

# **RESTORING THE RULE OF LAW:**

**The First Step is to**  
***Stop Congressional Lawbreaking***



Prepared statement of

**Professor Robert F. Turner, SJD**

Co-Founder and Associate Director  
Center for National Security Law  
University of Virginia School of Law

before the

**Subcommittee on the Constitution**

of the

**U.S. Senate Committee on the Judiciary**

Room 216 • Hart Senate Office Building

September 16, 2008 • 10:15 AM

## About the Witness

**Professor Robert F. Turner** holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for several years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.



His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Senate Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left in 1987 to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law*, which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution*, has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

***The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.***

• • •

## Contents

About the Witness	2
Executive Summary	5
Prepared Statement	8
Two Caveats	8
INTRODUCTION	9
The Founding Fathers' Fear of Legislative Tyranny Is Being Realized	10
A Blatant Example of Legislative Lawbreaking:	
More Than 500 New Unconstitutional Legislative Vetoes	11
Public Approval of Congress Is at "Record Low"	12
Understanding the Constitutional Separation	
of Foreign Affairs Powers	13
Quincy Wright's Classic <i>The Control of American Foreign Relations</i>	14
The Constitutional Meaning of "Executive" Power	16
The Influence of Locke, Montesquieu, and Blackstone	18
The Founding Fathers' Understanding of "Executive Power"	20
Historic Legislative Deference to the President	25
The Constitutional Convention	32
The Pernicious Influence of Vietnam Mythology	
and the Evils of Political Partisanship in Wartime	36
Understanding "Vietnam" and Its Tragic Legacy	38
What about Dean Harold Koh's Contention that Justice Jackson's	
Concurrence in <i>Youngstown</i> Has Superseded <i>Curtiss-Wright</i>	
as the Constitutional Foreign Policy Paradigm?	40
Dean Koh's Reliance on <i>Little v. Barreme</i>	45

A QUICK LOOK AT SOME SPECIFIC ISSUES	
IN THIS CONTROVERSY	47
Presidential Signing Statements	47
The Power of the Purse and “Conditional Appropriations”	51
Diplomacy and the Conduct of Foreign Relations	53
Usurping Presidential Control Over “the Business of Intelligence”:	
Warrantless Foreign Intelligence Surveillance and FISA	56
Usurping Presidential War Powers	58
CONGRESSIONAL USURPATION OF EXECUTIVE CONSTITUTIONAL DISCRETION	
HAS DONE TREMENDOUS DAMAGE TO AMERICA AND THE WORLD	59
The Human Consequences of Our Indochina Debacle	60
Congress, 9/11, and “Intelligence Failures”	65
Congressional Culpability for the Tragedy	
in Beirut Twenty-Five Years Ago	67
The Role of the Debacle in Beirut on Bin Laden’s Decision	
to Attack America on September 11, 2001	69
The Importance of Restoring	
Non-Partisanship to U.S. Foreign Relations	72

## EXECUTIVE SUMMARY

MR. CHAIRMAN, Senator Brownback, and Members of the Subcommittee. I am deeply honored to appear once again before this subcommittee – particularly because the topic is one of such great importance to the Nation: “Restoring the Rule of Law.” Ironically, that was the subtitle to one of my books on the War Powers Resolution.

I have a lengthy prepared statement (with more than 100 citations) that I would ask be included in the record. Although I worked on it all weekend, I did not have time to proofread it carefully and there remain some incomplete citations. I ask the Subcommittee’s permission to make corrections prior to publication.

My central premise is that we have a hierarchy of “laws” in this country, with the *Constitution* at the very top. Sadly, over the past three or four decades, Congress has been flagrantly violating the Constitution in a variety of ways.

As a Senate staff member in 1976, I drafted a lengthy memorandum explaining why “legislative vetoes” were unconstitutional. Seven years later, in the *Chadha* case, the Supreme Court reached the same conclusion on multiple grounds. Sadly, rather than eliminating the hundreds of existing legislative vetoes already on the books, Congress

has responded by enacting more than 500 *new* patently unconstitutional legislative vetoes – thumbing its nose at the Supreme Court and our Constitution in the process. This is the single most common reason presidents have found it necessary to issue signing statements.

The greatest congressional lawbreaking has occurred in the area of foreign affairs. Using quotations from Founding Fathers like Washington, Jefferson, Madison, Hamilton, Jay, and Marshall, I demonstrate that the Constitution gave *exclusive* control over our foreign policy to the president – subject only to narrowly-construed “exceptions” vested in the Senate and Congress – when it vested in that office the nation’s “executive power” in Article II, Section 1. And I demonstrate a long history of agreement on this point by all three branches of government.

The *Federalist Papers* explained that, because Congress could not be trusted to keep secrets, the new Constitution had left the President “able to manage the business of intelligence as prudence might suggest.” Throughout our history that was the common understanding until 35 years ago, when Congress began usurping power in this area.

As for “presidential signing statements,” I show that the principle behind them dates back to the Administration of Thomas Jefferson, who refused to enforce the unconstitutional Alien and Sedition Laws. I quote John Marshall in *Marbury v. Madison* declaring that ““a legislative act contrary to the constitution is not law,” and explaining

that, in the area of foreign affairs, the Constitution grants to the president a great deal of unchecked discretionary powers. In that landmark case, Chief Justice Marshall wrote: “whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.” As recently as 1969, Senate Foreign Relations Chairman J. William Fulbright acknowledged: “The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable.” Soon thereafter, in the anger and heat of the Vietnam War, Congress began a rampage of lawbreaking.

Finally, Mr. Chairman, I show how this congressional lawbreaking has done extraordinary harm to our national security and the cause of world peace. I explain how an unconstitutional 1973 statute snatched defeat from the jaws of victory in Indochina and led directly to the slaughter of millions of lives we had solemnly pledged to defend in Cambodia and South Vietnam. I show how the horribly partisan congressional subversion of our peacekeeping deployment in Beirut a decade later led directly to the terrorist attack that killed 241 Marines – and I document the role of that incident in persuading Osama bin Laden to attack American in 2001. I also show how unconstitutional legislative constraints on our Intelligence Community prevented it from protecting us from those attacks.

My time is up, Mr. Chairman, but I look forward to taking your questions.

## Prepared Statement

Mr. Chairman, Senator Brownback, and Members of the Subcommittee. I am deeply honored to appear once again before this subcommittee, and all the more so to address a constitutional issue that has been of great concern to me for many decades.

### Two Caveats

Before turning to the details of my presentation, it is important to make two important caveats. First of all, like all of my writing and public statements in recent years, the views I express this morning are *personal* and should not be attributed to the Center for National Security Law, the University of Virginia, the American Bar Association, or any other organization or entity with which I am or in the past have been associated. Secondly, I want to emphasize that my scholarship in this area has been focused on *national security* aspects of separation of powers issues. That is not to say that I am unwilling to address broader rule of law issues, but I can probably be of most use to you by focusing on the national security questions.



## I.

### INTRODUCTION

More than seventeen years ago I published a book that I had initially entitled “Restoring the Rule of Law in U.S. Foreign Policy.” Ironically, it was based largely upon several statements that I had delivered about war powers to this and several other Senate and House committees over a number of years. My publisher decided to reverse the title and subtitle<sup>1</sup> – but that didn’t change the message of the volume.

My central point was that, beginning in the later years of the Vietnam War, Congress had time and again usurped constitutional power vested by the American people *exclusively* in the President. My presentation this morning will focus upon some of the more harmful ways Congress has been breaking the law, and my bottom line is a simple one: “Physician, heal thyself.”<sup>2</sup> This is not to deny that the executive branch has also on occasion veered from respect for the rule of law – it certainly has. But in my judgment, those violations – as serious as some of them have been – pale by comparison to the lawbreaking of the legislative branch. It is my hope that the next president will have the courage to continue defending the Constitution against further legislative encroachment.

---

<sup>1</sup> See ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY (1991).

<sup>2</sup> Luke 4:23.

I mentioned that in my view the current Administration has on occasion failed to meet the standards we properly expect from our president *vis-à-vis* the rule of law. As some of you may recall, on July 26 of last year I co-authored a hard-hitting op-ed in the *Washington Post* entitled “War Crimes and the White House”<sup>3</sup> that was sharply critical of the current Administration’s position on the treatment of detainees. But while there is no doubt in my mind but that this Administration has on several matters been insensitive to the rule of law, I would say the same thing about the administrations of Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt during the wars that occurred on their watches. One of the things that distinguishes the current Administration from most of its wartime predecessors is that, immediately after the 9/11 attacks, it came to Congress and obtained statutory authorization for a number of measures it felt appropriate in the struggle against international terrorism. Nevertheless, its record is far from a perfect one.<sup>4</sup>

### **The Founding Fathers Fear of Legislative Tyranny Is Being Realized**

However, in terms of governmental misconduct, by *far* the greatest threat to the rule of law in this Nation in recent decades has been “lawbreaking” by the *Legislative* Branch in the form of usurpation of executive power. Ironically, this

---

<sup>3</sup> P.X. Kelley & Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007 at A21, available on line at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072501881.html?hpid=opinionsbox1>.

<sup>4</sup> For my critique of John Yoo’s *War By Other Means*, see Robert F. Turner, *An Insider’s Look at the War on Terrorism*, 93 CORNELL L. REV. 471 (2008), available on line at: <http://www.virginia.edu/cnsl/pdf/turner-review-of-yoo-book.pdf>.

was one of the great fears of our Founding Fathers. The Supreme Court has repeatedly observed “the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”<sup>5</sup> Typical of the prevailing view was Representative James Madison’s remark in 1789 that: “[I]f the federal Government should lose its proper equilibrium within itself, I am persuaded that the effect will proceed from the encroachments of the Legislative department.”<sup>6</sup> Later in my presentation<sup>7</sup> I shall discuss this broad concern about legislative abuse further.

**A Blatant Example of Legislative Lawbreaking:  
More Than 500 New Unconstitutional Legislative Vetoes**

To mention just one example of blatant legislative lawbreaking, consider the infamous “legislative veto,” by which Congress asserts a right to micromanage the execution of laws without following the proper constitutional legislative process. This is an issue that has been of concern to me for more than three decades. Indeed, on June 11, 1976, my then-boss, Senator Bob Griffin of Michigan, inserted in the *Congressional Record* a lengthy analysis I had drafted – complete with extensive footnotes – explaining why legislative vetoes are unconstitutional.<sup>8</sup> Seven years and twelve days later, the Supreme Court reached

---

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986).

<sup>6</sup> *Madison to Edmund Pendleton*, 21 June 1789, 5 WRITINGS OF JAMES MADISON 405-06 n.

<sup>7</sup> See *infra*, text accompanying notes \_\_\_ & \_\_\_. XXXX [search TJ Notes]]xxx

<sup>8</sup> 122 CONG. REC. 17643 (June 11, 1976), available on line at <http://www.virginia.edu/cnsl/bio/turner.html>.

the same conclusion in the case of *INS v. Chadha*,<sup>9</sup> using many of the same arguments I had used and striking down legislative vetoes as unconstitutional on *multiple* grounds. Yet, as my good friend Dr. Louis Fisher of the Library of Congress will confirm, since *Chadha* was handed down more than twenty-five years ago, Congress has not only failed to remove the hundreds of *preexisting* legislative vetoes from the statute books – it has enacted more than 500 *new* legislative vetoes, thumbing its nose at the Supreme Court and the United States Constitution each time in the process.

