Yale Law School

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Speaker Nancy Pelosi
U.S. House of Representatives

May 2, 2019

Dear Speaker Pelosi:

In vetoing Congress' joint resolution on Yemen, President Trump has defied fundamental principles of constitutional law laid down by the Supreme Court's landmark decision in the *Steel Seizure Case.* The Court's decision involved a genuine emergency. A steelworkers' strike had halted production, and this led to a dramatic reduction of crucial war materiel required by American troops fighting in Korea. Faced with a clear and present danger to the war effort, President Truman seized the steel mills in his capacity as Commander-in-Chief and ordered the workers back to work. In taking this step, Truman refused to follow specific provisions of the Taft-Hartley Act that Congress had laid out to deal with strikes in national emergencies. He instead declared that, as Commander-in-Chief, he had the power to act independently of the law laid down by Congress. The Supreme Court rejected Truman's assertion of unilateral power as unconstitutional in the *Steel Seizure Case*.

We call upon you, as Speaker of the House, to initiate a law-suit which calls upon the judiciary to vindicate *Steel Seizure* in the case of President Trump's military support of the Saudi war against Yemen. President Trump raises the very same constitutional question decided by *Youngstown* – only this time, it is the War Powers Resolution, not the Taft-Hartley Act, which *explicitly* prohibits the president from using his power as commander-in-chief to engage in unilateral war-making. This is the conclusion we have reached after a review of the relevant legal sources. While we differ from one another on a host of other issues, our scholarly commitment to fundamental principles leads us all to a common judgment on the importance of a House law-suit at this critical turning point in the history of the Republic.

Our argument relies on Justice Robert Jackson's great opinion in *Steel Seizure* –whose canonical status has been reaffirmed by the Roberts Court as recently as 2015. (See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015)). Jackson divides assertions of presidential power into three categories. In Category One, presidential action is explicitly authorized by the constitutional text or a clear statutory grant of authority by Congress. In these cases, presidential power is at a maximum. Category Two, where Congress has expressed only indifference, represents a "twilight zone" in which the President and Congress can both make colorable claims to authority. In Category Three, where Congress expressed disapprobation, the President's power is

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"at its lowest ebb," since he is acting in a manner "incompatible with the . . . will of Congress." In these situations, *Steel Seizure* declares that the judiciary has a solemn obligation to "scrutinize" presidential assertions of power, since "what is at stake is the equilibrium established by our constitutional system."[1]

Jackson's trichotomy played a central role in the enactment of the War Powers Resolution in 1970. In its report on the Resolution, the Senate Foreign Relations Committee stated:

> As the late Justice Robert H. Jackson pointed out in his concurring opinion in *Youngstown v. Sawyer*, there is a "zone of twilight" between the discrete areas of Presidential and Congressional power. Politics, like nature, abhors a vacuum. When Congress created a vacuum by failing to defend and exercise its powers, the President inevitably hastened to fill it. As Justice Jackson commented, "Congressional inertia, indifference or quiescence, may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility . . . ." [citing *Youngstown*, 343 U.S. 579, 637 (1952)].
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> To assert power is not, however, to legitimize it. As a Supreme Court Justice of the last century commented: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." [Citing Justice Field in *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).] The same principle must apply to actions by the executive. [2]

As the Senate Report emphasized, the core aim of the Resolution was to shift the status of presidential war-making from Category Two to Category Three – taking it out of the "twilight zone" and making it clear that, henceforth, the commander-in-chief's power is at "its lowest ebb" if he should ever defy the express commands of the Resolution. To make this even clearer, the Committee begins its Report with this statement by Jacob Javits, the Resolution's sponsor:

> My cosponsors and I regard this bill as basic national security legislation . . . . We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances. . . . [The bill] is rooted in the words and the spirit of the Constitution. It uses the clause of Article I, Section 8 to restore the balance which has been upset by the historical enthronement of that power over which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power—the exclusive authority of Congress to "declare war"; the power to change the nation from a state of peace to a state of war.[3]

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[1] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-54 (1952) (Jackson, J., concurring).

[2] S. Rep. No. 93-220, at 16 (1973).

