Cato Handbook for Policymakers

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10. Reclaiming the War Power

Congress should

- cease trying to shirk its constitutional responsibilities in matters of war and peace,
- insist that hostilities not be initiated by the executive branch unless and until Congress has authorized such action,
- rediscover the power of the purse as a means of restricting the executive's ability to wage unnecessary wars, and
- reform the War Powers Resolution to make it an effective vehicle for restricting unilateral war making by the president.

No constitutional principle is more important than congressional control over the decision to go to war. In affairs of state, no more momentous decision can be made. 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 1793: ''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. Beside the objection to such a mixture of heterogeneous powers, the trust and the temptation would be too great for any one man.''

The Constitutional Framework

The delegates to the Constitutional Convention of 1787 were well aware of those temptations, and sought to minimize them by limiting the president's war powers. At the start of the June 1 debates over the shape of the executive, Charles Pinckney of South Carolina supported ''a vigorous executive,'' but worried that ''the Executive powers of the existing Congress might extend to peace & war &c., which would render the Executive a monarchy, of the worst kind, to wit an elective one.'' His colleague

John Rutledge, also from South Carolina, agreed that the executive should not have the powers of war and peace, as, of course, did Madison, who noted that the executive powers ''do not include the Rights of war & peace &c, but the powers shd. be confined and defined—if large we shall have the Evils of elective monarchies.'' The Framers were nearly unanimous on that point. Even Hamilton, who gave a June 18 speech advocating a ''supreme Executive'' who might serve for life, didn't envision a president with the power to initiate wars; he'd merely have ''the direction of war when authorized or begun.''

Accordingly, the document that emerged from the convention vests the bulk of the powers associated with military action with Congress, 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. For example, with its power to ''grant Letters of Marque and Reprisal,'' Congress could authorize private citizens to harass and capture enemy ships. Since such actions might well lead to full-scale war, the Constitution vests the power to authorize them in Congress. Similarly, the power ''to provide for calling forth the Militia'' in cases of domestic unrest leaves it to Congress to decide when domestic unrest has reached the point where military action is required.

In contrast, the grant of authority to the executive as ''Commander in Chief'' of U.S. armed forces is managerial and defensive. The president commands the army and navy, 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.''

Congressional Abdication

Congress has not always been eager to take responsibility for that power, however. In his 1973 classic, *The Imperial Presidency*, historian Arthur Schlesinger Jr. noted that the erosion of Congress's control of the war power over the course of the 20th century ''was as much a matter of congressional acquiescence as of presidential usurpation.'' The 2002 debate over war with Iraq demonstrates that that pattern has continued into the 21st century.

Although Bush administration lawyers denied that congressional authorization was necessary to launch the Iraq War, the administration eventually sought, and secured, congressional authorization for the use of force. 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. The then–Senate minority leader Trent Lott (R-MS), 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.''

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 needed to attack Iraq, prominent members of Congress insisted they hadn't really voted to use force. That was for the president to decide. As the then–Senate majority leader Tom Daschle (D-SD) 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.'' But it is not for the president to decide whether we are ''there yet.'' The Constitution leaves that question to Congress.

In the rush to get the Iraq War debate behind them, most members couldn't even be bothered with due diligence on the alleged threat—to examine the available intelligence and decide for themselves whether they thought a serious threat existed. Throughout the fall of 2002, copies of the 92-page National Intelligence Estimate on the Iraq threat were kept in two guarded vaults on Capitol Hill—available to any member of the House or Senate who wanted to review it. In March 2004, the *Washington Post* revealed that only six senators and a handful of representatives found it worth the effort to go and read the whole document. Sen. Jay Rockefeller (D-WV) explained that general reluctance to read intelligence briefings by saying that, when you're a senator, ''everyone in the world wants to come see you'' in your office and getting away to the secure room—

across the Capitol grounds at the Hart Senate Office Building—is ''not easy to do.'' He added that intelligence briefings tend to be ''extremely dense reading.''

This will not do. When our representatives vote to wage war, it's not too much to ask that they've absorbed the available information and made an informed decision. Too often, however, it seems they'd prefer to punt the decision to the president, and hold him accountable for a decision that the Constitution insists is theirs to make.

