

1 A Constitutional Tyranny and Presidential Dictatorship

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. ...
(article I, section 1, clause 1)

The Congress shall have power ... to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
(article I, section 8, clause 11)

The executive Power shall be vested in a President of the United States of America.
(article II, section 1, clause 1)

The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.
(article II, section 2, clause 1)

For more than two hundred years, we Americans have prided ourselves on our republican Constitution and our democratic politics. We have stood tall and told ourselves and the world that America is “the home of the free.” No tyrants live here. Tyrants live and oppress their people elsewhere, across the sea in distant lands, in Cuba, in Haiti, in Nicaragua, in Nazi Germany and Imperial Japan, in North Korea, in North Vietnam, in Grenada, in the Dominican Republic, in Panama, in Bosnia and Kosovo, or in Iraq and Afghanistan. But tyrants in America, never.
Yet, when the dark clouds of discord appear on the horizon and the dogs of war howl and strain at their leashes, what happens in “the land of the

free”? Our Constitution is ignored; our democratic politics is circumvented, and smiling tyrants fill the vacuum. For example, what happened during the decades-long tragedy that was the war in Vietnam? Our Constitution mandates that the Congress shall “declare war.” But during those decades of war, who paid the least attention to the Constitution? Which member demanded that the Congress stand up, exercise its constitutional responsibility, and “declare war”? Likewise, our democratic politics mandates that the voice of the people be heard. But during those decades of war, who paid the least attention to the voice of the people? The voice of the people was shouted in the streets but was not heard in the halls of power. Not, that is, until the tragedy in Vietnam and the tyranny at home had surpassed all endurance.

In place of our republican Constitution and democratic politics during those decades of war, five presidents acted, not like the chief executives of a republic, but like elected kings. From Harry Truman’s initial decision to increase support for the French reconquest of Indochina in June 1950 through Richard Nixon’s “Vietnamization” policy in 1969–72, these “presidents” operated as kings and emperors have always done. They decided when and where to bomb, when and where to invade, and when to escalate or deescalate. Like the hereditary kings of old, they decided these vital questions in private for their own best motives and then imposed their decisions on an increasingly skeptical and reluctant Congress and public. In a word, the republic’s chief executives were oblivious to the rule of law and the Constitution. They had metamorphized into tyrants.

At its heart, after all, tyranny is not about beating, torturing, or imprisoning innocent people. When law rules, innocent people are not beaten, tortured, or imprisoned. Unnecessary wars are not fought in Vietnam or elsewhere. Strictly speaking, tyranny is about violating the rule of law. The essence of tyranny lies in powerful individuals’ acting against the law and imposing their will upon the people. To neuter tyrants, law, not men, must rule. But this most common of common sense has never become common practice. Instead, for more than two hundred years, the president has commanded the armed forces, in accordance with the law. Yet at the same time, he has violated both law and common sense. Repeatedly, he has initiated war in manifest violation of the Constitution and the congressional responsibility to decide the question of war or peace and, on the basis of its answer, to declare or not declare war. In sum, our republican Constitution has failed us when it is most needed, our democratic politics have withered when it is most needed, and tyranny has flourished under the cloak of national security and defense.

Yet, is the matter so simple and straightforward? Is the president simply a tyrant? Many will point out that the president is elected by the people. He serves at their pleasure. As proof, protests against the war in Vietnam forced

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Lyndon Johnson out of office, forced him not to seek a second term. True enough, but an elected tyrant is still a tyrant. For tyranny is not a personal characteristic; it is instead a pattern of egregious violations of the law. For example, the Second Continental Congress did not indict George III of tyranny because he was a bad man, because he beat, tortured, or imprisoned innocent colonists. No, the Second Continental Congress indicted him because “The History of the present King of Great Britain is a History of repeated injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States.” And what were these “repeated injuries and Usurpations”? They were twenty-seven in number that ranged from “He has refused his Assent to Laws, the most wholesome and necessary for the public Good” through “For depriving us, in many Cases, of the Benefits of Trial by Jury” and ending with “He has excited domestic Insurrections amongst us, . . .” Twenty-seven specific illegal acts are what made George III a tyrant, not whether he was elected or unelected, not whether he was a nice guy or a bad guy.

