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### The Power to Make War

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## THE POWER TO MAKE WAR

*Dennis J. Kucinich\**

Thank you very much for the invitation to be here at Loyola Law School and to attend this prestigious forum with the distinguished guests. Years ago, during the height of the Vietnam War, I was a copy boy at the *Cleveland Plain Dealer*. It was my responsibility to go out on what were called "art runs" to pick up photographs of young men whose families had been notified that their sons had just been killed in action. Often, I would drive up to a small wooden-framed house in the inner city, one with a blue star decal in the window. I was greeted quietly at the door and immediately walked into a front room where a mother and father huddled, weeping on an old sofa, holding the latest photo of their loved one in military dress. As I stood on a threadbare rug and asked for the picture so I could take it back to be published in the next day's paper, I kept thinking that these people are my parents' age, and this is a home just like the one we live in, and their son was about my age or perhaps younger.

I am from a generation which came of age during the Vietnam War. Vietnam forced us to study war, caused us in literature classes to discern the messages of the early twentieth century poets like Wilfred Owen, who wrote "Dulce et decorum est Pro patria mori. . . . *It is sweet and meek to die for one's country. Sweet! and decorous!*"<sup>1</sup>

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\* Congressman Dennis J. Kucinich is a graduate of Case Western University, where he received a masters degree in speech and communications. At the age of thirty-one, Congressman Kucinich was elected mayor of Cleveland, Ohio, making him the youngest person ever to be elected mayor of a major American city. He has also served in the Ohio State Senate, concentrating on matters involving utilities, healthcare, and environmental and labor issues. In 1996, he was elected to represent Ohio's tenth district in the United States Congress. During the crisis in Kosovo, Representative Kucinich argued forcefully for a more active congressional role in the decision-making process.

1. WILFRED OWENS, *Dulce Et Decorum Est*, in *THE POEMS OF WILFRED OWENS* 117, 117-18 (Jon Stallworthy ed., 1986) (emphasis added).

While serving one's country is certainly an honor, questioning one's country is a necessity. And while Terry Priebe, with whom I played baseball was killed in action, and Mark Fusile, with whom I played pinochle was killed in action, and Michael Aurady, with whom I went to high school was killed in action, their memories have stayed fresh in my mind through the intervening years. Thus, while I have stopped studying war, I did not stop asking questions.

Now, as a member of Congress, whose career has been built by knocking on doors, stepping into people's living rooms, and asking for their votes to represent them directly in the democratic process, I must not just ask questions. I must provide *answers* to my constituents' concerns. If the sons and daughters of America are to be sent off to war, in whatever cause, no matter how lofty the rhetoric, no matter how high-minded the sentiments, I have to be able to look parents in the eye. I must be able to tell them it is necessary; it is right; it is just; and it is honorable. I am not an attorney, not a constitutional scholar, but it is my firmest belief that as a member of Congress, I have a responsibility to protect the constitutional authority of Congress—the democratic institution of Congress. I believe that as a member of Congress, I have a moral and legal responsibility to my constituents and to my nation to regard the power to make war with the utmost circumspection and to ensure the democratic principles of consent and accountability are upheld, especially in moments of crisis. As a citizen of the world, I have a responsibility to make sure that our nation does no harm and that we should abide by the highest standards of justice in pursuit of humanitarian goals.

Thus, I have to raise the question about the United States and NATO in their efforts to intervene in Kosovo and throughout Yugoslavia. These efforts violated the Hague Conventions of 1907, which prohibit attacking undefended buildings and bombing a place without warning.<sup>2</sup> These actions violated the UN Charter of 1945, which states that members should refrain in their international relations from threat or use of force against territorial integrity or political independence of any state.<sup>3</sup> These actions violated the North Atlantic Treaty of 1949, which states that the parties should settle by peaceful

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2. See Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631.

