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PREFACE

The first edition of this book received a lead review in the New York Times Book Review on May 7, 1995. The reviewer, Theodore Draper, noted that ever since the Korean War, “Presidents have been violating the Constitution of the United States.” He wrote that I had “taken on all of the Presidents and their lawyers who have contrived for almost half a century to offer excuses for autonomous Presidential war-making,” and called my book “a hygienic effort to bring us back to the law.”

Those same goals motivate this third edition. The last two decades have underscored the extent to which the power of war has shifted to the presidency, with little restraint by Congress or the courts and little comprehension by the general public of the damage done to constitutional values, representative government, and democracy. The contemporary definition of executive power—to send troops anywhere in the world whenever the President likes—would have astonished the framers of the Constitution. Their structure of government very deliberatively rejected the British models that gave the executive exclusive control over foreign affairs and the war power. Instead, the framers vested in Congress explicit control over the initiation and authorization of war, power over foreign commerce, approval of treaties, confirmation of ambassadors, power of the purse, and other authorities over external affairs.

The trend of presidential war power since World War II—the last congressionally declared war—collides with the constitutional framework adopted by the founding fathers. The period after 1945 created a climate in which Presidents have regularly breached constitutional principles and democratic values. Under these conditions, Presidents have exercised war powers with little or no involvement by Congress.

The scope of presidential war power climbed to such heights that Congress felt compelled to pass the War Powers Resolution in 1973. Later, in 1980 and 1991, it adopted new statutory procedures to tighten legislative controls over covert actions. The Iran-Contra affair of the Reagan administration was not an aberration. It was merely a recent example of newly fashioned theories of executive power operating without effective checks from Congress, the judiciary, or the public. Numerous lawsuits, brought by members of Congress, were routinely
sidestepped by federal judges who declined to place limits on presidential power. So great is the magnitude of executive power that President George H. W. Bush invaded Panama in 1989 without any involvement by Congress, and he threatened to take military action against Iraq in 1991 solely on the basis of resolutions adopted by the UN Security Council. Only at the eleventh hour did he obtain authority from Congress. The willingness of President Bush to use military force in 1991 without congressional authorization provoked a grave challenge to constitutional government.

President Bill Clinton used military force repeatedly without ever seeking authority from Congress, intervening in Iraq, Somalia, Haiti, Bosnia, Sudan, Afghanistan, and Yugoslavia. President George W. Bush came to Congress twice to seek legislative action on the Authorization for Use of Military Force Act (AUMF) of 2001 and the Iraq Resolution of 2002. However, he later announced that he ordered the use of military force under what he considered his constitutional authority, not authority granted by Congress.

To find a comparable threat to constitutional government we have to go back to 1950, when President Truman, on his own authority, ordered troops to Korea. Truman, Bush I, Clinton, and Bush II claimed they could send American troops into large-scale combat without first receiving authorization from Congress, and in each case they justified their position largely on the basis of resolutions adopted by the UN Security Council. When Clinton was unable to obtain authority from the UN for his war against Yugoslavia, he turned to NATO for “authority.” In all of these actions, Presidents appealed to international or regional institutions rather than to Congress. President Barack Obama did the same with his military action against Libya in 2011.

What are the constitutional sources for presidential war power? At what point is prior authorization by Congress required? Why has Congress failed to protect its constitutional prerogatives over questions of war and peace? What role do the federal courts have in policing the limits of executive power? How do we keep presidential power consistent with the Constitution and the intent of the framers? Those questions, of fundamental interest to the liberties of American citizens, drive this book.

The entire manuscript of the first edition was read by David Gray Adler and Loch Johnson, who offered a number of helpful suggestions. I appreciate their close reading and the many contributions they have made to the study of war powers over a period of years. Colleagues who read specific chapters include David Ackerman, Richard Best, Ellen Collier, Robert Gerber, Robert Goldich, Nancy Kassop, Leonard W. Levy, Robert Spitzer, and Duane Tananbaum. I gained much from their insights. For the third edition, Chris Edelson and Stephen Weissman
provided careful review of my chapter on Barack Obama. Over the years I have kept in touch with other scholars, including John Hart Ely, Michael Glennon, Louis Henkin, Edward Keynes, Harold Hongju Koh, Jules Lobel, John Norton Moore, Richard Pious, Robert Turner, and John Yoo. While not responsible for what I have written, but in many ways they helped sharpen and deepen my understanding of the constitutional relationships between Congress and the President. I am delighted to publish once again with the University Press of Kansas, which has published and encouraged an outstanding list of books on constitutional aspects of the presidency. At each stage of production the staff members maintained a remarkable level of professionalism and competence. For the first and second editions I appreciate the careful copyediting by Leslee C. Anderson. For the third edition, my thanks to Linda Lotz for thoughtful copyediting.


