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(Theme music)

Voiceover: The following is a production of the Pritzker Military Museum and Library. Bringing citizens and citizen soldiers together through the exploration of military history, topics, and current affairs, this is *Pritzker Military Presents*.

Clarke: Welcome to *Pritzker Military Presents* with William E. Colby Award Winner Judge David Barron in a discussion about writing military history and his first book *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS*. I'm your host Ken Clarke, and this program is coming to you from the Pritzker Military Museum and Library in downtown Chicago, and it's sponsored by Norwich University. This program and hundreds more are available on demand at [PritzkerMilitary.org](http://PritzkerMilitary.org). Since the founding of the United States of America there has been a struggle between presidents and Congress about who has the power to declare and wage war. After the Continental Army lost the Battle of Brooklyn, General George Washington had planned to burn New York City in anticipation of a British invasion. But he was overrun by Congress, and he obeyed the congress setting an enduring precedent for future leaders of the nation. Nevertheless the debate over war powers has endured from our nation's infancy to the present. The Constitution gives only Congress the power to declare war, but the president serves as commander in chief and is authorized to wage war. From the War of 1812, the Civil War, both World Wars, Korea, Vietnam, and Iraq to today's War on Terror, presidents and Congress have clashed over who holds power to declare and wage war. *Waging War* shows our country's presidents at their most trying times, but most, for better or worse, have proved adept at getting their way over a reluctant Congress. But the same time they have always obeyed the will of Congress because the Constitution maintains an intricate system of checks and balances. David Barron is the 2017 recipient of Norwich University's William E. Colby Award. This distinguished honor is awarded annual to the first work by an author of fiction or nonfiction that has made a major contribution to the understanding of military history, intelligence operations, or international affairs. This award is presented annually at the William E. Colby Military Writers Symposium at Norwich University and is sponsored by the Pritzker Military Museum and Library. Judge Barron was appointed as a United States federal circuit judge to the First Circuit Court of Appeals in 2014. Prior to serving as a federal judge, Barron served as an advisor and acting assistant attorney general of the office of legal council for the United States Department of Justice. He has clerked for Judge Stephen R. Reinhardt of the United States Court of Appeals for the Ninth Circuit and for Justice John Paul Stevens of the United States Supreme Court. He taught law for many years at Harvard Law School and is a former S. William Green professor of public law. Barron is a recipient of the National Intelligence Exceptional Achievement Medal and the Secretary of Defense Medal for Outstanding Public Service. He graduated from Harvard College and then Harvard Law School in 1994. Prior to attending law school, he was a reporter for the News & Observer in Raleigh, North Carolina. Please join me in welcoming to the Pritzker Military Museum and Library Judge David Barron.

(Applause)

Clarke: It's our pleasure to have you, and again congratulations on winning this prestigious award. The Colby Award is a big deal, and the people who have come before you are--you know, you are in a long line of--

Barron: It's extremely good company. No, I was very, very pleased to win the award, and thanks very much to the Pritzker Museum for sponsoring it.

Clarke: Well, this is your first book. And before getting into talking the book, I wanna kinda know a little about who you are and what inspired you to write this book, because nothing comes from nothing. So tell me a little bit about what inspired you to get into the law practice and then how this book kinda came about.

Barron: Well the book is really a confluence of maybe three parts of my professional life that came together. One was, as you mentioned, I was a journalist once upon a time. And as lawyers that are listening may know, lawyers aren't known for the ease of their writing, whereas journalist' stock and trade is to try and write something that people actually can read. And so the book was a chance to write about law in a way that would be accessible, I hope, to a general audience of non-lawyers, to tell it as a story rather than just as a legal--set of legal propositions. So that was one aspect of it. Another is, I am a, I guess, frustrated historian or someone who always thought about potentially being a historian but never actually became one. So it was really a chance to learn the history of the country through one particular lens and tell the story of the country through this particular debate, which starts as you say with George Washington before we even were a country and runs all the way up until this very moment. And then the last of it is law, and I--my father was a law professor; my mother was a lawyer, so I had legal training. My sister is a lawyer. There's a lot of law in my family, and I got interested in that, I guess, as a young child even about politics and the way the country was structured. And the book really is then a culmination of my legal training, my journalistic background, and my interest in history.

Clarke: Can you think of anything in your past that kind of inspired you to do this? Any specific events?

