CATO HANDBOOK FOR CONGRESS

Policy Recommendations for the 108th Congress

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11. Reclaiming the War Power

Congress should

- insist that U.S. armed forces not be deployed to areas where hostilities are likely or imminent unless and until both houses of Congress have approved such action,
- defund any such deployment that lacks the prior approval of Congress,
- insist that hostilities not be initiated by the executive branch unless and until Congress has authorized such action, and
- oppose any effort to reshape national security doctrine in a manner that denies congressional supremacy over the war power.

The horror of September 11, 2001, changed many things: it ended a certain American innocence and sense of invincibility; it taught Americans that those who hate us could strike at us on our own soil; and it provided ample justification for defending ourselves by waging war on al-Qaeda and its nation-state allies. It did not, however, amend the Constitution. Indeed, President Bush has repeatedly made it clear that the fight against terrorists is a fight to maintain our free institutions and the way of life they sustain. Six days after the destruction of the World Trade Center and the attack on the Pentagon, President Bush issued a proclamation in honor of our Constitution. In it, he declared that ''today, in the face of the terrorist attacks of September 11, 2001, we must call upon, more than ever, the Constitutional principles that make our country great.''

No constitutional principle is more important than the principle that the war power belongs to Congress. In affairs of state, no more momentous decision can be made than the decision to go to war. For that reason, in a democratic republic it is essential that that decision be made by the most broadly representative body: the legislature. As James Madison put it: ''In

no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department.''

The Constitutional Framework

Under the Constitution as Madison and the other Framers designed it, the president lacks the authority to initiate military action. In the Framers' view, absent prior authorization by Congress, the president's war powers were purely reactive; if the territory of the United States or U.S. forces were attacked, the president could respond. But he could not undertake aggressive actions without prior congressional authorization.

On August 17, 1787, the Constitutional Convention considered the recommendation of the Committee of Detail that the legislature should have sole power ''to make war.'' Only one delegate, South Carolina's Pierce Butler, spoke in favor of granting that authority to the executive. As Madison's notes from the convention tell us, Butler's proposal was not warmly received. ''Mr. [Elbridge] Gerry [of Massachusetts said he] never expected to hear in a republic a motion to empower the Executive alone to declare war.'' For his part, George Mason of Virginia ''was agst. giving the power of war to the Executive, because not to be trusted with it. . . . He was for clogging rather than facilitating war.''

However, the delegates did take seriously the objection, raised by Charles Pinckney of South Carolina, that the House of Representatives was too large and unwieldy, and met too infrequently, to supervise all the details attendant to the conduct of a war. For that reason, ''Mr. M[adison] and Mr. Gerry moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks.'' Roger Sherman of Connecticut ''thought [the proposal] stood very well. The Executive shd. be able to repel and not to commence war.'' The motion passed.

The document that emerged from the convention vests with Congress the bulk of the powers associated with military action, among them the powers ''to declare War, [and] grant Letters of Marque and Reprisal.'' Other important war-making powers include the power ''to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years,'' and ''to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.''

Significantly, several of the enumerated powers allocated to Congress involve the decision to initiate military action. Viewed in this light, Con-

gress's power to issue letters of marque and reprisal and its power to call out the militia inform our understanding of Congress's authority to declare war. A letter of marque and reprisal is a legal device (long fallen into disuse) empowering private citizens to take offensive action against citizens of foreign countries, usually privateers attacking ships. Since military attacks carried out by American citizens might well be considered acts of war by foreign powers, and accordingly embroil the United States in hostilities, the Constitution vests the important decision to grant this power in the most deliberative body: the legislature. Similarly, Article I, section 8, gives Congress power over the militia, allowing Congress to decide when domestic unrest has reached the point where military action is required.

In contrast, the authority granted to the executive as commander in chief of U.S. Armed Forces is entirely supervisory and reactive. The president commands the Army and Navy, should Congress choose to create them, and leads them into battle, should Congress choose to declare war. He commands the militia to suppress rebellions, should the militia be ''called into the actual Service of the United States.'' In this, as Hamilton noted in *Federalist* no. 69, the president acts as no more than the ''first General'' of the United States. And generals, it should go without saying, are not empowered to decide with whom we go to war. The Constitution leaves that decision to Congress. As Constitutional Convention delegate James Wilson explained to the Pennsylvania ratifying convention: ''This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power in declaring war is vested in the legislature at large.''

War with Iraq

Given that constitutional framework, the yearlong debate about war with Iraq left a lot to be desired. Bush administration officials proceeded as if no authorization were necessary. Then, in August 2002, the White House Counsel's Office brazenly insisted that the administration already had congressional authorization for Gulf War II, in the form of the 1991 joint resolution that authorized the first Persian Gulf War. How could a resolution passed in 1991 to give a previous president authority to expel Saddam Hussein from Kuwait authorize another president to take Baghdad 11 years later? A good question, the answer to which was not at all apparent in the 1991 resolution. Such tendentious stretching of legal authority might have been appropriate for a trial lawyer zealously pressing his client's

interest. But for a president sworn to uphold the Constitution, and seeking legal justification to lead troops into battle, something more than clever ''lawyering'' was required: new and independent authorization for a new war.

