



# APPENDIX FOUR

## A WAR POWERS PRIMER



*This document reflects due diligence done by the Commission's staff,  
but not necessarily the views of the Commission.*

The nature of the war powers of the President and Congress remains more unsettled than virtually any other mainstream of American constitutional law. The following pages provide a brief primer of war powers debates throughout American history. It is not a complete synopsis of the debates, but a simplified overview. For further background, we commend your attention to the readings referenced herein and to those listed in the accompanying bibliography.

## A BRIEF HISTORY OF THE CONSTITUTION AND THE WAR POWERS

Generally speaking, participants in the war powers debate fall into two broad categories. They are: (1) *proponents of the President*, whose membership champions a President with broad executive authority to make war and peace decisions largely independent from congressional participation or approval apart from the appropriations process; and (2) *proponents of Congress*, whose adherents assert that the President generally may not commit armed forces to combat unless Congress authorizes him to do so, except in limited circumstances.

Of course, over more than two centuries of American history, the war powers debates have grown more complex than this simplified framework suggests, and some most certainly would disagree with limiting the discussion to these two categories. Furthermore, for every argument we describe, there exist counterarguments, some of which we may not have included for reasons of brevity. Moreover, one's views may vary depending on the facts of or political circumstances surrounding a particular conflict, whether it is at the initiation or termination stage, or whether it is ongoing.

## THE CONSTITUTION, ITS TEXT, AND THE INTENT OF ITS FRAMERS AND RATIFIERS

The text of the Constitution and the papers reflecting the viewpoints of its Framers and Ratifiers provide support for both the proponents of the President<sup>1</sup> and of Congress.<sup>2</sup> Attempting to determine the original intent of the Framers and Ratifiers is not easy.<sup>3</sup> Records of what was stated or voted on during or following the Constitution's drafting and ratification are fragmented and give rise to differing interpretations.<sup>4</sup> In addition, the plain language of the Constitution neither precludes nor authorizes broad presidential prerogative in the war powers arena.<sup>5</sup> Moreover, the Constitution's text often reflects the compromises and viewpoints not only of the 55 men who drafted the document in Philadelphia, but also the many more who voted on its ratification in each state.<sup>6</sup> Finally, the evidence suggests that those who drafted the text of the Constitution sometimes did so with deliberate ambiguity.<sup>7</sup>

### *Proponents of Congress*

Advocates for a strong congressional voice in matters of war and peace most often assert that both the text and intent of the Constitution provide Congress with virtually the exclusive authority

to determine when America may commit its armed forces to war. In defense of this assertion, proponents of Congress cite Article I, Section 8, which provides that, “The Congress shall have Power ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>8</sup> For proponents of Congress, this provision is understood to mean that only Congress can authorize war. Following congressional authorization, Presidents then are given the power to conduct the war, such as through controlling battlefield operations pursuant to Article II, Section 2 as the Commander-in-Chief.

Proponents of Congress further cite to an early draft of the Constitution, which granted Congress the authority not to “declare” war as in the current Article I, Section 8, but rather to “make” war.<sup>9</sup> Some scholars believe that this change from “make” to “declare” served two purposes: (1) to ensure that Congress did not have the authority to conduct (i.e., “make”) conflict in addition to authorizing (i.e., “declaring”) it,<sup>10</sup> and (2) to grant the President the ability to respond to “sudden attacks,” as James Madison stated, without first having to seek a congressional authorization or “declaration.”<sup>11</sup>

In addition to repelling surprise incursions on American territory, proponents of Congress generally have also conceded that the President may act without the authorization of Congress in other limited circumstances where he would not have time to secure congressional approval, or where direct American interests face immediate danger, such as when American citizens or embassies are at risk in foreign countries.<sup>12</sup> Finally, proponents of Congress believe that Presidents may constitutionally administer and enforce the terms of an armistice or cease-fire designed to terminate conflict involving the United States.<sup>13</sup>

Proponents of Congress additionally cite the statements of prominent Framers and Ratifiers. For instance, in a letter to Thomas Jefferson in 1798, Madison stated that, “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”<sup>14</sup> Similarly, in *The Federalist, No. 69*, Alexander Hamilton of New York, normally viewed as an advocate for executive authority, contrasted his view of the British government with that of the Constitution, when he noted that the power “of the British king extends to the declaring of war ... which by the constitution under consideration, would appertain to the legislature.”<sup>15</sup>