I have testified on a number of these issues before congressional committees. On February 23, 1994, I appeared before the House Permanent Select Committee on Intelligence to discuss the constitutionality of covert spending. Executive-legislative powers regarding national security were at stake when I testified before the Senate Select Committee on Intelligence on February 4 and 11, 1998, and before the House Permanent Select Committee on Intelligence on May 20, 1998. On April 17, 2002, I testified on war powers before the Senate Committee on the Judiciary. On June 7, 2007, I appeared before the House Committee on the Judiciary to testify on NSA surveillance. On April 10, 2008, I testified before the House Foreign Affairs Committee on war powers. During 2008 and 2009, I made four statements to the two Judiciary Committees on the state secrets privilege. On June 28, 2011, I appeared before the Senate Committee on Foreign Relations to speak on “Libya and War Powers.”

I have spoken on the issue of war powers at West Point; the Naval Academy; the National Defense University, Ft. McNair, Washington, D.C.; the U.S. War College, Carlisle Barracks, Pa.; Fort Leavenworth, Kans.; and the Center for National Security Law, Charlottesville, Va. In 1987, I served as the Research Director of the House Iran-Contra Committee and wrote major sections of the final report dealing with institutional and constitutional issues.

Four decades with the Library of Congress (as Senior Specialist in Separation of Powers with Congressional Research Service and as Specialist in Constitutional Law with the Law Library) gave me an opportunity to work closely with members of Congress, their staff, and legislative committees. Upon retirement in August 2010, I joined the Constitution Project as Scholar in Residence. Many of my articles, books, and congressional testimony are available on my personal webpage: http://loufisher.org.
NOTE ON CITATIONS

All court citations refer to published volumes whenever available: United States Reports (U.S.) for Supreme Court decisions, Federal Reporter (F.2d) for appellate decisions, and Federal Supplement (F.Supp.) for district court decisions. For cases not yet published in United States Reports, citations are to the Supreme Court Reporter (S.Ct.). There are also citations to Opinions of the Attorney General (Op. Att’y Gen.) and to Opinions of the Office of Legal Counsel (Op. O.L.C.) in the Justice Department. Decisions that focus primarily on federal rules of civil and criminal procedure appear in Federal Rules Decisions (F.R.D.). Congressional legal sources are to the U.S. Statutes at Large (Stat.), the U.S. Code (U.S.C.), and United States Treaties and Other International Agreements (UST or TIAS). Several standard reference works are abbreviated as follows:

Elliot

Farrand

FRUS

Journals of the Continental Congress

Landmark Briefs
Landmark Briefs and Arguments of the Supreme Court of the United States: Congressional Law, ed. Phillip B. Kurland and Gerhard Casper (Bethesda, Md.: University Publications of America)

Richardson
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Thorpe  Francis Newton Thorpe, ed., The Federal and State Constitu-
tions, Colonial Charters and Other Organic Law, 7 vols.

Weekly Comp.  Weekly Compilation of Presidential Documents, published
each week by the Government Printing Office from 1965 to
2009, when it became available online
The Constitution, 1787

When the framers assembled in Philadelphia in 1787 to draft the Constitution, existing models of government in Europe placed the war power securely in the hands of the monarch. The framers broke decisively with that tradition. Drawing on lessons learned at home in the American colonies and the Continental Congress, they deliberately transferred the power to initiate war from the executive to the legislature. The framers, aspiring to achieve the ideal of republican government, drafted a Constitution “that allowed only Congress to loose the military forces of the United States on the other nations.”1 In their deliberations at the constitutional convention, the delegates held fast to the principle of collective judgment, shared power in foreign affairs, and “the cardinal tenet of republican ideology that the conjoined wisdom of many is superior to that of one.”2

