



HALLOWS LECTURE

WHEN CONGRESS AND THE COMMANDER IN CHIEF **CLASH OVER WAR**

David J. Barron

I'm particularly pleased to be here today because I have a bit of a connection to this great university. My brother, Jonathan, now a professor at the University of Southern Mississippi, was a post-doctorate fellow in the English Department at Marquette, and I visited him here nearly 25 years ago. It's taken me some time to get back to Milwaukee, but I am glad to have done so, and I want to thank your dean for the invitation. As he mentioned in introducing me, we had the privilege of clerking together at the Supreme Court many years ago, for different justices. I should have predicted Dean Kearney's future. If we could analogize the group of young lawyers who were then clerking on the Court to a law faculty, he was definitely our dean. There was no one more enthusiastic or welcoming and no one more interested in doing something that is increasingly rare and increasingly important: trying to bridge differences of party and outlook to remind us of the importance of there being a shared legal culture in which respectful disagreement is possible.

In that same vein, I want to carry on a conversation that my colleague on the bench, Judge Brett Kavanaugh, began with his excellent Hallows Lecture here in 2015. Judge Kavanaugh drew on his own service, as an executive-branch lawyer in the George W. Bush administration, to address five important separation-of-powers challenges, one of which concerned war powers. I want to draw on my own experience as an executive-branch lawyer, in the Barack Obama administration, to review some of the history that bears on how our constitutional system allocates war powers. I wish to do so by considering one very important but often overlooked allocation: namely, who has control over how a war is conducted once it's underway.

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I. THE NATURE OF THE PROBLEM

This issue obviously has importance now, as it has ever since the attacks of 9/11. Since that September, we have been in an authorized armed conflict, as reflected in the statute that Congress passed that month, known as the Authorization to Use Military Force—and it seems likely that we will be in that conflict for the foreseeable future. This means that a recurring issue concerns not so much what we often focus on in thinking about war powers—who gets to declare war or use force—as a distinct one: Who gets to decide *how* to fight a war once it begins—that is, with what weaponry, with what tactics, with what scope, who may be detained and how and where, with what protections, what kind of surveillance is permissible and when, what kind of interrogation, how long can it go on? All of these issues and more have been subject to constitutional contestation over the last nearly two decades, sometimes resulting in face-offs in the Supreme Court but much more often resulting in clashes between presidents and Congress. The reason is clear. Not only is this an authorized war with no clear end, but it's a very unusual one in which the enemy is not traditional (in fact, some people contest whether it's a war at all) and the home front is very much a potential battleground. The result is that the conduct of this war is quite likely to bump into areas in which Congress has not been at all shy about regulating, thereby setting the stage for potential clashes between what the commander in chief would like to do and what Congress has said he may do.

My goal in this lecture is not to resolve such dilemmas: The privilege of being a judge making public commentary is that I'm relieved of my usual paid obligation, which is to make a decision. Instead, I just want to introduce the problem to you and describe some of the history that underlies it. I think that we can find in that history some important lessons about what has enabled our system of separated powers to endure—but also some cautions about its fragility and its dependence on the wise decision-making of those who are entrusted with leading its component parts.

One last point before diving in: The particular separation-of-powers challenge that I'm going to be discussing is a fitting one to address in a lecture that remembers the great legacy of Chief Justice Harold Hallows. His service as chief here in Wisconsin

spanned 1968 to 1974. These were critical years in the history of the battle over constitutional war powers, as some of you may remember.

Although I won't be focusing on those tumultuous years, it was during that time that what had largely been a passive and compliant Congress (some would even say an absent one) began slowly but surely to challenge the chief executive in his conduct of the Vietnam War. In the course of those years, the first measures to prohibit the use of combat force were enacted, with respect first to Laos and then Cambodia and eventually all of Indochina. The War Powers Act was also passed in this period, which also saw these things: the great American historian Arthur Schlesinger declared that we were facing the specter of what he termed an imperial presidency; Richard Nixon's too-often-underappreciated successor, Gerald Ford, would find a way to bring the Vietnam War to an end while respecting congressional limits on his war powers; and Ford would also declare it his intention to convince the American people that his presidency would not be an imperial one.

My own interest in the subject traces back to a time before I was a judge and before I'd even gone into the government while already a law professor. Before all that, I was a young lawyer at the Office of Legal Counsel, which is a small office in the Department of Justice. While working there, I was exposed to issues of presidential power.

After I left that office, it popped back into the news, as I was teaching. Some of you may remember that, in the early years of the war on terrorism, a series of news reports came out about memos, issued by that office, that took a quite sweeping view of the president's power to conduct war. Those opinions suggested that the president alone had the power to decide how best to defeat the enemy and that Congress had no right to control how he exercised that power. Those ideas took the form of opinions suggesting that even the torture act was unconstitutional insofar as it got in the way of the president's power to carry out the interrogation tactics that he believed to be necessary.

I confess that as an academic I was surprised to hear that this could be the law or that history would bear out that premise. But I was also surprised to find very little scholarship addressing the questions of who *does* have the final say in how to conduct a war. And so I dived into the issue as an academic and, along with Marty Lederman, produced two very long (and I mean *very* long) articles reviewing that history and trying to question the sweeping propositions that my old office had taken.

Who gets to decide *how* to fight a war once it begins—that is, with what weaponry, with what tactics, with what scope, who may be detained and how and where, with what protections, what kind of surveillance is permissible and when, what kind of interrogation, how long can it go on?



But sometimes life catches up with you. It turned out in 2009 that I was appointed to lead that office as the acting head. This meant that the questions I had written about were no longer academic. I had to confront them myself—and, as you may guess, things can sometimes look a little more challenging when they confront you for real.

