Perhaps the single most important question in American constitutional law is whether the president has authority to take the nation into a foreign war without congressional approval—that is, without either a congressional authorization for the use of force or a congressional declaration of war. A second and related question is whether Congress has authority to regulate the president’s conduct of war—for example, to regulate activities such as surveillance, interrogation, detention, and the use of military commissions.

As we recently passed the 16th anniversary of the September 11 attacks on our nation, I found myself engrossed in Judge David Barron’s book, “Waging War,” which tackles those questions.

Barron is a distinguished judge on the First Circuit and a respected professor at Harvard Law School. During the Clinton and Obama administrations, he served in the Office of Legal Counsel in the Department of Justice. So Barron has the advantage of having confronted in practice the questions he has studied as a scholar.

Barron’s book will no doubt become an essential resource for executive officials, legislative officials, and judges who wrestle with separation-of-powers problems in the national security arena. The book is essential because Barron supplies chapter after chapter of history of how presidents, Congresses, and courts have handled war powers issues—from the Revolutionary War to the present.

When Barron was first contemplating a book about the president’s war powers, he says that he mentioned his proposed topic to his father—himself a law professor—who responded, “I guess you will need to figure out what every president did” (p. 539). That was wise advice. Why? To borrow James Madison’s words, historical practice can help settle the meaning of the Constitution, especially when the constitutional text is unclear or vague. See Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908). The Supreme Court has stated many times that historical practice informs our understanding of what the Constitution means, particularly in

What does Barron’s survey of historical practice show us about those two major questions of war powers law?

First, Barron argues that, with rare exception, presidents from the founding to the present have led the nation into large-scale foreign wars only when they have obtained congressional authorization. Commentators and the media sometimes say that presidents have often led the nation into war unilaterally and that presidents lawfully may do so. But Barron says that those assertions about the Constitution and historical practice are wrong.

Barron starts with the original understanding of the Constitution on this point. He explains that the framers themselves “leaned hard in Congress’s favor when it came to making the crucial decision between war and peace” (p. 22). The text of Article I of the Constitution grants Congress numerous war powers, including the power to declare war. The text of Article II makes the president the commander in chief, thereby ensuring civilian control of the military, among other things. But Article II does not afford the president, at least expressly, any other unilateral war powers. Barron points out that even Alexander Hamilton, who generally favored a strong executive, emphasized in “Federalist 69” that the president lacked the power to unilaterally take the nation into war.

As Barron describes it, that founding understanding has been followed throughout American history: Congress has authorized almost every substantial foreign war waged by the United States. Those wars include: the Quasi-War against France in the late 1700s, the War of 1812 against Great Britain, the Mexican-American War in the 1840s, the Spanish-American War in the 1890s, World War I, World War II, the Vietnam War (through the Gulf of Tonkin Resolution), the Persian Gulf War, the war against al-Qaeda and related terrorist groups beginning in 2001, and the war against Iraq beginning in 2003.

After painstakingly reviewing the text and original understanding of the Constitution, as well as longstanding historical practice, Barron concludes that Congress must authorize or declare war and that presidents do not have unilateral authority to take the nation into war. Barron recounts and concurs with Madison’s statement in the run-up to the War of 1812 against Great Britain: Whether to go to war is a question “which the Constitution wisely confides to the Legislative Department of the Government” (p. 85).

To be sure, it is possible that some presidents throughout our history have sought congressional authorizations or declarations of war for political reasons rather than perceived constitutional obligation. After all, as a matter of politics and prudence, it makes sense for presidents to seek congressional buy-in for what may be a difficult and costly war. In Barron’s view, however, what ultimately matters for purposes of assessing the historical practice and the Constitution is what presidents have done, not the underlying motivations for why they might have done it.

The significant exception to the history is the Korean War. But Barron leaves little doubt that he thinks the Korean War was an unconstitutional exception to the firmly rooted constitutional understanding and historical practice. The subsequent major wars—Vietnam, the Persian Gulf War, the war against al-Qaeda, and the war against Iraq—all were congressionally authorized. Those subsequent examples underscore, in Barron’s view, that Korea was a one-off
anomaly, not a precursor to a changed understanding of the Constitution's allocation of war powers.

As Barron points out, presidents have the exclusive, preclusive authority (and duty) to repel attacks on the United States and on U.S. persons and property, even without specific congressional authorization. See, e.g., The Prize Cases, 67 U.S. 635 (1863). But that is different from the question of whether presidents may unilaterally initiate a war with a foreign country. On that latter question, Barron argues, the answer is no.