The British Models

The English Parliament gained the power of the purse in the 1660s to control the king. The power to initiate war, however, remained a monarchical prerogative. John Locke’s Second Treatise on Civil Government (1690) spoke of three branches of government: legislative, executive, and “federative.” The last consisted of “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.” The federative power (what we call foreign policy today) was “always almost united” with the executive. Separating the executive and federative powers, Locke warned, would invite “disorder and ruin.”3

A similar model appeared in the Commentaries written by Sir William Blackstone, the great eighteenth-century jurist. He defined the king’s prerogative as

“those rights and capacities which the king enjoys alone.” 4 Some of the prerogatives he considered direct—those that are “rooted in and spring from the king’s political person,” including the right to send and receive ambassadors and the power to make war or peace. 5 By vesting in the king the sole prerogative to make war, individuals entering society gave up the private right to make war: “It would, indeed, be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.” 6

Through the exercise of Blackstone’s prerogative the king could make “a treaty with a foreign state, which shall irrevocably bind the nation.” 7 The king could issue letters of marque and reprisal (authorizing private citizens to undertake military actions). As Blackstone noted, that prerogative was “nearly related to, and plainly derived from, that other of making war.” 8 Blackstone considered the king “the generalissimo, or the first in military command,” who had “the sole power of raising and regulating fleets and armies.” 9 Whenever the king exercised his lawful prerogative he “is, and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him.” 10

These models of executive power were well known to the framers. They knew that their forebears in England had committed to the executive the power to go to war. However, when they declared their independence from England, they vested all executive powers in the Continental Congress. They did not provide for a separate executive or a separate judiciary. The ninth article of the first national constitution, the Articles of Confederation, provided: “The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war.” The single exception to that principle lay in the sixth article, which allowed states to engage in war if invaded by enemies or when threatened with invasion by Indian tribes.

The authority of the Continental Congress extended to both “perfect” and “imperfect” wars—to wars that were formally declared by Congress and those that were merely authorized. As the Federal Court of Appeals noted in 1782, a perfect war “destroys the national peace and tranquillity, and lays the foundation

5. Id. at 239.
6. Id. at 257.
7. Id. at 251.
8. Id. at 258.
9. Id. at 262.
10. Id. at 250.
of every possible act of hostility,” whereas an imperfect war “does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals.”11 The power over perfect and imperfect wars lay with the Continental Congress and would remain with the U.S. Congress. The Constitution drafted in 1787 and ratified the next year not only empowered Congress to declare war but authorized it to grant “Letters of Marque and Reprisal.” Congressional control over perfect and imperfect wars was recognized by the Supreme Court in litigation growing out of the Quasi-War with France from 1798 to 1800 (see Chapter 2).

The states gave their governors broad power over the military, but that power was directed to actions of self-defense. For example, the New Hampshire Constitution of 1784 provided that the president of the state “shall have full power” to lead and conduct the military forces to encounter, expulse, repel, resist and pursue by force of arms, as well as by land, within and without the limits of the state; and also to kill[,] slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of the state; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist.12

Clearly these executive powers were directed at defensive operations in response to invasion from the outside or rebellion from the inside. Similar authority was given to the governor of Massachusetts in the Constitution of 1780.13 The value of having states engage in self-defense is reflected in the U.S. Constitution, which prohibits states from engaging in war “unless actually invaded, or in imminent Danger as will not admit of delay.”14

Opposing Monarchical Powers

During their learned and careful debates at the Philadelphia convention, the framers vested in Congress many of Locke’s federative powers and Blackstone’s

12. 4 Thorpe 2463–64.
13. 3 Thorpe 1901.
royal prerogatives. Given the governmental systems operating worldwide in 1787, with power concentrated in the executive, the scope of power granted to Congress is extraordinarily progressive and democratic. The power to go to war was not left to solitary action by a single executive, but to collective decision making through parliamentary deliberations. Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the essential republican principle of vesting in the representative branch the decision to go to war:

The power of declaring war is not only the highest sovereign prerogative; . . . it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead; . . . It should therefore be difficult in a republic to declare war; but not to make peace. . . . The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation.15

On numerous occasions the delegates to the constitutional convention emphasized that the power of peace and war associated with monarchy would not be given to the President. On June 1, 1787, Charles Pinckney said he was for “a vigorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”16 John Rutledge wanted the executive power placed in a single person, “tho’ he was not for giving him the power of war and peace.”17 Roger Sherman considered “the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”18 James Wilson also preferred a single executive but “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of

15. 3 Joseph Story, Commentaries on the Constitution of the United States 60–61 (1833).
16. 1 Farrand 64–65.
17. Id. at 65.
18. Id.
these prerogatives were of a Legislative nature. Among others that of war & peace &c."  