I knew that the issues were sure to arise. After all, those memos and the positions that the prior administration had taken about the president's power to conduct the war had been very much a subject of the campaign in 2008. I was now working on the transition for the new president, who in the campaign had made any number of commitments about how he would conduct the war differently.

This meant that questions might arise if the president chose to pursue one approach to interrogation or detention—say, closing the detention facilities at Guantanamo Bay—and Congress decided that it had a different view of how to conduct the war. What would the new president do? Would he back down, or would he, too, contend that Congress had no right to dictate the rules of engagement?

When I returned to being a professor, I was interested in the subject anew, but this time less to figure out what the right answer was and more to research what presidents have done in our history when they have clashed with Congress over how to conduct a war. Have they fought back? Have they backed down? Have they tried to find some way of accommodating? What has been the approach? Based on this research, this evening I want to explore the topic by working through three historical examples of commanders in chief who have confronted the dilemma and tried to address it.

II. THREE CASE STUDIES FROM HISTORY

Now you will forgive me because tonight I have cherry-picked my commanders in chief. This may make the matter seem a more optimistic tale than one could otherwise choose to tell. But I think it important to review these three: George Washington during the Revolution, Abraham Lincoln during the Civil War, and Franklin Delano Roosevelt during World War II. It's not just that they were extraordinary people who really, I think, understood the separation of powers in a way that very much suggested (as one person said of FDR) that it was stitched in their breast.

It also is that each of them confronted this challenge when there were real existential threats to the country. Indeed, during the Revolution, there was a question whether there would be a nation at all. Lincoln faced a time when the nation was threatening to be split in two. And of course World War II was the most serious threat to free societies that the world has ever known. So, to understate a point, it was not as if they were dealing with this challenge—of who gets to run a war—in a circumstance where the stakes were low. Yet when we review the history, each of these individuals managed to approach the question in a way that belies the idea that the commander in chief simply has absolute power or the simplistic notion that Congress alone just dictates the answer. So, with that setup, let me walk through what may amount to three stories about these commanders in chief.

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GEORGE WASHINGTON

We will start with George Washington. This is before we have a constitution and therefore before there truly is a United States of America as we know it now. But we did have a commander in chief: That was the title that the Congress of that time had given to George Washington. It is the summer of 1776. The first serious battle he faces—after a rather successful engagement with the British in Boston—is about to take place in New York. We are coming into the fall of 1776, and the British have amassed a huge naval force off the coast of Long Island. Washington is convinced that this is going to end badly for him. So he's decided that there is no percentage in trying to fight back: The aim is to get out of New York, and the question is, "How do you leave?"

One possibility is to do a clean retreat: No one gets hurt, and the British take over in New York. The other possibility is to burn New York to the ground on the way out, so that when the British arrive, there's nothing for them to claim. Washington debates it with his advisers, and he decides the clear and correct strategic option or tactical option is to burn New York to the ground.

But rather than just do that, he sends a letter to the president of the Continental Congress, who's off in Philadelphia, to ask whether he *can*. The letter says, in essence, this: "Ought we leave New York to be winters quarters for the enemy?" Now this is a room full of lawyers, so you will recognize that as a leading question.

Washington is fully expecting—I'm convinced—that the answer will be, "No, we ought not to leave New York as winter quarters for the enemy." It's not the answer he gets. John Hancock consults with his fellow members of the Continental Congress, and the very next day, they send a letter back to Washington, telling him that he is absolutely forbidden to burn New York to the ground. Washington is furious: He thinks this to be one of the capital errors of the Continental Congress. He doesn't see any good reason for this conclusion, but, by all accounts, he feels duty-bound to obey the order. So he does not burn New York.

Now, as some of you may know, fire does break out in New York, and a piece of New York does burn as Washington's troops are leaving. The British are convinced that Washington had to be behind it because any good general would actually

have burnt New York to the ground. But despite all the efforts of historians, over the centuries now, to demonstrate that Washington was behind it, the evidence is that he was not. “Providence,” as Washington put it, “or some good honest Fellow, has done more for us than we were disposed to do for ourselves”

In this first story, Washington is in the classic mode, in which he’s the aggressor. All the energy is in the executive: The executive is the one that wants to take the war to the enemy by using a harsh tactic, and Congress is the tempering force that restrains the commander in chief. The twist on the story is that, rather than the commander in chief’s acting like an emperor, he backs down and accommodates Congress’s wishes.

The story takes a different turn because not long after the standoff in New York, the Americans’ fortunes are going badly. They have one good thing: They had done pretty well in the earlier fight in Boston, before the British took New York, and during it, they had captured a British officer. But they have had a string of losses since New York, and now something even worse has happened: General Charles Lee of the Continental Army has been captured and is in British hands.

The Continental Congress thinks that this is a chance to raise the morale of the American people by making this a cause célèbre. The Congress stirs up a sense that the British are mistreating this captured American general. To keep pressing this point, it orders Washington as the commander in chief to mistreat the British officer whom he holds just as badly as it claims that General Charles Lee is being mistreated by the British.

Washington is horrified. This goes against all his notions of decency and fair play. He also thinks that it’s really stupid: It means that any of his own troops who are captured will be mistreated. He further believes that—in the eyes of the world whose support the Americans are trying to get—this will look really bad. Nonetheless, he complies. How so? Archibald Campbell, the British officer being held, finds himself no longer getting the 20 servants he was accorded as a captured enemy officer. He no longer gets to roam freely in Reading, Massachusetts, in a six-mile radius as he previously had. He finds himself put in close custody, in what he describes as a dungeon. We know that Archibald Campbell thought it to be a dungeon because he wrote a letter to George Washington, saying in essence, “You’re a dictator;

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you could do something about this. This is no way to treat me.” My favorite part of the letter: Archibald Campbell says (again, in essence), “I don’t even have a single servant.”

