The Law: Scholarly Support for Presidential Wars

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For the past half-century, political scientists and historians have given much intellectual support to the growth of presidential power. They have imbued the presidency with magical qualities of expertise and good intentions, motivated by the "national interest" rather than the local and parochial ambitions that supposedly drive members of Congress. In this decision to concentrate power in the president, scholars gave short shrift to legal boundaries and constitutional principles, including checks and balances and separation of powers. Supported by the academic community, presidents now regularly claim that the Constitution allows them to wage war against other countries without receiving either a declaration or authorization from Congress.

War Powers in a Republic

The Framers gave close thought on where to locate the war power. They knew that British precedents, on which they relied extensively in so many areas, assigned all of external affairs—including the war power—to the king. Yet the Framers did not trust executive judgments in matters of war. They were in the process of creating a republican government, and understood from their study of history that executives, in their search for fame and glory, had a dangerous appetite for war. John Jay in Federalist no. 4 warned that monarchs in other nations "will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans." Such motives prompted executives to engage in wars "not sanctified by justice or the voice and interests of his people" (Wright 1961, 101).

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From 1789 to 1950, all of the major U.S. wars were either declared or authorized by Congress (Fisher 2004, 17-79). Over that period, presidents used military force a number of times without first obtaining congressional authority. None of those actions, however, could be called a major war. Edward S. Corwin said that the list of these presidential initiatives consisted largely of "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like" (Corwin 1951, 16). A number of military initiatives were ordered not by the president but by naval officers and other military commanders, and some of those actions were later repudiated by the president (Wormuth and Firmage 1989, 149-51).

The Korean War

Respect for constitutional government ended abruptly in 1950 when President Harry Truman took the country to war against North Korea single-handedly. The academic community had an opportunity to challenge the legality of his actions, but chose instead to back what was deemed to be a politically defensible struggle against worldwide communism. Yet there was no need to make a choice between fighting communism and upholding the Constitution. Both could be achieved. If Truman decided he had to act first in an emergency, without congressional authority, he could have returned to Congress and sought statutory support. He chose not to.

On June 26, 1950, President Truman announced to the American public that the UN Security Council had ordered North Korea to withdraw its forces from South Korea and return to a position north of the 38th parallel. When North Korea failed to comply, Truman ordered U.S. air and sea forces to give support to South Korea. He made a commitment that the United States "will continue to uphold the rule of law" (Public Papers of the Presidents 1950, 492). In fact, Truman violated the U.S. Constitution, a congressional statute, the UN Charter, and his own public promises.

Consider the legislative history of the UN Charter. In 1945, senators debated language that called for member states to enter into "special agreements" when sending armed forces to the United Nations for collective military action. In an effort to build Senate support for the charter, Truman wired this note from Potsdam: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them" (U.S. Congress 1945). In this express manner, Truman publicly pledged to first seek statutory authority rather than assert a right to act unilaterally.

As ratified by the Senate, Article 41 of the UN Charter provides that all member states shall make available to the Security Council, in accordance with these special agreements, armed forces and other assistance. Each nation would have to ratify those agreements "in accordance with their respective constitutional processes." Congress therefore had to pass legislation to specify how it would implement the UN Charter consistent with the Constitution. Section 6 of the UN Participation Act of 1945 states with singular clarity that the special agreements "shall be subject to the approval of the Con-

gress by appropriate Act or joint resolution" (59 Stat. 621, § 6). The legislative history of the UN Charter and the UN Participation Act underscores congressional control over the initiation of war against other countries (Fisher 2004, 81-95).

Yet five years later, Truman sent U.S. troops to Korea without seeking congressional authority, either in advance of the crisis or afterward. How could he evade the intent of the UN Charter and the explicit language of the UN Participation Act? The legal answer cobbled together by attorneys in the executive branch: Truman did not enter into a "special agreement." Nonetheless, Truman claimed to be acting under UN authority. His secretary of state, Dean Acheson, insisted 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" (U.S. Department of State 1950, 46). Yet Truman ordered U.S. armed forces before the Security Council called for military action. In his memoirs, Acheson admitted that "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution" (Acheson 1969, 408). Truman had done nothing to uphold the sanctity of the UN Charter or the rule of law.

Truman attempted to play down the violation by saying the United States was not actually at war. Asked at a news conference whether the country was at war, he replied: "We are not at war" (Public Papers of the Presidents 1950, 504). Asked whether it would be more correct to call the conflict "a police action under the United Nations," he agreed: "That is exactly what it amounts to" (ibid.). Other than supplying a veneer of legality, it was clear to all that the United Nations had no control over the war. The United States supplied the troops and money and suffered the overwhelming number of casualties and deaths. True, the Security Council asked the United States to designate the commander of the forces and it authorized the "unified command at its discretion to use the United Nations flag" (ibid., 520). Truman promptly selected General Douglas MacArthur to serve as commander of this so-called unified command (ibid.).

