

ON UNILATERAL PRESIDENTIAL WAR POWERS

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Thanks to the Penn Federalist Society for inviting me to participate on this great panel.¹ The only regret I have is that I, a Philadelphia native, could not speak in person, nor join all of you at Pat's or Geno's and teach all of you how to eat cheesesteaks gracefully without letting the Cheez Whiz dribble.

I hope to touch on several ideas today, ranging from the delegation of war powers to the role of international treaties. But they all stem from the powers enshrined in the Constitution, so that is where we should begin too.

Constitutional War Powers

First, I should thank President Joe Biden who, once again, has made a Federalist Society convention a rousing success, this time by bombing Syria just in time for us to talk about its constitutionality.²

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1. This essay has been adapted from remarks delivered at the 2021 Federalist Society National Student Symposium in a debate on "Unilateral Presidential War Powers" with John B. Bellinger III, Prof. Claire Finkelstein, Prof. Saikrishna Prakash, Prof. Ingrid Wuerth, and, as Moderator, Hon. Neomi Rao of the United States Court of Appeals for the District of Columbia. The original debate can be viewed at The Federalist Society, *Panel III: Unilateral Presidential War Powers*, YOUTUBE (Mar. 20, 2021), <https://www.youtube.com/watch?v=RpFIUEQizco> [<https://perma.cc/N55M-4QAD>].

2. Ellen Knickmeyer, *Rivals Seeking to Gain as Biden Mulls Approach to Syrian War*, AP NEWS (Mar. 23, 2021), <https://apnews.com/article/joe-biden-us-approach-syria-war-8025c05507326d7e896b85802119f0f4> [<https://perma.cc/M5W7-YWCY>].

Let me just briefly explain my position that President Biden's February 26, 2021 attack on Syria,³ like President Trump's attack on Syria⁴ and President Obama's attack on Syria,⁵ was constitutional.

Liberals and conservatives often have problems with consistency on war powers. Senator Bernie Sanders, for example, heavily criticized President Trump's attack on Syria, calling it unconstitutional.⁶ He did not criticize President Obama's attack on Syria as unconstitutional, and I do not think he has criticized President Biden's attack on Syria.

Inconsistency on war powers has afflicted both originalists and those in favor of a living Constitution. For a long time, conservatives who tend to be originalists were somehow functionalists when it came to war powers. Judge Robert Bork, for example, gave a speech at the Federalist Society many years ago arguing on functionalist grounds that Congress did not have to declare war before the President could launch hostilities under his or her commander-in-chief power.⁷ Meanwhile, progressives or liberals, most notably Professor John Hart Ely, were strong originalists when it came to war powers.⁸ Professor Ely famously said that all wars, big or small,

3. David Martin & Margaret Brennan, *U.S. Airstrikes Target Iran-backed Militias in Syria in Biden's 1st Military Action*, CBS NEWS (Feb. 26, 2021, 7:06 PM), <https://www.cbsnews.com/news/syria-us-airstrikes-iranian-militia-target> [https://perma.cc/C6TQ-WGDM].

4. Daniel Arkin et al., *Trump Announces Strikes on Syria Following Suspected Chemical Weapons Attack by Assad Forces*, NBC NEWS, (Apr. 14, 2018, 8:56 AM), <https://www.nbcnews.com/news/world/trump-announces-strikes-syria-following-suspected-chemical-weapons-attack-assad-n865966> [https://perma.cc/8GPZ-SM3N].

5. David Greenberg, *Syria Will Stain Obama's Legacy Forever*, FOREIGN POL'Y (Dec. 29, 2016), <https://foreignpolicy.com/2016/12/29/obama-never-understood-how-history-works> [https://perma.cc/PQC9-NUSH].

6. Max Greenwood, *Bernie Sanders: Trump Has No Authority to Broaden War in Syria*, THE HILL (Apr. 11, 2018, 12:23 PM), <https://thehill.com/homenews/senate/382665-bernie-sanders-trump-has-no-authority-to-broaden-war-in-syria> [https://perma.cc/LT9W-U3EW].

7. Robert H. Bork, Judge, U.S. Ct. of App. for the D.C. Cir., Speech at the University of San Diego Law School: The Great Debate (Nov. 18, 1985), available at <https://fed-soc.org/commentary/publications/the-great-debate-judge-robert-h-bork-november-18-1985> [https://perma.cc/UX8G-VSGW].

8. See Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility*:

had to be approved by Congress first, except for cases of self-defense.⁹

I believe that originalism or constitutional interpretation, if properly conducted, shows there is a different system for warmaking policy, one quite different than the domestic legal system where Congress undeniably sets policy that the President carries out under the Take Care Clause.

