

## *The Law*

# When Wars Begin: Misleading Statements by Presidents

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*In 2009, a House subcommittee held a hearing on a bill to apply criminal penalties to presidents and executive officials who mislead Congress and the American people on the need for war. We are familiar with the false justifications made by President George W. Bush for initiating military action against Iraq, and also the false claim made by President Lyndon B. Johnson in August 1964 that there had been a “second attack” in the Gulf of Tonkin. But the record of presidential deception in matters of war runs much deeper and helps underscore why the framers feared executive wars and tried to check them.*

On July 27, 2009, the Crime Subcommittee of the House Committee on the Judiciary held a hearing on H.R. 743, the Executive Accountability Act of 2009. The bill would apply criminal penalties to presidents and executive officials who knowingly and willfully mislead Congress or the people of the United States for the purpose of gaining support for the use of U.S. armed forces. Although the bill was introduced in 2009, it could have been introduced in 1789, and the framers would have been pleased with it. They knew the danger of executive wars. They understood that executive military initiatives threaten the legislative powers of war and spending and undermine popular government. They concluded from a careful reading of history that executives often promote wars that are ruinous to their country, both in lives lost and treasures squandered. The framers believed that only one branch of the U.S. government—Congress—has the authority to take the country from a state of peace to a state of war against another nation. In voting on a matter that serious, members of Congress must have confidence in

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the information provided by presidents and executive officials. Often that information has been highly misleading, and lawmakers have not taken the time to independently assess and confirm the truthfulness of executive assertions.

## Checking Executive Wars

The views of the framers about foreign wars are reflected in the writings of John Jay, whose entire career up to 1787 had been in foreign affairs. If anyone might have been sympathetic to executive powers in national security, it would have been him. We recall what he wrote in *Federalist No. 64*, about the Senate and the treaty power. He said, “It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery” (Wright 2002, 422).

Whatever discretion Jay would have entrusted to the president in the negotiation of treaties, he was entirely opposed to executive wars. His warning about executive military initiatives appears in *Federalist No. 4*: “It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, 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 motivations and others, “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” (Wright 2002, 101).

What Jay feared has come to pass. At least since the Mexican-American War of 1846, presidents have had a record of making misleading statements to justify wars. The framers understood that government officials will deceive the nation about the need for war. In *Federalist No. 3*, Jay referred to the causes of war, “whether real or *pretended*” (Wright 2002, 98). In debating whether to use military force, members of Congress must receive from the president and executive officials reliable and truthful information. Legislative deliberation on such a grave matter as going to war must be informed. There can be no justification for the executive branch to knowingly and willfully mislead Congress and the public about the need for war. Deception and false statements in *time of war* may be necessary, but not in wars of choice for a democratic society.

## Section 1001

H.R. 743 adopts language from the False Statements Act, Section 1001 of Title 18. The purpose of the bill and the statute is to identify the types of conduct that would merit prosecution of individuals who falsify, conceal, or make other misrepresentations. In 1995, the U.S. Supreme Court in *Hubbard v. United States* (514 U.S. 695) ruled that

Section 1001 covered only false statements made to the executive branch, not to the judiciary or, by implication, to Congress. Congress quickly rewrote Section 1001 so that it would apply to Congress. During a House hearing, Representative William J. Martini testified that when Congress conducts oversight and legislates, “We generally operate, and rightfully so, on the assumption that the testimony we receive from various Government officials is accurate and truthful. Many would suggest that it’s the enforcement mechanism provided by section 1001 of title 18 that ultimately protects the legislative branch from false statements” (U.S. Congress 1995, 4). Similarly, Senator Arlen Specter said that Congress “relies on accurate information to legislate, to oversee, to direct public policy,” and unless the information provided to Congress “is accurate, we are unable to fulfill our constitutional functions” (U.S. Congress 1996, 2). The bill applying Section 1001 to Congress was enacted in 1996 (110 Stat. 3459).

### Misleading Justifications for War

In his study of presidential lies, Eric Alterman observed that “[b]efore the 1960s, few could even imagine that a president would deliberately mislead them on matters so fundamental as war and peace” (2004, 294). Actually, the record before the 1960s is not so benign. The framers put their faith not in honest officials but in a vigorous system of checks and balances to uncover abuse. On a number of occasions, presidents and executive officials have resorted to false and misleading statements to attract public and legislative support for military action.

