02 / 01

CARDOZO

VOLUME TWO : ISSUE ONE : 2003

PUBLIC LAW, POLICY AND ETHICS JOURNAL

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A brief discussion of the Constitution's war powers, about which whole treatises have been written,[1] can hardly do justice to so important and subtle a subject. Yet there is room for a brief discussion that sets nuance and detail aside. By focusing on the essence of the matter, such an essay can clarify issues more easily than lengthy treatises might. I hope to do that here.

We start, as we must, with the central constitutional question: Does the president, exercising his executive power under Article II, including his power as commander in chief of the nation's armed forces, need congressional authority under the Declare War Clause of Article I before engaging those forces in hostile acts? Plainly, if the answer to that question were clear, the debate that began at the Constitutional Convention would have ended long ago. It has not.

Those who answer in the affirmative argue, in the main, that the president may wage war without congressional authority only to repel sudden attacks.[2] After reflecting on the text of the Constitution, the original understanding of the Framers, the history of the war powers, and the practical aspects of their exercise, I have concluded that the affirmative answer is mistaken.[3] That does not mean, however, that the

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[1] *See, e.g.*, LOUIS H. FISHER, PRESIDENTIAL WAR POWER (1995); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990).

[2] *See, e.g.*, MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 81 (1990) ("There is no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel 'sudden attacks.'"); William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997) ("The Founders intended that the [Declare War] Clause would vest in Congress principal responsibility for initiating conflict.").

[3] I reached that conclusion some years ago through informal exchanges at the Cato Institute. I should add, however, that not everyone at the Institute shares my view. *See, e.g.*, Gene Healy, "The

president is free, constitutionally, to wage war as he wishes. Rather, it means simply that a *declaration* of war—which is essentially a juridical act by Congress, fraught with its own perils—is not a necessary precondition for the president's undertaking *acts* of war. If Congress wishes to restrain a president's foreign ventures, which it rarely does, it has, first, the power of the purse—war cannot be waged without the wherewithal to do so, of course—and, second, the power ultimately to impeach and remove the president.

It is no accident, therefore, that during our constitutional history, presidents have committed forces to combat over 200 times, depending on how one counts such events, but on only five of those occasions has a declaration of war been issued.[4] And never has a court ruled that a president had no authority to undertake such an action. Taken together, those two historical facts suggest that the war powers question is irreducibly political, not legal. In this domain above all others, that is doubtless as it should be.

I. Constitutional Text as a Framework for Analysis

Article I of the Constitution grants Congress the power "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" "to raise and support Armies;" "to provide and maintain a Navy;" and "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[5]

Article II vests the "executive Power" in the president. It provides also that the president "shall be 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."[6]

Arrogance of Power Reborn: The Imperial Presidency and Foreign Policy in the Clinton Years," *Cato Policy Analysis No. 389*, Dec. 13, 2000. More recently my thinking on the subject has been much enriched by the excellent work of John C. Yoo: *e.g.*, *War and the Constitutional Text*, 69 U. Chi. L. Rev. 1639 (2002); *Kosovo, War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673 (2000); *Clio at War: the Misuse of History in the War Powers Debate* 70 U. Colo. L. Rev. 1169 (1999); *The Continuation of Politics by Other Means: The Original Understanding of War Powers* 84 Cal. L. Rev. 167 (1996).

[4] Congress issued declarations of war for the War of 1812, the Mexican-American War (1848), the Spanish-American War (1898), World War I (1917), and World War II (1941). Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-1989*, reprinted in Thomas M. Franck and Michael J. Glennon, Foreign Relations and National Security Law 650 (West 2d ed. 1993).

[5] U.S. Const. art. I.

[6] U.S. Const. art. II.

That is sparse language. What is more, neither there nor anywhere else in the document is "declare War" or "executive Power" defined. Reduced to its essence, and to the relevant verbs, Congress may *declare* war; the president may *wage* war. That permits analysis using the standard four-box, yes/no matrix, with "Congress declares" on one side, "president wages" on the perpendicular side. In box one, Congress does not declare and the president does not wage war—that's peace. In box four, Congress declares and the president wages war—that's war. Neither scenario is constitutionally problematic. Box two, however, is interesting: Congress declares but the president does not wage war. That might seem an odd scenario, but it helps analysis by focusing on the practice and function of declaring war. Conceivably, Congress and the president might be at odds over a given situation, with Congress anxious and the president reluctant to go to war. More likely, however, yet still not common, a declaration of war, its execution held in abeyance by the president, might serve as a weapon in the nation's foreign policy arsenal. Suppose, for example, that Congress in the spring of 2003 had declared war on Saddam Hussein's Iraq, and Hussein, seeing a nation united against him and recognizing the odds before him, had sued for peace. Would that that had happened—yet it might have in the face of a declaration of war. Something like that did happen in the fall of 1993, albeit without a congressional declaration, when President Clinton, as part of an ongoing international effort to remove the Cedras regime from power in Haiti, threatened a U.S. invasion, leading to the regime's non-violent departure. How much more threatening is a nation speaking through its representatives, invoking the power implicit in a declaration of war? More on this presently.

