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Anthony E. Bundy
Baruch College

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THE CONSTITUTIONAL WAR POWERS OF THE PRESIDENT A STUDY OF THE EVOLUTION OF THE EXECUTIVE BRANCH'S AUTHORITY TO INITIATE HOSTILITIES

**by
Anthony E. Bundy ©**

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INTRODUCTION

Anyone with even a minute knowledge of the Constitution the United States understands that the power to declare war belongs to Congress. The Constitution, however does not stop there. It further states that Congress is responsible for "raising and supporting Armies, providing and maintaining the navy, as well as having the power to all forth the militia in order to suppress insurrections and repel invasions." This appears to be a far-reaching and exclusive power that is invested in Congress. The language is definitive concerning Congress' exclusive power to declare war, and quite an amount of space is spent describing the other powers of Congress over the military.

Further examination of the Constitution, however, discloses that "The President shall be 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..." The explanation of the President's military power, or power to make war, stops there. However, between 1945 and 1975, there were 215 "limited wars" and conflicts involving American armed forces that were results of presidential actions alone. These actions seem to be contrary to the language of the Constitution.

Even in the youthful years of the nation, Presidents used their power as commander in chief to justify the use of force without congressional approval. For example, Thomas Jefferson took such action when he used Naval forces to subdue the threat of the Barbary Pirates' raiding American vessels of trade in the Mediterranean.

The language of the Constitution seems clear on where the power to engage in military conflicts resides. This being the case, how does the President legally, constitutionally, engage the nation's troops in battle without the approval of Congress?

Our discussion of this question will begin with a basic introduction of how constitutionality is determined. We will then apply these concepts to the war powers provisions of the Constitution and examine several instances where the President has initiated conflict using the armed forces. What will be discovered is that Congress has allowed the President to take military actions as he sees fit. Congress has abandoned from its duties to declare war and has surrendered them to the President.

CHAPTER I **Constitutional Interpretation**

Before we can make a judgment as to whether the President's unilateral war-making power is constitutional, we must first understand two things. The first is how do we define "war", or hostilities, which will be used interchangeably in this analysis. For the purposes of this paper, war will be defined as occurring when "one of at least two parties capable of waging it opts for a military solution to an ongoing conflict between them." or "where the military option has been introduced." ⁽¹⁾

The second concept that must be understood is how the concept of constitutionality is derived. The Supreme Court established itself as the final authority on the constitutionality of laws and actions of government, including actions of the President, in the celebrated case of Marbury v. Madison (1803). It is in this opinion that Chief Justice John Marshall stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

In other words, it is the responsibility of the Supreme Court to decide what a law means to determine whether it is in harmony with the Constitution.

Since this first instance of judicial review, there have been three primary methods for construing the Constitution. The Constitution may be construed by its text, by the original intent of the Framers, or by history and precedent. Each of these methods may be applied to the President's constitutional war-making powers. However, before we apply them to the Constitution, let us first examine how they work.

Construing the law by reading the text is probably the most straight-forward approach to understanding the Constitution. Interpretation by text involves finding the exact meaning of the language used and applying those definitions to the law. Supreme Court Justices have used this method in many cases. In fact, Hugo Black was a staunch believer in interpreting the Constitution strictly by the text that was utilized by the authors. Black believed, as he disclosed in *A Constitutional Faith*, that it was not the Court's job to decide a case or interpret a law based upon the Justice's personal "views of fairness, reasonableness, or justice." He felt that if Justices interpreted the Constitution according to their personal beliefs, the Court would be in danger of "rewriting the constitution." ⁽²⁾ The Supreme Court must interpret the Constitution simply by the words that it uses. Law and policy-making should be left to the other branches. Interpretation by the text is a valuable tool. We will find, however, that applying only the words of the Constitution in this particular case will not prove to be definitive in our search for the President's legal war powers.

The second method that we will consider when examining the Constitution and the President is interpretation through original intent. In theory, a law or Constitution is meant to control the future. The Framers saw a particular evil in affording the President too much power. The theory and purpose behind interpretation by original intent was best explained by James Madison, who said that if "the sense in which the Constitution was accepted and ratified by the Nation ... be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers." ⁽³⁾ This method is an important tool, as the President's vast powers as commander-in-chief may be well beyond the intention of the Framers. This concept could make the President's initiation of hostilities without prior approval of Congress, unconstitutional.

The final method of interpreting the Constitution is that of history and precedent. Supporters of this method believe the wording of the Constitution are often deliberately vague or ambiguous to allow for it to adapt to changes in attitudes, technology, and the acquisition of new knowledge. This does not mean that there should be none of the continuity that Madison felt was so important. In fact, deciding the constitutionality of a case by this method requires looking at past, similar cases and deciding them in "similar manner. This system allows for consistency as well as change. This allowance for change is important use, according to Holmes:

... the law is always approaching and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.(4)

So in this method, we look to historical rulings and precedents and apply them to the present. However, if these precedents are not feasible in our present society, they may be overthrown. Consider Edward H. Levi's statement: "The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And is true even where legislation or a constitution is involved. "(5)

Certainly this is not the first inquiry into the President's exceptional power as commander-in-chief. It is interesting that the Supreme Court has not laid this question to rest, especially after such instances of public disapproval of limited wars as the Vietnam conflict. One explanation for the Court's lack of involvement in this particular controversy may be found in the doctrine of political questions. This doctrine of the Court is confusing at best, but is a rather useful tool in cases involving separation of powers. This doctrine was developed by the Court in the 1849 *Luther v. Borden* case, involving a revolt against the elected government of Rhode Island and a military search and arrest of an individual by that government. The Supreme Court in this case was asked to decide which of the two contenders was the legitimate government of Rhode Island. Chief Justice Taney argued in this case that the Constitution "has treated the subject [of interference in the domestic concerns of a state] as political in nature, and placed the power in the hands of [the general government]." He then asked, "After the President has acted and called out the militia [pursuant to authority granted by Act of Congress], is a Circuit Court of the United States authorized to inquire whether his decision was right?" In conjunction with this thought, Taney, then considered whether it would be up to the Court to remedy the situation, concluding that it was a task clearly beyond the ability of the court system. In short, the Supreme Court has decided that political questions are not suitable for judicial interpretation because deciding them would undermine the democratic political process created by the Framers.

Determining what constitutes a political question, however, is not always an easy task. In general, courts are bound to accept the use of power by any branch of government so long as it acts within its constitutional authority; courts may not limit the power of a branch of government if there are no such prescribed limits set by the Constitution; courts may not decide a case if there is no equitable way to remedy it; and finally, there may be provisions within the Constitution that are self-monitoring. The Court has refused cases on the President's war-making powers for these reasons.

However, the reason that most clearly fits is that of the Constitution being self-monitoring in terms of war powers between Congress and the President. For instance, the President may commit troops to battle, but Congress must choose to provide money for the war effort, a power clearly delegated to Congress. Another principle that is relevant is that the solution to such a question may be difficult for the Court, since it lacks the facility for acquiring accurate war information, preventing them from making an

equitable decision. Even though the Court has determined that presidential war-making is a political question it will not decide, the question remains. Such a determination exemplifies the Court's lack of power to remedy the problem.

One final aspect we should consider is the role the Supreme Court should play in this kind of dispute. This is a debate that is not easily answered. However, there are two fundamental viewpoints in use today. Those who believe in judicial activism argue that the Court should decide on the constitutionality of all laws, or in this case, actions of the branches of government, as they see it, with no concern for their anti-majoritarian base. Eugene V. Rostow, who served as the Dean of the Yale University School of Law, believed that judicial activism was necessary for the survival of the separation of powers by the independent mediation of the Supreme Court.⁽⁶⁾ On the other hand, believers in judicial self-restraint feel that the Court should be involved actively in review only if there has been a "clear mistake" made by the lawmakers. In fact, James Bradley Thayer, a professor of law at Harvard at the turn of the century, stated that "when [a court] holds an Act constitutional, it is merely this, not unconstitutional beyond a reasonable doubt."⁽⁷⁾ In other words, if there has not been a clear mistake made, then the benefit of the doubt should go to those who made the law. At the same time, restraintists would argue that making the Court decide the President's power through judicial review would relieve the voting public from its duties of responsible voting. However, no matter which role one supports for the Court, both restraintists and activists believe, in the end, that if the Court's action or inaction are not to the satisfaction of the public, the amendment process is available.

Although there is no definitive method for deciding what role the Court should play, there has been a pattern that is relevant to this situation. The Court in the past has occasionally taken action when an individual's civil rights are at stake. Are an individual's rights violated when he is called to serve in an undeclared war, especially if that person has been drafted? On the other hand, the Court has generally been reluctant to reverse the President when foreign affairs are involved. This trait is especially relevant to war. These two characteristics are important to keep in mind as we continue our analysis.

In our analysis of the President's war-making power, we will examine the Constitution using each of the above methods. We will compare both sides of the argument: does he have the constitutional grounds to commit troops to battle without Congress' approval? Or has he usurped his power and over-stepped his bounds?

CHAPTER II

Interpreting War Powers in the Constitution

Now that we have obtained a general understanding of the constitutionality of a law or action is determined, we should apply each method to the case at hand. We will briefly examine the text of the Constitution, where the root of the problem begins. The Constitution says very little about the war-making powers of the President. In fact, it does

not mention that the President even has a war-making power; that power is delegated to Congress. The Constitution simply says that the President is to be the commander-in-chief of the armed forces of the United States. Congress, on the other hand, has the responsibility to raise and support the Army and Navy and to regulate the rules of the forces and its engagements. Nowhere does the Constitution stipulate that the President can initiate hostilities. Yet on hundreds of occasions he has. To understand where the President might derive this power, one should turn to the original intent of the Framers.

Discerning the intent of the Framers' is not a task easily undertaken or completed. This can be attributed to the fact that there are only very limited records of the events that occurred during the Federal Convention. These records, sketchy at best and sometimes unreliable, are generally limited to official actions, such as the votes that were taken during the convention and not the debates that took place. Another source of information that may be used is notes that were taken during the Convention by some of those in attendance. James Madison's Notes in particular come to mind. Another possible source of information comes from the Federalist Papers. Caution should be used, however, when using these Papers, as they were written by Hamilton, Jay, and Madison, mainly as propaganda to encourage the ratification of the Constitution. Even though this was their intended purpose, some useful insights may still be gained from them. Other sources of information include letters and other documents from the Founding Fathers, as well as information gained from the ratifying conventions in each of the several states.

Often, one of the most quoted and useful insights into the original intent of the Framers concerning the war power of the President comes from the Notes of Madison. These notes concern a debate about the proper wording that should be used, when referring to Congress' power to "declare" or to "make" war. The debate occurred between Charles Pinckney and Pierce Butler. The fundamental issue involved was who should have the power to "make war". Pinckney believed that Congress would be too slow to react to sudden attacks, and felt that the power to make war should be vested in the Senate. This was not just for its relative speed, but also so that the larger states could not dominate the determination for war. Butler, on the other hand, favored "...vesting this [war making] power in the President who will have all the requisite qualities, and will not make war but when the Nation will support it." (8)

At this particular moment in the debate, Elbridge Gerry and Madison offered a compromise, changing the wording from 'Congress' power to "make war" to its power to "declare war" and leaving the power to repel sudden attacks to the President. Further insight is given to this change of wording by Rufus King's explanation of the change in wording. He feared that the term to "make war" might be considered to mean "conduct" war, which was to be a function of the Executive.(9) In this statement he acknowledged the distinction between the power to start a war and to conduct it. Additional evidence from this debate suggests that the power to commence war was generally accepted by most delegates to be strictly within the power of Congress, as the eight to one acceptance of the new text affirms. The convention clarified that once the decision had been made to declare war, the power to conduct it was to belong to the President. The Framers did not

completely remove all war making powers from the President, but they did restrict his use of this power to instances of defense.

