3

War Powers and American Expansion

The United States emerged from the War of 1812 newly confident in its security and ambitions. It had again fought the world's most powerful empire to a draw, and Britain accepted the most important American terms. In the decades that followed, the American population and economy ballooned – between 1820 and 1840, its population and exports roughly doubled.[1] The Army and Navy were reformed to improve professionalization and performance, but they remained dwarfed by those of major European powers. The United States didn't need a large standing force. As Alexis de Tocqueville observed on his 1831 tour of the country, the United States held a unique and enviable position free from the threat of invasion or conquest.[2]

That sense of continental security emboldened policymakers to imagine a far larger republic, and the primary national project between the War of 1812 and the Civil War was southern and western expansion. The 1803 Louisiana Purchase had already doubled the country's size. In this next period, it doubled again from territory acquired from Spain in Florida and by war with Mexico – a war of choice, not necessity. In pursuing that grand ambition, the United States shifted strategies from a defensive crouch to projecting military power beyond its borders.

This strategic shift strained earlier understandings of constitutional war powers, as arrangements suited for territorial defense proved inadequate for hegemonic ambitions. All the while, policies of territorial expansion were fiercely contested with arguments about constitutional war powers.

The slowly growing size of standing armed forces magnified some presidential powers that previously attracted little attention. The President could command forces during peacetime in ways that could either raise or reduce the risk of war. The President's exercise of diplomatic powers – what he or his subordinates *said* about American interests and intentions to defend them – had major implications for war and peace. New types of expansionist conflict, and the need to protect growing commercial interests abroad, filled out a broader role as supreme commander. Exercising war powers beyond U.S. borders, presidents also actively molded international legal rules to suit American strategy, rather than passively accepting them as they stood, and they drew on the international laws of war in surprising ways to

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justify sweeping commander-in-chief authority. Communication technology at the time limited the President's long-distance control of subordinate commanders, and it limited Congress's oversight of remote military operations even more. Meanwhile, Congress debated the constitutionality of granting the President, in advance, wide latitude on whether to use force.

Most of these developments allowed the President to create, in Hamilton's words from the 1793 neutrality crisis, "an antecedent state of things" that constrained Congress's decision-making. At the same time, though, Congress gained practice in exercising its own powers – especially with regard to creating, maintaining, or withholding military forces – sometimes to support presidential initiatives and sometimes to check them.

WINNING FLORIDA

The first true test of the strategic and constitutional tension between defense and expansion came on the nation's southern frontier, where the Monroe Administration showed how the grammar of self-defense could serve hegemonic designs.

Before he had even helped negotiate the treaty that ended the War of 1812, John Quincy Adams was the nation's preeminent diplomat; in 1817, President Monroe appointed him Secretary of State. Andrew Jackson emerged as that same war's greatest military hero and general. Both believed that the United States should pursue security through expansion, and the key site for that scheme was Florida.

Adams and Jackson could not have been more opposite. Adams, the meticulous, calculating, and stoically introspective son of the nation's second President, was born into the northeastern elite, spoke half a dozen European languages, and was groomed from childhood to be a leading statesman. The impetuous and swashbuckling Jackson, born a western commoner and orphaned in poverty, had clawed his way up in life. Adams would champion the abolition of slavery, while Jackson led efforts to remove or extinguish Native American peoples. They came to despise one another as they battled to become President. Before each would win that role, though, their career paths and their strategic thinking intersected during the First Seminole War – an episode that tested presidential initiative in undeclared conflict.

Until the 1810s, a major threat to the fledgling United States came from foreign empires that were too strong. Now danger came from an empire that was too weak. Spain's deteriorating hold on neighboring colonies to the south allowed cross-border threats to grow. Spain had recently lost much of its naval forces in the Peninsular War against Napoleon's France, and it faced internal political strife while its Latin American colonies rebelled.[3]

Seminole Indians and others were raiding Georgia from Spanish Florida – territory that Spain could not effectively govern. Florida was also a haven for Black men and women escaping slavery in nearby U.S. states, as well as pirates who raided American commerce. The Monroe Administration looked to address these threats

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on the United States' doorstep by force, and it ended up expanding U.S. territory in the process.

In 1818, General Jackson led a mixed force of U.S. Army regulars and state militia on a destructive march through Spanish Florida. The President had authorized Jackson to pursue hostile Seminoles into that territory, but, exceeding his written orders, the general razed Native American villages, seized Spanish forts, and executed two British traders who were allegedly aiding the Seminoles. Before long, U.S. forces effectively occupied most of Florida. These belligerent acts set off diplomatic protests from Spain and Britain and sharp political controversy at home. Many members of Congress and the press denounced Jackson's campaign as wanton, unconstitutional, and against international law – arguing that Jackson, and by implication Monroe, had unilaterally made war on Spain.[4]

It remains unknown for sure whether President Monroe privately approved of Jackson's actions. He had formally instructed Jackson not to take territory or attack Spanish forts, and further coordination between the President and Jackson was impractical when it took a month for letters to travel each way between Washington and Florida.[5] After the campaign, however, Monroe faced a stark choice: whether to disavow the capture of Spanish forts and the execution of British subjects or to defend them. Accepting responsibility meant absorbing the political, diplomatic, and constitutional criticism himself. Disclaiming responsibility, as most of his cabinet advised, would allow Monroe to censure Jackson's missteps but risk political backlash for abandoning a popular hero.

What followed was not merely a political quarrel but a constitutional test of how far a President could stretch "defense" to justify unilateral intervention. Several legal questions converged in the Florida crisis. Did the President, absent congressional sanction, have authority even to send forces across the border? If so, had Jackson's raids exceeded that authority? Were the attacks on Seminole villages and the seizure of Spanish forts consistent with international law? Adams persuaded Monroe to cut through these disputes with an aggressive defense of Jackson's actions, turning controversy into leverage against Spain.[6]

To critics at home and abroad, the Monroe Administration justified Jackson's campaign with Adams's expansive theory of self-defense. Because Jackson acted on orders that fell within the President's authority to repel cross-border Native American raids, Adams contended that both constitutional principle and international law permitted whatever further measures were necessary to accomplish that defensive mission – including seizing Spanish forts. Adams stood almost alone among leading statesmen of his generation in believing that the Framers had given Congress too much control over war initiation.[7] It is therefore unsurprising that he used this crisis to advance a broader conception of executive war powers.