*Mexican-American War.* In his first annual message on December 2, 1845, President James K. Polk reviewed for Congress the diplomatic efforts under way to resolve a number of disputes between Mexico and the United States for the purpose of definitively settling all pending differences, “including those of the boundary between Mexico and the United States” (Richardson 1925, 5:2241). The following spring, Polk ordered General Zachery Taylor to occupy disputed territory along the Texas–Mexico border. When Polk learned about a military clash between American and Mexican forces, he sent a message to Congress on May 11, 1846, claiming that Mexico “after a long-continued series of menaces [has] at last invaded our territory and shed the blood of our fellow-citizens on our own soil” (Richardson 1925, 2288). That statement was false. The territory did not belong to the United States.

Polk’s message to Congress claimed that “war exists.” Another false assertion. What existed was not war but hostilities. There could be hostilities, even invasion, without war. As noted by Representative Isaac E. Holmes during House debate, “We know nothing more than that the two armies have come into collision within the disputed territory, and I deny that war is absolutely, necessarily, the result of it. Suppose the Mexican Congress should not recognize the conduct of their general, and condemn it, and send here a remonstrance, or rather an apology—is it war?” (U.S. Congress 1846, 792). Despite the uncertainties of what happened, Congress declared war on May 13 and put the blame on Mexico: “Whereas, by the act of the Republic of Mexico, a state of war exists” (9 Stat. 9).

In early 1847, the Whig Party began publishing articles in its journal, *The American Review*, attacking Polk for executive usurpations and deceptions.<sup>1</sup> On December 22, 1847, Abraham Lincoln, as a freshman member of the U.S. House of Representatives, introduced what has become known as the “Spot Resolutions”—eight resolutions designed to determine whether American soldiers had actually died on American soil (U.S. Congress 1847, 64).<sup>2</sup> The purpose of these resolutions was to distinguish between presidential claims and presidential facts. The following month, on January 3, 1848, the House of Representatives passed an amendment censuring Polk for “unnecessarily and unconstitutionally” beginning the Mexican-American War. The measure passed by a vote of 85 to 81, with Lincoln voting in favor (U.S. Congress 1848, 95).

In his message to Congress on July 6, 1848, Polk seemed to back away from the claim that American blood had been shed on American soil. He explained that the peace treaty presented to Mexico proposed a “boundary line with due precision upon authoritative maps” to “establish upon the ground landmarks which shall allow the limits of both Republics” (Richardson 1925, 5:2438). Several weeks later, on July 24, Polk fully jettisoned the claim that the initial battle had occurred on American property. He said that after Texas had won its independence, its western boundary was declared by Congress to be the Rio Grande River, “from its mouth to the source, and thence due north to the forty-second degree of north latitude.” Texas, through its own acts, “asserted and exercised” title to the country west of the Nueces but “never conquered or reduced to actual possession and brought under the Government and laws that part of New Mexico laying east of the Rio Grande, which she claimed to be within her limits.” Polk now spoke clearly of claims, not facts. When war began, he said, Mexico was “in possession of this disputed territory” (Richardson 1925, 2446).

*Civil War.* Some have charged that Lincoln was hypocritical in rebuking Polk for his exercise of presidential power while invoking perhaps even broader powers after the Confederates fired on Fort Sumter in April 1861. One scholar remarked, “There is more than a bit of irony in Lincoln’s accusation against Polk. Within half a year of reviving it, Lincoln as president was himself to face the question of sending armed forces into disputed territory, and eventually his decision was to make him the second president to be charged with contriving a war and shifting the guilt to the other side” (Current 1990, 11).

Both Polk and Lincoln decided to put American troops or ships in a region where they were likely to provoke hostilities. Both men wanted to say that they acted in self-defense and that the other side was the aggressor. Yet Polk acted against a foreign country, while Lincoln coped with a civil war. Polk wanted to extend American territory; Lincoln sought to preserve the existing Union. For both, war was a matter of choice. Polk

1. See, e.g., “The President’s Message: The War,” *The American Review: A Whig Journal*, January 1847; “Military Conduct of the War,” *The American Review: A Whig Journal*, February 1847; “Executive Usurpation,” *The American Review: A Whig Journal*, March 1847; and “Mr. Slidell’s Mission to Mexico,” *The American Review: A Whig Journal*, April 1847.

