6

A Constitution for Total War

Early twentieth-century Europe was a volatile mix of hyper-nationalism, criss-crossing alliances, and tightly coiled war plans. The 1914 assassination of the Austro-Hungarian heir by a Serbian nationalist set off a chain reaction that plunged Europe into war. Germany and Austria-Hungary declared war on Serbia and her ally Russia. Germany invaded Russia's ally France through neutral Belgium, which led Belgium's ally Britain to declare war on Germany. By 1917, when the United States entered the war on the side of Britain and France, a stalemated war of attrition along jagged trench lines had cost millions of lives. This was "total war," entailing the mobilization of entire societies to field and supply huge mechanized armies for years.

If war powers are understood chiefly as authority to start or enter wars, World War I seems unremarkable. As the Framers might have wished, the United States strove to avoid war, declaring it only after other options failed. But if war powers are understood as a system of interlocking parts for managing and wielding military power, World War I is a pivotal episode. After Congress declared war, all three branches confronted new constitutional questions about how the nation fought, who did the fighting, how wars ended, and how future wars could be prevented. At what is now roughly the midpoint in the nation's history, the main war powers issues were strikingly different from the Founding era, as well as from the main ones of today.

The most profound constitutional issues in World War I had to do with Congress's powers to mobilize for industrial, expeditionary war. Congress assumed new powers to draft men into military service thousands of miles away – "over there" – and it exercised and delegated unprecedented regulatory powers on the home front to keep those troops supplied and the domestic economy humming. On issues ranging from conscription to prohibition, the Supreme Court upheld sweeping powers of the elected branches to determine both the scope and duration of "wartime." World War I was the moment in American history when the gap between Congress's peacetime power and its wartime power reached its apex – even if in practice the government stopped short of exerting the full extent of its powers.

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War on this scale also raised new questions of how the United States ends wars, and how wartime powers recede. After the November 1918 Armistice, constitutional disputes over war powers also helped sink Wilson's grand plan for collective security, as the Senate rejected his postwar treaty. World War I shows both the President's vast power to set war aims and Congress's role in shaping the peace.

Nowhere is the elasticity of the American constitutional war-powers system – its capacity to adapt to meet strategic demands – more evident than in World War I. In that respect, this episode lends more weight than others to the view that, in this domain, law ultimately gives way to politics. Yet the same institutional machinery that enabled such wartime flexibility also supplied the framework for returning to constitutional normalcy.

ENTERING THE GREAT WAR

On the evening of April 2, 1917, President Wilson entered the House chamber to clamorous applause, and he called on Congress to declare war. Many members waved flags as Wilson, who earlier in his career was among the most respected scholars of American government, made the case. Within four days, Congress obliged by wide margins. The resolution proclaimed "That the state of war between the United States and the Imperial German Government, which has been thrust upon the United States, is hereby formally declared." In some respects, this was how the Framers envisioned it would work: After exhausting alternatives, Congress would deliberate thoroughly and make a decision. But beneath the surface consensus for war lay confusion. The war-declaration process clarified neither America's aims nor the means to achieve them.

At the Founding, steering clear of Europe's wars was a first principle. More than a century later, the United States again worked hard to keep out of Europe's latest conflict – especially as that war descended into horrors on a scale never before seen. Instead of the quick war that all belligerents had planned for, the introduction of technologies like machine guns and rapid-firing artillery killed at staggering proportions and brought the warring parties to a stalemate. In the four-month battle along France's Somme River alone, casualties topped one million, as barely any territory changed hands. Waging a war of this magnitude transformed European societies, governments, and economies.

From the war's outbreak in August 1914 until Spring 1917, the United States clung to formal neutrality. Three thousand miles across the water, distant wrongs including Germany's pillaging of Belgium and sinkings of transatlantic ocean-liners carrying Americans failed to draw the United States into the war militarily, even as the United States supplied Britain and France with economic lifelines. Whereas many Framers assumed that presidents might be prone to war – hence the need for legislative brakes – Wilson took the nation to war reluctantly. When war first broke out in Europe, he pledged to keep America out of it. He won reelection in 1916 on

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a campaign slogan of having done so, and despite escalating German provocations well into 1917, he still remained determined to avoid war.[1] Legislative brakes on the rush to war operated chiefly against some congressional factions urging intervention rather than against a cautious President.

Wilson finally opted for war in 1917, but only after Germany resumed unrestricted submarine warfare in the Atlantic and revelations emerged that Berlin had tried to entice Mexico to attack the United States. In April, calling on Congress to officially recognize a state of war with Germany, Wilson warned of the extraordinary needs for military manpower, economic mobilization, and citizen loyalty to wage war on a mass-industrial scale.[2] Each of those needs would raise profound constitutional questions.