So Washington gets this letter, and you might think that he would just throw it away. Instead, remarkably, Washington writes back to our Archibald Campbell, and the thrust of his message is, “I do not have the powers you suppose; it’s neither in my authority nor is it my inclination to disobey the orders of the Congress.” But, at the same time, Washington’s on the side, writing to members of the Continental Congress and telling them that there is no reason to be doing this. He says, more or less: “You’ve told me to retaliate against Campbell; it’s not clear the British are actually treating General Charles Lee as badly as you say; so even under your own order, it’s not clear that I have to be treating him this way.”

And Washington keeps writing to the Congress even as he’s telling Campbell something like this: “My hands are tied; I must do what my Congress tells me.” Over the course of many months, the Americans work out a negotiation. Eventually John Hancock writes back to Washington and says, approximately, “Look—we never meant for you to treat him any worse than Lee is being treated; if you tell me that Lee is not being mistreated by the British, you can treat this guy fine, too.” Then, eventually, Washington convinces the Continental Congress to allow him to do a prisoner swap. Lee is let go; British soldiers are released; and the controversy passes.

The interesting thing about this is that Washington is in a very unfamiliar guise. The commander in chief is not the aggressor. He’s the tempering force. It’s Congress that wants to pursue hard war; Congress is the aggressor pushing the war on the chief executive.

Here, then, is the first thing to see *early* in our history (in fact, all this is some of the backdrop to the later Constitution): The model is a commander in chief who was quite overtly respectful of the idea that he was supposed to follow the orders of the Congress. The Framers have an idea from their own lived experience that it’s not inevitable for the president to be the aggressor and Congress to be the check. It’s just as possible for Congress to want to be the aggressor and the president to be the check. They also know from their experience that the actual lines of authority are somewhat murky.

ABRAHAM LINCOLN

Let's fast-forward quite far, into the Civil War— the next great moment of existential threat to the United States. The country has split in two. Abraham Lincoln is the president and immediately is confronted by the attack on Fort Sumter. Congress is away. Now you might suppose he thinks, "That's lucky. They can't check me." But the flip side of that is that Congress also can't *empower* Lincoln—and when one reads the Constitution, it's fairly clear there was some contemplation that the president would have to be empowered in order to wage a full-scale war.

What is Lincoln to do during this period? Here's the first issue he confronts: When do I call Congress back? In those days, Congress took an extremely long recess. The attack is in April, so Lincoln has months and months ahead of him with no Congress. Some people tell him: Call the legislators back right away. They could get here in a couple of weeks. Do a little bit if you must in the interim, but then call them back and get them to authorize things.

As it happens, Lincoln settles on July for the legislators' return. That gives him 80 days with no Congress in place. In those 80 days, he does an extraordinary amount on his own. No president has ever exercised war powers on his own the way Lincoln did during that period. He suspends habeas corpus, roughly speaking from Washington, D.C., all the way up to Maine. He authorizes huge amounts of forces to be called up. He institutes a blockade on the southern ports—which is, by all understanding at the time, an act of war. For much of this, there is no clear authority.

Why did he wait 80 days? I'm partial to this view: Lincoln waited that length of time in part because it was absolutely critical to him that Congress ratify what he had done in Congress's absence. That means he wants a Congress that has come back ready to ratify. In this he faces a problem because many of the border states had no legislators who could be seated: the representatives' terms had expired, and these states hadn't had the new elections for the next term. He picked the 80-day mark because that was the earliest period by which, under its laws, the border state about which he cared most—Kentucky—could select a new slate of members to sit in the Congress that Lincoln hoped would ratify all he had done. And in that period of time, Lincoln is monitoring very closely the coming elections in Kentucky, to make sure that he gets a slate that's going to be on board for his program.

So when Congress comes back, he's ready for it to ratify. The very first thing proposed at this session is a bill to ratify everything Lincoln had done in those 80 days. Charles Sumner tells Lincoln that it should take a week—no problem. In fact, that session goes on for nearly five weeks, and it's not until the very last day that Lincoln gets the authorization with ratification for what he had done.

As much as Lincoln or Sumner thought it would be compliant, Congress turns out to be very difficult to get on board. Its members have all kinds of different ideas about what should be done and how to do it. One of the big debates to break out was whether they can even debate things other than the war during this session; this completely exasperates Lincoln. Again, though, Congress does get on board, and that Kentucky delegation in particular proves supportive of Lincoln.

All this is worth relating because there's a clash coming for Lincoln: It's over how to fight the war, and it concerns particularly what to do about the enslaved people and how they'll be treated once they're captured.

By 1862, the Congress now is largely in the control of the radical Republicans. They want to pursue an approach that they call "hard war," and they're especially pushing for emancipation. Lincoln was famously reluctant to go down that road. Here is the way it first comes into view for Lincoln, most dramatically: Congress starts debating a statute, known as the Second Confiscation Act, which will order him to emancipate the slaves when they're taken in the South. The theory is that this is a wartime measure, so Congress should be able to decide how what's known as contraband—that's what they were calling the enslaved people in this context—should be treated.

