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Constitutional Confusion on Military Direction

and Foreign Affairs Powers

I. Introduction

Since the inception of the current Constitution, there has been much confusion on who leads the United States in the realm of foreign affairs and the use of military force. Does Congress have the responsibility and authority to direct action? Does the Executive have that authority? Are they supposed to act in tandem, coming to a joint decision before giving any directives? The reality of the situation is that there is no clear-cut answer to who has the responsibility and the much more contested authority. Congress and the Executive are frequently in conflict, both trying to usurp this power, to expand their authority. The other branch, the judicial, also oftentimes refuses to step in, and when it has over the course of history, frequently contradicts itself. Scholars alike, in their analyses, frequently come to different conclusions about who has the responsibility and authority in the realm of foreign affairs. Not only are Scholars and the Judicial conflicted, but the Framers also could not reach a decision on this subject. All of these groups possess examples that lend themselves to each of the three resolutions above; Congressional Supremacy, Executive Supremacy, and Tandem Action. This essay will analyze Framers', Scholars', and Judicial examples that seem to make a decision on who has the

authority. In the end, I will attempt to explicate my own position on the subject. Forewarning, I too fail to reach a single, clean-cut decision.

It is important to note, I will attempt to stay away from sources that are solely political; documents that were written with the intent to support one President's or Congress's action. Examples of this include the Office of Legal Affair's memorandum and the Majority report relating to the Iran-Conta Affair, as these documents were written to either support or denounce Reagan's actions in this specific circumstance, and do not attempt to answer the question as a whole.

On another important note, all information cited - save citation 9 - herein is referenced in Vol I of David G. Barnum's P.Sc. 366 *National Security and the Constitution*[1] course work. The coursework includes quotes from many other sources. However, to reduce confusion, only the original source will be cited with each quote, instead of two different citations; the original location and the coursework location.

II. Congressional Supremacy

A. Procedurally Reliant

The first possible solution to the question "Who leads the United States in foreign affairs," is Congress. As Adler and George said in The Constitution and the Conduct of American Foreign Policy, "[The] Framers' scheme brought Congress center stage in the foreign policy [process].[2]" This Congressional supremacy referenced by Adler and Gray is primarily rooted in the Framers' intent to have a procedurally reliant government. As Barnum writes, "[Spread throughout the Constitution] are provisions the sole purpose of which is to impose procedural constraints on the exercise by the government of the powers it has been granted.[3]"

B. Inherent Powers

These constraints, which mainly manifest in Article One, the Legislative directive, provide a means for Congress to attempt to usurp foreign policy power when viewed in conjunction with the other powers explicitly prescribed to Congress by the Constitution. Congress oft makes the argument that these procedures leave little room for the Executive to possess powers not explicitly prescribed to them, i.e. inherent powers.

In another attempt to justify its collection of foreign policy and military powers, Congress frequently relies on the Necessary and Proper Clause (Article I, Section 8). As Barnum writes, "This provision... vastly enlarges the overall boundaries of congressional power.[4]" This clause suggests that Congress possesses the very power they frequently argue that the Executive does not have, inherent power. Scholars frequently interpret these two ideas - the Executive's lack of inherent power, and Congress's assertion of inherent power - to expand Congress's authority over foreign affairs.

Furthermore on the Executive's lack of inherent powers, in Youngstown Sheet and Tube Co. v. Sawyer, Justice Black, in his majority opinion, wrote "[The] President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself.[5]" While the question presented in Youngstown did not pertain to foreign affairs (it regarded government seizure of steel mills), Justice Black's comment has a far-reaching effect on the Executive's authority as a whole. Justice Black creates the precedence that the Executive has virtually no inherent power; that any power they wish to use

must be allocated by Congress - presumably within the purview of the Non-delegation Doctrine - or from the Constitution.

C. Relevant Congressional Powers

It is undeniable that Congress possesses explicitly prescribed powers in the realm of foreign affairs. The most notable is the ability to declare war, found in Article I, Section 8, Chapter 11, although it is contested just how far this power reaches. This chapter simply permits Congress to create formal declarations of war. It does not give Congress control over the military, which is still vested in the Executive, as we will explore later. In the same section, Congress is also permitted to conduct commerce with foreign nations and to govern behaviors during a war. These powers relevant to foreign affairs, allotted to Congress, are used to further the claim that Congressional supremacy prevails.