That brings us to box three: Congress does not declare but the president wages war. As the most common scenario (aside from peace, box one), box three gives rise to the basic constitutional question: May the president wage war without a congressional declaration of war? If he may not, then we have a real, practical dilemma, which a second analytical device, a continuum, will bring out. Declaring war is a relatively clear, discrete act. Waging war is altogether different, lending itself to depiction along a continuum. At one end of the continuum are limited "acts of war" such as supplying arms to combatants, engaging in naval blockades, or quick surgical strikes. At the other end is all out war such as we waged in World War II. In between, of course, we find all manner and degree of actions, of varying durations, all characterized arguably as

acts of war or waging war. Think of Congress as having an off-on switch. Think of the president as engaged in an ongoing foreign policy of many forms, shades, and textures, including hostile actions.

Constitutional text provides little explicit help in putting those two very different "war powers" together. A congressional declaration followed by presidential action is only one scenario—uncommon, and inflexible as well. Yet even those who call for congressional dominance over the matter find themselves on the continuum, for no one argues that the president must seek a declaration of war before repelling a sudden attack. That much he can do without such a declaration, they say, although the text of course is silent on the point. But where do we go beyond that? Some urge a distinction between defensive and offensive actions, with the latter requiring a declaration; but here again the Constitution is silent—and most of the nation's "offensive" actions have been undertaken in the name of "defense" in any event. The last refuge of congressionalists is a call for congressional "authorization" in lieu of a *declaration* of war. Yet here again they are embarrassed, as textualists, by the text's silence on that measure as well. The Constitution calls for a *declaration* of war, strict congressionalists should argue, not for "authorization" of hostilities. The two measures are not the same. But is every hostile action, however minor or transient, to be undertaken only through a full-blown declaration of war? The practical implications of that contention are staggering.

Recognizing all of that should lead one to conclude that the war powers, as a textual matter, are seriously underdetermined—and for good reason. Unlike the detailed separation-of-powers provisions we find in the constitutional text for lawmaking, for example, the lean provisions for war making suggest that the Framers wanted to provide for flexibility in foreign affairs—and in war making in particular. Given the inherent complexities of the matter, they did not want a single, rigid method for threatening or undertaking hostilities. Thus, whereas lawmaking involves numerous powers and checks distributed variously *among* the three branches, the *entire* "executive power," including the president's power as commander in chief, rests with the president. Indeed, it would have been foolish or dangerous to impose a single, rigid method of war making. And the constitutional text reflects that flexible design in several ways.

First, the Constitution allows Congress to declare war if it thinks it appropriate, but it does not compel Congress to do so, of course. His-

tory demonstrates that Congress has rarely thought it appropriate to exercise so far-reaching a power (about which more below). Second, if Congress does declare war the text does not compel the president to wage war; declaring war is not the same as waging war, as we saw in box two above. Third, unlike in Article I, section 10, where states are forbidden to engage in various foreign policy measures without the consent of Congress, there is no affirmative denial of power to the president, no instruction that he may not exercise his executive power without congressional authorization. Finally, unlike with the ratification of treaties or the appointment of judges or ambassadors, the text imposes no affirmative duty on the president to seek congressional approval before undertaking hostile actions.[7] In short, the Constitution's sparse war powers language establishes broad guidelines within which the two political branches may operate cooperatively or in opposition. The text sets forth a vision of foreign policy shaped more by politics than by legal procedures.