To its credit, the administration eventually sought, and secured, congressional authorization for use of force against Iraq. It did so despite the fact that some prominent members of Congress did not want to be burdened with the vast responsibility the Constitution places on their shoulders. Senate Minority Leader Trent Lott (R-Miss.), for instance, treated the Democrats' push for congressional authorization as a partisan annoyance rather than a solemn constitutional duty, calling it ''a blatant political move that's not helpful.''

In some ways, this is nothing new. Throughout the 20th century, congressional control of the war power eroded, not simply as a result of executive branch aggrandizement, but also because of congressional complicity. The imperial presidency continues to grow, largely because many legislators want to duck their responsibility to decide the question of war and peace; delegate that responsibility to the president; and reserve their right to criticize him, should military action go badly.

Indeed, even in authorizing the president to use force, Congress attempted to shirk its responsibility to decide on war. After voting for the resolution, which gave the president all the authority he needs to attack Iraq should he choose to do so, prominent members of Congress insisted they hadn't really voted to use force. That was for the president to decide. As Senate Majority Leader Tom Daschle (D-S.D.) put it: ''Regardless of how one may have voted on the resolution last night, I think there is an overwhelming consensus . . . that while [war] may be necessary, we're not there yet.''

It is not for the president to decide whether we are ''there yet.'' The Constitution leaves that question to Congress. Thus far in the war on terror, though, Congress has dodged that responsibility, delegating it to the president. The use-of-force resolution Congress passed immediately after September 11, 2001, contains an even broader delegation of authority to the president, authorizing him to make war on ''those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001, or harbored such organizations or persons'' [emphasis added]. By its plain terms, the resolution leaves it to the president to decide when the evidence that a target nation has cooperated with al-Qaeda justifies war. President Bush has

exercised that authority in good faith so far, declining to argue that the flimsy evidence of a Saddam–al-Qaeda connection permits him to attack Iraq under the September 14, 2001, resolution. But if Congress wants a say on whether we should go to war with Iran, Syria, Lebanon, or any number of other nations the president may target in the future, it will have a difficult case to make.

Such broad delegations of legislative authority are constitutionally suspect in the domestic arena; surely they are no less so when it comes to questions of war and peace. As Madison put it:

> Those who are to *conduct* a war cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws [emphasis in original].

Preemptive Wars

The administration's new security doctrine, which emphasizes preemptive military strikes, may have equally troubling consequences for congressional control over the war power. Under the new doctrine, rogue nations in the process of developing nuclear, chemical, or biological weapons will be vulnerable at any time to sudden attack by the United States. In a graduation speech given at West Point on June 1, 2002, President Bush discussed the new strategy: ''The war on terror will not be won on the defensive,'' he said, ''we must take the battle to the enemy . . . [and] be ready for preemptive action when necessary.'' The administration formalized the policy in the National Security Strategy of the United States of America, released in September. That document does not discuss whether preemptive wars will be conducted pursuant to congressional authorization or launched unilaterally as surprise attacks by the president. In the case of Iraq, which may be the administration's first preemptive war, the president has not used the doctrine as an excuse to bypass the constitutional requirement of congressional authorization. But the development of the doctrine must be carefully monitored by this Congress and future ones, lest it become a pretext for unilateral presidential war making.

Granted, the Constitution does not categorically rule out unilateral military action by the president. No one would argue that, when missiles are in the air or enemy troops are landing on our shores, the president is obliged to call Congress into session before he can respond. As Madison's

notes from the Constitutional Convention make clear, the constitutional consensus about war powers was that, though Congress had the power to ''commence war,'' the president would have ''the power to repel sudden attacks.'' Within that power, there's some latitude for preemptive strikes. If a rogue state plans a nerve gas attack on the New York subway system, the president need not and should not wait until enemy agents are ashore to order military action.

But if the preemptive strike doctrine morphs into a freestanding justification for presidential wars, that will have grave consequences for the constitutional balance of power. The doctrine applies whether or not any specific attack on the United States is planned and whether or not U.S. intelligence can establish with any certainty that the target has weapons of mass destruction (WMD). It could be used by this administration or future ones to avoid the inconvenient task of securing authority from Congress. That would change the president's constitutional power to repel sudden attacks into a dangerous and unconstitutional power to *launch* sudden attacks.

Moreover, such a power would be ripe for abuse. Firm evidence of WMD capability is very hard to come by—indeed, in the case of Iraq, Secretary of Defense Donald Rumsfeld doubts that even an intensive, on-the-ground inspection regime, such as the United Nations operated in Iraq until December 1998, could determine with any degree of certainty what Saddam's WMD capabilities are. Justifications for preemptive wars will necessarily be speculative and susceptible to manipulation. The potential for politically driven attacks would be enormous.

Public opinion polls indicate that Americans view President Bush as a person of integrity and reward him with a high level of public trust. But Bush will not be the last president to wield the broad new powers his administration is forging in the domestic and foreign affairs arenas. As Rumsfeld has noted, the war on terror will take years, and if and when victory is achieved, we may not know with any certainty that we've won.

Our entire constitutional system repudiates the notion that electing good men is a sufficient check on abuse of power. As President Bush himself noted in his September 17 proclamation: ''In creating our Nation's Constitutional framework, the Convention's delegates recognized the dangers inherent in concentrating too much power in one person, branch, or institution.'' It's imperative that the 108th Congress resist the tendency to concentrate power and the further growth of the imperial presidency.

Suggested Readings

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