D. Congressional Usurpation

In Federalist No. 48, James Madison remarked on how Congress is constantly expanding its authority and using its inherent power to create or usurp power that may have been allocated to the Executive. Madison wrote, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.[6]" Congress has repeatedly proven this statement to be true, by using the Necessary and Proper Clause to expand its legislative ability and justify legislation that may not be constitutional, seeing as the authority to enact it was not specifically prescribed, however, inferred. Congress frequently does this same thing when it comes to foreign affairs, by attempting to restrict the Executive's actions, specifically in relation to military directives,

such as in Dellums v. Bush (1990), when members of Congress sued the President over his deployment of troops and potential military action. This usurpation again manifests itself in the Youngstown case. In the decision, Justice Burton writes about how Congress has the sole authority to act in emergencies, by passing legislation. Like the last reference to Youngstown, while the question did not pertain directly to foreign affairs, the effects are far-reaching, by setting the precedence that the Executive has no authority to single-handedly act during an emergency, that they must first either get authority from Congress, or let Congress act on its own, and resolve the emergency, However, seeing as the Youngstown case pertained to a domestic issue, the argument could still be made that the 'emergencies' referenced in the Court's decision were only domestic emergencies, and not foreign emergencies also.

II. Tandem Action

Another possible solution for the question, "Who leads the United States in foreign affairs," is that the Executive and Congress should act together in resolving foreign affairs issues and directing the military. However, while this may present as a compromise, this solution seems to have the least examples in Court, and backing by Scholars and the Framers.

To begin looking at this solution, we must first look at the original construction of our government. Madison, again in Federalist No. 48 posed that the Constitution was created in a way that branches of government would be so intertwined, and share so many responsibilities that, "these departments be so far connected and blended as to give to each a constitutional control over the others...[6]" With this in mind, we must recognize that the American Government was created in such a way where it is essentially impossible to separate each branch individually, it is essentially impossible to look at one branch's power without talking about another branch. Because we cannot separate the

branches in most other aspects, we should also look at foreign affairs and military directives through this connected lens. A notable example of this connectedness is how the Executive can nominate people to serve on the Supreme Court, yet, the Senate must confirm the nominee. An example more relevant to foreign affairs is the ability to make treaties. Article II, Section 2, Chapter 2, of the Constitution outlines this process by saying, "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...[7]" This section is a clear example of foreign affairs action that requires the participation of both Congress and the Executive. The Executive cannot enact treaties without obtaining the consent of the Senate, and the Senate has no power to enact treaties, simply approve or reject them. If we wanted to extrapolate this chapter and use it to speculate as to the mindset of the Framers, one could make the assumption that the Framers used this to indicate that foreign affairs powers were to be shared, as they are with treaties.

This can be furthered by Justice Jackson's writing in the Youngstown decision. In it, Jackson creates three distinct 'zones' to categorize how strong a President's actions are. Most relevant to the Tandem Action solution is zone one. In his explanation of this category, Justice Jackson writes, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum...[5]" Through reading this, we can come to understand that when Congress and the Executive act together, there is no question as to if the correct body initiated the action, or whether they took another branch's power, as both Congress and the Executive agreed to said action. In terms of military directives, if Congress first issues a declaration of war, or some resolution permitting the Executive to mobilize the military in a specific manner, there would be no question as to whether or

not the Executive had legitimate authority to do so. Therefore, as Justice Jackson wrote, the Executives authority is at its maximum. The only way the President's act can be held unconstitutional, after support by Congress, is if the Federal Government as a whole does not possess the power. Seeing as we can say, with much certainty, that the Federal Government - be it Congress or the Executive - has the power to direct the military and engage in foreign affairs (see Citation 19, the Compact Clause), if the Executive first obtains Congress's support, there is no questioning the legitimacy of the action.

One point written in *National Security and Constitutional Structure* that I believe is important to note, given the above philosophy about how it is impossible to separate each branch, "[The] absence of congressional participation is fatal to the constitutional validity of the President's action.[9]" This point further proves how there can essentially be no challenge to Executive action with Congressional approval.

However sound the Tandem Action solution presents itself, it also is the most unlikely of the three to come to fruition. Especially today, each branch is constantly trying to gain as much power as possible, without wanting to compromise and allocate powers to the other.

III. Executive Supremacy

The third and final solution to the question, "Who leads the United States in foreign affairs," is the idea of Executive Supremacy. This idea suggests the majority of power is allocated to the Executive, and that they need virtually no approval for resolving foreign affairs issues and directing the military, save what is explicitly laid out in the Constitution (e.g. enacting treaties).

