The 1973 War Powers Resolution

and Other Issues

Prof. Robert F. Turner

Center for National Security Law - Separation of Powers Project
War Powers Resolution (1973)
Overview

§ 1 - name of act (“War Powers Resolution”)
§ 2 - purpose & policy (“fulfill intent of framers”)
§ 3 - consultation (“in every possible instance”)
§ 4 - reporting
(a)(1) - “into hostilities/imminent involvement in” etc.
(a)(2) - “equipped for combat”
(a)(3) - “substantially enlarge” existing force deployment . . . .
War Powers Resolution (1973)
Overview

§ 5 - Congressional action
  (b) must withdraw in 62-92 days if no Cong. action.
  (c) Cong. may order withdrawal by concurrent resolution

§ § 6&7 - congressional procedures (reports and votes expected)

§ 8 - interpretation: no war by treaty, doesn’t change const. powers.
“[Watergate] had a tremendous impact on the pending War Powers Act. Congressional anger over the Cox firing was still apparent when the vote to override...was taken on November 7. One Senator reported such comments as these form his colleagues: ‘This is not the time to support Nixon;’ ‘We simply have to slap Nixon down, and this is the vote to do it on;’ and ‘I love the Constitution, but I hate Nixon more.’ As a result of this high degree of animosity...the House voted 284 to 135 in favor of the Act. Thus, by the slim margin of four votes the House overrode the President’s veto.”

War Powers Resolution: The Proper Constitutional Standard?

“[applies to] the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”

versus

“Congress shall have the power...to declare War”
Question to Ponder

Would the War Powers Resolution have prevented the Vietnam conflict if it had been enacted prior to the August 1964 Tonkin Gulf incident?
War Powers Resolution
Section 2(c)

“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”
QUESTION:
Does This Permit the President to Rescue American Civilians Abroad From Terrorists?

“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”
*In December 1984 I was on a panel with Senator Jacob Javits at the annual meeting of the American Section of the International Law Association in New York. To my surprise, when I asserted that Section 2(c) of the WPR unconstitutionally limited the President’s independent constitutional power to rescue endangered civilians abroad, the Senator agreed with me.
“Within sixty days after a report is submitted or is required to be submitted pursuant to section 4(a)(1) [Rep’t due in 48 hours], whichever is earlier, the President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty day period, (3) is physically unable to meet as a result of an armed attack upon the United States . . . “

[President may extend another 30 days to protect troops while withdrawing.]
“Notwithstanding subsection (b), at any time that the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.”
Justice WHITE, dissenting.

“Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.”
“Although portrayed as an effort “to fulfill”—not to alter, amend or adjust—“the intent of the framers of the U.S. Constitution,” the War Powers Resolution actually expands Congress’ authority beyond the power to declare war to the power to limit troop deployment in situations short of war.

By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.
The War Powers resolution does not work, because it oversteps the constitutional bounds on Congress’ power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America’s ability to effectively defend our national security.

In July 2008 the bipartisan National War Powers Commission **unanimously** concluded the War Powers Resolution is UNCONSTITUTIONAL and should be REPEALED.
The War Powers Resolution in Practice: Case Studies

Prof. Robert F. Turner
Implementation of the War Powers Resolution

- Has been motivated more by political expediency than by constitutional principle
- Has undermined deterrence by promoting divisive domestic debate during periods of crisis
- Has jeopardized peace and endangered the lives of American fighting men and women.
The War Powers Resolution and the April 1975 Evacuations from Indochina

- Da Nang
- Phnom Penh
- Saigon
“Not a single leader of either party remained in the capital [during Easter recess]. Three of them were in Greece, two in the PRC, two in Mexico, one in Europe, and another in the Middle East. The rest were in twelve widely scattered locations in the United States.”