2. The text of Lincoln’s resolutions is available at [http://www.sewanee.edu/faculty/Willis/Civil\\_War/documents/LincolnSpot.html](http://www.sewanee.edu/faculty/Willis/Civil_War/documents/LincolnSpot.html).

concluded that he could not acquire the territory he wanted by negotiating with Mexico. Lincoln decided to resupply Fort Sumter to prevent it from falling in the hands of the Confederacy. He did not want war in the same way as Polk, but he decided that allowing the states to secede and take federal property meant the destruction of the Union. Lincoln also feared that civil war would invite other nations to intervene for their own purposes. Lincoln was under greater pressure to act than Polk.

Polk spoke deceptively about American blood being shed on American soil. I am not aware of Lincoln committing the same type of deception or deceit. The closest he came was sending resupply ships to Charleston, knowing that war was the likely result. Both Lincoln and Polk stretched executive power to gain political objectives. Unlike Polk, Lincoln respected republican government and congressional authority, and he publicly conceded that he had exceeded his Article II powers and needed Congress to make legal what was illegal. He said that his extraordinary actions after the firing on Fort Sumter, “whether strictly legal or not,” were done with the belief that Congress “would readily ratify them.” He believed “that nothing has been done beyond the constitutional competency of Congress” (Richardson 1925, 7:3225). Through this language, he admitted to exercising not only his Article II powers but also those of Congress under Article I, and for that reason he sought and received retroactive authority (12 Stat. 326).

*Spanish-American War.* On February 15, 1898, the American battleship *Maine* blew up while sitting in the Havana harbor. The explosion killed two officers and 250 enlisted men. Fourteen of the injured later died, bringing the death toll to 266. President William McKinley ordered an investigation to determine the cause of the blast. On March 21, a naval court of inquiry concluded unanimously that the destruction of the ship had been caused “only by the explosion of a mine situated under the bottom of the ship.” The board said that it had been “unable to obtain evidence fixing the responsibility for the destruction of the MAINE upon any person or persons.” As to the possibility that the ship had been destroyed from an internal explosion of a magazine containing ammunition, the board said that “there had never been a case of spontaneous combustion of coal on board the MAINE.”<sup>3</sup>

The board neglected to acknowledge that other U.S. ships had experienced spontaneous combustion of coal in bunkers. In attributing the destruction to an external mine, the board was impressed that a massive upheaval had thrust a piece of bottom plating (still attached to the ship) upward so that it appeared 4 feet above the surface of the water. This part of the keel had the shape of a V, but was inverted, with the acute angle at the top.

On April 11, 1898, President McKinley reported to Congress on the board’s investigation, explaining that the naval board “did not assume to place the responsibility. That remains to be fixed” (Richardson 1925, 13:6290). Because of war fever in the United States, many newspapers, citizens, and members of Congress assumed that the mine had been placed by Spain or by agents of Spain. Newspapers published by William Randolph Hearst and Joseph Pulitzer blamed Spain for the wreckage. On February 17, Hearst’s *New*

3. See <http://www.spanamwar.com/mainerpt.htm>.

*York Journal* reported, "The Warship *Maine* was split in Two by an Enemy's Infernal Machine." A drawing in the newspaper showed the ship anchored over a mine, with wires connecting the mine to a Spanish fort. Newspapers helped promote the battle cry: "Remember the *Maine*. To Hell with Spain!" (Allen 1998a, 108).

Destruction of the *Maine* and the board's report were among several factors that prompted Congress on April 20 to pass a joint resolution demanding the withdrawal of Spanish armed forces from Cuba and directing the president to use military force to carry out the legislative policy (30 Stat. 738). On April 25, Congress passed legislation announcing that "war exists" between the United States and Spain, as of April 21 (30 Stat. 364).

The naval board did not make use of many technically qualified experts. George W. Melville, the navy's chief engineer, who doubted that a mine caused the explosion, was not asked for his views. He suspected that the cause of the disaster was an internal magazine explosion (Rickover 1995, ix, xvii, 46). Philip R. Alger, the navy's leading ordnance expert, told the *Washington Evening Star* a few days after the blast that the damage appeared to come from a magazine explosion (Rickover 1995, 46).

Many ships, including the *Maine*, had coal bunkers located next to magazines that stored ammunition, gun shells, and gunpowder. Only a bulkhead separated the bunkers from the magazines. If the coal, by spontaneous combustion, overheated, the magazines were at risk of exploding. An investigative board on January 27, 1898, warned the secretary of the navy about spontaneous coal fires that could detonate nearby magazines (Allen 1998a, 108).

