

# THE EVOLUTION OF WAR POWERS AND PRECEDENTS

When the founding fathers met in Philadelphia in 1787 to draft a charter for the newly independent country, they were acutely aware of two antecedents: the rule of a near-absolute monarchy in England, and the Articles of Confederation that had loosely held the colonies together during the Revolution. When it came to matters of war, they recognized the perils illustrated by King George III with his control over the military and what the legal authority Blackstone said was “the sole prerogative of making war and peace.” The Articles of Confederation, in contrast, had created no central power over war and the armed forces. That had weakened the effort against England and obviously would not serve for future foreign affairs.

The conundrum that faced the delegates was how to maintain civilian authority over the armed forces, prevent war at the whim of an individual, and yet manage war when the cannons began to boom. They struggled for a solution that would separate governmental powers. Ideally, entry into war would devolve upon the people’s elected representatives, but once engaged, the country would be led by a civilian commander in chief, the president. But these were only the basics. What was undefined was how the two branches of government would interact when war clouds gathered, the resources that would be available, and how the influence of experience and precedent would effect a functioning system.

The commander in chief was to control both the army and navy of the United States, but in the debate following the drafting of the Constitution in Philadelphia, whether or not there would even be standing armed

forces became an issue. One critic, "Brutus," a foe of the proposed federalism, spoke for several opponents as he disputed the need for a standing army. In January 1788 issues of the *New York Journal*, Brutus posted diatribes asserting that the history of almost every nation demonstrated that such armies are dangerous to the liberties of a people, and "a cloud of the most illustrious patriots of every age and country, where freedom has been enjoyed, might be adduced as witnesses in support of the sentiment." (Considering that in the eighteenth century it would have been difficult to find lands where even the barest freedom was enjoyed, Brutus had little empirical evidence for his claim.)

Brutus thrust damning words into the mouths of the federalists: "It is a language common among them, 'That no people can be kept in order, unless the government have an army to awe them into obedience; it is necessary to support the dignity of government, to have a military establishment.'" However, he allowed some plausible reasons for raising a permanent armed force, based upon danger from "Indians on our frontiers," or "European provinces in our neighborhood." He proposed that, "as standing armies in time of peace are dangerous to liberty, and have often been the means of overturning the best constitutions of government, no standing army, or troops of any description whatsoever, shall be raised or kept up by the legislature, except so many as shall be necessary for guards to the arsenals of the United States, or for garrisons to such posts on the frontiers, as it shall be deemed absolutely necessary to hold, to secure the inhabitants, and facilitate the trade with the Indians; unless when the United States are threatened with an attack or invasion from foreign power in which case the legislature shall be authorised to raise an army to be prepared to repel the attack."

A bare two days after this polemic by Brutus was published, James Madison, using the pen name of "Publius" for number 41 of the *Federalist Papers*, printed in the *New York Independent Journal*, insisted that the very independence of the nation required it to have a ready military. He noted that those who disputed the extensive powers of government under the Constitution ignored the necessity of such authority as a means to obtain a desired end. "They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust of which a beneficial use can be made." Between Brutus and Madison reverberated the classic argument of whether government, with its potential for oppression, can be rendered benign or is so intrinsically susceptible to evil as to be uncontrollable.

Madison asserted that security against foreign dangers was one of the prime desires of a civil society and was essential to the preservation of the

“American Union. . . Is the power of raising armies, and equipping fleets necessary? . . . It is involved in the power of self-defense.” The final version of the Constitution accepted the need for a trained, full-time army and navy.

One of the foremost contributors to the language of the Constitution, Madison emphasized Article I, Section 9, “No money shall be drawn from the Treasury but in consequence of appropriations made by law.” He stressed that “the legislative department alone has access to the pockets of the people,” and confirmed the intent to ensure that Congress not only possessed the sole authority to go to war, but, with its grip on the national wallet, reigned over the size and regulation of the armed forces. By these means, even in time of war, the commander in chief did not have a free hand. (Notably, the power of the purse shut down the war in Vietnam.)

Mindful that such an army should be small and with recognition of the states’ needs for their own security, there was acceptance of militias controlled by the governors. Outlining “the real characters of the proposed chief executive,” Alexander Hamilton in number 69 of the *Federalist Papers* argued that the president’s authority “will resemble equally that of the king of Great Britain and the governor of New York. . . . The President will have only 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 [federalization of the National Guard].” While the original language of the Constitution flatly gave to the legislature the authority “for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,” numerous presidents have federalized National Guard units for these duties. Lyndon Johnson did so during the urban disorders of the mid-1960s, without benefit of a congressional imprimatur.