II. Original Understanding of the Declare War Clause

Since the constitutional text gives little aid to those who argue that the president cannot wage war without a declaration of war, congressionalists rest their argument primarily on their reading of the often problematic original understanding. In so doing, however, they frequently practice what Professor John Yoo has called "law-office" history[8] by failing to place the primary sources in their appropriate political, legal, and constitutional context and by misinterpreting the limited evidence they adduce. Thus, they cite Joseph Story's observation, that vesting Congress with the power to declare war would inhibit the ability of one person to start war, as probative of the understanding of the Framers and ratifiers, even though it was written forty-five years after ratification. And they cite the Constitutional Convention's decision to change Congress's power from "make" to "declare" war as indicating that Congress was thus given the power to *initiate* hostilities, when in fact that change cuts against their larger argument. As Yoo points out: "This change demonstrates that the Framers understood that the broader power of making war existed, and that they decided explicitly to

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[7] Those points are discussed in greater detail variously in John C. Yoo, *supra* note 3.

[8] Yoo, *War and the Constitutional Text*, *supra* note 3, at 1644.

take that power away from Congress and replace it with the narrower power of declaring war."[9]

To more fully develop that point, however, we need to ask a fundamental question: What was and is the function of the Declare War Clause? Discussing it in its historical context, Yoo argues convincingly that its purpose was essentially juridical—to place the nation in a state of war, as understood under international law. Thus, it was *not* meant to be a device to "authorize" hostilities, under *domestic* law, as congressionalists read it today. That distinction is crucial to understanding the war powers issue.

Far from wanting to make a sharp break with English practice, then, the Framers drew upon the English experience to leave the war *making* power with the executive, transferring only the war *declaring* power to the legislature. As Yoo states it:

> A review of this legal and political context indicates that it is unlikely that a typical Framer would have understood the power to declare war as equivalent to the domestic authority to initiate military hostilities. Rather, the power to declare war only gave Congress the authority to transform hostilities into a "perfect" war under international law. In other words, the power to declare war was almost a judicial one, in which Congress issued its declaration that the legal state between the United States and another nation had switched from peace to war.[10]

Thus, a declaration of war was not understood to be a necessary precursor to war, lending legitimacy to hostilities under domestic law. In fact, when it was used in the seventeenth and eighteenth centuries, which wasn't often, it was usually in the *middle* of hostilities—to raise an "imperfect" war to a "perfect" one, giving notice to enemies, neutrals, and one's own citizens that the laws of war were now in effect. Of the eight major conflicts in which England was engaged between the Restoration and the American Revolution, Yoo notes, in only one was war declared at the start of hostilities.[11]

None of that meant, of course, that Parliament was powerless to restrain a king bent on war. It meant simply that a declaration of war was not the instrument for that. The real check Parliament had was its

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[9] Yoo, *Kosovo, supra* note 3, at 1694. See the essays cited at note 3 for a more complete discussion of the historical evidence.

[10] *Id.* at 1696-97.

[11] *Id.* at 1698.

power of the purse. As Yoo writes, "British history during the period leading up to the Revolution indicates that Parliament was able to use its power of the purse to win a functional veto over decisions of war and peace."[12] And that was the view of James Madison as well, the principal author of the Constitution. At the Virginia ratifying convention, surely one of the most important, Madison answered Patrick Henry's fiery charge, that the Constitution centralized military power in the hands of one man, by pointing to the separation of powers and the legislature's control of the purse, not to the Declare War Clause: "The sword is in the hands of the British King. The purse is in the hands of Parliament. It is so in America, as far as any analogy can exist."[13] As Yoo adds, "Federalists had every incentive to raise the Declare War Clause as an important check on the executive's powers, but they did not. Instead, they argued, as did Madison, that '[t]he purse is in the hands of the Representatives of the people. They have the appropriation of all monies.'"[14]

III. Contrary Evidence and Practical Responses

As already noted, the search for "original understanding" is always problematic, however important such evidence may be for interpreting text that is underdetermined. At the founding and, less important, thereafter, there were of course many "understandings." And some of them seem to run counter to the argument above. Let us look at a few of those and then conclude with practical considerations that lend perhaps the strongest support for a narrower view of the War Powers Clause.

Set aside the often desultory snippets we find in Madison's convention notes,[15] which can be read several ways with equal credibility,[16] and focus instead on evidence that might be thought more reflective. In *Federalist* No. 69, for example, Alexander Hamilton addressed the war powers question by saying that the president's authority

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[12] *Id.* at 1699.

[13] *Id.* at 1702 (quoting James Madison, The Virginia Convention Debates (June 14, 1788), in 10 The Documentary History of the Ratification of the Constitution 1282 (Merrill Jensen ed., 1976)).

[14] *Id.*

[15] *See Framers' Debate on the War Power* (August 17, 1787; 2 Farrand 318-19, *reprinted in* Louis Fisher, Presidential War Power, Appendix 207-208 (1995)).