A. History of Bypassing Congress

The idea of Executive Supremacy, in an attempt to, again, gain as much power as possible, is somewhat rooted in the idea of finding technical ways to bypass the Constitution, and Congress, to unilaterally enact foreign policy. Although we have established that enacting treaties is a power shared by Congress and the Executive, the Executive has frequently bypassed the congressional requirement, testing the limits of the idea of Executive Supremacy. The Executive frequently enters into so-called 'executive agreements,' which do not require the formal consent of the Senate. Although an 'executive agreement' and a formal treaty essentially accomplish the same thing, with an 'executive agreement,' the Executive can enact foreign affairs policies without obtaining the consent of the Senate.

A second, more extreme, example of the Executive bypassing Congress, comes in the form of sending the United States Military to fight in de facto wars (wars without a formal congressional declaration of war). Despite being in conflict for approximately 225 years of its 243-year existence[9] (as of 2020), Congress has only declared war five times. All other wars "have been undertaken either without congressional approval or with congressional approval that did not take the form of a formal declaration of war.[10]" Although frequently challenged, Executive Administrations still continue to push the boundaries by enacting foreign policy and directing the military, either without or, in some cases, in opposition to congressional directives.

B. Basis of Powers and Inherent Powers

The majority of the Executive's argument for Executive Supremacy arises out of one section of the Constitution. Article II, Section 2, Chapter 1 states, "The President shall be Commander in Chief of the Army and Navy of the United States...[11]" The Executive uses this to make the argument that, because the President is the leader of the military, he can send them directives without congressional

approval; that congressional declarations of war are more-or-less a formality, rather than permission to act, therefore it is an inherent power of the Executive to command the military without congressional approval. This is not limited to only military directives, but foreign affairs policies as a whole. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations," John Marshall said when speaking in the House of Representatives.

This argument has frequently been backed up by the courts. For example, in United States v. Curtiss-Wright Export Corp. Justice Sutherland, in the opinion of the Court, wrote, "[The] President thus had the discretion to determine what impact a certain policy might have on foreign affairs and make decisions accordingly, even had Congress not authorized him.[12]" Sutherland, in this opinion, sets the precedence that the Executive still follows to this day, that, in the realm of foreign affairs, the Executive does not need congressional approval to enact foreign policy.

The Framers and Scholars, often seemingly had/have a similar perspective; that it is important for foreign affairs and immediate national security to be vested in the sole Executive and that if a foreign affairs power is not specifically allocated, it defaults to the Executive. Alexander Hamilton, in his first "Pacificus" essay, wrote, "with these exceptions the EXECUTIVE POWER (*sic*) of the Union is completely lodged in the President.[13]" Saikrishna Prakash and Michael Ramsey write in The Executive Power over Foreign Affairs, "The President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text... Absent these specific allocations, traditionally executive foreign affairs powers would be Presidential.[14]" Hamilton, Prakash, and Ramsey all explain how foreign affairs powers are vested in the Executive, not Congress. However, it is important to note that this is read with a broad lens of the

term "executive power." Just how much power is allocated all depends on how broad you view the term "executive power." As Barnum explains, "the broad grant to the President of the 'executive power' may entail conceding to the President an enormous reservoir of constitutional authority for foreign affairs and military policy[15]." If you were to read the term "executive power" with a narrow lens, then the Executive's respective powers would then also narrow. However, because we are analyzing Executive Supremacy, and acknowledging their goal of expanding more authority, we will maintain a broad interpretation of "executive power," like Hamilton.

C. Need for a Single Hand of Power

Another prominent argument in support of the idea of Executive Supremacy is that it is not only the right but the responsibility of the Executive to lead the United States in foreign affairs. This argument has only gained strength with the advancement of weapons technologies. Hamilton, in Federalist No. 74, writes, "the direction of war most peculiarly demands ... the exercise of power by a single hand.[16]" In this quote, Hamilton expands on his thought from Federalist No. 70: "It is [, a strong executive,] essential to the protection of the community against foreign attacks.[17]" Herein these essays, Hamilton creates the basis for the Executives argument that, for national security, they must have expansive powers, to create foreign affairs policy, and direct the military.

It is not only the Framers who argue that a strong executive is necessary for national security, but the courts establish this basis as well. In the Prize Cases, President Abraham Lincoln, deployed the United States Military to suppress an insurrection. In the Court's holding, Justice Grier made the point that there need be no special legislative authority afforded to the Executive to direct the military when the United States is confronted with hostilities for the Executive to respond. In fact, Justice Grier

goes so far as to say that it is the Executive's responsibility, and they are bound by oath, to act when threatened by a foreign nation; "the President is not only authorized but bound to resist by force.[18]"

In perhaps the most convincing and direct precedent for the idea of Executive Supremacy, we are presented with the suggestion that the Executive must act if the United States is threatened.

