AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

*Randolph D. Moss*, **Authorization for Continuing Hostilities in Kosovo** (2000)[[1]](#footnote-1)

*Kosovo was part of Yugoslavia, which fractured into civil war in the years after the collapse of the Soviet Union and the Communist governments in Eastern Europe. Yugoslavia was particularly riven by ethnic conflicts between Serbs and Albanians, and Kosovo became a site of particularly violent conflict between Serbian and Albanian forces. In 1998, the administration of President Bill Clinton helped lead both the United Nations and the North Atlantic Treaty Organization (NATO) to intervene in the country. In 1998, NATO launched an air campaign in Kosovo aimed at forcing peace negotiations. In 1999, the contending sides accepted terms of peace, and a NATO-led peacekeeping force (including American soldiers) established itself in Kosovo. Kosovo remained under NATO and American military protection in subsequent years. During these efforts, the Clinton administration advised Congress on its actions, but did not seek congressional authorization for the use of force or the introduction of troops in Kosovo. In the spring of 1999, the administration did ask Congress for support for planned missile strikes against Serbian forces, but Congress was unable to agree to the terms of any authorization for the use of military force in the region. Congress did agree to pass a supplemental defense appropriations bill that, in part, provided funds for the Kosovo campaign. A lawsuit initiated by several members of Congress to block the use of force in Kosovo was dismissed by the courts. At the tail end of the Clinton administration, the Office of Legal Counsel provided an opinion outlining the president’s legal authority to continue American military activity in Kosovo in light of these developments and the expiration of the sixty-day time limit for the use of troops contained in the War Powers Resolution of 1973. The administration argued that the passage of the defense appropriations bill was sufficient to authorize the ongoing use of force in Kosovo. The opinion provided an extended analysis of whether military appropriations should be understood as providing congressional authorization for military action.*

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. . . . Section 5(b) [of the War Powers Resolution of 1973] requires the President to “terminate any use of the United States Armed Forces . . . [within 60 days]” unless the Congress takes certain enumerated actions to authorize continuing combat or “is physically unable to meet as a result of an armed attack upon the United States.” The 60 days period may be extended for an additional 30 days if the President certifies to Congress that “unavoidable military necessity respecting the safety of United States Armed forces requires the continued use of such armed forces in bringing about a prompt removal of such forces.”. . .

Under section 5(b) [of the War Powers Resolution of 1973], Congress may, within the 60 day period, authorize continuing hostilities after that period by any one of three methods: (1) by a declaration fo war; (2) by enacting a “specific authorization for such use of United States Armed forces”; or (3) by “extend[ing] by law such sixty-day period.” . . . In addition to requiring the President to seek approval for continuing hostilities, section 5(b) is also designed to hold Congress responsible for the ultimate decision over war and peace.

By its terms, the statute contemplates possible mechanisms for authorizing hostilities other than a declaration of war. The decision as to which legal vehicle to choose is within Congress’s power: it is well established that “it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war.” *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir., 1973). . . . Moreover, in the period since the WPR was enacted, Congress has explicitly authorized hostilities under the statute without declaring war. Congress has in fact often authorized hostilities by legislative measures other than formal “declarations of war” since the days of the early republic. Indeed, at the time of the Founding, formal “declarations” of war were increasingly rare in state practice, and prominent legal theorists known to the Founders had analyzed other legal devices for authorizing war. Moreover, whatever their view of the scope of the President’s authority to conduct hostilities, scholars agree that Congress could authorize conflict through measures other than a formal declaration of war.

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The Supreme Court has recognized that, as a general matter, appropriation statutes may “stand[] as confirmation and ratification of the action of the Chief Executive.” *Fleming v. Mohawk Wrecking & Lumber Co.* (1947). Congress may also “amend substantive law in an appropriations statute, as long as it does so clearly.” . . . “The whole question depends on the intent of Congress as expressed in the statutes.”

Indeed, on numerous occasions, the Supreme Court has applied this general principle to find that Congress had authorized or ratified executive branch action through appropriations measures. For example. . . . the Court found that Congress had authorized the Department of the Interior to appoint agents to protect timber on government land through “appropriations made to pay for the services of these special timber agents.” . . .

. . . . Indeed, Congress has on numerous occasions authorized U.S. involvement in armed conflict at least in part through appropriation laws. . . . In several instances of early Administrations, appropriation laws played an important role in authorizing or ratifying presidential use of the Armed Forces in situations of conflict. For example, President George Washington “Used force against the Wabash Indians pursuant to a statute that provided forces and authorized the call-up of militia to protect frontier inhabitants from the hostile incursions of Indians. This statute, along with the requests and debates that accompanied it, *and the appropriations that followed its adoption*, made clear that Congress approved the military engagements Washington undertook against the Wabash.” . . .

