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Who Decides when America Goes to War:

The President or the Congress? An Endless Debate in Perspective

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Dedication

Words are not enough to show my gratitude and love to my dear parents who have blessed and supported me throughout the ordeal of fulfilling my work. This dissertation is dedicated first to my dear father who has had a profound influence on me as it has been his dream to see me a doctoral school student. “Thank you ‘Father’ for your continuous encouragement and thank you for the days you spent in front of the PC trying to download helpful books; for this I am eternally grateful.” The work is dedicated to my beloved mother to whom I owe a tremendous debt. My appreciation goes to her because her motherly beatitude has been to provide me with words of wisdom and blessedness. Special thanks goes to my dear sisters Ismahen and Halima and my cousin Adila for being too patient and for tolerating my bad mood throughout the period of drafting this work. I would also like to dedicate this work to all my relatives (Zemiti, Haddouch and Ben Amira) and thank them for their continuous good wishes and prayers for me.

At the very end, I dedicate this dissertation to my husband HALIM Ben Amira whose presence in my life has provided me with the necessary psychological support I have needed to fulfill my research.

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Abstract

The United States has been frequently involved in wars by presidential decision and without being officially declared by Congress, but scholars still deny the shift in the practice of war powers. The dissertation attempts to confirm this shift by showing that the division of war powers as the Founding Fathers intended it to be is no longer respected. The work aims to prove that since the Second World War Congress has deferred to the President whenever he deploys troops abroad relying on his title as Commander-in-Chief of the American Army.

The choice of the subject is motivated by the significant number of American wars which were fought in different parts of the world mainly in Latin America, Asia, and more recently in the Middle East. As an illustration, “Presidentialists” defend the legality of presidential use of force even without congressional consent. By opposition “Congressionalists” refute such legality and accuse the President of usurping the war powers.

Successive presidents have claimed more war powers. By renouncing its constitutional powers, Congress has failed to challenge presidential power usurpation. In this regard the reasons behind the shift in the practice of war powers are explored and the conditions under which Congress may exercise a war power check are unveiled. The silence of the Supreme Court has largely contributed to the development of this negative phenomenon. The inability of the third branch to intervene to restore the balance of war powers has created a serious conflict between the executive and legislative branches. The contribution of this research is based on the analysis and understanding of the reasons for the change in the practice of war powers for the President and possibly on the proposals that will restore balance in the practice of allowing Congress in parallel to verify the credentials of war.

Résumé

De nombreux historiens et politiciens réfutent le changement dans la pratique des pouvoirs constitutionnels de guerres impliquant les États Unis. En contre partie, ce mémoire vise à confirmer ce changement en prouvant que le partage des pouvoirs de guerre n'est pas respecté comme les pères fondateurs l'avaient envisagé. Ce travail de recherche démontre que depuis la seconde guerre mondiale le congrès a toujours informé le président en tant que Commandant en Chef de l'Armée sur la participation des troupes américaines à l'étranger. Cependant, aujourd'hui les experts dans le domaine sont manifestement partagés sur ce phénomène et ont éventuellement abouti à des conclusions divergentes. Les «Présidentialistes» stipulent que le président jouit d'un pouvoir constitutionnel qui lui permet d'utiliser unilatéralement la force militaire à l'étranger. Ce même groupe encourage amplement cette pratique et souhaite qu'elle soit courante dans l'histoire des États-Unis. D'autre part, les «Congressistes » exigent que le président n'ait pas le droit de mener des guerres sans le consentement du Congrès. Ils accusent même le président d'usurper des pouvoirs de guerres jamais pratiqués auparavant.

Ce mémoire tente de confirmer que d'une manière ou d'une autre le président et le Congrès n'ont pas respecté l'esprit de la Constitution car tout au long de l'histoire des USA au fur et à mesure qu'un grand nombre de présidents américains s'accaparaient plus de pouvoirs de guerre, le Congrès renonçait à son pouvoir constitutionnel et se montrait passif quand à cette usurpation présidentielle. Le mutisme de la Cour Suprême a largement contribué au développement négatif de ce phénomène. L'impossibilité de la troisième branche d'intervenir pour rétablir l'équilibre des pouvoirs de guerre a créé un sérieux conflit entre l'exécutif et le législatif. C'est pourquoi la contribution de cette recherche se base sur l'analyse et la compréhension des raisons du changement dans la pratique des pouvoirs de guerre en faveur du président et éventuellement sur les propositions qui permettront le rétablissement pratique de la balance en permettant au Congrès de vérifier en parallèle les pouvoirs de guerre.

بالرغم من العدد المتزايد للحروب التي خاضتها الولايات المتحدة الأمريكية بأمر من الرئيس و بدون موافقة رسمية من الكونغرس، لم يعترف العديد من الباحثين بعد بالتغيير الجذري لممارسة قوى الحرب. تؤكد المذكرة هذا التغيير محاولة إثبات التقسيم الذي اختاره واضعو الدستور الأمريكي الذي لم يعد مطبقا. أظهر الكونغرس منذ الحرب العالمية الثانية الكثير من الطوعية و الاحترام لقرارات الرئيس بتجنيد الجيش الأمريكي خارج أراضيه اعتمادا على منصبه كقائد أعلى للجيش.

إن الدافع وراء اختيار هذا الموضوع هو العدد المتزايد للحروب الأمريكية التي وصلت إلى عدة بؤر في العالم. تشجع وفرة المؤلفات حول هذا الموضوع أيضا على المزيد من البحث فيه، إذ أنه بالرغم من اعتماد الباحثين على نفس المعطيات و الأحداث توصلوا إلى نتائج مختلفة و متناقضة. يؤمن أنصار الرئيس كل الإيمان في مشروعية استخدام الرئيس للقوة بالخارج بقرار انفرادي اعتمادا على سلطته الدستورية كقائد أعلى للجيش و يصرون على أن هذه الممارسة شائعة في تاريخ الولايات المتحدة. في حين يصر أنصار الكونغرس على أن الرئيس ليس لديه أي حق لشن أي حرب بدون موافقة الكونغرس. يلح أنصار الكونغرس أيضا على اتهام الرئيس بانتهاك حرمة الدستور من خلال تصعيده لصلاحياته الحربية.

تهدف هذه المذكرة إلى التأكيد أن كلا من الرئيس والكونغرس قد انتهكا روح و نص الدستور، إذ أن الرئيس قد ادعى المزيد من سلطاته الحربية، في حين تخلى الكونغرس عن سلطته الدستورية لإعلان حالة الحرب وفشله في تحدي اغتصاب الرئيس للسلطة. أثبتت المحكمة العليا أيضا أنها غير قادرة على التدخل لإعادة توازن سلطات الحرب بين الرئيس و الكونغرس تاركة الطرفين في صراع مستمر.

يهدف هذا البحث أيضا إلى تحري الأسباب التي أدت إلى التحول في ممارسة سلطة الحرب لصالح الرئيس و كذا تقصي الظروف و العوامل التي قد تدفع الكونغرس لتحدي الرئيس و مراقبة صلاحياته. كما تسعى هذه المذكرة إلى تسليط الضوء على التفاعل بين القانون الدستوري الأمريكي و القانون العالمي و تأثيرهما على استخدام الولايات المتحدة للقوة بالخارج و تقترح قانون التشاور حول قوى الحرب لسنة 2009 كحل تشريعي قد يؤدي إلى إعادة موازين تلك القوى إلى ما كانت عليه من قبل.

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Introduction

The clear constitutional duties of the three branches, the deliberate textual ambiguity and multifaceted interpretation of the U.S. Constitution have established an ongoing controversy and raised serious questions on who has the effective power to wage wars and commit American troops abroad, the President or the Congress. In the recent past the Congress successfully put into practice its explicit constitutional power by taking the decision of where and when to commit the nation into war but new circumstances would contribute to changing the stream of this classical and conventional practice.

Since World War II Congress has never declared wars anymore despite the continuous commitment of American troops to different international spots such as Korea, Vietnam, Kosovo, and Iraq. Involvement in such wars began by presidential initiations through which an independent unilateral authority was established to bring the country to war relying on the President's position as Commander-in-Chief of the U.S. army.

Recurrence of unilateral presidential war decision and the absence of congressional official declaration to such use of force enrich the debate among scholars and analysts over who has the upper hand in issues of military force abroad. According to "Presidentialists" the President possesses broad war powers under his title of Commander-in-Chief which gives him the right to deploy troops abroad unilaterally by bringing forth the legality of such use of force. By opposition "Congressionalists" support congressional supremacy in using force abroad and consider illegal any presidential unilateral wars void of congressional declaration.

Presidential insistence to wage unilateral wars and congressional unwillingness to participate in war decisions gives the impression that Congress has delegated its constitutional war powers to the President. This impression is interpreted by the practice of war powers that has shifted from the legislative to the executive. The aim of this research, therefore, is first to confirm this shift through the study and analysis of a U.S. war involvement case in which Congress

officially declared war and second to compare it with other cases in which troops were deployed abroad but never received a formal declaration.

Although the issue of war powers has been widely explored by political scientists and historians, it can be easily detected that the practical shift of war powers in favor of the President is not fully supported. This research is an attempt to prove the occurrence of that shift. The existing literature on this topic either supports or opposes presidential decisions to wage war and congressional consent to such decisions without providing convincing reasons behind such a shift.

The role of the Supreme Court, the neutral branch, is generally neglected despite its importance in solving constitutional conflicts. It is then important to expose the justifications behind its willingness not to interfere in war powers controversies in the last decades of the twentieth century and to clarify its role. The available literature deceptively concludes by blaming the President alone for the imbalance in the practice of war powers. One of the main targets of this research work is to show that the three branches are altogether responsible for this shift.

What supports the work's claim concerning congressional passivity and its unwillingness to play its supposed constitutional role of declaring war is its passage of the War Powers Resolution of 1973. The act was passed in the aftermath of one of the most controversial wars, the Vietnam War, and was an attempt by Congress to regain its lost powers. Regardless of the passage of the act, the U.S. involvement in wars would continue but congressional official blessing to such involvements never occurred.

The research is concerned with studying the war powers controversy and tracing the war powers of both Congress and the President as the Founding Fathers envisioned them to be. The work aims to explain the betrayal of the Founders' allocation of war powers and advances a hypothesis that the President is no longer interested in prior consultation with Congress before any troop deployment abroad. Congress is no more willing to have a decisive say regarding issues related to using force but prefers to authorize them in a veiled manner throughout its funding to such uses of force. This is caused by its desire to wash its hands of any responsibility in case of

failure, electoral concerns and a willingness by its members to give their President more powers that fit his status as a leader of the most powerful nation.

This dissertation considers the institutional prerogatives the President enjoys such as being a single head and his manipulation of the media and secret information significant factors in enhancing the presidential war powers and diminishing the congressional ones. U.S. membership in international organizations such as the Security Council of the United Nation and NATO also plays an effective role in hampering congressional participation in decisions regarding the use of force abroad.

This research tries find out that congressional unwillingness to perform its constitutional war duties impedes the court from meddling in presidential usurpation to war powers. Enforcing this assumption helps to prove that the practice of war powers really shifted in the good turn of the President thanks to an agreement between the three branches to give him green light to act freely and practically in the use of force abroad.

To validate the hypothesis of this research, an historical research methodology is necessary to review an extensive period of history starting from President Washington's administration. The case study approach is used to serve this inquiry. To fit the followed historical approach the case studies to be analyzed are selected from different periods of the United States history and not just from the modern history as tend to be the focus of much of current literature that have dealt with presidential use of force hitherto. Discourse analysis is an important approach to be used in this research. Primary documents such as the American Constitution, Congressional records and discourse surrounding the deployment of troops in areas in question are essential. The dissertation includes presidential speeches and correspondences to Congress.

Although the subject of war powers is as old as the Constitution, scholars still question the reasons behind excessive presidential war powers and congressional passivity and reluctance to challenge presidential dominance by asserting its authority in warfare affairs. Voluminous books, dissertations and articles have been written on this subject. In their book *To Chain the Dog of*

War of 1989, De Francis D. Wormuth and Edwin Brown Firmage examine the power to initiate war in American constitutional law and deal with the history of the use of that power starting from the beginning of the republic through what they consider the most costly and most tragic violation to the American Constitution, the Vietnam War. The book examines the legal question of ratification by appropriation, delegation of the power to make war, the nature of conditional war and separation of powers in foreign relations.

Donald L. Westerfield provides a balanced and scholarly analysis of the war powers controversy in his *War Powers: The President, the Congress and the Question of War* which was published in 1996. In this work the author deals with the subject of war powers starting from the debates among the Founding Fathers to Congressional and United Nations resolutions, communications between the Executive and Congress, and other issues surrounding the use of military force in foreign conflicts. Westerfield draws the attention of the reader that the change in warfare from conventional to electronic and from major ground force actions to swift air strikes and rapid response troop deployments have an impact on the war power controversy.

In his *War Powers: How the Imperial Presidency Hijacked the Constitution* which was published in 2006, Peter Irons talks about the Founder's intention to give the Congress the sole power to declare war and he mentions that this power has not been practised since 1941. Following this date every President from Harry Truman to George W. Bush has used military force in pursuit of imperial objectives without congressional authorization. Irons depends on congressional hearings, Supreme Court opinions, media reports, scholarly accounts and legal historians to examine how the Constitution has been stretched, distorted, and violated as presidents usurp a shared, solemn power by denying congressional approval and often suspending civil liberties in the process.

The Clinton Wars: The Constitution, Congress, and War Powers of Ryan C. Hendrickson which was published in 2002 studies the behavior of the Clinton administration and Congress in dealing with the range of American military operations that occurred during the Clinton

presidency. Hendrickson analyzes a number of factors that influence the domestic decision-making process. According to him, presidents rely on congressional consultation and approval during periods of political or personal weakness, while they act with freer hand in better times. Hendrickson uses a case-study approach, laying out the foreign background and domestic political controversies in separate chapters on Somalia, Haiti, Bosnia, Kosovo, and Iraq. Of special interest after the World Trade Center attacks is the chapter "Terrorism: Usama Bin Laden."

In *The Imperial Presidency* of 2004, Arthur Schlesinger, a well known historian and biographer of both FDR and John F. Kennedy explains well the American Constitution's conception of a strong presidency within an equally strong system of accountability. Schlesinger questions the continued aggregation of power in the executive branch and he traces the growth of presidential power over two centuries, from George Washington to George W. Bush with more emphasis on Truman's decision to send troops to Korea and President Nixon's to bomb Cambodia. The author sought to distinguish between usurpation and abuse of power and he was able to confirm that past presidents such as Lincoln and FDR had usurped power during crisis times or wars while recent presidents such as Lyndon Johnson and Richard Nixon abused power even in peace time. Schlesinger's book concurred with the passage of the War Powers Resolution and prior to the fall of Richard Nixon aims to convince the readers that presidential primacy has turned into presidential supremacy.

Richard Neustadt's *Presidential Power* provides an important work on the presidency and the powers associated with that position. In that book he uses the powerful presidency of Franklin Roosevelt to build a model for presidential leadership. Though he was not the first to state it, Neustadt is often quoted as restating the principle of separated powers as more accurately, "separated institutions sharing powers." Neustadt traces the rise of presidential power since World War II and demonstrates why presidents have gravitated toward foreign policy endeavors. He attributes presidential predominance in foreign affairs to three developments: greater constitutional latitude, greater public expectations, and greater cooperation and compliance on the part of Congress.

In a comprehensive case law book entitled *The Presidency and the Constitution: Cases and Controversies*, Michael A. Genovese and Robert J. Spitzer examine the evolution of judicial interpretation of the scope and limitations of presidential power. The authors try to prove that inter-branch struggles for power, presidential selection, campaign financing and war powers arise a new issue for the modern presidency that does not eventually find itself framed as a legal problem to be addressed by the courts. Court decisions to the authors are not only framed by legal arguments but are affected by politics and have profound political consequences as well.

Although the question of whether Congress has effectively limited the President's power to involve the United States in military actions has generally met a resounding "no," William Howell and Jon Pevehouse in their *While Dangers Gather* of 2007 reach a very different conclusion. They provide the most comprehensive evidence on Congress's influence on presidential war powers. Their findings have profound implications for contemporary debates about war, presidential power, and Congress's constitutional obligations. Presidents are less likely to exercise military force when their partisan opponents retain control of Congress.

This research work is composed of five chapters. The first chapter entitled "Allocation of War Powers in the U.S. Constitution" is devoted to understanding the division of war powers between the President and Congress as the Founding Founders allocated them in the Constitution. An objective understanding to this apportion requires a deep analysis of the history of drafting the U.S. Constitution and what debates accompanied it before and after its ratification. This study is important to comprehend the ideas that might affect the Founders' division plan of war powers that would figure in the new constitution. The chapter defines the meaning of the "separation of powers doctrine", the "declare war" and the "commander-in-chief" clauses to determine the Founders' intention to understand the shift in the practice of war powers.

The second chapter under the title "War Powers in Practice (1793-1945): Original Intent Preserved" is devoted to analyzing a sample of major uses of force including a series of wars that

occurred during the first two centuries of the United States and received a formal declaration. The cases to be studied are selected for either they are of historical importance or because they triggered some of the most significant Supreme Court decisions related to war powers issue. The majority of the selected cases occurred during the period of the Founding Fathers who simultaneously shared presidential and congressional positions. The aim behind this study is to canvass how the Founding Fathers implemented the war powers provisions and to confirm presidential and congressional respect to the constitutional division of war powers at that era.

Taking the title “War Powers in Practice (1951- 1973): Original Intent Betrayed” Chapter three is concerned with the study of two of the major uses of force that occurred between 1951 and 1973, namely the Korean and the Vietnam wars which ironically received no formal declaration by Congress. Investigating congressional and presidential behaviors in this era and comparing their interaction is essential to prove that the practice of war powers shifted dramatically in favor of the President. The chapter’s other aim is to explain this shift with an emphasis on the factors that took part to shape it and to prove that presidents acquired more war powers while Congress witnessed a great deal of passivity and unwillingness to challenge presidential excessive powers.

Under the title “War Powers Resolution of 1973: Has Anything Changed?” chapter four exposes one of the important legislative acts that aim to check presidential war powers and bring Congress back to the front as a legitimate partner in war decisions. The chapter briefly introduces the background of drafting the War Powers Resolution of 1973, and then provides a detailed analysis of the most important provisions of the act. This chapter addresses media and public opinion on the resolution and deeply looks into Court’s stance towards the resolution to decide its constitutionality. The chapter then concludes with an assessment of the resolution with an emphasis on its shortcomings.

The last chapter of this dissertation “Reasons Behind the Shift in War Powers ” delves into the factors which help the President to increase his war powers and explores the reasons which led

to congressional passivity towards war powers. As a conclusion to this chapter, the study of the provisions of the War Powers Consultation Act of 2009 is necessary. It is expected to be an effective measure to check presidential war powers and involve Congress in decisions related to using force in the case of U.S. involvement in war abroad.

Chapter One

Allocation of War Powers in American Constitution

The United States of America has been involved in hostilities abroad more than three hundred times. Within this context, Congress has declared wars only five times in its history while the other hostilities have been waged by initiations from the presidents.¹ These happenings give the impression that the American President has more powers regarding the use of force. The executive seems to be the only branch in charge of deploying American troops abroad while Congress has a secondary role to play at the level of foreign policy mainly when it concerns the issue of the use of force beyond the U.S. boundaries. A thorough reading to the United States Constitution is more than necessary to extract the existing war powers provisions. An analysis to the history of drafting and allocating such powers is essential to understand the intent of the Founding Fathers in initiating hostilities.

When reading war powers provisions in the U.S. Constitution there is no explicit mention that presidential war powers are superior and absolute. Executive powers that are relevant to this inquiry can be found in *Article II, Section 2* of the Constitution. The President according to this article is in charge of being “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

Article 1, Section 8 of the Federal Constitution gives Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”. The same article empowers Congress with the authority to “raise and support Armies” to “provide and maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces”. Congress has the authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” *Clause 16* of the same article and section gives Congress the power to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”

The allocation of war powers between the President and Congress was not put in a vacuum. The framers of the Constitution who met in Philadelphia in 1787 were revolutionists with a good experience in history, law and politics (Rogers 1195). Of the fifty-five men who gathered there for the Constitutional Convention, thirty-four had some form of legal training. Massachusetts delegate Nathaniel Gorham was a judge on the Middlesex Court of Common Pleas, despite his lack of a formal education in law. Several other delegates had served as judges and magistrates, with various levels of expertise (Dirck 27). Allocation of war powers thus was affected by both the Founders' legal backgrounds as well as by their experiences during the colonial period and under the *Articles of Confederation*.²

An objective understanding of war powers allocation necessitates a comprehensive historical analysis to the distribution of this type of powers in the English Constitution. This analysis is important to measure the impact of that English Constitution on the American drafters who were formerly British subjects.

1.1 The Allocation of War Powers in the English Constitution and Eighteenth-Century Political Thought

Prior to the emergence of the United States of America as an independent nation, North American colonies were under the direct control of England. The English Constitution would certainly have a considerable effect on how to govern the United States. The colonists sought to get their independence from their mother country to escape the tyranny of the English king who was exaggeratingly granted a great deal of war powers in the eighteenth-century English system.

This eighteenth-century English system was characterized by its virtual concentration of unlimited authority over foreign policy generally and war powers in the hands of the executive (Adler). The eighteenth-century English monarch was "in right of his crown, the generalissimo of all sea or land forces whatever; he alone can levy troops, equip fleets, built fortresses, and fill the posts in them" (Lolme and Macgregor 63). With regard to foreign nations, the king was the representative and the depository of all powers and joint dignity of the nation. He had the

prerogative of both sending and receiving ambassadors, contracting alliance and declaring war and making peace on the circumstances he saw fit (63).

At that time Parliament had a role to play in these areas through its sole control over the public treasury and through its power to impeach ministers. Parliament had the power to end wars by threatening to eliminate supplies for the army. It could try to force the monarch into war by voting funds for wars it wants to be initiated. Parliament could hold the Crown accountable for decisions concerning treaties and war by impeaching the king's ministers for foreign policy failures (Yoo 217). This advantage reflects that monarch's war powers during the eighteenth century were not totally absolute because they were subject to Parliament's control.

Although the English king possessed the power to command armies and equip fleets, he could not maintain it without the accord of Parliament. He could declare war but without Parliament's consent it would be impossible for him to carry it on. This situation allows Lolme and Macgregor to develop a summary on the system of the eighteenth-century British Constitution. In that summary they compare the royal prerogative to a completely equipped ship, but from which Parliament could at satisfaction draw off the water, leave it aground and then set it afloat (67).

The division of war powers between the King and Parliament was a result of a series of crises rotating around the military and war power. The struggle between the King and Parliament over the superior hand in foreign affairs and mainly over the issue of funding began with the Stuarts and the ascension of James I in the 1620s, continued into the Protectorate of Cromwell and the Restoration, and finally calmed down with the Glorious Revolution of 1688 (Yoo 209).³ The powers of each branch were not stable and were changing from one period to another.

The Parliament gained a formal supremacy in war powers during the Protectorate era but the Restoration of the Stuarts in 1660 returned to the King his formal powers, while

Parliament retained its sole control over appropriations. By the dawn of the eighteenth century, the conflicts between Crown and Parliament yielded a stable constitutional system which gave the executive discretion in matters of war, with the legislature playing a significant role due to its control over appropriations.

A deep understanding of how war powers are divided between the executive and the legislative, in Europe generally and in England specifically, necessitates an analysis of the works of three respective Enlightenment writers John Locke,⁴ William Blackstone,⁵ and Montesquieu whose works are often described as the “political Bibles of the constitutional Fathers” (qtd in. Turner “Power of 21st Century” 6).⁶ Analyzing these works is essential to show the impact of their war powers writings on the U.S. Constitution.

In *Second Treatise on Civil Government*, John Locke divides the powers of government into three branches: legislative, executive, and federative. By definition, the federative power is foreign policy which consists of “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth” (76; par. 146). According to Locke, “though the *executive* and *federative powers* of every community be really distinct in themselves, yet they are hardly to be separated, and placed at the same time, in the hands of distinct persons.” To separate the two powers, Locke warned, it would be appropriate sometime or other to cause “disorder and ruin,” because “the force of the public would be under different commands” (77; par. 148).

The executive enjoys a prerogative that certifies him in cases of emergency “to act according to discretion for the public good, without the prescription of the law, and sometimes even against it” (84; par. 160). The good of the society to Lock “requires, that several things should be left to the discretion of him that has the executive power: for the legislatures not being able to foresee” (83; par. 159). In spite of his division to governmental powers between different branches, Locke vested war powers in the hands of the executive alone without the help of the

legislative. Locke was not an exception. Other eighteenth-century theorists supported the idea that the executive should benefit from more prerogatives related to wars.

Montesquieu believed in the separation of governmental functions between different branches. He sought to give each branch the powers to check one another. When it came to military matters, he gave the executive exclusive control over the army because “once an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing; its business consisting more in action than in deliberation” (212; par. 62). His words reflected his belief in the supremacy of the executive in war matters.

Sir William Blackstone, the great eighteenth-century jurist incorporated the theories of Locke and Montesquieu on the separation of powers and the nature of the executive prerogative into a system of constitutional law. In his four-volume work *Commentaries on the Laws of England* (1765–1769), Blackstone gave the king “...the sole prerogative of making war and peace” (qtd. in Stephen 503). He considered any attempt by the people to oppose “the supreme magistrate, and putting him against his will in a state of war” as being “extremely improper” (qtd. in Stephen 504). Monarch’s prerogatives extended to include the power to negotiate “treaties, leagues and alliances with foreign states and princes” (qtd. in Stephen 503).

Blackstone regarded the king as “the generalissimo, or the first in military command,” who possessed “the sole power of raising and regulating fleets and armies” (qtd. in Fisher, “Recovering” 1201). He considered military command as “ever was and is the undoubted right of his majesty and his royal predecessor.” It was completely outside the jurisdiction of Parliament (qtd. in Stephen 510). His standpoint was perhaps due to Parliament’s attempt to wrest military control from the king during the Civil War. The king “is, and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him” (qtd. in Fisher, “Recovering” 1202) in the exercise of this legal prerogative.

The brief analysis shows that the three theoreticians agreed to give the king the lion’s share of powers and prerogatives related to the issue of war. They all regarded Parliament’s

prerogatives to be restricted to the power of the purse and the power of impeaching the Crown's ministers if they were accused of involving the nation in injudicious treaty or war.

A better understanding of the allocation of war powers in the United States Constitution requires having an idea about past allocation of such powers in America's first Constitution, namely, the *Articles of Confederation*. The United States experience with the document unavoidably had an enormous impact on the Founders when drafting the new constitution. The fact of substituting a new constitution for the *Articles* showed that it contained some provisions which were proved to be inadequate. What were the circumstances behind drafting that document?

When relations deteriorated between the American colonists and their mother country because of what they considered the combined tyranny of both the King and the Parliament, they decided to revolt trying to force Parliament to reconsider its unfair policies. On June 7, 1776, the Virginian statesman Richard Henry Lee offered a formal resolution based on the drafting of two important documents: a declaration of independence and a plan for confederation (Rebman 6). Lee's motion soon received a response.

Two committees were appointed by the Second Continental Congress to realize Lee's proposal. The first document, the Declaration of Independence, officially announced American independence, while the second set the structure and defined the powers of the new government in the *Articles of Confederation* (Rebman 6). The head of the committee who was in charge of drafting the Articles of Confederation was John Dickinson, a delegate from Delaware.

Dickinson initially proposed a strong central government with control over the Western lands, equal representation for the States, and the power to levy taxes. His proposal was rejected because the thirteen States' experience with England led them to fear a powerful central government (Snow 19). That fear caused the omission of a permanent executive office to prevent concentrating immense power in any one person because they considered executive authority the natural enemy of liberty and a potential repository for military tyranny (DeConde).

The drafters of the *Articles* granted all war powers to the Continental Congress.⁷ *Article 9* gives Congress “the sole and exclusive right and power of determining on peace and war”. It has the sole authority of “entering into treaties and alliances ... of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.” Congress according to the same article enjoys the power “of granting letters of Marque and Reprisal in times of peace” (par. 1).

Article 9 vests in Congress the power of “appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States – making rules for the government and regulation of the said land and naval forces, and directing their operations” (par. 4). The fifth paragraph of *Article 9* grants Congress the authority “to build and equip a navy – to agree upon the number of land forces and to make requisitions from each State for its quota.”

Despite what seemed to be an immense grant of powers to Congress, its authority is not absolute. The validity of any congressional decision depends on the agreement of nine out of thirteen States. *Article 9, Paragraph 6* denies Congress the power to declare war and enter into treaties and alliances with foreign nations and the power to coin, borrow, or appropriate money. Congress is not given the right to either determine the sums and expenses necessary for the defense and welfare of the United States” or “agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised. The same article does not allow the President to appoint the commander in chief of the army or navy and insisted that no “question on any other point” should be determined without the “votes of the majority of the United States in Congress assembled.”

At the same time, the *Articles* restricted States’ powers. As an illustration, *Article 6* mentions “No State shall engage in any war without the consent of the United States in Congress assembled.” States could engage in wars without prior congressional consent only in the case of being “actually invaded by enemies” or knew of an Indian attack so imminent that seeking

congressional approval would result in dangerous delay (*par. 5*). States were prohibited from granting “commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects, thereof, against which war has been so declared” (*Article 6; par. 5*). States could do so without congressional consent only when be infested by pirates (*Article 6; par. 5*).

The alleged limitation on State’s powers, each State of the Confederation maintained its “sovereignty, freedom and independence” (*Article 2*). Although Congress was responsible for conducting foreign affairs, declaring war or peace, maintaining an army and navy and a variety of other functions, it was denied the power to collect taxes, regulate interstate commerce and enforce laws (Hardison), a fact which contributed to undermining Congress’s credibility as a government.

American government relied on the good faith of the States to pay bills sent to them for the maintenance of the national treasury. In several instances such notices were ignored (Sorluccho 104) because the national government had no power of enforcement, many States violated treaties negotiated in the name of the United States, which meant that individual States were undermining the reputation, integrity, and security of the nation (“Constitutional Convention”). This situation led Alexander Hamilton to lament in *Federalist* N° 22 the international incredibility to the nation which left the faith, the reputation and the peace of the whole Union at the mercy of the prejudices, passions, and the interests of every member of which it was composed.

