

Loaded Dice and Other Problems: A Further Reflection on the Statutory Commander in Chief

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The question of how the Constitution allocates authority over military and foreign affairs between the President and the Congress has arisen with regularity throughout the history of the United States. While many of these conflicts quite properly remain internal to the two political branches, de Toqueville's observation that in America most important political issues eventually become legal ones is true here as elsewhere. Inevitably some interbranch conflicts end up in the judicial branch. Professor Kinkopf's paper focuses on such cases, and in particular on the tendency of the courts to adopt certain *ex ante* rules of construction when interpreting any statute that may bear on presidential actions in foreign or military affairs. Such rules amount to "loaded dice," skewing in advance what ought to be a situation-specific analysis.¹

This brief comment supplements the many excellent points Professor Kinkopf made, by providing a cautionary note: getting the rules of statutory interpretation right—while a significant step in the right direction—is likely to have little effect on overall maintenance of the proper relationship between the President and the Congress. This requires efforts of the two elected branches of government in ways quite distinct from the role of the judiciary in correctly deciding the relatively few cases of interbranch conflict that are submitted to them for review.

In the eyes of many legal theorists and students of the Constitution, this interbranch conflict pits two opposing conceptions of the Constitution against one another. As summarized by Professor Kinkopf, the exclusivity understanding of the Constitution holds that substantial powers have been assigned exclusively to the President, beyond the reach of any interference by the Congress, so that prohibitory statutes that purport to impinge on this sphere of exclusivity are unconstitutional. *United States v. Curtiss-Wright Export Corp.*,² with its encomium to the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" is its urtext.³

The reciprocity approach, on the other hand, understands the Constitution to have allocated most of the great powers vested in the federal government on a shared basis.⁴ Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*⁵ supplies its scriptural foundation. The reciprocity approach sees a quite different Constitution than advocated by exclusivity practitioners, one that "enjoins upon its branches separateness

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1. See Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006).

2. 299 U.S. 304 (1936).

3. *Id.* at 320.

4. Kinkopf, *supra* note 1, at 1170 (the exclusivity model "divides powers among the branches and reads those powers as separate and distinct"; the reciprocity model "focuses on the way the Constitution contemplates that power will be shared among the branches . . .").

5. 343 U.S. 579 (1952).

but interdependence, autonomy but reciprocity.”⁶ In Professor Kinkopf’s words, it stresses shared powers rather than separated ones.⁷

Both of these approaches come in a variety of inflections, and reciprocity theorists disagree among themselves regarding how much room exists for truly exclusive presidential action in the foreign and military affairs areas,⁸ but the degree of difference among them remains small compared to the distance that separates any of them from the exclusivity interpretation. A reciprocity theorist is much more prepared than is an exclusivity theorist to conclude that Congress has the constitutional ability to override a decision by the President in the foreign affairs or military affairs areas, provided it enacts a prohibitory statute or restricts the use of appropriated funds. When faced with a choice between the two approaches, Professor Kinkopf leans toward reciprocity, and so do I, although we might disagree on matters of inflection. The best understanding of the constitutional system “should leave room for each branch meaningfully to play its role in this process,”⁹ giving effect to what Harold Koh has termed a “constitutional principle of balanced institutional participation.”¹⁰

The contest between the exclusivists and the reciprocators has been brought into sharp relief a number of times in our country’s history. Prior to the current controversies that have arisen in prosecuting the war against terror, the most recent notable historical example arose during the Iran-Contra controversy of the mid-to-late 1980s. The controversy erupted after revelations that a surreptitious program was being run out of the White House National Security Advisor’s office to help the Nicaraguan Contras by selling arms to the Iranians and then diverting the funds to these Nicaraguan insurgents. Congress at the time had twice attached annual appropriations riders that barred any “agency or entity of the United States involved in intelligence activities” from spending funds “to support military or paramilitary operations in Nicaragua.”¹¹ For reciprocity theorists it seemed obvious that this “off the books” financial support of the Contras was unlawful because the Boland Amendments prohibited it. For exclusivity theorists, however, Boland amounted to an unconstitutional attempt to thwart the President in formulating the foreign policy of the United States as he saw fit.¹²

6. *Id.* at 635.