And what are the “repeated injuries and Usurpations” of the presidents? Repeatedly, over the two hundred and more years of the American Republic, president after president has begun one war after another without so much as a nod to the Constitution. As with George III so with our wartime presidents, who are tyrants “for depriving the Congress and the people, in all but four cases, of the Benefits of article I, section 8, clause 11 of the Constitution, the congressional power to declare war.” Such egregious, repeated violations of the Constitution deserve one and only one label – tyranny. No longer, at the beginning of the twenty-first century, is it acceptable for scholars to describe our Constitution and politics with respect to war as “executive initiative, congressional acquiesce, and judicial tolerance” (Yoo 2005, 13). For, beyond question, our unconstitutional wartime tyranny was not meant to be.

All agree that the question of war or peace is the single most consequential, most controversial, most difficult decision made by any human community. Deciding when or whether the people’s blood will be shed, the nation’s treasure will be expended, and the state’s very existence will be hazarded certainly requires special consideration and special procedures. Understanding this, the Framers of the Constitution thought that they had provided the new Republic with precisely the special procedures that would foster special consideration. Unlike in all the kingdoms, empires, and tyrannies of history, the Framers had the audacity to separate and divide the king’s inherent power as the nation’s war leader. The president was to command the nation’s armed forces; the Congress was “to declare war,” as Alexander Hamilton explained in *Federalist No. 69*:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the

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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 military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.

This unheard of division and separation of the king's divine right powers was unprecedented. Its aim was to drive a stake into the heart of tyranny. Its hope was that a powerful individual would no longer decide when, or if, the people's blood would be shed; the nation's treasure would be expended, and the state's very existence would be hazarded. Instead, a representative body of the people would make this most significant of decisions.

Such were the hopes of the Framers of the Constitution. But history is not built upon hopes. It is built upon the fulfillment or the lack of fulfillment of hopes. Contrary to the Framers' hopes, a stake was not driven into the heart of tyranny. Tyranny lived on, nourished by a fatally impractical division of the sovereign's war powers, which are three, and not two. Before declaring war, before commanding the diplomatic, economic, and military means, the decision must be taken. The question of war or peace must be asked and answered. The most reasonable democratic and republican assumption in 1787 was that the Congress would, first, decide and, then, declare, before the president commanded. The tyrannical reality, however, has always been that the president decides and commands, while the congressional declaration is an optional extra, an infrequent afterthought.

CATCH 22: CONGRESSIONAL INCAPACITY AND A DICTATORIAL PRESIDENT

Still, is the matter so simple? The president is a tyrant, end of discussion. Instead of warning of an *Imperial Presidency* (1973), Arthur Schlesinger Jr. got it wrong. He should have warned of a *Tyrannical Presidency*. For what else is one to call a powerful individual acting against the law to impose his wars upon a republican government and a democratic people? The situation appears to be very much more complicated than a straightforward case of presidential tyranny.

As a first step, is it not strange that the president is only a part-time tyrant? How can a real tyrant be both elected and only a part-timer? He is a part-time tyrant because he is the very picture of a republican and democratic "chief executive" during times of peace. And why? Because the Congress upholds its part of the constitutional bargain during times of peace. It can and does exercise its peacetime "legislative Powers." It regularly makes laws for the president to administer. Only when the dark clouds of war gather on the

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horizon and administering peace changes to waging war does the president become a tyrant. If the Congress were exercising its wartime duty “to declare war,” then the number of congressional declarations of war would equal the number of America’s wars. But, however one counts, America’s wars are several times more numerous than the four declarations made by the Congress – those for the War of 1812, for the Spanish-American War, for the First World War, and for the Second World War. As a result, part of the time the president is tyrannical; part of the time he is not.

