American interests. The role of the United States on the global stage, and the powers vested in the President, and the nature of war had expanded far beyond what was exercised when the Constitution was drafted.

Vietnam War (1959 to April 30, 1975)

Background: After the Korean War, subsequent Presidents sought to maintain the war powers assumed by Truman. Events such as the Cuban Missile Crisis further heightened tensions during the Cold War, and reinforced the authority of the President as Commander in Chief.[94] The United States also continued to implement a policy of containing Communism across the world, by any means necessary, in an effort to defeat the Soviet Union.[95] This

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[89] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).
[90] Yoo, *Crisis and Command*, p. 341.
[91] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952).
[92] Moss, *Undeclared War*, p. 79.
[93] "Mr. Truman's War," p. 240, http://www.jstor.org.libproxy.wustl.edu/stable/pdfplus/1406021.pdf.
[94] Schlesinger, *Imperial Presidency*, pp. 170-176.
[95] Schlesinger, *Imperial Presidency*, p. 164.

necessitated a degree of flexibility for the President so that he might combat this threat at a moment's notice.

Following World War II, Vietnamese nationalists sought to break away from French-colonial Indochina. In an attempt to maintain stability in Europe as well as Southeast Asia, the Truman and Eisenhower Administrations supported French efforts to prevent this, and provided billions of dollars in military aid and support to France. Eventually a peace agreement was reached, the Geneva Accords, which established two separate Vietnamese states. North Vietnam remained under the control of communist forces, while the South eventually coalesced under a U.S. backed leader.[96] President Kennedy continued supporting South Vietnam through heavy funding of its military and infrastructure, and by providing the additional presence of 16,000 U.S. military "advisors." These troops actively participated in anti-guerilla operations against communist and other insurgents, along with training Vietnamese forces.[97] The U.S. dramatically increased its commitment after Kennedy was assassinated and Lyndon Johnson assumed the Presidency.

On August 2 and 4, 1964, an American navy vessel off North Vietnamese waters reported attacks by Vietnamese torpedo boats. Although it was later proven that the second attack had actually not occurred and that the U.S ships were conducting covert operations against North Vietnam, President Johnson nevertheless used the incidents as justification to expand and fully Americanize the growing war in Vietnam. After only a few hours of debate, Congress nearly unanimously approved the Gulf of Tonkin Resolution, authorizing the President to "take all necessary measures," to prevent further attacks and stop Northern aggression.[98] The resolution, and Johnson's subsequent actions, led to the deployment of hundreds of thousands of U.S. forces to Vietnam.

Conflict and Outcome: After the Gulf of Tonkin Resolution, the United States escalated its involvement in Vietnam rapidly. The U.S. military initiated a brutal counter-insurgency campaign in the South while launching a massive bombing campaign against the North. The South Vietnamese rebels and North Vietnamese troops, collectively named by the Americans the Viet Cong, increased their attacks against the Americans and the South Vietnamese army. Thousands of Americans died during search and destroy missions conducted in the South, and many thousands of Vietnamese also lost their lives over the course of the war.[99]

One important turning point in the conflict came in 1968, during the Vietnamese holiday of Tet. The North Vietnamese launched a massive offensive all across South Vietnam which, although unsuccessful militarily, discredited the idea that the Americans had control of the situation or were winning the war.[100] After President Johnson decided not to run for reelection, in part due to his loss of credibility following the Tet offensive, Richard Nixon won the presidency and ushered in a new era for the war and American foreign policy. Nixon ordered a heavy bombing campaign, combined with a withdrawal of American forces and the rapid development of a self-sufficient Vietnamese force. He also initiated a series of peace

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[96] Edward Kenyes, *Undeclared War: Twilight Zone of Constitutional Power* (The Pennsylvania State University Press, 1982), 111.

[97] Schlesinger, *Imperial Presidency*, p. 177.

[98] Moss, *Undeclared War*, p. 86.

[99] "Chapter 28: The US Army in Vietnam," American Military History, Army Historical Series, Office of the Chief of Military History, United States Army, http://www.history.army.mil/books/AMH/AMH-28.htm.

[100] Shenkman, *Presidential Ambition*, p. 331.

talks with the North in order to end the war as quickly as possible.[101] At the same time, Nixon expanded the war to attack North Vietnamese supply lines and bases inside neighboring Laos and Cambodia.

These actions ultimately angered the public and Congress to the extent that Congress passed a series of bills designed to limit U.S. involvement in the Indochinese area and gradually end the war. Nixon would eventually become unable to continue conducting the war due to public anger and his own loss of influence following the Watergate scandal. In light of Nixon's fall from power and the cost of the Vietnam War, Congress passed the War Powers Resolution in an effort to limit the President's ability to unilaterally deploy troops.[102] The U.S. reached a cease-fire with the North Vietnamese in early 1973, leading to the complete withdrawal of U.S. forces. Congress would later completely withdraw support from the South Vietnam government, which was conquered by North Vietnam shortly thereafter.[103]

Constitutional Issues: At the start of the Vietnam War, the President dominated the conduct of war and foreign policy relative to Congress. By its end, with the loss of South Vietnam, the impeachment of President Nixon, and the passage of the War Powers Resolution, the President's perceived power was near its lowest point in a century. All of Kennedy, Johnson, and Nixon's wartime decisions came under new scrutiny in light of the failure and enormous cost of the Vietnam War.

