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War by Committee: An Examination of Legislative War Powers

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Abstract:

This paper will serve as an examination of the powers and limitations of the United States legislative branch of government in matters of war. In doing this, precedence will be given to specifically enumerated powers granted or withheld by the current Constitution of the United States. Founding documents, such as the Articles of Confederation and early state constitutions will also be examined and contrasted with the current legal regime in an attempt to better understand the true meaning behind the Constitution. International law, as it applies to American war powers, will also be examined when relevant.

Statement of Facts

The United States is a relatively young nation with its earliest claim to sovereignty reaching back to the Declaration of Independence in 1776.¹ The first true constitution to govern the nation was known as the Articles of Confederation.² Although the nation was governed under them for nearly a decade, the Articles of Confederation were widely considered to have been a foreign policy disaster.³ Problems of foreign policy principally arose from the fact that the Articles withheld a great deal of power to the states, particularly in matters of international commerce.⁴ In fact, many states were known to have negotiated independently with European powers for loans and commodities

1. Curtis A. Bradley & Jack L. Goldsmith, *FOREIGN RELATIONS LAW* 2 (3rd ed. 2009).

2. *Id.* at 4.

3. *Id.*

4. *Id.*

in direct competition with one another while they were governed under the Articles of Confederation.⁵ The independence of states in matters of international commerce meant the nation as a whole had no direct bargaining power with other nations as it could not enforce a unified trade policy.⁶

However, in matters of war it must be conceded that states were not completely free to do as they pleased under the Articles of Confederation. Much like the current Constitution of the United States, individual states could not unilaterally *engage in war* unless actually invaded by a foreign power.⁷ In order for a war to be *engaged in* at all, nine of the thirteen states had to vote to make it so at the federal level of government.⁸ Also, under the Articles of Confederation states who contributed military forces to the “common defense” only had the power to appoint military officers under the rank of Colonel.⁹ This limitation left the appointment of high officers and thus the control of said forces to the federal government.¹⁰

Lastly, the cost of any war was to be paid out of a common treasury that was to be funded by a national property tax scheme to which states would voluntarily contribute.¹¹ Obviously, with the tax being collected on a voluntary basis from state legislatures funding was chronically short for the federal government.¹² This inability to raise funds was one of many Articles of Confederation failures to be directly addressed by the succeeding constitution.¹³

For a myriad of reasons, the Articles of Confederation did not last and the United States adopted its current constitution as a replacement.¹⁴ Nonetheless, one should still keep the Articles of Confederation in mind when examining the current constitutional framework of the United States as it provides unparalleled insight into the founders’

5. *Id.* at 3.

6. *Id.* at 5.

7. ARTICLES OF CONFEDERATION OF 1781, art. VI; U.S. CONST. art I § 10.

8. ARTICLES OF CONFEDERATION OF 1781, art. IX.

9. ARTICLES OF CONFEDERATION OF 1781, art. VII.

10. *Id.*

11. ARTICLES OF CONFEDERATION OF 1781, art. VIII.

12. Russell R. Sobel, IN DEFENSE OF THE ARTICLES OF CONFEDERATION AND THE CONTRIBUTION MECHANISM AS A MEANS OF GOVERNMENT FINANCE: A GENERAL COMMENT OF THE LITERATURE, (1999).

13. U.S. CONST. art I § 8.

14. Curtis A. Bradley and Jack L. Goldsmith, FOREIGN RELATIONS LAW 2 (3rd ed. 2009).

beliefs of what did and what did not work at the federal level of government.¹⁵

Also of relevance when interpreting the current Constitution is the American experience with the British Empire that left Americans both painfully aware of the potential tyranny that standing armies could bring and yet conscious of the practical necessities that war entailed.¹⁶ Much as the current German Basic Law can only be understood in light of their confrontation with National Socialism, American constitutional law must be examined with a close eye on that which served as an impetus to its inception.¹⁷

Issues and Answer

This paper will serve as an examination of the powers and limitations of the United States legislative branch of government in matters of war. In doing this, precedence will be given to specifically enumerated powers granted or withheld by the current Constitution of the United States. Founding documents, such as the Articles of Confederation and early state constitutions will also be examined and contrasted with the current legal regime in an attempt to better understand the true meaning behind the Constitution. International law, as it applies to American war powers, will also be examined when relevant.