What about smaller-scale and temporary uses of U.S. military force abroad? Barron suggests that historical practice has developed in such a way as to allow presidents to take such actions in certain circumstances. But Barron says that those examples of relatively minor military activities do not alter the basic constitutional framework in which Congress must authorize any significant U.S. war in a foreign country. At most, Barron seems to suggest, those examples constitute a limited historical exception to the basic constitutional rule.

How does the War Powers Resolution of 1973 factor into Barron’s analysis? The most important provision of the War Powers Resolution forbids presidents from engaging in hostilities in foreign countries for more than 90 days without congressional authorization. Commentators and the media sometimes suggest that most presidents believe the War Powers Resolution to be unconstitutional. But Barron says that this common account of the presidents’ supposed views is not in fact correct, at least as to the War Powers Resolution’s most important provision, the 90-day provision. Barron contends that no president has definitively stated that this particular provision is unconstitutional. And in practice, almost every president has complied with the 90-day requirement. I say “almost” because there is a question about President Barack Obama and Libya. Of course, President Obama did not claim that this provision of the War Powers Resolution was unconstitutional under Article II. Rather, he said that the nation’s activities in Libya did not constitute hostilities for purposes of the War Powers Resolution, although many observers thought that characterization to be a stretch.

Interestingly, the War Powers Resolution in practice may have green-lighted presidents to take military action for up to 90 days without any additional, specific congressional authorization. Although the War Powers Resolution itself disclaims that possibility, it appears to have become a perhaps-unanticipated result of the War Powers Resolution as it has played out in the real world.

In any event, based on historical practice and the War Powers Resolution, Barron says that Congress and the various presidents seem to have reached a “tacit pact” that tolerates “small-scale, short-term commitments of troops” without congressional authorization but requires “full congressional backing” for “[l]arger and more enduring commitments of force” (pp. 388–89).

Although Barron’s historical study is comprehensive, a few important issues warrant further consideration in the future. For example, Barron treats both congressional authorizations and declarations as satisfying the Constitution’s requirement that Congress make the crucial decision between war and peace. He could perhaps do more in the future to explain the relationship between a congressional authorization for the president to use force and a congressional declaration of war. Both must be signed by the president (or, unlikely as it may be, passed over the president’s veto). The difference between an authorization and a declaration appears to boil down to a question of delegation. When Congress authorizes the president to use force, the question of whether and when to initiate hostilities has been delegated to the
president, subject to whatever constraints the authorization specifies. When Congress declares war against a foreign nation, the nation is immediately in a state of war, which can matter for purposes of certain domestic and international laws. But from the perspective of the Constitution, Barron concludes that both mechanisms satisfy the Article I requirement that Congress make the crucial decision whether to take the nation into war.

Another question that warrants further consideration is the role of the federal courts, and ultimately the Supreme Court, in policing the constitutional and statutory lines restraining the president, assuming Barron is correct about where the lines are drawn. Barron does not fully address that separate question. On the one hand, cases from Youngstown to Boumediene to Zivotofsky I suggest that courts perform their usual role even in the national security context, so long as a plaintiff has standing. On the other hand, on the ultimate question of whether a particular war is lawful, would the Supreme Court decide that a proposed or ongoing presidential use of force is unlawful and approve a declaratory judgment or injunction? Unclear.

In short, Barron advances an important originalist and historical-practice case that presidents constitutionally must obtain—and ordinarily have obtained—congressional authorization to take the nation into any substantial foreign war.

Second, Barron argues that, from the founding to the present, Congress has regulated the president’s conduct of war, on matters such as surveillance, detention, interrogation, military commissions, and other incidents of war.

Barron here builds on two landmark Harvard Law Review articles that he co-authored with Professor Marty Lederman. Those articles argued that Congress possesses the constitutional power to regulate the president’s wartime activities, including surveillance, detention, interrogation, and the use of military commissions, and that presidents do not have much (if any) authority to disregard statutes regulating the conduct of war.

In his book, Barron more fully examines the history of congressional regulation of those activities, as well as presidential responses. With respect to those activities, Barron explains, presidents are “mired in a swamp of statutes” (p. xii). And Barron demonstrates that presidents have complied with those statutes in most circumstances. Today, for example, think about the Foreign Intelligence Surveillance Act, the Military Commissions Act, the War Crimes Act, the Non-Detention Act, the anti-torture statutes. The list goes on. Congress has regulated many aspects of war and national security activities. To be sure, presidents may argue as a matter of policy against certain kinds of legislation. And they may read legislation as favorably as they can in certain cases (a practice that is hardly limited to war-related statutes). But presidents usually do not claim a general Article II power to ignore congressional statutes regulating wartime activities.

