

Battleground: war powers and the constitution

by John Yoo and Jules Lobel



NATIONAL CONSTITUTION CENTER

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Introduction

Does the decision to commit American troops to combat require authorization by Congress, or may the president act alone? This question, debated throughout American history and especially over the last 50 years, took on renewed urgency in spring 2011 when President Barack Obama—acting without authorization by Congress—committed American warplanes to military action in Libya.

The Constitution famously divides war powers between the president and Congress. Article I gives Congress the authority to "declare War" and finance military operations, while Article II makes the president "Commander in Chief." This allocation of military authority is one of the most fundamental features of our constitutional structure. But after more than two centuries of constitutional history, the respective war powers of the president and Congress are still disputed.

Since World War II, war-making power has shifted increasingly toward presidents. In the essays that follow, John Yoo and Jules Lobel debate whether the growth of presidential war powers is faithful to or a departure from constitutional principles.

A Note About This Series

We live in a country of competing views. Our Constitution was framed in disagreement. And while the Constitution is a source of our most cherished and unifying political ideals, it also provokes some of our sharpest quarrels as its principles and protections are debated and applied to present circumstances.

At a time when corrosive partisanship distorts political dialogue, the Constitutional Spotlight Series provides a forum for civil debate. It is dedicated to the idea that robust and open dialogue is fundamental to America's constitutional legacy.

The Presidential Power Argument

By John Yoo

By ordering U.S. warplanes to attack Libyan targets on the ground and impose a no-fly zone in the air, President Barack Obama sent the U.S. military into combat without the blessing of Congress. This was not always President Obama's view of presidential power. Just a few years earlier, anti-war Democrats had vigorously challenged President George W. Bush's conduct of the wars in Afghanistan and Iraq by claiming that he had violated Congress' right to declare war. As a presidential candidate in 2007, Senator Obama stated, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."

Fast forward four years. In announcing the intervention in Libya, President Obama told Congress that he was acting "pursuant to my constitutional authority to conduct U.S. foreign relations and as commander in chief and chief executive." And as the Libyan war reached its 60th day at the end of May 2011, he sent a letter to Congress that reported on progress but did not seek any authorization.

This time, President Obama has the Constitution about right. His exercise of war powers rests firmly in the tradition of American foreign policy. Throughout our history, neither presidents nor Congresses have acted under the belief

This time, President Obama has the Constitution about right. His exercise of war powers rests firmly in the tradition of American foreign policy. that the Constitution requires a declaration of war before the U.S. can conduct military hostilities abroad. We have used force abroad more than 100 times but declared war in only five cases: the War of 1812, the Mexican–American and Spanish–American Wars, and World Wars I and II.

Without any congressional approval, presidents have sent forces to battle Indians, Barbary pirates and Russian

revolutionaries, to fight North Korean and Chinese communists in Korea, to engineer regime changes in South and Central America, and to prevent human rights disasters in the Balkans. Other conflicts—such as the 1991 Persian Gulf War, the 2001 invasion of Afghanistan and the 2003 Iraq War—received legislative "authorization" but not declarations of war. The practice of presidential initiative, followed by congressional acquiescence, has spanned both Democratic and Republican administrations and reaches back from President Obama to Presidents Abraham Lincoln, Thomas Jefferson and George Washington.

Common sense does not support replacing the way our Constitution has worked in wartime with a radically different system that mimics the peacetime balance of powers between president and Congress. If the issue were the environment or Social Security, Congress would enact policy first and the president would faithfully implement it second. But the Constitution does not duplicate this system in times of war. Instead, our Framers decided that the

president would play the leading role in matters of national security.

Those in the pro-Congress camp call upon the antimonarchical origins of the American Revolution for support. If the Framers rebelled against King George III's dictatorial powers, surely they would not give the president much authority. It is true that the revolutionaries rejected the royal prerogative, and they created weak executives at the state level. Americans have long turned a skeptical eye toward the growth Common sense does not support replacing the way our Constitution has worked in wartime with a radically different system that mimics the peacetime balance of powers between president and Congress.

of federal powers. But this may mislead some to resist the fundamental difference in the Constitution's treatment of domestic and foreign affairs. For when the Framers wrote the Constitution in 1787, they created an independent, unified chief executive with its own powers in national security and foreign policy.

The most important of the president's roles are commander in chief and chief executive. As Alexander Hamilton wrote in essay 74 of the *Federalist Papers*, "The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority." Presidents should conduct war, he wrote, because they could act with "decision, activity, secrecy, and dispatch." In perhaps his most famous words, Hamilton wrote, "Energy in the executive is a leading character in the definition of good government. . . It is essential to the protection of the community against foreign attacks."

The Framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by preexisting legislation. The Framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by preexisting legislation. Instead, they demand swift, decisive action, sometimes under pressured or even emergency circumstances, that are best carried out by a branch of government that does not suffer from multiple vetoes or is delayed by disagreements.

Congress is too large and unwieldy to take the swift and decisive action required in wartime. Our Framers replaced the Articles of Confederation—which failed in the management of foreign relations—with the Constitution's single executive for precisely this reason. Even with access to the same intelligence as the executive branch, Congress' loose, decentralized structure would paralyze American policy while foreign threats grow.

Furthermore, Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues when the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure.

Congress' track record when it has opposed presidential leadership has not been a happy one. Perhaps the most telling example is the Senate's rejection of the Treaty of Versailles at the end of World War I. Congress' isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed Neutrality Acts designed

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to keep the United States out of the conflict. President Franklin Roosevelt violated those laws to help the Allies and draw the nation into war against the Axis. While pro-Congress critics worry about a president's foreign adventurism, the real threat to our national security may come from inaction and isolationism.

Many point to the Vietnam War as an example of the faults of the "imperial presidency." Vietnam, however, could not have continued without the consistent support of Congress in raising a large military and paying for hostilities. And Vietnam ushered in a period of congressional dominance that witnessed American setbacks in the Cold War and the passage of the ineffectual War Powers Resolution. Congress passed the Resolution in 1973 over President Nixon's veto, and no president, Republican or Democrat, George W. Bush or Barack Obama, has ever accepted the constitutionality of its 60–day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it.

Despite the Constitution's design and record of practice, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8 of the Constitution, which gives Congress the power to "declare War." But these observers read the 18th-century constitutional text through a modern lens by interpreting "declare War" to mean "start war." When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities. In the century before the Constitution, for example, Great Britain—where the Framers got the idea of the declare-war power—fought numerous major conflicts but declared war only once beforehand.

Our Constitution sets out specific procedures for passing laws, appointing officers and making treaties. There are none for waging war, because the Framers expected the president and Congress to struggle over war through the national political process. In fact, other parts of the Constitution, properly interpreted, support this reading. Article I, Section 10, for example, declares that the states shall not "engage" in war "without the consent of Congress" unless

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"actually invaded, or in such imminent Danger as will not admit of delay." This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. If the Framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive.

Presidents, of course, do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy, if it wants to. Only Congress can raise the military, which gives it the power to block, delay or modify war plans. Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military.

Congress' check on the presidency lies not just in the long-term raising of the military. It also can block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war or

disagrees with the president's decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action. Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation.

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The Framers expected Congress' power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded, "The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist." Congress ended America's involvement in Vietnam by cutting off all funds for the war.

Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress' funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution.

A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation will come at the price of speed and secrecy.

The Constitution created a presidency that can respond forcefully to prevent serious threats to our national security. While presidents can take the initiative, Congress can use its funding power to keep the executive in check. Instead of demanding a legalistic process to begin war, the Framers left war to politics. As we confront the new challenges of terrorism, rogue nations and proliferation of weapons of mass destruction, now is not the time to introduce sweeping, untested changes in the way we make war.

The Congressional Power Argument

By Jules Lobel

The Constitution provides that the decision to go to war not be made by one person. Rather, Article I, Section 8 assigns Congress the power to "declare War" and "grant Letters of Marque and Reprisal" authorizing lesser forms of hostilities, so that those decisions are subject to the collective judgment of the Congress and the president. Although Article II names the president "Commander in Chief of the Army and Navy," the president cannot engage U.S. armed forces in military action without first consulting with and gaining the explicit approval of Congress.

The Constitution's Framers, having rebelled against the abuses of the British monarchy, did not want the executive to have the broad power of the British king and therefore divided war powers between Congress and the president. The president was made the commander in chief of the Army and Navy to direct

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the conduct of warfare; Congress was given the authority to *initiate* warfare. Alexander Hamilton contrasted the war powers of the British king and the president in Federalist 69, arguing that the king's power "extends to the *declaring* of war and the *raising* and *regulating* of fleets and armies"—all of which the Constitution confers on "the legislature." When one delegate to the Constitutional Convention, Pierce Butler, proposed that authority to start a war should rest with the president, Connecticut delegate Elbridge Gerry responded that he "never expected to hear in a republic a motion to empower the Executive to declare war." Gerry's perspective carried the day.

