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## THE POLITICAL QUESTION OF THE WAR POWERS RESOLUTION

JOHN M. LEWIS\*

Professor Rostow has done an impressive job clearing away the undergrowth of legal and constitutional debate that has grown up around the War Powers Resolution in the past thirteen years. His learned and persuasive analysis seems to me to have demonstrated the unconstitutionality of the Resolution, though a full evaluation of his thesis must be left to those more qualified than I in the rigors of constitutional law. In clearing the ground, Professor Rostow has shown that at the heart of the controversy over the Resolution lies a political question that has exercised scholars' and politicians' minds since the Constitution was written. This is the question, as he puts it, of how we are to "fashion and refashion the Presidency and Congress as responsible and cooperative institutions capable of carrying out a foreign policy adequate to the security needs of our times. . . ."<sup>1</sup>

To be sure, constitutional and legal considerations throw revealing light on this political question by setting limits to the answers that are permissible. But constitutional and legal considerations do not fully answer it, according to Professor Rostow. The error of the "ultra-Whigs," and of Congress in passing the Resolution, is in seeking a legal remedy for a political problem. Such a course is, in this instance, not only unconstitutional but also futile. As is appropriate, Professor Rostow devotes most of his article to the legal issues and to the inadequacy of the legal remedy. But he has important and interesting things to say about the underlying political question, and it is this question I should like to explore.

The political question of how Congress and the president can best work together is one aspect of a broader problem. Lincoln described it, in a general form, in a speech he made on November 10, 1864: "It has long been a grave question whether any government, not *too* strong for the liberties of its people, can be strong *enough* to maintain its own existence, in great emergencies."<sup>2</sup> In *The Federalist* No. 51, Madison approaches the same

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1. Eugene V. Rostow, "Once More Unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U.L. REV. 1, 48 (1986).

2. Abraham Lincoln, *Response to a Serenade*, November 10, 1864, 8 THE COLLECTED

general problem from a different direction: in designing a government, he said, “you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>3</sup> The problem, then, is to create a government to which the people’s liberty may safely be entrusted and which is, at the same time, suitably strong or efficient. Two hundred years of debate and more have gone into defining terms like “safe” and “efficient”: the delegates to the Constitutional Convention and to the ratifying conventions could not agree on how to balance these two conflicting goals, and this disagreement lies at the core of Professor Rostow’s dispute with the ultra-Whigs. How safe is safe enough? How much safety may prudently be put at risk in order to gain greater efficiency? Answers to these questions depend upon fundamental attitudes and beliefs about the nature of human beings and the way the world works, and they are not susceptible of final, conclusive demonstration.

Lincoln had an answer: he judged that the actions he took in the interests of efficiency would ultimately enhance and not undermine the general safety. He believed, further, that he could find an acceptable balance within the requirements of the Constitution. If he achieved this goal, as generations of Americans have supposed he did, it was with a combination of what Professor Rostow refers to as “sensible political judgments”<sup>4</sup> and a profound understanding of the requirements of the Constitution. Madison, a major author of the Constitution and of the Federalist Papers, had a different kind of answer to the problem of balancing safety with efficiency. He sought to create a psychological mechanism, embedded in the Constitution, which would use human nature to provide a balance. Efficiency would be served by creating a national government notably more energetic and capable of decisive action than had been its predecessor under the Articles of Confederation; liberty would be kept safe by setting the ambition of each politician to check the ambitions of others.<sup>5</sup> Lincoln and Madison between them exemplify the two ways Americans have traditionally addressed the basic problem: relying on the good judgment of politicians, and depending on constitutional mechanisms. Much of American constitutional history can be seen as an on-going argument between those whose optimistic view of human nature leads them to trust politicians’ judgments and those whose more pessimistic view seeks protection from these judgments in formal constitutional safeguards. More precisely, the argument has centered on just how tightly should be drawn the constitutional restraints within which politicians are left to exercise their judgment. In other words, then, the fundamental question of how to balance efficiency with safety has traditionally

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WORKS OF ABRAHAM LINCOLN (1953) 100.

3. THE FEDERALIST 322 (Mentor 1961).

4. Rostow, *supra* note 1, at 50.

5. FEDERALIST, *supra* note 3, at 322.

been answered with a mixture of constitutional law and political judgment.

