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BOOK REVIEW

Chaining or Taming?: The Constitutional Allocation of War Powers

Review of: TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW. By Francis D. Wormuth and Edwin B. Firmage. (Dallas: Southern Methodist University Press. 1986. Pp. xi, 343).

*Constance K. Lundberg**

To Chain the Dog of War: The War Power of Congress in History and Law, by Francis D. Wormuth and Edwin B. Firmage, is an exhaustively researched study of what must surely be the most pressing constitutional issue of the moment, the limits on the President's use of the military in achieving his foreign policy objectives. Wormuth and Firmage have apparently chronicled every occasion on which any of the branches of government has either exercised war powers or reacted to such an exercise by another branch. As a compendium of the disputes between Congress and the President over the war power, and of the judiciary's past rulings on the limits of presidential military power, the book is invaluable. It will be a necessary reference to anyone concerned with the legality of recent actions of the President or Congress in Nicaragua, Iran, or Grenada. The book compels readers to reflect on the strengths and weaknesses of the constitutional delineation of war powers between the President and Congress.

The thesis of the authors, that the President has usurped the constitutional power of Congress to declare war, is attractive. Even more attractive is the conclusion implicit in Wormuth and Firmage's analysis that Congress could, by reasserting its constitutional role in declaring war, prevent another Grenada, or even another Vietnam or Korea. Nonetheless, this conclusion is hard to accept, not because one wishes to be caught in the present

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vortex of increasing presidential power and escalating international hostility, but because the authors' analysis is too simplistic, and ignores too many obvious problems, to be comforting. The authors suggest that "Whiggish understandings of power and the necessity of its containment are as relevant and wise in the twentieth as in the eighteenth century."¹ Their analysis amply demonstrates the relevance of such understandings, but it fails to demonstrate the wisdom the authors find in their version of the eighteenth century.

Wormuth and Firmage begin with a statement of the original intent of the framers of the Constitution. They present overwhelming evidence that the framers did not intend the President to have the power he presently exercises in initiating military maneuvers outside the boundaries of the United States. The problem with this, or any other original intent argument, however, is that the framers didn't intend, and could not anticipate, most of what has occurred since 1787. Thus, the real question is whether subsequent occurrences are within the spirit and framework of the Constitution. Rather than directly address this issue, Wormuth and Firmage move to the next point of their argument, that custom, usage, and the understanding of all three coordinate branches of government since ratification of the Constitution demonstrate that Congress has exclusive power to authorize war and war-like activities of the United States. This appears to be an implicit attempt to shore up the weakness of their original intent argument. By noting not only that the framers intended the President to defer to Congress, but that events since then have confirmed that original intent, the authors attempt to establish the invalidity of recent presidential invocations of the war power. However, it is here that the analysis and the presentation of evidence founders.

The authors have organized their material in a superficially logical fashion that obscures the deficiencies of their analysis. The book is structured like a brief, setting out in turn each legal argument that the presidency has usurped Congress' war power. Most of the arguments are historical/critical, as in turn the authors analyze the war clause, acts of war, declarations of war, wars de facto, presidential references to Congress, and so forth. But history simply does not segment by issue. Acts of war, dec-

1. F. WORMUTH & E. FIRIMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* viii (1986).

larations of war, and actions of the Commander in Chief have occurred within the framework of the facts and demands of their times. To understand why a President acted in a given way, one must understand the context. Jefferson may have been a more lawful president than Jackson, the Supreme Court less well grounded in the Constitution in 1863 than in 1800, but that tells a reader nothing about the substance of their decisions. In each chapter, the authors list the events supporting their position and those that do not. Their analysis, however, is frequently limited to approving or disapproving of the events:

With the reservations noted . . . it seems clear that the composition, structure, use, and actions of the armed forces are entirely determined by acts of Congress. This is not to say that Presidents have not usurped power. This has happened frequently But executive usage cannot establish constitutional power. Only legislative usage dating from the earliest history of the Republic can do this. And the legislative usage clearly confirms the exclusiveness of congressional power over the armed forces.²

and

Since the enactment of the Revised Statutes in 1874, more than seventy landings purportedly for the protection of citizens have been carried out. But there is reason to doubt that all of these actually met the conditions of the navy regulations

. . . .
There is, to be sure, the circuit court precedent of *Durand v. Hollins*, which claims a constitutional power for the President to protect citizens. But even if one accepts this eccentric decision, still the President does not have authority³

The book presents all the evidence, but not in a form that allows the reader to draw meaningful conclusions. The evidence best fits the story that the President and Congress have been in constant tension over the conduct of war. From the first years of the United States, Congress has been unwilling or unable to respond to perceived or real presidential needs in advancing the interests of the United States abroad. There are many occasions, carefully documented by Wormuth and Firmage, where the President or a senior military leader has acted to respond to a

2. *Id.* at 104. The authors offer no explanation of why executive usage cannot establish constitutional power but legislative usage can.

3. *Id.* at 158, 160.

perceived need. Sometimes Congress has ratified the action, sometimes not. Sometimes the courts have held the actors personally liable for the consequences, or otherwise held the actions to be unlawful, sometimes not. Sometimes, but not recently, the President has admitted that the actions taken were *ultra vires*.

