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MASTER OF MILITARY STUDIES


TITLE: THE POWER TO DECLARE WAR: THE ULTIMATE CHECK ON
PRESIDENTIAL POWER

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF MILITARY STUDIES

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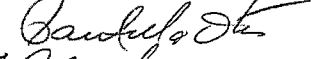
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Preface

After witnessing war first hand in Iraq, I questioned why Congress never formally declared war. I was curious as to why the last time Congress declared war was in WWII. I was surprised to learn through my research that there have only been eleven declarations of war passed by Congress in five wars. I also learned that the power to declare war is an extraordinary power that grants enormous powers to the President of the United States. Numerous laws are activated and the President has a carte blanche approach to prosecute the war with every resource in the U.S. Interestingly, by not declaring war, Congress has actually maintained the balance of powers the Founding Fathers intended. Limiting the President's ability to conduct war continues to be a controversial subject and the controversies are very similar to the ones that arose shortly after the first constitutional government was established in 1789.

Executive Summary

Title: The Power to Declare War: The Ultimate Check on Presidential Power

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Thesis: The United States Congress' strategic use of its power to declare war has maintained the intended balance of power within the government.

Discussion: Congress has formally declared war only eleven times in U.S. history in five wars, yet authorized the deployment of troops to situations that either involved the use of force or potentially involved the use of force over two hundred times. These situations ranged from capturing pirates on the high seas to full combat operations over an extended timeline. Formal declarations of war were already falling out of favor in the international community when the Founding Fathers drafted the nation's Constitution in 1787. Better communication between countries and the increased power of monarchs relegated formal reasoned declarations of war to the past. However, when devising the new government the framers of the Constitution recognized that the power to declare war could not reside with the same individual who was authorized to conduct it. A separation of powers was required to establish a system of checks and balances within the government. Although the nature of warfare was changing, early precedents set by the new constitutional government and Supreme Court decisions highly influenced the way in which the U.S. decides to go to war. Though not necessarily true in the 19th century for political reasons, the 20th century has shown that if war requires not only a whole of government approach, but a whole of nation approach then Congress will formally declare war. If war only requires limited resources then Congress authorizes the action through a resolution or by continued funding. When Congress does declare war it grants sweeping powers to the Executive Branch that threatens the balance of power within the government. Therefore, Congress is very selective in choosing which wars to formally declare.

Conclusion: Congress' strategic reservation of its power to declare war has maintained the balance of power within the United States Government.

Introduction

Over the past 223 years, the United States Congress has strategically declined to exercise its power of declaring war, limiting the President of special domestic, military and legislative powers. On the surface it may appear that Congress has not performed its constitutional obligations by authorizing military actions without issuing a formal declaration of war. In fact, it has only formally declared war against eleven foreign nations in five different wars and authorized two hundred “use of force” instances ranging from capturing pirates in Tripoli to invading a sovereign country such as Iraq.¹ However, after further analysis it is apparent that Congress has met the intent of the Constitution, fulfilling its legislative obligations while maintaining a balance of power between the bodies of government, reserving its power to declare war for situations that truly require it.

Formally declaring war was already falling out of favor in the international community when the Founding Fathers drafted the Constitution, yet they thought it important enough to ensure the chief executive was not granted this power. The framers wanted the chief executive to have the power to command the country’s military in times of war but wanted to restrict his use of these forces when the country was not at war. Early debate over the definition of war led to an important Supreme Court decision in 1800 that distinguished between several types of war and helped set the precedent for only formally declaring war in certain instances. Only nine years after the first constitutional government and under the administration of President Adams, the second president of the United States, troops were committed to hostilities without a formal declaration of war during the Quasi-War with France in 1798. In the years following and to the present day, Congress has passed and the president has signed only eleven formal declarations of war, providing the nation’s chief executive with the full might of the nation’s resources to pursue

victory.

Historical Perspective and Rationale for Declaring War

Today, a declaration of war “creates a state of war under international law and legitimates the killing of enemy combatants, the seizure of enemy property, and the apprehension of enemy aliens.”² Historically, a formal declaration of war announced a country’s intention to wage war and changed, “the relationship between the states involved from one of peace to one of war.”³ Nations stopped regularly making known their intent to create a state of war in the 17th century. In Federalist No. 25, James Madison says, "As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for as the legal warrant to the government to begin its levies of men for the protection of the [S]tate."⁴ Although falling out favor with nations, declarations of war were made by "functional equivalents".⁵ These equivalents could be an act of aggression by a foreign country, authorizing funds to support military engagements or through Congressional resolutions passed at the request of the President. Importantly, all wars are declared wars, though all wars are not formally declared wars.⁶