Hamilton observed that while as commander in chief of the army and navy the president’s authority might seem the same as that of King George, it was actually “in substance much inferior. . . . It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy, while that of the British king extends to the *declaring* and to the *raising* and *regulating* [all italics Hamilton’s] of fleets and armies; . . . which by the Constitution . . . would appertain to the Legislature.”

Hamilton, a former officer and aide to George Washington in the Continental Army, recognized the importance of a supreme military leader. He observed in number 74 of the *Federalist Papers* that conduct of war “most peculiarly demands those qualities which distinguish the exercise of power by a single head.” As the constitutional scholar Louis Fisher wrote,

Hamilton “understood that ‘command and direction’ [words defining the commander in chief] are more than clerical tasks. They can be powerful forces in determining the scope and duration of a war. Furthermore, the designation awarded a president meant that a civilian would govern the military. The Declaration of Independence contained the grievance that King George III had sought to make the military separate and superior to the civil officials.”<sup>1</sup>

Refining the constitutional imperatives, Congress in 1792 enabled the chief executive to call out the state militias in the event of invasion or an imminent threat from any foreign country or Indian tribe. The statute also provided for similar action to suppress domestic insurrections.

In 1794, farmers in western Pennsylvania refused to pay a federal excise tax on their distilled spirits and violently rebuffed the revenue collectors. As the so-called Whiskey Rebellion started to infect a wider area of the country, Washington, with the imprimatur of a Supreme Court judge, summoned the militias from four states, which quashed the revolt.

During the period from 1798 to 1800, disputes with former friend France brought the nation to the brink of hostilities. Although 166 years later the State Department attempted to cite the “undeclared war” with France as a precedent for the Johnson administration’s offensive operations in Vietnam, Louis Fisher reported that President John Adams did not decide to go to war with France on his own authority. Instead, he asked Congress to prepare the nation for war, similar to Franklin D. Roosevelt’s persuading the legislators during 1940–1941 to pass a number of measures to beef up the armed forces.<sup>2</sup>

One day after Thomas Jefferson succeeded to the presidency in 1801, Congress appropriated the funds for a “naval peace establishment” to go along with the standing army. The bill stated that the half dozen frigates would be “manned as the President of the United States may direct.” Of particular concern was the \$10 million in tributes exacted from the country by four North African states in return for guarantees not to interfere with American ships. Jefferson had decided the ransoms extorted by the “Barbary pirates” were intolerable. He dispatched warships to the Mediterranean with instructions that should the North African governments then declare war on the United States the infant navy should “protect our commerce & chastise their insolence—by sinking, burning or destroying their ships & Vessels wherever you shall find them.”<sup>3</sup>

Having strode to the potential brink of war, Jefferson tossed the issue to Congress, commenting that he was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.”

Hamilton, as usual, argued that Jefferson was defining presidential war power too narrowly. A declaration of war against the country eliminated the need for congressional approval of a response because, how is it that “one nation can be in full war with another, and the other not in the same state”? It did not matter, said Hamilton, if one was the attacker and the other defender; “the rights of both, as to measures of hostility, are equal.”

Revisionist historians have claimed that Jefferson initiated military actions without benefit of congressional sanction. Actually, the Congress of the day enthusiastically voted for a number of bills that authorized Jefferson to deploy armed force against the Barbary States. Likewise, it was enough for Panama to declare war on the United States in 1989 to permit President George H. W. Bush to invade the isthmus without need for a congressional declaration of war.

Congress first availed itself of its right to declare war in 1812, following messages from President James Madison condemning the British, in their conflict with the French, for having engaged in gross affronts to American shipping on the high seas. They had seized U.S. seamen and impressed them into their own navy, confiscated what they called contraband supplies bound for France, and instituted a blockade of American ports. Certainly these amounted to acts of war, and Congress had little choice but to declare war against Great Britain.

The conflict stretched over two and a half years, with severe economic losses caused by a British blockade of Atlantic ports, the burning of Washington, D.C., and significant casualties along the border of Canada. The War of 1812, which became known as “Mr. Madison’s War,” ended in a stalemate—the biggest American victory, the battle of New Orleans, occurred three weeks after a peace treaty was signed. Contrary to the assertions of some jingoists, the United States did not have an unbroken string of victories at war until Korea.

To prosecute the campaigns against the enemy, Madison had called up the state militias, as spelled out in the Constitution, once Congress issued its declaration. But the governors of New England refused to hand over their militias to the secretary of war. The defiance outraged James Madison. He observed that if the states could ignore a legitimate exercise of constitutional principles, the United States could not be considered “one nation for the purpose most of all requiring it.” Furthermore, he declared that without the authorized use of such militias, the country would need to create “large and permanent military establishments which are forbidden by the principles of our free government.”<sup>4</sup>

Fifteen years later, the challenge by the New England governors to Congress and the Militia Act reached the Supreme Court in the form of *Martin v. Mott*. The decision rejected the stand taken by the governors. In the 1827 opinion, the Court not only upheld the right of the commander in chief to call up the militia in these circumstances, it also gave him added muscle. It ruled he had the “authority to decide whether the exigency has arisen belongs exclusively to the President . . . his decision is conclusive upon all other persons.”

