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# Perspectives on Executive power: Legislative vs. Presidential War Powers in the United States

Cynthia A. Linton

# PERSPECTIVES ON EXECUTIVE POWER:

## Legislative vs. Presidential War Powers in the United States

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A Project

Presented to the Social Science MA

Faculty of

California State University,

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In Partial Fulfillment of the Requirements for the Degree

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in

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# ABSTRACT

The U.S. Congress and executive have battled since the presidency of George Washington over which branch of government should initiate military actions. While Congress is granted the power to declare war, the executive is vested with powers that are not as exhaustively listed as those of the legislative and the judiciary. This has allowed the executive to assume presidential prerogatives that appear to some to be unlimited, causing Congress to react with legislation designed to counter presidential power.

The conflicts between Congress and the executive are the result of an ambiguity in executive power that the framers of the Constitution found impossible to resolve. Without presuming to draw definitive conclusions on the issue, this thesis will examine the conflicting notions of executive power and how they apply to various "presidential wars" that were conducted without prior congressional approval.

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# DEDICATION

I dedicate this thesis to my family, who have provided me inexhaustible encouragement and support. Though deceased since 1987, my mother, Ida Mae Ballard Linton, laid the foundation for my education, along with my father, J.C. Linton. I also thank my wonderful sisters, Romona Lea Linton and Janet Linton-Blackburn, for their continued guidance and love.

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## Chapter I:
## Thesis Overview

A definitive theory of executive power on which both Congress and the executive concur has proven elusive. While the Constitution attempts to delineate the separation of powers between the legislative, judicial and executive branches of government, debates over original intent (i.e., what the framers of the Constitution intended) and presidential prerogative (i.e., presidential power beyond that which is clearly granted by the Constitution) began before the Constitution was ratified and continues to this day.

Many scholars have noted the ambiguity of executive power and the problems that have developed from it. This ambiguity has resulted in incessant conflicts between Congress and the executive, especially on issues related to war powers. Congress professes to promote a strict adherence to the Constitution because it grants it the power to declare war – though Congress has often used the ambiguity of executive power to shield itself from criticism. Presidents focus on the notion of prerogative,

which they can use to assume powers beyond those strictly granted to the executive by the Constitution.

To complicate matters, there are other reasons why political battles have waged since the presidency of George Washington between Congress and the executive over the scope of their respective war powers. Though the Constitution clearly states that Congress has the power to *declare* war, and the executive the charge to *make* (i.e., "conduct") war, [1] there are scholars who cite problems of diction and consider the wording of the Constitution too equivocal. However, James Madison (the chief drafter of the Constitution) did not seem to intend any such ambiguity when he stated that "Those who conduct war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded." [2]

In the context of delineating Constitutional war powers, we will discuss how the issues of executive power, diction, necessity and pragmatism have affected how the principles embodied in the Constitution are applied, and how the application of the principles can change over time and be influenced by specific time periods.

In addition to focussing on war powers, we will discuss the related issue of congressional influence on foreign affairs, and what some scholars consider an increasing imbalance of power in favor of the executive that has diminished significantly the ability of Congress to guide foreign policy.

As we evaluate actions of Congress and the executive, we will employ approaches intended to be objective, yet critical. Original intent of the Constitution must be considered, as well as the many and complex views of executive power. However, what we may find most illuminating in judging presidential actions related to war powers is circumstance. This should not be surprising if one considers the work of Thucydides, the Greek considered the father of political realism. His histories of the Pelopponesian Wars demonstrate how wars both require different – and often drastic – measures from leaders, while bringing to the fore man's natural instinct to eschew justice in times of necessity. [3] This will be discussed later in relation to the actions – which some scholars consider unconstitutional – of President Abraham Lincoln during the Civil War.

Though this thesis ultimately promotes the belief that presidents too often have abused the concept of prerogative to conduct military actions that were not sanctioned by Congress, it does not attempt to draw firm conclusions regarding a fixed concept of the nature of executive power or to delineate definitively the appropriate circumstances in which only Congress can sanction the use of U.S. troops. Due to the complexities of the issues involved, we may find our discussion more illuminating if we evaluate presidential actions by asking the following questions:

- What are the constitutional guidelines?: While we should be prepared to entertain a flexible interpretation of the Constitution in some instances, we should also be aware of its set principles before evaluating presidential actions.
- What actions were taken?: There is an obvious difference between a president sending troops abroad for peace-keeping missions — even into areas that may have active military action — than a president using troops to attack another country without provocation or congressional approval.

- What were the overall and particular circumstances in which the actions were taken?: We will discuss later in great detail the importance of "situation" in the evaluation of presidential actions and understand how measures taken by Lincoln during an insurrection were different from Polk's actions in the Mexican War or Lyndon Johnson's during the Vietnam War.
- What were the outcomes?: This is a question based on both the currently popular notion of "equality of result" [4] – and on Machiavelli's well-known "ends justifying the means." Should we judge presidents whose actions were less successful more harshly than those who triumphed? Do we allow more extreme action for those that succeed than for those that fail, even under the same conditions?
- How might the actions be interpreted by the Supreme Court?: History shows that the Supreme Court has never upheld a presidential claim of war power against that of Congress and that only one lower court ever decided against Congress [5] The Court often considers original intent – which seems to

favor a strict interpretation of the Constitution and limited executive war power – and has used The Federalist Papers in its adjudications.

- What is the character of the president in question?: Is there consensus that the president truly acted in the interests of the common good, or is he abusing executive prerogative for individual, selfish motives? The former might be best exemplified by Jefferson taking actions beyond powers vested in the executive to complete the Louisiana Purchase, [6] and the latter exemplified by Nixon's actions during the Watergate investigations. [7]
- What are the prevailing concepts of executive power in relation to the limits of the president?: This is a highly theoretical question that seems rarely voiced in congressional debate, yet it lies at the crux of the matter. Congress favors a strict, literal interpretation of the Constitution, so its arguments for reasserting its power to declare war and to be involved more

in foreign affairs can seem superficial. Congress does not sufficiently argue its points by discussing the notions of executive power, original intent, how perceptions of it change over the years – or in different situations – nor why many constitutional scholars confidently make the case for presidential prerogative.

- How did the Cold War affect the need for presidential prerogative and how does the post-Cold War era necessitate the need for a different approach to foreign affairs?

