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Daniel N. Hoffman
University of South Florida

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A REPUBLIC, IF YOU CAN KEEP IT

*Daniel N. Hoffman**

UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER. By *Edward Keynes*. University Park, Pa. and London: The Pennsylvania State University Press. 1982. Pp. ix, 236. \$17.95.

THE WAR-MAKING POWERS OF THE PRESIDENT: CONSTITUTIONAL AND INTERNATIONAL LAW ASPECTS. By *Ann Van Wynen Thomas* and *A.J. Thomas, Jr.* Dallas: Southern Methodist University Press. 1982. Pp. xiii, 177. \$15.

In *Undeclared War*, Professor Edward Keynes has set himself the task of assessing, first, the intent of the Framers regarding the scope and distribution of the constitutional war powers; second, the appropriate role of the judiciary in resolving doubts and conflicts about those powers (with special reference to the "political question" doctrine); and third, the actual record of judicial involvement with these questions. In general Keynes deserves high marks for the historical accuracy and right-thinking character of his conclusions, though I have some reservations about the clarity of the exposition and the comprehensiveness of coverage.

Keynes is at his best in his review of the Framers' effort to subject war-making to the rule of law. His conclusions cannot be repeated too often in these sorry times, when the regnant doctrine often appears to be an outright monarchism in everything but name. Lest this statement be thought extreme, recall that when President Richard Nixon wished to assure the Supreme Court that he was not claiming monarchical powers, he could concede only that the President does not serve for life.¹ During his tenure, presumably, the President's sovereign prerogative has no limit and his will is law. Nixon's successors have not been discernibly more restrained in their bold constitutional claims; nor, as Keynes would agree, has the Supreme Court really laid these claims to rest.

* Visiting Assistant Professor of Political Science, University of South Florida. A.B. University of Chicago; J.D. Harvard; Ph.D. Massachusetts Institute of Technology. Professor Hoffman is the author of *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981) and the coauthor (with Morton Halperin) of *FREEDOM VS. NATIONAL SECURITY: SECRECY AND SURVEILLANCE* (1977) and *TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW* (1977). — Ed.

1. Brief for the Respondent at n.43, *United States v. Nixon*, 418 U.S. 683 (1974), reprinted in *US v. NIXON* 352 (L. Friedman ed. 1974).

Every schoolchild ought to know that the Framers were anti-monarchist if they were anything. In Keynes's words:

In contrast to the modern view of the President as a king-general who exercises prerogative or discretionary power to make foreign policy, initiate war, and conclude peace treaties, the Framers had a limited conception of executive authority. Since the Constitution's authors believed that governmental power would threaten liberty, they separated and shared various powers of war, defense, and foreign affairs between Congress and the President. [P. 2].

In a constitutional system that incorporates the principle of popular sovereignty, such concepts as federative and prerogative powers are invitations to revolution by a weary people whose blood and treasure have been spent in the foreign wars and military adventures that such theories encourage. [P. 12].

It should therefore scarcely be necessary to belie, as Keynes does, "the argument that inherent, prerogative, or sovereign power devolved from the British Crown to the President of the United States in an unbroken chain of events between 1776 and 1789" (p. 25). Yet it *is* necessary; for, remarkably, that argument has commended itself not only to presidents, but to the Supreme Court.²

As my own research has shown,³ the record of the founding period lends no support to such a heretical doctrine. What the record does show is a fairly persistent presidential impatience with power sharing, and a notably inconsistent congressional response reflecting the disruptive impact of international crises and partisan calculations upon the development of consistent, principled norms of inter-branch relations. Though the Framers had clearly expected that Congress would set the fundamentals of policy and the President would carry it out, from early on Congress had major difficulties in agreeing on any policy, much less on a policy with which the President might feel comfortable. His built-in advantages of structural unity, control of information, and administrative command provided repeated temptations to initiate decisive action, not merely propose it. When challenged, early presidents sometimes advanced constitutional justifications for their actions that bore scarcely any resemblance to the orthodoxy of 1787-1789. They did so with increasing boldness as their legislative counterparts failed to develop and enforce a consistent rebuttal.

Part of the problem was the sketchiness of the constitutional plan. While Keynes argues persuasively that absolutist doctrines are neither necessary nor proper for filling in the gaps, there is and was much room for rhetorical maneuvering that can give such doctrines a certain veneer of legitimacy. But more basically, the tension be-

2. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

3. See D. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981).

tween the war power and the rule of law runs so deep that any effort to subject the former to the latter is apt, in difficult times, to seem inconvenient or even suicidal.