One of the most significant constitutional developments resulting from the Vietnam War was when Congress passed the War Powers Resolutions of 1973, overriding a veto by President Nixon. The purpose of the resolution was to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities." Congress wanted to act so that future wars could not start and continue solely at the President's discretion.[104] Moreover, Congress wanted to better define the relationship between President and Congress regarding war powers. The House and Senate acknowledged the President's role as Commander in Chief, and his ability to send the armed forces into combat during wartime, in the event of a national emergency and when Congress authorizes a deployment. The resolution requires the President to consult with Congress before and over the course of the hostile situation. Within forty-eight hours of hostile deployment, the President must submit to Congress an explanation of his actions, and his legal justification for them. The Resolution goes on to require that after sixty days, the President must withdraw U.S forces unless Congress specifically authorizes an extension. The President may extend the deadline by thirty days under certain circumstances, but Congress may insist that U.S. forces be removed at any time. Lastly, the President may not claim that any treaty or law grants him authority to deploy troops, independent of Congress and the War Powers Resolution.[105]

The War Powers Resolution has undergone a series of constitutional challenges since its ratification, and its legality remains in dispute. When President Nixon vetoed the bill, he cited two specific constitutional issues. First, Nixon argued that a concurrent resolution from Congress was not sufficient grounds to require troop withdrawal. Nixon also took issue with

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[101] Keynes, *Twilight Zone*, p. 115.

[102] John Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress over How America Goes to War* (New York: Charles Scribner's Sons), 89-92.

[103] Keynes, *Twilight Zone*, pp. 115-118.

[104] Moss, *Undeclared War*, p. 89.

[105] Lehman, *Making War*, pp. 94-96.

the automatic withdrawal of U.S. troops after 60 or 90 days, because it places a limit on the constitutional powers of the President without Congress actually taking action.[106] In *Immigration and Naturalization Service v. Chadha,* the Supreme Court found that the legislative veto of the Immigration and Nationality Act was unconstitutional, as it did not allow for the President to use his veto. The War Powers Resolution, which contains a similar provision, is thus also legally suspect.[107]

Under section 5(b) of the War Powers Resolution, once a President has reported to Congress under section 4(a) (1), military forces must be withdrawn after 60 or 90 days unless Congress explicitly authorizes an extension. Because of this automatic deadline, which Nixon and other Presidents' have objected to, Presidents have sought to avoid the obligation by filing reports to Congress "consistent with" 4(a)(1), rather than "pursuant to" the War Powers Resolution.[108] Presidents have argued that this deadline violates the constitutional powers of the President. Such a requirement also limits the President's authority to control the military as Commander in Chief. Since the Constitution does not grant the power to command the military to Congress, it is questionable whether it has the right to limit the President's power to do so. Congress has yet to either fix the 4(a) (1) loophole that Presidents have exploited, or to otherwise effectively enforce the Resolution.

Link to text of War Powers Resolution:
http://www.law.cornell.edu/uscode/50/usc_sup_01_50_10_33.html

Lebanon (1982)

Background: In the mid 1970s, Lebanon became immersed in a civil war. Several regional powers, including Syria, Israel, and the Palestine Liberation Organization (PLO) were drawn into the conflict. Israel and the Lebanese Christians soon found themselves fighting Syrians and the PLO over control of the country. Due to the extreme fragility of this situation, the United States proposed the deployment of a multinational peacekeeping force. In August 1982, with some international support, the Reagan Administration deployed 800 Marines to Beirut. By September, U.S. forces numbered 1200, and began to participate in an advisory role to the Lebanese army, and in support roles for a provisional Lebanese government.[109]

Conflict and Outcome: In the weeks after the Marines began the operation, several soldiers were killed, and the situation continued to deteriorate. Although a cease-fire was declared, the Lebanese viewed the U.S. forces as enemy combatants, firmly on the side of the Lebanese Christians and the Israelis. On October 23, a truck carrying heavy explosives crashed into a Marine barracks, collapsing the building and killing 241 Marines. This attack, and continuing assaults against U.S. troops, caused the U.S. to eventually withdraw all troops within six months.[110]

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[106] Ellen C. Collier, "Statutory Constraints: The War Powers Resolution," in *The U.S. Constitution and the Power to Go to War*, eds. Gary M. Stern and Morton H. Halperin (Westport, Conn.: Greenwood Press 1994), 58.
[107] Moss, *Undeclared War,* p. 91.
[108] "Statutory Constraints," p. 61.
[109] Lehman, *Making War*, pp. 101-104.
[110] Lehman, *Making War*, pp. 103-109.

Constitutional Issues: The arrival of U.S. Marines in Lebanon provided one of the strongest opportunities to test the strength of the War Powers Resolution. The subsequent debate over the legality of Reagan's actions demonstrated that the struggle between the President and Congress still continued in earnest. The Reagan Administration first sought to report its intentions to Congress, as was required under the War Powers Resolution, but in such a way that would not recognize any obligation under the War Powers Resolution, or trigger the sixty-day countdown. The President did not acknowledge that the Marines had been sent into a hostile situation, nor did he state that his reports were in compliance with section 4 of the War Powers Resolution.[111] After several Americans were killed in action, Congress began to agitate for Reagan to acknowledge the War Powers Resolution and its deadline for troop withdrawal. Eventually, Congress and the President reached a compromise, in which Congress would pass a resolution invoking the War Powers Resolution, but also grant Reagan permission to keep troops in Lebanon for up to eighteen months.[112] Reagan ultimately signed the resolution, which included rules for when the President must withdraw U.S. forces, but he publicly questioned the constitutionality of the War Powers Resolution, and the agreement he had reached with Congress.[113] The Constitution grants Congress the power to declare war, but does not place limitations on the President's use of the military once war has already been declared on the United States. If Reagan's actions amounted to going to war in Lebanon, he would have been required to first seek Congress' permission before becoming involved. The U.S. involvement in Lebanon illustrated that the President was not publicly willing to concede his Executive war powers to Congress, but would act pragmatically in the face of public opposition. Reagan would adopt a position taken by many subsequent Presidents in denying that the War Powers Resolution could limit his authority as Commander in Chief. At the same time, he sought support, rather than permission, from Congress in order to justify his actions.

