

The Breakfast Club

Constitutional Minute for 28 June 2025

Presidential War Powers

"If we desire to avoid insult, we must be able to repel it; if we desire to secure peace, one of the most powerful instruments of our rising prosperity, it must be known, that we are at all times ready for War." George Washington, Fifth Annual Address to Congress, December 13, 1793¹

"Great is the guilt of an unnecessary war." John Adams, Letter to Abigail Adams, 19 May 1794²

I need not go into detail as to why the framers gave Congress the sole authority to declare war; European kings, including British kings in the not-too-distant past had shown a nasty habit of unilaterally dragging their nations into wars and then expecting their legislatures to pay for them.

As James Madison explained to Thomas Jefferson in a 1798 letter: *"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. [The constitution] has accordingly with studied care vested the question of war in the Legislature."*³

In the *National Gazette* newspaper, January 31, 1792, Madison wrote:

"Here our republican philosopher might have proposed as a model to lawgivers, that war should not only be declared by the authority of the people, whose toils and treasures are to support its burdens, instead of the government which is to reap its fruits: but that each generation should be made to bear the burden of its own wars, instead of carrying them on, at the expence of other generations." James Madison, *National Gazette*, January 31, 1792.⁴

Notice Madison chose to say: "declared by the authority of the people," and not "...by the people themselves." We routinely think of the Congress as being part of "the government" - which of course it is, instead of an extension of "the people," which it is as well, and more importantly so.

"Few constitutional issues have been so heatedly debated by legal scholars and politicians in recent years as the distribution of war powers between Congress and the President."⁵ That

debate continues to this day and will not in any way be settled by this brief essay. What I will attempt to do is present both sides of the argument. The “For further reading section” at the end contains many good resources to broaden your understanding of this complex issue.

War powers are what today we call “shared powers” or concurrent powers;” i.e. they reside concurrently in more than one branch of the government. Under the Confederation, the Congress had the “sole and exclusive right and power of determining on peace and war.” The Confederation Congress’ prosecution of the War for Independence was none too stellar, leading some at the “Grand Convention” to argue that a Congress was ill-equipped for this function. But once the Convention had settled on the idea of a unitary Chief Executive, the debate then was whether that was the proper place to vest the war-making power. Assigning it exclusively in the Executive smacked too much of a Monarch, albeit an elected one.

In explaining the President’s powers in [Federalist 69](#), Alexander Hamilton calmed fears of an imperial president with power comparable to King George by stating: “The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union.” Hamilton goes on to distinguish other features of the President’s war powers from those of a typical Monarch. We must remember, of course, that the notion of a standing army was anathema; Congress was given the power to fund an Army for only two years at a time. When there was need of an Army it would be “raised,” and when no longer needed, sent home.⁶ It goes without saying that without a standing army, a President would compete with the Judiciary as the “lest dangerous branch.”

Although the Convention at one time was ready to give Congress the power to “make war,” they settled in the end on what we currently have in Article 1, Section 8, which provides Congress the exclusive power to “[to declare War](#).” What does the word “declare” mean? Since at least the year 1552, “the verb “declare” had become synonymous with the verb “commence; they both meant the initiation of hostilities.”⁷ Others insist that “declare” is only a rhetorical device to communicate that a state of war exists.

Besides declaring war, Article 1 also granted Congress the power to “grant [Letters of Marque and Reprisal](#), and make [Rules concerning Captures on Land and Water](#); To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and [Regulation of the land and naval Forces](#); To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”

In comparison with Congress’ extensive war-related powers, Article 2 provided the President only the power to act as “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

Those who argue that this too narrowly describes the President's war powers bring the Vesting Clause in Article 2, Section 1 into play, contending that the "executive power" that the clause vests in a "President of the United States" implies much, much more than merely commanding troops in a war that Congress has declared. Many commentators, for example, feel that implied in the "executive power" (as well as the Commander in Chief power) is the responsibility to keep the nation safe from sudden attack, to include taking action when necessary to subvert or forestall an attack. However, "no delegate at the (1787) convention ever suggested that 'executive power' was a fountainhead of power to make war."⁸

For Originalists like myself, the view of the Framers should be the final word on the matter, but I recognize that today is not 1787, and the world is a much, much more dangerous place, not only to the people who try to keep us safe, the military and first responders, but to average citizens themselves. With respect to the attack on Iran's nuclear weapons program, I think we must grapple with and discuss not only with the constitutional issues involved but the moral issues as well. Perhaps there are times, and perhaps this is one of them, where the Constitution must allow a greater moral issue to temporarily become "the supreme law of the land." Maybe you'll see an essay on this topic in the near future.