Until the 17th century, "initiating war involved elaborate, complex, and lengthy formalities that were cloaked in religious formulas and legalistic jargon."⁷ A formal declaration of war resulted from a diplomatic and political process. The process usually required public debate among the council, tribe or other political body, where grievances could be stated and a fully reasoned declaration could be drafted.⁸ Up until this time in history, war chiefs usually did not possess much political power and were required to achieve consensus among their councils or other political bodies. After the declaration was drafted, emissaries would deliver the list of grievances to the adversary and negotiations would commence.⁹ The three essential elements of

a declaration were, "First, the decision to war was taken only after extensive public debate in governing councils. Second, the declaration itself promised peace to the enemy if the grievances detailed were remedied. Third, battle was joined only after this formal, reasoned declaration was carried to the enemy by heralds and they had returned with a counter declaration denying the justice of those grievances."¹⁰

The 17th century brought about several significant changes that influenced future formal declarations of war. Countries started putting diplomatic representatives in foreign courts which provided the opportunity for the diplomats to address grievances or concerns through "continuous interchanges between monarchs."¹¹ Prior to the practice of diplomatic representatives an emissary would personally deliver a formal declaration that explained the reasons for initiating war. Brien Hallett, a professor and Vietnam veteran, in his book *The Lost Art of Declaring War*, quotes Emerich de Vattel who in his 1758 *Droit des gens* says, "In former times the European powers sent heralds, or ambassadors, to declare war; at present they content themselves with announcing it in their capital, in their principal towns, or upon the frontier. Manifestos are sent out, and now that communication has become so quick and easy owing to the establishment of a postal service, the news is soon spread on all sides."¹² The power of the monarch also grew during the 17th century. "The development of an absolutist theory of monarchy eliminated public debate completely, decisions for war and peace now being made in secret in the king's privy council."¹³ There was no longer a need to discuss in public the reasons for choosing to go to war. Therefore there was no reason to issue a formal reasoned declaration of war.¹⁴

A declaration of war "clarifies a government's action and both foreign and domestic perceptions of it. The public learns the reasons for such action by announcing the declaration

and stating the military goals, a breadth of knowledge that may not occur in instances of undeclared war, particularly if limited in both scale and objective."¹⁵ A declaration is only as useful as the effort put into writing it. The declarations of 1812, 1846, 1917, and 1941 only declare that a state of war exists, not listing grievances and therefore are unreasoned declarations. The conditional declaration of 1898 does list several grievances but with little analysis. The 1776 Declaration of Independence is the only declaration in U.S. history that lists the grievances and analyzes the reasons for going to war.¹⁶ Therefore it is the only reasoned declaration drafted in the history of the United States. The worst is "no declaration at all or 'statutory authorization' of a *fait accompli*."¹⁷

A declaration of war not only provides the opportunity for the government to clarify its actions, but even more significantly it grants the chief executive sweeping domestic powers. It "automatically triggers many standby statutory authorities conferring special powers on the President with respect to the military, foreign trade, transportation, communications, manufacturing, alien enemies, etc."¹⁸ Under a formally declared state of war, the president not only has the ability to use the whole of government but also the vast resources of the nation to prosecute the war effort. For example, he can order manufacturing plants to stop producing cars and start producing airplanes and seize them if they refuse.¹⁹ He can interdict all trade with the enemy, take over the nation's transportation system and give the military priority use of the nation's communications network. The Alien Enemy Act would come into effect giving the President "substantial discretionary authority" over foreign nationals in the U.S. The Foreign Intelligence Surveillance Act (FISA) would be activated, granting "special authorities to use electronic surveillance for purposes of gathering foreign intelligence information without a court order."²⁰ Enlistments of all service members could be extended through the duration of the war,

the Coast Guard would fall under the Department of the Navy and the president would have “substantial discretion over the appointment and reappointment of commanders.”²¹ A declaration would also remove the time constraints associated with the War Powers Resolution. From implementing martial law to expanding military jurisdiction over civilians, a large range of powers are granted to the President when Congress passes a formal declaration of war and the President signs it.

Under international law, a declaration of war was once required in order to create a state of war and to have international laws applied to it.²² Presently, international laws of war, “such as the Hague and Geneva Conventions, apply to circumstances of armed conflict whether or not a formal declaration or authorization was issued.”²³ Since the international laws of war apply to all armed conflicts, there is no longer a reason for countries to declare war in order to be protected by these laws. Additionally, formally declaring that a state of war exists may quickly lead to an escalation of hostilities. For example, a declaration may terminate certain treaties or trigger mutual defense treaties in which countries are obligated to participate in hostilities.²⁴ As a result of global hostilities during WWI and WWII, the Kellogg-Briand Peace Pact and the Charter of the United Nations both use language that condemns war in the international community, providing another reason for signatories not to formally declare war.²⁵ Since armed conflicts are covered by the laws of war and the international community condemns war, countries are unlikely to formally declare war in the future unless the declaration is used to activate domestic statutes or mutual defense treaties.

