

Saint Louis University Public Law Review

Volume 19
Number 1 *Congress: Does It Abdicate Its
Power? (Vol. XIX, No. 1)*

Article 4

2000

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Recommended Citation

Fisher, Louis (2000) "War and Spending Prerogatives: Stages of Congressional Abdication," *Saint Louis University Public Law Review*: Vol. 19 : No. 1 , Article 4.

Available at: <https://scholarship.law.slu.edu/plr/vol19/iss1/4>

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WAR AND SPENDING PREROGATIVES: STAGES OF CONGRESSIONAL ABDICATION

LOUIS FISHER*

From 1789 to World War II, the power to make war and decide spending priorities remained essentially where the framers placed it: with Congress. Since 1950, both powers have moved toward the President, slowly at first but more rapidly in recent decades. The War Powers Resolution of 1973 and the Congressional Budget and Impoundment Control Act of 1974 were billed as efforts by Congress to recapture its place as a coequal branch. Yet the War Powers Resolution marked an abject surrender of legislative prerogatives to the President, and the budget reform statute of 1974 played into the hands of Presidents and undermined Congress as a representative institution. So swift has been this transformation that it threatens core values of democracy and self-government.

The record of abdication of war powers has been particularly blatant. There should be little doubt about the precipitous decline of Congress in this area. The scope of abdication of spending powers has been less, but any loss of power so identified with Congress merits concern and attention. Whatever differences one might have on these patterns of abdication, one fact seems indisputable. The framers' belief that each branch would protect its prerogatives and give energy to the system of checks and balances has failed spectacularly since 1950. Faced with executive encroachment, Congress does not protect its institutional powers. It also voluntarily gives them away.

Why should citizens care about this institutional decline? If Congress wants to play second fiddle to the President, why offer any objection? The reason is that larger interests are at stake. Rights and liberties are protected by structural safeguards and the full play of checks and balances, not just by an independent judiciary. What we are witnessing, therefore, is a fundamental failure of our

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constitutional system, a failure that necessarily jeopardizes individual rights along with legislative prerogatives.

These trends should not be confused with the quite different issue of delegation. From the First Congress to the present, lawmakers have found it necessary to transfer to the executive branch discretionary authority over spending, tariffs, economic regulation, and other national powers. From the start, legislation by Congress has always depended on other branches to “fill up the details.”¹ Abdication—transferring to others what belongs to you—is a unique category with profound constitutional implications.

I. WHAT THE FRAMERS EXPECTED

In creating three separate branches, the framers expected that each branch would have the incentive to protect its prerogatives and fight off invasions from other branches. In Federalist No. 51, James Madison argued that the secret to avoiding a concentration of power in a single branch was “in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counter ambition.”² Madison knew that it was not enough to simply create three separate branches of government on paper. At the state level, despite language in the state constitutions carefully allocating power, legislatures had already begun to take power from the governor and the courts.³ Constitutional language in the states represented mere “parchment barriers.”⁴

Madison concluded from this experience that separation of power would never survive unless there were “auxiliary precautions.”⁵ It was his goal to give to each branch “the means of keeping each other in the proper places.”⁶ Instead of an impracticable separation of power, he turned to an elaborate system of checks and balances to keep the branches strong and independent.

Of the powers assigned to Congress, nothing was more fundamental than the power of the purse and the power to initiate war. In Federalist No. 58, Madison called the power of the purse “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”⁷ Joseph Story, who served on the Supreme Court from 1811 to 1845, said that the power of declaring war “is not only the highest sovereign prerogative; . . . it is in its own nature and effects so critical and calamitous, that

1. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

2. THE FEDERALIST No. 51, at 356 (James Madison) (B. Wright ed., 1961).

3. Record by James Madison (July 17, 1887), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 25, 35 (Max Farrand ed., 1937) [hereinafter Farrand].

4. THE FEDERALIST, *supra* note 2, No. 48, at 343.

5. THE FEDERALIST, *supra* note 2, No. 51, at 361.

6. *Id.* at 355.

7. THE FEDERALIST, *supra* note 2, No. 58, at 391.

it requires the utmost deliberation, and the successive review of all the councils of the nations.”⁸ By insisting on legislative control over the decision to go to war, the framers broke ranks with the models of government developed by John Locke and William Blackstone, who advocated executive control over foreign policy and decisions of war and peace.⁹

At the Philadelphia Convention, the framers were explicit about rejecting Locke and Blackstone. Charles Pinckney said he was for “a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one.”¹⁰ James Wilson agreed that “the Prerogatives of the British Monarch” were not a proper guide for the American Presidency.¹¹ To George Mason, the whole purpose of vesting the war power in Congress and requiring legislative deliberation was “for clogging rather than facilitating war.”¹² As Wilson explained at the Pennsylvania ratifying convention, the system of checks and balances “will not hurry us into war; it is calculated to guard against. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.”¹³

Through the granting of letters of marque and reprisal, monarchs were able to authorize private citizens to wage war on other countries. This method came to refer to any use of force short of a declared war. Unlike Blackstone, who recognized that the king had the power to issue letters of marque and reprisal, the framers transferred that responsibility to Congress and associated it with the power to declare war. Thus, Article I gives to Congress the power to “declare war, grant letters of Marque and Reprisal, and make rules concerning Captures on Land and Water.” Both general and limited wars were left to the discretion of the representative branch.

In 1793, Secretary of State Thomas Jefferson related marque and reprisal to the power to wage war. The making of a reprisal on a nation, he said, “is a very serious thing . . . when reprisal follows, it is considered an act of war, & never yet failed to produce it in the case of a nation able to make war.”¹⁴ If it became

8. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 60 (1833).

9. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 146-48 (Thomas P. Pearson ed., Bobbs-Merrill 1952) (1690); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 250-59 (1803).

10. Record by James Madison (June 1, 1787), in 1 Farrand, *supra* note 3, at 64-5.

11. *Id.* at 65-66.

12. Record by James Madison (Aug. 17, 1787), in 2 Farrand, *supra* note 3, at 314, 319.

13. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836-45).

14. Thomas Jefferson, Opinion on “The Little Sarah” (May 16, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON 257, 259 (Paul Leicester Ford ed., 1895).

necessary to invoke this power, “Congress must be called on to take it; the right of reprisal being expressly lodged with them by the constitution, & not with the executive.”¹⁵

During the Quasi War against France, from 1798 to 1800, Congress authorized private citizens to provide vessels and other military assistance. Alexander Hamilton, always protective of executive power, recognized that the Constitution vested in Congress exclusive power over reprisals.¹⁶ In the midst of hostilities, the President could repel force by force, but any actions beyond those measures “must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war.”¹⁷

Questions about framers’ intent invariably cause scholars to scatter and divide. Not so with the war power. There is remarkable agreement among experts on the war power that the framers vested in Congress the sole power to initiate hostilities against other nations. Taylor Reveley wrote that if you could ask a man in the state of nature to read the war-power provisions in the Constitution and compare them to war-power practices after 1789, “he would marvel at how much Presidents have spun out of so little. On its face, the text tilts decisively toward Congress.”¹⁸ To Charles Lofgren, the grants of power to Congress to declare war and to issue letters of marque and reprisal “likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war.”¹⁹ John Hart Ely noted that when academics try to divine the “original understanding” of the Constitution, the results can be “obscure to the point of inscrutability.”²⁰ But when the focus turns on the war power, the issue isn’t that complicated. All wars, big or small, declared or undeclared, “had to be legislatively authorized.”²¹ David Gray Adler concludes that the Constitution “makes Congress the sole and exclusive repository of the ultimate foreign relations power—the authority to initiate war.”²²

The major exception to these studies is an article written in 1996 by John Yoo, who argues that the framers designed a system that encouraged presidential

15. *Id.*

16. Letter from Alexander Hamilton to James McHenry (May 16, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 461, 461-62 (Harold C. Syrett ed., 1974) (emphasis in original).

17. *Id.*

18. W. TAYLOR REVELEY, III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCHES? 29 (1981)

19. CHARLES A. LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 36 (1986).

20. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993).

21. *Id.*

22. David Gray Adler, *Court, Constitution, and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19 (David Gray Adler & Larry N. George eds., 1996).

initiatives in war.²³ Yoo never distinguishes between the President's legitimate *defensive* powers and the legislative decision to initiate *offensive* actions against other nations. Taking the United States from a state of peace to a state of war was a prerogative assigned exclusively to Congress. Yoo makes no mention of the statements by President Washington, Secretary of War John Knox, President Jefferson, President Monroe, and other executive leaders who recognized that Presidents are limited to defensive actions.²⁴

In *The Prize Cases* of 1863, Justice Grier spoke clearly about the President's authority to conduct defensive but not offensive actions. The President "has no power to initiate or declare a war either against a foreign nation or a domestic State."²⁵ Richard Henry Dana, Jr., representing the executive branch, agreed that the actions by President Lincoln during the Civil War had nothing to do with "the right to *initiate a war, as a voluntary act of sovereignty*. That is vested solely in Congress."²⁶

According to Yoo, the Constitution's provisions on the war power did not break with British precedents, "but instead followed in their footsteps."²⁷ He concludes that "the war powers provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers."²⁸ That position is contradicted not only by statements made at the Philadelphia Convention and state ratifying conventions but by express language placed in Articles I and II of the Constitution. Blackstone assigned these powers exclusively to the Executive: powers over war and peace, treaty-making, appointing ambassadors, issuing letters of marque and reprisal, raising armies and navies, and controlling foreign commerce.²⁹ Those powers are either given expressly to Congress or shared between the President and the Senate. The framers largely repudiated the notion of executive prerogative in foreign affairs.³⁰

23. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996).

24. LOUIS FISHER, PRESIDENTIAL WAR POWER 13-69 (1995). See also Letter from Henry Knox to Governor Blount (Oct. 9, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 194, 195 (Clarence Edwin Carter ed., 1936); Letter from Henry Knox to Governor Blount (Nov. 22, 1792), *supra* at 220-21; Letter from Henry Knox to Governor Blount (March 23, 1795), *supra* at 386-87; George Washington, Letter to Governor William Moultrie (Aug. 28, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON 72, 73 (John C. Fitzpatrick ed., 1940).

25. *The Prize Cases*, 67 U.S. (2 Black) 635, 639 (1863).

26. *Id.* at 669 (emphasis in original).

27. Yoo, *supra* note 23, at 197.

28. *Id.* at 242.

29. 1 WILLIAM BLACKSTONE, COMMENTARIES, *240, *252-53, *256-58, *262 (1803).

30. For further analysis of Yoo's position, see Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1658-68 (2000).

II. IMPLEMENTING THE FRAMERS' MODEL

There is a reasonably close fit, from 1789 to 1950, between what the framers expected and what was actually carried out. Throughout that period, Congress was fairly consistent in protecting its war and spending powers. For all of the major military actions, Congress either declared war or authorized war. Declarations were used for the War of 1812 against England, the War of 1846 against Mexico, the Spanish-American War of 1898, and both world wars. Authorizations were used for the Indian wars, the Whiskey rebellion, the Quasi War against France from 1798 to 1800, and the Barbary Wars during the Jefferson and Madison administrations.³¹

In the exercise of the spending power, Congress functioned with confidence as the repository of the power of the purse. Of course criticism has always been directed at Congress, but legislators kept close tabs on the spending of money by the executive branch and never seriously entertained the idea of vesting in the President an item-veto authority.

A. War Powers

Presidents recognized that their powers over war were restricted to defensive operations. President George Washington and his Secretary of War, Henry Knox, confined military actions against hostile Indian forces to defensive measures. Anything of an offensive nature was a matter for Congress to decide.³² For domestic insurrections, like the Whiskey Rebellion of 1794, Washington carefully followed the statutory procedures set forth by Congress, including a novel requirement that an Associate Justice of the Supreme Court or a federal district judge would have to first notify the President that the ordinary governmental institutions within a state were unable to meet the danger.³³

When it came to mounting a military campaign against France in 1798, President John Adams never pretended that he had any express or inherent authority to act alone. He knew he had to come to Congress to explain the situation and request statutory authority.³⁴ President Thomas Jefferson was willing to take certain defensive actions against the Barbary pirates, but acknowledged that he was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.” It was up to Congress to authorize “measures of offence also.”³⁵ In 1805, President Jefferson advised

31. FISHER, PRESIDENTIAL WAR POWER, *supra* note 24, at 13-28.

32. 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 195, 220-21, 387 (Clarence Edwin Carter ed. 1936); 33 THE WRITINGS OF GEORGE WASHINGTON 73.

33. 1 Stat. 264, sec. 2 (1792); 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 150-52 (James D. Richardson ed., 1897-1925) (hereafter Richardson); HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 43-45 (1937).

34. 1 Stat. 547-611 (1798).

35. 1 Richardson 315.

Congress about a serious situation with Spain, carefully noting: “Congress alone is constitutionally invested with the power of changing our condition from peace to war.”³⁶

This pattern of deference to Congress could be broken, as it was, by Presidents like James Polk who moved U.S. troops into disputed territory and provoked a military clash. Still, Polk never believed that he could go to war against Mexico on his own authority. He knew he had to come to Congress, explain the situation, and depend on Congress to issue a declaration of war by recognizing that “a state of war exists.”³⁷

President Abraham Lincoln exercised a number of extraordinary powers while Congress was out of session, claiming that his actions in the midst of a civil war were forced upon him. Lincoln, however, never argued that he had full constitutional authority to act as he did. When Congress returned, he explained that his actions, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.”³⁸ In passing legislation to bless retroactively what Lincoln had done, lawmakers acted on the explicit assumption that his actions were illegal.³⁹ Furthermore, Lincoln justified his actions partly on statutes enacted in 1795 and 1807 that authorized the President to suppress insurrections.⁴⁰

A recent study on judicial cases affecting the war power concludes that courts are reluctant to rule on these matters but “when they are forced to rule, they usually uphold presidential action.”⁴¹ An earlier study claimed that the Supreme Court, before World War I, generally refused to decide war power disputes.⁴² Those statements misinterpret the record of judicial rulings. From the outset, court decisions restricted presidential power and recognized that the war making power resides in Congress.

In 1800, the Supreme Court acknowledged that Congress can either declare war or authorize it, as it had done with the Quasi War.⁴³ A year later, Chief Justice John Marshall said that “the whole powers of war” are vested in Congress.⁴⁴ In an 1804 case, Marshall was asked whether President Adams could issue a proclamation during the Quasi War that exceeded the statutory

36. *Annals of Cong.*, 9th Cong., 1st Sess. 19 (1805).

37. 9 Stat. 9 (1846); FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 24, at 29-34.

38. 7 Richardson 3225.

39. *Cong. Globe*, 37th Cong., 1st Sess. 393 (1861) (Senator Howe); 12 Stat. 326 (1861).

40. *The Prize Cases*, 67 U.S. at 668.

41. MARTIN S. SHEFFER, *THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS* x-xi (1999).

42. CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918*, at vii, 1, 16 (1989).

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

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

boundaries set forth by Congress.⁴⁵ The answer was a flat No.⁴⁶ When Congress passes a law establishing national policy for military operations, the President must execute statutory policy, not independent and inconsistent executive initiatives.⁴⁷

In 1806, in a case involving the Neutrality Act, a circuit court again rejected the notion that the President could exercise war powers independent of and in conflict with legislative policy.⁴⁸ Executive officials, including the President, could not waive statutory policy: “if a private individual, even with the knowledge and approbation of this high and preeminent officer of our government [the President], should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law?”⁴⁹ The court asked and answered its own question: “Does [the President] possess the power of making war? That power is exclusively vested in congress.” It was “the exclusive province of congress to change a state of peace into a state of war.”⁵⁰ As already mentioned, precisely the same statement was made by Justice Grier and Richard Henry Dana, Jr. in *The Prize Cases*.⁵¹

On a number of occasions Presidents used military force without seeking the authority of Congress. These so-called “life and property actions” number about two hundred, but they are generally modest in scope and limited in duration.⁵² They are in no sense a precedent for some of the presidential actions after World War II, including President Truman taking the nation to war against North Korea in 1950, President Bush claiming in 1990 that he could go to war against Iraq without congressional authority, and the repeated uses of military force by President Clinton in Bosnia, Yugoslavia, Iraq, and other countries. Moreover, many of those operations, involving repeated U.S. interventions into Central America and the Caribbean, would be condemned today both under the non-intervention policy of the Organization of American States (OAS) and Article 2(4) of the UN Charter, which proscribes “the threat or use of force against the territorial integrity or political independence of any state.”

B. *Spending Powers*

The power of the purse remained largely in the hands of Congress from 1789 to 1950. Through its creation of standing committees, Congress exercised close control over appropriations and revenues. Throughout the nineteenth century,

45. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804).