Barron starts from the beginning. Indeed, he starts before the beginning. Even before the Constitution, Barron explains, George Washington complied with regulation of his wartime activities by the Continental Congress (although it could be argued that the Continental Congress was simultaneously the executive and legislative authority of the newly united states). Throughout the war, Washington remained committed to the principle that Congress was supreme, even when he disagreed with Congress’s decisions.

Barron argues that Washington’s understanding of Congress as supreme on questions about the conduct of war was shared by the framers who allocated the war powers at Philadelphia in 1787. Article I grants Congress the power not only to declare war, but also to “raise and support Armies,” “provide and maintain a Navy,” “make Rules concerning Captures on Land
Congress and the President in Wartime | B. Kavanaugh

and Water,” “make Rules for the Government and Regulation of the land and naval Forces,” and, of course, “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”

Just a decade after the Constitution took effect, President John Adams “accepted a stunning degree of congressional control” over the war with France (p. 38). And Adams was not an isolated example. The early history of the country, Barron explains, “produced little precedent to suggest the president—by dint of his title, commander in chief—enjoyed an exclusive, uncontrollable power to determine the conduct of war. The Constitution did not by terms secure it. The delegates to the Constitutional Convention did not seem to endorse it. Congress had passed laws ... that were predicated on the assumption that the Constitution was not intended to enshrine it. The Supreme Court issued rulings rejecting it. Presidents conducted themselves as if they did not have it” (p. 99).

That said, during Franklin Roosevelt’s and Harry Truman’s administrations, debate erupted anew over the allocation of war powers. Some advisers—such as Henry Stimson and Dean Acheson—apparently believed that presidents need not comply with legislation regulating the conduct of war. Stimson, for example, “urged Roosevelt to reject a proposed statutory limitation on his right to deploy military convoys in the Atlantic Ocean” (p. 245). And Acheson argued that Congress could not “impose limitations” on Truman’s activities with respect to Korea (p. 305). Such legislation, those advisers argued, infringed on the president’s commander-in-chief power, which they thought gave the president the exclusive, preclusive authority both to take the nation into war and to decide how to wage it. Other advisers, however, strongly counseled against that reading of Article II, arguing that it would render the president equivalent to a king. And ultimately, Roosevelt and Truman did not endorse it.

To be sure, Presidents Roosevelt and Truman—like presidents before and after them—sometimes read statutes not to mean what the statutes seemingly said. But those presidents did not directly advance a general Article II power to ignore statutes regulating their conduct of war.

One of the advisers who counseled caution to Roosevelt was Attorney General Robert Jackson, who would of course later serve on the Supreme Court. In that latter capacity, Jackson would author the single most influential tract on national security separation-of-powers law.

In the famous Youngstown case decided in 1952, Justice Jackson’s concurring opinion established the framework that has become paramount in national security separation-of-powers law. Many people pay homage to the Jackson opinion in Youngstown. But fewer people really understand what it says.

Jackson articulated three categories of presidential wartime action. In category one, presidents are acting with congressional authorization. In category two, presidents are acting with neither congressional authorization nor in the face of a congressional prohibition. In category three, presidents are acting in the face of a congressional prohibition.

The Jackson framework raises two fundamental issues.

First, how do we determine which category a president’s action falls in? It is often assumed that it is easy to tell whether a presidential action falls into category one, two, or three. But it is not easy. It is a question of statutory interpretation that poses all the difficulties that statutory interpretation questions generally pose.

For example, in Youngstown itself, Jackson said that Truman’s action—seizure of private steel mills in the United States—fell into category three. No specific
congressional statute prohibited what Truman did (as Jackson acknowledged). But Jackson concluded that a phalanx of related statutes and failed congressional proposals together reflected a congressional intent to disallow Truman's action. In dissent, Chief Justice Fred Vinson did not directly take issue with Jackson's tripartite framework. Rather, because no statute expressly prohibited what Truman had done, Vinson thought that Truman's action fell into what would be category one or two, not category three. In Vinson's view, Truman's action was therefore permissible; at the same time, Vinson said that Congress still had authority to enact future legislation to prohibit Truman's action (and thereby move the case to category three). But Congress had not yet acted to disallow Truman's action, Vinson argued. For its part, Justice Hugo Black's majority opinion treated Truman's seizure as, in essence, a category two case. But Black made clear that the president has no authority in category one—"at least when taking action against U.S. citizens in the United States."