Eventually the question of whether the Korean conflict was a war or a UN police action entered the courts. Judges had to interpret insurance policies that offered benefits when someone died in "time of war." Federal and state courts had no difficulty in concluding that the hostilities in Korea amounted to war.[1] During Senate hearings in June 1951, Acheson finally admitted the obvious: "In the usual sense of the word there is a war" (U.S. Congress 1951, 2014).

Korea was the first unconstitutional presidential war because it entirely skirted Congress. In subsequent wars, as in Vietnam and the first Iraq War in 1991, presidents went to Congress to seek statutory support. Another unconstitutional presidential war was Kosovo, in 1999, when President Bill Clinton used military force not on the basis of a Security Council resolution (which he could not get) but by seeking the support of NATO countries (Fisher 2004, 198-201). This was an extraordinary stretch. According

1. *Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953); *Gagliomella v. Metropolitan Life Ins. Co.*, 122 F.Supp. 246 (D. Mass. 1954); *Carius v. New York Life Insurance Co.*, 124 F.Supp. 388 (D. Ill. 1954); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554 (Tex. 1953).

to this legal interpretation, presidents need not come to Congress for authority. They need only obtain the support of Italy, Belgium, and other NATO members!

To accept this process as constitutional, one would have to argue that the president and the Senate, acting through the treaty process, can create an international body (the United Nations) or a regional organization (NATO) and thus dispense with any future legislative role. Through this process, the president and the Senate would obliterate the war power of the House of Representatives, the body closest to the people. Such an argument is too farfetched to take seriously. How would the academic community respond to Truman's action?

Academic Support for Truman

Truman's initiative in Korea was defended by a number of leading academics who saw in the presidency the qualities of energy, decisiveness, and centralized power needed to act effectively in the domestic and foreign power arenas. Of special help to Truman were two historians, Henry Steele Commager and Arthur M. Schlesinger, Jr. In deciding to support the dispatch of U.S. troops to Korea, they made short work of constitutional principles.

In an article for the *New York Times* on January 14, 1951, Commager rebuked the critics of Truman's intervention. Senator Robert Taft had said that the decision to send U.S. troops to Korea without congressional authorization "usurped" power from Congress and "violated the laws and the Constitution of the United States." Those objections, Commager concluded, "have no support in law or in history." With regard to general constitutional principles, Commager found the historical pattern so clear and obvious and "so hackneyed a theme that even politicians might reasonably be expected to be familiar with it" (Commager 1951a, 11). Yet Commager's own reading of law and history was shallow and misinformed.

Commager cited John Quincy Adams for the proposition that however startled people may be at the idea that the president "has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power" (ibid.). Adams offered those remarks during a eulogy to James Madison, who died in 1836. What presidential wars had occurred by that time? Commager points out that the Neutrality Proclamation of 1793 issued by President George Washington "might well have involved us in war with France" (ibid.). Whatever it "might" have done it did not lead to war, and Washington found himself so lacking in legal authority that he had to appeal to Congress for statutory support, leading to the Neutrality Act the following year (Fisher 2004, 26-29). When violations of the Neutrality Act entered the courts, federal judges repudiated the claim that a president could somehow start a war. The president did not possess the power of making war: "That power is exclusively vested in congress."[2] Although the president has an implied authority to resist invasions, there was a "manifest distinction"

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

between defensive actions and offensive operations: "It is the exclusive province of congress to change a state of peace into a state of war."[3]

Commager next remarked: "On his own initiative John Adams overrode his cabinet and his party and sent commissioners to France to end the quasi-war with that country." Through this action Adams took steps to *end* a war, not begin one. When he thought that war against France was necessary, he came to Congress and sought statutory authority to prepare for military action (Fisher 2004, 24). Commager's third example: "On his own initiative Jefferson, in theory a strict constructionist, inaugurated the war with the Barbary pirates" (Commager 1951a, 11). Military conflicts with the Barbary pirates had plagued presidents from the beginning of the republic. Jefferson took certain *defensive* actions in the Mediterranean but came to Congress to seek authority for anything that went "beyond the line of defense." Congress enacted ten statutes authorizing military action by Presidents Jefferson and Madison in the Barbary wars (Fisher 2004, 32-37).