46. *Id.*

47. *Id.*

48. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 19, 342).

49. *Id.* at 1230.

50. *Id.*

51. *See supra* notes 25 & 26 and accompanying text.

52. Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad, 1798-1998*, Congressional Research Service Report No. 98-881 F (1998).

Congress monitored with great care any discretionary spending power it extended to executive officials. Subject to statutory guidelines, Presidents and executive officials were allowed to move funds from one appropriations account to another account (transfers between accounts) or from one fiscal year to the next (transfers between years). Congress tightened these statutory limits whenever it decided to exercise closer control.⁵³

In the years following the Civil War, Congress came in for heavy criticism for its handling of pension legislation and rivers and harbors bills. In the popular press, some Presidents gained a reputation as the guardian of the Treasury. President Chester A. Arthur vetoed a rivers and harbors bill in 1882 because he thought the spending level was excessive. Although the veto was overridden, a cartoon by Thomas Nast shows Arthur, armed with a rifle, watching an oversized vulture perched on the Capitol consume his veto message. At the bottom of the cartoon are these words of encouragement: "President Arthur, hit him again! Don't let the vulture become our national bird."⁵⁴ President Grover Cleveland vetoed hundreds of private and general pension bills designed to reward, in his mind, undeserving claimants. Another Thomas Nast cartoon captures the President exercising his role as protector of the purse. Cleveland manfully blocks the door to the U.S. Treasury while thwarted pension agents slink from his presence.⁵⁵

At the end of the nineteenth century, a succession of budget deficits triggered pressure for reform. Proposals to shift budgetary prerogatives from Congress to the President, by adopting a British parliamentary system, were regularly rejected by lawmakers. Executive officials, private citizens, and even members of Congress recommended that Congress be prohibited from appropriating money unless it had been requested by the head of a department, Congress could muster a two-third majority, or the funds were needed to pay a claim against the government or for routine departmental expenses.⁵⁶ Congress considered these proposals with great care and rejected them all. "Uncle Joe" Cannon, Speaker of the House from 1903 to 1911, warned in 1919 that an executive budget along the lines of the British parliamentary system would signify the surrender of the most important element of representative government: "I think we had better stick pretty close to the Constitution with its division of powers well defined and the taxing power close to the people."⁵⁷

53. LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 99-104, 123-127 (1975).

54. *Harper's Weekly*, Aug. 12, 1882, at 497.

55. *Harper's Weekly*, July 3, 1886, at 421.

56. John J. Fitzgerald, *Budget Systems*, *Municipal Research*, No. 62 (June 1915), at 312, 322, 327, 340; Charles Wallace Collins, *Constitutional Aspects of a National Budget System*, 25 *YALE L.J.* 376, 382-83 (1916); H.R. Doc. No. 65-1006 (1918); Annual Report of the Secretary of the Treasury, 1918-19, at 121 (from his testimony of October 4, 1919, to the House Committee on the Budget); DAVID HOUSTON, *EIGHT YEARS WITH WILSON'S CABINET* 88 (1926).

57. JOSEPH G. CANNON, *THE NATIONAL BUDGET*, H.R. DOC. NO. 66-264, at 28-29 (1919).

In passing the Budget and Accounting Act of 1921, Congress provided for an executive budget in the sense that the President would submit a budget and be responsible for the estimates in it. Thereafter it became a legislative budget, with Congress retaining full power to increase or reduce the President's estimates. Increases could be made in committee or on the floor, and in either place by simple majority vote. The act did not contemplate in any fashion the surrender of congressional prerogatives. It did not make Congress subordinate to the President's plan, which was merely a starting-point for legislative consideration.⁵⁸

C. *Slippage in the 1930s*

Although large-scale legislative abdication did not occur until after World War II, there were troublesome signs in the 1930s about Congress's capacity to conduct itself as a coequal branch. One area was tariff policy. Throughout the nineteenth century, Congress had delegated to the President a number of discretionary powers over tariffs, including the power to impose embargoes, suspend duty-free arrangements, and administer a set of flexible tariffs.⁵⁹ However, so discredited was the Smoot-Hawley Tariff Act of 1930, which put members of Congress on public display as enacting high tariffs to satisfy the needs of lobbyists, that Congress decided to shift power to the executive branch. In 1934, Congress passed the Reciprocal Trade Act, which authorized the President to adjust duties by up to 50 percent by entering into reciprocal agreements with other nations.⁶⁰ This legislation was more than a standard delegation. It marked an early stage of abdication because Congress acted out of institutional embarrassment and self-doubt.

A similar pattern appears in the decision of Congress in the 1930s to shift to the President new powers to reorganize executive agencies. Instead of the President coming to Congress with a reorganization proposal, which could be ignored or substantially amended by legislators, the President received authority to submit a reorganization plan subject to legislative review for a period of 60 days. Unless either House disapproved within that period of time, the plan would become law.⁶¹ Thus, the President could make new law without Congress. In delegating this extraordinary authority, lawmakers were clearly disillusioned by their inability to enact legislation in the face of strong interest groups. The prevailing congressional sentiment is expressed by Senator David Reed (R-Pa.):

58. H.R. REP. NO. 67-14, at 6-7 (1921).

59. LOUIS FISHER, *PRESIDENT AND CONGRESS* 133-144 (1972).

60. See RAYMOND P. BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY* 37 (1963); FISHER, *PRESIDENT AND CONGRESS*, *supra* note 59, at 133-144 (1972).

61. See generally, 47 Stat. 413-15, Title IV (1932).

Mr. President, I do not often envy other countries their governments, but I say that if this country ever needed a Mussolini it needs one now. I am not proposing that we make Mr. Hoover our Mussolini, I am not proposing that we should abdicate our authority that is in us, but if we are to get economies made they have to be made by some one who has the power to make the order and stand by it. Leave it to Congress and we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere.⁶²

One other development in the 1930s deserves mention: the Supreme Court's decision in *United States v. Curtiss-Wright Corp.*⁶³ The Court was asked to determine the constitutionality of a statute that empowered the President to declare an arms embargo in South America whenever he decided it might contribute to peace among the belligerents. The issue was whether *Congress* could delegate *its* power to the President. No one claimed an independent power of the President to act.

Nevertheless, the author of the decision, Justice George Sutherland, went beyond the specific issue at hand and indulged in dicta to magnify presidential power. First, he argued that foreign and domestic affairs are different "both in respect of their origin and their nature" because the powers of external sovereignty "passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."⁶⁴ A number of scholars have discredited this analysis.⁶⁵ The power of external sovereignty did not bypass the colonies, or states, and go directly to the President. The Constitution allocates the power of external sovereignty to both Congress and the President.

Sutherland claimed that legislation over the international field must often accord to the President "a degree of discretion and freedom from statutory restrictions which would not be admissible were domestic affairs alone involved."⁶⁶ Note the jump. Sutherland goes from statutory grants of power from Congress to the President, as with the arms embargo, to "freedom from statutory restrictions." Through this analysis, the President had gained the ability to operate on his own, unrestricted by Congress. Sutherland reaches this result by identifying the "very delicate, plenary and exclusive power of the President to as the sole organ of the federal government in the field of international relations."⁶⁷

62. 75 CONG. REC. 9644 (1932).

63. 299 U.S. 304 (1936).

64. *Id.* at 315.

65. Charles Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Assessment*, 83 YALE L.J. 1 (1973); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

66. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 320.

67. *Id.*

The phrase “sole organ” comes from a famous speech by John Marshall in 1800 when he served in the House of Representatives. However, Marshall never argued that the President was the “sole organ” in *making* national policy, which requires joint action by the President and Congress. Only after Congress has enacted a law, or after the Senate has approved a treaty, did the President become the “sole organ” in *implementing* national policy.⁶⁸ Despite these misconceptions and misreadings of history, Sutherland’s opinion is cited widely by the courts and academics to support not only broad delegations of legislative power to the President but also the existence of independent, implied, and inherent powers for the President.⁶⁹

III. UNRAVELING OF THE WAR POWER

In 1950, President Truman singlehandedly intervened in Korea without ever seeking authority from Congress. For the first time, a President had invoked independent power to initiate a major war. Members of Congress groused a bit but never took any tangible steps to protect their prerogatives. Truman offered two basic legal arguments: he engaged in a “police action,” not a war, and he operated under the “aegis” of a resolution passed by the UN Security Council. Neither argument survives scrutiny, but using a Security Council resolution as a substitute for a congressional statute established an important precedent. In 1990, President Bush claimed he could wage war against Iraq on the basis of a Security Council resolution. Similarly, President Clinton initiated military actions in Haiti and Bosnia and continued air strikes against Iraq by referring to “authority” in UN resolutions.

A. *The UN Charter*

Truman’s use of a Security Council resolution to justify military intervention in Korea has no support under the text and legislative history of the UN Charter. In the drafting of the Charter, procedures were developed to permit the UN to employ military force to deal with threats to peace, breaches of the peace, and acts of aggression. All UN members would make available to the Security Council, “on its call and in accordance with a special agreement,” armed forces and other assistance for the purpose of maintaining international peace and security. The special agreements reached between the Security Council and

68. Annals of Cong., 6th Cong. 613-14 (1800).

69. Delegation: *Ex parte Endo*, 323 U.S. 283, 298 n.21 (1944); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979). Inherent powers: *United States v. Pink*, 315 U.S. 203, 229 (1942); *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *United States v. Mazurie*, 419 U.S. 544, 566-67 (1975); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).

member states “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.”⁷⁰

The meaning of “constitutional processes” varied from country to country and had to be decided by their governments. During Senate debate on the UN Charter, President Truman sent a cable from Potsdam stating that all agreements involving U.S. troop commitments to the UN would first have to be approved by both Houses of Congress. He made this unequivocal pledge: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”⁷¹ Backed by this assurance, the Senate supported the UN Charter by a vote of 89 to two.⁷²

The statutory definition of “constitutional processes” for the United States is set forth in the UN Participation Act of 1945. Without the slightest ambiguity, Section 6 of the statute provides that the agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”⁷³ The legislative history of this statute is replete with assurances from Under Secretary of State Dean Acheson that only after the President received the approval of Congress could he offer U.S. troops to the Security Council.⁷⁴

The limits of presidential power to use armed forces under UN actions are clarified and reinforced by a statutory amendment in 1949, allowing the President on his own initiative to provide military forces to the UN for “cooperative action.” However, executive power is tightly constrained. These forces may serve only as observers and guards, may perform only in a noncombatant capacity, and may not exceed one thousand.⁷⁵

B. *Mutual Security Treaties*

It was during the time of the UN Charter and the UN Participation Act that Presidents gained access to another potential expansion of executive power: mutual security treaties. President Clinton would rely on NATO for “authority” to conduct air strikes in Bosnia and Yugoslavia, but the text and the legislative history of these treaties offer no legal support for his actions. Like the UN Charter, the Senate understood these treaties in more limited terms and the President pushed his powers to the maximum.

The NATO treaty of 1949 provides that an armed attack against one or more of the parties in Europe or North America “shall be considered an attack against

70. U.N. Charter art. 43, para 3.

71. 91 CONG. REC. 8185 (1945).

72. *Id.* at 8190.

73. 59 Stat. 621, sec. 6 (1945).

74. *Participation by the United States in the United Nations Organization: Hearings Before the House Committee on Foreign Affairs*, 79th Cong. 79-23 (1945); *see also* S. REP. NO. 79-717, at 5, 8 (1945); H.R. REP. NO. 79-138, at 7 (1945); 91 CONG. REC. 12267 (1945) (Cong. Sol Bloom).

75. 63 Stat. 735-36, sec. 5 (1949).

them all.”⁷⁶ The treaty further provides that, in the event of an attack, the member states may exercise the right of individual or collective self-defense recognized by Article 51 of the UN Charter and assist the country or countries attacked by taking “such action as it deems necessary, including the use of armed force.” Article 11 of the treaty states that it shall be ratified “and its provisions carried out by the Parties in accordance with their respective constitutional processes.”⁷⁷

The principle of an attack on one nation constituting an attack on all has never been interpreted as requiring an immediate or automatic response from any nation. Each country maintains the sovereign right to decide such matters for itself. As noted in the Rio Treaty of 1947, “no State shall be required to use armed force without its consent.”⁷⁸ During hearings in 1949, Secretary of State Dean Acheson conceded that if a signatory nation were the victim of an armed attack, the United States would not be pulled automatically into war: “[u]nder our Constitution, the Congress alone has the power to declare war.”⁷⁹

Moreover, NATO did not authorize offensive actions or general peacekeeping operations. The North Atlantic Treaty was a defensive pact, intended to contain the Soviet Union. The treaty’s parties were “resolved to unite their efforts for collective defense” and “resist armed attack.” In 1999, Secretary of State Madeleine Albright spoke with approval these words of Prime Minister Spaak of Belgium, offered five decades earlier: “The new NATO pact is purely defensive; it threatens no one.”⁸⁰ Yet, under Clinton, NATO would expand its mission to justify offensive operations in Bosnia and Yugoslavia.

NATO countries were directed to carry out the treaty “in accordance with their respective constitutional processes.” Allowing the President to conduct war singlehandedly against other countries is a flat violation of the Constitution. When the Senate agreed to NATO, it never acquiesced in such an interpretation. Nor could it have. Such an interpretation would have eliminated the constitutional power of the House of Representatives to decide matters of war.

At the time NATO was established, one scholar argued that the provisions of the treaty that it be carried out according to constitutional processes was “intended to ensure that the Executive Branch of the Government should come back to Congress when decisions were required in which the Congress has a constitutional responsibility.”⁸¹ The NATO treaty “does not transfer to the

76. 63 Stat. 2244, Art. 5 (1949).

77. 63 Stat. 2246, Art. 11 (1949).

78. 62 Stat. 1703, Art. 20 (1947).

79. *North Atlantic Treaty (Part 1): Hearings Before the Senate Committee on Foreign Relations*, 81st Cong. 90 (1949).

80. 145 CONG. REC. E462 (daily ed. March 17, 1999).

81. Richard H. Heindel et al., *The North Atlantic Treaty in the United States Senate*, 43 AM. J. INT’L L. 633, 649 (1949).

President the Congressional power to make war.”⁸² The repeated assurances that the war prerogatives of Congress would be protected under the UN Charter and mutual security treaties like NATO would, in time, mean nothing.

C. *The Korean War*

Given the text of the UN Charter and the UN Participation Act, fortified by their legislative histories, how was President Truman able to send U.S. troops to Korea—under the umbrella of a UN action—without ever seeking or obtaining congressional approval? Answer: He simply ignored the procedure for special agreements that was designed to safeguard congressional control. No special agreement was entered into in 1950, nor has any special agreement ever been entered into, by any nation, in the years since 1950. The procedure for special agreements has been made a nullity by the executive branch.

Truman could exploit the UN machinery because of a fluke: the Soviet Union absented itself from the Security Council when it twice passed resolutions regarding military action in Korea. Had the Soviet Union been present, it would likely have exercised a veto over the resolutions. How does the absence of the Soviets relate to constitutional authority? It cannot be seriously argued that the scope of presidential power fluctuates with the presence or absence of Soviet delegates to the Security Council.⁸³

Several statements from the Truman administration suggest that it was acting pursuant to UN authority. On June 29, 1950, Secretary of State Acheson said that all U.S. actions taken in Korea “have been under the aegis of the United Nations.”⁸⁴ Aegis is a fudge word, hinting at a legal relationship that never existed. The United States never operated under the legal banner of the UN. The UN did not exercise authority over the conduct of the war. Other than token support from a few nations, it remained an American war—measured by troops, money, casualties, and deaths—from start to finish.

Acheson also stated that Truman had done his “utmost to uphold the sanctity of the Charter of the United Nations and the rule of law,” and that the administration was in “conformity with the resolutions of the Security Council of June 25 and 27, giving air and sea support to the troops of the Korean government.”⁸⁵ The first resolution did not call for military action. As for the second, which did, Truman committed U.S. forces to Korea before the Council acted on the second resolution. Acheson later admitted that “some American

82. *Id.* at 650.

83. See Robert H. Bork, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT. L. 79, 81 (1971).

84. 23 U.S. Dept. St. Bull. 43 (1950).

85. *Id.* at 46.

action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution.”⁸⁶

Senators from both parties acquiesced to Truman’s decision. Senator Leverett Saltonstall (R-Mass.), the minority whip, supported Truman by saying “it seems to me the responsibility of the President of the United States to protect the security of the United States.”⁸⁷ Senator Arthur Watkins (R-Utah) asked whether Truman should not have notified Congress before ordering military forces to Korea. Senator Scott Lucas (D-Ill.), the majority leader, replied casually: “I am willing to leave what has been done in the hands of the Commander in Chief.”⁸⁸ A purer form of abdication could not be imagined.

