Balancing War Powers in an Age of Terror

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The Good Society, Volume 18, Number 2, 2009, pp. 1-9 (Article)

Published by Penn State University Press

DOI: 10.1353/gso.0.0082

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President Gerald R. Ford once asked “where, then, does the balance of [war] powers lie?” Answering his own question, Ford stated that:

[The balance] cannot lie in a constant rivalry for power. As Eugene Rostow has written, this ‘would tend to convert every crisis of foreign policy into a crisis of will, of pride and precedence between Congress and the President.’

The balance must lie, instead, in a frank recognition of the basic strengths and weaknesses of both the executive and legislative branches of government, in the institutional capabilities and limitations imposed by the Constitution and by common sense.1

For the Founding Fathers, that balance emerged from the fundamental structure of constitutional government that they created. “Ambition must be made to counteract ambition,” James Madison wrote in a powerful argument for the separation of powers.2 At first glimpse, this might seem to contradict Ford’s advice to avoid “a constant rivalry” over the conduct of America’s war efforts. But, if the rivalry over control of war powers occurs not with the branches fighting over the right to use this or that particular power but rather involves the presidency and Congress wielding their own specific powers both in pursuit of a coherent policy as well as to prevent the other from becoming too strong, then Ford’s vision can be merged with that of the Founders. While constant rivalry and competition between the branches may not be desirable, neither is a situation in which one branch exercises unchecked power. A sound theory of war powers should create a situation in which each branch uses its unique strengths and weaknesses not only to check the ambitions of the other but also to develop common solutions to the challenges that threaten the security of the nation.3

The war on terror has posed considerable problems for the constitutional balance of powers between the executive and legislative branches. In its efforts to protect the United States in the wake of the September 11 attacks, the Bush administration has tried to expand the scope and breadth of executive power. Time and time again, when the constitutionality of its policies have been challenged, the executive branch has responded with

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would be to alter legal relationships between subjects of warring nations and to trigger certain rights, privileges, and protections under the laws of war.”

Neither of these theories has been successful in the real world of policy making. The broad theory’s failure is evidenced by the approximately 200 uses of force without congressional authorization, including such conflicts as the Korean War and the U.S.-led NATO intervention against Serbia in 1999. Obviously, historical practice does not support the claim that a congressional declaration of war is necessary for the president to use force.

The broad theory fails on another dimension as well: It fails to recognize the “basic strengths and weaknesses” of the branches as urged by President Ford. Foreign affairs is an area in which the president is uniquely positioned to take decisive actions and to win disputes over them. Harold Hongju Koh argues the president “almost always seems to win in foreign affairs” because Congress is crippled by several structural characteristics that make the legislative branch likely to “persistently acquiesce in executive efforts” to deploy force without congressional authorization. The procedural tools which Congress uses to restrain the president “simply have not worked,” often because congressional action must take the form of legislation which can be vetoed by the president, forcing Congress to muster a two-thirds vote to hold back the president. This weakness is exacerbated as congressmen are often “unwilling to take responsibility for setting foreign policy, preferring to leave the decision—and the blame—with the president.” Koh notes that while a majority of Congress may have opposed the Vietnam War, that same majority was unwilling to take responsibility for ending that war.

James Sundquist addressed the unwillingness and unsuitability of the legislative branch to engage in policy making in areas such as war powers. For Sundquist, Congress’s problems:

[Flow] from the very nature of the congressional animal, a creature compelled to nurture its relationship with the state or district that determines, at two- or six-year intervals, whether it lives or dies. The demands of the constituency are so urgent and incessant as to lead the members of Congress—House members in particular but senators as well—to concentrate on the role of representative of their areas, to deal with local and peripheral matters, avoid broader responsibility, and leave basic decisions to the president.