The lopsided congressional votes for war – 82-6 in the Senate and 373-50 in the House – belied the depth of popular ambivalence, though much of the public initially rallied behind the President's decision.[3] The lopsided votes also, once again, did not reflect consensus on war aims. Congress's war resolution, much like the previous war declaration against Spain in 1898, spoke only in the most general terms of bringing the war to "successful termination." In asking Congress to declare war, however, Wilson's address was filled with lofty ideals that went beyond a military settlement.[4] To Wilson, the war resulted from Old World Europe's cutthroat balance-of-power system of *realpolitik*. His ideas of a new world order reflected the belief that democratic nations would be more peaceful and that common international commitment to self-determination and collective security could reduce propensities for war.[5]

Some of Wilson's idealistic rhetoric was designed to sell a war to a divided public. But he had been advancing these goals well before the United States decided to enter the war. In a January 1917 speech before the Senate, he had declared that after the war, "There must be, not a balance of power, but a community of power; not organized rivalries, but an organized common peace." He envisioned such a community, a "League for Peace," as a way to avoid entangling alliances, promote self-determination and other freedoms, and reduce pressures for arms racing.[6] Wilson finally and reluctantly led the nation into war in large part to secure an influential seat at any postwar negotiating table. He believed the United States would wage war in order to wage peace.[7]

But only a minority of lawmakers on Capitol Hill embraced these lofty ambitions. In fact, Congress spent little time discussing Wilson's grand vision for a postwar world. Many members expressly disavowed the idea that the United States was fighting to remake international relations in America's image. Senator Warren Harding of Ohio, who would later succeed Wilson, denied that he was voting for war in the name of democracy: "It is my deliberate judgement," he explained, "that it is none of our business what type of government any nation on this earth may choose to have." He and others emphasized that this was a war to defend American security and rights, nothing more. Indeed, for some lawmakers, the United States was, somewhat paradoxically, only entering the war in order to safeguard its prerogatives as a

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neutral.[8] The legislative history of the war declaration is filled with talk of "complete victory," without agreement on what that meant.

Congressional disagreement on aims may not have mattered much in 1917, when America entered the war – but it would come back to haunt Wilson two years later, after the conflict was over. In the meantime, surface-level congressional enthusiasm for war also concealed how unprepared militarily the United States remained to wage such a massive one.

DRAFTING AN EXPEDITIONARY ARMY

If declaring war marked a classic exercise of constitutional prerogative, mobilizing for it tested the Constitution's modern limits.

In July 1917, General John Pershing wired a cable from Paris that sent shockwaves through Washington. A steely veteran of the Spanish–American War and U.S. campaigns to capture Mexican guerrilla leader Pancho Villa, Pershing had been dispatched to command the "American Expeditionary Forces," as they were called. Arriving in Europe to lead a first wave of around 14,000 troops, he quickly grasped that the United States had embarked on a struggle far larger than its forces or institutions could yet sustain. "It is evident that a force of about 1,000,000 is the smallest unit which in modern war will be a complete, well-balanced, and independent fighting organization," he wrote to the War Department. Emphasizing that this was merely the minimum needed, he urged the Department to plan for three times that – "at least 3,000,000 men."[9] This demand for manpower would overwhelm the recently renovated Army reserve system and would pose not just policy and administrative challenges but constitutional ones.

The United States was at that time an economic heavyweight but not a military one. It was by far the world's largest producer of steel and produced a third of global industrial output, while its military did not even rank in the top ten by size.[10] When Congress declared war, the War Department had only a little over 200,000 troops available (many of them state national guardsmen posted on the Mexican border). Within a year and a half, this force would grow tenfold.[11]

Creating such a force required solving two problems: First, getting and training enough men. Second, retaining the ones essential to arming, transporting, and feeding those troops, while also sustaining the domestic economy. Solutions to both issues stretched congressional war powers in untested ways.

At the time Wilson called on Congress to declare war, he had also called for drafting at least half a million men according "to the principle of universal liability to service." Congress set to work right away, and debate over the draft mirrored debate over the war itself. Proponents appealed for sacrifice in the name of security and ideals; opponents doubted that threats justified such a price.[12] This debate took place before Congress knew the likely scale of American deployment overseas, though, or the answers to such basic questions as whether U.S. forces would be

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organized into their own divisions or be absorbed into British and French ones. The Executive Branch, exercising its command powers, decided on the former.

Within weeks, lawmakers produced the Selective Service Act of 1917. All male citizens of draft age were required to register with local boards, which were responsible for much of the program's administration. But liability to actual military service was, as the law's name suggests, "selective." Individuals were drafted based on health, family obligations and, importantly, engagement in the war industry. Historian David Kennedy explains that because the war was a contest of mass production, conscription would rely on selective service "as a way to keep the right men in the right jobs at home."[13]

Between Summer 1917 and the November 1918 Armistice, the national government drafted almost three million men, comprising more than 70 percent of those who served during the war. Of the roughly two million soldiers sent to Europe, more than half were draftees.[14] Most Americans before then had little, if any, direct interaction with the national government that now asserted coercive power to sacrifice their lives.[15] The biggest troopship ferrying these men across the Atlantic was a former German passenger vessel *Vaterland* that the Navy poetically renamed USS *Leviathan*.[16]

As previous chapters have alluded, constitutional fights over a national draft were not new, yet the issue did not reach the Supreme Court until World War I. Since the Founding, criticism had centered more on sensitive balances between federal and state governments than on individual rights. Direct national conscription might be militarily efficient but risked sidelining militias.

While most state militias had always required some form of compulsory service, they operated under a longstanding British tradition that limited service to local defense. The Constitution's Militia Clause in Article I appears to reflect that tradition, granting Congress authority to federalize state militias only for three domestic purposes: to "execute the laws of the union, suppress insurrections, and repel invasions." The War of 1812 had sparked the first major legal controversy over conscription, when Congress narrowly rejected a proposal to refill depleted Army ranks through a national draft. Constitutional objections to a national draft then resurfaced during the Civil War when the Union turned to federal conscription for the first time in the republic's history. Although the policy was never tested at the Supreme Court during the war, Chief Justice Taney privately drafted an opinion declaring it unconstitutional. In his view, permitting compulsory Army service, he warned, would allow the national government to drain militias of manpower, effectively erasing the role of state forces.