After the United States victory in the War of Independence, political leaders such as John Jay, George Washington, Alexander Hamilton, and James Madison came to perceive the inadequacies of the *Articles* in the making of foreign policy.⁸ It was during this era that the Americans sought a permanent president with the necessary powers to carry out a unified foreign policy (DeConde). With this objective in mind, they decided to amend the *Articles of Confederation* in a manner that would provide for a stronger central government but at the same time they aimed to prevent tyranny.

To put this idea into practice and to correct the deficiencies of the *Articles of Confederation*, the present members convinced Congress to authorize a convention for that purpose. Delegates from all States except Rhode Island met on 25 May 1787, in Philadelphia to attend the Constitutional Convention.⁹ Instead of amending the *Articles of Confederation*, the attendant eventually framed a new constitution. Before its finalization much debate occurred over the powers that would be accorded to the three identified branches in the new document.

American experience under the *Articles of Confederation* affected the Founders' distribution of powers among the three different branches. The framers decided to have a president in their new government.¹⁰ The emergence of the presidency reflected both the need for an executive and the dissatisfaction with multi-headed diplomacy (Henkin27). Sorrowful memories of royal prerogatives, fear of tyranny and unwillingness to repose trust in any one person as did the British, kept the drafters of the Constitution from giving the new President, too, much power.

Chief among the concerns that distressed the framers when drafting the new constitution, therefore, was the issue of waging war. The Founders defined war as one of the serious threats to civil liberty and a means that would pave the way for tyranny. James Madison enforced this idea when he described war as the most dreaded enemy to public liberty. In Madison's philosophy, war is the "parent of armies" that forcibly leads to the path of debts, taxes and armies which are the best instruments for controlling the many by the few (Hornberger).

On this basis, the framers of the U.S. Constitution decided to vest the powers of war in the hands of the branch that would not facilitate it to secure the lives and liberties of the citizens who would suffer its pains and bear its costs. Achieving this object compelled the drafters of the new constitution to bar monarch war powers and prerogatives as strongly as they could. The result of this decision implemented a new model of government with a new distribution of war powers. At the time of drafting the Constitution, the existing models of governments throughout Europe and particularly England were monarchical. The monarchy assigned virtually all external affairs to its

king who benefited from several prerogatives and powers that a parliament with all its members had little authority to restrict or stand against.

The delegates, who met at the Philadelphia Convention to draft the Constitution, were conscious of these royal prerogatives thanks to their experience and status as citizens of former British colonies. This bitter experience allowed them to conclude that kings always involved and impoverished their people in wars and conflicts which started by self-aggrandizing kings, acting generally, if not always, as if the good of the people was the object (Cohen). John Jay, the first Chief Justice of the United States, notes in *Federalist* N° 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal.”

The term “monarch” would be rejected whenever it was invoked at the Convention. The delegates decided not to frame the American executive exactly after the British model. James Wilson, a prominent figure at the Constitutional Convention, considered the powers of the British king not “a proper guide in defining the executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war and peace” (qtd. in Woods). Edmund Randolph, the delegate of Virginia shared the same opinion and asserted that the delegates had “no motive to be governed by the British Government as our prototype” (qtd. in Woods).

Delegates including John Rutledge, Governor of South Carolina and attendant at the Constitutional Convention were in favor of placing executive powers in one person, but “he was not for giving him the power of war and peace” (qtd. in Adler and Fisher 7). Alexander Hamilton, a favorite among extollers of a strong presidency, rejected the British example of executive prerogatives in the conduct of foreign affairs and the exercise of the war power. In a lengthy speech to the Convention, Hamilton explained that in “his private opinion he had no scruple in declaring...that the British Government was the best in the world” (qtd. in Adler and Fisher 7). His opinion meant that the American new form of government would not mirror the British one. The framers of the United States Constitution were conceived of choosing for their independent

nation a new type of government that would constitute a final break with the European form which regarded war as the province of the monarch. The Founders practically decided to involve the legislature in war decisions (Fausold 181). Their aim was to come out with a constitution that insisted on a typically American pattern of government.

That new framework is much more than an outcome of the framers' historical background as well as an outgrowth of their political ambition and experience. The Founders of the Constitution came to fear the executive desire for war. After dividing the federal government into three branches: Executive, Legislative and Judicial, they decided not to vest in the Executive the same war powers that had been vested in the king to avoid engaging people in many wars under the monarchical rulings. The Founding Fathers constitutionally planned to allow people to have control over matters of war and peace ("Understanding"). As a guarantee, the United States Constitution grants the war decision to Congress which is the closest branch to people where they have representatives.

In *Federalist* N° 69, Alexander Hamilton defines president's authority as "nominally the same with that of the King of Great Britain, but in substance much inferior to it." Hamilton clarified in the same *Federalist* Paper that unlike the British king whose power included declaring war, raising and regulating fleets and armies, President's power "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy."

In a letter to Thomas Jefferson in 1798, James Madison supported the idea of preventing the executive branch from the power of declaring war. According to Madison "the constitution supposes, what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has vested with studied care the question of war in the legislature" (qtd. in Mathews 294).

George Mason, an American statesman and a delegate from Virginia to the Constitutional Convention, did not regard the executive the trustworthy branch of government to be empowered

with this power (Fisher, “Recovering” 1203). James Wilson considered the division of power between the executive and the legislative an effective way to secure the nation from war:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of 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. This declaration must be made with the concurrence of the House of Representatives; from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war. (“Pennsylvania Ratifying Convention”)

But few delegates such as Pierce Butler, a South Carolina Representative, opposed the grant of war powers to the legislative and supported the idea of vesting the President with such a power. His belief was that the chief executive would never make war unless it was endorsed by the public (Hendrickson 6). Representative and delegate of Massachusetts, Elbridge Gerry commented, “I never expected to hear in a republic a motion to empower the Executive alone to declare war” (qtd. in Healy 30). None of the Founders but Butler wished to invest the president alone with the power to make war.

That power was granted to Congress. It was debated briefly at the Constitutional Convention on August 17, 1787, when the Committee of Detail submitted to the general convention a draft article which gave Congress the power to make war. This grant was unsatisfactory to James Madison and Elbridge Gerry who worried that the word ‘make’ would constrain the government, leaving it incapable to proceed quickly in an emergency, particularly when Congress was not in session (Dirck 32). Opponents to such a grant submitted a variety of alternatives.

Charles Cotesworth Pinckney, delegate of South Carolina, preferred war powers to be vested in the smaller Senate which thanks to its supervision of the treaty power would develop a well-versed judgment about foreign affairs (Fausold). Pinckney viewed legislatures proceedings “too slow” for they would meet once a year and conceived the House of Representatives as too

numerous for such deliberations. He preferred the Senate that he considered the “more acquainted with foreign affairs, and most capable of proper resolutions” (qtd. in “Madison Debates”).

Madison and Gerry inserted the word ‘declare’ in place of ‘make’. Madison’s motion was first carried by a vote of 7-2. When Rufus King, a Massachusetts Representative, explained that “make” war might be understood to “conduct” it which was an executive function, Elsworth of Connecticut changed his position (“Records of Federal Convention”) so that the vote changed to 8-1 in favor of Madison’s motion.

This change in wording was not intended to deprive Congress of its decisions to involve the country in war. The shift was meant to grant the President an emergency power that Madison explained as, “to repel sudden attacks” (Fausold 181). Madison and Gerry changed the word to avoid the confusion of “making” with “conducting” war which was the prerogative of the president (Rogers 1197) under what would be the new constitution.

Although the Founders altered the first wording of the War Powers Clause to elucidate and define the powers of each branch, the meaning of the new term and the purpose behind its insertion is still confusing scholars. Several interpretations are presented to clarify the meaning and aim behind using the term ‘declare’. To Adler and Fisher the word “declare” in the 1550’s had become synonymous with “commence”. They both meant the initiation of hostilities. This was the established usage in both the English and the international law where the terms “declare war” and “make war” were used interchangeably (9).

In eighteenth-century parlance, the word “declare” was used as a formal declaration by one country to indicate that a state of war existed with another. The use of the term brought about certain well-defined legal consequences concerning the participants as well as neutral nations (Glennon, Rivikin, and Casey 151). Little of the debate at the time of the convention centered on the meaning of the word “declare” and little attention was given to the scope of the president’s power to use the armed forces for defensive purposes (Rogers 1198) to protect the nation or its security interests.

William Alstyne, law Professor and constitutional law scholar, reviews three interpretations which offer quite different impressions of congressional power to declare war. Perhaps, the clause reinforces a formal duty on the part of Congress to approve an apparent condition of war. It may establish in Congress a more explicit power of veto, to detain executive power to make war, to declare against a war and in so doing, to check the executive from further quest of specific hostilities. It may also confirm that in the absence of an affirmative declaration by Congress authorizing extraterritorial use of armed force, the President may not pursue any national policy to use such force (5-6).

The drafters of the Constitution were clearly affected by their previous experiences under the British monarch and the *Articles of Confederation*. In allocating their war powers, the drafters modified and mixed the two previous forms. Congress as a substitute for British Parliament will declare war. The Senate, as a parliamentary body, is to share in making treaties of alliance or of peace. The President, as an alternative for the King, has limited powers; unlike the king he cannot declare war by his own authority, nor raise fleets and armies for these powers are vested in other hands (Allison 85).

Unlike in the *Articles of Confederation*, Congress under the new United States Constitution is granted the power to raise army, train and regulate a national military establishment without relying on indecisive state legislatures for funding. Congress works with a powerful new chief executive who is authorized to command whatever sort of army and navy Congress sees fit to create (Dirck 32) for the protection of the United States interests and citizens .

What the President retains alone is the command of the armed forces. The intention of the framers is to create a system in which recourse to war requires a joint decision by the whole body of men in national elective office. Presidents cannot declare war, congressmen cannot deploy troops. On this as on all minor concerns, these men will check and balance one another (Allison 90). This process of checks and balances is guaranteed through the separation of powers which is one of the important features of the American model.

1.2 Separation of Powers

When designing their government, the framers of the United States Constitution aimed to preserve and protect the liberty of citizens. Achieving this goal required that no branch of government would have absolute powers that could enable it to harm or devastate the nation. To avoid this practice, the drafters conveyed the writings of Locke and Montesquieu, who called for the separation of the legislative, executive, and judicial to prevent usurpation and tyranny by the holders of powers. The Founders relied on the principle of countervailing checks and balances.

The separation of powers principle is one of the characteristics of the United States Constitution which divides the authority between the different branches of government. The aim of this principle is to assure that no branch will have the authority to decide unilaterally in matters and issues that will affect the whole nation. A separation of powers system guarantees that each branch will be empowered with only a piece of authority, but at the same time, will have the ability to scrutinize, check and balance the powers of the two other branches (Allison 90) in case of dissatisfaction.

Louis Brandeis, the United States Supreme Court Justice, explicated that the doctrine of the separation of powers which was adopted by the Convention of 1787 was not inclined “to promote efficiency but to preclude the exercise of arbitrary power” (“*Myers v. United States*” 293). The purpose behind the doctrine was “not to avoid friction”, but was the inevitable friction caused by the distribution of the governmental powers among three departments which would save people from autocracy (“*Myers*” 293).

Chief among the areas in which the principle of separation of powers can play an important role is the responsibility of engaging the nation in armed conflicts. The framers of the Constitution lived under the effect of two different experiences, the British monarch and the *Articles of Confederation*. When the framers discussed the powers of involvement in armed conflicts, they decided to alter the old prerogatives of war powers by applying the principle of checks and balances.

On the one hand, the Founders changed the old federal procedure under the *Articles of Confederation* which used to vest the “sole and exclusive right and power of determining on peace and war” in the legislative branch. They did so because they wished to take advantage of executive speed, competence, confidentiality, and relative isolation from “public passions” (Rogers 1198). On the other hand, they aimed to curb the prerogatives of the unchecked British monarch who, as Hamilton described in *Federalist* N° 69, had supreme authority not only to command the military and naval forces, but to declare war, raise and regulate fleets and armies by vesting these powers in the legislative branch .

The result of these changes created a system which divides war powers between two different branches: the Legislative and the Executive. Legislative war powers are found in *Article I, Section 8* while executive war powers are mentioned in *Article II, Section 2* of the Constitution. This division of war powers between the legislative and executive branches highlights the framers’ intention to make the decision for commitment in hostilities a collaborative judgment between the two branches, with each branch having a say in this decision. Neither the President nor the House of Representatives or Senate is unilaterally authorized to initiate hostility. War initiation is taken by Congress along with the President (Rogers 1196).

The enumeration of war powers granted to each branch gives the impression that the Founders granted Congress more powers regarding the initiation of hostilities in purpose. While they decided to deprive the Executive of the power to declare war, they chose to assign it to the Legislative branch instead. Their decision was taken because the framers did not want to trust a single man with a power that would concern the entire nation. The drafters of the Constitution predicted that the decision of the President would be affected with some personal motivations that serve no one but himself. Chief among the driving forces that the Founders feared when drafting the Constitution was executive ambition for fame.

This fear came from their study of other nations’ history which exposed that executives, in their quest for fame and personal glory, had a great desire for war and little concern for their

subjects or the long-term interests of their country (Fisher, “Congress Power” 2). John Jay, one of the Founding Fathers, warned in *Federalist* N° 4 from monarchs who would often make war when their nations would get nothing by it. They just did so 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.” Although these motives affected only the sovereign, he engaged his country in wars that were neither sanctified by justice nor the voice and interests of his people.

James Madison was against the idea of empowering the executive with the capacity to initiate wars. In his writings of 1793, he expressed his fear from war by calling it the true nurse of executive aggrandizement:

In war the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace. (“Pacifcus-Helvidius Debate”)

In his writings under the pseudonym ‘Helvidius’, Madison insisted on keeping the power of Commander-in-Chief at arm’s length from the power to take the nation to war, on the reasoning that the decision to commence, continue, or conclude a war cannot be in the nature of things, a proper judgment of those who are to conduct a war. The conductors of war were barred from the latter functions by a great principle in free government, similar to that which separated the sword from the purse, or the power of executing from the power of enacting laws (“Pacifcus”).

Hamilton’s “Pacifcus” writings expressed similar opinion. He believed the distribution of authority to be the wisdom of the Constitution. As the duty of the executive was to preserve to the nation the blessings of peace, Hamilton argued, only the legislature could have the authority to interrupt that peace and place the nation in a state of war. Executive power to Hamilton is an

authorization that allows the President to do whatever else the law of nations, co-operating with the treaties of the country, directing the intercourse of the United States with foreign powers.

Joseph Story, an American legal writer and a Supreme Court Justice during Madison's presidency, considered the decision of the Founding Fathers to vest in the Representative branch the decision to go to war and never to grant such power to the executive as the essential republican principle. The power to declare war was not only the highest sovereign prerogatives, but it was in its own nature and effects so critical and calamitous. War tended to impose upon the people the most burthensome taxes, and personal sufferings. Story described war as sometimes fatal to public liberty itself, by introducing a spirit of military glory, which was ready to follow, wherever a successful commander would lead. Story concluded that the co-operation of all the branches of the legislative power ought, upon principle, to be required in the declaration of war (97).

Thomas Jefferson supported the idea of not trusting the executive with the power to declare and initiate hostilities. He regarded the grant of the power to declare war to the legislative branch and not the executive as an effective step in checking the dog of war, "we have given one effectual check to the dog of war by transferring the power of letting him loose from those who are to spend to those who are to pay" (qtd. in Turner 22). The framers tried to avoid tyranny and preserve civil liberty by vesting the power of declaring war in the hands of the legislative branch whose main function is people's representation. The President is denied such power, but in a language that is as clear as *Article I, Section 8*, that grants Congress the power "to declare War," *Article II, Section 2* of the Constitution designates him as Commander-in-Chief of the Army. What does this clause eventually mean and why is such a title granted to the President?

1.3 Commander in Chief Clause

As its wording indicates, the Commander-in-Chief of the army is one of the important components of war powers. The Founding Fathers decided to deny Congress such a power and preferred this time to vest it in the President. This decision was not taken at random because the

drafters had many reasons behind such allocation. Separating the powers of the purse from the powers of the sword was one of the important reasons that led the framers to vest this power in the executive and not in the legislative branch. A major argument in both the Philadelphia Convention and the state ratification conventions was that the fusion of the power of the purse and that of the sword would inevitably lead to tyranny. The Founding Fathers considered this practice as a dangerous breach of Montesquieu's belief that vesting the same branch with too much power would lead to tyranny (Turner 22). Madison presented a clarification and a remedy to that fear:

It is that you shall not place these powers either in the legislative or executive, singly; neither one nor the other shall have both, because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny. But when the purse is lodged in one branch, and the sword in another, there can be no danger. (qtd. in New York State 104)

The framers' decision to vest the command of the military forces in the President means that once Congress authorizes military hostilities, the President will have full power to conduct and prosecute the war effort (Schlesinger 5). The designation of the President as Commander-in-Chief gives him no war making power. It gives him, as it was proposed by Hamilton,¹¹ only the authority to repel sudden attacks on the United States and to direct war, when authorized or begun. At this level, he will direct those forces placed at his command by an act of Congress ("Commander"). Hamilton words deprived the President of any power to wage offensive war unilaterally relying on his title as Commander-in-Chief except in case of repelling sudden attacks.

Hamilton described President's power as Commander-in-Chief in *Federalist* N° 69 as "nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy." The title of Commander-in-Chief was not created but adopted by the Founding Fathers. As Francis D. Wormuth observed, "the office of Commander-in-Chief has never carried the power of war and peace, nor was it invented by the framers of the

Constitution”. The drafters of the Constitution adopted the title of Commander-in-Chief and its historical practice from England, where it was introduced in 1639 by King Charles I, when he named the Earl of Arundel Commander-in-Chief of an army to battle the Scots in the First Bishops War (107). The title was used to refer to the highest-ranking officer in a particular sequence of command or theater of action. The Commander-in-Chief’s office did not possess unfettered, sole power to lead. Alternatively, it was made subordinate to a superior such as Parliament or the secretary of war, who could issue orders and instructions to him (Lobel 417).

The practice of giving the officer at the highest rank of the military the title of Commander-in-Chief and of making him subject to instructions from a political superior was transferred to the American soil and then embraced by the Continental Congress. When it appointed George Washington ‘General and Commander-in-Chief’ of the revolutionary army, on 17 June 1775, it gave him the “full power and authority as you shall think for the good and welfare of the service” (“Commission”). Washington was not accorded independence from the Continental Congress which worked to instruct him to follow the articles of war it adopted (“Commander”), “and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress” (“Commission”).

Some State constitutions adopted during the Revolution or shortly thereafter, such as those of Massachusetts and New Hampshire, designated the Governor of the State as the Commander-in-Chief of the military forces. These constitutions sought to control the governor’s potential misuse of military power through either making the appointment of military officers subject to legislative approval, or mandating that the legislature alone make military appointments (Bradley and Flaherty 28).

Maryland’s 1776 Constitution appointed the Governor as Commander-in-Chief but contained some provisions requiring that the executive power be exercised consistently with the laws or constitution of the State:

The Governor, by and with the advice and consent of the Council, may embody the militia; and, when embodied, shall alone have the direction thereof; and shall also have the direction of all the regular land and sea forces, under the laws of this State, (but he shall not command in person, unless advised thereto by the Council, and then, only so long as they shall approve thereof); and may alone exercise all other the executive powers of government, where the concurrence of the Council is not required, according to the laws of this State. (“Maryland Constitution” XXXIII)

This fact enforces the framers familiarity with the usage of the Commander-in-Chief title. The Founders’ expertise with the title explains the absence of concerns about the nature of the post and why there was no debate on the Commander-in-Chief clause at the Convention. Previous use of the title accounts that there was no attempt at the convention or at any state ratifying convention to redefine the office of Commander-in-Chief (“Commander”).

The framers’ decision to give the President the title of Commander-in-Chief was limited to two purposes. The first purpose was to uphold unity of command. The Founders of the Constitution wanted the liability that came with a single person in charge of military operations (Fisher, “Exercising” 5). Hamilton’s words in *Federalist* N° 74 mirrors the framers desire to have a single hand responsible for conducting the direction of war: “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”

The second purpose was to assure civilian control of the military establishment (Schlesinger 6). The President is Commander-in-Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle” (qtd. in Fisher, “Domestic” 969). He is Commander-in-Chief for a different reason. To Edward Bates, an American lawyer and statesman who served as Attorney General under President Abraham Lincoln, whatever soldier leads U.S. armies to victory against an enemy, “is subject to the orders of the civil magistrate,

and he and his army are always ‘subordinate to the civil power,’” and as military officers are subject to the direction and command of the President, so the President is subject to the direction and command of members of Congress, because they are the representative of the sovereign people (qtd. in Fisher, “Domestic” 969).

The historical background of the allocation of war powers in the United States Constitution shows the framers insistence on a collective judgment for war. They expected a collective judgment would be superior to an individual judgment and would help guarantee that the United States would not go to war without a political agreement. The Constitution gives Congress the power to declare and fund wars and requires the President to persuade Congress to make him explain why war is necessary to the public who will ultimately bear its costs.

The division of war powers between the different branches was put with studied care. It was the result of long experiences under both the British monarch and the *Articles of Confederation*. The Founding Fathers planned not to give the President any supreme role or sole power to engage the nation into war. Congressional enumerated war powers do not indicate that this branch has a secondary role to play at the level of involving the nation to war. The Founders of the Constitution instead did their best to divide these powers between the two branches and urge them to work collaboratively to assure public sovereignty.

What seems a good division to war powers between the different governmental branches to prevent tyrannical Executive and a weak Legislative remains an ink on paper because only practice tests the efficiency of the Founders’ effort. The coming chapter will put constitutional war powers in practice to see how the Americans are going to perform and execute their Constitution, especially that the first four presidents were among the Founding Fathers. This is important to decide whether constitutional war provisions would be respected and honored or they would just do what their ancestors feared and tried to avoid. The nation would be involved in numerous brutal wars by an order from one person, the President.

Endnotes

¹ American declared Wars: The United States of America declared war five times in its history in the following wars: the War against England in 1812, the War against Mexico in 1846, the War against Spain in 1898, World War I and World War II.

² The *Articles of Confederation* is a document which was supposed to establish a “firm league of friendship” between the 13 States during the Revolutionary War. Although designed to create some unity, the government it established was too weak to accomplish too much. see Renée C. Rebman, *Articles of Confederation* (MN: Compass Point, 2006) ; Barbra Silberdick Feinberg, *The Articles of Confederation: the First Constitution of the United States* (CT: Twenty-First Century, 2002), chapters 1 and 2.

³ The Glorious Revolution refers to the series of events in 1688-89 which culminated in the exile of King James II and the accession to the throne of William and Mary. It has also been seen as a watershed in the development of the constitution and especially of the role of Parliament; for more information see “Glorious Revolution,” *parliament.uk*, 14 January 2009 <<http://www.parliament.uk/documents/upload/G04.pdf>>.

⁴ John Locke is considered the first of the British empiricists. His ideas still have enormous influence on the development of epistemology and political philosophy, and he is widely regarded as one of the most influential Enlightenment thinkers, classical republicans, and contributors to liberal theory. This influence is reflected in the American *Declaration of Independence* ; for more information see “John Lock,” *Nationmaster.com*, 14 January 2009 <<http://www.statemaster.com/encyclopedia/John-Locke>>.

⁵ William Blackstone is famous for his historical and analytic treatise on the common law called *Commentaries on the Laws of England*, first published in four volumes over 1765–1769. “Sir William Blackstone - Blackstone and Property Jurisprudence, Blackstone and anti-Catholicism, Trivia,” *stateuniversity.com*, 14 January 2009 <<http://encyclopedia.stateuniversity.com/pages/20740/Sir-William-Blackstone.html>>.

⁶ Charles Louis de Secondat, Baron de la Brède & de Montesquieu was a French political philosopher and jurist. Montesquieu recognized the influence that John Locke had on him. Charles de Secondat Montesquieu, and Melvin Richter, *The Political Theory of Montesquieu* (Cambridge: Cambridge Univ Press, 1977) 1-20.

⁷ Continental Congress: in the period of the American Revolution, the body of delegates who spoke and acted collectively for the people of the colony-states that later became the United States of America. The term most specifically refers to the bodies that met in 1774 and 1775–1781 respectively designated as the First Continental Congress and the Second Continental Congress. “Continental Congress,” *Britannica.com*, 20 January 2009 <<http://www.britannica.com/EBchecked/topic/134850/Continental-Congress>>.

⁸ The *Articles of Confederation* were weak and ineffective. Noah Webster, author of the first American dictionary, said they were “but a name, and our confederation a cobweb.” (qtd. in A. Genovese, J. Spitzer, *The Presidency and the Constitution: Cases and Controversies* (New York: Palgrave Macmillan, 2005) 3.

⁹ Rhode Island did not attend the Constitutional Convention because it was afraid that any new system proposed by the convention would be detrimental to its economy. Rhode Islanders were famous for their sense of independence and suspicious of the calls for a stronger national government. Initially, Rhode Island rejected the *Constitution*, but the reality of trying to go it alone as a sovereign nation, surrounded by a large and populous United States, finally convinced Rhode Island to ratify. Mount Steve, "Answers from FAQ," *USConstitution.net*, 14 January 2009 < http://www.usconstitution.net/constfaq_a6.html >.

¹⁰ For inventing the presidency see A. Genovese, J. Spitzer. *The Presidency and the Constitution: Cases and Controversies* (New York: Palgrave Macmillan, 2005) 4-6.

¹¹ For Commander in Chief clause, see Steven J. Costel, ed. *Surging Out of Iraq?* (New York: Nova Science Publ., 2008) 7-10.

CHAPTER TWO

War Powers in Practice (1793-1945): Original Intent Preserved

The United States Constitution echoes the framers' intention to make involvement in wars subject to collective judgment between the President and Congress for the purpose of upholding deliberation, political accord and liability for the use of force. Collective judgment is guaranteed through empowering each of the President and Congress with a piece of war powers to complete each other.

This chapter pertains to putting war powers in practice from the period of the Constitution's ratification to the last American declared war, namely World War II. The chapter will overview selected events in which the United States used force either for their historical importance or for their similarities with other major cases that will be studied. The aim behind this review is to see whether the distribution of war powers among the different three branches was respected throughout the first two centuries of the United States history or to consider the provisions of the Constitution just ink on paper. Some of the selected cases occurred during the presidency of the Founding Fathers while some of them were still serving as congressmen. Such cases are important to reinforce the Founders' original intention through practice. A great part of this chapter will be devoted to the reasons that drugged the nation to use force or declare war. Its other purpose is to find out whether the United States was acting defensively or offensively.

This chapter equally attempts to spotlight the interaction between the President and Congress during crisis times and helps understand whether the presidents of the concerned era were aware of the constitutional limitation on their war powers. Much attention will be given to congressional reaction and behavior prior and after the decision to use force or declare war.

Some of the cases to be studied triggered some of the most important Supreme Court decisions related to war powers issue. These decisions in their turn have a significant role in clarifying the original distribution of war powers and shedding light on the duty the courts are supposed to perform in case of ambiguity or debate over using force abroad.

1.1 Washington and the Neutrality Issue (1793-1794)

The new Constitution was to be put in practice soon after its adoption and the issue of war powers arose for the first time in the United States during the presidency of George Washington, the first President of the newly independent United States of America. Washington was a prominent figure among the Founding Fathers who worked hard during the Constitutional Convention to draft the provisions of the new Constitution. The war powers provisions of that Constitution were questioned and debated because of international conflicts.

When France and Great Britain went into war against each other in 1793, both parts sought the United States support (Larson 52). Relying on the Treaty of Amity of 1778 that committed the United States to guarantee the French possessions in the Americas, France did not doubt the U.S. backing (Campbell and Jamieson 114).¹ Congress did not immediately pass any legislation to declare the United States position (Larson 53).

A cabinet meeting was called later to discuss the options available to the United States. One of the suggestions was presented by Thomas Jefferson after consulting James Madison. Jefferson called the United States to impose discriminatory tariffs on British vessels believing these tariffs would promote the British to settle land claims issues with the United States. This suggestion was backed by both the supporters of the revolutionary government of France and those who trusted the obligation of the United States to uphold its Treaty of Amity with France (Bemis 95).

Contrary to the first suggestion, Hamilton contended such proposal would undermine American tariff policies (Bemis 95). In spite of Jefferson's anti-British sentiments and arguments, George Washington decided to keep the nation out of these great powers conflicts, (Campbell and Jamieson 114) justifying such a policy to protect America's flimsy trade with Britain and France. The Treaty of Amity could not determine American policy towards France because of its invalidity basing his argument on the revolution that had recently taken place in France (Bemis 95). Both Washington and Hamilton left the final decision to Congress to determine whether the United States would follow the neutral policy or not.

Vowed by the Continental Congress in 1783 the Neutrality Proclamation urged the thirteen states to be “as little as possible entangled in the politics and controversies of European nations” (Schmidt 8). The accordance between the two proclamations, Washington’s Proclamation was criticized by pro-French congressmen such as James Madison and Thomas Jefferson considering it as illegal and invalid morally and legally.² Washington’s Proclamation of Neutrality touched off a sharp debate on constitutional issues and raised the question of whether the President had the authority to issue a neutrality proclamation. A war of words developed between two prominent personalities among the Founding Fathers, Alexander Hamilton and James Madison. Hamilton who apparently showed sympathies to Britain decided to stand on the side of George Washington. While James Madison who declared his opposition to Washington’s proclamation chose to support France (Campbell and Jamieson 114).

Hamilton’s writings under the pen name ‘Pacificus’ that appeared in the *Gazette* of the United States on June 29, 1793, were devoted to defend the President’s constitutional authority to declare a policy of neutrality and his unilateral right to promulgate it (Schlesinger 18). In Hamilton’s view foreign policy was in its nature an executive function. The power of declaring war and ratifying treaties bequeathed by the Constitution on Congress were “exceptions out of the general ‘executive power’ vested in the President” and were consequently “to be constructed strictly, and ought to be extended no further than is essential to their execution” (“Pacificus - Helevidus Debates”).

To defend his point of view through ‘Pacificus’, Hamilton explained if Congress had the right to declare war, the President, too, had the right to judge national obligations under treaties. The President’s duty, according to him was to preserve peace till the declaration was made, “it belongs to the ‘executive power’ to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign powers” (“Pacificus - Helevidus Debates”).

Under the pen name ‘Helevidus’, Madison countered Hamilton’s standpoint in a series of articles that appeared in the *Gazette* of the United States between August 24 and September 18, 1793 (Campbell and Jamieson 114). In these articles Madison insisted that the Constitution had not given the President the power to declare neutrality. As the power to declare war resided with Congress, added Madison, it was for that body to decide whether the country would remain neutral and at peace. He denied powers of making wars and treaties to be inherently executive. He defined them as being British royal prerogatives that did not constitute those of the U.S. President (Schlesinger 19). The debate then was quieted in 1794, when Washington succeeded in obtaining congressional ratification of his action through its passage to the Neutrality Act of 1794.

