AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

*William H. Rehnquist*, **The President and the War Power: South Vietnam and the Cambodian Sanctuaries** (1970)

*The origin of the Vietnam War and the significance of the Gulf of Tonkin Resolution of 1964 occupied the constitutional analysis of the Lyndon Johnson administration. Richard Nixon’s presidency was faced with a different set of constitutional problems. As the war dragged on and became increasingly unpopular, congressional critics focused on new legislative devices that could be used to restrict the war effort and perhaps force the withdrawal of American troops from southeast Asia. Meanwhile, the Nixon administration wanted to maintain its own control over the pace, scope and goals of the war. For the administration, American troop withdrawal was the goal, but it had to done in a way that a “decent interval” would pass before the South Vietnamese government inevitably fell to their northern foes. At the same time, the administration struggled with the lack of a clear frontline in Vietnam. Both South Vietnamese rebel forces and North Vietnamese soldiers cut through neighboring Cambodia to move between the two Vietnams and avoid American military strongholds. The Nixon administration took a more aggressive stance toward Cambodia than the Johnson administration had, especially once the civil war broke out in Cambodia. In 1970, the administration formally announced a stepped up military campaign in Cambodian territory in the hopes of shoring up the military situation in South Vietnam. Soon thereafter, critics in Congress proposed cutting of funds for American operations in Cambodia. A limited version of that proposal was adopted in 1971.*

*As the administration was planning its moves in Cambodia, Assistant Attorney General William Rehnquist was tasked with writing a legal opinion explaining the president’s constitutional authority to undertake those actions. The unpublished memo became a key touchstone of executive branch understanding of the war powers.*

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The draftsmen of the Constitution clearly intended to divide the war power inhering in any sovereign nation between the President and Congress, and just as clearly did not intend to precisely delimit the boundary between the power of the Executive Branch and that of the Legislative Branch. They rejected the traditional power of kings to commit unwilling nations to war to further the king’s international political objectives. At the same time, they recognized the need for quick executive responses to rapidly developing international situations.

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. . . . Nearly 200 years of practice under the constitutional system has given rise to a number of precedents and usages, although it cannot be confidently said that any sharp line of demarcation exists as a result of this history.

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The questions of how far the Chief Executive may go without congressional authorization in committing American military forces to armed conflict, or in deploying them outside of the United States and in conducting armed conflict already authorized by Congress have arisen repeatedly throughout the Nation’s history. The Executive has asserted and exercised at least three different varieties of authority under his power as Commander in Chief:

1. Authority to commit military forces of the United States to armed conflict, at least in response to enemy attack or to protect the lives of American troops in the field;
2. Authority of deploy United States troops throughout the world, both to fulfill United States treaty obligations and to protect American interests; and
3. Authority to conduct or carry on armed conflict once it is instituted, by making and carrying out the necessary strategic and tactical decisions in connection with such conflict.

Congress has on some of these occasions acquiesced in the President’s action without formal ratification; on others it has ratified the President’s action; and on still others it has taken no action at all. . . .While a particular course of executive conduct to which there was no opportunity for the Legislative Branch to effectively object cannot establish a constitutional precedent in the same manner as it would be established by an authoritative judicial decision, a long, continued practice on the part of the Executive, acquiesced in by the Congress is itself some evidence of the existence of constitutional authority to support such a practice. *United States v. Midwest Oil Co*. (1915). . . .

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It has never been doubted that the President’s power as Commander in Chief authorizes him, and him alone, to conduct armed hostilities which have been lawfully instituted. Chief Justice Chase, concurring in *Ex parte Milligan* (1866), said:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as commander-in-chief* (emphasis supplied).

In the First World War, it was necessary to decide whether United States troops in France would fight as a separate command under General Pershing, or whether United States divisions should be incorporated in existing groups or armies commanded by French or British generals. President Wilson and his military advisors decided that United States forces would fight as a separate command.

In the Second World War, not only similar military decisions on a global scale were required, but also decisions that partook as much of political strategy as they did of military strategy: Should the United States concentrate its military and material resources on either the Atlantic or Pacific fronts to the exclusion of the other, or should it pursue the war on both fronts simultaneously? Where should the reconquest of allied territories in Europe and Africa which had been captured by the Axis powers begin? What should be the goal of the allied powers? . . .

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[T]he Executive, under his power as Commander in Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval. However, if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that congressional sanction need not be in the form of a declaration of war.

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. . . . A declaration of war by Congress is in effect a blank check to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct military operations . . . is both utterly illogical and unsupported by precedent. While cases such as *A.L.A. Schechter Poultry Corp. v. United States* (1935) hold that Congress in delegating powers to deal with domestic affairs must establish standards for administrative guidance, no such principle obtains in the field of external affairs. . . .