Gulf War (August 2, 1990 to February 28, 1991)

Background: During the Cold War, the Soviet Union and the United States both sought leading roles in the Middle East, particularly amongst the oil rich nations of Iran, Iraq, Saudi Arabia, and the other Persian Gulf nations. In 1979, Shah Mohammad Reza Pahlavi, the U.S.-supported leader of Iran was overthrown in an Islamic revolution. Saddam Hussein, the dictator of neighboring Iraq, used the opportunity to try and conquer parts of Iran, and the brutal war that ensued lasted nearly eight years. The United States attempted to use the regional instability to weaken Iran by assisting Hussein and attracting the other Gulf States as allies.[114] In 1988, at the end of the war, Hussein turned his vast army on dissenters within Iraq while the nation continued to struggle under the massive debts and fiscal problems that his rule had caused. In response to these mounting problems, Hussein accused his neighbor, the small Gulf state of Kuwait, of committing economic warfare against Iraq. Saddam Hussein demanded large concessions from Kuwait before eventually invading on August 2, 1990. In Washington, D.C., fear of a brutal dictator seizing control of significant amounts of oil and

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[111] Jane E. Stromseth, "Treaty Constratins: The United Nations Charter and War Power," in *The U.S. Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halperin (Westport, Conn.: Greenwood Press 1994), 67.
[112] Lehman, *Making War*, p. 107.
[113] Moss, *Undeclared War*, p. 95.
[114] Lehman, *Making War*, pp. 14-15.

potentially becoming the leading figure of the Arab World caused significant alarm.[115] One week later, President Bush ordered U.S. forces into the region to defend Kuwait and potentially repulse Iraqi forces, while assuring Congress that hostilities were not imminent.[116]

Conflict and Outcome: By late 1990, U.S. forces in the Gulf region numbered over four hundred thousand.[117] After the buildup, the Bush Administration decided to alter the combat mission from defending and liberating Kuwait to actively seeking out and fighting the Iraqis. Operation Desert Storm began on January 16, 1991 with an air campaign that crippled Iraqi forces and air defenses. The aerial assault and subsequent ground attack completely routed Iraqi forces, while also destroying the chemical and nuclear weapons research and construction facilities that Saddam had built. Between eight and thirty-five thousand Iraqi soldiers were killed, while fewer than 200 Americans died during Desert Storm. Although U.S forces liberated Kuwait, they left Iraq under the control of Saddam Hussein.[118]

Constitutional Issues: Despite sending hundreds of thousands of troops into a hostile situation, Bush initially denied the need for Congressional authorization. Although he kept congressional leaders informed of his activities, he stated that his authority as Commander in Chief was sufficient to justify the deployment.[119] The President only need seek permission from Congress when initiating war. If his actions fall short of starting war, the Constitution places no limitations on his authority as Commander in Chief to deploy the military. The President also cited Resolution 678, passed by the UN Security Council in November, which authorized Member States to use force against Iraq. However, this resolution serves merely as an authorization to use force, rather than an agreement to used force. If this were an agreement, the UN resolution would be subject to the Constitution's rules on treaty-making, requiring the President to seek the approval of two-thirds of the Senate. Instead, it is merely an indication that the UN would not view such a use of force as unwarranted. Congress objected to Bush's refusal to comply with the War Powers Resolution or seek permission from Congress to engage in hostilities, but it did little to stop the deployment of U.S. troops.[120] House Democrats passed a resolution demanding that the President seek authorization from Congress, and several Representatives even sued President Bush in federal court. The federal judge held that only a majority of Congress could sue the President over such a matter.[121] The Justice Department separately argued that the President only needed to seek Congressional authorization in cases of "war-making" as opposed to "offensive actions."[122] Despite Bush's ideological position regarding war powers, for political reasons he eventually sought and received Congressional support for his actions in the Gulf War.[123] Once again, Congress could do little but endorse the President's authority to carry out the military operation he had already begun. The President requested endorsement of his actions, not authorization, further undermining Congress' role in foreign affairs. Congress would

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[115] Lehman, *Making War*, pp. 19-22.
[116] Moss, *Undeclared War*, p. 95.
[117] Rudalevige*, New Imperial Presidency,* p. 195.
[118] Astor, *Presidents At War,* pp. 230-232.
[119] Moss, *Undeclared War*, p. 95.
[120] Rudalevige, *New Imperial Presidency*, p. 195.
[121] Moss, *Undeclared War*, pp. 95-96.
[122] Rudalevige*, New Imperial Presidency*, p. 193.
[123] Moss, *Undeclared War*, p. 96.

share the political responsibility for the war, even though the majority of Representatives had been against it from the beginning. Bush had followed the same course of action as his predecessor, Reagan, and once again the President treated the War Powers Resolution as nearly irrelevant.

