The use of military force and the Constitution

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An Indians fan shows a Chief Wahoo sign during the AL Division Series at Jacobs Field in Cleveland on Oct. 4, 1997.

The use of military force and the Constitution

L ast week, for the second time since becoming president, President Donald Trump ordered a military strike on Syria without seeking or obtaining authorization from Congress. Both strikes were responsive to chemical-weapons attacks that, American intelligence analysts say, the Syrian government launched against its own people.

Many believe that these forceful responses to horrific war crimes involving banned weapons were morally justified. But were they constitutional? The text of the Constitution appears to contemplate congressional and presidential roles in any decision to commit American troops to battle - at least in circumstances where the use of force is not clearly a matter of self-defense.

Article One confers on Congress the power "to declare War." It also gives Congress the powers to "raise and support Armies"; to "provide and maintain a Navy"; and to summon "the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

Article Two, in contrast, vests the president with the "executive Power," which some read to encompass broad war-making authority. Article Two also states that the president "shall be the Commander in Chief of the Army and Navy of the United States, maintain a Navy; and to summon the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."
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and of the Militia of the several States, when called into the actual Service of the United States."

Notwithstanding the Constitution's text, presidents have ordered the use of force without congressional approval — and in circumstances other than clear self-defense — throughout our history. And the practice has become more common in recent years.

President Barack Obama did so in Libya; President Bill Clinton did so in Kosovo; and President Ronald Reagan did so in Grenada, to take but a few of a number of possible examples. Thus, presidential unilateralism in war-making is not a practice adopted only by presidents of a single political party. Nor are President Trump's strikes on Syria abrupt departures from recent norms.

In considering the constitutionality of a practice, we tend to look first at what the courts have said. But in this context, judicial precedents are unilluminating. That's because the courts have largely rebuffed efforts to obtain judicial determinations of when the Constitution permits the president to order U.S. troops into action without congressional approval, and when it does not.

In disinclining a judicial role in overseeing the use of military force, courts have invoked justiciability principles such as the standing and "political question" doctrines. In matters of war-making, courts have said, they lack both the institutional competence and constitutional authority to use their power of judicial review.

But the fact that judicial relief is unavailable does not necessarily render the constitutional question academic. For if Congress were inclined to assert its constitutional prerogatives with respect to war-making, there are a host of tangible measures that it could take to enforce its views.

Congress could, for example, formally express disapproval of any unilateral presidential action through a joint resolution of the Senate and the House of Representatives. Or more concretely, it could withhold or even cut off military funding. And in an extreme situation, it could initiate impeachment proceedings against a defiant president.

So what does Congress think about the president using force without authorization and in circumstances other than clear self-defense? In recent years, Congress has remained largely supine in the aftermath of military strikes of this sort. Some argue that this congressional inaction should be understood as acquiescence, if not outright approval.

But in 1973, shortly after the United States withdrew from Vietnam, Congress passed a War Powers Resolution specifying that the president may only commit troops to military action abroad pursuant to a declaration of war; statutory authorization; or a national emergency occasioned by an attack on the United States, its territories or possessions, or its armed forces.

The War Powers Resolution also requires the president to notify Congress within 48 hours of taking military action without congressional authorization, and to impose a 60-day time limit (with an additional 30 days for withdrawal) on any such commitment to troops without an intervening declaration of war or statutory authorization.

Congress has not formally declared war since World War II. It has, however, enacted a number of statutory authorizations to use military force, AUMFs, for certain specified purposes. Congress's most recent AUMFs — passed by joint resolutions in 2001 and 2002 — authorize the use of force against those responsible for the Sept. 11, 2001, terrorist attacks and against Iraq, respectively. Neither would seem to apply to the strikes on the Syrian government.

In any event, the fact that last week's military strike appears to be at odds with the War Powers Resolution does not answer the constitutional question — even if we take that Resolution to continue to reflect Congress's understanding of the Constitution. That's because many believe that the resolution itself is unconstitutional. Those who hold this view believe that the Constitution should be read to give the president more expansive unilateral war-making authority than the resolution contemplates. And so, as is so often the case, round and round we go on the constitutional question.

In the end, we probably can say little more than that there is a range of perspectives on when, under the Constitution, the president can commit troops to battle without congressional authorization. Constitutional scholar Marty Lederman, writing for the Just Security blog, divides commonly held views on this question into three categories.

The first, what Lederman calls the "classical" view, says that the president may act without congressional approval only in those rare situations where doing so is necessary to interdict an attack on the United States or its troops. This view has not carried the day with respect to actual practice in recent decades.

The second, reflecting the other extreme, holds that the president may commit troops to battle whenever he believes it to be in "the national security interests of the United States." This position was articulated in a 2003 opinion on the war in Iraq authored by the Justice Department's Office of Legal Counsel under President George W. Bush. But like the classical position, it has not reflected actual recent practice. (Note that, notwithstanding this opinion, President Bush secured an AUMF from Congress before invading Iraq.)

The third, middle-ground perspective reflects recent U.S. practice. Lederman describes it as follows:

"The president can act unilaterally if two conditions are met: 1) the use of force must serve significant national interests that have historically supported such unilateral actions — of which self-defense and protection of U.S. nationals have been the most commonly invoked; and 2) the operation cannot be anticipated to be sufficiently extensive in nature, scope, and duration to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause, a standard that generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."

The debate over the constitutionality of uses of military force without congressional approval will remain theoretical unless and until Congress takes steps to assert its perceived constitutional prerogatives in circumstances where it believes that the president has gone too far. But congressional action of this sort does not appear to be forthcoming anytime soon.

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