Barron: Yeah, I think the main--two things stand out for me. When I was a reporter in North Carolina, I remember covering the court martial of an American soldier who had been involved in the Panama invasion, and watching the process of military justice and the way law and war fighting came together stayed with me. Very much in some ways was a trigger for me to think about going to law school and leaving journalism. But the second piece was I worked as a young lawyer in the Clinton administration in the office of legal council in the department of justice, and that office is responsible for advising the executive branch and the president in particular about the scope of his powers under the Constitution, the laws of the United States. And it's an office with a great and proud tradition of independent legal advice on some very controversial issues. Well, after I had left that office, the office became sort of a central player in the War on Terrorism. So this is many years after I had left, but it became the source of many of the legal opinions during the Bush administration that provoked great controversy about the scope of the powers of the commander in chief in a very unusual war, the War on Terrorism, which is a non-state enemy and which poses a direct threat to the home front, manifest most obviously in the horrible attacks of 9/11 that everybody of course is familiar with. And out of that came a set of legal positions of the department of justice authored by people in my former office that the commander in chief basically has the power to decide how to wage war on his own and the president and the president alone is empowered to make those decisions. And as an academic at the time teaching law, and as somebody that had worked in that office, those propositions struck me as concerning and problematic. And initially I thought I would just try and delve into that history as a legal scholar, which I did and wrote a pair of long articles with a coauthor, Marty Lederman about this question--not who gets to start a war, but once a war has begun, who controls how to fight it. And many of the central conflicts in the War on Terror have been less about whether to go to war, because Congress overwhelmingly authorized the president to use military force following the attacks on 9/11 without really putting severe limits on where that force could be waged, though naming the enemy that had to be targeted. But that

generated an enormous amount of conflicts--what tactics could you use in fighting that war? What about indefinite detention and who could be detained? What kind of interrogation practices could be used, and what kind of surveillance practices could be used? And how--well there was a fair amount of law that Congress had enacted over the years that touched on those issues. And the department of justice took the position that insofar as those statutes restricted the president's ability to interrogate as he thought necessary to protect the national security or survey in the way that was necessary or detain in the way that was necessary. The president had a trumping power, because we were at war, and he was the commander in chief. So those articles really were a legal account of what was our history, what was the tradition in that regard. And it suggested that the positions that the administration was taking at that time were too sweeping and weren't nuanced enough about the intricacies of the relationship between Congress and the president. And then having done that, I then served in the Obama administration as the head of that office, the acting head of that office, for the first year and a half of the Obama administration. And suddenly I was sort of charged with deciding some of those question for real, not thinking of them just academically. And when I left the office having spent a year and a half with those very challenging questions about detention, surveillance, use of drones, etcetera, I had a sense that there was another aspect to the story which wasn't just who has the legal power. But what does a president do, and what do his legal advisors and those that are advising him generally do, when in the midst of an ongoing war there's a conflict between what the president wants to do and what it looks like Congress has directed he may do? Not so much who wins that fight, but what has the practice been of how a president manages that tension and that conflict. And I thought it would be helpful if I could find some way through history to convey the tradition or the practice that's developed over many, many presidents and many, many legal advisors. And the book is really trying to tell that story.

Clarke: We're gonna get into more in that story in a minute. But I would like you to maybe be a little philosophical for a second, since we are in a museum and library dedicated to study and the propagation of military history. Why do you think the study of military history is important, and in this context or in general?

Barron: Well there is a way in which the history of any country but the history of our country certainly is defined by war fighting. And if you don't understand that aspect of our history I think you miss something central to the way our institutions have developed, because war inevitably shapes not just the culture of the society but the institutions. You know, we celebrate the system of checks and balances, and we are privileged to live in a country that has a system that's set up like that. But if there's a test for that system it's most likely to come in times of crisis. And war is a time of crisis by definition. And so trying to understand how the institutions work in those most trying times is a good way of getting insight into how stable is the system, how practical is it, how democratic is it in the end.

Clarke: So, waging war has changed over the course of our history, and it really does start with the American Revolution. Can you tell me a couple stories about how General Washington had to deal with Congress? And the thing that I'm very interested in hearing about is your stories about how Washington, even though he confronted Congress and challenged Congress, he always went along with the will of the congress, setting a very important precedent.

Barron: Yeah, I mean, I think he had a very strong instinct. And of course he-- we start with Washington when he is the commander in chief of the Continental Army. And he's gotten his commission from the Continental Congress, and we don't yet have a Constitution in which we have an elected president who is the commander in chief. We just have an appointed general who is the commanding general of that army. And that's

