This episode was transcribed using Popup Archive, an automated transcription service. Please excuse typographical errors.

***[Virginia Prescott] When you're elected president you don't just become president. You also assume the role of the highest ranking military officer in the country the commander in chief. Listener Don McNabb asked us what do we really mean when we say the president is the commander in chief what are the checks and balances on that power of the presidency breaking it down for us today is Michael Paulson constitutional scholar and professor of law at the University of St. Thomas. Hello Michael. Hello glad to be here Virginia. Well glad to have you with us to tell us what grants the president's power of commander in chief.***

[Michael Paulsen] Well the constitution breaks down the war powers between Congress and the president. I mean sort of an enduring theme for the framers of the Constitutional Convention was the separation of powers and the division of powers and the war power just like any other power that you would regard as too important to vested a single set of hands. The framers of the Constitution intentionally divided it between Congress's power to declare war to authorize war and to fund war and to raise troops and provide for an army and navy. And the president's power to execute the war he explicitly vested in Article 2 Section 2 of the Constitution the power of the president to be commander in chief of the Army and the Navy of the United States. And so there's this enduring debate between where the powers of Congress to authorize war leave off and the powers of the president to conduct or manage to execute the wars Pick-Up

***[VP] Have any presidents actually led troops into battle or made decisions in the field?***

[MP] Well that's an interesting question. Obviously General George Washington before he became president of the United States led troops into battle and fighting the Revolutionary War. And I actually think that there was one time when as president of the United States he led us troops into I believe Pennsylvania to put down the Whiskey Rebellion or some such thing. But generally when the president is serving as commander in chief that means that he is the ultimate authority to whom the generals answer he gives the general commands the specific instructions et cetera et cetera.

***[VP] But let's get to the commander in chief. Can they call for specific military operations like drone strikes for example?***

[MP] The president where legally authorized to conduct war is the commander. He makes the decisions as to where to use force when to use force how much force to use whom to attack with what weapons what the rules of engagement are what the rules of captured that tension and interception of enemy communications are. All of the practical and tactical and strategic choices in the conduct of the war would seem to fall within the ambit of the president as commander in chief. Now that's a fearsome and formidable power on its own. But the one power that is clear that the framers meant to withhold from the president is the power to initiate war. They that power they thought in a republic has to rest with the legislature. But let me add a couple of qualifications. One is the framers of the Constitution made a deliberate choice in the wording of Congress power to declare war. Changing it from an earlier draft that said Congress shall have the power to make war. They changed it to declare war. And one of the explanations they gave was that they wanted to leave within the power of the president the capacity to repel sudden attacks to repel attacks on the nation and that of course leaves some fuzzy areas. Nonetheless there have been times when presidents have engaged in military operations without authorization. Some of them have been small and arguably with in the commander in chief power or the executive power of the United States to defend U.S. citizens abroad. There have been rescue operations there have been limited military operations things of that nature. They fall in sort of this gray zone. That's been a problem area in the practice of war powers over the years because it's not clear when something is sufficiently warlike as to constitute a war when it falls within the president's inherent powers to protect the nation from attack and to protect its citizens and military forces abroad.

***[VP] Can anybody in the government overrule the president on military matters?***

[MP] That is a difficult and important question. I think the short answer is No. That where Congress has authorized war. The president alone serves as the commander in chief. He is the highest authority that said good presidents will rely heavily on the advice and counsel of their military officers. They will not attempt to direct things themselves. But the ultimate decision as to matters of how to wage war what weapons to use when to stop how to engage the enemy is ultimately for the president alone.

***[VP] What kinds of military decisions need or require presidential approval and which can be made without presidential approval?***

[MP] Well that's really up to the president. You know I'm just a dumb constitutional lawyer so I think that the, the constitutional legal answer is that the president possesses all of the constitutional powers military commander in chief how he wants to see that exercised in his administration is really up to him and his military advisors. Some presidents probably grant the wide range of discretion to their commanders. Some requires specific things to be approved in advance. Some presidents are very hands on and some are very deferential. So I think that the Constitution does not specify process. It vests the power and the president is commander in chief and then he can delegate that or a lot to his military advisors in the way that he thinks appropriate.

***[VP] Let's get deeper into these checks and balances because in 1973 Congress did pass the law. It was called the War Powers Resolution act and what motivated that? And how did that change the president's power over the military.***

[MP] Wow that's a wonderful and complex question. Let me try to break down what motivated it was dissatisfaction with the Vietnam War. The war powers resolution wasn't enacted in 1973 by Congress over President Nixon's veto and it was an effort by Congress to reclaim some of the lost territory of war powers the Vietnam War actually was legally authorized by Congress by the Gulf of Tonkin resolution of 1964 vague and open ended delegation of power or authority to the president to protect United States interests in Southeast Asia. Various presidents took that general authorization and ran with it and Congress by 1972 1973 was dissatisfied with the direction in which it had been taken. So the War Powers Resolution is it's kind of Congress's proclamation of what it understands to be the constitution divisions of war power. And it says that the president only has power to wage war where Congress has authorized it by a declaration of war where it is authorized by a specific statutory authorization or in the case of national emergency responding to an attack on the United States or its possessions or its citizens or its armed forces. So that's basically Congress's sense of the framers intent of the Constitution. Congress then went on to say you should not presidents infer broad war making authority by our general enactments we only mean to authorize war where we have said so. And then there are these multiple sets of complicated provisions where Congress is attempting to regulate the president's use and deployment of military forces.

***[VP] So that was pulling back on presidential power years into a controversial war. How about after 9/11 when the United States began fighting the “war on terror”? Did the commander in chief's realm of power change then?***

[MP] After 9/11 Congress within a week passed the authorization for use of military force of September 18th 2001 which is probably about the most sweeping declaration of war in the nation's history. Authorize the president to use all necessary and appropriate force against those nations organizations or persons that he concludes contributed in any significant way to the 9/11 attacks or who were affiliated with or aided or supported them or to nations that harbored them that gave the president's. And that would include President George W. Bush President Barack Obama. President Trump broad authorization to use force in the war on terror or against terrorist networks affiliated with al Qaeda or nations that harbored related terrorist supported activities and groups. In other words Congress authorized war authorize a war on terror by a sweeping declaration and that brings into play the full powers of the president as military commander in chief and that's led to the various tactics that various commanders in chief have used in the past 16 years.

***[VP] The nature of war has changed considerably of course since the founders granted the commander in chief powers over the military. Now we're looking at cyberwarfare differently targeted strikes what is the commander in chief's role in this, when we're not talking about direct or traditional use of force?***

[MP] The weaponry has changed the means of waging war has changed. But the power has not changed where the president is authorized to use force. He may use such force and weaponry is available at his disposal. You know it's not just flintlocks and muskets and cannons. Now it is nuclear bombs. It is cyber warfare. It is the full technological range of weaponry and use weaponry in a broad sense that that is available to him and all of that the control of all of the means of waging war lies with the president as commander in chief.

***[VP] Michael what do you think the most important thing or maybe misconception to clear up is that we should know about the president's role as commander in chief?***

[MP] Well I think the most important thing is that the role of commander in chief is not a power to initiate war. I think that's become the most common popular misconception is that the president commander in chief he can start whatever wars he wants. To some extent that has been encouraged by practice over the past 50 or 60 years in which presidents have with perhaps disturbing regularity initiated offensive military hostilities is clear from the Constitution the division of power that Congress starts wars. And the president fights them.

***[VP] Michael Paulson really helpful thank you so much. My pleasure. Virginia Michael Paulson constitutional scholar and professor of law at the University of St. Thomas.***