Commager turned next to precedents from the Civil War. In the prize cases, "involving the legality of Lincoln's blockade—and by implication of his powers to make war—the court held that it was for the president to determine when war comes, and that he is 'not only authorized but bound to resist force by force' " (Commager 1951a, 24). Commager confused actions taken during a domestic insurrection with military operations against another country. Justice Robert C. Grier carefully limited the president's power to defensive actions, noting that he "has no power to initiate or declare a war against either a foreign nation or a domestic State."[4] During oral argument, Richard Henry Dana, Jr., who was representing the White House, acknowledged that Lincoln's actions had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress."[5]

Commager's final point explored the president's duty to implement treaties. In that process he found an independent source of presidential power to take the country to war. Here are the reasons he advanced:

> [I]t is an elementary fact that must never be lost sight of that treaties are laws and carry with them the same obligation as laws. When the Congress passed the United Nations Participation Act it made the obligations of the Charter of the United Nations law, binding on the President. When the Senate ratified the North Atlantic Treaty it made the obligations of that treaty law, binding on the President.
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> Both of these famous documents require action by the United States which must, in the nature of the case, be left to a large extent to the discretion of the Executive. (Ibid., 24)

Commager totally ignored Truman's pledge to the Senate in 1945, the legislative history of the UN Charter, and the plain meaning of the UN Participation Act (requiring prior approval by Congress). Whatever "discretion" a president has in interpreting a treaty or a statute does not permit the violation of legislative language or constitutional principles. Commager appeared to give no thought to the constitutional dilemma

3. Ibid.
4. *The Prize Cases*, 67 U.S. 635, 668 (1863).
5. Ibid., 660 (emphasis in original).

of allowing the president and the Senate, acting through the treaty process, to strip from the House of Representatives its prerogatives over war.

A few months later, Commager wrote a second piece for the *New York Times*, arguing that "the limitation on the Executive power—with a corresponding expansion of the legislative power—finds no justification in our history." While the generation of Thomas Jefferson and Thomas Paine looked to executive power as "always dangerous," Commager insisted that the "history of democracy teaches a different moral." Strong presidents, he argued, use executive power boldly without threatening democracy or impairing the constitutional system. "There is, in fact, no basis in our own history for the distrust of the Executive authority" (Commager 1951b, 15). Of course there were good and sufficient reasons to distrust presidential authority, particularly over military initiatives, and it was on that very ground that the Framers placed the war power with Congress. Commager would later acknowledge the damage done by presidential wars and the need for Congress to assert its constitutional authority.

Schlesinger also defended the constitutionality of Truman's action in Korea. In a letter to the *New York Times*, he rejected Taft's statement that Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval," and that by sending troops to Korea he "simply usurped authority, in violation of the laws and the Constitution." Schlesinger called Taft's position "demonstrably irresponsible." Harking back to Jefferson's use of ships to repel the Barbary pirates, Schlesinger claimed that American presidents "have repeatedly committed American armed forces abroad without prior Congressional consultation or approval." Schlesinger ended with this strong admonition: "Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities" (Schlesinger 1951, 28). Years later, Schlesinger would admit that it was he, not Taft, who tried to rewrite American history and foist off political prejudices.

Whatever defensive actions Jefferson took in the Mediterranean provided no support for Truman's war. Truman claimed all of the warmaking power, both defensive and offensive, and never bothered to ask Congress for authority. Jefferson demonstrated a respect for, and understanding of, congressional prerogatives and constitutional limits. Truman did not. As for the examples in which presidents "repeatedly committed American armed forces abroad without prior Congressional consultation or approval," Schlesinger could not identify a single precedent to justify what Truman did in Korea.

Edward S. Corwin responded to this defense of Truman by challenging the "course of constitutional development, practical and polemical, which ascribes to the President a truly royal prerogative in the field of foreign relations, and does so without indicating any correlative legal or constitutional control to which he is answerable." He said "our high-flying prerogative men appear to resent the very idea that the only possible source of such control, Congress to wit, has any effective power in the premises at all" (Corwin 1951, 15).

At the height of the Vietnam War and Watergate, Schlesinger expressed regret for calling Taft's statement "demonstrably irresponsible." He explained that he had

responded with "a flourish of historical documentation and, alas, hyperbole" (Schlesinger 1973, 139). The problem was not merely flourishes and hyperbole. Schlesinger decided to remove his professional and academic hat and defend a president he admired to advance a political agenda he supported (fighting the Communists).

In the 1960s, with the nation mired in a bitter war in Vietnam, Commager and Schlesinger both publicly apologized for their earlier unreserved endorsements of presidential war power. By 1966, Schlesinger was counseling that "something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy" (Schlesinger and de Grazia 1967, 27-28). Commager told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations (U.S. Congress 1967, 21). When he returned to the committee in 1971, he testified that "it is very dangerous to allow the president to, in effect, commit us to a war from which we cannot withdraw, because the warmaking power is lodged and was intended to be lodged in the Congress" (U.S. Congress 1971, 62).

In his 1973 book, *The Imperial Presidency*, Schlesinger spoke about the domestic and international pressures that helped concentrate power in the presidency: "It must be said that historians and political scientists, this writer among them, contributed to the presidential mystique" (Schlesinger 1973, ix). Reconsideration is always valuable, but independent scholarly checks are needed at the time of constitutional violations, not two decades later. Moreover, Schlesinger and Commager seemed to awake to presidential abuse because they disliked the occupant in the Oval Office or a particular war. Scholars must weigh in against executive transgressions when they occur and sound the constitutional alarm against presidents and wars that they like.