—Ford, A Time to Heal 245
“And now I ask the Congress to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by insuring their evacuation, if this should be necessary. …

I hope that this authority will never have to be used, but if it is needed, there will be little time for congressional debate. Because of the gravity of the situation, I ask the Congress to complete action…not later than April 19.”

—Pres. Ford to Joint Session of Congress, April 10, 1975
“Speed and Dispatch” and the Congressional Response to President Ford’s Request

April 10—President Ford requests statute
April 12—Administration Submits Draft Bill
April 19—Deadline Passes
April 23—Senate approves one bill
April 24—House approves a different bill
April 25—Conference reports a compromise bill
   (House adjourns for weekend)
April 30—Last people evacuated, Saigon falls
May 1—House rejects compromise bill 246-162…
As one of the Americans in South Vietnam in late April 1975, I am personally grateful that President Ford decided to act on his own without waiting for Congress to enact new legislation.

This was an excellent illustration of why Congress is not institutionally suited to be entrusted with business that requires “speed and dispatch.”
S.S. Mayaguez Rescue
(May 1975)

- “Consultation” involved notifying congressional leaders after operation underway
- No authority recognized in War Powers Resolution to rescue endangered civilians
- Cooper-Church Amendment barred funds for combat operations on the ground, in the air, or off the shores of Cambodia (all were done)
- Operation perceived by public as a success
- Foreign Relations Committee passed unanimous resolution praising rescue as fulfilling the “spirit” of the War Powers Resolution
Iran Rescue Attempt  
(April 1980)

- No “Cooper-Church”-type prohibition on using force in region
- Greater need for secrecy than during Mayaguez
- Rescue failed (8 Americans died)
- Senate Foreign Relations Committee held press conference *denouncing* President Carter for violating War Powers Resolution
BERUIT 1982-1983

A PARTISAN CONGRESS PLACES A BOUNTY ON AMERICAN LIVES
Beirut Deployment - 1 (1982-83)

- U.S. was part of multinational peace keeping force
- Initial consultation called “excellent” by SFRC Counsel Fred Tipson
- Reagan reported deployment under “equipped for combat” language rather than “imminent involvement in hostilities” provision
  - This led to Hill criticism, but
  - consider what would have happened in region if president said U.S. was “going to war”
- Mission was non-combat “presence” designed to reassure parties they could negotiate in safety
- Every government and major military force in region originally welcomed MNF

Continued on next slide . . .
Beirut Deployment - 2

- Virtually no congressional criticism on merits; but widespread criticism for not complying with the War Powers Resolution
  - HFAC Chmn. Zablocki said Reagan threatened “constitutional crisis”
  - Sen. Cranston said Hill would approve if President told them “exactly how and when we propose to extricate them.” Sen. Byrd demanded to be told “specifically how long the Marines will be there.”
  - For what the Washington Post said appeared to be politically partisan reasons, Hill Democrats insisted on a vote on a resolution of approval
  - SFRC Report included “Minority Views of All Democratic Committee Members”

Continued on next slide . . .
• Gen. P.X. Kelley warned partisan debate was endangering lives of Marines
• Senate voted 54-46 to (2 Democrats supported President Reagan) to continue mission
• Even SFRC Chairman Percy said publicly that if there were further casualties Congress could “reconsider” the vote at any time
• Syrian Foreign Minister said “The United States is short of breath”
• Radical Moslem forces told to “kill 15 Marines” to force U.S. to go home
• 23 October truck bomb killed 241 Marines and sailors (more than in Gulf War)
• Congress demanded that P.X. Kelley produce the head of the Marine who was responsible for the tragic loss
The White House yesterday suggested that congressional Democrats’ efforts to put some time limit on the deployment of U.S. Marines in Lebanon may be endangering the troops there.

‘To suggest…that congressional insistence that the law be lived up to is somehow giving aid and comfort to the enemy is totally unacceptable,’ said Sen. Thomas F. Eagleton (D-Mo.).