Edmund Randolph worried about executive power, calling it “the foetus of monarchy.” The delegates to the Philadelphia convention, he said, had “no motive to be governed by the British Governmt. as our prototype.” If the United States had no other choice he might adopt the British model, but “the fixt genius of the people of America required a different form of Government.”  

Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”  

In a lengthy speech on June 18, Alexander Hamilton set forth his principles of government. Although later associated with vigorous and independent presidential power, he too jettisoned the British model of executive prerogatives in foreign affairs and the war power. Explaining that in his “private opinion he had no scruple in declaring . . . that the British Govt. was the best in the world,” he nonetheless discarded the Blackstonian and Lockean models. He proposed that the President would have “with the advice and approbation of the Senate” the power of making treaties, the Senate would have the “sole power of declaring war,” and the President would be authorized to have “the direction of war when authorized or begun.”  

By the time the framers completed their labors, the President had been stripped of the sole power to make treaties. Instead, he shared that power with the Senate. As late as August 6, with about a month remaining at the convention, the constitutional draft gave the Senate exclusive power to make treaties and to appoint ambassadors. Only in early September was it agreed to include the President in these decisions.  

In Federalist No. 75, Hamilton noted that the act of making treaties “will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them.” Treaties required legislative action because they were contracts with foreign nations with “the force of law.” Although it might be appropriate in hereditary monarchies to vest the treaty-making power with the executive, “it would be utterly unsafe and

19. Id. at 65–66.
20. Id. at 66.
21. Id.
22. Id. at 288.
23. Id. at 292.
improper to intrust that power to an elective magistrate of four years’ duration.” The history of mankind could not support transferring such power “to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.”

The framers rejected the British model for the appointment power, since the British monarch not only appointed officers but created the offices as well. The drafters at Philadelphia wanted to avoid that concentration of power, with its potential for abuse and corruption. They granted the President the right to send and receive ambassadors, but only after the Senate agreed to his nominations. He had no power to issue letters of marque and reprisal; that power was now vested exclusively in Congress. Although the President was made Commander in Chief, it was left to Congress to raise and regulate fleets and armies. The rejection of Locke and Blackstone was sweeping.

The extent of this break with English precedents is set forth clearly in The Federalist Papers. In Federalist No. 69, Hamilton explained that the President has “concurrent power with a branch of the legislature in the formation of treaties,” whereas the British king “is the sole possessor of the power of making treaties.” The royal prerogative in foreign affairs was deliberately shared with Congress, he noted. Hamilton contrasted the distribution of war powers in England and in the American Constitution. The power of the king “extends to the declaring of war and to the raising and regulating of fleets and armies.” Unlike the king of England, 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.” No such tether was attached to the king.

Associated War Powers

Through the granting of letters of marque and reprisal, sovereigns were able to authorize private citizens to wage war on other countries. By turning to citizens (or privateers), nations could quickly augment their armies and navies and respond more swiftly and with greater force to emergencies and threats. Privately owned vessels were authorized to prey on foreign vessels and take plunder, or “prizes.” The phrase “letters of marque and reprisal” came to refer to any use of force short of a declared war.

Unlike Blackstone, who recognized that the king had the power to issue letters of marque and reprisal, the framers transferred that responsibility solely to Congress and associated it with the power to declare war. Congress is given the power “To declare war, grant letters of Marque and Reprisal, and make rules
concerning Captures on Land and Water.” Any initiation of military action, whether by declaration or by marque and reprisal, was reserved to Congress. Thus, both general and limited wars were left to the decision of the representative branch. In 1793, Secretary of State Thomas Jefferson related marque and reprisal to the power to wage war. The making of a reprisal on a nation, he said, “is a very serious thing. . . . when reprisal follows, it is considered an act of war, & never yet failed to produce it in the case of a nation able to make war.” If it became necessary to invoke this power, “Congress must be called on to take it; the right of reprisal being expressly lodged with them by the constitution, & not with the executive.”25 Jules Lobel concludes that the marque and reprisal clause “probably was intended to cover all reprisals or uses of force against other nations short of declared war.”26

