

WAR POWERS OF THE PRESIDENT


MARK ROTENBERG'S LAW SCHOOL CLASS ON "CONSTITUTIONAL POWERS OF THE PRESIDENCY"

FEBRUARY 26, 1991

- LONG-STANDING DEBATE ABOUT THE DIVISION OF WAR-MAKING POWERS BETWEEN CONGRESS AND THE PRESIDENT.

- HAVING SERVED IN BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES, I LEARNED ABOUT THE STRENGTHS AND WEAKNESSES OF EACH. WHEN I WAS IN THE SENATE, I OFTEN LOOKED DOWN PENNSYLVANIA AVENUE TOWARD THE WHITE HOUSE AND WONDERED WHY THEY HAD ALL THE POWER. THEN I WENT TO THE WHITE HOUSE AS VICE PRESIDENT. VERY SOON, I BEGAN TO LOOK UP PENNSYLVANIA AVENUE TOWARD THE CAPITOL, AND I WONDERED WHY THEY HAD ALL THE POWER.

- THE JOB OF GOVERNING IN OUR POLITICAL SYSTEM CAUSES MANY FRUSTRATIONS. THESE FRUSTRATIONS ARE INEVITABLE — AND DESIRABLE. OUR NATION'S FOUNDERS CLEARLY INTENDED THIS WITH A CONSTITUTION FEATURING A SEPARATION OF POWERS AND A SYSTEM OF CHECKS AND BALANCES.



- THE FOUNDERS HAD A PESSIMISTIC VIEW OF HUMAN NATURE. IN EFFECT, THEY SAID: OUR LEADERS CANNOT BE TRUSTED BY THEMSELVES TO HAVE THE VIRTUE TO EXERCISE POWER RESPONSIBLY.

- JAMES MADISON (IN FEDERALIST PAPER NO. 51):
“... THE GREAT SECURITY AGAINST A GRADUAL CONCENTRATION OF THE SEVERAL POWERS IN THE SAME DEPARTMENT CONSISTS IN GIVING THOSE WHO ADMINISTER EACH DEPARTMENT THE NECESSARY CONSTITUTIONAL MEANS AND PERSONAL MOTIVES TO RESIST ENCROACHMENT OF THE OTHERS. THE PROVISION FOR DEFENSE MUST IN THIS, AS IN ALL OTHER CASES, BE MADE COMMENSURATE TO THE DANGER OF ATTACK. AMBITION MUST BE MADE TO COUNTERACT AMBITION. THE INTERESTS

OF THE MAN MUST BE CONNECTED WITH THE
CONSTITUTIONAL RIGHT OF PLACE.

"FOR WHAT IS GOVERNMENT ITSELF, BUT THE
GREATEST OF ALL REFLECTIONS OF HUMAN NATURE? IF
MEN WERE ANGELS, NO GOVERNMENT WOULD BE
NECESSARY. IF ANGELS WERE TO GOVERN MEN, NEITHER
EXTERNAL NOR INTERNAL CONTROLS ON GOVERNMENT
WOULD BE NECESSARY. [BUT] IN FRAMING A GOVERNMENT
WHICH IS TO BE ADMINISTERED BY MEN OVER MEN, THE
GREAT DIFFICULTY LIES IN THIS: YOU MUST FIRST ENABLE
THE GOVERNMENT TO CONTROL THE GOVERNED; AND IN THE
NEXT PLACE OBLIGE IT TO CONTROL ITSELF. A DEPENDENCE
ON THE PEOPLE IS, NO DOUBT, THE PRIMARY CONTROL OF
GOVERNMENT. BUT EXPERIENCE HAS TAUGHT MANKIND THE
NECESSITY OF AUXILIARY PRECAUTIONS."

WAR POWERS

- IN ARTICLE I, SECTION 8, THE CONSTITUTION
CLEARLY GRANTS TO CONGRESS THE EXCLUSIVE POWER TO
DECLARE WAR. SCHOLARS ARE UNANIMOUS ON THIS
POINT: THE FRAMERS OF THE CONSTITUTION, THOUGH THEY
DISAGREED ON MANY THINGS, WERE UNITED ABOUT
KEEPING THE POWER TO MAKE WAR WITHIN THE CONGRESS.

- IN FEDERALIST PAPER NO. 69, ALEXANDER HAMILTON WROTE: "THE PRESIDENT IS TO BE THE COMMANDER AND CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES. IN THIS RESPECT, HIS AUTHORITY WOULD BE NOMINALLY THE SAME AS THAT OF THE KING OF GREAT BRITAIN, BUT IN SUBSTANCE MUCH INFERIOR TO IT. IT WOULD AMOUNT TO NOTHING MORE THAN THE SUPREME COMMAND AND DIRECTION OF THE LAND AND NAVAL FORCES . . . ; WHILE THAT OF THE BRITISH KING EXTENDS TO THE DECLARING OF WAR AND TO THE RAISING AND REGULATING OF FLEETS AND ARMIES; ALL OF WHICH BY THE CONSTITUTION WOULD APPERTAIN TO THE LEGISLATURE."