Specific issues to be addressed include a broad examination of legislative powers in general, the funding powers of Congress, the powers Congress holds over militias and the power of Congress to issue declarations of war. From an international law perspective, the effect of the United Nations Charter on Congressional war powers will be given special attention.

Main Discussion

Legislative Powers Generally

The legislative branch is created and regulated by Article I of the Constitution.¹⁸ It is important to keep in mind throughout our entire

15. *Id.*

16. Charles L. Shanor & L. Lynn Hogue, NATIONAL SECURITY AND MILITARY LAW 1 (2003).

17. Vicki Jackson & Mark Tushnet, COMPARATIVE CONSTITUTIONAL LAW 123 (2nd ed. 2006).

18. U.S. CONST. art I.

examination of the legislature's war powers that Article 1 Section 1 of the Constitution states that "All legislative powers herein granted shall be vested in a Congress of the United States."¹⁹ The inclusion of the term "herein granted" plainly indicates that only powers that are specifically enumerated within the Constitution may be claimed by the legislative branch.²⁰

The obvious exception to this is of course found in the concluding statement of Article I Section 8 which states that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²¹ However, it is best to read the necessary and proper clause as one that does not actually create any new Congressional powers in and of itself.²² One should instead read the necessary and proper clause as one that limits Congressional authority to act too far outside of the scope of its specifically enumerated powers.²³

Put another way, this clause proclaims that Congress may act outside of its enumerated powers only when Congress must do so in order to carry out said powers.²⁴ If a law is enacted that does not directly effectuate an enumerated power then its enactment must be necessary to carry out said enumerated power or else it will be outside the scope of the legislature's Constitutional authority and thus constitutionally void.²⁵ Interpreting the necessary and proper clause any other way plainly contradicts the founders intentions of limited governmental power.²⁶

The Tenth Amendment to the Constitution echoes this sentiment of limited federal governmental power when it states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the

19. U.S. CONST. art I § 1.

20. John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1684 (2002).

21. U.S. CONST. art I § 8.

22. David E Engdahl, *The Necessary and Proper Clause As an Intrinsic Restraint on Federal Lawmaking* 22 *Power. Harv. J. L. & Pub. Pol'y* 1: 107 (1998).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

people.”²⁷ As an Amendment to the Constitution, the Tenth Amendment is considered “valid to all intents and purposes, as part of this Constitution” and should therefore be read as carrying a legal weight that is equal to the rest of the document.²⁸

The Tenth Amendment accomplishes much the same task as the term “herein granted” in Article 1 Section 1, but it does so much more forcefully.²⁹ The Amendment does this by first using the term “not delegated.”³⁰ The term “not delegated” assumes that the federal government has only those powers it was specifically assigned.³¹ Secondly, the Amendment then uses the term “reserved” which signifies that only that which has been explicitly surrendered to the federal government by the state is lost to the state and all other power is retained by it.³²

Taken as a whole the Constitution plainly reads in such a way that it begs one to interpret it strictly, giving power to the federal government only when it is obvious that said power was meant to be given. Keeping this in mind as further Constitutional provisions and laws are interpreted will most likely lead one to a result intended by the framers of the Constitution.

The Funding Provisions

In Article 1 Section 8 we are given a list of specifically enumerated Congressional powers.³³ The first war related power mentioned in Article 1 Section 8 relates to the power of Congress to collect taxes to “provide for the common defense.”³⁴ Congress is also given the power “To borrow money on the credit of the United States.”³⁵ These are not powers that ought to be dismissed as ineffectual as they encapsulate the sole ability of the federal government to finance a war.³⁶

27. U.S. CONST. amend. X.

28. U.S. CONST. art V.

29. *U.S. v. Darby*, 312 U.S. 100, 124 (1941).

30. *Alden v. Maine: Infusing Tenth Amendment and General Federalism Principles Into Eleventh Amendment Jurisprudence*, 51 CASE W. RES. L. REV. 505 (2001).

31. *Id.*

32. *U.S. v. Darby*, 312 U.S. 100, 124 (1941).

33. U.S. CONST. art I § 8.

34. *Id.*

35. *Id.*

36. Yoo, *supra* note 20.

When one remembers the nation's experience with the ineffectual Articles of Confederation and its voluntary tax contribution model, these new constitutional provisions that allow direct taxation and borrowing are seen as a purposeful remedy to a recognized failure of the nation's previous constitution.³⁷ It is little wonder that this direct taxation provision was adopted when one considers that under the Articles of Confederation the federal government received on average only half of what it requested from the states.³⁸ The founders saw a mistake in the old system and moved to correct it in the new.

