

A GRAND STRATEGY ESSAY

Domestic Law and National Security Strategy

by Abraham Sofaer

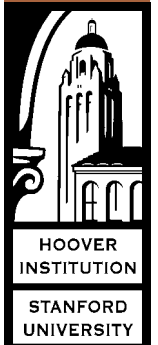
Working Group on Foreign Policy and Grand Strategy

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Effective national security planning depends in part on domestic considerations, one of which is law. The US Constitution and national laws govern the president's freedom to plan and implement a national strategy, and the possibility has existed throughout US history that the applicable rules could be construed or modified in ways that could unduly restrict executive authority or conversely could free the executive from virtually any constraint. In practice, however, US domestic law has consistently allowed US presidents since Washington broad authority to plan for and manage the nation's security, while preserving in Congress the power to approve, disallow, or take no action on executive initiatives.

The debate over the extent to which the executive should be constrained by domestic law in managing the nation's security is as old as the Constitution, and the general pattern in which executive and legislative authority has been exercised has been largely consistent in principle throughout. One of the most significant precedents in American history was set when in 1793 President George Washington issued the Proclamation of Neutrality, seeking to avoid war with both Britain and France. Though Thomas Jefferson voted along with a unanimous Cabinet in favor of the Proclamation, he urged James Madison, then serving in the House of Representatives, to challenge Alexander Hamilton's defense of the president's authority to take a stand that could in theory have led either or both Britain and France to declare war. In the *Pacificus-Helvidius* debate, Madison argued that without the prior approval of Congress the president could take no step — even one intended to preserve peace — that could lead to war. Alexander Hamilton responded on behalf of the administration, arguing that the president needed the authority to speak for the nation on such issues, while conceding (as the president

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did in his message to Congress) that Congress would have the final word.

Washington's view prevailed, and the president has ever since been recognized as having the power to act on most issues of foreign policy and national security without prior legislative approval.

As president, Jefferson adhered verbally to the Republican line of limited executive power, but his great foreign policy achievements (including the Louisiana Purchase and the Tripolitan War) were accomplished through the robust exercise of powers he claimed did not exist.

President Obama, too, began his first term promising to pull back from the broad exercise of executive power by George W. Bush. He distanced himself from the Bush administration's views concerning torture. But in most other respects he continued or even extended the policies President Bush had adopted in response to the attacks of September 11, 2001. He used force along with NATO in Libya without seeking legislative approval, and claimed the power to do so in Syria even as he decided to put the issue before Congress. He greatly increased reliance on drones to attack individual members or supporters of al Qaeda — including American citizens in Yemen — who posed a threat to the United States. He continued to resort to Bush administration methods for collecting electronic evidence, and to invoke the state secrets privilege to terminate litigation. His administration developed new grounds for refusing to comply with the War Powers Resolution, arguing at one point that attacking Libyan forces from the air, beyond the reach of Libya's defensive capabilities, did not put American forces "into hostilities." While he attempted to make much of his determination to try some terrorist suspects in federal court, he continued to hold indefinitely and without charge those suspects against whom the administration lacked sufficient admissible evidence to secure convictions.

Efforts to claim absolute executive powers over aspects of national security have been as inconsequential as efforts made by Congress (or promises by presidential candidates) to subject executive initiative in national security affairs to prior legislative approval. The principle that Congress has the power to set the nation's policies on security issues through legislation has been seldom challenged and never successfully. President Harry Truman lost the steel seizure case on the ground that his action was inconsistent with law. President Richard Nixon advanced the claim of far-reaching executive power over national security without seeking to apply it. And while some of President George W. Bush's lawyers sought to apply claims of absolute

power over all issues related to the exercise of military authority (subject only to fiscal control), the solicitor general was unwilling to make such an argument in *Hamdan v. United States*, where the Supreme Court dismissed the possibility in a footnote, stating: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”

It seems clear, then, that Edward S. Corwin’s profound insight remains the governing principle of executive-legislative relations under US law: the Constitution’s allocation of national security (and other) powers is an “invitation to struggle.” The president continues to have ample authority to lead (and to err) while Congress continues to have the (seldom exercised) power of ultimate control. It seems safe to say that no change in domestic laws is likely to occur to upset this balance.

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Abraham D. Sofaer, who served as legal adviser to the US Department of State from 1985 to 1990, was appointed the first George P. Shultz Distinguished Scholar and Senior Fellow at the Hoover Institution in 1994. Sofaer's work focuses on the power over war within the US government and on issues related to international law, terrorism, diplomacy, and national security.

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The certainties of the Cold War, such as they were, have disappeared. The United States now confronts several historically unique challenges, including the rise of a potential peer competitor, a rate of technological change unseen since the nineteenth century, the proliferation of nuclear and biological capabilities, and the possible joining of these capabilities with transnational terrorist movements. There has been no consensus on a grand strategy or even a set of principles to address specific problems. Reactive and ad hoc measures are not adequate.

The Hoover Institution's Working Group on Foreign Policy and Grand Strategy will explore an array of foreign policy topics over a two-year period. Our goal is to develop orienting principles about the most important policy challenges to better serve America's interests.

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