Seven clauses of the Constitution vest war powers in Congress. Clause 11 empowers Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Clauses 12 and 13 empower Congress to raise and support armies and provide and maintain a navy. Clauses 14, 15, and 16 authorize Congress to make rules for the government and regulations of the land and naval forces, to call forth the militia, and to provide for the organizing, arming, and disciplining of the militia. At the top of the list stands clause 10, which empowers Congress “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”

This cluster of powers broke with prevailing theories that placed war powers, foreign affairs, and judgments on the law of nations with the Executive. Blackstone, for example, regarded the law of nations as part of the king’s power. The law of nations consisted of “mutual compacts, treaties, leagues, and agreements” between various countries.27 It was the king’s prerogative to make treaties, leagues, and alliances with foreign states.

At the Philadelphia convention, Madison emphasized the importance of drafting a constitution that would “prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars.”28 One of the early statutes passed by Congress was legislation in 1790, set-

25. 6 The Writings of Thomas Jefferson 259 (Paul Leicester Ford, ed. 1892–1899).
27. 1 Blackstone’s Commentaries 43.
28. 1 Farrand 316.
ting forth punishments for certain crimes against the United States. One provision established fines and imprisonment for any person who attempted to prosecute or bring legal action against an ambassador or other public minister from another country. Persons who took such actions were deemed “violators of the laws of nations” who “infract the law of nations.”

Finally, the Constitution vests in Congress the power to regulate foreign commerce, an area with a direct relationship to the war power. Commercial conflicts between nations were often a cause of war. In *Gibbons v. Ogden* (1824), Chief Justice John Marshall said of the commerce power that “it may be, and often is, used as an instrument of war.” Guided by history, the framers placed that power with Congress.

**Repelling Sudden Attacks**

The debates at the Philadelphia convention reveal that the framers were determined to circumscribe the President’s authority to take unilateral military actions. The early draft empowered Congress to “make war.” Charles Pinckney objected that legislative proceedings “were too slow” for the safety of the country in an emergency, since he expected Congress to meet but once a year. Madison and Elbridge Gerry moved to insert “declare” for “make,” leaving to the President “the power to repel sudden attacks.” Their motion carried on a vote of 7 to 2. After Rufus King explained that the word “make” would allow the President to conduct war, which was “an Executive function,” Connecticut changed its vote and the final tally became 8 to 1.

There was little doubt about the limited scope of the President’s war power. The duty to repel sudden attacks represents an emergency measure that permits the President to take actions necessary to resist sudden attacks either against the mainland of the United States or against American troops abroad. The President never received a general power to deploy troops whenever and wherever he thought best, and the framers did not authorize him to take the country into full-

30. 1 James Kent, Commentaries on American Law 170 (1826).
31. 22 U.S. (9 Wheat.) 1, 190 (1824).
32. 2 Farrand 318–19.
scale war or to mount an offensive attack against another nation. John Bassett Moore, a noted scholar of international law, made this observation:

There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.33

Reactions to the Madison-Gerry amendment reinforce the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, arguing that he “will have all the requisite qualities, and will not make war but when the Nation will support it.” Roger Sherman objected: “The Executive shd. be able to repel and not to commence war.”34 Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”35 George Mason spoke “agst giving the power of war to the Executive, because not safely to be trusted with it; . . . He was for clogging rather than facilitating war.”36

Similar statements were made at the state ratifying conventions. In Pennsylvania, James Wilson expressed the prevailing sentiment that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.”37 In North Carolina, James Iredell compared the limited powers of the President with those of the British monarch. The king of Great Britain was not only the Commander in Chief “but has power, in time of war, to raise fleets and armies. He has also authority to declare war.” By contrast, the President “has not the power of declaring war by his own authority, nor that of raising fleets of armies. These powers are vested in other hands.”38 In South Carolina, Charles Pinck-

33. 5 The Collected Papers of John Bassett Moore 196 (1944).
34. 2 Farrand 318.
35. Id.
36. Id. at 319.
37. 2 Elliot 528.
38. 4 Elliot 107.
ney assured his colleagues that the President’s powers “did not permit him to declare war.”