The power of Congress to fund the military under the current Constitution is not absolute as it is later qualified further down in Article I, Section 8 by the explicit limitation that no financial support of the military "shall be for a longer term than two years."³⁹ This limitation is in fact a provision that empowers rather than inhibits Congressional war power as it ensures that the military will forever be dependent on Congress for funding.⁴⁰ Due to this limitation, a military campaign cannot be legislatively approved and then carried out by the executive in perpetuity without further Congressional action on at the very least a biennial basis.⁴¹

This model of empowering the legislative branch with the power of the purse is directly copied from the British political system, the system from which America was born.⁴² Outside of this two year limitation, Congress is explicitly given complete power of the purse. In other words, only Congress can raise funds and only it can appropriate said funds to the military.⁴³ Should Congress decide to tighten the purse strings to the military it would completely eliminate the ability of the nation to go to war.⁴⁴ This power should be seen as an operational, or a functional veto, over the nation's ability to wage war.⁴⁵ What's more is that Congress does not even hold a vote to exercise this

37. R. Sobel, IN DEFENSE OF THE ARTICLES OF CONFEDERATION AND THE CONTRIBUTION MECHANISM AS A MEANS OF GOVERNMENT FINANCE: A GENERAL COMMENT OF THE LITERATURE. (1999).

38. *Id.*

39. U.S. CONST. art I § 8.

40. Paul Yingling, *The Founders' Wisdom*, Armed Forces J., Feb. 2010.

41. *Id.*

42. Yoo, *supra* note 20.

43. *Id.*

44. *Id.*

45. *Id.*

functional veto over war making. Instead, it may simply fail to appropriate funds and the matter will be settled. Without active Congressional involvement, the military simply cannot function.⁴⁶

The Militia Provisions

The next legislative war powers to be discussed are the provisions which relate to the militia. In what I will term the first militia provision, Congress is explicitly given the power “to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.”⁴⁷ In the second militia provision, Congress is empowered:

[T]o 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.⁴⁸

These powers serve a dual function that can be best understood in a historical context that is unique to the United States.⁴⁹ In particular, one will find it helpful to review state constitutions that were in effect before and during the Articles of Confederation in order to get a better idea of what these provisions truly set out to accomplish.⁵⁰

The most significant accomplishment of these militia provisions was that they transferred what was traditionally state authority over the militia to the federal government.⁵¹ Specifically, the provisions transferred authority over state militias to the federal legislature.⁵² The use of the word “reserving” in the second militia provision of Article 1, Section 8 is evidence of this power transfer as the word reserve has, since its inception, meant to hold back and only that which was

46. *Id.*

47. U.S. CONST. art I § 8.

48. *Id.*

49. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 254 (1996).

50. *Id.*

51. *Id.*

52. *Id.*

previously present may be held back or “reserved.”⁵³ The legislative powers to “call forth the militia” and to organize, arm, discipline and govern “such part of them as may be employed in the service of the United States” were all powers once held by states.⁵⁴ Even a cursory glance at state constitutions of the time provide ample evidence of this.⁵⁵

Recall also that under the Articles of Confederation, states only had the power to appoint military officers under the rank of Colonel when forces were raised for the common defense.⁵⁶ The Articles were not referring to a militia in this provision but instead to an assembled national military force to which states could voluntarily contribute troops towards.⁵⁷ Under the Articles of Confederation the militia was understood to be a force that was erected for state defense, not the common defense, and thus it remained under state domain.

As previously stated, the state constitutions at the time provide support for this assertion.⁵⁸ For example, the Constitution of New Hampshire that was written in 1776 specifically creates state level procedures for nominating militia officers without any mention of federal rank limitations.⁵⁹ The 1776 Constitution of South Carolina carries similar language regarding militia officer appointment.⁶⁰ The 1776 Constitution of New Jersey also provides for state level procedures in militia officer nomination.⁶¹ Pennsylvania, Georgia, New York, and Vermont also all have provisions that speak to the state’s ability to appoint all officer posts in their respective militias.⁶² Delaware’s first constitution does not mention anything about a militia but it does state that the “general assembly shall appoint the generals and field-officers, and all other officers in the army or navy of this state,” which goes to