While the Court said this applied only to sudden dangers, the question of who defined an imminent threat, as opposed to an open attack, went unanswered. Arthur Schlesinger Jr. remarked, “There started to accumulate within the Presidency the means to force the issue of war on the branch supposedly empowered by the Constitution to make the decision. For the President had the ability to contrive circumstances that left Congress little choice but to ratify his policy.”<sup>5</sup>

Chief executives Lyndon Johnson and Richard Nixon both “contrived circumstances” to legitimize attacks on North Vietnam and Cambodia. Thirty years later, President George W. Bush would appear to have swallowed the 1827 decision whole, as his administration took the country to war in a presumed preemptive strike against Iraq that was endorsed by a Congress that accepted the premises handed it. (That the Bush government sincerely believed what was later proven faulty intelligence does not contravene the issue of contrived circumstances.)

From 1787 until the close of World War II, the United States had dutifully followed Washington’s precept to avoid foreign entanglements—with one exception. That was the 1825 Monroe Doctrine, which said the country would resist any foreign encroachments into the Western Hemisphere. While a unilateral declaration, it did potentially encumber the nation with responsibilities for other countries, and presidents entered into small overt wars in Latin America.

When residents of Texas, aided by an influx of expansionist and opportunistic American adventurers, announced the independence of Texas in 1836, President Andrew Jackson hesitated to recognize the new nation, aware that to the Mexican government the Republic of Texas was merely a province in revolt. Mexico might perceive legitimization of the break-away state as a “declaration of war.” Jackson deferred to Congress, which did not hesitate to acknowledge the independence of Texas.

After Mexico rejected Texas independence President John Tyler in 1844 mobilized the armed forces in the Gulf of Mexico and along the southwestern border of Texas. His secretary of state, John C. Calhoun, said

Tyler would protect Texas against an invasion. Calhoun claimed that such an action fell within the scope of a defensive war that could be waged until Congress approved or forbade it. That hardly squared with the demands of the Constitution. After nearly ten years the United States annexed Texas, which the Mexican government regarded as a just cause of war. Still, the foreign minister indicated a willingness to negotiate on this and other points of dispute.

When Mexico broke diplomatic relations with the United States, President James Polk instructed General Zachary Taylor to move troops across the Nueces River in Texas and into an area that extended to the Rio Grande, then a patch of territory unclaimed by Texas and assumed by Mexico as its turf. Units of its army attacked. Polk ignored doubts about whether the Americans had infringed upon a sovereign nation's turf and advised Congress, "The cup of forbearance has been exhausted. . . . Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil. By act of the Republic of Mexico, a state of war exists between the Government and the United States." That galvanized the majority of Congress to consider a declaration of war. Rather than a formal declaration, on May 13, by a vote of 174 to 14 in the House and 40 to 2 in the Senate, they chose to recognize that "a state of war exists."

Senator Henry Clay of Kentucky denounced Polk's policy. "This is no war of defense, but one of unnecessary and of offensive aggression. It is Mexico that is defending her firesides, her castles and her altars, not we." Elder statesman John Quincy Adams prophesied unforeseen consequences as a result of a serious wound to the spirit if not the letter of the Constitution. He observed that the recognition of a state of war evaded the provision for a declaration of war. To a comrade he wrote, "It is now established as an irreversible precedent, that the President of the United States has but to declare that War exists, with any Nation upon Earth, by act of that Nation's Government, and the War is essentially declared."<sup>6</sup>

In 1846, as he campaigned for Congress in Illinois, Abraham Lincoln, although he held private doubts, along with others urged a quick and united response toward the enemy. It was an acute example of the syndrome of how when the guns begin to boom, politicians tend to support the armed forces no matter what their misgivings, fearful of appearing disloyal to their constituents.

With the passage of time a groundswell of opinion increasingly questioned the events that had led to the war. Early in 1848, freshman Illinois representative Abraham Lincoln now joined fellow dissidents in adding,

to a resolution that praised General Taylor, the statement that the attack on Mexico had been “unnecessarily and unconstitutionally begun by the President of the United States.” The Senate eliminated the comment from the bill. Lincoln had challenged Polk to identify the exact “spot” upon American soil where American blood was shed.<sup>7</sup>

Lincoln followed up with a reply to a letter from W. H. Herndon, his law partner back home and an enthusiastic supporter of the war. “I understand to be your position . . . that if it shall be become *necessary*, to *repel invasion*, the President may, without violation of the Constitution, cross the line and *invade* the territory of another country; and that, whether such *necessity* exists in any given case, the President is to be the *sole* judge [Lincoln’s italics].” Polk actually had gone to Congress to obtain the requisite declaration, but under circumstances that seemed to have left the legislators little wiggle room.

