WAR POWERS

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Abstract: *When the Founders wrote the Constitution they set up a system of separate and shared powers between the branches of government. One such power was over war. Leading up to the* Steel Seizure Case *in 1952, the Supreme Court upheld the Founders view of the balance of war powers. Justice Jackson's three-prong-test was instituted in the* Steel Seizure Case *and changed the distribution of war powers forever. The current court has a skewed understanding of war powers where the President is subject to congressional approval. The Founders' intention for war powers is no longer upheld by the court.*

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Over the past decade, the issue of war powers, who has control over the military and decisions of going to war, has been present in the media. The dispute stems from the disagreement over how to share political powers over war between the different political branches of government. Since the term separation of powers was coined, emphasis has been placed on the divisions of powers within government. The Founders set up a government of separate but also shared powers. One such power in particular was power over war. The Founders set up a government in which war powers were shared between Congress and the President based on their strengths as offices. This understanding was upheld by the courts through the Civil War and until *Youngstown Sheet and Tube vs. Sawyer (1952)* in which Jackson's three-prong-test of executive power was introduced. Jackson's three-prong-test placed the President's power at the mercy of congressional approval through a system of three categories. Since the *Steel Seizure Case*, presidential power over war has become subject to congressional approval and the constitutional

divisions no longer apply. The current understanding of war powers is inconsistent with the vision of the Founders and early judicial precedent because Jackson's three-prong-test placed the President's power at the mercy of Congress' consent.

The term, separation of powers, did not represent the Founders' intentions for the three departments of government. The Founders did not design a government of completely separate powers. The government they designed was one of shared powers. The federation of three branches was intended to have distinct powers that exercised their strengths. Not only did they have separate powers, however, but they also shared powers over specific issues. The branches shared power over one issue but had separate responsibilities under that power. War power was one such power that they shared. Congress was given the power to declare and finance war and the Executive was given the power to make war. Declaring war is the formal declaration to the world that a country is at war. Making war is directing the war that has already begun. The federal government executes its power well when each branch is

using their strengths and each of the branches are checked by the others. The Founders intended for a balance of separate and shared powers.

Article II, Section 2 of the Constitution outlines the Founders' intended powers for the Executive Branch. Clause 1 states, "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."[1] The first clause of Article II gives the President power to make war. The President's power to make war includes the power to declare treaties, to command military officers, to hire officers, and to fire officers. The President's power also includes control over the boots on the ground as Commander in Chief.

The second clause shows how the Executive and Legislative branches share war powers. The second clause states the President, "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[2] The second

1 U.S. CONST. art. II § 2, cl. 1.
2 U.S. CONST. art. II § 2, cl. 2.

clause explains that the President can end a war if he has the approval of the Senate. The Founders intended that the Senate would provide consent or disapproval when the President made a treaty. Two-thirds of the Senate had to approve of the treaty for it to become legally binding. The second clause did not put the President under the Senate, it just allowed for the Senate to be consulted on treaties. These two clauses show that the Founders intended the President to have power to make war and preserve relations with foreign nations. The Founders gave the Executive leader powers that played to his strengths. The President is a swift and powerful actor which is necessary when making war and preserving foreign relations.

The Founders placed the war powers for Congress in Article 2 Section IIX of the Constitution. Section IIX reads, “The Congress shall have power… to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; To raise and support armies… To provide and maintain a navy… To provide for calling forth the militia to execute the laws of

the union, suppress insurrections and repel invasions."[3] Congress is vested with the limited power to declare an official war and the power of the purse. William Rogers explained the importance of the power of the purse for war powers in his California Law Review article. Rogers said, "In addition, Congress has the sole authority to appropriate funds, a vital power in the war powers and foreign relations area."[4] Congress has power over the legal declaration of a war and the funding to execute the war. These powers are part of Congress' responsibilities as a deliberative body.

The Constitution was ratified in 1789 to replace the failed Articles of Confederation which showed the need for a division of war powers. Under the Articles, the legislative body was given all power over war. The Articles stated, "No State shall engage in any war without the consent of the United States in Congress assembled."[5] Congress is the deliberative branch and so they did not execute the quick decision making that is involved in

3 U.S. CONST. art. I, § 8.

4 William P. Rogers, *Congress, the President and War Powers*, 59 CA. L. REV. 1194, 1195 (1971).

5 ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

making and directing war. When the Founders penned the Constitution they created a government with shared war powers to allow for an energetic Executive that could better fulfill the role of a maker of war. This new division of war powers was reinforced in Alexander Hamilton's Federalist Seventy Four.