George Washington, the first one. But nonetheless he has the title commander in chief, which the Constitution then uses to describe the president and sort of that central military figure. So it's instructive I think, what that title meant and what kind of powers came with it. Because we often hear now talk--if you're the commander in chief you get to decide everything, and that thought--what that title meant, at least when Washington first had it--and that's really clear from an early, early episode, and you alluded to it in your introduction, which is in the battle over New York. The Americans had done very well in Boston, surprisingly so. The British began to realize they were up against a more formidable foe than they might have hoped, and the battle moves to New York, and there's a mass of his majesty's ships off the coast of Long Island who are poised for an attack. Washington knows the attack is coming and knows that there's almost no way the Americans can prevail. The question he's thinking about is, how can I get out of it New York, not, how do I beat the British. There's no hope of that. And he's getting lots of advise about what kind of retreat he should have--just a clean retreat--you just leave--or alternatively on the way out should I burn New York to the ground, and there's a lot to be said, Washington thinks, for burning new york to the ground, namely that when the British come they'll have nothing to show for their victory. And Washington settles on this course of action, thinks it's probably the right thing to do, that we'll leave, but we'll raze New York on the way out. So he writes, though, to the Continental Congress before taking that action. And he sends a letter to the president of the Continental Congress who is in Philadelphia at the time, and it says, "Ought we leave New York to be winters quarters for the enemy?" Now as a lawyer that's obviously a leading question when you put it that way, and he's expecting the answer I think is gonna be no, we ought not leave it to be winters quarters for the enemy. It's not he answer he gets. The very next day Hancock writes him back on behalf of the Continental Congress and tells him he's absolutely forbidden from burning New York to the ground. Washington's furious. Calls it one of the capital errors of the congress of his time. But nonetheless by all accounts he obeys the order, and as he pulls his troops out once the assault begins by the British--it's just as frenzied and furious as he expected it would be--there's no indication that he put any plan in place to burn new york to the ground. As it happens, a fire does break out as they're leaving, and it burns a chunk of New York, but by no means the whole city. The British are convinced that Washington had to be behind it because any commander in chief would have wanted to burn it down. But after looking into it--many, many generations of historians--there's no indication that Washington did. Washington was happy it burned, and the letter says, "I'm glad that some good anonymous fellow did more than we were willing to do for ourselves." But it's a first indication of this dynamic between a commander in chief and a congress. And what's interesting, it fits sort of the normal pattern that we often think in our mind. The president's gonna be more aggressive; Congress will be the tempering force. And will the president obey that tempering force, or will he resist it? But interestingly soon after the battle in New York and the retreat very different kind of dispute breaks out between the congress and Washington. And in this one Congress is the aggressor and Washington's the tempering force. And what's happened is the British have captured an American general. And this is after they've just lost in New York. Morale is sinking. The British are clearly in the lead, and the American fortunes are going down. The Continental Congress sees this opportunity as a chance to rally public opinion by claiming that the British are mistreating the American general that they've captures. And they start whipping up a story about how vial the treatment of this American general is. And they know Washington when he won in Boston and captured some high-ranking British officers. And so what they direct Washington to do is to treat as poorly the British officers he holds as they claim the British are treating the American general that the British have captured. So they issue a

directive to Washington to retaliate against this British officer. Washington is appalled at this, thinks it's no way to treat a high-ranking officer. It's beneath the dignity of the armed forces of the United States. But he complies, and he takes this British officer, who was treated fairly well. He had a number of servants assigned to him, which gives you a sense of the difference in those days compared to now--puts him in close custody. And the British officer writes to Washington and says in the letter to Washington, "You're a dictator. You don't have to stand for what Congress is telling you to do. You can get me out of this situation. In fact I only have one servant now. You can't treat me this way." Well, amazingly, Washington writes back. So you just have to think about this. This is the middle of the revolution, Washington's getting a letter from his captured British officer, and he responds to it. And the letter saying, "You're a dictator; can't you help me?" And Washington writes back and says, "I don't have the power you suppose. It's neither in my inclination nor my authority to disobey my congress." But at the same time he tells him that, he's also writing to Congress saying, "You're crazy to be telling me to treat this officer this way. It's not good for us, it's not good for our reputation, and it doesn't make any sense. Plus the British aren't even treating the generals bad as you're saying." and what he works out over the course of many months is to bring congress along to his way, and eventually he gets Congress to relent, and a prisoner swap is made. And both men ultimately are released. And what's instructive about this to me, and it sets a pattern that I think you find throughout our history, on the one hand we often think of congress is the restraint, president is the aggressor. But from the earliest days of Washington, there's no inherent reason that has to be the case. Sometimes Congress, because of public opinion, is much more aggressive than the president in his wisdom thinks we need to be. And a clash can rise just as surely from a president wanting to go slow and a congress wanting to push as from the opposite proposition. And the second is that although we often think of the president as my way or the highway, in war you can't stop me. It's not how Washington behaved, but it's also no the case that Washington just laid down and said, "You tell me what to do. I'm happy to do it." He's also resisting Congress. He thinks Congress is making terrible judgments, and he's finding some way to get his way of waging war on terms that Congress can also abide. And it's that dance between the two branches, neither trying to get a clash but each trying to get its own way. That, I think is very reflective of the history that develops in the wake of Washington.

Clarke: Do you find it ironic that Washington's inclination to treat the officer well and the congress's desire to have Washington not burn New York kind of come from the same spirit, if you will? 'Cause isn't it true that we didn't want to burn New York down according to the congress because that's what the British would do?