7. See Kinkopf, *supra* note 1, at 1170.

8. Compare HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990) (finding very little room for exclusive action) with H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS* (2002) (contemplating a larger sphere of exclusivity for the President).

9. Kinkopf, *supra* note 1, at *46.

10. KOH, *supra* note 8, at 140. This is not to say, of course, that Koh’s particular cashing out of this principle is shared among all adherents to the reciprocity model. I consider H. Jefferson Powell’s understanding of the allocation of interbranch authority to fit under the reciprocity umbrella, and yet it assigns considerably more foreign affairs power to the President than does Koh’s approach. See POWELL, *supra* note 8.

11. The riders were named the Boland Amendments, after their House sponsor. Their texts can be found at 133 Cong. Rec. H7982-87 (daily ed. June 15, 1987).

12. See, e.g., L. Gordon Crovitz, *Crime, the Constitution, and the Iran-Contra Affair*, COMMENT., Oct. 1987, at 23, 28.

What makes the dispute over the Boland Amendment most germane for purposes of this response to Professor Kinkopf's paper, beyond the clarity with which the interbranch conflict was posed, is the fact that no resolution came of it in any forum. The question of Boland's constitutionality never entered the court system in a form that lent itself to judicial decision, so there was no judicial resolution.¹³ No resolution came from the elites as pundits, current and former government officials, and other opinion leaders continued to debate and to disagree. The controversy as a whole produced a weakened presidency in the final years of President Reagan's second term, and in the mid-term elections the Democrats gained enough seats in the Senate to regain control. But it is implausible to consider these events as constituting a conclusive referendum on the allocation of interbranch authority.

Even if Boland had reached the courts, if one looks to the historical behavior of the courts, it is far from certain that the judges or justices who might have heard the case would have provided a resolution. Remarkably few of the prior cases in which the Solicitor General has defended presidential actions in the face of congressional prohibitions by asserting exclusive or plenary authority in the area of military or foreign affairs have resulted in clear holdings one way or the other. Notwithstanding its reciprocity utterances, *Youngstown* was not such a case because Justice Black's opinion for the Court concluded that President Truman's actions in seizing domestic steel mills could not be justified as falling within the scope of the President's foreign affairs or military affairs powers at all.¹⁴ *Curtiss-Wright*, despite its iconic status among the exclusivists, was also unable to generate a definitive holding in this regard. The case involved the President's authority to criminalize the sales of arms to countries involved in a border dispute in South America. It was not a case, however, that juxtaposed prohibitory legislation and the President's claim to exclusive powers. In fact, Congress had passed a resolution authorizing the President to stop the sale of arms to countries involved in the Chaco border dispute. President Roosevelt immediately issued an order prohibiting munitions sales to the warring nations in the Chaco border dispute.¹⁵ Congress, in short, had endorsed President Roosevelt's authority to act. Therefore, the case hardly presented a circumstance of interbranch conflict.

13. See generally KOH, *supra* note 8, at 129–39 (discussing the Boland Amendment dispute between the reciprocators and the exclusivists, concluding that the legal issue is “unresolved and the president is free to challenge future appropriations limitations on executive branch actions as unconstitutional exercises of Congress's power of the purse.”).

14. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952) (“The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces . . . Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.”). The Solicitor General did not even try to justify the action as an exercise of the president's foreign policy powers. See also *id.* at 643–44 (Jackson, J., concurring) (“There are indications that the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief on the country, its industries and its inhabitants. . . . That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.”).

15. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 313–14 (1936).

In fact, throughout much of our modern history, the Court has not confronted the stark question that the reciprocators and the exclusivists debate so strenuously. This might seem rather odd given the considerable volume of statutes that purport to impinge upon powers the exclusivists regard as solely the President's.¹⁶ Much of this volume was enacted in the post-Vietnam era—the 1960 edition of Legislation on Foreign Relations comprises 519 pages, while the 1990 edition is 5483 pages.¹⁷ Many of the important foreign affairs or military affairs decisions in the last seventy-five years—for instance, *United States v. Curtiss-Wright Export Corp.*;¹⁸ *Dames & Moore v. Regan*;¹⁹ *Hamdi v. Rumsfeld*;²⁰ *Rasul v. Bush*;²¹ *Rumsfeld v. Padilla*²²—have implicated one or more such statutes.