This tendency of Congress results in a deep-seated problem: Concern over issues that more directly affect their constituents tends to distract congressmen from focusing on “fundamental issues of national policy,” and when Congress does focus on

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national issues, it tends to do so from a “local rather than a national viewpoint, producing the oft-criticized ‘parochialism’ and ‘irresponsibility’ of the Congress.”9

The dynamic identified by Koh and Sundquist was evident during congressional debates concerning the surge of U.S. troops in Iraq in 2007. Thomas Ricks notes that while Democrats, who controlled Congress, wanted to oppose the surge, ending the war in Iraq “would carry a political price they were not willing to pay. [The Democrats] wanted to appear to be doing something about [ending the war] without really doing anything. So while the House of Representatives voted 246 to 182 in Feb. 2007 to oppose the surge, it wasn’t prepared to follow up that nonbinding resolution with action.”10 Building on this point, Ricks identifies what he calls the central dilemma of the Iraq war for Democrats: “How to end the war without being blamed for how it ended.”11 If Congress is neither willing nor able to function as a decisive policy making body on issues of national security, the broad theory simply cannot work.

The narrow theory has fared no better and has suffered defeat after defeat in the courts, revealing flaws in its theoretical core. Judge Anna Diggs Taylor rejected President Bush’s use of the National Security Agency to wiretap the conversations of U.S. citizens without first obtaining a warrant, arguing that the program violated the will of Congress as expressed in the Foreign Intelligence Surveillance Act of 1978. In the cases Hamdi v. Rumsfeld and Rasul v. Bush—which dealt with American citizens and aliens, respectively—the Supreme Court ruled that those designated as enemy combatants being held indefinitely deserved an opportunity to contest their status before a competent authority other than the president. In Hamdan v. Rumsfeld, the Supreme Court determined that the president lacked the power to create military tribunals without congressional approval. In all of these cases, the president based his right to act on claims of inherent authority stemming from his constitutionally designated role as commander-in-chief of the armed forces of the United States. In all of these cases the president’s claims of authority were rejected. If the narrow theory is to succeed, it must be able to survive legal challenges. The Supreme Court’s repeated rejections of its logic indicates that its theoretical arguments are not sound.

The key to developing a constitutionally, legally, and practically sound balanced theory of war powers rests on the rehabilitation of a congressional power that has fallen into disuse over time—the formal declaration of war. Despite the constitutional grant to Congress of the power to declare war, war has only been formally declared in 5 conflicts, even though U.S. armed forces have been involved in more than 200 conflicts.12 An additional 11 conflicts have been explicitly authorized by Congress by means short of a formal declaration of war.13 However, that still leaves more than 175 uses of American armed forces without express authorization from Congress, including the Korean War (1950–1953), the invasion of Panama (1989), the intervention in Somalia (1993), and the participation in the NATO operation against Kosovo (1999).14

It is this disparity that is a major source of the current imbalance of war powers. The transformation of the role of the United States and the nature of the wars of the 20th century encouraged the shift in the balance of war powers from Congress to the president, but that nature is not replicated in the war on terror. The new dynamics of the war on terror—its indefinite duration, its unclear targets, its domestic components—call into question the appropriateness of unchecked presidential war powers. Adhering to the 20th century paradigm of Congress allowing the president to prosecute wars more or less as he sees fit threatens to undermine the U.S. effort to deal with al Qaeda by leaving policy outcomes in limbo to be challenged in U.S. courts.

Restoring meaning to the power to declare war offers a way to restore congressional war powers without infringing on the president’s ability to deploy troops and conduct military operations abroad. The power to declare war is not about the command, control, and deployment of the armed forces of the United States; rather it is a mechanism by which Congress can provide an a priori authorization to domestic actions by the president that would normally be beyond the scope of his powers. A formal declaration of war represents an acknowledgement from Congress that the gravity and risk of a military conflict demands that extraordinary legislative powers be given to the president so that the security of the country may be protected. With such powers, presidents historically have been able to take such actions as ordering the internment of Japanese-Americans during World War II, suspending habeas corpus during the Civil War, imposing rationing and censorship laws, arresting enemy aliens, seizing domestic transportation systems, and authorizing domestic warrantless wiretapping. Without a declaration, however, the peacetime paradigm of Congress as the law-making body holds, and the president is limited to his role as executor, not creator, of law. In the absence of a declaration of war, there are actions that are beyond the scope of unilateral presidential power, even if the nation is engaged in armed conflict with an enemy.