This is a direct threat to the powers of the commander in chief: Congress is now going to tell him directly how to treat the enemy's "property," against his apparent wishes. Just to give you enough flavor of this debate, a huge fight breaks out in the Senate, and one of Lincoln's closest friends in the Senate, Orville Browning from Illinois, takes the view that this has to be unconstitutional. No way can Congress tell the commander in chief how to treat the enemy during an ongoing war. When Browning takes that view, he's confronted by a senator from Michigan, Jacob Howard. I want to read you a little bit of their back-and-forth because I think it puts into sharp relief the nature of the constitutional debate that I'm describing.

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Jacob Howard says that he thinks it's absurd to say that Congress has no power to tell a president how to fight a war:

[S]hould the President, as Commander in chief, undertake an absurd and impracticable expedition against the enemy, one plainly destructive of the national interests and leading to irretrievable disaster, or should he basely refuse to undertake one, or, having undertaken it, insist upon retreating before the enemy, and giving over the war to the manifest prejudice of the country, or should he treacherously enter into terms of capitulation with the manifest intent to give the enemy an advantage, would the Senator rise in his seat here and insist that Congress has no power to interpose by legislation and prevent the folly and the crime?

Howard said that he could not imagine how Senator Browning could be willing to follow the logic of this position and “exclaim, ‘the country is without remedy; Congress is powerless; the Constitution furnishes no means to arrest the approaching ruin; we must not travel out of the Constitution; and we must submit our necks to the yoke. [They really spoke quite well back then, didn't they?] It is the will of the Commander in chief, and that, and that only, in such a case is the Constitution.’”

Orville Browning praised his adversary for “meet[ing] the question in the most direct and manly terms”—they didn't always speak perfectly—but said that he did not agree:

[W]hen the Army is raised, when the Army is supported, when it is armed, when we are engaged in war and, it is in the field marshaled for strife, I deny that Congress, any more than the humblest individual in the Republic, has any power to say to the President, do this or do that; march here or march there; attack that town or attack this town; advance to-day and retreat to-morrow; give up a city to be sacked and burned; shoot your prisoners.

So the debate ends. Browning loses in the Senate: The Second Confiscation Act passes, including a clause that, in effect, orders the commander in chief to issue an Emancipation Proclamation.

Browning makes one last-ditch effort to try and convince Lincoln not to do it. He meets with Lincoln, in the president's office, on July 13, 1862.



Browning makes the case that, as he puts it, either you sign this bill and the abolitionists run the war, or you veto the bill and you run the war. That's your choice. Browning leaves his meeting with Lincoln, who apparently didn't say much, convinced that Lincoln has agreed with him. What he doesn't know is that the very day he meets with Lincoln is when Lincoln does his famous carriage ride with the secretary of the navy, Gideon Welles, which is the first time Lincoln tells anyone that he's planning on issuing his own Emancipation Proclamation.

What's happened? What Browning thinks to be an intrusion on the president's authority, as commander in chief, Lincoln begins to see as a permission slip. He starts to see, "Maybe Congress is with me; maybe all my worries that I wouldn't have the country go along with me if I pursue this path were wrong. Maybe the politics now are right." And in that moment, I think (these of course are all my words), he thinks very much the way Washington thought about his powers: Rather than seeing it as a zero-sum game—"either Congress has it, or I have it"—he begins to see it as a potentially shared enterprise in which the aim is to get the timing right to do something that can have support. ►

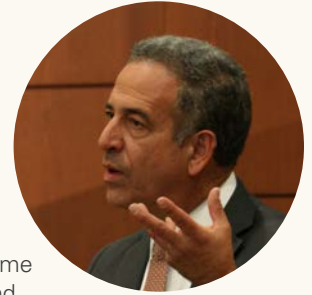
What Browning thinks to be an intrusion on the president's authority, as commander in chief, Lincoln begins to see as a permission slip.



REACTION

CONGRESS'S MINIMUM DUTIES IN THE WAR-POWERS SPHERE

by Russ Feingold



I am pleased to respond to the excellent Hallows Lecture given by Judge David Barron at Marquette University Law School. I have had occasion to reflect on this general topic since my time as an elected official—first during a wonderful year I spent teaching at the Law School in 2011 and, more recently, while visiting at Yale Law School, where I had occasion to be on a panel with Judge Barron.

That panel—which included a number of people besides the judge and me—unanimously noted the decline in the balance between executive and congressional war powers in the past few decades. Whether this is characterized in terms of executive aggrandizement or congressional abdication or acquiescence, few believe that the current balance reflects the Founders' will or the needed checks and balances on presidential power in this sphere. This trend has been well-documented, particularly by such scholars as Louis Fisher and Michael Glennon. Judge Barron is able skillfully to cite three examples of the tension between the two branches and to explain that, in the end of each, a resolution was achieved that at least in some form reflected such checks and balances. However, in each instance, the commander in chief or president was confronted and challenged by a clear congressional position that forced him to consider the role of Congress in war making or in the conduct of a war once initiated.

Unfortunately it has become too politically attractive for members of Congress not to insist on their duty, under Article I of the Constitution, of engaging with issues such as when a military action should be commenced or terminated. It is usually easier not to have a vote on record and then to see how things go—i.e., to criticize interventions if they go awry as the death tolls of American troops mount or to appear at “welcome home” parades or ceremonies when things go well. This has been the problem with the failure of Congress under three different presidents to challenge executive interpretations of the 2001 Authorization of the Use of Military Force (AUMF) intended to take on those who attacked us on 9/11. The result is a lack of public debate about whether the expanded military interventions should be undertaken in Yemen, or Syria, or remote regions of Africa against groups such as ISIS or Boko Haram, which didn't even exist in 2001, or whether the AUMF allows expanded domestic surveillance despite the clear limitations in the Foreign Intelligence Surveillance Act. Congress has been unable to come together to protect its constitutional role in defining the scope and duration of an intervention.