Adams tied security strategy to constitutional law in several ways. First, guarding U.S. borders, he argued, was not limited to repulsing cross-border raids – a defensive function clearly within the President's powers. American security sometimes

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required projecting force beyond U.S. territory, including pursuing Native American attackers into foreign sanctuaries. If the President was constitutionally empowered to repel attacks, he was also justified in suppressing threats at their source – in this case, the power vacuum left by Spain's waning control in Florida. President Washington had advanced a similar logic on the western frontier by authorizing incursions into Native-held lands to protect White settlements. Adams extended that reasoning across international boundaries.[8]

Alongside his bold constitutional claims, Adams advanced a parallel international-law defense, assuring foreign capitals that the United States had committed no aggression against Spain. Jackson's campaign, he insisted, consisted of limited and reasonable protective measures against threats that Spain itself had failed to control. Pairing Jackson's military measures with Adams's widely published diplomatic justifications – which were aimed at domestic audiences as much if not more so than foreign ones – the Monroe Administration asserted that the basic right of self-defense extended across borders when a neighboring state could not or would not suppress dangers arising within its territory.[9] Such a doctrine suited a republic that seemed destined to push its continental frontiers ever outward. (Readers versed in international law may notice that two decades later, the shoe was on the other foot, when Britain invoked a similar rationale of cross-border self-defense in justifying its 1837 raid from Canada against the American steamboat *Caroline*.) Adams's defense stands as an early example of the Executive Branch using its war powers to mold customary international law, rather than accepting it as it stands.

Adams linked security strategy with constitutional law in another way: by broadly interpreting the President's constitutional powers in the Seminole conflict to give the United States more leverage in its border negotiations with Spain. To concede that the President lacked authority for defensive incursions would have signaled reluctance to act again; by contrast, defending Jackson's conduct as constitutionally justified projected a credible threat of renewed intervention. A master at weaving ideas with power, Adams was not merely rationalizing past actions but warning of future ones. In effect, he adjusted constitutional argument to strategic need – a hawkish reading tailored to territorial expansion.

The Monroe Administration combined this bold legal formula for defensive powers with dubious recitations of the facts, and Congress could not muster a strong response. In his November 1818 annual address to Congress, the President railed: "In pursuing these savages to an imaginary line in the woods it would have been the height of folly to have suffered that line to protect them."[10] Many lawmakers responded with condemnation, viewing Monroe's elastic justifications as legally and strategically dangerous. In 1819, fiery House Speaker Henry Clay led a charge against what he saw as military subversion of the Constitution: "Of all the powers conferred" by it, "not one is more expressly and exclusively granted than that is to Congress of declaring war." He argued that the Constitution was designed to prevent rash decisions like the Florida campaign. The future president John Tyler urged his

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House colleagues to resist acquiescing in Jackson's campaign: "This nation, if this precedent receive your sanction, may be involved in war without the question ever having been submitted to the Representatives of the people." Monroe was unswerving, though, and in the end, both houses of Congress failed to pass resolutions condemning the campaign.[11]

One recurring lesson here is that the Executive's relative speed and agility to move first often give it advantages over Congress in a contest between the branches' constitutional powers. Another recurring lesson is that successful military actions often dampen Congress's efforts to assert its constitutional power. If the cumbersome machinery of Congress was supposed to clog hasty decisions for war, in this case, the same feature became a liability once the more dexterous Executive Branch acted unilaterally. At that point, it fell to Congress to act decisively and pass resolutions reversing or censuring the action. As it happened, Jackson's actions did not embroil the United States in a wider war, as Clay and others warned, making it politically difficult for Congress to challenge the campaign on constitutional grounds without impugning a revered general and his success. Indeed, later in 1819, Adams clinched a popular treaty with Spain, securing American claims all the way to the Pacific Ocean. Constitutional debates about Jackson's campaign would linger, but the United States – now with the Senate's formal approval – had Florida as a result of it.

On both the constitutional and international law planes, the Executive Branch assertively redrew doctrinal lines as American commanders and diplomats redrew territorial ones, laying the groundwork for grander frontier expansion and removals of Native Americans.[12] In the meantime, the Monroe Administration would exert constitutional powers to project American hemispheric influence in another way: by proclamation.

PRESIDENTIAL THREATS OF FORCE

Florida had shown that a President could turn local turmoil into a legal basis for military action. A few years later, the Monroe Administration would similarly blend strategy and constitutional power, this time to draw a line around the hemisphere. Whereas Jackson's march extended American control by arms, Monroe's warning to Europe would seek to extend it with words.

Often, the most important way the United States has used military potential is not by waging war but by threatening it. Threats of force often disappear behind their own success, though – if they work, nothing happens – and thus, they seldom register in accounts of constitutional war powers. Lawyers tend to think in terms of "cases" or "practice," so they usually overlook these non-events – the wars that were deterred or averted, which are hard to prove – and therefore miss ways that war powers actually function.[13]

Implicit threats of force always loom in the diplomatic background of foreign policy. But as the United States slowly built up its military power in the nineteenth

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century, threats moved to the foreground and sometimes were more explicit. This posed challenges for constitutional war powers: The President, as the nation's chief diplomat, has ample power to issue public or private warnings, but under prevailing practice and thought, he lacked full power to carry them out without congressional approval. This was not a problem when the President and Congress were aligned, but it introduced strategic dilemmas when they were not. Threats of force, often made more credible by Congress's backing, can deter aggression and forestall conflict. But even when Congress and the President are strategically united, threats can also provoke counterthreats, risking unintended conflict. Presidential threats may also trap a reluctant Congress, forcing it to defend American credibility.

