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## CONGRESS: DOES IT ABDICATE ITS POWER?\*

ADDRESS OF THOMAS F. EAGLETON\*\*

### I. INTRODUCTION

“Original Intent,” just what do these words mean? Justice Clarence Thomas<sup>1</sup> often uses these two words — likewise, with the *Wall Street Journal*<sup>2</sup> and Rush Limbaugh.<sup>3</sup> Senate and House members resort to these words when it is convenient to do so.<sup>4</sup>

Today — just for today — I find it convenient to argue in favor of “original intent.” Today, I want to praise our Founding Fathers and argue that we should follow the letter and spirit of what they expressed in the Constitution with respect to how our nation goes to war. Today I am the Gabriel of original intent.

### II. THE CONSTITUTION

Article I authorizes Congress, among other things, to “provide for the common defense;”<sup>5</sup> to “declare war;”<sup>6</sup> to “make rules for the government and regulation of land and naval forces;”<sup>7</sup> to raise armies and navies;<sup>8</sup> to make all

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1. Robert Robb, *Justice Thomas Wins Stature for Stance Becomes Strong Voice of Conservatism*, ARIZ. REPUB., Nov. 28, 1999, at B11.

2. Jonathan Turley, *Rule of Law: High Crimes and Misdemeanors According to the Framers*, WALL ST. J., Nov. 9, 1998, at A23.

3. Rush Limbaugh, *On the Frontier of Freedom*, at [http://www.townhall.com/hall\\_of\\_fame/reagan/speech/cpac12.html](http://www.townhall.com/hall_of_fame/reagan/speech/cpac12.html).

4. Greg Gordon, *Corporations' Parties at Two Conventions Anger Senators*, STAR-TRIB. (MINN.-ST. PAUL), Aug. 26, 2000, at 11A.

5. U.S. CONST. art. I, § 8, cl. 1.

6. *Id.* at cl. 11.

7. *Id.* at cl. 14.

8. *Id.* at cl. 12.

appropriations;<sup>9</sup> and to make “all laws which shall be necessary and proper”<sup>10</sup> for carrying out all of these enumerated powers.

In Article II, the President is given the power to appoint ambassadors and is denominated as “commander in chief.”<sup>11</sup>

One need not be a constitutional historian to conclude that the Founding Fathers decided that the business of war was too serious a matter to be left to one person. Having experienced more than enough of war making by George III,<sup>12</sup> they wanted no more unilateral war-making.

Although the Fathers could not be so omniscient as to provide exact answers to every question that might arise regarding the use of American armed forces, they were clear that the power to make war was shared between the Congress and the President.<sup>13</sup> The constitutional provisions were to provide a framework within which the Congress and the President could cooperate in the protection of the nation from external threat.<sup>14</sup>

In the 200 plus years of our Constitution, several Presidents have committed American forces without a declaration of war.<sup>15</sup> For example, America has attacked pirates in Tripoli,<sup>16</sup> and has chased Pancho Villa in Mexico<sup>17</sup> on unilateral presidential authority. Congress sometimes sulked about presidential adventurism, but often as not was happy to have been spared the political burden of ticklish decision-making about war.

In Korea, President Truman marched us there under a United Nations Resolution.<sup>18</sup> Congress, later on, did considerable second-guessing about this, but never felt the itch either to declare war or to stop it.

We inched into Vietnam under Truman,<sup>19</sup> Eisenhower,<sup>20</sup> and Kennedy<sup>21</sup> and then jumped in full force under Johnson with the Gulf of Tonkin

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9. *Id.* at cl. 13.

10. *Id.* at cl. 18.

11. U.S. CONST. art. II, §2, cl. 1.

12. *See generally* George III (1760-1820 AD), at <http://www.britannia.com/history/monarchs/mon55.html>.

13. *See* U.S. CONST. art. I, § 8, cl. 11; U.S. CONST. art. II, § 2, cl. 1.

14. *Id.*

15. *See infra* authorities and text accompanying notes 16-22.

16. LOUIS FISHER, PRESIDENTIAL WAR POWER 26-27 (1995).

17. *Id.* at 52.

18. *Id.* at 70.

19. *Id.* at 114 (citing 2 MEMOIRS BY HARRY S. TRUMAN, YEARS OF TRIAL AND HOPE 337, 339, 519 (1956)).