Somalia (1993)

Background: After gaining independence in 1960, Somalia came under the rule of Siad Barre, a dictatorial leader who exploited the numerous clans in the country to solidify his own power. This created a humanitarian crisis. A civil war broke out in 1991 because of Barre's human rights violations and unchecked corruption. In the resulting chaos, over a million people were displaced and tens of thousands lost their lives. Leaders like Mohammed Aideed rose to power and created new humanitarian problems, while relying heavily on violence to solidify his control over the country.[124] In response to the crisis, President Bush sent 28,000 troops to the region to assist UN Forces distribute aid and supplies to displaced Somalis, although the initial troop count would soon drop to just a few thousand. President Clinton inherited this dangerous, and open-ended mission in 1993.[125]

Conflict and Outcome: Both President Bush and President Clinton envisioned a greater role for the United Nations in rebuilding Somalia. Both sets of forces sought to disarm the warring clans and alleviate the famine that was devastating the country. In March of 1993, however, a group of UN peacekeepers was killed by Mohammed Aideed's soldiers. The mission in Somalia subsequently became more focused on capturing Aideed. This hunt eventually led to an incident in which eighteen U.S. soldiers were killed during an urban battle against Aideed's forces in Mogadishu. Live coverage of American soldiers being dragged through the streets created a strong negative response to America's involvement in this war amongst the American public.[126] President Clinton responded to pressure from Congress by declaring an exit date of March 31, 1994. A year after America's withdrawal, UN forces also left Somalia. The political and humanitarian situation remains unresolved, and continues to plague the region to the present day.[127]

Constitutional Issues: In late 1992, President Bush responded to the UN Security Council Resolution authorizing foreign troops to enter Somalia for the purpose of halting the humanitarian crisis. Despite the dangerous situation, both Bush and Clinton avoided invoking the War Powers Resolution by maintaining that the mission was a humanitarian mission, did not amount to war, and was not hostile to U.S. personnel. The House and Senate could not agree as to whether or not the War Powers Resolution should be invoked, so they never attempted to enact the sixty-day limit.[128] Since Congress never pressed the issue, the question of the constitutionality of the War Powers Resolution never rose. It is questionable

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[124] Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress, and War Powers* (Nashville: Vanderbilt University Press, 2002), 22-33.
[125] Richard A. Melanson, *American Foreign Policy Since the Vietnam War: The Search for Consensus from Nixon to Clinton* (New York: M.E. Sharpe, 2000), 247-248.
[126] Hendrickson, *Clinton Wars*, pp. 34-35.
[127] Melanson, *American Foreign Policy*, p. 249.
[128] Moss, *Undeclared War*, p. 98.

whether Congress has the power to place a time limit on the President's use of military force. The Constitution grants Congress the power to check the Executive use of force though appropriations—the power to choose whether or not to fund future military ventures. Since the Resolution was not invoked, Clinton decided to notify Congress in a manner consistent with the War Powers Resolution without specifically invoking it, similar to President Bush's actions during the Gulf War.[129] After the deaths of U.S. soldiers in Mogadishu, Congress more insistently demanded that Clinton seek congressional approval to continue the mission. Clinton avoided a potential showdown with Congress by announcing a withdrawal date and clarifying the U.S. mission. Once again, Congress refused to unite and invoke the War Powers Resolution, and instead limited itself to publicly criticizing Clinton, and passing nonbinding resolutions. Only a strong public backlash against the President's actions would have been able to compel any sort of compromise from Clinton. Despite the military setback in Somalia, the President remained firmly in control of America's war powers.[130]

Bosnia and Kosovo (1994-1999)

Background: Yugoslavia, was a multiethnic and multicultural area of the Balkans, and Marshall Tito had held it together from the 1940s to the 1980s. The underlying tensions of his regime, combined with the democratic revolutions in Eastern Europe following the collapse of the Soviet Union, resulted in the fracturing of Yugoslavia in the early 1990s. Slovenia, Croatia, Serbia, Macedonia, Montenegro, and Bosnia-Herzegovina all declared independence, triggering a bloody ethnic conflict between Muslims, Christians, and the various cultural groups in each country.[131] Slobodan Milosevic, the President of Serbia, sought to maintain control over the other Balkan nations. He initiated a campaign of violence and ethnic cleansing against his non-Serbian neighbors, which led to reprisals on both sides and a wider conflict that enveloped the entire region.[132] Thousands were being massacred on all sides throughout the early 1990s while the UN, NATO, and the United States debated how best to defuse the situation.

Conflict and Outcome: The United States under President Bush, and the UN, first sought to impose economic sanctions against the aggressive former-Yugoslav states, but were reluctant to send in soldiers to control the situation. President Clinton had supported a more aggressive approach, involving ground forces and peacekeepers in his campaign for the Presidency. However, he largely continued Bush's policies during his first years in office.[133] Clinton attempted a series of diplomatic measures in an attempt to stop the fighting, while the UN peacekeepers struggled to maintain stability throughout the Balkans. Thousands continued to suffer from the ongoing war. Eventually, in 1995, NATO began an air campaign against Serbia, which forced the participants to attend a peace conference in Dayton, Ohio. The Dayton Agreement recognized the state of Bosnia and called for an 8,000-man commitment from the U.S. to a NATO peacekeeping force.[134] While the measure restored

[129] Hendrickson, *Clinton Wars*, p. 32.
[130] Hendrickson, *Clinton Wars*, pp. 35-39.
[131] Melanson, *American Foreign Policy*, p. 243.
[132] Hendrickson, *Clinton Wars*, p. 70.
[133] Hendrickson, *Clinton Wars*, p. 73.
[134] Melanson, *American Foreign Policy*, p. 256.

some stability to Bosnia, it left the U.S. with no clear exist strategy, and the 8,000 troops were kept on the ground long past the one year deadline Clinton had established prior to their deployment.