### **Public Approval of Congress Is at “Record Low”**

One month ago today, the Gallup organization issued a report entitled: “congressional approval hits record low 14%” – the lowest approval level since Gallup began monitoring public attitudes towards Congress.<sup>10</sup> A full seventy-five percent of the American people contacted in the poll – three out of every four – declared they “disapproved” of the behavior of Congress. And this despite the fact that most Americans *don’t know* that, for a quarter of a century, Congress has been flagrantly violating the Constitution on a regular basis even after the issue was resolved by the Supreme Court, and then blaming the *president* when he seeks to defend the Constitution by refusing to execute such laws. Sadly, because

---

<sup>9</sup> 462 U.S. 919 (1983).

<sup>10</sup> Lydia Saad, *Congressional Approval Hits Record-Low 14%*, GALLUP.COM, July 16, 2008, available on line at: <http://www.gallup.com/poll/108856/Congressional-Approval-Hits-RecordLow-14.aspx> .

of tragic failures in our educational system even at the law school level,<sup>11</sup> this tactic is clearly working to deceive many Americans – although in last month’s Gallup poll the President’s approval rating was more than twice that of Congress.<sup>12</sup>

**B.**  
**UNDERSTANDING THE CONSTITUTIONAL SEPARATION  
OF FOREIGN AFFAIRS POWERS**

Our topic this morning is “Restoring the Rule of Law.” In addressing this subject, I submit it is important to begin by asking: “What *law* do you wish to restore?” Because in the United States we have a hierarchy of laws, and much of the debate I hear on this issue appears to ignore that fact. Under our system of government, the *Constitution* is supreme. It is supreme to the UN Charter and other international treaties and agreements. It is equally supreme to acts of the legislature. And much of the public debate I hear about broad presidential (and *vice* presidential) claims of “executive power” over foreign affairs seem to focus almost entirely upon *statutes* enacted by Congress. The assumption seems to be

---

<sup>11</sup> Throughout most of our history, it was well understood that the president has considerable constitutional discretion that could not be usurped either by Congress or the courts. Until World War II, the number of laws regulating diplomacy, intelligence, and the like could be counted on one hand and had been requested by presidents. All of this changed dramatically during the later years of the Vietnam War, but – with the exception of a single class taught by my Center for National Security Law co-founder Professor John Norton Moore, who began teaching Law and National Security in 1972 – most American law schools did not start addressing these issues until the end of the twentieth century. Since 9/11, National Security Law has become a popular offering at most American law schools, but many of the instructors still remain clueless that the Constitution treated foreign and domestic affairs differently.

<sup>12</sup> The poll measured 31% approval for President Bush. Saad, *Congressional Approval Hits Record-Low 14%*, *supra* note 7. [[CHECK IN FINAL xxxx.]]

that the president’s duty to “take Care that the Laws be faithfully executed”<sup>13</sup> means that he (or she) must carry out instructions from Congress across the board of governmental activities. I respectfully submit that this view of the Constitution is profoundly mistaken.

I think it is imperative, if you are *serious* about wishing to restore the “rule of law,” for you to focus upon the distinction between domestic and foreign affairs recognized by our Founding Fathers, academic commentators throughout the centuries, and the Supreme Court. I’ve written a 1700-page doctoral dissertation on this issue with more than 3000 footnotes, and I know you will be pleased to know that I don’t intend to subject you to the full version this morning. But a little background and a few examples will illustrate my point.

### **Quincy Wright’s Classic *The Control of American Foreign Relations***

My own scholarly interest in these issues began more than four decades ago, when I had the pleasure of hearing a presentation by the legendary Professor Quincy Wright – who during his distinguished career served as president of both the American and International Political Science Associations, the American Society of International Law, and the American Association of University Professors. He was a truly remarkable scholar and human being. For the record, since not everyone may recall this legendary scholar, no one would describe Quincy Wright as a “conservative” or a “hawk” in any sense. He spent much of

---

<sup>13</sup> U.S. CONST., Art. II, Sec. 3.

his life studying and championing the cause of peace and was from its start a vocal critic of the Vietnam War.<sup>14</sup> A great believer in the rule of law in international affairs, he was also among the first champions of an international criminal court.<sup>15</sup>

Among his many other achievements, Dr. Wright's 1922 treatise, *The Control of American Foreign Relations*, remains a classic in the field. In it, Professor Wright explained: "In foreign affairs, therefore, the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the president, checked only by the veto of the Senate or Congress upon completed proposals."<sup>16</sup>

Beyond these "vetoes" (or "negatives" as Jefferson and Hamilton often described them) – and, of course, other provisions of the Constitution – the President's authority over the nation's external relations was *exclusive*. Neither the Senate nor Congress itself had constitutional authority to usurp presidential authority in this area. Professor Wright explained:

Declarations of foreign policy may be made by Congress in the form of joint resolutions, but *such resolutions are not binding on the President*. They merely indicate a sentiment which he is free to follow or ignore. Yet they are often couched in mandatory

---

<sup>14</sup> See, e.g., the short tribute to Professor Wright on the University of Denver web server at: <https://portfolio.du.edu/portfolio/getportfoliofile?uid=111966>. ("He was from the outset an active opponent of the United States war in Vietnam, challenging its supposed legal basis as well as its asserted morality, justice, or political rationality.")

<sup>15</sup> See, e.g., Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952); and Quincy Wright, *The Scope of International Criminal Law*, 15 VA. J. INT'L L. 562 (1975).

<sup>16</sup> QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 151-52 (1922).

terms and in defense of his independence the President has frequently vetoed them.<sup>17</sup>

Now, as everyone here knows, a joint resolution is a type of statute. And, today, the idea that the President might be free to ignore a statute enacted by the Congress would shock people. It might even lead to hearings about “restoring the rule of law.” But throughout most of our history, this was the majority view of the Constitution.<sup>18</sup> But before turning to a discussion of congressional deference to the president in foreign affairs, it may be useful to briefly summarize the actual constitutional basis for the president’s largely unchecked authority over foreign affairs.

### **The Constitutional Meaning of “Executive” Power**

Mr. Chairman, at the core of much of the debate over broad claims of “executive power” by the incumbent President, Vice President Cheney, and scholars like John Yoo is a profound misunderstanding of the constitutional meaning of that term. Today, it is perfectly reasonable to assume that the vesting in the president of “the executive Power” of the nation conveyed merely a duty and authority to see the laws enacted by Congress “faithfully executed.” But that is *not* the meaning of “executive Power” as it is used in the Constitution, and the proof of this observation is overwhelming.

---

<sup>17</sup> WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 278 (emphasis added).

<sup>18</sup> I will discuss several examples of legislative deference to the president in this area below. *See*, especially, the statement by Senator John Coit Spooner, *infra*, text accompanying note \_\_. XXX UPDATE XXX



When I was researching my doctoral dissertation many years ago I spent months poring over historic documents concerning the origins of our Constitution. And I recall finding a letter from a signer of the Constitution who described it to an acquaintance as being “awful.” Knowing that he was a great admirer of the document, my first inclination was to assume that the letter must be from a different individual sharing the same name. But further research disclosed that in 1788 the word *awful* had an entirely different meaning than it does today. Indeed, a quick Google search of “definition of ‘awful’” reveals this original but now arcane usage as “amazing, awe-inspiring, awesome, awful, awing (inspiring awe or admiration or wonder).”<sup>19</sup>

I respectfully submit that were we trying to understand the meaning of a 1788 letter describing the new Constitution as “awful,” it would be imperative that we determine the meaning ascribed to that word by its author. And for the same reasons, if we wish to understand what powers the Founding Fathers conveyed by granting “the executive Power” to the President, we must try to grasp their understanding of that term as it was used in 1787 as well. While I do not deny there were some differences (particularly in the very early days of the Constitutional Convention) about which powers “executive” in their nature should be given to the new American executive, there is an amazing consensus clearly

---

<sup>19</sup> WORDNET (Princeton University), available on line at: <http://wordnet.princeton.edu/perl/webwn?s=awful>.

and contemporaneously recorded for posterity that establishes the meaning beyond any reasonable doubt.

### **The Influence of Locke, Montesquieu, and Blackstone**

To properly understand the separation of foreign affairs constitutional powers, it is important to be familiar with the literature that most influenced the Founding Fathers in this area. Often called the “political bibles of the constitutional fathers,”<sup>20</sup> John Locke, Montesquieu, and William Blackstone (along with numerous others of the era) argued that the control of foreign affairs – what Locke described as the business of “war, peace, leagues, and alliances” – was inherently part of the power belonging to the executive.

Locke explained that, although “in the well or ill management of it be of great moment to the commonwealth,” this power over “the management of the security and interest of the publick without” (outside the Nation’s boundaries) was of tremendous importance to the safety of the Nation, it had to be entrusted to the discretion of the executive because:

[I]t is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick [*sic*] good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to

---

<sup>20</sup> See, e.g., WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 363.

be managed by the best of their Skill, for the advantage of the Commonwealth.<sup>21</sup>

Professor William Goldsmith, in his three-volume, 2300-page compilation on presidential power, notes that:

Blackstone's chapter entitled "Of the King's Prerogative" was the most informative discussion of executive power available in the period, and much of the language and many of the provisions that found their way into Article II of the American Constitution traced their source to this book. . . .

Some of the language and substantive provisions which are found in the *Commentaries* can be recognized in our Constitution. Such phrases as "*ex post facto* law," "due process," etc., appear throughout the document, and there are a number of provisions of Article II which appear to be heavily influenced by Blackstone's chapter on the King's prerogative. The *Commentaries* present a Monarch who possesses close to absolute power in the realm of foreign policy as well as Commander in Chief of the Armed Forces . . . . Despite the Founding Fathers' denunciation of the unchecked power of the King, and their undisguised contempt for most of the trappings of royalty, they were obviously greatly influenced by Blackstone's definition of executive powers, and gave their democratic monarch many of the same responsibilities.<sup>22</sup>

As already noted, when we appeared before the full Senate Judiciary Committee early last year my old friend Lou Fisher quoted James Wilson as remarking in the early days of the Philadelphia Convention that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."<sup>23</sup> That's correct. But that was not the view that carried the day in Philadelphia. The final Constitution *did* invest the executive with certain prerogatives that were not subject to control by Congress. As Madison noted in

---

<sup>21</sup> JOHN LOCKE, SECOND TREATIES ON CIVIL GOVERNMENT § 147.

<sup>22</sup> 1 WILLIAM M. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 55-57 (1974).

<sup>23</sup> See *supra*, text accompanying note 40. XXX CK IN FINAL XX

*Federalist* No. 47: “The entire legislature, again, can exercise no executive prerogative . . . .”<sup>24</sup>

### **The Founding Fathers’ Understanding of “Executive Power”**

That those “executive prerogatives” included exclusive discretion over diplomacy, intelligence, and military operations – subject only to narrowly-construed “negatives” expressly vested in the Senate or Congress – was a point of *unanimity* among a diverse range of our Founding Fathers who quarreled extensively about other aspects of the new Constitution.

One of the first discussions occurred in the early days of the First Session of the First Congress, during the House debate on Madison’s bill to establish a Department of Foreign Affairs. Since the Constitution was apparently silent on the issue, the question arose as to where the power to *remove* a secretary of foreign affairs resided. Some argued that, in the absence of a clear grant of such power in the Constitution, the appointment must be for life-tenure unless removed for cause by impeachment. Others suggested that, since the Constitution had required the “advice and consent” of the Senate for appointment of such officers, the power of removal logically belonged to the president subject, again, to the advice and consent of the Senate. But Madison carried the day by arguing that removal was by its nature an “executive” function, and the Senate had only been given a negative over the *appointment* phase. Thus, the officer served at the

---

<sup>24</sup> FEDERALIST No. 47 at 326.

pleasure of the president. Explaining the decision, Madison wrote: “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department.”<sup>25</sup>

This is fine, you may say – no one questions the President’s power to fire the secretary of state. But what about this broader claim of, as it is sometimes put, the president being the Nation’s “sole organ” of foreign affairs? Here, too, the record is clear.