The Framers had several reasons for conferring on Congress the power to initiate warfare. First, because they believed—as James Madison put it—that war was "among the greatest of national calamities," they sought a structural mechanism to ensure that decisions to initiate warfare would not be taken lightly. James Wilson of Pennsylvania, an important participant at the Constitutional Convention, argued that giving the legislature the power to declare war "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 of declaring war is vested in the legislature at large."

The decision to initiate hostilities would thus be a collective decision, requiring, as the prominent early Supreme Court Justice Joseph Story wrote in his *Commentaries on the Constitution* (1833), "the utmost deliberation and the successive review of all the councils of the nation." Or as Abraham Lincoln, while a congressman, later argued, "no one man should hold the power of bringing" war upon us. For it is far easier for one person to decide on war than to convince a majority of both houses of Congress that war is necessary. The Constitution does make one key exception to the requirement that the commander in chief seek authorization from Congress to initiate warfare: the president can respond immediately to repel an enemy attack.

The Framers thought the executive branch acting unilaterally was likely to squander lives and money on reckless military adventures. Virginia delegate George Mason said that the president was "not to be trusted" with the

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power to initiate warfare and that the Convention should be "clogging rather than facilitating war." As Madison noted, "The Constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power

most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature." Since the executive, as commander in chief, will enjoy much of the glory, accolades and short-term political advantage of a successful military campaign, the decision to initiate hostilities was lodged elsewhere.

Finally, by vesting the power to decide on warfare in the entire Congress, and rejecting a proposal that only the Senate be empowered to declare war, the Framers ensured that the popularly elected House of Representatives—the body

most directly responsive to the voters—concurred in the decision. Requiring approval of both Houses provides the elected representatives of the people who fight, pay for and suffer the hardships of war with control over the decision and helps ensure that war is not commenced without the widest political consensus. If the president cannot persuade Congress that war is necessary, the popular support required to assume the costs and risks of warfare is unlikely to exist.

These reasons for giving Congress the decision to authorize warfare are even more compelling today. Warfare is more costly in lives and dollars than in 1787, and the executive tendency to initiate unwarranted and potentially

catastrophic wars is just as prevalent today as it was 200 years ago—as the recent Iraq war demonstrates. Indeed, our Vietnam and Iraq experiences, when congressional majorities uncritically accepted dubious administration arguments for war, illustrate the need for the independent, searching and deliberative legislative review of presidential requests to initiate warfare that the Framers contemplated.

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Despite the clear constitutional framework, presidents

after World War II have asserted broad power to initiate wars and have routinely sent American troops into combat overseas without congressional authorization. Perhaps most colorfully, President George H.W. Bush proclaimed, after the first Iraq War, that he "didn't have to get permission from some old goat in Congress to kick Saddam Hussein out of Kuwait."

The presidential power arguments are based on several textual, structural and policy rationales. The textual argument interprets Congress' power to declare war as simply to announce publicly that a state of war exists, allowing the president to make or initiate warfare without congressional approval. Second, presidential advocates argue that the structural mechanism Congress possesses to check presidential war-making is not the "declare War" clause, but rather the appropriations power, which permits Congress to defund any war of which it disapproves. Third, the Clinton and Obama administrations suggest that while Congress must approve major wars, smaller uses of military force, as in Bosnia in 1995 and Libya in 2011, can be initiated by the president alone. Finally, presidential power proponents claim that in the modern world, the president often has no time to seek congressional approval before engaging in military action. None of these arguments is persuasive.

First, the argument that the power to declare war was intended to permit Congress to announce officially that a war was on—and not to limit the president's prerogative to initiate warfare—ignores the clear constitutional design to preclude one person from initiating war. It also discounts the reasons the Framers amended the original language of the clause, which read "make" war rather than "declare" war. The language was changed to clarify that the president had the power, without needing congressional approval, to "repel sudden attacks," and the authority as commander in chief to conduct (or make) the war that Congress had authorized. Neither reason supports presidential power to initiate hostilities unilaterally. Moreover, in 1789, a nation could "declare" war either by "word or action," as the influential political theorist John Locke put it, and therefore Congress' power to declare war meant it could commence war either by issuing a declaration or by authorizing hostilities. Most fundamentally, however, to read the "declare War" clause as merely granting Congress the power to publicly declare that a state of war exists reduces to a virtually useless formality this important provision, of which Madison wrote, "in no part of the Constitution is more wisdom to be found."