Over our 236 years under this Constitution, there have only been five [declared wars](#): the [War of 1812](#), the [Mexican–American War](#), the [Spanish–American War](#), [World War I](#), and [World War II](#). Alternatively, Congress, even the early Congresses, have passed many "authorizations" for the use of military force (AUMF), most recently with wars against Iraq (1991), Afghanistan (2001), and Iraq again (2002). The Obama Administration's "kinetic action" in Libya was quite contentious; there was never any Congressional authorization nor, as Senator Kaine pointed out, has the "War against ISIL" (which had been the subject of an AUMF). As we will see in a moment, the recent attack against Iran's nuclear facilities did not meet any of the three criteria specified in the War Powers Resolution.⁹

George Washington tried desperately to keep his fledgling nation out of the hostilities that repeatedly engulfed the European powers, and was largely successful. John Adams tried likewise, but got into hot water when he was careless forwarding war guidance passed by Congress. Congress authorized attacks on ships taking goods to France, Adams clumsily allowed a privateer to attack a ship bringing goods from France. Chief Justice John Marshall, essentially, ruled Adams was wrong to go beyond the clear wording of legislation the Congress passed and which he had signed.

There was no declaration of war in 1861; it was a "rebellion" of the Southern states Congress faced. But as a "wartime" president, Lincoln found it necessary to willfully breach the bounds of the Constitution in order to "save the union." After unconstitutionally suspending habeas

corpus and declaring martial law in a certain area of Maryland, Lincoln sought and obtained the belated approval Congress.

The Spanish-American War of 1898 was a turning point in U.S. history because it thrust the United States onto the world stage as a global power. By compelling Spain to give up its claims on not only Cuba, but the Philippines, Guam, and Puerto Rico, the U.S. turned from isolationism towards, in the eyes of many, imperialism. This acquisition of new territory made the United States a major player in global politics.

Presidents Teddy Roosevelt and Woodrow Wilson built upon the nation's new status, Roosevelt by sending a newly refurbished navy on a round the world "show of force" cruise, and Wilson by seeking an opportunity to enter WWI as a means of having a say in the postwar world order. If America stayed out, Europe alone would determine its own path forward.

After the attack on Pearl Harbor, FDR waited on Congress to declare war before ordering retaliation. Once war was declared, the Commander-in-Chief power went into overdrive, even to the point of unconstitutionally rounding up and imprisoning 100,000 Americans of Japanese extraction (about 2/3 of them natural-born citizens). Amazingly, in a 6-3 decision,¹⁰ the Supreme Court upheld the detention.

Until the Korean War, U.S. Presidents, with a few notable exceptions, operated within the guidelines of this, shall we say, "historic interpretation" of the war powers: Congress declares the war and provides the troops; the President prosecutes the war as Commander-in-Chief. In June 1950, "Harry Truman's War" changed that paradigm. The swiftness and initial success of North Korea's invasion of the South caught everyone by surprise, and caught Truman with a military still drawing down from WWII. Truman, not certain whether Congress would authorize a unilateral U.S. response, promptly urged the United Nations to intervene; it did, and Truman dispatched U.S. troops under the UN flag led by U.S. General Douglas MacArthur.¹¹

Truman decided that with UN authorization he did not need further authorization from Congress; he was given assurances by Senate Majority Leader Scott W. Lucas that Congress supported the President's use of force and that a formal resolution would undoubtedly pass but was unnecessary, so one was never put to a vote. Following Truman's attempt to take control of the nation's steel mills by Executive Order in 1952, the Supreme Court ruled that a President, no matter what emergencies he may declare, cannot take over private industry or private property without a formal declaration of war, which, of course, Truman had failed to obtain.

After Korea, a steady pattern of presidential war-making took place: John Kennedy, Lyndon Johnson and Richard Nixon in Vietnam, Richard Nixon and Gerald Ford in Cambodia, Ronald Reagan in Lebanon, Grenada, and Libya, George H. W. Bush in Panama, and Bill Clinton in

Somalia, Iraq, Afghanistan, Sudan, and Bosnia -- all conflicts begun without a declaration of war; although some eventually gained congressional authorization.

Vietnam was a watershed event in many ways, not only with respect to the President's war powers, but also in the nation's view of whether all armed conflicts are prima facie legitimate.

The Gulf of Tonkin Resolution was passed by Congress on August 7, 1964 and repealed seven years later. Repeal had little effect on the conduct of the Vietnam War, leading to passage of the War Powers Resolution of 1973 (WPR).

The WPR was intended to check the president's power to commit the United States to an armed conflict without the consent of the U.S. Congress. It hasn't worked all that well. "Lauded by critics of unilateral presidential war power, the WPR was a political success at the time, but it has been a legal failure. In spite of its enactment, presidential war power has expanded ever since."¹²

The Resolution provides that the President can send U.S. forces into combat with either a declaration of war by Congress, with "statutory authorization," or in case of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

After establishing this neat constitutional "playing field," the Resolution then ignored its own restrictions by allowing the President, seemingly without any of the previous preconditions, to commit armed forces to any military action for up to 90 days (an initial 60 days, with a further 30 day withdrawal period) without any authorization by Congress or a declaration of war. The President need only notify Congress within 48 hours of his actions. Although Congress expressed disapproval of some Presidential "war-making" over the years, none resulted in any successful legal action against the President for alleged violations.

