CON-AT: KEEP PRESIDENTIAL WAR POWERS

By Vance Trefethen and Chris Jeub

***Resolved: On balance, the current Authorization for Use of Military Force gives too much power to the president.***

This CON-AT brief is repurposed evidence from the Season 14 briefs from Stoa resolution on military reform. The evidence will be helpful to PF teams running negative arguments against reforming presidential war powers.

CON-AT: KEEP PRESIDENTIAL WAR POWERS 2

Constitutional power to declare war doesn’t mean very much - does not imply that Congress must approve before military engagements 2

Congress’ power to “Declare War” is only referring to offensive or aggressive, all-out wars. Declaration of war isn’t necessary for limited military action 2

“Declare War” clause is an anachronism because we signed a treaty (the UN charter) agreeing we would never resort to war as defined by the law of nations 3

The “Letters of Marque and Reprisal” clause doesn’t limit the President 3

Presidents deploying troops in harms way is not a recent issue, it’s happened >200 times in US history 3

The Constitution has no clear answer: We should stop debating war powers and instead debate the merits of specific military action 4

Founding Fathers agreed: Presidential power is not just response to “Sudden Attacks.” No constitutional violation if President sends troops abroad without notifying Congress - Jefferson did it and Congress didn’t complain 4

Presidential power to send forces to war is supported by 2 centuries of constitutional history 4

Pres. Thomas Jefferson deployed military forces overseas and notified Congress 6 months later (they read about it in the newspapers before Jefferson notified them) 5

Early Congressional actions illustrate original understanding of war powers: They often delegated broad discretion to the President and accepted military actions that were not explicitly authorized 5

Founders intended to give the President control of the military, with only strictly construed limitations 5

Long American tradition: Presidents have been sending forces to battle since Washington and Jefferson 6

Works Cited 7

CON-AT: KEEP PRESIDENTIAL WAR POWERS

The PRO advocates for a radical change in how America conducts its war authority. CON shows how this is a foolish and risky change that must not be allowed.

Constitutional power to declare war doesn’t mean very much - does not imply that Congress must approve before military engagements

Herbert Lawrence Fenster 2012.(attorney, practiced in Washington, D.C., and Denver, Colorado, for over fifty years, primarily in the field of government contract law) “The Great War Powers Misconstruction” JOURNAL OF NATIONAL SECURITY LAW & POLICY, <http://www.jnslp.com/wp-content/uploads/2012/01/The-Great-Powers-Misconstruction.pdf>

Article I, Section 8, Clause 11, referred to as the Declaration Clause, is frequently cited as vesting Congress with its authority, but it is actually of very limited importance in defining the powers and responsibilities of the two political branches. It has been invoked only eight times in our nation’s 235-year history. But we have had several hundred military engagements of various sizes and shapes. Possibly, the foundational problem with the clause is that, being declarative only, it is inherently meaningless and little more than a repetition of the equally meaningless provision that had been included in the Articles of Confederation. What is most troublesome about the clause is the persistent attempts to give it meaning by the inference that it is essential for any military undertaking by the nation. The 1973 War Powers Resolution implies just such authority. This is plainly not the case nor is it likely that the Framers ever considered that its invocation was a prerequisite to military engagements. We should know this because it was clear that the military engagements that were anticipated by the Framers were most likely those initiated by state militias or engagements at sea for the protection of sea lanes.

Congress’ power to “Declare War” is only referring to offensive or aggressive, all-out wars. Declaration of war isn’t necessary for limited military action

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” <http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf>

It is important to keep in mind that when James Madison moved on August 17, 1787, to reduce the power to be given to Congress in the new Constitution from “make war” to “declare war,” he chose a term of art from the law of nations that had a well-understood meaning. Declarations of war were associated with large-scale perfect wars in which “one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other”; and formal declarations were only considered necessary for all-out “offensive” (what we would today call aggressive) wars. Things were different in that era. Sovereign states had a recognized right to resort to armed force for any purpose – to acquire territory or conquer a neighbor, or perhaps just to impose “justice” or obtain satisfaction for a perceived wrong. States were not expected to declare war when they were acting defensively or when their goals were more limited – i.e., when they were engaging in “self-help” measures or other uses of “force short of war.”

“Declare War” clause is an anachronism because we signed a treaty (the UN charter) agreeing we would never resort to war as defined by the law of nations

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” <http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf>

During the twentieth century, the world community outlawed the use of force as an instrument of national policy – first, in theory, by the 1928 Kellogg-Briand Treaty, and later with an (admittedly imperfect) enforcement mechanism, when the U.N. Charter entered into force in 1945. Article 2(4) of the Charter clearly prohibits any use of force that previously, under the law of nations when the Constitution was ratified, might arguably have required a declaration of war, and no nation has issued such a declaration since the Charter was ratified. Put simply, the power of Congress to declare war is as much an anachronism today as the power conveyed in the same sentence to “grant letters of marque and reprisal,” which will be discussed below.