In his December 1823 Annual Message to Congress, President James Monroe warned that the United States would resist any efforts by European powers to colonize or reassert control in the Western Hemisphere. At this point, the Spanish Empire was crumbling; most of its former Latin American colonies were either winning independence or on the course toward it. The Monroe Administration feared that stronger European powers – including major rivals France and Britain alongside an alliance of Russia, Austria, and Prussia – would swoop in to occupy Spain's colonial vacuum. Monroe declared to European powers that the United States would "consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety."[14] Later dubbed the Monroe Doctrine, this principle would guide American foreign policy for a century.

From a constitutional standpoint, Monroe's proclamation shows the President flexing a vast, uncertain power to set and communicate foreign policy. This was no routine diplomatic stance, however. Monroe was drawing a red line – with an implied war threat (perhaps more of a bluff) – even though the nation at the time lacked sufficient military means to back it up. The United States was tacitly counting on Britain, which too was eager to exclude continental European powers from Latin America, to intervene if needed. "In its sweep and bravado," writes American defense-policy scholar Kori Schake, "the Monroe Doctrine has few equals, especially since it was promulgated by a country that was not the peer of the states – Britain, France, and Spain – whose activity it sought to curtail."[15] The strategic brains behind this audacious move was, once again, Secretary of State John Quincy Adams.[16] And like the Florida episode, but this time more implicitly, the Doctrine reflected very bold and capacious notions of the country's international self-preservation rights – with the President positioned to judge threats to those basic entitlements.[17]

There was no real constitutional pushback to Monroe's proclamation at the time, but it nonetheless posed a serious constitutional snag.[18] The President was signaling a readiness for war if European states crossed Monroe's lines, a potential military commitment that only Congress could legally authorize. By putting U.S. credibility at stake, moreover, his threat limited Congress's freedom of action. In that respect, Monroe's move resembled Washington's Neutrality Proclamation, declaring the

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United States impartial in the conflict between France and Britain. There, too, the President took public diplomatic steps that were not binding on Congress but in practice were difficult for Congress to reverse. Congress was constitutionally free to act however it chose in both cases, but conditions established by the President – the sort of "antecedent state of things" Hamilton spoke of thirty years earlier – would undoubtedly weigh in Congress's decision. Ironically, Washington's proclamation of peace drew fiercer constitutional objection than Monroe's intimation of war. In this case, Congress's quiet acceptance reflected political alignment more than constitutional endorsement.

Even if congressional opposition to Monroe's declaration was muted, newly independent governments in Latin America pressed his administration on the constitutional questions.[19] When the government of Colombia inquired about U.S. plans for resisting European interference in Latin America, Adams responded that the Constitution placed "the ultimate decision" in Congress's hands. When Adams succeeded Monroe as President, his Secretary of State Henry Clay had a similar message for the Argentine government when it asked about the policy: "Should such a case arise, and it becomes consequently necessary to decide whether this country will or will not engage in war, Congress alone … is competent by our Constitution, to decide that question."[20]

The Constitution, in other words, divided the power to threaten force from the power to use it.

DELEGATING WAR POWERS

In theory, there was a straightforward way to bridge this constitutional gap: Congress could approve war in advance by delegating to the President the authority to use force if certain conditions were met. Formal congressional backing might also make American threats of force more credible in the eyes of foreign governments.

But, could Congress constitutionally do this – could it codify in law presidential discretion to use force? Many Framers appear to have had strong views on *whether* Congress should have the power to initiate war, but they left little guidance about *how* Congress could exercise such power. As discussed in later chapters, delegating that authority to the President is now a well-accepted practice. In the early nineteenth century, however, its constitutional footing was unclear and contested, and Congress struggled over whether it could safely and constitutionally lend the President flexibility to use force.[21]

Recall from Chapter 2 that during the Quasi-War with France, there was serious debate within Congress whether it was constitutionally permissible to delegate to the President decisions about taking certain military steps – such as whether Congress could pass on to the President decisions to expand the Army's size based on his assessment of need. This question of constitutional limits to war power delegations reemerged dramatically when tensions with France spiked again in the mid 1830s.

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Under an 1831 treaty, France owed the United States twenty-five million francs as compensation for French predations on neutral American shipping during the European war decades earlier, but the French government had issued excuse after excuse for its failure to pay up. President Andrew Jackson was determined to extract payment with threats of force. In 1834–35, the Senate, controlled by opposition Whigs, rejected two proposals that would have delegated to Jackson substantial military powers. First, it denied Jackson's request that Congress grant him authority to level reprisals against French property if France failed to make prompt payments. Second, it voted down a bill that would have given the President discretion to spend three million dollars on preparing national defenses during a Congressional recess if he thought it necessary. Senate Whigs blocked these proposals partly on policy grounds (they deemed them too provocative) and partly for partisan reasons (they were looking to clip Democrat Jackson's wings). But constitutional objections powerfully reinforced their strategic ones, too.[22]

Senator Daniel Webster warned that both proposals would unconstitutionally transfer to the President open-ended authority carefully vested only in Congress. "If we leave it with one man to decide, not only whether the military means of the country shall be used at all, but how they shall be used, and to what extent they shall be employed, what remains for Congress or the people but to sit still and see how this dictatorial power will be exercised?"[23] Senator Henry Clay, Jackson's political arch-rival, warned that yielding to the President open-ended authority over the creation of military forces or the initiation of conflict would subvert the Constitution's checks and balances.[24]

Arguments continue to this day over how much Congress may delegate discretion to the President in a wide range of public policy areas, including issues such as economic or environmental regulation. But the debates in 1834 and 1835 centered specifically on the delegation of war powers. Even if strategically sensible, concentrating war powers in the presidency through congressional preapproval was uniquely dangerous to democracy, many argued, because military force could be turned inward or wielded too perilously should any one man control it.