The *Maine* carried bituminous coal, which was more subject to spontaneous combustion than anthracite coal (Rickover 1995, 27). Fresh surfaces of newly broken coal oxidize as part of a chemical reaction that produces heat. If not dissipated, the heat accelerates the reaction. A higher moisture content in the coal will increase the tendency to heat up. The ship had spent most of the last three months anchored at Key West, Florida, or nearby. The tropical climate in that region and in Cuba would ensure that the coal was moist (Allen 1998b, 3).<sup>4</sup> Ships installed alarms in the coal bunker to detect overheating, but often fires from spontaneous combustion smoldered deep beneath the coal without raising temperatures near the alarm (Rickover 1995, 91). Fires from coal bunkers were frequent occurrences. From 1894 to 1908, more than 20 coal bunker fires were reported on U.S. naval ships (Rickover 1995, 125).

In 1910, President William Howard Taft ordered the U.S. Army Corps of Engineers to complete a new study of the *Maine* wreckage. The Corps built a cofferdam around the ship, pumped out the water, and examined the exposed hull. Many photographs were taken. By cutting away some damaged parts, the Corps was able to refloat the remainder. A new board of inquiry in 1911 reaffirmed the conclusion that an exterior mine had destroyed the ship, producing the inverted V. However, the new board changed the location where it believed the exterior mine had been placed.

4. Available at <http://proquest.umi.com/pqdweb?index=2&did=83179245&SrchMode=3&sid=1&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1249051089&clientId=45714>.

In 1974, Admiral Hyman G. Rickover asked naval historians to take another look at the sinking of the *Maine*. He was particularly interested in the cause: was it an external mine or an internal explosion? A team of experts reviewed government records, archival sources, personal papers, contemporary newspapers and periodicals, and other sources. The scholars turned to professional engineers to interpret photographs of the wreck and study the ship's structure. Their study determined that the explosion was, "without a doubt," internal (Rickover 1995, 125). The team analyzed the V shape of the keel. Instead of suggesting an external mine, it indicated that the source of the explosion was solely within the ship (Rickover 1995, 114-15).

A book by Lewis Gould in 1982 concluded that inadequate ventilation within the *Maine* had led to a fire in the coal bunkers that set off nearby gunpowder (Gould 1982, 35). John L. Offner did his doctoral dissertation on the Spanish-American War. His book published in 1992 noted that from 1895 to 1898, 13 other American ships had fires associated with spontaneous combustion in coal bunkers (Offner 1992, 123).

In 1998, the National Geographic Society commissioned a study by Advanced Marine Enterprises (AME) to prepare a computer model to explore the cause of the *Maine*'s destruction. Studies of heat transfer indicated that within four hours a fire in the ship's coal bunker "could have raised the temperature of the nearest canister of gunpowder (a mere four inches away on the other side of a quarter-inch-thick steel plate) to more than 645°—hot enough to ignite the powder, triggering a chain reaction in the adjacent magazines" (Allen 1998a, 105).

AME suggested that a simple mine, if ignited either by contact or by a wire from shore, "could have sunk the *Maine*. If so, the mine must have been perfectly placed, which under the circumstances would have been as much a matter of luck as skill" (Allen 1998a, 106). Although there was no evidence of a mine or wires from shore, AME made a number of assumptions to determine whether a mine was a possible cause. It acknowledged that the results of this analysis "cannot be considered conclusive, as there is no direct evidence supporting several assumptions included in the analysis" (Allen 1998b, 5). Its analysis "indicates that a coal fire could have been the first step in the *Maine*'s destruction" (Allen 1998b, 5). If a coal fire was a possible "first step" in igniting other magazines, the ship could have been destroyed without any trigger from an external mine.

AME assumed that if a mine had exploded beneath the ship at the right location, it could have been the first step leading to explosions within the magazines. It concluded, "while a spontaneous combustion in a coal bunker can create ignition-level temperatures in adjacent magazines, this is not likely to have occurred on the *Maine*, because the bottom plating identified as Section 1 would have blown outward, not inward" (Allen, 1998b, 12). It was "plausible" that a mine caused the explosion." AME found none of its findings "definitive" (Allen 1998b, 13). The experts who worked on the Rickover study and some analysts within AME did not accept the conclusions of the AME computer model regarding the likely cause (Allen 1998b, 3).