Other Senators spoke deferentially about presidential power. Senator George Malone (R-Nev.) said “[c]ongress cannot determine policy. Congress can only debate the foreign policy determined by the executive department. . . . The Constitution of the United States leaves determinations of foreign policy to the President.”⁸⁹ When Truman met with congressional leaders on July 3, 1950, and asked whether he should present to Congress a joint resolution seeking approval of his action in Korea, Lucas told him not to bother.⁹⁰ If the emergency facing Truman in June 1950 was so fast-moving and perilous that he had to act in advance of legislative authorization, nothing prevented him from returning to Congress at the earliest opportunity to ask for retroactive authority, as Lincoln had done.

Truman tried to justify his actions in Korea by calling it a “police action” rather than a war.⁹¹ Although Truman and Acheson continued to avoid the designation of war for the fighting in Korea, federal courts had no such difficulty. A district court noted in 1953: “We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war.”⁹²

The check on Truman came from the public and the courts, not from Congress. In 1952, facing a nationwide strike of steelworkers, he issued an executive order taking possession of the plants and facilities of 87 major steel companies.⁹³ Newspapers around the country published editorials that condemned Truman’s theory of inherent and emergency power. They ripped him for acting in a manner they regarded as arbitrary, dictatorial, dangerous, destructive, high-handed, and unauthorized by law.⁹⁴ Unwisely, Assistant

86. DEAN ACHESON, *PRESENT AT THE CREATION* 408 (1969).

87. 96 CONG. REC. 9229 (1950).

88. *Id.*

89. *Id.* at 9240.

90. FOREIGN RELATIONS OF THE UNITED STATES, Vol. VII, Korea, 1950, at 287-91.

91. The President’s News Conference, 1 PUB. PAPERS 177 (June 29, 1950).

92. *Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953).

93. Exec. Order No. 10,340, 17 Fed. Reg. 3139, and 3141-43 (1952).

94. 98 CONG. REC. 4029-30, 4033-34 (1952).

Attorney General Homer Baldrige told the district judge that courts were powerless to control the exercise of presidential power when directed toward emergency conditions.⁹⁵ The district court wrote a blistering opinion that repudiated this theory of inherent and unchecked presidential power.⁹⁶ The Supreme Court, split 6 to 3, sustained that decision.⁹⁷

D. *The Vietnam War*

President Dwight D. Eisenhower regarded Truman's action in Korea as a political and constitutional mistake. To foster joint action between the legislative and executive branches, he asked Congress to pass "area resolutions" to authorize in advance whatever military action might be necessary in the Formosa Straits and the Middle East.⁹⁸ When legislators asked why he requested statutory authority instead of acting unilaterally under executive power, he explained patiently that the Constitution "assumes that our two branches of government should get along together."⁹⁹ Under pressure in 1954 to commit U.S. troops to Indochina, he refused to act unless he first obtained statutory authority from Congress.¹⁰⁰

President Lyndon B. Johnson understood the risks of getting involved in Vietnam and did not want to act unilaterally, as Truman had done in Korea. Yet he didn't want to appear to be "soft on communism" and open himself to attacks by Richard Nixon and Senator Barry Goldwater.¹⁰¹ In August 1964, after reports on two attacks on U.S. ships in the Tonkin Gulf, he went to Congress and obtained a resolution authorizing him to respond militarily. The first attack did not justify an escalation of the conflict. The second attack probably never occurred.¹⁰²

Senator Wayne Morse (D-Ore.) had received some inside information raising doubts about whether the second attack took place. He also charged that the administration had deceived Congress and the public by presenting North Vietnam as the aggressor, rather than admitting that the U.S. had acted as provocateur by assisting South Vietnamese military actions.¹⁰³ Despite all the

95. H.R. Doc. No. 534, 82d Cong., 2d Sess. 371-72 (1952).

96. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F.Supp. 569 (D.D.C. 1952).

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

98. FISHER, *PRESIDENTIAL WAR POWER*, supra note 24, at 104-11

99. DWIGHT D. EISENHOWER, *WAGING PEACE*, at 179 (1965).

100. The President's News Conference, 1 PUB. PAPERS 50 (March 10, 1954).

101. MICHAEL BESCHLOSS, *TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES, 1963-64*, at 213-14 (1977).

102. EDWIN E. MOÏSE, *TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR* (1996). After a trip to Vietnam in 1995, former Secretary of Defense Robert S. McNamara announced that "I am absolutely positive" the second attack never took place, and was prepared to say, "without a doubt, there was no second attack." Keith B. Richburg, *Mission to Hanoi*, WASH. POST, Nov. 11, 1995, at A21, A25.

103. 110 CONG. REC. 18425 (1964).

uncertainty about what had happened, Congress quickly passed the Tonkin Gulf Resolution by a unanimous vote in the House and only two dissenting votes in the Senate. There were no independent legislative investigations to verify the administration's story.

During floor debate, Senators urged that legislative discussion be curbed in the interest of uniting behind the President.¹⁰⁴ At most, legislators said they could offer the President advice, if consulted.¹⁰⁵ The same desire to rally around the flag characterized debate in the House.¹⁰⁶ One of the remarkable comments was by Congressman Edwin Adair (R-Ind.), who said that the issue of congressional abdication was raised in committee but "we were given assurance that it was the attitude of the Executive that such was not the case, that we are not impairing our congressional prerogatives."¹⁰⁷ If legislators are anxious about possible abdication of legislative authority, just turn to the executive branch and have the doubts removed.

The Vietnam commitment continued to expand because many lawmakers who were strongly opposed to the war refused to say anything in public. The prime example is Senator Richard Russell, powerful chairman of the Senate Armed Services Committee and an influential adviser to President Johnson. Russell had warned about American involvement in Vietnam from Eisenhower through Johnson but rarely spoke out about his misgivings.¹⁰⁸ Public opposition from Russell would have been pivotal in ending America's commitment to Southeast Asia, yet he kept silent. One scholar suggested two reasons: "First, he had a misguided sense of what was respect for the president, and of the need to support the flag once committed. More important was his total lack of understanding of congressional responsibility in exercising power over the executive under Article I, §8, of the Constitution."¹⁰⁹

During hearings in 1968, Senator J. William Fulbright (D-Ark.) admitted that as chairman of the Senate Foreign Relations Committee he should have taken additional time to review the merits of the Tonkin Gulf Resolution: "I feel very guilty for not having enough sense at that time to have raised these questions and asked for evidence. I regret it."¹¹⁰ A year later, a Senate report concluded that when Congress adopted the Tonkin Gulf Resolution it committed the error of "making a *personal* judgment as to how President Johnson would implement the resolution when it had a responsibility to make an *institutional*

104. *Id.* at 18421 (Senators Church and Humphrey), 18457 (Senator Aiken).

105. *Id.* at 18457-58.

106. *Id.* at 18542 (Congressmen Albert and Halleck).

107. *Id.* at 18543.

108. EZRA Y. SIFF, *WHY THE SENATE SLEPT: THE GULF OF TONKIN RESOLUTION AND THE BEGINNING OF AMERICA'S VIETNAM WAR* 2, 7-10, 40, 52-57, 100 (1999).

109. *Id.* at 56.

110. *The Gulf of Tonkin, the 1964 Incidents: Hearings Before the Senate Committee on Foreign Relations*, 90th Cong. 80 (1968).

judgment, first, as to what any President would do with so great an acknowledgment of power, and, second, as to whether, under the Constitution, Congress had the right to grant or concede the authority in question.”¹¹¹

E. The War Powers Resolution

The War Powers Resolution of 1973 is usually described as a major effort to “reassert” congressional prerogatives. When the measure became law over President Nixon’s veto, the *New York Times* regarded the statute as “the most aggressive assertion of independence and power by the legislative branch against the executive branch in many years.”¹¹² However, its editorial contained more of a mixed message. After calling the statute “a resurgence of Congressional independence after a long period of acquiescence to the Executive’s accretion of power,” the editorial stated accurately that the law did not “in any way curtail the President’s freedom, as Commander in Chief, to respond to emergency situations. If anything, it gives the Chief Executive more discretionary authority than the framers of the Constitution intended in order to deal with modern contingencies that they could not have foreseen.”¹¹³

Section 2(a) of the Resolution claims that it is intended “to fulfill the intent of the framers” and to “insure that the collective judgment of both the Congress and the President” will apply to the introduction of U.S. forces to foreign hostilities. But by recognizing that the President may use armed force for up to 90 days without authority from Congress, the resolution legalizes a scope of independent presidential power that would have astonished the framers. Moreover, it does not in any sense insure collective judgment. Presidents Reagan, Bush, and Clinton used military force repeatedly without ever seeking or obtaining authority from Congress.

Given the national calamity of the Vietnam War and the soul-searching by Fulbright and other legislators, how could Congress have passed such a botched measure? Part of the reason is the political process of taking a weak House bill and a strong Senate bill and seeking compromise language in conference committee. Splitting the difference between the two chambers is common and acceptable practice for most bills. Shall we spend \$10 billion or \$8 billion on a housing program? Settling on \$9 billion does not threaten or diminish the Constitution. What the War Powers Resolution did, however, was to compromise fundamental institutional and constitutional principles.

That fact is borne out by the House effort to override Nixon’s veto. Fifteen members initially voted against the bill and the conference version because the legislation shifted too much power to the President. To be consistent, they

111. S. REP. NO. 129, 91st Cong. 22-23 (1969) (*emphasis in original*).

112. See Richard L. Madden, *House and Senate Override Veto by Nixon on Curb of War Powers; Backers of Bill Win 3-Year Fight*, N.Y. TIMES, Nov. 8, 1973, at 20.

113. *Congress Overrides*, N.Y. TIMES, Nov. 8, 1973, at 46.

should have voted to sustain the veto to prevent the bill from becoming law. Yet they switched sides and delivered the decisive votes for enactment. Many of them decided that giving Nixon a black eye was more important than protecting congressional prerogatives.¹¹⁴ For example, Representative Bella Abzug (D-N.Y.) urged an override to “accelerate the demand for the impeachment of the President.”¹¹⁵ A number of legislators correctly saw the measure as an expansion of presidential warmaking power.¹¹⁶

Senator Tom Eagleton (D-Mo.), a principal sponsor of the War Powers Resolution when it was introduced in the Senate, denounced the bill that emerged from conference as a “total, complete distortion of the war powers concept.”¹¹⁷ Instead of the three narrow exceptions specified in the Senate bill, the conference report gave the President “carte blanche” authority to use military force for up to 90 days. With memories so fresh about presidential extension of the war in Southeast Asia, Eagleton asked: “how can we give unbridled, unlimited total authority to the President to commit us to war?”¹¹⁸

IV. FROM FORD TO CLINTON

Operating in the shadow of the Vietnam War, Presidents Gerald Ford and Jimmy Carter made minimal use of military force. On three occasions Ford used U.S. forces to evacuate American citizens and foreign nationals from Southeast Asia. There were only two other presidential initiatives to use armed forces: Ford’s rescue effort of the *Mayaguez* crew in 1975 and the attempt by Carter to rescue American hostages in Iran in 1980.¹¹⁹ In short order, however, military activity would accelerate under Presidents Reagan, Bush, and Clinton.

A. *Reagan’s Initiatives*

In August 1982, President Reagan sent U.S. marines to Lebanon as part of a three-nation peacekeeping force. He expected them to remain “no longer than 30 days.”¹²⁰ After conditions deteriorated in September, Reagan announced that the troops would remain “for a limited period of time.”¹²¹ A terrorist bomb on April 18, 1983, killed 16 Americans, followed by the deaths of two U.S. Marines on August 29 and two more on September 6. Under Section 4(a)(1) of the War

114. The fifteen legislators are Bella Abzug, Robert Drinan, John Duncan, John James Flynt, Jr., William Harsha, Ken Hechler, Elizabeth Holtzman, William Hungate, Philip Landrum, Trent Lott, Joseph Maraziti, Dale Milford, William Natcher, Frank Stubblefield, and Jamie Whitten.

115. 119 CONG. REC. 36221 (1973).

116. *Id.* at 36204, 36207-08, and 36220.

117. *Id.* at 36176-77.

118. *Id.* at 36178.

119. FISHER, PRESIDENTIAL WAR POWER, *supra* note 24, at 134-40.

120. Remarks to Reporters Announcing the Deployment of United States Forces in Beirut, Lebanon, 2 PUB. PAPERS 1063 (Aug. 20, 1982).

121. *Id.* at 1188.

Powers Resolution, the existence of “hostilities” required the President to trigger the 60-90 day clock, but Reagan refused to do so. Here was another major flaw in the statute. Instead of placing a two or three month restriction on presidential war initiatives, there was now no limit. Members of Congress had to pass a statute to activate Section 4(a)(1), and in doing so they authorized Reagan to remain for 18 months.¹²²

Reagan also used military force against Grenada in 1983 and Libya in 1986, and on neither occasion did he seek authorization from Congress or report under Section 4(a)(1) to trigger the clock. In fact, only one President has reported under that section, and that was President Ford as part of the *Mayaguez* crisis. However, his report had no practical effect on presidential power because it was sent to Congress after the crew had been rescued.

Four times during the Reagan years, members of Congress went to court to challenge presidential military actions in El Salvador, Grenada, Nicaragua, and the Persian Gulf.¹²³ The message from the courts was the same each time. If Congress wanted the courts to referee these disputes, it would have to first confront the President by using all institutional powers available to it. When Congress failed to defend its prerogatives, it could not expect to be bailed out by the courts.

B. Bush Pushes the Envelope

One might have thought that with the end of the Cold War against the Soviet Union, Congress would begin to recapture its war power. However, under the Bush and Clinton administrations, Congress was more supine than ever. Bush invaded Panama in 1989 without coming to Congress for authority and claimed he could go to war against Iraq in 1990 without legislative approval. Only at the eleventh hour did Congress authorize the operation, and even at that point, in his signing statement, Bush denied that he needed authority from Congress.¹²⁴

The war against Iraq illustrates the importance of Truman’s precedent with Korea. Like Truman, Bush obtained from the UN Security Council a resolution authorizing the use of force against Iraq. On November 29, 1990, the Security Council passed Resolution 678, authorizing member states to use “all necessary means” to force Iraqi troops out of Kuwait.¹²⁵ Although Bush considered it crucial to obtain the approval of the Security Council, he felt no comparable

122. 97 Stat. 805 (1983).

123. *Crockett v. Reagan*, 558 F.Supp. 893 (D.D.C. 1982), *aff’d*, *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983); *Conyers v. Reagan*, 578 F.Supp. 324 (D.D.C. 1984), dismissed as moot, *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985); *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596 (D.D.C. 1983), *aff’d*, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); and *Lowry v. Reagan*, 676 F.Supp. 333 (D.D.C. 1987), *aff’d*, No. 87-5426 (D.C. Cir. 1988).

124. Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 PUB. PAPERS 40 (Jan. 14, 1991).

125. *U.N. Vote Authorizes Use of Force Against Iraq*, WASH. POST, Nov. 30, 1990, at A1.

need to seek authority from Congress. Secretary of Defense Dick Cheney, testifying before the Senate Armed Services Committee on December 3, 1990, stated that President Bush did not require “any additional authorization from the Congress” before attacking Iraq.¹²⁶ The phrase “additional authorization” implied that action by the Security Council was sufficient.

Congressman Ron Dellums challenged in court the power of Bush to act singlehandedly against Iraq, but Judge Harold Greene held that the case was not ripe, partly because Congress as an institution had failed to confront Bush.¹²⁷ At the same time, Judge Greene rejected the sweeping theory of presidential power presented by the Justice Department. He said that if the President “had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive.”¹²⁸

Writing in 1998, Bush said that had Congress not passed the authorization bill in January 1991, he would have ordered troops into combat because it was “the right thing to do.”¹²⁹ This is an autocratic or monarchical model. What mattered to Bush was not the Constitution or legal constraints, but simply doing the right thing. He excoriated Saddam Hussein for violating international law by invading Kuwait, but felt at liberty to violate the Constitution whenever he considered it necessary.

C. *Clinton’s Arrogation*

During his first seven years in office, President Clinton would use military force repeatedly, relying on what he considered to be his constitutional powers, augmented by decisions reached by the Security Council and NATO. As a source of authority, Congress was not in the picture and never insisted on being in the picture.

