

Presidential Military Actions That Violate the Constitution

Louis Fisher, Ph.D.

Visiting Scholar, William and Mary Law School; former senior specialist in separation of powers, Congressional Research Service; specialist in Constitutional law, Law Library of Congress

The framers of the U.S. Constitution rejected the British model that allowed a single executive to invoke the war power. John Locke in 1690 spoke of three categories of government: executive, legislative and federative. The latter, placed solely with the executive, covered “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.”¹ Article I of the U.S. Constitution rejected that model by placing many external powers expressly in Congress: the power to declare war, raise and support armies and navies, make rules for the military, grant letters of marque and reprisal (authorizing private citizens to engage in military operations), and Senate authority to approve treaties.

During debate at the Philadelphia Convention on June 1, 1787, John Rutledge agreed that executive power had to be placed in a single person but “he was not for giving him the power of war and peace.”² James Wilson did not consider “the Prerogatives of the British monarch as a proper guide” to define presidential power. Some of those powers, he said, were of “a Legislative nature,” including “that of war & peace.”³ Edmund Randolph expressed concern about executive power, calling it “the foetus of monarchy.” He did not want America “to be governed by the British Governmt. as our prototype.”⁴

As the debate continued on August 17, James Madison and Elbridge Gerry recommended that the language be changed from “make war” to “declare war,” leaving with the President “the power to repel sudden attacks.”⁵ In support, Roger Sherman said the President “shd. be able to repel and not to commence war.” To Gerry, he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” George Mason said he was “agst giving the power of war to the Executive, because not <safely> to be trusted with it.” He was for “clogging rather than facilitating war; but for facilitating peace.”⁶ The amendment by Madison and Gerry was accepted.

At the state ratifying conventions, objections to independent presidential war initiatives

1 John Locke, *Two Treatises of Civil Government* (E.P. Dutton & Co., 1962), Book II, Ch. XII, pp 146-47.

2 Max Farrand, ed., *The Records of the Federal Convention of 1789* (Yale University Press, 1966), Vol. 1, p. 65.

3 *Ibid.*, pp. 65-66.

4 *Ibid.*, p. 66.

5 *Ibid.*, Vol. 2, p. 318.

6 *Ibid.*, pp. 318-19.

continued to be voiced. In Pennsylvania, James Wilson reasoned that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress.”⁷ In South Carolina, Charles Pinckney explained that the President’s power “did not permit him to declare war.”⁸ In Federalist No. 4, John Jay warned that absolute monarchs “will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Those and other motives, he warned, “which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”⁹

Implementing Constitutional Principles

After the U.S. Constitution was ratified, a number of important checks were placed on presidential power. On April 22, 1793, President George Washington issued his Neutrality Proclamation, directing citizens to remain neutral in the war between Britain and France. Failure to abide by his policy could result in prosecution.¹⁰ However, what is interesting is that when the administration sought to bring individuals to trial, jurors insisted that criminal law in the United States is made by Congress, not the President. As a consequence, juries began to acquit those brought into court.¹¹ President Washington got the message and stopped prosecutions, telling lawmakers that it rested with “the wisdom of Congress to correct, improve, or enforce” the policy set forth in the proclamation.¹² A year later Congress passed the Neutrality Act. Jurors had a better understanding of the Constitution than Washington and his legal advisers.

The first war the United States entered into was not declared. Instead, the “Quasi-War” against France in 1798-99 was authorized by several dozen statutes. President John Adams

recognized he could not act unilaterally. The legislation authorized the President to seize vessels sailing to French ports. However, Adams issued an order directing American ships to capture vessels sailing to or from French ports. In a unanimous decision in 1804, Chief Justice John Marshall held that Adams had exceeded his statutory authority. The proclamation by Adams could not “change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.”¹³ Thus, congressional policy announced in a statute necessarily prevails over an inconsistent presidential order and military action. Statutory limits imposed by Congress were enforced in court.