There are a few recent hopeful signs, as bipartisan coalitions in both houses have at least begun to consider repealing or replacing the AUMF before the current administration uses it to broaden our role in the war in Yemen or to justify supporting the Myanmar regime's actions against its Islamic Rohingya minority. Efforts by such members as Senator Tim Kaine, Senator Bob Corker, and Representative Barbara Lee have at least been advanced at the committee level. The leadership of both houses, however, has thwarted real debate on these initiatives, giving the administration free rein. In fact, top officials of President Donald Trump's administration have asserted completely unfettered executive power in this context under the president's Article II commander in chief powers.

At a minimum, both houses of Congress should hold regularly scheduled public debate during the duration of a military intervention. Perhaps this could be required by the rules of each house. A model for this might be the kind of very focused, televised Senate debate that was held in January 1991 when President George H. W. Bush sought authorization for what has become known as the first Gulf War. Whether Bush would have intervened even if he had lost the vote is a fair consideration. Yet, at least, Congress went on record in a reasoned, deliberative way that all Americans could follow and evaluate. Sadly, nothing approaching that kind of debate preceded the grossly politically motivated and rushed decision in the fall of 2002 to authorize the second Iraq War. The subsequent exposure of the false premises of that war only underscores the need for more coherent, bipartisan congressional consideration of such matters.

This is why, for my money, the crucial comment in Judge Barron's lecture is this: “At some basic level, in a democratic system of separated powers, the people's ability to know what is being decided and why it is being decided that way is the most important check on the abuse of power that there is.”

This protection cannot be achieved without consistent, open, and coherent congressional debate on whether and how military interventions, once commenced, should be conducted and concluded. As Judge Barron so well illustrated, this is what General George Washington, President Abraham Lincoln, and President Franklin Delano Roosevelt all had to confront when each wanted to take crucial military action in the name of the American people. No president should be given any easier treatment.

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FRANKLIN DELANO ROOSEVELT

One last example: It involves Franklin Delano Roosevelt (FDR) during World War II. The year is 1942, so we're into the actual fighting, and the war is not going particularly well. Two different events are going to come together, with the Supreme Court at the fulcrum of them. They're going to put these issues of who controls the conduct of war right into the lap of the Supreme Court, in a way that I think to be the only time in our history it's been so directly presented (maybe with the exception of the *Steel Seizure Case*). The two things are happening simultaneously.

That summer a case comes to the Supreme Court concerning eight Nazi saboteurs. These are handpicked persons, each with American ties, chosen by Hitler, and they land in U-boats on the American coast—half of them land off the coast of Long Island and half of them land in Florida. They come in their uniforms, but they bury these in the sand upon arrival. They put on their street clothes and are supposed to fade into American society and wreak havoc. They're going to blow up train stations and bridges; they are supposed to target Jewish department stores and blow them up, too.

They are, in effect, the terrorists of their day; they also turn out to be a relatively hapless crew. Because they had American ties, some also had American girlfriends, whom they immediately start looking up when they get to the United States. Lo and behold, they find themselves captured by the FBI fairly quickly.

Roosevelt has no use for their being tried in civilian courts. He views the saboteurs as an invading enemy force, and they must be tried by the military, in his judgment. So they're transferred from the FBI into military custody, to be tried in a military commission constructed out of rules that the president will establish. In fact, the trial of those Nazi saboteurs occurred in a room in the suite of offices in which I worked on the fifth floor of the Justice Department. So the history was quite resonant while I was working there.

The important thing about this case is that it tees up a question for the justices in the following way. The Supreme Court holds an emergency session to hear the petition of the saboteurs as to whether they can be tried in these military courts. In the course of those proceedings, it becomes clear the Court thinks, "Yes, they can be tried in military courts."



There's no reason they have to be held in civilian proceedings or tried in civilian proceedings."

But there is one issue about which the Court is a bit worried: What procedures can be used to try the saboteurs? The Court worries because the statutes creating the authority of the president to establish military tribunals set forth certain rules that you have to apply, and a particularly key one is that to impose the death penalty requires a unanimous jury. By contrast, the rules that the president set up for this military commission allow the imposition of the death penalty with just a two-thirds vote.

The justices start to ask some questions of the attorney general, along the lines of, "How does the president have the right to set these rules?" The attorney general makes a pass at this, to the effect of encouraging the Court not to worry about it so much. And the justices come back and say, in essence, "No, we're kind of worried about it. What do you think about this seeming conflict?" To this the attorney general says, roughly, "Well, the president is not bound by a statute in the midst of war." In reading the transcript, one can practically see Chief Justice Harlan Fiske Stone leap forward to say, more or less, "Come again—the president's not bound by a statute?" Thereupon the attorney general says, in essence, "Well, I didn't mean to say that—I mean, you know, I'm sure he's kind of bound by statute." And *thereupon* Justice Felix Frankfurter leaps out of his chair, to this effect: "What do you mean you're saying that he can be controlled by Congress?" At this point Francis Biddle, the attorney general, basically sounds like if he could just leave, he'd be happy to do so. He manages to get through the proceeding without giving a clear answer.

Within days, the Supreme Court issues its judgment. It's a brief order, denying the petition for habeas and saying, in essence, "We'll get back to you with our reasoning in October." The reason that this is so important is what happens between that judgment in July and the opinion in October. During that time, a different kind of controversy concerning the president's war powers is really coming to a head. This one has to do with FDR's power to run the economy as the commander in chief, and it arises because inflation is spiraling out of control.