The critical time to decide whether to engage in warfare is at the outset—before people have been killed and wounded, before American prestige and influence are put on the line and before substantial sums of money have been spent. Second, the argument that there is no need for congressional power to authorize war, because Congress can simply refuse to fund any military action that the president initiates, reverses the structural presumption of the Constitution. The Constitution's design requires affirmative congressional action to commence war; it does not allow

one person to decide on war subject to the check that both houses of Congress could agree to defund it later. The critical time to decide whether to engage in warfare is at the outset—before people have been killed and wounded, before American prestige and influence are put on the line and before substantial sums of money have been spent.

Once we are already at war, the debate changes from whether the war is a good idea to whether, having expended lives and resources, we should quit. As the Vietnam experience illustrates, even an unpopular war is difficult for Congress to end, as the political realities make it hard for members to vote against appropriations when troops are in battle. Nor does it make sense to send soldiers into combat without congressional debate and approval, and thus risk a divisive debate while they are fighting on the battlefront. In addition, as occurred during the Vietnam and Iraq wars, congressional appropriation provisions limiting or ending war funding may face a presidential veto, requiring either a supermajority or a legislative compromise for Congress to prevail. The Framers believed that it should be more difficult to get into war than out of it, and relying solely on Congress' appropriations power reverses that presumption.

Some presidents have claimed that while they might not have the power to initiate major wars without congressional approval, such approval is not required for small–scale military actions such as the 1983 Grenada invasion, the 1989 Panama attack, Clinton's planned attack on Haiti in 1994 or the Obama administration's 2011 Libyan intervention. However, the "declare War" clause does not distinguish between major and minor warfare. Even if it did, the Framers included the issuance of Letters of Marque and Reprisal within congressional war powers, which in 18th–century parlance referred to limited wars or lesser hostilities—suggesting that all military actions, apart from repelling attacks, were to be authorized by Congress. As the Vietnam War illustrates, warfare that starts small can often become a major conflict involving a long–term commitment of thousands of soldiers and billions of dollars. Presidents cannot predict which small wars will go awry and become quagmires. In addition, any military attack on another country has serious consequences for American foreign relations and the treasury. For example, President Clinton's 1999 Kosovo action cost almost \$3 billion and resulted in the long–term involvement of the United States in that region.

Finally, presidential advocates claim that in the contemporary world there often is no time for the president to seek authorization. While hypothetical situations might exist when military action need be taken so quickly as to preclude congressional debate, virtually all actual cases where the president has unilaterally sent U.S. troops into combat have not. After Pearl Harbor and September 11, when Congress was convinced that the president made a compelling case for war, it acted rapidly. President Obama claimed that time was of the essence in ordering U.S. warplanes to attack Libya to avert a humanitarian crisis, yet he had time to obtain prior U.N. Security Council authorization. He has not sought congressional approval after the initial decision, which suggests that he was more concerned about the possibility of congressional disapproval than timeliness. That Congress might be divided and reluctant to authorize a war many believe unwarranted is precisely why the Framers sought to prevent the president from acting alone, except to respond to an attack.

After World War II, the presidential pattern of unilaterally initiating hostilities led Congress to enact the 1973 War Powers Resolution. As an attempt to limit executive power, that statute is generally considered a failure. A variety of reforms have recently been proposed, including a National War Powers Commission report calling for presidential consultation with a small group of congressional leaders before the initiation of significant military action. While such consultation is a good idea, closed discussions with a handful of congressional leaders cannot substitute for public debate and approval by Congress of decisions to go to war.

Restoring the original constitutional framework requires that we rethink our national reliance on military power. The Framers recognized that process was related to substance; their substantive aversion to warfare led them to adopt a constitutional process to make it less likely to occur. Our contemporary military and political dominance

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has led many in Congress and the political leadership to acquiesce in executive, unilateral uses of force, believing that such power serves our national interest. Yet the Framers' insights in this area must be relearned, for accepting executive unilateralism will undoubtedly lead to more unnecessary warfare—some of which, as in Vietnam and Iraq, will prove catastrophic.

Discussion Questions

The Constitutional Spotlight Series is intended to provoke civic dialogue by providing different perspectives on constitutional issues. Now it's your turn to weigh in on this timely topic! Here are some questions to spark conversation in your classroom, book club or around the kitchen table:

- 1. The United States formally declared war five times. Can you name these military conflicts? Do any of these episodes provide guidance as to when war should be declared?
- 2. Why does the president act militarily at times without the consent of Congress?
- 3. How can Congress use its power to check executive war-making powers?
- 4. How do both authors use the Framers to justify their position on war powers?
- 5. Since the time these essays were written, the United States conducted Operation Neptune Spear, the military operation that killed Osama bin Laden. How, if at all, does this event change the debate over war powers?



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