Consider, for example, a memorandum written at the request of President George Washington by our first Secretary of Foreign Affairs, Thomas Jefferson. Asked to examine where the Constitution had vested all of the unspecified aspects of foreign intercourse – like who decides where to send a diplomat and who decides whether he is to be designated “ambassador,” or “minister,” or by some other term, Jefferson replied:

The Constitution . . . . has declared that “the Executive power shall be vested in the President,” submitting only special articles of it to a negative by the Senate . . . .

*The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.*<sup>26</sup>

---

<sup>25</sup> *Madison to Edmund Pendleton, June 21, 1789, 5 WRITINGS OF JAMES MADISON 405 n.*

<sup>26</sup> *Jefferson’s Opinion on the powers of the Senate Respecting Diplomatic Appointments, April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (italics added).*

Three days later, President Washington made this entry in his diary:

“Tuesday, 27<sup>th</sup> [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that *they have no Constitutional right to interfere* with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being *Executive* and vested in the President by the Constitution.<sup>27</sup>

Read that language again – the Senate has “no constitutional right to interfere” in this business. So here we have Thomas Jefferson, George Washington, America’s first Chief Justice John Jay, and two of the three authors of the *Federalist Papers* clearly on record as believing that the business of foreign affairs was vested *exclusively* in the President as part of the “executive Power” contained in Article II, Section 1, save for those narrowly construed “exceptions” clearly vested in Congress or the Senate.

On most matters of controversy concerning the new government, if Thomas Jefferson and James Madison were on one side, Alexander Hamilton was probably on the other. But on this one, there was agreement. In his first *Pacificus* essay, Hamilton explained in 1793:

The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument. . . .

---

<sup>27</sup> 4 DIARIES OF GEORGE WASHINGTON 122 (Regents’ Ed. 1925) (emphasis added).

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and *the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly*, and ought to be extended no further than is essential to their execution.

While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the “executive power” to do whatever else the law of nations . . . enjoin in the intercourse of the United States with foreign Powers.<sup>28</sup>

I have not yet mentioned another Jefferson rival, John Marshall – said by some to have been the greatest chief justice of the United States in our history. As a Federalist member of the House of Representatives in 1800, Marshall swayed even many Republicans in arguing that President Adams had not violated the Constitution by ordering the seizure of a British deserter and his surrender to the commander of a British warship in Charleston Harbor pursuant to an extradition clause in the Jay Treaty without involving the judiciary. In remarks later quoted with approval by the Supreme Court in *Curtiss-Wright*, Marshall reasoned that the President was “the sole organ of the nation in its external relations” because “[h]e possesses the whole Executive power.”<sup>29</sup> Virtually paraphrasing the statement by Sir William Blackstone that “What is done by the royal authority, with regard to foreign powers, is the act of the whole nation,”<sup>30</sup> Marshall argued “the President expresses constitutionally the will of the nation” in foreign affairs.<sup>31</sup>

---

<sup>28</sup> 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) (emphasis added).

<sup>29</sup> 1 ANNALS OF CONG. 613 (Gales ed., 1851).

<sup>30</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

<sup>31</sup> 1 ANNALS OF CONG. 615.

Even more importantly, as our third Chief Justice – in perhaps the most famous case in the history of the Supreme Court – Marshall reaffirmed the exclusive nature of presidential power over foreign affairs. Writing for the Court in *Marbury v. Madison*, Marshall explained:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and *being entrusted to the executive, the decision of the executive is conclusive.*<sup>32</sup>

As though to emphasize that he was talking about the president’s exclusive powers in the realm of foreign affairs, Marshall continued:

The application of this remark will be perceived by adverting to the act of congress for establishing the department of *foreign affairs*. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.<sup>33</sup>

Thus, in support of the theory that Article II, Section 1, of the Constitution vested in the president the control of American foreign relations save for narrowly-construed “exceptions” expressly vested in the Senate or Congress, we have:

---

<sup>32</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165-66 (1803).

<sup>33</sup> *Id* (emphasis added).



- (1) The first President of the United States (who also served as president of the Constitutional Convention;
- (2) The first and third Chief Justice of the United States; and
- (3) All three authors of the *Federalist Papers* (by far the most important documents for explaining the new Constitution to the American people prior to ratification).

And yet, today, when “executive power” is discussed in Congress (or in American law schools, for that matter), it is usually in the context of denouncing our “law-breaking” President for failing to carry out the orders he has received from the legislature. That was not always the case.

### **Historic Legislative Deference to the President**

Mr. Chairman, I promised I would not impose my entire dissertation on you, but let me give you a few examples from the history of the United States Congress. One of the first statutes approved by the First Session of the First Congress in 1790 was an act to establish what we today know as the Department of State. It was a very simple act (it could have been printed on a single page) and was introduced by James Madison:

Be it enacted . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to

time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution . . . ; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct.<sup>34</sup>

Dr. Thach explains that – in strong contrast to the Department of the Treasury, whose secretary was required by statute to appear before Congress on demand and to submit his annual report not to the president or “the people” but to Congress – the “presidential departments” of foreign affairs and war were treated very deferentially:

The sole purpose of that organization [the Department of Foreign Affairs] was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the ‘presidential’ departments he could determine what should be done, as well as to how it should be done. . . . Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.<sup>35</sup>

Consider as well the first appropriations bill for foreign intercourse, which was equally deferential to the president’s exclusive constitutional responsibility for the business of intelligence and diplomacy. In language carried forward year after year, the statute provided:

[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable

---

<sup>34</sup> 1 Stat. 28 (1789).

<sup>35</sup> CHARLES C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 at 160.

not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . .”<sup>36</sup>

Indeed, the consistent congressional deference to the president while appropriating funds for foreign affairs during the first three administrations in our history was acknowledged by President Jefferson in an 1804 letter to Treasury Secretary Albert Gallatin:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties....Under...two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The purposes of the appropriation being expressed by the law, in terms as general as the duties are by the Constitution, the application of the money is left as much to the discretion of the Executive, as the performance of the duties. . . .

From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.<sup>37</sup>

When the Senate first established a permanent Committee on Foreign Relations in 1816, one of its first reports declared:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns

---

<sup>36</sup> 1 Stat. 129 (1790).

<sup>37</sup> *Jefferson to Gallatin*, Feb. 19, 1804, 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).

with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.<sup>38</sup>

In a similar vein, an 1897 Senate report on the constitutional power to recognize foreign governments explained:

Intervention, like other matters of diplomacy, sometimes calls for secret preparation, careful choice of the opportune moment, and swift action. It was because of these facts that the superintendence of foreign affairs was intrusted to the executive and not to the legislative branch of the Government. . . .

[O]ur Constitution gave the President power to send and receive ministers...[etc.]. These grants confirm the *executive* character of the proceedings, and indicate an intent to give all the power to the President, which the Federal Government itself was to possess—the general control of foreign relations. . . . That this is a great power is true; but it is a power which all great governments should have; and, being *executive* in the conception of the founders, and even from its very nature incapable of practical exercise by deliberative assemblies, was given to the President.<sup>39</sup>

Or consider one of the great debates on the Senate's power to demand negotiating documents. In 1906, Senator Augustus Bacon introduced a motion to instruct the president to provide the Senate with negotiating records concerning a treaty

---

<sup>38</sup> Quoted in CORWIN, THE PRESIDENT: OFFICE AND POWERS 441 (emphasis added). See also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

<sup>39</sup> U.S. SENATE, MEMORANDUM UPON THE POWER TO RECOGNIZE THE INDEPENDENCE OF A NEW FOREIGN STATE 6-7. Sen. Doc. 54-56, 54<sup>th</sup> Cong., 2d. Sess. (1897) (emphasis added).

pending before that body. In response, Senator John Coit Spooner delivered a detailed and obviously well-researched floor speech that reaffirmed the traditional view of presidential power. He remarked:

The Senate has nothing to do with the negotiation of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. ...

From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations *exclusively* in the President. And, Mr. President, he does not exercise that constitutional power, *nor can he be made to do it*, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.<sup>40</sup>

I noted earlier Professor Quincy Wright's contention that statutes enacted by Congress concerning foreign affairs were not in any way binding upon the president.<sup>41</sup> Consider Senator Spooner's comment on that same issue, uttered well before publication of the Wright book:

I do not deny the power of the Senate either in legislative session or in executive session—that is a question of propriety—to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses it is beyond any possible question purely *advisory*, and *not in the slightest degree binding in law or conscience upon the President*. ...[S]o far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the *absolute* and *uncontrolled* and *uncontrollable* authority.<sup>42</sup>

---

<sup>40</sup> 40 CONG. REC. 1417 (1906) (emphasis added).

<sup>41</sup> See *supra*, text accompanying note \_\_. xxxx

<sup>42</sup> 40 CONG. REC. 1417 (1906) (emphasis added).

You may be thinking that this was a radical view that was not taken seriously by Spooner's colleagues at the time. But Professor Corwin tells us that was not the case. Not only did Senator Bacon respond to the Spooner address by acknowledging that the Senate's claim to the information was based not upon "legal right" but upon "courtesy" between the President and the Senate, but the great Henry Cabot Lodge – a Harvard Ph.D. who chaired the Senate Foreign Relations Committee and was perhaps most famous for his role in leading the fight to block Senate consent to the ratification of the Versailles Treaty following World War I that created the League of Nations – remarked: "Mr. President, I do not think that it is possible for anybody to make any addition to the masterly statement in regard to the powers of the President in treaty making . . . we have heard from the Senator from Wisconsin [Sen. Spooner]."<sup>43</sup>

If this sounds shocking, let me leave you with but one more quotation. During my early years as a Senate staff member working with the Foreign Relations Committee,<sup>44</sup> it was chaired by Senator J. William Fulbright, of Arkansas. Today, he is perhaps best remembered for his strong opposition to the Vietnam War. But in 1959, before events in Vietnam<sup>45</sup> had captured the attention of many

---

<sup>43</sup> Edward S. Corwin, *The President: Office and Powers 1787-1957* at 182 (4<sup>th</sup> rev ed. 1957).

<sup>44</sup> I was not a member of the Committee staff, but rather what was referred to as an "S. Res. 60" staff member – paid out of a fund intended to provide each member of the Committee with a full-time personal staff member to assist him (or her) with Committee business.

<sup>45</sup> There was fighting in South Vietnam and the first two Americans were killed in hostilities on July 8, 1959. But I tend to view the actual "war" as beginning with the AUMF in August 1964 and ending with our final evacuation and the Communist conquest of the country we had repeatedly pledged to defend on April 30, 1975. But one might as reasonably date the origins of the war to

Americans, Chairman Fulbright delivered a scholarly lecture at Cornell Law School in which he declared:

The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.<sup>46</sup>

This, as I have said, was the conventional wisdom between the drafting of our Constitution and roughly a decade after Senator Fulbright’s Cornell speech. And I would draw your attention to the fact that the president’s “unalterable” power involved not merely the “conduct” of U.S. foreign policy, but its “formulation” as well.

If you have read this far, you are most likely confused. Why would members of the Legislative Branch recognize exclusive powers in the foreign affairs realm in the president? Where do such ideas originate? Let’s go back in history and try to find out.

---

Hanoi’s May 19, 1959, decision to open the Ho Chi Minh Trail and launch an effort to “liberate” South Vietnam by armed force.