Using the above measures, this thesis will begin by reviewing the mandates of the Constitution and what is considered "original intent." Next, we will review key theories of executive power before examining several cases of extraordinary – and sometimes clearly unconstitutional – presidential military actions. This will lead us to a description of the 1973 War Powers Act, an attempt by Congress to reassert its own constitutional prerogatives and wield more power in foreign affairs, especially when U.S. troops are deployed abroad.

Though this thesis promises no definitive answers on how to resolve contested use of presidential prerogative, it will provide an overview of the issues that should be considered before evaluating presidential actions, and conclude with a discussion on the limits of presidential prerogative.

## Chapter II:
## Perspectives on the Constitution and Original Intent

*We can see that more is at stake even than the constitutional principle of the separation of powers. At stake is the age-long effort of men to fix effective limits on government; at stake is the reconciliation of the claims of freedom and of security; at stake the fateful issue of peace or war, and issue fateful not for the American people alone, not alone for the stricken peoples of Southeast Asia, but for the whole of mankind.*

Henry Steel Commager [8]

One cannot discuss the appropriate assignment of war powers in the United States without first studying the Constitution and considering the original intent of its framers. Article I, Section eight of the Constitution clearly places the power to declare war in Congress (see Appendix A). Nowhere is that power granted to the executive. Article II, Section two provides three major areas of presidential power: administration, legislation, and foreign affairs. It designates the executive as the Commander-in-Chief and grants that branch of government the power — "by and with the Advice and Consent of the Senate" — to make treaties (Appendix B).

On a superficial basis, the intent of the Founding Fathers seems indisputable. They had followed the advice of the French writer and jurist Montesquieu, who held that

governmental powers should be separated and balanced to guarantee individual rights and freedom. Madison believed that constitutional liberties could be preserved only by reserving the power of war to Congress. In The Federalist 47, he stated that "The accumulations of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." [9]

In addition to Montesquieu, the Founding Fathers drew from the writings of Polybius, a Greek historian who had lived in Rome. He had studied that empire's system of government and wrote a forty-volume Universal History to show how and why all the civilized countries of the world had fallen under the dominion of Rome. He — like Aristotle before him and Montesquieu much later — concluded that the most successful form of government was one that provided for a separation of powers. [10]

Thomas Jefferson was also a defender of a government that granted Congress the power to declare war. While Secretary of State, he made the following statement:

> Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our

> resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the cooperation of other Powers. [11]

Even Alexander Hamilton – known for his support of a strong executive branch to achieve "executive energy" and avoid "legislative usurption" of presidential prerogative – differentiated between the power of a president and that of a monarch. In The Federalist 69, Hamilton stated that "There is no comparison between the intended power of the President and the actual power of the British sovereign." [12]

Agreeing with Hamilton, in 1999 Texas Congressman Ron Paul expressed his concern about the increase of "presidential wars" in the 20th century by noting that "While kings may have the right to promulgate laws simply be decree, it is Rule of Law which is king in our form of government." [13] Another congressman, Jack Metcalf, concurs, stating that "Congress has ceded to the executive Branch, its fundamental Constitutional duty," and that in decisions to declare war, "the framers expected national policy to be the result of open and full debate." [14]

Though both Hamilton and Madison were considered the two who best understood the importance of the allocation of war powers, it was Madison alone who focussed on this section of the Constitution because he "foresaw the twin problems of fear and violence giving strength to the Executive." [15]

John Hart Ely cites the following reasons why the Founding Fathers vested the power to declare war with the legislative:

- A determination not to let such decisions be taken easily
- The inclusion of the House of Representatives into the decision – despite their lack of expertise on foreign affairs – to slow down the process, to assure a "sober second thought"
- The inclusion of the House of Representatives into the decision since it is viewed as "the people's house" and would increase the participation of the people [16]

Ely also noted that James Madison considered war to be "among the greatest of national calamities" and so sought

to design the Constitution to assure the expectation of peace. In addition, Madison stated the following:

> The Constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislative. [17]

Peter Raven-Hansen's has delineated the following six major conclusions from the War Clause of the Constitution:

1. The framers intended it to be harder to initiate war than to achieve or continue peace
2. Congress' power to "declare" war was not merely ceremonial, but rather the power to commence war when it had not already been commenced against us by an enemy
3. The president has clear power to repel sudden attacks
4. The president has sole power as Commander-in-Chief to conduct all wars
5. Congress' appropriation power with respect to the military was designed to keep "the means of carrying on the war" in the legislative, not the executive branch
6. Congress' power to grant letters of marque and

reprisal applies in the same manner to uses of force less than war [18]

W. Taylor Reveley sheds light on the cause of the debate by listing the following four main influences on the division of authority over war and peace between the president and Congress:

1. The text of the Constitution's war-power provisions
2. The purposes of those who wrote and ratified the text in 1787-88
3. Evolving beliefs since 1789 about what the Constitution requires, and – irrespective of text, purposes, and evolving beliefs
4. Various allocations of control over the war powers that have existed *in fact* between the President and Congress during the past two centuries [19]

We have already discussed the text of the Constitution (Reveley's point #1) and original intent (#2). What Reveley also noted is that time can change how the text of the Constitution is interpreted. In addition, the *de facto* allocation of war powers has not always followed the letter

of the law. (How else do we find that only six of the 200 armed conflicts in which the U.S. has been involved were formally declared wars by Congress?) [20]

Reveley's points are important because they acknowledge both the *de jure* and *de facto* nature of the military actions that have been taken and contribute to a more sophisticated analysis of a complex problem. But were the issues involved in the debate over constitutional war powers simple, they would not remain unresolved to the present day.

So after over 200 years of constitutional analysis, some scholars categorically assert that the power to declare war is vested only in Congress, while others support the idea of wide executive prerogative, which was so eloquently and convincingly proposed by Locke that it is easy to understand why the idea was so prominent in the minds of the framers of the Constitution, despite the determination to form a government that would never be subject to a monarch.

