THE CONSTITUTIONAL HISTORY OF U.S. FOREIGN POLICY: 222 YEARS OF TENSION IN THE TWILIGHT ZONE

By Walter A. McDougall

We print below an excerpt from a new monograph by Walter A. McDougall. This essay is excerpted from lectures delivered at the Annenberg Summer Teacher Institute, National Constitution Center, Philadelphia PA, July 27, 2010. In this excerpt, McDougall discusses the history of presidential responses to the War Powers Resolution. To access the monograph, visit:


Walter A. McDougall is the Alloy-Ansin Professor of International Relations and Professor of History at the University of Pennsylvania. He is Chairman of FPRI’s Center for the Study of America and the West and co-chair of FPRI’s History Institute for Teachers.

In 1973, Congress passed the infamous War Powers Resolution (WPR), over Richard Nixon’s veto. It was perhaps the most ambitious Congressional effort to bridle the President since the battle with Andrew Johnson over Reconstruction. The WPR is worth reading—once—then forgetting, because its convoluted, contradictory, and doubtless unconstitutional mix of instructions, restrictions, and ticking clocks has never been honored by any administration or upheld by any court. Presidents Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush all dispatched U.S. forces into combat situations without paying more than lip service to the WPR. In 1990, following Saddam Hussein’s invasion of Kuwait, President Bush stationed 100,000 personnel in Saudi Arabia. He sought no authorization and, in fact, informed just one member of Congress: Senator Sam Nunn (D., Ga.). When he then prepared Operation Desert Storm to liberate Kuwait, 54 Congressmen led by the chairman of House Armed Services Committee, Berkeley radical Ron Dellums (D., Calif.), filed for an injunction to stop the war. U.S. District Judge Harold H. Greene ran for cover. Noting that 54 fell far short of a majority, he judged the case “not ripe for judicial determination.”

Even if upheld, the War Powers Resolution could not possibly fulfill its intentions. First, no one wants the President to be prohibited from acting in emergencies. Second, the 60 or 90 day periods after which the President must get Congressional authorization do not begin until the President, at his leisure, reports the deployment. Third, once U.S. troops are in a combat zone it is not likely that Congress will publicly ensure the defeat of their mission! In the first Gulf War, the real clock was set by the U.N. Security Council whose Resolution 678 required Iraqi forces to withdraw from Kuwait by January 15, 1991. That put Congress under a deadline. Three days of frantic debate ensued until, on January 12, the sullen chambers voted to authorize force by 250 to 183 in the House and 52 to 47 in the Senate. House Speaker Tom Foley called it “the practical equivalent of a declaration of war.” By then it was crystal clear that the War Powers Resolution was “a bad idea whose time has come and gone.”

Far from rolling back presidential authority in the wake of Vietnam and Watergate, Congress failed to prevent yet another big arrogation of Constitutional power by the least likely of presidents, Jimmy Carter. He suddenly announced that the United States would grant full recognition to the People’s Republic of China on January 1, 1979. That was an act blessed by the Constitution itself. But as part of the package, Carter had to terminate the 1955 Mutual Defense Treaty with the Nationalist Chinese regime on Taiwan. That was a treaty ratified by two-thirds of the Senate. Did the President alone have the right to un-ratify? Senators led by Barry Goldwater (R., Ariz.) filed a Constitutional challenge, but the Court of Appeals ruled against it and the Supreme Court refused the case on the grounds that it “involves the authority of the President in the conduct of our...”


2. Lehman, Making War; “come and gone” by Edward Keynes in Adler and George, The Constitution and the Conduct of American Foreign Policy, p 252).
national foreign relations.” (This time, however, Congress got a last laugh of sorts. Just as it learned after George Washington to attach amendments to treaties made by the President, so now it learned to pass laws that effectively amend treaties un-made by the President. Thus, did the April 1979 Taiwan Relations Act mandate the continued sale of weapons to the Taipei regime and, thus, give the Mutual Defense Treaty new de facto life.)