War Defined

Defining war is important to understanding why it needs to be declared in certain situations and not in others. What makes a war a war? The struggle over defining whether war

exists without it being declared started only a decade after the Constitution was ratified.²⁶

Generally, war is thought of as a state of usually open and declared armed hostile conflict between states or nations.²⁷ Kenneth Moss, in *Undeclared War and the Future of U.S. Foreign Policy*, believes the delegates at the Constitutional Convention would likely have read or have been familiar with important works on war to include those by Cicero, Hugo Grotius, Samuel Pufendorf and J.J. Burlamaqui. Moss goes on to say that "they would have agreed with Grotius's acknowledgement to Cicero in the beginning of the former's *On the Law of War and Peace* war is 'a contending by force'."²⁸ Additional accepted views would have included Samuel Johnson's definition that described war as "the exercise of violence under sovereign command" and his British contemporary Richard Lee's definition "as the state or situation of those . . . who dispute by force of arms."²⁹

Familiar to most military scholars, Clausewitz defined war as "an act of force to compel our enemy to do our will."³⁰ This definition is similar to definitions the framers of the Constitution were exposed to. Clausewitz added "war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means . . . the political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose."³¹ Using this definition, war is a political instrument and therefore the act of declaring war should be a political process. In *The Lost Art of Declaring War*, Brian Hallett argues that if war is simply combat or violence then there is no need to declare it. However, if war is in fact a political instrument as Clausewitz argues, then it is a rational human activity and "decision makers not only can but must justify their decision, laying out the causes, defining the ends, and explaining how war is the appropriate means to achieving those ends, which is precisely what a fully reasoned declaration of war does."³²

The religious wars of the 17th century led to an increased resolve to limit the scale of war and reduce the horrific violence associated with it.³³ The desire to limit war impacted the writings of J.J. Burlamaqui whom the Founding Fathers would also have been familiar with.³⁴ Kenneth Moss in, *Undeclared War and the Future of U.S. Foreign Policy*, identifies several important passages from Burlamaqui's *In The Principles of Political Law* written in 1748. Burlamaqui attempts to distinguish between different types of war. He discusses just and unjust wars as well as the differences between offensive and defensive wars. He also "wrote of 'solemn' war as war 'made by the authority of the sovereign' and accompanied with certain formalities, such as a formal declaration. War that was not 'solemn' was 'made either without a formal declaration, or against mere private persons'."³⁵ Burlamaqui differentiates between "perfect" and "imperfect war" by stating "the former 'entirely interrupt[s] the tranquility of the state, and lays a foundation for all possible acts of hostility'." He continues by stating "imperfect war 'does not entirely interrupt the peace, but only in certain particulars, the public tranquility being in other respects undisturbed'."³⁶

It is likely that the Founding Fathers were aware of Burlamaqui's views on war because similar thoughts are expressed in the Supreme Court's decision in the *Bas v. Tingy* case in 1800.³⁷ In 1793 the U.S. declared itself neutral in the hostilities between France and Great Britain. Jay's Treaty of 1795 was created to provide political and trade concessions to France's enemy. In response France ordered the seizure of U.S. merchant ships.³⁸ In 1799, a U.S. naval vessel, the *Ganges*, captured a U.S. merchant ship from a French privateer. Tingy, the captain of the *Ganges*, sought compensation for his actions. However, his opponents argued that Congress had not declared war and therefore he was not owed any compensation. Justice Bushrod Washington made the following comments in his decision which generally align to Burlamaqui's

views:

It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the members are not authorised to commit hostilities such as in a solemn war, where the government restrain the general power.³⁹

Justice Chase made similar comments in the case:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws. What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases . . . So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.⁴⁰

Both Justices distinguished between several types of war. War can be "solemn" or "perfect" if it is declared and one whole nation is against the other. Or, it can be "imperfect" or "limited" if it is not declared but is authorized by Congress, as it was in this case. This decision proves crucial in understanding that a state of war can exist without a formal declaration and that only those wars that involve the whole nation can become "solemn" or "perfect" wars as is evident in the 20th century declarations discussed in detail later.

United States Constitution and Separation of War Powers

Having defined war as the Founding Fathers would have understood it and after

investigating the significance of declarations, what was the intent of granting Congress the power to declare war if it was already an outdated and archaic means of conducting international affairs? The Constitutional Convention was held during the summer of 1787. Of the fifty-five delegates attending the convention, thirty-four possessed some form of legal training and thirty-four also possessed some type of military experience either in state militias or the Continental army.⁴¹ George Washington, the country's premier soldier, presided over the convention. Their backgrounds along with their experiences under British rule and lessons learned from the American Revolution highly influenced their thoughts on government and a permanent standing military force.

Americans generally feared a large standing professional army in 1787. American colonists feared the professional British soldiers who enforced the King's laws and also feared a "strong executive [who] could combine political ambition with unfettered control of a professional army."⁴² During this time in British history, many of its officers were from the same noble class that advised the King and sat in the House of Lords. Americans believed that it was this noble class that was threatening their liberties and led to a strong belief that civil and military authorities should not meld.⁴³ This fear of standing armies highly influenced the colonist decision to allow the Continental Congress to run the wartime government rather than a single chief executive. Additionally, Congress could raise an army but it lacked the power to raise revenues in order to fund the army under the Articles of Confederation.⁴⁴ The result was a "Continental army [that] was a ramshackle affair run on a shoestring budget and beholden to overly suspicious state authorities for supplies, reinforcements, and money."⁴⁵ Washington and Hamilton, two of the thirty-four veterans serving as delegates, undoubtedly would have remembered these shortcomings.