At the time of the Founders, the Anti-Federalists worried that this change in war powers gave too much power to the executive branch, the intent of which is explained by Hamilton in Federalist Seventy-Four. Hamilton said that the power of Commander in Chief had to go to the President because every other magistrate of foreign nations had this power. He also argued the power fit with the attributes of the position. He said it was an obvious truth, "The propriety of this provision is so evident in itself… that little need be said to explain or enforce it."[6] Hamilton went on to explain that the power was self-evident because a 'common strength' was necessary for war making power, "The direction of war implies the direction of the common strength; and the power of directing

6 THE FEDERALIST No. 74 (Alexander Hamilton).

and employing the common strength, forms a usual and essential part in the definition of the executive authority."[7] The President is the perfect war maker because he can act swiftly and is backed with approval of the nation.

The Founders' division of war powers was also reinforced when George Washington shut down the House Debate on the Jay Treaty. Washington did not want to hand over confidential papers related to a treaty with England, but Representative Albert Gallatin argued that the House of Representatives had a right to ask for the confidential papers because they were going to sign off on a treaty and make it binding. Gallatin argued, "The House had a right to ask for the papers proposed to be called for, because their cooperation and sanction was necessary to carry the Treaty into full effect, to render it a binding instrument, and to make it properly speaking, a law of the land; because they had a full discretion either to give or to refuse that co-operation."[8] Washington strongly disagreed with Gallatin's

7 *Id.*

8 Albert Gallatin, *House Debate on the Jay Treaty (1796), in* 1 AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 173, 173-174.

argument that the President had to submit his confidential papers to the House so that they could make their decision with all of the information in mind.

In true Washington fashion, he walked into the House and explained exactly why no President had to release confidential foreign relations information to Congress. He wanted to set a precedent that the President and Congress were on equal ground in war powers and that the President was not subservient to Congress. Washington said treaty-making power was the President's part of war powers and that the Senate was the only one who had to consent. Washington argued, "Every Treaty so made, and promulgated, thenceforward becomes the law of the land. It is thus that the Treaty-making power has been understood by foreign nations, and in all the Treaties made with them, we have declared, and they have believed, that when ratified by the President, with the advice and consent of the Senate, they become obligatory."[9] Washington's statement

9 George Washington, *House Debate on the Jay Treaty (1796), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 174, 174-175.

set precedent that part of the President's war-making power was the power to create treaties. His statement also clarified that the Senate, not the House of Representatives, was the entity that had to provide consent to the President's actions. The House Debate over the Jay Treaty solidified, with presidential precedent, that war powers were shared between the two branches and that they were on equal footing.

Until the Civil War, the Federal government operated under the Founders' understanding of separate and shared war powers. When a new form of unconventional war occurred, the debate rang out over who had power to act. The Civil War cases included many constitutional issues involving war powers. These cases included the group of 'civil wars' in the same category as 'traditional wars'. These cases also included an explanation of the Founders' shared war powers for civil wars. During *The Prize Cases* in 1863 this new addition of civil wars was added. *The Prize Cases* were a success in preserving the Founders' vision for war powers. The cases justified Lincoln's actions and showed that the President was the

maker of war and Congress was only to declare and fund war.

In the 1860s, President Lincoln ordered a blockade of the Southern ports. During this blockade, the Quaker City Union ship conquered and looted the Confederate ship, the *Amy Warwick*. The crew of the *Warwick* argued that the Union troops' looting was unlawful because the blockade itself was unconstitutional. Despite Congress' approval of the blockade after the fact, the South did not agree it was constitutional and said that Congress' actions could not apply retroactively. When this case climbed the steps of the Supreme Court, the Court ruled that Congress and the President had shared war powers. The President had war making powers and Congress had declaring powers. The Justices ruled Lincoln's actions constitutional because he was making war as the Commander in Chief during an obvious war. The rationale was that the Civil War was an obvious war even if it was not officially declared by Congress. The argument was that because the South had succeeded, and the North and South started fighting each other, the war was obvious. Lincoln, therefore, had full

constitutional authority in this action.