Roosevelt thought that if there was any threat to the war effort that was greater than the military threat the Nazis and Japanese posed, it was inflation. He believed that we really could lose the war if we could not keep inflation in check, both because of the cost of goods to run the war and because of what inflation would do to the morale of the

American people. So he's very intent on trying to cap prices—and in particular farm prices. But he has a problem: There's a statute that seems to prevent him from capping farm prices.

Roosevelt discusses with his advisers all spring what to do about this cap. One possibility is he simply says, "You know what? I'm the commander in chief; this is absolutely vital. We're living in an era of total war. If I can't mobilize the people, we can't successfully fight the war. So I will just assert extraordinary powers as commander in chief to cap prices in order to save the country."

A lot of advisers are horrified by this idea, think it's a very dangerous notion, and there's a debate in the executive branch back and forth—what should the president do? He approaches Congress to see if it'll give him some authority. "No, we won't give you any authority," is essentially the response. So what's Roosevelt to do? Well, in classic FDR fashion, he makes an announcement, to this effect: "I'm going to give a radio address on Labor Day. You'll know then what I'm going to do."

So everybody's poised for this Labor Day address, but no one knows what he's going to do. Is he going to issue the executive order? Many newspapers seem to think so. Roosevelt knows he is not going to issue an executive order.

Instead, Roosevelt gives an address and says, essentially, "I am going to give you one month to give me the power I've requested. If you don't, I will have to do what I can do under the statutes and the Constitution." No one knows quite what to do about it. But what happens—and this was Roosevelt's bet—is that members of Congress start jumping on the floor, saying (approximately), "We have to give him the authority, or we will have a dictator." Quite clever on the president's part.

And, interestingly, given what his lawyers have advised him, Roosevelt knows at the same time—just as did Washington, way back when he read those orders from the Continental Congress and saw that there was some give in it—more than he lets on. Just as Lincoln saw Congress's Second Confiscation Act as potentially empowering him, Roosevelt's lawyers say, in essence, "You know what? Congress passed a statute recently that allows you to ration goods, and that statute allows you to put conditions on the rations. You could put price conditions on the rations, and in effect through your rationing program you'd be able to get a cap on farm prices."

Roosevelt knows this—indeed, there is a whole elaborate legal opinion he's going to rely on if

In reading the transcript, one can practically see Chief Justice Harlan Fiske Stone leap forward to say, more or less, "Come again—the president's not bound by a statute?"

necessary—but he doesn't want to disclose it. He wants to scare members of Congress that they might have a dictator on their hands in hopes that instead they'll actually authorize him to proceed.

So that scene is played out on Labor Day, but now we're back to the Supreme Court because—you will remember—the Court promised to return with its opinion in October in the case of the saboteurs. The justices haven't written it yet. But they have just witnessed this extraordinary showdown between Roosevelt, potentially claiming powers to control the entire economy, and the Congress.

Here's the end of the story. Chief Justice Stone is working on the opinion, and he sends around a draft to his colleagues. In modern parlance, he says, "Houston, we have a problem." The problem is that he's having trouble writing the opinion, and the reason for this is that the statutes requiring certain procedures seem to conflict with the procedures that the president has said he's going to use in the commissions.

Stone tells his colleagues, in essence, "Well, maybe we could just overlook it, but if we do that and then the saboteurs who are not executed come and challenge the process, it's going to be evident we overlooked a legal problem. We blessed the process, and now six people have died." The other possibility, he says, is not so good either. To paraphrase the chief justice: "I can't quite figure out how to reconcile this statute and these rules."

Robert Jackson, who is a justice on the Court at the time, sends a memo around. He says, more or less, "I have the perfect solution. Just say that it would be unconstitutional for Congress to dictate to the president as to the rules he has to apply to an invading enemy force and trying them for a war crime. And because that would likely be unconstitutional, we can't read the statute to prohibit the president from choosing his own rules."

Well, other justices are horrified. In particular, Hugo Black's law clerk writes him a memo, saying, approximately, "You cannot sign onto this, boss, because, if you do, it's a green light for Roosevelt to do what he was just threatening to do in taking over the economy. If we say the president's not bound by statute—that he has control even when Congress has told him not to fight a war a certain way—we're opening up the floodgates in an era of total war. You can't go that route." So Black informs the Court of his displeasure with Jackson's solution.

I want to close this story with the way this standoff gets resolved in the Court. The resolution

Here's the end of the story. Chief Justice Stone is working on the opinion, and he sends around a draft to his colleagues. In modern parlance, he says, "Houston, we have a problem."

to this problem takes the form of a very unusual memo that Felix Frankfurter prepares. You know it's unusual because it's titled "FF's Soliloquy." I clerked at the Court only for a year, but I never saw a memo that was titled a soliloquy. Frankfurter says, in essence, "I know the men who are fighting in the fields right now. They were my students when I taught them in law school." Here's part of what Frankfurter writes (in the actual words):

It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result. I know some of these men very, very intimately. I think I know what they would deem to be the governing canons of constitutional adjudication in a case like this. And I almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commissions doesn't apply to this case. Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes—abstract constitutional discussions. Do we have to have another Lincoln-Taney row when everybody is agreed and in this particular case the constitutional questions aren't reached. Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime."