## Chapter III:
## Theories of the Nature of Executive Power

The first constitutional challenge:

*I never expected to hear in a republic a motion to empower the Executive alone to declare war.*
Elbridge Gerry [21]

Not long after being ratified in 1789, the Constitution was subject to heated debate regarding the designation of war powers between Congress and the executive. The debate began in 1793 when President George Washington issued a Neutrality Proclamation intended to keep the United States out of the series of conflicts and wars raging in Europe between France and Great Britain. [22]

Analysis of the proclamation showed the strong bias of the Federalist Party [23] (which included the president, Alexander Hamilton and John Jay) in favor of Great Britain. The Republican Party [24] (which included Thomas Jefferson and Madison) considered the proclamation unfair to France, which had supported the American colonists in their revolution of independence from Great Britain. As Jacob

Javits notes, "no dilemma confronting the President reflected the faction in his cabinet with more clarity than the battle regarding neutrality." [25]

The debate about Washington's Neutrality Act was conducted partly in print when Madison – urged by Jefferson – used the nom de plume "Helvidius" to publish a series of letters in opposition to Hamilton (who wrote under the name "Pacificus"). Ruth Weissbourd Grant and Stephen Grant summarized Madison's arguments by stating the following, which demonstrates Madison's strict interpretation of the Constitution:

> Madison argues further that the executive interpretation of treaties cannot in any case include a right to judge whether or not the nation is obliged to go to war under a treaty. Such a right is inseparable from the power to declare war, and as such is a usurpation of power given to the legislature and a violation of separation of powers. [26]

Madison's points may be substantiated if we examine the various neutrality acts that have been passed in the United States. When we do, we find that it is Congress that usually initiates such proclamations. It was Congress that passed a neutrality act in 1794 to curb private activities

in foreign military actions and Congress that passed the Neutrality Acts of 1935, 1936, and 1937, "many of them warned about increasing the power of the president in foreign affairs beyond congressional reach." [27]

With his Neutrality Proclamation, Washington — operating under the advice of Hamilton — announced that it was the "duty and interest" and the "disposition" of the country to be impartial in the war which had broken out in Europe between France and Great Britain. Washington warned Americans not to "contravene such disposition" because he believed that the United States "was not obligated under its 1778 treaty with France to enter the war on the side of that nation." [28]

If we use the measure of character — as mentioned in chapter one, we would see in Washington a great leader who exemplified much of what was best about the United States. Many — in his time and now — believed that he "symbolized qualities of discipline, aristocratic duty, military orthodoxy, and persistence in adversity that his contemporaries particularly valued as marks of mature political leadership." [29] In light of this, it may seem

inappropriate for anyone to question Washington's motives and methods.

Yet the debate between Hamilton and Madison over the proclamation was more a test of the new constitution's policies than an attack on Washington's character. Madison conceded that a similar proclamation might be justified, but on narrower grounds. Hamilton cited the "vesting clause" of Article II, which he and others — primarily Federalists who favored a strong executive — interpreted as giving the executive wide powers.

According to Sidney Milkis and Michael Nelson, Gouverneur Morris (chief draftsman of the Constitution's Committee of Style) deliberately left the wording of the vesting clause for the executive vague. The clause states that "the executive power shall be vested in a President of the United States of America," leaving an opportunity for many constitutional scholars to note that no exhaustive list of executive powers is delineated. However, Morris worded the vesting clause for Congress to read that "All legislative powers *herein granted* [emphasis added] shall be vested in a Congress of the United States".[30]

The latter clause implies that only the powers specifically listed in the Constitution belong to Congress.

Under this strict interpretation, Congress cannot claim the same concept of Locke's "prerogative" as can the executive. Locke explains "prerogative" below:

> For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws [the "executive"], having the power in his hands, has by the common law of Nature a right to make use of it to for the good of society, in many cases where the municipal law has given no direction. [31]

The above quotation refers to the difference between "natural law" and "positive law." Natural law is "a body of law or a specific principle held to be derived from nature and binding upon human society in the absence of or in addition to positive law," while positive law is "established or recognized by governmental authority." [32] Michael Glennon notes how the Roman empire "promulgated a law of nations that has been interpreted as little different from natural law in its emphasis on universal principles of justice and equality." [33] One can see how Locke used the idea of natural law – as opposed to specifically prescribed law – as the idea behind

presidential prerogative, which would support Washington's purview to declare a "state of neutrality."

The debate over Washington's Neutrality Proclamation ended with an apparent victory for Hamilton and those who favored a strong executive. Occurring in the first presidency, this conflict signaled what would be an on-going battle between Congress and the executive over war powers, and demonstrated that the framers of the Constitution had not been able to reach consensus over the nature of the executive.

## In defense of democracy:

*The necessary exactions of any government bring more danger and dishonor to free governments than to tyrannies.*
Harvey Mansfield [34]

Often inherent in the beliefs of those who favor a strong executive is the view that democracy cannot be defended by weak governments, or by presidents on whom too many limitations of power have been imposed. Thomas Carlyle expressed concern about strong governments by asking, "If the government is big enough to give you everything you

want, is it big enough to take away everything you have?" [35] In his special message to Congress on July 4, 1861, President Abraham Lincoln paraphrased Carlyle by asking, "Must a Government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?" [36]

Harvey Mansfield sympathizes with Lincoln. Mansfield notes that free republics often "come to grief or fade into memories of glory," and cites the examples of Venice and many German cities, as well as free republics that "blossomed large and grew small fruit" (e.g., the Dutch republics), or republics that "remained locked in a mountain retreat" (e.g., the Swiss cantons). [37] However, Mansfield also notes that the tyrannical excesses of "republics" — such as Cromwell's Commonwealth in England after the deposing and beheading of Charles I — "left republicanism with a heavy burden of popular disgust and learned disdain." [38]

As we try to determine when presidential actions exceed their authority, we should ask ourselves how far we want our government to go in defending what many consider

the best form of government (i.e., a representative democracy, as in the United States).

Some political theorists believe that since no mere document – including the Constitution – can stop real tyranny, the executive must be strong.[39] Such theorists extol the decisive – and successful – actions taken by Lincoln during the Civil War and note that the U.S. has been fortunate to have had strong executives during its most prominent wars (e.g., James Polk during the Mexican War, Woodrow Wilson in World War I, and Franklin Delano Roosevelt in World War II).