3. See U.N. CHARTER art. 2, para. 4.

means any international disputes in which they may be involved.<sup>4</sup> These actions violated the Geneva Convention of 1949, which prohibits attacks on objects indispensable for the survival of a civilian population.<sup>5</sup> These actions violated the Helsinki Accords of 1975, which state that European boundaries cannot be changed by force.<sup>6</sup> These actions violated the 1980 Vienna Convention on Treaties, which bars using coercion to make nations sign agreements,<sup>7</sup> which is what the United States did at Rambouillet.<sup>8</sup>

When the United States joined NATO in the bombing of Serbia,<sup>9</sup> I was sent on a personal odyssey, which put me opposite my President, my political party, and members of my own Croatian family who had lost friends and relatives in a war with Serbia a few years earlier. I knew from history that Article I, Section 8 of the Constitution gives the war-making power to the Congress,<sup>10</sup> and I looked to history for guidance. In the guidance, I found principles that are not shopworn canards, but extensions of the democratic theory which became embodied in our Constitution.

George Washington in 1793 said, "The Constitution vests the power of declaring war in Congress. Therefore, no offensive expedition of importance can be undertaken until after they have deliberated upon the subject and authorized such measures."<sup>11</sup> In a letter to

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4. See North Atlantic Treaty, Apr. 4, 1949, art. 1, 63 Stat. 2241, 2242, 34 U.N.T.S. 243, 244.

5. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, art. 19, 6 U.S.T. 3114, 3128.

6. See Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292, 1294; Richard B. Lilich, *Helsinki Accord*, in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 470.1, 470.4 (2d ed. 1990).

7. See Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 52, 1155 U.N.T.S. 331, 344.

8. See Walter Gary Sharp, Sr., *Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo*, 23 MD. J. INT'L L. & TRADE 295, 303 (1999).

9. See *id.* at 302.

10. See U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

11. William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 703 (1997) (citing 33 GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 73 (J.C. Fitzpatrick ed., 1939)).

James Madison, in 1789, Thomas Jefferson wrote, "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body . . . ."<sup>12</sup> James Madison, in 1793, said, "[T]he power to declare war, including the power of judging the causes of war is *fully* and *exclusively* vested in the legislature . . . ."<sup>13</sup> He wrote to Jefferson about 1798, "The constitution supposes, what the History of all Govts. demonstrates, that the Ex. is the branch of power most interested in war . . . most prone to it. It has accordingly with studied care, vested the question of war in the Legisl . . . ."<sup>14</sup> In the *Federalist Papers*, Alexander Hamilton proceeded with providing a critical distinction between the role of the United States' President as contrasted with the King of England, writing that

[t]he President [as] commander-in-chief of the army and navy of the United States . . . would amount to nothing more than the supreme command and direction of the military and the naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.<sup>15</sup>

In later writings, Hamilton would repeat his conviction that "Congress shall have the power to declare war, the plain meaning of which, that it is the peculiar and exclusive duty of Congress when this nation is at peace to change that state into a state of war."<sup>16</sup> And finally, James Wilson, who helped to frame and ratify the Constitution predicted, "This system will not hurry us into war. It is calculated to guard against it. It will not be in the power of a single man

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12. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958).

13. "Helividius" Number 4 (Sept. 14, 1793), in 15 THE PAPERS OF JAMES MADISON 106, 108 (Thomas A. Mason et al. eds., 1985).

14. Letter from James Madison to Thomas Jefferson (Apr. 2, 1789), in 17 THE PAPERS OF JAMES MADISON 104, 104 (David B. Mattern et al. eds., 1991).

15. THE FEDERALIST NO. 69, at 446 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966).

16. 8 THE WORKS OF ALEXANDER HAMILTON 246 (Henry Cabot Lodge ed., 1903).

or a single body of men to involve us in such distress, for the important power to declare war is vested in the legislature at large."<sup>17</sup>

The fact that the practice of administrations throughout our country's history has varied from what may be assumed to be the intent of the founders and Framers is not at issue today. It is a well-established fact that American presidents have used the power to engage in war and to commit troops without specific authorization.<sup>18</sup> It could be argued, and it is, that presidents often must act quickly to protect U.S. interests, and that Congress is unwieldy, or alternatively, that Congress has approved declarations of war whenever the president has asked them to do so. However, a series of Chief Executives has taken the initiative to send U.S. troops into action and conflict, and Congress sometimes has kept a distance, staying away from the untidy business. It could be argued that the founders and Framers had no intention of placing the power of war-making in anything but the hands of Congress. And while those hands have trembled and even pushed away the reins, that does not negate the thoughtful architecture of the separation of powers and checks and balances that went into the Constitution and underpins our democracy.