Although Washington’s policy was criticized as demonstrating the authority of the President to establish an antecedent in foreign policy, and despite his belief that congressional war powers did not extend to decisions on neutrality, unless it was determined to do so, Washington remained defer to Congress. In the Fifth-Annual Message he admitted, “It rested with the wisdom of Congress to correct, improve, or enforce this plan of procedure” (“Fifth-Annual...””) and soon requested the legislative branch to act. Neutrality became a congressional prerogative (Schlesinger 20). Notwithstanding the raised debate over constitutional war powers triggered by Washington’s Proclamation of Neutrality, Washington did not ignore Congress and it was the legislative branch that took the last decision.

The analysis of George Washington’s Neutrality Proclamation and the dispute that occurred between the two prominent drafters of the Constitution assured the President’s inability to decide neutrality unilaterally. The debate that accompanied the issue of neutrality reinforced the framers’ intention not to give the President any exclusive powers in the case of neutrality or war declaration.

1.2 The Quasi War with France (1798-1800)

The coming years showed that the neutral policy followed by George Washington did not keep the nation out of war. It instead involved the United States in its first serious international crisis. The undeclared Quasi War with France was the first serious American international conflict. Several prominent figures among the drafters of the Constitution were still serving as Congressmen. The conflict is an essential course to scrutinize the drafters' implementation of the Constitution and a valuable case to spotlight the real interpretation of the war powers clause because the drafters of the Constitution could protest if they viewed the President adopting an illegitimate way of conducting the hostility. The Quasi War was officially fought from July 7, 1798 to September 30, 1800, when the Treaty of Mortefontaine would be signed. The roots of the conflict date back to the signing of the Jay Treaty between the United States and Great Britain in 1794,³ especially in the provision permitting Britain to seize French goods from American ships in exchange for financial compensation (Hickman).

The ratification of the Jay Treaty was viewed by the French as a violation to the 1778 Treaty of Alliance with the American colonists and felt that the United States was favoring Britain in spite of declaring neutrality in the ongoing conflict between the two nations. As a result, the Directory issued a decree on July 4, 1796,⁴ announcing its intention to treat neutral vessels in the same manner that the Royal Navy treated them. American vessels were subject to harassment and seizure, and American sailors were pressed into service by the Royal Navy (Hodge and Nolan 17). This move by the Directory amounted to a repudiation of the Franco-American alliance and caused the unofficial declaration of war.

As a first step, John Adams tried to negotiate the matter with France, but the French government refused to receive the American envoy and suspended commercial relations with the United States. Three of the commissioners sent by Adams to France were told by three French agents, referred to as *X*, *Y*, and *Z*, that to speak to Foreign Minister Charles Maurice de

Talleyrand, they would have to pay a bribe of \$250,000, provide a loan of \$10 million for the French war effort, and Adams would have to apologize for anti-French statements.

Refusing to comply, the envoy departed and returned home and France delayed commercial relations with the United States (Jay). When American people heard about the *XYZ Affair*, a popular demand for war aroused and the popular slogan as described by John Jay was “millions for defense, but not one cent for tribute” (qtd. in Jay). The public support and call for the war did not lead President Adams to declare the war unilaterally. Adams then took a second constitutional step and called Congress to meet in special session “to consult and determine on such measures as in their wisdom shall be deemed meet for the safety and welfare of the said United States” (United States President 233). Adams’s consultation with congress reinforces President’s inability to decide war matters unilaterally without congressional consent.

Congress in its turn responded by enacting a series of measures that authorized the President to use military forces.⁵ The measures included enlarging the navy, appropriating more money for defense expenditures, permitting reprisal against French military vessels and renunciation of all treaties with the French government (Larson 58). With these measures, the operations did not amount to a full declared war. These measures simply were taken to illustrate Congress’s use of its power to control the conduct of warfare during that conflict (Lobel 423). The passed measures highlighted Congress’s power over appropriations it enacted for naval vessels (“War Powers...” 14). Congress performed its constitutional authority “to raise and support Armies” and “to provide and maintain a Navy” through the 1798 Act that established the Marine Corps (Elsea, Garcia and Nicola 6) which regulated how military staff are to be structured and employed.

The Quasi War with France emphasized the constitutional war powers of each branch as anticipated by the Founding Fathers. The power of declaring war during this conflict was reserved exclusively to Congress. Despite the refusal to declare war, the President did not give himself the right to take such an action unilaterally. The Quasi War triggered the Supreme Court to rule an

important case, *Bas v. Tingy* of 1800 which was an opportunity for highlighting and strengthening Congress's power to declare war during that period.

In that case, Justice Bushrod Washington held that Congress had the authority to establish a state of “imperfect” war, and that it had done so through the various legislative acts passed between 1798 and 1800 (“*Bas v. Tingy*”). In parallel, Justice Samuel Chase maintained in a second opinion for a unanimous court:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli* [the law of war—ed.], forming a part of the law of nations; but if a partial law is waged, its extent and operation depend on our municipal laws. (“*Bas v. Tingy*”)

The Quasi War with France was a valid pretext to put President's war power as Commander-in-Chief in practice, too, and was this time reinforced by Supreme Court's decisions which demonstrated Congress's authority to limit the President's opportunities for the conduct of war (Lobel 423). *Little v. Barreme* is one of the interesting cases that tackled this issue.

The roots of this case date back to Congress's passage to the Non-Intercourse Act of 1799. According to this law, the President was authorized to instruct American sea captains to postpone trade between France and the United States during the Quasi War with France by seizing and confiscating any American ships travelling to France or other French ports. The law said that only ships headed to French ports were to be seized (Genovese and Spitzer 193), which meant that those heading away from French ports were specifically expelled.

Pursuant to executive order from President John Adams, a United States vessel had seized what its Commander Naval Captain George Little deemed was a United States merchant ship bound from a French port and suspected that it was carrying contraband material (Elsea, Garcia and Nicola 7). The court ruled in 1804 that as Congress's law superseded Adams's executive order, Captain Little was “answerable in damages to the owner” for the wrongful seizure, even

though his actions were in obedience to President's order (Genovese and Spitzer 193) who was lawfully the Commander-in-Chief of the United States.

Chief Justice Marshall considered Adams's order to seize both vessels going to and coming from French ports as undeniably accepted from a military standpoint, for the efficiency of such order to enforce the embargo against France. He held that because Congress had implicitly prohibited such military action when it authorized the President to seize vessels bound to France ("Little v. Barreme"), the President who was supposed to faithfully execute the laws had no right to converse Congress's orders, Chief Justice Marshall said:

It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.

("Little v. Barreme" Page 6 U.S.177)

These cases demonstrated that the original division of war powers between the different branches as well as the Founding Fathers' intention regarding the use of force had been respected during the Quasi War with France. The power to declare war was kept for Congress, whereas President's war powers did not go beyond commanding the army. The President's power as Commander-in-Chief was not absolute; he was required to take only actions authorized by Congress. When he tried to order commands that were not authorized by Congress, the court was there to judge his actions.

1.2 The War against the Barbary Pirates (1801-1805)

The second use of force by the United States that will be discussed in this chapter is the war against the Barbary pirates that occurred in 1802 during the presidency of Thomas Jefferson.⁶ The importance of this war lies in the fact that many scholars who advocate presidential supremacy in war powers point to this war as a precedent for presidential right to use force abroad unilaterally.

Thomas Jefferson was famous for advocating a reallocation of power from the federal executive to Congress (Sofaer 21). He was known for fearing the aggrandizement of executive powers; he once confessed to George Washington that:

If the equilibrium of the three great bodies Legislative, Executive, & Judiciary could be preserved, if the Legislature could be kept independent [sic], I should never fear the result of such a government but that I could not be uneasy when I saw that the Executive had swallowed up the legislative branch. (qtd. in Casper 475)

Although the war was fought during the presidency of Thomas Jefferson, problems with the Mediterranean states, mainly Algiers, Tunis, Rabat, and Tripoli ingrained to the independence of the United States because American ships became no longer protected under the British flag (Carson 410). After gaining its independence the United States tried to deal with the Mediterranean pirates like many European powers by paying ransom and tribute to the Ottoman regencies of Algiers, Tunis, and Tripoli (Casper 481). The ransom was paid to guarantee the safety of its ships at the Mediterranean Sea.

The Pasha of Tripoli, Yusuf Karamanli had declared that the amount of the tribute paid by the United States to Tripoli was not enough (Sweetman 18) so he started menacing American ships to force the United States to pay more ransoms and tribunes. On May 14, 1801, the Pasha of Tripoli declared war through a symbolic act in which he ordered the flag staff flying the Stars and Stripes that was standing in front of the United States consulate to be cut down (Boddy-Evans) .

Before the news of the declaration of war reached the United States, Thomas Jefferson dispatched a squadron of four vessels under Commodore Richard Dale to the area in response to earlier threats (Casper 481). Thomas Jefferson had predicted a declaration of war against the United States from one or more of the Barbary States (Sofaer 25). On the grounds of his predictions, Jefferson called his cabinet to meet on 15 May, 1801 (Carson 412). Jefferson held the meeting to discuss his constitutional authority to respond to such attacks without congressional approval.

The meeting was opened by Jefferson's request to his advisors to suggest whether he should order the squadron under the command of Dale to cruise the Mediterranean. If so what kind of orders should he issue absent congressional authorization? (Carson 412). Secretary of the Treasury Albert Gallatin proposed that the President should order the squadron to sail without fearing any constitutional chains:

To declare war and to make war is synonymous. The Executive cannot put us in a state of war, but if we be put into that state either by the declaration of Congress or of the other nations, the command and direction of the public force then belongs to the Executive. (qtd. In Carson 412)

The secretary of the navy issued orders stipulating the President had instructed Dale to find out whether any or all of the Barbary powers had declared war on the United States. The order maintained that if Dale found that all Barbary nations declared or made the war, he was to distribute his force according to his judgment "so as best to protect our commerce and chastise their insolence – by sinking, burning or destroying their ships and Vessels whenever you shall find them" (Mayer 243). If Dale found that only the Pasha of Tripoli had declared or made the war, he would then be instructed to only blockade the port.

In obedience to the President's instructions, Dale issued orders to one of his officers, Lieutenant Andrew Sterrett, who was commanding the *Enterprise* and who was sailing to Malta from nearby Tripoli to obtain water. Sterrett was ordered to disarm and release vessels he was

able to conquer on the way to Malta for he had "... not much water on board," explained Dale (Sofaer 25). Seizing such vessels on the way back from Malta was, thereby, authorized under the order.

The vessel met a Tripolitan cruiser on the first day of August when it was on a supply mission and they engaged in a battle won by Sterrett. In compliance with the orders he had received from Dale, Sterrett disarmed and released the Tripolitan vessel and its crew (Mayer 243). When Jefferson delivered his first Annual Message to Congress, he attributed Sterrett's release of the Tripolitan vessel to constitutional rather than tactical considerations:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries. (qtd. in Jefferson, "First State of Nation")

Jefferson's words contradicted with his issued orders to Commander Dale, in which he allowed the navy to destroy and burn the ships of the state that declared or made war against the United States. Jefferson's words constricted and narrowed his authority as an executive to grab a rival ship and its crew absent congressional authorization (Casper 481). Similar view was expressed by one of modern commentators who described the statement as "one of the most restrictive interpretations of executive war powers ever uttered by an American president" (qtd. in Mayer 143).

Jefferson's statement can be understood as an invitation to Congress to authorize offensive measures against Tripoli (Henderson 23). Congress on its part responded to Jefferson's invitation by passing the Act for the Protection of American Seamen and Commerce of February 6, 1802. The act summed up that the naval force sent to the Mediterranean was essentially for protection, and its actions were chiefly directed against the vessels of Tripoli (Macleod 169-170). The act was

passed as a defensive measure against the nation which had already declared war against the United States of America.

Jefferson's statement which intended to narrow presidential war powers and aimed to show more deference to Congress set off a debate and brought him sharp criticism. Jefferson was not criticised for sidestepping congressional power or claiming more presidential power, but for not exercising his lawful war powers. Alexander Hamilton was one among those who spearheaded the debate in his writing in the *New York Evening Post* as "Lucius Crassus" in which he argued:

It is the peculiar and exclusive province of congress, *when the nation was at peace*, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received: in other words ,it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at *war* and any declaration on the part of Congress is nugatory: it is at least unnecessary. (qtd. in Cunningham 152)

Members of Congress believed in the President's authority to defend the United States against such attacks and addressed Jefferson's misunderstanding. Congressmen had already passed legislation that confirmed the responsibility of the future President to respond to foreign threats when they granted President Adams the authority to respond to similar attacks by French vessels and when they authorized the creation of the United States Navy (Larson 64) to defend American interests and commerce.

Sterrett's surrender to the *Tripoli* vessel was not because of his lack to congressional authorization as Jefferson claimed. He did so just for tactical reasons. His actions were in obedience to the instruction he received from his Commander Dale who had been ordered by the President. The objective was to protect American commerce from those who declared or made war on the United States by '...sinking, burning or destroying their ships and Vessels...' (qtd. in Mayer 243) without waiting for congressional authorization to take such actions. Jefferson's

orders to Dale did not exceed the limits of his constitutional powers and appeared to be constitutionally justifiable under even a relatively narrow view of executive power (Sofaer 26). President Jefferson was acting in a defensive manner against those who had already declared or made war against the United States.

During the war against the Barbary pirates, President Jefferson did not claim more war powers thanks to his status as Commander-in-Chief of the army. He was accused by Hamilton of tipping the balance of power in the good turn of Congress by giving up his constitutional power to respond to foreign attacks without congressional authorization.

1.3 The War against Great Britain (1812-1815)

The next war fought by the United States of America to be reviewed in this chapter occurred in 1812 during the presidency of another prominent figure among the Founding Fathers, James Madison. This war was fought for the second and last time against one of the oldest enemies to the United States, Great Britain, which used to be the mother country of the United States before getting its independence. The importance of this war is determined by the fact of being fought during the presidency of the Father of the Constitution and because it was the first war to receive formal congressional declaration. Prior to this war, the United States declared only its War of Independence against the same country, Great Britain.

The war of 1812 was a result of unsuccessful efforts by the United States to maintain its neutrality to preserve its interests and its honor in a world divided into two armed camps, France and Great Britain. Unlike George Washington who succeeded in preserving American neutrality and kept the nation out of war, and dissimilar to John Adams who had been involved in an undeclared war with France, Madison's attempt to use diplomatic negotiations and economic coercion to keep the nation out of war seemed ineffective (Cores 2). He resorted to recommend a declaration of war for the first time since the nation's independence against Great Britain.

Understanding the circumstances that led James Madison to take such bold decision requires going back to the reasons that caused this conflict. The origins of the war rooted back to the second period of the European war between Britain and France which opened in 1803. During that era the United States did its best to evoke and preserve its neutrality once again (Harney). The British seizure of American ships, insults and injuries to American seamen by the British Navy, and its opposition to the rapid expansion of the American frontier stood against American wishes to remain at peace (Center of Military History 117). British harassment to American ships and ambitions provoked the United States and forced it to get out of its neutrality.

The reason behind the British execution of these offensive policies was caused by its fear of an invasion by Napoleon. This fear combined with British feeling that the American merchant marine was profiting immensely from the European wars; the situation which would affect its commercial supremacy, and would constitute a threat to British naval power and to the safety of the country. These alarms led Britain to ignore the rights of neutrals to prevent any possible aid to the French (Horsman 6). To achieve this goal, Britain relied on its naval power to outrage American trade vessels at sea (Tubbsa).

The British outrages to American vessels at sea took two distinct forms. The first form was the seizure and forced sale of merchant ships and their cargo for supposedly defying the British blockade of Europe relying on its Navy that had great command at seas.⁷ While the second form was more injurious to American sovereignty. The British gave themselves the right to capture men from American vessels for forced service in the Royal Navy. The pretext for impressments was the search for deserters, who, the British claimed, had taken employment on American vessels (Center of Military History 118).

American public was tremendously upset because of the abuses that accompanied the search and impressments of suspected deserters.⁸ The British naval officers sometimes made mistakes and illegally impressed American citizens to compensate the lack of man power it needed for its navy. Though the British would correct their mistakes, it generally took years to

find and free an American they had unlawfully impressed. This state was considered by the Americans as an insult to their sovereignty and they felt that the nation that allowed the seizure and virtual enslavement of its citizens could not consider itself independent (Coles 5). Public outrage indicated their wish to use force against the country which threatened their sovereignty, but the President did not resort to war yet.

The issue of impressments came to a head in June 1807 when a fifty-gun British frigate HMS Leopard attacked and disabled the USS Chesapeake and the Leopard's captain demanded the right to search the Chesapeake and detain questionable British deserter. A general wave of resentment rose at that time and the United States was almost plunged into what might have come to be called the War of 1807 (Borneman 19). President Jefferson did not opt for war and decided to clamp an embargo on American trade by passing the Embargo Act (Center of Military History 118) to paralyze British and French economies (Coles 10). The Chesapeake affair remained a sore point until the United States declared war on 1812.

The other reason that pushed the United States to declare war against Great Britain was the issue of expansionism. The Americans knew about the aid British officers in Canada were providing to the Indians of the Old Northwest who were aiming to resist American expansionism westward. In 1805 the Shawnee, Tecumseh, and his brother Prophet, were trying to form a general Indian confederacy to resist this westward expansion and the British started supporting them in 1807. In an attempt to put an end to Indian menace, Governor William H. Harrison of Indiana clashed with the Indian confederacy at Tippecanoe on 1811 (Harney).

Americans who were known as War Hawks called for the eradication of the Indian threat to the United States. Invading Canada would help achieve this task and occupying Canada would satisfy American expansionist desires (S. Heidler and J. Heidler 4). Invading Canada would end the British presence in the continent of America because they knew that Canada was Britain's last foothold on the Americas (Harney).

All these reasons combined with James Madison's fears that he might lose the presidency in the election of late 1812 if he did not take the necessary bold actions against Great Britain (Benn 12). Madison came to recognize that he has one of the two choices; either to go to war or to submit (Harry Coles 22). He called Congress into an early session in November 1811 to prepare for war. His objectives were to unite his supporters and his critics and increased the pressure on the British to surrender (Benn 12).

James Madison decided to call Congress because he was aware that the war-making power was left to Congress (Coles 22). Unlike Jefferson who was criticized for not recommending the necessary actions to be taken as a reaction to the Chesapeake incident, Madison reviewed in a chronological order the Anglo-American relations since 1803 in his war message on June 1, 1812 (Coles 23) and he recommended that Congress should declare war against Great Britain to guarantee the United States sovereignty. As a response to Madison's recommendation, the House of Representatives passed a bill declaring the war against Great Britain on June 4 by a vote of 79 to 49; the Senate did the same on June 17 by a vote of 19 to 13 and President Madison signed the bill on the following day (Coles 23-25). The United States became engaged in a war that was fought from 1812 to 1815.

The constitutional war powers division had been respected and the President did not go beyond what the Constitution had given him. President's actions during this war fell within his role mentioned in *Article 2, Section 3* of the Constitution in which the Executive "shall, from time to time, give to Congress information of the state of Union, and recommend to their consideration such measures as in his judgment Congress ought to adopt." Congress executed its constitutional role by declaring war for the first time since the adoption of the Constitution against Great Britain because it had proven itself an offender that harmed the nation's interests and threatened its sovereignty.

1.4 The Second World War (1943-1945)

After declaring war on Great Britain in 1812, Congress used its constitutional authority of declaring war another four times in the history of the United States. The nation was engaged in a declared war against Mexico in 1846; in a war against Spain in 1898, and it participated in both the First and Second World War. The coming war to be analyzed in this chapter is the United States last declared war, the Second World War which first began in Europe and Asia in the time when the United States was pursuing neutral policies.

The importance of this war lies in the fact that it was the last war to receive a formal declaration in the history of the United States and because it was a virtual copy of World War I. The example of the war has been used because it is a substantial parameter for the rise of presidential powers related to that issue. American involvement in this struggle began by the summer of 1940. Arthur Schlesinger has reported to Gabor Boritt in a book entitled *Lincoln, the War President: The Gettysburg Lectures*, that by this time, Great Britain stood alone against Hitler with almost half of its destroyer fleet sunk or damaged. Then when the Nazi invasion of Britain was in prospect (162), the British Prime Minister Winston Churchill wrote to President Franklin Roosevelt about the heavy burden his navy was bearing and he requested for a lease of 50 American destroyers: “We must ask therefore as a matter of life and death to be reinforced with these destroyers” (qtd. in Moss 205).

Franklin Roosevelt responded to Churchill’s quest for the destroyers and planes on May 17, 1940 by saying: “As you know a step of that kind could not be taken except with the specific authorization of the Congress, and am not certain that it would be wise for that suggestion to be made to Congress at this moment” (Axelrod 89). Roosevelt’s assessment of Congress was right as the Senate soon amended the Naval Appropriations Bill. The Senate denied the President the authority to send military material to a foreign country unless the Chief of the Staff or the Chief Naval Appropriations certified that it was not necessary to the defense of the United States (Schlesinger 105-106).

Roosevelt promised to send destroyers to Britain (Axelrod 98) to prevent both its surrender and the triumph of Hitler as well as to protect the United States interests. President Franklin Roosevelt commented that “If Great Britain goes down, all of us in the Americas would be living at the point of a gun...the vast resources and wealth of this American hemisphere constitute the most tempting loot in all of the round world”(qtd. in O’Connor). Although Roosevelt’s desire was to help Great Britain, he sought congressional authorization to send destroyers.

According to Benjamin V. Cohen, a key figure in the administration of Franklin D. Roosevelt, executive action would be legal if it could be shown that this would strengthen rather than weaken American defense, the President disagreed by saying, “I fear Congress is in no mood at the present time to allow any form of sale.” Roosevelt proceeded with careful concern for the process of consent by meeting and consulting with his cabinet, with congressional leaders and consulting the Republican candidates for president and vice president (106). The held consultations confirmed President Roosevelt’s consciousness with the necessity to consent Congress before taking any action related to the nation’s foreign affairs.

With time running out on Great Britain and U.S. trade routes across the Atlantic being increasingly threatened, by both the prospects of German domination of Europe and the reality of German U-boat attacks on U.S. merchant vessels, Roosevelt agreed to Churchill’s request for destroyers (Larson 110). His agreement was in return for a long-term authority to build and operate bases on eight British colonies in the Western Hemisphere, ranging from British Guiana through the Caribbean to Bermuda and on north to Newfoundland. Roosevelt had no interest in acquiring colonies, but he hoped to have Bermuda and various British possessions in the Caribbean as military bases (Kimball 87). Roosevelt’s agreement to provide the British with the destroyers they needed for their war was in return for bases necessary for promoting American defense.

Regardless of his anticipation that “Congress is going to raise hell” about the lease (Kimball 87), Roosevelt agreed to send the destroyers but without appealing to full session of Congress. He

did so relying on the support that he had been assured by leading members of both parties in Congress (Larson 110). Roosevelt was encouraged by the pressure of interventionist groups who had sent a letter to the *New York Times*, signed by Dean Acheson and other eminent lawyers in which they reinforced the executive's authority to make the transfer. Roosevelt's stand was enhanced more by his Attorney General's claims that new bases would contribute more than over-age destroyers (Schlesinger 107-108) to enhancing American defense.

On September 3 which was a Labor Day weekend, and while the nation's attention was diverted, President Franklin Roosevelt announced that the Destroyer Deal had been completed: "It is over; it is all done". When reporters kept on asking for details, the President responded that it involved "all kinds of things that nobody here would understand, so I won't mention them. It is a *fait accompli*; it is done this way" (qtd. in Schmidt 171). This decision led numerous congressmen to rally against what Wendell Wilkie called "the most dictatorial and arbitrary [act] of any President in the history of the U.S." (qtd. in Dirck 59). Instead of raising Hell as Roosevelt had expected, Congress passed appropriations necessary for the implementation of the Lend Lease Act. Even Robert McCormick, the anti-Roosevelt publisher of the *Chicago Tribune*, thanked "God" that the Caribbean had become "an American lake". Public opinion polls showed general support to the deal (Kimball 88), because American people understood that the Lend Lease was completed to aid the United States of America with new military bases (Schmidt 171) and not helping and benefiting Great Britain only.

The arrangement of the *Destroyer Deal* is important to study not because it urged the United States to use force against any nation, but because it needed to provide the means for another nation to use force against its enemy. This condition placed the United States in a position of war against Germany under international legal principles because the arrangement permitted the United States to lease several territories belonging to Great Britain, and in the line of fire in a widely growing conflict. It was possible that it would need to send troops to protect its newly

interests (Larson 110-111), the state which would place it closer to the war with Germany that the Americans were willing to avoid.

Although the deal that would lead to this situation was unilateral in form, the President would not bear its responsibility alone. The arrangement was accompanied by extensive and vigilant consultation within the executive branch; between the executive and the legislative branches; among leaders of both parties and with the press (Schlesinger 108). Professors Langer and Gleason came to regard the *Destroyer Deal* as “at least as much the achievement of private efforts as of official action and it should be viewed as a truly popular, national commitment to share in the conflict against Hitler to the extent required by American security” (qtd. in Schlesinger 109).

History testified that the real event that would change America into a nation active at war was the Japanese attack on Pearl Harbor on December 7. The attacks killed 2,273 military personnel and wounded 1,119. Nearly 200 hundred aircraft were destroyed and sixteen warships were never used again (Schmidt 125). The attack perhaps was a retaliation and a reaction to Roosevelt’s announcement of July 1939 in which he declared the United States unwillingness to trade items such as gasoline and iron to Japan who needed it for their war with China. All Japanese assets were frozen in the United States because of their efforts to occupy French Indo-China and the Philippines (Kelly). These reasons would motivate the offender Japan to attack the United States more than the Destroyer Deal.

The day after the Japanese bombed Pearl Harbor, President Franklin D. Roosevelt became the last American President to request a formal declaration of war from Congress. President Roosevelt invoked the now famous imagery of a “day of infamy” to describe the Japanese assault, and called on Congress to ratify the hostilities that were already taking place in Hawaii, the Philippines, Wake Island, Guam, and other American possessions under attack by the Japanese (Dirck 57). His words were:

Yesterday, December 7, 1941—a date which will live in infamy—the United

States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan. . . . I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese empire.⁹ (Roosevelt, “Pearl Harbor Speech”)

The national mood on that day was such that Roosevelt had little reason to fear rejection of his request. “The facts of yesterday speak for themselves,” Franklin Roosevelt declared through his “Pearl Harbor Speech.” American people who were haunted by the images of enemy bombs falling on innocent servicemen and the blackened hulks of American warships as they lay half submerged in the muddy bottom of Pearl Harbor united in their desire for retaliation (Dirck 58). Declaring war against Japan became a necessity urged by both the President and the public.

After four days of Pearl Harbor attacks, Hitler unexpectedly declared war on the United States. Roosevelt sent a message to Congress “requesting the recognition of a state of war with Germany and Italy,” because those governments had “declared war against the United States” (Kimball 84). Congress as never before in the United States’ history granted Roosevelt his request by an overwhelming vote of 80 to 0 in the Senate and 388 to 1 in the House (Turner, “Utility of Formal Declaration” 23). The vote marked the beginning of a generally cooperative relationship between President Franklin Roosevelt and Congress (Dirck 58) during the period of war.

President Roosevelt was accused of transforming the presidency into a much greater instrument of national authority than had ever been envisioned by the Constitution’s Framers. He was blamed for using the Constitution’s war-making powers to enact domestic programs. His re-election to a third term backed people’s comprehension of his policies because they recognized that the unprecedented danger created by the Depression and the rise of fascism in Europe and Asia necessitated extraordinary government intervention (Dirck 59). Roosevelt’s

actions were essential and inevitable to defend and save the nation during hard times.

Roosevelt's actions and decisions during his presidency were not enhanced by his status as Commander-in-Chief of the country. The pre-Pearl Harbor documents were notable for the singular lack of reference to the office of Commander-in-Chief which signified only the narrow and traditional view of the armed forces if mentioned. Schlesinger noted that 1941 marked a significant change in Roosevelt's approach to presidential power (Schlesinger 113).

Following the war, E. S. Corwin, too, wrote that after the enactment of the Lend Lease, the President shifted to "a course that must in the end have produced a serious constitutional crisis had not the Japanese obligingly come to the secure" (qtd. in Schlesinger 113).

The Japanese attack on Pearl Harbor secured President Roosevelt from being accused of involving the nation into the Second World War. What has been presented indicated that despite his accusation of triggering the war by getting the United States out of its neutrality through supporting and encouraging Congress to pass the Lend Lease Act, Franklin Delano Roosevelt did not overstep the constitutional design. Roosevelt did not deploy troops to fight in the Second World War unilaterally and remained aware of congressional constitutional right to declare war.

The previous analysis showed that President Roosevelt did not claim extraordinary war powers relying on his title as Commander-in-Chief despite the imminence of the Nazi threat. Although Roosevelt's commitment to American forces to combat was far more conditional, he made no general claims to inherent presidential power and he did not assert his role as Commander-in-Chief which enabled him the right to ignore Congress. He rushed to Congress and asked for its formal declaration of war against offensive countries.

It may be ultimately construed that from the ratification of the United States Constitution to the Second World War, the constitutional design of war powers had been honored. American presidents generally, did not use military force without congressional consent and authorization, the fact which confirms presidents' awareness of the constitutional design. Presidents of the

studied era knew that Congress was bequeathed the upper hand in issues of waging wars and deploying troops abroad.

The bold decisions taken by Franklin D. Roosevelt during his presidency and mainly his enactment of the Lend Lease Act had far reaching indications. The enactment indicated the possibility of future modern presidents to go beyond their authority to involve the nation in protracted battlefield bloodshed without congressional approval relying on the flexibility of their title as Commander-in-Chief. The emergence of the United States as a world superpower may involve the nation in external wars to preserve its position of leadership.

Endnotes

¹For the provisions of this Treaty see : “Treaty of Amity and Commerce Between The United States and France; February 6, 1778,” *Avalon Project*. Yale Law School, 15 December 2010. <http://avalon.law.yale.edu/18th_century/fr1788-1.asp>.