As a second step, what is the cause of this effect? Why is it even possible for the president step in and do what the Congress is constitutionally mandated to do? All the Framers of the Constitution ever asked the Congress to do was 1) to recognize the gathering clouds of war; 2) to seize the initiative and draft a declaration of war, preferably a conditional declaration, in response to those ominous clouds; 3) to debate the draft declaration; 4) to amend it, if needed; and 5) to vote it up or down. That is all. Painfully though, the bicameral Congress has been and continues to be totally incapable of following this simple procedure. Specifically, it has been unable to get the procedure started. It has been unable either to recognize the initial signs of war or to seize the initiative and start the process. Instead, it has conceded the initiative to the president, waiting patiently for him to decide the question of war and peace. Of the greatest significance for remedying this constitutional contradiction is the contrast with the Second Continental Congress. In 1776 the unicameral Second Continental Congress did, in point of fact, recognize the issue, initiate action, draft a declaration, debate it, amend it, and vote on it.

The essential problem, therefore, has never been presidential tyranny, much less an “imperial presidency.” Rather, a failure of the Federal Convention to anticipate soon-to-occur changes in the size, organization, and functioning of the new Congress has led to a complete lack of congressional initiative. Hence, the president is not “simply” a tyrant. For the congressional inability to uphold its part of the constitutional bargain during time of war has forced the president into a very nasty Catch 22: If the Congress were able both to decide on and to declare war, as the Constitution implies, then presidential tyranny would be impossible in time of war as it is in time of peace. But, as the next three chapters prove, the Congress has not, cannot, and will not in the future either decide on or declare war. Hence, Catch 22, the president is caught on the horns of a very sharp dilemma. Speaking to the right-hand horn, if he waits on the Congress to do what it cannot and will not do on its own initiative, he abides by the Constitution but risks losing the nation. An example of this horn is the refusal of the Congress to act upon the clear and present dangers posed by Nazi Germany in Europe and Imperial Japan in Asia until after the bombing of Pearl Harbor. Speaking to the left-hand horn, if the president ignores the Congress so as to defend the nation on his own

authority in time of danger, he violates the Constitution, but saves the nation. An example of this horn of the dilemma is Abraham Lincoln's decision not to recall the Thirty-seventh Congress "to declare war" after the 12 April 1861 bombardment and surrender of Fort Sumter. Instead, he made the undoubtedly wise decision to wage the Civil War on the authority of his oath of office to "preserve, protect, and defend the Constitution of the United States."

The president, then, finds himself caught in a Catch 22. As a result, the previous indictment of tyranny does not ring true. The president has not deprived "the *Congress* and the people of the Benefits of article I, section 8, clause 11 of the Constitution, the congressional power to declare war." Instead, it is congressional incapacity that has deprived "the *president* and the people of the Benefits" of a republican division of the sovereign's war powers. Think how much easier the president's job would be if he only had to command the armed forces, as Commander in Chief George Washington did in 1776.

But if benevolent dictatorships always end in malevolent tyranny, then our republican government and democratic politics have teetered on the edge of a precipice for more than two hundred years. That we have not fallen over the edge into the abyss of tyranny is due only to the Roman virtues of our presidents. They have so far relinquished their extraordinary power when peace resumed. But dreaming that the virtuous examples of Cincinnatus and George Washington will protect us from the likes of Julius Caesar and Adolph Hitler is unwise in the extreme.

Therefore, the single most urgent issue confronting both our republican government and our democratic politics is how to drive a stake once and for all into the heart of the Constitution's incipient tyranny. How does one amend the Constitution to eliminate its Catch 22? How does one correct the fatally impractical division of the sovereign's war powers at the root of our presidential dictatorship? How does one overcome an incapacitated Congress so as to establish the rule of law in time of war as well as in time of peace? To answer these questions, this book explores four different approaches.

ORGANIZATION OF THE BOOK

In Part I, history is consulted to understand how and why the ever-larger bicameral Congress is incapable of exercising its constitutional responsibility to decide on and to declare war. The three chapters of this part tell the stories of how the Congress lost forever the power to decide the question of war or peace in 1812. How the Fifty-fifth Congress was determined to play politics instead of declaring war against Spain over Cuba in 1898. And how the War Powers Resolution of 1973 gave the president the legal authority to ignore the Congress.