The rapidity with which the executive branch reasserted its “sole organ” status was perhaps most evident when Carter used his 1980 State of the Union address to add his own to the growing list of presidential edicts. He had begun his term as a post-Watergate, post-Vietnam Democrat who implicitly repudiated Harry Truman’s heritage, as well as Richard Nixon’s in his Notre Dame speech of 1977. But following the Soviet invasion of Afghanistan, he pledged in the Carter Doctrine to take whatever war measures necessary to defend the Persian Gulf states from aggression and ensure the free flow of oil. Thus, American power filled the vacuum created by Britain’s retreat from her bases “east of Suez” in 1971 just as quickly and thoroughly as it had the eastern Mediterranean back in 1947. Only this time Congress was not even asked to vote.4

Ronald Reagan’s administration acted as if the WPR simply did not exist. It dispatched 1,200 marines to Beirut, launched an invasion of Grenada, sent advisers to El Salvador, and funneled aid to the Afghan Mujahedin and Nicaraguan Contras, which the White House praised as “Freedom Fighters,” resisting Communist regimes. In a column for TIME magazine, Charles Krauthammer later labeled the policy of assisting anti-Communist guerillas the Reagan Doctrine.5 Democrats in Congress hated such noblesse oblige, especially on the part of an unabashedly conservative President. So they passed three amendments named for Congressman Edward Boland (D., Mass.) that prohibited aid to the Contras. Their increasingly tortuous terms, meant to close every conceivable loophole, were what gave National Security Council officials the bright idea of funneling secret funds from Iran to Central America. Reagan confessed the affair was wrong and assumed responsibility, but after the televised hearings, starring Colonel Oliver North, Congress emerged from the Iran-Contra Affair at least as embarrassed as the White House.

Meanwhile, a very interesting novelty had emerged in the “twilight zone” regarding the federal government’s war powers. The executive branch, having successfully rendered the WPR anodyne, but also having recognized the real need for accountability and prudence in the wake of the Vietnam War, began to check and balance itself! In November 1984, Secretary of Defense Caspar Weinberger delivered a stunning speech to the National Press Club that laid out what immediately came to be known as the Weinberger Doctrine. Never again, he said, should an American President send forces into combat unless six severe conditions were met and only after all alternatives had been exhausted. The short-range cause of this initiative was Reagan’s catastrophic deployment of U.S. Marines in Beirut, where 241 were killed by a terrorist bomb. The longer-range causes included the determination of the Joint Chiefs of Staff, not to mention the Congress and public, that there should be “no more Vietnams.” Not surprisingly, the strongest internal opposition came from Secretary of State George Shultz, because effective diplomacy often requires the threat of force behind it. But for a number of years thereafter, the idea of the executive branch placing checks on itself got traction. Thus, General Colin Powell, in the run-up to the First Gulf War in 1991, added his own list of prerequisites that ought to be met prior to the dispatch of U.S. forces into overseas combat.6

After the 9/11 attacks, needless to say, Congress was thoroughly routed and even cautious voices in the executive branch were silenced. George W. Bush requested a resolution granting him authority “to deter and pre-empt any future acts of terrorism or aggression against the United States.” The House Committee on International Relations changed “pre-empt” to “prevent” (which in any case could be construed to include preemption) and the resolution passed by votes of 420-1 and 98-0. It gave the President authority “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

6. The Weinberg-Powell Doctrine included a list of conditions that must be met in advance of a deployment:
   1. The United States should not commit forces to combat unless the vital national interests of the United States or its allies are involved.
   2. U.S. troops should only be committed wholeheartedly and with the clear intention of winning. Otherwise, troops should not be committed.
   3. U.S. combat troops should be committed only with clearly defined political and military objectives and with the capacity to accomplish those objectives.
   4. The relationship between the objectives and the size and composition of the forces committed should be continually reassessed and adjusted if necessary.
   5. U.S. troops should not be committed to battle without a reasonable assurance of the support of U.S. public opinion and Congress. (Some lists also mention international support.)
   6. The commitment of U.S. troops should be considered only as a last resort.
persons...” The administration invoked that authority to overthrow the Taliban regime in Afghanistan, then invade Iraq in 2003, on the basis of flawed intelligence regarding Saddam Hussein’s programs for weapons of mass destruction. Both operations provoked local counterinsurgencies that attracted international support. Both are ongoing under Barack Obama, who seems determined to play the role of Richard Nixon, prolonging an unpopular war in hopes of redeeming it, even as Bush had appeared to play the role of his fellow Texan Lyndon Johnson.