One might misread Frankfurter's point—that is, one might mistake him to be saying that in times of war the laws fall silent. But if one reads this closely, the precondition for his saying "Let's not have a big fight if we ultimately agree" is his having said this (I've returned to paraphrasing): "All of us

REACTION

HOW POLITICS INFLUENCE PRESIDENTIAL WAR POWER—AND THE OTHER WAY AROUND

by Julia R. Azari



David Barron’s Hallows Lecture on war-powers clashes between Congress and the president highlights a number of important issues. As the judge rightly notes in his conclusion, legal debates about wartime authority reflect not just textual analysis but also real political, military, and human stakes. This response elaborates on the political implications of these considerations. Friction between branches over the conduct of an ongoing war is shaped by public opinion, partisan conflict, and prevailing ideas of the time. As wars continue, the political dynamics around them often shift, with implications for the roles of the president and Congress. The contours of these struggles often extend beyond the immediate circumstances.

Although political actors throughout history have perceived their wartime situations as new and unique (as Barron illustrates), there does seem to be something distinct about the current state of undeclared, indefinitely authorized (it would appear) wars against non-traditional adversaries. Race, national security, and presidential power have intersected before—consider Franklin Roosevelt’s executive order 9066, ordering the removal and internment of persons of Japanese ancestry. Affirmed by the Supreme Court as a constitutional national security measure, the policy also stood on the shoulders of decades of anti-Asian sentiment, some of it codified in immigration law. Here in 2018, the *Korematsu* decision is fresh on observers’ minds because of the Court’s decision to uphold the “travel ban” of President Donald Trump’s administration against six majority-Muslim nations. The crux of the Court’s decision rests on presidential national security authority. Yet the politics of the policy—Trump’s campaign rhetoric about Muslims and the role of anti-Muslim sentiment in his nomination and election—are very much rooted in a “war on terror” that has lasted for almost two decades. The backdrop of an ongoing war against an ill-defined adversary may not have changed the extent of presidential power in the realm of national security. But it has changed the electoral opportunities that determine who controls those executive powers and on what terms.

The second consideration is that conflicts tend to become less popular over time. We don’t have modern polling to assess what President Abraham Lincoln was facing, but we do know that George McClellan, running against Lincoln on an anti-war platform in 1864, won nearly 45 percent of the vote. In the face of flagging support, the war needed purpose. One of Lincoln’s most significant uses of war powers—the Emancipation Proclamation, which Barron discusses—also aligned with a shift to imbue the war with moral significance and to change its purpose from saving the union to ending slavery. Recent presidents have faced even more-challenging political conditions. By the end of 2004, a Gallup poll reported half of Americans as thinking that the Iraq War was a mistake. Similar attitudes about the Vietnam War reached that benchmark during the election year of 1968. Unpopular conflicts alter the political incentives for both presidents and Congress, encouraging them to repudiate the conflict if possible. The structure of each branch makes for different ways of addressing these dynamics. Presidents obviously have more options to undertake covert action, out of the public eye, to manage a war that has become unpopular. Congress faces collective-action problems in moving forward during an ongoing war (or really at any other time) but can sometimes pursue solutions aimed at altering the war powers framework.

This leads us to the third point about ongoing conflict and the political environment: After a lengthy and controversial war, members of Congress are sometimes inclined to blame presidential overreach and take action to correct it. Two examples of this are the Bricker amendment to the Constitution, which was unsuccessful in Congress, and the War Powers Resolution, which was passed over President Richard Nixon’s veto in 1973 and became law. The Bricker amendment, which would have altered presidential treaty-making power in the wake of the Korean War, addressed the end of conflicts, while the War Powers Resolution is primarily aimed at controlling how armed conflict begins. But both emerged in the context of a presidentially driven war that had become politically fraught. Both efforts arose from existing political situations as well—tensions within the post-World War II Republican Party over isolationism and international involvement, and clashes between Nixon and Congress in the 1970s. The mixture of political context and lengthy, unpopular wars can sometimes spark change that alters the war powers dynamic for years to come.

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REACTION

THE WAR-POWERS DYNAMIC TODAY, AS SEEN IN GUANTANAMO

by Benjamin Wittes



I am broadly sympathetic to Judge David Barron's contention that history does not support either "the idea that the commander in chief simply has absolute power [over the conduct of war] or the simplistic notion that Congress alone dictates the answer." The relationship is clearly more iterative and textured than that. I also am broadly sympathetic to his point that it is wrong to think of the presidency always as the aggressor in disputes over war powers and Congress as always the restraining branch.

It is not just history that refutes these arguments. To illustrate Judge Barron's points, we need not go back to World War II, much less to Abraham Lincoln or to George Washington. We may look simply at the interactions between Congress and President Barack Obama over the detention facility at Guantanamo Bay.

President Obama came into office wanting deeply to "close Guantanamo." That is, he wanted to strike a less "aggressive" posture on overseas counterterrorism than had the Bush administration. On this ambition, Congress—as Judge Barron reports of the Continental Congress with respect to detainees during the Revolutionary War—put its foot down. Congress disallowed transfers of Guantanamo detainees to the United States altogether, including for law enforcement purposes. It also put restrictions on the commander in chief's ability to transfer people from Guantanamo to other countries. In other words, whereas President Franklin Roosevelt insisted on the use of a military commission to try the Nazi saboteurs, Congress effectively forced the use of military commissions on President Obama with respect to September 11. And it refused to consider alternative detention sites for the dwindling number of detainees the military held.

While the president tried throughout his tenure to reduce the detainee population of Guantanamo and maintained a public commitment to shuttering it, he respected Congress's will—despite the evident embarrassment it caused him on a major policy priority of his entry into office. Sometimes, as Judge Barron argues, Congress is the aggressor and the president is the restraint.