In fact, only one Framer or Ratifier at the Philadelphia Convention of 1787, Pierce Butler of South Carolina, proposed that the power to commence wars should be vested in the President alone. For that suggestion, Butler was roundly attacked by other Framers, including Elbridge Gerry of Massachusetts who remarked that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>16</sup> Other Framers, such as George Mason of Virginia, expressed concern over the potential of *either* the legislature or the executive being vested with too much war-making power, and supported congressional authorization as a mechanism “for clogging rather than facilitating war; but for facilitating peace.”<sup>17</sup> Thus, some proponents of Congress believe that the deliberative process undertaken by both houses in authorizing conflict not only hews to the proper constitutional course, but also serves their own normative goal of decreasing the likelihood of American involvement in war. In fact, at the time of ratification, it was widely believed that the new nation would largely be at peace and that the

Constitution should reflect and ensure that reality.<sup>18</sup>

Some scholars have argued that the Framers' concern that Presidents would fall prey to the lure of "fame" played a critical role in their decision to vest in Congress the exclusive authority to commit America's armed forces to war.<sup>19</sup> William M. Treanor contends that the "crucial problem in structuring [the] government became how to control the desire for fame and renown," especially in relation to "military glory," which the Framers feared might lead a President to commit the nation to war when it was not in the national interest.<sup>20</sup> This concern is reflected in the writings of Madison, Adams, Hamilton, and numerous Federalists and Antifederalists.<sup>21</sup> Treanor argues that "the Founders gave Congress, rather than the Executive, the power to decide whether to start wars because they wanted the warmaking decision to be disinterested, and they feared that Presidents would lead the nation into war in order to achieve a place in history."<sup>22</sup>

### *Proponents of the President*

In contrast, proponents of the President draw support from the text of the Constitution and the writings of its Framers in furtherance of a different position: that the President, and not Congress, should be the primary arbiter of American war and peace decisions. Proponents of the President first contend that Article II, Section 1's "Vesting Clause" implicitly grants the President an array of executive powers not specifically delineated elsewhere in Article II, including powers relating to national defense and war.<sup>23</sup> This arguably broad grant of authority is contrasted with the limited grant of enumerated legislative powers to Congress in Article I, Section 1, which states, "All legislative Powers *herein granted* shall be vested in a Congress of the United States."<sup>24</sup> It is argued by presidential proponents that if the Constitution were intended to limit the executive's power, it would have delineated its power as it did for the legislature.

Second, many proponents of the President question a common interpretation of the "Declare War Clause" of Article I, Section 8. They assert that, according to dictionaries in common use during the late 1700s, the term "declare" was not equivalent to "begin" or "commence," but rather meant "recognize" or "proclaim."<sup>25</sup> Similarly, the proponents of the President assert, the "Declaration" of Independence did not authorize combat so much as it recognized or stated that, as a matter of international law, the former colonies were independent from Great Britain.<sup>26</sup>

Third, for many proponents of the President, Article II, Section 2's Commander-in-Chief Clause provides the President greater authority than proponents of Congress concede. For instance, they contend that nowhere in the Constitution does the text limit the President's use of the Commander-in-Chief powers to instances where Congress has declared war.<sup>27</sup> In addition, proponents of the President contrast the Declare War Clause with Article I, Section 10, which prohibits the states "*without the Consent of Congress ... from engag[ing] in war.*"<sup>28</sup> Had the Framers wished Congress to authorize or consent to all presidential military activity, it would have done so unequivocally, as it did in this provision limiting state authority.<sup>29</sup>

Finally, proponents of the President assert that their views of presidential prerogative do not ultimately relegate Congress to the status of a mere bystander. They contend that Congress is perfectly

capable of controlling the President’s wartime prerogatives through two principal remedies that are clearly articulated in the Constitution: (1) impeachment (Article II, Section 4); and (2) refusing to appropriate funds for disfavored military activity (Article I, Section 8).<sup>30</sup>

## TWO HUNDRED YEARS OF PRACTICE UNDER THE CONSTITUTION

Just as they cite the text of the Constitution and the intent of its Framers and Ratifiers in support of their respective positions, proponents on both sides of the debate likewise seek authority from more than 200 years of American war powers practice under the Constitution.

