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The Debate over War Powers

By Mark R. Shulman and
Lawrence J. Lee

The October 16, 2002, joint resolution authorizing the use of U.S. armed forces against Iraq (House Joint Resolution 114) marks a turning point in the history of American war powers. For half a century, the executive branch has tried to establish an independent authority to bring the United States into war. Executives have relied on imperial notions of the presidency, and especially on their role as commander in chief of the armed forces. To maintain its position against presidential usurpation, Congress has relied on the War Powers Clause of the Constitution and on the 1973 War Powers Resolution. Despite this historic tension, following a surprisingly mild political battle during the summer of 2002, the 107th Congress preauthorized President George W. Bush to use armed force against Iraq, effectively ceding the power to declare war to the president—at least in this one case. And the National Security Strategy introduced in September 2002 implies that the president may well continue to pursue preemptive wars like the invasion of Iraq, practically guaranteeing that the nation will face similar questions in the near future. Because the president still does not acknowledge the constitutional limitations, and Congress has dodged the issue, at least about Iraq, it is important to recognize it and insist that the president must seek congressional approval for future preemptive invasions.

War Powers

The text is simple: pursuant to Article I, Section 8, Clause 11 of the U.S. Constitution, "The Congress shall have Power . . . To declare War." On this there is no question. The Founders' decision to use the word *declare* instead of *make* leaves the president limited and clearly delineated power to "repel sudden attacks" against the United States. Under Daniel Webster's widely cited definition, such a defensive war is justified (and presumably needs no congressional

authorization) when the necessity to act is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

Responding to perceived trespasses by Presidents Lyndon B. Johnson and Richard Nixon in initiating and expanding the war in Southeast Asia, Congress clarified its sole authority to declare war

determine the legal status of the conflict. They posit that the president has the "inherent executive authority" to initiate wars as commander in chief under Article II, Section 2 and as part of the plenipotentiary power of the office. This argument, if accepted, would give the president virtually unlimited powers to use force—not only to repel sudden

Congress should not be in a position to decide how many casualties the United States will accept.

in 1973. The War Powers Resolution (WPR) requires the president to report to, and regularly consult with, Congress after deploying armed forces to a combat zone. Unless Congress authorizes military action, the WPR requires the president to withdraw U.S. forces within sixty days of deployment. A congressional declaration of war or enabling resolution such as House Joint Resolution 114 supercedes these requirements by authorizing the president to conduct war.

Some argue that the WPR is ineffective and unconstitutional because it seeks to alter the constitutional war powers framework, noting that no president has recognized the WPR's authority. In essence, the WPR serves merely to clarify and make effective Congress's constitutional war powers and reflects a political reality: in large-scale conflicts, presidents have consistently sought congressional authorization, for instance when President George H.W. Bush sought authorization for the Gulf War in 1991.

Founders' Intent

Some writers, such as Assistant Attorney General John Yoo, would curb the authority expressly granted to Congress, arguing that the Founders reserved for the president the power to initiate wars and gave Congress the power merely to ratify them, i.e., to

