AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

*John M. Harmon*, **Presidential Power to Use the Armed Forces Abroad without Statutory Authorization** (1980)[[1]](#footnote-1)

*The final months of 1979 were not easy times for American foreign policy. In November 1979, the American embassy in Iran was overrun and a large group of Americans were taken hostage. At the end of the year, the Soviet Union invaded Afghanistan. In his January State of the Union address, President Jimmy Carter announced the “Carter Doctrine,” that the United States was prepared to use military force to defend its “vital interests” in the Persian Gulf region. Shortly afterwards, Assistant Attorney General John M. Harmon in the Office of Legal Counsel provided a memorandum opinion to the attorney general on the scope of the president’s unilateral constitutional authority to use military force abroad and the extent to which that power was limited by the 1973 War Powers Resolution. Harmon argued that historical practice suggested a broad scope for presidential action, up to and including the commitment of American troops to the effort to repel military invasions of allied countries. In 1983, Assistant Attorney General Theodore B. Olson wrote an “appendix” to the Harmon memorandum clarifying that the War Powers Resolution was not triggered by the actions of the civilian operatives of the Central Intelligence Agency but would cover military personnel temporarily operating under CIA control.*

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The centrally relevant constitutional provisions are Article II, sec. 2, which declares that “the President shall be Commander in Chief of the Army and Navy of the United States,” and Article I, sec. 8, which grants Congress the power “To declare War.” Early in our constitutional history, it perhaps could have been successfully argued that the Framers intended to confine the President to directing the military forces in wars declared by Congress. Even then, however, it was clear that the Framers contemplated that the President might use force to repel sudden invasions or rebellions without first seeking congressional approval.

In addition to the Commander-in-Chief Clause, the President’s broad foreign policy powers support deployment of the armed forces abroad. The President also derives authority from his duty to “take Care that the Laws be faithfully executed,” for both treaties and customary international law are part of our law. . . .

We believe that the substantive constitutional limits on the exercise of these inherent powers by the President are, at any particular time, a function of historical practice and the political relationship between the President and Congress. Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. The pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action. . . .

The power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President’s general power as a matter of historical practice. . . .

Operations of rescue and retaliation have also been ordered by the President without congressional authorization even when they involved hostilities. Presidents have repeatedly employed troops abroad in defense of American lives and property. . . .

The history reveals the purposes of protecting American lives and property and *retaliating* against those causing injury to them are often intertwined. . . . Policies of deterrence seem to have eroded any clear distinction between cases of rescue and retaliation.

Thus, there is much historical support for the power of the President to deploy troops without initiating hostilities and to direct rescue and retaliation operations even where hostilities are a certainty. There is precedent as well for the commitment of United States armed forces, without prior congressional approval or declaration of war, to aid an ally in repelling an armed invasion, in President Truman’s response to the North Korean invasion of South Korea. But clearly such a response cannot be sustained over time without the acquiescence, indeed, the approval of Congress, for it is Congress that must appropriate the money to fight a war or a police action. . . .

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The War Powers Resolution begins with a statement of purpose and policy that seems designed to limit presidential use of armed forces in hostilities to situations involving a declaration of war, specific statutory authorization, or an attack on the United States, its possessions, or its armed forces. The policy statement, however, is not to be viewed as limiting presidential action in any substantive manner. . . .

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[I]f our armed forces otherwise lawfully stations in a foreign country were fired upon and defended themselves, we doubt that such engagement in hostilities would be covered by the consultation and reporting provisions of the War Powers Resolution. The structure and thrust of those provisions is the “introduction” of our armed forces into such a situation and not the fact that those forces may be engaged in hostilities. It seems fair to read “introduction” to require an active decision to place forces in a hostile situation rather than their simply acting in self-defense.

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We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of . . . the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of “unavoidable military necessity.” This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.

Finally, Congress may regulate the President’s exercise of his inherent powers by imposing limits *by statute*. We do not believe that Congress may, on a case-by-case basis, require the removal of our armed forces by passage of a concurrent resolution which is not submitted to the President for his approval or disapproval. . . .

1. Excerpt taken from 4a *Opinions of the Office of Legal Counsel* 185 (1980). [↑](#footnote-ref-1)