This distinction between the powers of the legislative branch and those of the executive branch is vital for ensuring a balance of war powers; it is also an essential element of American constitutional democracy. In Federalist Paper 47, James Madison wrote “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”15 Thus the president “in whom the whole executive power resides cannot of himself make a law,” while “the entire legislature can exercise no executive
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prerogative."\(^{16}\) The nature of the legislative power is nothing more than "a power of making laws."\(^{17}\) The essence of law is the authority to alter the status of individuals under the power of government; this is why it is critical to separate the power to make laws from the power to enforce them. As John Locke tells us:

It may be too great a temptation to human frailty apt to grasp at power for the same persons who have the power of making laws to have in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the ends of society and government.

Madison, Hamilton, and Locke sum up the fears expressed by many over the exercises of power by President Bush in the war on terror. As one prominent critic put it, President Bush is trying to "eliminate nearly all the checks and balances that have been traditionally understood to limit the power of the president."\(^{18}\)

The power to declare war, when properly understood, provides Congress with a powerful check on presidential power and a vital means of safeguarding domestic civil liberties. Whether the president can send American soldiers into battle does not depend on whether Congress has declared war, or even given its specific authorization to the use of force. Nor does the ability of Congress to prevent or oversee the president’s use of force turn on the existence of a declaration of war as congressional control over appropriations ensures that Congress can always end a conflict it deems unwise.

Rather, a declaration of war is about acknowledging the severity of a threat to the United States and recognizing that meeting that threat demands extraordinary measures above and beyond the president’s traditional powers. Few conflicts rise to the level of requiring declarations of war, and the threshold is not determined by the length of the hostilities, the intensity of the fighting, or even the number of casualties. The conflicts that have been deemed deserving of declarations of war have been those that engulf the world in combat and potentially threaten the existence of the country. The world wars of the first half of the 20th century were such conflicts, and in both Congress realized that defending the nation required the swift and decisive action of an empowered unitary executive. In those conflicts the president was given extraordinary legislative powers to support the prosecution of the wars. In the other conflicts of the 20th century, including ones as large as the Vietnam and Korean Wars, the home front contributed little, if anything to the conflict, and the president did not need expanded domestic powers to prosecute the wars.

By contrast, while the war on terror does have components that look like traditional warfare, such as the on-going conflicts in Iraq and Afghanistan, the domestic component of the war on terror is not just about support and supply as it was in the conflicts of the latter half of the 20th century; rather, the domestic arena is, to some degree, a battlefield in and of itself. Uncovering al Qaeda sleeper agents, monitoring communications from or to suspected terrorists that are moving through American phone lines, wireless towers, or involving American citizens, protecting America’s borders, detaining and trying suspected terrorists—all are critical elements of the war on terror that are taking place within America’s borders or in areas under American sovereign control. And since the war on terror has no conceivable end, it is not necessarily clear when any extraordinary powers given to the president would be returned as no longer needed. It therefore becomes even more important that claims to expanded powers be checked by the more deliberative and representative branch of American government. The power to declare war provides that check.

Understanding the declare war clause along these lines clearly separates potential armed conflicts into distinct legal categories of “war” and “not war” with the important difference being the amount of legislative power Congress cedes to the president. In Bas v. Tingy, the Supreme Court identified two distinct states of war: perfect and imperfect. In an imperfect war, war is not formally declared, and yet “it is public war, because it is an external contention by force.”\(^{19}\) Imperfect wars involve, obviously, military force, “though all the members are not authorized to commit hostilities such as in a solemn [perfect] war.” Thus, in an imperfect war, military force is used, but there are limitations on how that force can be used and what powers can be called upon to support the military effort.

In a perfect war:

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, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.\(^{20}\)

In a perfect war, the entire energy of the nation is directed towards the effort, while an imperfect war is fought in a more
limited manner. Justice Chase’s concurrence in *Bas* explains the limitations that result from a war being imperfect:

> Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels; nor even to capture French armed vessels lying in a French port; and the authority is not given, indiscriminately, to every citizen of America, against every citizen of France; but only to citizens appointed by commissions or exposed to immediate outrage and violence.