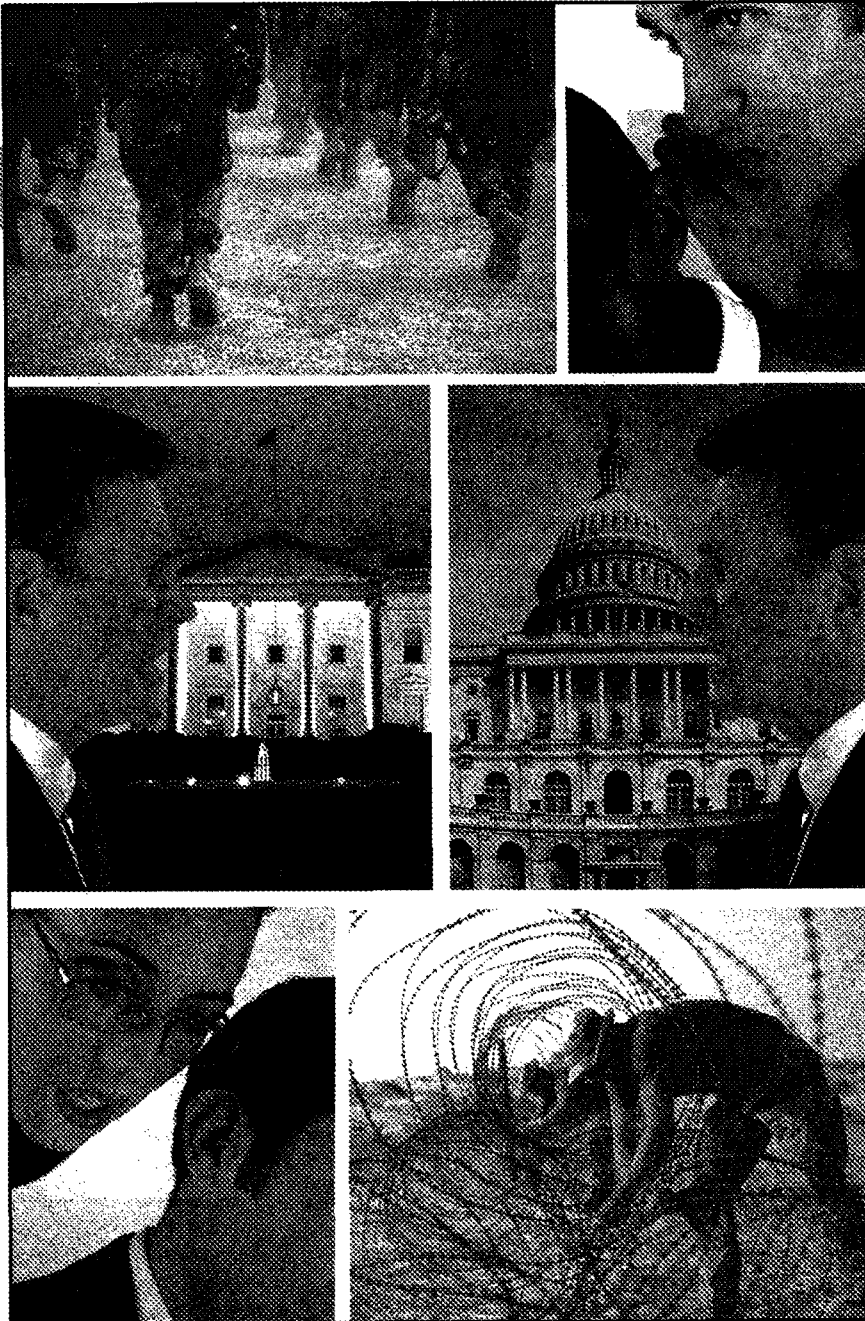
attacks but also to launch offensive operations, for example, as part of the war against terrorism outlined by the National Security Strategy. According to this view, congressional authority has atrophied over time through acquiescence to numerous presidential wars, for example, Kosovo.

These arguments ignore or miscast the plain text of the Constitution granting Congress the sole authority to authorize war. Conversely, no text provides the president with the discretion to do so without congressional authorization, in the absence of a sudden and overwhelming threat to national security.

War Powers Clause

Advocates of unilateral executive authority also bring a so-called originalist understanding to the War Powers Clause. They argue that the American concept of executive war powers was formed largely by the British experience, despite the historical fact that the colonies' revolt from Britain was partly a reaction to the Crown's excessive executive power. In reality the president's role as commander in chief was intended to institutionalize civilian control over the military; absent an immediate threat, the president may only execute Congress's decision to initiate war.

Those who broadly interpret the executive's war-making ability argue that



appropriations are a sufficient check—and the primary one intended by the Founders—against executive war powers. Congress, they say, may simply refuse to fund further military operations. Under this theory, Congress may halt military actions once troops have been committed. In reality, such a check could well be meaningless: the action could be ended, damage done, and lives lost well before the withdrawal of funding took effect. Moreover, such a plan could prove catastrophic if Congress withdrew funding after the president had committed a large ground force.

Congress should not be in a position to decide merely how many casualties the United States will accept rather than whether to risk incurring losses in the first place.

Security Council Resolutions. Some scholars focusing on international law, such as the eminent professor and judge Thomas Franck, propose that the president may undertake military action without congressional authorization if the UN Security Council had authorized the action. Under this view, Section 8, Article I, Clause 11 was intended to ensure that the decision to initiate war not rest with

one person. UN authorization avoids this problem, perhaps even more effectively than congressional authorization, because the Security Council “is far less likely to be stampeded by combat fever than is Congress.” Thomas Franck & Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT’L L. 63, 74 (1991). As examples, proponents of this view observe that U.S. forces have fought two wars pursuant to Security Council resolutions: the Korean War and the 1990-1991 Gulf War.