### *Proponents of the President*

Proponents of the President argue that congressional proponents disregard more than two centuries of presidential practice and that the two branches have long established a “stable, working system of war powers”<sup>31</sup> that is permissible under the Constitution. Under their logic, Presidents have constitutionally dispatched armed forces to conflict on multiple occasions without first having secured congressional authorization. In fact, they note that Congress has declared war only five times in American history, namely: the War of 1812, the Mexican-American War, the Spanish-American War, and World Wars I and II.<sup>32</sup> In contrast, the President has dispatched troops to combat, according to their count, at least 125 times without declaring war. Since George Washington’s term, Presidents have acted on their initiative to wage combat not only to repel ongoing attacks against American territory or to protect the lives of American citizens, as proponents of Congress might permit them to do, but also when:

- (a) Engaging in hot pursuit of aggressors (e.g., Monroe’s incursion into Spanish Florida in 1818<sup>33</sup>);
- (b) Conducting punitive reprisals (e.g., Jackson’s attacks in Sumatra in 1832;<sup>34</sup> McKinley’s response to the Boxer rebellion in China in 1900;<sup>35</sup> Wilson’s invasion of Veracruz, Mexico in 1914;<sup>36</sup> Ford’s bombing of Cambodia in response to the seizure of the U.S. frigate *Mayaguez* in 1975;<sup>37</sup> Reagan’s bombing of Libya in response to state-sponsored terrorism;<sup>38</sup> Clinton’s cruise missile attacks against Sudan and Afghanistan following the U.S. embassy bombings in 1998<sup>39</sup>);
- (c) Preemptively attacking enemies (Nixon’s bombing of Cambodia in 1970);<sup>40</sup>
- (d) Enforcing treaties, international agreements, international law, and acting pursuant to membership in international organizations (e.g., Jackson’s expeditions into Mexico pursuant to a treaty in 1836;<sup>41</sup> Wilson’s occupation of Haiti to support a democratic government in 1915;<sup>42</sup> Truman’s commitment of troops to Korea pursuant to the U.N. Charter and requests from the General Assembly in 1950;<sup>43</sup> Eisenhower’s intervention in Lebanon in 1958;<sup>44</sup> Clinton’s intervention in Haiti in 1994<sup>45</sup>).

Proponents of the President assert that the executive derives his authority for these forays from a variety of sources, including the Commander-in-Chief Clause and the Vesting Clause. They further argue that the demands of speed, secrecy, and efficiency in conducting battle demand one commander, rather than 535, who can act quickly and decisively without being encumbered by a Congress waiting to deliberate or even convene.<sup>46</sup>

Finally, proponents of the President assert that the President is granted implicit authorization in circumstances when Congress has appropriated money to fund hostilities commenced by the President even though it may have never expressly authorized them in the first place. Since Congress has provided the executive with the necessary tools — such as troops, money, and material — the President may commence hostilities on his own initiative when Congress has not previously banned a particular use of force.<sup>47</sup>

### *Proponents of Congress*

As noted above, proponents of Congress concede that Presidents have acted on their own initiative on many occasions. Nevertheless, they assert that, for the first 150 years of the Republic, Presidents generally did so only in certain *limited* matters or pursuant to specific congressional authorization or subsequent congressional approval. Until 1950, the President's unauthorized initiatives consisted of “fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like.”<sup>48</sup> For proponents of Congress, Truman's invasion of Korea in 1950 marked a radical departure from congressional oversight and amounted to an unconstitutional usurpation of congressional authority.