The bottom line, as Youngstown itself illustrates, is that ordinary but difficult debates over statutory interpretation can rear their heads when courts try to sort a presidential action into one of the three Jackson categories.

Second, what happens in each category? In category one, presidents act with the greatest power they can have in the war powers arena. Their authority is "at its maximum" because it includes all that they have in their own right "plus all that Congress can delegate." 343 U.S. 579, 635 (1952) (Jackson, J., concurring). As the Supreme Court later made clear in Hamdi v. Rumsfeld, when Congress authorizes war, that authorization includes an authorization for presidential activity such as surveillance, detention, interrogation, and the use of military commissions, among other incidents of war—unless Congress has enacted other legislation restricting those activities. But even in category one, a president may still lose if an action violates some other constitutional constraint. For example, if Congress enacts a statute that a president later implements, but it turns out that the statute violates the First Amendment or the habeas corpus clause, then the president will lose even though the president is acting in category one. That is a lesson of Boumediene v. Bush, where the Supreme Court concluded that a provision of the Military Commissions Act of 2006 was unconstitutional. Other than that, however, presidents win in category one.

In category two, presidents operate in a "zone of twilight," and the outcome depends on what Jackson stylishly but very unhelpfully called "contemporary imponderables." 343 U.S. at 637 (Jackson, J., concurring). Here, as elsewhere in constitutional law, historical practice is likely to fill the void.

In category three, presidents are operating at the "lowest ebb" of their power and "what is at stake is the equilibrium established by our constitutional system." Id. at 637–38. In that category, presidents usually lose, as Jackson explained, and as later Supreme Court cases such as Hamdan v. Rumsfeld demonstrated. But not always. The problem is that Jackson was not precise about when the president could prevail in category three. That question has bedeviled us ever since Youngstown. But Barron argues that the general guideposts appear clear as of now. In Supreme Court law, it seems settled that presidents possess exclusive, preclusive power to supervise, direct, and remove subordinate officers in the national security realm, and also possess exclusive, preclusive power to direct specific troop movements, as the court recently repeated in Hamdan v. Rumsfeld. Congress may not interfere with those presidential powers.

But beyond that, Barron says that presidents do not have exclusive, preclusive power to disregard congressional statutes regulating wartime activities such as surveillance, detention,
interrogation, and the use of military commissions. The bulk of Barron’s book is, in effect, an all-out effort to show that his position on that point is consistent with—even dictated by—the grand sweep of American history. Barron says that this approach has been followed throughout most of American history, including (after some initial DOJ opinions that suggested to the contrary) by the George W. Bush administration in the wake of September 11, 2001, as Barron details beginning on page 422 of his book. By taking us through numerous historical examples of the many statutes Congress has passed regulating those kinds of wartime activities and of how presidents have complied with those statutes, Barron explains that the situations where a president may win in category three are rare indeed.

In short, Barron advances a forceful originalist and historical-practice case that presidents must and do comply with congressional regulation of wartime activities such as surveillance, detention, interrogation, and the use of military commissions.

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As to both the initiation of war and the conduct of war, Barron contends that Congress—not the president—possesses the ultimate authority. In support of his conclusion, Barron presents a full-throated argument about the historical practice. He also sets forth an important originalist argument about the Constitution’s allocation of war powers, although some of course may disagree with him on the original meaning.

Barron does not directly address the normative question of whether this allocation of power is the best structure for defending America and preserving liberty. But he leaves little doubt that he thinks this system of shared and separated powers is far superior to a system where a president has unilateral, exclusive, preclusive power to decide whether to go to war and how to conduct war.

Some academic scholarship is far removed from the real world and is irrelevant to judges deciding cases. But some academic scholarship is quite helpful to courts and lawyers. In my 11 years as a judge, David Barron’s articles have been extraordinarily valuable to me as I have thought about national security law and addressed a variety of challenging national security cases.

Barron’s book is similarly essential reading. Those inside and outside of government who confront questions of national security law in general and national security separation-of-powers questions in particular would be wise to make themselves aware of Barron’s important scholarship, even when (actually, especially when) they might be skeptical of or disagree with Barron’s analysis or conclusions. In my office, Barron’s book will occupy a permanent place on the bookshelf next to my desk, along with my dog-eared copies of his prior articles.

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