[16] Yoo writes: "Attempting to draw [firm] conclusions from the brief debate on the [Declare War] Clause, which occupies only one page out of the Convention's 1273-page record, imposes far too much order on the confusion that surrounded the Framers' discussion." *Kosovo, supra* note 3, at 1694. *See also* Yoo, *The Continuation of Politics, supra* note 3, at 262.

> would be nominally the same as that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.[17]

Responding to Antifederalist concerns, Hamilton drew his contrast sharply, perhaps too sharply, but even taking his statement at face value, it hardly makes a case for executive incapacity absent a declaration of war. Hamilton simply observed that the war *declaring* power had been transferred to Congress. And in *Federalist* No. 25 he had noted that "the ceremony of a formal denunciation of war has of late fallen into disuse,"[18] suggesting that a declaration was no precondition for war making but was merely, as discussed above, the instrument for initiating or moving to a "perfect" war.

The ambiguity surrounding the term "war"—its juridical connotation; its actual denotation as various acts of war—is the source of much of the confusion, of course. Thus, when James Wilson told the Pennsylvania ratifying convention that this system "will not hurry us into war," for "the important power in declaring war is vested in the legislature at large;"[19] and when President Washington declined the request of the governor of Georgia in 1793 to send troops to retaliate against Indians who had been harassing settlers, saying "No offensive expedition of importance" could be undertaken without congressional sanction,[20] both could be understood as referring to full-blown "perfect" war. In fact, Washington speaks of "offensive expeditions of importance" as needing congressional sanction. That raises two issues. First, it suggests that expeditions of lesser importance, whether "offensive" or not, do not need congressional sanction. If so, we are already on the continuum discussed above, with a range of war making in need of no congressional sanction. Second, the *form* of congressional sanction is left open. It is entirely possible—in fact plausible, given both contemporaneous under-

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17 The Federalist No. 69, at 416 (Alexander Hamilton) (Kesler & Rossiter ed. 2003) (original emphasis).

18 The Federalist No. 29, at 161.

19 2 Documentary History, *supra* note 12, at 583.

20 Letter from George Washington to William Moultrie (Aug. 28, 1793), *in* 33 THE WRITINGS OF GEORGE WASHINGTON 73 (US GPO, John C. Fitzpatrick, ed., 1939), *quoted by* David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1 (2000).

standing and subsequent history—that the "sanction" Congress would give would take the form not of a declaration of war but simply of underwriting the cost of the expedition. Indeed, one imagines that retaliation of a kind the governor was requesting, using a declaration of war as the instrument to "sanction" such an expedition, would amount to legal overkill in the extreme.

That brings us, however, to the first of two powerful practical objections to the arguments congressionalists have advanced. If the function of the Declare War Clause were primarily to "authorize" hostilities as a matter of domestic constitutional law, such that acts of war undertaken without a declaration are illegal, a moment's reflection is all that should be needed to tell us that a declaration is a blunt and clumsy instrument for that purpose. When we think back on the more than 200 times presidents have committed forces to combat over our history, and imagine that for each to have been legal, Congress would have had to declare war on some nation, the point becomes clear. Is that the way we want to conduct foreign policy? The argument leaves us with a rigid, all-or-nothing system, not with the more nuanced tools of foreign policy one wants in a dangerous world.

But that leads to a second objection to the congressionalists' view of the Declare War Clause. A nation "at war"—an actual declared war—is a dangerous thing. At least 70 federal statutes are triggered under a declaration of war, ranging from the Trading With the Enemy Act of 1941 to the Defense Production Act of 1950 and much else. Comprehensive economic controls, rationing, abrogation of contracts, a draft, travel restrictions, the suspension of habeas corpus, and the seizure of steel mills are all more likely under a declared war. As the adage has it, "Be careful what you wish for—you just may get it."

Congressionalists tend to be driven, understandably, by one or both of two concerns: constraining the executive; and legitimacy. The constitutionally proper way to achieve both, as I hope to have shown, is through Congress's power of the purse and, if necessary, the power of impeachment and removal. The Declare War Clause was never intended for either purpose. It is ill-suited for constraining the executive, too inflexible, and too dangerous. What that means as a practical matter is that the war powers are irreducibly political, not legal. Just as it is no accident that declarations of war have rarely been used, so too it is no accident that the courts have left the grave questions of war and peace to

the political branches. More than lacking competence in such matters, they lack jurisdiction. For war is quintessentially a political matter.