Barron: Yeah, well, in fact in the declaration of independence, one of the crimes of the king, it's listed, is that he burnt our towns. And the Continental Congress has a different perspective than Washington at that moment, and this is another feature of a system in which you don't have one person in the field making all the decisions. But also feature of a system which you don't have one body of removed people, a collective body, making all the decisions. Is that the perspectives of those two actors or institutions are likely to be different at any given moment. It's the mix of those perspectives that produces clashes but also, you hope, produces a mix of desire to be aggressive, desire to be restrained, broader perspectives, recognition of the immediate practical concerns that arise, that at least the framers thought would produce a system that would have over time better outcomes for the country than an alternative one.

Clarke: Well, let's stay with Washington for a second. Let's talk about the Whiskey Rebellion for a second, 'cause this is an entirely different scenario, but it seems to have

some modern equivalents as well--raising of a militia to take on a situation that was civilian-based, and how Washington worked around the congress with that.

Barron: Well, there's two features of it that sort of strike me. So this is an uprising, and Washington responds to it aggressively with the use of military force. It's authorized by the congress of his day through a general authorization to raise up forces to take on this thing with conditions and limitations, which are respected and bind--and set boundaries on what he can do. But the two features of it that I think are significant for present purposes--one, how different the world looked at them then than the way the world looks to us now, in two respects. One, there was no standing army like there is now. There's no million-person, and there's no gigantic naval fleet, and there's certainly no air force to be used around the world that the president might wish. Anything he wants, he's got to call up and get to do any military operations, so just by the nature of that setup, Congress had a controlling hand, practically speaking, in a way that it needn't be thought to have today. The second thing is, in the Whiskey Rebellion, Washington commands the forces in the field. He's on the horse in the battle. And this idea was very resonant to the framers of the Constitution and the opponents of the Constitution. What they were very worried about was less what we sometimes think about as the imperial president, prescribing the world from the oval office, commanding forces to be sent wherever he wishes. What they were worried was a military leader at home suppressing Americans at home who might rise up to resist and that he would do it in military garb as the proverbial man on horseback and that once he succeeded in that role he'd be an unstoppable force, and you'd have a military dictator at home. So at the run-up to the ratification of the Constitution some of the leading opponents--Patrick Henry, George Mason--this was the image that they tried to really push about what the constitution risked creating. And one of the ways they tried to restrain it was in the Philadelphia Conference there were suggestions that the Constitution should include a provision that the congress would have to authorize the president to take command in the field. It's just--you think about political candidates or presidential candidates in the tank with the hat. Now that's not our worry, but at the time that was very much a fear that they had.

Clarke: So let's fast-forward to Lincoln's time, 'cause there are certainly some issues with this tug-of-war between Congress and the president. What was it that Lincoln faced as he went to wage the Civil War and conduct it?

Barron: Well, it's--you know, the main thing to realize is it's an existential threat to the country. And I think it's important not to lose sight of the different ways in which a president as commander in chief can confront a conflict over waging war. Not all wars are the same; not all wars pose the same sense of danger or peril to the country as some wars. The revolution was obviously an existential threat. If you lose, you don't have a country. Civil war is the same, and that's understood. The country is split, so can you bring it back together? So the stakes can't be higher. And the threat is at home directly. I mean, there's an invading force, in a sense, that you face, and they were at very real risk early on, you know, that they would come to Washington and take over Washington itself. So there's just the immediacy of the danger and the seriousness or the gravity of the threat. From the perspective of power, what Lincoln faces is the attack on Fort Sumter in April 1861, so the war is on, and Congress is not there. Congress is gone. So if you're gonna respond, you might think that's great 'cause if congress isn't there it's hard for them to stop you from doing anything. On the other hand, if they're not there and you've read the Constitution, you might have some questions about, "How can I do anything without them?" And so the first set of debates Lincoln confronts with his top advisors is, "What can I do, given that they're gone, and when should we call them back?" The way the constitutional system operated at the time, they weren't due to be back for quite a while. And so the first order of business is figuring out when to call them