<sup>46</sup> J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961) (bold emphasis added).

## The Constitutional Convention

My good friend Dr. Louis Fisher – certainly one of the preeminent scholars in the nation in this area – is fond of quoting from Madison’s *Notes* and Max Farrand’s four-volume *Records of the Federal Convention* to support his views. Thus, when we both appeared before the full Judiciary Committee on January 30 of last year, Lou testified:

Review what the framers said in Philadelphia. On June 1, 1787, Charles Pinckney offered his support for "a vigorous Executive but was afraid the Executive powers of Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." 1 Farrand 64-65. John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace." James Wilson, who also preferred a single executive, "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." Id. at 65-66. Edmund Randolph worried about executive power, calling it "the foetus of monarchy." The delegates to the Philadelphia Convention, he said, had "no motive to be governed by the British Governmt. as our prototype." Alexander Hamilton, in a lengthy speech on June 18, strongly supported a vigorous and independent President, but plainly jettisoned the British model of executive prerogatives in foreign affairs and the war power. In discarding the Lockean and Blackstonian doctrines of executive power, he proposed giving the Senate the "sole power of declaring war." The President would be authorized to have "the direction of war when authorized or begun." Id. at 292.<sup>47</sup>

---

<sup>47</sup> Statement by Louis Fisher Specialist in Constitutional Law appearing before the Senate Committee on the Judiciary "Exercising Congress's Constitutional Power to End a War" January 30, 2007, available on line at: [http://judiciary.senate.gov/hearings/testimony.cfm?id=2504&wit\\_id=432](http://judiciary.senate.gov/hearings/testimony.cfm?id=2504&wit_id=432) .



With all due respect to my friend Lou, Edmund Randolph is hardly a reliable source for the meaning of the Constitution – his “foetus of monarchy”<sup>48</sup> comment was directed against “unity in the Executive magistracy” while arguing that instead of a single executive the new Constitution should create three.<sup>49</sup> Randolph failed time and again to get his way in Philadelphia, and ultimately refused to sign the final document. And, as Lou acknowledges, all of these quotes occurred on June 1, 1787, at the end of only the first full week of substantive deliberations. James Madison’s *Notes* remind us that, on that same day:

[Roger Sherman] was for the appointment [of the president] by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed. An independence of the Executive on the supreme Legislative, was in his opinion the very essence of tyranny if there was any such thing.<sup>50</sup>

While this is apparently the fantasy of many in Congress today, to say the least – opinions changed *dramatically* over the course of the Convention.

Indeed, these misleading excerpts proffered by Dr. Fisher were *never* the prevailing sentiment in Philadelphia. As Professor Charles Thach observed in his classic 1922 Johns Hopkins study, *The Creation of the Presidency*:

State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers.

---

<sup>48</sup> 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 66.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 68.

The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth. . . .

Madison expressed the general conservative view when he declared on the Convention floor:

Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than cyphers; the legislatures omnipotent. If no effective check be devised for restraining the instability and encroachment of the latter, a revolution of some kind or the other would be inevitable.<sup>51</sup>

This problem of “omnipotent” state legislatures – and the tyranny they begat – was decried by Thomas Jefferson in his 1782 *Notes on the State of Virginia*:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature

---

<sup>51</sup> CHARLES THACH, *THE CREATION OF THE PRESIDENCY 1775-1789* at 52 (1922).

assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual . . . .

The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.<sup>52</sup>

Our Constitution was carefully drafted to prevent the reoccurrence of this legislative tyranny, and throughout most of our history both branches have generally – with notable exceptions – sought to remain within their proper boundaries. But starting in the late 1960s and continuing until this day, the federal legislature has forgotten its proper place and begun seizing the constitutional powers of the executive – especially in the field of foreign relations and its subcomponents of diplomacy, intelligence, and the control of military operations.

I have watched this development with great sadness, first in my position as a Senate staff member advising a member of the Senate Foreign Relations Committee for five years during the 1970s, later as the Acting Assistant Secretary of State for Legislative Affairs in the mid-1980s, and for the past two-decades or so as a scholar.

---

<sup>52</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245-46 (1782), available on line at: <http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all>.

## **The Pernicious Influence of Vietnam Mythology and the Evils of Political Partisanship in Wartime**

During the height of the Vietnam War, our nation went through a very intense and painful conflagration that often produced more heat than light. And it sometimes seems that portions of our collective memory – our “hard drive,” so to speak – were melted in the process. For by the time it was over, neither political branch seemed to understand the meaning of our Constitution in this area.

Members of Congress read the Constitution and observed it did not even use words like “foreign affairs” or “national security,” and they questioned why their predecessors had been so deferential to the executive. It became politically expedient to tell constituents that Vietnam was a consequence of presidential “lawbreaking” – LBJ (for Republicans) or Nixon (for Democrats) had taken the Nation into an unpopular, unnecessary, unwinnable foreign conflict in violation of the Constitution. Congress was going to pass the War Powers Resolution to regain its proper authority and the problem would be solved. When it was revealed that the Intelligence Community had made mistakes (and it had made mistakes, although much of the criticism was grossly overstated<sup>53</sup>), Congress

---

<sup>53</sup> A full discussion of this issue is beyond the scope of this short presentation, but I would note that when the Church Committee completed its massive inquiry into alleged “CIA assassinations” it concluded that the CIA had never “assassinated” anyone and that the two most recent Directors of Central Intelligence had each issued internal CIA regulations prohibiting any direct or indirect involvement in “assassination” long before Congress began its inquiry. (It did find that the CIA had repeatedly attempted to kill Fidel Castro – in my view a lawful target given his efforts to subvert numerous governments in Latin America by armed force – and had plotted to kill Patrice Lumumba but he had been killed by a rival Marxist organization before the CIA could act. *See generally*, Robert F. Turner, *It’s Not Really “Assassination” Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 UNIV. RICH. L. REV. 791-98 (2003).

promised to take control of that field as well. By the early 1970s Richard Nixon was the primary villain, and by demonizing him congressional Democrats won decisive victories at the polls and ultimately forced Nixon to resign.

Ironically, this was exactly the same tactic conservative Republicans had used against President Harry Truman in 1950.<sup>54</sup> And just as with Truman, the charge against Nixon was unfounded. Congress had for years pressured presidents to do more to stop Communist aggression in Indochina, and when a reluctant LBJ finally decided to act he went immediately to Congress and received a very clear AUMF by a combined vote of 504-2 – a margin of support of 99.6 percent. His public approval in the Gallup Polls shot up 58%, and the two senators who had opposed the authorization were defeated in their next election attempts. And given all of the silliness we heard about Nixon’s “illegal” incursion into Cambodia in 1970, I might note that the AUMF applied equally to Cambodia as well as South Vietnam (both being “protocol states” of the 1955 SEATO Treaty).

I want to talk briefly about “Vietnam” – or, perhaps more correctly, the war Congress authorized to defend South Vietnam, Laos, *and Cambodia* – because incredible harm has resulted from legislators attempting to “prevent another

---

<sup>54</sup> In reality, as once top-secret State Department records reveal, immediately upon returning to Washington following the North Korean invasion Truman told his senior advisers that he wanted to address a joint session of Congress as soon as possible and asked the State Department to draft what today we would call an “AUMF” (Authorization for the Use of Force). He repeatedly met with the joint congressional leadership, but everywhere he turned he was advised by congressional leaders that he did not need statutory authorization and he should “stay away” from Congress. Truman ultimately deferred to that advice, and Republicans who had initially supported him strongly denounced him as a liar and crook who had violated the Constitution as soon as the war started to become unpopular. See Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*. 19 HARV. J. L. & PUB. POL. 533 (1996).

Vietnam” without a serious understanding of what really happened during the Vietnam War.

### **Understanding “Vietnam” and Its Tragic Legacy**

I think it may be worth noting as well that history has largely reputed the arguments of the anti-war movement. I well recall sitting on a couch in the back of the Senate chamber in 1974 and listening to senators denounce the State Department as “lying” for asserting that the “National Liberation Front” (NLF) was a creature of North Vietnam. In my undergraduate honors thesis written in 1966, I noted that three months before the NLF was allegedly founded at a “conference of resistance fighters” in South Vietnam, the Third Party Congress of Hanoi’s *Dang Lao Dong* (Communist party) passed a resolution declaring that “[t]o ensure the complete success of the revolutionary struggle in south Vietnam, our people there must strive to . . . bring into being a broad National United Front.”<sup>55</sup> This was classic Leninism. I would add that – as I noted in my 1975 book, *Vietnamese Communism*<sup>56</sup> – entire paragraphs of the NLF program were lifted *verbatim* from the program of the “Fatherland Front” in Hanoi. It did not take a rocket scientist to see through this mythology. All you really had to do was do a little research and pay attention.

---

<sup>55</sup> 1 DEMOCRATIC REPUBLIC OF VIETNAM, THIRD NATIONAL CONGRESS OF THE VIET NAM WORKERS’ PARTY 225 (c. 1961).

<sup>56</sup> ROBERT F. TURNER, VIETNAMESE COMMUNISM: ITS ORIGINS AND DEVELOPMENT 234 and appendices I and K (1975).

After the war was over, Communist Vietnam published an official military history that was translated into English and republished in 2002 by the University Press of Kansas under the title *Victory in Vietnam*. In his forward to this volume, University of Pennsylvania Professor William Duiker notes: “one of the most pernicious myths about the Vietnam War—that the insurgent movement in South Vietnam was essentially an autonomous one that possessed only limited ties to the regime in the North—has been definitively dispelled.”<sup>57</sup>

I have no doubt that many in Congress during the early 1970s honestly believed that Congress had played no part in committing us to war in Indochina and it was perfectly appropriate for the legislative branch to seize control of military decisions on the conduct of the war and intelligence activities. Some clearly knew better.<sup>58</sup> But, I’m far more interested in seeing the system fixed than in placing blame – and certainly most of the members of the current Congress played no role in the early usurpations. But I must admit to a little frustration, having appeared before more than a dozen congressional committees over the past twenty-five or so years, documenting these facts time after time, when no one seems concerned about trying to restore Congress to its proper constitutional role.

---

<sup>57</sup> William Duiker, “Foreword: The History of the People’s Army,” in *Victory in Vietnam: The Official History of the People’s Army of Vietnam, 1954-1975* (Lawrence, Kansas: University Press of Kansas, 2002), p. xvi.

<sup>58</sup> See, e.g., my discussion of the conduct of Senator Jacob Javits and Representative Paul Findley in TURNER, REPEALING THE WAR POWERS RESOLUTION 15-16, 20, 34-35, 87.

**What about Dean Harold Koh's Contention that Justice Jackson's Concurrence in *Youngstown* Has Superseded *Curtiss-Wright* as the Constitutional Foreign Policy Paradigm?**

Judging from academic writing on the subject, if there is a modern “conventional wisdom” on the separation of foreign affairs powers under the Constitution it is the “shared powers” view embraced by my friends Dr. Lou Fisher and Professor Harold Koh – currently Dean of Yale Law School. Dean Koh’s highly acclaimed 1990 volume, *The National Security Constitution*, is cited time and again as gospel. But when the Koh book first came out, two of the nation’s preeminent authorities in this area – former Yale Dean Eugene Rostow and the legendary Yale Professor Myres McDougal wrote me separately expressing their shock that the book was receiving so much praise.

The explanation, I believe, is that in recent decades our law schools and universities have stopped teaching this important part of our constitutional history. Few law professors focus heavily in this realm, and by the early 1970s – when Harold was entering college – even the State Department largely stopped referring to the grant of “executive Power” as the president’s primary authority over foreign affairs. So, like probably the majority of scholars today who were unaware of this history, Harold set out to explain his “national security constitution” from the assumption that Congress was supposed to be the senior partner – making policy by laws the president was charged with faithfully executing.