- JAMES MADISON'S NOTES OF THE DEBATES AT THE CONSTITUTIONAL CONVENTION (1787): WHEN PIERCE BUTLER OF SOUTH CAROLINA URGED THAT THE PRESIDENT BE GIVEN THE POWER TO INITIATE A WAR, THE DELEGATES OVERWHELMINGLY REJECTED THE PROPOSAL. ELBRIDGE GERRY OF MASSACHUSETTS SAID THAT HE "NEVER EXPECTED TO HEAR IN A REPUBLIC A MOTION TO EMPOWER THE EXECUTIVE TO DECLARE WAR." GEORGE MASON OF VIRGINIA REMARKED THAT HE WAS "AGAINST GIVING THE

POWER OF WAR TO THE EXECUTIVE" BECAUSE THE PRESIDENT "IS NOT SAFELY TO BE TRUSTED WITH IT."

- BUT, SCORES OF PRESIDENTIAL MILITARY ACTIONS WITH ONLY LIMITED CONGRESSIONAL CONSULTATION HAVE THREATENED THE SEPARATION OF POWERS, UNDERCUTTING CONGRESS'S ROLE AS A RESTRAINT AGAINST THE ARBITRARY EXERCISE OF THE PRESIDENT'S MILITARY POWERS. CONGRESS MUST BEAR A HEAVY RESPONSIBILITY FOR THIS SHIFT. FOLLOWING THE POLITICAL LOGIC THAT IT CANNOT BE BLAMED FOR WARS IT NEVER AUTHORIZED, CONGRESS HAS BEEN RELUCTANT TO CLAIM ITS OWN CONSTITUTIONAL POWERS. EVEN THE CONTROVERSIAL WAR POWERS ACT OF 1972 GENEROUSLY GIVES THE PRESIDENT 90 DAYS TO ENGAGE IN UNILATERAL WAR WITHOUT CONGRESSIONAL AUTHORITY. *Upide Down Eayleton*

- TOO OFTEN, PRESIDENTS SEEM TO LOOK DOWN UPON CONGRESS AS A BODY TO BE OUTWITTED OR OUTFLANKED RATHER THAN RESPECTED AND CONSULTED.

- THERE ARE ALWAYS VOICES, OFTEN IN HIGH PLACES, TELLING US THAT THE MODERN WORLD REQUIRES FAR MORE CONCENTRATION OF POWER IN THE EXECUTIVE BRANCH — AND FAR LESS PUBLIC ACCOUNTABILITY. WE ARE TOLD IT IS INEFFICIENT, CONFUSING AND EVEN DANGEROUS FOR THE PRESIDENT TO SHARE AUTHORITY WITH CONGRESS IN FOREIGN POLICY.

- BUT CONGRESS'S ROLE IS AN OPPORTUNITY TO DRAW ON THE COLLECTIVE INTELLIGENCE AND JUDGMENT THAT ONLY DEMOCRATIC GOVERNMENT CAN PROVIDE. THE CONSTITUTIONAL SEPARATION OF POWERS DOES NOT MEAN THAT GOVERNMENT MUST ALWAYS BE DIVIDED; IT ALSO OFFERS THE OPPORTUNITY FOR SHARED POWER. WE WILL HAVE BETTER, STRONGER POLICY WHEN THE BRANCHES OF GOVERNMENT WORK TOGETHER IN ORDER TO CLARIFY OUR PURPOSES AND STRENGTHEN OUR RESOLVE.

eg (This war)

- OUR PRESIDENT OCCUPIES THE WORLD'S MOST POWERFUL PUBLIC OFFICE. HE CAN COMMAND HALF A MILLION AMERICAN TROOPS HALFWAY AROUND THE WORLD. PRECISELY BECAUSE OF THIS ENORMOUS POWER, THE PRESIDENT MUST RESPECT THE LIMITS IMPOSED BY

OUR CONSTITUTION. WE ARE BETTER OFF WITH A FRUSTRATED PRESIDENT THAN ONE WHOSE POWER TO MAKE WAR IS UNCHECKED.

- Intelligence Agencies*
- PRESIDENT BUSH HAS NOT DONE A VERY GOOD JOB EXPLAINING AND PERSUADING THE AMERICAN PUBLIC. THE PRESIDENT INSTEAD FOCUSED HIS EFFORTS ON BUILDING AND MAINTAINING THE INTERNATIONAL COALITION. THIS IS UNDERSTANDABLE, BECAUSE DIPLOMACY IS BOTH PRESIDENT BUSH'S OWN PERSONAL STRENGTH AND A DISTINCTIVE FUNCTION OF HIS OFFICE.

- FBI & Flaws*
- OUR CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES DID WORK IN THIS CASE (MORE OR LESS). LOOK AT THE CONGRESSIONAL HEARINGS IN NOVEMBER AND DECEMBER, WITH TESTIMONY THAT WAS OFTEN VERY CRITICAL OF THE PRESIDENT'S POLICY. FINALLY, CONGRESS DEBATED AND — ON JANUARY 12 — IT VOTED.



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