Despite the public fear of a professional army, the delegates understood the need to fix the deficiencies identified during the war with Britain and under the Articles of Confederation. Washington and Hamilton were on the side that supported a professional standing army and an executive with the power to use it. On the other side of the table were a number of others including Elbridge Gerry who feared a national military establishment and wanted the army limited to 1,000 troops.⁴⁶ The delegates knew they had to strike a balance between democracy and allowing a professional standing army to be controlled by an executive.⁴⁷ "America's soldiers had to be equipped to properly fight a war, yes, but they also had to be ultimately subordinated to the democratic process."⁴⁸ The solution to this problem would be a separation of powers between the Executive and Legislative Branches of government.

On Friday, August 17, 1787 a short debate among several convention members would lead to the heart of the issue that has stirred the passions of many for over 200 years. The arguments over the power to declare war ranged from Delegate Pinkney's belief that the power should reside in the Senate alone since "the House of Representatives would be too numerous for such deliberations . . . The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions", to Delegate Butler who thought the power should be vested in the President because he "will not make war but when the Nation will support it."⁴⁹ James Madison and Delegate Gerry "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."⁵⁰ Delegate Sharman "thought it stood very well. The Executive shd (sic) be able to repel and not to commence war."⁵¹ And on the motion to replace "make" war with "declare" war, the vote was 7 yeas, 2 noes and 1 absent.⁵² This is the only recorded instance at the Constitutional Convention that the issues concerning the power of Congress to declare war were debated.

The final draft of the Constitution granted the Legislative Branch control of the country's war making machine. Article I, Section 8 of the Constitution grants Congress the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water . . . to raise and support armies . . . 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 . . . to provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."⁵³ To emphasize the power Congress had over the military establishment, Section 10 of the Constitution states that "No State shall . . . keep Troops, or Ships of War in time of Peace."⁵⁴ The delegate's intent is very clear that the war-making machine under the Constitution would belong to the Legislative Branch and neither to the Executive nor the individual states.

The Constitution assigned the Executive Branch the power to control the war machine once it was called forth. Article II Section 2 states, "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."⁵⁵ Clearly, the framers of the Constitution wanted the executive to be in charge once Congress activated the war machine. The lessons learned from the American Revolution and the near disaster of not appointing a single chief executive undoubtedly played a large role in this decision. In addition, Hamilton states in Federalist No. 74, "Of all the cares or concerns of government the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the

common strength forms a usual and essential part in the definition of the executive authority."⁵⁶

The intent behind separating the war powers between several branches of government was to limit the executive's power over the military during peace. Congress controlled the purse and a turnover of Representatives in the House every two years, coincided with the two-year military funding cycle. The debate over the so called "war powers" clauses in the Constitution were insignificant in comparison to the bigger concern of states rights as the delegates pleaded their cases before their state assemblies.⁵⁷ If they had spent more time debating the differences between "declare" and "make" war, much of the confusion over the war powers clauses would have been alleviated. In the end the framers of the Constitution placed a civilian at the head of the military and this decision was probably aided by the fact that Washington, a highly respected national hero, would be the first at the helm of the young nation.

Quasi-War with France

Early experiences with war powers generally followed the intent of the Constitution, but not as specifically as one would have assumed after the discussions at the Convention in Philadelphia. In fact, the second President, John Adams, was the first President to wage a war not formally declared by Congress during the Quasi-War with France in 1798 - 1800.⁵⁸ President Adams pledged peaceful negotiations with the French but asked Congress to put the country on a war footing.⁵⁹ Congress debated the issues concerning the president's request and in the end authorized various measures such as the construction of ships, funds for additional cannon and arms as well as authorization to seize French ships.⁶⁰ Through these actions, it is clear that Congress authorized war even though it never formally declared it.⁶¹ During the debates that led to these authorizations, Congressman Edward Livingston said the country is "now in a state of war; let no man flatter himself that the vote which has been given is not a

declaration of war."⁶² Almost 200 years later, similar reasons for putting the country on a war footing without declaring war were used by the State Department regarding the Gulf of Tonkin Resolution and quoted in Brien Hallett's book *The Lost Art of Declaring War*:

Formal declarations of war are often deliberately avoided because they tend to indicate both at home and abroad a commitment to total victory and may impede settlement possibilities. The issuance of a formal declaration can also have certain legal results: Some treaties may be canceled or suspended; trading, contracts, and debts with the enemy are suspended; vast emergency powers become operative domestically; and the legal relations between neutral states and belligerents can be altered. (Department of State 1971, 12 n. 58)⁶³