Facing problems with the Barbary pirates in the Mediterranean, President Thomas Jefferson understood and valued the key distinction between defensive and offensive actions. Under the system at that time, the United States had to pay annual bribes (“tributes”) to four countries in North Africa: Morocco, Algiers, Tunis and Tripoli. By accepting those payments, the four countries pledged not to interfere with American merchantmen. However, the agreement collapsed on May 14, 1801, when the Pasha of Tripoli insisted not only on a larger sum of money but declared war on the United States. After notifying Congress of this demand, Jefferson sent a small squadron of vessels to the Mediterranean to protect merchantmen against attacks. He also requested further legislative guidance, stating he was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.” It was essential for Congress to authorize “measures of offense also.”¹⁴

When new military conflicts emerged in 1805, Jefferson spoke clearly about constitutional principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war.”¹⁵ According to claims by the Justice Department and some members of Congress, Jefferson acted militarily against the Barbary powers without seeking congressional authority.¹⁶ However, the record demonstrates that Congress passed at least ten statutes authorizing military action by Presidents Jefferson and Madison against the Barbary powers.¹⁷ In 1812, Congress

7 Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Convention* (1836-1845), Vol. 2, p. 528.

8 *Ibid.*, Vol. 4, p. 287.

9 Benjamin F. Wright, ed., *The Federalist* (Metro Books, 2002), p. 101.

10 Henry Steele Commager, ed., *Documents of American History* (Seventh edition: Appleton-Century-Crofts, 1953), p. 162.

11 *Henfield's Case*, 11 Fed. Cas. 1099 (C.C. Pa. 1793) (No. 6,360).

12 *Annals of Congress*, 3d Cong., 1-2 Sess. 11 (1793).

13 *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804).

14 James D. Richardson, ed., *A Compilation of the Messages and Papers of the President* (Bureau of National Literature, 1897-1925), Vol. 1, p. 315 (hereafter “Richardson”).

15 *Annals of Congress* 19 (1805).

16 4A Op. O.L.C. 185, 187 (1980); 140 Cong. Rec. 19809 (1994).

17 Louis Fisher, *Presidential War Power* (Third edition: University Press of

declared its first war, responding to a series of actions by Britain.

The second U.S.-declared war against Mexico in 1846 led to congressional reprimands against President James Polk. He claimed that Mexico had “passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil,” notifying Congress that “war exists.”¹⁸ Part of the boundary, however, was in dispute. Senator John Middleton Clayton issued this rebuke to Polk: “I do not see on what principle it can be shown that the President, without consulting Congress and obtaining its sanction for the procedure, has a right to send an army to take up a position, where, as it must have been foreseen, the inevitable consequence would be war.”¹⁹ On May 23, 1846, Congress declared war on Mexico.²⁰

Polk’s action led to censure by the House of Representatives on the ground that the war had been “unnecessarily and unconstitutionally begun by the President of the United States.”²¹ Among the members voting for censure was Abraham Lincoln, who later wrote that allowing the President “to invade a neighboring nation, whenever *he* shall deem it necessary to repel invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure.”²²

Fifteen years later, with the start of the Civil War, Lincoln as President found it necessary to analyze his source of constitutional authority. In April 1861, with Congress in recess, he issued proclamations calling forth the state militia, suspending the writ of habeas corpus, and placing a blockade on the southern states. He did not, however, claim some kind of independent or plenary authority to act as he did. After members of Congress returned to session, he announced that his initiatives, “whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.”²³ In short, he lacked authority to act as he did. After debating his actions, Members of Congress agreed to pass supportive legislation, but only with the explicit

understanding that his actions lacked legal authority.²⁴

Congress declared war a third time in 1898, against Spain. The next two declared wars, in 1917 and 1941, were worldwide in scope.

The President as 'Sole Organ'

In the 1930s, there developed the claim of plenary and exclusive presidential power in external affairs. The theory came not from Presidents or members of Congress but from the Supreme Court, relying on constitutional analysis that proved to be totally erroneous.