Congressional scholar Louis Fisher compares the Iraq vote to the Gulf of Tonkin Resolution that empowered Lyndon Johnson to expand the Vietnam War. As with the Iraq war resolution, the Gulf of Tonkin Resolution was so broadly worded that it allowed the president to make the final decision about war all by himself. Lyndon Johnson compared the resolution to ''grandma's nightshirt'' because it ''covered everything.'' And as with Iraq, the president did not immediately use the authority granted him. It would be six months later, after Johnson defeated Barry Goldwater in the November election, before the war escalated with a sustained bombing campaign in North Vietnam. In Iraq, President Bush waited five months before launching Operation Iraqi Freedom. As Fisher put it, ''In each case, instead of acting as the people's representatives and preserving the republican form of government, [Congress] gave the president unchecked power.'' In each case, it was easier to dodge the issue than to take responsibility.

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,* [or] *continued. . . . 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).

Situational Constitutionalism and Executive Power

As the Gulf of Tonkin example suggests, the growth of the Imperial Presidency cannot be laid at the feet of any one political party. After all, few Democratic presidents have hesitated to push broad theories of executive power. Our most recent Democratic administration, Bill Clinton's, was no exception. As presidential scholar Christopher Kelley puts it, ''The

Clinton administration was every bit as important as the Reagan and first Bush administrations in helping the current Bush administration formulate its attitude toward the unitary executive.''

In fact, President Clinton went even further than his Republican predecessors in his exercise of unilateral, extraconstitutional war powers. By carrying out a 78-day war over Kosovo in 1999, Clinton became the first president to violate the War Powers Resolution's 60-day time limit on combat operations that lack explicit congressional approval. Worse still, Clinton ignored several congressional votes denying him authority to conduct the Kosovo campaign. Congress had considered and *rejected* authorizing the war, yet Clinton continued in defiance of congressional will—with the administration's Office of Legal Counsel providing thinly reasoned legal cover.

For far too long, the debate over presidential power has been dominated by what political scientist Norm Ornstein has called ''situational constitutionalism'': the tendency to support enhanced executive power when one's friends hold the executive branch—and to oppose it when they don't.

Blinded by partisanship, too many prominent public figures have lost sight of our Constitution's foundational principle: skepticism toward unchecked power—a skepticism that ought to apply without regard to person or party. Recovering that skepticism will be necessary if constitutional checks on executive power are to be restored.

Righting of the Constitutional Balance

Should it want to restrain executive war making, Congress has a powerful constitutional tool available to it: the power of the purse. No less an advocate of broad presidential power, John C. Yoo points out that if Congress wants to wind down the Iraq War, it could legally ''require scheduled troop withdrawals, [and] shrink or eliminate units'' deployed to Iraq. Congress used the power of the purse to pressure President Nixon to bring the Vietnam War to a close, and some 20 years later, Congress used similar tactics to end our nation-building excursion in Somalia. A month after the Black Hawk Down incident, in the Defense Appropriations Act for fiscal year 1994, Congress used the power of the purse to cut off funding after March 31, 1994, ''except for a limited number of military personnel to protect American diplomatic personnel and American citizens, unless further authorized by Congress.''

Given Congress's historic reluctance to exercise the power of the purse when troops are in harm's way, however, many reformers believe there's

a need for a more comprehensive approach to restraining presidential war making. Toward that end, in the midst of the Watergate scandal and public disaffection over the Vietnam War, Congress passed the War Powers Resolution. That measure has proved an abject failure: in the 35 years since the resolution's passage, presidents have put troops in harm's way over 100 times without letting the WPR cramp their style. The WPR's time limit is supposed to kick in when the president reports that he has sent American forces into hostilities or situations where hostilities are imminent. However, the statute is ambiguous enough to allow the president to ''report'' without starting the clock, and presidents have exploited that ambiguity. Of 111 reports submitted from 1975 to 2003, only one president deliberately triggered the time limit, and that was in a case where the fighting had ended before the report was made.