53. DICTIONARY DEFINITION OF RESERVE, <http://dictionary.reference.com/browse/reserve>.

54. Yoo, *supra* note 49, at 254.

55. *Id.*

56. ARTICLES OF CONFEDERATION OF 1781, art. VII.

57. *Id.*

58. Yoo, *supra* note 49.

59. N.H. CONST.

60. S. C. CONST. art. XXIII, XXIV.

61. N.J. CONST. art. X.

62. PA. CONST. § V (1777), GA. CONST. art. XXXIV (1777), N.Y. CONST. art. XXIV (1777), VT. CONST. art. XLII (1777).

show just how independent states saw themselves at this point in history.⁶³

The notion of state authority over the militia then, prior to the current Constitution, was universal.⁶⁴ Therefore, in the second militia provision we see ample evidence that the federal government is, under the new Constitution, encroaching on what was previously a state power and that from this moment on states were to keep (or reserve) only a fraction of the authority they once enjoyed over the militia. Another driving force behind the first militia provision was the founders' desire to create a bulwark against a potentially tyrannical President, who would call forth a standing militia in place of raising his own army.⁶⁵ As mentioned, Article I, Section 8 gives Congress the sole ability to "raise" armies.⁶⁶

This fear is further justified when we look once again to state constitutions that were in effect at the time. In many states the executive branch was given direct power over the state militia. In particular, the constitutions of New Jersey, Delaware, North Carolina, South Carolina, Georgia, Vermont and New York all placed the executive as the commander-in-chief of the state militia.⁶⁷ Familiar with their own state constitutions, the founders preemptively took away the possibility of a President being able to argue that he had inherent executive authority over the militia without the legislature first allowing it to do so.⁶⁸ The founders emphasize this point in Article II, Section 2 of the Constitution when they establish that the President is Commander-in Chief of the militia "when called into the actual Service of the United States."⁶⁹ Unless Congress explicitly gives the President the power to control the militia, he has no authority over them.⁷⁰

63. DEL. CONST. art. 16 (1777).

64. Yoo, *supra* note 49.

65. *Id.*

66. U.S. CONST. art I § 8.

67. N.J. CONST. art. VII.; DEL. CONST. art. IX.; N.C. CONST. art. XVIII.; S.C. CONST. art. XI.; GA. CONST. art. XXXIII.; VT. CONST. ch. 2 § 3.; N.Y. CONST. art. XVIII.

68. Yoo, *supra* note 49, at 254.

69. U.S. CONST., art II, § 2.

70. Yoo, *supra* note 49, at 176.

Declarations of War

Article 1, Section 8 gives Congress the power to “declare war.”⁷¹ This term is as ambiguous today as it was when first written.⁷² In drafting the Constitution, a great deal of controversy surrounded the wording of this provision.⁷³ The drafters were divided on what verb to use before the word “war” in this clause.⁷⁴ The surviving accounts of the drafting process illustrate that the nation’s founders were keenly aware of the monumental difference that particular words would make.⁷⁵

At the center of the debate was the question of whether the Constitution should give the legislature the sole ability to determine when the nation would go to war or whether that power should be more evenly shared among the political branches.⁷⁶ Roger Sherman, a drafter from Connecticut, was an avid proponent of using the verb “make” instead of “declare.”⁷⁷ Sherman understood that using the term “declare” would greatly lessen legislative power in matters of war as the term “declare war” had a very specific meaning at the time.⁷⁸ In the end Mr. Sherman lost his battle and the verb declare won the day.⁷⁹ Even after establishing that the term “declare war” is not as expansive as the term “make war,” we are still unclear about what the term “declare war” actually means.⁸⁰

The founders’ debates on which term to use are helpful because they demonstrate that the writers of the Constitution were keenly aware of the differences that a single word could make.⁸¹ Their debates provide evidence of the deliberate use of every word in the document that governs our nation.⁸² Proponents of an expansive legislative war powers shrink from the fact that such debates over terminology were

71. U.S. CONST., art. I, § 8.

72. Francis D. Wormuth & Edwin B. Firmage, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 18 (1987).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Saikrishna Prakash, *Unleashing the Dogs: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45-45 (2007).