The Constitution divided what had been a combined set of powers under the British Crown¹⁰ and gave some to Congress—like the power to declare war, the power to raise troops, the power to fund the military¹¹—and gave others to the President—like the executive power¹² and, of course, the role of commander in chief.¹³ Rather than create a singular process, as with the passage of legislation,¹⁴ the Constitution armed each branch with different powers and decided to let politics sort it out. That is how the practice of war powers has worked out historically.¹⁵

Let me also say, I have always thought one of the most compelling approaches to the Constitution is that of Chief Justice Marshall in *McCulloch v. Maryland*.¹⁶ In *McCulloch*, Chief Justice Marshall reads the clauses of the Constitution in harmony with each other.¹⁷

Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1374 (1994) (“Ely is firmly in the congressional camp on this question of constitutional foundations [of the power to declare war].”).

9. *Id.* at 1385.

10. *Royal Prerogative*, The Magna Carta of Edward 1 (1297), 25 Edw. 1.

11. U.S. CONST. art. I, § 8.

12. U.S. CONST. art. II, § 1.

13. U.S. CONST. art. II, § 2.

14. U.S. CONST. art. I, § 1.

15. *Power to Declare War*, U.S. HOUSE OF REPS.: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Origins-Development/War-Powers/> [<https://perma.cc/LU9A-DGTR>] (last visited Aug. 20, 2021).

16. 17 U.S. (4 Wheat.) 316 (1819).

17. See *id.*; see also Cass R. Sunstein, *Beyond Marbury: The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2596 (2006) (comparing *Chevron* to *McCulloch* because both cases grant the executive “discretion to choose its own preferred means to promote statutory ends”).

If you adopt Chief Justice Marshall's approach, you will see that the Declare War Clause does not create a system that requires Congress to pre-approve the use of force abroad.¹⁸ Take a look at Article I, section 10 of the Constitution.¹⁹ This is the prohibition on states waging war. Notice that, at the end of Article I, section 10, the Constitution says, "No state shall, without the consent of Congress" — paralleling the declare war view of the Constitution — "engage in war" — not declare war — "unless actually invaded, or in such imminent danger as will not admit of delay."²⁰ Article I, section 10 includes the exceptions in writing that many scholars who think Congress has the dominant hand in war concede must exist, but since they do not appear in the Declare War Clause, they must read it in.

If the Constitution is so clear, so careful in dividing the war powers between the federal government and the States, why did the Framers not use the exact same language to achieve the exact same result when it came to the difference between the President and Congress? Instead, the Framers use very different language. It seems evident that the Framers created a political process rather than a legal process for bringing the United States into war.

Delegating War Powers

The Supreme Court has said that the nondelegation doctrine does not apply to foreign affairs. That is the point of *United States v. Curtiss-Wright Export Corp.*,²¹ which is probably the most famous and criticized decision by the Supreme Court on foreign affairs. In *Curtiss-Wright*, the Court said regardless of whether the nondelegation doctrine applies domestically, it does not apply when it

18. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 245 (1996) (arguing that a declaration of war was an instrument of setting international relationships, not of initiating hostilities).

19. U.S. CONST. art. I, § 10.

20. U.S. CONST. art. I, § 10, cl. 3.

21. 299 U.S. 304 (1936).

comes to foreign affairs.²² Justice Sutherland further held that the President had a broad sole organ power to set foreign policy.²³

That is the current doctrine. In terms of the original understanding, I do not think it would have occurred to the Framers as a question of delegation. What they had in mind was what they had seen in the 100 years of British constitutional history before the Founding.²⁴ They saw that the Crown and the Parliament fought over war through, primarily, Parliament's power to cut off funds for the Crown's wars.²⁵

The Crown would often start a war.²⁶ Sometimes the king himself would lead the battles without any declaration of war.²⁷ You would not see Parliament getting upset because there was no declaration of war. Instead, Parliament would control the war through its authority over funds.²⁸ It would not pass legislation or declarations of war to control warmaking. Instead, Parliament used the harder tool of funding.

For what it is worth, my view on the nondelegation doctrine domestically is that if Congress wants to stop anything that an agency does, it knows how to do it quite easily, which is to attach a funding rider here and there. When funding is at issue, the agencies snap to it. I think that tool works well in constraining executive action in both domestic and foreign affairs.

Interpretive Consistency and Separation of Powers

22. *Id.* at 315–16.