Keynes's effort to rationalize and justify the Framers' design focuses on the distinction between offensive and defensive military operations. In his view:

Only Congress can change the nation's condition from one of peace to war, but the President, as civilian commander in chief, can repel sudden attacks on U.S. territory, the nation's armed forces, and its public ships at sea. The President can also employ the armed forces to protect citizens' lives and property. [P. 34].

Insofar as the Framers intended to vest *any* war powers in the President, these powers were defensive. [P. 36].

I find this argument seriously flawed. For one thing, the historical documentation is curiously indirect.⁴ Despite the fact that the offensive/defensive distinction was apparently well known to international law neither the Constitution nor the surrounding debates explicitly relied upon it. As I view the record, the Framers clearly wished to subject the war powers to the rule of law, but wanted to do so in a manner consistent not only with realistic, effective government, but also with the expansive destiny of what many called their "infant empire." In establishing a stronger executive, then, their central concern was not the special moral and legal status of defensive operations, but the need for "vigor, secrecy, and dispatch" in foreign and military affairs generally. Executive power was preferred in light of both the proclivity of legislatures for drawn-out deliberations and the crucial fact that Congress was in those days very likely to be in recess when a crisis arose.⁵ Thus it was clearly essential to empower the President to repel sudden attack, but one can argue, and presidents did, that similar considerations empowered him to do more, certainly when Congress was in recess, and conceivably even when it was in session, so long as the steps taken did not amount to "declaring war" — that is, to an open-ended commitment of lives and property for a major military operation against a European power.⁶

In this connection, there has been too little discussion of the constitutional provision that if an emergency arises during congressional

4. Keynes relies on the facts that the Constitution requires the President to take an oath to "preserve, protect and defend the Constitution" which "implies an obligation to defend the people and their government against sudden attack," p. 164, and that a "stylistic" change made in article I — giving Congress the power to "declare" war rather than "make" war — "was intended to allow the President, as commander in chief, to respond to sudden attacks rather than to commence offensive war." Pp. 35-36.

5. Congressional sessions in the founding period typically occupied less than half the year.

6. Attacks on Indian tribes, Barbary pirates, and nonwhite "savages" did not require the formality of declaring war.

recess, the President “may” — not shall — convene them into special session.⁷ The records of the Convention do not show what calculations, if any, supported this fateful decision of the Framers. But as early as 1793, when war broke out in Europe, Washington used his discretion to avoid convening Congress and to issue a presidential Proclamation of Neutrality instead. While Representative Madison argued that this move derogated the congressional war powers,⁸ when Congress finally convened the political situation impelled not a confrontation with the President, but a ratification of his policy.⁹ The success of these preemptive tactics soon led to even bolder experiments along similar lines.

In 1794, Congress moved to enact legislation, regulating foreign commerce, that was too anti-British for the President’s taste. He thwarted it by commencing treaty negotiations with Britain on the same topics, and ultimately, in 1796, by signing a treaty pledging the country not to adopt laws of the sort Congress had proposed. When the House of Representatives protested, Washington told them sternly that they had no right to usurp the treaty power confided solely to him and the Senate, and that they were bound to appropriate the funds necessary to implement the treaty regardless of what they thought of its merits.¹⁰ In truth, the Senate’s checking role had already degenerated from the original design of an executive council that advised and consented at every stage of treaty negotiations to a last-minute take-it-or-leave-it ratifier, that was neither fully informed as to the course of the negotiations nor allowed to inform its constituents and take their views on the treaty’s contents. Long before the modern invention of executive agreements — a development Keynes ignores — the Senate’s role had become decidedly subordinate.¹¹ In instance after instance — in matters not involving sudden attacks upon the United States — an executive acting with vigor, secrecy, and dispatch presented Congress with a *fait accompli* in foreign affairs.

It was not only congressional powers that suffered in the wake of foreign crises, but civil liberties as well. Already by 1798, executive arrogance had inflated to the point where public criticism of either the administration or its policies was made a criminal act; and the federal courts zealously enforced the Sedition Law against the opposition press. The rationale for this repressive episode did not depend

7. U.S. CONST. art. II, § 3.

8. J. MADISON, *Heldivius* No. IV, 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 643 (Philadelphia 1865).

9. These events are more fully recounted and analyzed in D. HOFFMAN, *supra* note 3, at 88-104.

10. *Id.* at 131-77.