In an effort to rebalance our political system, which has tended towards an imperial presidency, Congress enacted in 1973 a law intended to facilitate the role of Congress in carrying out its duties under Article I, Section 8: the War Powers Resolution.<sup>19</sup> When the War Powers Resolution was being drafted, a significant change occurred that did not get included in this Act. The War Powers Resolution let the President commit the nation to war and then gave the Executive at least sixty days to withdraw and to report back to the Congress.<sup>20</sup> Instead of Congress assuring the right of prior approval of war-making, the War Powers Resolution gave the Executive the

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17. 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 528 (2d ed. 1937).

18. See, e.g., J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 56 (1991); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 172 (1996).

19. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1994)).

20. See 50 U.S.C. §§ 1543(c), 1544(b) (1991).

right to wage massive war for months without congressional approval.<sup>21</sup>

In this era of modern war-making, with our nation having unlimited destructive power at its disposal, the yielding of the war power to wage war for even a single day can lead to incredible casualties. Over the course of the war in Yugoslavia, the U.S. and NATO inspired action resulted in tens of thousands of bombing runs, loss of thousands of lives, tens of thousands of injuries, and property damage in the tens of billions of dollars, all done without the consent of the United States Congress.<sup>22</sup> In fact, the reporting requirements of the War Powers Act should be inspected. There are eighteen cases of intervention without reporting to Congress.<sup>23</sup> There are seventy-six cases during the time of the War Powers Resolution of "intervention with reports."<sup>24</sup> That the administration simply reports on intervention does not necessarily mean that Congress is going to take a role. However, the War Powers Resolution does exist, and with all of its flaws, it does provide that after troops have been committed, those forces must be withdrawn within sixty to ninety days, unless Congress formally declares war or authorizes the power to remain.<sup>25</sup>

War is not always legal, nor is it academic to the victims. I watched in horror the video account of attacks by the forces of Slobodan Milosevic upon the people of Kosovo.<sup>26</sup> The massacre at

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21. See, e.g., Yoo, *supra* note 18, at 181-82.

22. See Richard B. Bilder, *Kosovo and the "New Interventionism": Promise of Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153, 167-68 (1999); David Wood, *U.S. May Have Learned Wrong Lesson in Kosovo*, TIMES-PICAYUNE, July 25, 1999, at A31 (reporting the cost of the seventy-eight day air war and 23,000 bombs and missiles at two to three billion dollars); Anthony H. Cordesman, *The Lessons and Non-Lessons of the Air and Missile Campaign in Kosovo* (Ctr. For Strategic & Int'l Studies, Wash., D.C.), Sept. 29, 1999, at 21 (reporting the use of precision guided weapons); Press Release, NATO, NATO's Role in Relation to Kosovo (Aug. 9, 2000), available at <http://www.nato.int/docu/facts/2000/Kosovo.html> (reporting that the Human Rights Watch estimates between 488 and 527 civilians lost their lives during NATO's air campaign).

23. See Yoo, *supra* note 18, at 181-82.

24. See *id.* (reciting specific instances of presidential military action without congressional authorization but reporting action in a timely manner).

25. See 50 U.S.C. §§ 1543(c), 1544(b).

26. See CNN *the World Today: Latest Kosovo Violence Dims Hope that War Can Be Avoided* (CNN television broadcast, Jan. 17, 1999), available at

Racek moved me deeply enough to call the White House and ask if something should be done to resolve the growing crisis. The grim procession of refugees surely necessitated a humanitarian response. Unfortunately, the administration's response did not include getting the approval of the House of Representatives to enter into a sharply escalating conflict with NATO against Yugoslavia.<sup>27</sup> Many members of my own party, Democrats, felt a need to support the decision that the administration had made in Yugoslavia.