Despite the reasons stated above for a strong executive, those who wish a government free of tyranny concern themselves with trying to curtail excesses of power. Though it may be too naive to believe – as pessimist Arthur Schopenhauer did – that "ethical goals cannot be achieved by unethical means,"[40] Glennon states that "governmental deceit is saddening because it bespeaks a distrust of the insight and good sense of the people."[41]

To those in favor of a strong executive, Glennon's statement is fraught with misconceptions. First, "governmental deceit" is sometimes warranted. While it can

be pointed out that this is especially true during times of war, it can additionally be said that in today's world of continual global conflict, covert actions – while often unsavory – are unavoidable. However, we then are left with the fact that some covert actions – which are directed by the executive through the CIA and National Security Council – have been conducted contrary to congressional will and public sentiment (e.g., Reagan's funding of the Contras in Nicaragua despite the Boland Amendments).[42]

Second, Glennon's belief in "the insight and good sense of the people" leads to understandable debate. The *constitutional* democracy of the United States is structured to avoid a tyranny of the masses – the majority of whom are not as well-educated or informed as their elected representatives, an arguably not as "virtuous" as the framers of the Constitution. The specter of ochlocracy (i.e., mob rule) is abated by the Constitution and the Bill of Rights that work in tandem to provide a wide degree of individual freedom, yet within a constitutional framework that provides for a representative form of government. Thus, we achieve as much as possible Aristotle's ideal of a government led by "aristocrats" (i.e., those with the moral and intellectual ability to represent others best).

We end the question of how best to defend a democracy without employing too many undemocratic actions with a quotation from Glennon, who states that while diplomacy can clash with constitutionalism, the "interests of diplomacy cannot be pursued by discarding the interests of constitutionalism." [43] To Glennon, democracy can – and should – be defended with actions that not only support, but are consonant with the ideals of democracy.

Situational analysis of presidential prerogative:

*The state's annihilation are of the highest importance in the moral calculus, and that acting to prevent the state's destruction may take precedence over competing moral claims.*

Michael Walzer [44]

In reviewing presidential actions, we sometimes fail to consider the concept of prudence as dealing with unique situations that cannot be anticipated. [45] Such situations cannot be legislated easily in advance and demonstrate the limitations of any constitution, especially one drafted by leaders (e.g., Madison) who believed that the United States usually would be at peace. As John Hart Ely notes, it is

"truly impossible to predict and specify all the possible situations in which the president will need to act to protect the nation's security before he has time to obtain congressional authorization." [46]

The following quotation by Locke describes how his concept of prerogative was designed to recognize the special times when the normal legislative process could not be followed without seriously jeopardizing the state:

> This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative; for since in some governments the law-making power is not always in being and is usually too numerous, and so too slow for the dispatch requisite to execution, and because, also, *it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public* [emphasis added] . . . therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe. [47]

One of the many mistakes made by the 1973 War Powers Act was trying to delineate when presidents could and could not initiate military actions without congressional approval. The framers of the act seemed to overlook the fact that certain situations allowed limited presidential action. Though not listed in the War Powers Act, presidents

have the constitutional right to use the military to rescue U.S. citizens abroad, rescue foreign nationals when it directly affects the rescue of its own citizens, protect embassies, implement cease-fires involving the U.S., and to carry out the security commitments in a treaty. [48]

Yet despite the logic of the arguments detailed above, there have been times when both Congress and the public have questioned presidential actions. Challenging the application of the domino theory and containment, many Americans protested against the Vietnam War with unparalleled violent dissent. Journalist Walter Lippmann called containment a "strategic monstrosity" because it did not adequately differentiate "vital from peripheral areas," and had the potential of causing many unnecessary military conflicts in non-strategic places around the globe. [49]

While Michael Glennon notes that "presidential authority exists in emergency situations of bona fide threats to the survival of the nation," [50] he also notes that "crises have been the cause of constitutional imbalance." [51] Part of the conflict between Congress and the executive relates to how those two branches of government define a crisis and that it is Congress that

usually depends on a strict application of the Constitution, which it tries to use to gain more involvement in military actions and foreign affairs.

Yet there are times when the situation demands quick, decisive, action that logistically only can be achieved by the executive. No case better exemplifies this than that of President Lincoln and the actions he took during the Civil War. Though Lincoln's actions have been labeled unconstitutional by some scholars, others defend his actions because they occurred under the unique circumstances of an insurrection. Robert Tucker notes the following:

> The state "has been found almost everywhere to be, if not the source of values, then at least the indispensable condition of values . . . This serves to justify the extreme measures which may be taken to preserve it." [52]

Yet, according to Jacob Javits, Lincoln "assumed a series of powers relating to the conduct of the war and of the national life that were constitutionally unwarranted" and "Lincoln's assumption of war powers was on so huge a scale as to change historically the nature of the

constitutional structure. [53] These actions included the following:

- Calling the "emergency Congress" three months after most of the drastic actions he took at the outbreak of the Civil War in 1861 [54]
- Appropriating funds for the military without required laws passed to do so.
- Suspending the writ of *habeas corpus* (a power specifically granted in the Constitution to Congress)
- Ordering summary arrests (i.e., without warrant)
- Barring from the mails any materials he deemed inimical to the national interest
- Confiscating personal property
- Applying a system of martial law to persons instead of to areas [55]

Alexander Bickel, however, defends Lincoln's actions by noting the importance that circumstance plays in relation to presidential actions. Bickel states that "Lincoln's actions in the singular circumstances of the

outbreak of civil war were not only great and good, but different in legal contemplation from the international use of force. [56] Bickel – like many constitutional scholars – differentiates between military actions during an insurrection and those during war with a foreign country. And despite the fact that the special constitutional powers granted for repelling insurrections were given to Congress, not the executive, Corwin recalls Locke's notion of presidential prerogative by noting that "in meeting the domestic problems that a great war inevitably throws up, an *indefinite* [emphasis added] power must be attributed to the president." [57]

In the special session of Congress on July 4, 1861, Lincoln reviewed the initial stages of the Civil War and explained the extraordinary actions he had taken in the months prior to this congressional session. Lincoln noted that the "Founding Fathers did not think in every case that danger should run its course until Congress convened," [58] though he did not explain why he waited three months to convene Congress. While some support his actions by reminding us of the limited transportation and communication of that era (i.e., no e-mails or bullet

trains), [59] others speculate that Lincoln wanted that time to assume dictatorial powers which he considered necessary to act quickly against the insurrection. [60]

Sounding a bit Machiavellian, near the end of that message of July 4, 1861, Lincoln also noted that "when an end is lawful and obligatory, the indispensable means to it are also lawful and obligatory." [61] But the differences between Machiavelli and Lincoln are obvious. Machiavelli believed that "princes" should employ all and any means necessary to retain power. In contrast, Lincoln did only "what he deemed his duty" to preserve the Union. His actions adhered to Locke's concept of prerogative because they were enacted "according to the public good" and with the idea that all the actions were those that Congress would have made. [62] (This was substantiated when Congress upheld Lincoln's early war actions.)