Let's consider an excerpt from *The National Security Constitution* setting forth the *Curtiss-Wright vs. Youngstown* Koh paradigm:

[T]hroughout our constitutional history, what I call the *Youngstown* vision has done battle with a radically different constitutional paradigm. This counter image of *unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in *United States v. Curtiss-Wright Export Corp.* As construed by proponents of executive power, the *Curtiss-Wright* vision rejects two of *Youngstown's* central tenets, that the National Security Constitution requires congressional concurrence in most decision on foreign affairs and that the courts must play an important role in examining and constraining executive branch judgments in foreign affairs.<sup>59</sup>

When I first read this, I could not help but wonder if Dean Koh had even carefully read Justice Jackson's *Youngstown* concurrence, or the majority opinion in the case by Justice Black. For in *Youngstown*, both Black and Jackson went to

---

<sup>59</sup> HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 72 (1990).

considerable lengths to emphasize that they were not endeavoring to constrain the powers of the President in dealing with the external world. At issue in *Youngstown* was whether the President’s “war powers” authorized him to instruct the Secretary of the Interior to seize domestic steel mills – the *private property* of Americans – to prevent a labor strike that might affect the availability of steel for the Korean War. This was in my view at its core a Fifth Amendment case involving the guarantee that “[n]o person shall . . . be deprived of . . . property, without due process of law . . . .”

That the Supreme Court in *Youngstown* perceived it was dealing with a domestic rather than a foreign affairs case is abundantly clear from this excerpt from Justice Hugo Black’s majority opinion:

The order [to seize steel mills] cannot properly be sustained as an exercise of the President’s military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. 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 had the ultimate power as such to take possession of *private property* in order to keep *labor disputes* from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.<sup>60</sup>

But Dean Koh focuses primarily on the Jackson concurring opinion, so let’s consider that. First of all, there is no reason to believe that Justice Jackson was in the slightest degree hostile to *Curtiss-Wright* as the appropriate foreign policy

---

<sup>60</sup> 343 U.S. 579, 587 (1952) (emphasis added).

paradigm. Just two years before *Youngstown*, he wrote for the Court majority in *Eisentrager*:

Certainly it is not the function of the Judiciary to entertain private litigation - even by a citizen - which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. . . . The issue . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is *exclusively* responsible. *United States v. Curtiss-Wright Corp* . . . .<sup>61</sup>

Even in *Youngstown*, Justice Jackson was appropriately deferential to presidential power with respect to the *external* world:

[N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that a President whose conduct of *foreign* affairs is so largely uncontrolled, and often is even unknown, can vastly enlarge his mastery over the *internal* affairs of the country by his own commitment of the Nation's armed forces to some foreign adventure. . . .

That military powers of the Commander in Chief were not to supersede representative government of *internal* affairs seems obvious from the Constitution and from elementary American history. . . . Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of *domestic* policy . . . .

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his *exclusive* function to command the instruments of national force, at least *when turned against the outside world for the security of our*

---

<sup>61</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (emphasis added).

*society*. But, when it is turned *inward*, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, *to seize person or property* because they are important or even essential for the military or naval establishment.<sup>62</sup>

Even more fundamentally, in *Youngstown* Justice Jackson actually cited *Curtiss-Wright* early in his concurring opinion, explaining in a footnote: “That case does not solve the present controversy. It recognized *internal* and *external* affairs as being in separate categories . . . .”<sup>63</sup> And, as both Justice Black and Jackson repeatedly emphasized, *Youngstown* was an “internal affairs” case.

I would add that is also the consensus of scholars like Columbia Law School Professor Louis Henkin, who in *Foreign Affairs and the Constitution* noted:

*Youngstown* has not been considered a “foreign affairs case.” The President claimed to be acting within “the aggregate of his constitutional powers,” but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.<sup>64</sup>

Consider further the reaction of Justice Rehnquist, joined by Chief Justice Burger and two other members of the Court, in the 1979 dispute over President Carter’s constitutional power to terminate the U.S. mutual security treaty with the

---

<sup>62</sup> *Id.* at 642, 644, 645 (emphasis added).

<sup>63</sup> *Id.* at 637 n.2 (bold emphasis added).

<sup>64</sup> HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 341 n.11 (1972).

Republic of China on Taiwan. Senator Goldwater had urged the Court to decide the case on *Youngstown*, but Rehnquist wrote:

The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable *domestic* impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of *foreign* affairs."<sup>65</sup>

#### **Dean Koh's Reliance on *Little v. Barreme***

Dean Koh's paradigm is not premised entirely upon the *Youngstown* concurrence, but that is its mainstay. *Inter alia*, he also cites the 1804 case of *Little v. Barreme*<sup>66</sup> to demonstrate the Supreme Court has sometimes decided against the president in a war powers context. In *Barreme*, President Adams had directed American warships to seize American-owned vessels bound to or from French ports – acting pursuant to an act of Congress that had only authorized the seizing of American ships headed *to* French ports. The litigation resulted when the U.S. frigate *Boston*, commander by Captain Little, seized *The Flying Fish* (ultimately shown to have been owned by a Dutch national) on the high seas shortly after it *departed from* a French port.

---

<sup>65</sup> *Goldwater v. Carter* 444 U.S. 996 (1979) (emphasis added).

<sup>66</sup> 6 U.S. 170 (1804).

The key to understanding *Barreme* is not merely that, like *Youngstown*, the case involved a seizure of property believed at the time to belong to an American owner; but that one of the “exceptions” to the general grant of executive power to the president that was expressly vested in Congress is the power to “make Rules concerning Captures on . . . Water . . . .”<sup>67</sup> The primary focus of the decision was on whether damages for the wrongful seizure of foreign property should be paid by the government or by Captain Little, and Chief Justice Marshall acknowledged that his own initial thinking had been for the former – but he had been “convinced that I was mistaken”<sup>68</sup> by his colleagues on the Court. In the end, Congress enacted a private bill indemnifying Captain Little for the cost of the judgment.

There are other cases Professor Koh (or others) might cite in which the Supreme Court decided against the executive, but I would urge you to examine them carefully to see if they perhaps involve seizures of person or property without due process of law or other clear “excptions” to the president’s general grant of executive power.

---

<sup>67</sup> U.S. CONST., Art. I, Sec. 8, Cl. 11.

<sup>68</sup> *Id.* at 179.

**C.**  
**A QUICK LOOK AT SOME SPECIFIC ISSUES  
IN THIS CONTROVERSY**

Mr. Chairman, having discussed some of the more theoretical issues, let me turn and quickly address some of the specific issues that are often raised by legislators when they accuse modern presidents of violating the “rule of law.” In particular, I will talk about “presidential signing statements,” conditional appropriations, and congressional involvement in diplomacy, foreign intelligence, and war powers.

**Presidential Signing Statements**

Let me start by considering those controversial “presidential signing statements” – one of the issues that will certainly be addressed by others during this hearing as an example of presidential disregard for the rule of law. The incumbent President has often announced while signing legislation that he will not be bound by certain provisions he believes to be unconstitutional; or, alternatively, that he will interpret ambiguous provisions in a new statute in such a manner as to avoid unconstitutional ends. As you know, in August 2006 the American Bar Association House of Delegates approved a resolution declaring that presidential signing statements are “contrary to the rule of law and our constitutional system of separation of powers . . . .”<sup>69</sup> This is absolutely *absurd*.

---

<sup>69</sup> The full text of the resolution may be found on line at: [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-)

For the record, I believe that the current Administration has at times issued signing statements in inappropriate settings.<sup>70</sup> But I strongly *commend* the President for having the courage to stand firm against congressional usurpations of constitutional authority. As the legendary Professor Charles Warren of Harvard Law School observed in 1930:

Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people . . . Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights - defense of power which the people granted him . . . . In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.<sup>71</sup>

By far the most frequent basis for presidential signing statements – in this administration, and in every administration at least since Ronald Reagan was president – has been flagrantly unconstitutional<sup>72</sup> legislative vetoes. And when a

---

[report 7-24-06.pdf](#) . In preparing for this morning’s hearing, I found an ABA news release that suggests that this resolution was edited to read “The American Bar Association opposes, as contrary to the rule of law and our constitutional system of separation of powers, the *misuse* of presidential signing statements [emphasis added]” before it was approved by voice vote. The news release is available on line at: [http://www.abanet.org/media/releases/news080806\\_1.html](http://www.abanet.org/media/releases/news080806_1.html) . I was unaware of this change. If it was added to make it clear that some signing statements are constitutional, I apologize to the ABA for my prior criticism of the resolution. However, other explanations for the change are possible.

<sup>70</sup> For example, one of the “exceptions” to the general grant of “executive Power” to the president was the power given to Congress in Article I, Section 8, Clause 10, “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nation . . . .” That clearly, in my view, empowers Congress to enact statutes punishing violations of the 1949 Geneva Conventions, the Convention Against Torture, and other instruments of international law to which the United States is a party.

<sup>71</sup> Charles Warren, *Presidential Declarations of Independence*, 10 B. U. L. REV. 1, 35 (1930).

<sup>72</sup> See the discussion of the *Chadha* case, *supra*, text accompanying notes \_\_\_ - \_\_\_. XXX CK XXX



President in such cases declares that he is going to uphold the Constitution over an inconsistent and flagrantly unconstitutional statute enacted by Congress, he is being faithful to his oath of office to “take Care that the Laws be faithfully executed . . . .”<sup>73</sup> For as Chief Justice John Marshall observed in *Marbury v. Madison*, “a legislative act contrary to the constitution is not law.”<sup>74</sup>

Although the Alien and Sedition Acts were signed into law by John Adams, his successor Thomas Jefferson refused to enforce them on constitutional grounds and pardoned all of those they had victimized. He later explained: “[T]he sedition law was contrary to the constitution and therefore void. On this ground, I considered it as a nullity wherever I met it in the course of my duties ; and on this ground I directed *nolle prosequis* in all the prosecutions which had been instituted under it . . . .”<sup>75</sup> Had this act been passed over his veto, there is no question that Thomas Jefferson rather than James Monroe would have issued our first “signing statement.”

Signing statements have been used to uphold the rights of the people against a lawbreaking Congress time and again throughout our history. In 1942, a powerful subcommittee chairman on the House Appropriations Committee inserted a rider in the Urgency Deficiency Appropriation Act of 1943 prohibiting the use of treasury funds to pay the salaries of three named individuals – men many House

---

<sup>73</sup> U.S. CONST., Art. II, Sec. 3.

<sup>74</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803). See also, *Fairbank v. United States*, 181 U.S. 283, 285-86 (1901).

<sup>75</sup> *Jefferson to Gideon Granger*, Mar. 9, 1814, in 9 THE WRITINGS OF THOMAS JEFFERSON 454, 456-57 (Paul Leicester Ford, ed. 1898).

members no doubt sincerely believed were “Communists.” (After all, they had been identified by name as “subversives” in a floor speech by Rep. Martin Dies, Chairman of the House Committee on Un-American Activities – and for all I know they all *were* Communists.) Some House members objected – the provision was termed a “legislative lynching” and compared to the “star chamber” during the House floor debate – and the Senate unanimously rejected the initial conference report because of this provision. But the House would not yield, the money was urgently needed to feed and supply our military forces fighting World War II in Europe and the Pacific, and the fifth conference report was ultimately approved by both houses with Section 304 intact. Because the money was needed for the war effort, President Roosevelt did not have the option of vetoing the bill. So he issued a statement upon signing the act into law declaring that Section 304 was unconstitutional and would bind neither the executive branch nor the judiciary. How shocking!

