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Presidential Interpretation and War Powers

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Scholars pay much attention to the power,³ or powers,⁴ of the president, especially in regards to the extent of the expressed powers that come with the office. However, less attention is given to one of the president's most powerful tools—the power of constitutional interpretation.⁵ This may be because legal scholars have internalized Chief Justice John Marshall's claim that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁶ However, the power of interpretation is not exclusive to the judicial branch, in fact, both the president and Congress have an implied power of interpretation inherent in their constitutional functions. For the president, being able to interpret the laws is essential to being able to enforce them.⁷

While Chief Justice Marshall indicates exclusivity for the judicial branch's role, a problem has arisen regarding presidential war powers. This problem, which originated during the Cold War and is perhaps most

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³ RICHARD NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 4 (1991).

⁴ KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXEC. ORDS. AND PRESIDENTIAL POWER* 4-11 (2002).; MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXEC. POWER UNDER THE CONST.* 95-119 (2020).

⁵ To be clear, we advocate for presidential constitutional interpretation to be considered a presidential *power*, not merely a norm or a right.

⁶ Nicholas Mosvick, *Marbury v. Madison and the Independent Supreme Court*, CONST. CTR. (Feb. 24, 2022), <https://constitutioncenter.org/interactive-constitution/blog/marbury-v-madison-and-the-independent-supreme-court>; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷ Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35, 36 (1993).

famously illustrated specifically during the Vietnam War,⁸ is that “...the Supreme Court—has generally betrayed for over seven decades its responsibilities to hold the executive meaningfully accountable in cases the executive claims implicates national security,”⁹ thus leaving the “debate entirely to the political process.”¹⁰

Relegating war powers to a political question has consequences. Judge Frank Easterbrook argues that the meaning of various language and wording can be very difficult and problematic to discern, especially within a legal context.¹¹ Further, Easterbrook writes that “without a settled way of deriving meaning for an enactment, meaning lies in the selection of a rule. The rule selection process is discretionary. Discretion belongs to judges. And discretion is power. . .”¹² But because courts defer to presidential power in questions of war, the executive has wide discretion to push broad readings in its favor without a serious threat of judicial intervention. Judicial deference further allows presidential discretion due to the nature of the political branches, where “the executive branch has a much easier time agreeing and acting on a unified view of its powers than the legislative branch, which is divided into two houses and pulled apart by partisan fissures and competing committees.”¹³

Presidential constitutional and statutory interpretation—coupled with judicial inaction and a lack of active congressional oversight—has allowed presidential war powers to grow tremendously in the post-9/11 era.

⁸ Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 Washburn L.J. 275, 275 (1994).

⁹ DAVID RUDENSTINE, *THE AGE OF DEFERENCE: THE SUPREME COURT, NAT’L SEC., AND THE CONST. ORD.* 1, 3 (2016).

¹⁰ Steve Vladeck, *The Courts Don’t Even Try to Settle Fights About War Powers Anymore*, WASHINGTON POST (Jan. 15, 2020), <https://www.washingtonpost.com/outlook/2020/01/15/courts-dont-even-try-settle-fights-about-war-powers-anymore/>.

¹¹ Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL’Y 87, 89 (1984).

¹² *Id.* at 91.

¹³ Matthew Waxman, *War Powers Oversight, Not Reform*, WAR ON THE ROCKS (Nov. 19, 2019), <https://warontherocks.com/2019/11/war-powers-oversight-not-reform/>.

Presidents have been able to strengthen their war powers by constructing broad readings of relevant laws, including both post-9/11 Authorizations of Military Force (AUMFs) and the related interpretations of presidential constitutional authorities.¹⁴ The immediate aftermath of 9/11 saw the passage of the 2001 and 2002 AUMFs, respectively targeting Al Qaeda and the Saddam Hussein regime in Iraq.¹⁵ The passage of the new AUMFs, coupled with the already existing 1973 War Powers Resolution,¹⁶ created a complicated legal web that has since become a prime target for broad interpretation.¹⁷ The broad language and vague restrictions in each of the laws has in practice allowed Presidents to circumvent the constitutional safeguards meant to require congressional approval for usage of the armed forces.

From President Obama's military operation in Libya in 2011,¹⁸ to the war against the Islamic State, to President Trump's strike against Iranian General Qassem Soleimani,¹⁹ presidents of both parties have used obscure or vague language within existing legal frameworks to argue their military operations or usages of force required no prior congressional authorization. Harvard Law Professor, and co-founder of *Lawfare*, Jack Goldsmith, in the

¹⁴ Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628, 629 (2016).

¹⁵ Authorization for Use of Military Force, S.J. Res 23, 107th Cong. (2001); Authorization for Use of Military Force, H.J. Res. 114, 107th Cong. (2002)

¹⁶ The War Powers Resolution is designed to "... fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations." War Powers Resolution 50 U.S.C. §1541.

¹⁷ Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRES. STUD. QUART. 176, 181-182, (2012). Fisher offers a specific example of how the Obama administration used broad readings of the War Powers Resolution to justify military operations in Libya without congressional approval. *Id.*

¹⁸ *Id.*

¹⁹ Anna Holyan & Tobias T. Gibson, *Under Fire: Targeted Killing, UAVs, and Three American Presidents*, in CONTEXTUALIZING SECURITY: A READER, 119, 130-132, (Tobias T. Gibson & Kurt W. Jefferson, eds.), (forthcoming in Aug, 2022).

aftermath of Trump's strike against Soleimani, describes the alarming state of war powers in the United States as a system where "one person decides."²⁰ Such a system is precisely the kind that the framers of the Constitution were trying to avoid.²¹

Presidents should have a limited power of interpretation to effectively perform their duty as an executive. However, for Congress to limit the president in taking unilateral military action, it must start by addressing the existing legal framework that has allowed presidents to do so. Given the problems with the subjectivity of legal language, even if Congress is to be extra careful in the wording of legislation, there may still be instances of interpretative disagreement. While "nothing can truly prevent constitutional drift and interpretational errors... specificity generally makes it harder for readers to inadvertently or willfully misconstrue legal documents."²² Such specificity would at least signal a small step forward in what has largely been a losing constitutional battle for Congress.²³

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²⁰ Jack Goldsmith, *The Soleimani Strike: One Person Decides*, LAWFARE (Jan. 3, 2020), <https://www.lawfareblog.com/soleimani-strike-one-person-decides>.

²¹ THE FEDERALIST NO. 69 (Alexander Hamilton).

²² SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS*, 67 (2020).

²³ Matthew R. Trout, *What the situation in Ukraine can teach us about constitutional war powers at home*, COLUMBIA MISSOURIAN (Apr. 20, 2022), https://www.columbiamissourian.com/opinion/guest_commentaries/what-the-situation-in-ukraine-can-teach-us-about-constitutional-war-powers-at-home/article_5f55c8c4-c00f-11ec-bb6c-af2e93afc5d1.html.

