

Prof. Robert F. Turner's response to Questions from Senator Sheldon Whitehouse:

I believe a more helpful or illustrative approach is to view all sovereign power possessed by the United States as belonging ultimately to the people, who through the Constitution have vested certain powers in the Legislative chambers, certain powers in the Executive, and other powers in the Judiciary. Those powers are only revocable by the act of the people as provided in Article V of the Constitution through the amendment process.

As I explained in some detail in my prepared statement, the general management of the nation's external intercourse – the negotiation of treaties, the collection of foreign intelligence information, the management of military operations, and much else as well – was viewed by the Founding Fathers as “executive” business confided in the President by Article II, Section 1. Congress and the Senate were given certain “exceptions” to this general grant of power, including as we discussed during the hearing the power “to make Rules governing Captures on Land and Water” – which I believe permits Congress to legislate humane treatment of captured enemy combatants. The expressed power granted Congress in Article I, Section 8, Clause 10, to “define and punish Offenses against the Law of Nations” would similarly authorize Congress to attach criminal penalties to acts of genocide, violations of the Convention Against Torture, and war crimes prohibited by the 1949 Geneva Conventions.

Some of these “exceptions” vested in Congress or the Senate were of the nature of “negatives” or “vetoes” – such as the power of the Senate to reject a diplomatic nomination or a treaty. Congress was not given the “treaty power” (which, in fact, was placed in Article II concerning executive powers), but merely the power to negative or veto a decision by the President to ratify a negotiated treaty. That Congress itself is “powerless to invade” the business of negotiating a treaty has been affirmed by the Supreme Court in the landmark 1936 *Curtiss-Wright* case, and President Washington recorded in his diary that James Madison, Thomas Jefferson, and Chief Justice John Jay shared the view that the Senate had “no Constitutional right to interfere” with the business of the Department of Foreign Affairs save for the specific grants of negatives over appointments and treaties. This view was embraced as well by Chief Justice Marshall in *Marbury v. Madison*, when he used the business of the Department of Foreign Affairs as an example of presidential discretion that could not be checked by the other branches. I quoted this in my prepared statement, but it may warrant restatement. In perhaps the most famous of all Supreme Court cases, Chief Justice Marshall wrote:

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

to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

I believe Andrew Hamilton (who played a key role at the Constitutional Convention in drafting Article II) was correct in his first *Pacificus* essay when he explained:

The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument. . . . It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

So on your first question, I believe you have gone astray in confusing the Congress with the sovereign American people. By “declaring war” Congress does not confer upon the President the Commander-in-Chief power. The President received that power directly from the American people in Article II, Section 2, of the Constitution. Congress is joined in the business of war by having a veto over a formal “declaration of war” – which, as I discuss in my prepared statement, was understood to be necessary only in what we would today call “aggressive” wars. Congress also has the power to raise and support armies and control over the expenditure of treasury funds. But these important powers were not intended to be used to usurp the discretion of the President with respect to either the negotiation of treaties or the conduct of war.

Your second question is premised on the idea that the President’s Commander-in-Chief power is bestowed by Congress rather than by the people, and that the President in war serves as the agent of Congress. I have no doubt that the American people may at any time amend the Constitution to alter grants of power, but Congress may not do so by a mere statute.

As to your third question, it is not at all clear to me that Congress has the power to “undeclared war.” Certainly Congress has the power, by simply refusing to raise and support armed forces or provide funds for the military, to so weaken our military that an enemy victory will be virtually guaranteed. But when understood as a “negative” vested in Congress over a presidential decision to initiate a war in a setting where the Law of Nations (what we today refer to as “international law”) would require a formal declaration, this congressional power might well be compared to the Senate’s negative over diplomatic or military appointments.

The comparison is useful, because the issue of the residual power of the Senate with respect to the Secretary of Foreign Affairs once it has fulfilled its constitutional duty of

advising and consenting to the appointment was debated at length in the First Session of the First Congress, by men who had for the most part served as delegates to the Philadelphia Convention and/or to their state ratification conventions. Representative Madison took the view that, since the appointment of the Secretary was “executive” in nature, the involvement of the Senate in that process was to be construed strictly. And since the Senate was only joined in the appointment phase, of the process – with no mention of a Senate role in the *removal* of said officer – the Senate did *not* have a negative over a presidential decision to remove the Secretary. This view prevailed in both chambers of Congress, and is discussed at some length by Chief Justice Taft in the landmark 1926 case of *Myers v. United States*.