War of 1812

It would take another fourteen years before Congress passed the nation's first declaration of war and significantly it was at the request of the chief executive. President Madison requested a formal declaration of war from Congress on 1 June 1812 against Great Britain. The request was made for a number of reasons including the impressments of American sailors into the British navy. In so doing, he established the precedent for Congress to "be dependent on and subordinate to the commander-in-chief. By custom and precedent Congress could not act except at the request and with the permission of the commander-in-chief."⁶⁴ Madison's "War Message to Congress" listed the reasons that Congress should consider in determining whether or not to issue a formal declaration of war.⁶⁵ Seventeen days after his request the Twelfth Congress gave him the following declaration:

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That war be and the same hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their Territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects, of the Government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof.⁶⁶

In this first instance of Congress exercising its constitutional power to declare war, it relied on the President to issue the grievances and published an unreasoned yet formal declaration of war. In so doing, it set the precedent for the next 200 years of American history.

Mexican-American War

The second declaration of war issued by Congress wasn't until 1846. Between the War of 1812 and 1846 there were thirty-one instances of the U.S. sending troops to situations that may have or required the use of force. Significantly, President Jefferson sent forces to Tripoli in 1815 and there were multiple armed engagements with Indians throughout Florida and operations in South America to include Peru and Argentina.⁶⁷ In 1846, President Polk dispatched forces to disputed territory in Texas and ordered the navy to be ready to seize key cities in California.⁶⁸ After negotiations with Mexico failed and Mexican forces attacked a U.S. reconnaissance party, Polk presented his war message to Congress:

As war exists, and, notwithstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon by every consideration of duty and patriotism to vindicate with decision the honor, the rights, and the interests of our country . . . In further vindication of our rights and defense of our territory, I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace. . . .⁶⁹

Controversy surrounded these statements as the President declared that a state of war already existed. Members of Congress debated the President's statement and argued whether this was a defensive or offensive war. If it was defensive then the President was within the bounds of the Constitution, but if it was offensive then the President over stepped the restrictions placed on his powers in the Constitution. Ultimately, Congress did draft a declaration of war and it followed the precedent of the 1812 declaration by being unreasoned.⁷⁰

Interestingly, in the 1812 declaration of war against Great Britain, Congress failed to

appropriate money to fund the military in its haste to adjourn. Therefore, much of the substance of the 1846 declaration of war against Mexico explicitly stated who was responsible for providing various resources to the military.⁷¹ Additionally, Congress censured Polk's actions concerning the repositioning of troops in Texas and his request for a declaration of war in 1848 because the war had been "unnecessarily and unconstitutionally begun by the President of the United States."⁷² The President placed Congress in a difficult position because he had already deployed troops and was now asking for funding after the fact.⁷³ Future President Abraham Lincoln, who would have to deal with his own constitutional crisis during the Civil War, voted against Polk's request for a declaration of war against Mexico and told a friend:

Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an 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 a pleasure. . . . This, our Convention understood to be the most oppressive of all Kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing the oppression upon us.⁷⁴

Only fifteen years later, President Lincoln would deploy military forces without the authorization of Congress, suspend the writ of habeas corpus and order a blockade against the rebellious southern states without prior approval from Congress. This scenario, unlike any other in U.S. history dealt with a domestic crisis that threatened to bring about the dissolution of the Union in which Lincoln had sworn to defend. He was not taking actions to defend against foreign invasion nor offensive action against a foreign country.⁷⁵

Spanish-American War

Congress passed the next declaration of war against Spain in 1898. Between 1846 and 1898, the U.S. committed forces to either existing conflicts or potential conflicts fifty-nine times.⁷⁶ Louis Fisher in his article, *Historical Survey of the War Powers and the Use of Force*, quotes presidential scholar Edward S. Corwin who says that these conflicts largely 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."⁷⁷ Regardless, fifty-nine uses of military troops in fifty-two years, excluding the Civil War, is rather significant and continues the precedent of Congress not declaring war since the new constitutional government was formed in 1789. The declaration of war approved by Congress in 1898 is interesting because it led to a discussion about which branch of government actually decides to go to war.⁷⁸

Controversy surrounded potential U.S. intervention in Cuba in order to force Spain to withdraw from the island. President Cleveland told Congress that he refused to act if war was declared against Spain.⁷⁹ His successor, President McKinley was also reluctant to go to war with Spain. Even after the explosion on the Maine in February 1898, McKinley still sought diplomatic measures to terminate hostilities between Spain and Cuba. Congress pressured McKinley to declare war on Spain but he refused to do so until all diplomatic measures had proven unviable.⁸⁰ McKinley's April 11th message to Congress, "sought intervention as a neutral. He did not recognize the Cuban insurgents, and he wanted to intervene for humanitarian purposes, to protect U.S. citizens and commerce on the island, and to end a strategic problem in the Western Hemisphere."⁸¹ Congress agreed to the President's terms, Spain rejected them and McKinley requested a declaration of war four days later.⁸² The third of five declarations of war brought to the forefront the issue of what if Congress actually does exercise its constitutional power to declare war, without first being asked to by the President. Congress talked about passing a declaration of war without the President's support but they were afraid he would veto it and more importantly the supporters of the declaration and the President were both republicans.⁸³ In the end, politics ruled supreme, Congress and a reluctant President agreed and an unreasoned

formal declaration of war was passed.