Remarks by Pierce Butler at the South Carolina ratifying convention are quite instructive. Having expressed his total confidence in presidential wars in Philadelphia and finding no support from other delegates, he now fully distanced himself from his own prior position. He stated: “Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.” Of course the “gentleman” was Butler.

The framers gave Congress the power to initiate war because they believed that Presidents, in their search for fame and personal glory, would have an appetite for war. John Jay warned in Federalist No. 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

Many of these sentiments appear in the writings of Madison. In 1793, he called war “the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.” Five years later, in a letter to Jefferson, Madison said that the Constitution “supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis.”

39. Id. at 287.
40. William Michael Treanor, “Fame, the Founding, and the Power to Declare War,” 82 Corn. L. Rev. 695 (1997).
41. 6 The Writings of James Madison 174 (Gaillard Hunt, ed. 1900–1910).
42. Id. at 312.
Separating Purse and Sword

The idea of keeping the purse and the sword in distinct hands was a bedrock principle for the framers. They were familiar with the efforts of English kings to rely on extraparliamentary sources of revenue for their military expeditions and other activities, with some of the payments coming from foreign governments. Because of these transgressions, England lurched into a civil war and Charles I lost both his office and his head.43 The rise of democratic government is directly related to legislative control over all expenditures, including those for foreign and military affairs.

The U.S. Constitution attempted to avoid the British history of civil war and bloodshed by vesting the power of the purse squarely in Congress. Under Article I, section 9, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” In Federalist No. 48, Madison explained that “the legislative department alone has access to the pockets of the people.” In Article I, Section 8, Congress is empowered to lay and collect taxes, duties, imposts, and excises; to borrow money on the credit of the United States; and to coin money and regulate its value. This power of the purse, said Madison in Federalist No. 58, represents the “most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”

The framers did more than place the power of the purse in Congress. They deliberately divided government by making the President the Commander in Chief while reserving to Congress the decision to finance military operations. Madison insisted on keeping the power of Commander in Chief at arm’s length from the power to take the nation to war. To protect constitutional liberties, the latter had to be reserved to Congress:

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.44

44. 6 The Writings of James Madison 148 (emphasis in original).
This understanding of the war power was widely held. Thomas Jefferson praised the transfer of the war power “from the executive to the Legislative body, from those who are to spend to those who are to pay.” At the Philadelphia convention, George Mason counseled that the “purse & the sword ought never to get into the same hands whether Legislative or Executive.”

The fact that Congress was given express power to declare war did not mean that the President could prevail in undeclared wars. Whether declared or undeclared, the decision to initiate war was left to Congress. The framers were well aware that nations approved war either by declaration or authorization. In Federalist No. 25, Hamilton acknowledged that the “ceremony of a formal denunciation of war has of late fallen into disuse.”

Commander in Chief

The framers empowered the President to be Commander in Chief, but that title must be understood in the context of military responsibilities that Congress authorizes. The language in the Constitution reads: “The President shall be 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.” Congress, not the President, does the calling. Article I gives to Congress the power to provide “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.”

In Federalist No. 74, Hamilton explained part of the purpose for making the President Commander in Chief. The direction of war “most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” The power of directing war and emphasizing the common strength “forms a usual and essential part in the definition of the executive authority.” In Federalist No. 69, Hamilton offered a modest definition of commander-in-chief powers, claiming that the office “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.” He knew better than that. As Washington’s aide during the Revolutionary War, Hamilton understood that “command and direction” are more than clerical tasks. They can be powerful forces in determining the scope and duration of war.

Designating the President as Commander in Chief represented an important

45. 5 The Writings of Thomas Jefferson 123.
46. 1 Farrand 139–40.
technique for preserving civilian supremacy over the military. The person leading the armed forces would be the civilian President, not a military officer. One of the complaints included in the Declaration of Independence was that King George III had “affected to render the Military independent of and superior to the Civil Power.” General Thomas Gage, British commander during the war of independence, issued orders to prevent his officers from interfering with the civil administration.47