UN authorization does not absolve the president of a constitutional obligation to obtain congressional authorization. Treaty obligations such as those under the UN Charter or the North Atlantic Treaty (forming NATO) are equivalent to federal statutory law and, as such, never trump the Constitution. See U.S. CONST., art. VI, cl. 2; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, cmt.(a). The examples of the Korean and Gulf Wars are unpersuasive. President Harry S. Truman sent U.S. forces to Korea to repel a sudden attack—the North Korean invasion had nearly overrun South Korea, threatening irreparable harm to U.S. security interests. As noted above, in case of sudden attacks on the United States or its vital interests (including those vital enough to be included in mutual defense treaties), the president has authority to wage war. Moreover, President Truman sought UN approval only as a fig leaf for acting without Congress; he had ordered the deployment of American forces to South Korea before obtaining UN authorization and later commented that he would have ordered military intervention regardless of the Security Council’s position. More recently, President George H.W. Bush, despite UN authorization, sought and received congressional approval for the Gulf War. Absent congressional approval, Security Council resolution alone has never sufficed for declaration of war.

Large-Scale Invasion Is War

The administration started to build its case for invading Iraq shortly after September 11, 2001. During the thirteen months between September 11 and the signing of House Joint Resolution 114,

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Introduction

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The United States should adopt a policy of being a friend who shares its legendary resources and wealth with the 800 million persons in the global village who are chronically malnourished. The nation needs a new foreign policy that lives up to the ideals of human rights proclaimed in the United Nations Charter. The United States and all of the 190 nations of the earth pledged in Articles 55 and 56 of the UN Charter that they would help one another attain the newly recognized political and economic rights that now constitute the public morality of the world. This cannot be done so long as the United States relies almost exclusively on its military prowess for its foreign policy. Lawyers of America have to act as moral architects who will restrain the impetuous policies of the government that teach that violence, armed conflict, and military might can solve the moral, spiritual, and human problems that overwhelm much of humanity.

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its arguments moved from the idea that Iraq was somehow behind the terrorist attacks; to a declaration that Iraq, Iran, and North Korea constituted an "Axis of Evil"; to a general justification based on Iraq's use of weapons of mass destruction (WMD) and its animosity to the United States; and finally to a moral imperative. Only after the Security Council took up the debate did the administration take a position that Iraq must be disarmed. Despite the shifting rationalizations, the administration's goal has remained the same: the United States will use all means necessary to

depose Saddam Hussein. And yet, despite the obvious lack of an instant and overwhelming threat, the administration claimed for nearly a year that it did not need congressional authorization for such a war. Moreover, even as the president signed the Joint Resolution, his press secretary maintained that the authorization was unnecessary.

Constitutionally, the president has the unilateral authority to commit U.S. troops to Iraq or another rogue state under the newly promulgated preemption policy of the National Security Strategy only if he can show that such an action constitutes response to a sudden or imminent attack. The administration has provided no evidence that Iraq had invaded or intends to invade the United States (i.e., as a sponsor of September 11), let alone that it will do so imminently. Absent such evidence, congressional approval is needed. This conclusion is based upon the following three points:

First, the scale of military action necessary to force a regime change in Iraq (or any relatively stable state) strongly suggests the action would be a "war" as defined by the Constitution. In the most recent judicial opinion on the subject, *Dellums v. Bush*, a federal district court found "no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen . . . could be described as a 'war' within the meaning of [the War Powers Clause]." *Dellums v. Bush*, 725 F. Supp. 1141 (D.D.C. 1990). Congress would more likely acquiesce to unilateral executive decisions involving relatively small forces, but it cannot waive its constitutional war powers.

Deployment of 200,000 or more troops (or, even a smaller force deployment in conjunction with a massive aerial assault), as the Pentagon has proposed, is practically and qualitatively different from the scale of other recent U.S. military interventions, except for the Vietnam and Gulf Wars (for which the president specifically sought and received congressional authorization).

Second, invading Iraq to effect a regime change is clearly not an example of repelling a sudden or imminent attack. At least since 1993 when Iraq may have attempted to assassinate former President Bush, Saddam Hussein has neither used force against or direct-

ly threatened the United States or its vital interests (aside from attacks on allied aircraft patrolling the no-fly zones above Iraq). According to National Security Advisor Condoleezza Rice, any threat that Iraq poses is not of an immediate nature; if it were, the president already would have acted. Thus, characterizing an invasion of Iraq as repelling a sudden or imminent attack under these circumstances dangerously distorts the Founders' intent to limit the Executive's authority.

Third, time limitations help to clarify the boundary between executive and legislative war powers with regard to repelling "sudden attack." The president has the authority and obligation to repel sudden attacks because there is no time to deliberate, and an individual can act faster than Congress. A president who feared rejection of war plans might not want them subjected to congressional scrutiny, but that decision does not belong solely to the president.

National Security Strategy

The administration has made clear that Iraq may not be its only target. On September 20, 2002, the president issued the National Security Strategy, which proclaims that in order to "forestall or prevent . . . hostile acts by our adversaries, the United States will, if necessary act preemptively. . . . [I]n an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle where dangers gather."

