The Law Governing American Use of Force in Foreign Affairs

For half a century, Syria has intermittently been the object of hostile actions by the United States and Israel. Most of these actions were covert; some were carried out overtly with American assistance in money and equipment by the Israelis; and from 2004 the US Government imposed sanctions.[1] Since at least the Spring of 2012, US Government policy hardened toward regime change in Syria, with increased assistance to the rebels in the civil war that began in 2011 and encouragement of allies to boycott or otherwise weaken the Syrian Government and economy.

As Joshua Landis wrote in *Foreign Policy* already in June 2012,[2] "Let's be clear: Washington is pursuing regime change by civil war in Syria. The United States, Europe, and the Gulf states want regime change, so they are starving the regime in Damascus and feeding the opposition. They have sanctioned Syria to a fare-thee-well and are busy shoveling money and helping arms supplied by the Gulf get to the rebels."

Although not publicly acknowledged, clandestine moves against the Assad regime were becoming more invasive in the early months of 2013. Had some of the actions been undertaken by a foreign power inside America they would have been regarded as acts of war. However, the Syrian Government was in no position to respond militarily as the American Government would have done.

It is now known that at least from the Spring of 2013 plans were put in place for enhanced American military intervention. So alarming to the Joint Chiefs of Staff were the moves toward an overt attack on Syria that the JCS Chairman, General Martin Dempsey, wrote to the Chairman of the Senate Armed Services Committee, Senator Carl Levin, on July 19 warning of the likely outcome of such operations. Use of military force, no matter how limited at the beginning, General Dempsey pointed out, "is no less than an act of war…[and once taken] Deeper involvement is hard to avoid."

Outside the Government, some of us have sounded similar warnings over the earlier interventions in Iraq, Afghanistan, Somalia and Libya. (See my *Humpty Dumpty: The Fate of Regime Change,* Amazon 2013.) These experiences provide the historical proof text for General Martin's warning: what were initially thought to be limited operations turned into wide-spread, continuous, enormously-expensive and inconclusive wars. The possibility of such wars against Iran and Syria also raised questions not only of the effects of such actions on the two countries but also on the American political process and economy.

Then on August 21, 2013, a chemical weapons attack was launched on several suburbs of the Syrian capital, Damascus. President Obama, other members of his administration and most of the American media reacted with understandable revulsion. Use of such weapons, as Secretary of State John Kerry said,[3] is "a moral obscenity." It should be – and now has become – legally inadmissible in most of the world. Only two Middle Eastern countries, Israel and Egypt, have not ratified the 1993 "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction."

America was right to be seriously concerned about the use of chemical weapons even though they posed no threat to the United States or to American personnel. But, the Obama administration apparently did not look judiciously before leaping to the conclusion that the weapons were fired by Syrian Government troops and that, consequently, the regime of

President Bashar al-Assad was guilty. Without consulting Congress President Obama decided to order military action to punish the Assad regime.[4]

As *The New York Times* reported, "Administration officials said that although President Obama had not made a final decision on military action, he was likely to order a limited military operation — cruise missiles launched from American destroyers in the Mediterranean Sea at military targets in Syria…" President Obama described such missile attacks as "a shot across the bow,"[5] but since each of the projected 100-150 cruise missiles would carry half a ton of high explosives, the "limited" attack might be better compared to the London Blitz. Indeed, even more missiles might have been fired from the four guided missile warships already in position, off the Syrian coast, and a fifth was ordered into position on August 29.

As General Dempsey had described it to Senator Levin, "Stand-off air and missile systems could be used to strike hundreds of targets [with]…hundreds of aircraft, ships, submarines, and other enablers. Depending on duration, the costs would be in the billions." Many civilian would have been made homeless, wounded or killed. Certainly, as General Dempsey had pointed out, no matter how limited such an attack would be, it was an act of war.

President Obama had been unmoved by General Dempsey's advice.[6] Nor was he deterred when the British Parliament voted against the motion of its Government to join in the American military attack.[7] At the same time, German Foreign Minister Guido Westerwelle announced that Germany would not be part of any military attack on Syria. "'Our participation has not been requested, nor are we considering it,' Westerwelle told *Neue Osnabrücker*. He explained that Germany was bound by very strict limitations in both case law and the German constitution."[8] Among America's major NATO allies, Britain's and Germany's "defections," as some described them, left only France. As the former colonial governor of Syria and for domestic French political reasons, the administration of President François Hollande was willing to act. Indeed, on August 30, French fighter-bombers were in a countdown mode, briefed and loaded for a raid on Damascus.[9]

Then on August 31, 2013, in an abrupt about-face, President Obama called off the attack. As he announced,[10] "…even though I possess the authority to order military strikes, I believed it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress...This is especially true after a decade that put more and more war-making power in the hands of the President…"

People all over the world were shocked: President Hollande was humiliated; the people of Damascus were profoundly relieved; the English public appeared delighted; the Saudi Arabians and the Israelis were furious; and the American public was incredulous.