81. Wormuth, *supra* note 72, at 18.

82. *Id.*

important and instead rely on un-authoritative private writings from founders such as Thomas Jefferson, who were supposedly of the view that “declare war” meant that only Congress and not the President could unilaterally bring the nation into war.⁸³

To support this view, Jefferson is often quoted as saying, “We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body.”⁸⁴ I do not dare argue that Jefferson is wrong. In fact, I believe Jefferson is absolutely correct in his assessment of war powers in the United States.⁸⁵ However, there is no evidence to support that in this statement Jefferson was referring to Congress’s power to declare war. It is my contention Jefferson’s quote was not referring to the power to declare war; rather he was more likely speaking to Congress’s ability to “raise and support armies” and the congressional power of the purse.⁸⁶

Legal scholars who support an expansive reading of the “declare war” provision such as Michael Ramsey and Saikrishna Prakash lift only a limited, out of context, portion of Jefferson’s letter to James Madison to support their personal agenda.⁸⁷ If one refers directly to the source, one can plainly see that this statement is made in a discussion of the checks-and -balances between the executive power of the sword and the legislative power of the purse.⁸⁸ In fact, the quote as a whole reads: “We have already given, in example one effectual check to the Dog of war, by transferring the power of letting him loose from the executive to the Legislative body, from those who are to spend to those who are to pay.”⁸⁹

Legislative war power proponents fail to even present the completed thought of Jefferson because doing so would severely undermine their argument. Rather than relying on private and out of context statements from the founders in order to interpret the legislature’s Constitutional war powers one should focus more heavily on what was

83. Prakash, *supra* note 80, at 45-46.

84. Michael D. Ramsey, *Textualism and War Powers*, U. of Chi L. Rev. 1543, 1549 (2002).

85. *Id.*

86. 8 U.S. CONST. art. 1 §8.

87. Ramsey, *supra* note 84, at 1549-53.

88. Thomas Jefferson, *The Earth Belongs to the Living: To James Madison September 6, 1789*, THE LETTERS OF THOMAS JEFFERSON 1743-1826.

89. *Id.*

actually said in official documents such as the current Constitution, the Articles of Confederation and state constitutions that were in effect during the founding era of the nation.⁹⁰

In the Articles of Confederation, the word war is used a total of ten times, four of which are in regards to “vessels of war” and can therefore be disregarded as irrelevant to the current discussion.⁹¹ In the current Constitution, the word war is only mentioned four times, one of which is in regards to “ships of war.”⁹² Between both documents we have nine potentially useful instances where the word war is used.⁹³ By examining the preceding words to war in each document we can perhaps elucidate exactly what is meant by “declare war” in Article I Section 8 of the Constitution.

In each of these documents, we find the most striking contrast between the phrases “declare war” and “engaging in war.”⁹⁴ In Article I, Section 10 of the Constitution individual states are prohibited from “engaging in war.”⁹⁵ The term “engage in war” is present in the Article of Confederation as well in two separate Articles.⁹⁶ In one of these articles, states are explicitly disallowed to “engage in war.”⁹⁷ It is safe to say that the term “engaging/engage in war” is used to accomplish the same goal in both constitutions. In both instances the term prohibits states from engaging in war unless specific circumstances exist.⁹⁸

The term also arises in the Articles of Confederation is when the document decrees that the nation as a whole will not “engage in war” unless a majority vote from the states allows it to do so.⁹⁹ When examining the term in both constitutions we see that the verb engage was commonly used as a way to strictly prohibit all war.¹⁰⁰ This suggests that if the founders wished to prohibit the executive form bringing the

90. Yoo, *supra* note 20, at 1543.

91. ARTICLES OF CONFEDERATION OF 1781, art. VI, VIII and IX.

92. U.S. CONST., art. I, § 8, 10; *id.* art. III, § 3.

93. ARTICLES OF CONFEDERATION OF 1781, art. VI, VIII and IX; U.S. CONST., art. I, § 8, 10; *id.* art. III, § 3.

94. Yoo, *supra* note 20, at 1639.

95. U.S. CONST., art. I, § 10.

96. ARTICLES OF CONFEDERATION OF 1781, art. VI and IX.

97. ARTICLES OF CONFEDERATION OF 1781, art. VI.

98. *Id.*

99. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6.

100. Yoo, *supra* note 20, at 1648.

nation into hostilities without legislative approval that they were very familiar with how to do so.¹⁰¹

Instead of using the ambiguous declare war provision in Article I, the founders could have easily inserted an unambiguous clause that stated, “The nation will not engage in war without the approval of the legislature.”¹⁰² However, the founders did not do this. Considering their familiarity with creating legislative checks on executive power, the founders rationally intended the term “declare war” not be given a special meaning in order to grow legislative power nearly two centuries after it was written.¹⁰³ What then does declare war actually mean? Perhaps international law holds an answer.