23. *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800)).

24. See generally Yoo, *supra* note 18, at 196–217 (discussing English historical practice regarding declaration of wars in the eighteenth century).

25. *Id.* at 213.

26. See JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 51 (2005).

27. See Yoo, *supra* note 18, at 216 (“[T]he entire Empire celebrated the battle of Dettin-gen, in which King George II himself led British troops to victory over the French.”).

28. See *id.* at 211–13 (detailing Parliament's influencing in warmaking through its powers over the purse).

I think we still are suffering from a case of what we sometimes call “foreign affairs exceptionalism,” whereby the law on particular foreign affairs is just different than domestic affairs. Many people think Congress ought to have the same power over war that it has over domestic affairs. That leads people to ask: why does Congress not have the right to use the same tools to control the President in war that it would normally use when it comes to building a power plant or shutting down a pipeline?

For judges, the answer has to rest on what the Constitution says, which should turn on original meaning. Are originalists, however, going to be consistent? Are critics willing to be originalist in foreign affairs or on the war powers and then apply those same commitments to all other questions of constitutional interpretation? Are they willing to be originalists on the question of the administrative state or the role of the courts in the expansion of individual liberties? Why is it that originalism is only applied in foreign affairs but not to questions of the Due Process Clause or questions of deference to the agencies under *Chevron*?²⁹

The second point I would make in particular about the role of the courts is that if several of the other speakers on the panel are to be believed and the practice of war powers for the last sixty or seventy years has been unconstitutional, are they calling for courts to intervene and strike down all of these wars? If that is the case, do they also believe that courts should be equally interventionist in the decisions of the executive branch, and particularly the administrative state, on domestic questions?

Why is it that we see progressives urge such enormous deference to agencies domestically but not in foreign affairs?³⁰ Look at the

29. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

30. See, e.g., Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2378 (2006) (arguing that the President should be constrained in his decision to send troops to engage in hostilities); Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 67 (2013) (arguing that the President has the authority to exercise prosecutorial discretion to grant temporary reprieve from deportation to a large class of illegal aliens).

enormous demands for judicial deference to the decisions of agencies and executives on the question of the COVID–19 pandemic and lockdowns.³¹ I often find some of the same people demanding intrusive judicial review in foreign affairs would not adopt the same posture toward the workings of the executive branch on domestic affairs.³²

I do not expect President Biden to be consistent on these questions. President Biden has already flip–flopped on this. He wrote a law review article where he called for more changes to the War Powers Resolution to make it stronger and tougher to stop presidential adventurism in military affairs.³³ This is the same Joe Biden who just attacked Syria without seeking permission beforehand from Congress.³⁴

I expect President Biden, like many Presidents, will have taken one position before he was President, such as granting Congress the premier role in foreign affairs. But then once in office, Biden will

31. See, e.g., Lawrence Gostin, *The Supreme Court's New Majority Threatens 115 Years of Deference to Public Officials Handling Health Emergencies*, FORBES (Dec. 11, 2020, 11:00 AM), <https://www.forbes.com/sites/coronavirusfrontlines/2020/12/11/the-supreme-courts-new-majority-threatens-115-years-of-deference-to-public-officials-handling-health-emergencies/> [<https://perma.cc/C58P-DUJ>].

32. Compare Ian Millhiser, *The Only Remaining Check on Trump Is the 2020 Election*, VOX (Jan. 7, 2020, 8:10 AM), <https://www.vox.com/2020/1/7/21048243/trump-2020-election-iran-soleimani-no-law> [<https://perma.cc/8U5K-FZLQ>] (“The federal judiciary frequently defers to the president’s decisions on national security, even when those decisions shock the conscience As a practical matter, the U.S. has few enforceable checks against a reckless commander in chief.”), with Ian Millhiser, *Yes, Covid–19 Vaccine Mandates Are Legal*, VOX (July 30, 2021, 7:30 AM), <https://www.vox.com/22599791/covid-vaccine-mandate-legal-joe-biden-supreme-court-jacobson-massachusetts-boss-employer> [<https://perma.cc/YLT5-5A8B>] (explaining that Congress could get around the Supreme Court’s case law and use its commerce and taxation powers to effectively require U.S. residents to receive a COVID–19 vaccine).

33. See Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L.J. 367, 394–99 (1988).

34. JOSEPH R. BIDEN, JR., NOTIFICATION OF A TARGETED MILITARY STRIKE, H.R. DOC. NO. 117–19, at 1 (2021).

use traditional presidential powers over war just as his predecessors have.

It is very easy for Congress to respond if it wants to. Professor John Bellinger and I worked on the negotiations over the Authorization for Use of Military Force (AUMF) in 2001.³⁵ Congress was heavily involved in both the 2001 and 2002 AUMFs, and its negotiators asserted the constitutional right to approve wars beforehand. They also raised questions about how long the AUMF should run, what would happen if Al Qaeda morphed into different organizations, should the authority be limited to a single region, or a certain kind of conflict.

But when it came time to vote on the AUMF, nobody in Congress actually wanted to impose those limitations. The problem is not that Congress lacks powers. Congress ended the Mexican–American War.³⁶ Congress ended the Vietnam War.³⁷ The problem is that Congress does not want to use the ample powers it has.

I do not think the Constitution has a defect. It is just that Congress does not want to, for political reasons, take responsibility and accountability for war decisions. Congress is happy to fund an enormous, offensive army. Our military is not designed for homeland defense; it is designed to carry out wars in other people's countries. Congress has created a military that is designed for offensive operations. But it does not want to take responsibility for how that army is used. I do not think we should reread the Constitution in different ways to force Congress to take accountability when it is going to do everything it can to escape it.

Defining Powers and the Office of Legal Counsel

Some people suggest that the Office of Legal Counsel (OLC) should be an impartial arbiter of interpreting the Constitution in

35. See Authorization for Use of Military Force, 115 Stat. 224, Pub. L. No. 107–40 (2001), *codified at* 50 U.S.C. § 1541.

36. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, art. XIII, 9 Stat. 922 (1848).

37. Pub. L. No. 93–52, § 108 (1973).

order to provide a check on what the executive officials want to do. I disagree. OLC's role flows from the President's authority in constitutional interpretation, which is all the authority OLC could, at its maximum, ever exercise. OLC is just exercising the delegation to the Attorney General from the President or the President's ultimate authority to interpret the Constitution for the executive branch.

I would not say the President is supposed to be an impartial arbiter of constitutional disputes among the branches. The President interprets the Constitution because he has the Article II authority to take care that the laws are faithfully executed.³⁸ As part of that responsibility, he or she must interpret the law. The President should come to the interpretation that he or she thinks is best, but that does not mean that the President is a neutral arbiter.

Some say that the courts should be a neutral arbiter, but sometimes I do not think that they are. I do not think Congress is neutral either. I think the Constitution creates a departmental system where each branch interprets the Constitution for itself within its area of competence. The Constitution expects the branches to fight over its interpretation as over other subjects. Out of that fighting emerges a practice or consensus about what the Constitution means. But this does not create a system where any one branch has any supreme authority, including the courts. No branch has supreme authority over the final meaning of the Constitution.

I think that is what OLC has come to be, but I do not think that was what it originally was. Historically, it was an offshoot of the Solicitor General's department,³⁹ and the Solicitor General's job was to represent the interests of the executive branch in Supreme Court litigation.⁴⁰ The OLC split off from the Solicitor General's office when its job of adjudicating disputes among the agencies became

38. U.S. CONST. art. II, § 3.

39. Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 234–35 (2013).

40. Todd Lochner, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 554 (1993).

too significant and distracted from the advocacy function of the Solicitor General's office.⁴¹

I disagree with OLC's work product on war. Since the Clinton years, OLC has taken the view that wars that were small, short, and not too dangerous to U.S. personnel did not need congressional approval.⁴² I just do not think that is the correct answer. If that test were right, then the United States could drop a nuclear bomb on an enemy, and that would not be a war because no U.S. ground troops would be involved. By dropping a nuclear weapon, the ability of the enemy to attack us would be zero. Yet that is the test that OLC essentially adopted: no ground troops, no chance of American casualties, so therefore, no war.

Consider Libya—we tried to kill the head of state of another country, Muammar Gaddafi.⁴³ I happen to disagree with the OLC test in that case, but I do not think it means OLC itself has to be reformed or changed. And I do not think President Biden and Merrick Garland are going to change the OLC. They will act just like White Houses and Justice Departments in the past when it comes to war.

Treaty Obligations and War Powers

It is not the subject of our discussion today, but I am sure everybody is familiar with the question of self-executing and non-self-executing treaties. There is a debate over whether we are a country

41. Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2087 (2008).

42. See *Deployment of U.S. Armed Forces into Haiti*, 18 Op. O.L.C. 173 at 173, 177, 179 (1994). Though not listed in the cited opinion, the proposition is in volume 18, per other citations to the opinion and the OLC website.

43. Bernard Weinraub, *U.S. Jets Hit Terrorist Centers in Libya; Reagan Warns of New Attacks if Needed*, N.Y. TIMES (Apr. 15, 1986), <https://www.nytimes.com/1986/04/15/politics/us-jets-hit-terrorist-centers-in-libya-reagan-warns-of-new-attacks.html> [<https://perma.cc/DMX3-PZN3>]; *Timeline: Libya's Choppy Relations with the U.S.*, REUTERS (Jan. 3, 2008, 1:23 AM), <https://www.reuters.com/article/us-libya-usa-timeline/timeline-libyas-choppy-relations-with-the-u-s-idUSGOR32651420080103> [<https://perma.cc/SU2M-G3AB>].

where most treaty obligations must be carried out by statute or by administrative regulation in the same way that those same policies would be carried out domestically, or whether treaties are self-executing and courts can enforce them directly without implementation by the political branches.⁴⁴ I have written that these treaties are non – self-executing and require statutory or regulatory enactment.⁴⁵ But if all treaties are presumptively self-executing, which is the majority view among international law scholars, then why is the NATO treaty obligation not automatically legally binding in domestic law?

This was the constitutional issue that killed the Treaty of Versailles.⁴⁶ People may remember that one of the arguments that Senator Henry Cabot Lodge made was that the United States could not join the League of Nations because Congress would be delegating its war powers to an international organization.⁴⁷

My point is a little different. It is that a treaty cannot create a new domestic legal obligation to go to war. A treaty is just a promise, but then we still have to go through the normal domestic process—however you think the Constitution distributes war powers—in deciding whether to live up to the treaty obligation or not. The treaty itself cannot change the Constitution’s allocation of power between the President and Congress. Those who believe most treaties are self-executing must take a different view. It must be that the treaty’s existence creates a domestic legal obligation, and we must

44. See William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 350 (2010).

45. See John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2219 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999).

46. S. COMM. ON FOREIGN REL., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 3, 37, 110 (Comm. Print 2001); see John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 758 (2001) (explaining that the Treaty of Versailles failed because it did not meet the constitutional threshold and was not passed as a statute).

47. *The Struggle Over the Reservations*, 68 CURRENT OP. 139, 141–44 (1920).

carry it out, unless the President terminates the treaty.

Concluding Thoughts

The topic of the President's war powers will continue to inspire worthwhile debate. You might remember Arthur Schlesinger, Jr. He wrote the book *The Imperial Presidency* after the Vietnam War, which was a long critique of the slow, gradual presidential accumulation of powers over war.⁴⁸ But before the Vietnam War, Schlesinger argued that nuclear weapons rendered domestic war powers obsolete because a nuclear missile made war too quick.⁴⁹ It removed the time frame for Congress to deliberate about war. There were a number of scholars in the period between the end of World War II and Vietnam who thought that the Constitution had to be interpreted differently because of the challenge of new military technologies.⁵⁰

This is a phenomenon that we will face again. I predict that ultimately, our application of the Constitution to new technology — as in, say, cyber warfare—will enhance presidential power. Cyber warfare shows again the weakness of Congress as an institution to exercise the war powers that some people are calling for, especially given the difficulty in attributing the origins of an attack and how quick and easy attacks are to wage. It seems to me that, regardless

48. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

49. See Arthur Schlesinger, Jr., *Congress and the Making of American Foreign Policy*, FOREIGN AFFS. (Oct. 1972), <https://www.foreignaffairs.com/articles/united-states/1972-10-01/congress-and-making-american-foreign-policy> [https://perma.cc/5UKT-WP7Z] (“[I]f foreign policy becomes the property of the executive, what happens to democratic control? . . . [T]he invention of nuclear weapons has transformed the power to make war into the power to blow up the world. And for the United States the question of the control of foreign policy is, at least in its constitutional aspect, the question of the distribution of powers between the presidency and the Congress.”).

50. Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1543–44, 1582 (1988); William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1, 1, 4–5 (1986); Stephen L. Carter, *The Constitution and the Prevention of Nuclear Holocaust: A Reaction to Professor Banks*, 13 J. LEGIS. 206, 206–08 (1986).

of how you think the Constitution originally should be read to allocate war powers, cyber warfare is going to lead to more authority by the executive branch over how to conduct war.

Do you think Congress would ever really vote, or want to vote, on whether to conduct a campaign in cyber against another country or against a non-state actor beforehand? I doubt it. I would be shocked, actually, if it did.

The President's unilateral war powers are strong, both constitutionally and, with increasing frequency as time passes, in practice.