Drawing on these long-running arguments more than fifty years later, some critics viewed the World War I Selective Service system as doubly unconstitutional. First, by drafting men into national military service, it threatened states' militia powers. Second, by deploying draftees abroad, it effectively nullified constitutional limits that confined mandatory service to domestic defense. Many opponents now

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added another constitutional objection that a draft violated the post-Civil War 13th Amendment abolishing "involuntary servitude."[17]

Whatever potency the objections to a national draft may have carried in earlier generations, the Supreme Court roundly rejected them in 1918, in *The Selective Draft Law Cases*. The petitioners were convicted of failing to register. Echoing some of Taney's arguments, they claimed that the Framers understood "raising armies" to mean only voluntary enlistment, and that ever since (with the brief exception in the Civil War that was never legally resolved), Congress had respected the Framers' intention to raise an army by that method alone.[18] The government responded that the Framers were well aware of compulsory service as a means for raising troops, and – cognizant of problems in fielding enough troops in the Revolutionary War – they specifically designed the Constitution to vest Congress with complete power to create armies as it saw fit.[19]

Chief Justice Edward White's unanimous 1918 opinion swept aside the petitioners' historical arguments and their claims that a national draft would improperly swallow states' militia powers. He barely took the time to respond to other constitutional objections. During the Revolutionary War, "the want of power in Congress to raise an army," he wrote, had left the Confederation perilously dependent on state quotas for troops – a system that had nearly cost the fledgling nation victory. The Constitution, he concluded, thus granted Congress discretion to raise armies by whatever means it deemed appropriate, given exigencies of the moment.[20]

What explains the apparent ease with which the unanimous 1918 Court dispensed with Civil War objections of two generations earlier, and the objections in the War of 1812 two generations before that? For one thing, the Civil War recast centralized military power as a needed check on state-level threats to liberty, not just the other way around. (Ironically, Chief Justice White himself had fought for the Confederacy.) As Chapter 5 explored, a series of early twentieth-century reforms to standardize and improve antiquated militias also had, in return for substantial federal funding, subordinated those state forces – now "National Guards" – to the regular Army. Moreover, *The Selective Draft Law Cases* unfolded in an atmosphere of intense patriotism and active government efforts to suppress dissent. During oral argument, counsel for a defendant challenging the draft suggested that the American people had not endorsed the war they were being compelled to fight. The Chief Justice shot back across the bench that such a claim "is a very unpatriotic statement."[21] Consider also the Court's position when it heard the case: The U.S. military had over 100,000 combat troops in Europe and was readying to send hundreds of thousands more, many of them drafted. Striking down the draft then would have been crippling. The real constitutional fight had already been waged – and settled – in Congress, not the courts.

But the principal reason why the Supreme Court brushed aside lasting constitutional doubts has to do with profound transformations in the nature of war itself. By 1918, the European powers had already been at war for more than three years and,

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as the Supreme Court would observe, had all turned to national drafts to maintain protracted mobilization. In casually discarding objections, the Chief Justice noted the "almost universal" resort to compulsory drafts among the warring powers to deal with the manpower demands of industrial warfare.

The Court's ruling in *The Selective Draft Law Cases* is best understood to mean that Article I's power to "raise and support armies" combined with the Necessary and Proper Clause gives Congress wide discretion to assemble an Army by whatever means it chooses. As the size of modern armies ballooned, Congress's powers to raise armies inflated, too. This was not just a matter of size, though: Acceptance that federal draftees could be sent *abroad* was another step, like the National Guard reforms discussed in Chapter 5, in untying the matters of how forces are raised from where they could be used. Once again, the view that constitutional war powers are elastic – meant to flex as Congress sees fit – won out over the competing vision that demands rigidity and fixed limits precisely when leaders are most prone to abuse power.

The Selective Draft Law Cases represented just one of many constitutional disputes in World War I in which flexibility bested rigidity. To effectively support expeditionary forces at this scale, the entire home front became a theater of war. In response, many other constitutional strictures would therefore slacken, too.

MOBILIZING THE ECONOMY

"Wheat," implored one of the war's most ubiquitous propaganda slogans, "will win the war."[22] Like conscription, economic mobilization had some precedent in the Civil War. But World War I economic regulation – energetic government control or pressure reaching down to basic diet – differed from Civil War policies in degree and in kind. In this era of industrial-scale "total war," the American public's lives would be dictated or guided in unprecedented ways by a complex set of administrative agencies and boards.[23] Many Framers would have deemed such programs to be constitutionally profane and beyond their imagined scope of warfare.

Total war harnessed entire societies – industry, labor, finance, transportation, communication – to field and support colossal military forces and staggering quantities of war machines, blurring the boundary between organized combat and the systems that supported it. The three years of conflict before American entry had exposed European belligerents' mistakes in failing to organize their societies to meet the demands of protracted, modern war – mistakes the U.S. government resolved to avoid.[24] In his 1948 book *Constitutional Dictatorship*, Clinton Rossiter later described the domestic power Wilson wielded as "infinitely more … than had ever been given to an American President. In absolute terms it far exceeded Lincoln's, for it extended to a control of the nation's economic life that would have caused a revolution in 1863."[25] Even so, the national government never actually exercised the full extent of its newfound coercive powers. Unlike the major European powers, for

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whom this was a war of survival, the United States fought far from its shores and for a relatively short time.[26]

While never reaching its full potential, government regulation of the war economy entailed three major constitutional moves: wartime expansions of Congress's regulatory power, wartime narrowing of economic rights, and wartime delegation to the Executive.