A war of the formally declared, or perfect, type involves a level and intensity of hostilities that are significantly higher than in an imperfect war and thus requires the total effort, focus, and resources of the entire country. In imperfect wars, only the political elites and the members of the military participate in any meaningful sense. A formal declaration of war, or the creation of a state of perfect war, affects both domestic and international law, subordinating both to the war effort, and broadens the scope of presidential power to allow for a more complete, unified, and effective national effort in the prosecution of the conflict. In a formal state of war, the president has been allowed to suspend habeas corpus, seize property needed for the war effort, establish rationing patterns for food and materiel, or even intern large numbers of American citizens.

When the country is not in a state of perfect war by virtue of a declaration of war, the president’s ability to take such domestic actions is restricted and limited. The logic of this distinction is supported by a critical Supreme Court decision during the Korean War, *Youngstown Sheet & Tube Co. v. Sawyer*, more commonly known as the “Steel Seizure” case. During the Korean War—which despite its name was not fought under a formal declaration of war or any other congressional authorization, but rather a United Nations resolution and presidential authority—President Truman attempted to seize domestic steel mills in an effort to force striking steel workers back to their jobs. Truman argued that the steel mills produced materiel that was vital to the war effort, and thus, under his inherent authority as president and commander-in-chief of the armed forces, he had the power to take over the mills and force them to produce steel.

Despite Truman’s claim of inherent authority and military necessity, the seizure of the mills was struck down as it was, according to Justice Black’s opinion, “lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President…. In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” Furthermore:

> The order cannot properly be sustained as an exercise of the President’s military power as Commander-in-Chief of the Armed Forces. Even though the ‘theater of war’ is an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.

When the president wants to take, pursuant to his powers as commander-in-chief of the armed forces, an action that is inherently legislative in nature, he must have explicit permission from “an Act of Congress or from the Constitution itself.” Since, as Justice Black notes, the Constitution refutes the idea that the president can have legislative powers, the permission must come from an Act of Congress. Without such permission, a president is not allowed to seize steel mills to ensure that the supply of war-essential materiel is not threatened, conduct warrantless wiretapping of American citizens, indefinitely detain without challenge those suspected of involvement in international terrorist organizations, or change the rules governing the procedures for military commissions.

In wartime, however, it may be neither expedient nor strategically sound for the president to be forced to come before Congress for permission for each and every legislative action deemed necessary for the war effort. Circumstances in war are fluid and unpredictable, and legislation passed at one time may quickly become irrelevant or obsolete. The deliberation and compromise that are the hallmarks of congressional legislation may be ill-suited to war, which demands swift and decisive action to keep on top of rapidly shifting military situations. As one scholar puts it, “Congress at war is not a pretty sight. The legislative branch can be questioning and judgmental, impatient for victories yet free with inexpert advice, slow to provide the men and materiel for combat, reluctant to vote the taxes needed to pay for the war, critical of generals, and careless with secrets.” In times in which the country faces an existential, or otherwise exceedingly dangerous, threat, it may not behoove the president, the military, or the nation as a whole to require the president to ask Congress time and time again to enact laws to advance the war effort.

The declarations of war for World Wars I and II both contain specific, particular, and unique language that provides clear indication that Congress did intend to cede broad and discretionary legislative power to the president in recognition of the unlimited scope and scale of the conflicts. The language can be found at the end of the declarations: “the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of _______; and to bring the conflict
to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States. [emphases added]"26 Furthermore, the declarations all specify that a “state of war” between the United States and the enemy is “formally declared.” This language makes it clear that Congress understands the implications when it votes to formally declare war, and recognizes the implications of “war” as opposed to “not war.” A declaration of war represents congressional recognition that in times of crisis and existential threat the president will need more tools at his disposal than when using force in a less comprehensive manner during a limited conflict.

“All the resources of the government” and “all of the resources of the country” mean exactly that: When the United States is in a war for its survival, the president must be able to call upon the domestic arena using all the powers of government, including those of a fundamentally legislative nature. The declaration of war stands as a means by which Congress can temporarily transfer extraordinary lawmaking power to the president by giving a priori authorization to policies implemented by the president. However, even a declaration of war does not give unlimited power to the president. As Justice O’Connor noted in the Hamdi opinion, “a state of war is not a blank check for the President,” a concept that was affirmed in the Boumediene v. Bush decision of June 2008 that found that even when the president acts in accordance with congressional legislation, there are still certain constitutional guarantees that cannot be ignored.