What had happened to cause Obama to make this remarkable about-face? Why had the march of events that had led right up to the take off into a major act of war suddenly been aborted? Had Mr. Obama had the authority, as he asserted, independently to make an act of war or not? Should Congress have been involved from the beginning? What, indeed, were the proper roles of the President and the Congress. In short, Mr. Obama posed for the first time in at least half a century the essential questions of authority in war and peace that the Constitution was designed to answer. I now turn to these fundamental issues in the light of American law.

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Two documents lay out the criteria for legal American use of force in international affairs: the Constitution and the Charter of the United Nations, The Constitution is, of course, the foundation of the American state; it is the "social contract" between us as citizens and our government. The Charter of the United Nations is a treaty or a contract between our government and other governments and, since it was ratified by the US Senate,[11] it is the law of the land.[12] I look first at the Constitution.

I do not apologize for going into detail because, probably like most readers of this note, I have had only a general view of the background, evolution and import of our social contract. Many of the important aspects, and particularly the controversies engendered by interpretations of them, were not, until recently, a pressing part of my intellectual or civic concern.[13] Perhaps that is also true of you. So allow me to be a bit pedantic at least on the central issues I am here concerned with, the power to make war and where it is vested. These are issues on which the lives of millions of people -- fortunately not yours or mine -- have hung and trillions of dollars --unfortunately yours and mine -- have been spent. These issues were what President Obama's two policies – threatening to make war and then deciding not to do so – posed. So, first, what in general should be said about the Constitution.

We can think of the Constitution as a tree. Then we can ask why it was planted; in what "soil" its roots were set, how its trunk and branches took shape at the Constitutional Convention, and how over the years, successive judges and political leaders have pruned and grafted it. I will briefly consider each of these issues and then, in separate papers, I will discuss the law of nations and current controversy over the war powers of the Presidency and Congress. First, the "soil" in which the Constitution was planted:

* * *

In the aftermath of the Revolution, the mood of the American public, as reported throughout the former colonies, was one of confusion, dejection and even anarchy.[14] The great cause – fighting for independence – having been won no longer governed, but "victory" had not brought the millennium people expected. So throughout the new country, people were asking what had the Revolution been for? What did independence really mean? Who was then to be in charge? What were the limits on his authority? How did the new states relate to one another or to whatever body they had joined in creating? Opinions and actions arising from these questions – roughly divided between hostility to authority and fear of lawlessness -- set the parameters of American politics in the first experiment in self-government, the Confederation.

The Confederation was intentionally weak. After all, the Revolution had been undertaken to break loose from an authoritarian government, the British monarchy. Area after area expressed itself to state governments and in various conventions denouncing the idea that sovereignty could be delegated to any official body. "People power" was the sense of politics throughout the land.

But who were "the people?" Society was deeply divided. Living in the seaside settlements were groups of polyglot landless workers, small holders and the urban poor. As British restrictions on westward movement were evaded or lapsed, individuals, families and small bands of vigorous, lawless and determined settlers plunged into the interior. Their goal was land acquisition; to them, government of any kind was an enemy. Finally, there was a widely scattered elite that was composed of the men who had administered the colonies

under British rule. Each group feared the others. Revolution threatened to turn into civil war.

Members of the elite were so disturbed by the current malaise that they delved into the history of the ancient Roman republic and contemporary European states – particularly England -- to see how other peoples had handled the definition and practice of government. They also read and discussed the works of such then recent philosophers as Montesquieu, Locke and Hobbes and Blackstone's Commentaries on English Common Law. Our ancestors were widely read and surprisingly well informed.[15]

The hundreds of discussions on the form of government that took place throughout the land were not only philosophical or abstract. They were also concrete. And answers were partly predetermined. Contemporary Americans had inherited the political, economic and social system that had evolved over the previous century. The essential feature of that system was the division of the land into thirteen self-governing colonies. Each had its own constitution and its own customs of government. Such local sovereignty as then existed was the separate endowment of each state. Indeed, their independence from one another had been specifically recognized in the November 30, 1782 Treaty of Paris that ended hostilities with Britain.[16] Parties to the treaty were Great Britain on the one side and on the other the "said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia…[which] His Brittanic Majesty acknowledges… to be free sovereign and independent states." The separation from Great Britain, as Luther Martin of Maryland later put it, "placed the 13 States in a state of Nature towards each other." They recognized no overlord, certainly not the Continental Congress. They were encouraged to assert their rights by one of the then most popular commentators, Noah Webster,[17] who warned, that the people must make use of their freedom or they would lose it.[18] They were safe, he thought, to assert their rights because a "European or Asian kind of tyranny… *do not exist in this country.*"

Few people agreed. Memories of the British monarchy were recent and painful. The very idea of a standing army – which most people equated to British rule – was anathema. James Madison probably spoke for most Americans when he said that "A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence [sic] against foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people."[19]

What to do about governing while maintaining liberty? Even the elite was deeply divided over this issue. So, already during the dangerous 1780s, we can see the beginnings of "factions," that were to become parties: the Federalists (influenced by Alexander Hamilton) and the Republicans (later led by Thomas Jefferson). To simplify, the Federalists wanted a strong, central government aimed, as Gouverneur Morris put it, "to save the people from their most dangerous enemy, themselves." On the contrary, the Republicans favored what today we would call a "liberal" political system.