This debate is one of the few times that the war powers were ever discussed at the convention. Further, the distinction between what constituted "offensive" and "defensive" actions was never discussed. Where was the line to be drawn? We look to Hamilton for an explanation. Hamilton, commenting on Adams' powers as commander-in-chief to conduct hostilities with France during the naval wars,

held that the Constitution narrowly constrained the President's actions, Adams might authorize the repelling of sudden attacks, but he could not make reprisals without Congress' approval. In other words, according to Hamilton, the President could only conduct hostilities as commander-in-chief in order to stave off the initial and pertinent threat; any further actions, once the threat was subdued, required Congressional approval.⁽¹⁰⁾

With this information, it seems fairly clear what the Framers had intended for the President's role to be concerning war. He was responsible for strategic decisions, control of the military that Congress provided, and defending the nation and its troops in case of a sudden attack. He would be authorized to repel this attack in defense, but once the immediate threat of danger subsided, he would need approval from Congress for any further military action.

This interpretation of the original understanding seems to be consistent with the understanding of those involved in the process of adopting the constitution. In the New York ratification convention it was understood that "Congress has the power of making war and peace they involve us in war at their pleasure,"⁽¹¹⁾ it is not the duty of the President to initiate hostilities.

This same attitude towards the President's war making power can also be seen in the Federalist Papers. Alexander Hamilton stated in #69

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but substance much inferior to it. It 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; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.⁽¹²⁾

Hamilton also adds to this that the President will only have this authority when the armed forces are actually called into service by Congress.

With this information it seems fairly clear what the Framers' intent was concerning the President as commander-in-chief. It is intriguing, however, that one must look to several

different sources for this information. Thus, the question can fairly be asked, did the Framers expect us to use their intent and apply it perpetually? Let us investigate.

Probably the easiest argument to use against the theory that the Framers expected us to apply their intent to the interpretation of the Constitution is that if this is what they wanted, they very simply could have said so. However, they did not, and maybe, therefore, we should not. This is simply an argument, and could have just been an oversight by the Framers. The Framers, though, were very astute and practical men. It is highly unlikely that they would have simply left this out, if it had been their intent. There are other clues that may lead us to believe that they did not expect us always to use their intent.

An examination of the language used in the Constitution provides one of those clues. There are certain areas of the Constitution, where the language used allows no room for interpretation. For instance, it clearly states concerning the House of Representatives that "No person shall be a Representative who shall not have attained to the Age of twenty-five Years." (13) There can be very little doubt about what the Framers intentions were here, and it is as obvious that they expected their intent on this issue to be followed. The explicitness does not stop at those requirements but further extends to duties of the Senate. For example, Congress is "To Coin Money, regulate the value thereof, and of foreign Coin, and fix the Standard of Weights and Measures". (14) These types of phrases are strewn throughout the Constitution and can hardly be disputed about their meaning. It is clear that the Framers meant them to be that way.

On the other hand, there are phrases that can be questioned about their meaning. The "commander-in-chief" and "declare war" clauses are but a few of them. Others include the commerce clause, and the executive power. In fact, "some of the Framers at the convention did not even understand the words themselves". For example "Mr. King asked what was the precise meaning of "direct taxation," and "No one answered," according to Madison. For each questionable phrase, there could have been fifty-five different intentions and opinions.(15) If this were true, how could we decide which intent was to prevail in each case? The task would be impossible to complete.

Perhaps one of the most knowledgeable men on constitutions was Thomas Jefferson. Although he was not in attendance for the convention, surely his presence was felt. In fact, much of the knowledge obtained by Madison, often considered the Father of the Constitution, was facilitated by Jefferson's sending of philosophical books from Europe. Jefferson himself spent his free time writing constitutions for the state of Virginia as a relaxation technique. To Jefferson, "fundamental law was not so sacred that it could not be changed. Quite the contrary. But until it was it stood as an expansion of the public will and could not be challenged by a public official."(16) Jefferson believed that there should be a constitutional convention every twenty years. Times would change and so would the need for new laws and interpretations. The best insight to Jefferson's strong beliefs about this need may be found in his words.

No society can make a perpetual constitution, or even perpetual law. The earth always belongs to the living generation. The fresh start that he and his contemporaries had been given in the American experience must somehow be passed on to each succeeding generation. Each generation must be allowed to begin anew. Each must redefine its goals and ideals; all must recommit themselves to each other. It is essential to a democratic community that each generation be able to depute representatives to a convention, and to make the Constitution what they think will be best for them.(17)

It is plausible that Framers enveloped Jefferson's ideas into the Constitution. By not giving us detailed information on their intentions and by not giving us explicit explanations for both the President's war-making power and Congress' war-declaring power, they intended for us to decide for ourselves, or perhaps they were not sure themselves. Hamilton, for one, had felt both ways from time to time about whether the President could bring us into war. The debate has never quite ended, and it is a struggle that continues until the present.

CHAPTER III

Thomas Jefferson and the Barbary Pirates

Understanding the theories of the Founding Fathers is one attempt to reveal their intentions on the war-making power of the President. Another possibly even more revealing method is to examine the actions of the Framers, or at least the actions of their contemporaries. Jefferson used his powers as commander-in-chief to deploy forces in a precarious position and eventually into war without first consulting Congress. This episode, of course, occurred with the Barbary Pirates, a situation which we will examine more closely now.

The Barbary Pirates were from the northern part of Africa in the Mediterranean. For centuries, they had controlled the shipping trade in the Mediterranean. Their interest was not as much in the cargo of the ships as it was in the crews that manned the ships. 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. The only way to escape this fate was for a country to pay tribute to each of the Barbary states, and this was not always a guarantee. Paying tribute, however, was a common practice for all the European nations. In fact, when the United States were still colonies, the English had paid dues to protect their ships, as well as those of the American colonies. Now that the colonies had won their independence, England and the other powers of Europe had no interest in protecting the trade of the new nation. The attitude of Europe was that as long as the pirates had the smaller countries of the world to raid, there was no need for the pirates to impede the travels and trade of the larger countries in Europe. This, however, did not save them from paying tribute, which they continued to pay year after year. It did, however, reduce the inconvenience of further attacks. In fact, some countries paid tributes in the millions every year.

Long before Jefferson had ever been elected President, he abhorred the idea of paying homage to the Barbary states. On many occasions he had petitioned Congress and President Adams to take military action against the Barbary powers, each time to no avail. Eventually, as an envoy to France Jefferson abdicated his position on the Barbary Pirates and gave in to the pressure of Congress. In 1786 Jefferson sent Thomas Barclay, the Consul General, to purchase peace with Morocco. Barclay was successful in negotiating a treaty that gave the United States protection and most favored nation status. This was at a price of \$30,000 a year, as well as some gold and jeweled trinkets. Jefferson, of course, was not happy with the treaty because he felt that it still did not offer any guarantees that American shipping would be spared capture and slavery. He believed, basing his opinion on the successful strike by France against Algiers, that war was the only way to guarantee freedom of trade in the Mediterranean. He also relayed to President Adams as well as Congress that he felt going to war would only guarantee peace, but would also offer an excellent opportunity to train the nation's naval forces. Adams and Congress disagreed, and the debate continued until Jefferson became President.

After Jefferson became President, he felt he finally had an opportunity to deal with the problem of piracy in the Mediterranean. The United States had just completed a peace with Algiers, and was in the process of completing an arrangement with the Bey of Tripoli. The deliberations were proceeding unfavorably as the Bey of Tripoli believed that Algiers had received a far better deal than he. Tensions were strong in the Mediterranean, and Jefferson felt sure that war would ensue. Congress and President Adams had failed to act judiciously to solve the problem of the pirates. Adams had succeeded in keeping the United States out of an anti-piracy confederacy with other American countries. Congress had also been slow to offer acceptable amounts of money for tributes to the Barbary states. In fact, Congress had authorized a mere \$80,000 for the appeasement of the Barbary powers. This was only a fraction of what it would have cost the United States to secure peace in the region. All of these previous efforts had failed, and their failures were threatening a rather large part of the United States' international trade: one sixth of American exports of wheat and flour went through the Mediterranean, as well as one-fourth of all pickled and dried fish.⁽¹⁸⁾ This was a considerable amount of trade for a developing country.

Jefferson wanted what he always had, war. It appears that Jefferson, in dealing with the Barbary pirates had decided that it would be cheaper and more beneficial to fight a war than continually to pay homage. President Jefferson had made his entire presidency one that stressed reduced budgets and spending, and the discharge of the public debt. Continuing to pay large ransoms and other gratuities would not achieve this goal; fighting a short decisive war might. Jefferson saw this as an opportunity to advance the goals of his administration, and decided, therefore, to deploy the navy.

Jefferson undoubtedly was mindful of the Constitution's limitations on the President's war powers. In general, Jefferson had favored a strict interpretation of the Constitution, and he knew that as President he was limited to defensive measures without having approval from Congress to act offensively against the Pirates. He was bound by the "chains of the

Constitution." Surprisingly, however, these thoughts did not stop Jefferson from dispatching Robert Dale to the Mediterranean, with orders to find out if any or all of the Barbary powers had declared war on the United States. If only the Bey of Tripoli had declared war, Dale was to blockade Tripoli's port. If any other of the Barbary states had declared war, then Dale was to deploy his troops as he saw fit in order to "protect our commerce and chastise their insolence-by sinking, burning or destroying their ships and Vessels wherever (he should) find them."[\(19\)](#) This order by President Jefferson authorized actions that clearly were beyond the line of "defensive" actions authorized by the Constitution.

When Dale arrived, only the Bey of Tripoli had declared war on the United States. On the first day of August, the *Enterprise*, one of Dale's ships, came across a Tripolitan ship. The *Enterprise* engaged the Tripolitan ship in battle, and was victorious. The crew of the *Enterprise* then stripped the ship and sent it back to port, not sinking it or taking prisoners. Dale's orders had, however, authorized the taking of prisoners. The *Enterprise* had not taken any only because it was on a mission for supplies, water specifically, and could not afford to keep prisoners on board. This was a tactical consideration.[\(20\)](#)

When Jefferson reported his and Dale's actions to Congress, the returning of the Tripolitan vessel to its port unharmed became a constitutional consideration. Jefferson wrote:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel, being disabled from committing hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on equal footing with that of its adversaries.[\(21\)](#)

Congress did authorize the appropriate measures of allowing the navy and the President to capture and make prizes of Tripolitan vessels. The authorization led to a war effort that lasted for four years.