On June 26, 1993, Clinton ordered the launching of 23 cruise missiles into Baghdad as an exercise of the “inherent right of self-defense.”¹³⁰ He acted after his administration concluded that the Iraqi intelligence service was responsible for a failed assassination attempt of former President Bush. Clinton called the attack “an attack against our country and against all Americans.”¹³¹ Two attorneys of constitutional law thought it “quite a stretch” to call the bombing an act of self-defense for an assassination plot that had been averted two months

126. *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services*, 101st Cong. 701 (1990).

127. *Dellums v. Bush*, 752 F. Supp. 1141, 1151 (D.D.C. 1990).

128. *Id.* at 1145.

129. GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 446 (1998).

130. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 PUB. PAPERS 940 (June 28, 1993).

131. *Id.* at 938.

earlier.¹³² White House officials let the public know that this early use of force erased any doubts about Clinton's ability to act decisively as Commander in Chief. He could make the tough calls and sleep well.¹³³

Also in 1993, the initial U.S. humanitarian intervention into Somalia turned bloody and veered into "nation building."¹³⁴ Congressman Dellums asked: "who gave us the right—as peacekeepers—to determine which political figure or faction deserves to emerge victorious in Somalia?"¹³⁵ Congress used its power of the purse to bring the military operation to a halt. Legislation prohibited the use of any funds after March 31, 1994, for the operations of U.S. armed forces in Somalia unless the President requested an extension and received authority from Congress.¹³⁶

By October 1993, Clinton was threatening to invade Haiti to force the military regime to step down and allow the return of President Jean-Bertrand Aristide, who had been ousted on September 30, 1991. Madeleine Albright, U.S. Ambassador to the United Nations, said that the administration had "not ruled out" a unilateral use of force in Haiti.¹³⁷ Congress took a number of votes to define its role on military action against Haiti.¹³⁸ In the end it settled for weak, nonbinding statutory language, stating that it was the "sense of Congress" that funds in the defense appropriations bill should not be obligated or expended for U.S. military operations in Haiti unless (1) authorized in advance by Congress, (2) it was necessary to protect or evacuate U.S. citizens, or (3) the President determined that the deployment was "vital" to U.S. national security interests and there was insufficient time to seek and obtain congressional authorization. Even those elastic guidelines could be set aside if the President reported in advance that the deployment was justified by U.S. national security interests.¹³⁹

Like Truman in Korea and Bush in Iraq, Clinton circumvented Congress by turning to the Security Council, which adopted a resolution "inviting" all states—particularly those in the region of Haiti—to use "all necessary means" to remove the military leadership on that island.¹⁴⁰ The Senate responded with a nonbinding resolution that stated that the Security Council resolution "does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers

132. Michael Ratner and Jules Lobel, *Bombing Baghdad: Illegal Reprisal or Self-Defense?*, LEGAL TIMES, July 5, 1993, at 24

133. *Show of Strength Offers Benefits for Clinton*, WASH. POST, June 28, 1993, at A1, A4.

134. 139 CONG. REC. 22748 (1993) (remarks by Cong. Hamilton).

135. *Id.* at 22754.

136. 107 Stat. 1476, § 8151(b)(2)(B) (1993).

137. *See* WASH. POST, Oct. 18, 1993, at A16.

138. 139 CONG. REC. 25729 (1993); 140 CONG. REC. 11632-33, 12420-21, 15016-52 (1994).

139. 107 Stat. 1476, § 8147 (1993).

140. *U.N. Authorizes Invasion of Haiti*, WASH. POST, Aug. 1, 1994, at A1.

Resolution (Public Law 93-148).” The Senate language passed by a vote of one hundred to zero.¹⁴¹ Having decided what does *not* constitute authorization, Congress could never agree on the legislative action mandated by the Constitution.

In a nationwide televised address on September 15, 1994, Clinton told the public that he was prepared to use military force to invade Haiti, referring to the Security Council resolution and his willingness to “carry out the will of the United Nations.”¹⁴² No word from the President about carrying out the will of Congress or the American public. Clinton was determined to proceed with the invasion, regardless of public opposition, because “I believe [it] is the right thing to do. I realize it is unpopular. I know it is unpopular. I know the timing is unpopular. I know the whole thing is unpopular. But I believe it is the right thing.”¹⁴³ There seemed to be no interest in doing the legal thing, the authorized thing, the constitutional thing. The planned invasion was shelved when former President Jimmy Carter, Senator Sam Nunn, and Colin Powell were able to convince the military leaders to step down and permit Aristide’s return.¹⁴⁴

With regard to Bosnia, Clinton announced on May 7, 1993, that he would have to obtain authority from Congress before ordering air strikes.¹⁴⁵ However, he soon changed his language from authorization to congressional “support.”¹⁴⁶ By 1994, decisions to use air power in Bosnia were taken in response to Security Council resolutions and NATO decisions. As Clinton explained: “the authority under which air strikes can proceed, NATO acting out of area pursuant to U.N. authority, requires the common agreement of our NATO allies.”¹⁴⁷ Interestingly, Clinton would have to obtain approval from England, France, Italy, and other NATO allies, but not from Congress.

Air strikes began in February 1994 and continued in April, August, and November. Clinton told reporters that the military activity was “conducted in strict accordance of existing U.N. policy” and that the Security Council resolution “gives NATO the authority to act.”¹⁴⁸ By approaching international and regional bodies, like the UN and NATO, Clinton effectively sidestepped Congress and its constitutional prerogatives. Air strikes continued during the

141. 140 CONG. REC. 19324 (1994).

142. Interview with Wire Service Reporters on Haiti, 2 PUB. PAPERS 1559 (September 14, 1994).

143. *Id.* at 1551.

144. John F. Harris & Douglas Farah, *Clinton Halts Invasion as Haiti Leaders Agree to Quit; U.S. Forces Land Today*, WASH. POST, Sept. 19, 1994, at A1.

145. The President’s News Conference with European Community Leaders, 1 PUB. PAPERS 594 (May 7, 1993).

146. The President’s New Conference with Prime Minister Morihiro Hosokawa of Japan in New York City, 2 PUB. PAPERS 1620 (Sept. 27, 1993).

147. Remarks and an Exchange with Reporters on Bosnia, 1 PUB. PAPERS 186 (Feb. 6, 1994).

148. Exchange with Reporters on Bosnia, 1 PUB. PAPERS 661 (Apr. 11, 1994).

first half of 1995, with the war's biggest air raid conducted at the end of August 1995. Clinton said he conducted the bombing attacks as "authorized by the United Nations."¹⁴⁹

Clinton's next step was sending about 20,000 U.S. ground troops to Bosnia. In an effort to restrict this deployment, both Houses debated a number of amendments, ranging from binding to nonbinding provisions.¹⁵⁰ Most of the lawmakers showed great deference to presidential power. Congressman James B. Longley, Jr. (R-Me.) said it was a threat to American lives when Congress "attempts to micromanage foreign policy. I have told the President that I would respect his authority as Commander in Chief."¹⁵¹ It is not "micromanagement" when Congress debates sending ground troops to another country, nor does such legislative deliberation threaten American lives. Those lives are threatened when the President puts them in harm's way.

The response in Congress depended greatly on what Bob Dole, the Senate Majority Leader, would do. He decided to defer both to the President and to public polls: "We need to find some way to be able to support the President and I think we need to wait and see what the American reaction is."¹⁵² In what must be one of the weakest, most internally inconsistent pieces of legislation ever passed, the Senate adopted language providing support for American troops but expressing "reservations" about sending them to Bosnia.¹⁵³ The House also acted on a series of measures on Bosnia. An amendment to prohibit funds from being used to deploy troops without congressional authorization failed, 210 to 218.¹⁵⁴ It next voted 287 to 141 to pass a nonbinding House resolution that expressed "serious concerns and opposition to the President's policy" but declared that the House was confident U.S. troops would perform their responsibilities well.¹⁵⁵ Another House resolution, "unequivocally" supporting American troops but omitting any direct criticism of the President's policy, lost 190 to 237.¹⁵⁶

The final escalation of military activity came in 1999 when Clinton participated with other NATO allies in the bombing of Yugoslavia. Although Congress had no formal role in the use of force against the Serbs, legislatures in other NATO countries had to authorize military action. It was necessary for the

149. Remarks on the Legislative Agenda and an Exchange with Reporters, II PUB. PAPERS 1353 (Sept. 12, 1995).

150. 141 CONG. REC. S14633-40 (daily ed. Sept. 29, 1995); *id.* at H11398-422 (daily ed. October 30, 1995); *id.* at H13206-248 (daily ed. Nov. 17, 1995).

151. *Id.* at H13239 (daily ed. Nov. 17, 1995) (statement of Congressman Longley, Jr.)

152. Dan Batz, *As Dole Equivocates on Troop Deployment, Most GOP Rivals Oppose Plan*, WASH. POST, Nov. 28, 1995, at A9.

153. 141 CONG. REC. S18552 (daily ed. Dec. 13, 1995) (statement of Sen. Dole).

154. *Id.* at H14848-49

155. *Id.* at H14860.

156. *Id.* at H148721-72.

Italian Parliament to vote approval for the NATO strikes.¹⁵⁷ The German Supreme Court ruled that the Bundestag, which had been dissolved with the election that ousted Chancellor Kohl, would have to be recalled to approve deployment of German aircraft and troops to Kosovo.¹⁵⁸ Congress was content to watch from the back seat.

On March 11, 1999, with Clinton close to unleashing air strikes against Serbia, the House voted on a resolution to support U.S. armed forces as part of a NATO peacekeeping operation. The resolution—purporting to “authorize” Clinton to deploy U.S. forces to implement a peace agreement—passed 219 to 191.¹⁵⁹ However, legislators were voting on a concurrent resolution (H. Con. Res. 42), and Congress cannot authorize anything in a concurrent resolution because it has no legal effect. Authorization requires a bill or joint resolution, both of which are presented to the President for his signature or veto. A concurrent resolution passes both chambers but is not presented. Lawmakers voted on something that started out as a joint resolution but changed at some point to a concurrent resolution, with no one alert enough or willing enough to change the word “authorize” to something more appropriate, like “support.”

Members of the House clearly anticipated a peace agreement between Serbs and Kosovars. The Kosovars eventually accepted the plan but not the Serbs. Therefore, the House vote cannot be taken as support for the bombing operation that would begin within two weeks. On March 23, the Senate voted 58 to 41 to support military air operations and missile strikes against Yugoslavia.¹⁶⁰ Like the House, the Senate made the mistake of using the word “authorize” in a concurrent resolution (S. Con. Res. 21). The war against Serbia began on March 24.

On April 28, after the first month of bombing, the House took a series of votes on war in Serbia. It voted 249 to 180 to prohibit the use of appropriated funds for the deployment of U.S. ground forces unless first authorized by Congress. A motion to direct the removal of U.S. armed forces from Yugoslavia failed, 139 to 290. A resolution to declare a state of war between the United States and Yugoslavia was rejected, 2 to 427. A fourth vote, to authorize the air operations and missile strikes, failed on a tie vote, 213 to 213.¹⁶¹

Newspaper editorials and commentators derided the House for these multiple and supposedly conflicting votes, but the House articulated some basic values. It insisted that Congress authorize the introduction of ground troops and it refused to grant authority for the air strikes. Lawmakers pointed to the irony of

157. Alessandra Stanley, *Italy's Center-left Government is Toppled by One Vote*, N.Y. TIMES, Oct. 8, 1998, at A32.

158. Williams Drozchak, *Allies Grim, Milosevic Defiant Amid Kosovo Uncertainty*, WASH. POST, Oct. 8, 1998, at A32.

159. 145 CONG. REC. H1249-50 (daily ed. Mar. 11, 1999).

160. *Id.* at S3118 (daily ed. Mar. 23, 1999).

161. *Id.* at H2376-2452 (daily ed. Apr. 28, 1999).

President Clinton seeking the approval of 18 NATO nations but not the approval of Congress. Congressman Ernest Istook (R-Okla.) remarked: "President Clinton asked many nations to agree to attack Yugoslavia, but he failed to get permission from one crucial country, America."¹⁶²

In contrast to the House, the Senate decided to duck the issue. Senator John McCain offered a joint resolution to authorize Clinton to use "all necessary force and other means, in concert with United States allies, to accomplish United States and North Atlantic Treaty Organization objectives in the Federal Republic of Yugoslavia (Serbia and Montenegro). This amendment was tabled, 78 to 22.¹⁶³ A few weeks later the Senate tabled another amendment, this one by Senator Specter, to direct the President to seek approval from Congress before introducing ground troops to Yugoslavia. Failure to obtain approval would deny the President funds to conduct the operation.¹⁶⁴ The Specter amendment was tabled, 52 to 48.¹⁶⁵ An amendment by Senator Bob Smith (R-N.H.), to prohibit funding for military operations in Yugoslavia unless Congress enacted specific authorization, was tabled 77 to 21.¹⁶⁶

Through these successive tabling motions, the Senate might as well have considered one final motion: "[d]o we want to exercise our constitutional powers and participate in matters of war?" Tabled, 63 to 37.

Other American military actions occurred during 1998, again without congressional authorization. In August, Clinton ordered cruise missiles into Afghanistan to attack paramilitary camps and into Sudan to destroy a pharmaceutical factory suspected of involvement in the production of nerve gas. A year after the attack on Sudan, news report still questioned whether the plant had a role in the manufacture of chemical weapons.¹⁶⁷

Clinton continued to use military force against Iraq. In September 1996, he ordered the launching of cruise missiles against Iraq in response to an attack by Iraqi forces against the Kurdish-controlled city of Irbil in northern Iraq. Cruise missiles also struck air defense capabilities in southern Iraq. Clinton explained that the missiles "sent the following message to Saddam Hussein: When you abuse your own people or threaten your neighbors, you must pay a price."¹⁶⁸ With that standard, how many nations could a President attack? Quite a long

162. *Id.* at H2419 (daily ed. Apr. 28, 1999) (statement of Rep. Istook).

163. *Id.* at S4616 (daily ed. May 4, 1999); *see id.* at S4514-70 (daily ed. May 3, 1999) (contains most of the debate).

164. *Id.* at S5809 (daily ed. May 24, 1999).

165. *Id.* at S5940.

166. *Id.* at S6034-40 (daily ed. May 26, 1999).

167. Vernon Loeb, *U.S. Wasn't Sure Plant Had Nerve Gas Role*, WASH. POST, Aug. 21, 1999, at A1.

168. Remarks Announcing a Missile Strike on Iraq and an Exchange with Reporters, 2 PUB. PAPERS 1469 (Sept. 3, 1996).

list. Start with Russia and China and then turn to smaller but still substantial countries in Asia, Africa, and other continents.

Toward the end of January 1998, Clinton threatened once more to bomb Iraq, this time because Saddam Hussein had refused to give UN inspectors full access to examine Iraqi sites for possible nuclear, chemical, and biological programs. On February 19, during a visit to Tennessee State University, Secretary of State Madeleine Albright was asked how Clinton could order military action against Iraq after opposing American policy in Vietnam. Her response: "We are talking about using military force, but we are not talking about a war. That is an important distinction."¹⁶⁹ The distinction makes no sense, unless it is another administration effort to claim that the President has full authority to conduct military operations as long as they do not amount to "war."

In December 1998, Clinton ordered four days of bombing in Iraq. In a letter to Congress, he argued that the military operation was "consistent with and has been taken in support of numerous U.N. Security Council resolutions, including Resolutions 678 and 687." In this same message, he claimed that he acted under the authorization of P.L. 102-1, enacted in January 1991.¹⁷⁰ To accept that argument, one would have to believe that Congress, in January 1991, fully delegated its war power to the Security Council and to the President. However, the limited purpose of P.L. 102-1 and the Security Council resolutions was to get Iraq out of Kuwait, not to punish it in perpetuity.

As a result of the December bombing, there are now no UN inspectors to monitor chemical, biological, and nuclear capability in Iraq. Moreover, the administration has apparently jettisoned its legal reliance on Security Council resolutions. Secretary of State Albright and Secretary of Defense William S. Cohen warned that the United States and Britain would continue to act militarily against Iraq, with or without the approval of other allies or the UN Security Council.¹⁷¹ Over the following eight months, the United States and Britain conducted repeated air strikes against Iraq, firing more than 1,100 missiles against 359 targets, or triple the number of targets attacked during the four-day operation in December 1998.¹⁷²

V. BUDGET REFORMS FROM 1974 TO THE PRESENT

A year after the War Powers Resolution, Congress passed the Congressional Budget and Impoundment Control Act of 1974, also widely touted as an effort to

169. Barton Gellman, *Students Receive Albright Politely*, WASH. POST, Feb. 20, 1998, at A19.

170. Letters to Congressional Leaders on the Military Strikes Against Iraq, 2 PUB. PAPERS 2195 (Dec. 18, 1998).

171. Thomas W. Lippman, *U.S. Warns Iraq of More Raids*, WASH. POST, Dec. 21, 1998, at A1.

172. Steven Lee Myers, *In Intense but Little Noticed Fight, Allies Have Bombed Iraq all Year*, N.Y. TIMES, Aug. 13, 1999, at A1.

reassert legislative power. This statute has had a complex and mixed history, but there is good reason to conclude that it helped President Reagan in 1981 to pass a budget plan that led to a fivefold increase in the national debt. The explosion of deficits led to the Gramm-Rudman-Hollings Act of 1985, which abdicated legislative power not so much to the President as to automatic formulas and triggers. With Reagan's encouragement, the drumbeat for transferring greater spending power to the President prompted Congress to consider a variety of measures, culminating in the Line Item Veto Act of 1996.