While the leadership was increasingly divided, all were members of the small Protestant, male, white elite. They shared generations of tradition and years of experience in running most of their affairs. They were highly protective of their differing economic interests and were clearly opposed to any program that would diminish their powers. From

their ranks came the "most experienced & highest standing Citizens" (as James Madison described them) who would gather at Philadelphia in May 1787 to devise the "Tree." They were driven together by the virtual collapse of the government that had been formed under the Articles of Confederation. It was in the context of their aspirations and fears that they deliberated. Their thoughts are still today mined by legal scholars, judges and justices to determine what the Constitution means. We are fortunate in having a cogent summary of their discussion by James Madison.[20]

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For my present purposes, the key issues relate to what the Constitution mandates on the legality of war and the question of what authority can authorize it.

But, at Philadelphia, there was little discussion about the power to be vested somewhere in the projected government to make war. I infer that this is so in part because, in the evident collapse of the military force that had fought the Revolution, the issue of any form of armed attack on another power would have seemed ridiculous in 1787.[21] But here is how the delegates perceived the issue of the power to make war, according to Madison's notes:

> Mr. [Charles] Pinckney [of South Carolina] opposed the vesting of this power [to make war] in the Legislature. Its proceedings were too slow. It w[d22] meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs and most capable of proper resolutions. If the States are equally represented in [the] Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority [the House of Representatives] to make war, and another [the Senate] peace.
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> Mr. [Pierce] Butler [of South Carolina] The objections against the Legislature lie in great degree [also] against the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.
>
> Mr. Madison and Mr. [Elsbridge] Gerry [of Massachusetts] moved to insert '*declare*,' striking out '*make'* war [from the text under discussion]; leaving to the Executive the power to repel sudden attacks.
>
> Mr. [Roger] Sherman [of Connecticut thought it stood very well. The executive should be able to repel and not to commence war. 'Make' is better than 'declare' the latter narrowing the power too much.
>
> Mr. Gerry [said that he] never expected to hear in a republic a motion to empower the Executive alone declare war. [That power was, as the delegates well knew, the power of the European and British monarchs.]
>
> Mr. [Oliver] Ellsworth [of Connecticut] there is a material difference between the cases of making *war* and making *peace.* It should be more easy to get out of war, than into it. War also is a simple and overt declaration, peace attended with intricate & secret negotiations.
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> Mr. [George] Mason [of Virginia] was against giving the power of war to the Executive, because not only safely to be trusted with it; or to the Senate, because not so constructed to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred '*declare'* to '*make.'*
>
> On the motion to insert *declare* – in place of *make,* it was agreed to.

[That is how the text of the Constitution emerged – Article One, Section Eight, Paragraph 1 and 11: "The Congress shall have Power…To declare War…" Madison then gives the votes by states.]

Mr. Pinckney's motion to strike out [in the draft transcript] whole clause, disagreed to without call of States. [That is, he favored the return to the role of the separate states conducting their own foreign policy including the decision on making war. The other delegates in the committee voted against him and one of the specific decisions of the framers of the Constitution was that the several states could no longer engage in foreign affairs which was to be the exclusive preserve of the Federal Government. (Article One, Section Ten, Paragraph 1: "No State shall enter into any Treaty Alliance, or Confederation…")]

Mr. [Pierce] Butler [of South Carolina] moved to give the Legislature [the] power of peace, as they were to have that of war.

Mr. Gerry seconded him. 8 Senators may possibly exercise the power if vest in that body, and 14 if all should be present; and may consequently give up part of the U. States. The Senate are more liable to be corrupted by an Enemy than the whole Legislature. [the ms inserted 'it was unanimously negative.']

On the motion for adding 'and peace' after 'war' [the delegations voted no]

[In the meeting of Friday, June 1, 1787, discussing the Executive] Mr. Pinckney was for a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & wars &c, which would render the Executive a monarchy, of the worst kind, to wit an elective one.

Madison later picked up the same theme, remarking that the first task of the Legislature was "to protect the people against their rulers…" He went on to say, that the second purpose was "to protect the people against the transient impressions into which they themselves might be led. A people deliberating in a temperate moment, and with the experience of other nations before them, on the plan of Government most likely to secure their happiness, would first be aware that those charged with the public happiness might betray their trust. An obvious precaution against this danger would be to divide the trust between different bodies of men, who might watch & check each other."

Alexander Hamilton agreed with Madison on this issue. On how to achieve the balance that both men sought, he disagreed. Given that "Men love power," he urged in a long and eloquent speech that his fellow delegates pattern their choices on the government that resulted from the British Constitution, He called it " the best in the world…" The essential feature of the British system was that it removed the need for the powerful constantly to grasp more power in order to perpetuate themselves in office. Hamilton thought Americans should make their executive "president for life." An elected monarch, he thought, would "be guarded against the *tumults* excited by the ambition and intrigues of competitors [but] he was aware that his proposal went against the ideas of most members."

