10-1-1996

# War Powers "Short of War"

Louis Henkin

# War Powers "Short of War"

LOUIS HENKIN*

Thank you, John Ely. It was worth coming here just for that introduction. I am reminded of—I think it was Samuel Johnson who said—"epitaph is not affidavit." Neither is "introduction."

I add my congratulations to the *Law Review* and to the participants, and particularly to John Ely. And, as Harold Koh said earlier, I do so with respect and affection.

My role here is not clear, because although I am on this panel, I am not of it, so to speak. Nobody told me that I was to address what my colleagues have spoken about this afternoon; I came prepared only to give some overall perspective. Since everything has been said, I am prepared to throw my notes away. However, I shall say something about what I heard in light of what of I had thought, and maybe about what I think in light of what I heard. And then, since I am the last, I can hit and run.

Briefly, I see my role to be that of critic of what I have heard; I shall offer also some perspective on the subject overall. In general, I am with Harold Koh and Mike Glennon, and in the same camp with John Ely and *Professor* Dellinger. I am not out of line in important degree with Professor Lobel's analysis, but not in sympathy with the U.S. policy he advocates. I was educated by Professor Gudridge and agree with much of what he said. But President Bush is not Emerich de Vattel. One problem I have with what he suggested is, that if you remove as much as he would from the "declare war" clause, you leave more to be inferred from no clause at all. Since the "declare war" clause was a substitute for, and intended to equal, "to make war," it should mean more than Professor Gudridge implies.

Judge Sofaer is an old friend of mine, but I disagree with almost everything he said. I disagree in particular with his unnecessary digressions. Not all digressions are unnecessary, but his digression to state the position of the United States on the meaning of self-defense in the U.N Charter is both unnecessary and wholly wrong and wrongheaded. (For those interested, he was shooting at an article I wrote in which I tore to pieces his attempt to justify the Panama war.[1])

---

* University Professor Emeritus, Columbia University.

1. Louis Henkin, *The Invasion of Panama Under International Law*, 29 COLUM. J. TRANSNAT'L L. 293 (1991).

I appreciate what I heard from Attorney General Dellinger and from Representative Fascell; I have time only to stress small bits of disagreement. As you will see, I agree with my colleagues on this panel, Professors Stromseth, Damrosch, and Oxman.

As to my perspective on what I heard and what I think now, there are two categories of issues, one constitutional, one political. And both sets of issues are difficult and perhaps intractable.

The constitutional issues are intractable for an extraneous reason, to which Mr. Fascell referred: the courts are not likely to become involved. They have given us little guidance hitherto. And some people think they should not get involved and give guidance. Mr. Fascell apparently is one of them. In any event, the courts are likely to continue *not* to give guidance. To that end they may resort to misconceived distortions of "political questions." There were four Justices on the Supreme Court, at least as of the moment of the *Goldwater* case,[2] who said that issues as to the allocation and distribution of power between the President and the Congress are matters that those "big boys" can settle between themselves. I think those four Justices were mistaken. There were only four Justices, I stress, but we can expect to hear that view expressed again. And whether or not the Court says that these are political questions, Justices will try hard to avoid deciding such issues.

But the Constitution does not speak only to the courts. In fact, for most purposes, it does not speak to the courts at all. It speaks to the Congress and the President—and to you and me. Each of the political Branches is likely to interpret the Constitution in substantial measure as it sees the national interest (and its own interests). But the constitutional system shapes what they do, and the Constitution is not irrelevant simply because we get little help from the courts in construing it. And who knows? Some day we may get a little help from a Justice or Judge, witness Harold Greene in the *Dellums* case.[3] In that sense, constitutional issues remain intractable, but the Constitution works, and we continue to work within its system, even without help from the courts. Political intractability is a different problem, for reasons we have heard.

What are the issues under the Constitution? Except for Mr. Sofaer, there is not much disagreement on this panel; and even Mr. Sofaer agrees that when Congress acts, Congress determines the war power. So, at least if Congress says it does not wish the President to go to war, he cannot do so.