Lincoln cautioned, “Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure.”<sup>8</sup> Notably, for all his reservations about the Mexican venture, Lincoln never availed himself of the means by which Congress could control use of the armed forces. He unfailingly voted funds to support the troops. In the 2004 election, John Kerry was forced to square his vote that permitted the president to invade Iraq with a vote against the appropriations bill. Actually, he had voted for a similar measure with an amendment attached that required a rollback of tax cuts on upper-income earners. That proposal lost in Congress, particularly after President George W. Bush said he would veto it, meaning Bush would have blocked money for the military under fire.

The Mexican War was the most egregious case where Article II, Section 2 bumped up against Article I, Section 8, but during the nineteenth century presidents deployed the armed forces without benefit of congressional authority in a number of less celebrated instances. On several occasions, seagoing bandits captured and looted merchant ships. U.S. Navy ships retaliated, notably in Sumatra and Puerto Rico, by attacking towns rather than seizing the criminals.

President Millard Fillmore in 1852 dispatched Commodore Matthew C. Perry to open up Japan. Ostensibly Perry sailed to the Far East on a peaceful mission to rescue shipwrecked American seamen who had been stranded in Japan and abused while incarcerated. The instructions to him reportedly cautioned, “He will bear in mind that as the President has no power to declare war his mission is necessarily of a pacific character, and will not resort to force unless in self-defense.”<sup>9</sup> The reigning mikado



bowed to the westerners but left unresolved the question as to how, if the Japanese had resisted, Perry could truly meet the requirements for a permissible “defensive” war.

Two years later, the first American gunboats began to prowl China’s Yangtze River, beginning more than seventy-five years of foreign warships plying the inland waters of that sovereign nation, to battle pirates, warlords, and rebels in defense of private American interests and citizens, all without benefit of approval by Congress, other than through appropriations to the navy.

Upon the secessionists’ firing on Fort Sumter on April 12, 1861, President Abraham Lincoln, who little more than a decade earlier had castigated Polk for taking upon himself war powers that belonged to Congress, without convening the legislators added to the army and navy without regard to the limits set by Congress, mobilized the militia, called for volunteers, spent public money not appropriated upon the armed forces, suspended the basic right of habeas corpus, allowed the arrest of citizens denounced as disloyal, and authorized a blockade of the newly formed Confederacy. It was an encyclopedia of violations of the Constitution. Not until some twelve weeks later did the Great Emancipator face a sitting Congress.

While seeking the benediction of the legislators, Lincoln claimed that because a state of emergency existed, threatening the extinction of free government, he had a constitutional right to act. Actually, Article I, Section 8 reserved those powers for Congress.

In his argument, one that resonates still, that emergencies required immediate steps, Lincoln asked, “Must a Government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?”<sup>10</sup> No language in the Constitution defined an emergency, and the use of it as a rationale reverberated in President Harry Truman’s June 1950 deployment of the U.S. military in Korea as well as President George W. Bush’s invasion of Iraq predicated on the imminent danger of a mushroom cloud over the country courtesy of Saddam Hussein.

In only one instance was Commander in Chief Lincoln challenged. Chief Justice Roger B. Taney ruled that the president had no right to suspend habeas corpus for a prisoner accused of leading a secessionist engaged in sabotage. However, officials refused to free the incarcerated man when presented with the writ from Taney. The justice suspended further action with the note that it would be referred to Lincoln with “his constitutional obligation to ‘take care that the laws be faithfully executed.’”

In 2004, Lincoln’s handling of a prisoner would be cited when questions of jurisdiction arose over foreigners and even American citizens in

alleged instances of terrorism or support for foes in both Afghanistan and Iraq. Again, a Supreme Court decision that prisoners were entitled to the standard rights of an accused did not bring relief.

“All theories leak,” theorized the educator Alan Shapiro, paraphrasing an analyst of grammar rules. Theories are dependent upon words whose definitions are subjective, and the Constitution, while a model of precise language, has always been open to interpretation. Even the fullest of prescriptions cannot cover every contingency. Invariably it is the president, whose role as chief executive means he must react to a situation, who has led. It is the president who dispatches the troops, who calls upon Congress to declare war. Under these circumstances, whether it has been whiskey tax resisters, border disputes, or secessionists, the commanders in chief during the eighteenth and nineteenth centuries felt compelled to make a stand. While the measures taken settled the issue of the day, they also established precedents that would further the use of military force and confound the roles of commander in chief and Congress.