Most scholars point to Jefferson's address to Congress as support for Congress' exclusive right to engage in hostilities. This seems only partially true. Jefferson did not want to "act in such a way that might compromise the power to declare war assigned exclusively to Congress by the Constitution "[\(22\)](#) but at the same time he wanted to advance the goals of his administration, such as reducing the national debt and the budget. Had Congress made this a constitutional issue, Jefferson might have responded that his actions were based on "a question of expediency," rather than on a technical question of constitutionality; the nation had to react quickly to the Bey's declaration of war and Congress was not in session at the time. His actions were for the good of the nation and not to satisfy a personal fervor for power. This would not make his actions constitutional, but it would make them forgivable. Jefferson further hoped that his actions would not be a signal for other Presidents to bypass the Constitution and its provisions for war-making. He believed that the "good sense" of the people would not allow this precedent to be one that would continue.[\(23\)](#) That is he believed that if other presidents abused their power,

the people would pressure Congress for an impeachment. This is an argument that would parallel his justification of the Louisiana Purchase.

In any case, Congress did not question President Jefferson's actions even though he had essentially brought the nation into a state of war. His actions went virtually unnoticed. The only objection of note came from Hamilton. Hamilton, however, did not criticize Jefferson for using force, but rather said that Jefferson did not use nearly enough force. Hamilton also insinuated doubts about Jefferson's strict interpretation of the war powers of the President. Hamilton commented that Jefferson had the power to retaliate because Congress' power to declare war was merely to be used to bring the nation out of a non-war state into a state of war. Since Tripoli had already declared war, there was no need for this act of Congress.

There are other possibly more important reasons that Congress did not investigate Jefferson's orders to Dale. Perhaps, as would be the attitude of Congress in dealing with similar actions by Presidents in the early twentieth century, Congress did not see the Barbary pirates as that large a threat. The pirates were more of a nuisance than anything else, and Jefferson's initiative just gave Congress prompting to deal with the situation.

Public opinion supported Jefferson, as well as stated earlier the only real dissenter on the war was Hamilton, and even he conceded that the President had every right to defend the nation from aggressors. Congress must have agreed that the President's actions were within the scope of defense. Or maybe because of Jefferson's public show of respect for Congress, it simply forgave his actions.

Probably, the most frightening and accurate reason for Congress' lack of action is that Dale was successful. No American lives had been lost, and the shipping lanes in the Mediterranean were freed from harassment. Jefferson had dodged a bullet with his apparent success.

No matter why Congress accepted Jefferson's actions, a dangerous precedent had been set. Jefferson had embroiled the nation in war without congressional assent. He had done it in attempting to reduce the public debt and budget, a goal he felt was good for the nation and for him, the ends justified the means. Congress had accepted his actions for these reasons, as well as the fact that the Barbary states were no threat to the continental United States. Finally, because the effort was a success, there was no incentive to question its constitutionality. This early action by a President set a historical precedent for future Presidents. These justifications for Jefferson's actions were not in line with the original intent of the Framers' concerning the President's war powers; yet all of these factors would be seen again as justifications for presidentially instigated wars in the twentieth century.

There are many factors to be considered when determining the Founding Fathers' intentions concerning the war powers. Several things seem to stand out in particular. The original understanding of the powers of the President to conduct war was meant to be strictly defensive in nature if Congress had not already declared war. Congress also had

the exclusive right to declare war. Once war was declared, the President would direct its efforts. According to Jefferson's constitutional theory, the precedent would become the voice of the people at the time.

However, another important factor to consider is the idea that the Presidency was something altogether new to the Framers. They developed it with the hope that it would be able to act in a way that would allow government to be stronger than it had been under the Articles of Confederation, yet not so strong that the President would become synonymous with a monarch. Because of this lack of understanding of the executive branch, deliberate vagueness and ambiguity was written into the Constitution by the Framers, almost inviting one to interpret and expound upon its meanings and upon each branch's particular powers.

Certainly, though, the Framers did not expect a President to use the ambiguity concerning the commander-in-chief clause to advance his own administrative goals, especially when these goals were intertwined with war. This would not be a concern, as long as Washington was President, but after Washington retired, they were not sure what to expect. Therefore, they protected themselves with different strategies. The President, should he act unconstitutionally, could be checked by Congress, impeached and additionally in a last-ditch effort, the Constitution could be amended. The Fathers expected and wanted future Presidents to interpret and expound their powers for the unique situations that each of them would face, but not without being checked. However, this has not been the case with the war powers of the office of the Presidency. Congress did not question Jefferson's actions. It simply ignored them. Other Presidents would follow Jefferson's lead, and Congress would continue to leave the war powers of the President unchecked. The office of the President would gain total control of the war-making power.

CHAPTER IV

James Polk and the Mexican-American War

Thomas Jefferson was not the only President in the nineteenth century to place his troops in a precarious and somewhat provocative position that eventually led to war. James Polk placed his troops in a "defensive" position in an area of land, whose ownership was hotly contested by Mexico. His placement of General Taylor in the area of the Rio Grande River engaged the United States in a war. Polk's actions, although controversial, were never really challenged, and Congress declared war without concern for the constitutional ramifications.

To understand the causes of the war between the United States and Mexico, it is important to understand the history of the dispute among the United States, Mexico, and Texas. In 1835, Texas declared its independence from Mexico. Mexico did not recognize this declaration, and a war ensued. Texas easily won its independence, though Mexico refused to accept it. The boundary between the two countries was never settled. Both

countries claimed ownership to a piece of land that lay to the east of the Rio Grande and to the west of the Nueces River. Although Mexico did not recognize Texan independence, the United States, Britain, and France all readily accepted Texas' claim. This, along with Mexico's indebtedness to the United States, soured the relationship between the United States and Mexico.

The relationship between the two countries worsened with the election of Polk. Polk was elected on a platform that embraced the ideal of Manifest Destiny. This was the new American motto that stated it is "our manifest destiny to overspread the continent allotted by Providence for the free development of our multiplying millions."⁽²⁴⁾ Polk had his eyes on Texas, and this allowed him victory in the presidential race. Polk's lust for land did not end in the acquisition of Texas; he desired Upper California, as well as the area of New Mexico. Polk desired this vast area of land, so that the United States could have better access to the west coast. Trade with the orient had become lucrative and a port on the coast would facilitate the trade.

Just before Polk took office, President Tyler signed the legislation for the annexation of Texas. Tyler left an open clause, allowing for further negotiations of its terms. As soon as Polk took office, he changed the terms of the agreement, insisting that Texas accept it without alteration. Texas agreed to its terms and it became U.S. property on July 4, 1845. The joint resolution of Congress that allowed Texas to be annexed was vague concerning the borders between Texas and Mexico. Polk wanted Texas to push for the Rio Grande as its westernmost border, and Texas agreed on the condition that Polk send troops to Texas to protect the claim. Texas' claim to this area in reality could hold no guarantee. That is, just because Texas claimed the area did not mean that Mexico or any other country would legally recognize it. Polk agreed to send troops to the area, and on May 29, 1845 sent orders to General Taylor that upon the annexation of Texas, he was to send troops to the area. When Taylor arrived in the town of Corpus Christi, he was further instructed, "It is expected that in selecting the establishment of our troops, you will approach as near the boundary line-the Rio Grande-as prudence will dictate."⁽²⁵⁾

By the time Taylor arrived, Polk heard rumors of an approaching Mexican invasion of the disputed area. The President then issued orders to Taylor, stating that in an emergency he was authorized to call on the governors of several of the neighboring states for troops; and in the event that Mexico were to invade or declare war, "Taylor should drive the invaders back across the Rio Grande and seize Matamoros and any other Mexican towns he found expedient. The Navy would cooperate by blockading or seizing Mexico's ports..."⁽²⁶⁾ These orders had all been given by the President without the knowledge or consent of Congress. Taylor moved into the Rio Grande area.

There were several reasons why Polk had not consulted Congress. Polk was using a strategy of graduated pressure. He was attempting to force Mexico into a position where it would bargain. He was hoping to get Mexico to bargain not only on the Rio Grande issue, but also on the sale of New Mexico and Upper California. At this point, President Polk did not expect a war to begin between the two countries. He had concluded that Mexico could not afford a war with the U.S., and thus would not attempt to start one.

Believing this, he expected Mexico to cringe under the military pressure of the United States. Second, Polk felt that he was within his realm of power as commander-in-chief to place troops within the boundaries of the United States in a "defensive" position. Should war break out, he had simply placed his troops in a defensive position to protect the claims of the United States. Although it might have appeared "offensive" from Mexico's point of view, Polk's actions were certainly within his realm of power as commander-in-chief. As Jefferson had provoked a war with the Barbary states by placing the Navy in what appeared to be an offensive deployment to the pirates, Polk could do the same. By claiming history and precedent, Polk's actions were justifiable and constitutional. Jefferson's fear of setting a precedent had become reality.

Some members of Congress, however, did not agree with his strategy, and had doubts about his authority to place troops in the Rio Grande area. John C. Calhoun, a prominent Senator who had served as Secretary of War, was the most notable of these protesters. These Congressmen even attempted to pass legislation that would restrain the President from certain actions, one of them being any attempt to acquire New Mexico or California. These Congressmen felt that Polk's deployment was simply a provocation of the Mexican government designed to meet that end. Congress' attempt to stop Polk eventually failed, when Calhoun balked, fearing his Oregon legislation, which was an attempt to establish settling rights in the Oregon area between Britain and the United States, might lose support.⁽²⁷⁾

In December of 1845, the same month that Texas became a state, Major General Mariano Paredes Arillago, a Mexican General, revolted against the Mexican government. With his revolt went the last opportunities for a peaceful settlement of the boundary dispute. On the 2nd of January 1846, Paredes vowed to uphold the integrity of Mexican territory; he would no longer hold any negotiations. By April 23, 1846 the new President Paredes declared a "defensive war" against the United States. Paredes strongly believed that it was more respectable to lose a war than to cede the land to an imperialist nation. Shortly thereafter, Mexican troops made several raids along the Rio Grande River on American troops. on April 30 the war began, with Mexicans assaulting the Americans at Fort Texas, which lay just on the east side of the Rio Grande in no man's land.

On May 11, 1846, Polk delivered his war message to Congress. Polk's message found several reasons for declaring war against Mexico. He based most of his message on two points. First, he reviewed the long standing indebtedness issue with Mexico, as well as the near annihilation of trade between the two countries. Then he justified the placement of troops in the Rio Grande area, stating that Taylor had only been placed in the area due to the "urgent necessity to provide for the defense of that portion of our country." He also claimed that Mexico had attacked American forces on American land and had "shed American blood on American land." ⁽²⁸⁾ interestingly enough, Polk never discussed his desire for California in his entire message.⁽²⁹⁾ This was probably in hopes that he would not undermine his justification for the deployment of Taylor in an area that he had somewhat unconvincingly claimed was the legitimate property of the United States.