In 1998, Milosevic shifted his attention to the autonomous Yugoslav province of Kosovo, which had a large Albanian population. He initiated a campaign of violence and starvation against the local populace, despite warnings from the United States.[135] In 1999, President Clinton ordered air strikes against Serbian targets in response to Milosevic's actions, while specifically stating that the United States was not at war with Yugoslavia.[136] The air strikes this time were not backed by ground forces, as had been the case in Bosnia. At the same time, hundreds of thousands of locals continued to be displaced by newly aggressive Serbian forces. Eventually, air strikes combined with diplomatic pressure from Russia persuaded Milosevic that his position was untenable, and he withdrew his remaining forces from Kosovo. The immediate crisis in the Balkans had ended, leaving thousands murdered, and another huge refugee problem.[137]

Constitutional Issues: Throughout the U.S. involvement in Bosnia and Kosovo, President Clinton continued his practice of reporting to Congress in a manner consistent with, but not specifically under, the War Powers Resolution. As in Somalia, the President refused to acknowledge that a war-like or hostile situation existed, because doing so might trigger the sixty-day limit required by the Resolution. A partisan Congress was completely unable to challenge the President's actions. After the Kosovo bombing campaign, the House of Representatives passed measures blocking funds from the operation, but could not pass a resolution demanding the withdrawal of U.S. troops. The Constitution specifically grants Congress the power to check the Executive's use of military power through appropriations, meaning it can simply decide not to fund military ventures of which it disapproves. However, the Constitution does not give Congress the power to otherwise define the scope of such a mission. As Commander in Chief of the Army and Navy, the President has the authority to define the scope and nature of the United States' military ventures, short of declaring war. The Senate was equally unable to challenge the President's initiative in calling for air strikes, and it could not work together with the House.[138] The judicial branch of government also took no action. It maintained the same position that Justice Powell articulated in 1979 when he wrote that, "If the Congress chooses not to confront the President, it is not our task to do so."[139] Throughout the military and humanitarian campaigns in the Balkans, Congress had numerous opportunities to invoke the War Powers Resolution, which would once again table the question of its constitutionality, or to otherwise cut off funding to U.S. troops. Instead, Congress largely conceded to President Clinton the same powers that nearly every President since Truman had exercised when intervening abroad militarily.

Afghanistan War (2001 to present)

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[135] Melanson, *American Foreign Policy*, p. 258.
[136] Moss, *Undeclared War*, p. 99.
[137] Melanson, *American Foreign Policy*, pp. 260-261.
[138] Lehman, *Making War*, p. 100.
[139] Rudalevige*, The New Imperial Presidency*, p. 199.

Background: Throughout the 1990s, the United States sensed the threat of terrorism and Islamic extremism growing across the globe. Different groups committed a series of attacks against U.S. targets around the world, including the 1993 bombing of the World Trade Center, the 1993 attack on U.S. forces in Somalia, a 1995 bombing in Saudi Arabia killing 5 Americans, followed by a 1996 truck bombing that killed 19 more, the 1998 American embassy bombings organized by Osama Bin Laden, and the 2000 attack on the USS *Cole* which resulted in the deaths of 19 American sailors.[140] Especially in the last half of the decade, U.S. intelligence focused on Bin Laden as a major financier and organizer of terrorism through his al Qaeda organization, which has devoted itself to attacking and killing Americans in response to the supposed occupation of Islamic holy sites.[141] Al Qaeda itself formed in the aftermath of the Soviet invasion of Afghanistan, a decade long struggle that attracted Muslims from all over the world in a jihad to expel the foreign invaders.[142] Bin Laden and many other future members of his organization received weapons and training with the help of the United States in order to fight the Soviets. Afghanistan remained the focal point for the terrorist network, especially after the religiously extreme Taliban took power in the mid 1990s, following the Soviet retreat and a civil war.[143] From Afghanistan, Bin Laden and Khalid Sheikh Mohammed, another Al Qaeda member, began planning the 9/11 attacks around 1999. Al Qaeda cells existed all over the world, and Khalid Sheikh Mohammed recruited men from numerous locations. Eventually, 19 future hijackers traveled to the United States to carry out the attack, with some undergoing pilot training. During this time, U.S. intelligence resources were prioritized for preventing overseas assaults, and were not effectively focused on domestic threats.[144] On September 11, 2001, the 19 hijackers successfully took control of four airplanes. Two crashed into the World Trade Center and one into the Pentagon. Passengers on the fourth plane overpowered the hijackers but lost control of the aircraft, resulting in a crash landing and the deaths of all on-board. The final death toll was 2,995 people, making this the deadliest terrorist attack on U.S. soil in history.[145]

Conflict and Outcome: The administration of George W. Bush responded to the 9/11 attacks by launching a global "War on Terrorism," with the President stating, "We will make no distinction between the terrorists who committed these acts and those who harbor them."[146] Alongside an extensive domestic response to prevent future attacks, President Bush immediately sought the support of the international community, especially Pakistan, in isolating the Taliban government in Afghanistan.

Under the codename "Enduring Freedom," the military planned to invade Afghanistan. Phase One consisted of obtaining international support, guaranteeing freedom of movement for U.S. forces in the region and further isolating the Taliban. This involved the

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[140] National Commission on Terrorist Attacks Upon the United States, "The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States: Executive Summary," http://govinfo.library.unt.edu/911/report/911Report_Exec.htm.

[141] "The 9/11 Commission Report."

[142] Andrew Marshall, "Terror 'blowback' burns CIA," *The Independent*, November 1, 1998, http://www.independent.co.uk/news/terror-blowback-burns-cia-1182087.html.

[143] "The 9/11 Commission Report."

[144] "The 9/11 Commission Report."

[145] *ABC News*, "The World's Most Deadly Terror Attacks," 2010, http://abcnews.go.com/Blotter/slideshow/worlds-deadly-terror-attacks-10982617.