So-called “Indian” wars, which were common in American history, were also not declared wars; rather, Congress was said to have authorized or ratified them by a variety of means, including voting appropriations to pay the troops called out and to defray the expenses of campaigns. . . .

The most conspicuous example of Congress authorizing hostilities through its appropriations power occurred during the War in Vietnam. . . . In that war, the State Department Legal Advisor argued that Congress had authorized the conflict, not only through the Gulf of Tonkin Resolution, but also by enacting supplemental appropriations bills. . . .

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Some have argued that, on the contrary, appropriation statutes that fund ongoing war efforts do not constitute authorization of those war efforts. . . . This argument can take one of two forms. First, one could argue that a general defense-related appropriation statute does not authorize the ongoing hostilities because it provides only general defense-related funds and does not indicate any approval of the specific hostilities at issue. While this might be true, it does not undermine the basic principle explained above – that an appropriation statute specifically and conspicuously aimed at funding hostilities may constitute authorization of those hostilities. Second, some have argued that appropriations, regardless of how specific they may be with respect to ongoing war efforts, should not be interpreted to authorize continuing military operations because those appropriations could just as easily be understood as providing resources for men and women already in combat, simply to ensure that they do not suffer as a result of a disagreement between the Executive and the Congress regarding the wisdom of the deployment. . . . Although this may be true in some cases, in other cases . . . this proposition “doesn’t make sense . . . [because] Congress could [phrase] its funds cut-off as a phase out, providing for the protection of the troops as they [are] withdrawn.” . . . In the end, the question whether a particular targeted appropriation constitutes authorization for continuing hostilities will turn on the specific circumstances of each case.

. . . . Although it might be the case that general funding statutes do not necessarily constitute congressional approval for conducting hostilities, this objection loses its force when the appropriations measure is directly and conspicuously focused on specific military action.

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. . . Professor Philip Bobbitt has argued that, were [the WPR] read to bind subsequent Congresses, it would be unconstitutional:

[F]ramework statutes . . . cannot bind future Congresses. If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference . . . is without legal effect. . . . [I]f one Congress could bind subsequent Congresses in this way, it would effectively enshrine itself in defiance of [an] electoral mandate. . . .

This argument is compelling. If [the WPR] were read to block all possibility of inferring congressional approval of military action from any appropriation, unless that appropriation referred in its terms to the WPR and stated that it was intended to constitute specific authority for the action under that statute, then it would be unconstitutional. . . . [U]nder the Constitution, Congress can authorize and ratify presidential engagement in hostilities through an appropriation law. One statute, such as the WPR, cannot mandate that certain types of appropriation statutes that would otherwise constitute authorization for conflict cannot do so simply because a subsequent Congress does not use certain “magical passwords.” . . .

. . . . On the question whether an appropriation statute enacted by a subsequent Congress constitutes authorization for continued hostilities, it is the intent of the subsequent Congress, as evidenced by the text and legislative history of the appropriation statute, that controls the analysis. . . .

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On its face, H.R. 1664 provided authorization, in the form of an appropriations measure, for continuing military operations – or, more specifically, for continuing United States participation in the NATO air campaign – in Kosovo. The bill itself was entitled “[a]n Act Making emergency supplemental appropriations *for military operations*, refugee relief, and humanitarian assistance *relating to the conflict in Kosovo*.” In bearing this title, H.R. 1664 plainly indicated the main purpose for which the appropriated funds would be spent. . . .

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More generally, [the appropriations] met the President’s request for emergency supplemental funding for the very explicit purpose of continuing military operations in Serbia and Kosovo. The obvious and stated purpose of the Administration in seeking this supplemental funding was to meet anticipated expenses of the campaign. . . .Congress clearly endorsed and authorized the Administration’s plans. . . .

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[The appropriations bill] constituted Congressional authorization for continuing bombing efforts in Kosovo even after the running of the 60 day clock established by . . . the WPR. . . . If a subsequent Congress, however, chooses in a particular instance to enact legislation that either expressly or by clear implication authorizes hostilities, it may decide not to follow the WPR’s procedural requirements. In this case, read in light of the background principle . . ., the text and legislative history [of the bill] make clear that Congress intended to authorize continuing hostilities in the Federal Republic of Yugoslavia.

1. Excerpt taken from 24 *Opinions of the Office of Legal Counsel* 327 (2000). [↑](#footnote-ref-1)