Richard Neustadt

Probably no presidential study has had the impact of Richard Neustadt's *Presidential Power*, published in 1960 and reissued as a paperback four years later. Over the past four decades, students have read this book to learn how presidents gain and exercise political power and how they prevail. Neustadt's book had appeal because it examined presidential power in practical terms, bringing to life the Oval Office with engaging stories and case studies. The cost of this approach, as explained by Ronald Moe, was to ignore or downgrade institutional, legal, and constitutional values. The political techniques of influence and persuasion overshadowed the fundamental constraints of public law (Moe 1999, 266-67; Moe 2004, 24-25).

Neustadt begins with a modest theme. Presidential power "is the power to persuade" (Neustadt 1964, 23). Persuasive power "amounts to more than charm or reasoned argument. . . . For the men he would induce to do what he wants done on their own responsibility will need or fear some acts by him on his responsibility" (ibid., 43). Still, it all sounds quite civilized and moderate. The formal powers of Congress and the president "are so intertwined that neither will accomplish very much, for very long, without the acquiescence of the other" (ibid., 45). In a phrase that seems consistent with the

Framers' reliance on checks and balances, power "is a give-and-take" (ibid., 47). Neustadt is famous for saying that the Constitutional Convention did not create a government of separated powers: "Rather, it created a government of separated institutions *sharing* powers" (ibid., 42, emphasis in original).

The introductory chapters offer a reassuring and soft glow of mutual accommodation and shared power. As the book moves along, a different side emerges. Neustadt now begins to urge presidents to take power, not give it or share it. Power is something to be acquired and concentrated in the presidency, and the power is to be used for *personal* use. Neustadt's model president was Franklin D. Roosevelt, not Dwight D. Eisenhower: "The politics of self-aggrandizement as Roosevelt practiced it affronted Eisenhower's sense of personal propriety" (ibid., 157). Was it just Eisenhower's "personal propriety" or his understanding of what the Constitution allowed, both in terms of separation of powers and federalism? To Neustadt, it did not seem to matter. FDR had every right to seek power for his own use and enjoyment: "Roosevelt was a politician seeking personal power; Eisenhower was a hero seeking national unity" (ibid.). Because Eisenhower cared more for national unity than personal power, Neustadt wrote him off as an "amateur" (ibid., 170, 171, 182).

Neustadt covers part—but only part—of Truman's problems in Korea. Truman gave General Douglas MacArthur too much latitude and had to fire him. Truman's effort to seize steel mills to prosecute the war in Korea was struck down by the Supreme Court. Whether Truman had constitutional or legal *authority* to go to war against North Korea was not addressed by Neustadt, nor did he explore at all Truman's inflated definitions of executive emergency power that the judiciary and the country found offensive (Devins and Fisher 2000, 67-71). Issues of that nature did attract Neustadt's attention. Certainly Truman never used the power of "persuasion" to convince Congress and the public for the war. On that score there was no talk of "shared power."

Neustadt appeared to support the military intervention in Korea, on both legal and political grounds. It was Truman's job "to make decisions and to take initiatives." Among Truman's private values, "decisiveness was high upon his list." His image of the president was "man-in-charge" (Neustadt 1964, 166). Applying that attitude to the Korean War, there was no need to persuade others or enter into a give-and-take. Truman satisfied his high calling if he made a decision and took the initiative. Whether he had constitutional authority to act was not examined by Neustadt. Perhaps dwelling on constitutional issues smacked too much of the public law model developed by Corwin.

At least in the area of the war power, Neustadt's book does not encourage or advise a president to persuade or seek interbranch accommodations and compromises. Neustadt writes for "a man who seeks to maximize his power" (ibid., 171). Such a framework fits the needs of an American president, Winston Churchill, Adolf Hitler, Benito Mussolini, or Joseph Stalin. In maximizing power, a prime ingredient is confidence: "Such confidence requires that his image of himself in office justify an unremitting search for personal power" (ibid., 172). An interesting choice of words: not institutional power or constitutional power but personal power.

Neustadt again: "The more determinedly a President seeks power, the more he will be likely to bring vigor to his clerkship. As he does so he contributes to the energy of

government" (ibid., 174). Neustadt measures success by action, vigor, decisiveness, initiative, energy, and personal power. Absent from this analysis are constitutional checks, sources of authority, or the ends to which power is put. Neustadt evaluates a president "on the basis of his influence on the outcome, but not on the outcome itself" (Hart 1977, 56). Throughout the book, Neustadt makes only two brief (and inconsequential) references to the Constitution, neither of which merits an entry in the index (Neustadt 1964, 51, 66).

Alexander Hamilton and other Framers emphasize the need for "energy" in the executive, but it was energy within the law, not outside it. In Federalist no. 70, Hamilton rejected the notion that "a vigorous Executive is inconsistent with the genius of republican government." Energy in the presidency, he said, "is a leading character in the definition of good government." Energy was necessary to protect "the community against foreign attacks" (defensive, not offensive, wars) and for "the steady administration of the laws." Energy was needed to carry out the laws, not to make or break them, and certainly not to undermine republican government.