The proper proportions in which these ingredients should be mixed, and who decides what is proper, are themselves controversial questions. In much of domestic politics these issues have been defined and redefined repeatedly, by the courts, by the legislatures, and by the everyday practice of politicians over two centuries. In foreign and national security affairs, on the other hand, the lines have usually been less sharply drawn. For the most part, the pattern of decision making in the field of national security policy has been set by what presidents have actually done rather than by what the courts or Congress said should be done. The Supreme Court has, over the years, set outer limits to the president's discretion; but this has generally been on occasions when national security policy substantially spilled over into those economic or civil liberties issues with which the Court has traditionally concerned itself. For example, in *Ex Parte Milligan*<sup>6</sup> the Court chastised Lincoln over his use of special military courts to try civilians, but they did so only after his death; in *Youngstown*<sup>7</sup> Truman was limited in the domestic means he could employ to support a war economy, but without significantly interfering with his conduct of the Korean War. More recent and less famous cases have continued to define the outer edges of the president's authority, but have left intact most of his customary room to manoeuvre.<sup>8</sup> On the other hand, in *Korematsu*,<sup>9</sup> the president's judgment of what was required for military efficiency was upheld over Korematsu's claim of constitutional protection for his liberty.

Congress' legislative restrictions upon the president's conduct of national security policy have been more frequent, and Professor Rostow notes that this tension between the two branches of government is traditional. The Senate's refusal to ratify Woodrow Wilson's League of Nations in 1919 and various congressional restrictions on the use of money and troops in Vietnam in the early 1970s are notable examples, in this century, of substantial curbs upon presidential action. In general, however, the president has usually been allowed, within broad limits and often after a struggle, to rely on his own political judgments of what circumstances require and how to balance the needs of efficiency and liberty in the field of national security policy.

Professor Rostow suggests that these delicate balances, between president and Congress and between constitutional law and political judgment, have become more contentious as the twentieth century has advanced,

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6. 4 WALL. 2 (1866).

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

8. CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1976), esp. introductory note and chap. III by RICHARD P. LONGAKER.

9. *Korematsu v. United States*, 323 U.S. 214 (1944).

largely because increased American involvement in a turbulent world has made national security affairs more salient in the national agenda and, therefore, a more frequent subject of dispute between the executive and legislative branches.<sup>10</sup> Congress has grown less willing to trust the president to find a balance between efficiency and liberty. The War Powers Resolution is a result of this reluctance. In the terms I have been using, the Resolution attempts to adjust the mixture of constitutional law and political judgment in favor of the former, by shifting important decision-making responsibility from the president to Congress, and thereby, presumably, making safer the president's pursuit of efficiency. This attempted shift, Professor Rostow argues, is both unconstitutional and impractical. As I have said, I am persuaded by his discussion of constitutionality. The matter of impracticality I would like to examine further.

Presumably the fundamental doctrine of the Constitution requires that Congress share with the president responsibility for policy making, in foreign and national security affairs as in other areas. Professor Rostow agrees, and he quotes with approval John Marshall's phrase about the "Grand Design of the American polity"<sup>11</sup>—a design which includes a prominent place for Congress. But in the turbulent world of twentieth century national security policy, it has become not only increasingly necessary to define Congress' proper role but also increasingly difficult. Congress is, by design, a deliberative institution, tuned to the leisurely pace of public debate where all points of view may be heard and decision is reached by unhurried bargain and compromise among generalists and laymen. Congress is, in fact, a marvelous product of the eighteenth century American Enlightenment with its confidence in rational discussion moderated by Madisonian cautions and precautions. But in the twentieth century Congress has had to try to adjust to a politics which is not only more concerned with vexatious world affairs than before but also more in need of speedy decisions, secret decisions, and the mastery of arcane technical information.

To some extent Congress has met these challenges by relying on professional staffs, specialized committees, and a vast cloud of lobbyists offering expertise on every imaginable topic. But all this has not prevented a decline in Congress' ability to participate in a timely and meaningful way. In domestic affairs, for example budgetary policy, the nation accepts delays and unseemly last-minute scrambling as the price for full congressional participation. Efficiency is sacrificed for the safety that liberty finds, presumably, in the participation of 535 elected members of Congress. But the strain is showing, and we frequently hear grumbles of frustration and impatience from the public and from executive officials.