Proponents of Congress believe that the legislature is empowered — and obliged under the Constitution — to authorize all combat, with limited exceptions for emergencies, even if it does not declare war. In fact, while Congress has only declared war five times, it has specifically authorized combat on other occasions, including in Vietnam, Iraq, and Afghanistan. In situations where it has failed to exercise authority over combat, or simply appropriated money to fund hostilities commenced by the President, proponents criticize Congress for abdicating its constitutional authority.<sup>49</sup>

Proponents of Congress contend that where Presidents have chosen to initiate combat without congressional authorization they have acted unconstitutionally, and the fact that this violation has continued for more than 200 years does not make it constitutional.<sup>50</sup> Indeed, much of the rhetoric that has reflected the debates over war powers has come from Members of Congress who have attacked the President for acting unconstitutionally. In 1848, the House of Representatives censured President James K. Polk for dispatching troops for the war with Mexico “unnecessarily and unconstitutionally begun by the President of the United States.”<sup>51</sup> Congressman Abraham Lincoln voted for the resolution, and stated: “Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure.”<sup>52</sup>

The rhetoric continued throughout the twentieth century. In 1919, Congressman Hannis Taylor inveighed against Woodrow Wilson's commitment of troops to World War I, stating: “The unauthorized transportation by the executive power of our conscripted National Militia to the battle fields of Europe, in defiance of section 8, Article I, of the Constitution, will stand out in time to come as the most stupendous act of illegality in all history.”<sup>53</sup> In the aftermath of Truman's commitment of troops to Korea, some Congressmen asserted that he acted unconstitutionally and without their consent.<sup>54</sup>

Later in the century, Members of Congress and others filed suit in federal district court challenging the President's use of force in places such as Cambodia, Grenada, and the Persian Gulf.<sup>55</sup>

## A STRUGGLE FOR POWER BEFORE, DURING, AND AT THE END OF WAR

The debates between proponents of Congress and of the President reflect a struggle for the allocation of war powers during all stages of military conflict. For instance, proponents of the President assert that the President is provided with constitutional authority to initiate conflicts when the President deems it necessary. Whereas, proponents of the Congress contend that the Commander-in-Chief Clause gives the President merely the authority to conduct a conflict only after Congress has authorized it — pursuant to the Declare War Clause and the intent of the Constitution's Framers and Ratifiers.

Historically, most war powers struggles between the President and Congress have been over the initiation of conflicts. These days, however, the struggles focus on the conduct of the conflict (for instance, who gets to decide how enemy combatants are treated, how to structure the domestic surveillance of suspected enemies, and whether practices such as extraordinary rendition, secret prisons, torture abroad, and holding prisoners incommunicado may be allowed, and if so, who may authorize it and who may review these practices).

As with other aspects of the war powers debate discussed above, both proponents of the President and of Congress can point to competing authority to terminate the involvement of American troops in conflict. For instance, Presidents as Commanders-in-Chief may choose to withdraw forces on their own initiative. In contrast, Congress also has the power to conclude a conflict by cutting off funds or through the even more drastic measure of impeachment. In addition, both branches may exercise prerogatives in drafting, negotiating, and entering into treaties of peace. Advocates on all sides of the war powers issue debate the effect of all these powers — and which branches hold which powers in the initiation, conduct, and termination of war.