Those who disagree with Locke's notion of prerogative may have supported Lincoln's actions during a civil war, but would have labeled them clearly unconstitutional had they been taken during a war with a foreign nation. Such scholars would note the limitations of prerogative as we will debate in depth at the end of this thesis. However,

those who believe that we should only focus on the "ends" – regardless of the "means" – would concur with Machiavelli's infamous quotation noted above.

We conclude this discussion of circumstance and Lincoln's actions during the Civil War with the following quotation by Sidney Milkis and Michael Nelson:

> While Lincoln's grasping of the reins of power caused him to be denounced as a dictator, other aspects of his leadership demonstrated more obviously his faithfulness to the purpose for which the Union and the Constitution had been ordained. Thus, the Constitution, although stretched severely, was not subverted during the Civil War. [63]

## Chapter IV:
## Loss of Congressional Power in Foreign Affairs

*"The war-making power of the president constantly erodes the war-declaring power of Congress."*
Louis Fisher [64]

According to Alexander Bickel, the erosion of congressional power has been slow, but steady, and many presidential exploits "have denuded the Congress of its portion of the war powers and have ended by establishing the imperial President." [65] Since wars generally require swift action that American presidents have rarely avoided, the executive branch has gained extended power during war. [66] One reason why Congress has difficulty in reasserting its influence on foreign affairs after wars is because it has not reached a clear consensus regarding the nature of the executive and how that relates to both military and peacetime actions of the president.

In the Mexican War, Congress acquiesced to President James Polk and officially declared the war after the president had sent U.S. troops into disputed territory. However, Congress also officially censured Polk's actions after the war. Many scholars consider Polk's actions the

cause of the Mexican War and note that "Polk was so intent on acquiring California, which belonged to Mexico, that he was prepared in early May 1846 to make war on Mexico with or without a pretext." [67]

When President Woodrow Wilson tried to gain support for his 14 Points and the League of Nations, he met opposition from both foreign leaders (i.e., Clemenceau in France) and American statesmen. Chair of the Senate Foreign Relations Committee, the conservative Henry Cabot Lodge was known as Wilson's chief legislative obstacle. Lodge announced his own "14 Points," a reservation for each of Wilson's proposed policies. Lodge asked Wilson if he were willing to put his soldiers and sailors at the disposition of other nations. Most of Lodge's reservations were intended to remind the executive "that Congress would retain its constitutional role in foreign affairs." [68]

Reflecting the public's anti-war sentiments and congressional concern regarding their loss of power in foreign affairs, Congressman Louis Ludlow introduced the "Ludlow Amendment" in 1938 to require "a national referendum on decisions for war," despite President Franklin D. Roosevelt's objections. [69]

Though he once believed that "American diplomacy would be better served if Congress generally deferred to the president," [70] Senator William Fullbright later agreed with Michael Glennon that "active involvement of all three branches is required if this nation's foreign policy is to be measured successfully against the requirements of the Constitution" and if "the balance intended for our constitutional structure is to be restored." [71]

In addition to their concerns about a loss of power in foreign affairs, Congress has expressed its concern over the years that many presidents have abused the concept of prerogative and committed unconstitutional actions in defense of their private goals. As an example, many presidents have issued doctrines intended to promote their international agendas, whether Congress supported them or not.

President Monroe issued his doctrine in 1823, though it was not supported by congressional legislation or affirmed in international law. For many years it remained only a policy that asserted U.S. interests with an intent to diminish foreign (non-U.S.) colonialization of the Caribbean and Latin America. But eventually, the Monroe

Doctrine was used by several presidents for national and personal aggrandizement. Polk used the doctrine in 1845 against British threats in California and Oregon, and to justify the annexation of Texas, only one of the actions he took that instigated the war with Mexico in 1846. [72]

Though President McKinley announced no specific doctrine, his actions during the Spanish-American War and his interference in the Philippine struggle for independence were considered by some to be examples of "the inherent ability of the executive to aggrandize his own prerogatives." [73] During the Filipino wars on independence, McKinley – despite support for the rebels by the American public – took actions to control that country and any in the United States who spoke against his actions. He gave American generals in the Philippines cart blanche to suppress the insurrections. In the United States he tried to suppress free speech by censoring the press. [74] As Javits notes, "McKinley's actions – and those of his immediate successors, dramatized the inherent ability of the executive to aggrandize his own prerogatives within the context of a perfectly legal exercise of constitutionally assigned authority." [75]

Theodore Roosevelt developed his own corollary to the Monroe Doctrine, stating that the United States had "police power" over Latin America. He used this proclamation to acquire control over the Panama Canal during the 1903 revolution in that country. Despite the opposition of Panama's nationalist leaders, the U.S. forced a treaty on the country that named the United States as "guarantor of Panamanian independence," and gave the U.S. the right to intervene in case of military disorder in the country. [76]

Though the Republican-dominated 80th Congress eventually supported the Truman Doctrine by providing the financial means for it to be carried out, it was normally hostile to the president. Thomas Patterson writes that "many in Congress resented Truman having handed them a fait accompli" when he announced the Truman Doctrine on March 12, 1947. The doctrine was aimed at blocking Communist expansion anywhere in the world, though especially in Greece and Turkey. It became "the commanding guide to U.S. foreign policy in the Cold War." [77]

Though no major wars officially have been declared after World War II, Truman's foreign policy – articulated by George Kennan (Director of the State Department Policy

Planning Staff) – began the era of "containment" that triggered numerous regional and international conflicts through both sanctioned and covert actions in the 20th century. Though undeclared wars, these conflicts had all the catastrophic effects of officially declared wars: they caused innumerable deaths, devastated cultures, and ruined economies, yet seldom resulted in definitive solutions to global hostilities. While it is not obvious what actually caused the Cold War, it can be said that containment contributed to the increase in presidential wars during that era.

President Eisenhower broadened the Truman Doctrine by issuing his own on January 5, 1957. Though both houses of Congress approved it, Senator William Fullbright represented a vocal minority when he protested that the administration "asks for a blank grant of power . . . to be used in a blank way, for a blank length of time, under blank conditions with respect to blank nations in a blank area . . . Who fills in the blanks?" [78]

It should be noted that while Eisenhower did not announce his doctrine until 1957, prior to that year, he had sanctioned several covert actions across the globe without congressional approval. These included the overthrow of

popularly-elected foreign leaders such as Arbenz in Guatemala (1954) and Mossadegh in Iran (1954).