World War I

The next several years in U.S. history saw a significant deployment of troops to the Philippines and Hawaii. The U.S. sent over 120,000 troops to fight guerrillas in the Philippines without ever declaring war between 1899 and 1902.⁸⁴ In total, there were thirty-nine “use of force” instances involving U.S. troops prior to the fourth and fifth declarations of war being passed by Congress and signed by President Wilson on 6 April 1917, declaring war on Germany and on 7 December 1917, declaring war against Austria-Hungary.⁸⁵ President Wilson maintained U.S. neutrality, although supporting the allied war effort with significant resources, until Germany made the decision on 1 February 1917 to engage in unrestricted submarine warfare against all vessels in the war zone, to include those of neutral parties.⁸⁶ President Wilson felt this decision was “an unacceptable assault on U.S. sovereign rights which the German Government had previously pledged to respect.”⁸⁷

World War II

World War II saw the final declarations of war the U.S. has passed. In all, six declarations were passed by Congress and signed by the President during the Second World War against Japan, Germany, Italy, Bulgaria, Hungary and Rumania. Between WWI and WWII, U.S. troops deployed to twenty-seven potentially hostile or hostile situations where combat ensued ranging from protecting American interest in China to pursuing bandits in Mexico.⁸⁸ President Roosevelt requested a declaration of war from Congress on 8 December 1941 against Japan shortly after the Japanese launched, “direct military attacks . . . against U.S. territory, military personnel and citizens in Hawaii and other outposts in the Pacific area.”⁸⁹ Germany and Italy declared war on the U.S. three days later and President Roosevelt requested and received

declarations of war against these two countries on 11 December 1941. Bulgaria, Hungary and Rumania declared war on the U.S. in 1942 and Congress responded by passing declarations of war against those countries on June 5, 1942.⁹⁰

Summary of 20th Century War Declarations

The declarations of war passed in the 20th century contain very similar language and granted enormous powers to the President to bring the full might of the U.S. into the war efforts. For example, President Roosevelt ordered the internment of Japanese-Americans during WWII without a specific piece of legislation to authorize his actions other than it was in support of the war effort.⁹¹ Looking at the 1917 and 1941 declarations of war, in contrast with the 1812, 1846 and 1898 declarations, it is easy to see how much power is transferred to the President to execute the war. The declarations of the 19th century generally just authorized the President to use the military forces of the U.S. The 1917 and 1941 declarations not only authorize this action but even more importantly, the resources of the nation:

That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.⁹²

Congress granted the President all of the resources of the country and of the government to prosecute the war until the conflict was resolved.⁹³ Looking back to the problems of not having a single chief executive to lead the war effort during the American War for Independence, it is clear that the framers of the Constitution provided an acceptable and successful mechanism to fight “perfect” or “solemn” wars.

Conclusion

Since 1942, the United States has not declared war but has participated in over fifty

incidents involving hostilities ranging from large scale conflicts such as the Korean War to smaller scale limited conflicts such as the most recent air war in Libya. The precedent for committing troops to conflicts without a formal declaration of war was established in the first decade after the Constitution was ratified. This precedent, especially in the 20th century when declarations of war gave the President enormous domestic powers, has prevented the President from using powers that are only granted to him during a formally declared war. For example, during the Korean War, President Truman sought to seize steel mills to force union workers back to work, claiming that the steel was crucial for the war effort. In the *Youngstown Sheet & Tube Co. v. Sawyer* case, the Supreme Court ruled that Truman could not seize the mills because Congress had not passed legislation authorizing him to do so. Under a formally declared war, Truman more than likely would have been able to seize the mills.⁹⁴

Congress, especially in the 20th century, has met the intent of the Founding Fathers by only declaring war when the war required the full might of U.S. resources; only during “solemn” or “perfect” wars when the whole of the nation was pitted against the whole of another nation.

In *Restoring the Balance, War Powers in an Age of Terror*, Seth Weinberger says:

. . . a declaration of war is about acknowledging the severity of the threat to the United States and recognizing that meeting that threat demands extraordinary measures above and beyond the foreign deployment of troops. Few conflicts rise to the level of requiring declarations of war, and the threshold is not determined by the length of the hostilities, the intensity of the fighting, or even the number of casualties. The conflicts that have been deemed deserving of declarations of war have been those that threatened to engulf the world in combat and potentially hold in danger the existence of the country.⁹⁵

The selective use of this power in conjunction with congressional power over appropriations has provided a check on the President as the commander in chief. From blocking President Clinton’s continued operations in Somalia to denying President Reagan’s request to aid rebels in Nicaragua, Congress has adequately maintained its check on Presidential power per the intent of

the Constitution.⁹⁶ Debate will undoubtedly continue over the President sending troops into hostile situations that do not require the whole of the nation's resources. Imagine the consequences though if Congress formally declared war against terror. The war has no end in sight and is being fought throughout the globe.⁹⁷ As a nation that takes great pride in individual liberties, a declaration of war against terror would give the President *cart blanche* indefinite powers to prosecute the war. In conclusion, Congress' strategic reservation of its power to declare war has maintained the balance of power within the United States Government.