*World War I.* Upon the outbreak of the European war in 1914, President Woodrow Wilson issued proclamations of neutrality (Richardson 1925, 16:7969-77).

This policy of neutrality gave way gradually to a preference for England over Germany. England set up a zone and warned that any ships entering it would be sunk. When Germany adopted the same policy to protect its interests, it was condemned by Wilson. In 1915, a German torpedo sank the British steamer *Lusitania*. More than a thousand passengers lost their lives, including 124 Americans. The vessel carried rifle cartridges, shrapnel, and other war material to assist the Allies (Link 1980, 33:135n). Secretary of State William Jennings Bryan believed that Germany had a right to prevent war supplies from reaching its enemies: "A ship carrying contraband should not rely upon passengers to protect her from attack—it would be like putting women and children in front of an army" (Link 1980, 33:134-35). When it was clear that Wilson intended to denounce Germany for the same practices followed by England, Bryan resigned (Fisher 2004, 67).

In an address delivered to Congress on December 7, 1915, Wilson recommended an increase in the size of the army, an acceleration of shipbuilding, and a strengthening of the merchant marine (Richardson 1925, 16:8106-10). Nevertheless, his reelection campaign in 1916 relied heavily on a promise to keep America out of the war. His renomination at the Democratic convention was accompanied by shouts of "He Kept Us out of War." During the campaign Wilson opposed a House resolution that would have prohibited Americans from traveling on armed merchant ships in submarine-infested waters (Livermore 1968, 7). On the eve of the election, on October 31, 1916, Wilson announced, "I am not expecting this country to get into war" (DeWeerd 1968, 21). On April 2, 1917, Wilson asked Congress to declare war on Germany (Richardson 1925, 16:8226-33). Four days later, Congress declared war (40 Stat. 1).

**World War II.** Similar to Wilson's commitment during the presidential campaign of 1916 to keep the nation out of war, President Franklin D. Roosevelt on October 23, 1940, denied that his administration "wishes to lead this country to war." He repeated the Democratic Party's platform: "We will not participate in foreign wars and we will not send our army, naval or air forces to fight in foreign lands outside of the Americas except in cases of attack" (Roosevelt 1940, 9:494, 495).

After the December 7, 1941, Japanese attack on Pearl Harbor, President Roosevelt said in a message to Congress, "The United States was at peace with that Nation and, at the solicitation of Japan, was still in conversation with its Government and its Emperor looking toward the maintenance of peace in the Pacific" (Roosevelt 1941, 10:514). He told Congress that Japan had "undertaken a surprise offensive extending throughout the Pacific area" (Roosevelt 1941, 515).

What Roosevelt did not tell Congress and the public is that the United States knew that diplomatic efforts to avoid war had failed and that war was coming to the Pacific. Several weeks earlier, on November 27, the administration had warned military and naval commanders in the Pacific (including Pearl Harbor) that diplomatic remedies were not likely. If hostilities "cannot be avoided the United States desires that Japan commit the first overt act." Like Polk and Lincoln, Roosevelt wanted the other side to initiate military action. But instead of urging strong defensive measures throughout the Pacific, the November 27 message advised military leaders not "to alarm [the] civil population" and to limit dissemination "of this highly secret information to minimum essential



officers” (Prange 1981, 402). When Japanese planes reached Pearl Harbor, the naval base was at its lowest alert (Fisher 2008, 49-51).

*Korean War.* On June 26, 1950, President Harry S. Truman publicly announced that there had been “unprovoked aggression against the Republic of Korea” by North Korea (Truman 1950, 491) by North Korea. The United Nations Security Council ordered a withdrawal of the invading forces to positions north of the 38th parallel, the border between North and South Korea. On the following day, after North Korean forces had not withdrawn, Truman ordered “United States air and sea forces to give the [South] Korean Government troops cover and support” (Truman 1950, 492). This was the first time that a president had entered a major military conflict without first seeking either authorization from Congress or a declaration of war. On June 29, 1950, Secretary of State Dean Acheson claimed that all U.S. actions taken in Korea “have been under the aegis of the United Nations” (1950, 43).

The statements by Truman and Acheson implied that a president may commit armed forces abroad not on the basis of congressional authority but solely in response to resolutions passed by the UN Security Council. Nothing in the history of the UN Charter supports that constitutional interpretation. In drafting the charter, it was well known that America’s entry into the League of Nations had failed when President Wilson and the Senate collided over the Treaty of Versailles. Wilson refused to accept reservations offered by Senator Henry Cabot Lodge designed to protect the congressional prerogative to initiate war (Fisher 2004, 81-83, 84-90).