The doctrines cited above and others illustrate the growing power of the executive to position the U.S. in situations that have the high potential of instigating armed conflicts. But except for refusing to support Wilson's 14 Points and not ratifying the Versailles Treaty that ended World War I, Congress usually accepted the *fait accomplis* of presidential decrees, thus participating as an often silent partner in the erosion of their constitutional powers.

## The War Powers Act of 1973:

*The War Powers Act of 1973 undertakes to establish a procedure for comity as to different views in the future, so that Congress can be brought in from the periphery of the warmaking power to its center in order to exercise its proper role.*

Senator Edmund Muskie [79]

In view of the presidential actions listed above — and presidential actions during the Vietnam War and Watergate investigation — it should be no surprise that a time came when Congress took definitive steps to clarify the

constitutional division of war powers and attempt to exercise more control over foreign affairs, especially in decisions to commit U.S. troops abroad.

In 1973 — over the veto of President Nixon — Congress passed the War Powers Act, an attempt to reassert its role in foreign affairs, especially in decisions to introduce U.S. troops into military action. Introduced by Senator Jacob Javits, the bill was passed along with the Budget and Impoundment Control Act, which was designed to strengthen Congress' power over foreign affairs through better fiscal controls.

The War Powers Act was described by many as a feeble attempt at best to diminish the number of undeclared wars in which the U.S. could be involved. After it passed, Congress required the president to "consult" with it "whenever possible" prior to committing troops and to submit an official, written report to Congress within 48 hours after troops were introduced into combat. In addition, Congress could recommend withdrawal of troops after 60 days if it did not concur with the purpose of their deployment (see Appendix C).

But the 1973 War Powers Act never was the success it was intended to be. Over the years, liberals,

conservatives, Republicans and Democrats have all attacked the law, labeling it unconstitutional and impractical. Some claim that the wording of the act is not definitive enough to provide real guidance. While Congress may think that the requirement to "consult" with them prior to committing troops means to be "asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated," [80] presidents have said that it was not clear with whom they were to consult (i.e., the entire Congress or a representative group) and have defined "consult" in the narrowest of terms. They may have consulted (met) with Congress, but have not always concurred with — or acted on — their advice.

When President Clinton sent troops to Haiti in 1994, he stated that while he would welcome the support of Congress, he "did not agree that he was constitutionally mandated to obtain it." [81] According to Tom Raum, "All presidents since Nixon have found ways to sidestep the act." [82]

In addition to the problems cited above, Congress does not seem to have considered U.S. participation in multinational organizations (e.g., the United Nations) and

alliances (e.g., NATO, SEATO, etc.) when it drafted the War Powers Act. U.S. involvement in such organizations and treaties has generated so many military actions that it was considered necessary in 1994 to enact the Foreign Relations Authorization Act, which established new requirements for the president to consult with Congress prior to committing troops to "peacekeeping actions." [83]

Congress has accused presidents of cloaking their own administration's war goals by taking advantage of what they describe as U.S. international obligations. They have done so despite clauses such as Article 11 of the North Atlantic Treaty which states that its provisions are to be carried out by the parties "in accordance with their respective constitutional processes." [84] Most interpret that clause to imply some role for Congress – or the specific nation's legislative branch – in the event of war. As Congressman Vito Marcantonio noted, "When we agreed to the United Nations Charter we never agreed to supplant our Constitution with the UN Charter." [85] Marcantonio asserts that the deployment of troops in the name of organizations such as the UN and NATO – which are not sovereign bodies – cannot supercede the regulations of its individual member

nations. It would require a constitutional amendment for the United States to subvert its laws to those of international bodies.

The effects of the War Powers Act are ambiguous. Despite it, presidential wars have continued. Since 1973, Congress has received only 50 reports under the Act (4 by Ford, 1 by Carter, 14 by Reagan, 7 by Bush and 25 by Clinton). The increasing number of reports should indicate that simply having to submit a report to Congress — or even seek their "consent" to deploy troops — has not controlled presidential military actions. As a consequence, the War Powers Act continues to receive widespread criticism and attempts either to amend it or abolish it.

Yet despite its warranted criticisms, one might wonder if the number of presidential wars would be even greater without the War Powers Act. While the act has not completely eliminated military action without the consent of Congress, its existence has served over the years to be a constant reminder to both Congress and to the executive that acts of war should not be conducted unilaterally. And though most presidents have sought to circumvent the act, few presidents have been able to avoid its mandates totally.

Congressional Limitations:

One might ask why Congress has not used its "power of the purse" to curtail unilateral presidential military actions by denying funding of such actions. [86] Some speculate that while Congress fights to retain the official power to declare war, presidential military actions have the benefit of shielding Congress from public criticism of actions that it may have eventually sanctioned. Glennon notes that "Congress, as partner, has approved an American role that would be used to justify presidential rejection of the partnership." [87]

Some congressional critics note that Congress – while complaining of military actions it did not approve in advance – has not acted sufficiently on its power of the purse. It continues to fund presidential wars, imposing only minor legislation to curtail them. Even Lincoln voted financial support for the Mexican War, though he strongly disagreed with actions taken by President Polk. It seems to be the natural tendency for Congress to complain while continuing to fund presidential military actions. [88]

Many speculate that members of today's Congress are not adequate to the job of serving as a balance to

executive prerogative. They accuse congressmen of focussing too much on getting reelected and not taking action strong enough to direct appropriately foreign and national policy. Despite a general lack of interest in foreign affairs by the American public — compounded by a low voting rate — Congress makes feeble complaints regarding its declining power, though it creates administrative work to perpetuate itself while avoiding controversy. As George Will notes, "Government is becoming less respected as it increases its scope and becomes a 'servile state,'" gleefully buried in bureaucratic responsibilities that shield it from addressing any issues that are considered controversial. [89] Thus, congressmen can avoid such issues in order to increase their chances for reelection.

In order for Congress to become more affective, drastic changes in the political culture of the United States would have to occur. Such changes should reduce the administrative role of Congress in a "servile state," reconsider the use of term limits as a way to improve election to Congress, and reevaluate how the separation of powers outlined in the Constitution can achieve real balance, with meaningful congressional participation in foreign affairs. Such participation could serve to check

presidential prerogative, especially as it is used in military actions.