Take the Food and Fuel Control Act, or Lever Act, which Congress passed in August 1917. Earlier that year, Wilson had appointed engineer Herbert Hoover to serve as a national administrator tasked with managing the country's food production and distribution. Wilson acted similarly in other areas, for example, creating by executive order a board to coordinate the purchasing of war supplies.[27] In doing so, the President was acting solely on his own constitutional authority – a potentially shaky basis.

Statutes like the Food and Fuel Control Act put these executive bodies on firmer legal foundations. That act granted the President immense powers to issue regulations he deemed essential to ensuring adequate and equitable supply and distribution of those crucial resources – that is, to govern broad swaths of the economy in service of sweeping objectives.[28] As the sponsor, Congressman Asbury "Frank" Lever, bluntly (if hyperbolically) put it: "We must either confer the so-called autocratic powers upon the constitutional head of our Government or be prepared to have them assumed by the German Kaiser."[29] Hoover, like Wilson's other wartime administrators, did not in fact go anywhere near that far. Whereas Britain, for example, turned to austere state-directed rationing, the United States relied instead on softer forms of restraint, combining regulation with appeals to voluntary, patriotic self-sacrifice.[30] Still, the Food and Fuel Control Act and other wartime statutes granted the President near-blanket authority.

Today, it would be easy to justify legislation like the Food and Fuel Control Act under the Constitution's Article I Commerce Clause, which gives Congress power to regulate interstate economic activity and which, since the New Deal, the Supreme Court has interpreted broadly to include even local activity merely affecting interstate business streams. At the time, though, peacetime regulation of most domestic economic activity was still widely considered the states' exclusive domain; the Commerce Clause had limited reach.

Just as Congress's peacetime economic regulation powers were interpreted narrowly, constitutional due process rights were generally understood to bar government control of "private" activities. Businesses and activities that were not "affected with the public interest" were largely protected from government interference.[31] True, the Progressive movement had recently ushered in new federal and state business regulation. But only a decade before the war, in *Lochner v. New York*, the Supreme Court had struck down a state law setting maximum hours for bakers, on the grounds that it violated constitutional rights to contract freely.[32]

Now these constitutional bindings flexed in wartime to fit the government's perceived needs. As the entire domestic economy became a theater of war, the elected

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branches worked together – without encountering judicial resistance – to expand Congress's Article I regulatory powers to reach every producer and consumer as a war measure. Congress could regulate virtually any corner of the economy not by invoking its Commerce Clause power but by invoking its war power. In parallel, activities normally deemed private were recast as public; peacetime spheres of protected economic rights were open to wartime control. Once Congress put those extraordinary regulatory powers to work, wrote legal scholar Lindsay Rogers in 1919, the Executive had "well-nigh absolute authority over the character and the amount of the citizen's meal and the heat on his hearth."[33]

Tellingly, it was at that time the top lawyer of the Agriculture Department (of all places) who drafted perhaps the most detailed executive branch legal analysis of Congress's exceptional wartime powers. He wrote that Congress's authority to pass legislation like the Food and Fuel Control Act rested primarily on the Constitution's "war clauses": that is, those providing for the common defense, declaring war, creating and supporting land and naval forces, and organizing and calling forth militia. The opinion distinguished the nationwide ambit of these powers from Commerce Clause powers that could not normally reach purely intrastate activity. The Necessary and Proper Clause, the opinion noted, served to render the scope of war clauses all the broader. Maintaining the food supply in order to provide for domestic consumption and to export much needed food to European allies was, it concluded, an essential component of the war effort.[34]

Congress, too, reported that its own authority to pass the Act rested "primarily on the war powers conferred on Congress by the Constitution."[35] Representative Sydney Anderson, who in the House provided the chief constitutional rationale of the Act, cited the powers to declare war, to raise and support Armies, and to provide and maintain a Navy, coupled with the Necessary and Proper Clause, calling food as essential to war as ammunition. Unlike the Commerce Power, he noted, the war powers "operate without reference to state lines or to the power of the States to regulate intrastate transactions."[36]

The condition of war, in other words, unlocked immense legislative power over domestic affairs – power that was, in that era, inaccessible in peace – if Congress deemed it essential to the war effort.

Expanded legislative powers and narrowed economic rights still required one other wartime constitutional adjustment: the formation of large and technocratic bureaucracies. Nobody thought that Congress itself had the expertise and agility to set and continually update the intricate rules and details of a vast new regulatory administration. Those tasks would have to be entrusted to experts in executive branch agencies. "An administrative army marched into Washington before a military force sailed overseas," opens Robert D. Cuff's chronicle of the War Industries Board.[37] By the end of 1918, executive agencies controlled the railroads, telegraph and telephone networks, many industrial facilities that produced needed materiel, and other national infrastructure.

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Under prevailing peacetime constitutional thought before the war, many of the major wartime statutes would have been viewed as impermissible transfers of Congress's policymaking responsibility to the President. True, the administrative state had been growing steadily for decades. Yet constitutional orthodoxy at the turn of the century still demanded a strict division of legislative, executive, and judicial functions.[38] A corollary principle limited Congress's authority to assign its own policymaking roles to the Executive. This would later become known as the "nondelegation doctrine," though pre-World War jurisprudence in this area was scarce.