[146] White House transcript, Statement by the President in his Address to the Nation, Sept. 11, 2001, http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010911-16.html.

creation of an international coalition, the International Security Assistance Force (ISAF), a U.N. sanctioned group authorized to support a new Afghan government.[147] Phase Two, which began on October 7, 2001, involved a series of air strikes and the deployment of Special Operation units to Afghanistan. In Phase Three, ground troops were sent in to completely remove the Taliban regime. On November 9, Afghan rebel forces working with the United States had secured the northern part of the country, and by early December all major cities were in the hands of coalition forces. A provisional government was created on December 22 under the leadership of Hamid Karzai, officially ending Taliban rule.[148] The vast majority of surviving al Qaeda members, possibly including Bin Ladin, fled to Pakistan. These actions were largely completed by mid-2002, after which the focus of the war shifted to creating a stable government and fighting a Taliban-led insurgency.

Constitutional Issues: The government's management of the Afghanistan War, and the larger War on Terrorism waged by both the Bush and Obama Administrations, has challenged the traditional conception of war and the separation of war powers. As in the buildup to the Gulf War, President Bush sought authorization from Congress to respond to the 9/11 attacks. Congress passed the Authorization for Use of Military Force Against Terrorists (AUMF) on September 14, just days after 9/11.[149] Since the United States had been attacked, the President probably did not need to seek permission from Congress to carry out a military response against Al Qaeda and the Taliban. The Constitution grants Congress the power to declare war, but the President has unlimited authority to respond to an enemy who has already created a state of war for the United States. However, since the aggressors in this instance did not represent another nation's government, but were independent terrorists with a political agenda, it is unclear whether their attack created a full state of war. Given the ambiguity, by first seeking permission, the President probably avoided extensive debate on the issue. Nonetheless, the very open ended language of Congress' resolution allowed for the President to take action not only against another nation, but against "organizations" and "persons," linked to the September 11th attacks.[150] This resolution provided some of the legal framework for the treatment of detainees and for electronic surveillance programs. Furthermore, it has proven difficult for Congress to conduct oversight over the extensive number of secret operations taken in response to 9/11, and the language of the AUMF potentially permits future wars so long as a link to 9/11 is shown. President Bush in many ways followed the example set by his father during the Gulf War. The political situation was such that he may have been able to rely solely on his authority as Commander in Chief, as had been done since President Truman decided to enter the Korean War. However, he sought Congress' approval to show resolve and add legitimacy to his actions as President's.[151] Whether or not Congress will eventually declare an end to hostilities in such an open-ended conflict, and move to regain control over some of its war powers, remains to be seen.

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[147] UN Security Council, *Security Council resolution 1510 (2003) on ISAF, Afghanistan*, 13 October 2003, S/RES/1510 (2003), http://www.unhcr.org/refworld/docid/3f8d30c54.html.

[148] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United* States (New York: W.W. Norton and Company), 337-338.

[149] Rudalevige*, New Imperial Presidency*, p. 215.

[150] Moss, *Undeclared War*, p. 103.

[151] Moss, *Undeclared War*, p. 102.

Iraq War (March 18, 2003 to present)

Background: The Gulf War left Saddam Hussein weakened but still firmly in control of Iraq. UN sanctions continued throughout the 1990s and early 2000s, and the United States intervened militarily numerous times during the same period. President Clinton repeatedly authorized bombings of Iraqi targets, notably under operation Desert Fox in 1998. Hussein was strongly suspected of developing weapons of mass destruction, despite the continued sanctions. After Iraq had repeatedly refused to allow UN weapons inspectors into the country, the United States bombed certain targets in Iraq over a period of four days.[152]

Following the September 11 attacks against the United States, the Bush Administration refocused on Iraq, declaring a belief that Hussein was both aiding terrorists and continuing to build weapons of mass destruction. The intelligence community sought to find evidence supporting these theories, while the U.S. government developed plans for a potential invasion.[153] Despite conflicting intelligence reports, President Bush made the case to Congress and the United Nations that Saddam Hussein had weapons of mass destruction. In October of 2002, Congress passed the Use of Force Against Iraq Resolution, granting President Bush the authority "as he determines to be necessary and appropriate," to defend the United States against the Iraqi threat, and to enforce past UN resolutions regarding Iraq.[154]

Conflict and Outcome: Operation Iraqi Freedom began on March 19, 2003 with a failed attempt to assassinate Saddam Hussein and his sons. Following a massive bombing campaign, which crippled the Iraqi military and infrastructure, over 140,000 U.S. troops invaded. The capital, Baghdad, fell in three weeks, and any formal resistance soon dissipated.[155] The Bush administration and the military had counted on a quick victory and a short deployment for U.S. forces. Unfortunately, the United States and its allies were ill prepared to govern or police a nation that found itself without basic infrastructure or authority. Massive unemployment, poor living conditions, and the disbandment of the entire Iraqi army soon led to a massive insurgency. Ethnic tensions between Sunnis, Kurds, and Shiites further complicated the matter, resulting in estimates of up to a hundred thousand Iraqi deaths, along with thousands of American and Coalition casualties.[156] Intelligence reports also quickly emerged that discredited the notion that Hussein had supported terrorists or possessed significant weapons of mass destruction program.[157] U.S. forces remain in Iraq at present, though the country now is self-governing and maintains its own security forces.[158]

Constitutional Issues: Once the Bush administration had decided to invade Iraq, it had to decide whether or not to seek a resolution of support from Congress. Some top officials argued that the President did not need Congress. They maintained that the Authorization for Military Force against Terrorists applied to Iraq because it allegedly sponsored terrorists, and