## Chapter V:
## The Limits of Presidential Prerogative

*No overzealous President should involve the U.S. in unnecessary hostilities while avoiding congressional scrutiny.*
Ronald Rotunda [90]

We have examined many conflicting ideas of presidential prerogative and specific cases to understand how that concept has been applied. Alexander Hamilton believed in a strong presidency, even in time of peace. And Madison – known for his support of the Republican view of a limited executive defined by strict constitutional allocation of powers – once conceded the need for presidential prerogative. [91]

Yet there must be some limits to prerogative, even for those who support a strong executive and find the need for presidential prerogative even greater in the war-torn 20th century than when it was described by Locke. Are there limits to prerogative? Were President McKinley's actions against not only the Filipino insurgents, but those in the United States who opposed him appropriate? When President Truman sent troops to Korea without congressional approval, was he within the limits of prerogative when he asserted

"an inherent and *seemingly unlimited* [emphasis added] presidential authority to protect any 'interest of American foreign policy'"? [92] And when President Clinton bombed Kosovo and Serbia under presidential edict, was that within presidential prerogative?

Justice Robert Jackson stated that "presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress" [93] His fellow justice, Chief Justice John Marshall "did not want to define the limits of presidential power in the face of complete congressional silence." Marshall went further to state that the "president is invested with certain important political powers and decisions of the executive are conclusive and can never be examined by the courts." [94]

Taking a more optimistic approach in reviewing presidential actions, Alexander Bickel states that "there are very few instances in our history where a president has taken the law into his own hands against the will of Congress." [95] But Bickel's statement forces the question of how he defines "the will of Congress" and if the president should determine what Congress wants.

As evidence of a need to limit presidential prerogative, congressional scholars could list the following presidential actions that Congress did not support, or for which Congress was not consulted in advance:

- Jefferson's supervision of the Louisiana Purchase
- Polk's actions that instigated the Mexican War
- Nixon's claim that "If the president does it, it is not illegal" [96]
- Reagan's funding of the Contra's despite the Boland Amendment [97]

In relation to the limits of presidential prerogative, Harvey Mansfield's comment below further exemplifies the ambivalence of executive power:

> The beauty of executive power . . . is to be both subordinate and not subordinate, both weak and strong, and to reach where law cannot [using prerogative], and thus supply the defect of law, yet remain subordinate to law. [98]

Throughout his writings, Mansfield notes the ambivalence of the executive that "permits its strength to

be useful to republics, without endangering them." [99] But despite the contradictions of its power, the executive continues to assert prerogative, leaving Congress and the public able only to hope for the best. As Milkis and Nelson note, "the design of the executive was one of the most vexing problems of the Constitutional Convention," where the framers "labored in the realm of intellectual and political uncertainty." [100]

Mansfield has not been the only scholar to use the word "ambivalent" in relation to executive power. It is often employed in discussions related to the American presidency. According to Richard Pious, "executive power was a general term, sufficiently ambiguous so that no one could say precisely what it meant." [101] Though it was clear that the Framers did not want a monarch, they demonstrated their own ambivalence regarding executive power as they struggled to make that branch of government strong enough to protect the Union from both foreign and domestic foes, without making it so powerful that it could not work within the confines of the Constitution and avoid the extremes of the royal prerogative exercised by British monarchs.

The Effects of the Cold War and Post-Cold War Era:

The Cold War era (approximately 1945 - 1990) created an international context of perceived continual crisis during which American presidents increased their use of prerogative through an escalated use of military actions. This was possible because the Cold War was considered an actual war, whether hostilities manifested themselves in military action or in ideological rhetoric. Concluding at one time that "American diplomacy in general . . . would be better served if Congress generally deferred to the president," Glennon notes the following:

> As the 1950s proceeded, and in a Congress where parochialism still reigned, it was not difficult to be persuaded that modern realities required greater latitude for the president and that proponents of congressional prerogative were agents of unenlightened reaction.[102]

During the Cold War, American presidents felt unrestrained in their use of military power. Though not a formally declared war, the Cold War contributed to expanding executive idea of prerogative. Presidents could explain that the development of the United States as a superpower thrust upon the executive branch a breadth of

responsibility that necessitated corresponding authority for quick, unilateral action. [103]

One major factor related to the growth of presidential military powers during the Cold War was the development of "weapons of mass destruction." With the authority to "push the button," presidents could consider the world to be continually at the brink of nuclear war, a state of mind they used to make deployment of U.S. troops into actual military actions seem more palatable, both to Congress and to the American public.

Examples of presidential actions during the Cold War include Truman committing troops to the Korean War without prior congressional approval, Kennedy bringing the world to the brink of nuclear war during the Cuban missile crisis, and Lyndon Johnson coercing Congress into passing the Tonkin Gulf Resolution during the Vietnam War.

While the majority of the military actions taken during the Cold War were supported either tacitly or overtly by Congress, the example of the Tonkin Gulf Resolution leads us to a discussion on presidential character and presidential prerogative achieved through deception. As with the supposed attack on the *Maine* during the Spanish-American War, confusion and misinformation have

contributed to decisions to take military action. Though it has taken time to recognize that the explosion on the *Maine* was due to a problem in the boiler room, the confusion related to the need for the Tonkin Gulf Resolution was evident in 1964, when it appeared to some that the U.S. destroyer *Maddox* had been fired on by the North Vietnamese in the Gulf of Tonkin. [104]

To complicate matters, President Johnson – and his Secretary of Defense, Robert McNamara – used the confusion over the *Maddox* incident to "flagrantly mislead the Congress." [105] Glennon cites Johnson's "exaggerations" (i.e., lies) to Congress when he notes how "in contract law, a contract induced by fraud or mistake if voidable," and that "some analogous doctrine in constitutional law should apply when statutory authority is given a president on the basis of fraudulent or mistaken representation." [106] As evidenced by Nixon's many claims of executive privilege during the Watergate investigations, there are enough valid reasons to argue over presidential prerogative without adding deception by the executive into the debate.