20. FISHER, *supra* note 16, at 114 (citing STEPHEN AMBROSE, EISENHOWER: THE PRESIDENT 175-76 (1984)).

21. FISHER, *supra* note 16, at 114-15 (citing Gary R. Hess, *Commitment in the Age of Counterinsurgency: Kennedy's Vietnam Options and Decisions, 1961-1963*, in SHADOW ON THE WHITE HOUSE: PRESIDENTS AND THE VIETNAM WAR, 1945-1975, at 67-68 (David L. Anderson ed., 1993)).

Resolution. That Resolution sounded a lot less alarming to the public than a drastic declaration of war. The Gulf of Tonkin Resolution had the same legal effect as a declaration of war. No doubt about it, Congress had legalized “Johnson’s War.”<sup>22</sup>

During the interminable agony of Vietnam, Senators and Congressmen first in twos and threes, and later by the score swore that we should never get fooled again.<sup>23</sup> Somehow, there had to be a framework that put Congress in a position to exercise its constitutional obligation on the dispatching of American troops into hostilities.

### III. THE CREATION OF THE WAR POWERS ACT

One day in 1970, Senator Frank Chrch (D, Idaho), de-facto Chairman of the Foreign Relations Committee, said to me: “we must begin to think about what is going to happen when the Vietnam War is over. We’ve got to restore the Congressional role in the decision-making process about how we go to war.” He asked me to work up some materials on a constitutionally proper, shared balance between the Congress and the President on the sending of American combat forces into hostilities.

Skiping all of the intermediate steps, Senators Jacob Javits, John Stennis and I ended up with the “first cut” of a War Powers Act.<sup>24</sup> It recognized the constitutional authority of the Congress and the President to exercise their shared constitutional powers in situations of undeclared war. It spelled out the President’s responsibility to repel attack,<sup>25</sup> to forestall an imminent attack on the United States<sup>26</sup> or on United States’ armed forces outside the United States, and to protect or rescue United States’ nationals abroad.<sup>27</sup> All of that was, both by the Constitution and by historical precedent, singularly up to the President.<sup>28</sup>

However, under the Act, when the President wanted to use U.S. armed forces outside of these time-sensitive, emergency-related situations, he was to seek authorization from the Congress — simple as that. Once again, in emergencies — self defense, forestalling an attack, and rescuing — the President acts on his own.<sup>29</sup> Otherwise, if American forces are to be

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22. LARRY BERMAN, LYNDON JOHNSON’S WAR: THE ROAD TO STALEMATE IN VIETNAM, at xi (1991).

23. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 180 (1996).

24. S. 2956, 92d Cong. (1971) (a bill to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress).

25. 50 U.S.C. §1541(2000).

26. *Id.*

27. *Id.*

28. See U.S. CONST. art. II, § 2, cl. 1.

29. See *supra* authorities cited and text accompanying notes 24, 25, 28.

deliberately placed where there was a risk of hostilities, Congress, as contemplated by Madison<sup>30</sup> and Hamilton,<sup>31</sup> must be part of the collective decision-making.

The War Powers legislation percolated through Congress as the war in Vietnam droned on its bloody way.

#### IV. THE COMPROMISE

Ultimately, a bill as previously described, passed the Senate. However, a bill based on a much different premise passed the House, it was: “in war, the President alone knows best.”<sup>32</sup> Out of the Senate-House conference, a compromise emerged — a totally unilateral, presidential war for 90 days without Congressional authority.<sup>33</sup> After the 90 days, the war would terminate unless Congress authorized its continuance under such time or other constraints as Congress saw fit to impose.<sup>34</sup>

Senator Javits and I had a rather bitter debate as to what had happened in the Senate-House conference.<sup>35</sup> As I saw it, the Constitution had been stood on its head — the President had been empowered to wage a unilateral war whenever and however he desired. Once the troops were sent by the President, for all practical purposes the die was cast — and unalterably so. The Founding Fathers had to be somersaulting in their graves.

Senator Javits believed to his dying day that the bastardized War Powers Act would somehow all work out. I disagreed.

I voted against the final version of the War Powers Act<sup>36</sup> — in a sense I voted against what had once been my own bill. To me, it was untenable and even unconstitutional in its attempt to give the President the sole power to wage war.

#### V. THE WAR POWERS ACT IN PRACTICE

The Act in practice has been a total failure. It has in no way established a shared-power relationship in war making. It has in no way established any sense of consensus building on war making. The original Senate bill provided for the shared decision required by the Constitution and the consensus building that went with such a shared decision of both the President and the Congress.

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30. *See generally* THE FEDERALIST NOS. 41-3 (James Madison).

31. *See generally* THE FEDERALIST NOS. 26, 27, 29 (Alexander Hamilton).

32. THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 103 (1974).

33. War Powers Resolution, 50 U.S.C. § 1544(b) (2000).

34. *Id.*

35. 119 CONG. REC. 33,555-60 (1973) (remarks of Senators Eagleton and Javits in Senate debate, Oct. 10, 1973).

36. *Id.* at 33,569.

Every President from Gerald Ford to Bill Clinton has abhorred the War Powers Act. All presidents have danced around it. President Ford, in 1975, ignored the War Powers Act in the now long-forgotten Mayaguez incident.<sup>37</sup> President Carter, in 1980, ignored it in the ill-fated attempt to rescue Americans held hostage in Iran.<sup>38</sup> President Reagan, in 1982, wiggled around the Act when he decided to send the Marines to Lebanon.<sup>39</sup> In 1983, he wiggled some more when he decided to send American forces to Grenada.<sup>40</sup> In 1986, he wiggled for a third time when decided to bomb Libya.<sup>41</sup> All of these were unilateral presidential decisions. Congress was informed afterwards.

President Bush, in 1989, acted alone in sending troops to Panama.<sup>42</sup> In 1990, he claimed he had the unilateral authority to send troops to Iraq.<sup>43</sup> At the last minute, Congress decided to authorize this endeavor. Bush signed the authorization, but said it was superfluous because he already had inherent authority to send American forces wherever he wanted to do so.<sup>44</sup>

During the 1992 presidential campaign, President Clinton indicated that he might pay some attention to Congress's role in deciding when, how, and where we go to war.<sup>45</sup>

However, once he became president, he acted just like his predecessors. In Somalia<sup>46</sup> and Haiti,<sup>47</sup> he asserted unilateral authority "to do the right thing."<sup>48</sup>

In Bosnia, President Clinton said we were taking action on the authority of the United Nations and NATO.<sup>49</sup> Clinton argued that he had obtained approval from the NATO allies, but did not seek to obtain approval from Congress.

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37. Michael J. Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CIN. L. REV. 84 n.45 (1983).

38. Yoo, *supra* note 23, at 181.

39. Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics than Law*, 78 AM. J. INT'L L. 571, 572 (1984).

40. FISHER, *supra* note 16, at 141 (citing PUBLIC PAPERS OF THE PRESIDENTS 1513 (1983)).

41. FISHER, *supra* note 16, at 143-44 (citing PUBLIC PAPERS OF THE PRESIDENTS 478 (1986); CONG. Q. WEEKLY REPT. 1023 (Apr. 19, 1986)).

42. FISHER, *supra* note 16, at 145.

43. *Id.* at 149 (citing *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings of the Senate Comm. on Armed Services*, 101st Cong. 701 (1990)).

44. FISHER, *supra* note 16, at 150-1 (citing 27 WEEKLY COMP. PRES. DOC. 25 and 48 (1991)).

45. DONALD L. WESTERFIELD, *WAR POWERS: THE PRESIDENT, THE CONGRESS, AND THE QUESTION OF WAR* 175-76 (1996).

46. FISHER, *supra* note 16, at 153 (citing 29 WEEKLY COMP. PRES. DOC. 1101 (1993)).

47. FISHER, *supra* note 16, at 156-7 (citing 30 WEEKLY COMP. PRES. DOC. 1616 (1994)).

48. FISHER, *supra* note 16, at 156-7.

49. *Id.* at 158-59 (citing 29 WEEKLY COMP. PRES. DOC. 2097 (1993); 30 WEEKLY COMP. PRES. DOC. 219-20 (1994)).

In the Kosovo operation, there was some interaction between Clinton and Congress.<sup>50</sup> The House fooled around with legislation relating to intervention to Kosovo, but the Senate took a walk and did nothing.

#### VI. WHAT SHOULD BE DONE?

In my judgment, the existing War Powers Act is an unworkable mess. All recent Presidents insist that war-making is their decision and their decision alone. Future presidents will undoubtedly take the same approach.

I have reluctantly come to the conclusion that Congress really does not want to be in on the decision-making process as to when, how, and where we go to war. Congress really does not want to have its fingerprints on sensitive matters pertaining to putting our armed forces into hostilities. Congress prefers the right of retrospective criticism to the right of anticipatory, participatory judgment.

I am saddened by the fact that most Senators and House members really do not have the political stomach for decision-making involving war. Thus, the answer to today's question — has Congress abdicated its power — is a unqualified YES. Congress has, in effect, written itself out of the Constitution.

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50. *Senate Begins Debate on Kosovo Pullout Bill*, The WASH. POST, May 12, 2000, at A25.