² Opponents argued against the Proclamation by claiming that Washington’s neutrality broke the Franco-American Treaty, meaning that the Proclamation was legally invalid. Moreover, the critics reminded Washington that France had been an ally for years when the United States was fighting a similar Revolutionary war and they considered turning the nation’s back to this country was simply ungrateful and cowardly policy from the part of the United States of America. Amy. H Sturgis, *Presidents from Washington through Monroe, 1789-1825: Debating the Issues in Pro and Con Primary Documents* (Westport, CT: Greenwood, 2002) 35.

³ For Jay Treaty see, Carl Cavanagh Hodge and Cathal J. Nolan, *U.S Presidents and Foreign policy: from 1789 to the present* (CA: ABC-CLIO, 2007) 17.

⁴ Directory (2 November 1795 until 10 November 1799) was a body of five *Directors* that held executive power in France following the Convention and preceding the Consulate. The Directory era, constitutes the second to last stage of the French Revolution. Available on “French Directory,”:Wikipedia.org, 15 December 2010. <http://en.wikipedia.org/wiki/French_Directory>.

⁵ For the measures taken by Congress see, Jules Lobel “Conflicts between the Commander in Chief and Congress: Concurrent Power over the Conduct of War,” *Ohio State Law Journal* 69 (2008) : 423, U of Pittsburgh School of Law, Pennsylvania, 10 Sept. 2008.

⁶ The Barbary Pirates were from the northern part of Africa in the Mediterranean. For centuries, they had controlled the shipping trade in the Mediterranean. The pirates would capture and then enslave the crews of the vessels that sailed in the Mediterranean, forcing the men to labor in workhouses as well as subject them to starvation. Anthony E. Bundy, “The Constitutional War Powers of the President: A Study of the Evolution of the Executive Branch’s Authority to Initiate Hostilities,” Thesis. City University of New York, 2009. Dspace. Texas A&M University Libraries, 21 Sept. 2009. Web. 10 Jan. 2010.

⁷ For further reading on the British restriction of American trade see, Carl Benn, *The War of 1812* (Oxford: Osprey, 2002) 2.

⁸ For further reading on impressment, see Carl Benn, *The War of 1812* (Oxford: Osprey, 2002) 1.

⁹ The complete speech is available on; Franklin D. Roosevelt, “Pearl Harbor Speech,” *From Revolution to Reconstruction*, 17 December 2010. <<http://odur.let.rug.nl/~usa/P/fr32/speeches/ph.htm>>.

CHAPTER THREE

War Powers in Practice (1951- 1973): Original Intent Betrayed

From its independence to the Second World War, American Presidents and Congresses showed their understanding and deference to constitutional provisions regarding the use of force abroad. Presidents of the era which preceded World War II were responsive to constitutional war powers and aware of their constitutional duty to consult Congress and respect its constitutional role concerning the initiation of wars and deployment of forces abroad. Congress was conscious of the responsibilities and the duties conferred to it by the Constitution and it fulfilled its role by declaring war when it believed necessary. It provided the President with appropriations and mandates to put down minor hostilities.

Prior to the Second World War, the United States foreign policy makers avoided engaging their nation neither in European conflicts nor in international organizations such as the League of Nations for the sake of preserving its peace. With the Japanese attack on Pearl Harbor the United States got out of its neutrality and got fully entered in European conflicts by declaring war against Japan and Germany. Defeating the Axis powers during that war inherited the United States a new leadership position in world politics and it was unable to hide behind its shores any more. The United States became a permanent member in the newly established United Nation that is in charge of promoting peace all over the world.

The U.S. membership in such organization would involve it in many hostilities and wars all over the world. No one ignores that the United States troops had been engaged in hundreds of wars and hostilities after its triumph in the Second World War. The United States never declared a war following World War II. This point raises the question of how the United States troops had been deployed abroad without any formal declaration of war.

This chapter will explore a sample of the major wars that occurred in post World War era to see how the United States had been waging its wars and what circumstances were behind its

involvement in such wars. The chapter will expose and explain congressional stance towards deploying American troops abroad absent its formal declaration of war. The study of a war sample is necessary to conclude whether the division of war powers between President and Congress had been respected or betrayed. The absence of congressional declaration throughout the long period from World War II to 2003 gives the impression that this governmental organ had been marginalized. The aim of this chapter is to find out whether Congress was really neglected by the President or it deliberately chose to abdicate its constitutional war powers to the President.

The light will be shed on court's decision in the major cases raised after the wars to be studied throughout this chapter to compare its actual stance towards war powers controversies to its previous attitude. Studying all these aspects is more than necessary to probate the hypothesis of this research. Practice supports the primacy in war powers that shifted in favor of the President.

1.1The Korean War (1950-1953)

The defeat of the Axis powers during the Second World War was not the last threat to American security and world stability because the United States would soon engage in an ideological conflict known as the Cold War with one of its former pre-war allies, the Soviet Union. The Second World War left the United States and Russia as the dominant military powers in the world. The two countries had very different and opposing forms of government and economy: capitalist against communist. This difference led the two nations to suspect that the other side was attempting to construct a post-war order that would reflect its ideologies ("Introduction to the Cold War in Europe"). The United States and the Soviet Union became harsh rivals. America wanted a democratic Europe and was afraid of communism dominating the continent. Russia on the other hand wanted the opposite; a communist Europe in which it dominated and not, as it feared, a capitalist Europe (Wild, "Origins of Cold War"). To achieve its aim, Russia began to establish Soviet satellites out of its lands.

The United States countered with the *Truman Doctrine*,¹ with its policy of containment to stop communism spreading and the *Marshall Plan* that aimed to support collapsing economies which were letting communist sympathisers gain power (Wild, “Origins of Cold War”).² When American atomic monopoly ended in late 1949 with the Soviet Union’s first test to its atomic bomb (Hess 3), the two nations came to recognize the danger of confronting each other. They turned to indirect confrontation in their attempt to spread their ideologies through participating frequently in ‘proxy wars’ by supporting allied nations in numerous minor wars (“Cold War Causes...”). The two countries opted to proxy wars in order to avoid involvement in major wars that would lead to a third World War. Among the regions that were of great importance to the interests of both the Soviet Union and the United States and that caused an indirect confrontation between the two powers was Korea.

The Korean War is one among the most important wars fought by the United States of America following World War II. The importance of this war lies in the fact that despite its costly casualties, it did not receive a formal declaration by Congress. The war as many scholars from different stripes confirm was run by a unilateral decision from the part of the President. This subsection will be devoted to studying the reasons of this war, American involvement in it, President’s justifications for waging it, and congressional and public reaction to it. Studying this war will help to determine whether the practice of war powers really shifted from Congress to the President, and if so, what circumstances were behind this shift. This subsection will spotlight Court’s stand towards the constitutionality of this war.

The peninsula of Korea had been an independent nation for centuries before the Japanese took it as a colony in 1910. When the Soviet forces were fighting the Japanese military on the China-Korea border in August 1945 it became apparent that the Red Army might occupy all of Korea. The United States suggested a temporary division of the country until it would be prepared for self-rule. Americans would take the Japanese surrender in the southern sector, while Soviet

troops would dominate the north (Hatch). The Soviets agreed to this plan, and Korea was divided on either side of the 38th parallel.³

Soviets in the North backed a Stalinist regime under their client Kim Il-sung and created the North Korean People's Army. That Army was equipped with Russian tanks and artillery. The Americans backed in the South an administration under the presidency of Syngman Rhee, who openly declared his aim of imposing a national unity by force. The American-trained South Korean army was limited to a lightly armed gendarmerie that was lacking equipment (Hickey). That position was perhaps due to United States reluctance to arm the South Koreans, in part because of its own ambivalence about defending Korea and its distrust to Rhee's misuse to his Army. Rhee was deploying the army against his own citizens in the South by establishing a military dictatorship (Schmidt 244). The practice offended American sensibilities.

Rhee's abuses led American military leaders to assume that Korea lacked military and strategic value in case of a war in Asia. The wake of the communist victory in China caused the Americans to be more reluctant to make military commitments on the Asian mainland. They turned to share their administration's view that Europe and not Asia would be the main area of confrontation with the Soviet Union. This view was reinforced by Secretary of State Dean Acheson who confirmed in a speech before the National Press Association in January 1950 that Korea was not within the American defense perimeter in Asia (Kaufman 6-7).

Kim on the other side spent the entire month of April 1950 in Moscow lobbying the Soviet leader Stalin for permission to invade the South. Encouraged by the Chinese leader Mao Tse-tung's approval of the invasion, Stalin accepted Kim's proposal. Stalin did not accept the venture. He did so because he believed that Washington had given sufficient signals that South Korea would not be defended. The Soviets recent detonation of their first atom bomb encouraged him. Stalin made it clear that North Korea was on its own. The Soviet Army would not come to his rescue if military success escaped Kim. There would be aid and advice, but no troops would be sent (Schmidt 245). In the early hours of June 25, 1950, the North-Korean People's Army-crossed the dividing line in strength and began pushing southward toward Seoul. The Southern Army - the Republic of Korean Army showed some initial resistance to the stronger

Korean People's Army and then retreat became rout (Hatch).

President Truman was informed by his Secretary of State Dean Acheson that the Communist government of North Korea had crossed the thirty-eight parallel that divided Korea, and attacked the American-supported government of South Korea (Hess 8). Truman suspected that the USSR had directed the attack (Hatch) which he considered as the opening move to a wider war. At that point, the United States would reverse its policy by deciding to intervene militarily to defend South Korea. This decision was taken by Truman after recalling his thoughts on the plane from Missouri to Washington before meeting his advisers on the North Korean Crisis. He reiterated:

I had time to think aboard the plane. In my generation, this was not the first occasion when the strong attacked the weak. I recalled some earlier instances: Manchuria, Ethiopia, Austria. I remembered how each time that the democracies failed to act, it had encouraged the aggressors to keep going ahead. Communism was acting in Korea, just as Hitler and Mussolini. (qtd. in Cashman 58)

Truman's biographer David McCulloch reported that when the North Korean aggression increased, Averell Harriman, a European ambassador who had been appointed by Truman as a special assistant at the White House to stay on top of the developing crisis in Korea, recommended the President to go to Congress for a declaration of war against North Korea. The recommendation was opposed by Secretary of State Acheson whose constitutional knowledge led him to assure that the President would only have trouble with Congress if he sought a declaration (Dean). Congressional refusal to declare war would affect and delay Americans' response to the growing Korean emergency.

As a substitute, Dean Acheson advised the President to go to the United Nations and convinced him that the United States should request an emergency meeting of the United Nations Security Council to solve the issue. Acheson kept on calling again and again till he gained Truman's approval of a draft resolution to be presented to the Security Council,

charging North Korea with a “breach of the peace” and an “act of aggression” (Hess 8) and let the Security Council take the necessary actions it saw fit to end the fighting. Truman finally sided with Acheson, telling Harriman that “to appeal to Congress now would make it more difficult for future presidents to deal with emergencies” (qtd in Dean). Truman’s decision to bypass Congress would really give future presidents the green light to act in the same way.

Acheson’s proposal was put in practice and the Security Council met on 25 June - which was the next day in Korea- at New York, and thanks to the absence of the Soviet delegate who was supposed to veto any resolution directed against its allies,⁴ the Council approved the United States resolution that called for the end of hostilities and the withdrawal of North Korean forces above the 38th parallel (Kaufman 3). To achieve its task, the Council asked “all Members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities” (82 Resolution of 25 June 1950).

Truman, on that evening, convened his top foreign policy and defense officials and asked each for his views. He then decided to commit American air and sea forces to the support of South Korea. What was crucial in Truman’s decision was that he decided to commit troops in Korea without first meeting with congressional leaders whom he met later on 27 June, three days after the attack and two days after the decision (Schlesinger 131). On that day Truman announced that the United States would comply with the resolution by ordering air and naval forces under the command of General Douglas MacArthur stationed in Japan to provide all assistance to South Korea (Schmidt 247). The Resolution on which Truman relied to provide military force had not specified military intervention in the area (Schlesinger 131). This fact unveiled Truman’s intent not to act in obedience to the Security Council’s Resolution as he alleged.

The Security Council’s order to use military force came on June 27 when it passed a second resolution calling this time for “urgent military measures are required to restore

international peace and security” (83 Resolution of 27 June 1950). The second resolution encouraged Truman to authorize on June 30 the use of ground forces as a response to the news of the near collapse of the Republic of Korea forces (Schmidt 247). This order increased American contribution to war which this time amounted to half of the number of combat troops and 80-90% of air and naval support. Various contingents were unified under American control and direction of General MacArthur (Smith 60). These facts gave the impression that the war was an American war despite the participation of other nations under the umbrella of the Security Council.

This huge participation, President Truman declared at a news conference on June 29 that “We are not at war” when he was asked whether the country was at war. He agreed to call the conflict “a police action under the United Nations” by saying “that is exactly what it amounts to” (qtd. in Fisher, “On What Legal Basis” 33-34). This state of affair revealed that Truman’s decision to sent troops to Korea was allegedly taken in obedience to the United Nations’ quest which he followed without seeking any congressional authorization. Truman simply worked with the advice of Secretary of State Dean Acheson and Senate Majority Leader Scott Lucas who both convinced him to rely on his Commander-in-Chief powers to support his actions in Korea (Yoo 178).

Truman’s decision contradicted the established constitutional clause which empowers Congress not the President with the power to decide when the nation goes to war. Truman’s actions in Korea broke with the practice of one hundred and fifty years of abiding constitutional requirements and he established a new practice of presidential war making. He committed large numbers of troops in Korea without seeking a declaration of war from Congress as did former presidents during the wars of 1812, 1846, 1898, 1917 and 1941 to legitimize his military operations against North Korea.

This was not recognized by President Truman who considered his decision as constitutional and denied it to require a congressional consent. Truman justified his stand by arguing that his actions were in compliance with the Security Council authorization to its member states to support

South Korea against North Korean aggression (Hendrickson, “War Powers, Democracy” 56). Republican Senator William Knowland of California was in Truman’s side and denied Truman’s action to be defined as ‘war’. He regarded Truman’s involvement in Korea as clearly legal under both the United Nations ‘police action’ which required immediate response as well as his authority to do it under his constitutional power as Commander-in-Chief of the Armed Forces of the United States (Hendrickson “War Powers, Democracy” 56-58).

Knowland justification did not convince everybody and criticism to Truman’s unconstitutional decision to deploy American troops without consulting Congress was raised soon. The influential criticism came from the floor of the United States’ Senate by Senator Robert Taft, a Republican from Ohio. Taft questioned the means by which Truman was involving the nation in the conflict and he argued against his decision by asserting that Truman had done “the right thing the wrong way” (qtd. in Hess 26). Taft accused Truman of disrespecting constitutional provisions by bypassing Congress in committing United States forces in Korea:

Truman’s action unquestionably has brought about a de facto war with the Government of northern Korea. He has brought that war about without consulting Congress and without congressional approval. . . . [This] seems to me . . . a complete usurpation by the President of authority to use the Armed Forces of this country. If the incident is permitted to go by without protest. . . . (qtd. in Hess 26)

Taft was not against the idea of intervening in Korea; he was against the unilateral decision taken by Truman. This idea was reinforced by Taft’s statement in which he declared, “I may say that if a joint resolution were introduced asking for the approval of the use of our Armed Forces already sent to Korea, and full support of them in their venture, I would vote in favour of it” (qtd. in Taft and Wunderlin 169). Senator H. Alexander Smith of New Jersey likewise suggested at a new meeting with congressional leaders that the President should request a joint resolution approving his action. As a response, Truman promised to consider the suggestion and he

instructed Acheson to prepare a recommendation on it. The debate spilled over the Senate (Schlesinger 132) between Senators from different parties.

On the one hand, Senator Kenneth Wherry of Nebraska expressed similar views to that of Taft. Though he declared his support to military response to North Korean aggression, he announced the violation of the Constitution by the president who bypassed Congress in deciding such a matter. Democrats on the other hand gave strong support to Truman by asserting that what he had done was completely lawful. Perhaps the most complete Democratic defense of Truman's action was provided by Senator Paul Douglas of Illinois who produced a number of arguments to amplify the defense of Truman's unilateral actions (Hendrickson "War Powers, Democracy" 59).

As a first argument, Douglas went back to the Constitutional Convention and he argued that the substitution of the word 'declare' for 'make' in the clause was done to give Congress the power 'to declare war'. The change to Douglas was made because "the convention did not want to tie our country's hand by requiring congressional assent for all employment of armed force" (qtd. in Lofgren 232). Douglas quoted James Madison's view that the change in wording left "to the Executive the power to repel sudden attacks". As Korea was a sudden attack in his view, Congress did not have to be consulted (Lofgren 232).

Douglas defended the President's decision to act unilaterally without consulting Congress as being consonant with the need for rapid action. Though he believed in the ability of the 1950 Congress to assemble more rapidly than previously, he admitted that war itself had become swifter and debate mainly in the Senate, could prove lengthy in a day when "even the slightest delay may prove fatal"(qtd. in Lofgren 232).

To enhance more his position, Douglas believed Truman's introduction of armed forces to drive invaders back to the 38th parallel "was not an act of war, but instead merely the exercise of police power under international sanction" (qtd. in Lofgren 233). He regarded the attack of North Korea to South Korea as a clear threat to American security because it could have led to a chain of

events evocative of those of Hitler during the late 1930's (Lofgren 233), and that is what could not be tolerated.

As a final argument, Douglas held that though Congress had the power to declare general war, situations calling for "the retrial use of force" ought to be left to the President claiming that these powers had been already left to the President (Schlesinger 133) throughout American history.⁵ Truman's actions to Douglas were legal and justified from both constitutional and practical perspective. Douglas was not the only one to believe in presidential traditional power of using force without consulting Congress. In a Department of State Bulletin, the administration recognized the political practice of independent presidential use of the military as firmly established in United States history: "President's power to send the Armed Forces outside the country is not dependent on Congressional authority has been repeatedly emphasized by numerous writers...in the broad interests of American foreign policy" (Hendrickson, "War Powers, Democracy" 57).

Presidents cited by the State Department and Douglas were not precedents for continuous and major war against a sovereign state. The mentioned wars were just precedents for limited action to suppress pirates or to protect American citizens in conditions of local disorder (Schlesinger 133). Similar justification was presented by Constitutional scholar Edward Corwin, who confirmed that the list constituted chiefly 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" (qtd. in Bandow). These counter arguments thus confirmed Truman's accusation of violating the Constitution and establishing a precedent that would encourage future presidents to tip up war powers balance in favor of the President.

Truman's contention that membership in the United Nations gave him authority and justified his decision to send United States' forces into combat without seeking congressional authorization was legally unacceptable and inconvincible (Hess 37). Conveying the history of the

United States membership in the United Nation reveals how members of Congress worried about the possibility of losing their own war powers. Their fear was due to the provisions of *Chapter 7* and *Article 25* of the United Nations Charter which gave the U.N. Security Council a new grant of military authority that would narrow Congress's constitutional war powers (Hendrickson, "Clinton Wars" 9).⁶

In response to the fears expressed by members of Congress, President Truman sent a telegram to Congress confirming that "when any such agreement or agreements are negotiated, it will be my purpose to ask the Congress by appropriate legislation to approve them" (qtd. in Watson, Devine and Wolz 145). *Article 43* of the United Nations' charter reads:

All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.... The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. ("Action with Respect...")

To protect its constitutional war powers, Congress passed the United Nations Participation Act which had been signed by Truman in 1945.⁷ *Section 6* stipulates that no agreements under *Article 43* – committing U.S. troops to support the United Nations could become operative without approval of Congress by "appropriate Act or joint resolution" (qtd. in Al Snow 86-87). It is ironically fitting to note that Dean Acheson, who at the time was Under-Secretary of State, has mentioned this feature of the act when he testified in late 1945 before the Foreign Affairs Committee of the House of Representatives. Acheson had given congressmen surety that a president could commit troops requested by the U.N. Security Council for peace-keeping operations only after he had received approval of Congress to do so (Lofgren 228). This reality showed how Acheson's initial words concerning congressional right to be consulted before any

military deployment contradicted with his advice to Truman following the North Korean aggression.

Truman violated the United States Constitution, *Article 43* of the United Nations charter as well as the United Nations Appropriation Act to allegedly obey the United Nations Security Council orders. This justification was not true because Truman's decision to commit American troops in Korea was taken before the approval of the Security Council. Truman's order to U.S. air and sea forces to support South Korea were issued on June 26, while the resolution permitting the deployment of troops was passed by the Security Council later that evening (Fisher, "The Korean War..." 33), the fact which assured that Truman's decision to deploy troops was not even in compliance to the Security Council's orders.

This conclusion was later validated by Acheson who wrote in his memoirs, "some American action, said to be in support of the resolution of June 27, was ordered and possibly taken, prior to the resolution" (qtd. in Wittkopf and McCormick 159). Truman himself had admitted after leaving the presidency that there was "no question" about his readiness to use military force in Korea without the United Nations backing (Fisher, "The Korean War..." 33). This fact left no doubt that President Truman at that time was acting unilaterally and that obeying the Security Council's orders was nothing more than a delusion and a claim to avoid Congress that was expected to refuse the war by Truman's administration.

Although the constitutional doubts were expressed by some congressmen who opposed and disapproved of Truman's decision to bypass Congress and deploy troops without its consent, Congress provided the army with regular sufficient funds to support the war. Congress did so because it had little choice in the matter; it had either to fund American troops who had been already far from home, or let it overwhelmed in the field ("The Continuing War ...").

Chief among the reasons that contributed to congressional support of Truman were both the stance of public opinion that stood solidly behind the President and its belief in the success of the mission (Hendrickson, "War Powers, Democracy..." 62). Congress was in favor of using force in

Korea and even the Senators who criticized Truman such as Taft and Wherry did so not because they were against the use of force in Korea, but because they felt the spirit of the Constitution had been violated. It was the fear of being unpatriotic when fighting a communist aggressor which led Congress to wash its hands of any serious policy making role in the first deployment and combat process.

When war soured at home due to the necessity to increase American commitments overseas to respond to the Soviet threat, Conservative congressmen began to realize the dangers and the bad consequences of their passivity in the face of the President. Among those who regretted congressional passivity was Fredrick R. Coudert of New York who wondered “how devastating a precedent they have set in remaining silent while the President took over the powers specifically reserved for Congress in the Constitution” (qtd. in Schlesinger 135). In an attempt to regain its constitutional powers, Congress passed a resolution declaring that no more ground troops should be sent to Europe without further congressional approval as a response to Truman’s intention to send four more divisions to support the American Army in Europe (Lofgren 236). The resolution was a practical step which expressed congressional regret for its previous passivity.

Truman administration reacted to congressional passage to the resolution by asserting presidential independent constitutional authority to commit troops anywhere in the world, with or without congressional authorization (Yoo 178). This idea was enhanced this time by President Truman himself who announced in a press conference held on January 11, 1951, that he did not need the approval of Congress to send troops to Europe. Truman insisted that “under the President’s constitutional powers as a Commander-in-Chief of the Armed Forces” he had the authority to send troops anywhere in the world, believing this power had been “repeatedly recognized by Congress and the courts” (“The President’s News Conference”). Truman words affirmed his administration’s intention to “continue to send troops wherever it is necessary to uphold its obligation” to the United Nation (“The President’s News Conference”). Truman’s words

left no doubt that he was claiming an unprecedented presidential authority enhanced by his title as Commander-in-Chief of the army.

In spite of his insistence that the fight in Korea was not a war but a police action, the American casualties in that war showed that the fight was a war. The three years of the fight caused the death of approximately 41,000 Americans and left 103, 000 wounded.⁸ Federal District Judge Harry C. Westover wrote in the spring of 1953 that “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,” “Certainly those who have been called upon to suffer injury and maiming, or to sacrifice their lives,” added Westover “ would be unanimous in their opinion that this is war-war in all of its horrible aspects” (qtd in. Lofgren 223).

Apart from Judge Harry C. Westover statement, no definitive answer was given by federal and state courts on the question of whether the Korean conflict was a legal war or not. Unlike its previous practice during the previous century, the Supreme Court refused to hear any of the cases in question (Lofgren 223). The only case ruled by the Supreme Court during this conflict was the *Youngstown Sheet & Tube Co. v. Sawyer* or what is known as the *Steel Seizure Case*, which some defenders of presidential war powers regard as a case about the taking of private property without due process of law (Devins and Fisher) rather than foreign affairs case.

The Supreme Court on that case limited Truman’s power as Commander-in-Chief by its refusal to allow him to federalize the nation’s steel industry as an emergency war measure as he wanted. The Supreme Court did not solve the issue of who may constitutionally initiate a major war (Drick 67) considering foreign affairs questions such as war powers disputes to be beyond judicial competence (Yoo 183). Supreme Court’s argument gave the freedom to the legislative and executive branches to solve such a dispute as they saw fit without seeking judicial review as bequeathed by the Constitution.

Congress to which the Founders of the Constitution gave some powers that can check the President in cases similar to the Korean War was unable to do so. Among the congressional

powers that can check presidential war powers is the power of the purse. Congress never used such power during that war and preferred to provide President Truman with the funding that he needed to continue the war. Following only six days of North Korean invasion, Congress passed a one billion dollar appropriations act that designated sixteen million dollars for use in the Korean conflict (Weine 16). This fact proved congressional passivity during the Korean War because it was unable to use its power of the purse to check the President and put an end to that war.

All these factors contributed to decreasing and undermining Truman's popularity within the public opinion that used to support him. The Korean War helped put an end to the twenty years of Democratic control of the White House. Historian Professor and biographer of Presidents Eisenhower and Nixon, Stephen Ambrose considered "Korea not crooks or communists" as "the major concern of the voters" who opted for Dwight Eisenhower who announced two weeks before the elections his intention to "go to Korea" to end the war (qtd. in Fisher, "The Korean War..." 35).

The study of the Korean War has found that President Truman practiced and claimed more war powers relying on his status as Commander-in-Chief than no other President asserted before him, establishing a precedent for future presidents. In his decision to deploy troops in Korea, Truman not only ignored his second partner in this issue, Congress, but substituted its approval with the Security Council's resolution. That was a precedent of its kind, too. Congress in its turn showed a great deal of passivity in dealing with the unprecedented rise of presidential war powers. Despite the numerous protests and objections by different congressmen, Congress as a body failed to pass any legislation that would really condemn and challenge presidential usurpation of power. Congress approved Truman's actions in Korea indirectly by funding the presence of troops in the region.

The Supreme Court declined in that war to declare the unconstitutionality of Truman's actions. It was congressional failure to pass a legislation that would officially confront President Truman's decision to deploy troops in Korea unilaterally which perhaps disabled the Supreme

Court from intervening to restore to Congress its neglected powers. All these factors would open the door for other presidents to try to increase and double their war powers relying on Truman's actions in Korea as a model.

1.2The Vietnam War

The next war to be detailed in this chapter is one of the most controversial wars in American history. It is the Vietnam War, or what is called the Second Indochina War. This war was fought outside American soil and lasted more than fourteen years. It never received a formal declaration by Congress. The fight in Vietnam began before the beginning of the brutal American War in Vietnam. That fighting roots back to the end of World War II when Vietnam, part of the French colony, Indochina had been occupied by the Japanese during the war (Hickman, "Vietnam War: Origins"). Vietnam was occupied by two foreign powers, Japan and France, the state which necessitated the emergence of a revolution to expel foreign powers from Vietnam (Rosenberg). The United States at that time seemed a logical ally to Vietnam's independence revolution because of its classical tradition and historical enmity to colonialism. American position was more reinforced since 1940 after its approval of the Atlantic Charter. Among the charter's provisions was the people's right in self determination and self government (Taylor 107).

The leader of that revolution was found in the communist Ho chi Minh who came back to Vietnam with the aim of ridding his country from foreigners. To achieve his task, Ho Chi Minh established the Viet Minh and waged guerrilla war against the Japanese with the support of the United States (Hickman, "Vietnam War: Origins"). Minh announced the establishment of an independent Vietnam with a new government called the Democratic Republic of Vietnam on September 2, 1945 (Rosenberg). Expelling the Japanese from the region was not its last threat.

The defeat of the Japanese encouraged France to try to regain the possessions of its colony and they were really able to re-enter Vietnam. Their entrance was conditioned this time by its recognition of the Democratic Republic of Vietnam as an independent state within the French

Union (along with the associated states of Laos and Cambodia). By the end of 1946 the French agreement with Ho had collapsed. Ho and his followers had retired to their rural and mountain strongholds, while the French entered Hanoi. These events marked the beginning of the first Indochina war between the French and the Viet Minh (Palmer 4).

The United States of America during this era proved unable to remain neutral and soon decided to be involved in the ongoing conflict. American intervention this time contradicted its previous ideologies since it chose to side with France against Minh who previously did his best to have the United States in his favor by working closely with American Special Forces to combat the Japanese within Indochina (Taylor 108). The United States' choice to side with France was to contain the spread of communism brought about by the post World War politics that tended to divide the world between American and Soviet allies. To prevent the spread of communism in capitalist states, the United States implemented the containment policy and then followed what became known as the Domino Theory (Hickman, "Vietnam War: Origins").

Although the United States help amounted to about three-fourths of the war financial cost, the French were unable to confront the Viet Minh. The Viet Minh forces under General Vo Nguyen Giap succeeded in the spring of 1954 in investing the French stronghold, Dien Bien Phu (Palmer 4). France's loss of that battle opened the door for negotiations that would end the First Indochina War. The negotiations which came to be known as the Geneva Accords were held in Switzerland, Geneva. In that convention, a number of nations met to determine how the French could peacefully withdraw and they agreed on the temporary division of Vietnam at the seventeenth parallel – the division split the country into communist North Vietnam and non-communist South Vietnam – pending for national elections to be held (Boyer). The purpose of the election was to unite the two parts under one national government.

The United States declined to endorse the Geneva Convention for it expected that the elections would result in the unification under the communists since it was the Viet Minh who had led the struggle for independence. The United States assumed that the vast majority of

Vietnamese looked upon Ho Chi Minh as the preeminent voice of their aspirations (Rosenberg). Realizing its ideologies in Indochina region obliged the United States to prevent the occurrence of the planned election.

To achieve its task, the United States eased the French out of Vietnam and decided to build in the southern half of a temporarily divided nation an independent, non-communist government that could stand as a barricade against further communist gains in the region. This decision constituted the United States real involvement in the region. President Eisenhower and his Secretary of State John Foster Dulles provided billions of dollars in military and economic aid and sent hundreds of advisors to assist the fledgling government of South Vietnam under the non-communist Ngo Dinh Diem (Boyer).