[3] S. Rep. No. 93-220, at 2 (1973; *see also* the parallel House committee report, H.R. Rep. No. 93-287, at 4 (1973). This theme was elaborated time and again in the course of Congressional deliberations, and reemerged as a central theme of the debates surrounding the Congressional override of President Nixon's veto. *See, e.g.*, 119 Cong. Rec. 36,202 (Nov. 7, 1973) (statement of Rep. Zablocki) ("The war powers resolution is purely and simply a legitimate effort by

President Trump's decision to support the war in Yemen represents a clear violation of the War Power Resolution's reaffirmation of the Founder's grant to Congress over the ultimate question of war and peace. Section 8(a)(c) not only grants Congress power to forbid American troops from engaging in "hostilities" involving direct acts of violence. It explicitly defines "hostilities" very broadly to enable the House and Senate to prohibit American armed forces from engaging in actions which "coordinate" or "accompany" the "regular or irregular military forces of any foreign country."[4] Congress was acting well within its constitutional authority in insisting on this broad definition of "hostilities." Given the ease with which military "coordination" with foreign powers can escalate into full-blown war under modern conditions, the Constitution's "necessary and proper" clause gave Congress ample authority to include these indirect forms of military support in order to preserve its ultimate authority "to declare war."

It is not enough, then, for President Trump to ignore the recent joint resolution banning "hostilities" in Yemen on the ground that American aircraft are not themselves bombing the Houthi rebels. The recent joint resolution imposes stringent limitations on American assistance that preclude the re-fueling Saudi aircraft and other forms of "coordinat[ion]."

Nor is President Trump right to suppose that his veto of the joint resolution liberates him from the restraints it imposes on his conduct as commander-in-chief. The veto provision was not a part of the 1973 Resolution. It was added by statute in 1986 in response to *INS v. Chadha*, 462 U.S. 919 (1983), which invalidated a legislative veto in a case that did not involve Congress' war powers. *Chadha* in no way overruled *Steel Seizure*, whose continuing status as a constitutional landmark has been reaffirmed as recently as 2015.[5] It is entirely appropriate, then, for the Speaker to bring suit against the President and call upon the courts to redeem *Steel Seizure*'s pledge to "scrutinize" unilateral presidential war-making when it is "incompatible with the . . .

Congress to restore its rightful and responsible role under the Constitution."). Representative Broomfield explicitly borrowed Justice Jackson's "twilight zone" language. 119 Cong. Rec. 33,859-60 (Oct. 12, 1973) (statement of Rep. Broomfield).

[4] The key terms of Section 8 provide:

involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities … and stat[es]that it is intended to constitute specific statutory authorization within the meaning of this joint resolution;
[...]

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of member of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government [when such] military forces are engaged, or there exists an imminent threat […]that such forces will become engaged, in hostilities. [emphasis supplied]

[5] *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*.") (Opinion of the Court); see also, *id.* at 2113 (Roberts, C.J., dissenting).

will of Congress," since "what is at stake is the equilibrium established by our constitutional system."[6]

It is entirely appropriate, then, for the Speaker to bring suit against the President and call upon the courts to redeem *Steel Seizure*'s pledge to redeem the Framers' original intention and declare that it is the People' House, together with the Senate, that has the ultimate power over the commander-in-chief.

So long as a majority of the House authorizes her action, the Speaker's initiative will also require the judiciary to resolve a long-standing debate between Justices Lewis Powell and William Rehnquist on the justiciability of her lawsuit. The disagreement between the two Justices was provoked by Senator Barry Goldwater's challenge to President Carter's unilateral revocation of US treaties with Chiang Kai-Shek's regime when Carter recognized the Communist Chinese government's authority over the mainland. In a separate opinion in *Goldwater v. Carter*, Rehnquist argued that the Senator did not raise a justiciable question, given the president's broad powers to conduct foreign affairs.[7] Powell agreed, but on a much narrower ground. He emphasized that Goldwater had failed to convince a majority of his colleagues to endorse his lawsuit. In Powell's view, it was only if Goldwater had won majority support from the Senate that the Court could legitimately consider the merits of its inter-branch dispute with the president. The other Justices in the majority, however, refused to enter this debate. Instead, they joined a summary per curiam opinion, which dismissed Goldwater's lawsuit without resolving the Powell-Rehnquist debate.

This time around, the judiciary must confront the Powell/Rehnquist debate, should a majority of the House call upon the Court to redeem *Steel Seizure's* pledge to serve as the ultimate bulwark against presidential efforts to make war unilaterally in the manner of King George III. Indeed, the Speaker's lawsuit, demanding compliance with the War Powers Resolution, represents a moment of truth for a Court that professes a profound commitment to the "original understanding." If it denies the Speaker her day in court, it will remove the last institutional check on the country's tragic turn away from the Founding principle that it is the People's House, not the Commander-in-Chief, which has the final say when it comes to making war in the name of We the People of the United States.

Signatories: Solely for purposes of identification; not to be considered an institutional endorsement of the substantive views expressed.

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[6] *Youngstown*, 343 U.S. at 637-38.

[7] *See Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring); 444 U.S. 996, 998-1002 (Powell J., concurring).

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