And by this same logic, since the Congress is given the power “to declare War” but *not* the expressed power to direct the termination of a war, Madison’s reasoning would suggest they have no such power. The Senate cannot terminate a lawful presidential appointment of a defense secretary or Army general merely by voting to “repeal” its resolution that had earlier granted its advice and consent to the President to make the appointment, and I’m not persuaded that Congress can order the end to a war by similarly “repealing” the declaration of war or authorization for the use of force. In any event, it is clear from *Chadha* that the Congress could not do so without the legislation being subject to a presidential veto.

One might also draw a comparison to the President’s “legislative” power granted in Article I, Section 7, Clause 2, to negative a bill passed by both houses of Congress unless it is subsequently re-passed over his veto by a two-thirds majority of each house. Would anyone claim that this narrow exception to the legislative powers granted to Congress in Article I carries with it a residual power in the President to decide that he erred years earlier in not vetoing a particular bill, and thus to declare it without force unless and until Congress re-enacts it by a two-thirds majority of each chamber?

These are interesting theoretical issues. But, as I have acknowledged, by simply refusing to enact new legislation to maintain an armed forces or rejecting supplemental appropriations acts to fight a war, Congress can certainly leave our forces without food or ammunition and probably ensure an enemy victory in any major war. And as was demonstrated tragically in Beirut on October 23, 1983, even if the President ultimately “wins” a vote, merely by holding a highly partisan political debate the Congress can embolden America’s enemies so as to weaken the position of our military forces and ultimately lead to their slaughter.

I would add that anyone who believes we should simply “assume” that the Framers of our Constitution intended for Congress to have not only the power to “declare War,” but also the power to legislate an end to a war, needs to explain why a specific proposal to “give the Legislature power of peace, as they were to have that of war,” was *unanimously* rejected at the Philadelphia Convention on August 17, 1787. (See pages 24-25 of my prepared testimony.) In a practical sense, whether the Constitution permits Congress to directly legislate the end of a war may be only of academic interest – because Congress clearly has the power to withhold approval of appropriations requests and to refuse to

authorize the existence of any military forces for the President to command. But to those of us who take the constitutional limits on Legislative power seriously, these are important matters.

During the hearing, the most popular authority cited by advocates of broad congressional authority in this area seemed to be James Madison's first *Helvidicus* essay. My old friend Dr. Louis Fisher wrote in his prepared statement:

For Madison, it was a fundamental principle of democratic government that "[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."

(Uncharacteristically, Dr. Fisher cited this statement to "6 *The Writings of James Madison* 146," when in reality it appears two pages later.) Chairman Feingold also quoted a portion of this Madison statement.

It is important to put Madison's statement in context. In early April of 1793, word reached America that France had two-months earlier declared war on Great Britain. Later that month, President Washington unilaterally proclaimed that "the duty and interest of the United States require, that they should . . . adopt and pursue a conduct friendly and impartial toward the belligerent [*sic*] Powers" Although he did not actually use the term "neutrality proclamation," Washington's decision upset Thomas Jefferson, Madison, and others who felt the United States should have aligned itself with France (with whom we had a defensive military alliance) in the conflict.

Defending the President's proclamation, Alexander Hamilton wrote a series of seven essays under the *nom de plume* *Pacificus*. It was during the first of these that he argued that the grant to the President of the nation's "executive Power" included the general control of the nation's external intercourse. He reasoned:

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

On July 7, Jefferson wrote to Madison: "For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in face of the public." And after making a number of excuses in an effort to avoid the task, Madison – in what he later characterized as "the most grating" task he had "ever experienced" – wrote the *Helvidius* essay that is being so widely quoted.

In essence, Jefferson and his Republican friends – who controlled the House and had close to a working majority in the Senate – were “forum shopping.” They wanted the United States to side with France and felt they had a better chance of that outcome if the decision were made by Congress. And the reason Madison found writing as *Helvidius* to be so difficult was probably because he was contradicting both his own and Jefferson’s earlier interpretation of the Constitution to make his case. Thus, three years earlier Jefferson had argued in a memorandum to Washington:

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

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

And even as *Helvidius*, Madison acknowledged that if “the powers of war and treaty are in their nature executive,” then “so far as they are not by strict construction transferred to the legislature, they actually belong to the executive” (6 *Writings of James Madison* 152.) And Madison further admitted (as I discussed in my prepared statement) that writers such as Locke and Montesquieu viewed these powers to be “executive” in character. But this time – in the finest traditions of lawyers changing their arguments to best serve the ends of their clients from one case to the next – he seeks to *discredit* Locke and Montesquieu by asserting they were “warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration ordering on idolatry.” (6 *Writings of James Madison* 144.)