It seems to me that Judge Sofaer said also, however, that as long as Congress is silent, the President can do many things with U.S. military

2. Goldwater v. Carter, 444 U.S. 996 (1979).

3. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

forces, perhaps even go to war. If he believes that, I think he would not get any support in this room (or any significant support outside this room). That the President can go to war when Congress is silent was not the view of the Framers even before the Constitution was framed—for example, it was not the view of Alexander Hamilton in the Federalist Papers—or of anybody else who discussed that issue then or since. I have never heard any authoritative source say that, except perhaps Mr. Sofaer (if I heard him correctly), and whoever it was who argued for the President in the *Dellums* case.

Of course, once you decide that only Congress can declare war, or decide to go to war or not to go to war, we still have to decide what "war" is. "War" was used in the Constitution with reference to, and in, a known universe of discourse. The Framers knew what "war" was. They knew it as a status in international relations, a relationship between nations, a status different from, opposed to, a regime of peace. (Those of you who have looked at the international law of an earlier time might recall that it divided war from peace. For example, the classic work, *Oppenheim's International Law*,[4] consisted of two volumes, one *Peace*, one *Disputes, War and Neutrality*; war had a separate legal regime with its own rules.)

We are not sure what happened to that distinction since the U.N. Charter; in my view the Charter intended to abolish war as a legal regime. But the U.S. Constitution has not changed. We have not figured out how to read the war powers of the Constitution—notably the phrase "to declare war" and its implications and developments—in the light of the provisions of the U.N. Charter that member states shall refrain from the use of force. The Charter was intended to abolish war, and to prohibit also undeclared wars and other uses of force. But we have not worked out how to relate the word "war" in the Constitution to Article 2(4) of the Charter.

The big issues between President and Congress, as everybody recognizes, are variously described as "the small wars." Most of us talk about "short of war," uses of force that do not rise to the level of war for whatever reasons—their international status, the level of intensity of fighting, perhaps the desire not to put the nation on a war footing. From a constitutional perspective, small wars, hostilities "short of war," are also within the war powers. The question is what are the respective powers of Congress and of the President in respect to the big issues of "small wars"; the answers are not clear or agreed.

One of the issues, and one on which there is disagreement in this

4. LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW (7th ed. 1952).

room, is the significance of history in deciding this question. Does—can, did—history change what the Framers intended? In other domains, I believe strongly that history has indeed changed what the Framers intended, and I am not prepared to say that history cannot change what the Framers intended as regards war powers. But we must understand what history shows. That is the source of my disagreement.

History shows that Presidents have exercised authority to engage in "little wars," to deploy forces "short of war," in a number of cases—a goodly number—of differing importance. And Presidents have done so without Congressional authorization, and essentially without Congressional criticism or resistance. (Every now and then some members of Congress demurred, but not enough of them or soon enough, and they did not lead to any formal action by Congress.) So perhaps the President has acquired from history the authority to engage in "little wars," in hostilities short of war, when the Congress is silent. I repeat: *when Congress is silent.* There is no support in history, *no support in history*, for the proposition that the President can engage in hostilities "short of war" or in "little wars" when Congress has prohibited him. That is the fundamental fallacy in much of the discussion about the uses of history in our subject.

Without any relevant history, we are back to text and to the intent of the Framers. In my view, under its War Powers Congress can regulate "short of war." It can regulate military deployments because they might lead to war. If one should approach war powers as the Supreme Court of the United States has addressed the Commerce Clause in the past fifty years, Congress can regulate anything that affects war, that might affect war, or that is necessary and proper for the purpose of regulating war. But one does not have to go all that far to insist that Congress can regulate military deployments by the President "short of war."

And so, I am committed to the view that Congress has that power—and that goes for good Congresses and bad Congresses, responsible Congresses and irresponsible Congresses, in relation to good Presidents or less-good Presidents. And, as regards the Constitution, we have to live with irresponsible Congresses in this phase of our worldly affairs, as we do for many other important affairs, including our domestic world.