The view that congressional war powers may not be delegated to the President was applied inconsistently. In many other instances, such delegation was accepted, and for good reasons. The President's constitutional roles as commander in chief and chief executive implied at least *some* discretion over military affairs. Crisis situations also required rapid response and presidential agility. The Militia Acts of the 1790s discussed in Chapter 2, for example, authorized the President to call up state units in emergencies based on his own assessment of situations and in accordance with prescribed criteria. Not long after rejecting delegations of military powers to Jackson, Congress gave President Martin Van Buren broad discretionary authority to use military forces to handle British threats along the U.S. border with Canada.[25]

Whatever the case for curbing delegations, Webster's position against almost any delegation was untenable. There was no way for Congress – designed to be

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cumbersome – to continually respond to all security contingencies, and sometimes, delegations would be important to deterring aggressors. If Webster's tight-fisted interpretation was meant to protect congressional powers, it was also short-sighted. By restricting Congress to an all-or-nothing choice on the use of force, and denying it the ability to grant the President some discretion, the resulting rigidity would narrow crisis options to the point of making unilateral presidential action virtually inevitable.

As later episodes will show, the argument that Congress may not constitutionally delegate power to initiate war receded over time, especially as strategic needs made presidential discretion more compelling. The objection has even been turned upside down: Whereas in early American history, many influential voices argued that delegating military power to the President was uniquely dangerous – considering it to be an assault on the Constitution's careful division of war powers – today this is an area in which delegating power is widely accepted as especially appropriate and necessary. Still, a question would resurface again and again in the future: When Congress delegates questions of force to the President, is Congress responsibly exercising its constitutional power or is it irresponsibly surrendering it?

MEXICO: THE CONSTITUTION FOR CONQUEST

If the Florida episode had shown that the line between offense and defense could bend, the Mexican War showed just how far.

The Constitution imposes no restriction on the purposes for which wars may be waged. Still, many Framers saw the Constitution as engineered for defensive wars of necessity, not offensive wars of choice. In an 1850 case, Chief Justice Roger Taney wrote that "the genius and character of our institutions are peaceful." "[T]he power to declare war," he continued, "was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens."[26]

The war with Mexico, however, gave greater reason to doubt how well the constitutional design restrained offensive impulses. Waging war for foreign territory, rather than defending one's own, also meant widening presidential and congressional powers.

In 1846, Congress formally declared war for the second time in U.S. history (the War of 1812 was the first). In the previous year, the United States had annexed Texas, which had recently seceded from Mexico with American encouragement. While resulting tensions between the United States and Mexico ran high, particularly with a dispute over their boundary, President James Polk was setting his sights beyond it. The bellicose and expansion-minded Polk had long been pressing for war, viewing the acquisition of Mexico's northern territories of New Mexico and California as part of America's "Manifest Destiny" to spread democracy westward. When his overtures to buy that territory were predictably rebuffed, Polk sent General Zachary

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Taylor and a few thousand soldiers into the disputed border zone between the Rio Grande and the Nueces River, which the United States and Mexico each, respectively, regarded as the proper line. This move – again, predictably – provoked Mexican forces to attack Taylor's. When Mexican troops killed some American soldiers patrolling the disputed border area, it took two weeks for the news to reach the President by mail. The President quickly urged Congress to declare war, claiming that Mexico had "invaded our territory and shed American blood on American soil."[27] Polk got the war that he wanted.

Congress's power over war declaration once again failed to serve as the brake that the Framers had intended. Polk's allies rushed his proposed war resolution through the chambers with little information or debate, and on May 13, 1846, Polk signed the measure proclaiming that "by the act of the Republic of Mexico, a state of war exists between that Government and the United States."[28] Aside from any constitutional requirement that Congress authorize war, Polk needed this act of Congress for a very basic reason: The United States had only a small standing army at the time, so the resolution also gave him the money and authorization to expand it.

A repeating lesson – illustrated in later chapters – was that even if Congress holds formal controls over where and when to make war, the Commander in Chief can take unilateral diplomatic or military steps that effectively set the nation on a path to conflict. Congress, moreover, depends heavily on information provided by the Executive Branch in deliberating about war. At a time when communications still traveled very slowly overland – railroads and telegraphs were still just starting to be laid along the East Coast and to the Midwest, but not to Texas – that information could not be quickly and carefully scrutinized from afar. In this case, Polk's dramatic and unchallenged account of unprovoked bloodshed on U.S. soil and misleading portrayal of Mexico as the instigator galvanized Congress and stirred national passions, setting the stage for a swift war declaration.

Polk's gambit succeeded. Following a two-year war – much longer than he expected – the United States and Mexico signed the Treaty of Guadalupe Hidalgo. The 1848 treaty set the southern Texas border at the Rio Grande and ceded Mexico's northern provinces (which today include California and large parts of Arizona, New Mexico, Utah, Nevada, and Colorado) to the United States in exchange for fifteen million dollars. The Senate approved the treaty that July.

Today, many constitutional scholars remember this war for how it began: that Polk pretextually created a border crisis to manipulate Congress into declaring war over spilled American blood. Daniel Webster, then a Massachusetts Senator and fierce war critic, offered one of the most detailed critiques in late 1846, observing: "No power but Congress can declare war; but what is the value of this constitutional provision, if the President of his own authority may make such military movements as must bring on war?"[29] A year later, as the political and material costs of war mounted, freshman Illinois Congressman Abraham Lincoln made a name for himself with a series of proposed resolutions calling out Polk for misleading Congress

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into war.[30] In a rare formal, constitutional rebuke – though carrying no binding legal effect – the House passed a resolution pronouncing the war "unnecessarily and unconstitutionally begun."[31]

However, the start of the Mexican–American War is only one of many important constitutional aspects of the conflict. Focusing not on how the conflict started but, instead, how it ended – the wresting of California and New Mexico – helps bring into sharper focus many other important constitutional dimensions.