Several prominent scholars have proposed amendments to the WPR that would give the resolution teeth. John Hart Ely's ''Combat Authorization Act'' would shorten the current 60-day ''free pass'' to 20 days and command the courts to hear suits by members of Congress seeking to start the clock. If the court determined that hostilities were imminent, and if Congress did not authorize the intervention, funds would automatically be cut off after the clock runs out.

In the Bush years, WPR reform has taken on new urgency. Disturbed by the Iraq War disaster and the president's conviction that he has all the constitutional power he needs to start a war with Iran, Rep. Walter Jones (R-NC) recently drew up a bill that echoes Professor Ely's Combat Authorization Act. The Constitutional War Powers Resolution would allow the president to use force unilaterally only in cases involving an attack on the United States or U.S. forces, or to protect and evacuate U.S. citizens. As with Ely's Combat Authorization Act, the CWPR would give members of Congress standing to ''start the clock,'' and would cut off funding should Congress refuse to authorize military action.

In 2005, foreign policy luminaries Leslie H. Gelb and Anne-Marie Slaughter proposed an even simpler solution to the problem of presidential war making: ''A new law that would restore the Framers' intent by requiring a congressional declaration of war in advance of any commitment of troops that promises sustained combat.'' Under the Gelb-Slaughter proposal, the president could still, as the Framers contemplated, ''repel sudden attacks,'' but any prolonged military engagement would require a declaration, otherwise ''funding for troops in the field would be cut off automatically.''

Each of these proposals has the merit of demanding that Congress carry the burden the Constitution places upon it: responsibility for the decision to go to war. The Gelb-Slaughter plan shows particular promise. Although Congress hasn't declared war since 1942, reviving the formal declaration would make it harder for legislators to punt that decision to the president, as they did in Vietnam and Iraq. Hawks should see merit in making declarations mandatory, since a declaration commits those who voted for it to support the president and provide the resources he needs to prosecute the war successfully. Doves too should find much to applaud in the idea: forcing Congress to take a stand might concentrate the mind wonderfully and reduce the chances that we will find ourselves spending blood and treasure in conflicts that were not carefully examined at the outset.

But we should be clear about the difficulties that comprehensive war powers reform entails. Each of these reforms presupposes a Congress eager to be held accountable for its decisions, a judiciary with a stomach for interbranch struggles, and a voting public that rewards political actors who fight to put the presidency in its place. Representative Jones's Constitutional War Powers Resolution, which seeks to draw the judiciary into the struggle to constrain executive war making, ignores the Court's resistance to congressional standing, as well as the 30-year history of litigation under the War Powers Resolution, a history that shows how adept the federal judiciary is at constructing rationales that allow it to avoid picking sides in battles between Congress and the president.

Even if Jones's Constitutional War Powers Resolution or Ely's Combat Authorization Act could be passed today, and even if the courts, defying most past practice, grew bold enough to rule on whether hostilities were imminent, there would be still another difficulty; as Ely put it: ''When we got down to cases and a court remanded the issue to Congress, would Congress actually be able to follow through and face the issue whether the war in question should be permitted to proceed? Admittedly, the matter is not entirely free from doubt.''

It's worth thinking about how best to tie Ulysses to the mast. But the problem with legislative schemes designed to force Congress to ''do the right thing'' is that Congress seems always to have one hand free. Statutory schemes designed to precommit legislators to particular procedures do not have a terribly promising track record. Historically, many such schemes have proved little more effective than a dieter's note on the refrigerator. No mere statute can truly bind a future Congress, and in areas ranging from agricultural policy to balanced budgets, Congress has rarely hesitated to undo past agreements in the pursuit of short-term political advantage.

If checks on executive power are to be restored, we will need far less Red Team–Blue Team politicking—and many more legislators than we currently have who are willing to put the Constitution ahead of party loyalty. That in turn will depend on a public willing to hold legislators accountable for ducking war powers fights and ceding vast authority to the president. Congressional courage of the kind needed to reclaim the war power will not be forthcoming unless and until American citizens demand it.

Suggested Readings

Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath.* Princeton, NJ: Princeton University Press, 1993.

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