Polk and the administration expected strong resistance to the declaration of war from the House as well as the Senate. The administration, therefore, decided to attach the decision for war to a law that appropriated money for the support of Taylor and his troops in the field. This, as was expected by the administration, met strong resistance. Calhoun was again the main voice of resistance in the Senate, and his sentiments were echoed by Joseph R. Giddings in the House. Giddings was a staunch abolitionist, and had at one point been censured by the House for his support of mutineering slaves, but was quickly reelected. He complained that the United States was brought into a state of war not by the "actions of Mexico" as President Polk had argued in his war message, but rather, by the President's placing President Taylor in the disputed area of land; this, he believed had led to an unconstitutional war. Giddings felt that the land where Taylor had been attacked was not even United States' property. Mexican law, as well as military posts and customhouses, dotted the entire area of Polk's conquest. The people in the area also paid taxes to the Mexican government. Giddings even used Polk's own language in the war message to question the administration's confidence to the claim of ownership. All of these pieces of evidence, and more, made the land between the Nueces and the Rio Grande property not lawfully owned by the United States. To Giddings and many of his supporters, the effects of Polk's war that had been begun unconstitutionally could best be summed up by Giddings statement to the entire House.

Our constitution is gone ... I point you to the invasion of Mexico, by order of the Executive, while Congress was in session; to the blockade of Matamoras; to those acts which have involved us in all the evils of actual war, without deigning to consult Congress on the subject ... this usurpation of imperial powers, this most despotic act of making war, has been sanctioned by this body; and in a manner, too, which fully illustrates the disregard of constitutional restraints entertained by this House.(30)

The law passed easily in Congress, and on the very same day of the delivery of this speech, the Senate passed the measure as well. Polk had managed to persuade Congress that the Mexicans had committed acts of hostility without provocation. This aroused strong feelings of patriotism in Congress and the American people, which ensured Polk's success.

This speech and Congress' subsequent disregard for it are of importance in our discussion. Clearly, Polk's orders and actions were questionable uses of his power as commander-in-chief, at least according to the Framers, original understanding, because he had provoked war. Congress, in this case, as was the case with Jefferson, could have stopped the progression of the war. Some members of Congress, however, simply said that they had no choice but to support the bill because if they had not, Taylor's troops would have been left destitute of support. Congress does control the "purse", and certainly could have appropriated monies for the support of Taylor without the declaration of war. In the end, however, Congress acquiesced, probably for two reasons: the generally united support of the American people for the war and acquisition of new lands, and the willingness to allow the President to "take the heat" for any negative ramifications brought on by the onset of hostilities. The trend of Congress' acquiescence on the war issue had, by this time, been strongly entrenched, and the President's ability to

start a war or hostilities no longer seemed to be a constitutional question but simply an administrative prerogative.

CHAPTER V

Theodore Roosevelt and the Panama Canal

The cases earlier cited illustrate the roots of the widening of the President's military power. As the country grew stronger economically and militarily in the twentieth century, so did the President's military power. Presidents have used the armed forces in this century to solidify the United States' influence in the Western Hemisphere. They have encouraged and discouraged revolts in countries across the Western Hemisphere, used the Navy as shows of force on numerous occasions, and have occupied territories throughout the world without the approval of Congress.

In the early 1900's, Presidents used the military to control the Western Hemisphere. South and Central America were the subjects of most of the United States' use of military force. President Theodore Roosevelt was particularly fond of using the military to enforce his foreign policy. He and his actions in securing a location for the building of the Panama Canal will be our next focus. His actions are illustrative of the types of minor uses of force that were used frequently throughout the early part of the twentieth century by Presidents independent of congressional approval.

Roosevelt, when he became President after the assassination of McKinley, did not have a specific agenda for his domestic policy. His foreign policy, however, was clear in his mind. After the United States became a world power after the Spanish-American War, Roosevelt felt that it was the United States' responsibility to promote stability throughout the world, especially in a world that embraced imperialism. Roosevelt envisioned that to carry out such a responsibility, the country would need a formidable navy. A well equipped navy would be nearly worthless if it continued to have to travel around the tip of South America to reach the Pacific Ocean. Roosevelt, for these reasons, had a specific interest in the building of a canal across Central America.

Congress was also interested in building such a canal. In 1902, it began debating where to begin construction and how to obtain the rights to build the canal. Eventually, Colombian owned Panama became the agreed upon site for the construction of the canal. This was primarily due to the cost advantages of building there. A previous attempt to build a canal had been started there by a Frenchman, Phillipe Bunau-Varilla, and the New Panama Canal Company. It had been abandoned earlier by the French. Congress approved a plan to negotiate a treaty with Colombia in order to secure the rights to continue building the canal in Panama.

Roosevelt felt that there were problems in dealing with Panama. The most important was that the country had just been ravaged by civil war and was now led by a brutal "unconstitutional dictator", Jose Marroquin, and there was a possibility of a separatist

revolt in the remote state of Panama.⁽³¹⁾ Still, it was the preferred site. Secretary of State John Hay was sent to Panama with the approval of Congress to negotiate with Colombia for the rights to build the canal. Hay and Roosevelt had agreed to a plan that would allow the United States a zone of control over the canal that included the policing of the zone as well as a court system. Colombia would receive a sum of money and a rental fee to be paid perpetually. The final agreement was signed by Hay and Dr. Tomas Herran, the President of Colombia, on January 22, 1903. The agreement included the zone of courts and police, with sovereignty remaining with Colombia, which would receive \$10 million in gold and \$250,000 in annual rental fees. The treaty was ratified by the United States Congress in March, 1903, and was then forwarded to Colombia, whose Congress debated the issue for two months and voted against the treaty because it threatened Colombia's sovereignty over Panama. The Colombian senate rejected the treaty, despite warnings from Panamanians that they would secede if the treaty were not accepted.

Roosevelt received news of the rejection on August 13. He then began to consider his other options. After meeting with Hay, Roosevelt decided that the United States should pursue building the canal under an 1846 treaty with New Grenada, the predecessor of Colombia. This treaty was established between the two countries in order for the United States to transport war materials across Panama. Since Panama was almost constantly in a revolutionary state, Colombia could not always ensure unmolested travel. The United States would ensure free travel by the use of force. On several occasions the United States had done exactly that. Roosevelt felt that his extension of the interpretation of the old treaty could justify the building of a canal. No action was immediately taken by the President, as he waited for Congress to approve another version of the treaty that could be forwarded to Colombia. The new version would give Colombia more sovereignty over the operation of the canal and its zone.

In October, a separatist Panamanian and stockholder in the New Panama Canal Company, Bunau-Varilla, met with Roosevelt. His objective was to gain support for the revolutionist movement that was currently being organized in Panama. Earlier, Bunau-Varilla had learned that this was something the President was not particularly against. After several meetings with the President, Bunau-Varilla was convinced that he had the support of the United States for the revolution. He felt he had convinced the President that the new republic would ensure the acceptance of a treaty. Secretary of State Hay had assured Bunau-Varilla, in turn, that should the revolution take place; "We shall not be caught napping. Orders have been given to naval forces on the Pacific to sail towards the Isthmus."⁽³²⁾

Rumors by this time had spread that the revolt was imminent. Colombia had taken measures to send troops to the unruly republic. Roosevelt, upon hearing this information on November 2, ordered two ships already in the area to

maintain free and uninterrupted transit. If interruption threatened by armed force, 'occupy the line of railroad. Prevent landing of any armed force with hostile intent, either government or insurgent, either at Colon, Porto Bello, or other point ... Government force

reported approaching the Isthmus in vessels Prevent their landing if in your judgment this would precipitate a conflict.(33)

On November third, the revolution occurred after American ships had been spotted offshore. Some Panamanians refused to participate until there was proof of the support of the United States. The whole affair ended in two days with only one fatality, not an American. Troops went on shore on at least two different occasions to protect American citizens, but again there was no bloodshed. The Panamanian revolution was a success. This probably would not have been so without the presence of the United States Navy. "Many believe that a group of resolute policemen could have crushed the movement if the American Forces had not been on hand. "(34)

The President accepted the credentials of Bunau-Varilla as minister to the United States on November 13. Five days later, a new treaty was signed by Panama that allowed for a perpetual rental of the entire canal zone for \$250,000 and a \$10 million dollar lump sum. The question of where and under what terms a canal would be built had been solved.

Roosevelt had seen an opportunity in the revolution of Panama. He knew after meeting with Bunau-Varilla that should a revolution be successful, he was virtually guaranteed a quick approval of a treaty. He also knew, however, that supporting the revolution outright could possibly have ill consequences in the international arena as well as with Congress. Outright support for a revolution might encourage other nations to do the same for their own purposes. Congress probably would not care to support a revolution. Roosevelt had chosen his words carefully when he gave orders to ships in the region. His primary purpose was to protect the transit across the Isthmus. The orders he gave were very similar to, earlier ones. Holding to this purpose, Roosevelt gave constitutional orders to the ships in the region. He was simply upholding the United States' obligation under the Treaty of 1846 with New Grenada. In fact, when Congress had questioned his actions, this is how he defended them. He also said that "Colombia had forced the United States to take decisive steps to bring to an end a condition of affairs which had become intolerable. "(35) When Congress continued to question Roosevelt, he vehemently denied that anyone in the United States government had had anything to do with instigating or encouraging the revolution of Panama. The public was not concerned with how the revolution succeeded or what Roosevelt's role was, they were interested only in the results of the entire incident.

This would be the end of Congress' interest in the acts of Roosevelt, even though it had not necessarily believed him. One of the reasons that Congress may have ignored this use of force by the president is because it was such a minor incident. This could have been considered to be a political use of force. However, the definition of war earlier cited. would fit this situation. But, more importantly, this instance illustrates the continued absence of Congress from the use of the military.

Some members of Congress would make a feeble attempt to defeat the Hay-Bunau-Varilla treaty, but the public would not support it, and the attempt failed.(36) Congress made no further attempt to investigate Roosevelt for several different reasons. Perhaps

the most important of these was that public opinion strongly supported the President. But also important are the facts that the deployment of troops had been successful in two ways. First, no American lives had been lost, and second, the United States enjoyed an extremely lopsided agreement with Panama in terms of the Hay-Bunau-Varilla pact that at Panama had accepted. Another reason Congress probably made no move to criticize the President is because this was how he normally acted. Roosevelt, believed the President should be the steward of the people and consistently did what he felt was right for the country with little or no concern for Congress or the President's constitutional limitations.

To this point it seems that there are certain criteria that a President's actions must meet, when he places the military in a position that involves the nation in an undeclared war or other action, in order for Congress to acquiesce from challenging the President constitutionally. First, public opinion must support it. This depth of support may not be formidable, the duration may be short, and the level of knowledge of the public may be limited. How the President presents the situation to the people will influence its support more than their knowledge of a war's principles. After all, how many people were probably aware of the Barbary pirates and better yet, how many cared? Yet people supported the effort because the President did. In all three cases previously discussed this has been true. Second, the operation or war must be successful. Clearly, all of the previous examples meet this criterion. The United States gained free access to the Mediterranean, huge amounts of land from Mexico, and finally the right to build and maintain a canal in Central America. Finally, although maybe not quite as apparent, the country being acted upon must appear weak from the beginning. Most of the actions conducted by Presidents early in the twentieth century met these criteria, and as such were rarely questioned by the legislative body. But what happens when a war does not meet the criteria of being successful, and what happens when more information of the war effort becomes available? Vietnam is a case in point.