So the question arises – was *Helvidius* voicing the honest views of James Madison and his instigator Thomas Jefferson, or was this legal advocacy motivated by forum shopping? How do we explain Madison’s views expressed during Jefferson’s first cabinet meeting on March 15, 1801, on the President’s power to send two-thirds of the new American navy to the Mediterranean with instructions to sink and burn ships (without any authority from, or even notifying, Congress) with his limited view of executive power as *Helvidius*? How do we reconcile Madison’s disdainful dismissal of Montesquieu as *Helvidius* with his reference to that same “celebrated” Frenchman in *Federalist* No. 47 as “the oracle who is always consulted and cited” on issues of separation of powers? And how do we reconcile *Helvidius* with Thomas Jefferson’s earlier argument that “the transaction of business with foreign nations is executive altogether” – a view that President Washington recorded was endorsed by Madison at the time, along with Chief Justice Jay? In candor, I would caution you to be a bit wary of giving too much reliance to Madison’s 1793 essays.

Finally, I should add that in cases like *Bas v. Tingy* and *Talbot v. Seemen* the Supreme Court recognized that Congress could authorize both “perfect” and “imperfect” war. In the former of these cases, Justice Washington wrote:

It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the members are not authorised to commit hostilities such as in a solemn war, where the government restrain the general power.

Justice Patterson added in the same case: “As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations.” But, in reading these excerpts, we must keep in mind that Congress was here exercising its expressed Article I, Section 8, power to “make Rules concerning Captures on Land and Water.”

I have serious doubts about whether Congress, in authorizing war, could attach conditions for the purpose of directly the President how to *conduct* military operations – such as telling him which military units to send where and when and prohibiting him from calling up reserves or moving forces from one hill to another as the Commander in Chief or his generals believed necessary to accomplish their mission.

Nor, I submit, may Congress properly legislate in such a manner as to usurp the independent discretion vested in the President by the Constitution – such as raising an Army but then providing (as Congress did on the eve of the U.S. entry into World War II, during consideration of the 1940 Selective Service Act) that “[p]ersons inducted into the land forces of the United States pursuant to this act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.” When first-term Senator Henry Cabot Lodge (R-Mass.) introduced that amendment, this exchange occurred between Lodge and Senator Henry Ashurst of Arizona--then in his twenty-eighth year as a Senator:

Mr. ASHURST. . . . [I]t is my opinion that not to exceed three or four Senators would vote that American boys shall be sent to Europe to participate in European wars. . . . [B]ut I ask the Senator from Massachusetts, . . . Have we the power to limit the President in such a case? My judgment is that under the Constitution he may send the Navy or

the Army anywhere he chooses. It is the business of Congress to raise and support the Army and to provide and maintain a navy. I leave it to the judgment of the Senator, Is it not a fact that when we give or grant to the President an army he is the Commander in Chief and may send them wherever he pleases? Has the Senator reflected on that?

Mr. LODGE. I have reflected on it, and I think there is much force in what the Senator from Arizona says. . . .

Mr. ASHURST. I fear the Senator's amendment is what we call a *brutum fulmen*, a harmless thunderbolt, though it is a provision which should be in this bill. I am of the opinion that the present Chief Executive, or any other Chief Executive, would be inclined to respect an expression of this sort by the Congress, incorporating into the bill certainly the legislative wish and hope, the expression of our opinion that drafted troops should not be sent to Europe to participate in the wars of Europe; but *such an expression is not legally binding on the Executive*.

Mr. President, let us be under no illusions. Let us not, after we have passed a very important piece of legislation, discover that we have given to an Executive a large army, he may do with as he pleases.

Of course, very able lawyers disagree with my conclusion; but, after long study, and having passed through the experiences of the first World War, in which our country participated, I say to the Senate in all solemnity that *if we give the President this army he may send it where he chooses*.

Mr. LODGE. I think there is, of course, a great deal of learning and force behind the Senator's statement, as there always is in every contribution he makes in the Senate.

86 *Congressional Record* 10,895-96 (1940).

Despite this provision in the 1940 Selective Service Act, most of the American soldiers sent to Europe to fight World War II were draftees.