Only in the Afterword, published in 1964, does Neustadt show his hand on what he thinks the Constitution requires. In discussing the Cuban Missile Crisis of 1962 and the "substantial nuclear capability" of both the Soviet Union and the United States, he sees "profound" consequences for the presidency (ibid., 186-87). The Constitution, he says, originally contemplated that decisions of military force "should emanate from President *and* Congress" (ibid., 187, emphasis in original), but the prospect of nuclear war had worked a fundamental change: "When it comes to action risking war, technology has modified the Constitution: the President perforce becomes the only such man in the system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time" (ibid., 187-88).

Persuasion, interbranch accommodation, give-and-take—given prominence in the 1960 edition—were now wholly jettisoned in the case of nuclear war. In their place is this striking formulation: "The President remains our system's Great Initiator. When what we once called 'war' impends, he now becomes our system's Final Arbiter" (ibid., 189).[6] Neustadt's reformulation may appear to turn on nuclear war, but for the conventional war against Korea he also supported Truman as the Great Initiator and Final Arbiter.

In the year of Neustadt's paperback edition, President Lyndon B. Johnson would ask for and receive from Congress the Tonkin Gulf Resolution, grounded on a false report of a North Vietnamese "unprovoked" attack on U.S. ships (Fisher 2004, 129-33). Having ignored the harm done by the Korean War to Truman, the Democratic party, and the nation, Neustadt was in no position to anticipate the damage the Vietnam War would inflict on constitutional government. His model of the presidency did not make room for such considerations.

When Neustadt's book was reissued in 1990 under a different title, in the preface he wrote: "To share is to limit; that is the heart of the matter, and everything this book

6. Although Neustadt supposedly reprinted the 1960 version in subsequent editions unchanged, in 1990 the language is altered to: "The President remains our system's usual initiator. When what we once called 'war' impends, he now becomes our system's final arbiter" (Neustadt 1990, 182).

explores stems from it" (Neustadt 1990, x). The 1960 edition and the 1964 Afterword had little to do with sharing the war power. Neustadt centered that power in the president, not only for nuclear war but for the Korean War. He was stung by someone's suggestion that the earlier edition served as a primer for presidential abuse during Watergate (ibid., xvi). He explained that he assumed that White House aides would be "experienced in government, to some significant degree, as I had been when I was there in Truman's second term," and that they would have a "feel" for Congress and understand "what it means to work inside a Presidency sharing powers with the Congress, courts, and states, where no one has the 'final' word, except, sometimes the voters" (ibid., xvii). With respect to Korea, Truman did not share powers with Congress and it was he—and no one else—who assumed the final word on going to war.

Neustadt's *Alliance Politics* (1970) offers a more cautious and less romantic assessment of presidential power. He concentrated on two controversies: the Suez Crisis of 1956 and America's cancellation of the Skybolt missile to Britain in 1962. Presidential decisiveness, initiative, and action are no longer touted as obvious and overriding virtues. Even among allies, the relationship between the United States and Britain was marred by "muddled perceptions, stifled communications, disappointed expectations, and paranoid reactions" (Neustadt 1970, 56). The misconceptions and errors of judgment that accompanied these two disputes made Neustadt wonder whether there was a competence within the executive branch to cope effectively with the problems that were then emerging in South Vietnam (ibid., 151).

Nixon's problems with Watergate prompted Neustadt to revisit the presidency in an article in 1974. Congressional and judicial efforts to limit presidential use of force abroad, his impoundment of funds, or the exercise of executive privilege would amount to "dents [on] the presidency at an outer edge, narrowing discretion, reducing flexibility, but strik[ing] no vital spot" (Neustadt 1974, 394). Congressional reforms, such as the Budget Act of 1974, represented "pinpricks, reaching nowhere near the core of presidential power" (ibid., 395). As to the criminal actions and abuses of Watergate, Neustadt predicted that Nixon's successor "will not be tarred by it" (ibid., 397).

In one of his last publications, in 2004, Neustadt faulted the neoconservatives in the administration of George W. Bush for promoting war against Iraq and other countries. Neustadt said these "junior ministers" in the administration "appear to disregard the limits on the presidency embedded in the Constitution" (Neustadt 2004, 17). In this short essay Neustadt did not identify or discuss these "limits," but his earlier writings left little guidance on constitutional checks on presidential wars.

Critiques of Presidential Power

The scholarly preference for the executive branch, and particularly the president, was addressed in a paper by Thomas Cronin, delivered at the 1970 American Political Science Association annual convention. Entitled "The Textbook Presidency and Political Science," Cronin criticized textbooks for promoting "inflated and unrealistic interpretations of presidential competence and beneficence." Scholars inclined toward

"exaggerations about past and future presidential performance." This infatuation with the presidency necessarily diminished the role of Congress, the Constitution, and democratic processes (Cronin 1970). Cronin's views were later reprinted in a reader (Bach and Sulzner 1974, 54) and in his book (Cronin 1975, 23-51).