A. *The Downside of Comprehensive Action*

The Budget Act of 1974 was enacted against a backdrop of executive claims that Congress was irresponsible in budget matters because it acted in piecemeal fashion on various appropriations, authorization, and tax bills. In defending the President's authority to withhold funds that Congress had appropriated, OMB Deputy Director Caspar Weinberger told a Senate committee in 1971 that "the whole nature of the appropriation process is such that Congress is, in one way or another, virtually prevented from taking an overall look at the effect of their total actions."¹⁷³

During the 1972 election campaign, President Nixon charged that Congress, as an institution, acted irresponsibly on federal spending. He attributed this behavior to the procedures that Congress used to consider the budget, asserting that Congress "not only does not consider the total financial picture when it votes on a particular spending bill, it does not even contain a mechanism to do so if it wished."¹⁷⁴ Budget problems resulted from the "hoary and traditional procedure of the Congress, which now permits action on the various spending programs as if they were unrelated and independent actions."¹⁷⁵ White House aides joined in the attack on Congress. John Ehrlichman, the President's domestic adviser, blasted the "credit-card Congress" for adding billions to the budget. He likened the lawmakers to a spendthrift brother-in-law "who has gotten hold of the family credit card and is running up big bills" with no thought of paying them.¹⁷⁶

This was a bold move, calculated to put Congress on the defensive. And it worked, even though easily available budget data demonstrated that Nixon's picture of Congress was a caricature, for Congress had little net effect on total budget spending during his years in office. Congress reduced Nixon's appropriations requests for fiscal years 1969 through 1973 by a total of \$30.9

173. *Executive Impoundment of Funds: Hearings Before the Senate Committee on the Judiciary*, 92nd Cong. 135 (1971) (statement of Caspar Weinberger, OMB Deputy Director).

174. Radio Address on Federal Spending, 1 PUB. PAPERS 965-66 (Oct. 7, 1972).

175. Special Message to the Congress on Federal Spending, 1 PUB. PAPERS 742 (July 26, 1972).

176. *Nixon Message Warns Congress Democrats Against Voting 'Excessive' Money Bills*, WALL ST. J., July 27, 1972, at 3.

billion. That reduction was offset by a \$30.5 billion increase in spending authorized by backdoor devices (such as contract authority on the clean-water program) and mandatory entitlements.¹⁷⁷ In short, pretty much of a wash. The budget deficits during the Nixon years were caused mainly by the loss of tax revenues due to the recession of 1970, not to runaway federal spending.¹⁷⁸

Instead of providing a more independent and objective analysis, Congress merely reiterated and reinforced Nixon's aspersions. In a report released in 1973, a joint study committee on budget control linked the increasing size of budget deficits to procedural inadequacies within Congress: "The constant continuation of budget deficits plus their increasing size illustrates the need for Congress to obtain better control over the budget." The committee concluded that "the failure to arrive at congressional budget decisions on an overall basis has been a contributory factor" in the continuation of deficits. No committee was responsible for deciding "whether or not total outlays are appropriate in view of the current situation." Spending bills were considered "as a separate entity."¹⁷⁹

In fact, the system at that time was not so fragmented, incoherent, and irresponsible. The Joint Committee on Reduction of Federal Expenditures prepared "scorekeeping reports" and circulated them on a regular basis. Those reports were printed regularly in the *Congressional Record*. Legislators therefore knew, from month to month, how congressional action compared to the President's budget. Through informal techniques, Congress managed to coordinate its actions and change the shape of the President's budget without exceeding its size. The results reveal a systematic and responsible pattern, not chaos. Congressional totals remained within the ballpark of the President's budget. Legislative spending was not wildly out of control.

The arbitrary and heavy-handed impoundments by the Nixon administration provoked Congress to draft legislation to curb presidential power. Administration officials refused to back off. At hearings in 1973, OMB Director-Designate Roy L. Ash defended impoundment on this ground: "the present difficulty results from the lack of a congressional mechanism to review and act upon the overall government fiscal situation in advance of taking appropriation and other legislative actions."¹⁸⁰ In 1973 the House passed legislation to control impoundment, as did the Senate (three times).¹⁸¹ But both chambers were nervous about enacting their bills into law because voters might

177. H.R. REP. NO. 93-147, at 39 (1973).

178. H.R. REP. NO. 93-90, at 7 (1973); S. REP. NO. 94-731, at 3 (1976).

179. H.R. REP. NO. 93-147, at 1 (1973).

180. *Impoundment of Appropriated Funds by the President: Joint Hearing Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Gov't Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong. 269 (1973) (statement of Roy L. Ash, Director-Designate, OMB).

181. 119 CONG. REC. 11036-72, 15212-56, 21657, 25541-76, 25821-54 (1973).

interpret them as having an irresponsible pro-spending bias. The impoundment provision had to be attached to a larger bill promising greater congressional control over the budget. In 1974, the Impoundment Control Act became Title X of the budget reform act.

Reformers in 1974 assumed that members of Congress would behave more responsibly if they voted explicitly on budget aggregates and faced up to totals, rather than decide spending actions in “piecemeal” fashion on separate appropriations and legislative bills. In 1974, as now, it was difficult to defend fragmentation, splintering, and decentralization when reformers pressed eagerly for “coordination,” “coherence,” and a “unified budget process.”

The model of the executive budget looked appealing. The Budget and Accounting Act of 1921 assumed that presidential control and responsibility would be improved if the budget process was centralized in the executive branch. There has been no retreat from that principle for the President, but advantages for the Chief Executive do not necessarily carry over to Congress. The risks are high when Congress, possessing very different institutional qualities, tries to emulate the executive branch.

The Budget Act of 1974 anticipated a contest between two budgets: presidential and congressional. The analogy is weak because the President is head of the executive branch, which is fortified by a central budget office. There is no head in Congress, and there could be no comparable powers for a congressional budget office. Congress is inherently centralized between two chambers, two parties, and various appropriation, authorization, and tax committees. No amount of procedural tinkering can hide that reality.

Yet these considerations, reasonable as they are, did not stop the march toward comprehensiveness in Congress. The 1974 statute created Budget Committees in each House and made them responsible for reporting budget resolutions with five aggregates: total budget authority, total outlays, total revenues, the surplus or deficit, and public debt. Adoption of a budget resolution would guide the individual efforts of authorization, appropriation, and tax committees. The Budget Act established the Congressional Budget Office (CBO) to give legislators technical support.

The new procedures and organization mandated by the 1974 legislation looked impressive on the surface, but there was no guarantee that comprehensive action by Congress would yield more responsibility or heightened accountability. Increasing the size of a legislative vehicle—from an appropriations bill to a budget resolution—could introduce new, unanticipated problems. It is difficult enough to pass individual appropriations, tax, and entitlement bills. Compromises and delicate tradeoffs must be fashioned to build majority support.

Why would it be any easier to pass a comprehensive budget resolution, where all parties would seek to have their interests included? Such a step magnifies the scope of legislative conflict and encourages additional concessions to members and interest groups. As the cost of doing business in Congress

increases, so does the need for obfuscation and deception. That has been one of the major lessons since 1974. When legislative conflict exceeds a certain point, the result is escapist budgeting. Members become less, not more, responsible. By centralizing the legislative process, the Budget Act of 1974 made it more difficult to pass a budget and increased the likelihood of political deadlock.¹⁸² The larger the legislative vehicle, the harder to attract a majority. As noted by John Gilmour, the “genius of the old [pre-1974] practice of considering the budget only in pieces, never as a whole, was that it minimized the possibility of stalemate.”¹⁸³

During hearings in 1990, former CBO Director Rudolph Penner remarked that Congress seemed to function more responsibly under the former decentralized, informal system than under the more comprehensive procedures of the 1974 statute:

I have always been struck by the fact that in looking at the history of the [budget] process that it appeared chaotic in the late 19th century and early 20th century, but the results were very good in terms of budget discipline, yielding balanced budgets or surpluses most of the time, unless there was really a good reason to run a deficit.

Now we have a process that looks very elegant on paper, but it is leading to very dishonest and disorderly results. It is my strong feeling that, while Gramm-Rudman may have done some good in reducing the deficit as we measure it, it has also done an enormous amount of harm in spawning a large number of gimmicks that make it very difficult to analyze the budget anymore. . . .

. . . I am one of those public policy analysts who thought the 1974 process was a good idea when it was first invented. I have to confess to a lot of disappointment and frustration as to how it actually worked out. I think the criticism of that process, that it was too complex and too time consuming, are right on the mark. . . .¹⁸⁴

The appropriations committees found it difficult to argue against amendments that proposed additional spending when their bills were below the amount allowed in a budget resolution. Allocations in budget resolutions created a new incentive or rationale for higher spending. Instead of reporting bills with less money than the President had reported (the previous pattern), the choice was now to spend “up to” the figure inserted in the budget resolution. A chief clerk of an appropriations subcommittee complained that the spending limits in a

182. JOHN B. GILMOUR, RECONCILIABLE DIFFERENCES? CONGRESS, THE BUDGET PROCESS, AND THE DEFECIT 229 (1990).

183. *Id.* at 230.

184. *Budget Process Reform: Hearing Before the Task Force on Budget Process, Reconciliation and Enforcement of the House Comm. on the Budget*, 101st Cong. 20-21 (1990) (statement of Rudolph G. Penner, Senior Fellow, The Urban Inst.; Former Dir., CBO).

budget resolution had been set too high: “We were faced with pressure to spend up to the full budget resolution. It’s almost as if the Budget Committee bent over backwards to give Appropriations all that it wanted and then some.”¹⁸⁵ Because of these calculations, the Budget Act legitimized spending that would not have occurred under the previous system.¹⁸⁶

B. Reagan’s 1981 Initiative and Gramm-Rudman

Budget resolutions were praised because they represented a vehicle for centralized, systematic, and coherent legislative action—all intended to strengthen Congress. Under some condition, however, the process of passing a budget resolution could strengthen *the President*. Those conditions materialized in 1981 when President Reagan attracted the necessary votes to gain control over the budget resolution in both Houses. The budget resolution became the blueprint for enforcing Reagan’s priorities for a tax cut, defense buildup, and retrenchment of domestic programs. The budget resolution therefore advanced presidential, not congressional, goals. Once the White House had seized control of the budget resolution, which embodied its overall budget strategy, subsequent action on the tax bill, appropriations bills, and the reconciliation bill became the necessary steps to implement presidential policy. When Reagan’s theory of supply-side economics failed to generate predicted revenues, the nation faced budget deficits of \$150 billion to \$200 billion a year. At the time President Reagan entered office, the national debt (accumulated since 1789) stood at approximately \$1 trillion. In his first four years that number doubled and by the time he left office it had climbed to \$3 trillion.

Would the actions in 1981 have happened without a budget resolution? Possibly, but Reagan would have faced almost insurmountable hurdles in trying to enact his radical program with the pre-1974 budgetary process. Most likely his program would have been chopped to bits by successive committee and subcommittee action. The incrementalism of the decentralized process that existed before 1974 would have functioned as an effective brake on extreme proposals. Budget analysts generally agree with this assessment.¹⁸⁷

The budget resolution gave Reagan the centralizing vehicle he needed. David Stockman, Reagan’s OMB Director, explained how the centralized congressional budget process became a convenient instrument for implementing White House goals. By gaining control of the budget resolution, Congress

185. ALLEN SCHICK, *CONGRESS AND MONEY* 313 (1980); *see also* JOEL HAVEMANN, *CONGRESS AND THE BUDGET* 152-153 (1978).

186. SCHICK, *supra* note 185, at 469-470, 474-481.

187. Rudolph G. Penner, *An Appraisal of the Congressional Budget Process*, in *CRISIS IN THE BUDGET PROCESS* 69 (Allen Schick ed., 1985); Allen Schick, *How the Budget Was Won and Lost*, in *PRESIDENT AND CONGRESS: ASSESSING REAGAN’S FIRST YEAR* 25 (Norman J. Ornstein ed., 1982).

would be reduced to the status “of a ministerial arm of the White House” and would have to “forfeit its independence.”¹⁸⁸

The danger of permitting a President, or the executive branch, this much control over Congress is reflected in Stockman’s own assessment of the expertise available in the White House and OMB. After leaving office he admitted: “a plan for radical and abrupt change required deep comprehension—and we had none of it.”¹⁸⁹ He conceded that he had “built an edifice of doctrine, but not a theory of governance.”¹⁹⁰

For those who associate the executive branch with expertise and objectivity, take a look at a key decision on the 1981 budget. It was well known within the White House that the initial allocation of a 9 percent annual growth rate for the Defense Department was unacceptably high, especially with the large tax cut. In order to prevent large deficits, it was necessary to pare back the increase to 5 or 7 percent. On September 9, 1981, Stockman met for a “shootout” with President Reagan and Secretary of Defense Caspar Weinberger. After some discussion, Weinberger unveiled a large chart showing three cartoon characters representing different defense budgets: the Carter budget (a tiny soldier without a rifle), the Stockman budget (a bespectacled little soldier holding a small wooden rifle), and the Weinberger budget (a big, square-jawed, fully-armed GI Joe). Weinberger got his 9 percent.¹⁹¹ Imagine the ridicule that would have been directed at a congressional committee that analyzed a national security issue in this fashion.

The record of 1981 exposed serious weaknesses within Congress. Instead of depending on its supposedly superior analytical capability gained from the 1974 statute, including CBO and the Budget Committees, Congress embraced the administration’s flawed and false premises. What explains the continued support for the 1974 statute? Congressman Trent Lott (R-Miss.) put it this way in 1985: “The primary reason is that it is worthwhile politically. Members of Congress use the budget process to give the appearance that they are doing something about the deficits or dealing with the budget. In my judgment, they are using it as political cover so that they can continue to be fiscally irresponsible.”¹⁹²

The astonishing growth of budget deficits after 1981 paved the way for the Gramm-Rudman-Hollings (GRH) Act of 1985. Beginning with a deficit of \$171.9 billion for fiscal 1986, the statute promised steady decreases over a five-year period to yield a balanced budget by fiscal 1991. Of course it failed to deliver. The fact that Congress enacted this bill meant that lawmakers had no faith that the process created by the 1974 budget act could deal with deficits in

188. DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS* 59, 200 (1986).

189. *Id.* at 91.

190. *Id.* at 245.

191. RICHARD DARMAN, *WHO’S IN CONTROL?* 95-97 (1996). A similar account appears in STOCKMAN *supra* note 187, at 291.

192. Trent Lott, *The Need to Improve the Budget Process: A Republican’s View*, in *CRISIS IN THE BUDGET PROCESS* 72 (Allen Schick ed., 1985).

the range of \$200 billion a year. Instead of helping matters, GRH led to continued increases in budget deficits and a further loss of accountability. Budgeting escapism reached new heights of ingenuity.¹⁹³ Allen Schick offered this judgment: “GRH started out as a process for reducing the deficit and has become a means of hiding the deficit and running away from responsibility.”¹⁹⁴

Representative Marty Russo (D-Ill.), member of the House Budget Committee, explained how the two branches regularly practiced deceit with budget deficits: “The President submits a budget that relies on very optimistic economic and technical assumptions and questionable savings proposals to meet the Gramm-Rudman deficit target. Congress attacks the assumptions and proposals as phony, but uses them in the budget resolution anyway.”¹⁹⁵ Congress accepted the President’s phony figures because honest numbers (which were available) would have increased the projected deficit and made Congress look like the “big spender.” Once the President ducked responsibility by submitting a dishonest budget, politics required Congress to embrace the same mistaken assumptions.