During Senate debate on the UN Charter on July 27, 1945, President Truman wired a note from Potsdam to Senator Kenneth McKeller, explaining the administration’s position when it entered into special agreements with the Security Council to contribute armed forces and other military assistance. Truman made this pledge: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them” (U.S. Congress 1945, 8185). It was with that understanding that the Senate approved the UN Charter, voting 89 to 2 (U.S. Congress 1945, 8190).

Under the UN Charter, each nation had to decide how to contribute armed forces and other military assistance to the Security Council, “in accordance with their respective constitutional processes” (Fisher 2004, 89). Congress passed the UN Participation Act of 1945 to define U.S. constitutional processes. Without the slightest ambiguity, the statute requires that the agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution” (59 Stat. 621, sec. 6). Presidents could commit armed forces to the Security Council only after Congress gave its explicit consent (Fisher 2004, 91-95). It is quite true that the particular procedure for submitting “special agreements” did not develop within the United Nations, but no one could doubt that President Truman and Congress understood that the U.S. Constitution required advance approval from Congress to initiate war on another country.

It is possible to argue that the emergency facing Truman in June 1950 demanded prompt action without first seeking and obtaining legislative authority. However, even under that extreme circumstance, Truman could have returned to Congress at the earliest

opportunity to seek retroactive authority, as Lincoln had done in 1861. John Norton Moore has written, "As to the suddenness of Korea, and conflicts like Korea, I would argue that the president should have the authority to meet the attack as necessary but should immediately seek congressional authorization" (1969, 32).

*Vietnam War.* On August 3, 1964, President Lyndon B. Johnson ordered the U.S. Navy to take retaliatory actions against the North Vietnamese for their attacks in the Gulf of Tonkin. He acted following an attack on the U.S. destroyer *Maddox* by Communist PT boats. His August 4 radio and television report to the American public offered further details on the incident and described a second attack, this one against two American destroyers. The first attack did not provide grounds for a major military commitment. Questions were raised as to whether there had been a second attack, but Congress proceeded to pass the Gulf of Tonkin Resolution, approving and supporting the determination of the president, as commander in chief, to take "all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" (78 Stat. 384).

On August 4, 1964, a U.S. naval commander in the area cabled that review of the second action "makes many recorded contacts and torpedoes fired appear doubtful. Freak weather effects and over-eager sonarman may have accounted for many reports. No actual visual sightings by *Maddox*. Suggest complete evaluation before any further action" (U.S. Congress 1968, 54). In 1964, Secretary of Defense Robert McNamara had no doubts about a second attack. After a trip to Vietnam in 1995, he announced that he was "absolutely positive" that the second attack had never taken place (Richburg 1995). A study published in 1996 concluded on the basis of documents and interviews that the second attack had never occurred (Moïse 1996).

In 2005, a newspaper story reported that a study by the National Security Agency had cast doubt on a second attack, but the research paper was classified (Shane 2005). Within a matter of weeks, the NSA decided to declassify the study and release it to the public. The analyst concluded that the "second attack" was actually late signals coming from the first (Hanyok 1998). In short, there was no second attack.

*Iran-Contra Affair.* On November 3, 1986, a Lebanese periodical *El Shiraa* disclosed a secret U.S. program of selling arms to Iran. Funds from those sales were used to provide military assistance to the Contra rebels in Nicaragua, in violation of a congressional statute that prohibited such assistance. A special committee of Congress in each house filed a joint report, concluding that senior officials in the Ronald Reagan administration "misled Congress, withheld information, or failed to speak up when they knew others were giving incorrect testimony" (U.S. Congress 1987, 381). Lawrence E. Walsh, appointed independent counsel to investigate illegalities of the Iran-Contra Affair, prosecuted many executive branch officials for testifying falsely to congressional committees. Some of those prosecutions were blocked in December 1992 when President George H. W. Bush issued six pardons to Iran-Contra figures: three Central Intelligence Agency (CIA) officials (Duane Clarridge, Alan Fiers, Clair George), former Secretary of Defense Caspar Weinberger, Assistant Secretary of State Elliott Abrams, and former

National Security Advisor Robert McFarlane. A number of private citizens who had participated in illegal assistance to the Contras were prosecuted and convicted (Walsh 1997).