The issue was finally resolved four years later when the Supreme Court struck down Section 304 as an unconstitutional Bill of Attainder in the 1946 *Lovett* case.<sup>76</sup> Presumably, the American Bar Association and current Members of Congress who find such signing statements inherently objectionable share the view – argued by Counsel for the House before the Court at the time – that riders to appropriations measures are nonjusticiable political questions that cannot be

---

<sup>76</sup> *United States v. Lovett*, 328 U.S. 303 (1946). For a more detailed discussion of this issue, see <sup>76</sup> Robert F. Turner, *Presidential Signing Statements and the ABA*, WASH. TIMES, August 6, 2006, and my prepared statement before the full Senate Judiciary Committee on January 30, 2007, at 37, available on line at: <http://www.virginia.edu/cnsl/pdf/Turner-SJC-testimony30Jan2007.pdf> .

challenged in the courts. But, as the *Lovett* case established, that view is profoundly *wrong*.

There is no doubt that the Constitution gives Congress complete control over appropriations<sup>77</sup> – just as the president’s general control over foreign policy is clear.<sup>78</sup> The president may veto an appropriations bill, and the Senate may block a completed treaty or refuse to provide funds for foreign aid or other international activities. Otherwise, the powers are exclusive. But as the Supreme Court noted in *Curtiss-Wright* (a seminal case that will be discussed further below<sup>79</sup>), *every* governmental power “must be exercised in subordination to the applicable provisions of the Constitution.”<sup>80</sup>

### **The Power of the Purse and “Conditional Appropriations”**

In domestic settings, it is commonplace for legislators to place conditions in appropriations acts restricting the way money can be used. Unless such “riders” conflict with constitutional constraints, such measures are usually unobjectionable. But the practice that became popular during the Vietnam War of conditioning money for the presidential departments of Defense and State – or for

---

<sup>77</sup> U.S. CONST., Art. I, Sec. 9, Cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”)

<sup>78</sup> *See infra*, text accompanying notes \_\_ - \_\_. XXXXX CK FINAL XXX

<sup>79</sup> *See infra*, text accompanying notes \_\_ XXXX CK FINAL XXX

<sup>80</sup> *United States v. Curtiss-Wright Export Corp*, 299 U.S. 304, 320 (1936). *See also, Gravel v. United States*, 408 U.S. 606,644 (1972) (“The Court said [in *Curtiss-Wright*] that the power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power ‘like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.’”).

the Intelligence Community – raises very serious constitutional problems unless confided strictly to one of the narrow exceptions to executive power expressly vested in Congress or the Senate.

Few serious scholars would suggest that Congress could tell the President he could not use appropriate funds unless he agreed to appoint a particular individual as Secretary of Defense, not to negotiate a particular international agreement with a specified foreign country, or where to deploy combat units in time of authorized war. Put simply, Congress may not constitutionally use appropriations riders to accomplish ends that it is otherwise prohibited from doing by the Constitution.

I've written about this issue at length elsewhere<sup>81</sup> and will not elaborate further here, beyond expressing the view that the 1973 statute that prohibited the president from spending appropriated funds for combat activities in Indochina was in my view unconstitutional, and had Congress actually enacted legislation early last year prohibiting the President from implementing the so-called “surge” in Iraq it would have been unconstitutional. Calling up existing reserve forces during a congressionally-authorized armed conflict is at the core of the Commander-in-Chief power. Congress clearly has the discretion to refuse additional forces and appropriations – and thus can compel an American military defeat if it so wishes – but it has no general authority to legislate an end to an

---

<sup>81</sup> Robert F. Turner, *The Power of the Purse*, IN THE CONSTITUTION AND NATIONAL SECURITY (Howard E. Shuman & Walter R. Thomas, eds., 1990), available on line at: <http://www.virginia.edu/cnsl/pdf/PowerofthePurse-RFT1990.pdf> .

armed conflict. Indeed, a proposal at the Philadelphia Convention to give Congress some role in ending a war was following debate *unanimously* defeated.<sup>82</sup> The parallels with the 1789 decision over the power to remove the Secretary of Foreign Affairs are obvious.<sup>83</sup>

This practice of abusing conditional appropriations is a threat to our system of separation of powers. For if Congress may properly usurp the Commander-in-Chief power in this way, what is to prevent it from enacting legislation providing that no funds shall be available to the judiciary unless the Supreme Court agrees to take directions from Congress. Whether the “condition” is to “overturn *Roe v. Wade*” (or “not override a particular case), or a prohibition against overturning any statute enacted by Congress, the very principle would mean the end of meaningful separation of powers.

### **Diplomacy and the Conduct of Foreign Relations**

I have already noted that in April 1790 Thomas Jefferson, George Washington, James Madison, and John Jay agreed that the Senate had “no constitutional right to interfere” with the business of diplomacy.<sup>84</sup> If there was any doubt about this issue, it should have been resolved in 1936 when the Supreme Court in *Curtiss-Wright* declared:

---

<sup>82</sup> 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 319.

<sup>83</sup> See *supra*, text accompanying note \_\_\_\_ . XXXX

<sup>84</sup> See *supra*, text accompanying note \_\_\_\_ . XXXX

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.* As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." . . . .<sup>85</sup>

The Court explained:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and *exclusive* power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.<sup>86</sup>

There was a time when the Senate Foreign Relations Committee had a firm rule that it would not permit formal testimony by a foreign official. This was seen as an infringement of the diplomatic prerogatives of the executive. Perhaps the last stake was driven through the heart of that constitutionally-premised rule when Chairman Jesse Helms demanded that foreign diplomats at the United Nations formally testify before the Committee. Committee members in the old days would willingly meet informally with foreign representatives over cocktails, and

---

<sup>85</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (bold emphasis added).

<sup>86</sup> *Id.*

international travel (particularly trips that involved visits with American military forces abroad) became fairly common after World War II.

But Congress itself, as early as 1798, made it a felony for any American to “usurp executive authority” (as the debate was entitled in the *Annals of Congress*<sup>87</sup>) by communicating with a foreign government about a matter in controversy or dispute between the two governments without the approval of the Executive Branch. As if to emphasize that this applied especially to Members of Congress, Republican Albert Gallatin declared during the floor debate that (making reference to the diplomatic and quasi-military conflict with France):

In our situation, for instance, said he, it would be extremely improper for a member of this House to enter into any correspondence with the French Republic. . . . It might, therefore, be declared, that though a crime of this kind cannot be considered as treason, it should nevertheless be considered as a high crime.<sup>88</sup>

Some of you will no doubt recall the trip the Speaker of the House took to Syria last March over the objections of the White House. More important than her flagrant violation of a felony statute was the usurpation by a leader of one political branch of constitutional powers the Supreme Court has affirmed belong *exclusively* to the executive.<sup>89</sup>

---

<sup>87</sup> 9 ANNALS OF CONG. 2489 (1798).

<sup>88</sup> *Id.* 2498.

<sup>89</sup> See Robert F. Turner, *Illegal Diplomacy*, WALL STREET JOURNAL, April 6, 2007, available on line at: <http://www.opinionjournal.com/extra/?id=110009908>.

## **Usurping Presidential Control Over “the Business of Intelligence”: Warrantless Foreign Intelligence Surveillance and FISA**

I worked in the Senate when FISA was first enacted in 1978, and it was my strong view at the time that it was flagrantly unconstitutional. Nothing in the Constitution empowers Congress to interfere in the business of collecting foreign intelligence, and John Jay in *Federalist* No. 64 explained to the American people before the Constitution was ratified that – because Congress and the Senate could not be trusted to keep secrets<sup>90</sup> – the new Constitution had left the *President* “able to manage the business of intelligence as prudence might suggest.”<sup>91</sup> As discussed, early foreign affairs appropriations bills required the president to account “specifically” only for those expenditures “as in his judgment may be made public,” and to account “for the *amount* of such expenditures as he may think it advisable not to specify . . . .”<sup>92</sup> As I have documented in previous testimony before the Senate and House Judiciary Committees,<sup>93</sup> until 1973 the

---

<sup>90</sup> FEDERALIST No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (“There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. . . . and there doubtless are many . . . [potential sources] who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly.”). As early as 1776, Benjamin Franklin and a unanimous Committee of Secret Correspondence of the Continental Congress decided that a sensitive covert operation involving French support for the American Revolution could not be shared with others in Congress, for “We find by fatal experience that Congress consists of too many members to keep secrets.” *Verbal statement of Thomas Story to the Committee*, 2 P. FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES, Fifth Series, 819 (1837-53). For a detailed discussion of the Founding Fathers’ recognition that Congress could not be trusted with keeping secrets, see my prepared testimony before the House Permanent Select Committee on Intelligence on February 23, 1994, “Secret Funding and the ‘Statement and Account’ Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities,” available on line at: [http://www.fas.org/irp/congress/1994\\_hr/turner.htm](http://www.fas.org/irp/congress/1994_hr/turner.htm) .

<sup>91</sup> FEDERALIST No. 64 at 435.

<sup>92</sup> 1 STAT. 129 (1790) (emphasis added).

<sup>93</sup> “Congress, Too, Must ‘Obey the Law’: Why FISA Must Yield to the President’s Independent



prevailing view – as expressed by the great Henry Clay during a 1918 debate in the House of Representatives – was that it would be *improper* for Congress to inquire into expenditures for foreign intelligence purposes.<sup>94</sup>

When Congress enacted the first wiretap statute in 1968, it expressly declared “Nothing contained in this chapter . . . shall limit *the constitutional power of the President* to take such measures as he deems necessary . . . to obtain foreign intelligence information . . . or to protect national security information against foreign intelligence activities.”<sup>95</sup> After Vietnam, an angry Congress enacted FISA, flagrantly usurping the President’s constitutional control over “the business of intelligence.” That statute created an appellate FISA Court of Review, which in 2002 noted that every court to consider the issue held that the president has independent constitutional power to authorize warrantless foreign intelligence surveillance, adding that “FISA could not encroach on the President’s constitutional power.”<sup>96</sup>

Over the years, the Supreme Court has had no less than seven opportunities to declare that the lower courts were wrong about there being a foreign intelligence

---

Constitutional Power to Authorize the Collection of Foreign Intelligence.” Testimony before the U.S. Senate Committee on the Judiciary, February 28, 2006 [http://www.virginia.edu/cnsl/pdf/TURNER-SJC-28Feb06\\_FINAL.pdf](http://www.virginia.edu/cnsl/pdf/TURNER-SJC-28Feb06_FINAL.pdf); and “Is Congress the Real “Lawbreaker?”: *Reconciling FISA with the Constitution.*” Testimony before the House Judiciary Committee hearing on Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans’ Privacy Rights, September 5, 2007, available on line at: [http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-\(final\).pdf](http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-(final).pdf) .

<sup>94</sup> 32 ANNALS OF CONG. 1466 (1818).

<sup>95</sup> 18 USC § 2511(3) (1970) (emphasis added).