The problem with *To Chain the Dogs of War* is that it does not consider why Congress has failed to preserve its constitutionally designated role, and why the executive has assumed it. It is not enough to condemn presidents since Franklin Roosevelt (or perhaps since Wilson, or Theodore Roosevelt, or Jefferson) for betraying the Constitution. One cannot imagine, and the authors do not suggest, that presidential disregard for the constraints of the Constitution was consistently casual or thoughtless. The authors have described one important facet of the congressional abdication and presidential assumption of power, but they have not sought to understand it. They simply condemn it as unlawful. Their failure to understand the process undercuts the viability of their proposals to reverse the trend. An example of history from which Wormuth and Firmage could have learned is *United States v. Midwest Oil Co.*⁴ In that case the Supreme Court upheld President Taft's withdrawal of lands from appropriation under the mineral laws because Congress did not subsequently overrule the withdrawal. The Court held that Congress impliedly consented to a presidential override of the Article IV Property Clause, which gave jurisdiction of all public lands to Congress. Wormuth and Firmage find the holding unwarranted and dismiss it because it is "one of statutory interpretation" and "[w]e may suppose that the Supreme Court really upheld the withdrawal in *Midwest Oil* because it wished to prevent giving away oil that the navy needed."⁵

However, the case is not one of statutory interpretation; it is a judicial affirmation of a presidential assumption of power granted by the Constitution to the Congress. No closer parallel to the War Power can be found. And it would not be an over-reading of *Midwest Oil* to say that it represents an instance where the Court acquiesced in presidential action taken to preserve vital United States interests in the face of Congressional paralysis. What national need, real or perceived, supported pres-

4. 236 U.S. 459 (1915).

5. F. WORMUTH & E. FIRMAGE, *supra* note 1, at 139. This chapter was actually written by Colonel Francis P. Butler, a contributing author. Wormuth and Firmage do not even reach *Midwest Oil* in their chapters.

idential assertions of war powers and judicial and congressional acquiescence in the same? The authors do not tell us, leaving us to speculate, but not to learn from history.

The frustration caused by this catalog of alleged excesses of the Executive Branch is exacerbated by the book's two conclusions, which Firmage wrote after Wormuth's death. Given Firmage's experience as a White House Fellow and his close ties to the Johnson-Humphrey Administration, these conclusions are most interesting. Firmage first concludes that Presidents are susceptible to political corruption, combativeness, megalomania, exhaustion, and erosion of physical and mental health, with all the attendant consequences of loss of control and manipulation by others. Thus, Firmage predicts that the presidency, if not checked, will produce a Mussolini, Hitler, Franco, Stalin or similar figure who "fulfills the promise of power." His other conclusion is equally apocalyptic. Firmage predicts nuclear holocaust arising from the dominance of the presidency, characterized, he says, by secrecy and dispatch. This swift, secret presidency will propel us into war where, Firmage surmises, Congress would not have taken us because of its open and deliberative nature.⁶

The antidote Firmage offers is not sufficient to the task. He proposes that Congress control the President through the budget, the power of advice and consent, sense of the Congress resolutions, formal censures, legislative veto, judicial review of executive actions, and impeachment. He discusses impeachment at some length, but gives only a cursory look at the others. He rejects budget as a tool because the President now spends money in violation of express congressional restrictions. He does not consider ways the Congressional Budget Office or congressional committees could be reorganized or otherwise used more effectively to control presidential spending. He rejects advice and consent because Presidents are relying more upon executive agreements and less upon treaties requiring ratification. He does not consider an increasing stringency in approving presidential appointments, or a reassertion of the Senate's possible role in reviewing dismissals. He rejects legislative veto based upon the Supreme Court's decision in *Immigration and Naturalization*

6. The secrecy and dispatch which Firmage characterizes as the tragic flaw of the presidency was viewed differently by the founders. John Jay noted that "[t]he Constitution would have been inexcusably defective" if it would not have provided the presidency with these very traits to carry out foreign policy. THE FEDERALIST No. 64, at 328 (J. Jay) (Bantam ed. 1982).

Service v. Chadha,⁷ but does not consider whether there are limits upon *Chadha's* application when Congress is exercising a power specifically delegated to it by the Constitution, such as the War Power. He rejects judicial review because of the current Court's reliance upon the political question doctrine of judicial abstention. He does not consider the evidence, presented at length earlier in the book, that the Court has historically felt quite willing to review questions of executive power vis-a-vis Congress.

This leaves Firmage, and the reader, with impeachment. As casually as he rejects less draconian methods of asserting congressional authority, he has no serious questions about impeachment:

Impeachment is of course the ultimate weapon in the arsenal of Congress. . . . Modern Presidents have strayed from the constitutional course in which peace is the norm, war is a last resort, and the people's representatives decide when to use the war power. Impeachment was included in the constitutional system to correct such deviations—not to punish the President (the criminal law exists for that purpose) but to preserve the nation.⁸

Here Firmage's self-proclaimed Whiggishness comes to its full flower. The national and international political consequences of impeachment are something we all confronted eleven years ago. Impeachment did not diminish the powers of the presidency; it only increased the chaos among the branches. Even those who believed impeachment was the right and inevitable outcome of the process of review of Nixon's actions would have dreaded the confusion which resulted. Yet Firmage calmly suggests impeachment as a way to right disruptions in constitutional power as if there were only benefits to be had from such a process. He apparently advocates the appropriateness of the process even though the President's abuse of military power which provides the basis for impeachment may have placed the nation in armed conflict, a most disastrous time to change a Commander in Chief.

At the outset of the book the authors observe: "It may strike the reader that Locke made a bad choice in granting a prerogative to violate the law for the public good and leaving no

7. 462 U.S. 919 (1983).

8. F. WORMUTH & E. FIRMAGE, *supra* note 1, at 275.

remedy for abuse of this power other than revolution.”⁹ Firmage’s ultimate conclusion is, under current political conditions, not much less.

9. *Id.* at 6.