



Episode 383 – Presidential Powers: The Truth and Lies

Guest: Lou Fisher

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WOODS: Before you came on I played the segments, which probably you've heard by now, of Leon Panetta talking to Senator Sessions. So let's start there. We can talk about Libya in just a minute, but let's start there. He was claiming two basic things: number one is, without saying it in so many words, he was in effect saying we might consult you after the fact if we feel like doing it, but we don't feel compelled to do it, and secondly, what really matters is that we get some kind of international recognition of what we're doing. Can you take those one at a time for us? Take all the time you need explaining what's wrong with that.

FISHER: Well, I think what Panetta is doing is got started with President Truman. He was the first president to circumvent Congress. This is June 1950. He circumvented Congress. He went to the UN Security Council for "authority." The Security Council passed two resolutions. So that is the first time in our history after 160 or so years where a president would totally walk around Congress and go to some outside body. And that's basically what Secretary Panetta is saying here—maybe not the Security Council, but our NATO allies—and after Truman did that in 1950, which was actually against the law in 1945: when the Senate passed the UN charter, the United States had to decide how it was going to participate, and the UN Participation Act that year in Section 6 made very clear that any time a president used military force in the UN, it had to come first to Congress to get authority.

So five years later, Truman violated that law and the constitutional underpinnings, and other presidents have done it as well. The first Bush in 1990 went to the Security Council in November to get "authority" to go to war against Iraq. There was a statute passed in January 1991, so that's another example, and then Clinton several times went to either the Security Council to use military force, as in Haiti and in Bosnia, and when he couldn't get in Kosovo from the UN, then he went to NATO allies, and of course, President Obama going to military operations against Libya first going to the Security Council and later going to NATO. So you can see that pattern, and regrettably, Congress doesn't understand—either appreciate its institutional and constitutional role or something is going on that's really been so passive, and as you know, once a president does something and gets away with it, they will do it again and again until

something stops it. But Congress as of yet hasn't been one that should protect itself, and it's not.

WOODS: Once in a while, when proponents of this view even deign to acknowledge our arguments they will come back with well, in the last resort, Congress holds the purse strings. Congress can just withhold funds for any operation it doesn't want, so this is a whole lot of caterwauling about nothing. If they really felt strongly, they could just withhold the funds, and that would be the end of it—you don't have to argue about war powers anymore. What would you say to that?

FISHER: Well, once you take that attitude, that the president can do what he likes, and then Congress can always come later and stop him, either cutting off money or doing something else, then if that's your theory of government, then I think any president coming to Congress for legislation, say, on the Affordable Care Act, you know, just do it by executive order or some proclamation, and if Congress doesn't like it, then Congress can pass a statute to repeal it, and I guess that's subject to a veto, and then you need 2/3 in each house. So I think the Constitution is set up when you make policy, whether domestic or national security, the authority comes from Congress, and the initiative does not come from the president putting pressure on the Congress when he wants to stop being president. So I think it has the Constitution upside down.

WOODS: Talk to us a little bit about the War Powers Resolution of 1973. I read an article you wrote—it might have been in *Presidential Studies Quarterly*, I don't remember which one—that you may have co-authored on this issue. You are calling for repealing it because it gives the president too much power. Whereas somebody like Newt Gingrich wants to repeal it because he thinks it curtails the president's power. Is there a disconnect here? Is there something incoherent in the resolution itself that could lead to such divergent views of it?

FISHER: Well, I think the War Powers Resolution of 1973 is an extremely dishonest statute, and the reason I say that, Congress, particularly with the Vietnam War escalating, felt it had been left behind, and was under pressure to "reassert itself." And the Senate bill did do that—very narrow exceptions for what a president could do unilaterally. Otherwise, they had to come to Congress. The House never felt like you could by statute do anything in this area. So when the House and the Senate got to the conference committee, they came up with a bill that Senator Tom Eagleton called a bastard, meaning it came out with a little bit of the Senate and a little bit of the House, but it's incoherent.