Having nourished the "imperial presidency," some liberals turned against it for a time because of the Vietnam War and Watergate. Yet scholars tended to regard both tragic periods as mere aberrations, attributable to grievous misjudgments by the occupant of the White House. Operating under that view, they continued to support Neustadt's model of presidential power (Hart 1977, 48-54). Contemporary textbooks in American government pay little attention to the source and limits of presidential authority. Students are left in doubt about how the Constitution allocates foreign affairs and the warmaking power between the president and Congress, and they are taught that American foreign policy is dominated by the president and his advisers (Adler 2005).

The only principled critique of presidential power and support for constitutional checks came from a community of scholars who touted conservative and Whiggish views. They regularly took the lead in explaining and defending the values of republican government. In his classic *The Road to Serfdom* (1944), Friedrich A. Hayek expressed concern about the transfer of legislative power to "experts" in the executive branch. He warned that this shift posed a threat to democracy and would lead to arbitrary power and dictatorship (Hayek 1944, 61-71). Conservatives counted Hayek among their ranks, but in a thoughtful article he declined full membership, preferring to classify himself as "an unrepentent Old Whig—with the stress on the 'old' " (Hayek 1964, 100).

Another conservative study, by James Burnham in 1959, presented a full-fledged defense of congressional prerogatives: "The Founding Fathers believed that in a republican and representative governmental system the preponderating share of power was held and exercised by the legislature" (Burnham 1959, 92). The powers of Congress were sweeping, both on the face of the Constitution and in the deliberations at the Philadelphia Convention. To Burnham, it was axiomatic that the tendency of conservatives was "to favor the relative power of Congress within the diffused power equilibrium," while it was the tendency of liberals "to distrust Congress, and to favor the relative power of the executive" (ibid., 119). As to the war power, Burnham concluded that by "the intent of the Founding Fathers and the letter and tradition of the Constitution, the bulk of the sovereign war power was assigned to Congress" (ibid., 184). A fundamental link existed between congressional power and the preservation of liberty: "If Congress ceases to be an actively functioning political institution, then political liberty in the United States will soon come to an end" (ibid., 344).

A 1960 article by Willmoore Kendall, "The Two Majorities," also placed a conservative imprimatur on the role of Congress in preserving a republican form of government. After listing some conventional generalizations about the president and Congress, Kendall rejected the widely held belief that the president and the national bureaucracy represent "high principle" while Congress represents low principle, no principle at all, reaction, and unintelligence (1960, 325, 345). He found such stereotypes not only trite and inaccurate but destructive to a healthy system of checks and balances.

The conservative American Enterprise Institute sponsored a series of studies edited by Alfred de Grazia and published in 1967. The subtitle carries the message: *Congress: The First Branch of Government*. de Grazia set the tone for the volume with these words: "Congress is the central institution of the American democratic republic. Unless it functions well and powerfully, much more so than it has in the past, the road to a bureaucratic state and kind of monarchic government will be opened up" (de Grazia 1967, 15). In a book of readings published in 1970, Ronald Moe selected materials to underscore the fundamental importance of Congress in a constitutional order. He talked about the attraction of the liberal community to the presidency: "Historically, there has been a tendency for intellectuals to be wary of democratic legislatures," believing that "they as a class would have more influence within the executive than in the legislative branch" (Moe 1970, 3).

The conservative reaction to Vietnam and Watergate was much like the liberal response. The personal performances of Presidents Johnson and Nixon had caused great damage to the country and to political institutions, but a number of conservatives and neoconservatives cautioned against turning against the presidency. Writing for the *Wall Street Journal* on September 20, 1974, Irving Kristol offered his views in an article called "The Inexorable Rise of the Executive." Accurately, he said that many of the authors declaiming the "imperial presidency" were of the liberal persuasion "who until yesterday were actively promoting the very tendency they now deplore. Suspicion of a strong presidency has, in recent times, been a conservative prerogative . . . [o]n the whole, conservatives have been more averse to increasing presidential power than have liberals." However, he parted company with conservatives on this point: "Indeed, in the area of foreign affairs, I would say they were usually wrong." Although Congress had the power of the purse,

> the notion, favored by many conservatives since 1920 and now propounded by some liberals, that Congress should have anything like an equal share in the making of foreign policy, is absurd. The Founding Fathers never expected it to; it cannot, in the nature of things, do so. Foreign policy involves secrecy in negotiation, swiftness in decision-making, and an irreducible minimum of duplicitous scheming—all of which go against (and should go against) the grain of Congress as a public, deliberative body. (Kristol 1974, 12)

After reviewing what he believed to be irremediable deficiencies in Congress and the courts, Kristol pronounced that the "only possible inference from this state of affairs is that the 'imperial presidency,' in some form or other, is here to stay—along with the federal bureaucracy that is its true partner in power." One can quarrel with his opinions about the constitutional allocation of power and the Framers' intent, but his prediction has been on the mark.