Hamilton's argument did not carry the day. But many agreed with his assertion; "Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many. Both therefore ought to have [enough] power that each may defend itself against the other." The general consensus of the meeting was for divisions of power and responsibility, "checks and balances." This was sharply and categorically set in the issue of war making. Indeed, this is one of the most explicit divisions of power set out in the Constitution.[23] As we shall see, his expectation was unduly sanguine. The presidency was to grow and the legislature would often fail to protect its position. But that turn of events was far into the future. The delegates agreed that the Congress would balance the Executive.

In their later debate,[24] Madison argued that "Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."

* * *

The Constitution that emerged from the Convention is a short document. It sets forth, for the most part, general considerations rather than exact specifications. It was, in large part, a compromise between competing interests and beliefs. These forces inevitably have left lacunae for interpretation. But, rather than being a source of weakness, inexactitude has produced resiliency. This is why, in contrast to most other countries' constitutions, it has survived changing circumstances: within limits on which reasonable people could agree, it remains the basic guide.

To test those limits and to uphold the essential principles, lawyers, of whom I am not one, here act as historians, of whom I am one. The lawyers and judges go back to the authors and events that shaped its construction. This is not an arcane activity: the laws that affect our daily lives today are matched – or should be matched – to its standards.

The Constitution came into effect on July 21, 1788 when nine of the thirteen states ratified it. The first Congress was seated on March 4, 1789, and on April 30 of the same year George Washington was inaugurated as the first President of the United States. New York, North Carolina, Rhode Island and Vermont then ratified the Constitution.

I focus here on the war powers.

Article One, Section One: "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 One, Section Eight, Paragraphs 1: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense…" Paragraph 11: "To declare war…" And Paragraph 12: "To raise and support Armies, but no Appropriations of Money to that use shall be for a longer Term than two Years;" Paragraph 15: "To provide for calling forth the militia to execute the Laws of the Union, suppress Insurrections and repel invasions;" Paragraph 16: "To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States…" And Paragraph 18: "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers…"

Those are the war-making powers vested in the Congress. The war powers of the President are set out in Article Two.

Article Two, Section One, Paragraph 1 specifies that "The executive Power shall be vested in a President…" Section Two, Paragraph 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 actual Service …" Paragraph 2: "He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur…" And, in Section Three, his duty is set out that "…he shall take Care that Laws be faithfully executed…"

In short, the president's responsibility is to *execute* the decision of the Congress. That is the clear reading of the text, but as we shall see, this has not always been the Court's interpretation or policies of subsequent administrations in recent years.

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The issue of war making power and its relationship to diplomacy soon arose. Thomas Jefferson (who was serving as minister to France at the time of the Philadelphia Convention) sought a way to deal with the challenge posed by the so-called Barbary Pirates.[25] For generations, they had levied a tax on merchant ships passing their shores. Jefferson was determined to stop the practice. First, he endeavored to get the European states to join in what we might consider the ancestor of NATO, a defensive Mediterranean alliance. Some of the smaller European countries were agreeable but England and France were not. They found the by-then traditional system acceptable. Jefferson was ready to go it alone. The answer, he wrote to James Monroe the year before the Philadelphia Convention, was to build a suitable navy to protect American sailors and goods:[26]

> Every national citizen must wish to see an effective instrument of coercion, and should fear to see it on any other element than the water. A naval force can never endanger our liberties, nor occasion bloodshed; a land forces would do both.

When in 1801 Jefferson became president, he refused to pay the $25,000 annual fee demanded by the Tripoli ruler who promptly declared war on the United States. In response, Jefferson sent a naval squadron to the Mediterranean, as he informed Congress in his first annual message.[27] However, Jefferson acted in what he thought as a strict conformity to the Constitution. As Edward S. Corwin of the Library of Congress's Legislative Reference Service has written: [28]

> When the Bey of Tripoli declared war upon the United States in 1801 a sharp debate was precipitated as to whether a formal declaration of war by Congress was requisite to create the legal status of war. Jefferson sent a squadron of frigates to the Mediterranean to protect our commerce but its mission was limited to defense in the narrowest sense of the term. After one of the vessels in this squadron had been engaged by, and had defeated, a Tripolitan cruiser, the latter was permitted to return home. Jefferson defended this course in a message to Congress saying, "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel being disabled from committing further hostilities, was liberated with its crew."

Alexander Hamilton, who had actively participated in the Philadelphia Convention, disagreed but did so in only one aspect of the issue: whether "war" already existed by the action of the Tripolitanians and not in respect of the power of Congress to declare it. He memorably summed up his interpretation of the war-making decision there taken in these words:

> It is the peculiar and exclusive province of Congress *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocation, or injuries received; in other words, it belongs to Congress only *to go to War.* But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war,* and any declaration on the part of Congress is nugatory; it is at least unnecessary."

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The Constitution specified a means to resolve such disagreements in Article Three. Article Three, Section One specified that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article Three, Section Two, Paragraph 1 specified that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution…" This power is the justification for what I have termed the pruning and trimming of the "Tree." More accurately, it is the justification for a reasonable interpretation of the intent of the Founders when their intent was unclear.