Various versions of GRH relied on a combination of legislative and executive agencies to implement the budget cuts needed to reduce the deficit: CBO, GAO, and OMB. Congressman Henry Waxman (D-Cal.) protested this transfer of power to unelected officials: “We cannot delegate our authority to make laws to CBO or OMB or GAO or even to the President. The drafters of the Constitution most fundamentally wanted the voters to have a say in who makes laws and wanted the voters to be able to get to these elected representatives.”¹⁹⁶ Congressman James Scheuer (D-N.Y.) agreed that Congress “should not place the ultimate authority for budgetary matters in the hands of unelected bureaucrats at OMB, GAO, and CBO who don’t directly represent the will of the people.”¹⁹⁷ Senator Robert C. Byrd (D-W.Va.) remarked that “this process represents the most significant abdication of the responsibility of Congress to determine the fiscal priorities of the Nation that I have seen in my 33 years on Capitol Hill.”¹⁹⁸

193. *Budget Reform Proposals: Joint Hearings Before the Senate Comms. on Governmental Affairs and the Budget*, 101st Cong. 3 (1989) (statement of Jim Sasser, Chairman, Committee on the Budget); 134 CONG. REC. 587 (1988) (statement of Cong. David. Obey); Raphael Thelwell, *Gramm-Rudman-Hollings Four Years Later: A Dangerous Illusion*, 50 PUB. ADM. REV. 190, 197 (1990).

194. ALLEN SCHICK, *THE CAPACITY TO BUDGET* 204 (1990).

195. *Budget Process Reform: Hearing Before the Task Force on Budget Process, Reconciliation and Enforcement of the House Comm. on the Budget*, 101st Cong. 1 (1990) (Marty Russo, Chairman).

196. 131 CONG. REC. 36075 (1985).

197. *Id.* at 36079; *see also id.* at 36079 (statement of Cong. Henry Hyde); *id.* at 36080 (statement of Cong. Peter Rodino).

198. *Id.* at 10857.

In 1986, the Supreme Court struck down as unconstitutional the transfer of executive power to the Comptroller General.¹⁹⁹ When it became obvious that the deficit targets of GRH could not be reached, the two branches enacted a law in 1987 known as Gramm-Rudman II. The new statute pushed the fantasy back by two years, anticipating a deficit of zero by fiscal 1993. The deficit for that year came in at \$255 billion.²⁰⁰

In 1990, Congress and President Bush agreed to abandon fixed deficit targets. Instead, by placing caps on spending and increasing taxes, they hoped that deficits would decline over the years. The caps were extended in 1993 along with additional tax increases. In 1997, spending caps were combined with a modest tax cut. As a result of these actions and a healthy economy, fiscal 1998 actually closed with a small surplus.

Spending caps signal many things. They are meant to demonstrate discipline and constraint, but they also reveal that lawmakers have no faith in the regular legislative process or the budget statute of 1974. If members remain under the caps, they can claim that they lived within established boundaries. But if caps are set at generous levels (as they have been), they invite spending that might not have occurred. Caps encourage legislators to spend up to the limit. Caps can also be broken whenever members of Congress decide it is necessary, as they did in 1998, 1999, and 2000.

C. *The Push for an Item Veto*

Because of the phenomenal increase in deficits in the 1980s, members of Congress began to debate measures to increase the President's power to rescind (cancel) appropriated funds. This was a strange development. Because the President had submitted an irresponsible budget proposal in 1981 that led to intolerable annual deficits, Congress decided to reward the President with additional powers.

In 1984, the Senate debated a proposal that would allow the President to item-veto appropriations bills, subject to a legislative override of a majority of each chamber instead of the two-thirds required by the Constitution.²⁰¹ It appeared that a majority of the Senate would support this measure, even though (or perhaps precisely because) it would invite a court case. Senator Pete Domenici (R-N.M.) disagreed that "something as patently unconstitutional as this ought to be passed" and tossed to the courts for resolution.²⁰² It was only when Senator Lawton Chiles (D-Fla.) raised a point of order "that the bill is

199. *Bowsher v. Synar*, 478 U.S. 714 (1986).

200. LOUIS FISHER, *THE POLITICS OF SHARED POWER* 240 (1998).

201. 130 CONG. REC. 10844 (1984).

202. *Id.* at 10857.

legislation which changes the Constitution of the United States” that the measure was derailed.²⁰³

Some members of Congress urged Presidents Reagan and Bush to exercise an “inherent item veto.” Under this curious theory, the Constitution—ever since 1789—has included an item veto, although no one noticed it until the 1980s, when an op-ed piece appeared in the *Wall Street Journal*.²⁰⁴ Advocates of the inherent item veto argued that the passage of “omnibus” bills by Congress had so eroded the President’s original veto power that the President was justified, as an action of self-defense, in vetoing individual items. However, omnibus appropriations bills have been with us from the beginning,²⁰⁵ and it was President Washington’s understanding in 1793 that the Constitution required him to “approve all the parts of a Bill, or reject it in toto.”²⁰⁶

Despite the dubious legitimacy of the inherent item veto, four Senators and 48 House members in 1991 urged Bush to try it and provoke a test case in court.²⁰⁷ The next year, Bush finally announced that his legal advisers had convinced him that there was no legal support for an inherent item veto.²⁰⁸ The controversy continued into the Clinton administration, when the Senate Judiciary Committee held hearings on a Senate resolution encouraging the President to use the inherent item veto and let the dispute be settled in the courts.²⁰⁹ Bottom line: members of Congress should transfer legislative power to the President and see whether courts will return the power to Congress. But each branch is supposed to protect its own prerogatives.

From 1985 to 1995, Congress held a series of hearings to explore different ways of granting the President some form of expanded impoundment power. In debating these measures, lawmakers wallowed in institutional self-flagellation. On the issue of transferring the item veto to the President, House Minority Leader Bob Michel (R-Ill.) said in 1993 that he would be asked: “Bob, why would you give up your legislative authority to an all-powerful chief executive?” His response: “Because we have loused it up here in the Congress. That’s

203. *Id.* at 10851, 10859-70.

204. Stephen Glazier, *Reagan Already Has Line-Item Veto*, WALL ST. J., Dec. 4, 1987, reprinted at 133 CONG. REC. 34,208 (1987).

205. 1 Stat. 95, ch. XXIII (1789); 1 Stat. 104, ch. IV (1790).

206. Letter from George Washington to Edmund Pendleton (Sept. 23, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 24, at 96.

207. *Resolution Urges President to Try Line-Item Veto as a Test of Power*, ROLL CALL, May 20, 1991, at 3.

208. Remarks to Republican Members of Congress and Presidential Appointees, 1 PUB. PAPERS 477, 479 (Mar. 20, 1992).

209. *Line Item Veto: The President’s Constitutional Authority: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 103d Cong. 190, 197 (1994) (“Expressing the sense of the Senate that the President currently has the authority under the Constitution to veto individual items of appropriation and that the President should exercise that authority without awaiting the enactment of additional authorization.”).

why.”²¹⁰ The previous year, Senator John McCain (R-Ariz.) supported the item veto because “controlling spending is something that the Congress is completely unable to do.”²¹¹

When the Republicans took control of Congress in 1995, they had the votes to enact item-veto legislation. Senator Dan Coats (R-Ind.) argued that presidential power had to be increased to compensate for legislative irresponsibility. Congress, he said, “cannot discipline itself. . . . [I]t is selfish and greedy and out of touch with the American people [and] cannot put the national interest ahead of parochial interests or special interests.”²¹² The two Houses finally agreed on what is known as “enhanced rescission.” The new law put the burden on Congress to disapprove presidential rescission proposals within a 30-day period. Along with rescission of discretionary appropriations, the President could cancel any new item of direct spending (entitlements) and certain limited tax benefits. Clinton received the bill and signed into law the Line Item Veto Act of 1996.²¹³

As though uncertain about the legality of their own handiwork, members of Congress included a procedure allowing for expedited review in the courts for challenges that the statute violated the Constitution.²¹⁴ Some legislators expected the judiciary to protect legislative prerogatives. Marge Roukema (R-N.J.) said she was convinced “that the Supreme Court of the United States will save this Congress from itself.”²¹⁵ Bill Clinger, Republican from Pennsylvania and chairman of the House committee with jurisdiction over the item-veto bill, offered this response to those who objected that the bill was unconstitutional: “It is not really our job to determine what is constitutional or what is not unconstitutional.”²¹⁶ In 1998, the Court held that the Line Item Veto Act violated the Presentment Clause by departing from the “finely wrought” constitutional procedures established for the enactment of law. Cancellation authority, said the Court, represented the repeal of law that could be accomplished only through the regular legislative process, including bicameralism and presentment.²¹⁷

210. 139 CONG. REC. 8628 (1993).

211. 138 CONG. REC. 3534 (1992).

212. *Line-Item Veto: Joint Hearing Before the House Comm. on Gov't Reform and Oversight and the Senate Comm. on Governmental Affairs*, 104th Cong. 13-15, 22 (1995) (statement of Dan Hoats, Senator, Indiana).

213. Line Item Veto Act of 1996, Pub. L. No. 104-103, 110 Stat. 1200 (1996) (held unconstitutional by the United States Supreme Court in *Clinton v. City of New York*, 524 U.S. 417 (1998), as a violation of the Presentment Clause, U.S. CONST. art. I, § 7, cl. 2.).

214. Line Item Veto Act § 3, 110 Stat. at 1211.

215. 142 CONG. REC. 6912 (1996).

216. *Id.*

217. *Clinton v. City of New York*, 524 U.S. 417 (1998).

If Congress wants to transfer to the President discretionary authority over the level of federal expenditures, there are many constitutional ways of doing that. Enactment of these proposals, however, would come at a cost. They continue to send a not very subtle message that members of Congress are chronically and incurably irresponsible in exercising their legislative duties and must rely on the finer, nobler instincts of the President to delete wasteful programs and projects. That picture of our political institutions is not supported by what we know about the two branches. It is too demeaning to Congress (and representative government) and too flattering and reverential about the presidency.

D. More Congressional Self-Reproach

In the years following World War II, Congress revealed other uncertainties about its institutional purpose and capability. Functions that had been discharged from 1789 to 1950 now seemed increasingly difficult to do, prompting legislators to seek relief by novel statutory procedures or by amending the Constitution. Three examples are the chronic problems of raising congressional pay and debate over constitutional amendments for a balanced budget and for term limits.

The Constitution provides that Senators and Representatives “shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.”²¹⁸ In implementing this provision, legislators throughout the nineteenth century and early twentieth century found it awkward and excruciating to raise their own salaries, but that is what the Constitution requires.²¹⁹

These were gruesome experiences for lawmakers, but by one means or another they managed to raise their pay periodically from 1789 to the 1960s. Soon, however, they began to look for automatic increases that would not depend on legislative action. In 1967, Congress established a commission to recommend every four years the rates of compensation for members of Congress, Justices of the Supreme Court, federal judges, and certain high-ranking government officials. The President, after receiving these recommendations, would submit to Congress his own proposals for salaries. They would take effect within 30 days unless disapproved by either House or replaced by a different salary schedule enacted into law.²²⁰ Legislation in 1970 adopted a similar scheme, allowing for increases in federal salaries unless either

218. U.S. CONST. art. I, § 6.

219. For the agonizing record, see Louis Fisher, *History of Pay Adjustments for Members of Congress*, in *THE REWARDS OF PUBLIC SERVICE: COMPENSATING TOP FEDERAL OFFICIALS* 25-52 (Robert W. Hartman & Arnold R. Weber eds., 1980).

220. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 225, 81 Stat. 613, 642-44 (1967).

House disapproved within 30 days.²²¹ Of course if Congress did not act the salary increases would take effect.

The history of federal pay in the 1970s and 1980s found legislators entangled in painful roll call votes and deft parliamentary maneuvers, writhing again and again over their compensation and the salaries of executive and judicial officials. The pay issue continued to dog Congress. In 1989, in one of his last official actions, President Reagan recommended a 51 percent salary hike for members of Congress. The huge increase was needed because regular (and more modest) pay increases had been repeatedly blocked by Congress. The increase was scheduled to take effect on February 8 unless both Houses voted to disapprove. Constituents and the media heaped scorn on lawmakers for seeking a salary increase without taking a vote. Having absorbed a public beating for several weeks, Congress created the worst of all worlds by deciding to disapprove the pay increase (not only for themselves but for all of government). Congressman Vic Fazio (D-Cal.), one of the few to vote for the pay raise, expressed regret at the inability of legislators to defend themselves:

... if we are to have any success when we ultimately come to the floor with solutions to these problems, we are going to need more self-respect for ourselves and respect for the institution.

We are going to need to show some courage individually. We no longer are going to be in a position to hand this problem to some process or some person and assume it will be taken care of for us. We are going to have to venture something of ourselves if we are going to make any progress.²²²

The House and the Senate voted on February 7 to kill the pay raise.²²³ So much for clever delegations and automatic procedures. Legislation enacted at the end of 1989 now requires Congress to approve, by recorded vote, pay increases.²²⁴

The proposal for a balanced budget amendment is another advertisement that Congress is irresponsible and cannot be trusted. Instead of confronting and resolving fiscal problems within their own institution, some lawmakers hope to place coercive language in the Constitution to compel Congress to act responsibly. As Congressman Gerald Solomon (R-N.Y.) noted in 1995:

Madame Speaker, Congress has repeatedly shown that it is not prepared to deal responsibly with the problems without some kind of a prod. The enactment of a balanced budget amendment will help to give Congress—and this is the point—it will help to give Congress that prod, that spine, that backbone and,

221. Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, § 3, 84 Stat. 1946, 1946-49 (1971).

222. 135 CONG. REC. 1709 (1989).

223. *Id.* at 1725-26, 1754.

224. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 701, 103 Stat. 1716, 1765 (1989); 2 U.S.C. § 359 (1994).

for some who need it, the excuse to do what the American people have to do, and that is to live within means.²²⁵

The amendment would do little to balance the budget and do much to unbalance political institutions. It would increase presidential power and shift a number of fiscal and budgetary decisions to federal judges. In turn, it would weaken Congress and representative government and further erode public confidence in elected officials. Citizens would discover what we have learned about state constitutional amendments for a balanced budget: They do not eliminate indebtedness.

States do not live within their means. They borrow. If states spent only when they took in as revenues, there would be no need for the limits on indebtedness that we see placed in state constitutions. Nor would we hear of state and municipal bond offerings, or states worrying about their bond ratings. States do not “balance their budgets.” They balance their operating (or general) budgets and run debts on their capital budgets. Over the years, states have devised a number of techniques for creating and concealing debts.

A balanced budget amendment is likely to increase presidential powers over the budget. At the state level, governors use balanced-budget requirements to justify greater power over spending by invoking item-veto authority, impounding funds, or shifting expenditures into the next fiscal year. With a balanced budget requirement for the national government, pressure would mount to extend those same powers to the President, exercised either as inherent authorities or as delegated by statute to the President. The amendment would also transfer a number of sensitive fiscal decisions to federal judges, with little expectation that the courts have the competence (technical or political) to discharge these new duties.²²⁶

Finally, the power and prestige of Congress would suffer when citizens learned that Congress could promise a balanced budget but could not deliver. All the tricks for escaping the deficit targets embodied in the Gramm-Rudman-Hollings Act would be dwarfed by new heights of accounting ingenuity. If citizens want government benefits without being taxed for them, Congress will find ways to disguise the deficit. Instead of dealing with a deficit of known size, honestly displayed, the incentive would be to paper it over, push it underground, and shove it to the future. This result would deepen public cynicism and disrespect for the national legislature. Large deficits in the annual budgets threaten the nation. So do deficits of trust in our governmental institutions.

Arguments for an item veto and a balanced budget amendment rest on the belief that Congress is irresponsible and unworthy of trust. Similarly, term limits are designed to get rid of lawmakers supposedly corrupted by lengthy service.

225. 141 CONG. REC. 2361 (1995).

226. See Louis Fisher, *The Effects of a Balanced Budget Amendment on Political Institutions*, 9 J.L. & POL. 89 (1992).

The clear message: “Members of Congress are not honest. The longer they serve, the worse they get.” The punitive spirit behind the proposal is reflected in the title of a book published in 1994 by John Armor: *Why Term Limits? Because They Have It Coming!*

Public support for term limits seemed to ignore its impact on the constitutional balance between the executive and legislative branches. Turning members of Congress into citizen-legislators with short terms would give them little stake in protecting legislative interests, and it would weaken their power to protect those interests even if they wanted to. Power would flow from Congress to the White House, political appointees, and members of the career bureaucracy. Congressman Henry Hyde (R-Ill.), chairman of the House Judiciary Committee, broke with his party on this issue, refusing to participate in the “dumbing down of democracy.”²²⁷

With Congress weakened in relation to the executive branch, lawmakers would become more, not less, dependent on the expertise eagerly offered by interest groups and lobbyists. Far from eliminating or reducing corruption, term limits are more likely to exacerbate the problem. Unable to look forward to a career in Congress, lawmakers are likely to view lobbyists not merely as sources of information but as potential employers. Congressman Tony Beilenson (D-Cal.) said that because of the six-year term limit in his state, “legislators come into office looking for ways to use their short stint to make their next career move.”²²⁸

In 1997, Congressman Hyde reflected on the reason behind the drive for term limits: “The popularity of term limits is a measure of the low esteem our citizens have for politics and politicians. Some of my colleagues may think that is fine. I think it is dangerous.” He said that because of the way members of Congress “attack each other and the way we demean this institution in every campaign, it is no wonder we are held in contempt.”²²⁹

VI. STRENGTHENING OUR POLITICAL INSTITUTIONS

After protecting congressional war and spending prerogatives from 1789 to 1950, why have lawmakers agreed to transfer power to the President in wholesale lots? Congress remains a strong and independent branch in many areas—capable of retaining close control over executive agencies and the President—but in the domains of war and spending it has not acted with confidence, self-respect, or institutional courage. At stake is not just congressional prerogatives but representative government.