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[152] Hendrickson, *Clinton Wars*, p. 154.
[153] Astor, *Presidents At War*, p. 258.
[154] Moss, *Undeclared War*, p. 106.
[155] Astor, *Presidents At War*, p. 257.
[156] Astor, *Presidents At War*, pp.; 272-273.
[157] Astor, *Presidents At War*, p. 274.
[158] Helene Cooper and Sheryl Gay Stolberg, "Obama Declares an End to Combat Mission in Iraq," *New York Times*, August 31, 2010, http://www.nytimes.com/2010/09/01/world/01military.html.

that the initial Resolution adopted before the Gulf War still applied because Iraq had not complied with UN resolutions.[159] As Commander in Chief, Bush would simply be able to continue fighting this unfinished war. However, Bush ultimately decided that because Congress was so willing to support his actions, it was worthwhile to seek its authorization. The entire situation bore strong resemblance to Johnson's request for a Gulf of Tonkin Resolution. Highly questionable intelligence was presented as fact, and Congress granted the President extremely broad powers with limited debate. Constitutionally, Congress' authorization did not represent anything new. However, it did demonstrate a failure to exercise adequate oversight and debate.

Conclusion

The framers of the Constitution did not consider war a priority for the United States. They had founded a relatively isolated, weak republic with no standing army or navy. The framers still understood that war would likely occur, so they vested control of the military with a single leader, while giving the power to actually declare war to both houses of Congress. This separation of power served to insure that the President would not become a tyrant and wage war all over the globe. After dealing with King George of England, they had a reason to be wary of an executive with too much power. War, however, is not so easily defined, and the role of the United States has changed dramatically from the late 18th century to the early 21st. Throughout most of its first hundred years, Congress had a prominent role in handling war powers. Even when the President clearly acted within his constitutional rights, as in cases of self-defense, he generally consulted Congress. Adams, Jefferson, and Madison all sought authorization from Congress to conduct defensive military operations. Even Lincoln, who expanded Presidential war powers in response to extremely desperate circumstances, constantly professed his concern with the role of Congress in justifying his actions. However, Congress was not a passive player in the contest for war powers when challenged by a strong President. After James K. Polk forced the United States into an expansionist war for Mexican territory, Congress reprimanded him and reasserted its dominance throughout the next several Presidential administrations.

The balance of war powers truly began to shift once the United States became a world power in the 20th century. With seemingly vital economic and security interests all over the world, and an increasingly powerful army and navy waiting to be used, Presidents began to act decisively to secure the world for Americans. The U.S. greatly expanded its use of limited war once its national interests were at stake. Nonetheless, although Theodore Roosevelt, Taft, and Wilson all sent troops abroad without Congress' authorization, they also acknowledged Congress' place in the war-making process. Wilson may have reluctantly pushed the U.S. into open hostilities with Germany, but he would not commit to an outright war without first securing a declaration from Congress. Likewise, Franklin Roosevelt could maneuver the United States into strongly supporting the Allies early in World War II, but he would wait for a declaration of war from Congress to fully involve the America in the fight.

The Cold War completely shifted the balance of power toward the Presidency. Truman adopted the policies of NSC 68 and created a national security state, with an enormous military-industrial complex, and a prominent role in global affairs. The struggle to

[159] Rudalevige, *The New Imperial Presidency*, p. 219.

contain communism meant more than an expanded military. It meant a new type of warfare entirely. Presidents now commonly employed covert operations to overthrow hostile governments. They demanded drastically increased appropriations for the intelligence community and Defense Department, and sent American troops all over the globe to defend U.S. interests and stop the spread of communism. By resorting to international resolutions and executive agreements (arrangements the United States had avoided for most of its history) the President began to rely on sources of authority outside of Congress. Once the Presidency assumed decisive authority in military and foreign affairs, it held onto that power even after the immediate crisis had passed. Clinton, the first post-Cold War President, relied on the same arguments President Truman used to send troops into Haiti, Bosnia, and Kosovo. The response to the September 11 attacks also meant a new definition of war. Congress granted the President enormous leeway in conducting an open-ended fight against terrorism, and has shown little inclination to assume oversight of the expanded role of the Executive.

Congress retains all the war powers it had when the Constitution was written. It has the power of the purse, the power to ratify treaties, the power of impeachment, and the power of oversight. In the modern era, Congress has only reluctantly used any of these measures to reassert itself. Doing so would require a degree of unity and purpose rarely found in the current political environment, and a willingness to accept some of the responsibility for the management of U.S. foreign policy. In dire cases, such as Vietnam, Congress has affected the outcome of a war by cutting off funding for military operations. But even after passing the War Powers Resolution, Congress has rarely questioned the President's decisions regarding war powers. The political risks are too great, and the expanded war powers of the President have become too entrenched.

Newspaper Articles

"COUP IN PAKISTAN: THE OVERVIEW; PAKISTAN ARMY SEIZES POWER HOURS AFTER PRIME MINISTER DISMISSES HIS MILITARY CHIEF"

http://www.nytimes.com/1999/10/13/world/coup-pakistan-overview-pakistan-army-seizes-power-hours-after-prime-minister.html?scp=4&sq=pakistan+coup&st=nyt

In June of 2010, President Obama fired General McChrystal, the commander of U.S. forces in Afghanistan. A decade ago in Pakistan, the Pakistani Prime Minister fired a similarly powerful general. Afterwards, Obama faced some limited public criticism. Prime Minister Sharif found himself the victim of a military takeover of the government. Pakistan did not have a strong background with democracy, and the military remained a relatively independent and powerful institution within the country. In the United States, civilian control of the military has been firmly established since the founding of the country. At times, especially during the Civil War and the Korean War, generals have resisted taking orders from the President. This has never led to any real threat of rebellion. In nations where the commitment to civilian leadership is not as firm, civilian interference in the military can mean the end of democracy.

http://www.nytimes.com/1999/10/13/opinion/dangerous-coup-in-pakistan.html?scp=2&sq=pakistan+coup&st=nyt

"Obama Says Afghan Policy Won't Change After Dismissal"

http://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html?_r=1&ref=stanley_a_mcchrystal

The article, when read alongside the article on the Pakistan coup, reveals the stark contrast between military governments and nations that have civilian control of the military. The army in Pakistan rebelled partially in response to the Prime Minister ordering an unpopular military policy. In this instance, Obama could safely fire a general who did not obey his orders without fear of any military backlash. Policy could be set by civilians advised by the military, without the threat of a military coup if that policy changed.