In 1800 and 1801, two decisions by the Supreme Court -- then the bastion of the Federalists who had been defeated by the Jeffersonian Republicans in the 1800 election[29] – confirmed the reading of the Constitution as stated above. The first of these was *Bas v. Tingy* which affirmed that only Congress could declare war (as it did against the French Republic in 1798) ruling that "As far as congress tolerated and authorised [sic] the war on our part, so far may we proceed in hostile operations."[30] And, in the second, a year later, *Talbot v Seeman,* the newly appointed Chief Justice John Marshall affirmed for the unanimous Supreme Court that[31]

> The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed…if she [France] has violated them, w ought not to violate them also, but out to remonstrate against such conduct…a violation of the law of nations by one power does not justify its violation by another…The whole powers of war, being by the Constitution of the United States, vested in congress…the congress alone may declare war."

This reading of the Constitution was unchallenged during most of the following century. But an extraneous element was later to be introduced into the issue of war powers from a speech made in Congress by the man who later would become Chief Justice, John Marshall.

John Marshall was then a (Federalist) Congressman. He had served as a member of the delegation sent to Paris to try to resolve the financial and diplomatic conflict with France, was subsequently rushed into office as Chief Justice by President John Adams just before the expiry of Adams' term in office and would go on to become perhaps the most influential of the Chief Justices of the Supreme Court. In a speech before Congress in 1800, he coined the phrase to describe the military or foreign affairs power of the presidency, "sole organ." What he argued was that the president had, as the Constitution clearly states, the sole executive power and was obligated to effect the law as passed by Congress. As we shall see, his statement, taken out of the context of a speech before Congress, has been elaborated to mean that the president is the sole source of committing the nation to war.

While the Court made no further comment on this issue, the then Congressman Abraham Lincoln in 1848 gave what apparently everyone assumed to have been the intent of the Founders when he wrote that

> The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons. Kings had always been

> involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our [Constitutional] Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us…[32]

Twelve years later he felt constrained by his interpretation. In 1860, Confederate forces began the siege of Fort Sumter in Charleston Harbor. In his inaugural address, Lincoln sought to diffuse the issue, saying that the Confederates "can have no conflict without being yourselves the aggressors." He did not attempt to relieve the fort which fell in April, 1861. But he began a series of actions including blockading Confederate ports and seizing Confederate ships at sea. A number of the ship seizures resulted in cases that reached the Supreme Court under the general category of "Prize Cases." The Supreme Court held that[33]

> By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is 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. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But, by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called out the militia and use the military and naval forces of the United States in case of invasion by foreign nations and to suppress insurrection against the government of a State or of the United States.
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> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral."

In summary, we have seen that up to this point, roughly three generations after the writing of the Constitution, there was no question about the Constitutional division of powers between the Congress (to declare war) and the Presidency (to execute the law as passed by the Congress). Indeed, it was to be another seventy years before this doctrine was challenged. And since it is on the basis of this challenge that America has repeatedly engaged in war in our lifetime, we must examine the major transformation. To revert to my analogy of the Constitution as a tree, this has been a period of severe pruning and unanticipated grafting. The man on whose revisionist decisions on the "imperial presidency" rest is George Sutherland.

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George Sutherland was an English immigrant who was educated at Brigham Young Academy and the University of Michigan Law School. After practicing law in Salt Lake City, and being active in Republican politics, he was appointed by the state legislature to be a senator from Utah. His life-long mission was to argue[34] -- "that the president must be given a free, as well as a strong hand." During the First World War, he developed his stance to include the notion that in time of war, all restraints in traditional rights and liberties were to be withdrawn. Further, he believed civil rights existed only in domestic law. (As we shall see, this doctrine was a starting point for the torture of prisoners). Appointed to the

Supreme Court by President Warren Harding in 1922, he played a major role in the attempt to overturn President Roosevelt's New Deal program. For my present purposes, his most significant decision was in the *United States v. Curtiss-Wright Export Corp*.[35]

Briefly put, in 1932 the Curtiss-Wright Export Corporation was selling machineguns (and allegedly bombers and fighter planes) to Bolivia which was then engaged in a war with Paraguay over the province of Chaco. Chaco was believed to have a substantial oil potential and two of the giant oil companies, Shell and Standard Oil, were vying for it through their proxies, Bolivia and Paraguay. President Roosevelt, "acting under and by virtue of the authority conferred in me by the said joint resolution of Congress" declared an embargo on the sale which Curtiss-Wright violated. The case gave the Supreme Court a chance to rule on the extent of presidential and congressional powers. George Sutherland wrote for the Court, and his opinion, quoted in turn in later decisions, provided the basis for the assertion of presidential power in the "war on terror." So the it has been one of the most important decisions of the modern Supreme Court.