Incidentally, in light of what I have said, I do not understand Professor Koh's unhappiness with the fact that people will begin to look for statutory authorization. One *should* look for the statute. That is what our constitutional plan is about. We want them—the President (and his supporters)—to find the statute if they can, and to interpret it honestly. But no statute, no authority.

And so to the War Powers Resolution. In view of what I have just

said, as I understand the War Powers Resolution it is constitutional in its essentials. I have no doubt about the power of Congress to pass this kind of legislation. I say "this kind" of legislation because we have to decide what the War Powers Resolution means, but assuming it means what we think it means, it is constitutional in principle. Presidents, every one of them I think, including perhaps Mr. Clinton, have questioned its constitutionality, but no President (and no Attorney General) has told us why it is unconstitutional. The only reason I know is the one given in President Nixon's veto message, which said essentially that Congress would be taking away powers which the President has exercised for 200 years. That may be true, but that does not make the Resolution unconstitutional. Presidents have exercised that authority because Congress acquiesced, did not say no. Now that Congress is prepared to say no, that is the end of all the precedent, and, to me, the end of all the arguments about constitutionality. (I leave aside the legislative veto provision which does not go to the heart of the resolution.)

There is another area of agreement, of a different kind: Everybody agrees that they are not quite sure what the Resolution means and that it is terribly drafted. The question is, what do we do about it? I do not agree with my friend, Mike Glennon, when he says we should repeal the Resolution. I disagree for several reasons. One is that I am not sure the Resolution has been wholly ineffective. Deterrent effect is always hard to prove, but I think the Resolution has had some deterrent effect. Inevitably, the Resolution shapes the behavior of the Executive Branch; I think Attorney General Dellinger will agree that the President and his advisors know the Resolution is there and that they have to act in its light. And the Resolution compels the President to justify what he does. The need to justify what he is doing in light of the War Powers Resolution shapes the President's behavior; in any event, it contributes to legal process and the rule of law. I do not think any President, even Mr. Nixon who was in office when it all began, has taken the position, "this is unconstitutional and therefore I do not have to justify my action under it"; in fact, Presidents all justify their actions under it.

I do not think the Resolution is a dead letter, and I would like to see it live. And, if we repeal it, I do not know when we will get another chance. Short of another Watergate or another Vietnam War (heaven forbid), we are not likely to get Congress to face this issue. And if it does, it is likely to be in a mood which none of us here would favor, a mood reflected in some of the bills running around Capital Hill now. So my position essentially is, if we can fix it, by all means let's fix it. But if we cannot, let's leave it alone.

How would we fix it if we could? One thing I would like to fix is

Section 2c,[5] but, again, if we do not fix it, let it stay there, reaffirmed. That section indicates the President's constitutional powers as Congress sees them. I would have liked to see that section "legislated," instead of, as one of you called it, put as "rhetoric." It is more than rhetoric; it is a statement of what Congress thinks Presidential power is. In my view, Congress has the President's powers right. By all means we should leave that on the books; if we cannot give it legislative character, let us live with it as is.

If I could fix the Resolution, I would like to have Congress affirm, or explicitly reaffirm, its authority over these activities—"little wars," "short of war"—as well as over "war." In other words, I would like to have the legislation read so that whatever it authorizes the President to do, he would do under the authority of Congress, by authority of the Congress, and subject to the authority of Congress. That may mean that Congress should expressly give the President some authority to act short of war, by delegation: some, but not too much. Congress might authorize the President to use force, short of war, in order to safeguard U.S. troops abroad—which probably was not within the original Framers' intent; to defend the lives of citizens; to act in emergency, *real* emergency. But we would have the President act by authorization from Congress, rather than on his own authority. A provision to that effect could be drafted by the people in this room, and done reasonably well. Incidentally, that is not a novel idea. Senator Biden tried it once.[6] Unfortunately, from my perspective, his bill would have delegated to the President authority to use force for virtually everything. That is not my idea. The idea is to delegate to the President authority to do a limited number of things in defined circumstances without going back to Congress. (Of course, if the President wishes to go back to Congress, he can come back for anything that Congress has power to authorize and delegate.)