Some argue that the framers’ model was appropriate for the eighteenth century but not for contemporary times, when it is claimed that greater power

227. 141 CONG. REC. 9684 (1995).

228. 141 CONG. REC. 9501 (1995).

229. 143 CONG. REC. H470 (daily ed. Feb. 12, 1997).

must be concentrated in the President. The framers also lived in a time of crises and emergencies and deliberately chose to vest in Congress the core powers of war and spending.

Why should citizens care if Congress continues to defer to the President? Why not let Congress remain comfortably and passively in the back seat? There would be some justice to that. However, a weak Congress undermines the public control and democratic values that operate through a representative branch. What steps might citizens and Congress take to restore constitutional checks?

A. *Constitutional Law 101*

Few members of Congress seem to have much understanding of the prerogatives they are expected to exercise and defend. After decades of Presidents claiming that they can do anything they want as Commander-in-Chief, and after decades of Congress, the public, and the media pretending that the President is a more trusted guardian of the purse, it is little wonder that lawmakers have become accustomed to a subordinate role.

A few years ago I gave a talk on war powers at a law school. I had hardly begun when a second year law student cut me off, with palpable irritation in his voice, by asking: “Doesn’t the Constitution give the President the power to declare war, subject to the advice and consent of the Senate?” For a moment my supposedly involuntary breathing system failed me. Did he say what I thought he said? Could a second year law student be that unaware of the text of the Constitution? I moved from those musings to a broader thought. Evidently the student had not manufactured this off-the-wall idea. He picked it up somewhere from the press, from friends, and other sources. I was not in the midst of a unique and original misreading of the Constitution. Disturbingly, he reflected something deeper.

Early in 1999, on a drive home from work, I listened to a speech that former President George Bush was giving to the Senate. He discussed the difficulty in 1990 of developing a consensus with Congress about the need to take military action against Saddam Hussein. I heard him say there was a difference of opinion about who had the power to declare war. Had I heard him correctly? Since the Constitution clearly decides that issue, how could it still be unsettled in his mind? Had Bush ad-libbed and strayed from the text of his speech? No. I got a copy of his speech and the language was unambiguous: “there was a fundamental difference of opinion between the Senate and the White House over the Senate’s role in declaring war—one that dated back to the War Powers Act.”²³⁰ Of course the issue dates back much earlier (to the Constitution) and it is not the Senate’s but the Congress’s role “to declare war.”²³¹ Ignorance by a

230. 145 CONG. REC. S959 (daily ed. Jan. 23, 1999).

231. U.S. CONST. art. I, §8, cl. 11.

law student is one thing. To hear a former (and recent) President stumble on such a fundamental point is much more alarming.

I am constantly surprised by arguments put forward by some members of Congress. Increasingly I hear them say that Congress may not use the power of the purse to prevent a President from using military force against another country. They say that only after the President orders troops into combat would it be constitutionally permissible for Congress to deny funds. There is no basis for that position. If there was, legislators would be fighting a rear guard battle, trying to exercise control after the President had made crucial military and financial commitments. Members may restrict a President's actions prospectively as well as retrospectively. Nothing prohibits Congress from passing legislation to deny funds for something the President is about to do. If such a statutory restriction were somehow challenged in court, there is every reason to believe that courts would uphold it.

The system of checks and balances applies as much to military policy (if not more so) as to domestic policy. We cannot expect foreign policy and national security to be formulated well in the hands of an unchecked Executive. In a speech in 1998, Congressman Lee Hamilton (D-Ind.) pointed to the value of joint action by Congress and the President: "I believe that a partnership, characterized by creative tension between the President and the Congress, produces a foreign policy that better serves the American national interest—and better reflects the values of the American people—than policy produced by the President alone."²³²

The contemporary President benefits from some new developments. One is the volunteer army. During the Vietnam War years, citizens protested by burning their draft cards, refusing induction, fleeing to Canada, and participating in mass demonstrations. With the current volunteer army, the passions and outlets for civil disobedience seem mooted. College campuses, once vigorous centers of opposition to the Vietnam War, are largely silent. As Joseph Califano has noted, an all-volunteer army "relieves affluent, vocal, voting Americans of the concern that their children will be at risk of going into combat."²³³

Second, military technology now enables Presidents to wage wars with few casualties. During the four days of bombing Iraq in December 1998, not a single U.S. or British casualty resulted from 70 hours of intensive airstrikes involving 650 sorties against nearly 100 targets.²³⁴ The following year, President Clinton

232. Rep. Lee H. Hamilton, *The Role of the Congress in U.S. Foreign Policy*, Address Before the Center for Strategic and International Studies (Nov. 19, 1998), at <http://www.csis.org/html/sp98hamilton.html>.

233. Joseph A. Califano, Jr., *When There's No Draft*, WASH. POST, Apr. 6, 1999, at A23.

234. Eugene Robinson, *U.S. Halts Attack on Iraq After Four Days*, WASH. POST, Dec. 20, 1998, at A1.

waged war for eleven weeks against Serbia without a single NATO combat casualty.

Third, the growing cost of running for office means that legislators have less time to tend to their institutional duties. As Congressman Hamilton noted in 1998: “Members today must spend a disproportionate amount of time fundraising, which means less time with constituents discussing the issues and less time with colleagues forging legislation and monitoring federal bureaucrats.”²³⁵ Less time in Washington, D.C., means less time understanding legislative prerogatives, less time working with colleagues on like-minded issues, and less time forging alliances to fight back against executive encroachments.

B. *Constitutional Clichés*

The President’s capacity to conduct war unilaterally expands when legislators, members of the public, and the media routinely accept clichés and superficial maxims about executive power. A coequal and independent Congress requires that tired, trite axioms be dissected and punctured whenever they start to circulate, especially when they parade as received wisdom.

1. President as “Sole Organ”

As legal support for broad presidential power, the administration continues to cite language from *Curtiss-Wright* that the President is “sole organ of the nation in its external relations.”²³⁶ This phrase comes from a speech by Congressman John Marshall in 1800. As explained in Section II-C, Marshall never argued that the President was the exclusive policymaker in foreign affairs. At no time, either in 1800 or during his long tenure on the Supreme Court, did Marshall ever suggest that the President could act unilaterally to make foreign policy or military policy in the face of statutory restrictions, nor did he ever imply that Presidents could conduct offensive wars on their own authority. The President was “sole organ” in *announcing* and *implementing* policy, not in *making* it. National security policy is formulated through the collective effort of the executive and legislative branches, either by treaty or by statute.

2. The 200 Precedents

Unilateral presidential actions in committing military troops is often defended by referring to the two hundred or so instances in which Presidents have used force without congressional authority.²³⁷ No doubt one can put

235. 144 CONG. REC. E1668 (daily ed. Sept. 9, 1998).

236. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

237. For compilations of these incidents, see Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad, 1798-1998*, Congressional Research Serv. Report No. 98-881 F (1998); R. ERNEST DUPUY & WILLIAM H. BAUMER, *THE LITTLE WARS OF THE UNITED STATES*

together a long list of such precedents, but they do not change the constitutional authority of Congress to take the nation from a state of peace to a state of war. Take a close look at the precedents: President Monroe's use of U.S. forces to expel a group of smugglers in Florida, the landing of a naval party in Argentina in 1890 to protect the U.S. consulate and legation, the chasing of bandits into Mexico, and so forth. Those actions cannot possibly justify Truman's war against Korea, Bush's operation against Iraq, or Clinton's bombing of Serbia and Yugoslavia.

3. Stopping Politics at the Water's Edge

When President Clinton bombed Iraq in December 1998, the *New York Times* ran an article with this subtitle: "Politics Stop No More At the Water's Edge."²³⁸ Because some legislators questioned Clinton's motives in ordering the attacks the day before the House was scheduled to take up the Articles of Impeachment against Clinton, the reporter claimed that the legislators violated "Washington's long-standing political code. You don't criticize the President, that code says, when American forces stand in harm's way."²³⁹ There is no such code. As the article itself acknowledged, many Presidents have run into trouble on Capitol Hill over foreign policy. Lyndon Johnson was driven from office for his Vietnam policy. As the reporter notes, Ronald Reagan was accused by some members of Congress and editorial writers of "staging the invasion of Grenada to mute criticism of his failure to protect marines who were killed in Lebanon."²⁴⁰ Stopping politics at the water's edge is not the practice in America. Instead, it is a formula for a second-class Congress and a muzzled public.

4. Speaking With One Voice

In the midst of bombing Yugoslavia in 1999, President Clinton urged that "America must continue to speak with a single voice."²⁴¹ Stop. The President is not America; he is not the nation. There is no need to revive Louis XIV's *L'état c'est moi*. Nothing is treasonous or disloyal about questioning and disagreeing with military actions ordered by the President. In 1919, a unanimous Supreme Court upheld the criminal indictments of individuals who opposed America's

(1968); JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION: AN INQUIRY INTO THE POWERS OF THE PRESIDENT AND CONGRESS, NINE WARS AND A HUNDRED MILITARY OPERATIONS, 1789-1945* (1945); MILTON OFFUTT, *THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES* (Johns Hopkins Univ. Studies in Historical and Political Science, Series XLVI, Nov. 4, 1928).

238. R.W. Apple, Jr., *No Reservoir of Credibility: Politics Stop No More at the Water's Edge*, N.Y. TIMES, Dec. 17, 1998, at A1.

239. *Id.*

240. *Id.* at A15.

241. Remarks Following a Meeting With a Congressional Delegation and an Exchange With Reporters, 35 WEEKLY COMP. PRES. DOC. 759 (April 28, 1999).

entrance into World War I and spoke out against the draft.²⁴² The “clear and present danger” test announced in this decision was followed by the “bad tendency” test, which argued that the mere tendency to create evil justifies suppression by the government.²⁴³ In a penetrating critique in the *Harvard Law Review*, Zechariah Chafee, Jr., argued that it was particularly in time of war that public debate must be left free to challenge governmental policy.²⁴⁴

5. “If We’re In It, Win It”

Once Clinton began bombing Yugoslavia, some supporters (and previous opponents) argued that no matter how ill-advised the military operation might have been, once the United States and NATO decided to intervene it was necessary to “win” the war. As a general policy, that makes no sense and has never been national strategy. The United States has been involved in numerous military actions without insisting on victory, whatever the cost. Examples of America disengaging from military operations short of a successful outcome include Korea, Vietnam, Lebanon in 1983, and Somalia in 1993. Sometimes when we’re in, it is smart to get out, and quickly. It is not a national disgrace to disengage from wrong-headed and ill-fated ventures.

“If we in it, win it” was the attitude that kept the United States mired in Vietnam for years, absorbing huge casualties with no hope of success. Had the United States followed the policy to win a war once engaged, President Kennedy would have found himself in an air and ground war in Cuba after the Bay of Pigs and the Cuban Missile Crisis. In both cases he chose a more limited, and more successful, strategy. If we’re in it, we have to decide whether it is in the national interest to remain there.

6. Saving Credibility

When Clinton made a commitment to send troops to Bosnia in 1995, some legislators who had opposed his policy now switched positions and claimed that continued resistance would undermine the credibility of the United States, the presidency, and NATO. Similar arguments surfaced with the bombing of Serbia in 1999. Through some mysterious process, a presidential initiative becomes a “vital national interest.” Supporters argued that any effort to renege on Clinton’s decision, however misguided it might have been, would undermine the credibility of the presidency and NATO. No doubt the credibility of the presidency and NATO is important, but so is the credibility of Congress, the Constitution, the system of checks and balances, and popular control.

242. *Schenck v. United States*, 249 U.S. 47 (1919).

243. *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

244. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

Presidential shortcuts and legislative acquiescence mark the road from representative government to autocracy.

7. “Doing the Right Thing”

Writing after his presidency, Bush said that had Congress failed to authorize the war against Iraq he would have acted anyway, because “it was the right thing to do.” Clinton used precisely the same phrase in justifying his planned invasion of Haiti and his interventions in Bosnia and Serbia. Multibillion dollar commitments should not be entered into simply because the President says it is the “right thing” and is determined to proceed with or without Congress and with or without public support. That is a superficial foundation for national policy, domestic or foreign. More important than doing the right thing is doing things the right way: following constitutional procedures, developing a national consensus and public support, and working with the legislative branch instead of circumventing it.

8. Protecting the Troops

One of the standard arguments in defense of presidential wars is that regardless of how deficient the policy might be it is necessary to offer support because American troops deserve protection. That was the position of the Senate in 1995 when it passed legislation to support American troops in Bosnia but expressed “reservations” about sending them there. Some legislators even suggested that a cutoff of funds would leave American soldiers stranded and without ammunition, food, and clothing. Clearly, that would not be the result. A cutoff of funds means that troops are withdrawn, out of harm’s way. Military commitments need to be examined on their merits. If the policy cannot be defended, it makes no sense to fund it or send American soldiers. In such circumstances the best protection for troops is not to have them there.

9. “We’ll Consult with Congress”

Presidents regularly promise to brief legislators and consult with them about military commitments. Cabinet officials, like the Secretary of Defense, speak earnestly about the need for an open and frank dialogue between the President and Congress. Many legislators seem mollified by these offers. Consultation, however, is not enough. Congress is a legislative body and discharges its constitutional responsibilities by passing statutes that authorize and define national policy. Congress exists to legislate and legitimate, not to have Presidents and executive officials simply touch bases with it.

10. Word Games

For the past half century, Presidents and their assistants have resorted to word games to justify military adventures, but semantics are a poor substitute for

constitutional principle and effective policy. Truman denied he was “at war” in Korea. It was, instead, a “police action under the United Nations.” Even federal courts, operating at some distance from military issues, found that position singularly unpersuasive. As noted before, Secretary of State Albright was asked in 1998 how President Clinton could order military action against Iraq after opposing American policy in Vietnam. Her response: “We are talking about using military force, but we are not talking about a war. That is an important distinction.”²⁴⁵ Supposedly clever distinctions between war and military force do much to undermine democratic and constitutional values. They eviscerate the congressional war power and public control.

C. *The War Powers Resolution*

The War Powers Resolution of 1973 is generally considered the high-water mark of congressional reassertion in national security affairs. In fact, it was ill-conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction. The statute further subordinates Congress to presidential war initiatives and should be repealed in its entirety.²⁴⁶

Other than genuine emergencies or legitimate measures of defensive action, the President should come to Congress in advance for statutory authority. If he must act in a sudden emergency without such authority, he needs to come as soon as possible to receive retroactive authority. In 1995, a conference report noted that President Clinton’s initiatives in Somalia, Rwanda, Haiti, and refugee relief in the Caribbean “all mark significant departures from previous emergency deployments of American forces.” The conferees expressed the proper constitutional principle by stating their “strong belief” that military deployments “in support of peacekeeping or humanitarian objectives both merit and require advance approval by the Congress.”²⁴⁷

In 1998, the House passed language to narrow the scope of presidential war power. An amendment, added to the defense appropriations bill, provided that no funds appropriated in that act “may be used to initiate or conduct offensive military operations” by U.S. armed forces except in accordance with the war powers clause of the Constitution, “which vests in Congress the power to declare and authorize war.”²⁴⁸ That language was tabled in the other chamber because Senators were scrambling to get out of town for the August recess.²⁴⁹ If legislators want to reclaim constitutional powers that have drifted to the

245. *Students Receive Albright Politely*, WASH. POST, Feb. 20, 1998, at A19.

246. Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1 (1998).

247. H.R. REP. NO. 104-101, at 25 (1995).

248. 144 CONG. REC. H5247 (daily ed. June 24, 1998).

249. *Id.* at S9386-92 (daily ed. July 30, 1998).