Presidential power in external affairs was greatly broadened in 1936 by extraneous material (“dicta”) placed in the Supreme Court’s decision *United States v. Curtiss-Wright Export Corp.* The issue involved legislation passed by Congress in 1934, authorizing the President to prohibit the sale of military arms in the Chaco region of South America whenever he found “it may contribute to the reestablishment of peace” between belligerents.²⁵ When President Franklin D. Roosevelt imposed the embargo, he relied exclusively on statutory authority, stating that he acted “by virtue of the authority conferred in me by the said joint resolution of Congress.”²⁶

Writing for the Court in *Curtiss-Wright*, Justice George Sutherland upheld the delegation but proceeded to add erroneous dicta, claiming that the Constitution commits treaty negotiation exclusively to the President.²⁷ Nothing in the litigation had anything to do with treaties. Moreover, the historical record clearly demonstrates that Presidents often invite not only Senators to engage in treaty negotiation but members of the House as well. The purpose is to build legislative support for authorization and appropriation bills needed to implement treaties.²⁸

If one wants a particularly impressive repudiation of the belief that Presidents possess exclusive power over treaty negotiation, it would be a book published in 1919 reflecting

Kansas, 2013), pp. 35-37.

18 Richardson, Vol. 5, p. 2292.

19 Cong. Globe, 29th Cong., 1st Sess. 786 (1846).

20 9 Stat. 9 (1846).

21 Cong. Globe, 30th Cong., 1st Sess. 95 (1848).

22 Roy Basler, ed., *The Collected Works of Abraham Lincoln* (1953), Vol. 1, pp. 451-52 (emphases in original).

23 Richardson, Vol. 7, p. 3225.

24 Cong. Globe, 37th Cong., 1st Sess. 393 (1861) (Senator Howe).

25 48 Stat. 811 (1934).

26 *Ibid.*, 1745.

27 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

28 Louis Fisher, “Congressional Participation in the Treaty Process,” *University of Pennsylvania Law Review* 137 (1989), pp. 1511-22.

someone's twelve years as a U.S. Senator. He explained that his colleagues regularly participated in treaty negotiations, and Presidents agreed with this "practical construction." The author of this book? George Sutherland.²⁹

How could Sutherland, given his years in the U.S. Senate, agree to include in his decision claims about treaty negotiation he knew to be false? The Chief Justice at that time, Charles Evans Hughes, selected Sutherland to write the majority opinion in *Curtiss-Wright*. Previously, Hughes had served as Secretary of State under President Warren Harding from 1921 to 1925 and developed an expansive theory of presidential power in external affairs. In that capacity, Hughes strongly endorsed the notion of the President acting as the sole negotiator of treaties. On May 18, 1922, he claimed that by virtue "of this constitutional relation to the conduct of foreign affairs, the correspondence and negotiations with foreign powers are exclusively in the hands of the President."³⁰ He said that Thomas Jefferson, the first Secretary of State, offered this advice to President Washington: "The transaction of business with foreign nations is Executive altogether."³¹

Sutherland's major error in *Curtiss-Wright* was to completely misrepresent a speech that John Marshall gave in 1800 while serving as a member of the House of Representatives. In 1800, Thomas Jefferson campaigned against President John Adams. Jeffersonians in the House wanted to either impeach or censure Adams for turning over to Great Britain an individual charged with murder. They thought the individual was an American under the name of Jonathan Robbins. He was actually Thomas Nash, a native Irishman.³²

In his speech, Marshall strongly opposed the move to impeach or censure President Adams, explaining that Adams was simply carrying out a provision of the Jay Treaty with Great Britain, which authorized each country to deliver up to each other any person charged with murder or forgery.³³

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Nash, being a British subject, could be turned over to Britain for trial. President Adams was not acting unilaterally in the field of external affairs. He was carrying out a treaty. In

the course of his speech, Marshall included this sentence: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."³⁴ "Sole" means exclusive but what is "organ"? It is clear that Marshall merely meant the President's duty to communicate to other nations U.S. policy *after* it had been established by the elected branches. He was defending Adams for carrying out a treaty. When Marshall completed his speech, the Jeffersonians found his argument so well-reasoned that they dropped efforts to impeach or censure Adams.