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. . . . Congress undoubtedly has the power in certain situations to restrict the President’s power as Commander in Chief to a narrower scope than it would have had in the absence of legislation. . . .

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Very recently, Congress has enacted legislation providing that United States forces shall not be dispatched to Laos or Thailand in connection with the Vietnam conflict. This proviso was accepted by the Executive.

This is not to say, however, that every conceivable condition or restriction which Congress may by legislation seek to impose on the use of American military forces would be free of constitutional doubt. Even in the area of domestic affairs, where the relationship between Congress and the President is balanced differently than it is in the field of external affairs, virtually every President since Woodrow Wilson has had occasion to object to certain conditions in authorization legislation as being violative of the separation of powers between the Executive and the Legislative Branch. The problem would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander in Chief of the armed forces. Surely this is the thrust of Chief Justice Chase’s concurring opinion in *Ex parte Milligan*. . . .

Nor is the manner in which armed hostilities may be terminated altogether free from doubt. All declared wars in our history have been customarily concluded by treaties negotiated by the President and ratified by the Senate. An effort in the Constitutional Convention to give Congress the power to declare “peace” as well as “war” was unanimously turned down at the session of August 17, 1787.

The duration of the Vietnam conflict, and its requirements in terms of both men and materiel, have long since become sufficiently large o as to raise the most serious sort of constitutional question had there been no congressional sanction of that conflict. . . .

Since that time [of the adoption of the 1964 Gulf of Tonkin Resolution], Congress has repeatedly adopted legislation recognizing the situation in Southeast Asia, providing the funds to carry out United States commitments there, and providing special benefits for troops stationed there. By virtue of these acts, and by virtue of the provision in the Gulf of Tonkin resolution as to the manner in which it may be terminated, there is long-standing congressional recognition of a continuing United States commitment in Southeast Asia.

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A requirement that congressional approval of executive action in this field can come only through a declaration of war is not only contrary to historic constitutional usage, but as a practical matter could not help but curtail effective congressional participation in the exercise of the shared war power. If Congress may sanction armed engagement of United States forces only by declaring war, the possibility of its retaining a larger degree of control through a more limited approval is foreclosed. While in terms of men and materiel the Vietnam conflict is one of large scale, the objectives for which the conflict may be carried on, as set forth in the Gulf of Tonkin resolution, are by no means as extensive or all inclusive as would have resulted from a declaration of war by Congress. Conversely, however, there cannot be the slightest doubt from an examination of the language of the Gulf of Tonkin resolution that Congress expressly authorized extensive military involvement by the United States, on no less a scale than that now existing, by virtue of its adoption of this resolution. . . .

[T]he President’s determination to authorize incursion into the Cambodian border area by United States forces in order to destroy sanctuaries utilized by the enemy is the sort of tactical decision traditionally confided to the Commander in Chief in the conduct of armed conflict. From the time of the drafting of the Constitution it has been clear that the Commander in Chief has authority to take prompt action to protect American lives in situations involving hostilities. Faced with a substantial troop commitment to such hostilities made by the previous Chief Executive, and approved by successive Congresses, President Nixon has an obligation as Commander in Chief of the country’s armed forces to take what steps he deems necessary to assure their safety in the field. A decision to cross the Cambodian border, with at least the tacit consent of the Cambodian government, in order to destroy sanctuaries being utilized by North Vietnamese in violation of Cambodia’s neutrality, is wholly consistent with that obligation. It is a decision made during the course of an armed conflict as to how that conflict shall be conducted, rather than a determination that some new and previously unauthorized military venture shall be undertaken.

By crossing the Cambodian border to attack sanctuaries used by the enemy, the United States has in no sense gone to “war” with Cambodia. United States forces are fighting with or in support of Cambodian troops, and not against them. Whatever protest may have been uttered by the Cambodian government was obviously the most perfunctory, formal sort of declaration. The Cambodian incursion has not resulted in a previously uncommitted nation joining the ranks of our enemies, but instead has enabled us to more effectively deter enemy aggression heretofore conducted from the Cambodian sanctuaries.

Only if the constitutional designation of the President as Commander in Chief conferred no substantive authority whatever could it be said that prior congressional authorization for such a tactical decision was required. Since even those authorities least inclined to a broad construction of the executive power concede that the Commander in Chief provision does confer substantive authority over the manner in which hostilities are conducted, the President’s decision to invade and destroy the border sanctuaries in Cambodia was authorized under even a narrow reading of his power as Commander in Chief.