Indeed, I am a witness to many heartfelt, personal, impassioned speeches inside our caucus stating the humanitarian cause, averring that we were preventing genocide and stopping a bloodless dictator intent on total destruction of the Albanian people. I strongly objected to the attacks on the Kosovo Albanians. But, I believe that it was possible to be opposed to Slobodan Milosevic and also opposed to the bombing of Yugoslavia. Yet all around me I could feel the dense illogic of war beginning to grip Washington. D.C. was becoming the capital of dichotomized thinking, of split consciousness, of Democrats versus Republicans, of left versus right, which is the stuff of which wars are made, of us versus *them*: of NATO versus Serbia, of NATO versus Yugoslavia, of NATO versus Russian interests. This type of thinking is what makes it possible to defend the human rights of some while depriving others of theirs.

As the U.S.-NATO bombings became "humanitarian" bombings and dead civilians became "collateral damage," and accidental bombings and the assignment of collective guilt only to the Serbs seemed to justify each other, I began to speak out against the war and made several attempts to try to limit it. I wrote a letter to the *New York Times*, which created a stir, asking, why are we bombing Belgrade.<sup>28</sup> This led me to get even deeper into the question, because the public response to my letter was so powerful. Until, at last, on April 28, 1999, Congress had to forcefully face the issues of the war. Congress, first, as was recounted, voted against a declaration of

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LEXIS, News File.

27. See President's Address to the Nation, 35 WEEKLY COMP. PRES. DOC. 516 (Mar. 24, 1999) (announcing that he authorized military air strikes against the Federal Republic of Yugoslavia).

28. See Dennis J. Kucinich, *Why is Belgrade a Target?*, N.Y. TIMES, Apr. 9, 1999, at A23.



war.<sup>29</sup> They next voted to prohibit the use of funds unless the deployment of troops was specifically authorized by law.<sup>30</sup> They then defeated a resolution which directed the immediate removal of the troops.<sup>31</sup> Finally, they voted against a resolution, which would have authorized the United States to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia. This resolution was Senate Concurrent Resolution Twenty-One.<sup>32</sup> I went to the floor of the House of Representatives and argued against the resolution and passed out a leaflet on the floor, which said the resolution was a blank check for war<sup>33</sup> because once it passed the House, the resolution would have met the test of the War Powers Act, which required authorization of the use of force by *both* houses of Congress.<sup>34</sup> The President then would have been able to conduct war without having to come to Congress, since it had already passed in the Senate.<sup>35</sup>

Shortly after that, I joined Representative Tom Campbell of California in a lawsuit to reinstate the power of Congress.<sup>36</sup> There was a hearing a month ago in the Court of Appeals for the District of Columbia Circuit.<sup>37</sup> I am proud to have the opportunity to take a stand on behalf of an American tradition of representative government. Next year I am going to be introducing in the House of Representatives a plan for a Department of Peace. The plan intended to change the consciousness of this nation, so that we do not look at war-making as a means of resolving international disputes and so

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29. See 145 CONG. REC. 2440 (daily ed. Apr. 28, 1999) (rejecting proposal to declare war by vote of 2 to 427).

30. See *id.* at 2413.

31. See *id.* at 2427 (rejecting resolution directing President to remove troops by a vote of 139 to 290).

32. See *id.* at 2451-52.

33. See *id.* at 2446 (statement of Rep. Kucinich).

34. See *id.* (referring to Section 5 of the War Powers Resolution which requires the President to terminate force unless Congress officially declares war).

35. See *id.*

36. See *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (seeking a declaration that the President violated the War Powers Clause of the U.S. Constitution and the War Powers Resolution by conducting air strikes in the Federal Republic of Yugoslavia without congressional authorization).

37. See *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (affirming the District Court of the District of Columbia's decision to dismiss because plaintiffs lacked standing to file suit).

that we can look at conflict resolutions to help make us a more peaceful people as we approach new ways of dealing with difficulties, dissensions, and conflicts at every level of our society. Thank you very much.