back, and what can I do until they get there. So some people advocate to Lincoln, "Call them back right away." It will still take a few weeks for them to come, just travel being what it was in those days. Other people say, "Just wait until they're supposed to come back. You'll have many, many months to figure it out, and you can run the war as you want." In the end they settle for--and I think this is consistent in a way with the theme from Washington, a middle course. Lincoln calls them back for a special session in July to begin in July of that year, so that gives them about eighty days. And what's interesting--why does he wait those eighty days? Well, one theory about why he waits the amount of time he does is, it's the amount of time he needs to ensure that the border state congressional delegations can get elected representatives who can serve in that special session because the quirk of the election timing meant otherwise they wouldn't have anyone seated for the special session. But they can move up the election only so quickly, and they can get those people elected by late June, as it turns out under state law, which means that a new state border state delegation will be in place for that special session in July. And Lincoln thinks, "If I can get border state delegations that support me, then I'll have an important chunk of the congress with me for this war." And so in those intervening days, he's doing two things. One, exercising extraordinary amount of independent executive power to wage war, raising tens of thousands of troops without Congress having specifically authorized him to do so, suspending habeas corpus through a good chunk of the country when the Constitution does not suggest the president has that power to do so. More power being exercised to wage war than any president on his own has ever asserted, Lincoln does in those days. And at the same time he's planning for this special session of Congress to make sure he has Congress with him in the fighting of the war. And their planning what's that special session gonna look like, and the very first order of business is a bill that they're working with their friends in senate and the house to get going, which will be a bill in which Congress will ratify all the things Lincoln has done in that eighty days when Congress is gone. Because Lincoln thinks it's critical that he has Congress with him rather than against him, and that the popular understanding is that he's doing this war with Congress' support rather than without it.

Clarke: So how do you think then the debate changed during WWI? Because that's a very different--you have Wilson, and you have Pershing, and you have this dynamic duo really pushing America into war. And really the same debate was there.

Barron: Yeah, well, it's actually maybe--to really understand it's probably helpful to finish the story with Lincoln in the following way. Once the war's on and Congress is back in the Civil War, inevitably conflicts between Congress and Lincoln break out over how to fight the war. Most dramatically, Congress in 1862 starts pushing Lincoln to emancipate before Lincoln is ready to issue an emancipation proclamation or to support it. In fact, he's very worried that the congress by pushing this far is going to undermine his effort to hold the Union together because of the affect it might have on the Border States. So a debate breaks out in congress where the radical republicans in congress have proposed this second confiscation act, which will be a directive to the president to in fact order emancipation in the south. And Lincoln's advisers are very wary of it. And a good friend of his in the senate, a republican, senator Orville Browning from Illinois, implores Lincoln not to sign the second confiscation act out of fear that if Lincoln does he'll have handed over the power of the commander in chief to the congress. And he says to him at a meeting in the White House, "Either the abolitionists are running this war, or you're running the war, and you have to decide who it is. And the only way you can decide that is by showing them you're running it, which means you have to veto this bill." Lincoln in typical fashion doesn't say much at the meeting. Browning leaves the meeting thinking, "I'm pretty sure Lincoln agrees with me." Turns out he's wrong, and Lincoln ends up

signing the bill which in Browning's eyes meant he's capitulating to the Congress, but interestingly the very moment he's meeting with Browning and hearing Browning say, "You have to resist Congress' efforts here," Lincoln has met with his secretary of the navy and for the first time made clear that he intends to issue an emancipation proclamation on his own. And what Lincoln had realized is actually this is not Congress just sticking it to me, telling me what to do; it's Congress authorizing or acquiescing or suggesting to me that the country's more ready for emancipation than I had been thinking. And Lincoln then issues an emancipation proclamation, which does more even than the second confiscation act, but he wraps himself in the second confiscation act and issuing it. And so just very much in the spirit of how Washington behaved, he's both asserting himself and trying to ally himself with Congress at the same time. Well, the victory of the Civil War makes this kind of powerful president, president as wartime leader, an extremely attractive idea. And then the post-Civil War reconstruction period, which results in the conflict with Andrew Johnson, Lincoln's successor after Lincoln is assassinated, and the impeachment of Johnson, or the failed impeachment of Johnson, leads to also an image of Congress as overstepping its bounds, because one of the fights that broke out between Congress and Johnson over impeachment was who controlled the conduct of war. One of the articles of impeachment was that Johnson resisted Congressional attempts to control him as commander in chief. So you have a kind of a history going into WWI of a very attractive idea of presidential power and Congresses role suddenly not looking as attractive as it once had. And it shapes very much the thinking of all people of Woodrow Wilson, who of course is the president for WWI. He was a southerner, but he also was a historian and a political scientist and a theorist of presidential power. And he writes a book in which the villain is what he calls Congressional government, and the model or the ideal is what he calls Constitutional government. But interestingly although he has this inflated idea of executive power and wars being an opportunity for the executive to really lead the country, take the leading hand, he's also, I think because of his southern heritage, very wary of war and very wary of aggressive war and very wary of an overweening victorious occupying power. So he goes into WWI with a really mixed set of ideas of sort of strong presidential power but also reluctance to get into war. He runs on the idea that we are not gonna get into the war. In fighting the war, he's thinking very much of the way in which we can manage this war without becoming sort of an aggressive occupying. He talks about things like peace without victory and various things, which complicate the standard image of, you know, the strong executive in wartime. And that shapes very much the way the politics of the war, WWI, play out.