CONCLUSION: PERHAPS ALL SAIL AND NO ANCHOR ISN’T SO BAD

By now it should be pretty clear why a chapter in a book on the Constitution and foreign relations is simply entitled: “Why the President Almost Always Win in Foreign Affairs,” and a recent article is entitled “Why Hawks Win.” First, the executive almost always takes the initiative; second, Congress almost always acquiesces; third, the courts always demur on the grounds that war and diplomacy are in the domain of the “political branches.” For better or worse, the U.S. government has changed a great deal since the great Federalist lawyer James Wilson assured the Pennsylvania Ratifying Convention: “This system will not hurry us into war; it is calculated to guard against it. It will not be within the power of a single man, or a single body of men, to involve us in such distress.”

But before we praise or blame the assertive chief executives or passive legislatures and jurists who have wrought or acquiesced in great changes, we need to place them all in their historical contexts. Every change was a response to a challenge born of new circumstances at particular times. We may judge them to have been wise or foolish by their results, and worthy or unworthy of being precedents by the persistence of the challenges that inspired them. But we would be wise to listen to Louis Henken, who delivered the prestigious Cooley Lectures at the University of Michigan Law School on the Constitution’s bicentennial. Henkin worried about presidential abuse of the war powers, yet held to the dictum “if it ain’t broke, don’t fix it” because a healthy “tension in the twilight zone” had enabled the federal government to adapt to America’s role as a world power in an era of revolutionary change. He prescribed no major amendments to the Constitution and concluded that even if British critic Thomas Macauley was right that our Constitution is “all sail and no anchor,” perhaps all it needs is a rudder. Perhaps, but that begs the question of who or what can serve as rudder of the American ship of state. Congress is unable or unwilling to do so, serving primarily as a squeaky brake that engages too late to prevent executive blunders but often in time to snatch defeat from the jaws of possible victory. Courts are unable and unwilling to steer policy. So that leaves it up to the ultimate arbiters in our Constitutional system: the American people themselves. Presidents may abuse their war powers and/or commit malpractice in foreign affairs, but so long as they do not arrogate to themselves the power to suspend elections “for the duration,” the voters are empowered to oust the people or party in charge every two or four years. Granted, public opinion is a rude instrument subject to all sorts of manipulation, short-sightedness, folly, and overreaction: Vox populi isn’t vox dei. But in our system it is sovereign, which is why we have little choice but to trust Theodore Roosevelt’s principle embedded in the Progressive “Bull Moose” Party platform of 1912: “We hold with Thomas Jefferson and Abraham Lincoln that the people are the masters of their Constitution, to fulfill its purposes and to safeguard it from those who, by perversion of its intent, would convert it into an instrument of injustice.”

Finally, before rendering judgment on 222 years of Constitutional adaptation, we need to perform one more pressing task, which is define what we now mean by war in an era of nuclear weapons, cold war, limited war, counterinsurgency, and terrorism by non-state actors. For instance, if the War on Terror is a war as traditionally understood, then preemptive strikes, restrictions on civil liberties, and semi-permanent nation-building operations in darkest Asia are clearly within presidential authority. But to that one could retort, if the War on Terror is a war as traditionally understood, then it ought to be declared by Congress and re-declared every two years. But to that one could retort, if the War on Terror is a truly a war, then against whom would Congress declare it? The world has moved so far from the era of blatant fascist aggression, not to mention staid monarchical wars, that our Constitutional language seems inadequate. Yet, its very sparseness and ambiguity allow us to hope that the United States may continue to adjust relatively quickly, if not smoothly, to whatever new challenges loom.

---


11. An excellent book by William G. Howell and Jon C. Pevehouse, While Dangers Gather: Congressional Checks on Presidential War Powers (Princeton, 2007) argues that whereas the Congress speaks with many voices and must usually act indirectly to restrain executive assertion, it can nonetheless wield meaningful influence through hearings, protests, budgetary procedures, and especially the media and public opinion.

Justice Louis Brandeis put the point elegantly in a dissenting opinion of 1926. “The doctrine of the separation of powers,” he wrote, “was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.” So stipulated! As long as “We the People” revere our Constitution it cannot harm our national interest, because the Constitution is our national interest, the very content of our Exceptionalism.

13 Myers vs. United States, 272 U.S. 52, 293, in Glennon, Constitutional Diplomacy, p. 325.

To access the monograph, visit: http://www.fpri.org/pubs/2010/McDougall.ConstitutionalHistoryUSForeignPolicy.pdf