Writing for the *National Review* in 1974, Jeffrey Hart explored some of these same issues. Focusing on the "steady growth of the federal bureaucracy," he counseled that if conservatives want to get the executive branch behind the policies they desire, "they can do so only by supporting a powerful and activist Presidency" (Hart 1974, 1353). Also, to counter the power of the media, Hart concluded that of the three branches, "only one

has the capacity to contest the mass media where the focusing of opinion is concerned, and that, of course, is the Presidency" (ibid., 1355).

Conservatives and neocons found great promise in the power and purpose of the American president. To Norman Podhoretz, editor of *Commentary*, the attack on presidential power in the 1970s caused damage to "the main institutional capability the United States possesses for conducting an overt fight against the spread of Communist power in the world" (Podhoretz 1976, 35). After another presidential scandal, this time in the form of Iran-Contra, Charles Krauthammer put his cards on the table. It was important, he stressed, that the United States remain a superpower, and it could only exercise that role by relying on a strong president. Superpower responsibilities "inevitably encourage the centralization and militarization of authority." Politically, "imperial responsibility demands imperial government, which naturally encourages an imperial presidency, the executive being (in principle) a more coherent and decisive instrument than its legislative rival" (Krauthammer 1987, 23). Krauthammer found no need to search for constitutional principles in the Founding Fathers, as Kristol tried to do. It was enough to identify contemporary objectives (the need for the United States to function as an imperial government to check Soviet power) and select the political institution best suited for that task.

President Ronald Reagan is remembered today by conservatives as a strong president who favored military superiority and was willing to confront the Soviet Union. One would not know that by reading what conservatives said during his two terms in office. In 1987, at the height of the Iran-Contra affair, Krauthammer spoke contemptuously of Reagan's willingness to allow an investigation by Congress and an independent counsel: "If President Reagan really wanted to aid the *contras* in 1984, he should have relentlessly taken his case on the stump and on the tube. Instead he chose to husband his popularity, lost the fight in Congress, and then let Ollie [North] do it" (Krauthammer 1987, 25).

L. Gordon Crovitz wrote a scorching article for *Commentary* in 1988, entitled "How Ronald Reagan Weakened the Presidency." He ripped the Justice Department for withholding constitutional support for a presidential item veto, decried the actions of an "insatiable Congress," and faulted Reagan for retreating in the face of an investigation into the Iran-Contra affair (Crovitz 1988). Crovitz and Jeremy Rabkin edited a collection of articles that generally faulted Congress for placing unacceptable constraints on the president (Crovitz and Rabkin 1989). Other conservatives urged presidents to exercise the full extent of their powers (Eastland 1992; Tatalovich and Engeman 2003, 178-92).

Conservative scholars pay little attention to Congress, but what is said is usually derogatory (Jones and Marini 1988). A refreshing exception is the work of Joseph Bessette, both in his studies on the deliberative process (1994) and the volume he edited with Jeffrey Tulis (1981), which studies the presidency in the context of a constitutional order. The importance of this volume is its emphasis on what conservatives (and liberals) had long ignored: how to assure that the president operates within the constraints of public law. To that extent, the work of Bessette and Tulis broke decisively with the writings of Neustadt, David Barber, and other presidential scholars (Bessette and Tulis 1981).

Reconsiderations

Larry Berman has published a number of probing works on the miscalculations by President Lyndon Johnson in widening the Vietnam War. Using declassified documents, Berman traced the deliberate manipulations and the reliance on illusions that eventually discredited Johnson and his advisers (Berman 1982, 1989). John Burke and Fred Greenstein published an excellent analysis to show how Johnson's style of leadership (compared unfavorably to Eisenhower's) undermined the reality, feasibility, and constitutionality of U.S. national security policy (Burke and Greenstein 1989). H. R. McMaster, an Air Force major, published a scathing critique of the actions and decisions by Lyndon Johnson, Robert McNamara, and the Joint Chiefs of Staff that led to failures in Vietnam. In biting prose he describes Johnson's partisan motivations, McNamara's miscalculations, the timidity of the Joint Chiefs in failing to confront Johnson with realistic options, the arrogance of Pentagon planners, and a persistent record of lies and deceptions (McMaster 1998, 323-34).

George Edwards has described the broad constitutional role granted to Congress in the area of national security: "There is little question that the Constitution allocates to Congress a central role in determining the major elements of national security policy if Congress chooses to do so" (Edwards 1991, 82). At the same time, Edwards sharply questioned the conventional models that assign to the president and executive officials a decided advantage in providing competence, coherence, and rational-policy analysis. He found little evidence to support such broad claims (ibid., 88-91). Edwards writes that it was "by no means clear that the executive branch has a monopoly on wisdom or that national security policy cannot benefit from a deliberative process, even at the cost of speed and secrecy in action" (ibid., 94).