Justice Grier explained in the majority opinion of *The Prize Cases*, that if any rebellion began it was a war, regardless of who started it, and that the President then had normal power to act. Grier explained, "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[10] Justice Grier determined that the President was Commander in Chief; he was in charge of the protection of the nation and had the responsibility to respond. He went on to explain that the Civil War was a war against a rebellious province so the normal rules of war applied. The President was Commander in Chief and had power to direct the military, saying, "It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the

10 Robert Grier, *The Prize Cases (1863), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 311, 311-312.

law of nations."[11] Even though the Civil War was different than previous wars, it was still a war, so the normal separation of war powers applied.

Justice Nelson wrote the dissenting argument in this case and stated that Lincoln's military actions were unconstitutional. The defeat of Justice Nelson's dissent ingrained into history for the next century that the President did not have to wait for Congressional approval to take actions of war. Justice Nelson, in the dissent, argued that Congressional recognition of war could not approve the President's blockade. The blockade happened before Congress recognized the war so the blockade had to be unconstitutional. Justice Grier and the majority explained that requirement was not in the Constitution and President Lincoln's actions were justified. *The Prize Cases* added another layer of precedent to the President and Congress' shared control over war powers. The President still shared the power and was not placed at the mercy of Congress.

Until the mid-twentieth century there was general agreement on the constitutional division of war powers.

11 *Id.* at 311.

The President had the power to make war by making treaties and acting as the Commander and Chief of the armed forces during war. Congress had the power to declare war as well as the power of the purse to fund war. *Youngstown Sheet and Tube vs. Sawyer (1952)* changed the normal understanding and pulled the Supreme Court away from the constitutional provisions. Often referred to as the *Steel Seizure Case*, *Youngstown Sheet and Tube vs. Sawyer (1952)* was a case that involved President Truman and a steel plant during the Korean War. At this point in American history, the United States was in an un-declared war with North Korea and Truman was Franklin Delano Roosevelt's Vice President. Roosevelt was a powerful example and greatly influenced Truman's expectations of presidential power. In 1951 the Steelworkers of America union wanted to strike. Charles Sawyer, Secretary of Commerce, was given power by Truman's executive order to keep the steel mill running. Truman argued that this action was within his power because it was important for the war effort. FDR had exercised similar types of power while he was president and Truman expected the same level of flexibility. Congress

did not approve of his actions and this went to the Supreme Court.

Justice Black's opinion showed that the constitutional division of war powers did not allow for Truman to take this action. Black began by arguing that the President was not given power to seize private property during war time. He said, "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is the job of the Nation's lawmakers, not for its military authorities."[12] Justice Black continued in his opinion to further explain the President's power: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[13] Truman was only given power to execute laws on United

12 Hugo Black, *Youngstown Sheet and Tube Co. v. Sawyer* (1952), *in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 493, 494.

13 *Id.* at 494.

States' soil. He could not create laws on American soil and force the steel mill employees to work because the theater of war was only in Korea. The Executive power to control the steel mill would have to come from war powers or a delegation from Congress. Neither of these sources provided the power, so it was unconstitutional. The Constitution does not give the President power over commerce in times of war. Thus, Justice Black's decision, in this case, was correct.

Justice Jackson, in his concurrence, changed forever the way the Supreme Court evaluated war powers disputes with his three-prong-test. Justice Jackson explained that the Constitution was impossible to understand: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[14] He compared the founding document of the United States with the dreams Joseph was to interpret in the Bible. He argued that there

14 Robert Jackson, *Youngstown Sheet and Tube Co. v. Sawyer* (1952), *in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 493, 494.

should be a three-prong-test to determine how strong the President's power was instead. His three-prong-test separated Supreme Court precedent from the traditional and constitutional understanding of war powers to the detriment of the nation.

The three-prong-test placed the strength of the President's power on a sliding scale in connection with Congressional approval, which was exactly what George Washington was trying to avoid in the debate on the Jay Treaty in 1796. Jackson determined that the President was most powerful when he was operating with the support of Congress. He said, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[15] The second prong then explained that when the President acted neither with nor without Congressional appeal he was in a zone of twilight. The zone of twilight became a gray area that where the President's power was not at its maximum because it was not reinforced by Congress. Finally, when

15 *Id.*

the President acted in opposition to Congress he was at his lowest ebb. Jackson said, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[16] Jackson's three-prong-test defined the degree of presidential power by the amount of congressional support. The new test provided a way for the Supreme Court Justices to look at one aspect of a case and determine if it was justified without having to refer to the Constitution. Under this test many unconstitutional divisions of war power could occur and still be deemed constitutional.

