First PRINCIPLES SERIES

No. 13
June 20, 2011

Constitutional Guidance for Lawmakers

The Sword and the Purse (Part 2): The President as Commander in Chief

Under the Articles of Confederation, all war power was vested in a Congress and the United States lacked a formal executive. This arrangement proved unworkable as America's foreign policy and defense, deprived of executive guidance, floundered. Recognizing the need for an executive to act with swiftness and dispatch in response to foreign threats, the Framers of the Constitution vested the President with full "executive power" and entrusted him, as commander in chief, with paramount authority for national security. The President therefore has ultimate discretion over the deployment of soldiers and nearly all aspects of the conduct of war—including the initiation of hostilities. Ever mindful of the dangers of unfettered powers, the Framers were careful to empower Congress to check the President by controlling the funding of the military. Congress also possesses the exclusive power to declare war (see Part 1) and to regulate the military. This essay is adapted from The Heritage Guide to the Constitution for a new series providing constitutional guidance for lawmakers.

"The President shall be Commander in Chief of the Army and Navy of the United States...."
—Article II, Section 2, Clause 1

Few constitutional issues have been so consistently and heatedly debated by legal scholars and politicians in recent years as the distribution of war powers between Congress and the President. As a matter of history and policy, it is generally accepted that the executive takes the lead in the actual conduct of war. After all, a single, energetic actor is better able to prosecute war successfully than a committee; the enemy will not wait for deliberation and consensus. At the same time, the Founders plainly intended to establish congressional checks on the executive's war power. Between these guideposts is a question of considerable importance: Does the Constitution require the President to obtain specific authorization from Congress before initiating hostilities?

Article II, Section 1, Clause 1, vests the entirety of the "executive Power" in a single person, the President of the United States. By contrast, under Article I Congress enjoys only those legislative powers "herein granted." Scholars generally agree that this vesting of executive power confers upon the President broad authority to engage in foreign relations, including war,

Published by The Heritage Foundation LEADERSHIP FOR AMERICA

214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

except in those areas in which the Constitution places authority in Congress. The debate, then, is over the extent of Congress's constitutional authority to check the President in matters of war.

Article II, Section 2, expressly designates the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Presidential power advocates argue that this provision confers substantive constitutional power upon the executive branch to engage military forces in hostilities. The executives throughout British history as well as in the colonial governments and several of the states prior to the Constitution generally enjoyed such power. In contrast, the Articles of Confederation did not provide for a separate executive branch and thus gave "the sole and exclusive right and power of determining on peace and war" to Congress.

The presumption of presidential initiative in war established by these two provisions of Article II appears to be bolstered by other constitutional provisions. Article I, Section 10, Clause 3, expressly prohibits states from "engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay" unless they have obtained the "Consent of Congress." By contrast, no such limitation on engagement in war by the President can be found in Article II. Although Article II expressly authorizes the President to engage in other foreign relations powers (such as the making of treaties and the appointment of ambassadors) only with the consent of Congress, it imposes no such check with respect to the use of military force.

The lack of an express consent requirement for executive initiation of hostilities is particularly meaningful in light of preconstitutional American practice. America's earliest years were haunted by fear of executive tyranny, following the recent experience of living under British rule, and that fear was reflected in several of the legal charters preceding the United States Constitution. Under the Articles of Confederation, the United States could not "engage in any war" absent the consent of nine states. The constitution of South Carolina expressly provided that the state's executive could neither "commence war" nor "conclude peace" without legislative approval. Other states limited executive war power differently through a variety of structural limitations, such as frequent election, term limits, and selection of the executive by the legislature. In one extreme example, Pennsylvania replaced its single governor with a twelve-person executive council. Problems arising out of weak executive authority soon brought about a reversal in the trend, however. New York established a strong executive, vested with the authority of commander in chief and free of term limits or consent requirements, and Massachusetts and New Hampshire soon followed suit. The text of the Constitution suggests a continuation of, rather than a departure from, this newer trend of enhancing executive authority.