Clarke: I think it's very interesting, because you have Washington's first major battle, the Battle of the Wabash, is a disaster for American troops, and he faces a congressional inquiry where he is asked to turn over all the papers. And there is a debate on whether or not the president should turn those papers over to the congress because of the balance of power between the two. Lincoln faces the same thing, Emancipation Proclamation confiscation. And then you have this very imperial president, in a way, in Wilson in the way that he conducted WWI. There's a theme there, isn't there, that seems to be very common through that segment of our history?

Barron: Well, there's certainly, I guess, two things. One, the clash is as old as old can get, right? It's built into the very founding of the country, this idea that there will be a tension between the executive and the legislature--legislative branch of the Congressional body in the fighting of war. There's also, though, a sense that each president has of the importance of protecting the prerogatives of both, both in the moment--they have their own idea of how to fight the war, and they're not particularly appreciative of a congress telling them to do it a different way. You know, in the Civil

War, Lincoln faces a committee on the conduct of war, which is a special congressional committee, which he thought was nothing but a nuisance and constantly harassed him. And in WWI when it was going poorly, there was a big push to create a replica of the committee on the conduct of war to harass and create trouble for Wilson. And Wilson would have none of it. He thought the lesson of the Civil War was we don't need a committee like that, and I won't stand for it. And he manages to manage the politics well enough that he eventually is able to stop anything like that from being established. But not only is their own immediate interest, I think each of these presidents also is thinking about themselves as part of a tradition of presidential power and the legacy they need to leave to the next president, which is from my own expediency at the moment, it might be helpful to cut a deal with the congress, give them more authority. On the other hand, what am I doing to the office if I set that precedent? At the same time, they're also thinking though, "What precedent do I set if I suggest that I'm free and clear of Congress and can act unchecked?" And that anxiety I think of the influence of who came before them and what legacy they're leaving after, for the wisest presidents, you really see them wrestling with that issue when they face these conflicts.

Clarke: Then how did it change for WWII? Certainly it's a layers, if you will, and precedent and looking at those things. So what did we face during WWII with this clash between president and Congress?

Barron: Yeah. Well, in some ways the clash is there at the very beginning in a very evident way, because the legacy of WWI was a real reluctance for the US to participate in another European war, and a whole range of congressional statutes that sort of enforce neutrality going forward in the United States. So when war is breaking out in Europe for a second time, Churchill in England is begging for the US, as is France to help support them against the Nazi invasion and aggression in Europe. But there's all these statutes in place that suggest that we cannot lend military assistance to Belligerent Paris 'cause we haven't entered the war, so we are a neutral. And it would be a crime to lend military assistance. So Roosevelt's first task is to figure out, "Well, how can I lend aid to them?" 'Cause he thought he should, consistent with these criminal statutes that prevent me from doing so. And early on he turns to his lawyers, and he asks them. He says, "I see there's these neutrality statutes. Do I really have to follow them?" And the lawyers and the justice department convene, and they write him back, and they say, "We kinda think you do have to follow them. And just to make clear the difficulty of not following them, you should be aware you signed some of these statutes, so it would be pretty awkward for you not to follow them." Now so Roosevelt sort of accepts that, and then over the next many months is involved in an incredibly intricate legal battle sort of internally in the executive branch to figure out some way to lend aid to Churchill and England and the other European powers, notwithstanding the maze of legal restrictions that they face. Of course when the attack finally comes on Pearl Harbor and we enter the war in full, at that point Roosevelt's in a very different position. He's got Congress authorize--it's the last declared war we've had, but as much power as can be given to a president has been given to a president, and it's in an era of what's known as total war, which is different just in a sense that the line between civilian and soldier is blurred. The need for the entire society to mobilize on behalf of the war becomes evident. You're in an industrial age of war fighting, which changes things. There's aircraft in a way that there hadn't previously been. So that all shapes the kinds of issues that arise. But interestingly, or I guess sort of significantly, there is one moment where this issue comes to a head in WWII, one particular moment, which is in 1942. Hitler has sent saboteurs, Nazi saboteurs, to the United States. And they come over in U-boats. They get out of the U-boats surreptitiously. They land in Long Island. They come in their German uniforms; immediately upon landing they take them off and bury them in the sand. They come into