One cannot dismiss international law as irrelevant to our domestic law. Although many may not realize it, international law plays an important role in our Constitution.¹⁰⁴ For example, the Supremacy Clause states that the “Constitution . . . and all treaties made, or which shall be made . . . shall be the supreme law of the land.”¹⁰⁵ Treaties, much like regular laws, do not take precedence over the Constitution but they can in some instances trump federal and state laws.¹⁰⁶ Also of relevance to international law, Article I, Section 8 of the Constitution, empowers Congress to “define and punish . . . offences against the law of nations.”¹⁰⁷ The law of nations is known today as customary international law.¹⁰⁸ In these two articles we see that at the very least the founders were familiar with international law and created constitutional provisions that dealt with international law’s implications on domestic law.¹⁰⁹

Declarations of war held a very specific meaning under international law at the time of the founding.¹¹⁰ Up until the early 20th Century, war was considered a legitimate state activity that was recognized

101. *Id.*

102. *Id.* at 1666.

103. *Id.* at 1668-69.

104. Robert E. Dalton, NATIONAL TREATY LAW AND PRACTICE: UNITED STATES, 189 (1999).

105. U.S. CONST., art. VI, §2.

106. *Reid v. Covert*, 354 U.S. 1, 9 (1957).

107. U.S. CONST. art. I, §8.

108. Thomas Buergenthal & Sean Murphy, PUBLIC INTERNATIONAL LAW IN A NUTSHELL, 23 (Thomson West eds. 4th ed., 2007).

109. Dalton, *supra* note 104, at 209.

110. Yoo, *supra* note 20, at 1649.

and regulated under international law.¹¹¹ Declarations of war were in a sense notifications that formally changed legal standing between parties.¹¹² Not only did a declaration of war change the legal relationship between two warring states, it enacted the laws pertaining to states that were neutral to the conflict as well.¹¹³ With such a particular meaning under international law and the incorporation of constitutional provisions that plainly indicate a familiarity with it one is hard pressed to seriously argue that the term “declare war” in the Constitution holds a different meaning than what it did under international law at the time of the founding.

As international law has developed over the past few centuries, Congress’s power to issue a declaration of war has more or less been rendered functionally obsolete.¹¹⁴ The UN Charter, which currently acts as the supreme legal source of international law, has in effect relieved Congress of its power to declare war.¹¹⁵ War itself may still be legal under international law so long as it is carried out in compliance with certain provisions of the UN Charter. War is no longer governed by the same principles of customary international law as it was when the Constitution was written.¹¹⁶ When one considers that the declaration of war power was written into the Constitution so as to allow Congress to legally “perfect” war under international law we see that the provision has today become functionally obsolescent.¹¹⁷ With international law changing the rules of the game, the declare war provision no longer has any legal utility in the international setting.

The War Powers Resolution

Within the current legal framework, we are told that our current “Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.”¹¹⁸ However, the Constitution does not explicitly specify which (law or

111. Paul W. Kahn, *War Powers and the Millennium*, 34 Loy. L.A. L. Rev. 11, 14 (2000).

112. *Id.*

113. *Id.*

114. Charles A. Shanor & L. Lynne Hogue, NATIONAL SECURITY AND MILITARY LAW, 361 (1980).

115. U.N. Charter art. 103, ¶1.

116. *Id.*

117. *Bas v. Tingy*, 4 U.S. 37, 40 (1800).

118. U.S. CONST., art. VI.

constitutional provision) is to be disregarded when the two conflicts. Luckily, this matter was resolved early on in our history in *Marbury v. Madison*. The Supreme Court eloquently stated that, “If a law be in opposition to the Constitution . . . the Constitution, and not such ordinary act, must govern the case to which they both apply.”¹¹⁹ This ruling makes sense when one considers Article 5 of the Constitution, which covers the procedure to amend said document.¹²⁰ If a mere act of Congress could amend the Constitution, Article 5 would be superfluous.