The “Letters of Marque and Reprisal” clause doesn’t limit the President

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” <http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf>

It was these “general” letters of marque and reprisal, authorizing private ship owners to arm their vessels and seize the ships and subjects of an enemy state on the high seas, that Elbridge Gerry had in mind on August 18, 1787, when he moved that the powers given Congress include the power to grant letters of marque and reprisal – an apparently uncontroversial action that produced no record of a debate. There is no serious evidence that the Framers intended by this clause to vest in Congress a negative over every use of force short of war, as letters of marque and reprisal were by 1787 a very specific type of authorization for private ship owners to engage in certain otherwise unlawful actions against specified targets on the high seas. Even in those nations that conferred virtually all “war powers” on the King, the issuance of letters of marque and reprisal was reserved to the legislative branch.

Presidents deploying troops in harms way is not a recent issue, it’s happened >200 times in US history

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY, The Constitutionality of Covert War: Rebuttals <http://www.jnslp.com/wp-content/uploads/2012/01/The-Constitutionality-of-Covert-War-Rebuttals.pdf>

The practice of Presidents sending troops into harm’s way without legislative sanction to protect American lives or defend our interests has occurred more than two hundred times throughout our history, and did not begin in 1950. Virtually every situation Professor Lobel complains about since then was defensive in character, often carrying out commitments established by the U.N. Charter or other treaties. While there are often risks that such operations might escalate into major hostilities, a policy of weakness and vacillation might also lead to armed conflict (e.g., Munich in 1938). Providing covert training and military equipment to paramilitary forces in response to armed international aggression does not require a declaration of war, and Professor Lobel’s suggestion that Congress should have instead declared war against the Soviet Union over Afghanistan is truly bizarre.

The Constitution has no clear answer: We should stop debating war powers and instead debate the merits of specific military action

James A. Baker III and Lee H. Hamilton 2011. (Baker was secretary of state from 1989 to 1992. Hamilton is a former Democratic representative from Indiana) June 10, 2011 Breaking the war powers stalemate WASHINGTON POST, (ellipses in original) <http://www.washingtonpost.com/opinions/breaking-the-war-powers-stalemate/2011/06/08/AGX0CrNH_story.html>

Stuck in the middle are the American people, particularly our soldiers in arms. They would be best served if our leaders debated the substantive issues regarding the conflict in Libya — and those of Afghanistan and Iraq — rather than engaging in turf battles about who has ultimate authority concerning the nation’s war powers. There is, unfortunately, no clear legal answer about which side is correct. Some argue for the presidency, saying that the Constitution assigns it the job of “Commander in Chief.” Others argue for Congress, saying that the Constitution gives it the “power to . . . declare war.” But the Supreme Court has been unwilling to resolve the matter, declining to take sides in what many consider a political dispute between the other branches of government.

Founding Fathers agreed: Presidential power is not just response to “Sudden Attacks.” No constitutional violation if President sends troops abroad without notifying Congress - Jefferson did it and Congress didn’t complain

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY, The Constitutionality of Covert War: Rebuttals <http://www.jnslp.com/wp-content/uploads/2012/01/The-Constitutionality-of-Covert-War-Rebuttals.pdf>

As for citing Framers, Hamilton drafted much of Article II. “Repel sudden attacks” was an example of ways in which the President might need to use force defensively. Jefferson’s cabinet unanimously agreed to send two-thirds of the U.S. Navy to the Mediterranean with instructions to sink and burn their ships if the Barbary Pirates had declared war against us, and Jefferson did not formally notify Congress for nearly nine months – at which time no one in Congress complained, and Hamilton argued that legislative sanction was “unnecessary” in that setting. Jefferson was hardly responding to “sudden attacks.”

Presidential power to send forces to war is supported by 2 centuries of constitutional history

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” <http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf>

American Presidents have sent military forces into harm’s way without congressional authorization more than 200 times, often engaging in hostilities, and in most cases without visible signs of significant congressional concern. As the Supreme Court noted in United States v. Verdugo-Urquidez: “The United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security.” During the Carter administration, the Justice Department’s Office of Legal Counsel observed:

Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action. Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.