CHAPTER VI

Lyndon Johnson and the Vietnam War

Vietnam had been divided into two parts after the Geneva agreement of 1954, which was in response to the war that took place between the south Vietnamese backed by France and the rebellious communist north. That agreement also provided for the reunification of the country through democratic elections. The communist regime of Ho Chi Minh felt confident that it would win the elections in 1956, and bring both parts of the country under communist rule. Ngo Dinh Diem, the leader of South Vietnam, felt the same and, supported by the United States, blocked the elections. In response at the direction of the North, communist rebels who had been left behind in the south after the division of the country, began terrorist actions against the South Vietnamese government. Soon, they were supported by the communist government of the North, which infiltrated insurgent forces into South Vietnam, with the purpose of overthrowing Diem's government, and

replacing it with one that would agree to an immediate reunification of the two republics into one communist state.

President Eisenhower believed in the doctrine of the containment of communism and the "domino effect." That is, he thought that communist powers were inherently expansionist and had to be confined by force or the threat of force, and he feared that if Vietnam fell to the communists, the rest of Southeast Asia would soon follow. In order to help South Vietnam defend itself, he sent several hundred military advisors to South Vietnam to help them learn how.

President Kennedy followed Eisenhower's lead by eventually bringing the number of United States forces in the area to 16,000 troops. When Johnson came to power after Kennedy's assassination, he believed in the same strategy, fearing that losing Vietnam would cause a domino effect in all of Asia.

By June 1964, President Johnson had contingency plans to bomb North Vietnam, hoping this would help stop the war between the North and South. However, he needed an excuse to begin the bombings. In preparation for such a mission, the intelligence community of the United States drafted orders for a reconnaissance mission in the Gulf of Tonkin off the coast of Vietnam. On July 15, the orders were sent to the Navy, which in turn assigned a destroyer named the *Maddox* to the mission. The types of information it was to collect included identification of radar transmitters along the coast and boat activity of the North Vietnamese in the area. Also included in the orders was to "stimulate Chicom Vietnamese electronic reaction." (37) This last order meant that they would activate certain electronic warfare weapons on their ship, and assess the reaction of the North Vietnamese. The devices that would be used would indicate electronically that their ship was just one of many in the Gulf. Johnson hoped that this might encourage a confrontation and give him reason to bomb the North.

The *Maddox* sailed shortly after the orders came down, and headed for Vietnam. The crew, however, was unaware of its destination. On July 31, South Vietnamese conducted raids along the coast of North Vietnam in the Tonkin Gulf. These were the first raids conducted by the South. This was precisely the same day that the *Maddox* started its first reconnaissance mission. The destroyer was to conduct its mission within international waters at all times while off the coast of North Vietnam. The United States considered international waters as anything three miles off-shore, though North Vietnam claimed 12 miles as being the end of their borders. During its mission, the *Maddox* crossed the 12 mile area that North Vietnam claimed as its sovereign border several times. This, coupled, with the sudden arrival of an American destroyer on the same day of the first raids by the South Vietnamese on the North, might well have seemed threatening to the North Vietnamese.

The *Maddox* was equipped with electronic surveillance devices, and began to pick up signals about its presence over North Vietnamese radio. In fact, on August 2, the crew heard orders from a Vietnamese commander to attack the *Maddox* as soon as possible to test the destroyer's reaction. (38) The crew then saw three boats approaching them at high

speed. The captain of the Maddox viewed this action as a threat to his and the crew's safety, and according to the log of the crew, the first shots fired between the American ship and the Vietnamese boats were fired as warning shots from the Maddox.(39) The Maddox turned and ran, at the same time calling for air support from a nearby aircraft carrier. Before it got support and out of range of the Vietnamese ships, the Maddox was fired upon by the enemy boats. The boats reportedly launched a torpedo and fired machine guns at the US ship, scoring only one hit with no casualties, hardly a major crisis. Air support arrived, covering the retreat of the American ship and firing upon the vessels, possibly scoring a few hits. The first episode of American involvement in the Gulf had ended.

President Johnson was briefed after details of the entire incident arrived in Washington. His decision was immediate. "I want that ship back up there, because we are not going to be run out of places where we have a right to be. "(40)

Orders were then sent to the Maddox to resume its patrol in the area. This time it would be accompanied by another destroyer, the Turner Joy. Again, the orders called for the mission to proceed into areas that North Vietnam had considered to be within its borders. This time the evening's events are not quite as clear. On August 4, the Maddox and the Turner Joy went on their reconnaissance mission. The weather on that night was particularly bad, which may have caused radar and sonar equipment problems on the destroyers. In any case, the crew reported five or six blips on its radar screen that were approaching the destroyers at high rates of speed. The presence of the blips caused reactions of confusion, and evasive measures were taken by the ships. To complicate matters, sonar picked up a large number of blips on its screen as well. The end result was mass confusion on the part of the crews of both ships. Massive amounts of torpedoes as well as ammunition were fired by both ships, but throughout the night there was no definitive eye contact made with any of the Vietnamese ships. In fact, the only clear target that was discovered the entire night was the Turner Joy, which was nearly fired upon by the Maddox.(41)

The details of the second incident in the Gulf of Tonkin may seem sparse, but these were the details reported to President Johnson. In fact, there was considerable doubt among all those who received the reports, including Johnson, that a second attack ever took place.(42) When he heard the news however, the President knew this was his opportunity to retaliate with against the North.

Johnson wanted to retaliate for two basic reasons. First his opponent in the upcoming election, Senator Goldwater, had charged that he was soft on communism. A strategic bombing in North Vietnam would counter this claim. Even though Johnson was well ahead in the campaign, this would seal a landslide victory, giving Johnson an opportunity to get his social programs passed easily in Congress and earn him the reputation of being a great president. Second, the situation in Vietnam was deteriorating rapidly. Diem's government had been overthrown and he was killed. After his death, no one government could stay in power for long, and the effort to fight the insurgents in South Vietnam was

suffering from the struggle for power. A military effort on the United States' part would, in Johnson's mind, ward off disaster.

Johnson looked for advice, and decided that air strikes would be his best course of action. Johnson sent his orders to strike at this time. He then decided to hold a meeting with the leaders of Congress and to inform them of his orders to the Navy to bomb some strategic sites that were related to the attacking vessels, such as ports and refueling stations.

The President relayed his message to congressional leaders, stating that he felt that North Vietnam should be punished for its "unprovoked" attacks on the United States ships. This was stated, even though the ships had not only entered the area considered by Vietnam to be its property, but also had fired the first shots. Also, the President had continued, the United States must show strength, and not allow the communists to get away with such aggression. Had Johnson indicated that the Maddox may actually have provoked the incident, perhaps this would have changed the response of congressional leaders. However, without such knowledge, all of those in attendance but one agreed with the President's retaliatory measures to bomb Vietnam, and promised full congressional support for any further measures. The President addressed the United States people on television that evening, informing them of the incidents in the Gulf. He did this to arouse public support for his countermeasures in Gulf. In the address, he appealed to American patriotism by equating the attacks on the American ships with the insurgent activities in Vietnam:

Aggression by terror against the peaceful villages of South Vietnam has now been joined by open aggression on the high seas against the United States of America.(43)

He then stated that he had ordered bombings in North Vietnam to show American resolve, and promised them that he would seek a joint resolution of Congress that would allow him to "take all necessary measures to support freedom and peace in Southeast Asia. "(44)

Given the very imperfect knowledge as to the incidents that took place in the Tonkin Gulf, Johnson's reaction was, to say the least, rather disproportionate. After all, the United States had suffered no casualties and only one piece of equipment was damaged by a single bullet. Certainly, this should not have justified heavy bombings meant to cripple North Vietnam's navy. Johnson understood this. Such a small incident would not arouse support for long nor was it important enough to convince Congress that he needed a resolution. He quickly went to work on creating an atmosphere of urgency that would make up for the lack of actual events. Secretary of Defense McNamara reported details of the bombing. Then, over the next two days there would be more reports from upper level officials and interviews as well. Soon, the American people became aroused over the entire incident that is plausible Johnson staged, and Congress followed. Nearly the entire country had rallied behind the President and his actions. Almost instantly, Johnson had rid himself of the "soft" image. In fact, polls showed that 85% approved the president's actions. This was significant considering at least 25% of the country knew nothing about what was happening in Vietnam before that the time.(45)

As he had promised, Johnson immediately sought a joint resolution in Congress. Still, using the atmosphere he helped to create, he focused Congress' attention on the resolution. His staff wrote the wording of the Tonkin Gulf resolution. One of the most important lines in the resolution stated:

the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.(46)

Johnson had asked Congress, for all practical purposes, to give up its right to declare war and grant it to the President. The President, through Secretary of State Dean Rusk, defended the strong wording of the resolution in two ways. The first was that this would not be the first time a President had asked that such a resolution be passed by Congress. In fact, three times in recent history similar language had been used. The Cuban Resolution in response to the 1962 missile crisis, for example, had stated that the United States was "determined... to prevent by whatever means may be necessary, including the use of arms" to prohibit Cuban subversive actions anywhere in the Western Hemisphere.(47) The second reason for the strong wording of the Resolution was that it was meant to show a determined unity among all those in government in the United States not to let the aggression in the Gulf stand.

The show of unity is what Johnson pressed the hardest in Congress. He led Congress to believe that if anyone voted against the resolution, this would make the United States appear weak and encourage North Vietnam to continue its efforts. Not only did he want a show of unity he wanted it quickly, and with no changes in the resolution Except for one phrase, he was successful in convincing Congressmen not to change the wording.

Senator William Fulbright would be the primary sponsor of the War Powers resolution. He was the chairman of the Foreign Relations Committee, and was a critical player in the passing of the resolution. He was urged by Johnson not to allow changes in the wording. Fulbright cooperated with the President and time and time again he reassured concerned Congressmen that the resolution, even in consideration of its strong language and the broad powers it gave to the President, would not be dangerous:

This provision is intended to give clearance to the President to use his discretion. We hope and believe that the President will not use his discretion arbitrarily or irresponsibly... I have no doubt that the President will consult with Congress in case a major change in present policy becomes necessary.(48)

Fulbright's reassurances were instrumental in the passage of the resolution without any changes. His assurances were also echoed by others, such as Thomas Morgan, the House Foreign Affairs committee chairman, who said he had to "practically get down on my hands and knees to plead with my committee, please don't change a single word in this resolution."(49)

Johnson was successful. He convinced Congress that what North Vietnam had done was completely inexcusable and intolerable and must be dealt with accordingly. Congress backed his resolution, with only a minor revision stating that Congress could terminate the actions in the area by joint resolution.

This would prove to be nearly impossible to accomplish. Congress had been caught in the fabricated sense of urgency instilled by a crafty President. Johnson, through Fulbright, had convinced Congress to give him the power to escalate the war effort, even though he denied he had any intentions of doing so, on the basis of a very minor incident in the Gulf.