President and restore Congress as a coequal branch, revisiting this amendment with hearings and full legislative debate is a good place to begin.

When Secretary Albright appeared before the House Appropriations Committee in 1998, Congressman David Skaggs (D-Colo.) asked her to explain what authority President Clinton possessed to initiate further attacks against Iraq. In a statement later supplied to the committee, as an insert for the record, she claimed that the President's constitutional authority as commander in chief allowed him "to use armed forces to protect our national interests."²⁵⁰ That is a startling interpretation. Whenever the President determines, on his own, that a matter is in the national interest, he may use military force against another nation without ever seeking authority from Congress. Nothing in the Constitution supports that claim of power.

D. Behaving Like a Coequal Branch

During President Reagan's first year in office, Interior Secretary James Watt withheld documents from a House subcommittee, provoking a committee subpoena for the documents and a recommendation by the Committee on Energy and Commerce that Watt be cited for contempt. Attorney General William French Smith claimed that "all of the documents in issue are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations."²⁵¹

In fact, the dispute with Watt concerned the impact of Canadian investment and energy policies on American commerce, an issue squarely within the Article I enumerated power of Congress to "regulate Commerce with foreign Nations." The Justice Department seemed to have difficulty reading, much less following, the text of the Constitution. As the controversy escalated upward to a contempt citation, the documents were released to the committee.²⁵²

In 1996, the Justice Department issued a memorandum objecting to two statutes that concerned the rights of federal employees to provide information to Congress. Both statutory provisions gave executive employees a right to furnish information to either House of Congress or to a committee. The Justice memo claimed that a congressional enactment "would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of Congress without receiving official authorization to do so." In defending this position, the

250. *Id.* at H5217 (daily ed. June 24, 1998).

251. House Comm. on Energy and Com., 97th Cong., Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior 2 (Comm. Print 1981).

252. *Contempt of Congress: Hearings Before the House Committee on Energy and Commerce*, 97th Cong. 385-94 (1982); H.R. REP. NO. 97-898 (1982).

Justice Department cited a number of presidential roles, including Commander in Chief, head of the executive branch, and “sole organ” of the nation in its external relations.²⁵³ I prepared a memo, detailing the deficiencies in the Justice Department analysis.

In order to examine the position of the Justice Department, the Senate Select Committee on Intelligence held two days of hearings in 1998. Professor Peter Raven-Hansen of the George Washington University law school and I appeared the first day to rebut the Department’s position that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information. On the second day of hearings, I testified alongside a representative of the Justice Department.²⁵⁴

Based on these hearings and its own independent staff analysis, the committee reported legislation despite claims by the Justice Department that the bill was an unconstitutional invasion of presidential prerogatives. The committee acted unanimously, voting nineteen to zero to report the bill.²⁵⁵ The bipartisan vote for legislative prerogatives was solid. The Senate report said that the administration’s “intransigence on this issue compelled the Committee to act.”²⁵⁶ The bill passed the Senate by a vote of 93 to one.²⁵⁷ The House Permanent Select Committee on Intelligence took a different approach in drafting legislation, but also rejected the administration’s claim that the President exercised exclusive control over national security information. I testified before the House committee as well.²⁵⁸ Like the Senate, the House committee dismissed the assertion that the President, as Commander in Chief, “has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity.”²⁵⁹ The two committees reported and enacted legislation with this language: “national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President.”²⁶⁰ The statute further provides that Congress, “as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has ‘a need to know’ of allegations of wrongdoing within the

253. *Disclosure of Classified Information to Congress: Hearings Before the Senate Select Committee on Intelligence*, 105th Cong. 6 (1998).

254. *Id.* at 4-61.

255. S. REP. NO. 105-165, at 2 (1998).

256. *Id.* at 5.

257. 144 CONG. REC. S1561-64 (daily ed. Mar. 9, 1998).

258. *Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act: Hearings Before the House Permanent Select Committee on Intelligence*, 106th Cong. 32-53 (1998).

259. H.R. REP. NO. 105-747, pt. 1, at 15 (1998).

260. 112 Stat. 2413, § 701(b) (1998). *See* H.R. REP. NO. 105-780, at 19 (1998).

executive branch, including allegations of wrongdoing in the Intelligence Community.”²⁶¹

Dozens of war-power issues have been litigated since World War II. The trend in recent decades is for members of Congress to take these disputes to court, hoping that a judge will agree with their constitutional interpretation. But there is little reason to think that these member cases will be successful. Courts have made it plain that they are loath to decide such cases, because just as one group of members will claim that the President has violated the Constitution, so will another group claim that he has acted properly. Judges don’t want to be in the middle of this intramural crossfire. They will not referee a case unless the two branches are in irresolute conflict and the entire Congress has made use of the institutional remedies available to it. If members want to protect their institution, they must take the time to forge a majority capable of doing battle against the President.

E. The Spending Power

Rather than duck accountability on spending issues and heap blame on their institution, legislators can point to the clear record that they generally remain within the budget aggregates proposed by the President. Having established their fiscal bona fides, they are then in a position to participate fully in deciding how the totals are to be spent. Under these conditions, there is no need to delegate cancellation or other spending powers to the President, and no need to construct a complicated budget process for the purpose of convincing the public that they can act “comprehensively.”

It would put executive-legislative relations in better perspective if we acknowledged the obvious: Presidents are just as good as Congress in promoting and originating expensive programs. In fact, they are probably better. Really big programs are likely to come from the President: the supercollider, the strategic defense initiative (Star Wars), and the Clinton health plan of 1993. Presidents are more apt to complain about Congress cutting programs than adding to them.

The media helps foster the notion of an irresponsible Congress. An article on page A18 of the *New York Times* on September 9, 1999, has this arresting title: “Lawmakers’ Spending Plans Could Turn Surplus to Deficit.” How many readers will go much beyond the headline? The gist of the story is that the Republicans planned additional spending to wipe out a projected \$14 billion surplus for the next year and create in its place an \$11 billion deficit. A \$25 billion swing is quite a lot, suggesting that an undisciplined Congress is solely responsible for turning a good situation into a bad one.

An industrious reader could locate another story, on page A1 of the same paper, with the title “Lott Says Veto Is Likely to Kill Tax Cut in ‘99.” Doesn’t seem to have anything to do with spending, but of course it does. The

261. *Id.*

Republicans proposed a \$792 billion tax cut but President Clinton promised to veto anything of that size. Instead, he wanted a tax cut of about \$300 billion in order to direct more funds to education, a prescription drug program for the elderly, and other domestic programs. His list of new spending initiatives was much longer, and more expensive, than what the Republicans had in mind. The headline could just as well have been: "Clinton's Spending Plans Could Turn Surplus to Deficit." But it wasn't.

A month later, Clinton threatened to veto the Republican foreign aid bill because it provided \$1.9 billion less than he requested. When Republicans considered a plan to cut spending 2.7 percent across-the-board, the White House was quick to denounce the plan for requiring devastating reductions in education, health, transportation, and other domestic programs.²⁶² Congress had to settle for an across-the-board cut of 0.39 percent. With Clinton threatening to shut the government down unless he got additional funds, Republicans accommodated his demands by including several billion to hire more teachers and police and to acquire western desert and ranch land as part of Clinton's "Land Legacy" program.²⁶³

The State of the Union Message has become a major showcase for presidential largesse. Prior to the release of the message, newspaper stories carry leaks from the administration, explaining how the President will first benefit this group and next that group. When President Clinton gave his State of the Union Message in January 1999, it was studded with new spending and tax initiatives. He proposed a new pension initiative to use a little over 11 percent of the surplus to establish Universal Savings Accounts to give all Americans the means to save. Next came a tripling of funding for summer school and after-school programs, \$200 million "to help States turn around their own failing schools," a six-fold increase in college scholarships for students who commit to teach in the inner cities and isolated rural areas and in Indian communities, building or modernizing 5,000 schools, and raising the minimum wage by \$1 an hour over the next two years. Clinton also proposed changes in the tax code that would reduce federal revenue: tax credits of \$1,000 for the aged, ailing, or disabled; tax credits and subsidies for working families and for expanded after-school programs; and a new tax credit for stay-at-home parents. He asked Congress for "a dramatic increase in Federal support for adult literacy" and proposed a 28 percent increase in long-term computing research.

Turning to national security, he asked for an increase in funding by almost two thirds over the next five years to keep terrorists from disrupting computer networks, to prepare local communities for biological and chemical emergencies, to support research into vaccines and treatments, and to restrain the spread of nuclear weapons. He called for a "sustained increase" over the next six years for

262. *House Narrowly Passes Foreign Aid Measure*, WASH. POST, Oct. 6, 1999, at A6, A7.

263. *Spending Agreement Eludes Negotiators*, WASH. POST, Nov. 13, 1999, at A4.

readiness, for modernization, and for pay and benefits for U.S. troops and their families.

Clinton said his budget would expand support for drug testing and treatment and contain two new initiatives: a \$1 billion Liability Agenda to help communities save open space, ease traffic congestion and grow in ways “that enhance every citizen’s quality of life,” and a \$1 billion Lands Legacy Initiative to preserve places of natural beauty across America.²⁶⁴ These and other presidential proposals dwarf the projects that members of Congress attempt to steer toward their communities.

F. The Price of Centralization

Congress could profitably rethink the merits of the Budget Act of 1974. Even when a process is crippled and dysfunctional, it’s not easy or comfortable to kick away crutches. But there is good reason to doubt that budget resolutions are an important discipline for enforcing overall budget decisions. It is probably more true that they obscure accountability, invite greater spending, and open the door to greater presidential leverage, as happened in 1981. Centralized procedures in Congress do not automatically yield benefits or improvements.

Centralizing the budgeting process in 1974 has led to less participation by members of Congress. Put another way, voters and constituents now have less influence through their representatives. There has been an increasing trend toward “summit meetings” that include a handful of executive and legislative leaders to hammer out the final details of a budget plan. The \$500 billion omnibus appropriations bill in 1998 included eight appropriations bills, supplemental appropriations, emergency appropriations, a tax cut, and a number of authorization bills. Toward the end of the process, key negotiations were conducted by White House representatives and four legislators: Speaker Gingrich, House Minority Leader Gephardt, Senate Majority Leader Lott, and Senate Minority Leader Daschle.

Republican rank-and-file, and even more senior lawmakers, resented the budget summit in 1995 that included only Republican leaders and White House officials.²⁶⁵ Similar criticism was directed at Speaker Gingrich in 1997 for making budget decisions without including a sufficient number of other Republican lawmakers.²⁶⁶ In the fall of 1998, Republicans presented Clinton with a single omnibus appropriations bill instead of the 13 individual appropriations bills. He was thus ideally positioned to threaten a veto and force another shutdown of government (with the public most likely to blame the

264. 145 CONG. REC. H259-63 (daily ed. Jan. 19, 1999) (statement of President Clinton).

265. DANIEL J. PALAZZOLO, *DONE DEAL?: THE POLITICS OF THE 1997 BUDGET AGREEMENT* 37 (1999).

266. Jackie Koszczuk, *Gingrich Under Fire as Discord Simmers From Rank to Top*, CONG. Q. WKLY. REP., June 21, 1997, at 1415-18.

Republicans) unless he received funding increases for various domestic programs.²⁶⁷ Republican leaders once again walked into a trap they helped set.²⁶⁸ The anger and sense of betrayal from Republicans excluded from this process was one of the factors in Gingrich's decision to step down as Speaker and retire from Congress.²⁶⁹

By combining a number of bills to form a single, omnibus measure in 1998, lawmakers left themselves no opportunity to offer floor amendments. The decision was to vote up or down, take it or leave it. No legislator claimed to know the contents of the 4,000 page measure. The very size of the bill invited the inclusion of projects that might not have survived in smaller bills. Congressman Joseph Moakley (D-Mass.) remarked: "the good news for the Democrats is this bill contains a lot more Democratic provisions than we could have gotten under the regular legislative procedure if that legislative procedure had taken place in its orderly fashion."²⁷⁰

The budget process adopted in 1974 is highly complex and has grown more so over the years. The more complex the budget process, the less suitable it is for representative government. Few members of Congress and their staff understand the arcane procedures and rules. The general public cannot follow them. That is a high price in a democratic society, where taxpayers and citizens should be able to monitor spending decisions.

Congress is often criticized for being "decentralized" and "fragmented." In fact, that is a major source of strength and explains why Congress remains effective in protecting legislative prerogatives. Committees and subcommittees play a vital role in checking the executive branch.

In *INS v. Chadha*, the Supreme Court struck down what had come to be known as the "legislative veto": efforts by Congress to control the executive branch by resolutions (one-House or two-House) that did not go to the President for his signature. The Court said that whenever congressional action has the "purpose and effect of altering the legal rights, duties, and relations" of persons outside the legislative branch, Congress must act through both Houses in a bill presented to the President.²⁷¹ The breadth of this ruling would have invalidated every type of legislative control, including committee and subcommittee vetoes.

Following the Court's ruling, Congress amended a number of statutes by deleting legislative vetoes and replacing them with joint resolutions (which do go to the President).²⁷² Yet Congress continues to add committee vetoes to bills and

267. Andrew Taylor, *Clinton Gains Ground in Struggle Over Catchall Spending Bill*, CONG. Q. WKLY. REP., Oct. 10, 1998, at 2723-26.

268. *Id.*

269. Jeffrey L. Katz, *Shakeup in the House*, CONG. Q. WKLY. REP., Nov. 7, 1998, at 2989-92.

270. 144 CONG. REC. H11584 (daily ed. Oct. 20, 1998).

271. 462 U.S. 919, 952 (1983).

272. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 286-87 (1993).

Presidents continue to sign them into law. In the years following *Chadha*, Congress enacted over four hundred of these statutory provisions. When committee-veto provisions came to President Reagan in 1984, he signed the bills but announced that he would implement the statutes “in a manner consistent with the *Chadha* decision.”²⁷³ The clear implication: committee vetoes would have no legal effect. After notifying the committees, agencies could do as they liked without obtaining committee approval.

The House Appropriations Committee lost little time in responding to this presidential threat. It reviewed a procedure that had worked well with the National Aeronautics and Space Administration (NASA) for about four years. Statutory ceilings (“caps”) were placed on various NASA programs, usually at the level requested in the President’s budget. NASA could exceed those caps only if it received permission from the Appropriations Committees. Because the administration now threatened to ignore the committee controls, the House Appropriations Committee said that it would repeal both the committee veto *and* NASA’s authority to exceed the caps.²⁷⁴ If NASA wanted to spend more than the caps allowed, it would have to do what the Court mandated in *Chadha*: pass a bill through both Houses and have it presented to the President.

NASA was aghast. It did not want to obtain a new public law every time it needed to exceed spending caps. To avoid that kind of administrative rigidity, NASA Administrator James M. Beggs wrote to the Appropriations Committees and suggested a compromise. Instead of putting the caps in a public law, he recommended that they be placed in a conference report that explains how Congress expects a public law to be carried out. He then pledged that NASA would not exceed any ceiling identified in the conference report without first obtaining the prior approval of the Appropriations Committees.²⁷⁵ Imaginative remedies like this allow government to function. For the most part, agencies find it in their interests to adhere closely to nonstatutory controls.

Members of Congress need to reeducate themselves on their institutional duties and constitutional prerogatives. They would then be in a position to educate their constituents and promote a healthy system of checks and balances. Presidents should not be allowed to engage the country in war singlehandedly. Congress should not transfer item-veto powers to the President. If legislators fail to take the lead, citizens can challenge them at town-hall meetings and remind lawmakers of their constitutional duties.

Over the past decade I have advised a number of countries from Eastern Europe and the former Soviet Union and Yugoslavia. I worked with legislators, executive officials, judges, and constitutional experts from Albania,

273. Statement on Signing Department of Housing and Urban Development – Independent Appropriations Act, 2 PUB. PAPERS 1057 (July 18, 1984).

274. H.R. REP. NO. 98-916, at 48 (1984).

275. This letter is reproduced in Fisher, *supra* note 272, at 289.

Armenia, Belarus, Bosnia-Herzegovina, Bulgaria, the Czech Republic, Hungary, Lithuania, Macedonia, Romania, Russia, Slovenia, and Ukraine. What impressed them (with their history of executive dominance) was the capacity of Congress to participate as a coequal branch and provide effective checks on the President. They saw the value of a vigorous system of checks and balances. So should we. The framers knew what monarchy looked like and rejected it. Yet especially in matters of the war power, the United States is recreating a system of monarchy (or autocracy) while it professes to champion democracy and the rule of law abroad. When Presidents act unilaterally to use military force ostensibly to further those values, they undermine democracy and the rule of law at home. That is the reality. What are we willing to do about it?