Essentially what Justice Sutherland argued[36] was that presidential power was far greater than had ever before been claimed, that "in international relations, the President is the "sole organ" of the Federal Government" and that "unbroken legislative practice from the inception almost of the national government…must often accord to him [the President] a degree of discretion and freedom which would not be admissible where domestic affairs alone involved and that the restrictive provisions of the Constitution were operative only in domestic affairs and of limited scope even then."

As a historian I find fundamental faults in Sutherland's opinion. We must examine his assertions because they form the Constitutional basis on which the growing power of the presidency in war making rests today.

The first fault is that American presidents from Jefferson through Lincoln to Roosevelt did not assert the powers he assigned to them. As I have pointed out, each was careful to define his powers and justify his powers in relationship to the role of the Congress as defined in the Constitution: they were to decide policy and he was to implement it. Not more and not less.

Sutherland lists a number of Congressional actions that gave the President authority to act in foreign affairs and in some instances[37] gave him discretionary powers. On these issues, Sutherland summarizes his position thus: "…while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all reasonable doubt it finds them to be so…A legislative practice such as we have here evidenced not only by only occasional instances but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of providing the presence of unassailable ground for the constitutionality of the practice [of the President handling all aspects of foreign affairs]." True enough, but in each of the actions cited by the Justice, the President is acting under the authority of the Congress, not on his sole authority.

The second fault, in my opinion, is that Sutherland based his argument for presidential overlordship on the assertion that the "States severally never possessed international powers…[And that, when the Revolution was ended in a peace treaty] the powers of extended sovereignty passed from the Crown not to the Colonies severally, but to the Colonies in their collective and corporate capacity as the United States of America…since the states severally never possessed international powers, such powers could not have been

carved from the mass of state powers, but obviously were transmitted from…the Crown." Thus, he argues, the Constitution did not limit or otherwise define the powers of the Executive in foreign affairs. "The powers to declare and wage war to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality…[it is] a power which does not require as a basis for its exercise an act of congress."

As I have pointed out, the 1783 Treaty of Paris that ended the war specified that it was made between Great Britain on the one hand and each of the thirteen "free. Sovereign and independent states" on the other. This is significant because at the time sovereignty was passed to the states, there was no chief executive. While the Continental Congress was mentioned in the Treaty, its sole function was to "earnestly recommend" to the states to restore properties they had confiscated from British subjects.

As befits a lawyer, Sutherland thought of sovereignty as a single attribute, but the reality of sovereignty in America in those years was diffuse. As is common in insurgencies,[38] what amounted to "sovereignty" was dispersed. In the year before the Philadelphia Declaration of Independence, nearly a hundred declarations of independence were proclaimed by self-governing local groups.[39] One of these, in the frontier area of North Carolina, was the work of my great, great, great grandfather, General Thomas Polk.[40]

Sutherland's assertion that the colonies had no international or foreign affairs role is also historically fallacious. What, after all, was the Revolution? North Carolina established a Provincial Congress in 1774, and Massachusetts quickly followed. The Massachusetts declaration of self government came from an armed revolt centered on Worcester that dissolved the 1691 Charter and took control of all the settled areas of the colony outside of British-occupied Boston. The Second Provincial Congress of New York during June 1775 refused permission for provisioning Royal Navy ships in its harbor. The June 12, 1776 Virginia Declaration of Rights called for Virginia to have "the proper, natural, and safe defence [sic] of a free state" to be upheld by its own armed force. Other colonies declared themselves independent states at roughly the same time. During the early battles, the states separately – to the dismay of George Washington -- employed their own military forces under their own command. Later, while the Continental Congress enrolled an army of its own, the "Continental Line," the states continued to maintain their separate armies or militias.[41] Surely, each of them was engaged in foreign affairs. Foreign affairs – the struggle against Great Britain – was the essence of politics in each state.

As the eminent American historian Gordon W. Wood has written,

> When on July 4, 1776, Americans declared independence from the monarchy of Great Britain, they were faced with the formidable task of creating new republican governments. Their immediate focus was not on any central authority but on their individual state governments. Today we are apt to forget that the federal government under which we now live was a decade away in 1776. Indeed, the strong national government that was created in 1787 was beyond anyone's imagination at the time of the Declaration of Independence.

It is true, as the records of the 1787 Constitutional Convention make clear that the delegates wanted a strong central government. But, even Alexander Hamilton, as I have written above, was determined that it be carefully balanced so that no single branch overshadow the other two. It was for this reason, as the eminent scholar of American

Constitutional Law, Louis Fisher pronounced,[42] "…the Framers [of the Constitution] rejected the model of an executive empowered to exercise exclusive control over external relations." Fisher also pointed out that in John Marshall's speech before Congress, on which Justice Sutherland heavily relied, ""Marshall emphasized that President Adams had not attempted to make foreign policy single-handedly. He was carrying out a policy…formulated through the collective effort of the executive and legislative branches, either by treaty or by statute, [only then] did the president emerge as the sole organ in implementing national policy." And, as Chief Justice, Marshall held that ""The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry." But, Marshall's Congressional speech has been misused to assert that the President could disregard or even override the will of the Congress. This has had a profound influence on modern American politics.