Sutherland thoroughly misrepresented Marshall's speech by announcing that the President possesses "plenary and exclusive power" over foreign affairs and, in that capacity, serves as "sole organ" in external affairs.³⁵ Executive branch officials regularly cite *Curtiss-Wright* to defend independent presidential power. In 1941, Attorney General Robert Jackson described the opinion as "a Christmas present to the President."³⁶ Harold Koh has explained that Sutherland's "lavish" description of presidential power was quoted with such frequency that it became known as the "'Curtiss-Wright, so I'm right' cite."³⁷

Jettisoning the Sole-Organ Doctrine

Litigation in the George W. Bush administration led to judicial reexamination of the sole-organ doctrine. In signing a bill in 2002 that covered passports to U.S. citizens born in Jerusalem, President Bush objected that some provisions "impermissibly interfere with the constitutional functions of the presidency in foreign affairs." By referring to the President's authority to "speak for the Nation in international affairs," he appeared to rely on *Curtiss-Wright* dicta.³⁸

29 George Sutherland, *Constitutional Power and World Affairs* (Columbia University Press, 1919), p. 123.

30 Charles E. Hughes, *The Pathway of Peace: Representative Addresses Delivered During His Term as Secretary of State (1921-1925)* (Harper & Brothers, 1925), p. 250.

31 Ibid.

32 For details on the *Curtiss-Wright* case, see Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court is Not the Last Word on the Constitution* (University Press of Kansas, 2019), pp. 101-20.

33 8 Stat. 129 (1794).

34 10 Annals of Congress 613 (1800).

35 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

36 Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (Vintage Books, 1941), p. 201.

37 Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale University Press, 1990), p. 94.

38 *Public Papers of the Presidents* (2002), Vol. II, pp. 1697-99.

Legal challenges to this legislation continued for many years, leading to a D.C. Circuit opinion on July 23, 2013, stating that the President “exclusively holds the constitutional power to determine whether to recognize a foreign government.” Under that reasoning, language in the 2002 statute “impermissibly intrudes on the President’s recognition power and is therefore unconstitutional.”³⁹ Five times the D.C. Circuit relied on the sole-organ doctrine in *Curtiss-Wright*, claiming that the Supreme Court “echoed” the words of John Marshall by describing the President as the “sole organ of the nation in its external relations.”⁴⁰ The D.C. Circuit did not understand that Sutherland’s opinion echoed Marshall’s words but not his meaning. It demonstrated no understanding that the doctrine was not merely judicial dicta but erroneous dicta.

In response to this opinion I filed an amicus brief with the Supreme Court on July 17, 2014, analyzing the erroneous dicta in *Curtiss-Wright*.⁴¹ While the Supreme Court is in session, the *National Law Journal* runs a column called “Brief of the Week,” selecting a particular brief out of the thousands filed each year. On November 3, 2014, it chose mine, carrying this provocative title: “Can the Supreme Court Correct Erroneous Dicta?”⁴²

On June 8, 2015, the Supreme Court finally rejected the sole-organ doctrine but never explained how the statutory issue had anything to do with the President’s recognition power.⁴³ Nor did the Court acknowledge that the D.C. Circuit relied five times on erroneous dicta. The Court did not discuss how Justice Sutherland wholly misinterpreted John Marshall’s speech. Moreover, the Court perpetuated the belief about Presidents possessing exclusive power over treaty negotiation, repeating language from *Curtiss-Wright* that the President “has the sole power to negotiate treaties.”⁴⁴

Having jettisoned the sole-organ doctrine, the Court proceeded to create a substitute that promotes independent presidential power in external affairs, claiming that “only

the Executive has the characteristic of unity at all times.”⁴⁵ Anyone even vaguely familiar with the presidential record would understand that administrations regularly display inconsistency, conflict, disorder and confusion. One need only read memoirs of top officials who chronicle the infighting and disagreements within various administrations, including disputes over foreign affairs.