11. *Id.* at 61-69, 80-82, 133-47.

on the defensive nature of the foreign and military policies under attack, but on the offensive nature of the Federalist party's political strategy and its elitist views on mass participation. And its end, with Jefferson's election to the presidency, signalled less a return to constitutional orthodoxy than a reinforcement of the view that what counts is to have the right demigod at the helm.¹²

Keynes concedes that the offense/defense principle may be an inadequate restraint on presidential power in today's very different world (pp. 165-67). In my view the early history shows that it never was adequate. Even if the nature of warfare has changed, the tendency of combatants to claim that they are acting in self-defense is surely not new; nor is the phenomenon of a Congress reluctant to challenge presidential initiatives for fear of being branded subversive, appeasing, or otherwise irresponsible. The vagueness of the offense/defense doctrine only reinforces the ambivalence that inheres in Congress as an institution. While presidents may be expected resolutely to defend the power of their office, congressional leaders have often, in refutation of Madison's brilliant theoretical argument in *The Federalist No. 51*¹³ (but in emulation of his actual strategy as a member of the House) tried to capture the presidency for themselves or their party rather than to try to weaken it. This "fusion" (Keynes's term; some would say presidential usurpation) of the national war powers may have been legitimated by the Supreme Court only in the 1860's,¹⁴ but the process was already far along by 1800.

Can today's courts be expected to restore a more balanced constitutional framework? Keynes discusses the judicial role at great length from both theoretical and historical perspectives. He argues rather convincingly that the classical "political question" doctrine, properly understood, does not preclude judicial arbitration of inter-branch conflicts, since its rationale applies only where a power is clearly committed to a single branch, not where it is shared by two branches jointly (p. 69). Yet he cannot and does not claim that the Supreme Court has accepted this view.¹⁵ The modern Court has

12. *Id.* at 178-220.

13. [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

THE FEDERALIST NO. 51, at 323 (H. Lodge ed. 1892).

14. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863).

15. He does suggest that support for this view may be found in *Powell v. McCormack*, 395 U.S. 486 (1969). P. 135. The seminal case, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), seems to take a contrary line, as does Justice Rehnquist's plurality opinion in *Goldwater v. Carter*, 444 U.S. 996 (1979), a case which Keynes mysteriously omits. Keynes also misleads in implying, p. 63, that John Marshall rejected entirely the propriety of abstention from deciding political questions, *see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and in suggesting, pp. 70-71, that Justice Jackson applied the political question doctrine in his dissent in *Korematsu*

managed to keep all its options effectively open.

Instead Keynes proceeds with an elaborate analysis of modern "political question" cases, all of them Vietnam-era lower court decisions. He offers a complex four-fold categorization of those cases, and discusses at length several examples of each type (pp. 120-32). Unfortunately, this reviewer found the categories, and the criteria for assigning a case to a given category, very difficult to understand. Furthermore, the dates of decision do not seem to support Keynes's suggestion of a chronological trend toward increasing judicial activism. In fact, dicta aside, these decisions provide little evidence of activism at all. Keynes's fourth category, the only one in which the courts are said to have reached the merits, consists of two district court decisions that were reversed on appeal.¹⁶ When it comes to the bottom line, Keynes is forced to conclude on a note of keen disappointment. The "conventional wisdom" turns out to be correct: the courts are extremely reluctant to reach the merits in war-powers cases; and when they do, they are nearly certain to uphold executive action:

[J]udicial opinion continues to promote the development of a virtually unlimited national war power. . . . [T]he courts have acted as a mid-wife to the birth of constitutional dictatorship in the United States. . . . [O]pponents of constitutional dictatorship should not await a judicial David to slay an executive Goliath. [P. 159-60].

Before invoking the Federal judiciary's assistance, opponents of presidential warmaking should recall that the judiciary is likely either to tolerate or to support the exercise of executive power. In the future, opponents of presidential warmaking should focus their opposition on Congress rather than the Federal courts. [P. 175].

This is strong language, but where the courts are concerned, it seems entirely justified. The harsh truth is that there are precious few modern cases that in any way curtail presidential powers in foreign and military affairs. The few that do¹⁷ are neither sweeping in scope nor of unquestionable validity in today's climate. On the other side may

v. United States, 323 U.S. 214 (1944). Consider Jackson's concluding sentence: "I would reverse the judgment and discharge the petitioner." 323 U.S. at 248.

16. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) (challenge to the legality of military activities in Cambodia presents a nonjusticiable political question); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd*, 464 F.2d 178 (9th Cir. 1972) (three servicemen did not have standing to challenge the constitutionality of the use of military personnel in Cambodia).

17. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (government had not met heavy burden of showing cause for prior restraint on the publication of a classified study of Vietnam policy); *Kent v. Dulles*, 357 U.S. 116 (1958) (denial of passport without due process due to alleged Communist associations not a valid exercise of the war power); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (president does not, as commander-in-chief, have the power to take possession of private property to prevent labor dispute from stopping production of military goods); *Ex parte Endo*, 323 U.S. 283 (1944) (power to protect war effort against espionage does not imply power to detain a loyal citizen).

be counted numerous bulwarks of monarchism.¹⁸ Most of the cases fall outside Keynes's rather narrow definition of his subject and are not discussed, but their inclusion would only reinforce the conclusion he has reached.

As for his advice that opponents of presidential warmaking focus their efforts on Congress, Keynes provides little reason for optimism that such efforts would succeed. Indeed, his historical overview makes clear that so far neither Congress nor the courts has provided sufficient restraints on the expansion of presidential power. Unfortunately, he says little by way of explanation or of cure. Rather, he seems content to present and analyze doctrinal pronouncements, abstracted from the political and social context in which they appear — as if no one had any other concern but the correct expounding of constitutional and legal texts. This is typical of academic legal studies; and it may be unfair to take an author to task for not having written an entirely different sort of book. Still, one wishes Keynes had gone further.

The Thomases' book, *The War-Making Powers of the President*, also seeks to describe the state of the law on presidential war-making powers, but it differs from Keynes's effort in several respects. It is even more legalistic in approach, to the point that historical narrative is breathtakingly terse and political analysis almost absent. Yet it goes well beyond judicial opinion in its coverage, reporting a variety of other official and academic positions on the issues. It pays close attention to the doctrines of international law and their impact on domestic law. It reviews in detail the arguments for and against

18. See, e.g., *INS v. Chadha*, 51 U.S.L.W. 4907 (U.S. June 23, 1983) (congressional veto of Attorney General's order suspending deportation under the Immigration and Nationality Act unconstitutional); *Haig v. Agee*, 453 U.S. 280 (1981) (upholding authority of Secretary of State to revoke passports on determination that citizen's activities abroad are causing serious damage to national security); *Snapp v. United States*, 444 U.S. 507 (1980) (former CIA agent held to have breached fiduciary duty for not submitting manuscript to agency for pre-publication review); *Goldwater v. Carter*, 444 U.S. 996 (1979) (unilateral abrogation of treaty by President a nonjusticiable political question) (plurality opinion); *United States v. Richardson*, 418 U.S. 166 (1974) (CIA Act not unconstitutional because it permits agency to account for expenditures solely on director's certification); *Laird v. Tatum*, 408 U.S. 1 (1972) (first amendment rights not violated by Army intelligence surveillance of political activity); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding executive exclusion of Marxist scholar under Immigration and Nationality Act); *United States v. Reynolds*, 345 U.S. 1 (1952) (upholding Secretary of Air Force's claim of military secrets privilege in tort action); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (president has final authority over applications to engage in overseas and foreign air travel); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding executive wartime order assigning persons of Japanese ancestry to relocation centers); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (holding that Congress and the president, acting together, could impose a wartime curfew on Japanese Americans); *United States v. Pink*, 315 U.S. 203 (1942) (Court will not review recognition of foreign governments or agreements made by president incident to recognition); *United States v. Belmont*, 301 U.S. 324 (1937) (affirming president's assignment, by executive agreement, of Soviet claims against Americans to United States); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding presidential proclamation prohibiting arms sales to foreign power).

presidential power to take a variety of specific steps, such as armed intervention to protect American persons or property, and the interests of informal or treaty allies, against diverse threats. It includes a useful summary of presidential acknowledgments of congressional authority over the years, and of attempted congressional curbs on presidential action.

Yet in the end, the Thomases seem to agree with Keynes that, for practical purposes, presidential warmaking is scarcely subject to the rule of law: "All in all, the power of the President to commit forces abroad remains a dark continent of American jurisprudence" (p. 146). The very diversity, and sometimes downright craziness¹⁹ of the doctrinal claims they recount suggests that this is so, even though in some cases they are prepared to take firm stands on the issues. The courts, they agree, have largely "capitulated" to executive power (P. 109); and congressional efforts to legislate curbs have so far been basically ineffective:

The *Mayaguez* incident demonstrated that neither the funding limitation nor the War Powers Resolution had diminished the ability of the President to act decisively in committing troops abroad. [P. 143].

[T]here has been no cutting back on the assertion of the power of the President to use force . . . [P]robably no President would refuse effectively to defend what he thought was the country's best interest [P. 146].