The wording of the resolution and its apparent "blank check" to start a war did not go completely unnoticed. Senator Wayne Morse, a member of the Senate Armed Services Committee for eight years, was the most outspoken objector. He knew that the wording gave the President the power to declare war in the region. Cantankerous, he freely expressed his views to Congress. But most Congressmen paid very little attention to his concerns. One Senator said to him:

Hell, Wayne, you can't get in a fight with the President at a time when the flags are waving and we're about to go to a national convention. All Lyndon wants is a piece of paper telling him he did right out there, and we support him, and he's the kind of President who follows the rules and won't get the country into war without coming back to Congress.⁽⁵⁰⁾

This statement reveals some very important insights about what members of Congress were thinking. First, few Congressmen dared to disagree with a President when public opinion was so supportive of his actions, especially around the time of an election. Also, time and time again Congress had given the President similar powers with no terrible consequences. In fact, such resolutions had brought about considerable changes in the world for the United States' benefit. For instance, the Cuban Resolution brought about the removal of missiles from the island by the Soviet Union. This was thought to be nothing different. No one expected the President to escalate the war effort. This was true even though Congress was warned by Senator Morse of the consequences of such a resolution. But no one paid him any mind. In fact, Senator after Senator defended the resolution, agreeing with Johnson that the entire country should stand behind the President and his show of force. Senator Bartlett, an Alaskan Democrat, perhaps summed up the attitude of Congress in his statement, "Our honor, our integrity, our vital interests are assuredly now at issue. We can do but one thing as I see it-unite behind the President."⁽⁵¹⁾ All but a handful of Congressmen were indoctrinated into Johnson's instilled emotions of urgency and patriotism. The resolution passed easily on August 7, 1964.

Some Congressmen involved in the passing of this resolution may have voted differently if the facts of the Tonkin Gulf had been reported accurately to them. The facts that had been reported were not far from the actual events that took place in the Gulf. The crews of both ships believed that they had been fired upon on two different occasions. If it had been reported to Congress accurately, that is to say, that there appeared to be a second

attack on U.S. forces but that the President was waiting for confirmation, the results from Congress probably would not have been much different. Congress was not interested in the facts of the situation. If they had, they would have taken Senator Morse more seriously as he accused the US Navy of provoking the incidents in the Gulf by supporting the raids conducted by south Vietnam. Entranced with Johnson's fabricated atmosphere of urgency and patriotism and in being so, Congress authorized the President to declare and utilize whatever force would be necessary to aid South Vietnam. The American people as well were enveloped in Johnson's message of urgency and accepted the actions of Congress and the President nearly unanimously. Conveniently close to the election of that year, Goldwater was caught off guard and did not recover. Johnson accomplished both of his goals. He sealed a landslide victory and gained authorization for future military actions in the Gulf.

Was the enactment of the Gulf of Tonkin resolution constitutional? It was not. Although Johnson may have slightly misrepresented the facts he did not do so to any large extent. Johnson had followed the precedent set by many before him and initiated hostilities. This kind of action had become an accepted practice, and was constitutional by historical precedent. However, Congress still had the duty and power finally to decide whether or not hostilities would continue. The Framers had considered bringing the nation into war a serious decision and for this reason they gave that power to Congress so that one person would not be responsible for the decision. Inherent with this power is the obligation that the decision to go to war not be taken lightly. But Congress' quick decision to pass the resolution does not show evidence of responsibility. Congress, by not taking the time to investigate the situation more thoroughly, failed to perform its function to declare war. In fact, Congress acquiesced from the decision of war altogether. Further, Congress delegated its responsibility to declare war to the President through the resolution. This situation is quite different from the previous examples. Previously, Presidents had initiated hostilities; Congress subsequently agreed with the effort, authorized the use of force, and directed further uses of force. In Vietnam, Congress had agreed with the effort, retroactively authorized the initial use of force, but delegated the decision for further use of force to the President. This may seem to be a subtle difference, but it is an important one. By delegating the decision to continue the war effort to the President, Congress effectively bypassed the war-making provisions of the constitution. There is only one way to change the Constitution, and that is by amendment. Therefore, the passage of the Gulf of Tonkin resolution was not constitutional.

Johnson's subsequent use of the resolution, if one ignores its unconstitutionality, was legal. He did not violate the provisions of the resolution. He had every provision needed to escalate the war effort. At any time, if it had chosen to, Congress could have forced the President to withdrawal his forces from Vietnam by refusing to pay for it, for example. They did not, and the war continued at the President's discretion. Congress had become a rubber stamp of approval of presidential war-making authority.

In February, following Johnson's oath of office and the passage of the Tonkin Gulf Resolution, the war effort was escalated, first by bombing North Vietnam and the Ho Chi Minh trail in an effort to destroy the supply lines of the communist insurgents, then by

the addition of ground troops to protect the airfields that supported the bombing. Once the initial ground troops were committed, the United States commitment snow-balled. In May 1965, close to 40,000 ground troops were in Vietnam. By the end of 1965, 185,000 had landed. American casualties followed the deployments.

By 1967, public support for the war began to evaporate. In April of that year, 300,000 people demonstrated in an anti-war campaign in New York City. A few days later, 55,000 protested in front of the Pentagon. By 1968, over 50% of Americans no longer approved of the war effort.⁽⁵²⁾ This was due to the effectiveness of the Tet Offensive and the media coverage of it. Up until this time, the administration was assuring victory. After the offensive, the public became disillusioned. Congress, seeing the lack of support, attempted half-heartedly to limit or end combat activities. By showing that they no longer wanted a war, they could avoid taking responsibility for it. In their attempts, Congress took 113 roll call or teller votes, all of which failed. Congress managed in 1970 to repeal the Tonkin Gulf resolution, but it took President Nixon to get the country out of war. He did so in 1973. This was not before 58,000 United States troops had died and another 300,000 had been wounded. The effort had been successful in keeping the government in South Vietnam intact while the war continued, but two years after the withdrawal of United States troops, the South Vietnamese government folded. The United States had lost its first war.

The public opposition reached a high point after the Tet Offensive and subsequent large increases in casualties. With this was the feeling among the American people that there was no way to end the war quickly and decisively. This opposition to the war effort started to gain momentum in 1966, when prominent politicians and intellectuals voiced dissent. When this occurred opposition to the war became respectable.⁽⁵³⁾ The combination of this strong opposition of the American people to the war, the embarrassment of having been fooled by Johnson, and Congress' total inability to stop the war effort inspired Congress to attempt to regain its constitutional power to declare war. This effort would result in the War Powers Resolution of 1973. Its purpose and consequences will be studied next.

CHAPTER VII

Congress and the War Powers Act

Without question the Vietnam war inspired the writing of the War Powers Resolution and its subsequent enactment. Congress had become frustrated with the war effort in Vietnam, and was particularly disturbed by Nixon's decision to bomb Cambodia. Congress realized that it had lost complete control over the war-making process. Congress was also frustrated with the overall growth of the power of the so-called imperial presidency that had occurred since Roosevelt. The War Powers Resolution was an attempt to regain the influence that had been intended by the Framers in the original understanding of the Constitution.

Passing the War Powers Resolution was not a simple task, and it took three different attempts before it succeeded. Three major themes ran throughout the negotiations on the resolution. These themes were deemed to be the most important aspects that should be addressed by the resolution. First, the President must retain some flexibility as commander-in-chief. There was general agreement that there should be no formal detailed description of when the President could engage the military in armed conflict and when he could not.⁽⁵⁴⁾ The world was simply too complex to list all the possible instances when armed force might be appropriate and then further break them down into when Congress should take action first or when the President should make a unilateral decision.

Second, Congress must reassert its powers. Jacob Javits, a Republican Senator from New York and author of one version of the War Powers act, said in his address to the Committee on Foreign Affairs, concerning the President's nearly unilateral control of the decision for war or peace, that the President had not usurped his power. Javits instead stated that "the Congress has given its power away... in an endless series of loosely worded and broadly drawn delegations of authority." Once Congress gave away its power in Vietnam, it never again "played a commensurate role in the painful and protracted disengagement from that ill-starred misadventure."⁽⁵⁵⁾ In other words, Congress had completely abandoned its war-making duties, and now it was time for it to reassert itself so that other similar incidents such as Vietnam would not recur, at least not without Congress' having some say in its conduct and duration.

Third, Congress should be kept informed of all activities in relation to the initiation of hostilities as well as the conduct of the war effort. This would prevent future Johnsons and Polks. Although Congress would be kept informed, most strategic decisions would constitutionally remain the President's responsibility. Congress could, however, prevent attacks on countries that were not involved directly in the war with the United States.

These goals produced the War Powers Resolution of 1973. In accordance with the first theme, the resolution states:

The President in every possible situation shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement is clearly indicated by the circumstances.⁽⁵⁶⁾

The phrase "in every possible situation" is important. Congress thus leaves an opportunity for the President to retain flexibility for emergency situations when Congress cannot first be consulted. Defining "every possible situation" is difficult. Congress' intent was that if the United States were not in any immediate danger, such as from a nuclear attack, it would be consulted. The President's interpretation of the same phrase could be quite different. 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, such as the bombing after the Tonkin Gulf incident. This disparity creates a problem for the effectiveness of this part of the

resolution. A further problem with this section is that it does not state exactly with whom the President is to consult.

Congress evidently saw a potential problem with this, and added a reporting requirement for all instances of armed conflict that occur without congressional approval. When the President has introduced troops into hostilities, or into an area where hostilities are imminent, he must report to Congress within forty-eight hours. He must then further explain:

- (A) the circumstances necessitating the introduction of United States Armed Forces;
- (B) the constitutional and legislative authority under which such introduction took place;
- (C) the estimated scope and duration of the hostilities or involvement.(57)

This is meant to insure that once a President involves the armed forces in conflict, he must report to Congress immediately, so that it can begin to take action. Congress then will authorize by concurrent resolution his use of force, declare war, or refuse to do so. But if Congress takes no action within sixty days after the start of hostilities, the President must withdrawal the forces. The sixty day requirement is contained in section 5(b). This acts as a fail-safe device. If Congress cannot decide on what action to take, the President will have to remove the armed forces from conflict. Also, in the event that the President does not report his actions to Congress, the sixty day requirement starts anyway.(58)

The sixty day provision for congressional action in theory is an excellent attempt to force the President to remove troops from an unwanted conflict. The problem arises, however, with the tendency of Congress and the American people to rally around the President once he initiates hostilities. Once this happens, as it did with the Tonkin Gulf incident and subsequent bombing, "specific statutory authorization can always be obtained."(59) This historical tendency practically renders useless the sixty day reporting requirement. Further, once hostilities have begun, and Congress has taken appropriate measures to authorize the war effort, the President must then report on the status of the effort at least every six months.

Lastly, in order for Congress to ensure it has control over the war, the resolution states:

[if] the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.(60)

The intent here is clear. If Congress decides that it does not want war, the President must withdraw the troops if Congress so decides by concurrent resolution. Such a resolution is also not subject to a veto. But this only applies when there is no declaration of war or statutory authorization for war. If one has been passed, then "the concurrent resolution procedure to terminate hostilities cannot be used."(61) This is a major problem with the

resolution, as it is very likely that the President will gain statutory authorization for any military action he undertakes.

Congress addressed each of its themes in the War Powers Resolution. First, it allows for some flexibility for the President to conduct emergency military actions. Second, it theoretically assures that Congress regains its power to decide on war or peace. No hostilities initiated by the President may continue past sixty days without a concurrent resolution or declaration of war from Congress. The problem is that once this is obtained, and it most likely will be, Congress cannot change its mind. The only option it may have is to eliminate funds for the war. This is not likely to happen, as it will appear that Congress left "the boys" stranded. Finally, Congress will be kept informed of the war effort on a regular basis, fulfilling the objective of keeping Congress up to date on the war effort.