The War Powers Resolution (WPR) is a legislative act that was passed in 1973 only after achieving the necessary supermajority majority vote to override President Nixon’s veto.¹²¹ The stated purpose of the WPR was to ensure Congress and the President shared in the decision-making process of whenever the United States would become involved in hostilities.¹²² Upon reading the WPR however, it is clear that the Resolution was a congressional attempt to firmly establish the roles of both the Legislature and the Executive in matters of war.¹²³

It is also important to understand the historical context from which the WPR was developed. The United States had been in the unpopular Vietnam War for years, and many saw this Resolution as a direct response to that particular war.¹²⁴ The animosity between the two political branches was palpable at the time and this Resolution’s passage was for many a formal rebuke to the President.¹²⁵ When examining the WPR, one must keep in mind that it is only an act of Congress, a mere law, and that if it conflicts with the Constitution, said law has no force or effect.¹²⁶

The WPR is divided into nine sections, the first section merely naming the act the “War Powers Resolution.”¹²⁷ The second section sets out what Congress declares to be the purpose of the act, “to fulfill the intent of the framers of the Constitution,” by ensuring that the

119. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

120. U.S. CONST., art. V.

121. See Stephen Dycus et. al., NATIONAL SECURITY LAW 240 (4th ed. 2007).

122. Richard F. Grimmett, CONG. RESEARCH SERV., RL31185, THE WAR POWERS RESOLUTION: AFTER 28 YEARS, 1 (2002)

123. James A. Baker, III, et al., MILLER CTR. OF PUB. AFFAIRS, NATIONAL WAR POWERS COMMISSION REPORT, 21 (2008).

124. *Supra*, note 122.

125. *Id.*

126. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

127. The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-48.

President and the Congress must consult with one another before introducing American armed forces into hostilities.¹²⁸ Next, in Section 2, the act recites the Necessary and Proper clause from Article I, Section 8 of the Constitution in an attempt to assert the authority of the legislature to make such a law.¹²⁹ Lastly, in Section 2, the Congress attempts to define the Presidents Commander-in-Chief powers by stating that said powers only become activated when a declaration of war is issued, specific statutory authorization deems them active, or when an emergency exists and was created by an attack.¹³⁰

According to Section 1543, the President must consult with Congress before introducing The United States Armed Forces into hostilities. After introducing the military, the President must regularly consult with Congress over the matter until the armed forces are removed from hostilities.¹³¹ Section 1543 requires the President to adhere to a reporting requirement when the nation is in hostilities without a declaration of war.¹³² Section 1544 describes who in Congress must receive the reports discussed in Section 1543. Further, Section 1544 limits the President's ability to use armed force abroad.¹³³ Specifically, the Act requires that the President withdraw armed forces from hostilities after sixty days unless he receives Congressional authorization to continue.¹³⁴ The President may receive the maximum of a thirty day extension but only if said extension will result in the prompt removal of forces from hostilities.¹³⁵

Sections 1545-1546a describe the relevant procedures for passing joint and concurrent resolutions.¹³⁶ Section 1547 provides that the Congressional authority to commence or continue hostilities cannot be inferred from an appropriation act or a ratified treaty.¹³⁷ Finally, Section 1548 addresses how to deal with potential litigation under the act

128. *Id.*

129. *Id.*; U.S. CONST. art. I, §8, cl. 18.

130. *Supra* note 127.

131. *Id.* at §3

132. *Id.* at §1543.

133. *Id.* at §1544.

134. *Id.*

135. *Id.*

136. *Id.* at §1545-46a.

137. *Id.* at §1547.

by noting the “separability” of the provisions. When one provision is nullified, all remaining provisions remain in force.¹³⁸

President Nixon’s veto to the WPR was unsurprising, and in a letter to Congress he stated his objections to the act.¹³⁹ His principle objections related to the constitutionality of the act.¹⁴⁰ The President especially took issue the provision that gave Congress what is essentially a legislative veto over the use of force and empowered them to direct the withdraw of troops.¹⁴¹ The constitutionality of the sixty day mandatory withdraw requirement was also questioned as it allowed Congress to place a check on Presidential power without any affirmative action required by the Congress.¹⁴²

Subsequently, President Nixon urged that the act undermined foreign policy because it impacted the President’s ability to conduct foreign affairs effectively.¹⁴³ However, Nixon did not state that the act was entirely unconstitutional.¹⁴⁴ He praised the Act’s intent to promote cooperation between the political branches and he embraced Section 1542 entirely.¹⁴⁵ Ever since the WPR was enacted, every President has deemed the Act an unconstitutional infringement on the President’s executive powers.¹⁴⁶

Conclusion

The inability to wage war effectively under the Articles of Confederation stemmed less from state retention of power and more from the inability of the federal government to produce effective national leadership. Under the Articles of Confederation, the United States was governed without an executive branch and had a legislative body that is best described as a neutered parliament which lacked even the leadership of a prime minister.¹⁴⁷ The current Constitution was developed

138. *Id.* at §1545-46a.