In addition to attributing to the President the quality of “unity,” the Court added four other characteristics for the President: decision, activity, secrecy and dispatch, borrowing those qualities from Alexander Hamilton’s Federalist No. 70. In what sense could the total of those five qualities be consistent with constitutional government? The qualities of unity, decision, activity, secrecy and dispatch could easily describe monarchs and dictators. Certainly, those five qualities can produce negative consequences. Consider President Truman allowing U.S. troops in Korea to travel northward, provoking Chinese troops to intervene in large numbers and resulting in heavy casualties for both sides. President Johnson was greatly damaged by his escalation of the war in Vietnam. Think of Nixon and Watergate and Bush II using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction, with all claims found to be erroneous.

Three Justices issued strong dissents in the Jerusalem passport case. Chief Justice John Roberts, joined by Justice Samuel Alito, pointed out that never before “has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”⁴⁶ A dissent by Justice Antonin Scalia, joined by Roberts and Alito, agreed that the statute at issue had nothing to do with recognizing foreign governments.⁴⁷ Scholars have criticized this decision for promoting independent and exclusive presidential power in external affairs.⁴⁸

39 *Zivotofsky v. Secretary of State*, 725 F.3d 197, 220 (D.C. Cir. 2013).

40 *Ibid.*, 221.

41 “Brief Amicus Curiae of Louis Fisher in Support of Petitioner,” *Zivotofsky v. Kerry*, No. 13-628, U.S. Supreme Court, July 17, 2014. www.loufisher.org/docs/pip/Zivotofsky.pdf

42 Jamie Schuman, “Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?,” *National Law Journal*, November 3, 2014. www.loufisher.org/docs/pip/Fisherbrief.pdf

43 *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2089 (2015).

44 *Ibid.*, 2086.

45 *Ibid.*

46 *Ibid.*, 2113.

47 *Ibid.*, 2118.

48 Jack Goldsmith, “*Zivotofsky II* as Precedent in the Executive Branch,” *Harvard Law Review* 129 (2015), p. 112; Esam Ibrahim, “The Dangers of *Zivotofsky II*: A Blueprint for Category III Action in National Security and War Powers,” *Harvard Law and Policy Review* 11 (2017), p. 585.

Unconstitutional Actions from Truman Forward

In a public statement on July 27, 1945, President Harry Truman pledged that if agreements were ever negotiated with the U.N. Security Council to use U.S. military force against another country “it will be my purpose to ask the Congress for appropriate legislation to approve them.”⁴⁹ The U.N. Participation Act of 1945 requires Presidents to seek congressional support before involving the nation in a U.N.-authorized war.⁵⁰ With these safeguards in place to protect constitutional principles, Truman in June 1950 unilaterally ordered U.S. air and sea forces to defend South Korea against aggression by North Korea. At a news conference on June 29, 1950, he was asked if the country was at war. His reply: “We are not at war.” Asked whether it would be more correct to call his decision “a police action” under the United Nations, he answered: “That is exactly what it amounts to.”⁵¹ Federal and state courts had no difficulty in defining the hostilities in Korea as war.⁵²

As with Truman, President Bill Clinton decided not to seek congressional approval for his military actions abroad. Instead, he sought support from the Security Council and NATO allies. He used military force in Iraq, Somalia, Haiti, Bosnia, Afghanistan, Sudan and Kosovo without once seeking or receiving statutory support.⁵³ The Office of Legal Counsel concluded that his military initiatives in Bosnia did not require statutory authority because they did not constitute “war.”⁵⁴ After a peace agreement was finally reached, Clinton announced: “America’s role will not be about fighting a war.”⁵⁵ Yet with full inconsistency he then claimed: “Now the war is over,” describing the conflict in Bosnia as “this terrible war.”

President Barack Obama followed a similar course when using military force abroad, seeking support from the United Nations and NATO allies, not from Congress. On March 21, 2011, he announced that the United States would take military action in Libya to enforce U.N. Security Council Resolution 1973. He anticipated that military operations

would conclude “in a matter of days and not a matter of weeks.”⁵⁶ They lasted seven months, exceeding the 60–90 days limit of the War Powers Resolution.