Much as powers grew in wartime, peacetime limits to legislative delegation loosened, too. The Food and Fuel Control Act was significant not only for its wide scope but for leaving so much policy direction to the Executive, through whatever regulations and licensing schemes the President deemed essential. In much the same way, for example, Congress authorized the President to take over and operate the nation's rail system and its communication networks.[39] Congress also delegated to the President broad authority to rearrange the federal government to prosecute the war effectively.[40]

Despite many opportunities for judicial pushback, no significant wartime economic regulation was struck down for overstepping Congress's powers, for improper delegation, or for violating economic or contractual rights.[41] In most wartime judicial cases, according to a leading constitutional law treatise published a decade later, "the constitutionality of the acts of Congress as war measures was taken for granted without argument."[42] It was even questionable whether prevailing judicial doctrine allowed courts to second-guess Congress's judgment as to what was or was not crucial to the effort.[43]

When considered together, pervasive national management of the economy marked one of the most significant developments in American war powers to date – and Congress, the President, and the courts all lined up behind it. Along with the national draft, wartime legislation did more than expand the range of Congress's regulatory power; it temporarily transformed the very structure of government by delegating vast policymaking functions to executive branch agencies and by centralizing functions from the states to the federal government. These steps had Civil War precursors, to be sure, each justified by necessity. But those earlier measures were tied more directly to battlefield needs. Civil War legislation creating paper currency, for example, was controversially justified and upheld primarily as needed to pay troops – a government function well-known to the Framers (indeed, it had been a major challenge in the Revolutionary War). The constitutional law of World War I reflected not just home-front needs in support of forces on the combat front, but a breakdown of the distinction between those fronts, as entire societies mobilized for total war. And whereas many of Lincoln's most drastic Civil War actions – suspension of habeas corpus, the federal draft, emancipation – were unilateral or never blessed by the Supreme Court, the most far-reaching World War I measures received approval of all three branches.

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Drafting armies and directing the economy were only parts of twentieth-century total war under this constitutional framework. Sustaining public morale was another.

SUSTAINING MORALE: FREE EXPRESSION IN WARTIME

Charles Schenck and Elizabeth Baer were leaders in the American Socialist Party. They were arrested and prosecuted during the war for publishing and mailing pamphlets – with subtitles like "Wake Up, America! Your Liberties Are in Danger!" – arguing that the draft was unconstitutional and tyrannical, and urging draftees to resist.[44] Unanimously upholding their conviction, the Supreme Court reasoned in 1919 that the First Amendment's dictates – "Congress shall make no law … abridging the freedom of speech, or of the press" – posed no obstacle to perceived necessities of war.

As it turned to national conscription and national economic regulation, the government also turned to national control of information. Wilson had taken the country to war over a set of lofty ideals more than direct threats, so he needed to sell the costly effort to the public. Soon after the United States declared war, the President created via executive order the Committee on Public Information. Chaired by muckraking journalist George Creel, that agency used every available form of mass communication – newspapers, posters, films, and speeches – to mobilize public support. The constitutional power to wage war implied authority to rally the nation behind it.

Alongside its propaganda efforts, the national government took drastic steps to combat dissent. A year and a half before it entered the war, President Wilson had complained in his December 1915 address to Congress that many recently naturalized citizens had "poured the poison of disloyalty" into American society.[45] Wilson reaffirmed to Congress in his April 1917 war address that "If there should be disloyalty, it will be dealt with a firm hand of stern repression."[46]

Congress passed the Espionage Act in June 1917. Some of its provisions, which remain on the books today, addressed spying or the publication of sensitive military information. Others cut more directly at free speech and the press. A provision criminalized willfully making false statements intended to undermine the war effort, in addition to willfully causing insubordination, disloyalty, or refusal to serve in the military. Another provision criminalized obstruction of military recruiting. Schenck and Baer were prosecuted for violating some of these measures. The act also restricted the use of mail to distribute material urging treason or forcible resistance to any federal law. In an influential 1919 book, George Sutherland – a former congressman, senator, and president of the American Bar Association, who would later be appointed to the Supreme Court – wrote: "In order to win the war, surely legislation which seeks to punish and prevent false statements calculated to obstruct and delay or defeat the accomplishment of that end, must be sound and righteous."[47]

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Lawmakers agreed. In 1918, they toughened the Espionage Act. Reminiscent of severe 1798 laws passed during the Quasi-War and Lincoln's suppression of disloyal speech during the Civil War, the 1918 provisions were known as the Sedition Act. Though repealed two years later, it punished wartime speech or publication considered "disloyal" or intended to bring the government, Constitution, or armed forces into "contempt" or "disrepute."[48]

The Executive Branch wielded these authorities as clubs against anti-war protest. The government arrested and prosecuted thousands of dissenters who it feared might drag down public morale, military recruiting, support for government war bonds, and other mobilization efforts. The postmaster general aggressively exerted censorship authority, too, preventing the distribution of anti-war literature.[49]

From today's perspective, these restrictions may seem like obvious violations of the Constitution's free speech guarantees. But First Amendment jurisprudence was not developed at the time. The Supreme Court had never yet struck down a law on free speech grounds, and the First Amendment was understood chiefly as a ban on prior restraints, not as a general shield for dissent. World War I enforcement actions offered the first real Supreme Court test of whether the Constitution protected Americans at all from punishment for what they published in wartime.