As we shall see (in my next essay), the presidents who followed Franklin Roosevelt have often taken Sutherland's verdict in the Curtis Wright case as a pass to avoid the balancing safeguards spelled out in the Constitution. Indeed, despite Sutherland's attempt to draw a distinction between what a president could lawfully do in foreign affairs and was prohibited from doing in domestic affairs, the trend on which he placed such emphasis has been to give the president greater, indeed virtually overwhelming, power also in domestic affairs.

In his own political activity, Sutherland drew a distinction between what the President could legally do abroad and what he could do in domestic affairs. Sutherland wanted him powerful overseas but sought to restrain his actions at home. Put in historical terms, he saw world affairs as taking place in what Thomas Hobbes thought of as a "state of nature;" that is, essentially actual or potential war of everyone against everyone. In such a world there was little time for deliberation. To preserve themselves, states had to be swift in using "the sword." And any that were delayed or unable to do so were doomed. Thus, without naming the adversary, one of the greatest of the Constitutional Founders, James Madison, Sutherland resolutely rejected Madison's warning (quoted above) that the "power of executing [must be separated] from the power of enacting laws."

In the second part of this essay, I turn to International Law and American agreements and in the third part I carry both issues into the present days.

William R. Polk
January 13, 2014

[1] U.S. Department of the Treasury, Office of Foreign Asset Control (OFAC), Updated August 2, 2013, pursuant to Executive Order 13338 of May 11, 2004. The order blocked any "U.S. person" from investing in Syria and/or purchasing any Syrian produce including petroleum, Syria's only significant export. Various senior officials of the Syrian Government and the Assad family were "Specially Designated."

[2] *Foreign Policy,* June 5, 2012, "Stay Out of Syria."

[3] *The New York Times,* August 26, 2013, Michael R. Gordon and Mark Landler, "Kerry Cities Clear Evidence of Chemical Weapon Use in Syria."

[4] *The New York Times,* December 13, 2013, "U.N. Chief Responds to Syria Report." ' Speaking to reporters late Friday, members of the [Organization for the Prohibition of Chemical Weapons (OPCW)] team took pains to say that others, namely United Nations human rights officials, would have to undertake additional forensic investigations to determine who did what." Also see UN/OPCW Report, December 12, 2013. Also see my Appendix B: Chemical Weapons.

[5] *Fox News, August 29, 2013,* "Obama advocates 'shot across the bow' for Syria

[6] The President, as Commander in Chief is specifically authorized by the Constitution (Article Two, Section Two, Paragraph 1) to seek such advice, in his presumed lack of expertise to make an independent military judgment.

[7] *The Guardian,* August 30, 2013, Paul Lewis and Spencer Ackerman, "Obama's Syria plans in disarray after Britain rejects use of force" and "White House to release Syria findings as it pushes ahead with plans to strike."

[8] *Deutsche Welle,* August 31, 2013, " Germany won't participate in Syria strike."

[9] According to the report in *Nouvel Observateur*, cited in *Haaretz,* September 30, 2013, "French fighter jets were ready to take-off for an attack in Syria on August 31, but were called off only hours away from launch time…France's president, Francois Hollande called off the attack after a call with U.S. President Barack Obama, who decided that same day he would seek approval from Congress before carrying out a military response over chemical weapons use in Syria."

[10] *White House Press Release,* September 10, 2013. He went on to say, ", and more and more burdens on the shoulders of our troops, while sidelining the people's representatives from the critical decisions about when we use force. I don't think we should remove another dictator with force -- we learned from Iraq that doing so makes us responsible for all that comes next.

"America is not the world's policeman. Terrible things happen across the globe, and it is beyond our means to right every wrong. But when, with modest effort and risk, we can stop children from being gassed to death, and thereby make our own children safer over the long run, I believe we should act. That's what makes America different. That's what makes us exceptional. With humility, but with resolve, let us never lose sight of that essential truth."

[11] Constitution, Article Two, Section two, #3, The President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur…"

[12] Constitution, Article Six, #3, "…all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land…"

[13] This is perhaps optimistic. In *The New York Times* of May 11m 2013, Columnist Frank Bruni gives a devastating account of "America the Clueless." He pointed, among other things, to a survey showing that "about 35 percent [of the population] couldn't assign the proper century to the American Revolution and 6 percent couldn't circle Independence Day on a calendar."

[15] My own ancestors and other relatives were not at the Constitutional Convention, but were active in state government and were particularly involved in the creation of schools, colleges and universities as I have set out in my book *Polk's Folly* (New York: Doubleday, 2000).

[16] Yale Law School, The Avalon Project: Documents in Law, History and Diplomacy, The Paris Peace Treaty of September 30, 1783, Article 1. Article 7 stipulates that "There shall be a firm and perpetual peace between his Brittanic Majesty and the said states…"

[17] James Madison wrote of him, "Noah Webster whose pol. & other valuable writings had made him known to the public…"

[18] "Government" in the *American Magazine*, I (1787-1788) quoted in Wood, op. cit., 377.

[19] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison.* (New York: W.W. Norton, 1987), Friday, June 29.