Justice Jackson wrote in his concurrence that Truman's actions were unconstitutional. Jackson's decision was not reached by reading the Constitution but by noting that Truman acted against Congress. Truman was wrong because he was operating from the lowest ebb of power. Congress did not approve of Truman controlling the mill, so it was declared unconstitutional. Jackson's new

16 *Id.* at 477.

three-prong-test fundamentally changed the way that the Supreme Court judged disputes over war power because it made the President's power subject to congressional approval which Washington did not want. The Founders did not intend for this sliding scale of shared power. They intended for Congress to declare war and fund it and the Executive to make war and make the quick decisions needed. This original division of powers played to each branches' strengths. The new division of power, created by Jackson in the *Steel Seizure Case*, placed the extent of Executive power at the mercy of Congress.

Jackson's three-prong-test for executive power changed the way the Supreme Court ruled in that they no longer looked to the text of the Constitution but to which category the presidential action fell under. An example of this was *Dames and Moore v. Reagan (1981)* when President Reagan acted with approval from Congress when he made his executive order regarding claims. The Supreme Court ruled his actions constitutional because he was operating with the largest majority of power. Justice Rehnquist wrote the majority opinion and stated, "Because

the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. *Youngstown, 343 U.S. at 343 U. S. 637 (Jackson, J., concurring)*."[17] President Reagan's actions were deemed constitutional because his war powers fell under the maximum authority; it did not matter if his specific action was constitutional. All that mattered was that it fell under the first prong of the test.

In 1973, the War Powers Resolution was passed, and it further disrupted the original division of war powers. This resolution required the President to get a declaration of war that authorized the use of force from Congress within sixty to ninety days of deploying troops. The law stated that, "Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of

17 Dames & Moore v. Regan, 453 U.S. 654, 674 (1981).

United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."[18] The War Powers Resolution further placed the President in submission to congressional appeal. Not only would the President's actions be declared unconstitutional but he would also have to withdraw troops already engaged in a war. This Act was not constitutional but works under Jackson's three-prong-test.

Congress passed the unconstitutional War Powers Resolution even though President Nixon vetoed. Nixon said, "House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."[19] He also explained how this was detrimental to actions in foreign policy by saying, "For it would seriously undermine this Nation's ability to act decisively and convincingly in time of international

18 *The War Powers Act of 1973, in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 547, 548.

19 *Veto of the War Powers Resolution (1973), in* 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Howard Gillman et. al. eds., Oxford Univ. Press 2013), 549, 549.

crisis."[20] Nixon explained how the Resolution was both unconstitutional and detrimental to the country. Nixon demonstrated understanding of the Founders' intention to split the war powers to accentuate each branches' strengths.

Since the War Powers Resolution of 1973 was passed, Presidents have found loopholes to leave their foreign policy power unaffected. Now Presidents invade, fight, and win wars in other countries within sixty to ninety days. The fortieth President, Ronald Reagan, invaded and conquered Grenada in three days. He never had to go to Congress to ask them to declare war on Grenada because he worked through the ninety-day loophole. The War Powers Resolution has not helped define the war powers division. The law does not work because it distorts the Founders' intention for the separation of war powers and it does not play to each branches' strengths. The War Powers Resolution also does not work because it does not force the President to consult Congress on decisions of war if the President can execute the war in under ninety days. This, in essence, has allowed the President to take on Congress'

20 *Id.* at 549.

power to declare war which is not what the Founders had intended.

Since the creation of Justice Jackson's three-prong-test in the *Steel Seizure Case,* the Constitution is no longer the basis upon which the Supreme Court then judges war powers definitions and disputes. The Founders originally intended for a division of war powers where Congress declared war and the President made war. The Founders' framework was upheld until the mid-1900s. Justice Jackson's concurrence in the Steel Seizure case created an unconstitutional three-prong-test that eliminated the need to refer to the Constitution in issues over war powers. Since this concurrence, the Supreme Court no longer uses the constitutional divisions. War powers are now determined by whether Congress approves or disapproves of the President's actions. Attempts to redefine the Founders' division of the shared war powers has only caused confusion over who has what power. The creation of Jackson's three-prong-test has created a subjective value system by which to judge the constitutionality of the President's actions regarding war. Since the creation of that

test, the opinions that followed have further distorted the Founders' vision. The Supreme Court has created a system that excludes the need to refer to the Constitution to resolve constitutional power disputes. The Supreme Court no longer judges the constitutionality of these cases based on the Constitution.