Florida the same way. And their plan is once they get into the US to make mayhem. They're supposed to blow up department stores and do various sabotage activities all throughout the US. It turns out they're a pretty hapless group. They've all got ties to the US. Some of them had lived here before, visited here. One of them at least was an American citizen. And some of them, when they get here, look up their old girlfriends, which is not a preferred strategy for a saboteur. And others of them eventually go shopping. Instead of blowing up the department store, they buy suits at the store. Finally one of them turns himself in to the FBI, and the whole plot is exposed. Roosevelt is insistent that these people not be tried in civilian court and that they be tried in a special military tribunal. And that's what happens. In fact, that military commission was held in the suite of offices that I served in in the fifth floor of the justice department. There's a little plaque there commemorating it, so you're very aware of this history of this as you're working on these issues. And the clash that's gonna arise comes in two forms. On the one hand, a court case is gonna emerge, because the defendants in this military commission contend that the president had no right to try them this way. So that case is heading to the Supreme Court. And it gets to the Supreme Court, and the court hears the argument and decides that the president was within his rights. And he has a special emergency session in the summer and decides the president could do what he did and try them militarily, issues a quick judgment saying the president's fine to have done what he did, but then says, "And we'll write the opinion when we come back in October. We'll give you our full reasons then." Well, what complicates things is that in the interim, Roosevelt's engaged in a fight with Congress, and a very serious one. And the way this fight palsy out is a threat to the war effort, which isn't always appreciated, the kinds of things that can really threaten a war effort. It's not just the enemy, but it's the economy. And Roosevelt's terribly worried about inflation and what the war's doing to prices in this country. And he's quite convinced that if we can't get a handle on inflation, there's just no way we can win. It will sap the morale of the people. It makes the cost of goods too high. So he's finding some way to check inflation, and what he wants to do is cap farm prices. Unfortunately Congress seems to have prohibited him from doing that. And so a debate breaks out whether as commander in chief he has the power to disregard that statute in the name of protecting the country and winning the war to go ahead and cap the farm prices. And a big debate is breaking out; it leaks into the public. What's Roosevelt gonna do? And Roosevelt is very cagey and says, "You know what, I'm gonna give a speech on Labor Day over the radio, and I'll tell whether I'm gonna cap the prices on my own or not." And so everybody's waiting, what's gonna happen. There's all kinds of rumors that he's gonna issue what is called an arbitrary executive order, in which he's gonna claim as commander in chief to power to essentially run the economy as he wishes. And Roosevelt's loving it 'cause he knows he's not gonna do that. And on the day he gives his speech, and what he says is, "In one month if Congress doesn't give me the power to do what I need to do, I will then do what is necessary." He's vague as to what he's actually gonna do. His bet is that Congress will wilt in the face of this threat, and he turns out to be right. In fact on the floor of Congress, representative and senators get up one after another to say, "You know, we have to give Roosevelt the power he asked, otherwise we'll have a dictator." And Roosevelt sort of called their bluff and won. But the justices, recall, who just decided this military commissions case but haven't issued the opinion explaining it, are watching all this. And the problem they confront is, as they are trying to write the opinion about the military commissions that they've already approved, they run into a problem. And the problem is that the way Roosevelt ordered the procedures for this military commission doesn't seem to square with the procedures Congress required for military commissions. So the chief justice writes to his colleagues, and he says, "You know, I'm having trouble writing this opinion. I can't quite see how the

procedures that were used are the ones Congress authorized. And we have a slight problem because six of the men who were tried have been executed, so it would be a problem to now say we got it wrong. So what do we do?" So some of the justices write to him and say, "No problem. In a time of war, the president's commander in chief. Congress can't tell him how to set the procedures. And so just say that." Well, other justices are nervous about that, and partly what they're nervous about is what they've just witnessed with Roosevelt as commander in chief threatening to disregard a statute, claiming that in a time of war he can do what's necessary. And they start to say, "I just can't sign on to something that says that." And they're at a bit of a stalemate. And finally Felix Frankfurter, who was a justice on the court at the time, writes a very odd memo to his colleagues in which he says essentially, "Let me tell you what this looks like to the people on the field." How he knew from the court, who knows. But he said he does know, and he basically tells them, "Look, we all agree that for one way or another you can read these statutes to authorize, either because you'd read them narrowly to protect the president's power or because you think that's the best reading. Let's not have a big fight over whether congress or the president gets to control the war. Let's avoid that fight. Let's find some way to explain ourselves that avoids any big proposition about Congress controls things or the president controls things." Because the last thing we need is what he calls, "America's favorite constitutional pastime," which is abstract constitutional discussion. And he says, "The people in the field won't like it, the morale of the country can't take it, and some things are better left unresolved." And Frankfurter's view ultimately holds sway. And the issue and opinion, which concludes that if you squint hard enough, the statute and what the procedures were fit together well enough, and it was lawful what the president did. And there's no resolution of the question of ultimately, who has the upper hand. Congress or the president, in waging war. In the silence on that point is I think also part of the pattern of our history, that a lot of it is ambiguous; a lot of it is left to prudence and judgment rather than any kind of clear resolution.

Clarke: Well, then how does that play into the Vietnam War? So you already said it, that our last declared war was WWII. I'm gonna pass over Korea for the sake of time in this program. But the Vietnam War has all sorts of this stuff going on, which is quite fascinating.