[20] Other records of the deliberation were taken, but I concentrate here on Madison's.

[21] The major foreign military operation had been, 12 years before, the disastrous attempted invasion of Canada and in 1786 Shay's Rebellion in Massachusetts showed how little military capacity the government had.

[22] For convenience, I write out Madison's abbreviations, so "would" in place of wd etc.

[23] it is noteworthy that when Hamilton, Madison and Jay produced the essays we know as *the Federalist Papers* to try to convince the state of New York to ratify the Constitution, they did not address the issue of war-making powers. In essay number 41, Madison touched on the issue but was mainly concerned with the danger of an over-power military establishment within America.

[24] *The Pacificus-Helvidius Debates of 1793-–1794*

[25] Both "pirate" and "Barbary" are misnomers. Probably most of the leading corsairs were of Christian origin and English sailors actually commanded the Tunisian fleet at various times. By Jefferson's time, they had settled down to collecting duties on Mediterranean commerce. Britain paid the duties and the American colonies were thus given free passage. But when America left the British empire, American merchant sailors were at risk. At first, the Continental Congress paid.

[26] The Thomas Jefferson Papers, Library of Congress, "America and the Barbary Pirates: An International Battle Against an Unconventional Foe," by Gerard W. Gawalt,

[27] Further information on what Gerald Gawalt described as "America's first unconventional, international war in the primary sources, the Manuscript Division of the Library of Congress holds manuscript collections of many of the American participants."

[28] *Works of Alexander Hamilton* quoted in Edward S. Corwin (ed.) of the Legislative Reference Service, Library of Congress, *The Constitution of the United States of America*, Government Printing Office, Washington D.C. 1952, pages279-280

[29] In the earliest case of "packing the count," a charge later levied at President Franklin Roosevelt, President Adams in the last months of his tenure in office appointed a number of new judges including the Chief Justice of the Supreme Court, John Marshall. Jefferson was furious. Marshall and the Court essentially established the power of the court overseeing the preservation of the Constitution in their ruling on a case known as Marbury v. Madison in 1803.

[30] 4 U.S. 37. Bas. Plaintiff in Error versus Tingy, Defendant in Error, Supreme Court of United States

[31] Legal Information Institute, Cornell University Law School, Supreme Court, Silas Talbot v. Hans Frederick Seeman 5 U.S. 1 (, 2 L.Ed. 15). Also see Justia: US Supreme Court Center, cites Talbot v Seeman, 5 U.S. 1 Cranch 1 1 (1801). "

[32] Letter to William Herndon on February 15, 1848 from Abraham Lincoln.

[33] Findlaw for Legal Professionals, U.S. Supreme Court: Prize Cases the Amy Warwick, - 67 U.S. 635 (1862). Four vessels were captured for attempting to violate the blockade imposed by President Lincoln. The court stated that "The right of prize and capture has its origin in the *jus belli,* and is governed and adjudged under the law of nations." The court also affirmed that the President "has no power to initiate or declare a war either against a foreign nation or a domestic State." In a footnote, the editors, Lawrence Evans and Charles Fenwick pointed out (*Cases on American Constitutional Law,* Chicago: Gallaghan, 1943, 616-617) that "President Jefferson, for all his strict construction of the Constitution, was prepared to resist the attacks of the Barbary Pirates without waiting for action by Congress and President Monroe sent an even stronger naval force in 1915 which put an end to their attacks altogether." They also point out that once war is declared, the President has the authority to conquer a hostile country, set up provisional courts there and establish a military government "until such time as Congress may choose to act, De Lima v. Bidwell, 182 U.S. 1, 21 S. Ch 743, 45 L. Ed. 1041 (1901)."

[34] "The Internal and External Powers of the National Government" 1910 and his book *Constitutional Power and World Affairs, 1913.*

[35] 299 U.S. 304 (1936). The case was argued on November 19 & 20, 1936 and decided on December 21, 1936.

[36] Legal Information Institute, Cornell University Law School, Supreme Court 299 U.S. 304 Curtis-Wright Export Corporation et al,

[37] The first act he cites was on June 4, 1794 which "authorized the President to lay, regulate and revoke embargoes…and to continue or revoke the same, whenever he shall think proper." This and subsequent acts cited by Justice Sutherland specify that the action of the Executive was authorized by Congress.

[38] See William R. Polk, *Violent Politics: A History of Insurgency…*(New York: Harper Collins, 2007).

[39] Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997).

[40] The Mecklenburg Resolves of May 31, 177 when the Royal Governor prevented the North Carolina Assembly from sending delegates to the meeting at Philadelphia. See William R. Polk, *Polk's Folly* (New York: Doubleday, 2000). On two other famous declarations, Westmoreland and Pine Creek see Charles Patrick Neimeyer, *America Goes to War* (New York: New York University Press, 1996)

[41] During the Revolution, the later Chief Justice John Marshall served in the Light Infantry of Virginia, the state's army.

[42] Louis Fisher *President War Power,* (Lawrence: University Press of Kansas, 2nd edition, 2004).