In a short 1919 opinion for the unanimous Court, Justice Oliver Wendell Holmes upheld the conviction of Schenck and Baer. Holmes, who had been wounded three times while serving for the Union in the Civil War, rejected both the view that rights were suspended outright in wartime and that their content was rigidly fixed at peacetime levels. "When a nation is at war many things which might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight," he reasoned. "No court," therefore, "could regard them as protected by any constitutional right." The Court held that the petitioners' leaflets created a "clear and present danger" that Congress was empowered to prevent.[50] *Schenck v. United States* was quickly followed by two more unanimous decisions – *Frohwerk v. United States* and *Debs v. United States* – upholding convictions for anti-war speech (in *Debs*, by the nation's leading Socialist Party figure) that had only an indirect tendency to obstruct the draft.[51]

Later that year, the Court similarly upheld the conviction of Russian immigrants living in New York who had protested American intervention in Russia's civil war. It ruled that by urging an ammunition-factory strike, they had violated the amended Espionage Act. This time, Holmes dissented, reasoning that the petitioners had not intended to impede the war effort. Still, a 7-2 majority ruled that "the manifest purpose" of the publication was "to defeat the war plans of the government of the United States."[52] The American Bar Association journal a few years later summarized these cases as standing for "the fundamental proposition that war under modern conditions demands not only all the man power, and all the material, but also all the spiritual resources of a nation."[53] Free expression was a price of waging total war.

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The significance of the Supreme Court's World War I speech cases lies not just in the abstract doctrinal formula – that in wartime, the balance of government interests and free expression tips strongly toward the former – but also the extreme deference with which the Court treated government claims. Much as it was unwilling to second-guess the elected branches' judgments about the necessity of economic regulation, the Court likewise declined to second-guess their determinations about the need for speech restrictions. Previous and later chapters show that this judicial posture was common in wartime – though not always, and not consistently so.

Beyond their impact on individual rights, World War I restrictions on speech and press posed a further challenge for the functioning of constitutional war powers. The idea that government powers expand in war, and that courts should defer to elected leaders, rests on confidence in political checks, above all the accountability that comes from public debate. Someone, after all, needs to decide what is or is not necessary to wage war effectively, and that involves judgments about both means and ends. But exceptional wartime powers, by limiting dissent, can undermine the very deliberation and scrutiny that are meant to test the soundness of those judgments and keep them in check.

This point was best made at the time by Harvard Law School professor Zechariah Chafee: "Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects." War strategy, he continued, "must be vigorously and constantly cross-examined, so that … the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished."[54] Chafee was arguing that free-speech crackdowns were not just matters of liberty. They short-circuited the political process that is so critical to evaluating and reevaluating war strategy – not only matching ends with effective means but even decision-making about ends themselves.

Recall that the constitutional process by which the President had sought and Congress had passed a war declaration provided some cross-examination (to use Chafee's words) of the justifications for war, but it did not settle ultimate war aims. Debates over major war legislation did not subject the President's lofty objectives to serious and sustained testing on Capitol Hill, either. It was only the constitutional process for ending the war that would force the issue.

WAR AIMS, WAR ENDING, AND TURNING WAR POWERS OFF

On the 11th hour of the 11th day of the 11th month of 1918, the guns fell silent in Europe. The warring parties had agreed on armistice terms, but this was no mere ceasefire. Two days earlier, German Kaiser Wilhelm II had abdicated. Under the truce, Germany had to withdraw its troops and hand over the bulk of its navy. President Woodrow Wilson declared to a joint session of Congress that day: "The

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war thus comes to an end, for, having accepted these terms of armistice, it will be impossible for the German command to renew it."[55]

Yes, the military conflict was essentially over, even if pockets of fighting persisted intermittently, mostly in eastern Europe. But Germany's defeat raised two sets of constitutional questions in the United States: First, although Congress had clearly held the power to declare war in April 1917, which branch (or branches) held power to formally end it? This was chiefly a matter of external relations. And second, when would extraordinary wartime powers at home expire – and who, for that matter, would decide? These were chiefly matters of internal governance.

All of these questions were of exceptional gravity in an era of total war because wartime government powers were so immense and intrusive. They had special complexity because the war aims were so contested and, for the President, so ambitious and lofty. And they were legally unprecedented because, unlike America's declared wars of the past, World War I ended for the United States without a peace treaty. In answering these questions, Congress exerted powers in ways unanticipated by the Framers.

Congress's April 1917 war declaration had formally converted U.S.-German relations from peace to war and thereby triggered international legal rules on combatants, prisoners, neutrals, and other subjects – as well as some statutory provisions that applied only in declared wars. Recall that Wilson requested that declaration with grand ambitions of remaking international relations, including establishing a new league of states based on rules and values that would help prevent future wars. If that were the measure of success, then the November 1918 Armistice merely began a new phase of the conflict. But some members of Congress had voted to declare war with much more modest aims in mind, like protecting American maritime rights against German predations. By that measure, the war was successful once German forces were thoroughly defeated in battle.

The Constitution provides no direct answer to who controls war aims, and previous chapters have shown that in practice this often means that the President has wide power to set them – unless and until Congress uses its own array of powers to push back. There is, however, one specific way in which the Constitution indirectly allocates power over war ends: Most major interstate wars had customarily ended with formal peace treaties, and Article II provides that the President negotiates the terms, but two-thirds of the Senate must approve them. All previous, formally declared American wars ended this way: the 1815 Treaty of Ghent, the 1848 Treaty of Guadalupe Hidalgo, and the 1898 Treaty of Paris.