IV. My Position

For me, Justice Jackson's idea that the Executive authority is at its strongest when they act along with Congress is perhaps the most notable argument within this whole topic. The fact that the only way a decision formed using the Tandem Action solution can be challenged and overturned is if the Federal Government as a whole lacks authority seems to me to be the most solid solution. However, I do recognize the need for expediency when certain situations arise. Justice Grier's suggestion that the Executive is bound to act to protect national security, when viewed with Hamilton's reasoning for the need for a strong executive, also seems to be quite important. That is why, given the current state of things, I believe that the Executive and Congress should act in tandem- at most points. But, recognizing how fast security and foreign issues can arise, I do believe that the Executive is authorized to act, solely, when there is an imminent threat. However, when there is not an imminent threat, the Executive should seek out the advice of Congress, in some way or another, be it an act, resolution, or some other notice. In addition, this, to me, recognizes how the Constitution in and of itself was formed, out of compromise. The Constitution was not formed to appease one subset of people, but to attempt to give each subset something they can be satisfied with. The format laid out above continues that mindset.

V. Conclusion

"Who leads the United States in foreign affairs?" Again, the reality of the situation is that there is no clear-cut answer to who has the authority. Congress and the Executive both stake a claim for this authority, and frequently go head-to-head over who has the actual authority. Yet, there are Framers, Scholars, and Justices who have decided all different ways.

Congress, proclaiming Congressional Supremacy, makes the argument that the strict procedural nature of the constitution, along with the few foreign affairs responsibilities prescribed to them gives them the inherent power to be in charge.

The Executive, proclaiming Executive Supremacy, with its history of bypassing Congress, uses the Framers' desire for a strong executive - the only body tasked with the protection of its people, and the only one with an ability for rapid responses - to expand its control over both the military and foreign affairs.

Then there is the answer of compromise, where Congress and the Executive act in tandem to solve foreign affairs issues and direct the military. The answer that seems the most sound, but is the least likely to prevail.

Throughout the history of the United States, there has never been one single answer to this question. Instead, there has been an ever-changing landscape, guided by new interpretations, new rulings, and both Congress and the Executive deciding to push the boundaries, in an attempt to gain more power.

VI. Citations

[1] Barnum, David G. "Volume I: National Security and Constitutional Structure." *P. Sc. 366 National Security and the Constitution*, Department of Political Science, DePaul University.
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[3] Barnum, David G. *National Security and the Constitution*, Volume I, Winter 2022, 2022, pp. 4–4. *National Security and Constitutional Structure*.
[4] Barnum, David G. *National Security and the Constitution*, Volume I, Winter 2022, 2022, pp. 17–18. *National Security and Constitutional Structure*.
[5] Youngstown Sheet & Tube Co. v. Sawyer - 343 U.S. 579, 72 S. Ct. 863 (1952)
[6] Madison, James. "The Federalist Papers." Volume 48. 1 Feb. 1778.
[7] U.S. Constitution. Article II, Section II, Chapter II
[8] Barnum, David G. *National Security and the Constitution*, Volume I, Winter 2022, 2022, pp. 8–8. *National Security and Constitutional Structure.*
[9] Jang Group and Geo Television Network
[10] Barnum, David G. *National Security and the Constitution*, Volume I, Winter 2022, 2022, pp. 17–17. *National Security and Constitutional Structure*.
[11] U.S. Constitution. Article II, Section II, Chapter I
[12] United States v. Curtiss-Wright Exp. Corp. - 299 U.S. 304, 57 S. Ct. 216 (1936)
[13]Hamilton, Alexander. "Pacificus No. 1". 29 June 1793
[14] Saikrishna B. Prakash and Michael D. Ramsey, "The Executive Power over Foreign Affairs," 111 Yale L.J. 231,252-4 (2001).
[15] Barnum, David G. *National Security and the Constitution*, Volume I, Winter 2022, 2022, pp. 18–18. *National Security and Constitutional Structure.*
[16]Hamilton, Alexander. "The Federalist Papers". Volume 74 25 March 1788.
[17] Hamilton, Alexander. "The Federalist Papers". Volume 70 18 March 1788.
[18] Prize Cases, 67 U.S. 635 (1862)
[19] Under Article I, Section 10, Clause 3 of the Constitution (the Compact Clause), Individual States are actually prohibited from entering into Agreements or Compacts with other states or foreign powers and waging war, without the advice of the Federal Government.