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CONSTITUTIONAL THEORY

and the

COMMANDER-IN-CHIEF

by

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Commander, USN

A RESEARCH REPORT SUBMITTED TO THE FACULTY

IN

FULLFILLMENT OF THE CURRICULUM

REQUIREMENT

Advisor: Colonel Gay

MAXWELL AIR FORCE BASE, ALABAMA

April, 1994

CONSTITUTIONAL THEORY AND THE COMMANDER-IN-CHIEF

Those republics which in times of danger cannot resort to a dictatorship will generally be rushed when grave occasions occur.

Machiavelli

Since our founding fathers first drafted the United States Constitution, there has been a continuous debate over the legitimate role of the President and the Congress concerning who is responsible for committing United States military forces in limited engagements. The War Powers Act of 1973 represented a more recent attempt by the legislative branch to resolve this issue, yet members of Congress have continued to accuse the President of failing to comply fully with this law. At no time has Congress or the President attempted to resolve this issue in court; rather, they appear to want to keep the issue vague and unclear. In the words of Senator Sam Nunn (Democrat, Georgia):

American national security is often defined in terms of power. How this power is put to use, and toward what end, are less easily formulated. The use of force and the policy objectives to be realized by it are always contentious issues. ¹

In this paper I will first review the constitutional theory surrounding this issue, and provide an assessment of Constitutional background papers. Second, I will argue for a strong executive role in limited engagements short of declared

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war, in accordance with Constitutional theory. Finally, I will briefly discuss that executive role in view of current world events and the present administration.

When the Constitutional Convention convened in 1787, as a result of the failure of the Articles of Confederation, there was little to indicate the course the convention would take. However, at the outset there was some agreement on certain key issues. Most delegates believed that simply amending the Articles of Confederation was inadequate and agreed, in principle, to some form of republican democracy under a new constitution. This "federal government" would be separate and distinct from a *pure* democracy, in which there are no representative leaders and no elected or appointed head of state. Among the major contentious issues was how legislative representation would be effected, and how to empower and yet still control any head of state.

With regard to the executive function, the framers feared on the one hand an imperial president with unlimited powers. He might send Americans away to fight and die in furtherance of his own personal agenda. On the other hand, the framers also feared the inability of a large, slow, deliberative body which was incapable of effectively reacting during crises. "The framers recognized that the speed and secrecy, which only a single decision maker could provide, was essential to the safety of the

nation if it came under attack." ²

The framers clearly understood both sides of the war powers debate, and yet, "it was clearly recognized by the founding fathers that in moments of peril the effective action of the government of the United States would be channeled through the person of the chief executive." ³ For this reason, the wording about limited engagements short of war is left to the shared powers ⁴ of the individuals.

By 1787, republicanism, then, was positioned between monarchy and "mere democracy." As it benefited from experience of the years after 1776 and struggled to contain the tension between "unalienable rights" and majority rule, republicanism became both more moderate and more intricate. ⁵

One of the early constitutional debates centered around whether the executive should be a singular or plural body. Generally, federalists saw plurality in government as a way for politicians to sidestep responsibility.

It often becomes impossible, amidst mutual accusations, to determine on whom to blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. ⁶

Eventually the debate focused not on the virtues or vices of singular or pluralistic governments or about other abstract

concepts, but rather upon a practical approach to selecting a single head of state. On the one hand, the framers wanted to effectively empower a virtuous leader, while at the same time guard against the vices of a corrupt one. The framers clearly viewed the best government as one with a single head of state, provided he could be trusted.

An appreciation of this vital role was shared by all the founders of the United States, but it was counterbalanced by their determination to avoid investing in the American presidency the sole prerogative of making war and peace. '

Given their reservations, they nonetheless granted the chief executive formidable responsibility for matters involving the use of military force. As political scientist Clinton Rossiter wrote: "We have placed a shocking amount of military power in the President's keeping, but where else, we may ask, could it possibly have been placed." *

The debates were sometimes heated, but eventually a Constitution was written and agreed upon by the delegates. The President was given rather broad powers, and vested with primary responsibility for foreign policy.