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In Part II, a variety of sources are consulted to answer the question, *How?* These three chapters identify the compositional elements of a declaration of war, the principal functions of a declaration of war, and the six possible procedures for declaring war. Along the way, the full range of presidential and congressional declarations are cataloged and analyzed. The most significant results derived from Part II are 1) the critical difference for the rule of law between procedurally perfect and procedurally imperfect declarations of war and 2) the four principal functions of well-written declarations of war, such as the Declaration of Independence. These four principal functions consist of two pairs of two linked functions each:

I. Recognition and response:

- a) A declaration manifests, transforms, and defines a contentious conflict as this specific “war.”
- b) An open and determined declaration is a necessary first step in a conflict resolution process, especially when a conditional declaration of war precedes an absolute declaration.

II. Decision and deployment:

- a) A declaration establishes coherence between the political ends sought and the diplomatic, economic, or military means employed.
- b) An open and determined declaration is a necessary first step in creating a proper coordinate relationship between the declarer of war and the commander of the nation’s diplomatic, economic, or military means.

In Part III, the insights gleaned in Parts I and II are put to use to propose two possible solutions. As already noted, the large, bicameral U.S. Congress is entirely incapable of declaring war. Given this fact and assuming that continued tyranny is unacceptable, any solution must begin by proposing a new, small, unicameral, independent entity modeled on the Second Continental Congress to exercise what John Locke called the *foederative* powers, including the power to treat of peace, to decide the question of war or peace, and to declare war in an open and determinate manner. The first proposal, therefore, suggests a constitutional amendment to achieve this objective. The second proposal suggests a significant internal reorganization of the Congress to achieve the same objective in a less than satisfactory manner. In fine, both proposals acknowledge the obvious fact that any statutory solution, such as an amended War Powers Resolution, is no solution at all. The incapacity of the large, bicameral Congress cannot be remedied with a bandage; major constitutional surgery is needed.

In Part IV, attention shifts from the concrete and practical to the abstract and theoretical. As is made clear in Parts II and III, the baseline issue is the

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degree of procedural perfection with which both the decision and the declaration are made: Whenever war is declared in accordance with recognized constitutional procedures, rule of law prevails and the declaration has traditionally been termed “perfect.” Whenever war is declared as an exception to recognized constitutional procedures, rule of law is betrayed, tyranny has triumphed, and the declaration has traditionally been termed “imperfect.” On the assumption that the United States is a nation ruled by law and not tyrants, it therefore follows that imperfect declarations of war are always illegal and illegitimate. To substantiate the claim that the rule of law is superior to the rule of men, the penultimate chapter explores the pragmatic value that both early republican Rome and modern bureaucracies have discovered in adhering to proper procedures. In the final chapter, a philosophical analysis of the speech act foundations of declarations of war is undertaken. Illuminating the foundations should answer several unanswered questions that the previous pages may have raised in the reader’s mind.

Two appendixes are also found at the end of this book. The first reproduces all the legally recognized congressional declarations of war in American history, beginning with the Declaration of Independence. These texts constitute textual data for concluding that the Congress of the United States cannot possibly fulfill its constitutional responsibility to decide on and to declare war. The second appendix is a short comment on the declaring of war in parliamentary governments. Since the declaring of war is a universal issue and since parliamentary regimes possess a different structure from presidential regimes, the principles articulated in this study need to be applied somewhat differently to parliamentary governments.

In conclusion, this book is based upon the two complementary assumptions, that tyranny has no place in our republican and democratic nation and that the rule of law is superior to the rule of tyrants, even during time of war. For more than five thousand years, kings, emperors, and dictatorial presidents have declared war on their personal authority as the nation’s war leader. In 1787, a group of delegates meeting in Philadelphia attempted unsuccessfully to change the course of that history. They rejected the traditional consolidation of the power to decide the question of war or peace, the power to declare war, and the power to command the armed forces in the hands of a single individual. Instead, they attempted unsuccessfully to separate these three powers. Their experiment was both radical and noble, but a complete failure. By focusing narrowly on the complexity hidden within the infinitive phrase “to declare war,” it is hoped that the experiment begun in Philadelphia in 1787 might finally reach a successful conclusion during the twenty-first century.

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PART I

WHAT IS THE HISTORY?

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