John Locke explained that a key reason for entrusting a nation's foreign intercourse to the executive was that large deliberative assemblies lack the institutional competency to act with unity of plan, secrecy, or speed and dispatch. Congress cannot pass laws controlling the behavior of foreigners beyond our shores, and it can't anticipate all of the developments that might occur in negotiations or during war that would warrant a major change in policy. I have been following these issues closely both as a scholar and government practitioner for well over three decades, and the wisdom of Locke's theoretical analysis routinely manifests itself.

I worked in the Senate in May 1975, when Cambodian forces seized the crew of the *S.S. Mayaguez* and took its crew of 43 men to Koh Tang Island. Although Section 2(c) of the War Powers Resolution implicitly denied the President the power to rescue American

citizens abroad who were not part of our armed forces, and Public Law 93-52 had prohibited the expenditure of any treasury funds for combat activities in the air, on the ground, or off the shore of Cambodia, President Ford had the courage to ignore these “laws” and rescued those Americans. When Senator Frank Church was asked about the fact that the popular rescue had been carried out in clear violation of statutory language he had helped pass, he replied that Congress had not intended to prohibit this kind of rescue operation. I worked for a member of the Foreign Relations Committee at the time, and I wondered how Congress would have reacted – and how the voters would have responded – had the President simply gone before the nation and explained that Congress had tied his hands, he could not violate the “law,” and thus nothing could be done to help those American citizens. (You may recall that, at the time, the Khmer Rouge was in the process of slaughtering more than 20 percent of the population of Cambodia – so my guess is those merchant seamen would not have lasted long.

I could give you many other examples, but will mention just one more in the interest of time. When the U.N. Security Council sought help in ejecting Saddam’s forces from Kuwait in 1990, it authorized the use of force not just to eject Iraqi troops from Kuwait (Res. 660), but also by Resolution 678 to “restore international peace and security in the area.” But, wary of “Vietnam” and lacking confidence that our military could make such short work of ejecting Saddam’s Revolutionary Guard, Congress carefully worded its authorization for the use of force to *exclude* any military activities beyond ejecting Iraqi forces from Kuwait. As I recall, the joint resolution said something like “pursuant to Resolution 678, the President is authorized to use military force to implement resolutions 660 . . . [to] 677.” The only military objective in any of those resolutions was the removal of Iraqi forces from Iraq.

And yet, after General Schwarzkopf’s brilliant “left hook” that left the Revolutionary Guard in route and fleeing across the dessert, and General Powell persuaded President Bush to cases military activities, how many congressional Democrats who had opposed assisting the Security Council in any way involving the use of military force denounced the President as being a “wimp” for “stopping forty-eight hours too soon” and not going all the way to Baghdad to capture Saddam Hussein and try him as a war criminal? I’m not saying we should have gone to Baghdad in 1991. My point is that Congress erred in its judgment of what was likely to happen, and by the time a decision had to be made a lot of members who had voted to tie the President’s hands in mid-January were having second thoughts.

In December 1984 I took part in a panel discussion with former Senator Jacob Javits in New York City before the American Branch of the International Law Association on the War Powers Resolution, of which Senator Javits had been the chief Senate proponent. And I argued at the time that the denial of the President’s constitutional power to rescue endangered American civilians abroad in Section 2(c) of the 1973 statute was unconstitutional. And, to my surprise, Senator Javits during his rebuttal conceded the point. But it remains on the statute books.

My own fear is that if Congress tries to tie the President's hands in Iraq, it will embolden our enemies, demoralize our own troops, and lead rather quickly to our defeat and withdrawal. That, in turn, will swell the ranks of militant Islam by hundreds of thousands if not millions of angry young men anxious to take the fight to the infidels. They might start by merely chasing us out of Jordan, Egypt, and Saudi Arabia. But, eventually, I suspect they will want to come here and bring the struggle to our own churches, schools, and shopping centers. For we will have showed them that America has no will to resist if our people are dying. That was the lesson bin Laden attributed to our bug out in Beirut after Congress virtually placed a bounty on the lives of our Marines by telling the terrorists that further casualties would likely produce a new vote in Congress on continuing the deployment. (I discuss this in my prepared testimony.) At some point, the American people may find out what Congress has been doing — how many Americans today realize that Congress has enacted a law prohibiting the President from protecting private U.S. citizens abroad or on the high seas from terrorist attacks absent a declaration of war or AUMF? — and there will be an accountability. Sadly, if Congress continues its current approach, the long-term cost in American lives may well dwarf the horror of September 11, 2001.