Pres. Thomas Jefferson deployed military forces overseas and notified Congress 6 months later (they read about it in the newspapers before Jefferson notified them)

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” <http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf>

It is important to keep in mind there was no “sudden attack” or even reasonable likelihood that any Barbary state was considering attacking the United States – and no need for urgency (since the squadron did not leave for more than two months). Yet Congress was not even officially informed of the deployment for more than six months (although legislators certainly read about it in the newspapers), and when it was finally reported there were few if any complaints from Capitol Hill that the President had exceeded his constitutional authority. Sadly, Jefferson’s overly deferential (indeed, quite misleading) description of the deployment in his first State of the Union message has confused many scholars. It is true that Congress (at Jefferson’s urging) in subsequent years enacted several statutes approving the use of force, but they were neither sought nor enacted until months after Jefferson had sent most of the U.S. Navy into harm’s way.

Early Congressional actions illustrate original understanding of war powers: They often delegated broad discretion to the President and accepted military actions that were not explicitly authorized

Jennifer K. Elsea, Michael John Garcia, Thomas J. Nicola 2011. (Legislative Attorneys with Congressional Research Service) 8 Sept 2011 “Congressional Authority to Limit Military Operations” <http://www.fas.org/sgp/crs/natsec/R41989.pdf>

Early exercises of Congress’s war powers may shed some light on the original understanding of how the war powers clauses might empower Congress to limit the President’s use of the Armed Forces. In the absence of a standing army, early presidents were constrained to ask Congress for support in advance of undertaking any military operations. Congress generally provided the requested support and granted the authority to raise the necessary troops to defend the frontiers from deprivations by hostile Indians and to build a navy to protect U.S. commerce at sea. Congress, in exercising its authority to raise the army and navy, sometimes raised forces for specific purposes, which may be viewed as both an implicit authorization to use the forces for such purposes and as an implicit limitation on their use. On the other hand, Congress often delegated broad discretion to the President within those limits, and appears to have acquiesced to military actions that were not explicitly authorized.

Founders intended to give the President control of the military, with only strictly construed limitations

Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” <http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf>

By vesting the nation’s “executive Power” in the President, the Founding Fathers intended to convey the general control of the nation’s diplomatic, political, and military relations with the external world – subject to some very important “negatives” vested in the Senate or Congress. One of those negatives was that the President could not use whatever military forces Congress made available to initiate what today would be called a major aggressive war (a use of force subsequently outlawed by international law). But as exceptions to the general grant of power to the President, these negatives were to be “construed strictly.” Presidents have used “force short of war” both overtly and covertly hundreds of times since at least the days of Jefferson, and until recently Congress has seldom seriously complained. The President needs the approval of two-thirds of the Senate to make a treaty and a majority of both houses of Congress to raise and equip military forces or provide money for operations.

Long American tradition: Presidents have been sending forces to battle since Washington and Jefferson

Prof. John Yoo 2012. ( professor at the Univ of Calif.-Berkeley, School of Law; worked in the Department of Justice's Office of Legal Counsel in the G.W. Bush Administration) War Powers Belong to the President 1 Feb 2012, ABA JOURNAL (journal of the American Bar Association) <http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president>

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.

Works Cited

1. Herbert Lawrence Fenster 2012.(attorney, practiced in Washington, D.C., and Denver, Colorado, for over fifty years, primarily in the field of government contract law) “The Great War Powers Misconstruction” JOURNAL OF NATIONAL SECURITY LAW & POLICY, http://www.jnslp.com/wp-content/uploads/2012/01/The-Great-Powers-Misconstruction.pdf
2. Prof. Robert F. Turner 2012. (U. of Virginia Law school; taught International Law at the U.S. Naval War College; veteran of two Army tours in Vietnam; was national security adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee; served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy) JOURNAL OF NATIONAL SECURITY LAW & POLICY “Covert War and the Constitution: A Response” http://www.jnslp.com/wp-content/uploads/2012/01/Covert-War-and-the-Constitution-a-Response.pdf
3. James A. Baker III and Lee H. Hamilton 2011. (Baker was secretary of state from 1989 to 1992. Hamilton is a former Democratic representative from Indiana) June 10, 2011 Breaking the war powers stalemate WASHINGTON POST, (ellipses in original) http://www.washingtonpost.com/opinions/breaking-the-war-powers-stalemate/2011/06/08/AGX0CrNH\_story.html
4. Jennifer K. Elsea, Michael John Garcia, Thomas J. Nicola 2011. (Legislative Attorneys with Congressional Research Service) 8 Sept 2011 “Congressional Authority to Limit Military Operations” http://www.fas.org/sgp/crs/natsec/R41989.pdf
5. Prof. John Yoo 2012. ( professor at the Univ of Calif.-Berkeley, School of Law; worked in the Department of Justice's Office of Legal Counsel in the G.W. Bush Administration) War Powers Belong to the President 1 Feb 2012, ABA JOURNAL (journal of the American Bar Association) http://www.abajournal.com/magazine/article/war\_powers\_belong\_to\_the\_president