## FOOTNOTES

- 1 See, e.g., John Yoo, *Point/Counterpoint: Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1688 (2000).
- 2 See, e.g., John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 3 (1993) (On many issues, the intent of the Constitution's Framers and Ratifiers can be "obscure to the point of inscrutability," but with respect to war powers, "it isn't.>").
- 3 See, e.g., W. Taylor Reveley, III, *War Powers of the President and Congress: Who Holds the Arrows and the Olive Branch?* 68 (1981).
- 4 See *id.* at 69. Indeed, both congressional and presidential proponents cite to different statements of the same Founding Fathers - e.g., James Madison and Alexander Hamilton, among others - in support of their respective views.
- 5 See *id.* at 30-31 (Some scholars assert that (a) the text of the Constitution's war and peace provisions is generalized and can give rise to expansive or narrow interpretations, (b) the text grants certain powers to the President and others to the Congress that can be read to cover the same areas, and (c) numerous gaps in the text leave war powers authority undefined.).
- 6 See *id.* at 70.
- 7 See *id.* at 71.
- 8 "Letters of Marque and Reprisal" were grants of government permission to either a private party or government employee to engage in military operations against agents of another country to recover compensation. See, e.g., Ely, *supra* note 2, at 66; Yoo, *supra* note 1, at n. 67; John Yoo, *The Powers of War and Peace* 148 (2005).
- 9 See generally Reveley, *supra* note 3, at 81-85; Ely, *supra* note 2, at 5.
- 10 See generally Reveley, *supra* note 3, at 81-85.
- 11 See generally *id.*
- 12 See Ely, *supra* note 2, at 117-118 (citing *War Powers: A Test of Compliance: Hearings on War Powers before the Subcomm. on Internal Security and Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. 90-91 (1975)).
- 13 See *id.*
- 14 *Id.* at 4 (quoting Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 *The Writings of James Madison* 312-13 (G. Hunt ed. 1906)).
- 15 Reveley, *supra* note 3, at 102.
- 16 *Id.* at 82-83.
- 17 *Id.* at 84. See also Ely, *supra* note 2, at 4 (citations omitted).
- 18 See *id.* at 61 (In Hamilton's view, "Europe is at a great distance from us. Her colonies in our vicinity, will be likely to continue too much disproportioned in strength, to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position be necessary to our security.>").
- 19 See Douglass Adair, *Fame and the Founding Fathers*, in *Fame and the Founding Fathers* 3, 7 (Trevor Colburn ed., 1974).
- 20 See William M. Treanor, *Fame, The Founding, and The Power to Declare War*, 82 Cornell L. Rev. 695, 699-700, 734-40 (1997).
- 21 *Id.* at 733-34, 741-48.
- 22 *Id.* at 758.
- 23 U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.>").
- 24 U.S. Const. art. I, § 1 (emphasis added).
- 25 See John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. Rev. 1639, 1670 (2002).
- 26 See *id.* at 1671.
- 27 See *id.* at 1662.
- 28 See *id.* at 1661; U.S. Const. art. 1, § 10 (emphasis added).
- 29 See Yoo, *supra* note 25, at 1661.
- 30 See *id.* at 1659 (citations omitted) (Madison compared Congress' power of the purse to the manner in which the British Parliament held the purse-strings of the Crown: "The sword is in the hands of the British King. The purse in the hands of the Parliament. It is so in America, as far as any analogy can exist.>").
- 31 John Yoo, *The Powers of War and Peace* 13 (2005).
- 32 See *id.* (citations omitted).
- 33 See *id.*
- 34 See *id.*
- 35 See *id.*
- 36 See *id.* at 139; 158.
- 37 See *id.* at 139.
- 38 See Yoo, *supra* note 25, at 1683.
- 39 See *id.*
- 40 See Reveley, *supra* note 3, at 139.
- 41 See *id.* at 142.
- 42 See *id.*
- 43 See *id.* at 141.
- 44 See *id.* at 144 (citations omitted).
- 45 See Yoo, *supra* note 25, at 1664.
- 46 See Reveley, *supra* note 3, at 197.
- 47 *The War Power After 200 Years: Congress and the President at a Constitutional Impasse: Hearings before the Spec. Subcomm. on War Powers of the Senate Comm. on Foreign Relations*, 100th Cong., 2d Sess. 493 (1988) (testimony of W. Taylor Reveley, III).
- 48 Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1208 (2006) (quoting Edward Corwin, *The President's Power*, *New Republic*, Jan. 29, 1951, at 16).

- 49 See Ely, *supra* note 2, at 49 (quoting *The War Power After 200 Years: Congress and the President at a Constitutional Impasse: Hearings before the Spec. Subcomm. on War Powers of the Senate Comm. on Foreign Relations*, 100th Cong., 2d Sess. 493 (1988)).
- 50 See *id.* at 9-10 (“[P]ast violations are only that - violations - and cannot change the meaning of the Constitution. ... Usurpation isn’t precedent, it’s usurpation.”).
- 51 *Id.* (quoting *Cong. Globe*, 30th Cong., 1st Sess. 95 (1848)).
- 52 Arthur Schlesinger, *The Imperial Presidency* 118 (2004).
- 53 Reveley, *supra* note 3, at 118 (quoting 57 CONG. REC. 1729 (1919)).
- 54 See Louis Fisher, *Presidential War Power* 101 (2004).
- 55 See *id.* at 156, 163, 171.