In the narrow interpretation advanced by the Bush administration, the trigger for the president’s assumption of broad emergency powers is not an authorization by Congress but rather the existence of a state of war. If Congress chooses to acknowledge the state of war and authorize the expanded presidential powers, all the better for the president. But congressional action is certainly not necessary, as the Bush administration and its supporters have made abundantly clear in their defenses of the president’s policies. As John Yoo wrote in an on-line debate, “declarations of war do not serve a purpose in the balance of powers between the president and Congress in wartime.”27

This argument is unsatisfying on two grounds. First, it cannot be said that simply because a theater of war exists the president has access to the complete set of his war powers. Numerous Supreme Court decisions support the claim that not all actions are necessary and appropriate at all levels of armed combat. In Brown v. United States, the Court found that a declaration of war did not give the president the power to confiscate the property of an enemy alien if the property had no military value.28 Little v. Barreme, which took place during the Quasi War between the United States and France, produced a similar result. Both of these cases support the claim that even during times of armed hostilities there are limits on the war powers upon which the president can call. As Brown makes clear, even a formal declaration of war does not give the president the power to do anything and everything he deems necessary to win the war. And, as Yoo himself admits, “one doubts whether the courts would have allowed the wholesale internment of Panamanian Americans during the 1989 Panama War, or of Yugoslavs during the Kosovo conflict…”29

The second reason that this argument does not work is in the language of the Authorization for Use of Military Force (AUMF). It could be argued that while it may be true that not every use of military force activates the full range of presidential war powers, a conflict in which Congress has expressly recognized the existence of a state of war and broadly authorized the president to take action does, and that the AUMFs passed in 2001 and 2002 do precisely that. As mentioned above, in multiple instances the administration and its defenders have argued that, on top of the president’s inherent war powers, congressional passage of the AUMF constitutes explicit authorization of the broadest package of war powers and places the president at the height of his war powers.

But the language of the AUMFs does not support such an argument. Where the texts of past declarations of war state that Congress has pledged “all the resources” of the government and country to the president for the war effort, the AUMFs have no such wording. Instead, the AUMF passed in the immediate aftermath of the September 11 attacks authorizes the president “to use all necessary and appropriate force” while the AUMF that sanctioned the invasion of Iraq authorized the president to “use the Armed Forces of the United States as he determines to be necessary and appropriate.”30 Neither AUMF makes any mention of “all the resources” of the government or the country. Neither recognizes the existence of a state of war. Nothing in the debates, nothing in the op-eds written, and nothing in the AUMFs provides evidence that Congress intended to transfer legislative power to the president with the passage of the AUMFs. And without clear and explicit authorization, a president may not claim extraordinary legislative powers for himself. Even in times of crisis, Congress still can and must play an important role.

As President Ford admonished, a theory of war powers must be capable of functioning in defense of the nation, respecting the constitutional division of power, and recognizing the strengths and weaknesses of each branch. The balanced theory creates an understanding of war powers that is
both politically practical and theoretically sound. It permits the president to deal with foreign threats by deploying American
armed forces even without express authorization from Congress,
while ensuring that Congress retains control of the domestic
arena and is able to safeguard civil liberties. Encouraging
Congress to challenge the president over the deployment of
troops threatens to turn foreign affairs into the “crises of will”
President Ford urged the nation to avoid. The balance of power
between the president and Congress is not undermined by the
foreign deployment of U.S. troops but rather by a president
seeking to expand the battlefield to encompass the home front.
An unfettered president, even one acting in good faith to defend
the nation, implementing policies that affect the legal status of
individuals is a serious threat to the constitutional nature of the
United States. The basic foundation of American democracy
rests on the separation of the executive branch from the legisla-
tive, and it should take more than presidential say-so to undo that
separation, even in the face of war.

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in a Never-Ending ‘War’” in ILSA Journal of International
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