Finally, I come to what I heard this afternoon from my friend, colleague, and former student, Bernie Oxman. I would like to see the War Powers Resolution modified to take care of Mr. Oxman's problem, but as I understand his point, he begins where I would not begin. He begins with the President's first "power," as Commander in Chief. I do not think of that as a power, only as a designation of authority. Designations, assignments, have power to go with them, but in my view the Commander in Chief clause was not intended to be a source of large power. It is not written as a power. If you look at your Constitution

5. 50 U.S.C. § 1541(c) (1988).

6. *See* Joseph R. Biden Jr. & John B. Ritch III, *War Power at a Constitutional Impasse: A 'Joint Decision' Solution*, 77 GEO. L.J. 367 (1988).

(Justice Black said he never went anywhere without a copy in his pocket), Article II says, "The executive Power shall be vested in a President . . . ."[7] There are other clauses beginning "he shall have the power," but the Commander in Chief clause is not one of them.

I do not mean to make too much of that linguistic bit. But Alexander Hamilton was quite clear: He did not think the Commander in Chief clause gave the President very much, nothing like the power the King of England had at the time, and nothing like what I think Mr. Sofaer would give the President today.

Mr. Oxman is right to be concerned for the ability of the United States to play an important role in world order, and he would like us to interpret Presidential power broadly to enable the United States to do so. Specifically, if the Security Council says, "let's do something," the President should have the authority to do it.

As Professor Stromseth said, if there were an order of the Security Council, a "decision" (which is mandatory), the United States would be obligated to act under the Charter, and plausibly the President could act to carry out that treaty obligation. I am less confident of that suggestion when the Security Council merely "permits" "authorizes" or even "recommends" action, where there is no treaty obligation on the United States to act. I do not know how to broaden the President's power to act in that context without broadening it everywhere. In other words, if we were to read our Constitution as giving the President authority to act to support "international order," I can see Mr. Sofaer and others applying that anywhere, even without support in a resolution of the Security Council.

My suggestion would be, if we were to amend the War Powers Resolution, to include a provision reaffirming the United Nations Participation Act,[8] giving the President authority to carry out resolutions of the Security Council, even its recommendations. It would be clear that the President would be acting under the authority of Congress. That would be a very important change. But I would wish to be sure that we do not touch the U.N. Participation Act in other respects; as is, at least, it gives the President something. The failure of the United States since the end of the Cold War to make the United Nations what it was intended to be is a gross and stark failure. The United States is unwilling to lead the U.N. to exercise authority. We are unwilling to provide resources. We are unwilling to put up armed personnel. We cannot play a leading role on the world scene without being willing to do all of that. I am in favor of the new world order which President Bush talked about; to me that

7. U.S. CONST., art. II, § 1, cl. 1.
8. 22 U.S.C.A. § 287 (1990).

means the older world order of 1945 (now without Cold War), and subject to authorization from Congress, as was intended.

If I am right about the intractability of the constitutional issues, and perhaps of the political issues, we should probably be looking for some institutional change. What we need, I believe, is to establish a small body of Congressional leaders to meet regularly with the executive branch, at least for consultation. Such regular consultation would be more meaningful than consultation "with Congress" as required by the War Powers Resolution. (You do not "consult" five hundred people.)

I propose a small, continuing body. I think the President could learn to live with it. It would force Congress to be responsible, and not able to blame the President for what he did. It would lead to political cooperation in this very important field. I think it might be possible to persuade Congress to try this because it would be getting something it does not have now. And it might be possible to press the President to try it, if only on a consulting basis.

It has been a good discussion. Thank you for including me.