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Why Do the Courts Let Presidents Get Away with War?

By Alfred W. Blumrosen and Steven M. Blumrosen

Alfred Blumrosen is the Thomas A. Cowan Professor of Law Emeritus, Rutgers, the State University of New Jersey. Steven Blumrosen has a law degree from Quinnipiac University School of Law. *The authors acknowledge the assistance of Alex Blumrosen, a member of the Council on Foreign Relations, and Fredrica Wechsler, the retired Director of Cultural Affairs for the National Academy of Sciences.* *Disclosure: Alfred and Steven Blumrosen have been advising the Constitutional Litigation Clinic at Rutgers Law School that is supporting the NJPA v. Bush case referred to in this article.*

Federal Courts have never considered the June 1, 1787 understanding at the Constitutional Convention that gave Congress—not the president—authority over war. In disregarding the events of that date, the courts have distorted the meaning of the Constitution, undermined the War Powers Resolution of 1973, and upheld unconstitutional wars in Iraq and Vietnam. This same error carried forward to the proposal in 2008 by former Secretaries of State James Baker and Warren Christopher. Their proposal would further expand executive power to take the nation to war.

Delegates to the Federal Convention of May of 1787 began by agreeing on a plan proposed by Virginia to separate governmental powers among the president, a two-house Congress, and a judiciary. On June 1, they turned to Virginia's proposal that the president be given the "executive powers" held by the congress under the Articles of Confederation.

Charles Pinckney [South Carolina], "…was afraid the Executive power of [the existing] Congress might extend to peace & war & etc., which would render the Executive a monarchy, of the worst kind, to wit an elective one." Pinckney's fear was based on the conclusions of Montesquieu, Locke and Blackstone that decisions for war belonged to kings.

This fear of presidential power over decisions on war was shared by all delegates who spoke to the issue. "Mr. Rutledge [South Carolina]... was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace." Mr. Sherman [Connecticut] "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect…, which was the depositary of the supreme will of the Society.

Mr. Wilson [Pennsylvania] "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c..."

Rufus King [New York] reported that " Madison: [Virginia] agrees with Wilson in his definition of executive powers -- executive powers ex vi termini,[from the words alone] do not include the Rights of war & peace &c. but the powers should be confined and defined -- if large we shall have the Evils of elective Monarchies…"

These Framers had solid reasons to insist that the president not be granted the power of war that was characteristic of monarchies. John Dickinson [Delaware] explained that he personally preferred a limited monarchy, but that "was out of the question. The spirit of the times--the state of our affairs, forbade the experiment, if it were desireable."

Historian Joseph Ellis, in 2001 described that "spirit" of the times: "At the very core of the revolutionary legacy ... was a virulent hatred of monarchy and an inveterate suspicion of any consolidated version of political authority. A major tenet of the American Revolution… was that all kings, and not just George III, were inherently evil. The very notion of a republican king was a repudiation of the spirit of '76 and a contradiction in terms."

To make doubly clear that the President would not have the power to make war, the Convention , on June 1, not only deleted the clause proposed by Virginia but also determined that "making war" was not an "executive power" of the President. It was to be a "legislative power" exercised by Congress. This disregard of the judgment of Montesquieu, Locke and Blackstone was an example of what Madison called:

".. the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity,… to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience."

The delegates' conclusion of June 1 was confirmed on August 6, by the Convention's Committee on Detail. That Committee reported that Congress should have the power to "make war." This recommendation was considered by the Convention on August 17.

Charles Pinckney opposed vesting this power in the Congress. "Its proceedings were too slow. …The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions." Pierce Butler, [South Carolina] thought the Senate would also be too slow. Butler alone "was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Gerry [Massachusetts] "never expected to hear in a republic a motion to empower the Executive alone to declare war." Butler's proposal was buried.

Madison and Gerry, responding to Pinckney's concern that a speedy response to a foreign attack might be necessary, "moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks." Sherman, [Connecticut], "thought it stood very well. The Executive shd. be able to repel and not to commence war. Ellsworth [Connecticut], "there is a material difference between the cases of making war, and making peace. It should be more easy to get out of war, than into it."

Mason [Virginia], "was against giving the power of war to the Executive, because not *safely* to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "declare" to "make." The motion to insert declare -- in place of make-- was agreed to.

