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Stanley Kober: War power and our republic

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At the conclusion of the convention that wrote the American Constitution, Benjamin Franklin was asked what kind of government had been created. "A Republic," he replied, "if you can keep it."

Franklin's warning was a recognition of the fragility of governments based on popular sovereignty. Our founders were trying to find a balance: to create a government strong enough to protect the people from foreign attack and to preserve domestic tranquility, while at the same time not being so strong that it would itself become a danger to their liberties and peaceful pursuits.

Traditionally, the approach to this problem had focused on mechanisms for assuring enlightened government by selecting virtuous leaders, but the founders thought this solution inadequate. "Enlightened statesmen will not always be at the helm," James Madison bluntly acknowledged in the Federalist No. 10. Consequently, power had to be divided, since any concentration of power could lead to abuse. As he famously put it in Federalist No. 51, "ambition must be made to counteract ambition."

Nowhere was this scheme more precisely balanced than in the War Power, which the founders thought so critical to preserving the republican character of our government. Congress was given the power to declare war, while the president was designated as the commander in chief of the armed forces.

This division of power has become the subject of much dispute, highlighted by the conflict in Libya. The focus of the debate has been the compliance of the Obama administration with the 1973 War Powers Resolution, but, fundamentally, it is a debate over the nature of the republic the founders created. Put simply, what are the powers of the commander-in-chief and, what did the founders mean by declare war?

The answer to the first question was provided by Alexander Hamilton in the Federalist No. 69. Contrasting the president's power with that of the British sovereign, he explained that it "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies – all which, by the Constitution under consideration, would appertain to the legislature."

The implication is that the president has no authority, as commander in chief, to initiate war, and that impression is confirmed by even a cursory reading of what the founders wrote and said. For example, when one of the participants at the Constitutional Convention proposed vesting the war power in the president, the proposal immediately died because no one would second it. According to Madison's notes, another participant exclaimed that he "never expect ed to hear in a republic a motion to empower the Executive alone to declare war."

In other words, the founders regarded the power to declare war as the equivalent of initiating war, "leaving to the Executive the power to repel sudden attacks," as Madison explained at the Convention. The founders feared that giving the president the power to initiate war would lead over time to a distortion in the structure of government, with more and more power concentrating in the executive at the expense of the other branches of government, which would upset our constitutional system of checks and balances and, ultimately, threaten the liberties of the American people.

To be sure, defenders of the president's authority to initiate war can point to the practice of recent decades, but in doing so they are, presumably unwittingly, also validating the foresight of the founders. "The tyranny of the legislatures is the most formidable dread at present, and will be for long years," Thomas Jefferson wrote to James Madison on March 15, 1789. "That of the executive will come in its turn, but it will be at a remote period."

Two centuries later, Jefferson's apprehension is before us. If we permit a single individual to decide the question of war, we upset the system of checks and balances that is the foundation of our constitutional government.

We will not keep our Republic.

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