Attorney General Edward Bates later explained in 1861 that the President is Commander in Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He is Commander in Chief for a different reason. Whatever soldier leads U.S. armies to victory against an enemy, “he is subject to the orders of the civil magistrate, and he and his army are always ‘subordinate to the civil power.’”48 In 1895, the Supreme Court noted that the purpose of the commander-in-chief clause “is evidently to vest in the President the supreme command over all the military forces,—such supreme and undivided command as would be necessary to the prosecution of a successful war.”49

Scholars have long disagreed whether the term Commander in Chief merely confers a title or implies additional powers for the President. Justice Robert Jackson underscored the elusive nature of this power by remarking that the commander-in-chief clause implies “something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by non-assertion yet cannot say where it begins or ends.”50 He noted that the commander-in-chief clause is sometimes put forth “as support for any presidential action, internal or external, involving the use of force, the idea being that it vests power to do anything, anywhere, that can be done with the army or navy.”51 To this proposition he said that nothing would be “more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.”52

51. Id. at 641–42.
52. Id. at 642.
Some studies would construe the commander-in-chief clause narrowly. Raoul Berger concluded: "How narrowly the function was conceived may be gathered from the fact that in appointing George Washington Commander-in-Chief, the Continental Congress made sure . . . that he was to be ‘its creature . . . in every respect.’" Berger notes that instructions drafted by the Continental Congress in 1775 told Washington “punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of the United Colonies, or committee of Congress.”

Citing these precedents is misplaced for two reasons. First, they ignore the extensive delegations that the Continental Congress soon found necessary. For example, three days later the Congress gave these liberal instructions to General Washington: “whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection.” Second, the precedents are drawn from the wrong period. The office of President in 1787 was created as a separate, coequal, and independent branch, unlike the status of executive officers under the Continental Congress (who served as agents of Congress).

Scholarly Analysis

Scholars on the war power generally agree that the framers broke with available monarchical models and vested in Congress the exclusive power to initiate hostilities against foreign nations. Taylor Reveley, writing in 1981, concluded that if you asked a man in the state of nature to read the war-powers provisions in the Constitution and compare them to governmental practices after 1789, “he would marvel at how much Presidents have spun out of so little. On its face, the text tilts decisively toward Congress.” Charles Lofgren, in a 1986 study, wrote that the constitutional grants of power to Congress to declare war and to issue letters of marque and reprisal “likely convinced contemporaries even further that the new

54. 2 Journals of the Continental Congress 101 (1905).
Congress would have nearly complete authority over the commencement of war."56 The years following ratification of the Constitution reinforced the impression that Americans "originally understood Congress to have at least a co-ordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not."57

In 1993, John Hart Ely wrote a major work on the performance of Congress in the Vietnam War. He said that when academics try to divine the "original understanding" of the Constitution, the results can be "obscure to the point of inscrutability," but when the dispute narrows to the war power, all wars—big or little, declared or undeclared—"had to be legislatively authorized."58 To David Gray Adler, the Constitution "makes Congress the sole and exclusive repository of the ultimate foreign relations power—the authority to initiate war."59

Looking to the Constitution’s textual grants of the war-making power to the President, Michael Glennon found them "paltry in comparison with, and are subordinate to, its grants to Congress."60 He could discover "no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel sudden attacks."61 In a similar vein, Harold Koh noted that the first three articles of the Constitution "expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role."62 The framers "pointedly denied" the President other grants of power, such as the power to declare war, "thereby rejecting the English model of a king who possessed both the power to declare war and the authority to command troops."63

In contrast to these studies, John Yoo wrote a major article in 1996 arguing that the framers constructed a constitutional system that “encourage[d] presidential
He claimed that the Constitution’s provisions on the war power “did not break with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps.” He concluded that “the war power provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers.” That argument contradicts not only statements made at the Philadelphia convention and the state ratification debates but also the text of the Constitution.

Over the next two centuries, a number of incidents were invoked by Presidents and their supporters to expand the President’s potential for making war over the formal power of Congress for declaring war. In the nineteenth century, Presidents resorted to military force for the announced purpose of protecting American lives and property—actions that would be cited as a legal source for enlarging executive power. The concept of “defensive war” was stretched to justify presidential war-making throughout the world. Other developments in the twentieth century, including military security treaty provisions and the UN Charter, were used to inflate the President’s war power beyond the intentions of the framers and beyond the control of Congress and the public.

65. Id. at 197.
66. Id. at 242.