Barron: Well, Korea, just briefly 'cause it sets the stage a little bit for the dynamics that go on in Vietnam at least in terms of the constitutional pull--push and pull. WWII is the last declared war, and in part because as you know the way WWII comes to an end is with the use of an atomic weapon. That changes in the minds of many what it means to declare war and the signal that a declaration of war might send. After all, we have WWI; we have WWII. There's a real worry that another declaration of war for the United States well sound like WWIII. And we now know that there are atomic weapons to be used. And so the concern is that that will send a signal to the world of a degree of violence and a use of force that's out of proportion to what's intended. So one of the things that happens when Truman sends, you know, tens of thousands of troops into Korea without Congress having authorized it or there being any declaration of war is a real reluctance on both Congress' part and the president's part to have it understood as a war for fear of the signal that wills end to the Soviets, to the Chinese, and to the broader world. And that sort of, I think, lingering idea of trying to describe these as limited operations rather than all-out world wars plays a big role in the disuse of the idea of a declaration of war. We sometimes think of it as evidence that Congress doesn't want to get involved, and there's some truth to that. But there's also a piece of it in which no one wants it to be understood as war in that full-on sense. The idea of a limited conflict or an engagement that can be managed in a world with nuclear weapons has a lot of virtue--

Clarke: How does that play, though, when you have the Vietnam War described as a police action, and yet the Vietnam veteran who's been in combat knows that it was a war?

Barron: Well, this is Korea, where they described it as a police action, and they--it creates--I mean, the negative version of this is a cynicism that's bred in the culture because one's observed experience is that the country is at war, and yet there's some sense to describe it in terms that seem to be against that experience. It's a police action. It's a limited engagement. It's a conflict. It's a use of force--all these other terms that don't seem to engage with what people's actual experience of it is, and that leads I think to a sense among many that our constitutional system is out of whack, that people are playing games with it. That they're not being straight in using the constitutional procedures as they should be. The truth is, from the very beginning we've used sometimes declarations of war to authorize force and, sometimes, other means such as authorizations to use force in the quasi war with France, which involved definite use of military force. There was never a declaration of war. This was in the late 18th century. There was just different statutes authorizing different limited uses of force. And that's been the practice--it was the practice in Vietnam with the Gulf of Tonkin Resolution. And of course one of the things about these authorizations is although unlike a declaration they have the potential to be limited in some way, they also can be written quite broadly, as that resolution was, and that of course created a great deal of controversy throughout the Vietnam war, whether what the presidents were doing was really authorized by Congress to begin with. The--for the purposes of the story of the book, the most significant piece of the Vietnam War is the way it ends, because it ends in many respects through Congress legislating the end of that war through a series of quite dramatic restrictions on the power of the president to expand it in Cambodia, Laos, and ultimately even to--in Cambodia, even to continue it at all. And really probably more than any other conflict there is a set of legislation by the end of it that has sort of put an end to the president's authority to use force. That's really sort of unprecedented in American history beforehand.

Clarke: I want to move on briefly for the sake of time, for our audience, to things going on now. So we have this broadly termed War on Terror. It's not a declared war. It's more of an idea. It's more akin maybe to the Cold War, if you will, than you would say a conflict like WWII. And yet the power of the president as you talked about early on in this conversation has very much been debated when we went into Iraq and Afghanistan. And there's things going on today, too, so--for example, the use of drones and how a president can basically conduct war in that manner from a distance. So could you tell me a little bit about kind of the state of what's going on now with war fighting and Congress and the president?

Barron: Well, I guess one unusual feature of the moment we're living in, when we think about the debate that I've been describing throughout our history, is the fact that we've got an authorized armed conflict--Congress overwhelmingly authorized the president to use force in the wake of the attacks on 9/11--and to use it against the persons and groups responsible for those attacks, which is an amorphous definition as to who's included in that. And that's still standing. And so we're sixteen years in to a standing authorization of the use of force, which has been the source of the president's power to wage the war in Afghanistan but also to use military force in a number of other countries. Throughout it was in part the authorization to use military force that the president cited to in the operation against Bin Laden in Pakistan. So it's a significant standing authorization to use force that's persistent--and no indication that it's going to go away any time soon.

Clarke: We're gonna close the program, but I want to thank you very much.

(Applause)

Clarke: Thank you to David Barron for an outstanding discussion and to Norwich University for sponsoring this program. To learn more about Norwich University, visit [Norwich.edu](http://Norwich.edu). The book is *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS*, published by Simon and Schuster. To learn more about the Pritzker Military Museum and Library, visit in person or online at [PritzkerMilitary.org](http://PritzkerMilitary.org). Thank you, and please join us next time on *Pritzker Military Presents*.

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(Theme music)

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(Theme music)

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