A single-person executive, the president, was created. It had no counterpart in the Articles of Confederation. Congress, however, had ultimate power: the appropriation of funds for the executive's use. The executive was to be Commander in Chief of the Army and Navy, could negotiate treaties for Senate

consideration, and might nominate ambassadors and other public Ministers with the advice and consent of the Senate. The Constitution thus established a new agency to conduct day-to-day foreign policy. ⁹

It then fell to a small group of men to "sell" the new Constitution to the public in order to ensure ratification. Alexander Hamilton, with the aide of James Madison and John Jay, published a series of articles for the New York newspapers under the assumed name of "Publius." Although these editorials were written primarily to persuade the populace to vote for ratification of the new Constitution, the essays were soon compiled into two volumes entitled The Federalist Papers. This work became the most authoritative work of literature explaining the Constitution.

The Federalist is the most important work in political science that has ever been written, or is likely to be written, in the United States. It is, indeed, the one product of the American mind that is rightly counted among the classics of political theory. ¹⁰

Opinion was soon divided into basically two camps. The federalists argued for ratification of the new Constitution, and it was largely through their efforts that participating states eventually ratified the Constitution. Therefore, an understanding of federalist theory is important to understanding the Constitution.

At the heart of federalist thought was the need for a strong

central government, unlike the loose alliance created by the original Articles of Confederation. Under the Articles of Confederation, the nation had remained poor, as there was no authority for the levying of taxes or the generation of revenue.

A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. ¹¹

Some form of empowerment by the people was necessary, and federalists saw a strong national government as essential to preserving the freedom of citizens of each state. "Well aware of the tendencies of small, vulnerable republics to quarrel and be gobbled up by more powerful nations," ¹² the federalists found strength in centralized government as well as a single head of state. "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." ¹³ Still, for the federalists, the real issue was not only the effective use of big government, but also "the insurance of its faithfulness to the people and of the stability and wisdom of its enactments." ¹⁴

If men were angels, no government would be necessary . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. ¹⁵

The federalists believed it was much easier for the public to control a single executive, and "that it is far more safe there should be a single object for the jealousy and watchfulness of the people." ¹⁶

In the aftermath of British imperialism, anti-federalists were skeptical of any large government and especially of a single head of state. Anti-federalist leaders, most notably Patrick Henry and John Dewitt, feared that embracing a powerful central government would ultimately infringe upon the rights of individuals. Thomas Jefferson's "republicanism" was similar to anti-federalist thinking. He argued this way:

The question turns, Sir, on the poor little thing-the expression, *We, the people*, instead of the States of America. I need not take much pains to show, that the principles of this system, are extremely pernicious, impolitic, and dangerous. Is this a monarchy, like England-a compact between Prince and people; with checks on the former, to secure the liberty of the latter? is this a Confederacy, like Holland-an association of a number of independent states, each of which retain its individual sovereignty? It is not a democracy, wherein the people retain all their rights securely. ¹⁷

The anti-federalists' vision of America centered around a loose confederation of small agrarian states. Their alternative to "federalism" included small local communities, capable of governing themselves without interference. They believed that local citizens knew better than anyone which problems were important to solve.

They (anti-federalists) saw in federalist hopes for commercial growth and international prestige only the lust of ambitious men for a "splendid empire" where, in the time-honored way, the people would be burdened with taxes, conscription, and campaigns.¹⁸

"The anti-federalists were, in a sense, 'men of little faith' as critics have charged, but this was true only within their fear that centralized power tended to become arbitrary and impersonal." ¹⁹

Current political jargon is far different from the framers' original words, but federalist and anti-federalist themes are still valid today. Roughly speaking, the federalists would probably be members of the Republican Party, and would be labeled "conservative". The anti-federalists would be Democrats, and labeled "liberal." Thomas Jefferson's republicanism (no relation to the modern Republican Party) was similar with anti-federalist theory; and, over the years, Jefferson's "republicanism" evolved into the Democratic Party.

Due to these differences in political philosophy, many contentious issues were left intentionally vague by the framers, and these issues remain unresolved today. Two examples of this split in responsibility occur with "foreign policy" and "war making powers." Today, the President and the Congress continue to debate these issues with little hope in resolution. The

debate centers in part around two modern political science models for analyzing government decision making. A review of the differences between the rational-comprehensive model and the incremental model helps to explain some of the fundamental differences between the single head of state, the President, and the plural Congress.

The rational-comprehensive model states that decision makers will do what is in their own self interests (or what is in the national best interests). Clarification of values is usually distinct from, and a prerequisite to, empirical analysis of alternative policies. As a result, policy is usually approached through means-end analysis. That is to say that the ends are isolated and then the means are sought. Analysis is comprehensive, with every important, relevant factor taken into account, and the typical test for "effective" policy is that it can be shown to be the most appropriate means to the desired ends. This model is most often used in analyzing decisions of a single decision maker. (President Bush's decision not to pursue the removal of Saddam Hussein after Iraq's expulsion from Kuwait provides a good example of rational-comprehensive analysis.)