139. Richard Nixon, Message vetoing House Joint Resolution 542, A Joint Resolution Concerning the War Powers of Congress and the President, H.R. Doc. No. 93-171, (1973).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Richard F. Grimmet, CONG. RESEARCH SERV., RL31185, THE WAR POWERS RESOLUTION: AFTER 28 YEARS, 1 (2002)

147. *Id.* at 4.

in light of the failures of the Articles of Confederation with an eye toward remedying those issues without creating a state that could be easily gripped by tyranny. The result that was a Constitution that embraced was what is known as a system of “checks and balances.”¹⁴⁸

Many have begun to fear that our system of checks and balances is in danger of becoming nothing more than a historical memory.¹⁴⁹ In particular, there is a fear that the President may unilaterally send the nation into war without any Congressional involvement.¹⁵⁰ This is a fear that is mightily overblown considering the extraordinarily powerful legislative checks on the executive branch.¹⁵¹ Without Congressional approval, the President cannot raise or borrow funds to sustain a military campaign.¹⁵²

Although Congressmen may complain that it is politically costly to not vote on a bill that will fund the military, we must not confuse a lack of political will with political incapacity.¹⁵³ One must remember that at our founding the idea of maintaining a standing military was extremely unpopular.¹⁵⁴ Congress, the only governmental body capable of raising and supporting a military has forgotten this sentiment and allowed the nation to maintain a vast military machine.¹⁵⁵

One must also realize that the United States is not the fledgling nation it was at its founding; it has become a global hegemon with military commitments throughout the world. Should the legislature truly wish to remove the nation from the possibility of the military being utilized all it need do is vote accordingly when awarding appropriations.¹⁵⁶ Fear of losing re-election is not a justifiable excuse for Congressmen to complain that they have no check on executive war making ability.¹⁵⁷ Should Congress truly feel they need a further check on the executive they ought to seek an amendment to the Constitution

148. Louis Fisher, *Congressional Checks on Military Initiatives*, 109 POL. SCI. Q. 739 (1994)

149. *Id.*

150. *Id.*

151. Yoo, *supra* note 20.

152. *Id.*

153. *Id.*

154. *Supra* note 16.

155. U.S. CONST. art. I, § 8.

156. *Id.*

157. *Id.*

rather than pass resolutions that seek to alter Constitutional powers of the government.

The argument to read the declare war provision of the Constitution as one which greatly empowers Congress is not only mistaken but dangerous.¹⁵⁸ Commanding checks against the executive's power to use the military are already in place and need not be added to.¹⁵⁹ Reading the declare war provision too broadly risks forcing the nation to wage war by committee, a mistake the founders sought to correct as they abandoned the ineffectual Articles of Confederation. Taken as a whole, it seems best to read "declare war" as something far less than an outright prohibition of the use of force by the executive.¹⁶⁰

It is likely noticeable that throughout this discussion little mention was made of the judicial branch. This is because the judicial branch receives its powers from Article III of the Constitution and in Article III the only mention of war comes in the form of defining the crime of treason as "levying war" against the nation.¹⁶¹ The judicial branch has no power in matters of war, as war is ultimately a political act.¹⁶² Because of war's political nature, courts have been hesitant to even address the legal squabbling that often arises between Congress and the President.¹⁶³ By asserting the political question doctrine, courts have been able to avoid a great many pressing legal questions on the grounds that some issues are best resolved by the political branches of government.¹⁶⁴

Of course, there is another check on power: the ability of American citizens to vote out unfavorable governments. If the political branches make a decision to go to war and the people do not wish to do so, the opportunity to rectify the matter is only an election away.

158. *Supra* note 16.

159. *Id.*

160. *Id.*

161. U.S. CONST. art. III, § 3.

162. A. Heder, *The Power to End War: The Extent and Limits of Congressional Power*, 4 ST. MARY'S L. J. 472 (2009).

163. *Id.*

164. *Id.*