"The World; Only Congress Can Declare War. Really. It's True."

http://www.nytimes.com/1999/05/02/weekinreview/the-world-only-congress-can-declare-war-really-it-s-true.html?scp=4&sq=%22war+powers+resolution%22&st=nyt

This article highlights some of the problems with involving Congress in the war making process, and the troubles plaguing the legislature in regards to war powers. Despite passing the War Powers Resolution, Congress failed to effectively enforce it during the Kosovo bombings in the late 1990s. It demanded to be consulted by the President, but passed contradictory resolutions regarding the air campaign. Congress is faced with the dilemma of not wanting to surrender its war powers, while also not wanting any of the political backlash associated with contradicting the commander in chief during war time. The article outlines some of the major conflicts in the late 20th century as examples of how, once a President commits troops to a situation that turns hostile, Congress is left with little choice but to support the President.

"CONFRONTATION IN THE GULF; CONGRESS ACTS TO AUTHORIZE WAR IN GULF; MARGINS ARE 5 VOTES IN SENATE, 67 IN HOUSE"

http://www.nytimes.com/1991/01/13/world/confrontation-gulf-congress-acts-authorize-war-gulf-margins-are-5-votes-senate.html?scp=5&sq=authorization+for+use+of+military+force&st=nyt

This article outlines the close vote in Congress that passed the Authorization for Use of Military Force against Iraq Resolution in 1991. This was also the first time since the Gulf of Tonkin Resolution that Congress approved offensive military action, though this debate took up more time and was much closer than during the Vietnam War. The House also passed a resolution declaring "Congress's exclusive constitutional authority to declare war." President Bush only requested the resolution from Congress due to strong political pressure from the

legislature, and the House wanted to remind the President of Congress' role in declaring war. The debate revealed the dilemma Congress finds itself in today. By passing the Resolution, it reasserts its authority in foreign policy. However, it also takes on a share of the political burden of the war, a difficult choice in a highly political body.

"BUSH MAY REQUEST CONGRESS'S BACKING ON IRAQ, AIDES SAY"

http://www.nytimes.com/2002/08/29/world/bush-may-request-congress-s-backing-on-iraq-aides-say.html?scp=25&sq=authorization+for+use+of+military+force&st=nyt

This article covers the debate within the Bush administration as to whether or not so seek Congressional and United Nations support for the war against Iraq. President Bush believed that he already had the authority to invade Iraq, either from the commander in chief clause in the Constitution or from the Gulf War authorization, but still wanted Congress to sign off. Legal scholars in the article noted that Congress had only declared war five times, while U.S. forces have been sent abroad nearly 200 times. Congress might insist on being consulted for a large-scale invasion, but President Bush did not believe Congress necessarily had that right.

"AFTER THE ATTACKS: NEWS ANALYSIS; No Middle Ground"

http://www.nytimes.com/2001/09/14/us/after-the-attacks-news-analysis-no-middle-ground.html?scp=11&sq=authorization+for+use+of+military+force&st=nyt

In this article, President Bush and his advisors outline the global war on terrorism. The author notes that the open-ended conflict could involve fighting in dozens of countries over the world against a shadowy enemy with no centralized power base. The article also discusses how Bush questioned the constitutionality of the War Powers Act, but was prepared to go to Congress for broad authority to conduct the war on terror. Many previous Presidents had debated how to involve Congress without sacrificing executive authority, and Bush sought extremely broad authorization from Congress while denying he constitutionally needed their support.

"Bush Can Use Defense Budget for War"

http://www.scoop.co.nz/stories/HL0711/S00250.htm

The 2008 Defense Appropriations Act showcases the difficulty Congress has in cutting off funding for wars under the current appropriations system. In the past, Congress has maintained some leverage over the President by threatening to cut off funding for wars or military operations it does not approve of. In the 2008 budget, hundreds of billions of dollars allocated for defense could be used to also fund wars in Afghanistan and Iraq. If Congress had passed a specific war funding bill, it might include conditions under which the funds could be spent, or a timeline for troop withdrawal. The general defense fund has no such limitations attached. The decision not to limit war spending shows some of the political difficulties Congress faces in allocating defense spending. Although Congress has the Constitutional authority to cut off spending, in reality it would need to overcome a two thirds

majority to overcome a Presidential veto, and also risk appearing politically weak by abandoning U.S. forces. The modern appropriations system severely limits the power of the purse that the framers of the Constitution envisioned Congress controlling.

"US official: CIA runs elite Afghan fighting force."

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Shortly after the U.S. invasion of Afghanistan in 2002, the CIA began training a 3000-man Afghan force in order to hunt insurgent Taliban and al-Qaeda fighters in both Afghanistan and Pakistan. These units, combined with U.S. special forces and predator drones, routinely operate and carry out missions inside Pakistan, a U.S. ally in the fight against terrorism. Despite being controlled and run by the CIA and coordinated with NATO, these paramilitary teams are subject to Afghan, rather than American review. Such tactics have been used throughout the CIA's history, and provide a way for the President to avoid asking Congress for permission to conduct hostile operations in foreign countries.

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