The Thomases seem more hesitant to lament this result than does Keynes. At one point they worry that the War Powers Resolution could harm national security if it prevented presidents from threatening to use force (p. 138). Their relief that it has not done so casts doubt upon the seriousness of their quest for constitutional balance, and thereby diminishes much of their study's potential impact.

This brings us to a question seldom openly discussed: what, in the best of all plausible worlds, would *be* the impact of such studies as these? Of course their aim is educational, and the authors will have helped students, government legal advisors, and litigants to make more accurate, better documented and more subtle arguments, but to what end? Can abuses be effectively prevented or, failing that, redressed?

Perhaps there have been times when presidents refrained from an action because of doubts about its legality; but this hardly seems to be common. Presidential advisers tend to be yea-sayers, unless they can point to decisive pragmatic reasons for holding back. Presidents know that strong action is usually popular, and that indecisiveness or appeasement are often devastating campaign issues. They are un-

19. *E.g.*, the argument that forcible "self-defense" may be justified by acts of "economic aggression" such as "manipulation of tariffs." P. 59.

derstandably more inclined to view foreign enemies as a menace to national interests than to see their own activities in such a light. When in doubt, security comes first. Thus such diverse personalities as Washington, Lincoln, Franklin Roosevelt and Richard Nixon all transcended legal barriers in the name of what they saw as a higher good. Congressional leaders too have appeared to use or to waive legal arguments, depending on the overriding political concerns of the moment. Such action need not be consciously cynical; for, bolstered by such materials as Keynes and the Thomases provide, one nearly always has legal arguments available that most would regard as nonfrivolous. One may urge, and convince oneself, that a given restraint on war-making power is unconstitutional; or that it does not apply to the specific plan at issue; or that one is entitled to deny the very existence of such a plan, effectively exempting it from the rule of law. If the President goes ahead and opponents press the legal issue, their chances for inflicting major costs in Congress, in court, or at the polls are limited. Many Americans have more taste for "nuking Iran" than for constitutional niceties.

Still, we have not yet reached the stage where legal restraints can be openly flouted without political cost; and a nonfrivolous argument may be a losing argument. Thus, to some extent legal objections *are* pragmatic objections, worth making and worth backing up. One might wish, though, for more self-consciousness than the present authors display about the uses — or lack thereof — to which their studies lend themselves.

Whatever scholarly writings may suggest, the present prospect for systemic legal reforms to curtail presidential warmaking seems bleak. Amending the Constitution to restrain presidential power would attract few potent supporters. Even the disasters of Vietnam and Watergate, like those of the Federalists' "reign of terror," produced only a short-lived interest in structural reform. So long as the country's security and the leader's decency are not emphatically in doubt, we tend to feel, why tamper with a system that works?

It may be that the level of congressional concern over existing weaknesses in statutory curbs, such as the loopholes facilitating continued covert operations against Nicaragua and the "rescue mission" in Grenada, or those created by the recent demise of the legislative veto, does make some small reform proposals politically viable. Continued executive demands for an even freer hand can and should be resisted. In particular, it must be insisted that repeated efforts to constrict the flow of information to the public, through such devices as secrecy oaths, pre-publication review, visa denials, court injunctions, and criminal sanctions are not immunized from constitutional scrutiny by the talisman of "national security," and indeed are inimi-

cal to constitutional values.²⁰

In the end, though, the relation between structure and function is such that the tension between the national security state and democratic, constitutional procedures cannot be satisfactorily resolved. Neither an army nor a secretive, elite executive body is a democratic institution. From the founding until now, those in charge of national defense and foreign policy have openly resisted sharing information and power, arguing that broad participation would aid the nation's enemies by depriving our leadership of vital unity, flexibility, knowledge, vigor, secrecy, and dispatch. Two hundred years of ostensible democratization have had no visible impact on this aspect of our political life. We have repeatedly suffered major moral, material, and political upheavals in consequence; and today we face the ultimate threat of nuclear annihilation. Whether or not our species is incurably warlike, the suspicion grows that enduring peace in the context of the nation-state system is a contradiction in terms. That we escaped previous wars with our Constitution apparently intact does not show that there is nothing amiss, nor that we can count on our luck holding in the future. Perhaps the Framers attempted the impossible in seeking to establish a durable republic in one country. But at the present, real disarmament and world government are both utopian dreams.

In these circumstances, we would do well to guard the precarious cultural, institutional, and legal defenses against war that we do have. Whatever their flaws, the political processes in which such concepts as a rule of law, checks and balances, and the people's right to know find their traditional uses are about the only game in town.

20. See M. HALPERIN & D. HOFFMAN, TOP SECRET 87-102 (1977).