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Defense Primer: President's Constitutional Authority with Regard to the Armed Forces

Article II, Section 2, Clause 1

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 States....

Commander in Chief

The Constitution makes the President Commander in Chief of the Armed Forces, but does not define exactly what powers he may exercise in that role. Nor does it explain the extent to which Congress, using its own constitutional powers, may influence *how* the President commands the Armed Forces. Separation-of-powers debates arise with some frequency regarding the exercise of military powers.

Early in the nation's history, Alexander Hamilton wrote in *The Federalist*, No. 69, that the Commander in Chief power is "nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy." Concurring in that view in 1850, the Supreme Court in *Fleming v. Page* stated, "[The President's] duty and his power are purely military. As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."

In *Little v. Barreme*, Chief Justice Marshall had occasion to recognize congressional war power and to deny the exclusivity of presidential power. There, after Congress had authorized limited hostilities with France, a U.S. vessel under orders from the President had seized what its commander believed was a U.S. merchant ship bound from a French port, allegedly carrying contraband material. Congress had, however, provided by statute only for seizure of such vessels bound to French ports. The Court held, the President's instructions exceeded the authority granted by Congress and were not to be given the force of law, even in the context of the President's military powers and even though the instructions might have been valid in the absence of contradictory legislation.

In *Bas v. Tingy*, the Court looked to congressional enactments rather than plenary presidential power to uphold military conduct related to the limited war with France. The following year, in *Talbot v. Seeman*, the Court upheld as authorized by Congress a U.S. commander's capture of a neutral ship, saying that "[t]he whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry." During the War of 1812, the Court recognized in *Brown v. United States* that Congress was empowered to authorize the confiscation of enemy property during wartime, but that absent such authorization, a seizure authorized by the President was void.

In the *Prize Cases*, the Supreme Court sustained the blockade of southern ports instituted by President Lincoln in April 1861, at a time when Congress was not in session. Congress had at the first opportunity ratified the President's actions, so that it was not necessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization or in the face of any prohibition. Nevertheless, the Court approved the blockade five-to-four as an exercise of presidential power alone, on the basis that a state of war was a fact and that, the nation being under attack, the President was bound to take action without waiting for Congress. The case has frequently been cited to support claims of greater presidential autonomy by reason of his role as Commander in Chief.

The Supreme Court has also suggested that the President has some independent authority to employ the Armed Forces, at least in the absence of contrary congressional action. In the 1890 case of *In re Neagle*, the Supreme Court suggested, in dictum, that the President has the power to deploy the military abroad to protect or rescue persons with significant ties to the United States. Discussing examples of the executive lawfully acting in the absence of express statutory authority, Justice Miller approvingly described the Martin Koszta affair, in which an American naval ship intervened to prevent a lawful immigrant from being captured by an Austrian vessel, despite the absence of clear statutory authorization.

The expansion of presidential power related to war, asserted as a combination of Commander in Chief authority and the President's inherent authority over the nation's foreign affairs, began in earnest in the 20th century. In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court confirmed that the President enjoys greater discretion when acting with respect to matters of foreign affairs than may be the case when only domestic issues are involved. In that case, Congress, concerned with the outside arming of the belligerents in the war between Paraguay and Bolivia, had authorized the President to proclaim an arms embargo if he found that such action might contribute to a peaceful resolution of the dispute. President Franklin Roosevelt issued the requisite finding and proclamation, and Curtiss-Wright and associate companies were indicted for violating the embargo. They challenged the statute, arguing that Congress had failed adequately to elaborate standards to guide the President's exercise of the power thus delegated. Writing for the Court, Justice Sutherland concluded that the

limitations on delegation in the domestic field were irrelevant where foreign affairs are involved. This outcome was based on the premise that foreign relations is exclusively an executive function combined with the constitutional model positing that internationally, the power of the federal government is not one of enumerated but of inherent powers.

Presidents from Truman to Trump have claimed independent authority to commit U.S. Armed Forces to involvements abroad absent any congressional participation, other than consultation and after-the-fact financing. In 1994, for example, President Clinton asserted authority to order the participation of U.S. forces in NATO actions in Bosnia-Herzegovina based on what his Administration viewed as the President's "constitutional authority to conduct U.S. foreign relations" and role as Commander in Chief. Additionally, President Clinton protested congressional efforts to restrict the use of military forces there and elsewhere as an improper and possibly unconstitutional limitation on his "command and control" of U.S. forces.

In March 2011, President Obama ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973. Resolution 1973 authorized U.N. Member States to take all necessary measures (other than through military occupation) to protect civilians from attacks by the Libyan government and to establish a no-fly zone over the country. Although these operations had not been authorized by legislation, the executive submitted a report to Congress that claimed the President has the "constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad."

In 2018, President Trump ordered airstrikes against three chemical weapons facilities in Syria, where U.S. troops were engaged in armed conflict against the Islamic State (ISIS). The U.S. Armed Forces also have at times engaged Syrian government targets on the justification of defending partner forces, although the extant authorizations for the use of military force against terrorist groups responsible for the attacks of September 11, 2001, and against Iraq in 2002, arguably do not go so far as to permit extension of the conflict to the Syrian government. The Office of Legal Counsel advised the White House that attacks on Syrian government targets are within the President's Commander in Chief powers without need for congressional approval because the President "had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense."

In January 2020, President Trump ordered a strike against an Iranian target in Iraq, killing Qasem Soleimani, the head of the Islamic Revolutionary Guard Corps-Quds Force (IRGC-QF), and Abu Mahdi al Muhandis, an Iraqi security official and founder of Kata'ib Hizballah, an organization deemed responsible for attacks against U.S. and U.S. partner forces in Iraq. The Trump Administration subsequently submitted a report to Congress describing a change to existing legal and policy frameworks governing the use of armed force, which explained the Administration's view that

> Article II of the United States Constitution, empowers the President, as Commander in Chief, to direct the use of military force to protect the Nation from an attack or threat of imminent attack and to protect important national interests. Article II thus authorized the President to use force against forces of Iran, a state responsible for conducting and directing attacks against United States forces in the region.

Under the Trump Administration's apparent view, such use of force does not require congressional consultation or authorization, seemingly without consideration of the likelihood of escalation into "war in the constitutional sense." The report also cited the 2002 authorization for the use of military force against Iraq in support of the operation.

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