The Convention's vote to allow the president to repel a "sudden attack," reinforced the June 1 resolution that gave the decision on war to Congress. The change from "make" to "declare" did not reduce the power of Congress to decide whether to take the nation to war. The Framers expected that the decision for war would be made by the vote of each member of Congress "in the face of their

constituents," thus assuring that members of the House would be accountable to voters at the next election.

Opponents of the Constitution – the "anti federalists" – who feared a president with too much power and control of the army – did not claim during the ratification of the Constitution that the President would have the power to take the nation to war. Alexander Hamilton explained in Federalist #26:

> *… [The president's] authority would … amount to nothing more than the supreme command and direction of the military and naval forces, 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…. would appertain to the legislature.*

Early practice under the Constitution confirmed congressional power to shape and limit war. During the "quasi war" with France, 1798-1800, Congress specified that the President could order the navy to capture French ships in territorial waters and on the high seas – but not elsewhere – and limited the presidential authority to one year. The Supreme Court, between 1800 and 1804 held that Congress had full power to define and limit the scope of military action. It could declare unlimited or "perfect" war, or a "limited" war, restricted to a particular country, to the nature and duration of hostilities.

Between 1812 and World War II, Congress declared war on only five occasions. By the time of the Vietnam hostilities, Congress and Presidents had agreed on a new formula that has been used in four occasions since then. Under this formula, Congress authorizes the President to use military force at his discretion, thereby abdicating its constitutional responsibility. This formula was reviewed in the leading case of *Massachusetts v. Laird* concerning the Vietnam war in 1971.

The unanimous discussion of June 1, 1787 that confined the power to "make war" to Congress was not considered in that case. The *Laird* opinion stated: "the Congress was given the power to declare war and nothing was said about undeclared hostilities." What the court called "undeclared hostilities" were encompassed within the concept of "imperfect" or "limited" wars that the Supreme Court had recognized in connection with the "quasi war" with France.

By ignoring June 1, 1787 and thereby misunderstanding the August 17 discussion, the *Laird* opinion invented a "joint authority" between President and Congress to initiate war. This "joint authority"

allowed Congress to shift its constitutional responsibility to the President. Compounding this error, the *Laird* opinion's "joint authority" was accepted in the War Powers Resolution of 1973 that recognized that an authorization to the president to use military force was equivalent to a declaration of war. *Laird* was followed in *Doe v. Bush* (2003) concerning the Iraq war. *Laird* and *Doe* have been followed by other lower Federal courts.

The *Doe* opinion missed the point of June 1 when it asked:

> *Suppose … that Congress did pass a law stating simply, "The United States declares war on Iraq." This would still leave to the President all determinations concerning timing, strategy, and tactics; the President would decide both when and how to start an attack and when and how to stop it. It is difficult to see how Congress could be said to shirk its constitutional responsibilities in that scenario.*

In the scenario stated in *Doe*, Congress did make the decision to go to war as required by the Constitution. But that is not what happened in the Iraq resolution of 2002 that was before the court in *Doe*. There, Congress told the President that he could make the decision to go to war. In adopting the Iraq resolution of 2002, Congress passed the buck to the President, thereby ignoring the separation of powers established on June 1, 1787.

The Supreme Court has never reviewed the decisions in *Laird* or *Doe*, nor has any US Court examined the June 1 discussion at the Convention concerning the power to declare war. *New Jersey Peace Action v. Bush* was filed in 2008 in the Federal District Court in Newark, New Jersey. It seeks a declaratory judgment to address the issue discussed here, and asserts that citizens may enforce the congressional duty to declare war under the principle in *Marbury v. Madison* that "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

In authorizing the president to decide to use military force, Congress avoids the necessity to examine proposals for war in light of each member's personal reelection prospects. A greater attention by Congress would require presidents to be more forthcoming in presenting reasons for war. Greater clarity may lead Congress to shape and limit presidential authority regarding the time, place and

manner of a limited war. This would conform to the requirements of the Constitution and to the practices in the early years under the Constitution. In contrast, the July 2008 proposal of the Baker and Christopher Commission would extend the time in which the president could conduct hostilities without congressional authority and enlarge presidential discretion over "preventive wars" and "seven day wars."