The incremental model, on the other hand, states that decision makers operate on the margin; that is to say, they only look at the area of change. Selection of value goals and empirical analysis of needed action are not distinct from one

another, but are closely intertwined. Since the means to the desired ends are not distinct, means-end analysis is often inappropriate. In fact, analysis is drastically limited, with many important policy alternatives and affected values neglected. Typically, the test of "good" policy is that analysts find themselves agreeing on policy without agreeing whether it is the most appropriate means to an agreed objective. Incremental decision making tends to be slow and deliberate and is most often used to study the decision making process of a large group like the Congress. (Tracing a bill from start to finish through the House of Representatives and the Senate provides a good example of incremental decision making.)

Since the rational-comprehensive model is used primarily by individuals like a single executive, "the rational actor model is probably the most relevant to explaining and understanding crisis decisions. One of the President's assets in the struggle over control of foreign policy is his ability to act, to shoot first and ask questions later." ²⁰ In crisis situations, a collective group tends to be ineffective.

A modern federalist would argue that the rational-comprehensive model provides the best method for determining whether or not to use military force in any given crisis. Anti-federalists would favor the incremental model, since incremental decision making is often more appropriate for groups or

institutions. It is for this reason that Congress operates incrementally, as individual members debate and compromise on many aspects of public policy, while the collective group ultimately decides on the best course of action. ²¹

Because of compromises between the advocates of both large and small government, the United States Constitution gives *war making* powers to the deliberative body, Congress ²² and *war fighting* powers to a single individual, the President. ²³ Beyond these two points, with regard to conflicts, the Constitution is relatively silent by design. From the beginning this silence has been deafening.

In the United States, the powers of the President, as commander-in-chief, are quite broad, although their extent is not entirely settled. He has relied on this power to use armed forces to carry out military operations in advance of a declaration of war or approval of hostilities by Congress; to deploy the forces within or without the federal territory to provide the most effective defense; and, in certain instances, to provide for their supply . . . The President may not act contrary to legislation, however. Moreover, Congress can review and often control such actions in passing on requests for necessary funds or other supporting legislation. ²⁴

As previously mentioned, the President is primarily responsible for foreign policy, since he alone negotiates foreign treaties. ²⁵ "Congressional hearings are at best a cumbersome way to make foreign policy, partly because they typically come after the fact, partly because partisanship is seldom more

clearly in evidence than in a congressional hearing, and increasingly because of a divided government." ²⁶ Clearly, the framers intended for the President to have some limited powers in using military force in the furtherance of foreign policy, as well as to react decisively during crisis. Alexander Hamilton said:

Of all the causes or concerns of government, the direction of war most particularly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms an usual and essential part of the definition of the executive authority. ²⁷

Of course, today the President has at his ready disposal numerous experts, especially those in the Defense Department. The Office of Secretary of Defense, with its thousands of trained experts, especially those uniformed employees who are salaried to advise on military matters, is a part of the executive branch. Additionally, the Chairman of the Joint Chiefs of Staff, a uniformed military officer, is appointed by and advises the President, since "suits over uniforms" is a fundamental precept of the Constitution. Clearly, today, the executive branch of government stands at the top of the national security decision making process, and it seems only logical that the highest ranking uniformed military officer should be included in any decision to use force. It would appear that even Congress would agree. In the authorizing report for fiscal year 1969, the House

Armed Services Committee said:

. . . the committee feels that too much emphasis has been placed upon the recommendations of persons who lack actual military experience and a frame of reference which can best be gained by long immersion in military matters over a period of years. Not enough emphasis is placed upon the recommendations of those who have attained their knowledge through years of doing and being exposed to the actual threat of extinction by a determined enemy. ²⁸

In spite of all of the clear evidence to the contrary, some ultra-liberal "experts" argue that the framers never intended for the executive to be allowed to authorize the use of military force under any circumstance without the prior approval of Congress. If this is true, then every President, from Washington to Clinton, has overstepped his authority at some point and violated the Constitution by using the military option without a Congressional declaration of war.