In spite of its previous support to Ngo Dinh Diem, the United States turned against him due to his mistreatment to his subjects. American officials came to recognize that Diem would never be able to unite the South Vietnamese against communism and they decided to get rid of him. CIA agents with the tactical approval of President Kennedy provided covert support to military officers, led by General Duong Van Minh, who plotted Diem's overthrow by providing a group of South Vietnamese generals with \$40,000 to carry out the coup which was really carried in early November 1963. Though Diem was promised by the generals that he would be allowed to leave the country, the generals changed their minds and killed him (Simkin).

As U.S. military efforts were intensifying in Vietnam, both Congress and the intelligence committees supported Eisenhower and Kennedy's Southeast Asian military designs, and members from both parties voted on a number of occasions to appropriate money during the early stages of the conflict. Some Republican members were not satisfied with that limited intervention and called for vigorous role in Vietnam (Hendrickson, "War Powers, Democracy" 66). That state meant that during Eisenhower and Kennedy's presidencies the number of U.S. troops engaged in fighting in Vietnam was very limited but this would change soon with the coming of the new President.

The coming President was Deputy Lyndon B. Johnson who replaced the assassinated President Kennedy. Johnson's words "If we quit Vietnam, tomorrow we'll be fighting in Hawaii and next week we'll have to fight in San Francisco" (qtd. in Kelly, "Quotes Lyndon B. Johnson") confirmed his strong support of the *Domino Theory*. To contain the spread of communism, Johnson decided to dispatch increasing numbers of military advisors and aid to the South. He stated:

The United States, at the request of the Republic of South Vietnam and in accord with our obligations under the Southeast Asia Treaty Organization, is helping South Vietnam defend its freedom with military advisors, ammunition, and material. It is not engaged in the war and does not intend to be." (qtd. in Doblix 2)

It is worth to mention the comment of Gene Healy who argued in his *Cult of Presidency*, that the principal rationale behind the Vietnam War was not containment of communist aggression only; it was a Progressive war that reflected an exalted view of the President's role and America's historic mission. This idea was mentioned by Walter McDougall who called Vietnam in his book *Promised Land, Crusader State*, the "Great Society War", which aims to realize the dream of great society not only in America, but in Asia, too (Healy 92). These comments presuppose that the United States was not involved in the Vietnam War to secure the country from communism, but was involved in a war for empire.

Even if Johnson did not want to appear to the American public and the international community as the aggressor of the looming military conflict, he would interpret any and all North Vietnamese actual happenings to his political advantage. To obtain congressional approval for giving him sole power to escalate American involvement in Vietnam, Johnson and his Cabinet manipulated the *Gulf of Tonkin Incident* (Doblix 2).

The incident occurred on August 2, when North Vietnamese gunboats attacked the U.S. destroyer *Maddox* on an electronic intelligence-gathering mission in the Tonkin Gulf.¹⁰ To

exaggerate the situation, the Johnson administration alleged that the *Maddox* and another destroyer, *C. Turner Joy*, were again targets to a second attack in heavy seas two days later (VanDeMark 17). The alleged second attack was promoted by the Johnson administration as a justification to their use of force in the region.

Despite the request for an investigation by the *Maddox* commander, Captain Herrick who was not convinced with the occurrence of a second attack, Secretary of Defence, Robert McNamara with the backing of Johnson, reported to Congress that there was “unequivocal proof” of a second “unprovoked attack” on U.S. ships. He later admitted that his statement regarding the Gulf incident was false (Model 130). The incident that was based on a lie prompted a swift reaction by the Johnson’s administration that started reprisal air strikes against North Vietnamese torpedo-boat bases and oil-storage depots near the seventeenth parallel without first consulting Congress. Johnson saw the incident as a direct challenge to the United States security (VanDeMark 18) which provoked his war powers as Commander-in-Chief.

Johnson tried to gain public support to his military retaliation against the North Vietnamese. To do so, he addressed the United States people on television, informing them of the incidents in the Gulf and trying to appeal to their patriotism by equating the attacks on the American ships with the insurgent activities in Vietnam:

Renewed hostile actions against U.S. ships on the high seas in the Gulf of Tonkin have today required me to order the military forces of the United States to take action in reply. The initial attack on the destroyer *Maddox*, on August 2, was repeated today by a number of hostile vessels attacking two U.S. destroyers with torpedoes... repeated acts of violence against the Armed Forces of the United States must be met not only with alert defense, but with positive reply. (qtd. in Model 132)

To legitimize his attacks, Johnson decided to involve Congress. In his Message to Congress on August 5, 1964 he said:

As President of the United States I have concluded that I should now ask the Congress, on its part, to join in affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom. (“The Tonkin Gulf Incident”)

As a practical step, Johnson sent Congress the Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, or what became known simply as the Gulf of Tonkin Resolution. The resolution was prepared by the State Department and charged North Vietnam with having “deliberately and repeatedly attacked U.S. naval vessels lawfully present in international waters” and that “these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime of North Vietnam has been waging against its neighbors” (“The Gulf of Tonkin...”). *Section I* of the resolution affirmed that Congress “approves and supports the determination of the President, as Commander-in-Chief, to take all necessary steps to repel any armed attack against the forces of the United States and to prevent further aggression” (“The Gulf of Tonkin...”). The first section of the resolution authorized the President “to take all necessary steps, including the use of armed force, to protect any [SEATO] member or protocol state . . . requesting assistance in defense of its freedom” (“The Gulf of Tonkin...”).⁹

Congress was convinced with the President’s claims and voted for the resolution which was passed by 416 to nought in the House of Representative, and 88 to 2 in the Senate (VanDeMark 18). This unanimous vote occurred despite the disagreement of some congressmen to the involvement of their armies in non American wars. One of the most frank critics to American involvement in this war came from Democratic Senators Ernest Gruening of Alaska and Wayne Morse of Oregon. Gruening warned of “sending our boys to sacrificing a single American boy in this venture. We have lost far too many already” (qtd. in Vietnam War Documents). Morse foresaw that “history will record that we have made a great mistake in subverting and circumventing the Constitution of the United States. . . We are in effect giving the president . . .

war-making powers in the absence of a declaration of war. I believe that to be a historic mistake” (qtd. in “Vietnam War Documents”).

The President succeeded in gaining congressional support because they did not know that the second North Vietnamese attack against the *Maddox* was a defensive and not an offensive attack against ships that had fired the first shots. This fact has been sustained by the Director of Central Intelligence, John McCrone who stated, “The North Vietnamese [were] reacting defensively to our...attack on their off-shore is lands. They [were] responding out of pride...” (qtd. in Strabala and Palecek 54). This reality proved that congressional approval to the Tonkin of Gulf Resolution was based on false and flawed information.

This fact did not negate congressional responsibility of involving the nation in a futile war for it failed to perform its function to declare war, by not taking the time to investigate the situation more thoroughly, especially when it had been proven that the North Vietnamese did not launch offensive attacks against the American ships. Congress had been accused of delegating its responsibility to declare war to the President through the resolution (Bandy). This means that the Congress effectively bypassed the war-making provisions of the Constitution by delegating the decision to continue the war effort to the President.

By the presidential campaign of 1964, Johnson appeared as a candidate of ‘peace’ and assured audiences that he had no intention of sending “American boys nine or ten thousand miles away from home to do what Asian boys ought to be doing for themselves” (Johnson). Soon after his landslide victory to those elections on November 3, his old promise would not be kept because of the increasing Viet Cong attacks against both South Vietnam and the American presence there (Hess 88). Johnson came to realize that the only way to respond to the Viet Cong attacks was the deployment of ground troops in the region:

Every time I get a military recommendation it seems to me that it calls for large-scale bombing. I have never felt that this war will be won from the air, and it seems to me that what is much more needed and would be more effective

is a larger and stronger use of Rangers and Special Forces and Marines, or other appropriate military strength on the ground and on the scene. (qtd. in Helsing 55)

The American escalation of the war necessitated more deployment to American soldiers. The number of the American soldiers that were to fulfil the Operations Rolling Thunder, a bombing program against North Vietnam that would last three years (1965-68), amounted to 47,000 by mid-May, then in late June 1965, Johnson approved an additional 50,000 U.S. troops and privately agreed to send another 50,000 before the end of the year (Logevall 101). The deployment of that number of troops demonstrated that the war was already on the road to being Americanized. Undersecretary of State George Ball confirmed this reality when he said, “In raising our commitment from 50,000 to 100,000 or more men and deploying most of the increment in combat roles we were beginning a new war” (qtd. in “The Vietnam War...”). The considerable number of American soldiers had been deployed in a war that first began as a civil war, but American presidents insisted on transferring it to an American war.

Johnson’s anticipation of ground troops placed him in a critical position because politicians criticized him for his failed policies in Vietnam. Congressman Ernest Gruening of Alaska called for a halt to the bombing by arguing, “After two years of the most intense and savage bombing of North Vietnam it has become apparent that it has not succeeded in stopping the flow of men and materials into South Vietnam” (qtd. in Hendrickson, “War Powers, Democracy...” 70). Some members such as Senator Fulbright criticized Johnson’s wide interpretation of the Tonkin Gulf Resolution and regretted his initial support to it (Lester and Leuchtenberg), for he considered the war going into the wrong path. Johnson admitted that his deployment of troops in South Vietnam was based on his own authority. He announced in 1967 his determination to deploy troops in that region even without the Gulf of Tonkin Resolution, “We stated then, and we repeat now, we did not think the [Gulf of Tonkin] Resolution was necessary to do what we did and what we’re doing” (qtd. in Vancet 80).

The events of January 30, 1968 would increase criticism when the North Vietnamese with the help of the Viet Cong surprised both the U.S. forces and South Vietnamese with an attack to about a hundred South Vietnamese cities and towns. Notwithstanding the ability of the U.S forces and the South Vietnamese army to repel the assault known as the *Tet Offensive*, the attack proved to Americans that the enemy was stronger and better organized than they had been led to believe (Rosenberg). The *Tet Offensive* would be a turning point in the American involvement in the Vietnam War.

With American victory in the *Tet* attacks, people did not believe this triumph and only few took U.S. Commander in Vietnam, General William Westmoreland, victory statements seriously. The chief political casualty of the Tet Offensive was Lyndon Johnson who would be facing a shift in public's opinion that used to be in his side. In the six weeks after *Tet*, pillars of establishment opinion such as *Walter Cronkite*, *Newsweek*, the *Wall Street Journal*, and *NBC News* gave way and called for de-escalation. The *Gallup Poll* reported a seismic shift in public opinion; in February, hawks had outnumbered doves 60% to 24%; in March hawks were 41% while doves 42% (Matusow 12). This change in public opinion marked the beginning of the anti-war movements.

One of the antiwar movements occurred in April when protesters occupied the administration building at Columbia University and the police used force to evict them. Raids on draft boards in Baltimore, Milwaukee, and Chicago soon followed, as activists smeared blood on records and shredded files. Some other protesters attacked offices and production facilities of Dow Chemical, manufacturers of napalm for sabotage, the state which caused brutal clashes between police and peace activists. A second march on Washington in November 1969 drew an estimated 500,000 participants whom most of them opposed escalating the U.S. role in Vietnam, believing the economic cost too high (Barringer). These events would have far reaching

consequences on Johnson's and the Democratic Party's political future.

Johnson recognized that both the American public and congressmen were against his war policy in Vietnam. That recognition led him decide to change American course in Vietnam. He scheduled a nationally televised address on March 30 in which he informed the American people with his decision of taking the "first step to de-escalate the conflict" (qtd. in Gettleman 402). In that same speech Johnson declared, "I shall not seek, and I will not accept, the nomination of my party for another term as your President" (qtd. in Gettleman 409). This decision presupposed Johnson's prediction that his agenda in Vietnam would not enable his party to win the coming election.

Time showed that Johnson's prediction was right. The next elections were won by the Republican candidate Richard Nixon, who campaigned during 1968 with his 'secret plan' to end the war. To do so, Nixon pursued several paths, including talks, terrorism and expanding the war in other regions (Buzzanco101). Instead of terminating the Vietnam War, Nixon enlarged upon President Johnson's view of presidential war-making powers by ordering the secret bombing of enemy supply lines in Cambodia in 1969 (Vancet 80). A year later, in a highly controversial move, he authorized an American-South Vietnamese ground assault against communist positions in Cambodia (Hess 149), relying on his constitutional role as Commander-in-Chief which conferred on him almost unlimited discretion over the deployment of troops (Vancet 80). Nixon moved to reduce tensions with the Soviet Union and the Chinese People's Republic, partly in the expectation that they would induce North Vietnam to end the war (Hess 149).

The American people elected Nixon hoping that he would end the fight in Vietnam Soon. But peace was reached by the end of his term. Nixon kept the war going four more years in spite of his decision to let Asian boys fight their own war. Another 20,000 young American men died during his term, which means that fully 40% of all deaths during that long war occurred during the four years of the Nixon presidency (Schmidt 287). The reason behind this delay lays in the fact that

Richard Nixon did not want Vietnam ruin his presidency as it was the case with Lyndon Johnson. He was determined to reach an honorable peace (“The Vietnam War...”). To achieve it, Nixon outlined a plan known as *Vietnamization of the war*.

The Vietnamization was an approach which aimed to hand the war back to South Vietnamese with the United States still providing support, but not in the form of military troops. Nixon used a second approach to reach the honorable peace. He relied on official negotiations which were to be conducted in Paris, with secret negotiations taking place in congruence between Kissinger, the American national security adviser who was the chief U.S. negotiator and Xuan Thuy, chief negotiator of North Vietnam (Barnuri).

The Paris peace talks of January 27, 1973, succeeded in producing a cease-fire agreement (Jennifer Rosenberg) that ended one of the longest, second most expensive and bloodiest wars in the United States with some 58,000 killed (Healy 93). Johnson’s war ironically was the only war that ultimately ended in defeat as the North Vietnamese succeeded two years later in bringing the reunification of Vietnam under communist leadership enforced by a major attack that overwhelmed a demoralized South Vietnamese army (Hess 150) which the United States tried to avoid with all means. Despite the claims of many politicians and scholars who questioned the constitutionality of that war arguing that the President had gone behind the line of his constitutional war powers, and that the Congress was unable to check him using its constitutional war powers, the courts mostly ducked the matter.

In *Mora v. McNamara* 389 U.S. 934 (1967) case, the Supreme Court refused to hear a challenge from several men drafted into the military and slated to be sent to Vietnam. The petitioners appealed to the Court challenging the war’s constitutionality. The Court majority refused to hear the case denying the petition for writ of certiorari (Genovese and Spitzer 210). Justice Douglas dissented from the denial of certiorari on the ground “that the constitutional questions raised by conscription for a presidential war are both substantial and justiciable but to no avail” (qtd. in Yoo 184).

Two justices Stewart and Douglas wrote a dissent arguing that the Court should hear the matter on its merits. After citing numerous questions that go to the heart of the war power, the constitutionality of the Gulf of Tonkin Resolution and the limits of Court authority in war-related matters, the justices concluded, “We do not, of course, sit as a committee of oversight or supervision. What resolutions the President asks and what the Congress provides are not our concern” (“*Mora v. McNamara*...”). This decision meant that the Supreme Court not only refused to solve war powers disputes over Vietnam War, but washed its hands of any case of this kind.

Lower courts likewise dismissed cases related to Vietnam War suits claiming that they present political questions. Determining that the President and Congress had made a joint decision to wage the war, the Second Circuit along with the District of Columbia Circuit held:

Some mutual participation between the Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. (“*Orlando v. Laird R a Berk*” 15)

The D.C. Circuit refusal to deal with these cases was not only because of difficulties in discovering judicial standards, but out of deference to the executive. Even if the necessary facts were to be laid before it, a court would substitute its judgment for that of the President, who had an unusually wide measure of discretion in this area and who should not be judicially condemned except in a case of clear abuse amounting to bad faith (qtd. in *Mitchell v. R. Laird*).

Congress during this war was unable to challenge the President using its power of the purse to end the crisis. It continued appropriating it until President Nixon decided to withdraw all troops. Professor Ely described the process in which Congress appropriated funds for the Vietnam War in the following manner: “[I]t would be an understatement to say that the program for which

Congress was appropriating funds, and extending the draft, was conspicuous” (qtd. Weiner 20). Both houses of Congress voted for appropriation bills with large margins. The first major funding bill was titled ‘Funds for Military Activities in Southeast Asia’ passed the House of Representatives by a margin of 408-7 and the Senate 88-3. A similarly titled provision allotting \$1.7 billion was passed soon afterwards. The 1966 funding bills, which exploded to the level of \$4.8 billion, were passed by similarly large margins of 393-4 in the House and 93-2 in the Senate (Weiner 20).

What can be deduced from this war is that presidents who ruled throughout the Vietnam War continued to use force and deploy troops abroad relying on their status as Commander-in-Chief and their international obligations. Fear of communism and desire for hegemony led American presidents to interfere in non American wars by alleging attacks against their sovereignty to get the support of the public and the approval of Congress to their military intervention.

Congress during this era had been accused of abdicating its constitutional war powers of declaring war to the President by passing the Tonkin Gulf Resolution and by its passivity to cut off its funding to the troops to oblige the President to withdraw them. Fear of appearing unpatriotic as well as public blessing to presidential actions were the reasons which encouraged congressmen to remain passive throughout the fight in Vietnam. With the increase of both American casualties in the war and the revolt of the public opinion who were asking for a rapid halt to that war, the Congress recognized its passivity and discovered its inability to check the President as it was supposed to do. By that time it was very difficult for it to cut the funds of the American boys who had been staffed there for a long period.

Courts which were supposed to reset the balance of war powers between the President and Congress in case of usurpation declined to do so. It was perhaps the fault of Congress which did not give the court a real chance to interfere in war powers controversies by passing no real legislation prohibiting presidential actions in Vietnam. Analyzing presidential and congressional

interactions during two of the major American wars that occurred after World War II exposed that the way in which these wars were waged changed enormously in comparison with the pattern of America's first wars discussed in the second chapter. The first apparent change that any reader can notice is the absence of the formal congressional declaration of war in none of the wars that followed the Second World War; these wars were initiated and conducted by the President, while Congress was kept far away from the arena of decision.

The previous study on the Vietnam and Korean wars shows that presidents acquired new war powers which bypassed both their constitutional war powers and congressional powers. Starting from the Korean War, American presidents adopted a new practice of involving the nation in wars or arms conflict without consulting Congress. They did so depending merely on either their status as Commanders-in-Chief or in obedience to international institutions such as the United Nations Security Council and the North Atlantic Treaty Organization.

This position marginalized Congress and denied it its constitutional war powers, mainly its power to declare war. Congress in its turn did nothing to check presidential usurpation of power as the Founding Fathers intended to do. It preferred to remain silent and inactive. Whenever the President waged a war on his own initiation, he faced no real challenge or objection by congressmen; he found all congressional actions supportive to his decision.

Presidential abuse of power was encouraged by courts and justices who refused to tackle many cases related to war powers or presidential unconstitutional wars. Court's refusal to say its decisions in such cases was based on the argument that they had no power to tackle political issues or to do deeds Congress should do. These conditions enhanced President's claim that his unilateral decision to wage wars was legal. Failure in Vietnam and its realization that the courts would not limit presidential war-making inspired Congress to attempt regaining its constitutional power to declare war. That effort would result in the War Powers Resolution of 1973.

Endnotes

¹ Truman Doctrine: On March 12, 1947, in an address to Congress, President Harry S. Truman declared it to be the foreign policy of the United States to assist any country whose stability was threatened by communism. His initial request was specifically for \$400 million to assist both Greece and Turkey, which Congress approved. For more information see “Truman Doctrine,” u-s-history.com, 17 December < <http://www.u-s-history.com/html>>.

² The Marshall Plan or what is called the European Recovery Plan was enacted by the U.S. in 1947 as a way to help rebuild Europe after World War II. The mastermind of this plan was George Marshall, who was at the time the US Secretary of State. “What was the Marshall Plan?” wisegeek.com, 12 Feb 2011 <<http://www.wisegeek.com/marshall-plan.htm>>.

³ For the history of dividing Korea see; Donald E Schmidt, *The Folly of War: American Foreign Policy, 1898-2005* (New York: Algora Pub, 2005) 243.

⁴ The Resolution was passed in the absence of Soviet delegate who was supposed to use his veto to block a resolution directed against their allies. Unfortunately, its boycott to the United Nations in protest of the denial of membership to the recently established Communist government in China. Gary R. Hess, *Presidential Decisions For War: Korea, Vietnam, the Persian Gulf, and Iraq* (Baltimore: Johns Hopkins UP, 2001) 8.

⁵ Douglas' list of past examples of Executive action, which was typical of the lists cited by others, but he conceded that in a few of these instances “the exercise of this power was probably unwise, but in most “it was distinctly wise, benefiting both this country and the world as a whole.” Charles A. Lofgren, “Mr. Truman's War: A Debate and Its Aftermath,” *The Review of Politics* 31.2 (1969): 232-233. JSTOR. 19 July 2009. <<http://www.jstor.org/stable/1406021>>.

⁶ For more details on that provisions see Rayan C. Henrickson, *The Clinton Wars: The Constitution, Congress, and War Powers* (Nashville: Nashville Vanderbilt University Press, 2002) 9-13.

⁷ For the United Nations Participation Act see; Al Snow, *Exceptional Profile of Courage: The United Nations vs. American Liberty* (UT: Agreka, 2002) 83-89.

⁸ For more details about the casualties in the Korean war see ,“America's Wars: U.S. Casualties and Veterans,” infoplease.com, 22 July 2009 <<http://www.infoplease.com/ipa/A0004615.html>>.

⁹ For more details on the Maddox incident see, Joseph C. Goulden, *The Truth is the First Casualty: The Gulf of Tonkin Affair-Illusion and Reality* (New York: Rand McNally & Company, 1969) P131-132.

¹⁰ For further reading about the South East Asia Treaty Organization see “The South East Asia Treaty Organization,” globalsecurity.org, 17 December 2010. <<http://www.globalsecurity.org/military/world/int/seato.htm>>.

Chapter Four

War Powers Resolution 1973: Has Anything Changed?

After the tragic end of the Vietnam War Congress came to recognize its inability to exercise quick or coherent judgments regarding executive actions and its unwillingness to deprive the President of needed troops or funding once military action had begun. Congress admitted that it lost its constitutional war powers and it lost control over the President in matters related to wars or deployment of troops abroad. Congress decided to make a step that would enable it to regain its constitutional war powers granted by the Founders of the Constitution so that it could make a positive decision about United States military engagements the framers intended to do. That step was embodied in what became known as the War Powers Resolution.

This chapter will review the major concerns that led to drafting the War Powers Resolution, and will deal with the most important provisions that are supposed to check presidential usurpation of war powers. The chapter will equally put the War Powers Resolution in practice through studying some cases that occurred after the passage of the resolution to see whether the act succeeded really in checking presidential abuse of power and involving Congress in decision making or not.

Emphasis will be given to the opinion of both the public and the media regarding the efficiency of the War Powers Resolution. Court's stance towards this resolution will be highlighted to determine its constitutionality. Congressional passage to the resolution was an important step which was supposed to give the court a chance to intervene in war powers controversies whenever presidents bypass constitutional limits or ignore the provisions of the resolution. The chapter then will be concluded with an assessment of the resolution to determine whether it succeeded in achieving its goals or not.

The Resolution of 1973 was not the achievement of any single mind. Congress considered a number of alternative proposals of varying scope and intensity for restoring the constitutional

balance between Congress and the Presidency in war making (Allison 96). When the 93rd Congress got under way in 1973, it received some thirty bills and resolutions that dealt with war powers issue (Hinkson 319). This number gives the impression that the passage of the War Powers Resolution was not a simple task; it was as difficult and complicated as the issue it attempted to address.

The passage of the resolution passed throughout the negotiations of the three major themes that should be addressed in the Resolution. The first theme run around the idea that the President should maintain some flexibility as Commander-in-Chief, and that there should be no formal detailed description of when the President could engage the military in armed conflict and when he could not. This was justified on the argument that the world became too complex to list all possible instances when armed forces should be deployed or not and who should decide, Congress or the President (Bundy).

The second theme tackled congressional passivity in issues related to war and maintained that it was time for Congress to reassert its role to prevent the repetition of other Vietnam. This point was reinforced by Jacob Javits, a Republican Senator from New York and author of one version of War Powers Act, in his address to the Committee on Foreign Affairs. Javits believed the President had not usurped his power; he was given during the Vietnam War the “opportunity to neutralize Congress” that never worked as a whole body during that war, and failed to play “a commensurate role in the painful and protracted disengagement from that ill-starred misadventure” (qtd. in “War Powers: Hearings before...” 2). There was an urging necessity for Congress to regain its influential position in war decisions.

The third theme was an attempt to prevent the emergence of future Johnsons. Achieving this goal required keeping Congress informed with all activities in relation to the initiation of hostilities and the conduct of the war effort so that it could prevent attacks on countries that were not involved directly in the war against the United States. Although Congress was kept informed, most strategic decisions would constitutionally remain the President’s responsibility (Bundy).

These three themes became really the core of the War Powers Resolution which would confirm all previous themes in each of its provisions. Its authors clarify in the introduction of the resolution that it aims “to fulfil the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities” (*SEC. 2a*).

To link the President to Congress, the act contains a consultation provision which requires “The President in every possible situation” to “consult with Congress before introducing United States Armed Forces into hostilities” (*SEC. 3*). The use of the phrase “in every possible situation” accords with the first theme; it gives the President more flexibility in emergency situations where the Congress cannot be consulted (Grimmett 3).

Section Four of the act addresses the situations where the President can introduce American troops absent congressional declaration. The act gives the President the authority to introduce troops “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstance”; “into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces,” or “in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation” (*SEC. 4.a*).

Congress wanted to highlight its exclusive power to declare war and to authorize international use of force which the courts have tried sometimes to ignore by finding either that there was no activity requiring a declaration of war, or finding that something the Congress has done amounts to a declaration. The War Powers Resolution insists that during the previous situations, the President is required in *Section 4(a) (1)* to submit to Congress a report within forty-eight hours in which he explains “the circumstances necessitating the introduction of United States Armed Forces,” “the constitutional and legislative authority under which such introduction took place” as well as “the estimated scope and duration of the hostilities or involvement.” This Section addresses the third theme; it aims to insure that once a president involves the armed forces

in conflict, he must report to Congress immediately, so that it remains informed. *Section 4 (C)* of the act stipulates that the President will report to Congress no event “less often than once every six months.”

To regain its lost control over wars and to prevent the emergence of future Johnsons, the authors inserted *Section 5(b)* which Richard Grimmett, specialist in International Security, Foreign Affairs, Defense, and Trade Division, called the “Teeth of the War Powers Resolution” (4). The provision obliges the President to terminate United States use of Armed Forces in no more than sixty days after a report is submitted or required to be submitted pursuant to *Section 4(a)(1)*. *Section 5* does not apply only if Congress “has declared war or has enacted a specific authorization for such use of United States Armed Forces,” “has extended by law such sixty-day period”, or “is physically unable to meet as a result of an armed attack upon the United States.”

The act allows the President to extend the sixty-day period for no more than an additional thirty days. This may happen only if he determines and certifies to the Congress “in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces” (SEC. 5.b). The same section allows Congress to remove United States forces “engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization” by concurrent resolution if there has been neither a declaration of war nor specific statutory authorization.

Unlike a bill or joint resolution, the requisite concurrent resolution as defined in the United States Senate Glossary, does not have the force of law and it does not go to the President for approval. This characteristic avoids the possibility of a presidential veto of a congressional resolution directing the president to withdraw United States forces (“Congress Control of Presidential...” 1225). Representative Clement Zablocki, sponsor of the House bill, argued that

Congress's choice to apply the nonvetoable method was a result to its deep understanding to its constitutional power to declare war ("Congress Control of Presidential..." 1225).

To guarantee to Congress its constitutional war powers, the act provides Congress with two-barrel approach to end commitment of forces ordered by the president. Zablocki stated that the first barrel involves the sixty-day period, while the second barrel involves the Concurrent Resolution which Congress can use to demonstrate its unwillingness to declare war before the expiration of the sixty-day period ("Congress Control of Presidential War-Making" 1225).

This brief analysis of the most important provisions explains that Congress addresses each of its themes in the War Powers Resolution. First, it gives the President some flexibility to conduct emergency military actions. Second, it theoretically assures that Congress regains its power to decide on war or peace through insisting that no hostilities initiated by the President may last more than sixty days without a concurrent resolution or declaration of war from Congress. Finally, the President is deemed to report to Congress all his decisions to commit United States forces abroad (Bundy). This requirement is addressed in fulfilment to the objective of keeping Congress up to date on the war effort.

The War Powers Resolution does not aim to tie President's hands or deny him his constitutional war power as Commander-in-Chief. It aims to provide the method by which President and Congress can render a collective judgment on the question of war. President Nixon did not recognise the resolution and chose to veto it. That veto represented presidents' unwillingness to accept any curb to their power to commit American troops abroad (Javits 133-134), even if that curb comes from its legal partner in decision making.

The urgent need to limit presidential wars enabled Congress that accumulated great amount of confidence after the wake of the Watergate scandal to override the veto of the weakened President Nixon by the requisite majorities of two-thirds in both houses (Carter 102). The House passed the Resolution narrowly by 284 to 135, while the Senate passed it by a more comfortable margin, 75 to 18 (Adler and Fisher 4). Despite its passage on November 7, 1973, the act was, and

is still a source of debate between its opponents and proponents as well as a target to criticism by its challengers.

The resolution to its supporters was considered as a “desirable and predictable swing of the pendulum of power toward Congress” (Craig 319). It was intended to force Congress to make a positive decision about United States military engagements (Deering 146). Among those who supported both the resolution and the restoration of Congress’s war powers were Democrat Senate and House members. Clement Zablocki of Wisconsin called the resolution “a legitimate effort to restore [Congress’s] rightful and responsible role under the Constitution” (qtd. in Hendrickson, “Clinton Wars” 16). Democrat Spark Matsunaga of Hawaii defended the resolution by saying, “It merely enunciates a procedure by which we in the Congress may assert that sole power vested in the Congress, the power to declare war” (qtd. in Hendrickson, “Clinton Wars” 16). Similar opinion was expressed by the Democrat Hugh Carey of New York who declared, “We are simply restating and making more explicit what is our constitutional function with regard to peace-keeping, and with regard to the powers to make war” (qtd. in Hendrickson, “Clinton Wars” 16). Michael Harrington of Massachusetts likewise noted that it “would help restore the lawful authority of Congress in the process of committing our Nation to war” (qtd. in Hendrickson, “Clinton Wars” 16).