As a result of Congress's authority over the purse, the President is unable as a practical (if not constitutional) matter to engage in hostilities without Congress.

Any power to initiate hostilities would be useless, of course, without the resources necessary to engage in hostilities. Under our Constitution, the power to provide those resources is unequivocally vested with Congress. Under Article I, it is Congress, not the President, that has the power to "lay and collect Taxes" and to "borrow Money," to make "Appropriations" and "provide for the common Defence," to "raise and support Armies" and "provide and maintain a Navy," and to "call[] forth the Militia." Thus the President may be Commander in Chief, but he has nothing to command except what Congress may provide. As a result of Congress's authority over the purse, the President is unable as a practical (if not constitutional) matter to engage in hostilities without Congress.

Based on these provisions of the Constitution, some originalist scholars have concluded that Congress's war power is limited to its control over funding and its power to impeach executive officers. They contend that the President is constitutionally empowered to engage in hostilities with whatever resources Congress has made available to the executive.

Advocates of stronger congressional war power, by contrast, contend that Congress not only has the power to deprive the executive of military resources, but also to control the President's authority to initiate hostilities. They typically locate the textual hook for their argument in Article I, Section 8, which vests the powers to "declare War" and to "grant Letters of Marque and Reprisal" in Congress, not the President. Congressionalists argue that these two powers exhaust the entire range of possible hostilities and that their vesting in Congress must mean that the President cannot initiate hostilities without prior congressional authorization.

Presidentialists contend that the power to "declare War" is only a power to alter international legal relationships. In their view, placing the power to declare war in Congress does not affect the President's domestic constitutional authority to engage in hostilities. Notably, Article I provides that states may not, "without the Consent of Congress,...engage in War," and Article III defines treason as "levying War" against the United States—suggesting that the power to "declare War" is a lesser power that does not include the ability to control the actual initiation and conduct of war. Presidentialists also argue that the Marque and Reprisal Clause vests Congress only with the power to authorize private citizens to engage in hostilities for private, commercial gain.

A final textual clue should be noted. Congressionalists generally contend that, although the President may not initiate hostilities, the Declaration of War Clause leaves the President with the authority as Commander in Chief to repel invasions without prior congressional approval. According to his own notes of the Constitutional Convention, James Madison successfully moved to replace the phrase "make" war with "declare" war, "leaving to the Executive the power to repel sudden attacks." Congressionalists read this power to repel attacks as exhaustive, rather than merely illustrative, of presidential authority. On the other hand, Article I expressly provides that states generally may not engage in war without congressional consent "unless actually invaded, or in such imminent Danger as will not admit of delay"; there is no such language, by contrast, governing the President. In addition, Article I vests authority with Congress to "call[] forth the Militia to...suppress Insurrections and repel Invasions."

Presidentialists contend that the power to "declare War" is only a power to alter international legal relationships.

In summary, the argument for executive initiative rests on the background understanding that the vesting of "executive Power" and the "Commander in Chief" designation together constitute a substantive grant of authority to the President to conduct military operations. The argument also rests on the absence of explicit provision for congressional incursion into that power, other than through its express powers over funding and impeachment. Under this view, the contrary position—that congressional consent is required before the initiation of hostilities—suffers from a lack of strong textual support.

Accordingly, congressionalist scholars frequently turn to other authorities. First, they cite statements from various Founders, both before and after the Framing period, in support of broader congressional power. For example, they frequently quote James Wilson, who had urged limits on presidential power during the Constitutional Convention, and who argued during the Pennsylvania ratifying convention that "[t]his system will not hurry us into war; it is calculated against it. It will not be in the power of a single man,

or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war."

Presidentialists respond that Wilson's statement must be placed in context. They claim that Wilson was simply responding to concerns that exercise of the treaty power alone could start a war. They further note that nowhere in Wilson's reference to declarations of war did he ever deny the President's authority to initiate hostilities without a declaration.