Although Congress is empowered to declare war, it has done so only on five occasions: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II. Over the past two centuries, American forces have fought in several hundred military actions. ²⁹

It seems inconceivable that every President in the history of our nation would disregard the Constitution in using military force without authorization. The framers intended this executive authority. While it is true that American forces have been involved in hundreds of actions short of declared war, under the

direction of the President. only rarely has Congress objected with anything stronger than rhetoric. Congress is reluctant to use stronger measures for good reason. First, legislation and court actions mean accountability, and "accountability is pretty frightening stuff." ³⁰ By design, the President is the only nationally elected official directly and individually accountable to the collective public. Since he stands alone at the top, he is held accountable for most government actions, whether or not these actions are of his individual commission. Congress (collectively) is accountable to no one, and the members would like to keep it that way. Second, Congress has no clear Constitutional argument for limited engagements, again as the framers intended. Third, and most important, the framers intended for the President and Congress to work together to resolve differences for the collective good of the country.

Even Thomas Jefferson used his executive authority to authorize force without the prior consent of Congress. The father of the Democratic Party fiercely argued against executive authority beyond any day-to-day administrative duties. He passionately articulated his view that the Commander-in-Chief should never be allowed to send Americans away to fight and die without the full support of the American people as viewed through the eyes of a deliberative, legislative body of representatives. This process would ensure a slow and deliberate debate in Congress prior to any hostilities. Only after proper debate and

a formal declaration by Congress should the President be allowed to use and military option.

And yet, early in his presidency, this same Thomas Jefferson found himself at odds with his own philosophy. The Barbary Pirates were attacking United States merchant ships while demanding tribute from the infant American government. With first consulting Congress, Jefferson dispatched four of the six war ships owned by the infant United States Navy, giving them specific orders to shoot and sink hostile ships if necessary.

"But if you find on your arrival in Gibraltar hat all the Barbary Powers have declared war against the United States, you will distribute your forces in such a manner, as your judgment shall direct, so as best to protect our commerce and chastise their insolence-by sinking, burning, or destroying their ships and vessels wherever you shall find them" . . . Jefferson did not disclose these orders to Congress when he went before that body on December 8, 1801, to request approval to take the offensive in the naval war that was already being fought. ³¹

As an aside:

Hamilton (a Federalist), however, found Jefferson's consultations with Congress ridiculous . . . "When a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war and any declaration on the part of the Congress is nugatory; it is at least unnecessary." ³²

President Jefferson, a stickler for following the letter of

the Constitution, had argued previously against any presidential authority to make war. Yet he found no problem with using military force in a foreign place to protect American life and property. Clearly, President Jefferson was able to distinguish between his own theoretical view of executive authority, and the more practical use of his actual Constitutional authority as Commander-in-Chief during conflicts of short duration.

Because the Constitution is relatively silent on the full scope of presidential authority in limited engagements, Congress has at times attempted to regulate or limit the President's authority to authorize force. In order to further define responsibilities between the President and Congress under the "shared powers" concept, the War Powers resolution of 1973³³ was enacted. It was not passed with the support of the executive; rather, it was enacted after Congress overturned President Nixon's veto. This legislative act, requiring the President to notify Congress when United States troops are in combat situations and to withdraw them within 60 days without further approval from Congress, was a clear example of Congress' trying to rewrite the Constitution.

Many in the legal community regard the War Powers Act as unconstitutional. It had never been tested . . . The uncertainty of affirmative and prompt action by both houses of Congress would encourage adversaries simply to wait out the sixty-day period.³⁴

Ironically, the only lasting result of this legislation was to further legitimize the President's authority to use military force prior to a "proper" debate in Congress.

Whereas the President can-at least in theory and subject to some constraints-move with dispatch and secrecy in the national security arena, the deliberative processes of Congress are slow and open-or, if not avowedly open, "leaky." ³⁵

Of course, when time permits and the situation warrants, the President must consult Congress first--regardless of any legislation. When declaring war, Congress must perform its Constitutional duty by debating and voting on the issue. However, there are times (usually in limited conflicts) when the Commander-in-Chief may have to commit forces immediately.

The delegates to the Constitutional Convention, however, did not expect Congress to authorize every use of military force. They knew that speed and secrecy, which only a single decision maker could provide, were essential to the safety of the nation if it came under attack. ³⁶

The President will be the subject of intense scrutiny by the media, Congress, the American people, and the international community from the outset and he will most certainly be judged after the fact. Secretary Shultz, arguing for presidential power to commit military forces, said:

. . . democratically elected and accountable officials

have been placed in positions where they can and must make decisions to defend our national security. The risk and burden of leadership is that those decisions will receive, or not receive, the support of the people on their merits. The democratic process will deal with leaders who fail to measure up to the standards imposed by the American people and the established principles of a country guided by the rule of law. ³⁷

Mr. Shultz advocated the executive use of force in order to respond to terrorist acts. This is but one of many limited roles the military might play in furtherance of the President's national security policy. Some other possible uses of military force, short of declared war, might include protection of American life and property on foreign soil, an attack to preempt an assault, and delivery of humanitarian aide.