<sup>96</sup> *In re Sealed Case*, 310 F.3d 717, 742 Foreign Int. Surv. Ct. Rev., November 18, 2002 (NO. 02-002, 02-001).

exception to the Fourth Amendment's warrant requirement, yet that principle was so well established by the time of the 1980 *Truong* case<sup>97</sup> that not a single Justice voted to grant *certiorari*.<sup>98</sup>

## Usurping Presidential War Powers

I worked in the Senate during the first five years following enactment of the 1973 War Powers Resolution, and its flagrant unconstitutionality has been the subject of two of my books, numerous articles, and countless lectures and debates. In December 1984 I had the honor of debating former Senator Jacob Javits, the chief Senate sponsor of that legislation, who to my surprise acknowledged that portions were unconstitutional. Four years later, Senator George Mitchell observed in a Senate floor speech “the War Powers Resolution does not work, because it *oversteps the constitutional bounds* on Congress’ power to control the Armed Forces in situations short of war . . . .”<sup>99</sup> And just two months ago, the very distinguished bipartisan National War Powers Commission – co-chaired by former Representative Lee Hamilton – unanimously concluded that the War Powers Resolution is unconstitutional and should be repealed.<sup>100</sup> Sadly, I see little interest in doing so on the Hill today.

---

<sup>97</sup> *United States v. Truong*, 629 F.2d 908, 912 (1980).

<sup>98</sup> *Humphrey v. United States*, 454 U.S. 1144, (1982)

<sup>99</sup> CONG. REC. 6177, May 19, 1988. For a more extended excerpt from this statement see TURNER, REPEALING THE WAR POWERS RESOLUTION 162.

<sup>100</sup> “One topic on which a broad consensus does exist is that the War Powers Resolution of 1973 does not provide a solution because it is at least in part unconstitutional and in any event has not worked as intended.” NATIONAL WAR POWERS COMMISSION REPORT 6, available on line at: <http://millercenter.org/dev/ci/system/application/views/newwebsite/policy/commissions/warpow>

**D.**  
**CONGRESSIONAL USURPATION OF EXECUTIVE  
CONSTITUTIONAL DISCRETION HAS DONE  
TREMENDOUS DAMAGE TO AMERICA AND THE WORLD**

Mr. Chairman, from my years as a Senate staff member and working in the Department of State I realize that it is common for legislators and even cabinet members to conclude that these technical constitutional issues are too complex and confusing – especially for non-lawyers – and thus to try to set them aside and focus on more “important” problems between the political branches.

Indeed, I remember when Senators John Tower and Arlen Specter approached the Department of State perhaps two-dozen years ago with the idea that Congress and the Executive Branch might cooperate to create a “case or controversy” so that the Supreme Court could address and clarify the roles of each branch – or at minimum rule on the constitutionality of the 1973 War Powers Resolution. Ultimately, Senator Tower was not able to attend the meeting between Secretary of State Shultz and Senator Specter, but I was asked to sit in both because I was at the time Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs<sup>101</sup> and (I suspect) because I had published a book a year or two earlier on the War Powers Resolution and thus might be able to provide useful background. I personally favored the idea, but – I think in part because he felt we already had

---

[ers/report.pdf](#) .

<sup>101</sup> I don’t recall the date of the meeting, and thus am not certain whether at the time I had taken over as Acting Assistant Secretary following the retirement of Tapley Bennett or perhaps I was still serving as Principal Deputy Assistant Secretary. The point is not material to this discussion.

enough quarrels with Congress that we didn't need to be manufacturing new ones, and also perhaps because he was not an expert on the constitutional issues and was uncertain how such a move might play out – Secretary Shultz did not elect to pursue the issue.

Lest my presentation this morning come across as a lot of esoteric theorizing with no real-world significance, I want to make it clear that I am talking about legislative lawbreaking that has repeatedly had catastrophic consequences for our nation and the world.

### **The Human Consequences of Our Indochina Debacle**

More than thirty-five years have passed since the last American combat unit withdrew from South Vietnam, and most Americans have tried to put that tragedy behind us. Perhaps it is because I continue to teach a seminar on the conflict, or perhaps because it was such an important part of my life for more than a decade, but I can't do that.

I wrote my undergraduate honors thesis on the conflict before volunteering for military service, volunteering for the infantry (becoming an Expert Infantryman), and repeatedly volunteering for service in Vietnam. I grew up in a military family, and my sense of "Citizenship in the Nation" was no doubt enhanced by my Eagle Scout training. But, as it turned out, the government was far more

interested in my knowledge of Ho Chi Minh and his colleagues than it was in my talents as a warrior – and I would up spending both of my Vietnam assignments on detail from MACV to the American Embassy working on North Vietnamese Affairs.

When I left the Army as a Captain in 1971 I took a job and then became a Fellow at Stanford's Hoover Institution on War, Revolution, and Peace, where I wrote the first major English-language history of the Vietnamese Communist movement. The fellowship brought me to Capitol Hill, where I made regular trips back to Indochina – ending in April 1975 when I was the last Hill staff member in South Vietnam during the final evacuation. Between 1968 and 1975 I had traveled through 42 of South Vietnam's 44 provinces plus Laos and Cambodia, and in the process I developed a great affection for the land and people I met.

One of my tasks in the Embassy (where I filled a newly-created position as “Assistant Special Projects Director”) was to investigate enemy terrorism, and a lot of my travel was tied to specific terrorist incidents. I spoke with defectors and cooperative POWs, followed the North Vietnamese media, and read countless captured documents. And it became obvious that if America abandoned our commitment to defend the non-Communist people of Indochina there would quickly be a bloodbath.

Ironically, although the American press seldom reported it, by 1972 the United States was winning the war in South and North Vietnam militarily. When Congress in 1973 enacted a statute making it unlawful for the President to spend treasury funds on combat operations anywhere in Indochina – quite literally snatching defeat from the jaws of victory – it accomplished two ends.

First of all, it betrayed a solemn commitment our Nation had first made through the UN Charter<sup>102</sup> in 1945 and more specifically by the SEATO Treaty – which was ratified in 1955 with the advice and consent of all but a single Senator present and voting. In his Inaugural Address, a young President John F. Kennedy inspired friends of liberty around the globe when he promised America would “oppose any foe” for the cause of human freedom. Then, in August 1964, by a collective margin of 99.6 percent, the U.S. Congress enacted what today would be called an Authorization for the Use of Force (AUMF) empowering the president to use military force to assist any “protocol states” (i.e., South Vietnam, Laos, and Cambodia) of the SEATO Treaty requesting assistance in defense of its freedom.

To be sure, many legislators who voted to betray those solemn commitments – and the sacrifice of the more than 58,000 American forces who had lost their lives in that struggle – were honestly taken in by the Communist propaganda line that the National Liberation Front was independent of Hanoi and only wanted peace, human rights, and an end to “foreign occupation” of their country. But as I’ve

---

<sup>102</sup> See Article 1, Section 1, which committed us to take effective collective measures in response to threats to the peace.

already observed, Hanoi has since the war admitted that it made a decision in May 1959 to “liberate” South Vietnam by armed force. Our defense of South Vietnam was very much part of the Containment Doctrine that had led us to resist Communist aggression in Korea in 1950 and send tens of thousands of American forces to Europe to protect our NATO allies from possible aggression.

The other consequence of the congressional decision to betray our commitments was perhaps even more tragic. When Congress passed what I continue to believe was an unconstitutional statute intended to prevent the president from fulfilling our longstanding commitments, we had just compelled Hanoi to sign the Paris Agreements and both Moscow and Beijing were pressuring Hanoi to curtail its activities in South Vietnam. There was a serious chance for peace. But when Congress threw in the towel, North Vietnamese Premier Pham Van Dong declared that “the Americans won’t come back now even if we offer them candy,” and Hanoi soon sent virtually its entire Army to seize control of its neighbors to the south and west by classic international armed aggression. Hanoi’s Soviet-made tanks would have been sitting ducks to American airpower – but Congress had made that illegal.

The worst immediate consequences were in Cambodia, where the Yale Cambodia Genocide Program estimates 1.7 million people – more than 20 percent of the population – were slaughtered. Ironically, the reason I had returned to Saigon in April 1975 was to try to rescue orphans, and I had focused especially on a plan to

bring Cambodian orphans out through Saigon on the empty C-130 cargo planes that were delivering rice day after day. I was too late, Phnom Penh fell, and those orphans likely suffered the fate of so many “undesirables” under Pol Pot’s Genocide. Not wanting to waste bullets, the Khmer Rouge often dispatched small children by simply picking them up by their tiny legs and bashing them against trees until they stopped quivering.<sup>103</sup> Had it not been for a lawbreaking Congress, that didn’t have to happen.

The loss of life in South Vietnam was less. Including those who starved in “reeducation camps” or died at sea as “boat people” trying to escape the Stalinist tyranny we imposed on that country, and those actually executed, the death toll certainly was in seven figures. And despite all of the rhetoric from congressional war critics that abandoning our commitments would bring both peace and human rights, in the two decades following their conquest of South Vietnam the Hanoi regime consistent ranked among the “dirty dozen” and “worst of the worst” human rights violators by Freedom House.

Heady over their glorious victory over the hated Richard Nixon in Indochina, congressional liberals soon turned their attentions to Angola, where the Soviet Union was transporting thousands of Cuban forces to help the Marxist MPLA achieve a military victory rather than take its chances through free elections. With shouts of “No More Vietnams,” Congress enacted yet another

---

<sup>103</sup> See, e.g., “Killing Fields” Lure Tourists to Cambodia, NATIONAL GEOGRAPHIC TODAY, Jan. 10, 2003, available on line at: [http://news.nationalgeographic.com/news/2003/01/0110\\_030110\\_tvcambodia.html](http://news.nationalgeographic.com/news/2003/01/0110_030110_tvcambodia.html).



unconstitutional statute – the Clark Amendment – that made it unlawful for us to resist the Soviet/Cuban aggression. It took a decade for Congress to realize how stupid that move had been, and in the process an estimated half-million people had died in Angola.

The decision to abandon our long-standing commitments in Indochina was not missed by the world's major tyrants, who realized that America had largely lost its will to defend other victims of aggression. American hostages were seized in Iran, and the Soviet Union invaded Afghanistan (resulting in another million deaths and the birth of the Taliban). For the first time in more than half-a-century, Moscow instructed its client Communist parties in Central America that it was acceptable to commence armed struggle. And when first President Carter and then President Reagan tried to assist victims of Communist aggression in El Salvador, once again congressional liberals stepped in with cries of “No More Vietnams.”

### **Congress, 9/11, and “Intelligence Failures”**

As national security adviser to Senator Griffin during the Church Committee hearings in 1975-76, I attended several hearings and tried to follow the investigation closely. It was like a feeding frenzy, with legislators rushing to expose the sexiest secrets they could find – and to assure front-page coverage,

they would embellish much of the real “dirt” they found. The CIA was a “rogue elephant,” and Congress was going to bring it down.

Nevermind that the overwhelming majority of disclosures had already been made public by the Attorney General before the hearings started. Nevermind that Directors of Central Intelligence Helms and Colby had each issued internal regulations prohibiting any direct or indirect CIA involvement with “assassination” – or, for that matter, the fact that when their investigation was over they could not identify a single person the CIA had ever “assassinated.” To be sure, Presidents Eisenhower and Kennedy had directed that the CIA try to assassinate Fidel Castro and several attempts had been made. And there was evidence as well of a plot to kill Patrice Lumumba of the Congo – but he was killed by a rival Marxist guerrilla group before the CIA could act.

I’m not suggesting that there were no serious problems exposed during the Church-Pike hearings. But steps had already been taken within the Executive Branch to correct them quietly, and the damage done to the Intelligence Community by the Church and Pike hearings did tremendous harm to our nation. Those problems were exacerbated by the subsequent Iran-Contra hearings.

Immediately following the 9/11 tragedies, author Tom Clancy wrote an op-ed that was published in the *Wall Street Journal* a week thereafter. It was a very thoughtful piece and I commend it to you. He wrote:

It is a lamentably common practice in Washington and elsewhere to shoot people in the back and then complain when they fail to win the race. The loss of so many lives in New York and Washington is now called an "intelligence failure," mostly by those who crippled the CIA in the first place, and by those who celebrated the loss of its invaluable capabilities.