Not all members of Congress supported the War Powers Resolution. Some Senators namely Thomas F. Eagleton of Missouri argued against it from a different perspective. He called the act a “horrible mistake” that would grant the President “unilateral authority to commit troops anywhere in the world for 60 to 90 days. He gets a free sixty days and a self-executing option” (qtd. in Rudalevige 194) without congressional authorization. Senator Abourezk described it as “a blank check which will implicate Congress in whatever aggressive war making president judges to be necessary” (qtd. in Allison 98). The resolution was looked upon by others as a futile effort by Congress to assert powers it already had (Hendrickson, “Clinton Wars” 16).

Some other opponents of the resolution looked to it with a quite different eye. For Stephen L. Carter, an American law professor at Yale Law School and legal and social-policy writer, the resolution was inexcusable usurpation by the legislative branch of the powers of the executive. He considered it as just Congress's way of pretending that the Vietnam War had somehow been a fast one pulled by the executive branch, rather than a disaster jointly managed by two presidents and five congresses (102). Looking to the resolution from this angle gives the perception that Congress wanted to confirm by its passage to the resolution that it shared no responsibility in the disaster of the long Vietnam War.

Yale Law Professor Eugene Rostow showed his opposition in an article which appeared in the *Virginia Law Review* in 1975 an opposing view. For Rostow both Congress and the President were responsible for the disaster in Vietnam:

During the war in Vietnam, we experienced naked political irresponsibility. First, the President and the Congress, acting together in a constitutional mode that goes back to the time of Washington, made a series of decisions involving us in the war... Later, when the war... became unpopular, many of the congressmen who had voted and voted and voted for it) suddenly began to say that (it was) all the President's fault. They claimed that the President had involved the country in war through stealth and concealment. (qtd. in Turner "Utility of Declaration of War" 35)

The media's opinion was mixed. The *New York Times* expressed in an editorial that the veto override represented "a turning point in the continuing struggle to restore the American constitutional system of checks and balances" (qtd. in "Nixon's Override" 46). From the opposing point of view, the *Washington Post* columnist William S. White called the resolution "the most flagrant sham ever to emerge from Congress in my 40 years of close observation of that body" (qtd. in Raymond 75). The *Washington Star* questioned the resolution ability to restrain the President in future crisis.

Among the strong figures that opposed the War Powers Resolution and doubted its constitutionality was President Richard Nixon. He vetoed the bill on the ground that the resolution would impose restrictions on the President's authority which he considered as both unconstitutional and dangerous to the interest of the Nation. Nixon charged that the Resolution "would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis" ("Veto of the War Powers Resolution"). Even with his efforts to plea to the American people the unconstitutionality of the resolution, the *Gallup Poll* taken at the time of the resolution's passage showed that 80% of the American people were in favor of the new law (Raymond 75). This percentage confirmed public outrage of the President's military interventions.

President Gerald Ford complained that the resolution "has potential for disaster" (qtd. in Allison 97). His administration too argued in 1975, before a House subcommittee that the concurrent-resolution mechanism and the sixty-day limitation were all unconstitutional. The Carter administration expressed similar view when they doubted the compatibility of the resolution with the President's constitutional authority as Commander-in-Chief (Rushkoff 1332).

These presidential statements indicated that the provisions of the War Powers Resolution would remain an ink on paper. The presidents announced publicly that they did not recognize its constitutionality. A brief review of some cases that occurred during the presidencies of either these or other executives is necessary to decide whether the resolution would achieve its objective of involving Congress in consultations with the President before he would introduce forces or not. Putting War Powers Resolution in practice is important to measure presidential compliance with its provisions.

From 1975 to 2007, presidents have submitted 123 reports as the result of the War Powers Resolution (Grimmett). Statistics held by Grimmett in 2001 specified that while President Ford submitted four reports, President Carter submitted only one; President Reagan fourteen reports and President George W. Bush six reports. President Clinton submitted eighty-six reports, whereas President George W. Bush six reports ("The War Powers Resolution...").

Among the reports submitted in the first ten years after the enactment of the War Powers Resolution in which the President reported to Congress were those which covered the evacuation of United States troops and American, Vietnamese and Cambodian civilians from Danang, Phnom Penh, and Saigon; the recapture of the *Mayaguez*; the abort mission to rescue hostages in Iran; the participation of U.S. forces in the Sinai and Lebanon multinational peacekeeping forces (Wald 1420). The situation in Danang, Phnom Penh and Saigon to Jacob Javits were terrible that statutory law gave some accommodation to the use of troops for these evacuations (“War Powers Reconsidered” 135). In several other instances such as those of the Cyprus evacuation of 1974, the Lebanon evacuation of 1976, the 1976 tree-trimming incident in the Korean DMZ, and the Zaire airlift of 1978, presidents did not report to Congress under the War Powers Resolution (Wald 1420) and took measures without effective prior consultation despite the fact that those situations necessitated them to do so.

During the instances in which presidents were said to be reporting to Congress, no one could assure that all presidents concerned in these cases did effectively obey all the provisions of the act, or at least consulted with Congress in advance as *Section 3* of the War Powers Resolution requires. A brief analysis of one among the major instances mentioned previously will help to find out whether presidents really complied with the provisions of the resolution or not.

The first incident to be discussed is the recapture of the *Mayaguez* which many scholars consider as the only case in which the President complied with the War Powers Resolution. The incident which cost 41 lives and wounded other 49 to “recover” 40 sailors (Carroll 167) dates back to May 12, 1975, when the merchant ship *S.S Mayaguez* was seized in the Gulf of Thailand in international waters by Cambodian boarding party (“Memorandum For the President”). The incident was a good opportunity to test the efficiency of the War Powers Resolution.

The news of the seizure of the ship reached President Ford at 7:40 (“History of the Pacific 428”) of the same day.¹ As a response to the seizure of the *Mayaguez*, President Ford met the National Security Council after noon of the same day to discuss the matter. Ford decided to

dispatch both the air craft carrier *U.S.S. Carol Sea* and its escorts from the Philippines to proceed toward the seizure area and the *P-3 Orion* reconnaissance planes from Thailand to locate the *Mayaguez* and maintain surveillance (Raymond 102). The surveillance was perhaps held to prevent the displacement of the ship.

On Tuesday 13 at 6:20, Washington time, U.S. aircraft fired warning shots across the bow of the *Mayaguez* to prevent the ship from being moved to the Cambodian mainland. On May 13 and 14, U.S. fighter planes sank three Cambodian gunboats ready to move the *Mayaguez*'s U.S. crew to the mainland. The destroyer escort *Holt* which was ordered to secure the *Mayaguez* arrived on the scene in the morning of May 14. As President Ford believed that the crew was imprisoned in Koh Tang Island, he ordered U.S. forces to assault Koh Tang Island on that afternoon. The assault was followed three hours later by the heavy bombing of Ream airfield on the mainland (Vance 88).

The Cambodians decided that evening to release the *Mayaguez* crew unharmed in a Thai fishing boat. The release was perhaps prompted by the intense air strike of U.S. jets and the fear of retaliation. Destroyer *U.S.S. Henry G. Wilson* arrived on the scene and took the crew aboard (Kruzell). President Ford announced to the American public the rescue of the ship on Thursday, May 15 at 00:27, in a television and radio broadcast from the White House (Westerfield 104).

What is interesting about this case is that it occurred during the presidency of Gerald Ford, one of the outspoken opponents to the War Powers Resolution. Ford was known with his consistent position towards the resolution throughout his political career. The man voted against it when he was a member of Congress; he voted against the conference report and sustained the Nixon vote (Raymond 108). Ford's report submitted to Congress during the *Mayaguez* crisis was considered the only War Powers report till 2008 to specifically cite *Section 4(a)(1)* of the War Powers Resolution (Grimmett 11). This case is important because it had the chance to test the efficiency of the resolution eighteen months after its adoption. The crisis invoked as an aftermath,

a debate between the executive and the legislative branch over the meaning of consultation required in the War Powers Resolution.

During the first day of the crisis, President Ford in a conference call, talked to the Majority and Minority Leaders of the Senate. The leaders respectively were the Democrat Senator Mike Mansfield and the Republican Hugh Scott, who both appreciated the President's call, asked for further in-depth information as soon as possible and urged him not only to keep them advised, but to advise their counterparts in the House as well. President Ford met the House Majority Leader, the Republican John Rhodes and briefed him with the little information he had concerning the *Mayaguez* seizure (Raymond 110) so that the leaders of both Houses knew about the incident.

President Ford wanted to develop a game plan for dealing with the War Powers Resolution. He directed his Counselor Marsh on May 13 to do so. Marsh on his turn, talked to Buchen, Council to the President, General Scowcroft, Deputy Assistant to the President for National Security Affairs, and Friedersdorf, Assistant to the President for Legislative Affairs, to get their opinions on who should be 'consulted' and on how and when the 'consultation' should take place (Raymond 114). This question revealed that the Executive branch found difficulty in complying with the 'consultation' process required in the resolution due to the ambiguous language used in drafting the resolution.

The strategy they decided upon was simple. The administration would go through the process of notifying and providing information to Congress, but at the same time would not concede these actions were taken in compliance with the War Powers Resolution (Raymond 114). Starting at 5:30 p.m. on the evening of May 13 President Ford directed White House aides to contact congressional leaders; ten in House and eleven in the Senate (Westerfield 105). At about 7:00 p.m. of the same day, a White House congressional liaison officer began to telephone congressional leaders to inform them of the situation (Vance 88). This timing shows that the 'consultation' begun more than twelve hours after the first warning shots fired by U.S. forces by an order from the President. On May 14, after President's order to begin the rescue mission,

President Ford met between 6:30 and 7:00 with seventeen Congressional leaders in the cabinet Room of the White House. The President gave the attendants a two-hour briefing regarding developments surrounding the *Mayaguez* incident (Westerfield 105) and the decision he had just taken, that is to begin the air strike.

Three leaders among the attendants expressed their opposition to President's air strike order. These leaders were Senator Mike Mansfield, Majority Leader, Senator Robert Byrd, Majority Whip, and the Democrat Senator John McClellan. The President then defended the attacks as essential to prevent Cambodian reinforcements from attacking the marines on Koh Tang. According to Ronald Harold Nessen, White House Press Secretary for President Ford, the argument was superfluous. Ford had already issued the orders (Bostdorff 127). Their disapproval remains useful to confirm that not all congressmen blessed President Ford's actions. Opposition uncovered both congressional inabilities to challenge the President and the inadequacy of the resolution's concurrent resolution requirement to terminate military actions in case of dissatisfaction. Even if Congress attempted to do so, the President would fulfil his mission before the passage of that resolution.

On May 15 President Ford sent a letter to the Speaker of the House of Representatives, Carl Albert, outlining the action that he had taken throughout the days of the crisis. What was striking in that letter is its third paragraph which began as follows: "In accordance with my desire that Congress be informed on this matter and taking note of *Section 4(a) (1)* of the War Powers Resolution, I wish to report to you" (qtd. in Behuniak 128), and not 'in compliance with the War Powers Resolution'. He concluded his letter with the statement, "This operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces" (qtd. in Behuniak 129). Ford's words in that report exposed that he did not comply with the reporting requisite of the War Powers Resolution because he was obliged to do so. He instead did so just because of his personal desire to keep Congress informed to maintain the executive-congressional harmony.

The idea was reinforced three years later by President Ford himself in a speech entitled “War Powers Resolution” delivered at Kansas State University. In that speech he informed Congress on any action concerning foreign policy was due to his career as a former member of Congress and as the Minority Leader for over nine years in the House of Representatives,

I knew from first-hand experience that congressional understanding and support developed with such communication. It is my view that when the president as Commander-in-Chief undertakes such military operations he would inevitably take the Congress into his confidence in order to receive its advice, and if possible, insure its support. (“War Powers Resolution”)

President Ford confessed in that speech that in none of the military crisis that occurred during his presidency, including the *Mayaguez* seizure, he considered the War Powers Resolution applied. He admitted:

I did not concede that the resolution itself was equally binding or legally binding on the president on constitutional grounds. Nevertheless, in each instance, I took note of its consultation in reporting provisions and provided certain information on operations and strategies to key members of the House as well as the Senate.

These statements by the President tell that even the only President to comply or to mention a provision among the provisions of the War Powers Resolution did so without being really convinced with neither its legitimacy to oblige him to report to Congress nor its efficiency to promote collaborative decision between the Executive and Legislative branch. He just did so because he recognized the necessity of informing Congress, perhaps to avoid any clash with the Legislative branch, especially that he was a non-elected President.

Presidential policy towards Congress during the *Mayaguez* seizure uncovered many deficiencies in the provisions of the War Powers Resolution. The end of the crisis brought to front a serious debate between the executive and legislative branch over the meaning of the ambiguous language used in drafting the resolution. The chief issue that would cause controversy between the

two branches was the question of what constitutes ‘consultation’. The historical review to events during the *Mayaguez* crisis exposed that ‘consultation’ took place three times, yet that consultation occurred after orders were issued to commence military operations. That timing was not satisfactory to some congressmen who argued that Congress’s requirement to ‘consultation’ meant that it wanted to be involved in the executive process with the President seeking its opinion, and taking it into account before making a decision to commit armed forces (Grimmett 11). ‘Consultation’ as Congress wanted it to never occur.

Some congressmen criticized the way they were consulted. Most of the consultation process as it has been exposed was in the form of telephone calls held by White House congressional liaison officers. The calls were described by their recipients as a perfunctory notification of U.S. actions and not genuine attempt to consult with the leadership (Vance 88). Majority Senate Leader Mansfield later confirmed this description by saying, “I was not consulted. I was notified after the fact about what the Administration had already decided to do” (qtd. in Carroll 167). Senator Eatland Case and House Majority Leader O’Neill all denied that they were consulted for their views (Raymond 146), despite expressing opposing view previously. Chairman John Sparkman opened the meeting of the Senate Foreign Relations Committee held in the afternoon of May 14 and expressed his committee’s prediction to be consulted under War Powers Resolution “prior to the decision to take retaliatory action.” He stated that those telephone calls the night before to two members did not constitute consultation as required in the resolution (Raymond 132).

Critics of White House calls built their disapproval on several grounds. They maintained that the calls were made after actions had been taken. The White House liaison officer reported that he had “been given a prepared statement to read to the Senators on what amounted to a *fait accompli*” (qtd in Vance 88-89). The critics testified that the contacts were low level in nature, that is they were made by liaison aids mainly and not the President himself. Some congressmen

wished consultation to take place through face to face meetings with the President prior to any major commitment (Westerfield 106) and not a telephone call held by a liaison officer.

The only opportunity for congressmen to meet the President directly occurred half an hour before the beginning of the Koh Tang assaults, while the President's formal report to Congress was received on Capitol Hill after the operation was completed (Vance 89). The state assured President's Ford in compliance with the consultation requirement of the War Powers Resolution because what he did was much more a notification than a consultation. It was the vagueness of the language of the resolution which caused this controversy and misunderstanding. This state was supported by some congressmen who admitted their ignorance to the meaning of consultation required in the War Powers Resolution. Senator Hugh Scott, was one of these congressmen who stated: "We were informed. We were alerted. We were advised. We were notified. We were telephoned. It was discussed with us. I don't know whether that's consultation or not" (qtd in Westerfield 111).

President Ford and his advisors deliberately chose to draw a technical distinction in which they would notify Congress after the tactical decisions were made and Congress would agree. This idea was reinforced by General Scowcroft who said, "We did not notify the Congress until we decided on the course of action, at which time the president called them down and told them what we were going to do" (qtd. in Raymond 117). There was "not much in the way of true consultation under the War powers Resolution...it really wasn't consultation on the (Mayaguez), it was notification; the aircraft were already on the way" (qtd. in Raymond 117). President Ford summed up the distinction observing:

There is a fine line between consultation and notification. The problem is a narrow difference, but fundamentally, in my judgment, it makes the War Powers Resolution unconstitutional. A President is Commander-in-Chief. As Commander-in-Chief, you have to make up your mind as to what you should do diplomatically and militarily. Congress is a legislative body. It is not an

executive body. So consultation from the point of view of the President is different from consultation the way the Congress describes it in the War Powers Resolution. (qtd. in Raymond 118)

Ford's observation left no room to doubt that he was not unlike the other twentieth-century presidents who committed troops abroad without prior consultation. Ford's actions in this crisis highlighted the President's powers as Commander-in-Chief regardless of the War Powers Resolution and affirmed congressional passivity or unwillingness to challenge the President.

Although there were repeated calls of Representative John Seiberling of Ohio that "Congress must not let stand without challenge a precedent [Ford's failure to consult] which would practically nullify this section [consultation] of the resolution" (qtd. in Raymond 152); In spite of Jacob Javits desire to make congressional opposition to executive practice of informing selected members of Congress few hours prior to the implementation of decision taken within the executive branch, known to the executive and the country ; no real action was taken by Congress to assert its position and existence except for some proposals to amend the War Powers Resolution, which in their turn died at the end of 94th Congress (Raymond 152-154). In spite of President Ford's statutory violation to provisions of the War Powers Resolution, no member of Congress attempted to take the issue to the judicial branch (Raymond 167). Not only Congress remained silent and refused to challenge the President, it expressed its support to President's action during the *Mayaguez* seizure.

According to the *Bangor Daily News* which appeared on May 15, 1975, the Senate Foreign Relations Committee voted unanimously on Wednesday to support President Ford's efforts to secure the release of the captured U.S. merchant ship and its crew. "We support the President in the exercise of his constitutional powers within the framework of the war powers Resolution to secure the release of the ship and men", declared the committee (Cargo Crew Surrendered).

This committee which supported President's actions is the same committee which

opened with blaming the President for not consulting its members. This situation led Senator Eagleton to conclude later that “Congress really didn’t want to be in on the decision making process as to when, how, and where we go to war” (qtd. in Koh 27). He became convinced with Congress’s preference to the right of retrospective criticism to the right of anticipatory, participatory judgment (qtd. in Koh 27). Eagleton’s statement assured the unwillingness of congressmen to assume responsibility for issues related to war and use of force.

Congressional reluctance to oppose presidential decision increased more when the public supported those actions. Public support was indicated by the thousands of letters, calls, and telegrams received by the White House in favor of Ford’s crisis management, and opinion polls showed the President’s stock on the rise (Bostdorf 127). Ford recalled, “all of a sudden, the gloomy national mood begun to fade. Many people’s faith in their country was restored and my standing in the polls shot up 11 points...I had regained the initiative, and I determined to do what I could with it”(qtd. in Rozell 98).

What was different about the *Mayaguez* crisis was the way in which President Ford prompted it. Unlike other presidents, Ford did not make a dramatic public announcement of the crisis until after the crew was secured. One reason may have been Ford’s belief that action was preferable to rhetoric (Bostdorf 128). The public support which followed this crisis was perhaps due to the fact that the people had no time to think about the matter or its aftermath, since they knew directly about the news of triumph.

The media were for President Ford’s actions since regardless of the causalities caused to marines, the news portrayed the mission as a successful one (Bostdorf 127). This support was attributed to those supporters who considered these actions as a reaction to restore America’s national credibility. In an article to *New York Times* entitled “Praise for the President.” James M. Naughton wrote, “The merchant ship *Mayaguez*... serves as a visible symbol of the United States resolve to remain an influence - and, if necessary, a military presence – abroad despite the recent debacle in Indochina” (qtd. in Rozell 95).

Different journal editorials praised Ford's reaction to the seizing of the *Mayaguez*. Wall Street Journal depicted the *Mayaguez* rescue mission as "not only succeeded in its immediate purpose but made the exceedingly useful point that U.S. power is still something to be reckoned with throughout the world". *U.S. News and World Report* agreed that the President's response "was meant as a signal to U.S allies and adversaries. In essence: Don't take us lightly... the humiliating setbacks in Indo-China... have not paralyzed Americas will to play its role as a global power" (Rozell 99-100).

The *Mayaguez* crisis and Ford's implementation of the War Powers Resolution illustrated that the law did not restrain the President, rather it legalized the prerogative powers contemporary Commanders-in-Chief have long assumed. The Resolution seemed to transfer more powers from Congress to the Oval Office rather than encouraging congressional participation (Bostdorf 141-142). The resolution's flaws ensured president's willingness to make important crisis decisions by themselves.

The previous analysis to the implementation of the War Powers Resolution during the *Mayaguez* crisis unveiled many of the shortcomings of the resolution. Instead of preventing presidential unilateral decisions to use force abroad, it legitimized the President's actions with its vague provisions which were interpreted differently. The incident was an occasion to uncover the uselessness of most of the resolution's provisions in practice. All these deficiencies proved the failure of the War Powers Resolution to achieve its purpose few months after its adoption.

The provisions of the War Powers Resolution continued to be ignored by presidents till 1983, when President Reagan gave Congress the chance to adjust for the first time its sixty-day clock during the military intervention in Lebanon. Studying the background of this military intervention would reveal President Reagan's doubtfulness about the efficiency of the War Powers Resolution to chain his war powers as Commander-in-Chief.

Though President Reagan consulted with the House and Senate foreign relations committee over his decision to deploy American marines in Beirut in August 1982 to assure the evacuation

of the Palestine Liberation Organization fighters, he declined to do so during his second deployment. The second deployment took place in September 1982, as part of a multinational peacekeeping force sent to maintain order in the wake of the assassination of President Bashir Gemayel of Lebanon and the massacres at the Sabra and Shatila Palestinian refugee camps (Javits 135).

Reagan's uncertainty about the duration of his troop's presence in Lebanon gave Congress the impression that troops would remain "only for a limited period to meet the urgent requirements posed by the current situation" (qtd in. Wald 1423). He told Congress there was "no intention or expectation that U.S. Armed Forces would become involved in hostilities" (qtd in. Wald 1423). Reagan's refusal to consider his troops as involved in hostilities was an effort from him to bypass the War Powers Resolution. Reagan's communication with Congress during that era confirmed more his intention to evade the War Powers Resolution. He relied on his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief" (qtd. in Javits 135) in defining his authority to send American marines to Lebanon.

Congress in its turn played no significant role in challenging the President's decision to station troops in Beirut without its legal authorization. Despite protests from some congressmen and some violent incidents in the region, Congress enacted in June 1983 the Lebanon Emergency Assistance Act to validate the presence of troops. The act necessitated congressional authorization for any expansion in the number or role of the troops (Wald 1423). The passage of this act guaranteed congressional agreement and approval to Reagan's decision to station troops in Lebanon and its unwillingness to impose *section 4a (1)* of the War Powers Resolution to terminate the hostility.

The murder of two Marines in West Beirut on August 29 constituted a turning point in American policy in the region. The President reported the casualties to some congressional leaders (Nzelibe 1027). In his report, Reagan cited the War Powers Resolution but proceeded with care not to cite the section of the act under which he made the report to evade triggering the time clock

that would limit troops' presence to only 60 or 90 days (Javits 135) if the situation in Lebanon was proved to be hostility.

His escalation to the conflict by ordering an additional 2000 Marines to ships off the coast of Lebanon left no doubt that American forces were engaged in hostilities. Some congressional leaders such as Senator Robert Byrd of West Virginia, turned to be more assertive and insisted that *section 4a (1)* of the War Powers Resolution became operative with the murder of the two American Marines (Nzelibe 1027). American public was unsatisfied with Reagan's policies in Lebanon. Their stand was expressed in the first national political poll on the deployment which suggested that only 40% of Americans were satisfied with how the President was handling the Lebanese intervention (Nzelibe 1027). Public position reinforced more congressional will to activate the sixty to ninety day clock.

President Reagan's insistence not to consider the situation in Lebanon hostility and his argument that any limitations imposed by Congress would weaken the United States diplomatic position (Wald 1424) led the President and the Congress to work out a compromise. That compromise was reached on September 29, 1983, through congressional passage of the Multinational Force in Lebanon Resolution. The Resolution determined that the requirements of *section 4a (1)* of the War Powers Resolution became operative on August 29, 1983, and it succeeded for its first time to obtain President's signature on legislation invoking the War Powers Resolution. The price for this recognition was a congressional authorization for the U.S. troops to remain in Lebanon for 18 months (Grimmett "War Powers Resolution After Thirty...").

In spite of his signature on the legislation that invoked the War powers Resolution, President Reagan refused to recognize any limitation on his war powers as Commander-in-Chief:

I believe it is, therefore, important for me to state, in signing this resolution, that I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgment that the

President's constitutional authority can be impermissibly infringed by statute... or that section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces... . ("Statement on Signing...")

Less than a month after the signing of the Multinational Force in Lebanon Resolution, a bomber exploded in Beirut on October 23, 1983 and killed 239 Marines (Wald 1426). The explosion constituted a turning point in American policy in Lebanon. The heavy casualties the Marines faced in Lebanon were reported by the media which quickly attacked the President's Middle-East policies and predicted public's frustration with the role of U.S. forces in Lebanon (Nzelibe 1028).

Robert D. McFadden wrote in an article in the *New York Times*, "Americans reacted to the terrorist attack upon United States marines in Beirut yesterday with sorrow, shock, outrage and expressions of growing doubt about the nation's involvement in Lebanon" ("Americans React to Attack..."). *Gallup Poll* held by mid-December of that same year showed that about 52% of the respondents said that they thought it was a mistake for the United States to send the Marines to Lebanon (Nzelibe 1030). Public disapproval of Reagan's policies in the Middle East would for sure have an impact on congressional assessment to the situation in Lebanon.

Influenced by the media and public opinion position, many congressmen began to regret their previous approval to Reagan's military action in Lebanon. Robert Michel, the House Minority Leader stood against Reagan and urged him to pull out the Marines in Lebanon as soon as possible. Senator Charles Mathias of Maryland likewise announced his support to a resolution that would reduce the eighteen-month withdrawal timeframe under the Multinational Force in Lebanon Resolution to six months (Nzelibe 1030).

Democrats in the House led by House Speaker Tomas O'Neill drafted a nonbinding concurrent resolution sharply critical of Administration policy and urging a "prompt and orderly withdrawal" of all United States forces from Lebanon ("Democrat's Plan Urges..." 2). President Reagan

opposed the proposed Democratic resolution in the beginning on the grounds that the resolution would clearly make matters worse for the troops in Lebanon and chose to escalate the military strikes on enemy positions in Lebanon:

I have asked Secretary of Defense Weinberger to present to me a plan for redeployment of the marines from Beirut Airport to their ships offshore. This redeployment will begin shortly and will proceed in stages. U.S. military personnel will remain on the ground in Lebanon for training and equipping the Lebanese Army and protecting the remaining personnel.² (“Statement on the Situation in Lebanon”)

By early February President Reagan decided to change the tactics of his intervention in Lebanon and started drafting plans for the withdrawal of troops. In a letter to the Speaker of the House of Representatives, Thomas P O’Neill, President Reagan wrote:

In accordance with my desire that Congress be kept informed on these matters, and consistent with *Section 4* of the Multinational Force in Lebanon Resolution, I am hereby providing a final report on our participation in the MNF... The U.S. military personnel who made up the *U.S. MNF* contingent were earlier redeployed to U.S. ships offshore. Likewise, the *MNF* personnel of other national contingents have either already departed Lebanon or are in the process of departing. (“Letter to the Speaker...”)

Reagan in that same letter informed Congress with the latest casualties of the United States in that hostile and concluded with thanking it for the vital efforts it spent when adopting the Multinational Force in Lebanon Resolution (“Letter to the Speaker...”). After less than two weeks, President Reagan turned on blaming and attacking Congress to assure that he did not bear the failure in Lebanon alone. He insisted that Congress shared its responsibility with its approval to the Lebanon deployment. Congressmen on the other hand, mainly those in opposition insisted on washing their hands of any responsibility in Lebanon. Many of the Democratic candidates tried to

make the Lebanese deployment a key issue in the election by pouring all the blame on the President (Nzelibe 1032-1033).

The brief study on President's Reagan intervention in Lebanon confirmed that though the situation was a good occasion for evoking the provisions of War Powers Resolution, the President kept hesitant to accept any limitation on his powers as Commander-in-Chief. Even Congress which was supposed to play an effective role in ending the Lebanon hostile by evoking the provisions of the War Powers Resolution seemed reluctant to condemn the military operation in region. When Congress decided to act it blessed Reagan's deployment of troops by granting him an additional eighteen months to fulfil his mission. Congress used the War Powers Resolution to legitimize Reagan's military actions in Lebanon.

Congressional condemnation to Reagan's deployment of troops in Lebanon came only after the frustration of the American public and the media due to the increased number of casualties the Marines were bearing in Lebanon. At that level congressmen decided to reconsider and reassess their previous support to Reagan's policies by urging the immediate withdrawal of American troops, but it was high time. Concerns for re-election were perhaps the main motivation behind congressional resolve to change their minds.

Notwithstanding congressional calls for the immediate withdrawal of troops and its threats to cut its funding, the President carried on his plans as he saw fit without any regard to congressional calls. When President Reagan wrote to the Speaker of the House of Representatives to inform Congress of his decision to end the presence of Marines in Lebanon, he did not mention his obligation to inform or report to Congress under the War Powers Resolution.

The previous study on American involvement in Lebanon reflects the inability of the War Powers Resolution to play any significant role in either asserting congressional war powers or limiting presidential ambition to decide unilaterally. Alternatively, congressmen used the resolution as a means to validate presidential action and to give him more freedom to deploy troops abroad. Presidential ignorance to both Congress and the War Powers Resolution continued

throughout American history, and congressional passivity persisted, too. To mention a few cases, President Reagan sent troops to invade Grenada in 1983 without congressional authorization and launched air strikes against Libya in retaliation for their suspected sponsorship of terrorist activity in 1986. President George Bush sent military forces into Panama in 1989 to capture General Manuel Noriega without congressional authorization in 1989. President Clinton ordered massive air strikes in Kosovo in 1999 as part of a NATO operation without authorization from either Congress or the United Nations Security Council (Yin 971).

The court failed to uphold the constitutionality of the War Powers Resolution. The first suit presented to the court concerning the constitutionality of the War Powers Resolution was *Crockett v. Reagan* (1982). The suit was filed on behalf of 29 members of Congress challenging U.S. military intervention in El Salvador and accusing President Reagan of non-compliance with the reporting requirement of the War Powers Resolution (“*Crockett v. Reagan*”). The federal district court in Washington, D.C., dismissed the claims without deciding the merits of the plaintiffs’ contentions. The court dismissed this count as presenting “unmanageable standards” for fact-finding. When the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court’s decision, plaintiffs turned to file a petition for certiorari to the U.S. Supreme Court, which on its turn denied the suit in June 1984.