As chief executive, commander-in-chief, and the occupant of the only elected national office that is never out of session, the President is also recognized as being responsible for the defense of the nation if it is attacked. This role is reinforced by the presidential oath of office in the Constitution, which pledges the President to preserve, protect, and defend the Constitution of the United States. ³⁸

The list of possible uses of military force is almost endless, and for this reason the legislative and executive branches were intentionally left to battle over ambiguities of war powers.

Finally, it is important in any debate about executive authority to distinguish clearly between the Office of the President and any particular administration, like the Clinton

Administration. The Office of the President of the United States of America has become the most powerful political office in the world. Even though the Clinton Administration has made necessary cuts in military spending, the United States still has the most effective fighting force in the world. As the world looks to the United States for leadership, foreign leaders naturally focus on the Office of the President. As a result, it seems only natural that the current President would want a coherent foreign policy that includes a range of credible military options. However, this administration, like the Johnson administration of the 1960s, seems to be ignoring foreign policy to concentrate on an aggressive domestic agenda. Harry Summers, a freelance writer wrote this:

In one of history's more bizarre exhibitions of poetic justice, Mr. Clinton now finds himself as the reincarnation of his old nemesis, Lyndon Baines Johnson. Like LBJ, he inherited a foreign policy debacle, and, like Johnson, he has managed to make that predicament even worse by his own bumbling. ³⁹

Later in the same article Mr. Summers goes on to report that:

LBJ's heart was never in the war in Vietnam. And Bill Clinton's heart was never in U.S. military involvement abroad either. His passion, too, is domestic politics. Mr. Clinton sought to rid himself completely of the distractions of such involvement, palming it off on the United Nations. ⁴⁰

As a result, President Clinton's foreign policy with regards to

the Balkans has been a policy on the margins.

Now the Clinton administration has taken steps that gradually drag the United States into the Balkan conflict. . . . The real question is whether the United States would be engaged militarily in the Balkans without a clear and practicable political blueprint. Such a blueprint does not exist at this time. An impulsive rush into Bosnia could easily make the administration hostage to an intractable problem, and even undermine Clinton's presidency. ⁴¹

The President must pay attention to foreign policy, and especially to unstable areas like the Balkans. A continual rational-comprehensive review of current United States policy in that region of the world, as well as others, is needed. Even if the case is made that United States' national interests are directly threatened, there must also be clear national objectives for that region and there must be an end in sight.

In this context, the international recognition of Bosnia-Herzegovina as a single state when it clearly was not one, however well intentioned it might have been, made a tragic situation infinitely worse, and means that the area will remain unstable for a long time to come. ⁴²

It is ironic that, with regard to foreign policy, the current President has sought the advice of a former President from the opposite party. Many have regarded President Richard Nixon (37th President, Republican) as the greatest foreign-policy President in our nation's history. In revamping United States' foreign policy, and to Mr. Clinton's credit, the President has

put political and philosophical differences aside in an attempt to refocus his efforts. This kind of comprehensive review by a single executive, after soliciting advice from both sides of the aisle, is precisely what the framers intended.

In today's complex new world order it is imperative that every President formulate a comprehensive, coherent and rational foreign policy, as a necessary means of fulfilling the constitutional authority of the high office to which he has been elected. Additionally, the President must clearly understand his unique role in directing the armed forces, and this awesome constitutional power must be directed in a coherent and positive way to "preserve and defend the Constitution." The framers of the Constitution expected this, and the American people presently demand it. Even when the President's policies seem disjointed, and his lack of experience with military issues brings his credibility as Commander-in-Chief under fire, he still represents the Office of the President of the United States -- constitutionally elected by all the citizens of the nation. Whether or not a particular President consults with Congress on every issue, and whether or not Congress has spoken, it is the President who necessarily directs the course of military events. If for no other reason than this, President Clinton must clearly articulate his foreign policy; first, to all government agencies (including the military) involved with implementing his policy; second, to the American public; and third, to the world at large.

American voters expect this from every President and they will stand for nothing less. The Constitution guarantees it.

I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the states who did not admit, as the result of experience, that the UNITY of the executive of this state was one of the best distinguishing features of our Constitution.

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