‘The administration has thrown out a red herring,’ Eagleton said, with ‘an attempt to intimidate the Congress and frighten the American people with this kind of ludicrous argument.’

When the anonymous White House comment implying danger for the Marines was reported on Capitol Hill, Democratic leaders were infuriated and, if anything, hardened their position.”

Congress Signals Weakness

“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support.”

Terrorists Told To Kill Marines

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Why did they think this?
Congress Had (Unintentionally) Placed a **Bounty** on Our Forces

At dawn on Oct. 23, 1983, a terrorist truck loaded with explosives killed 241 sleeping marines at the BLT Headquarters in Beirut, Lebanon.

Shortly thereafter, the remaining marines were withdrawn.
Osama bin Laden drew *lessons* from Beirut about U.S. “will” and courage that helped bring us 9/11

In 1998 Osama bin Laden told ABC News that America’s retreat following the Beirut bombing proved we were “paper tigers.”
Osama bin Laden drew lessons from Beirut about U.S. “will” and courage that helped bring us 9/11.

A 2003 Knight Ridder account observed: “The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation.”
Operations in Libya (2011)
UNSC Res. 1973  
(17 March 2011)

“4. *Authorizes* Member States . . . acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, *to take all necessary measures*, notwithstanding paragraph 9 of resolution 1970 (2011), *to protect civilians and civilian populated areas* under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory . . . .”
Dear Mr. Speaker:  (Dear Mr. President:)
I am providing this supplemental consolidated report, prepared by my Administration and consistent with the War Powers Resolution (Public Law 93 148), as part of my efforts to keep the Congress informed about deployments of U.S. Armed Forces equipped for combat. . . .
Dear Mr. Speaker: (Dear Mr. President:)

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The U.S. Role

“MILITARY OPERATIONS IN LIBYA

... (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO led coalition's efforts. ... With the exception of operations to rescue the crew of a U.S. aircraft on March 21, 2011, the United States has deployed no ground forces to Libya.”
MILITARY OPERATIONS IN LIBYA

. . . . Since April 4, U.S. participation has consisted of:  . . . .

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With the exception of operations to rescue the crew of a U.S. aircraft on March 21, 2011, the United States has deployed no ground forces to Libya.

Is this *legal* under the War Powers Resolution?
Questions

Does anyone doubt that sending Predator drones over Libyan territory to fire Hellfire missiles at members of that country’s armed forces falls under the definition of taking part in “hostilities”?

Center for National Security Law - Separation of Powers Project
Meaning of “Hostilities”

“[I]t might be possible to come up with language that keyed in on whether U.S. forces have been authorized to use lethal force other than on a self-defense basis.”

Prof. Robert Chesney
Lawfare Blog

The Obama Administration’s Position

Pentagon General Council Jeh Johnson said we were involved in “hostilities” and needed congressional approval.
The Obama Administration’s Position

Acting Asst. Att’ y Gen. (OLC) Carolyn Krass reportedly said we were involved in “hostilities” and needed congressional approval.
The Obama Administration’s Position

Att’ y Gen. Eric Holder reportedly said we were involved in “hostilities” and needed congressional approval.
The Obama Administration’s Position

State Department Legal Adviser Harold Koh said we were NOT involved in “hostilities” and needed NO congressional approval.
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Harold Koh and I have debated War Powers and other issues dating back to 1990.

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The Obama Administration’s Position

State Department Legal Adviser Harold Koh said we were NOT involved in "hostilities" and needed congressional approval. Some might call this "forum shopping." I call it ironic.