Although Congress theoretically achieved its goals, the War Powers resolution obviously has some major problems. It is a solid attempt by Congress to lay some ground rules on the President's commitment of the Armed Forces. In the preceding analysis, we discovered some major gaps in the policy, caused by broad language, that allows the President to take military measures just as he has in the past. Congress understood that in time of perceived crisis, the country demands leadership. The President is the only place this leadership can come from. By allowing the President to continue his use of the armed forces and by not restricting it in any broad sense, the country can react quickly and effectively in any crisis. This need for immediate action may be necessary because the battlefield has changed with technology, but regardless, there is still the need for leadership from the President and the War Powers Resolution allows for this.

The resolution also relieves Congress of the burden of initially deciding if the use of force is necessary and gives it to the President. It basically gives the President a free hand to conduct operations with the military as he sees fit for sixty days. This was politically motivated. Congressmen are not likely to deny any credit for a good decision. Sixty days is likely long enough for Congress to decide if a military action undertaken by the President will be a success or not. If it appears that the operation will be, or already is, a success, Congress may then authorize the use of force and share in the victory. On the other hand, if the President's use of force appears like a failure, or is a failure, Congress can force the withdrawal of forces either by joint resolution or by doing nothing. The President then will be forced to withdraw the armed forces; Congress will be the cause of it, and can take the opportunity to take credit for the withdrawal of forces that an unruly President engaged in combat. The resolution acts as a win-win situation for Congress, and ensures they will not be embarrassed by another Vietnam.

Although the resolution is an ambitious effort to allow Congress to take a larger part in the decision to engage the armed forces in combat for an extended period of time, the question of its constitutionality remains. Through precedent, Presidents have claimed the ability to engage troops in combat, whether the operation is offensive in nature or defensive. This is contrary to what the Framers believed. Congress, however, has allowed the practice to continue and it therefore has become accepted as the President's

prerogative. The War Powers Resolution alters the provisions of the Constitution in two ways. First, it, gives the President congressional authority to engage troops in offensive operations without its prior consent. This is certainly not what the Framers had intended and should therefore, be unconstitutional. Second, the War Powers Resolution attempts to take away Congress' responsibility to make a decision on war or peace altogether. If Congress cannot make a decision within sixty days, then the decision is "no." This is contrary to the Constitution, as well. By giving the power to declare war to Congress, the Framers expected a conscious decision to be made by Congress, not for a decision made by silence. It seems that the War Powers Resolution attempts to amend the Constitution without an amendment. This is clearly unconstitutional. But these arguments did not arise during the debates between Congress and the President.

President Nixon was in office at the time the resolution was passed and sent to him to be signed into law. He vetoed it.' In his veto message, he stated that the resolution was an unconstitutional restriction on the powers that the President had exercised for over 200 years. He also stated that it would undermine the confidence of allies in international security agreements and inhibit the President's ability to act with flexibility in emergency situations.(62) The President was not willing to give up the power to initiate hostilities, however, he was willing to set up a commission consisting of members of Congress, academics, attorneys, and members of the presidential staff. The commission's objective would be to investigate and offer a plan that would encourage better cooperation between the President and Congress. The President and the executive office was not willing to give up his war-making power.

In response to the veto, a letter was sent to every member of Congress. It was a point-by-point rebuttal of every argument made by the President. The letter, written by Clement Zablocki, a Democratic Congressman, stated that the President's veto message was misleading and complained that the President's "flexibility" plea had become an equivalent to presidential dominance in war-making. The letter further explained that in recent years the presidency had gained more and more power, not only in war-making but in general. This was the answer to the war-making problem.(63)

Many Senators were unmoved by Nixon's response. To them it appeared that Nixon had grown "accustomed to operating in an extra-constitutional fashion." Watergate was testimony of that. This new restriction appeared simply to be unacceptable to the President.(64) Senators, such as Javits, responded by pointing out that the War Powers Resolution did not prohibit the President's use of force when necessary; it only required that there be more information related to Congress, and that Congress could end the conflict. For this reason, they denied that the War Powers Resolution would prevent effective response by the President in a crisis. Even with Nixon's attempts to recruit enough votes for his side to block the override, both the House and Senate agreed with Davits' logic, and overrode the President's veto.

Despite any constitutional problems with the Resolution, it is still in place and operative today. The conflict between the President and Congress still continues. But adherence by the President to the War Powers Resolution is the question, not constitutionality. Now we

must examine the resolution as it operates and its effects on Congress' attempt to regain the power to make the final decision for war or peace. Does the resolution work in practice? Did Congress regain the ability to make the determination for war? We will consider America's most recent war, Desert Storm, in an attempt to answer this question.

CHAPTER VIII **George Bush and Desert Storm**

On August 2, 1990, Saddam Hussein ordered the Iraqi army to invade its neighboring country, Kuwait. His reason for the invasion of the fellow Arab state was mainly economic in nature. He essentially had two main goals in mind. The first was to gain control of the Rumala oil fields that were being pumped by Kuwait, even though 90% of the formation actually was under Iraq. Gaining these fields would allow Iraq to raise oil prices and help rebuild its economy which had suffered during a long and brutally inconclusive war with Iran. Kuwait had been pumping far more oil than it had agreed to as part of an agreement among the oil producing countries in the region. This had forced oil prices down and had undermined the recovery of the Iraqi economy. The second objective of Saddam Hussein was to gain control of two small islands held by Kuwait that would be used to protect Iraq's only port on the Persian Gulf. The two countries had been in negotiation for some period before the invasion, but these had failed. Subsequently, Hussein ordered the invasion.

The invasion took only twelve hours to complete. The entire country of Kuwait was held by Iraq, and a puppet government was installed shortly afterwards. After the invasion was over and resistance had stopped, Iraqi forces were moved to the countryside and took up a defensive position.

The same day, the White House issued a brief statement condemning the invasion. Concern over the situation, however, was actually rather minimal. In fact, as President Bush met with the National Security Council, the mood of those involved was: "Hey, too bad about Kuwait, but it's just a gas station and who cares whether the sign says Sinclair or Exxon?"(65) President Bush felt similarly about the situation. He left that day for Aspen, Colorado for an already scheduled meeting with Prime Minister Margaret Thatcher of Great Britain.

It is in this meeting that President Bush changed his mind. He was convinced by Thatcher that the incident was no different from the selling out of Czechoslovakia at Munich that preceded World War II.(66) Bush and Thatcher further discussed military options that may have been available. Bush, upon returning to Washington that night, stated that the invasion of Kuwait was intolerable and unjustified, pleading with all nations to act together to ensure the withdrawal of Iraqi forces.(67)

Not only was Bush sincerely convinced that this was really an issue of right and wrong and good versus evil, partially explained by his strict Protestant upbringing, and partially

by Thatcher's influence, but he feared Hussein's next actions as well. The West would suffer dire economic consequences if Iraq held control of Kuwait. Even more frightening was the prospect of Iraq controlling the entire Gulf region and its oil. Bush was determined not to let Iraq stay in Kuwait.

Bush immediately went to work. In the next several days he called upon King Fahd of Saudi Arabia asking that the United States be allowed to place forces in his country in order to protect it from invasion. Fahd was hesitant at first, as he did not feel that his country was in any danger of invasion.(68) Bush showed the King satellite pictures of his country that indicated a large massing of troops near the border between the two countries. Eventually, probably due to these photos, Fahd agreed to a force for protection. But he added that if the United States sent troops, they must commit to total war and Defense Secretary Richard Cheney gave him that assurance.(69) Once troops were dispatched to Saudi Arabia, Bush was basically committed to war. On August 5, without consulting Congress, Bush dispatched troops to Saudi Arabia. He did not speak with members of Congress simply because he felt he did not have to as commander-in-chief, and he did not expect support from Congress for a nation that was just a "gas station."

To get the nation's support for his move and to create an atmosphere of urgency as Johnson had, Bush addressed the nation concerning his deployment of forces to the region. In his address of August 8, Bush explained the situation in the Gulf and his administration's position. Even though there were few casualties that occurred in the invasion he described Iraq's actions as being a "brutal act of aggression." He further stated that the "acquisition of territory by force is unacceptable." Bush placed his emphasis on Iraq's current placement of the military:

Iraq has amassed an enormous war machine on the Saudi border capable of initiating hostilities with little or no additional preparations. Given the Iraqi government's history of aggression against its own citizens as well as its neighbors, to assume that Iraq will not attack again would be unwise and unrealistic.(70)

He also cleverly added that the United States imports nearly half of its oil. Bush appealed to the American people, not only to their emotions on such an "evil" event, but also to their pocketbooks. Just as Johnson had been successful in rallying support, so was Bush. Shortly after the speech, he gained a 74% approval rating for his efforts. Congress, of course, fell right in line. Minority Leader of the Senate Robert Dole, a Republican, said Bush was "doing precisely the right thing. He's drawing more than a line in the sand, he's insisting the line go back." The Democratic Speaker-of the House, Thomas Foley, also agreed with Bush, saying that he "had to act." Bipartisan support was strong, but there was an understanding that the deployment was for defensive purposes only.(71) With an election coming up soon, few would disagree with the President, especially considering the strong support for his actions. Bush had also called for economic sanctions.

Sanctions were adopted not only by the United States, but also by the United Nations, which followed suit shortly after the United States. These sanctions, coupled with the

idea that the troops were on a defensive mission, helped Bush. It proved that he was seeking a diplomatic solution before he would attempt to use force.

The support for his actions may not have been so strong had everyone been aware of Bush's intentions. As early as August 15, members of his administration were well aware that he was planning for war. They also held little regard for Congress and its exclusive authority to declare war. Some even said that Congress would be informed of the start of a war only "after the first bombs had dropped."⁽⁷²⁾ This indicates that not only did Bush have plans for war; he also did not plan to give much advance notice to Congress. Bush was aware of the War Powers resolution, however, and he did send letters about the deployment to the Speaker of the House and the President pro tem in the Senate, basically satisfying the requirement of notification required by the War Powers Resolution, except Bush left out his intentions of offensive measures. So, even if the President reports as required, there is still no assurance that he is not planning hostilities in the future, making the reporting provision ineffectual.

Bush also intentionally downplayed the number of troops that he was deploying to the region. He did this because he was afraid that his public support would drop significantly.⁽⁷³⁾ In addition, it would also serve as a deception for Iraq so that it would not have additional time to prepare for war. Nevertheless, Bush assured the American people and Congress that the troops were strictly on a defensive mission.