One might well suppose that this volume of legislation would have supplied ample occasions when presidential initiatives would be confronted by prohibitory enactments, and that eventually enough of these would find their way into court to have resulted in a good body of case law concerning interbranch conflict. Upon examination, however, these statutes, far from hemming in or “fettering” the presidency as some have asserted,²³ have been routinely interpreted by the courts to contain implied authorization of or acquiescence in the President's actions, thus enabling the judiciary to dodge the interbranch conflict issue entirely.²⁴ A deferential rule of statutory construction converts statutes whose origins flowed from a desire to restrict or channel presidential authority into grants of authority that serve to justify presidential actions.²⁵ When statutes are actually ambiguous, as statutes often are and will continue to be,

16. Kinkopf, *supra* note 1 at 1175 (“It will be the rare circumstance where Congress has actually been silent. To be sure, the array of statutes relating to military and foreign affairs is not so elaborate as that covering domestic affairs. Nevertheless, that array is quite extensive.”)

17. JAMES M. LINDSAY, CONGRESS AND THE POLITICS OF U.S. FOREIGN POLICY 1 (1994).

18. 299 U.S. 304 (1936).

19. 453 U.S. 654 (1981).

20. 542 U.S. 507 (2004).

21. 542 U.S. 466 (2004).

22. 542 U.S. 426 (2004).

23. *See, e.g.*, THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (collecting essays); Dick Cheney, *Congressional Overreaching in Foreign Policy*, in FOREIGN POLICY AND THE CONSTITUTION 101 (Robert A. Goldwin & Robert A. Licht eds., 1990).

24. *See, e.g.*, KOH, *supra* note 8, at 137–38 (“[T]he Burger Court has resurrected *Curtiss-Wright*, not so much in constitutional interpretation as in the realm of statutory construction. . . . [It largely agreed with] executive branch attorneys [who] urged . . . a canon of deferential statutory construction.”).

25. *Dames & Moore v. Regan*, 453 U.S. 654 (1981), in which restrictive language in the International Emergency Economic Powers Act (IEEPA) morphed into enabling language, strengthening the legitimacy claims of the President, is discussed in Kinkopf, *supra* note 1, at 1176, which provides an excellent illustration. *See also*, KOH, *supra* note 8, at 139 (“Justice Rehnquist[’s opinion in *Dames & Moore*] construed a history of unchecked executive practice, the fact of IEEPA’s existence, and the absence of express congressional disapproval of the president’s action to demonstrate that Congress had impliedly authorized the act, thereby elevating the president’s power”) (emphasis omitted).

such a deferential rule has an even easier time upholding presidential initiatives, all the while ducking the issue of interbranch conflict entirely.²⁶

From the viewpoint of the exclusivists, such judicial irresolution helps give them a good portion of what they seek, namely presidential domination of the foreign policy and military decisions made by the federal government. One important thesis of Professor Kinkopf's paper is that this judicial skewing is unjustified and ought to be avoided. It bears some emphasis, however, that judicial deference does not and could not produce *de facto* exclusivity by itself. This judicial approach to interbranch conflicts works in combination with several other structural and political regularities that shape the modern policy-making environment in foreign and military affairs. These include the post-World War II establishment of an elaborate national security bureaucracy, whose budget is classified and hence never publicly debated and which gives Presidents an enormous power of operational initiative. The national security bureaucracy is joined as well by a large standing armed services commitment, essential in a climate in which displays of military might are regular instruments of foreign policy. With both the means to initiate action and the intelligence information that may be supplying the reasons to do so, Presidents who act first and consult Congress later place that latter institution at a considerable disadvantage in even attempting to maintain any partnership relations with the executive branch. Senator Vandenberg noted this phenomenon years ago: "The trouble is that these 'crises' never reach Congress until they have developed to a point where Congressional discretion is pathetically restricted. When things finally reach a point where a President asks us to 'declare war' there usually is nothing left except to 'declare war.'"²⁷

When Congress has the political will to take a more proactive approach to problems in the areas of foreign and military affairs, it often does not fare much better in establishing parity in any supposed partnership with the President. As already noted, legislation is the product of compromises, and Presidents almost always have supporters within the legislative chambers who will work with the President's forces to push for such compromises. Occasionally, political stars may align to produce a genuinely reciprocal arrangement, as they did when the Foreign Intelligence Surveillance Act (FISA) was enacted with the full support of President Carter and his Attorney General, Griffin Bell.²⁸ Such moments, however, are extremely rare. Much more common are situations like enactment of the War Powers Resolution.²⁹ Because

26. See GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* 13 (1997) (describing post-Vietnam efforts to constrain presidential authority: "As with any piece of controversial legislation, a compromise was sought and reached, but in almost every one of these cases, the compromise ended up adopting broader language, or moving the constraining language from the law itself into a non-binding preamble or statement of purpose. The legislation left large loopholes, or adopted the executive's language to secure passage. While Congress as a whole had not endorsed the executive prerogative interpretation, enough members had, and they forced these legislative compromises through.").

27. *THE PRIVATE PAPERS OF SENATOR VANDENBERG* 342 (Arthur H. Vandenberg, Jr. ed., 1952).

28. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C.A. §§ 1801-1871 (2004)).

29. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-

presidential opposition prompted compromises, the Resolution did not accomplish its objective (whatever one might think of its merits), namely to “put the pressure where it should be—on the [P]resident to start thinking about removing armed forces sixty days after he has committed them to a hostile situation;” instead it “puts pressure on Congress to declare that United States forces are ‘in hostilities’ in order to trigger the sixty-day clock for troop removal.”³⁰

Equally common may be occasions when members of Congress conclude that their preferred course of action is to acquiesce in presidential initiatives, choosing either to criticize or cheer individually while permitting the President to assume full responsibility for the consequences of the action. Certainly when the initiative involves the commitment of U.S. armed servicemen and women:

To have supported the [P]resident (and the troops in the field) in a losing cause is far less damaging to a political reputation than would be the case if one were the person responsible for deaths or abandonment of allies—both charges being quite familiar to legislative opponents of every American military action ranging from the War of 1812 through the world wars, the Korean War, the Vietnam War, and the Persian Gulf War of 1991.³¹

These conditions—deferential judicial review, a standing army, bureaucracies with intelligence gathering capabilities, legislative compromises, and political incentives—create great difficulties for maintaining effective reciprocal relations and greater ease in maintaining a regime of de facto exclusivity. In the post-World War II era, the trend toward de facto exclusivity was halted for a while after Vietnam and Watergate; within the space for congressional action created in that political climate, both the War Powers Resolution and the Foreign Intelligence Surveillance Act became law.³² It was, however, a temporary cessation, and the trend picked up again with the election of President Reagan in 1980 and has been largely unabated since. Indeed, by the mid-to-late 1980s, a considerable stream of scholarly writing was decrying the “fettered presidency,” a lament sensible only to those who conceive of the exclusive or imperial presidency as the baseline norm and the hiatus of the mid to late 1970s the exception to that norm.³³

The tragedies of 9/11 only served to increase the weight of these conditions. Important Congressional actions regarding the war on terror are more accurately characterized as giving the President nearly everything he has asked for, rather than evidence of a genuine dialogue. The Authorization for Use of Military Force³⁴ (AUMF) could have been more broadly written, as the President requested it to be, but the primary limitation Congress had in mind was to preclude its use as significant new justification for internal, domestic operations. As a foreign and military affairs

1548 (2000)).

30. KOH, *supra* note 8, at 127.

31. SILVERSTEIN, *supra* note 26, at 196 (citations omitted).

32. *See supra* notes 28–29 and accompanying text.

33. *See supra* note 23 (citing works). This is not to say that Congress never interferes in an unhelpful way with presidential initiative in the foreign and military affairs areas, but only that the occasions when this occurs pale in comparison to occasions when Presidents are unfettered in their decision making.

34. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498) (Oct. 16, 2002).

authorization, the AUMF gives the President nearly everything he needs to prosecute the war against al Qaeda as he sees fit. Congress also achieved some changes in the USA PATRIOT Act, but they were marginal tinkering with an executive branch design. The ability of committed civil libertarians to stand up to executive branch pressures for expansive powers was restricted to a few points of successful resistance, such as imposing a sunset provision on some of the augmented surveillance powers of Title II, and modulating changes in the jurisdictional scope of the Foreign Intelligence Surveillance Court.³⁵

In other areas of great public concern, Congress has done nothing legislatively. Concerns have been raised for four years now about the treatment of detainees at Guantanamo Naval Base, and yet Congress has taken no legislative action to address those conditions. The revelations of treatment of detainees at Abu Ghraib generated renewed and heightened concern, as have reports of “black” detention sites run by the CIA and extraordinary renditions of high-value detainees to countries that practice torture. Yet Congress had done nothing to address the issue of prisoner treatment until December 18, 2005, when it enacted a supplemental appropriations bill that contained the McCain Amendment prohibiting “cruel, inhuman, or degrading treatment or punishment” of any person held in United States custody.³⁶ Yet even the effectiveness of this seemingly minor intrusion into presidential initiative has been called into question by President Bush’s signing statement, which warns that the “executive branch shall construe [this prohibition] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch as Commander in Chief and consistent with the constitutional limitations on judicial power”³⁷

The halting response of Congress to the events of 9/11 can be traced back to the institutional and political features mentioned earlier. The apparatus for prosecuting a global war on terror being already equipped, staffed, and at the ready, the President had tremendous flexibility in seizing the initiative in the immediate aftermath of those events. This flexibility was certainly a good thing and a sign that the presidency was operating with the dispatch and energy that the Framers contemplated would be characteristic of the office. Once the chain of reactive events was put in motion, however, Congress’s role became and has remained reactive and largely ineffective. Congress has been controlled by the President’s party throughout this period, and often

35. Section 224 of the USA PATRIOT Act originally subjected sixteen provisions of the Act to a sunset date of December 31, 2005. USA PATRIOT Act, Pub. L. No. 107-56 § 224, 115 Stat. 272 (Oct. 26, 2001). All but two of these provisions have now been made permanent through the USA PATRIOT Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006). One of the changes made permanent expanded the jurisdiction of the FISA Court to investigations in which the gathering of foreign intelligence information was “a significant purpose.” This relaxed the former standard in which such information gathering was “the purpose,” but was a more modest change than the Administration’s preferred “a purpose” standard. *See* Pub. L. No. 107-56 § 218; 50 U.S.C. 1804(a)(7)(B) (Supp. 2004).

36. The Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739–40.

37. President’s Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influence Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

the ties of partisanship have been more powerful determinants in congressional actions than has institutional jealousy or ambition. Beyond explanations rooted in partisanship, in the immediate aftermath of U.S. actions in Afghanistan and Iraq, members of both parties became acutely aware of the rapidity with which objections to policy can be twisted into accusations of disloyalty to our troops on the ground. So, too, the President's consistent insistence that everything the U.S. does with respect to prisoners and intelligence gathering is done in the name of making America safer has dampened the enthusiasm of Congress to assert its supposed partnership status.

A further ingredient that must be added to an explanation of the *de facto* exclusivity that has reigned since 9/11 stems from the predispositions of the President himself. According to all available evidence, this President earnestly subscribes to the exclusivity understanding of his constitutional role. In that light, it is hardly surprising that the executive branch has done nothing to promote, and much to suppress, any genuine partnership or joint participation by Congress in the development of our post 9/11 foreign and military affairs.

Cumulatively, it would appear that these extra-judicial elements go far to explain the inability of the Congress to implement a reciprocity vision of its institutional role. The elimination of "loaded dice" would be a salutary development in the role that the judiciary has been playing in skewing the interbranch conflict toward the presidency, but the health of the constitutional system depends upon more than a single branch. It will require reformation of the other two branches as well.