This was the republic's first major war of conquest.[32] Polk's strategy was to seize Mexican territory west and south of Texas while blockading Mexico's eastern ports, thereby compelling it to surrender its northern provinces. Had Polk confined his objectives to securing the disputed Texas border, his actions might have drawn far less constitutional criticism. But his broader territorial ambitions – and the strategy devised to achieve them – raised four additional constitutional questions: What roles does a commander in chief actually play? Who fights America's wars? Who controls war aims? And who governs captured territory? By focusing so singularly on the power to start wars, many scholars today neglect the crucial precedents set on these questions.

As commander in chief, Polk directed wartime military operations, diplomacy, and administration to a degree unmatched by any of his predecessors. For Polk, the war was a form of armed negotiation, and he insisted on managing the pressure on the Mexican leadership personally. After securing initial legislation, financing, and recruitment to support the war, he stayed in as close touch with field commanders as was feasible at that time, relying on combinations of railroad, steamboat, and horseback to send and receive messages. Though lacking much military experience compared to recent predecessors, Polk involved himself in the most minute details of military operations.[33]

Even with Polk's extraordinary efforts to direct the war from the White House, top commanders and diplomats outright defied him. As they marched through Mexico, for instance, American commanders occasionally struck temporary ceasefires despite Polk's instructions to press the attack. Polk repeatedly sought to sideline the Army's two senior generals – men he regarded as disloyal partisans with presidential ambitions – but political risk and the lack of credible successors kept them in command.[34] On the diplomatic side, the Treaty of Guadalupe Hidalgo was negotiated and signed behind Polk's back by an insubordinate envoy who had ignored his dismissal by the President; the terms were presented to the furious Polk as a fait accompli. This was a war in which the Executive Branch was in some ways more unitary under the President's personal direction than ever before, but in other ways was more fragmented.

As Polk refashioned the President's role at the top of the war effort, he and Congress also refashioned who fought American wars on the ground. The Mexican–American War was waged mostly by wartime, volunteer federal troops, as opposed to part-time militias or full-time servicemembers. Although this may not seem like a

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constitutional issue, it involved some clashing ideas about military power that were built into the Constitution.

Since the Founding, American military policy reflected competition between two major visions: that effective defense required a standing national force, and that liberty was best protected by relying instead on local citizen-soldiers. The Constitution grants Congress the power to create the former while expressly preserving the latter in state militias. Until the mid twentieth century, the result was a small but skilled regular Army that was flexibly expandable with amateur units for war.[35]

In the War of 1812, the United States had challenged the world's foremost military power while relying largely on state militias; by 1846, such forces were unsuited to Polk's war ambitions. They were poorly trained. They were statutorily limited to three months of federal service – too short for expeditionary warfare into Mexico. The selection of most militia officers was constitutionally guaranteed to states, undercutting Polk's desire for control. Militias were also constitutionally limited to domestic functions – law enforcement, putting down insurrections, and repelling invasions – and thus unusable for Polk's push to carry the war across the border into Mexico.

Polk and Congress solved these problems in the Mexico war by enlisting wartime "Volunteers," who fought alongside a core of regular Army officers and troops, and who agreed to serve for one year or the war's duration. Although the basic concept of Volunteers dated back to the early years of the republic, small-scale reliance on such units always faced constitutional resistance from both advocates of a larger federal army and advocates of state militias. Opponents of Volunteers argued that Congress's Article I power to raise and support "Armies" applied only to full-time soldiers, while its power to call forth state "Militias" applied only to part-time, local-defense forces. To critics, the Constitution left no room for another middle category.[36]

In this war, Congress flexed its national Army-raising power in ways that cemented Volunteers in constitutional practice and thereby relegated state militias' status. The War Department requested enlistees from each state, which were responsible for recruiting and organizing the units before they were entered into active federal duty.[37] Those Volunteer units still identified strongly with their home states, but raising them this way bypassed some of the legal restrictions on traditional militia forces (plus, Volunteers needed generals, and Polk – ever a master of patronage – rewarded loyal Democrats with commissions and commands).[38] Whereas traditional state militias made up almost 90 percent of American land forces in the War of 1812, they were only about 12 percent of the total in the war with Mexico.[39] It proved a lasting shift in responsibility for military manpower from the states to the national government, without building up a permanent, regular Army.

Then there was the question of what exactly these Volunteers were fighting for. The Mexican–American War shows that Congress's role in starting wars rarely ensures interbranch deliberation about how they should end. Congress's hurried debate over Polk's war declaration gave scant attention to what the war was actually

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meant to achieve. Polk had long coveted California, and the debates carried an unmistakable expansionist spirit; surely many lawmakers who voted for war shared his ambitions. Yet the war resolution itself suggested a far narrower purpose: merely settling the Texas border dispute. Even members of Polk's own cabinet were surprised to learn that his objectives extended to the conquest of Mexico's northern provinces.[40]

Congress may have been passive in setting the war's aims at the start, but as the fighting dragged on, lawmakers began to reclaim a measure of control. Rather than the process of declaring war, it was Polk's need for more money to keep paying troops that later inserted Congress into decisions about endgames. Polk and his congressional allies had assumed it would be a quick war. But after a year of fighting and the need for new funding, Polk had to work with a Congress divided between those opposed to any annexation and those unwilling to settle for anything short of "all Mexico."

Although Congress played a minimal role in setting war aims at the outset, the Senate's role in approving peace treaties also gave it a crucial, if partial, lever over how wars ended. Webster's constitutional criticism during the Mexican War helped rally an opposition bloc that saw in the Senate's powers a duty to restrain the President's ambitions – especially his drive for new territory. Annexation was entangled with the explosive issue of slavery, since adding new states would upset a precarious balance between slave and non-slave states. In the end, Polk's military triumphs – occupying Mexico's northern provinces and seizing its capital – undermined efforts by Webster and others to prevent major territorial expansion. Yet congressional pressure to end the war pushed Polk to accept treaty terms he regarded as imperfect.

Polk may not have worried much about Congress's aims at the war's start. But he had to heed Congress on war aims as he waged and ended it.