The University Press of Kansas has published a number of recent works that explore the presidency within a legal framework and emphasize the importance of congressional and judicial checks. David Gray Adler and Larry N. George edited a collection of fourteen articles that looked in depth at interbranch relations in the area of foreign policy (Adler and George 1996). In the foreword to the book, Schlesinger offers this view: "With the warmaking predilections of absolute monarchs in mind, the Framers assigned the vital powers in international affairs to Congress. . . . The Framers envisaged the conduct of foreign affairs as a partnership between Congress and the president, with Congress, when it came to warmaking, as the senior partner" (ibid., ix-x). That is true, but few textbooks today reflect those fundamental constitutional principles.

Six years later, in a book edited by Adler and Michael A. Genovese, University Press of Kansas published an exploration of the legal and constitutional problems that President Clinton encountered. Nine articles examine such areas as the war power, executive privilege, pardons, independent counsels, executive immunity, campaign finance, and impeachment. In a foreword to this volume, Thomas Cronin remarks that contemporary Madisonians and conservative constitutionalists "remind us that no one, including presidents, should be above the law. They know, too, that presidents make mistakes and sometimes become slaves to wrong-headed policies" (Adler and Genovese 2002, xiv).

Alexander DeConde, in 2000, released a trenchant analysis of executive wars, entitled *Presidential Machismo: Executive Authority, Military Intervention, and Foreign Relations*. He noted that scholars and other writers "built an industry out of the study of the presidency. They gave it fictitious qualities that defied reality" (DeConde 2000, 5). Quoting with approval language from Schlesinger, he expressed his belief that "the country could benefit from 'a little serious disrespect for the office of the Presidency' " (ibid., 7). DeConde finds that "no substantial body of evidence sustains the assumption that, in matters of life and death, one man can decide better than many or that the presidency ennobles the incumbent" (ibid., 292). The great danger in a democracy "lurks in executive machismo in the conduct of foreign affairs because it breeds contempt for law, can subvert democratic institutions, and could lead to tyranny" (ibid., 294).

Richard Pious has prepared a number of probing analyses of presidential power. In an article called "Why Do Presidents Fail?," he suggested that it was time to revisit some of Neustadt's formulations, such as his distinction between the amateur (Dwight D. Eisenhower) who thinks first of the public interest and then of his political stakes, and the professional (Franklin D. Roosevelt) who defines the public interest in terms of his political advantage: "These Neustadtian distinctions have been at the core of our theoretical understanding of presidential power, but they cannot account for the spectacular failures of presidents such as Nixon, Johnson, or Clinton, all of whom understood and acted on their power stakes and showed no signs of being willing to sacrifice their political interests for any abstract conception of the public interest" (Pious 2002, 727).

In an article published in 2002, I agreed that presidential policy making, politics, and elections are important areas of study, but they "ought not to be pursued at the expense of constitutional considerations. The presidency is a creature of the Constitution, which was and remains the source of its powers and defines its limitations" (Fisher 2002, 673). I did what I could to shoot down the ever-present and facile distinction that identifies the president with the national interest and lawmakers with the local or special interest. I argued that "there is nothing automatically negative about local interests, just as there is nothing automatically positive about the national interest" (ibid., 677). I cited the work of J. David Singer, who described the national interest as "a smokescreen by which we all too often oversimplify the world, denigrate our rivals, enthrall our citizens, and justify acts of dubious morality and efficacy. When the hoary concept of 'the national interest' is invoked, products of such a culture—and the educational structure that spawns them—snap to attention, do their duty and turn off their ethical and intellectual equipment" (ibid., 676).

James P. Pfiffner, in his studies on presidential character, has turned his attention (and ours) to presidential lies, the big and small. One of his careful analyses consisted of statements by the Bush administration after 9/11 designed to promote war against Iraq. The result was this article: "Did President Bush Mislead the Country in His Argument for War with Iraq?" (Pfiffner 2004a, 25). Pfiffner completed a larger study on presidential lies, published in book form: *The Character Factor: How We Judge America's Presidents* (Pfiffner 2004b). Also in 2004, Eric Alterman published *When Presidents Lie: A History of Official Deception and Its Consequences* (Alterman 2004). My own work on presidential

deceptions about Iraq and Congress's failure to adequately discharge its role as an independent and coequal branch appeared in 2003 (Fisher 2003).

These studies are helpful, but public opinion will not start to turn until students in high school, college, and law schools begin to receive a more balanced, and more constitutional, introduction to the presidency. Those who write for newspapers and speak on television can help educate the public that strong presidents are not always good presidents, decisiveness is not the same as sound judgment, the exercise of military force can be contrary to the national interest, and opposition to misguided and unjustified presidential policies in the field of national security is the highest form of patriotism.

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