Appendix A. Text of Formal Declarations of War Passed by the United States of America.⁹⁸

War with Great Britain 1812

(Act of Jun. 18, 1812, ch. 102, 2 Stat 755)

CHAP. CII.—An Act declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof.

APPROVED, June 18, 1812.

[Terminated by Treaty of Ghent, entered into force Feb. 17, 1815. 8 Stat. 218, Treaty Series 109.]

War with Mexico 1846

(Act of May 13, 1846, ch. 16, 9 Stat. 9)

CHAP. XVI.—An Act providing for the Prosecution of the existing War between the United States and the Republic of Mexico.

Whereas, by the act of the Republic of Mexico, a state of war exists between that Government and the United States:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purpose of enabling the government of the United States to prosecute said war to a speedy and successful termination, the President be, and he is hereby, authorized to employ the militia, naval, and military forces of the United States, and to call for and accept the services of any number of volunteers, not exceeding fifty thousand, who may offer their services, either as cavalry, artillery, infantry, or riflemen, to serve twelve months after they shall have arrived at the place of rendezvous, or to the end of the war, unless sooner discharged, according to the time for which they shall have been mustered into service; and that the sum of ten millions of dollars, out of any moneys in the treasury, or to come into the treasury, not otherwise appropriated, be, and the same is hereby, appropriated for the purpose of carrying the provisions of this act into effect.

SEC. 2. And be it further enacted, That the militia, when called into the service of the United States by virtue of this act, or any other act, may, if in the opinion of the President of the United States the public interest requires it, be compelled to serve for a term not exceeding six months after their arrival at the place of rendezvous, in any one year, unless sooner discharged.

SEC. 3. And be it further enacted, That the said volunteers shall furnish their own clothes, and if cavalry, their own horses and horse equipments; and when mustered into service shall be armed at the expense of the United States.

SEC. 4. And be it further enacted, That said volunteers shall, when called into actual service, and while remaining therein, be subject to the rules and articles of war, and shall be, in all respects except as to clothing and pay, placed on the same footing with similar corps of the United States army; and in lieu of clothing every non-commissioned officer and private in any company, who may thus offer himself, shall be entitled, when called into actual service, to receive in money a

sum equal to the cost of clothing of a non-commissioned officer or private (as the case may be) in the regular troops of the United States.

SEC 5. And be it further enacted, That the said volunteers so offering their services shall be accepted by the President in companies, battalions, squadrons, and regiments, whose officers shall be appointed in the manner prescribed by law in the several States and Territories to which such companies, battalions, squadrons, and regiments, shall respectively belong.

SEC. 6. And be it further enacted, That the President of the United States be, and he is hereby, authorized to organize companies so tendering their service into battalions or squadrons, battalions and squadrons into regiments, regiments into brigades, and brigades into divisions, as soon as the number of volunteers shall render such organization, in his judgment, expedient; and the President shall, if necessary, apportion the staff, field, and general officers among the respective States and Territories from which the volunteers shall tender their services as he may deem proper.

SEC 7. And be it further enacted, That the volunteers who may be received into the service of the United States by virtue of the provisions of this act, and who shall be wounded or otherwise disabled in the service, shall be entitled to all the benefit which may be conferred on persons wounded in the service of the United States.

SEC 8. And be it further enacted, That the President of the United States be, and he is hereby, authorized forthwith to complete all the public armed vessels now authorized by law, and to purchase or charter, arm, equip, and man, such merchant vessels and steam boats as, upon examination, may be found fit, or easily converted into armed vessels fit for the public service, and in such number as he may deem necessary for the protection of the seaboard, lake coast, and the general defense of the country.

SEC. 9. And be it further enacted, That whenever the militia or volunteers are called and received into the service of the United States, under the provisions of this act, they shall have the organization of the army of the United States, and shall have the same pay and allowances; and all mounted privates, non-commissioned officers, musicians, and artificers, shall be allowed 40 cents per day for the use and risk of their horses, except of horses actually killed in action; and if any mounted volunteer, private, non-commissioned officer, musician, or artificer, shall not keep himself provided with a serviceable horse, the said volunteer shall serve on foot.

APPROVED, May 13, 1846.

[Terminated by Treaty of Guadalupe Hidalgo, entered into force May 30, 1848.

9 Stat. 922, Treaty Series 207.]

War with Spain 1898

(Act of Apr. 25, 1898, ch. 189, 30 Stat. 364)

CHAP. 189—An Act Declaring that war exists between the United States of America and the Kingdom of Spain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this Act into effect.