The President also clashed with Congress over who, constitutionally, controlled seized territory during the war – the Executive Branch or Congress. The issue may appear narrow, but the reasoning behind the President's position was far-reaching. At its core, the dispute turned on how constitutional war powers interact with the international laws of war. Those laws are commonly treated as constraints on the Commander in Chief, and in the early republic, it was widely understood that the President was duty-bound to honor their limits.[41] In this instance, however, the laws of war did not restrict executive power so much as enlarge it.[42]

As U.S. forces advanced through Mexican territory, they needed to govern areas they controlled – a crucial part of Polk's strategy to stave off anti-U.S. insurgencies in those zones. In sending General Stephen Kearny, a frontier veteran, and a 1,700-man force to take those provinces, the War Department initially provided only bare-bones guidance: "It is foreseen that what relates to the civil government will be a difficult and unpleasant part of your duty, and much must necessarily be left to your own discretion."[43]

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That discretion was sweeping. Upon reaching New Mexico, Kearny exercised it by proclaiming the entire territory liberated: "It is the wish and intention of the United States to provide for New Mexico a free government, with the least possible delay, similar to that in the United States." He granted American citizenship to inhabitants of that territory, while he declared that disloyal ones could be tried and hanged.[44] Kearny went on to issue new legal codes and to appoint a governor, supreme court justices, and other civilian officials. He and other commanders were only a little more restrained in California.

But it was far from clear that the President had constitutional power to set up those occupational governments. In effect, he was ruling more than half a million square miles of new land that he had no intention of giving up. In his December 1846 Annual Message to Congress, Polk explained that, under the international laws of war, military commanders had established provisional governments in the territories they had occupied. Kearny's proclamations in New Mexico, however, certainly sounded permanent, and besides, Article IV of the Constitution clearly grants Congress the power to enact laws for U.S. territories. Congress demanded answers. In an especially testy debate, opposition members charged Polk with acting like an emperor, while many of his allies argued that the Constitution did not apply at all to wartime occupation in captured territory, dismissing those who worried about constitutional niceties as fools.[45] Others pointed out that the international laws of war required an occupying power to administer seized territory, but they disagreed over which branch had authority to do so.[46]

Mollifying many congressional critics, Polk called portions of Kearny's conduct unauthorized, but he stood by the Executive's authority to establish temporary military rule in New Mexico and California.[47] Polk's argument – which was not formally accepted or rejected by Congress – was that the international laws of war authorized, even required, the governance of occupied territories, making it part of the President's commander-in-chief power. The bounds of commander-in-chief power conformed, in other words, to the laws of war – sometimes tying the President's hands, but now untying them.

This constitutional issue was mooted when Congress established a system of government for the territories following the peace treaty. A few years later, the Supreme Court also ruled that the President could direct commanders "to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country."[48] But executive actions in New Mexico and California until then stand out as vivid examples of how presidents can enlarge their commander-in-chief powers by pegging them to international law – a move that later presidents would repeat in future wars.

International law, however, could not settle a broader and recurring question that has appeared in every era of American history: whether a republic with checks and balances can compete militarily with undemocratic political systems. Following ratification of the peace treaty, Polk extolled in his 1848 address to Congress the virtues

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of the American constitutional system for waging war. "It has been usual for writers on public law," he noted, "to impute to republics a want of that unity, concentration of purpose, and vigor of execution which are generally admitted to belong to the monarchical and aristocratic forms." But, "the war which we have just closed by an honorable peace evinces beyond all doubt that a popular representative government is equal to any emergency which is likely to arise in the affairs of a nation."[49] A forgivable flourish, this was an exaggeration. The United States had defeated not a major power but a weakened and unstable one. That said, Polk was successful in his war because he adapted the Constitution to match his offensive strategy.

MARITIME EXPANSION AND NAVAL DIPLOMACY

As the United States pushed its borders across the continent, similar constitutional issues of presidential initiative and congressional oversight followed the Navy across the seas. Even as the Navy remained small relative to Europe's fleets, the Executive used it to extend U.S. reach abroad and, in the process, broadened its control over the use of force.

Tallies of presidential interventions in the nineteenth century often include many seemingly isolated naval assaults, skirmishes, and other violent incidents in faraway spots across Latin America, Asia, and Africa. The Executive Branch took almost all of these actions without explicit congressional authorization. Together, they established a pattern that modern-day critics of presidential unilateralism cite as steady constitutional encroachment and that proponents cite as historical acceptance of broad executive power. Both conclusions overlook the reasons why this practice developed, in addition to the arguments and leverage that Congress still wielded to restrain it.

In the early nineteenth century, the United States faced a major strategic challenge: how to protect its expanding commercial and diplomatic interests abroad without provoking armed conflict with European powers pursuing their own interests in the same regions, all at a time when communications moved slowly across oceans. More rapid and reliable transportation and communication technologies – most on land, but also by sea – were coming into use. Even so, messages between Washington and naval forces on distant stations could take weeks, or even months, to arrive.[50] This meant that the President could dispatch naval forces only with great uncertainty about the current state of diplomatic relations thousands of miles away and with limited ability to recall those forces once they were sent. If timely and decisive military action was sometimes necessary, it was unworkable to coordinate naval operations closely with the administration in Washington – let alone to obtain case-by-case congressional approval for each use of force.

To protect distant American interests, the Executive Branch relied on naval power – using shows of force and, at times, violent demonstrations of it. Administrations typically justified these actions under the President's Article II authority, even as

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they acknowledged that only Congress could initiate war against another state. The constitutional terrain was far less clear, however, when it came to using force against nonstate actors – "pirates," "savages," and "brigands" – who fell outside the club of recognized states.[51] Americans generally viewed such groups as inferior and beyond the international law protections reserved for sovereigns. Besides, those entities could not mount a major war against the United States. Presidents therefore claimed constitutional power to take limited military action against nonstate actors without prior legislative approval, especially to safeguard American lives and property. Congress – and, in the Greytown case discussed in this section, the judiciary – usually accepted this view, if sometimes reluctantly, but the precise boundaries of that power remained uncertain.

