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The Future of Congressional War Powers

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If he is elected president, Mitt Romney will take an oath to “preserve, protect and defend” the Constitution. Yet he has proudly declared that he doesn’t believe in the Constitution—at least in the clear and unambiguous language that the right to declare war belongs to Congress.

The former Massachusetts governor already has embraced discredited neoconservative nostrums about foreign policy. There apparently is no war in which he does not want to intervene, including Syria. He is particularly enthusiastic about the possibility of bombing Iran.

Now he says he will not be bound by the Constitution. On CBS’s *Face the Nation* he declared: “I don’t believe at this stage, therefore, if I’m president that we need to have a war powers approval or special authorization for military force. The president has that capacity now.” At least candidate Romney took a position this year. Back in 2008, he said “You sit down with your attorneys and [they] tell you what you have to do.” So much for reading the Constitution.

Presidents often have used the military without legislative authority, but most such actions have been limited and many had colorable congressional backing. Despite modern presidents who claim the unilateral authority to bomb and invade other nations, many of America’s strongest chief executives recognized Congress’s authority.

For instance, President George Washington said: “The Constitution vests the power of declaring war with Congress; therefore no

offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.” Abraham Lincoln praised the Founders for recognizing war “to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.”

Presidents Woodrow Wilson and Franklin Delano Roosevelt sought declarations of war for the conflicts that defined their presidencies. President Dwight Eisenhower, a former general, said he would not go to war without legislative authority. George W. Bush sought authority to attack Iraq. Even President Barack Obama, charged by his critics with attempting to extirpate American liberty, admitted that he cannot unilaterally attack Iran. (He did, however, claim the right to attack Libya since it was not a war. George Orwell, call your office!)

During the 2008 campaign, candidate Obama explained: “The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” Candidate Hillary Clinton explained: “I do not believe that the president can take military action—including any kind of strategic bombing—against Iran without congressional authorization.” Senator Joseph Biden threatened President Bush with impeachment if the latter bombed Iran without congressional assent since the Constitution gave “Congress the power to initiate all hostilities, even limited wars.”

No doubt, few people would be surprised if President Obama forgot his promise and decided to act unilaterally. Indeed, in recent congressional testimony Defense Secretary Leon Panetta suggested that the administration cared more about getting “international permission” than congressional authority for possible intervention in Syria. But Romney apparently doesn’t believe that the Constitution even theoretically applies to executive war-making.

The Founders didn’t believe they were creating that kind of presidency. Alexander Hamilton wanted something akin to a king, but the vast majority of his fellow constitutional convention delegates did not. The American colonists broke with Great Britain in response to

abusive, untrammled executive power. They didn't want to recreate that system.

Moreover, the early Americans understood, as Randolph Bourne observed, that "war is the health of the state." The most abused, least controlled monarchical power was war-making. James Madison warned: "Of all the enemies of true liberty, war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instrument for bringing the many under the domination of the few."

Madison and his fellow delegates also didn't trust sinful human beings with expansive, unreviewable power. John Jay warned that discreditable motives often led kings "to engage in wars not sanctified by justice or the voice and interests of his people." Pierce Butler insisted that the Constitution did not give the president authority to start wars "as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction."

For these reasons, the Founders consciously impeded rather than facilitated executive war-making. Indeed, the Founders granted the legislature most military powers: raising an army, funding the military, ratifying treaties, approving rules of war and issuing letters of marque. And only Congress could take America into war. Article 1, Sec. 8 (11), stated: "Congress shall have the power . . . to declare war." Said James Madison: the "fundamental doctrine of the Constitution that the power to declare war is fully and exclusively vested in the legislature."

That didn't mean legislators simply got to "declare" that the president had started a war. Of course, the Founders recognized that America could be attacked without warning, which is why they changed the provision's operative word from "make" to "declare." But that did not mean they empowered the nation's chief executive to attack other states without warning. President Romney would have no defense justification for launching a surprise strike on Iran. The consensus of U.S. intelligence agencies is that Tehran does not even have a nuclear weapons program. Without one there is no threat of Iranian

attack—an unlikely prospect in any case since Washington would wipe Iran off of the face of the earth in retaliation. Romney is threatening war to preempt a nonexistent Iranian capability, so the U.S. military could strike at its leisure. If President Romney didn't want to tip his hand, he could ask Congress for a conditional declaration of war.

That candidate Romney seems to view the American presidency as a modern monarchy illustrates why the Founders did not trust chief executives to make war unilaterally. George Mason explained that the president "is not safely to be entrusted with" the power to start wars, so Mason favored "clogging rather than facilitating war." James Wilson made a similar point: "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 in the legislature at large." Thomas Jefferson endorsed the Constitution's "effectual check to the dog of war by transferring the power of letting him loose."

A President Romney would of course command the military, but that position only enables the president to conduct wars authorized by Congress. Even Alexander Hamilton termed the commander-in-chief the "first general and admiral." Hamilton explained that the chief executive's authority was "in substance much inferior to" that of Britain's monarch, and "would amount to nothing more than the supreme command and direction of the land and naval forces . . . while that of the British king extends to the declaring of war."

With the putative Republican presidential candidate taking a seemingly cavalier attitude toward the Constitution, Congress should act now to assert its constitutional role. For instance, Senator Rand Paul (R-Kent.) pushed an amendment to the recent Iran sanctions bill noting that nothing in the act could be construed as authorizing an attack on Iran or Syria. His language was incorporated in the final legislation, though incessant war-hawks such as Senator John McCain (R-Ariz.) insisted that the bill indicate war was still an option. Senator Paul explained: "Before sending our young men and women into combat, we should have a mature and thoughtful debate over the ramifications of and over the authorization of war and over the motives of war." With bipartisan support the House approved a similar

stipulation authored by Representative Ron Paul (R-Tex.), among others.

Virginia's Senator James Webb (D-Va.) has introduced legislation requiring congressional authority, through an expedited procedure, for "humanitarian intervention." Congress faced a stark choice, he argued: "Either Congress must reject this passivity and live up to the standards and the expectations regarding presidential power that were laid down so carefully by our Founding Fathers, or it must accept a redefinition of the very precepts upon which this government was founded."

Yale law professor Bruce Ackerman recently argued that President Obama should go to Congress for legal backing for his expanded bombing in Yemen. Congress authorized the president to respond to the terrorist assaults of September 11, 2001, not attack any nation at any time based on some alleged connection to terrorism. Said Ackerman: "The president should not try to sleepwalk the United States into a permanent state of war by pretending that Congress has given him authority that Bush clearly failed to obtain at the height of the panic after Sept. 11." If the president doesn't request such authority, Congress should impose its will.

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