So, in theory, even if the constitutional war declaration process did not ensure interbranch agreement on war aims at the front end, the constitutional peace-treaty process and need for Senate consent could help reach some agreement at the back end. Normally, this process still heavily favored the President, who could commit the country to peace terms and leave the Senate little room to maneuver. In World War I, however, Wilson failed to win that chamber's approval for a war-ending

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treaty – the Treaty of Versailles, and accompanying Covenant of the League of Nations – that the President had personally negotiated in France. So, although major combat ended in November 1918, the United States remained legally in a state of war, and it was not entirely clear constitutionally what was to happen next.

During the months he had spent leading the American delegation to the 1919 Paris Peace Conference, Wilson helped draft the plan for a League of Nations, his ambitious idea of an international organization for peaceful settlement of international disputes. The League would prevent conflict with a combination of arbitration, disarmament, and collective responses. Wilson regarded Article X of its charter as key. It stipulated that in cases of aggression, a council of great-power members would devise a joint response. By envisioning emergency military action, the provision provoked Senate debates over war powers – clashes that foreshadowed the post-World War II effort to reconcile the Constitution with the United Nations Charter.[56]

Some Senate critics of the proposed League argued that the treaty bargained away American sovereignty – and with it, Congress's war prerogatives. Although these arguments were secondary to the deeper partisan and policy battles over intervention versus neutrality, opponents often voiced their objections in constitutional terms.[57] Henry Cabot Lodge, the powerful chairman of the Senate Foreign Relations Committee and a chief critic of the treaty, insisted that the United States ratify the agreement only subject to a set of reservations – chiefly a reservation that denied any American obligation to intervene militarily "unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide." A Senate report on the treaty warned: "American lives must not be sacrificed except by the will and command of the American people acting through their constitutional representatives in Congress."[58]

Wilson and his allies replied that the Treaty left Congress's war powers intact, creating only a moral – not legal – duty to join collective military actions. "There is nothing in the Covenant," Wilson insisted, "which in the least interferes with or impairs the rights of Congress to declare war or not declare war, according to its own independent judgment, as our Constitution provides."[59]

Technically, Wilson was right: The pact left room for discretion, and even as a treaty party, Congress could still approve or reject U.S. participation in League missions. But in another sense, this legal parsing missed a core objection: that if the League called for military action, Congress might face overwhelming pressure to oblige. In many ways, this constitutional dispute between the Lodge and Wilson camps rested on different assumptions about the League's prospects for deterring conflict. For Wilson, the practical impact on American war-making was largely hypothetical because he believed League membership would prevent wars from breaking out or escalating in the first place. For the skeptical Lodge, the practical impact was all too real because he assumed future wars were inevitable.

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The Senate voted twice against ratifying the Treaty of Versailles and joining the League. The Legislative Branch and the President had battled over winning the peace, and the President lost. This obviated – for now – the need to resolve whether and how constitutional checks and balances could be reconciled with radical new systems of international governance.

But while rejecting the Treaty avoided one set of constitutional questions, it raised another: If Congress's war declaration formally turned *on* the state of war, then how, without a peace treaty, does the U.S. government turn it *off*? Could the President do so alone (much like he alone concluded the Armistice agreement)? Could Congress do so through a resolution without presidential signature? If military victory was so complete that the enemy surrendered unconditionally, was formal action constitutionally needed at all? Or was the answer any of the above – and perhaps others? With no clear precedent or clarity in the Constitution's text, lawmakers in both houses forced the issue by proposing to end the state of war through a joint resolution.[60]

The ensuing constitutional debate was driven more by politics than principle, and it broke down along heavily partisan lines. President Wilson and his allies took the ultimately untenable view that only a peace treaty could undo a war declaration. Doing so by joint resolution would, in their view, intrude on the President's diplomatic prerogative to negotiate long-term peace terms.[61] Wilson allies also argued that a war-ending joint resolution would trespass on the Senate's special prerogative to review and approve peace treaties. When both houses of Congress passed such a resolution in 1920, Wilson vetoed it, perhaps to keep alive very dim hopes that the United States might yet join the League.[62]

Republicans on Capitol Hill, meanwhile, saw a war-ending joint resolution as a way to further diminish Wilson's dwindling control of the peace-building process – and to project themselves as the peace-restoring party.[63] They had sensible constitutional arguments: If war-declaration was a legislative act, it stood to reason that, like other legislative acts, it could be repealed or superseded by another one.[64] This also fits with the view of many Framers that making peace should be easier than declaring war. Congressional Republicans would have to wait until July 1921, however, for a president of their own party to sign that joint resolution.

Even as lawmakers and the President sparred over how to declare the war legally ended abroad, there was also the question of how long the Constitution should treat it as ongoing at home. This question would land in the Supreme Court.

The basic idea that government powers expand to match needs for winning wars was generally premised on the notion that upon war's conclusion, peacetime limits would be restored. But timing and speed of that restoration were not so clear. Peacetime constitutional limits might snap back or might resume gradually. As Chapter 4 explained, versions of this issue arose but went unresolved in the Civil War.

After the 1918 Armistice, all three branches of government accepted that exceptional war powers could continue beyond the end of major combat. The far harder

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question was when those temporary powers should finally expire. The prevailing logic maintained that because wartime emergency conditions might outlast the fighting, expanded constitutional powers should as well. The Supreme Court affirmed that reasoning in cases about, of all things, liquor.