A key tool for managing both these strategic and constitutional complexities was the written instructions to naval commanders, usually issued by the Secretary of the Navy, who reported to the President. Instructions had to be specific enough to avoid diplomatic and military pitfalls or legal transgressions, yet broad enough to allow commanders to respond as local conditions changed. Naval commanders truly had to be "sailor-diplomats," embodying all American foreign policy – security, economic, cultural – across their assigned regions. Written naval orders became an instrument not only for presidents to manage military action in advance but also for Congress to oversee it after the fact.

Take, for example, Jefferson's sending of a small naval squadron to the Mediterranean back in 1801. Determined to end humiliating tribute payments to Tripoli and other Barbary states, but cautious not to exceed his constitutional authority while Congress was out of session, Jefferson sent Commodore Richard Dale with dual instructions: to escort and protect American merchant shipping if the Barbary states remained at peace, and to take more forceful steps to defend commerce – including sinking enemy vessels – if those governments took up arms. As it happened, when the U.S. schooner *Enterprise* encountered and defeated a Tripolitan cruiser that summer, Tripoli had already declared war, though Jefferson and Congress would not learn of that fact for several months. After news of those events reached him, Jefferson used his Annual Message to Congress to defend the naval escort and his orders as necessary to protect American trade, yet explained that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense."[52] Jefferson was deliberately ambiguous about where that line lay, positioning himself somewhere between those who argued that only Congress could authorize the use of military force and those who claimed that the Commander in Chief's duty to repel attacks justified limited counterstrikes.[53] In February 1802, relying on the Administration's account of the situation, Congress passed a resolution acknowledging the state of hostilities. It further authorized the President to use force against Tripoli's cruisers and "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require."[54] Over the next three years, Congress continued to support

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Jefferson's requests for resources, while distance made it impossible to monitor operations closely. Sustained naval pressure, combined with some operations on land, forced the Pasha of Tripoli to conclude a peace treaty – the republic's first significant military victory far from home.

Later executive-authorized naval expeditions often exhibited less restraint. In 1832, for example, a U.S. Navy captain and his crew attacked the Sumatran village of Quallah Batoo, in modern-day Indonesia, following reports that local natives had killed and robbed American pepper traders the prior year. President Jackson's Navy Secretary had instructed that captain to investigate and demand restitution from the local government – with force if necessary. Upon arriving already fully convinced of the need to exact retribution, the overeager officer burned the town and killed dozens of residents.

When news of the fierce American attack arrived in the United States months later, the President's political opponents criticized him for waging war against Quallah Batoo without a formal approval from Congress. The anti-Jackson newspaper *National Intelligencer* editorialized: "If the President can direct expeditions with fire and sword against the Malays, we do not see why he may not have the power to do the same in reference to any other power or people." The pro-Jackson *Globe* shot back that critics were adopting dangerously narrow interpretations of the President's constitutional powers for partisan gain. A similar debate took place in Congress, which demanded copies of the Navy Secretary's instructions to see how far the forces were directed to go. Such demands were not toothless oversight. In an era when naval expansion was politically controversial, and the Navy often accounted for about 20–25 percent of the federal budget, Congress's power of the purse was significant. In this case, since the documents revealed that the captain had exceeded his orders, neither branch ultimately saw advantage in pushing the issue further. The controversy fizzled out.[55]

Two decades and many small U.S. naval engagements after Quallah Batoo, a similar episode arose in the town of Greytown, a key transit point on the coast of present-day Nicaragua. In 1854, events there had gotten out of hand.

After a U.S. diplomat was assaulted while trying to protect an American trader from a mob, he urged a strong American response. The Navy Secretary, on behalf of President Franklin Pierce, dispatched a warship with instructions to teach Greytown's residents a lesson. "It is, however," said the orders, "very much to be hoped that you can effect the purposes of your visit without a resort to violence and the destruction of property and loss of life."[56] Arriving weeks later at Greytown's harbor, the commander demanded that local authorities apologize and compensate for the damage to American property. When that warning went unheeded, he razed the town.

An American merchant, whose property suffered collateral damage, sued the naval officer in U.S. federal court. The judge (who also served as a Supreme Court justice) ruled that the commander was not liable because the President's orders

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were valid: "Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president."[57] Given how rarely courts address presidential powers to use force, this opinion remains a key citation for broad authority to intervene overseas.

Below this seemingly sweeping judicial statement, though, both elected branches read the President's powers more cautiously. The President defended the naval actions later that year to Congress, emphasizing Greytown's lack of "regular government" authority – again, this was action against nonstate actors, not interstate conflict – and his instructions directing the commander to avoid military force if possible. Both houses of Congress passed resolutions requiring the President to turn over relevant naval instructions, and the Executive Branch promptly complied. Congress had leverage here, since presidents pushing naval expansion had to overcome fears that larger peacetime forces would fuel adventurism. A small but vocal set of House members accused the President of violating Congress's war powers, but after reviewing the matter, Congress took no formal action against Pierce or his naval agenda.

Greytown gets attention among constitutional lawyers because its bombardment produced a rare federal court decision on these issues, but it was not even the most significant naval action of 1854. Around the same time, Commodore Perry steamed into Tokyo Bay with black-hulled warships to pry open Japan to U.S. trade and diplomacy. Perry carried orders from the Secretary of the Navy to – if necessary – threaten the "semi-barbarous" Japan with force. "He will bear in mind," the letter caveated, "that, as the President has no power to declare war … [he] will not resort to force unless in self defence in the protection of the vessels and crews under his command." The instructions thus walked a fine line on presidential power, cautioning Perry against starting a military conflict while recognizing the possibility that Perry's coercive diplomacy might nevertheless lead to one.[58] The orders also emphasized the need to give Perry broad discretion: "It is impossible by any instructions, however minute, to provide for every contingency that may arise in the prosecution of a mission of so peculiar and novel a character," especially "on account of the remoteness of the scene of his operation." No shots were fired, and Perry triumphantly carried home to Washington a treaty with Japan. The Japanese government had backed down in the face of Perry's military muscle, but had Japan instead tested Perry's will, the event might today be remembered as unilateral war – perhaps defended by the President and accepted by Congress by stretching again the notion of self-defense.