Harold Koh and I have debated War Powers and other issues dating back more than 20 years. Here he is in Oct. 1990 challenging my argument that we could intentionally target Saddam Hussein during Operation Desert Storm.
Harold Koh \textit{said targeting individuals was “assassination” and illegal under U.S. and international law.}
In March 2010, Harold defended targeting individuals by Predator drones as lawful in address to the American Society of International Law.
Harold Koh’s Defense of Libya Operation

Quoting Ford and Reagan lawyers, he claimed “I continue nearly four decades of dialogue between Congress and Legal Advisers … regarding the Executive Branch’s legal position on war powers.”
Harold Koh’s Defense of Libya Operation

Noting past presidents had largely ignored the WPR, Koh warned about “narrow parsing of dictionary definitions” so as “to avoid unduly hampering future presidents ....”
Harold Koh’s Defense of Libya Operation

“[T]he military operations that the President anticipated … were not sufficiently extensive … to constitute a ‘war’ requiring prior specific approval under the Declaration of War Clause.”
Obviously, he is **right**—but that is **not** the standard of the WPR!
“Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us which is not one of law but of policy.”
In other words, if it’s good policy, let’s not worry about whether we are breaking the law?
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Is that the function of the Legal Adviser?
Harvard’s Prof. Jack Goldsmith noted “for a quarter century . . . Koh was the leading and most vocal academic critic of presidential unilateralism in war.”
There is an old Washington adage: “Where you stand often depends upon where you sit.”
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His behavior raises an interesting question.
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Who is the government national security lawyer’s client?
Some might think “the President,” or the attorney’s “Department or Agency head,” or perhaps the “General Counsel” of the department.
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I submit it is ultimately the Constitution.
There is an old Washington adage: “Where you stand often depends upon where you sit.”

Perhaps you can tell I enjoyed watching Harold Koh paraphrase arguments I’ve been making since 1974.
There is an old Washington adage: "Where you stand often depends upon where you sit."

Perhaps you can tell I'm having fun watching Harold Koh paraphrase arguments I've been making since 1974. But that doesn't mean I don't think he is right in his bottom line conclusion.
“[T]he anticipated operations here served a ‘limited mission’ and did not ‘aim at the conquest or occupation of territory.’ ”
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The War Power Resolution was a response to the Vietnam War. We didn't 'aim at the conquest or occupation of territory' in Vietnam, either!
Does President Obama have a defense to violating the War Powers Resolution?
Does the 
Constitution trump an inconsistent statute?
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Does the Libya Operation even arguably conflict with the power of Congress “to declare War”?

Does anyone doubt that sending Predator drones over Libyan territory to fire Hellfire missiles at forces loyal to that country’s government falls under the definition of taking part in "hostilities"?

Have U.S. armed forces "been sent” into the territory, airspace or waters of a foreign nation, while equipped for combat . . . ?

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DOES IT REALLY MATTER?

Does President Obama have a defense to violating the War Powers Resolution?

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Yet, to date, the Obama administration is the only presidential administration since it was enacted over Nixon’s veto that has not asserted the War Powers Resolution is UNCONSTITUTIONAL.
Conclusions

- Sen. George Mitchell was correct in 1988 when he observed that the War Powers Resolution “unduly restricts the authority granted by the Constitution to the President as Commander in Chief.”
- Sadly — in the guise of asserting that the President must “obey the law” — the WPR has usurped presidential constitutional power.
- It has also been used as a political tool by both parties to mislead the public, undermine our security, and place our forces at unnecessary risk.
Conclusions

➢ It probably contributed at least indirectly to the 9/11 attacks by persuading bin Laden we would fold our tents if hit hard.
Conclusions

- Neither Korea nor Vietnam were “presidential wars” initiated against the will of Congress.
- The WPR would not have stopped Vietnam, which was specifically authorized by statute as permitted by § 5(c)(3).
- For nearly 25 years, Dr. Lou Fisher and I debated whether the War Powers Resolution should be repealed.
- Writing in *Political Science Quarterly* in 1998, Dr. Fisher finally came out for the repeal of the War Powers Resolution.
Conclusions

That would in my view be a great step in the right direction.
The “Power of the Purse”

Does Legislative Control Over Appropriations Give Congress Constitutional Authority to Direct the Execution of Commander-in-Chief Powers?
Are there no limits on the “Power of the Purse”?

