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Legal Sidebar

The Declare War Clause, Part 3: Authorizations for Use of Military Force and Debate over Initiating Military Action

September 30, 2024

This Legal Sidebar is the third part of an eight-part series that discusses the Declare War Clause in Article I, Section 8, Clause 11 of the Constitution, which grants Congress the power "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water[.]" The power to take the nation to war is a central element of the Constitution's scheme of war powers, but interpretation of the Declare War Clause is complex and evolving. This Sidebar series discusses the Supreme Court's jurisprudence related to declarations of war by Congress and highlights interbranch practices that illuminate the executive and legislative branches' sometimes differing interpretations of the clause. Additional information on Congress's War Powers and the President's powers as Commander-in-Chief can be found in the Constitution Annotated.

Authorizations for Use of Military Force

The Supreme Court has long construed the Declare War Clause to mean not only that Congress can issue formal declarations of war, but that it can also authorize the use of armed force for more limited operations short of a full-scale war. Congress has, on various occasions, enacted what have become known as authorizations for the use of military force, which permit the President to use United States military forces in pursuit of set objectives and within parameters defined by Congress. Early examples include congressional authorization to protect American commercial vessels from pirates and hostile foreign countries. Since the Second World War, Congress has not formally declared war, and authorizations for the use of force have become the predominant method to authorize hostilities. For example, Congress passed and the President signed into law statutory authorization during the Vietnam War, the Persian Gulf War of 1991, post-September 11, 2001, invasion of Afghanistan, and the 2003 Iraq War.

Several reasons account for the change in practice. Alexander Hamilton observed as early as 1787 that formal declarations of war had "fallen into disuse" in international practice. Other aspects of the change can be attributed to 20th century developments. For most of U.S. history, international law treated war as

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LSB11232

a legal and legitimate method for achieving foreign policy goals under certain conditions; however, the Charter of the United Nations (UN) fundamentally restructured the international legal regime related to use of force. The UN Charter prohibits war as a foreign-affairs strategy by barring countries from using military force unless in response to armed attack or under an authorization from the UN Security Council. As a result of these and other international legal developments, declarations of war have become anachronistic in modern international law and relations.

Debate on Congressional Versus Executive Primacy in Initiating Military Action

Academic commentators disagree on the precise meaning of the Declare War Clause and the significance of the assignment of this power to Congress. One group of scholars argues that the Declare War Clause assigns to Congress the primary power to initiate military action. These scholars contend that, except for a limited power to repel sudden attacks, the Constitution does not permit the President to commit troops to combat without congressional authorization. Proponents of this view often cite a statement from James Wilson at the Pennsylvania ratifying convention suggesting that any presidential power to initiate conflicts would be limited:

> Th[e] [Constitution's] system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

Advocates for a dominant congressional role also rely on statements and practices of early U.S. Presidents and government officials suggesting that these figures understood that the power to initiate offensive military actions was vested primarily with Congress. Some observers contend that a congressionally oriented approach provides institutional advantages, such as ensuring that the United States does not engage in war without first ensuring sufficient deliberation that cannot be guaranteed by a single executive decisionmaker.

A different set of scholars asserts that the Declare War Clause assigns a more limited power to Congress, and contend that Article II provides the President wide latitude to initiate military action regardless of congressional authorization. Some commentators argue that, at the time of the Founding, declarations of war served a technical legal function by triggering rules of international law on issues such as seizure of vessels and naval blockades. Under this view, the Declare War Clause only gives Congress the power to invoke the legal implications of a state of war, but it does not assign exclusive control over war-initiation. According to this interpretation, Article II vests the President with broad constitutional powers and supplies a basis for the President to function as the leading institutional actor in deciding whether to commit U.S. forces overseas.

Certain observers argue that there is a long-standing tradition of Presidents initiating conflicts without first seeking congressional approval, and that this practice supports the constitutionality of presidential power. Others contend that, as a large legislative body, Congress lacks the institutional capacity to act with the speed and decisiveness required to employ armed forces when necessary.

The Interbranch Debate on Initiating Military Action

Like scholars, the legislative and executive branches have expressed differing views on their respective powers to initiate military action. In a joint resolution enacted in 1973 known as the War Powers Resolution (discussed in detail in other CRS products), Congress stated that the Constitution only permits the President to introduce troops into hostilities (or situations where hostilities are imminent) if Congress

has declared war, specifically authorized the President to use force, or there is a national emergency created by an attack on the United States or its territories. The executive branch contends that it is not legally bound by this interpretation and that the Constitution provides to the President far greater authority than the War Powers Resolution permits.

The executive branch's interpretation of the Declare War Clause and the President's independent power to initiate military action has sometimes changed under different presidential administrations. According to the Office of Legal Counsel (OLC) in the Department of Justice, Article II affords the President constitutional power to "deploy the military to protect American persons and interests without seeking prior authorization from Congress." This interpretation gives the President "a great deal of discretion" to decide what events warrant U.S. military intervention. OLC and other executive branch officials have sometimes expressed the view that the President has plenary authority to initiate military action in response to overseas threats, and Congress can only curtail presidential action in this field using the power of the purse. More often, however, OLC has opined that the Constitution's assignment to Congress of the power to declare war implies that no other branch of government can bring the United States into a "full-scale war" without congressional authorization. Under the latter view, military action cannot rise to the level of what OLC describes as "'war' in the constitutional sense" without congressional authorization.

Although OLC's prevailing view is that the Declare War Clause limits presidential power, the executive branch has also at times reasoned that only "prolonged and substantial military engagements" rise to the level of what OLC calls war in a constitutional sense. The executive branch has never publicly concluded that a military operation crossed the threshold into an unconstitutional war, but it has opined that a variety of military operations do not reach this level. For example, OLC concluded that deployments of 20,000 ground forces, a two-week air campaign including 2,300 combat missions, and an air campaign involving over 600 missiles and precision-guided munitions did not amount to wars in the constitutional sense. Even when Congress enacted authorizations for use of military force—including in the Vietnam War, Persian Gulf War of 1991, post-September 11 conflict of Afghanistan, and the 2003 Iraq War—each presidential administration claimed that they possessed independent constitutional authority to engage in those conflicts even if Congress had not authorized them. Accordingly, it is unclear whether any military action short of a "total war" akin to the First and Second World Wars would, in the executive branch's view, amount to a war in the constitutional sense that requires congressional authorization.

Judicial Reluctance to Resolve the Constitutional Debate

Despite the wide disagreement over how the Constitution allocates power to commit U.S. forces to hostile circumstances, the judicial branch has generally refrained from resolving cases that require resolution of this dispute. Lower federal courts have frequently declined to decide challenges to presidential authority to deploy U.S. force into conflicts overseas, holding that the plaintiffs could not meet threshold constitutional standards required for federal court jurisdiction. Courts have based these decisions on several justiciability doctrines that limit federal court review, including standing, mootness, ripeness, and the political question doctrine.

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