Under the doctrine of preemption, the administration claims the right to launch wars to prevent harm to U.S. interests: in essence claiming the United States may decide unilaterally to preemptively invade another country. This policy applies not only to Iraq but also to any state that helps put weapons of mass destruction in the hands of terrorists. Indeed, in light of recent information about North Korea's nuclear weapons program, this could well be the next point on the Axis of Evil to face a preemptive war.

Conclusion

The issues remain timely and relevant: must the president seek congressional authorization to order preemptive

invasions of rogue states that may deliver weapons and aid to terrorists? What is the correct scope and allocation of war powers for preemptive invasions? House Joint Resolution 114 did not answer or reduce the urgency of these questions. Both history and the Constitution itself show that the president is not free to change the constitutionally mandated allocation of war powers.

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Omarska Camp, Bosnia

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functioning more efficient or effective, or performing acts that advance the goals of the criminal enterprise.

Persecution and Sexual Violence

Notably, the Chamber also stressed that any who knowingly participate in a significant way in a criminal enterprise are responsible not only for all crimes committed in furtherance of the enterprise but also for all crimes that were natural or foreseeable consequences of the enterprise, even if these other crimes are incidental or unplanned. Consequently, even though there was not evidence to suggest that most of the accused were aware of the rape crimes committed in Omarska camp, nonetheless these crimes were clearly foreseeable, as the Trial Chamber emphasized: "it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence."

The Trial Chamber recognized that war creates situations where average citizens get caught up in the violence or hatred, and people often commit crimes they would ordinarily never even have dreamed of committing.

Nonetheless, the Chamber emphasized, the presence of war or mass violence cannot shield or excuse perpetrators from prosecution if they knowingly participate in or facilitate criminal activity.

The Trial Chamber heard evidence that each accused was present during specific instances of abuses committed in the camp, and it also heard evidence that some of the accused occasionally attempted to assist a few of the detainees. Ultimately however, the court concluded that each of the accused had participated in a significant way in the joint criminal enterprise that functioned as Omarska camp, a camp where persecution of non-Serbs through various forms of physical, mental, and sexual violence was rampant. The accused who had not physically committed crimes had showed up for work everyday despite the daily murders, tortures, beatings, and other mistreatment and performed the tasks assigned to them efficiently, effectively, and without complaint. They had facilitated the commission of the crimes and allowed them to continue with ease and without disruption. All five accused were convicted of persecution as a crime against humanity for the assortment of evils committed in Omarska camp.

As to the rape crime charges against Radic, the Trial Chamber was convinced that he was involved in "the sexual harassment, humiliation, and violation of women" in Omarska camp. Several witnesses testified to his raping, attempting or threatening to rape, or groping them. The Trial Chamber found that the sexual violence constituted both rape and torture. The women suffered severe pain and suffering constituting torture, in part because the "fear was pervasive and the threat was always real that they could be subjected to sexual violence at the whim of Radic." Despite this finding, because the indictment failed to indicate whether the sexual violence committed by Radic was different from the rapes charged as part of the persecution count, they were deemed subsumed by the persecution count; thus he was not convicted of rape and torture for these crimes as crimes against humanity. Radic was however convicted of torture as a war crime for the sexual violence he inflicted upon women in Omarska camp.

Conclusion

The *Omarska Camp* case can be used to demonstrate that even during armed conflict, one cannot turn a blind eye to blatant criminal activity; if you know crimes are being committed and you perform acts that facilitate the commission of the crimes, you can be held criminally responsible. It can also be used to show that women are particularly vulnerable when detained in facilities guarded by armed men of an opposing side, and that all necessary and reasonable measures must be taken to provide protections against sexual violence to such women. Any planned or foreseeable crimes, including rape crimes, committed during the course of a joint criminal endeavor cause liability to attach to participants in the enterprise.

The degree of culpability, the amount of time spent in the camp, the position of the accused, and whether the men convicted physically perpetrated crimes was taken into account in sentencing. For the roles they played in facilitating or committing the crimes, Kvočka, Prcac, and Kos were given five- to seven-year prison terms; Radic received twenty years, and Zigic was sentenced to twenty-five years' imprisonment. This case is currently on appeal before the ICTY Appeals Chamber.

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Author's Note: The joint criminal enterprise theory developed in this case is a major component of the indictment against Slobodan Milosevic. His trial is currently underway in The Hague, where the former head of state is charged with genocide, crimes against humanity, and war crimes for a number of crimes, including mass murder, torture, and rape, committed by Serb forces during conflicts in Bosnia, Croatia, and Kosovo. For more information on all cases, see the ICTY website at www.un.org/icty.