What a pity that they cannot stand up like adults now and say: "See, we gutted our intelligence agencies because we don't much like them, and now we can bury thousands of American citizens as an indirect result." This, of course, will not happen, because those who inflict their aesthetic on the rest of us are never around to clean up the resulting mess, though they seem to enjoy further assaulting those whom they crippled to begin with.

Call it the law of unintended consequences. The intelligence community was successfully assaulted for actions taken under constitutionally mandated orders, and with nothing left to replace what was smashed, warnings we might have had to prevent this horrid event never came. Of course, neither I nor anyone else can prove that the warnings would have come, and I will not invoke the rhetoric of the political left on so sad an occasion as this.

But the next time America is in a fight, it is well to remember that tying one's own arm is unlikely to assist in preserving, protecting and defending what is ours.<sup>104</sup>

### **Congressional Culpability for the Tragedy in Beirut Twenty-Five Years Ago**

Thirteen days from today will mark the twenty-fifth anniversary of an incredibly partisan Senate debate about the War Powers Resolution that signaled our adversaries that America was divided and, to quote Syrian Foreign Minister Abdel

---

<sup>104</sup> Tom Clancy, How We Got Here: First we crippled the CIA. Then we blamed it., Wall Street Journal, Sept. 18, 2001, available on line at: <http://www.opinionjournal.com/extra/?id=95001164> .

Halim Khaddam, “short of breath” over our deployment of peacekeepers in Beirut, Lebanon.<sup>105</sup> Shortly after the highly-partisan Senate vote, during which only two Democrats supported President Reagan, we intercepted a message between two fundamentalist Muslim terrorist groups that said: “If we kill 15 Marines, the rest will leave.”<sup>106</sup> Why did they believe that? Because the world’s media reported the highly partisan and narrow Senate vote and speculated that, if there were further American casualties, many Senators and Representatives would “reconsider their support.”<sup>107</sup>

Certainly no one in Congress intended to be placing a “bounty” on the lives of our Marines, but that’s what they did. And on October 23, 1983, a terrorist truck bomb murdered 241 sleeping Marines, and congressional pressure forced President Reagan to withdraw those who had survived the attack.

This incredibly partisan debate – the *Washington Post* explained that “the Democrats are doing push-ups for 1984” (referring to the upcoming elections), and the minority report of the Senate Foreign Relations Committee was entitled “Minority Views of All Democratic Committee Members” – was totally unnecessary. Sending a contingent of U.S. Marines to join peacekeepers from Great Britain, Italy, and France and with the consent of every significant military

---

<sup>105</sup> See TURNER, REPEALING THE WAR POWERS RESOLUTION 143-44.

<sup>106</sup> *Marines Draw a Bead on Snipers*, U.S. NEWS & WORLD REPORT, Oct. 31, 1983 at 13.

<sup>107</sup> See, e.g., John Knickerbocker & Dan Southerland, *Congress: A Wary “Aye” on Marines*, CHRISTIAN SCIENCE MONITOR, Sept 22, 1983 at A1 (“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support.”).

force in the region did not even *arguable* infringe the power of Congress “to declare War.”<sup>108</sup> (Only four Marines had died during the year prior to the start of the debate.)

Once again, those Marine deaths were a direct cause of unconstitutional efforts by Congress to turn voters against the incumbent president with cries of “No More Vietnams.” Historically, even our enemies were reticent about attacking U.S. Marines. The likely consequence was that – assume the attacked Marines didn’t end the conflict by killing the attackers – by morning the area would be crawling with a new group of Marines with a very bad attitude. But things change when a partisan American Congress assures our enemies that an attack on our Marines will lead to a legislative vote to abandon the mission.

### **The Role of the Debacle in Beirut on Bin Laden’s Decision to Attack America on September 11, 2001**

In a 1998 interview in Afghanistan, Osama bin Laden told an ABC News correspondent that America’s retreat following the Beirut bombing proved we were “paper tigers.” A 2003 Knight Ridder account observed: “The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation.”<sup>109</sup> I don’t think it is an overstatement to conclude that the highly-

---

<sup>108</sup> U.S. CONST., Art. I, Sec. 8, cl. 11 (“Congress shall have the power . . . to declare War . . . .”)

<sup>109</sup> Scott Dodd & Peter Smolowitz, *1983 Beirut Bomb Began Era of Terror*, DESERET NEWS, Oct. 19, 2003, available on line at: <http://deseretnews.com/dn/view/0,1249,515039782,00.html> . See also, Brad Smith, *1983 Bombing Marked Turning Point In Terror: The U.S. reaction to the Beirut*

partisan war powers debate of September 1983 contributed significantly to bin Laden's decision to attack the United States on September 11, 2001.

Of course, we still might have prevented those attacks had Congress not flagrantly usurped the constitutional power of the president "to manage the business of intelligence as prudence might suggest."<sup>110</sup> Although Congress itself had as late as 1968 recognized by statute the President's independent constitutional power to authorize warrantless foreign intelligence surveillance (wiretaps),<sup>111</sup> when the Supreme Court in the 1972 *Keith* case drew a distinction between wiretaps involving agents of foreign powers, and those involving purely domestic national security targets (requiring a warrant for the later) – and suggested that Congress might want to consider enacting new legislation to provide rules for wiretaps of purely *domestic* national security targets – the Congress elected instead to seize control of the president's power over *foreign* intelligence collection.

In so doing, Congress didn't consider the possibility that we might face a foreign terrorist threat from an individual who was not technically an "agent" of a foreign power, like Zacharias Moussaoui, so made no provisions for obtaining a FISA warrant for such an individual and made it a felony for NSA or FBI employees to engage in electronic surveillance inside the United States other than as permitted by FISA. Thus, the reason FBI lawyer Colleen Rowley could not get permission to seek a FISA warrant to examine Moussaoui's laptop was because a careless

---

*attack set off a chain of events, some say*, TAMPA TRIB., October 23, 2003.

<sup>110</sup> See *supra*, note \_\_ and accompanying text. [JAY FED 64 XXX]

<sup>111</sup> See *supra*, note \_\_ and accompanying text. [[Omnibus Crime Bill]]

Congress had unconstitutionally seized control of foreign intelligence collection and had neglected to foresee the possible existence of such a threat. (Remind anyone of John Locke's warnings?)

. General Michael V. Hayden, currently Director of the Central Intelligence Agency and former Director of the National Security Agency, has publicly expressed the view that, had the controversial NSA Terrorist Surveillance Program been in effect prior to 9/11, "it is my professional judgment that we would have detected some of the 9/11 *al Qaeda* operatives in the United States, and we would have identified them as such."<sup>112</sup> Put differently, had Congress not unconstitutionally usurped the President's exclusive control over the collection of foreign intelligence in 1978, the Intelligence Community might well have prevented the 9/11 attacks.

So the record strongly supports the conclusion that congressional lawbreaking – that is, the usurpation of constitutional authority expressly vested exclusively in the president – persuaded our terrorist enemies in Beirut to slaughter 241 sleeping Marines on October 23, 1983. According to Osama bin Laden himself, our withdrawal from Lebanon following that tragic and unnecessary attack convinced him that Americans were unwilling to accept casualties. It does not require great analytical skills to realize that this was likely a key factor in his decision to launch the September 11, 2001, terrorist attacks that killed approximately 3,000 of our

---

<sup>112</sup> Remarks by Lt. Gen. Michael V. Hayden, National Press Club, January 23, 2006, available online at [http://www.dni.gov/release\\_letter\\_012306.html](http://www.dni.gov/release_letter_012306.html).

countrymen. But, had it not been for yet another act of congressional lawbreaking – enactment of the FISA statute – it is the professional judgment of one of our most senior Intelligence Community leaders that those attacks still might have been prevented.

So, Mr. Chairman, I am delighted to learn that the Subcommittee on the Constitution is focusing its attention on the important business of restoring the rule of law as we approach a national election that will bring a new occupant to the White House. I wish you well, and I hope that my presentation will motivate you to give some attention to the very serious problem of congressional violations of the rule of law.

**The Importance of Restoring  
Non-Partisanship to U.S. Foreign Relations**

Mr. Chairman, I will close with a plea for nonpartisanship in foreign affairs. I am neither a Republican nor a Democrat. I've never given a penny to either party or to any candidate for federal office, and I tend to cast my votes for the individual based more on perceptions of character and talents than on party affiliation. Quoting Thomas Jefferson, I have often remarked: "If I could not go to heaven but with a party, I would not go there at all."<sup>113</sup> My desire to avoid party politics

---

<sup>113</sup> In a 1789 letter from Paris to Francis Hopkinson, who had asked whether Jefferson was a Federalist or an Anti-Federalist, Jefferson replied:



is no doubt influenced by a strong commitment to bipartisanship when it comes to foreign policy and national security matters. Indeed, I have framed on my office wall a memorandum<sup>114</sup> I wrote to my boss – Foreign Relations Committee member Senator Bob Griffin – more than three decades ago, urging that as the probable Senate Minority Leader under the incoming Carter Administration he should reach out to the new President in the great tradition of another Michigan Republican, Senator Arthur Vandenberg.

---

I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in any thing else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all. Therefore I protest to you I am not of the party of federalists. But I am much farther from that of the Antifederalists.

*Jefferson to Francis Hopkinson*, Mar. 13, 1789, in 14 THE PAPERS OF THOMAS JEFFERSON 649, 650 (Julian P. Boyd, ed. 1958).

<sup>114</sup> Election day was November 2, and the following morning I wrote the Senator a memo with the Subject “Possible ‘Vandenberg’ Speech for Next Year.” It read:

The voters have selected jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years.

You have often praised Senator Arthur Vandenberg for his spirit of bipartisan cooperation in foreign policy. As Vandenberg once noted, ‘in the final analysis the Congressional ‘opposition’ decides whether there shall be cooperation.’

Since you are the probable choice for Minority Leader and a member of the Foreign Relations Committee, you are obviously going to have alot [sic] to say about the Republican party’s policy vis a vis Carter’s foreign relations.

So long as Carter’s policies are reasonable - - even though they might not conform to our own views on how best to get the job done -- I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn’t is no excuse for our not trying.)

If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session?

As it turned out, Senator Griffin lost the race for party leader early the next year by one vote to Senator Howard Baker, and soon thereafter decided not to run for re-election in 1978. The speech I had hoped for became a casualty of those events.

In the years since then, I've published articles criticizing Republican conservatives for misrepresenting the facts in attacking Harry Truman over the Korean War,<sup>115</sup> and I've criticized congressional liberals for misrepresenting the facts in attacking LBJ and Nixon in Vietnam. During the 1996 election I strongly criticized Senator Bob Dole for trying to usurp President Clinton's discretion over whether to move our embassy from Tel Aviv to Jerusalem.<sup>116</sup> One may disagree with my conclusions and interpretations, but I don't believe my scholarship has ever been tainted by political partisanship.

And, in closing, I would commend to each of you this excerpt from the February 10, 1949, remarks of the late Senator Arthur Vandenberg, who said during a "Lincoln Day" address in Detroit:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.<sup>117</sup>

Mr. Chairman, this concludes my prepared remarks.

---

<sup>115</sup> See, e.g., Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J. L. & PUB. POL. 533 (1996).

<sup>116</sup> Robert F. Turner, *Only President Can Move Embassy*, LEGAL TIMES, Jan. 22, 1996 at 46.

<sup>117</sup> Quoted in TURNER, THE WAR POWERS RESOLUTION 118.