APPROVED, April 25, 1898.

[Terminated by Treaty of Paris, entered into force Apr. 11, 1899. 30 Stat. 1754, Treaty Series 343.]

War with Germany 1917

(Act of Apr. 6, 1917, ch. 1, 40 Stat. 1)

CHAP. 1.—Joint Resolution Declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States and making provision to prosecute the same.

Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

APPROVED, April 6, 1917.

[Terminated by Act of July 2, 1921, [S.J.Res. 16] ch. 40, 42 Stat. 105 which declared the state of war between the U.S. and Germany to be at an end. Recognized by Treaty on Establishment of Friendly Relations, entered into force Nov. 11, 1921. 42 Stat. 1939, Treaty Series 658.]

War with Austria-Hungary 1917

(Act of Dec. 7, 1917, ch. 1, 40 Stat. 429)

CHAP. 1.—Joint Resolution Declaring that a state of war exists between the Imperial and Royal Austro-Hungarian Government and the Government and the people of the United States, and making provision to prosecute the same.

Whereas the Imperial and Royal Austro-Hungarian Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

APPROVED, December 7, 1917.

[Terminated by Act of July 2, 1921, [S.J. Res. 16] ch. 40, 42 Stat. 105 which declared the state of war between the U.S. and Austria, a successor state and government to the Austro-Hungarian monarchy, to be at an end. 42 Stat. 105. This was recognized by a Treaty on Establishment of Friendly Relations, entered into force Nov. 8, 1921. 42 Stat. 1939, Treaty Series 658. The Act of July 2, 1921, also declared the state of war between the U.S. and Hungary, a successor state and government to the Austro-Hungarian monarchy, to be at an end. This was recognized by a Treaty on Establishing Friendly Relations, entered into force Dec. 17, 1921. 42 Stat. 1951, Treaty Series 660.]

War with Japan 1941

(Act of Dec. 8, 1941, ch. 561, 55 Stat. 795)

[Chapter 561]

JOINT RESOLUTION

Declaring that a state of war exists between the Imperial Government of Japan and the Government and the people of the United States and making provisions to prosecute the same.

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.
APPROVED, December 8, 1941, 4:10 p.m., E.S.T.
[Terminated by Treaty of Peace with Japan, entered into force Apr. 28, 1952. 3 UST 3169, TIAS 2490.]

War with Germany 1941

(Act of Dec. 11, 1941, ch. 564, 55 Stat. 796)

[CHAPTER 564]

JOINT RESOLUTION

Declaring that a state of war exists between the Government of Germany and the Government and the people of the United States and making provision to prosecute the same.
Whereas the Government of Germany has formally declared war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Government of Germany which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.
APPROVED, December 11, 1941, 3:05 p.m., E.S.T.
[Terminated by [H.J.Res. 289] Act of October 19, 1951, ch. 519, 65 Stat. 541]

War with Italy 1941

(Act of Dec. 11, 1941, ch. 565, 55 Stat. 797)

[CHAPTER 565]

JOINT RESOLUTION

Declaring that a state of war exists between the Government of Italy and the Government and the people of the United States and making provision to prosecute the same.
Whereas the Government of Italy has formally declared war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Government of Italy which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Italy; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.
APPROVED, December 11, 1941, 3:06 p.m., E.S.T.
[Terminated by Treaty of Peace with Italy, entered into force Sept. 15, 1947. 4 UST 311, 61 Stat. 1245.]

War With Bulgaria 1942

(Act of Jun. 5, 1942, ch. 323, 56 Stat. 307)

[CHAPTER 323]

JOINT RESOLUTION

Declaring that a state of war exists between the Government of Bulgaria and the Government and the people of the United States and making provisions to prosecute the same.

Whereas the Government of Bulgaria has formally declared war against the Government and the people of the United States of America: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Government of Bulgaria which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Bulgaria; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

APPROVED, June 5, 1942.

[Terminated by Treaty of Peace with Bulgaria, entered into force Sept. 15, 1947.

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War with Hungary 1942

(Act of Jun. 5, 1942, ch. 324, 56 Stat. 307)

[CHAPTER 324]

JOINT RESOLUTION

Declaring that a state of war exists between the Government of Hungary and the Government and the people of the United States and making provisions to prosecute the same.

Whereas the Government of Hungary has formally declared war against the Government and the people of the United States of America: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Government of Hungary which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Hungary; and, to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

APPROVED, June 5, 1942.

[Terminated by Treaty of Peace with Hungary, entered into force Sept. 15, 1947.

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War with Rumania 1942

(Act of Jun. 5, 1942, ch. 325, 56 Stat. 307)

[CHAPTER 325]

JOINT RESOLUTION

Declaring that a state of war exists between the Government of Rumania and the Government and the people of the United States and making provisions to prosecute the same.

Whereas the Government of Rumania has formally declared war against the Government and the people of the United States of America: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Government of Rumania

which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Rumania; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

APPROVED, June 5, 1942.

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