In a message to Congress, Obama stated that U.S. forces had begun military actions against Libyan air defense systems and military airfields in order to prepare a “no-fly zone.” He said the strikes would “be limited in their nature, duration, and scope.”⁵⁷ Although executive officials often attempt to minimize a no-fly zone, the use of military force against another country that has not threatened the United States should be called what former Secretary of Defense Robert Gates has described it: an “act of war.”⁵⁸

On April 1, 2011, the Office of Legal Counsel concluded that military operations in Libya did not constitute “war” because of the limited “nature, scope, and duration” anticipated.⁵⁹ By early June, however, after exceeding the 60-day limit of the War Powers Resolution, Obama sought another supportive memo from OLC stating that “hostilities” did not exist. Remarkably, OLC declined to provide that memo. Jeh Johnson, General Counsel for the Defense Department, also refused to comply with Obama’s request.⁶⁰

It is often argued that when a President receives a Security Council resolution providing support for military action, there is compliance with international law. That procedure, however, does not satisfy the Constitution. Acting through the treaty process (as with the U.N. Charter and NATO), the Senate may not transfer the Article I authority of Congress to international and regional organizations.

On June 28, 2011, during hearings before the Senate Committee on Foreign Relations, I testified on “Libya and War Powers.” Regarding Obama’s claim that he received “authorization” from the U.N. Security Council to take military actions in Libya, I said it is legally and constitutionally impermissible to transfer the Article I powers of Congress to an international (U.N.) or regional (NATO) body. The President and the Senate through the treaty process may not

49 91 Cong. Rec. 8185 (1945).

50 Fisher, *Presidential War Power*, pp. 90-94.

51 *Public Papers of the Presidents*, 1950, p. 504.

52 Fisher, *Presidential War Power*, p. 98.

53 Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (University Press of Kansas, 2017), pp. 221-36.

54 19 Op. O.L.C. 327, 329 (1995).

55 *Public Papers of the Presidents* (1995), Vol. II, p. 1784.

56 *Ibid.* (2011), Vol. I, pp. 266, 271.

57 *Ibid.*, p. 280.

58 Robert M. Gates, *Duty: Memoirs of a Secretary at War* (Vintage Books, 2015), p. 513.

59 Office of Legal Counsel, “Authority to Use Military Force in Libya,” U.S. Dept. of Justice, April 1, 2011; <https://www.justice.gov/olc/opinion/authority-use-military-force-libya>.

60 For further details on military operations in Libya, see Louis Fisher, *President Obama: Constitutional Aspirations and Executive Actions* (University Press of Kansas, 2018), pp. 214-19.

surrender power vested in the House of Representatives and the Senate. Treaties may not amend the Constitution.⁶¹

Conclusion

From President Truman forward, Presidents have unilaterally engaged in military actions abroad, including Eisenhower's covert operations in Iran and Guantanamo. With the ill-fated Bay of Pigs, Kennedy supported the invasion of Cuba. In violation of statutory policy, Reagan became involved in the Iran-Contra affair. Claiming independent power, Trump bombed Syria after its use of nerve gas and assisted Saudi Arabia with military operations in Yemen. Under the Constitution, such initiatives require joint action by both elected branches.

About the Author

Louis Fisher is Visiting Scholar at the William and Mary Law School. From 1970 to 2006, he served for 35 years with Congressional Research Service, reaching the level of Senior Specialist in Separation of Powers. He then served five years as Specialist in Constitutional Law with the Law Library of Congress. His 27 books include *Presidential War Power* (Third ed., 2013). His most recent book is "Reconsidering Judicial Finality: Why the Supreme Court is Not the Last Word on the Constitution" (University Press of Kansas, 2019). Many of his articles and congressional testimony are posted on his personal webpage: www.loufisher.org.

⁶¹ Statement by Louis Fisher, "Libya and War Powers," Senate Committee on Foreign Relations, June 28, 2011, https://www.foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf