

Constitutional Law: War Powers

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In the 20th and 21st century, an issue has emerged in American Politics. That issue is who declares war. Many would say that the United States Constitution is clear and states who has the power to declare war. Article 1, Section 8, Clause 11 of the U.S. Constitution states, that the United States Congress has the power to declare war¹. That clause has only one interpretation, The United States Congress has the full authority to start war if needed and Congress is the only one that can declare it. However, The Presidency of the United States has found a loop hole to undermine this constitutional clause. The main argument used by the President of the United States is that the constitution gives him/her the authority to go to war without asking the United States Congress for permission due to the Commander-in-Chief clause. This clause is located in Article 2, Section 2, Clause 1. The clause states that, The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States². The President is given authority by the Constitution to command and serve as leader of the armed forces who are sent to fight in combat.

The question is, does the President of the United States have the authority to declare war or go into war without asking Congress permission even if the United States Constitution gives the office the leadership of the armed forces? The wording of the Constitution doesn't seem to be a problem; Article 1 seems to be clear. But is not giving the President the authority to declare war, disrespecting the role they have as Commander-in-Chief? Many scholars have looked into this argument

¹ *U.S. Constitution, Art. I, § 8.*

² *U.S. Constitution, Art. II, § 2.*

of who has the power to declare war and many cases have been in court to resolve this dispute. This research will give a solid answer on who has the power to declare war.

When looking up the in the United States Congress library, the official number states that the United States Congress has declared war 11 times³. Those wars include Declaration of War against Great Britain in 1812, Germany in 1917, Austria-Hungary in 1917, Japan in 1941 and Germany again in 1941. The major wars the United States was involved in, were approved by Congress. Declaring war did not seem to be an issue up to that point, but after the World War II victory, this started to become a problem within American Politics. The problems happening in Asia in the early 1950s and 1960s changed the role the President had in the U.S. Armed Forces. Wars in Vietnam and in Korea are technically wars but not officially. The President of the United States did not get any authorization from the Legislative Branch in order to get involved in any of those two wars in the Pacific. In 1973, the United States Congress through legislation tried to stop Presidential Actions from entering into conflicts/war without U.S Congress authorization after President Richard Nixon commanded the U.S. Armed Forces to bomb Cambodia while fighting in Vietnam without notifying Congress. This immediately made Congress pass the War Powers Resolution of 1973.

This seemed to be a move by the U.S. Congress to define issue of who declared war. This resolution gave a clear interpretation of what declaring war meant. It re-introduces that Congress is the only one to declare war, that the President has consulted with Congress of all the decisions made while in combat and time periods in which the President

³ *Official Declarations of War by Congress*, United States Senate, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm, (last visited March 19, 2019.)

has to notify Congress of the activities abroad and results. After this resolution was introduced as a public law, the effect and impact it has caused on the executive power are minimal. The United States has gotten into many other conflicts/wars without congressional approval. El Salvador and Grenada in the 80s, Persian Gulf Conflict and many other conflicts/war the U.S. has been involved in. Presidential power over congressional approval has raised serious legal questioning. This has caused legislators to force lawsuits against the Commander-in-Chief. The *Sanchez-Espinoza v. Reagan* case was one of the many times that House Representatives have taken this issue to court. House Members, 12 to be exact, brought this case to the U.S. District Court, District of Columbia. What the House Members claimed was that President Ronald Reagan broke the law by violating the War Powers Resolution by engaging in war activities by providing weapons and military equipment to one of the sides to forcibly remove the Nicaraguan Government from power and asked the judiciary to solve this issue and prevent the President from exercising this unconstitutional action. President Reagan's legal team believed they did not violate the War Powers resolution or any other federal statute that was accused of, and asked for the court to dismiss the case. The decision made by the judiciary was to dismiss that case and stated that this was a non-justiciable question but more of a political question and that on those grounds, it was impossible for them to make decision.⁴ This court case was then brought to the U.S. Court of Appeals in the District of Columbia.⁵ The Circuit judges confirmed the District Court's decision and also dismissed the case.

A more recent case was the *Campbell v. Clinton* case in 1999. This case was a result of the NATO air strikes against Yugoslavia in Kosovo. The

⁴ *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983).

⁵ *Sanchez-Espinoza v. Reagan*, 770 F. 2d 202 (D.C. Cir. 1985).

House Representatives introduced a lawsuit claiming that U.S. involvement with NATO led by President Clinton violated the article 1, section 8 clause 11 of the United States Constitution which states that Congress declares war and that it also violated the War Powers Resolution. House members wanted United States to withdraw any participation in these actions and no longer participate in actions against Yugoslavia. Attorney Andrea Gail Cohen, who was President Clinton's attorney filed a motion to dismiss the case on the grounds that it was not a legal question, it was a political question. The United States District Court of D.C. dismissed the case and stated that the House members lacked standing.⁶ The court believed it was a political question. In 2000, the United States Court of Appeals in D.C. affirmed the decision made by the District Court of D.C. and also dismissed the case giving the same opinion.

When analyzing and looking into the different schools of thought, strong arguments and very well-structured points of view seem to come out. Even if Article 1, Section 8, Clause 11 seems to be clear, scholars and legal masterminds have another view on it. The Commander-in-Chief clause has given a whole new dimension to who declares even if the War Powers Resolution confirms Article 1. The Presidents have changed the term of war and have claimed that many of the conflicts they have entered are more like police actions. Markus Dubber and Mariana Valverde state that United States serves as the police in the world and in the region. They give the example of President Theodore Roosevelt and how he made changes to the Monroe Doctrine, "Roosevelt Corollary" which gave the U.S. power to intervene in conflicts in Latin America. Under this doctrine, the United States can act if they see a threat to democracy or peace in the region.

⁶ *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999).

The President has broad power over foreign affairs, and they guide America Foreign Policy negotiating treaties and having the ability to appoint public officials such as ambassadors and high-rank officials in the State Department. Police Actions are a justification of scholars that side with the President when it comes to having the ability to start conflict. The President is Commander-in-Chief and also deals with the countries' foreign affairs; this gives the President ability to get involved in conflict and label it as Police Action not war. In 2011, President Barack Obama approved of United States participation in a military intervention in Libya against Muammar al Qadhafi in coalition with NATO. This action caused President Obama a lawsuit by congress members. The case was *Kucinich v. Obama*, President Obama was accused of violating the War Powers Resolution and violating the constitution by not having permission to go into war by Congress. District Judge of the District of Columbia, Reggie Walton dismissed the case on the lack of subject-matter. What is interesting is President Obama's defense and the statements given by him and his administration to court and congress. President Obama believed that his actions were not war actions but more of a police action. White House Press Secretary Jay Carney stated that, the operations were, "time-limited military action."⁷ Then President Obama sent a letter to Congress stating that, "The War Powers Resolution did not apply to this case because of the limited nature of the involvement."⁸ He added that he had the authority to conduct these operations, "constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive."

The Presidency uses not only the Commander-in-Chief clause but also, powers over foreign policy. This gives them two claims in their

⁷ *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

⁸ *Id.*

argument of declaring war. The third claim President Obama used was the Political Question. The Political Question has been an ally to the Presidency because this blocks the judiciary from making a decision because the judiciary defines declaring war a non-justiciable question but a Political Question. Political Questions is an automatic dismissal by the court and is sent back to Congress and Presidency to dispute. The judiciary only answers legal questions, political questions make it difficult for courts to give a resolution. John Yoo from Berkeley Law believes that war powers are something that the judiciary can't solve.

“The judiciary’s powers are limited in the area of war powers.”⁹ The judiciary could solve issues in foreign policy but not war powers. This is favorable for the Executive because courts can't get involved and congress has a hard time enforcing war powers.

On the other side of the argument is congress and their claim of declaring war. Many scholars argue that the United States Presidency has exceeded its constitutional limits and have turned in imperial presidency. This claim was made by Arthur Schlesinger when he wrote the book *The Imperial Presidency*. The main argument of Schlesinger is that the President has obtained too much power over war/conflicts and foreign affairs.¹⁰ He sides with constitutionalists that believe the President is not meant to have too much power in his/her hands.

Schlesinger treats war powers just as identified in Article 1, Section 8, Clause 11. Jonathan Turley from George Washington University Law

⁹ John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, California Law Review 84, No. 2 (1996), <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1653&context=californialawreview>, (last visited March 19, 2019.).

¹⁰ Arthur Schlesinger, *The Imperial Presidency*, New York, Popular Library, 1974.

School seems to agree with this idea that declaring war resides in the hands of congress. Turley was the Attorney of the House Members who were the Plaintiffs during the *Kucinich v. Obama* case. During the court, Turley undermined President Obama's statement of the length of the intervention and that was not a war, by stating that, "Military operations constitute of war."¹¹ Legal scholars that believe in congressional power to declare war define military/police actions as an act of war. They try to close the loop whole in which many presidents have held themselves closely too. Scholars believe this argument is a loop hole that helps the executive exceed its' power and its' not consistent with the design of the constitution. Stephen Carter published a research paper in the Virginia Law Review and stated that important decisions like this should not rely on one person and that is why the constitution gave the power to declare war to congress. Carter believes the War Powers Resolution was passed to back Article 1, Section 8, Clause 11, "The genius of the Resolution, with all of its faults, is this: It guarantees that unless the Congress of the United States gives its approval, all of that awesome power will not be concentrated in the hands of a single individual."¹² Louis Fisher in Presidential War Power, states that war declaration has to be a decision made only by congress. Scholars that defend congress believe that Presidents going into conflict is a clear violation of the constitution, the war powers resolution and abuse of presidential power.

Conclusion

The power to declare war seems to be a problem in which both sides

¹¹ *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

¹² Stephen Carter, *The Constitutionality of the War Powers Resolution*, Yale Law School, 1984, https://digitalcommons.law.yale.edu/fss_papers/2225/, (last visited March 19, 2019.)

claim rights to it and have strong academic leverage to back their positions. The legislative branch has power in paper and executive has found loop wholes to form a strong case. Where is the solution? The solution is in the United States Constitution. The solution can be found while researching where the founding fathers got their idea of Article 1, Section 8, Clause 11, the solution can be found in the obligations of congress in relations with armed forces and the solution is in future judiciary resolution.

The founding fathers had a vision that is not questionable or taken out of context. The United States Government was designed to not have a king. Many powers were put in congressional hands because the founding fathers did not want a president to have full authority over many important issues. War is one of them. In the Federalist Papers, Alexander Hamilton stated in Federalist Paper Number 69, that the President was not a king.¹³ The power a king has over war in countries where they have monarchies, is absurd. The king has full autonomy to decide the destiny of armed forces. The reason why Hamilton wrote this was to remind Americans that we had to rely on Congress for many approvals because Congress is the representation of the American people and its will. Article 1, Section 8, Clause 11 cannot be taken out of context because our federalist papers are there to show why our founding fathers wrote what they wrote on the Constitution. The President is the commander-in-chief, but this doesn't mean they can decide whether to go to war/police actions or not. After Congress approves war or police actions, then they can make all the decisions of

¹³ Alexander Hamilton, James Madison, and John Jay. *Federalist No. 69, The Real Character of the Executive*, The Federalist Papers, <https://www.gutenberg.org/files/1404/1404-h/1404-h.htm>, last visited March 19, 2019.)

military strategy and operations. After approval, the commander-in-chief can responsibly command our troops but not before approval. Congress is the only one that can declare war and has the power to fund the armed forces.

Congress has the obligation to support our armed forces on Article 1, Section 8, Clause 11 & 12. Clause 11 gives them the authority to raise and support Armies and clause 12 gives them authority to provide and maintain a Navy. The United States Congress has to support troops but can end any participation or operations by defunding war. Congress can bargain with the President and prevent them from sending troops abroad, by passing resolutions in which they will not fund war/conflicts if the President doesn't fulfill their constitutional duty. War is a serious matter and congress has the constitutional obligation to have a say in whether to go to war or not because its peoples' taxes that are being spent on the war.

The role of the judiciary is crucial to topic like war. The judiciary has been accurate by making the decision of dismissing the cases but in the future, it is key that they set a precedent. Michael Garcia from Congressional Research Service stated that the judiciary has not ruled out a possible resolution.¹⁴ This is a sign that maybe one day, a district court, court of appeals or even supreme court might have a say may set a precedent. It is important and crucial to preserve the separation of powers and rule of law. But if this issue becomes a constitutional problem or by some reason it has an impact that can change society completely, the judiciary, as wise academic intellectuals, have to make a

¹⁴ Michael J. Garcia, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution*, Congressional Research Service, February 17, 2012, 1-20.

decision for the best of us. Only the judiciary can help the United States Congress enforce the declaration of war clause and war powers resolution.