In January, 2014, Senator Tim Kaine joined by Senator John McCain (R- AZ) proposed legislation that would repeal the 1973 War Powers Resolution and replace it with a new law that requires greater presidential consultation with Congress before committing military forces to a war or armed conflict. The new law would require the President to consult with Congress before deploying troops into a "significant armed conflict" or engaging in combat operations expected to last more than seven days. It tightens up other provisions of the 1973 Resolution as well, but I think we can already see that without further definition or delineation the phrase, "significant armed conflict" will be quite unhelpful.

More recently, Senator Kaine introduced a resolution that would rein in the Trump administration over any further attacks on Iran without Congressional approval. The measure was defeated on Jun 25 with a 53-47 vote.

Why is all this important? First, anytime American military lives will be put at risk it is a matter of gravest import and we as a nation should be sure we condone the process by which those lives were imperiled and the purpose for which are imperiled. Second, we as a nation have a moral obligation to ensure our military force is used only for morally supportable causes, that we are not being dragged into some “[wag the dog](#)” glory trip by a power-hungry President (or Congress). Third, the potential for innocent civilian casualties must be considered. The Bureau of Investigative Journalism estimates between 423-965 civilians were killed by U.S. drone strikes in Pakistan alone.¹³ Fourth, the war powers carry with them the specter of surveillance, surveillance of actual or potential enemy or perhaps even U.S. citizens giving aid and comfort to that enemy. The bulk collection of phone records by the NSA was justified under the 2001 AUMF. Other civil liberties have been and might again be lost during times of war.¹⁴

The American people, largely ignorant of their Constitution, its history, and the responsibilities of citizenship, have for the most part remained on the sidelines of this issue. Some have indeed mounted vociferous campaigns against these affronts to the Supreme Law of the land, while others (notably the neo-cons) have argued just as vociferously for an “energetic” President with substantial war powers (be to used only to keep us safe and secure, right?).

While the division of Constitutional war-making power today remains fluid and contested, what remains sure is that most modern Presidents, and particularly the current one, will exercise whatever powers, whether war-making or otherwise, that he deems appropriate.

For further reading:

- [Deciphering the Commander-in-Chief Clause](#), by Saikrishna B. Prakash, 2023.
- [Presidential Power and the Constitution](#), by Edward S. Corwin, (Cornell University Press, 1976).
- [The Discretionary President; The Promise and Peril of Executive Power](#), by Benjamin A. Kleinerman, (University Press of Kansas, 2009).
- [The Unhappy Legal History of the War Powers Resolution](#), by Mary L. Dudziak, 2023
- [The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks](#), by Robert F. Turner, 2012.
- [The War Powers Resolution: After Thirty-Eight Years](#), by Richard F. Grimmett, 2013.
- [The War Powers Resolution: Concepts and Practice](#), CRS Reports, Updated March 8, 2019.
- [The War Powers Resolution: Is It Time for a New Approach?](#) by Raymond S. Eresman, 2012.
- [The War Powers Resolution: Time to Say Goodbye](#), by Louis Fisher and David Gray Adler, 1998.

- [War Powers Resolution: Expedited Procedures in the House and Senate](#), by CRS Reports, 06/24/2025.
- [War Powers Resolution: Presidential Compliance](#), by Richard F. Grimmett, 2012.

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Previous Constitutional Minutes can be accessed [here](#).

¹ https://avalon.law.yale.edu/18th_century/washs05.asp.

² <https://www.masshist.org/digitaladams/archive/doc?id=L17940519jasecond>.

³ https://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html.

⁴ <https://founders.archives.gov/documents/Madison/01-14-02-0185>

⁵ *Heritage Guide to the Constitution, Online Edition*, David F. Forte, Sr. Ed., Found at <http://www.heritage.org/constitution#!/articles/2/essays/86/commander-in-chief>

⁶ As opposed to a Navy, which could be “maintained.”

⁷ *Inventing the American Presidency*, Thomas E. Cronin, ed. University Press of Kansas, 1989, p. 123.

⁸ *Ibid*, p. 130.

⁹ The legislation originated in the House as a Resolution, the Senate debated their version as an Act, you will encounter both a War Powers Resolution and War Powers Act in the literature.

¹⁰ *Korematsu v. United States*.

¹¹ It should be noted that the UN Charter requires that the Security Council’s commitment of member nations’ troops must be authorized by these nations’ “respective constitutional processes.”

¹² Mary L. Dudziak, *The Unhappy Legal History of the War Powers Resolution*, (Cambridge, Cambridge University Press: 2023), accessed at: <https://www.cambridge.org/core/journals/modern-american-history/article/unhappy-legal-history-of-the-war-powers-resolution/F2CB327804389ED1EAA5A237F220785E>.

¹³ <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>

¹⁴ Former Chief Justice William H. Rehnquist discusses the loss of civil liberties in wartime in his insightful book “All the Laws but One.”