“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”

Curtiss-Wright
First Appropriations Bill for Foreign Intercourse (1 July 1790)

“[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually…”

U.S. Statutes at Large, vol. 1, p. 129 (1790).

Article I, Section 9, of the Constitution requires that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. …”
The Constitution has made the Executive the organ for managing our intercourse with foreign nations…. The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.

*The Writings of Thomas Jefferson*, vol. 11, pp. 5, 9, 10 (Mem. ed. 1903).
Thomas Jefferson on Appropriations

Sadly, since Vietnam Congress has encumbered appropriations acts for foreign affairs and national defense with numerous “conditions” that often usurp the discretion vested in the President by the people through the Constitution.

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The Writings of Thomas Jefferson, vol. 11, pp. 5, 9, 10 (Mem. ed. 1903).
Congress May Not Lawfully Use Its Powers to Usurp the Constitutional Powers of Another Branch

- *United States v. Klein*
- *United States v. Lovett*
“[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have. . . . The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. . . .
It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. ...Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration."
During 1942, the conservative chairman of the House Appropriations Committee inserted section 304 into the Urgency Deficiency Appropriation Act of 1943 prohibiting the payment of treasury funds to three named individuals who had been accused of being “subversives” by the chairman of the House Committee on Un-American Activities.

The Senate repeatedly rejected the conference report, but FDR desperately needed the money for the war so asked them to approve it.

FDR then issued a signing statement refusing to enforce Section 304.
United States v. Lovett
328 U.S. 303, 313, 315, (1946)

“We…cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say….
United States v. Lovett
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“We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed.’”
The modern practice of using “conditions” on appropriations bills to exercise control of powers vested elsewhere in the Constitution is a threat to the core doctrine of Separation of Powers. If Congress can seize the Commander-in-Chief power, it can destroy the Judicial power too . . . .
Supreme Court Neutralization Act of 2014
(not yet introduced)

Be it hereby enacted, that…

No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.
Presidential Signing Statements

Is this presidential “lawbreaking” or upholding the “law” of the Constitution?
Signing Statements

- Without objection, in August 2006 the ABA approved a unanimous report declaring that “signing statements” were “contrary to the rule of law and our constitutional scheme of separation of powers.”

- Candidate Obama repeatedly denounced them. Bush, we were told, thought he was “above the law.”
A Typical Bush Signing Statement

“However, provisions of this bill . . . would interfere with my constitutional authority to conduct foreign relations . . . . I will not treat these provisions as limiting my ability to engage in foreign diplomacy or negotiations.”
However, provisions of this bill . . . would interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with international organizations and foreign governments, or by requiring consultation with the Congress prior to such negotiations or discussions. I will not treat these provisions as limiting my ability to engage in foreign diplomacy or negotiations. 

My bad …

That was the language used by President Obama in signing the Supplemental Appropriations Act of 2009 on June 24, 2009.
Signing Statements

Under the Constitution, Congress is empowered to enact laws and the President must see them “faithfully executed.”
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But we have a hierarchy of “laws”.

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But we have a hierarchy of “laws”.

At the very top is the Constitution.
“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--
‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”

- U.S. Constitution
- Art II, § 1.
Under the Constitution, Congress is empowered to enact laws and the President must see them "faithfully executed." As a principle, that's not in dispute. But we have a hierarchy of "laws." At the very top is the Constitution. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--

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Did that make Jefferson a "lawbreaker?"
Chief Justice John Marshall
*Marbury v. Madison* (1803)