The reason that I say that it's incoherent is that the first part of the statute says this bill isn't keeping with the intent of the Framers. That's one objection. Secondly, this will ensure collective judgment. Then when you look at the statute, it doesn't do either one because it allows the president to use military force for up to 60, 90 days. That has nothing to do with the intent of the Framers, and it certainly has nothing to do with collective judgment. So it's an extremely dishonest statute pretending to be assertive, and in fact, giving away power that the Framers would have been aghast at Congress authorizing presidential wars. But you're right.

People look at it as either Congress giving away too much or people who say it entrenches on presidential powers are those who believe that the president somehow can go to war whenever he wants to, but as I mentioned early, that was never the case. From 1789 up 1950, every president came to Congress either for a declaration or for an authorization.

WOODS: What do you say to the comeback that this a whole lot of nonsense because we can find “hundreds”—you’ve heard the “hundreds of times” argument probably hundreds of times. “Hundreds of times” presidents have deployed troops for this or that purpose without consulting Congress.

FISHER: Well, the example is sort of chasing bandits over the border into Mexico, but actually going to war against another country, using military force against another country, everyone that you can think of—the first one is an authorized war against France in 1798. 1812 was a declared war—Mexico a declared war. The Spanish-American, declared war. World War I and World War II, declared war. Vietnam an authorized war. The first Iraq war, authorized. And October 2002, authorized war against Iraq. And the year before, authorized war against Afghanistan. So every time they use military force, it’s always been either authorization or declaration. Now you do have Libya as a big example of never coming to Congress, and certainly Clinton’s war against Kosovo never coming to Congress. So there are some examples, but certainly less than a dozen, maybe six at the most.

WOODS: My understanding is that when you have a limited engagement like, for example, the Quasi War with France, just some naval skirmishes, that some sort of congressional authorization is sufficient, but when you are talking about going all-out war against a country, then nothing short of a declaration of war would be acceptable. And yet in the Iraq thing, it does seem like there was—the Congress is in effect saying that if the president decides that we need to go to war with this country, then he can go ahead and do that. Is there a problem with that constitutionally?

FISHER: It is true that some people say that a declaration of war means that you are using all of your capacity in the country to act against another, but I don’t think that’s the case. Vietnam was one of the biggest wars we ever had—5,000 or 10,000 troops [CHECK]—and that was authorized by the Gulf of Tonkin Resolution in August 1964. I think what the Quasi War was in 1798—I think they used the word Quasi not just because it was not declared, but because it was a naval war. There was no authority to go on land. So I think that’s the notion of the Quasi War. And it could have been done. Actually the Supreme Court in 1800 and 1801, both times, said it’s up to Congress. It can either authorize or declare. And the Framers knew that formal declarations were going out of style. Countries were not using declarations. They were using authorization. So I think they are equivalent. Constitutionally you can either declare or authorize.

WOODS: Is there anything that can be done? Is there any wording that could restrain an ambitious leader? Was there any wording that could have stopped a Caesar? Are we ultimately

faced with the fact that constitutions are just pieces of paper, and we the people are basically helpless to enforce them, and we just have to sit back and take it when the presidents do this? Is that where we are?

FISHER: I hope not. The Framers rejected monarchy. They rejected putting all of the external affairs, foreign affairs, and the war powers in the executive. That was the British model. And it was all very, very clear, and you could look at a lot of the foreign affairs powers and war powers that had been given to the king in Article I for Congress. So that model lasted from 1789 to 1950, when Truman went to war in Korea using the UN. So I think what has destabilized the Constitution is these misapplied institutions. The UN was never supposed to be a substitute for Congress. The UN Participation Act of 1945 makes that clear. NATO was never supposed to be a substitute for Congress, but presidents after 1950 used that, and Congress didn't protect itself.