In 1990 the Court dismissed the case of *Dellums v. Bush*. The roots of that case dated back to August 1990 when President George W. Bush sent 350,000 troops to the Persian Gulf in response to Iraq invasion of Kuwait to deter further Iraqi aggression without first obtaining congressional authorization. Fearing that the President would wage the war on his own initiation, fifty-four members of Congress sought judicial intervention. The plaintiffs demanded a judicial injunction to prevent the President from beginning such a war without consulting and obtaining an authorization from Congress (Genovese and Spitzer 212).

The Justice Department argued on behalf of the President that the lawsuit should be dismissed because it involved a political question, which would be resolved between the executive

and legislative branches, and that the matter was not ready for judicial action anyway, as far as the President had not taken any offensive military action (Genovese and Spitzer 212). The District Court held that the plaintiff's claims were reasonable, because the President had not yet initiated war-like actions. Since only 54 members of Congress (53 members of the House and one member of the Senate) were involved in the suit, and not a majority, the court held the dispute as not ripe for adjudication at that time. The motion for preliminary injunction was denied ("Dellums v. Bush"). The Court confirmed with this decision its unwillingness to intervene in war powers controversies.

The review of some cases that occurred after the passage of the War Powers Resolution and court's decisions in some cases that tackled war powers controversies affirmed the Resolution failure to create a collaborative judgment between the President and Congress. This downfall made the provisions of the War Powers Resolution a subject to criticism from different scholars and on different grounds. Even ardent advocates of congressional power recognize that *Section 2(c)* of the Resolution too narrowly defines the President's war powers, and many agree it has been regularly violated ("National committee ..." 21). Presidents through U.S. history used force in occasions incompatible with the mentioned instances.

Some scholars such as Louis Fisher criticized the ambiguous poor language used in drafting the Resolution. Fisher argues, "instead of trying to define the precise conditions under which presidents may act, [Congress] relied on procedural safeguards"(qtd. in Simmons 5) such as entailing the President to consult with Congress 'in every possible instance'. This provision to Adler and Fisher, vests the President with discretion to decide whether consultation is "possible" and, more generously, whether it is desirable (3). For a president it may not be possible to report to Congress beforehand for security reasons, or it may be impossible because of the need for an immediate reaction by the United States for effect (Bandy). The ambiguity of this provision gives the President more freedom to deploy troops abroad without congressional consent alleging that necessity of secrecy made it impossible to consult Congress.

Another problem with this section is that the language used in the provision not only permits the President to determine when to consult, but how and with who to do so since the resolution does not identify with whom among 535 congressional members the President must meet (“National Committee...” 23). The meaning of ‘consultation’ is much vaguer than that of ‘every possible instance’. The problem with this provision is that some presidents have tended to treat it as a synonym for notification after the deploying troops (Adler and Fisher 3). The ambiguity of *Section 3* creates a constitutional problem. It means that Congress has delegated its constitutional power to decide for war to the President, and this contradicts with both the constitutional framework and the purpose of “ensuring collective judgment” stated in the second section of the War Powers Resolution.

Other legal commentators of various stripes have dismissed the War Powers Resolution as a toothless piece of legislation. These critics point out to the reporting requisite of *Section 4*. They argue that since the termination requirement of *section 5(b)* can be triggered only with *Section 4a (1)*, it will be easy for any president to evade that termination requirement of *Section 5b*. A president who wants to evade *Section 5b*’s time limits can simply report that a deployment falls under *Sections 4a (2)* or *4a (3)*, which do not have automatic termination prerequisite instead of *Section 4a (1)* (Nzelibe 1116-1117).

Section 5b of the War Powers Resolution allows the Commander-in-Chief to deploy troops on his own authority for sixty-days which can be extended to ninety-days if he certifies to the Congress in writing that the safety of United States Armed Forces requires so. Once troops have been sent Congress will probably support the decision, because citizens tend to rally around the Commander-in-Chief and his interpretation of crisis events. The public stand will affect the legislators who will hesitate to withdraw support from the President, especially when American soldiers have lost their lives in hostilities (Bostdorf 139). This provision virtually forces Congress to support the President.

Arthur Schlesinger observed, “before the passage of the resolution, unilateral presidential wars were a matter of usurpation. Now, at least for the first ninety days, it was a matter of law” (434-435). Schlesinger enforced the concept that the War Powers Resolution did not only strengthen presidential war powers but legalized them too. But this privilege did not fit the Framers’ intention and the constitutional division of war powers which the Resolution attempts to preserve.

The resolution forced Congress to give up some of its constitutional war powers. It makes congressional war powers subordinate to and dependent upon the Commander-in-Chief. This dependency arose because the resolution conceives Congress powerless and unable to act unless the Commander-in-Chief acts first. The Congress cannot practice its constitutional war power of declaring war unless the President consults with it in case of hostilities or imminent threat (Hallett 6). Even *Section 5c* which provides that Congress may compel the president to remove troops by passing a concurrent resolution has been subject to heavy criticism by scholars and commentators who considered it an unconstitutional provision. The unconstitutionality of the provision was reinforced more on 1983 due to Supreme Court’s decision in a non-war power case, *Immigration and Naturalization Service v. Chadha*.⁴

In its decision on that case, the Supreme Court relied on the “Presentment Clauses”, *Art. I, Section 7, clause 2 and 3* which apparently “invalidate every use of the legislative veto” (“*INS v. Chadha*”)) to struck down the long-standing congressional practice of using one-house ‘legislative vetoes’ to invalidate regulations that federal administrative agencies had promulgated. The Supreme Court held both Houses of Congress needed to vote to approve a measure and then, pursuant to the “Presentment Clause” in the Constitution, present the bill to the President for his signature or veto if the measure was to have the force of law (“National Committee” 23). Though the decision affected only some provisions of the resolution while others remained untouched, it undermined the constitutionality of the whole resolution.

The analysis of some instances of the force use and the brief criticism of what is considered the most important and potential provisions of the War Powers Resolution confirmed the resolution's failure to achieve its stated purpose, prevent unilateral presidential wars and involve Congress in the use of force decision. Practice proved that presidents declined to recognize the resolution's constitutionality and continued their unilateral use of force relying on their power as Commander-in-Chief.

The resolution contains many flaws which instead of preserving the Founders' division of war powers and asserting congressional constitutional war powers, alters the provisions of the Constitution. The War Powers Resolution does not check and control the Commander-in-Chief usurpation of power. It legitimizes his actions and gives him a green light to deploy troops for sixty to ninety days without congressional consent. It encourages Congress to give up its responsibility to make a decision on war. The Resolution gives Congress the option of acting by inaction, since it states that if Congress fails to support any use of force within sixty days, the decision then is no. The War Powers Resolution does not assure congressional participation in use of force decisions, but promotes congressional passivity.

Congressional reaction to regain its lost constitutional war powers with its passage of the Resolution of 1973 did little to prevent presidential unilateral wars, or at least to involve Congress in that decision. Presidents who have ruled the United States since 1973 continue using force abroad unilaterally relying on their title as Commander-in-Chief or in compliance to international obligations as did presidents of the era that followed World War II. The Resolution failed to achieve its task and has done nothing to reset the balance of war powers.

The President has the upper hand in issues related to the use of force and military deployment, while the Congress is passive and unable to assert its position or perform its constitutional duties. The previous analysis confirms the congressional unwillingness to limit presidential war powers is affected to a high extent with the public approval of the President's military operations. It becomes apparent that congressional reaction is conditioned by public

disapproval of some military operations that generally cause heavy casualties. Congressmen's interest in public opinion is to gain their trust and to win their votes in the elections.

In sum, the history of the United States which is concerned by the use of force in the period following the Second World War reflects the disrespect of the constitutional distribution to war powers. The studied cases assure that the balance of war power is tipped in favor of the executive, who is helped by congressional passivity and unwillingness to challenge him. This attitude awakens the curiosity of any scholar to search for the reasons behind this shift in the practice of war powers.

Endnotes

¹ Time is held in Eastern Standard Time where it was 5:30, while it was 7.40 Eastern Daylight Time).

² For President Reagan's plan to increase military strikes on enemy positions see, Ronald Reagan, "Statement on the Situation in Lebanon," utexas.edu. 22 December 2008. <<http://www.reagan.utexas.edu/archives/speeches/1984/20784d.htm>>.

³ For the background of the case see, "Congressional Control of Presidential War-Making under the War Powers Act: The Status of a Legislative Veto after Chadha," *University of Pennsylvania Law Review* 132.5 (1982) 1226-1227. JSTOR. 14 January 2009. <<http://www.jstor.org/stable/3311909>>.

Chapter Five

Reasons Behind the Shift in War Powers

When exploring the United States Constitution's important war powers provisions, it is recognized that the drafters in fashioning their government wished to preserve the liberty of their citizens and prevent tyranny and unilateral decisions. To achieve this goal they relied on the principle of separation of powers and countervailing checks and balances between the different branches. As they were aware that wars were among the harshest enemies to human beings, they decided to delegate the powers of waging them to Congress, the closest branch to people.

The previous sample study on wars which were fought during different eras showed that the chosen system by the Founding Fathers seemed to be honored from the founding of the Republic to the Second World War. Till that period, most major uses of force received formal sanctioning by both Congress and the President, while the period which followed the last declaration of war witnessed a remarkable shift in the practice of war powers among the different branches. The shift lies in the principle of congressional primacy which has given way to executive dominance and the intent of joint decision that has been conversed to presidential unilateralism and congressional acquiescence.

The United States has been marching backward in war powers issues for presidents betrayed the Founders' intent. They succeeded to secure through practice the prerogatives of the English Crown that the Framers denied them in the Constitutional Convention, and which the nation had severely disapproved since the writing of the Declaration of Independence. The cases studied in the previous two chapters demonstrated congressional reluctance to preserve its constitutional war powers. They showed a great deal of Congress's passivity that opened the door for presidents who succeeded to strike the balance of war powers in their favor.

This chapter attempts to sum up the reasons of this shift by studying the incentives behind the rise of presidential war powers as well as the causes which led to congressional passivity and

its unwillingness to be involved in war decision-making. The third branch was touched by the shift as well. The Court which is expected to interfere in war powers disputes between the Legislative and the Executive as one of separation of powers cases that disrespect the spirit of the Constitution and its division to federal powers. To validate this conclusion a comparison between previous situations and decisions of the Court and its actual standpoint is necessary. An investigation in the reasons and justifications behind the shift in Court's attitude will be an important aspect to be studied in this chapter, too. The last subsection of the chapter will be devoted to a brief study to the War Powers Consultation Act of 2009 which is suggested to reset the balance of war powers as stated in the Constitution.

The transformation in the practice of war powers during the twentieth century is a result of many factors which contributed to the enhancement of presidential powers and the marginalization of Congress. One of the primary factors which give the President more chance to aggrandize his war powers is the powerful position the United States maintained following World War II. That war left the United States with a large well-equipped, standing military capacity ready to play a major peacekeeping role almost anywhere in the world and with little delay (Rogers 1207).

The substantial increase in the size of the standing military establishment under the direct command of the President is one of the most influential factors that engendered the shift of war powers balance to the advantage of the President. In an article entitled "Congress, the President, and Military Policy", Christopher J. Deering, Professor of Political Science at George Washington University explains how the number of standing army has increased ever since World War II by five hundred times larger than it was in the decade of 1790's while the population is just under sixty times greater. One-tenth of one percent of the population in 1790's was in the active military service of the United States, while about one full percent of the population today is engaged in active military service (141). The increase in the number of standing military disadvantaged Congress and shifted the war-making power and altered the long standing constitutional balance

of power between Congress and the President in support of the executive who is the Commander-in-Chief of this large standing army.

The end of World War II transformed national security into world security and the concept of collective self-defense appeared. The United States became a member in organizations and alliances such as the United Nations and the NATO whose prevailing formula was that the United States agreed to consider any attack on a member nation as threatening its own safety, and its response was to include assistance in defensive measures (Fausold 182). As the United States possesses the strongest army, the President rarely hesitates about deploying troops abroad unilaterally in obedience to the United Nations or NATO's request without congressional consent just as what happened in the Korean War, military intervention in Lebanon and the air strike against Kosovo.

Chief among the factors which gave the President more chance to upgrade his war powers is the Cold War. Evolution in the balance of world power has left the United States as one of the two great super states in a bipolar system which fears the shift of territory from one bloc to another. Cold War presidents used the well-equipped American army to intervene abroad freely in attempting to prevent a loss of territory to communism. Such initiations of force, though clearly authorized by the executive alone, were broadly supported until Vietnam, on the assumption that dissent might undermine American security (Reveley 1250).

The third factor which plays an important role in the extension of presidential war powers is the precedential effects of executive branch action. Presidents generally rely on some powers the executive branch already exercised to support later exercises of power. The use of such powers by previous presidents stands as authority for a current or future President to engage in similar actions (Marshall 510-511). President Truman was accused of establishing a precedent by consulting the United Nations and not Congress to send troops to Korea for future presidents to neglect Congress once again.

The other factors which help the President to gain more powers related to war are the institutional prerogatives he enjoys as the executive branch. The lawyering power the President enjoys makes him the final judge of his own authority. Many of the questions surrounding the scope of presidential powers, particularly war powers never reach the courts because of the justifiability limitations. These cases are left to the Department of Justice and its Office of legal Council to opine them. Thanks to his power of appointment, the President chooses an Attorney General who will support his policies. The Attorney General's decisions are always affected by the threat of removal as well as by the personal loyalty to the President who appoints him (Marshall 511-512). Presidents guarantee that their unilateral war power decision faces no opposing petition.

Another reason for the growth of presidential war powers is his access to information. Unlike the Congress or any other branch, the President is at the center of an incomparable information network and because he is assisted by countless experts and national security advisors, an entire intelligence community, diplomats and ambassadors stationed all over the globe, the President is generally the first to know whenever a conflict erupts abroad (Howell and Pevehouse 9). Presidential prerogative of access to information puts Congress always in a subordinate position to that of the President because it must rely on the executive for that review and must continually negotiate with the executive from a position of reliance.

Presidential power has increased to meet the ever-increasing pace, complexity and hazards of human life (Reveley 1265). Securing and protecting American soil in the twentieth century differs a lot than that mission in the period following the foundation of the United States. During that era, reaching American soil might take weeks if not months, whereas by the twentieth century and with the effect of technology and the new weapons, mainly nuclear weapons, war and hazard became more probable for the nation may be under attack in only a few hours.

The fear of nuclear war and the importance of deterrence have engendered a sense of need to be able to take rapid, decisive executive action (Rogers 1208) to meet the heightened pace of

contemporary events. To deal with the complexity of the times, the government needs people with full knowledge and access to relevant facts in order to fashion appropriate policies. Surviving the recurrent crises requires a leadership which is always ready to respond and which can act flexibly and, if necessary, secretly (Reveley 1265).

These changes necessitate a “quick action and a single authoritative voice necessary to deal with an increasingly complex, interdependent, and technologically linked world of almost instantaneous massive destruction” (qtd. in Kittredge 95). Unlike Congress, the President is a single man who is always in session (Henkin 32), so that he can act quickly, decisively, and secretly. This point reflects Neustadt’s observation that “Technology has modified the Constitution: The President, per force, becomes the only man in the system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time” (qtd in Allison 94). These conditions added more powers to the President who becomes the nation’s ‘Final Arbiter’.

Presidents of the last decades did their best to manipulate these modern changes and threats to aggrandize their war powers. Presidents were aware that American people lived under the fear of the Cold War and Communism, which has been changed to fear of terrorism and nuclear weapons later. Presidents played on this rope to increase their war powers to act freely at the level of using force and deploying troops abroad. They generally convinced the public and Congress that their decision was nothing more than a response to the dangers that threatened the safety and stability of the United States.

On his annual State of the Union address, President George W. Bush spoke about the many reasons why America was prepared to go to war against Saddam Hussein and Iraq. In that speech President Bush related his decision to homeland security:

Before September the 11th, many in the world believed that Saddam Hussein could be contained. But chemical agents, lethal viruses and shadowy terrorist networks are not easily contained. Imagine those 19 hijackers with other

weapons and other plans—this time armed by Saddam Hussein. It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known. We will do everything in our power to make sure that that day never comes. (qtd. in Dadge and Schechter 11)

Thanks to its mention of chemical and biological weapons and links to the September 11 attacks, President Bush's words succeeded in convincing both the public and congressmen about the necessity of the War against Iraq. Bush's words portrayed his war against Saddam Hussein as a requisite to protect American lives.

A further reason which upholds contemporary presidential power is their capacity to influence public attitudes and initiate policies through technological developments. The technology has provided the President with invaluable new means such as the radio and television which enable him to reach the public directly and continually to explain and define the issues and shape the debate in such a way that congressmen find it difficult to criticize him. They cannot get the exposure he receives, or the level of public attention, and must debate on the terms that he has already defined. *Gallup Polls* has shown public opinion generally is inclined to support the President after he directly announces the happening of the crisis (James 265). The media help the President to gain public support to his policies and decisions. Good manipulation of media such as the selection of decisive words as well as appropriate times to appear on TV or talk on radio enables presidents to gain public support and approval of his policies and decisions to use force abroad. Presidential use of the media during war-times or international crisis thus enables them to raise their popularity and cause what John Mueller names the 'Rally Round the Flag'.

Citing earlier works which dealt with the relationship between presidential popularity and international events such as those of V.O. Key, Kenneth Waltz, Richard Neustadt and Nelson P. Mueller introduced the phrase 'Rally Round the Flag' (Lian and Oneal 279). To the political science lexicon, the Rally Round the Flag phenomenon takes place when the nation or its honor is threatened. The public during these times is thought to suspend its usual mode of opinion

formation and form ranks behind the President and the flag. External threat gives rise to the belief that one's patriotic duty needs the appearance of solidarity which, in the public at large, manifests itself as an unexpected jump in approval of presidential job performance (Brody 47). That jump in the approval of presidential job is the effect of the rally round the flag, which in its turn raises his popularity.

The occurrence of the rally round the flag is very useful to presidents to increase their war powers too because the public approve and support presidential decision to use force or deploy troops. Helped by this phenomenon, the President will face no opposition or criticism from Congress. Most members of Congress generally withdraw their criticism and give supportive speeches once they recognize that the public is with the President. What happened during the Iranian Hostages in 1979 embodied this attitude. Public support for President Carter during that crisis led the Republican presidential candidate, John Connally to reverse his vigorous criticism of the President with a strong supportive position by saying "we have only one President. Now is the time to rally behind him and show a solid front to Iran and the world" (qtd. in Brody 72). Showing unity during crisis time is so important for Congressmen.

Media are one of the primary causes of the rally. Besides the preexisting political affiliation, "media priming" seemed to influence the Americans' evaluations of the presidential action in a rally event. People would be more likely to rally if they were exposed to the media (Edwards and Swenson 209). The rally can increase more if the President makes a statement regarding the situation personally. As presidential statements concerning a conflict usually appear on the front page of the *New York Times*, the President can expect to increase the rally by about two percent (Baker and Oneal 682). The increase in presidential popularity is strengthened by public's blessing to presidential decision, and that is enough to give him the motivation and self-confidence to boost his war powers.

What can end the rally in the United States is the increase in the number of American casualties. John Mueller reinforced this idea in his analysis of the public support during the

Korean War. He found that in spite of the enormous role the media can play to reverse public opinion, no other factor can be more effective than the increases in American casualties:

Many have seen Vietnam as a “television war” and argue that the vivid and largely uncensored day-by-day television coverage of the war and its brutalities made a profound impression on public attitudes. The poll data used in this study do not support such a conclusion. They clearly show that whatever impact television had, it was not enough to reduce support for the war below the levels attained by the Korean War, when television was in its infancy, until casualty levels had far surpassed those of the earlier war. (qtd. in Darley, “War” 121)

American presidents have the ability to elevate their war powers and assure public blessing to their decision to use force abroad actually without congressional consent by waging short term wars with the minimum of casualties. The new tools and processes of waging war like information warfare and supremacy in high-tech conventional weapons, or what comes to be known as the Revolution of Military Affairs enables the President to win wars quickly.¹ Rapid and precise air strikes paralyze an opponent’s military and civilian infrastructure which in its turn makes ensuing land operation faster, more predictable and less costly (Kamienski). Presidents such as Bill Clinton, George W. Bush, Sr. and George W. Bush, Jr. waged RMA wars respectively in the Persian Gulf (1991), Kosovo (1999), and Iraq (2003).

The Revolution in Military Affairs is one of the important factors which affect the distribution of constitutional war powers between the President and Congress. Its effect backs the President because it helps him keep public support for his military actions and avoid him any conflict with Congress. This state strengthens the executive branch and gives it more opportunities to neglect and bypass Congress in war decisions.

The process of electing the American President plays a significant role in the rise of presidential power especially in comparison to that of Congress. The democratic process of election gives the President the natural role as the external leader of Congress. The American

people consider the President, and not Congress as the chief guardian of national interest, the most democratic organ of government and the symbol of national unity (Reveley 1298).

Unlike Congress which is made up of “535 congressmen representing competing regional and parochial interests with different philosophies and objectives in mind,” (Tower 233-234) the President along with the Vice President is the only officer of government who is elected by and responsible to the nation as a whole. Americans believe in their President’s ability to fashion a unified foreign policy that reflects the interests of the United States as a whole, and he commits it only in wars necessary to the safety of the nation.

One of the most potential factors which helped and justified the growth of the President’s unilateral war powers is the ambiguity of the Constitution. Professor Edward S. Corwin supports this idea in his renowned book *The President: Office and Powers 1787-1957*, “To those that think that a constitution ought to settle everything beforehand, it should be a nightmare; by the same token, to those that think that constitution makers ought to leave considerable leeway for the future play of political forces, it should be a vision realized” (qtd. in Dodds 2). The document offers no clear definition as to where legislative authority ends and presidential prerogative begins (Tower 232). The Constitution would appear to have vested war powers in both the Executive and Legislative branches. *Article I, Section 8* confers the power to declare war and raise and support the armed forces on Congress, while *Article II, Section 2* makes the President Commander-in-Chief of the armed forces.

The document is notably vague concerning the allocation of authority between the President and Congress over American foreign relations as it grants to each branch a line of powers which, in isolation, could support a claim to final authority (Reveley 1247). Professor Corwin has explained this constitutional arrangement in terms that scholars have embraced as aphoristic “All of which amounts to saying that the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy” (qtd. in Adler). It is the President who won the

struggle in the last decades.

All these factors contributed to aggrandizing the war powers of the President who throughout inheritance, practice, and usurpation succeeded in obtaining what the framers tried to prevent him from. The previous factors cannot stand alone as the only reason to cause the shift in war powers for the executive because the American division of powers is accompanied with the characteristic of checks and balances which urges the other two branches to intervene in case of usurpation or imbalance. The unwillingness of the judicial and legislative branches to exercise their powers as the Founders of the Constitution had planned is an effective factor in the rise of presidential war powers.

The history of the United States witnesses that the attitude of the Supreme Court towards the question of war powers changed dramatically. During the first years of the Republic, the Supreme Court was able to clarify the Founding Fathers' intention regarding the dispute over war powers, and its decisions were reinforcing congressional supremacy and highlighting its authority to block the President in war issues. According to Justice Marshall the whole powers of war vested in Congress by the Constitution of the United States were the acts of that body that could alone be resorted to as guides in this enquiry. Justice Marshall insisted in that case that "Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed" (*Talbot v. Seeman* 5 U. S. 28). Marshall's words reinforced congressional rightful and exclusive power to authorize hostilities whether they were general or partial.

In 1803 Justice Marshall acknowledged in *Madison v. Marbury* (1803) that the Constitution invested the President "with certain important political powers, in the exercise of which he is to use his own discretion... no power to control that discretion... the decision of the executive is conclusive" (*Marbury v. Madison* 5 U.S. 137, 166). The province of the court was the only one to decide on the rights of individuals, not to inquire how the executive,

or executive officers, perform duties in which they had a discretion. Questions, in their political nature, and which were, by the Constitution and laws, submitted to the executive, could never be made in that court (*Marbury v. Madison* 5 U.S. 137, 170).

In 1804 Justice Marshall reaffirmed the authority of Congress to limit the scope of presidential power in times of war. In *Little v. Barreme* he denied the President any power that would contradict or exceed the limits on the use of force expressly put by Congress. Founding Father and Supreme Court Justice William Patterson insisted in *United States v. Smith* (1806) that the President could never lawfully initiate a war but only had the power to respond to attacks upon the United States (Hendrickson 8). Justice Patterson had no doubt to support the idea that only Congress had the power to initiate hostilities abroad with another nation.

Justice George Sutherland's opinion in *U.S. v. Curtiss-Wright Export Corporation et al.* in 1936 constituted a dramatic break with previous court decisions. In that case Justice Sutherland reiterated that the President was not limited by the Constitution in foreign policy making and had sovereign powers in foreign affairs. He described the President as the "sole organ of the federal government in the field of international relations," and had "plenary and exclusive" power as President. Justice Sutherland's decision exhibited a new pattern to the division of war powers. His words indicated that Congress was supposed to have a secondary role at the level of foreign policy, whereas the President as Commander-in-Chief was meant to have a supreme role which would allow him to claim unilateral powers.

In 1952 Justice Jackson undercut all presidential claims of unilateral war making power in comparison with Congress. Bruce Ackerman and Oona Hathaway Sterling Professors of Law and Political Science at Yale, and Bernice Latrobe Smith, Professor of International Law at the Yale Law School, respectively regarded Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer* or what is known as the *Seizure Case* as the classic statement of executive power (11). In that case Jackson declared that "presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress" (343 U.S. 579, 635). Justice Jackson

articulated a three part grouping of the “practical situations in which a president may doubt, or others may challenge, his powers” (343 U.S. 579, 636).

President’s authority to Jackson “is at its maximum,” when he “acts pursuant to an express or implied authorization of Congress” (343 U.S. 579, 636). “[W]hen the President acts in absence of either a congressional grant or denial of authority” Jackson suggested that the president “can only rely upon his own independent powers”. He referred to “a zone of twilight” in which President and Congress “may have concurrent authority” (343 U.S. 579, 637). President’s power to Justice Jackson was “at its lowest ebb” when he “takes measures incompatible with the expressed or implied will of Congress” (343 U.S. 579, 638). Justice Jackson’s formulation denied the President any absolute powers and highlights the principle of shared powers between President and Congress.

The *Seizure* case has been used by many scholars and congressionalists to disclaim presidential supreme role in using force in comparison with congressional role. Yale Law professor Harold Hongju Koh regards the Youngstown as reinforcement to the constitutional vision of shared powers. That vision of shared powers to Professor Koh rests on the simple notion that constitutional checks and balances do not stop at the water’s edge. The ruling in Youngstown reflects a democracy which requires fighting any war through balanced institutional participation led by an energetic executive, but checked by an energetic Congress and overseen by a skeptical judicial branch (2364). Koh’s understanding to Justice Jackson’s opinion enforces the idea that both the Congress and the President must agree on the setting of foreign policy and the use of war powers.

Court’s decisions dating to the earliest years of the country and its first international conflict adhere to a consistent interpretation of the Constitution’s allocation of war-making authority between Congress and the President. Throughout its early decisions except *U.S. v. Curtiss-Wright Export Corporation*, the Court has always ruled that Congress has the power to place limits on the President’s use of military force. In times of war and of grave national emergency, the Court

affirms congressional limitation to presidential authority to use military force are not optional. Judicial decisions in the previous cases are conditioned by congressional interference and willingness to have a say in such issues.

By time the court changed its previous attitude towards resolving war powers controversies. Congressional hesitance to seek judicial intervention to restrain presidential usurpation regarding deployment of troops abroad encouraged the judicial branch to exhibit an attitude of deference to the President. Even during cases submitted by individuals who have been affected by presidential unilateral decision to deploy troops abroad, the court hesitates to say its opinion.

Relying on doctrines including political questions,² ripeness,³ mootness, and standing,⁴ and by refusing to grant a writ of certiorari, the Court has studiously avoided becoming embroiled in war powers disputes (Yoo 182). During the Vietnam War the Supreme Court refused to rule on two major war powers questions brought before it. The Court denied certiorari in *Mora v. McNamara* (1967) in which the petitioners asked the Court to rule on whether American military activities in Vietnam were illegal. In 1970 the Court refused in *Commonwealth of Massachusetts v. Laird* to determine if the President was in violation of the war powers clause because Congress had not declared war in Indochina (Hendrickson 3).

Lower Courts faced with Vietnam War suits dismissed them on the argument that such cases presented political questions. In the Second Circuit of *Orlando v. Laird*, the court held that “the constitutional propriety of the means by which Congress has chosen to ratify and approve protracted military operations in Southeast Asia is a political question” (1044). Court’s decision to dismiss such cases was not only due to the difficulties of solving political question. The District of Columbia Circuit’s decision to abstain such cases was affected with its deference to the President:

Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. (488 F2d 611 *Mitchell v. Laird*)

The Court's refusal to act paved the way for presidential leadership in military and foreign affairs. The petitioners would not be allowed to change the President's foreign policy ambitions simply because Congress had not declared war. By implication, the President was allowed to engage American troops in combat without specific war declarations from Congress, and to some degree, had military powers independent of Congress (Hendrickson 3). In this case both Congress and the Court distributed in the emergence of what Schlesinger called 'the Imperial Presidency'.

Court's opinion concerning war powers issues had been subject to a shift in support of the President. Its shift led many scholars who wished it to intervene in tipping the balance of war power in favor of Congress once again to accuse federal courts of abdicating their role in the constitutional system of checks and balances (Yoo 194). Why did then the courts appear to be reluctant to intervene to chain the rise of presidential war powers and to reset the constitutional distribution of war powers?

Perhaps one of the most potential incentives behind judicial decision to dismiss war powers cases is congressional reluctance to seek its intervention. Justice Powell's decision in *Goldwater v. Carter* (1979) reinforces the idea that "if the Congress chooses not to confront the President, it is not our task to do so" (444U.S. 996,998). In all wars in which the President bypassed Congress or violated the provisions of the War Powers Resolution, the Court received no case in which the Congress as whole stood against the President by seeking judicial intervention. On the contrary, most cases which reached the Court were submitted by an individual member or a minority group of Congress. To Assistant Professor of Law, Jide Nzelibe, this means that the majority of Congress has either explicitly accepted the President's national security agenda or has implicitly acquiesced to the agenda without taking formal legislative action (1060). The Court attaches its refusal to tackle war powers cases to congressional inaction and its unwillingness to trigger court scrutiny.