*Iraq War (2003).* On October 7, 2002, President George W. Bush spoke to the nation from Cincinnati, Ohio, explaining why military force might be necessary against Iraq to prevent it from using weapons of mass destruction. He claimed that Iraq was reconstituting its nuclear weapons program by purchasing aluminum tubes to enrich uranium for nuclear weapons (Bush 2002, 1718). Other analysts within the Bush administration concluded that the tubes were not part of a nuclear weapons program, but were most likely intended for small artillery rockets. After the war began, the Senate Intelligence Committee reported on July 9, 2004, that “the information available to the Intelligence Community indicated that these tubes were intended to be used for an Iraqi conventional rocket program and not a nuclear program” (U.S. Congress 2004, 131).

On December 19, 2002, the State Department released a “Fact Sheet” (prepared jointly with the CIA) that criticized an Iraqi report about its weapons of mass destruction. According to the department, the report “ignores efforts to procure uranium from Niger. *Why is the Iraqi regime hiding their uranium procurement?*”<sup>5</sup> The following month, in his State of the Union address, President George W. Bush told Congress and the American public that the “British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” The assertions by the State Department and President Bush were later discredited when it was discovered that the documentary evidence about Iraq seeking uranium ore had been fabricated. On July 7, 2003, after the initiation of military action against Iraq, the Bush administration conceded that the president should not have included in the State of the Union address the claim about Iraq trying to buy uranium in Africa (Pincus 2003; Sanger 2003).

The State Department “Fact Sheet” also drew attention to what it called “Mobile Biological Weapon Agent Facilities.” It asked, “*What is the Iraqi regime trying to hide about their mobile biological weapons facilities?*” President Bush mentioned these mobile labs in his State of the Union address on January 28, 2003. In May 2003, several months after military operations were under way in Iraq, the United States discovered one of these labs, prompting President Bush to announce from Poland, “We found the weapons of mass destruction. We found biological laboratories” (Bush 2003, 690). Experts within the administration later concluded that the most likely use for the trailers was to produce hydrogen for weather balloons, not biological weapons (Jehl 2003). Secretary of State Colin Powell, who had described these labs in his speech to the UN Security Council on February 5, 2003, on the eve of the war, later admitted that they were not for biological warfare and blamed the CIA for his misconceptions (Kessler 2004; Marquis 2004). In October 2004, U.S. inspector Charles Duelfer said that the trailers could not have been used for a biological weapons program and were manufactured to generate hydrogen (Jehl 2004). Other claims by the Bush administration regarding Iraqi weapons of mass

5. U.S. Department of State, “Illustrative Examples of Omissions from the Iraqi Declaration to the United Nations Security Council,” Fact Sheet, December 19, 2002.

destruction (an alleged link between Iraq and al-Qaeda, the existence of chemical and biological weapons, and unmanned aerial vehicles) were found similarly to be empty of substance (Fisher 2006, 289-313).

## Conclusions

The framers would not have been surprised that presidents and executive officials would deliberately mislead Congress and the American people about the need to go to war. They did not trust human nature, and they certainly did not trust executives and their capacity to initiate wars ruinous to their countries. Presidents are surrounded by aides who focus more on “mandates” from a winning campaign and less on constitutional and legal constraints. Although recent presidents (Truman, Johnson, Bush II) have been chewed up by failed military commitments, the aura remains that in order to be a great president, the occupant of the White House must be a war president. There is great temptation for presidents and executive officials to dissemble and distort.

The drafters of the Constitution hoped that the capacity to abuse power would be checked by rival institutions. As Madison expressed it in *Federalist No. 51*, each department of government “should have a will of its own” (Wright 2002, 355). Each department had to possess “the necessary constitutional means and personal motives to resist encroachments of the others” (Wright 2002, 356). Over the last half century, Congress has frequently failed to honor that fundamental duty, choosing to defer to presidential decisions and Supreme Court rulings (Fisher 2010). Congressional committees need to call executive officials to testify, under oath, to defend their public statements about going to war. To do that effectively, lawmakers and their staffs must arm themselves in advance with information obtained from executive agencies and from experts outside of government. Going to war is the most consequential act of government. Congress cannot function in an independent and informed manner by conceding that the president possesses plenary and exclusive control over national security intelligence. The executive branch does not have, constitutionally or politically, a superior advantage in deciding military commitments. Leaning in that direction undercuts the hope for democracy and the rule of law.

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