The effects of the Cold War on presidential prerogative are indisputable. However, the end of the Cold

War has presented new challenges to presidential prerogative. Though the United States is a major participant in global economics, since it is the only remaining superpower, some believe that the level of U.S. participation in global politics should be more flexible today. [107] With no major rivals, the United States can redefine its international role, possibly at the expense of presidential prerogative. Ronald Steel agrees with the above and lists the following steps that should be taken in a post-Cold War era:

- The U.S. should not use the UN or NATO to accomplish its own foreign policy goals under the guise of "multilateralism" (e.g., Bush's war against Iraq and Clinton's intervention in Haiti).
- Realize that foreign policy almost by definition is an elite preoccupation, but don't let the public leave it automatically to the experts, who are often self-appointed and want to promulgate bureaucracy.
- Increase public scrutiny of foreign policy making.
- Don't be tempted to try to police the entire world or push the goal of "legal order" globally when it may not be a natural state of affairs. In short, adopt a much more minimalist approach to foreign

policy.

- Subject foreign policy to more rigorous checks of reality and practicality by explaining why any particular war/conflict is necessary.
- Acknowledge that non-democratic governments sometimes have legitimacy and should deserve respect of their sovereignty. [108]

## Chapter VI:
## Concluding remarks

The United States has been fortunate in having strong presidents in times of crisis. Furthermore, it is fortunate that most presidents – Lincoln most notably – have acted ultimately to protect the precepts of the Constitution, though they have often done so by wielding power in a manner that makes some question the limits of prerogative.

But if we examine the word "fortunate," we are reminded that chance has, indeed, played a large role in the effectiveness – and appropriateness – of presidential prerogative. Fortunately, there have been relatively few times when presidential actions have resulted in disasters for U.S. foreign policy. And while the country could continue to count on luck, perhaps an amended Constitution could provide a clearer consensus regarding presidential prerogative. This could better protect citizens and their government during times when the country cannot depend solely on luck, nor hope that presidential actions do not damage the fabric of democracy, or cause disastrous policy errors that result in a large-scale loss of life.

Since politics is truly the architectonic science, it is the nature of humans to seek the power that can help them attain their goals, be those basic (e.g., food, shelter, clothing, etc.) or more ambitious (e.g., wealth, happiness, influence, etc.). Because of this – and due to the continual ambiguity of executive power – conflicts between Congress and the executive seem inevitable and endless. While some scholars believe that the Constitution was designed to ensure slow debate – especially when military actions were contemplated – others consider continually conflicts between the legislative and executive branches as often unnecessary and unproductive.

As indicated earlier, a definition of executive power that is acceptable to both Congress and the executive has not been found. And as we have noted, when Congress does assert its constitutional powers, it often does so with superficial arguments that do not address the roots of the problem, which include the ambiguity of executive power, the seemingly limitless nature of presidential prerogative, and the successful attempts by Congress to evade public scrutiny by avoiding controversial decisions.

Accordingly, Americans continue to enjoy their good fortune, which has – along with a flawed, but exemplary

Constitution and generally benevolent presidents — contributed to a stable liberal democracy. Despite weak congressional actions and the exercise of strong presidential prerogative, the United States has outlasted all other superpowers to become the preeminent global leader, exemplifying the wisdom of its founders and the strength of its leadership.

# APPENDIX A: The War Clause of the U.S. Constitution

Excerpts from Article I, Section 8 of the U.S. Constitution:

The Congress shall have power To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

**To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;**

# APPENDIX B: Powers vested in the Executive by the Constitution

Excerpts from Article II, Section 2 of the U.S. Constitution:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

**He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;**

# APPENDIX C: Selections from the War Powers Resolution of 1973

**If U.S. troops are sent into action, the President must do the following:**

• Be responding to a national emergency created by an attack on U.S. territory or on U.S. armed forces

• Report to Congress immediately and terminate any use of troops within 60 days unless Congress specifically approves of further action (Section 4a-1)

• Consult with Congress in every possible instance prior to the introduction of troops (Section 3). **NOTE**: The definition of "consult" has created different interpretations of this point. Presidents have often considered "consult" to mean only to inform, while some members of Congress believe it means that the President must seek their advice prior to sending troops, and is some cases even obtain their approval.

• Consult with Congress regularly after the introduction of combat troops

• Submit a detailed written report to the Speaker of the House of Representatives and the President Pro Tempore of the Senate within 48 hours after the introduction of combat troops

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**NOTE**: The six US declared wars are as follows: Barbary Wars, War of 1812, Mexican War of 1846, Spanish-American War, World War I & World War II.

21 **Gerry**, E. in **Ely**, **page 3**

22 The French revolutionary army invaded the Austrian Netherlands (Belgium) and declared war on England in February 1793.

23 At this time, the Federalist Party was in opposition to the Republicans. They advocated a strong national government and were the dominant political party from 1789-1801, when the Republicans came into power.

24 At this time, the Republican Party was in opposition to the Federalists. The party's original name was the Democratic-Republican Party. They believed in agrarian interests, strong states rights and a strict interpretation of the Constitution, policies which were called "Jeffersonian democracy."

25 **Javits**, **page 13**

26 **Grant**, R. & **Grant**, S. in **Bessette**, J. M. & **Tulis**, J. (1981). The Presidency in the Constitutional Order. Baton Rouge, Louisiana. **page 49**

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46 **Ely** in **Rotunda, page 3**

47 **Locke, page 1**

48 **Glennon, page 96**

49 **Patterson, Clifford & Hagan, page 292**

50 **Glennon, page 84**

51 Ibid, **page iv**

52 **Tucker**, R. in **Walzer, page 2**

53 **Javits, page 116**

54 **Events related to the Civil War:**
10/16/1859: John Brown's raid on Harper's Ferry instigates concern by Southerners on how long slavery will last.
1/9/61: Supply ships for Fort Sumter are fired on
3/4/61: Lincoln takes office
3/5/61: Lincoln informed that Fort Sumter is in jeopardy
4/4/61: Lincoln calls "emergency" session of Congress
4/12/61: First shots fired at Fort Sumter
4/13/61: Congress declares war

55 **Milkis** & **Nelson, page 158**

56 **Javits, page x**

57 **Milkis** & **Nelson, page 161**

58 **Lincoln, page 68**

59 From a conversation with Political Science Dept. Prof. Brian Janiskee, California State University, San Bernardino. May 8, 2000.

60 **Zentner** conversation

61 **Lincoln**, page 74

62 **Locke, page 1**

63 **Milkis** & **Nelson, page 161**

64 **Fisher**, L. in **Stern, page 11**

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