One might tally incidents like these – there were many, all around the world – to bolster claims that both elected branches have long accepted broad presidential power to use force abroad. In most cases, the President sent armed forces to deal with a security situation, and Congress as a whole did not formally object. But beneath what might on the surface look like assertive presidential unilateralism was an Executive Branch trying, but not always succeeding, to exercise armed force with limitations. And beneath the appearance of congressional acquiescence was a

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politically divided and poorly informed legislature, imperfectly and intermittently supervising the Executive's military adventures.

An alternative approach – specific, case-by-case congressional authorization of force as needs arose – would have been unworkable for many missions like Quallah Batoo, Greytown, and Japan. Either the rigid procedural check or the muscular strategy had to give. But one might wonder whether naval power in this era could have been better regulated through broad congressional delegations of authority in advance. Could the President not have requested prior approval to use force in response to general types of threats or affronts – perhaps with conditions that restricted the use of force as an option of last resort? Pierce's successor, James Buchanan, tried that approach but failed. His efforts and the congressional response highlight continuing doubts among some at that time about the constitutionality of such delegations.

Buchanan was determined to spread American dominion, and he also believed that only Congress could initiate military hostilities. So, on occasions in the late 1850s, he sought advance legislative authorizations to protect American interests in Latin America. Congress resisted for several reasons. Some members doubted the wisdom of Buchanan's hardline approach; others opposed Buchanan's proposals for partisan reasons. And, again, that policy resistance was bolstered by constitutional objections to the notion that Congress could delegate authority to use force in advance of specific provocations. Woven throughout the ensuing congressional debates were questions – ones that repeat across American history – whether constitutional constraints designed originally for Founding-era worries were feasible in light of new security and foreign policy imperatives.

Take, for example, the position of anti-imperialist Vermont Senator Jacob Collamer. When Buchanan requested a narrow congressional authorization to use force, if he later deemed it necessary, to obtain redress from Paraguay for a past attack on an American ship, Collamer argued on the Senate floor that the Constitution required the President to lay before Congress specific facts and then leave it to Congress "to say whether they will order reprisals, or whether they will declare war, or what other measures they will authorize."[59] In other words, Congress could not legislate on such matters open-endedly: It either prescribed forceful military measures or it did not. To Buchanan and his allies, such a constitutional straitjacket would hinder the ability of the United States to compete as a regional power, especially when rival European states could project their military prowess more freely. The narrow and conditional force authorization against Paraguay ultimately passed, but only after Collamer delayed it.

Although he barely prevailed in Congress that time, Buchanan knew it was impractically cumbersome to rely on the slow and unpredictable Congress each time he wanted to use any force to defend sprawling American interests abroad. In 1859, he therefore asked Congress for blanket authorization of force to protect American interests against future violence in Central America. "Could anything be

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more strange and preposterous," objected New York Senator (and Lincoln's future secretary of state) William Seward, "than the idea of the president … making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared: where the time, or place, or manner, or circumstance of the duration of it, the beginning or the end: and without limiting the number of nations with which war may be waged?" When this time Congress rebuffed him, the President incredulously responded: "In the progress of a great nation many exigencies must arise imperatively requiring that Congress should authorize the President to act promptly on certain conditions which may or may not afterwards arise."[60]

Later chapters will show that, in the future, this type of broad and advance authorization becomes well-accepted as constitutional, even if rarely used. Within two years, however, this unresolved constitutional issue would seem trifling as the nation split apart and had to be saved through civil war.

CONCLUSION

Expanding territory and overseas interests after the War of 1812 tested constitutional war powers in new ways. Especially on the land and sea frontiers – and owing partly to executive branch legal arguments (both constitutional and international law ones) – the distinction between self-defensive force and offensive force became blurrier, and so too did any distinction between the President's purported authority over the former and Congress's control of the latter. Standing forces were still very small compared to those of European states, but as American peacetime military power slowly grew, so did the President's ability to create an "antecedent state of things." Presidents exercised their diplomatic and military powers in ways that could maneuver the United States toward war – but also deter it. Meanwhile, the President's power to command military forces swelled during wars of territorial expansion and in increasingly ambitious naval expeditions, though limits to communication technology curbed both the President's and Congress's war powers.

Congress often took a back seat in these developments, but at a time when standing U.S. forces remained small, Congress's power to expand or contract them also gave it leverage to shape military policy and security strategy. This power extended beyond simple scaling up or down of armed forces; both their type and size mattered. Presidents also had to mind congressional oversight during and after military encounters. Throughout this period, congressional critics of territorial or hegemonic expansion wielded constitutional arguments in political battles over how best to secure American interests.

The United States won handily its biggest war of this period, against Mexico – a conflict that shows the evolving interconnectedness of war powers. Today, war powers scholars usually see it as a declared war launched under Polk's deceptive pretenses and often end the analysis there. But the constitutional mechanisms were far more complex, extending in time both before and after the formal start of the conflict.

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The President's power to move troops in peacetime triggered Congress's powers to declare and fund war. That combination of moves opened congressional options for providing manpower, the choice of which – along with presidential command decisions about where to send and keep combat forces – enabled the President to pursue his war aims. His choice of ambitious aims required more congressional war funding and, ultimately, the Senate's war-ending approval. Movement along any of those joints would have produced a different war with a different outcome.

An irony of Polk's triumphant claim that the military victory vindicated the American constitutional system's wisdom is that the war also hastened its unraveling. As many critics had forewarned, the Mexican War's territorial spoils soon upset the fragile balance between free and slave states, setting the nation on the path to civil war. Few of this period's experiments in war powers would provide much guidance for the trials that followed, when the greatest test of war powers would lie not at the borders but within them.

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