Guantanamo is also a good example of Judge Barron's other large point: that the power to define the rules is, in fact, a shared one. And it's not just shared between the president and Congress. It's shared with the judiciary, too. Look today at the rules for detention at Guantanamo, and you'll see a remarkable tapestry of law and regulation. The basic substantive law of detention was written by the U.S. Court of Appeals for the D.C. Circuit in a string of cases following the Supreme Court's 2008 decision in *Boumediene v. Bush*. Congress also wrote some of those rules into law and tinkered with a few of them in doing so. For example, the basic authority to detain those who are "part of or substantially supporting" Al Qaeda, the Taliban, or their "associated forces" was written into the 2012 National Defense Authorization Act. And Congress also clarified, following a D.C. Circuit decision suggesting otherwise, that the law of armed conflict does, in fact, inflect detention authority. All of these rules were produced in dialogue with the executive branch, which was both litigant in the post-*Boumediene* cases and active participant in the legislative processes at issue. And other rules governing detentions, specifically those related to the discretionary review of individual detentions, are a creature of the military's implementation of a presidential executive order.

Even before *Boumediene*, near the height of the Bush administration's executive-power enthusiasm, the power to write the rules at Guantanamo was still shared. *Boumediene* itself rejected the adequacy of an earlier iteration of judicial review over Guantanamo, one which Congress had crafted and which sought to give the D.C. Circuit power to review detention judgments from military review panels at the base. The executive branch did not resist the idea of the legislature's writing rules of the conduct of war or of the judiciary's making military detention decisions. Indeed, President George W. Bush signed it into law, and the solicitor general argued for its integrity before the Supreme Court. You actually have to go back to 2004, to the aftermath of September 11, before the power to write the rules over Guantanamo—whatever the rhetoric may have been—was not acknowledged by both Congress and the executive to be a shared one.

Constitutional scholars tend to debate separation of powers issues in the language of high principle. But the reality of these disputes is more political in character. If a working majority in Congress really cares about an issue, it will find a way to affect the rules—and the executive branch will find a way to accommodate Congress's intervention. For it will have no choice. Conversely, in other circumstances, Congress will often not assert itself or will assert itself ineffectively—and the executive, acting with unity and dispatch, will then run roughshod over the legislature or accept its delegation. These situations both mask the degree to which power is, in fact, shared—a reality that lives in the details, both historically and in contemporary war making.

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agree on the lawfulness of this procedure. We have different ways of understanding how to get there—some think it's constitutional powers, some think it's statutory authority—and it's critical to bypass a resolution of that high-stakes question of who has ultimate authority and leave it for another day.”

In that sense, what Frankfurter's doing there is much like what Washington was trying to do in his time and Lincoln in his day: to find some way of resolving this short of an ultimate bald claim by the president that these questions are for the president alone.

III. LESSONS AND CHALLENGES

So we have reviewed these three case studies of the commander in chief's clashing with Congress over how to wage war. What lessons might we draw?

The first is that it is a mistake to think of the battle between the political branches as one in which the president is always the aggressor in war and Congress is always the tempering force. Sometimes that is the case. Other times it is not. And the system of separated powers must be understood as a system that allocates power for both types of cases.

The second is that, if there is anything old about this debate, it is that when these clashes occur, defenders of presidential prerogative usually assert that the situation the president is confronting in the current conflict is totally new and, thus, that old notions of the proper allocation of power are necessarily quaint. That was said during the Cold War, in light of the advent of atomic weaponry. It has been said during the war on terror, due to the non-state nature of the enemy and the unusual threat to the homeland that is presented. But it was, of course, possible to say it also during Lincoln's presidency, when the country faced a civil war. Or during World War II, when the era of total war arrived. This reality—the availability of the argument that a certain type of warfare is totally new and thus that the rules allocating power among the branches must change—is itself a very old one, as it is important to keep in mind. It suggests to me that history has much to offer in thinking about whether a dramatic shift in the rules is really as necessary as many may contend in the moment at hand.

Third, are there really any rules at all? This is perhaps the hardest question. The text of the Constitution is notable for how little it says about who gets to decide how to conduct a war. And our

history—as suggested by even the examples I have given—is hardly clear in describing the rules of the road. Justice Jackson—in ruling against President Harry Truman in the *Steel Seizure Case*—famously remarked on just how inscrutable the history can be on these points for one willing to delve deeply into it. But still I am struck by this sense, in each of the dilemmas I have described for you: how much the participants in them believed that there were rules to be respected, and that there was a framework of ordered relations between the branches counseling a measure of caution and prudence. They felt some need to find an accommodation that would permit the dilemma to be resolved in a way that might avoid a true clash. However murky the rules may be, I find it hard to read the history as indicating that either the president or Congress is free to proceed without accounting for the views of the other.

Fourth, there is one other lurking—and especially challenging—point. The history I have described is known to us. It is visible. And thus it permits us to assess how decisions were made, why they were made, and that they were made. At some basic level, in a democratic system of separated powers, the people's ability to know what is being decided and why it is being decided that way is the most important check on the abuse of power that there is. But what if war making takes a turn that makes knowledge of it much less visible, much less knowable? What if technology develops in ways that make this basic check one that is much less of a check than it has been? That is a potentially great threat to our system of checks and balances and a challenge that—as old as this story is—is not one that the country has faced in the way that over time it might.

Finally, to end on a more optimistic note, I am struck by the fact that, for all the change in the system of separated powers, and for all the undeniable shift toward the power of the presidency in war that has occurred over that time, there is still a recognizable system of checks and balances in place. It is evidence of the great achievement of the Framers and their successors across the generations that we can still recognize such a system to be our own so long after the Constitution was drawn up in Philadelphia. But it is—of necessity—a fragile achievement. Knowing what those entrusted with trying to honor it have done in clashes over the conduct of war is vital to ensuring that the achievement does not itself become mere history. ■

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