In early October, Congress passed resolutions in support of all the President's past actions. But by November, Bush was frustrated by the slow progress of the sanctions and the dwindling public support. The public had become disillusioned with Bush's reasons for the deployment, oil would no longer be good enough. In effect, the public had become restless. Bush decided to act. On November 1, he authorized the Pentagon to double the forces in Saudi Arabia and the Gulf region and to prepare for an offensive operation.⁽⁷⁴⁾ On November 8, after the elections, he announced his decision, again on national television:

Iraq's brutality, aggression and violations of international law cannot be allowed to succeed ...Right now Kuwait is struggling for survival. And along with many other nations, we've been called upon to help. The consequences of our not doing so would be incalculable, because Iraq's aggression is not just a challenge to the security of Kuwait and other Gulf nations, but to the better world that we all have hoped to build in the wake of the Cold War.⁽⁷⁵⁾

Again, Bush added to the atmosphere of urgency. He implied that the entire balance of the world was at stake. The entire world was going to fall into chaos if Iraq did not leave Kuwait. Again, this announcement and decision occurred without advance notice to Congress. Bush did this not only because he thought it was his constitutional right based on precedent, but also because he felt it would be easier just to deploy the forces then to ask Congress for its approval.⁽⁷⁶⁾

Congress was not expecting nor was it prepared for the President's announcement. Only nine days before, he had told Congress that he was willing to wait and let the sanctions force Hussein out of Kuwait. Congress reacted. They were not as interested in going to war as soon as the President indicated that he was. The House Majority Leader, Richard Gephardt, urged the President to "stay the course," arguing that sanctions would take some time to work. Georgia's Senator, Sam Nunn, feared that the President had "limited our options by creating a use it or lose it situation."⁽⁷⁷⁾ The Senate Foreign Relations Committee did not like the situation, either. Its chairman, Clairborne Pell, asked Secretary of State Baker if Bush would seek congressional approval before the initiation of hostilities. Baker said, "I cannot make a general, across-the-board commitment ⁽⁷⁸⁾

This alarmed Congress. Congressmen did not want to go to war without first giving their approval: Many of them feared another Vietnam. Popular figures such as Ross Perot believed a war in Iraq would be a military disaster. In response, the House passed a resolution that demanded that the President seek prior approval for any offensive actions in the gulf. Some members were so concerned that Gephardt threatened to stop funding the effort if Bush did not cooperate.⁽⁷⁹⁾ The main concern of Congress was that they did not want to be entangled in a war again that they had no part in the decision for. But Bush counteracted these concerns and told Congress that any division of its members would appear to be a sign of weakness to Saddam, and would undermine any peaceful solution that might be obtained. This was the same argument that Johnson used. In the end, this argument would keep Congress from taking any further actions.

The United Nations then passed a resolution in addition to the sanctions. It provided that if Iraq did not retreat from Kuwait by January 15, the alliance could use force to make them leave.

Congress reconvened in early January, and the leaders of both houses attempted to delay any debate on a bill authorizing the use of force until after the January 15, deadline. Their efforts were not successful. Members of Congress simply did not want Bush to decide on war alone. They wanted him to first consult with Congress. They also did not want to issue another Tonkin Gulf styled "blank check."

Bush saw strong opposition in Congress, and decided to go along with its demands for a resolution of some kind. He enlisted Senate Minority Leader Dole and House Minority Leader Robert Michel for their help. The Republicans helped draft the "Authorization for Use of Military Force Against Iraq Resolution," the important parts of which are as follows:

The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 [which authorized the use of force].

(b) Before exercising the authority... the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that-

(1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council Resolutions ...and (2) that those efforts have not been and would not be successful in obtaining such compliance.(80)

The idea was to require the President to do everything possible, such as to continue sanctions, before resorting to using force. The pressure on members of Congress was tremendous. One Congressman, urging that division would show a sign of weakness said, "Some people say, 'Don't vote for the President.' Who should we vote with: Saddam Hussein?"(81) The President as well, added some more indirect pressure for its approval by sending Secretary of State Baker to Switzerland to meet with Iraqi-foreign minister Tariq Aziz to seek a final chance for peace. This was to show that the President was trying everything to achieve a diplomatic solution. Bush also added direct pressure on Congressmen for his war authorization by courting them with dinners and breakfasts. In the end, it worked. The idea that eventually won was that a division of Congress on whether the nation should go to war would encourage Hussein to stay. Both houses passed the resolution.

Congress had again given a blank check to the President to initiate hostilities. The very general language of the resolution invited the President to take action, leaving the decision for war up to him. If the president felt that he had done all he could to settle the conflict peacefully, all he had to do was inform Congress of the same and he could take action. Baker's efforts were unsuccessful, mainly because he did not negotiate, but rather issued an ultimatum. For Bush, this must have been all he could do. All attempts for peace were unsuccessful, and the country was at war four days after the passage of the resolution.

Even after the adoption of the War Powers Resolution, the ability of a President to bring the country into war has not really been harnessed. Bush's initial deployment of forces to the region before consulting with Congress and his subsequent rhetoric, really put the country in a position either to fight a war with Hussein or humiliatingly lose face to an incorrigible Iraq. Although Congress expressed its concerns about a potential presidentially initiated war in the region, the legislative body essentially did nothing. It enacted a piece of legislation that seemed to be a surrender more than an establishment of its power to declare war. Congress acquiesced. Nothing had changed since Jefferson's Barbary war.

Bush's Desert Storm has two important points that cannot be overlooked. First, Bush, and probably most Presidents, had very little regard for Congress' power to declare war. In fact, a day before he asked for the resolution from Congress, he said, "I don't need it."(82) Any President who observes Congress' past reactions can assume that he can do whatever he wants with the military. Congress will rumble about the Constitution for awhile but afterwards will do nothing. Or better yet, Congress will support the President in whatever decision he makes. But they will also hold him responsible for any wrong decisions.

The second important factor is the exceptional success that the United States enjoyed. Once the war was over, few paused to reconsider Congress' role. In fact, this was basically ignored. The United States was successful and that was all that mattered. Parades were thrown, heroes were honored, and the whole triumph passed by without a second look. Iraq had one of the largest armies in the world. It was practically annihilated. Bush became a hero- -although short-lived- -he will always be remembered as the President who led the nation through Desert Storm. This seemingly easy success may be tempting for Presidents in the future who feel they need to make a lasting impression before leaving office. Considering there will probably be no intervention from Congress, a quick little war may be quite tempting.

CHAPTER IX **The Conclusion**

Considering the Constitution strictly by its text reveals little insight into what the constitutional war powers of each branch of government are. The only thing that can be derived from the text is that Congress declares war and the President is commander-in-chief. The text reveals nothing about the realm of undeclared wars, or other even smaller operations that are simply police actions. The Supreme Court has taken a restraintist view when confronted with a case of the war powers of the President and thus must believe that the Framers did not make a clear mistake. The text is why there has been so much controversy concerning the war powers. With textual content revealing little about the scope of the President's power to declare or initiate war, we must then move to original intent.

The intentions of the Framers seem to have been that the President could not initiate war on his own. Congress must declare war before an offensive war could be started constitutionally. Although this view may be attained by examining the documents of the Framers and the Constitutional Convention, their later actions and interpretations seem to reveal a somewhat different attitude. Jefferson's actions seem to contradict the "defensive" nature of the President's intended power. His orders in the Mediterranean were clearly meant to initiate hostilities, and were thus offensive in nature. Some of the Founding Fathers criticized Jefferson's defense saying that he had not used enough force. This provocation seemed to be an acceptable use of force by the President. This confusion requires us to look elsewhere for the answer on the President's constitutional ability to initiate hostilities.

By examining court cases concerning the President's power to declare war, one could obtain an understanding of the opinions of the Supreme Court. However, in most cases, the Supreme Court has decided that the war powers question is a political one, and therefore it cannot rule on the President's power. The Court is more likely to take interest in domestic affairs than in foreign affairs. Foreign affairs is an area considered by the Court to be an area where more information is needed to make a decision than the Court has access to. Therefore, the war powers question is best decided by the other branches of

government. With the Court taking a restraintist view, we are left with only one solution to determine how the presidency has involved the United States in so many undeclared wars.

The historic record speaks for itself, with several themes that run through each instance of presidentially initiated conflict. By far the most important of these is that Congress has abandoned its duties and responsibilities concerning the declaration of war. Congress has declared war only five times in history. In one of these times, the Mexican War, the President had initiated the hostilities, and Congress simply followed his lead. Congress has the responsibility to investigate and consider thoroughly all the actions leading to initiation of hostilities. Once having considered all of the facts, Congress should then seriously consider the question of war. Should it be declared, and why?

Since Jefferson's time however, Congress has not done this. It has consistently been willing to let the President deploy forces, initiate hostilities, and conduct a war in any way that he sees fit. On most occasions, not only has Congress allowed him to take action; it has subsequently endorsed all actions that he has taken. In the cases of Vietnam and Desert Storm, it even endorsed all future actions that the President might take.

This acquiescence has occurred for several reasons. First, it appears that Congress has generally perceived public opinion as generally supportive of the President, or at least not strongly opposed to it. In a democratic system public opinion can make the difference between being reelected or defeated in the next election. Presidents, generally, have not started wars that were contrary to public opinion. Once the conflict begins the public seems to search for, and rally around, a leader. The President is the only public figure who can fittingly fill the position. Opposing the President in such times could be detrimental to a Congressman's career. In addition, if public were not initially behind the President, public opinion will almost always be in support of the president in a period of crisis. The depth of public support may also play a factor. In Vietnam, support was deep for fear of a Communist take-over of all of Asia. In recent instances such as Haiti, public support may not run as deep and may evaporate quickly. In instances such as these, Congress may be more likely to act.

Fear of opposing public opinion is not the only reason that Congress backs the President in times of crisis. On the international level, a divided Congress would illustrate division in America and undermine the appearance of American resolve. A sign of weakness from a country already involved in hostilities could prove to be detrimental. Propaganda campaigns by the enemy would flourish and destroy morale. Past Presidents, such as Johnson and Bush, have focused on this when obtaining support for the war effort.

Another reason that Congress may want to abstain from carrying out its war-making duties is the possibility of failure of the war. If a President brings the country into war and Congress claims that it had no choice but to support the men in the field, then any blame for a costly war, in lives and money, can be placed on the President. Public hostility will be directed towards the President first, as it was in Vietnam, and only

secondarily towards Congress. On the other hand, a successful war can be enjoyed by both Congress and the President.

Congress will take little or no action if it appears that military action will be successful. The country that is opposing the United States must not appear as much of a threat. Vietnam in itself did not appear as much of a threat, and so the war against it was allowed. In Desert Storm, there were some rumblings in Congress about the President illegally bringing the nation into war. This really was not so much a constitutional consideration as it was a strategic one. Iraq had a large army and air force that was thought to pose a considerable challenge to the United States. Even then, Congress eventually gave the President authority to act.

The ability to declare war is no longer really a constitutional question, not for the President at least. He has enough historical precedents to defend his actions if need be. For the President, the decision to go to war is based on his policy. If war is necessary to achieve his policy goals, it can be used at the President's discretion. He can count on congressional support. Even the War Powers Resolution will not stop the President from initiating hostilities. In fact, the War Powers Resolution endorses presidential power to initiate hostilities. The resolution requires more information from the President, and Congress can then choose whether to continue hostilities.

Through history the President has gained the right to initiate hostilities. This has been true since Jefferson's time, and the acquiescence of Congress has brought this about. Until the mid-1900's, Congress authorized the actions of the President and then it decided to continue action. More recently, however, Congress has authorized the military actions of the President and then left the decision to continue hostilities up to him. This significantly alters the Constitution, and in doing so, is unconstitutional. The War Powers Resolution attempts to do the same thing by relinquishing Congress from the duties of war declaration.

What has occurred is a presidency that can start, conduct, and end a war as it sees fit. This has occurred with Congress' and the Supreme Court's endorsement through acquiescence. This has been a workable solution to the war powers question, except for Vietnam. The problem is that another precedent has been set that does not involve the question of war. If Congress and the President can change the Constitution without an amendment and without the Supreme Court's interference, is there any constitutional provision that is out of reach?

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