The Framers expected all three branches to protect themselves to fight off encroachments. That's what keeps the separation of powers alive and well. But Congress from World War II on has not protected itself, inasmuch as not protecting itself is not protecting the constituency that send them there. It's not protecting democratic government. Probably the Democrats and the Republicans will get by with whatever they can, and it's up for Congress to have some institutional people there. I think there's been a huge decline. I worked for Congress from 1970—for 40 years—till August 2010. I certainly worked with many, many people who understood the institution and were willing to dedicate to protect it. There are very few today, very, very few. That's the problem we have. Unless members protect their institution, we will continue on the road we are on.

WOODS: What do you say to people like the one I described before we went into the break who say that, well, these days things have changed. We've got all kinds of different threats, very different from ones that the Framers could have anticipated. So of course we have to allow some kind of elastic interpretation of the president's war powers. Otherwise, it would just be unreasonable. What do you say to that?

FISHER: Well, the Framers fought in the Revolutionary War. They know all about that, and they did not adopt the British model, which is what the caller would want to do: go back to the British model of putting all external affairs in the president. There are parts of the Constitution that make it very clear that the Framers understood dangers, for example, they gave Congress the authority to provide for calling forth a militia to execute the laws of the Union, suppress insurrections, and repel invasions, and also, in Article I you cannot suspend the privilege of the writ of *habeas corpus* unless in cases of rebellion or invasion that public safety may require. So the Framers knew all about the emergency power. Certainly, the huge emergency, which would have been phenomenal, was 9/11, and yet, about a week after 9/11, President Bush came to Congress, and he got the authorization to use military force, AUMF. So even the greatest emergency we've had after World War II, the smart thing to do constitutionally and politically is for the two branches to work through statutory authority, not to have the president go off half-cocked. That would be the dumbest thing to do. So whether it's an emergency or not, the

president comes to Congress. President Bush would have been much better had he come to Congress after 9/11 and gotten authority with the military commissions instead of doing it unilaterally. That just was a calamity for the next six, eight years. We've never gotten over that unilateral action. So come to Congress, get authority, and you're on the right footing both legally and politically.

WOODS: My sense of the Authorization for the Use of Military Force was that it was analogous to the types of things that we saw that Congress did authorizing Adams to use force in limited circumstances, authorizing the Barbary pirates' activities, and it was aimed at, all right, well, these are the guilty parties; let's go out and get them. But I would have viewed it as an abuse to take the AUMF and use it as a justification for a full-scale invasion of a whole country. It did seem like in the AUMF that we're going to pinpoint who the perpetrators are. We're going to go after them. My view was that the AUMF was clearly you would have to go beyond that to justify the full-fledged invasion of a whole country, but you disagree with me on that?

FISHER: No, I agree with what you said and the fact that once you decide that al Qaeda is in Afghanistan, you have managed the country you are going to go into, and then of course, al Qaeda can go to Somalia, Yemen, and the other places. So now it's not one country. It's as many countries as al Qaeda wants to go to. So you're right. I think what you said earlier about President John Adams, if the country was France and Mexico later, we've always gone against one country, or World War II was certainly several countries. But 9/11 is certainly totally new territory. It just looks as many countries are available as al Qaeda wants to go to.

WOODS: We've got just about a minute left. On this issue in the War Powers Resolution, they will use words that are very important to define, like war or hostilities. But the question, and when war exists, then these congressional so-called limitations come into effect, but it seems to me the issue is who defines when something constitutes a war in the first place.

FISHER: It's a perfect example to end because, as you know, in Libya, the Obama Administration not only said there is no war there, there's not even hostilities. And the reason they said that is because we don't have any casualties. So that means that any powerful nation can pulverize another country, and if there are no casualties by the aggressor, then there is no war and no hostilities. That's just playing games with words, an incredible kind of logic.

WOODS: That's the tricky part about trying to tie these people up with words, because they are so skilled at navigating their way out. Lou Fisher, thanks so much for taking some time with us. A pleasure talking to you.