“[A]n act of the legislature, repugnant to the constitution, is void.”
American presidents have been using “signing statements” to announce they would not execute unconstitutional statutes since James Monroe was President in 1822.
Often they do this to protect individual rights, as FDR did in the *Lovett* case during WW II.
In 1942 the powerful chairman of the House Appropriations Committee added a rider to the Urgency Deficiency Appropriation Act of 1943 that prohibited the use of appropriated funds to pay the salaries of three named government employees who were alleged “subversives” according to the House Committee on Un-American Activities.
Other legislators called it a "legislative lynching" and a "star chamber" proceeding. The outraged Senate refused to approve the conference report four times.
The money was essential to support the WW II war effort. President Roosevelt in desperation asked the Senate to approve the bill, but in signing it issued a statement declaring that **Section 304 was unconstitutional** and would bind neither the executive branch nor the judiciary.
The money was essential to support the WW II war effort. President Roosevelt felt in desperation that the Senate should  

Should FDR instead have vetoed the bill – denying beans and bullets to our troops and perhaps lost the war? 

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Did this “signing statement” make FDR a “lawbreaker”?

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328 U.S. 303, 313, 315 (1946)

“We...cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say....
‘We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed.’”
Today We Have a "Lawbreaking Congress"

In June 1976 I drafted a speech in the Senate explaining why Legislative Vetoes are unconstitutional.

Seven years later, the Supreme Court in INS v. Chadha reached the same conclusion and declared legislative vetoes to be unconstitutional.

Why do we have so many more signing statements in the modern era?
Today We Have a “Lawbreaking” Congress

In June 1976 I drafted a speech for Sen. Griffin explaining why Legislative Vetoes are unconstitutional. [On CNSL Web site.]

Seven years later, the Supreme Court in *INS v. Chadha* reached the same conclusion and declared legislative vetoes to be unconstitutional.
Since the 1983 *Chadha* decision, Congress has enacted more than 500 new legislative vetoes – thumbing its nose at the Supreme Court and the Constitution.
Supreme Court Neutralization Act of 2010

Be it hereby enacted, that...

No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.

If presidents don’t resist unconstitutional acts by Congress we will quickly abandon the doctrine of Separation of Powers.
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Congress will seize all governmental power by unlawful *conditional appropriations*.
The State Secrets Privilege
There are two bases for the State Secrets Privilege

A long-standing Common Law rule based upon prudence: the security of the nation outweighs the rights of a single plaintiff;

A constitutional commitment to the President of “Executive Power,” including the power to decide what national security information to share with other branches.
“[T]he Executive had a right, under a due responsibility, … to withhold information when of a nature that did not permit a disclosure of it at the time. . . . It belonged, he said, to each department to judge for itself.”
The National Security Executive Privilege
*United States v. Reynolds*, 345 U.S. 1 (1953)

Judicial Experience with the privilege which protects military and state secrets has been limited in this country. . . .

In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted,
The National Security Executive Privilege

*United States v. Reynolds*, 345 U.S. 1 (1953)

but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.
This is clearly stating that the president’s privilege to withhold military secrets is absolute.

but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.
“So far as practice and weight of opinion can settle the meaning of the Constitution it is today established that the President . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments.”

The same logic applies to disclosing secrets to the judiciary, a point recognized repeatedly by the Supreme Court.
“He [Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.
“It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.
“On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.
“Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.”
“We reverse because this holding contravenes the longstanding rule, announced more than a century ago in Totten, prohibiting suits against the Government based on covert espionage agreements. . . .

We recognized [in Reynolds] the privilege against revealing military secrets, a privilege which is well established in the law of evidence. . . . When invoking the ‘well established’ state secrets privilege, we indeed looked to Totten.”
“In a later case [Weinberger v. Catholic Action, 1981], we again credited the more sweeping holding in Totten . . . holding that whether or not the Navy has complied with [the National Environmental Policy Act] . . . is beyond judicial scrutiny in this case,’ where ‘[d]ue to national security reasons,’ the Navy could ‘neither admit deny’ the fact that was central to the suit.”
Undermining the Intelligence Community