The vesting of "executive Power" and the "Commander in Chief" designation together constitute a substantive grant of authority to the President to conduct military operations.

Presidentialists also focus attention on the ratification debates in the battleground state of Virginia, where Anti-Federalists launched a feverish campaign against, among other things, excessive executive power to wage war. Notably, the Federalist effort to ease concerns rested largely on congressional control of the purse—not the Declaration of War Clause. Presidentialists also cite James Madison's statement that "the sword is in the hands of the British King. The purse in the hands of the Parliament. It is so in America, as far as any analogy can exist."

Congressionalists and presidentialists also disagree about the proper interpretation of numerous post-ratification statements by Founders and later prominent American figures, as well as early American practice under the Constitution. For example, congressionalists cite the limited, defensive-oriented approach taken by President Thomas Jefferson during the Tripolitan War (1801–1805) and by others in the nation's earliest hostilities. Presidentialists respond by noting Alexander Hamilton's sharp criticisms of Jefferson as well as the broader theory of presidential power urged by Jefferson himself when he was Secretary of State. More generally, presidentialists note that, out of only five declarations of war in our nation's history, the first did not take place until the War of 1812. Presidentialists also contend that early Congresses exerted significant control over hostilities not by refusing to exercise its powers under the Declaration of War Clause, but by denying the President a large, peacetime, standing military force through its control of the purse. In their view, early references to presidential subservience to Congress merely reflected Congress's ability to deny funding to presidential initiatives, and little else. Finally, presidentialists generally criticize the usefulness of post-ratification statements as little more than the self-interested assertions of politicians caught in the heat of partisan conflict, and not as good faith endeavors to ascertain original meaning.

The modern debate over the allocation of war powers between Congress and the President was triggered largely by the establishment of a large United States peacetime military force in the wake of World War II.

United States intervention in Korea in 1950 began with congressional support but without a formal declaration of war. When the war stalemated, executive power was challenged. President Harry S. Truman responded by claiming independent constitutional authority to commit troops without congressional authorization. Presidents Lyndon B. Johnson and Richard M. Nixon undertook military operations of breathtaking breadth in Vietnam, armed with only the Gulf of Tonkin Resolution. Congressional criticism of that protracted campaign led not only to funding restrictions, but also to the 1973 enactment of the War Powers Resolution, over President Nixon's veto. The Resolution substantially limits the President's ability to engage U.S. forces in hostilities for more than sixty days, absent a declaration of war or specific congressional authorization, and requires

the President to consult with Congress about military deployments.

The War Powers Resolution has proven largely impotent in practice. President James Earl Carter did not consult with Congress before attempting to rescue Iranian hostages. President Ronald Reagan refused formal compliance (instead claiming "consistency") with the terms of the Resolution when he deployed American military forces in Lebanon, Grenada, Libya, and the Persian Gulf. Before Desert Storm, President George H.W. Bush publicly declared that he had constitutional power to initiate war unilaterally. Congress responded by authorizing him to use force. President William Jefferson Clinton followed these precedents in Somalia, Haiti, Bosnia, the Middle East, and Kosovo.

Members of Congress have periodically filed suit to enforce the War Powers Resolution and the congressionalist interpretation of the Declaration of War Clause, but courts have generally avoided ruling on the merits by dismissing such cases on a variety of procedural grounds. In *Campbell v. Clinton* (2000), for example, the D.C. Circuit unanimously dismissed a congressional challenge to President Clinton's airstrikes campaign in the former Yugoslavia, albeit under a panoply of competing theories arising out of the legislative standing, mootness, and political question doctrines. In *O'Connor v. United States* (2003), the court dismissed a challenge to President George W. Bush's intention behind the war in Iraq because it posed a nonjusticiable political question and "there are no judicially discoverable standards that would permit a court to determine whether the intentions of the President in prosecuting a war are proper."

*—**John Yoo** is a professor of law at the University of California at Berkeley. **James C. Ho**, a former Solicitor General of Texas, is partner at Gibson, Dunn & Crutcher.*