When members of Congress decide to sue the President, the Court faces difficulties in implementing a successful judicial rule regarding the allocation of war powers. Among the

difficulties and obstacles the Court may face is the question of ripeness. Justice Powell dismissed the case of *Goldawter v. Carter* as not ripe for judicial review believing the “dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority”. The judicial branch “should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse” in order not to “encourage small groups or even individual members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict” (444 U.S. 996, 997). The issue of ripeness proves the Court’s inability to do nothing to check presidential usurpation or defend congressional powers as far as Congress is not participating in the war arena. Congress should have a say first in war decisions by providing the President with some measures and instructions to be able to sue him later if he will disobey or bypass them.

The Court fails to adjudicate foreign affairs and mainly war powers controversies because of the obstacle of political question doctrine. According to Thomas M. Franck, the honorary President of the American Society of International Law, judges rely on the political question doctrine because the Constitution gives the President the primary role in foreign affairs to speak as the single organ of the nation. Courts are in a position to interfere in cases where they may embarrass the President or disrupt the conduct of international relations. Foreign affairs cases to judges involve issues where no legal standards are available. Judges reliance on the political question doctrine is based on their belief that foreign affairs cases require the production of evidence that is too complex, technical, unobtainable, or just plain foreign for an American judge to use.

Risk of non-compliance with judicial decisions is one of the factors that caused Court’s reluctance to adjudicate on war-powers claims. Courts seem to worry about intervening in separation-of-powers issues in foreign affairs, because they feared the popular legitimacy that underlies judicial resolution of domestic constitutional disputes would not extend to foreign-

affairs disputes. In such disputes it is unlikely that the judicial branch will be able to draw on the popular supporting of its legitimacy to secure political-branch compliance with its decisions (Nzelibe 1061). The public have no appetite for increased judicial involvement in foreign affairs disputes.

These reasons were not persuasive to many scholars who accused federal courts of abdicating their role in the constitutional system of checks and balances by dismissing war powers lawsuits. Thomas Franck is one of the outspoken critics of judicial refusal to tackle such a kind of cases. He stands against the justification of the political question doctrine because it violates and contradicts with Chief Justice Marshall's great dictums which maintained, "it is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison* 5 U.S. 137, 178).

Judges' reliance on political question doctrine to avoid war powers cases exempted the President from the normal judicial umpiring process that checks his actions at home. Judges are not applying the political question doctrine faithfully. They apply the doctrine selectively, seemingly by their own whim or political tastes. When they do apply the doctrine, judges are merely indulging their slavish obedience to the President in all things foreign. The jurisprudence has a powerful whiff of hypocrisy: Judges say they will abstain but fail to do so; judges proclaim the separation of powers but almost always decide in favor of the government. Judges are just using the political question doctrine as a cover to their unwillingness to challenge the President.

The Court's reasons and justifications to explain its failure and unwillingness to chain presidential usurpation of war powers show that it is unable to act against the president as far as Congress itself is unwilling to assert its position in war-making decisions. This attitude explains Court's willingness to wash its hand from the responsibility of intervening in war powers disputes by passing its burden to Congress. Congress is the branch which takes for granted the President's check and control by passing resolutions and instruments that enforce its position in decision-making.

By contrast congressional practice of its war powers witnessed an enormous shift in comparison with its performance of its duties in the first centuries of the republic. Congress throughout the twentieth century not only failed to perform its constitutional duty of declaring war, but it became notable with its passivity and unwillingness to constrain presidential unilateral wars. It is necessary to investigate the reasons which led Congress to abdicate its constitutional powers and which caused its passivity. Much emphasis will be put on the incentives behind congressional willingness to remain passive and reluctant to challenge the President and advances its position as a partner in decision making.

One of the principal reasons which hampered congressional involvement in war powers issues is its institutional nature. Unlike the President who is a single man who speaks with a single voice, Congress which is composed of five hundred and thirty-five congressmen and assisted by huge staff as Justice Robert Bork explained “is obviously incapable of swift, decisive, and flexible action in the employment of armed force, the conduct of foreign policy, and the control of intelligence operations” (qtd. in Lauterpacht and Greenwood 702).

As congressmen represent different constituencies, every action taken by Congress will testify the ideological, partisan, regional, and personal divisions within it (Lindsay and Ripley 9). The initial interest of these congressmen is to satisfy their constituents by focusing more on local and constituent concerns, like federalism and individual rights issues while constitutional questions of foreign affairs do not seem to be part of congressional concern (Nzelibe 1058).

The power of the purse which is one of the most effective powers which the Founders of the Constitution provided Congress with, as a means to check presidential war powers seemed to be ineffective. The study of the major wars initiated by presidents unilaterally corroborates that in none of them Congress applied this power. Its inability to defund troops already deployed in the battlefield seemed logic to many scholars such as Tung Yin, Professor of law at Lewis and Clark faculty. Yin regards congressional cut off of its funding for American troops already in the field as a failure to support the armed forces (975-976). Members of Congress who would cut funds for

their troops would be vulnerable to the accusation of undermining troop morale and catering to the enemy (Howell and Pevehouse 7).

James Lindsay, Senior Vice President and Director of Studies, and Maurice R. Greenberg Chair at the Council on Foreign Relations, recognizes that members of Congress often avoid putting themselves in “the politically and morally difficult position of allowing funds to be cut off to troops who may be fighting for their lives ” (qtd. in Howell and Pevehouse). Senator George McGovern, quoting Senator Russell described congressional failure to fund troops involved in Vietnam says, “It involves more the throwing of a rope to a man in the water. We may have caused the question how he got there, but he is there, he is a human being, he is our friend and a member of our family...” (qtd. in Ely 29). Lindsay’s and Russell’s words reinforce congressmen’s failure to check presidential unilateral wars by cutting funds is due to moral feeling of responsibility towards their fellow soldiers in the battlefield.

The way in which American modern presidents fulfilled their military interventions relying on quick military strikes hindered to a far extent congressional ability to use its power of the purse. American history contains numerous examples of short-term conflicts in which presidents fulfilled their military missions in few days, including the two days of air strikes and ground assaults in 1975 against Cambodia following the capture of the *Mayaguez*; the invasion of Panama in 1989 which accomplished the objective of capturing Manuel Noriega in less than a month while the full withdrawal of troops occurred within ninety days as well as the invasion of Grenada in 1983 which was completed within ninety days (Yin 976-977).

Modern international threats such as communism and terrorism are among the driving forces which encouraged Congress to abdicate its war powers to the President and banned it from criticizing his resolve to use force. The previous analysis to the Korean and the Vietnam wars exposed that both the public and congressmen were for presidential plans and decisions to contain the spread of communism through deploying troops in the regions. Public approval to presidential

decisions pushes Congress to rally round the flag and stand by the side of the President in order not to undermine his international prestige as communist or terrorist fighter.

Members of a president's own party are likely to support his military action, while criticism generally comes from members of the opposition party (Howel and Pevehouse 35). Congressional response to presidential decision to deploy troops abroad is supposed to increase if the House and Senate are controlled by the opposition party to that of the President. The previous analysis of the Korean War validates the harshest criticism to Truman's failure to consult Congress before taking his unilateral decision to deploy troops in Korea came from Republican congressmen like Robert Taft and Kenneth Wherry. Democratic members such as Senator Paul Douglas showed not only deference to Truman's decision but his defence, too.

Partisanship cannot always explain congressional support for presidential decision to use force abroad. In the case of the Gulf of Tonkin Resolution the House voted unanimously to support a military response to the alleged attacks by North Vietnam. Opposition to President Lyndon Johnson's war came mainly from Johnson's fellow Democrats and not from Republicans (Fisher, Hendrickson and Weissman). This attitude suggests the existence of more important driving forces behind congressional resort to support or oppose presidential decision to use force abroad than partisanship.

National interest is one of the factors which play a major role in congressional resort to support presidential decision to use force abroad rather than contesting. When President Bush declared his decision to send combat troops to Saudi Arabia to protect it from the Iraqi invasion, Congress showed no opposition. Democratic leader in the Senate George Mitchell told the press: "American interests and our long standing ties with Saudi Arabia make the President's decision to help defend Saudi Arabia the correct one....It is important for the nation to unite behind the president in this time of challenge to the American interests" (qtd. in Bennett and Paletz 255-256).

Congressmen appeared to be more reluctant to oppose the President during foreign crisis. Tim Groeling, Associate Professor of communication studies, and Matthew Baum, Professor of

global communications and public policy, detail in their work “Crossing the Water’s Edge: Elite Rhetoric, Media Coverage, and the Rally Round the Flag Phenomenon” the effect of congressional criticism to presidential decision. “Criticizing the President in a highly profile foreign crisis,” argue Groeling and Baum, “is highly risky” for members of Congress will “have little to gain, and potentially much to lose, from opposing the President in a crisis” (1071).

Blame avoidance is one of the most important motivations for congressional passivity towards presidential military intervention. Congress “wants to be visibly involved but not held responsible if something goes wrong” (19). Appearing unpatriotic is what congressmen fear to be blamed for. They resorted to inaction than action that would be regarded by the public as an intervention in the Commander-in-Chief function and preventing the nation from taking a correct, aggressive course of action (Meernik 379).

Congressional reluctance to share its responsibility in decision making concerning troops deployment corroborates its uncertainty about both the legality and the consequences of these military interventions. American history sustained Congress’s usualness to have no hesitation in approving uses of force by declaring war against nations who really threatened American sovereignty by taking offensive actions against the Americans inside their territory.

As congressional fear of being blamed by the public for hampering the defense of the nation by interfering with the Commander-in-Chief may explain its reluctance to use its powers, it is public opinion that largely determines when Congress will attempt to constrain the president’s control over the military. The previous study on the Korean War underpinned congressional disapproval of presidential action that increasingly intensified because of public disapproval of that war. The passage of the War Powers Resolution, the most notable step taken by Congress to regain its lost war powers came after public frustration over the Vietnam War.

Chief among the reasons that may frustrate the public regarding the use of force abroad and urges Congress to restrain presidential war powers is the increase in casualties. The effect of casualties on public opinion has been exposed by John Mueller who finds that public support

during both the Korean War and the Vietnam War began at similar levels but then dropped by about ten-percentage points every time U.S. casualties increased by a factor of ten (Meernik 383). Dean Acheson and Bruce Russett likewise cite a study which found that when offered ten criteria by which to judge whether U.S. forces should be deployed abroad, the public rated the cost in soldiers' lives as number one (Meernik 383-384).

The long duration of the military conflicts is one of the factors which frustrate the public and thereby trigger congressional response. According to Harvard University Professor Marc Smyrl, "When U.S. involvement . . . continues over a period of months or years, the likelihood of congressional action can increase if public opposition to military actions develops" (qtd. in James Meernik 384). It is observed in this context that:

Congress has implemented restraints or threatened to restrain the president using the War Powers Resolution] or similar legislation when U.S. deployments lead to the long-term and large-scale use of force. Congress has acquiesced to the use of force so long as the administration's action is swift or small scale. Such deployments raise little likelihood of future Vietnam-style conflicts and do not necessitate congressional action. Without exception, however, long-term conflicts were met with either congressional threats or legislative action with the potential to start the war powers clock. (qtd. in Howell and Pevehouse 42)

Congress uses public opinion to decide when it is important to remain passive and when it is time to act and interfere. So why does public opinion affect congressional behavior in war decisions? The obvious answer to this question is that the importance of public opinion to congressmen lies in the importance of their electoral voices. It is well known that the main concern for majority if not all congressmen is to remain in position as much as they can. Their primary political objective is winning constituent trust to be reelected (Mayhem 20). Electoral concerns thus are one of the important motivations that may cause congressional passivity at the level of using force abroad.

Congressional passivity and acquiescence to presidential decisions to deploy troops abroad

has been target of criticism by both the public and many congressmen themselves. To reset the balance of war powers between the legislative and the executive branch as specified by the Founding Father the National Committee on War Powers gave great concern to this issue and decided to legislate an act that would promote collective judgment between the President and Congress. The first effort which attempted to give Congress back its constitutional war powers was embodied in the War Powers Resolution of 1973. Although the resolution challenged presidential unilateral decisions to use force abroad by involving Congress in such issues, the thirty-five years of practice strengthens the inefficiency of the resolution to achieve neither purpose.

One of the noticeable deficiencies of the War Powers Resolution was its weak and vague language used to guarantee congressional involvement in decisions regarding deploying troops abroad. Putting the War Powers Resolution in practice endorses that both congressmen and presidents declined throughout the years to apply the consultation required in *Section 3* of the resolution supporting presidents from both parties preferred to notify and not to consult congressmen before taking any decision related to using force. No President since 1973 has recognized the resolution's constitutionality and the court played no role in reinforcing its provisions.

To remedy the shortcomings of the War Powers Resolution of 1973, the National War Powers Committee decided to repeal the resolution and replace it with a new legislation called the War Powers Consultation Act of 2009. *Section 2* of the new legislation states the primary purpose of the act which does not mean to "define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative branches of government." Rather the act tries "to describe a constructive and practical way in which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed conflict" (*Section 2*).

The act tries to leave no room for ambiguity concerning the situations that are considered significant armed conflict and which are covered by the new statute. *Section 3a* of the War Powers Consultation Act of 2009 defines significant armed conflict as “any conflict expressly authorized by Congress,” or “any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.” To understand well the situations that necessitate congressional involvement, *Section 3b* of the act stipulates that the phrase “significant armed conflict” does not include “the actions taken by the President to repel attacks, or to prevent imminent attacks, on the United States, its territorial possessions, its embassies, its consulates, or its armed forces abroad.” The act would not be triggered in “limited acts of reprisal against terrorists or states that sponsor terrorism” and “humanitarian missions in response to natural disasters,” “investigations or acts to prevent criminal activity abroad,” “covert operations,” “training exercises” and “missions to protect or rescue American citizens or military or diplomatic personnel abroad” are all exempted from the coverage of the new act.

Providing the act with a list of operations that do not initiate the provisions of the statute defines the drafters’ intention to involve Congress only in conflicts where consultation seems essential. As an example on situations which cannot be considered as significant armed conflict and which do not require congressional involvement, the committee points out to President Reagan’s limited attacks against Libya. The two Iraq Wars and the United States campaign in Bosnia in the 1990’s are considered by the drafting committee as significant armed conflicts (National War Powers Commission 36). Unlike the War Powers Resolution of 1973, the proposed act of 2009 clearly lies out with whom in Congress the President must consult. The drafters of the act established the Joint Congressional Consultation Committee as the organ with whom the President should consult personally and *Section 3c* sets forth its membership. *Section 3d* of the act identifies the Chairman and Vice Chairman of the group.

Like the War Powers Resolution of 1973, the Act of 2009 urges consultation between the President and Congress in issues related to using force abroad. *Section 4* of the act describes when

and how the President should or must consult Congress. While *Section 4b* is not obligatory, it encourages the President “to consult regularly the Joint Congressional Consultation Committee regarding significant matters of foreign policy and national security.” *Section 4b*, however, is obligatory. “Before ordering the deployment of United States armed forces into significant armed conflict” it states, “the President shall consult with the Joint Congressional Consultation Committee” (*Section 4b*).

To overcome the ambiguity of ‘consultation’ faced in the War Powers Resolution of 1973, the new act describes that consultation for the purpose of the act requires the President to “provide an opportunity for the timely exchange of views regarding whether to engage in the significant armed conflict, and not merely notify the Joint Congressional Consultation Committee that the significant armed conflict is about to be initiated” (*Section 4b*). The drafters of the War Powers Consultation Act were aware that what may begin as one of the situations mentioned in *Section 3b* may change over time to a significant armed conflict as described in *Section 3a*. *Section 4b* of the new act concludes that the President in this instance “shall similarly initiate consultation with the Joint Congressional Consultation Committee.”

Although the act urges the President to consult the listed members of Congress, “before ordering the deployment of United States armed forces into significant armed conflict” (*Section 4b*) the act permits the President to consult with the Joint Congressional Consultation committee within three calendar days after the beginning of significant armed conflict” (*Section 4c*). This delay is tolerated only if the “need for secrecy or other emergent circumstances precludes consultation” (*Section 4c*).

Section 4d of the act demands from the President before ordering any significant armed attack to “submit a classified report, in writing, to the Joint Congressional Consultation Committee.” In that report, the President is obliged to set forth “the circumstances necessitating the significant armed conflict, the objectives, and the estimated scope and duration of the conflict.” To preserve some discretion and flexibility to the President, *Section 4e* allows him to

submit that report “within three calendar days after the beginning of the significant armed conflict” if the need “for secrecy or other emergent circumstances” precludes prior consultation.

The drafters of the War Powers Consultation Act of 2009 not only wanted to guarantee regular consultation between the President and Congress on national security and foreign policy matters, but they planned to assure face to face meetings between the President and the members of the Joint Congressional Committee. The drafters of the act knew that imposing so many meetings would not lead to meaningful consultation because it would prompt the President to ignore the requirement or send delegates in his stead (National War...38). *Section 4f* of the act states: “For the duration of any significant armed conflict, the President shall consult with the Joint Congressional Consultation Committee at least every two months.”

Section 4g of the act requires the President to submit an annual written “classified” report each “first Monday of April” to the Joint Congressional Committee describing “all significant armed conflicts in which the United States has been engaged during the previous year” as well as “all other operations, as described in *Section 3b* of this act.” To go beyond the statutory schemes providing for congressional oversight of covert operations, the statute excludes covert operations from such reports (National War... 38). The drafters of the act wanted to overcome the problem of meaningful consultation between Congress and the President because of congressional subordination to the President who enjoys more access to information. *Section 4h* establishes a permanent, bipartisan staff with access to all relevant intelligence and national-security information.

Section 5 of the act which its drafters called the “heart of the War Powers Consultation Act of 2009” (National War Powers 39) addresses the situation when “Congress has not enacted a formal declaration of war or otherwise expressly authorized the commitment of United States armed forces in a significant armed conflict.” In that situation, within 30 calendar days after the commitment of United States armed forces to the significant armed conflict, *Section 5a* of the act calls the Chairman and Vice Chairman of the Joint Congressional Consultation Committee to

introduce an identical concurrent resolution in the Senate and House of Representatives calling for approval of the significant armed conflict. *Section 5b* of the resolution provides for expedited hearing and vote on the resolution within five calendar days.

If the concurrent resolution approving the conflict is defeated, *Section 5c* of the act then allows any Senator or Representative to file a joint resolution of disapproval of the significant armed conflict. The same section reads that “the joint resolution shall be highly privileged, shall become the pending business of both Houses, shall be voted on within five calendar days thereafter, and shall not be susceptible to intervening motions, except that each house may adjourn from day to day.” *Section 5c* states that the joint resolution will not have the force of law only if signed by the President or if approved by Congress over his veto.

The requisites of *Section 5* mirror the framers’ objective to give Congress a say in decision making regarding using force abroad. The drafters of the War Powers Consultation Act 2009 aim to reinforce Congress’s role through forcing it to vote up or down on the President’s decision to commit military forces in a significant armed conflict. Forcing Congress to vote aims to overcome the shortcoming of the War Powers Resolution of 1973 which tied President’s hands through entailing him to remove troops whenever Congress failed to act (National War ... 39). Presence or removal of American troops under the new act will be conditioned with congressional approval or disapproval.

Section 5c of the act seeks to involve Congress more in decisions regarding using force abroad. It provides Congress with legitimate means to use in case of inability to override presidential veto to the joint resolution. *Section 5c* recognizes that each house may specify, through its internal rules, the effect of the passage of any joint resolution of disapproval. The inherent internal rulemaking powers of both Houses allow them to make rules providing that any new bill appropriating new funds for the armed conflict would be out of order (National War... 40). The remaining provisions include *Section 5d*, *Section 6* and *Section 7*. *Section 5d* guarantees congressmen’s right to “introduce a measure calling for the approval, disapproval, expansion,

narrowing, or ending of a significant armed conflict,” while *Section 6* strengthens the ineffectiveness of any treaty obligation of the United States on any provision of the act. Interpreting *Section 7*, if the court holds any part of the act invalid, “the remainder of the act shall not be affected thereby.”

These are the provisions of the War Powers Consultation Act of 2009 which work to reset the balance of war powers between the President and Congress. The act as its provisions indicate seeks to preserve the spirit of the Constitution and the intention of the Founding Fathers of shared powers and collective judgment through facilitating the participation of both political branches of government in any decision to commit forces in any significant operation. Although scholars accuse the President of being alone to tip the balance of war powers into advantage, this research reached a different conclusion. The previous study of some of the major reasons which led to the shift in the practice of war powers from Congress to the President asserts that the imbalance is not the responsibility of one but the liability of three branches.

The previous analysis exposed the leading position held by the United States since the end of World War II and its membership in international organizations that contributed with a great deal to aggrandizing presidential war powers. This study related presidential monopoly of war powers to the different institutional prerogatives American presidents enjoy. If the ambiguous language of the Constitution practically fails to trace the exact limits of each branch’s power it works to support and enhance presidential war powers.

Congress shares a great deal of responsibility in disrespecting the provisions of the Constitution. It does so by its unwillingness to practice its constitutional war powers by either declaring war officially or by forcing the President to withdraw through cutting funds. It is perhaps the much headed nature of Congress and the effect of public opinion which used to rally around the flag and supported the President during international crisis that led to alienating Congress in war decisions. Congressmen generally tend not to take any decision against actions

taken by the President and blessed by the public for fear of appearing unpatriotic, a position that will menace their electoral concerns.

The Court plays a significant role in tipping the balance of war powers for the President through its failure to interfere in war powers disputes. The Court relies on to justify its reluctance to check and limit presidential usurpation to war powers, it remains an important key in preserving the constitutional division of war powers because it is supposed to be a neutral branch in such issues. The passivity of Congress and the reluctance of the Court to check the President combined with the institutional prerogatives the President enjoys to cause a remarkable shift at the level of practicing war powers. That shift is in the good turn of the President and it produces what Arthur Schlesinger called the 'Imperial Presidency.' In a second attempt to recover its lost war powers and to preserve the spirit of the Constitution, Congress drafted the War Powers Consultation Act of 2009.

The act is seen by its drafters as an effective step in setting back the balance of war powers as planned by the Founders of the Constitution. Its provisions aim to guarantee the collective judgment between the President and Congress. The passage of the act is not only important for preserving the constitutional balance of war powers between President and Congress, but it is more important for protecting both the American people and the whole world from adventurous presidents waging unilateral wars. The War Powers Consultation Act of 2009 will force a reluctant Congress to debate and participate in war decisions, and this will minimize American hazardous and risky involvement in wars.

Endnotes

¹ For further reading about the MRA see Sharjeel Rizwan, “Revolution in Military Affairs,” *defence journal*. 24 January 2010. <<http://www.defencejournal.com/2000/sept/military.htm>>.

² For political questions see, *Baker v. Carr* which listing six factors courts may use to determine if a case presents a non-justiciable political question available on: <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=369&invol=186>>.

³ Mootness, The mootness doctrine precludes a court from rendering an advisory opinion in a case where there is no live controversy. “Mootness doctrine and Exceptions- Case Law Mootness,” *Houston-opinions.com*. 10 January 2011. <<http://www.houston-opinions.com/law-moot-mootness-doctrine.html>>.

⁴ Standing is the legal right to initiate a lawsuit. To do so, a person must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action. For more details see, “Standing,” *lectlaw.com*. 22 October 2010. <<http://www.lectlaw.com/def2/s064.htm>>.

Conclusion

By adopting an historical analysis of one of the most complex subjects in American politics, the research work has studied the interplay between the American President and Congress over war powers responsibilities. The explored issue which still raises intellectual curiosity reflects important insights which have been gained on the extent of presidential and congressional respect and deference to national laws embodied in the Constitution. After having studied the background of drafting the United States Constitution and reviewing the important theories and experiences that affected the drafters, there is a manifest confirmation that the founders of the Constitution did not intend to grant the President any superior or absolute war powers. The American sufferings under the rule of the British king inspired the drafters of the Constitution not to give the President absolute war powers. The American negative experience with the *Articles of Confederation* compelled the drafters of the Constitution to opt for an executive. But when it came to decisions related to using force, the Founders preferred to grant such power to Congress which was considered the closest branch to people.

Statements by prominent figures such as James Wilson, Alexander Hamilton, Edmund Randolph, George Mason and John Jay are significant responses to any attempt to establish an absolute president. It has been central to find out through this work the aim behind giving the President the title of Commander-in-Chief which Presidentialists rely on to justify presidential unilateral decisions to use force abroad. The reached result allows concluding that the main reason behind designating the President with this title is to separate the powers of the purse from that of the sword and guarantee the unity of command under the leadership of a civilian.

Investigation in the historical usage of the title shows that the latter gives the President no supreme war powers. The title instead gives the President just the authority to respond to sudden attacks and appoints him as the highest ranking officer in the army. Resorting to war should pass through a collective judgment between the President and Congress. Through the Founders'

avoidance of giving the President the upper hand in decisions related to using force, the President is deliberately and convincingly denied such power.

Scrutiny in the interplay between the President and Congress throughout the different periods of crisis from 1793 to 1945 demonstrates presidential deference to Congress. The findings of this analysis prove presidential recognition to congressional role as a partner in decisions related to using force. Analysis of the first case that triggered the war powers debate, the Washington and the Neutrality issue case, enforces presidential deference to Congress and unwillingness to act unilaterally even in decisions which are related to neutrality.

Supreme Court's opinion concerning the scope of congressional and presidential war powers throughout this era reinforce congressional constitutional right and duty to share in decisions related to using force. In *Bas v. Tingy* and *Little v. Barrem* the Court respectively highlight congressional constitutional duty to authorize the President to wage either a general or limited war and objects the President to take any war measure relying on his title as Commander-in-Chief.

The study to the Barbary War upon which Presidentialists rely to justify presidential usurpation of war powers comes out with a different conclusion. President Jefferson's first Annual Message to Congress denied the President any power to hold rival ship absent congressional authorization. For his statement, President Jefferson was harshly criticized and was accused of narrowing presidential war powers by not exercising his lawful defensive war powers. The results obtained from the cases that occurred from the first years of the Republic to 1945 confirm both presidential and congressional respect and deference to the Constitution and denied the President any superior war powers relying on his title as Commander-in-Chief.

Analysis of two of the most controversial wars in American history, namely the Korean and the Vietnam wars supports the central hypothesis of this dissertation. The Founder's war powers allocation had no longer been respected and the practice of these powers shifted dramatically in favor of presidents who assigned themselves the right to deploy troops abroad

absent congressional blessing. In their efforts to respond to the Soviet threats, American presidents claimed more war powers relying on their title as Commander-in-Chief. The United States membership in international organizations such as the Security Council and the NATO had a significant effect on marginalizing Congress. The study found out that presidents substituted congressional consent with international obligations to justify their use of force.

Congress on its part showed a great deal of passivity and acquiescence to presidential usurpation of war powers. Its passivity was embodied in its unwillingness to challenge presidential excessive war powers and its failure to impose itself as a partner in decisions related to deploying troops abroad by using its power of the purse. Congress, however, continued to sponsor presidential wars which cost billions of dollars without any objection. Investigation in congressional behavior during crisis times concluded that Congress was following the “wait and see” strategy. Uncertainty about the results of the wars led Congress to take no legal or political responsibility when it came to the initial deployment of troops. Fear of appearing unpatriotic as well as feeling of a duty to fund American ‘boys’ who had been dispatched far away rather than its support to presidential policy was in many cases the reason behind congressional passivity and assent to presidential unilateral wars. Public opposition to using force abroad and increase in American casualties are generally the main factors that could lead congressmen to regret their previous passivity and inability to challenge presidential usurpation of war powers.

In an attempt to regain its lost constitutional war powers and to fulfil the founders’ intention of collective judgment, Congress passed in 1973 the War Powers Resolution. The background of drafting the act revealed that it aimed to check presidential war powers and to involve Congress back in using force decisions. Rather than checking presidential use of force, the act legitimized the President’s decision to deploy troops for sixty to ninety days. Presidential in compliance with the resolution’s provisions especially when it came to “consultation” with Congress was highly demonstrated throughout this work. The findings obtained from some major uses of force that occurred after the passage of the resolution proved that no President practically consulted

Congress before troops' deployment; what happened was nothing more than a notification. This means that the War Powers Resolution failed to achieve its purported aims. The act neither limited presidential war powers nor involved Congress in using force decisions. It instead legitimized presidential unilateral wars and encouraged congressional passivity, since it gave it a chance to act by inaction.

After confirming the betrayal of the Founder's principle embodied in the war powers division and proving the shift in the practice of these powers in favor of the President, it was central for this research to investigate the major reasons behind such reallocation. The results of this work show that the powerful position the United States inherited after World War II and the increase in the number of the standing army enhanced presidential war powers. The United States membership in international organizations played a significant role in increasing presidential war powers as presidents rarely hesitate about using the strong army under their command to participate in international missions. Modern threats such as communism, terrorism and weapons of mass destruction gave the President a solid ground to unilaterally use force abroad.

The institutional prerogatives presidents enjoy and their capacity to influence public opinion through media played a significant role in upholding presidential war powers. The 'Rally Round the Flag' is considered as an important factor that enhances presidential war powers because it assures public support for presidential decisions to use force. Studying some major judicial decisions related to war powers controversy unveiled that even judicial stance had been subject to shift. The obtained results from such analysis established the certainty that courts became more reluctant to interfere in war powers cases relying on political question doctrine, ripeness, and standing. Court's unwillingness to opine war powers cases meant that even this neutral branch had given its constitutional duty to check the other two branches, and mainly to chain presidential usurpation of powers.

Congressmen's unwillingness to sue presidents for usurping power encouraged presidents to exercise more powers. Research proved that Congress asserted its position vis-à-vis the

President on condition that it would be affected by either media's negative depiction of the crisis or after public dissatisfaction with American decisions to deploy its troops abroad. Fear of appearing unpatriotic and reluctance to give the President the necessary powers to fit his status as leader of the most powerful country explains to a far extent congressional disinclination to challenge the President or hamper his war decisions.

The present work substantiates that the imbalance in the practice of war powers is not the responsibility of the President alone as scholars claim. The imbalance, however, is a shared responsibility between the three branches including the legislative and the judicial due to their desire to empower the executive to protect American interests and enlarge U.S. hegemony. The study analyzed the inefficiency of the War Powers Resolution of 1973 and took into account the War Powers Consultation Act which was certainly issued to remedy that serious weakness. As a result, it suggests the latter as a legislation which may reset the balance of war powers.

Efforts were made all along this dissertation to modestly add contribution to war powers literature by reaching a new conclusion through analyzing the new act embodied in War Powers Consultation Act of 2009. The present research work is ultimately supposed to constitute an extra pole for other studies in the same field.

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