The Foreign Intelligence Surveillance Act (1978)
“There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly.
“The convention have done will therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.”
Remember, the *Federalist Papers* were by far the most important source for understanding the new Constitution when it was ratified. Madison’s *Notes* and the official *Journal* were not published for decades.
First Appropriations Bill for Foreign Intercourse (1 July 1790)

“[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually…”

- U.S. Statutes at Large, vol. 1, p. 129 (1790).
The “National Security” Exception to 4\textsuperscript{th} Amendment

Every Court of Appeals to decide the issue held the President has constitutional power to authorize warrantless foreign intelligence wiretaps.
The “National Security” Exception to 4th Amendment

Courts have recognized many exceptions allowing warrantless “. E.g.,:

intelligence wiretaps.
The “National Security” Exception to 4th Amendment

Courts have recognized many exceptions allowing warrantless “searches”—especially when public safety is concerned. E.g.,:

- Food processing plants and restaurants can be inspected without probable cause;
- intelligence wiretaps.
The “National Security” Exception to 4th Amendment

Courts have recognized many exceptions allowing warrantless “searches”—especially when public safety is concerned. E.g.,:

- Food processing plants and restaurants can be inspected without probable cause;
- **Commercial airline passengers** and their **baggage** can be inspected without the slightest individualized suspicion of criminal activity.
The district court accepted the government’s argument that there exists a foreign intelligence exception to the warrant requirement. ... We agree with the district court that the Executive Branch need not always obtain a warrant for foreign intelligence surveillance. ... The exception applies only to foreign powers, their agents, and their collaborators.

The Carter Administration authorized the warrantless entry into a U.S. Person’s home to plant bugs and wiretap the phone of a suspected Vietnamese spy who had lived in America lawfully for more than a decade.
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In his espionage trial, Truong’s lawyer moved to exclude all evidence obtained via this warrantless surveillance on 4th Amendment grounds.
The government's argument that there exists a foreign intelligence exception to the warrant requirement was accepted by the district court. We agree with the district court that the Executive Branch need not always obtain a warrant for foreign intelligence surveillance. The exception applies only to foreign powers, their agents, and their collaborators.

The DC Circuit disagreed.
U.S. v. Truong
CA 4th Cir., 629 F.2d 908, 912-13 (1980)

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Crime Control and Safe Streets Act (1968)

"Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

CONGRESS has also recognized this constitutional power of the President.
Crime Control and Safe Streets Act (1968)

“Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.”
The Truong court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power."
FISA and 9/11

FISA makes it a felony to engage in foreign intelligence surveillance in U.S. without a FISA warrant.

Warrant only available if it can be shown target was “agent of a foreign power” (including al Qaeda).
FISA and 9/11

FBI agents identified two of the terrorists on American Airlines Flight 77 as possible terrorists in San Diego long before the attacks, but were told to back off because of fears they might violate civil liberties without a warrant they could not get.
FISA and 9/11

In Minneapolis, FBI identified Zacharias Moussaoui as a terrorists and tried hard to get info to qualify for a FISA warrant so they could examine his laptop. Failed because of FISA (Congress didn’t anticipate we might face a “lone wolf” terrorist.)
“Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such.”

Lt. Gen. Michael Hayden
Director, National Security Agency
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The only reason it was not in effect before 9/11 was because Congress had tied the President’s hands by enacting the unconstitutional FISA statute.
"It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water’s edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don’t will serve neither their party nor themselves."
More than 30 years ago . . .

The day after Jimmy Carter won the election as President, I wrote a memo to my boss, Asst. Senate Minority Leader Robert P. Griffin (R. Mich) — the original is on the wall in my office.
“The voters have selected Jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years.

So long as Carter’s policies are reasonable -- even though they might not conform to our own views on how best to get the job done -- I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn’t is no excuse for our not trying.)

If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session?”
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If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session? Stop by my office if you’d like to see the original 1976 memo, along with the Senator’s hand-written response.
Are there any questions?