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10. Rostow, *supra* note 1, at 5.

11. *Id.* at 3.

Congress has made a different kind of adjustment in national security affairs. Here, the demands of secrecy and technological expertise are often much greater. And the need for speedy decisions may be totally beyond Congress' ability to meet, as when the government must respond to a threat of imminent nuclear attack. Professor Rostow points out that there have been numerous national security crises in the recent past when these modern pressures have effectively excluded Congress from participating in critical decisions at the time they were made. And surely he is right that a president's consultation with Congress during a crisis, should this actually occur, hardly constitutes official congressional action as envisioned by the separation of powers.<sup>12</sup> It is clear, then, that to achieve necessary efficiency in the conduct of modern national security affairs we must sometimes abandon the particular kind of safety Congress was designed to provide. The War Powers Resolution is impractical because it seeks to give Congress a role in those very decisions where its antique procedures obstruct efficiency—and, when the nation's security is most desperately threatened, we will demand efficiency even at a high cost in congressional safeguards for liberty. I agree with Professor Rostow that, in the fearful emergencies of modern national security policy, a rigid insistence upon formal constitutional procedures must give way to a reliance upon the sensible political judgments of politicians, even if the sensible political judgments of congressmen amount to no more than leaving the president to handle the crisis himself.<sup>13</sup> I would, however, dissent from his assertion that, in passing the War Powers Resolution, Congress' goal was to "annex some Presidential territory as its own,"<sup>14</sup> and his implication that this was a "naked grab for Congressional supremacy."<sup>15</sup> That seems to me to go beyond what the facts will support.

Professor Rostow proposes for Congress a self-denying policy in these urgent military crises that is reminiscent of one that Justice Jackson proposed for the courts in his dissent in *Korematsu*.<sup>16</sup> There Jackson argued that it was inappropriate for the courts to second-guess the president in the exercise of his military powers in a grave emergency, not because those powers were necessarily sanctioned by the Constitution but because constitutionality was an inappropriate standard to require of military actions in such emergencies. Jackson would have neither approved nor disapproved the president's actions: he implied that the Court should not have taken the case. He went on to make the same political point that Professor Rostow paraphrases from John Marshall in *Gibbons v. Ogden*,<sup>17</sup> namely that the

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12. *Id.* at 2, 17, 40.

13. *Id.* at 50.

14. *Id.* at 40.

15. *Id.* at 45.

16. 323 U.S. 214, 242-8 (1944).

17. Rostow, *supra* note 1, at 50.

principal safeguard against abuse of executive power in a military emergency lies in the electoral responsibility of the president to the people. This is surely eminently sound: the people's willingness to elect wise and responsible politicians is a far surer safeguard of liberty than are constitutional constraints—especially in a desperate crisis where there is no time to engage constitutional machinery. History shows that dictators and scoundrels are not much impeded by constitutional limitations once they are elected to power.

Where does all this leave Congress in the conduct of national security affairs? Professor Rostow demolishes the War Powers Resolution, but he does not answer this question. This is no criticism: he did not set out to answer it. But it remains an intriguing problem, and it is an important one if we are to continue to take seriously the "Grand Design" of the Constitution. What can Congress realistically expect to do in modern crises that are increasingly urgent, desperate, complex, and frequent? It can, of course, substantially influence the way the president handles a crisis by determining in advance, by statute, what resources he shall have available. It can continue to ask the president to consult with key members of Congress even as a crisis unfolds—and sometimes he may do so. It can exercise its own political judgment and endorse the president's actions. But none of this assures Congress the sort of place in policy making that the Framers of the Constitution intended. The Framers probably expected the president to exercise a considerable prerogative in urgent crises; but they cannot have foreseen how frequent these crises would become or how important they would be in determining general policy.

It seems likely that the modern balance between efficiency and liberty, between constitutional law and political judgment, and between president and Congress can never again be what the Framers intended. The Constitution was designed to be flexible and to adapt to changing needs; that is one of its strengths. But modern politics appears to require a degree of distortion of the original plan that threatens to subvert the Framers' fundamental vision. The War Powers Resolution is an attempt, however misguided, to address a serious problem. Professor Rostow's discussion gives an indication of how difficult it will be to solve.