The alcohol prohibition movement had been growing for a century, and it would eventually culminate in a 1919 constitutional amendment banning liquor production and sale. Until then, and for reasons discussed earlier in relation to economic mobilization, peacetime constitutional law in that era held the federal government lacked power to regulate alcohol consumption or purely intrastate production and sale of it. This would have been the sort of general police power reserved to the states. Prohibition advocates on Capitol Hill spotted an opening in wartime constitutional powers: Congress could enact national prohibition as a war measure, justified as necessary to mobilizing resources and manpower efficiently.

The War-Time Prohibition Act became law over the President's veto on November 21, 1918 – ten days after the Armistice. The Act provided that, as of June 1919, it was illegal to produce or sell liquor "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." Almost a year later, in October 1919, Congress overrode the President's veto again to pass the Volstead Act, which extended the prohibition to even low-alcohol near-beer. The legislation stated explicitly an objective of conserving military manpower and military efficiency. (The Eighteenth Amendment, which banned alcohol nationwide and gave Congress and the states power to enforce it, was ratified in January 1919 but did not take effect for another year.)

Brewers and distilleries challenged these prohibition statutes, among other grounds, as beyond Congress's powers because the war had effectively ended – and, therefore, Congress's exceptional legislative powers should have expired, too. Without much analysis, but with far-reaching implications, the Supreme Court ruled for the government.

In one case brought by the Kentucky Distilleries & Warehouse Company, the Court was persuaded that the country remained in a war emergency, well after German forces surrendered. No one argued that the government's war powers instantly evaporated the moment an armistice was signed; at least some residual powers must, of course, carry over, including to handle the massive tasks of military demobilization. The core dispute was whether, a year later, when it was clear the war would not resume, those statutes had lapsed because the wartime emergency had passed.

A unanimous Court held that the laws remained valid as continuing exercises of war powers. Among other factors, no peace treaty had yet been concluded, the political branches continued to engage in other war activities (like regulating railways), and "it cannot even be said that the man power of the nation has been restored to a peace footing."[65] Some of this reasoning is circular – that constitutional war powers had not expired because the government continued to claim and apply them – and

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the Court did not offer any clear standards for determining the lasting duration of war powers. Nor did the Court clarify whether it was ever appropriate for courts to scrutinize claims by the political branches that war emergencies continued.

One might have expected the judiciary to examine carefully the government's self-serving claims – that the war-emergency, and hence its war powers, endured – since government agencies might be loath to give up their war-augmented powers. Instead, the Court deferred heavily to the government's claim that wartime powers remained necessary. The Court gave the government every benefit of doubt, because "the very life of the nation depend[ed]" upon the war power. In a closely related case the next year, the Court came out the same way, but this time three of nine justices took a different approach to deference. A New York brewer (represented by, of all people, former Secretary of War Elihu Root) challenged the validity of near-beer prohibitions. The Court again upheld the statutes as valid wartime legislation. However, a trio of dissenters expressed doubt whether there truly was a reasonable relationship between war-waging and the statute's substance.[66]

A couple of years later, the Court finally pushed back against the government's continued reliance on war powers, ruling that by Summer 1922 – nearly four years after the Armistice – Congress could no longer extend a wartime rent-control act based on a claim of continuing emergency.[67] At that point, the government had little factual basis to hang its claim on. Still, these cases entrenched judicial deference to the elected branches' judgment that war-related emergencies, and thus war powers, remained in effect.

Wilson's successor finally settled when the war ended and when exceptional war powers contracted. Warren Harding, pledging a "return to normalcy," signed Congress's 1921 resolution formally terminating the state of war. In doing so, the branches together established a precedent that a war declared by Congress could be undeclared by joint resolution – even though the United States and Germany concluded a peace treaty only months later. Those actions, along with the swift lapse or repeal of wartime regulations, closed the book – for now – on many total-war powers.

CONCLUSION

In the decades before World War I, some constitutional theorists had questioned whether the American system was too rigid to survive war against major powers. How risky, they thought, to fix presidential terms at four years when a peacetime leader might prove ill-suited to wartime command, or to require that wartime legislation still be passed by two houses of Congress when one or both might be controlled by opposing parties to the President. Writing after observing the American Civil War, British essayist Walter Bagehot wrote in *The English Constitution*:

> The American Government calls itself a Government of the supreme people; but at a quick crisis, the time when a sovereign power is most needed, you cannot *find* the supreme people. You have got a Congress elected for one fixed period, going

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> out perhaps by fixed instalments, which cannot be accelerated or retarded – you have a President chosen for a fixed period, and immovable during that period: all the arrangements are for *stated* times. There is no *elastic* element, everything is rigid, specified, dated.[68]

As a political historian at the turn of the century, then-Professor Woodrow Wilson had warned about the American constitutional system's stiffness. The difficulty, he advised, "is of a sort to be felt at all times, in seasons of tranquil rounds of business as well as at moments of sharp crisis; but in times of sudden emergency it might prove fatal."[69]

But World War I revealed a different constitutional reality. The system proved not rigid but highly elastic – and powerfully so. It is the moment in American history when the differential between normal, peacetime government power and wartime constitutional power (most notably legislative power) reached its apex. Indeed, war powers were so flexible that one could argue that most wartime constitutional law was really just politics; that the Constitution did little to constrain or guide strategy, as it had in other eras.

With the advent of total war in the early twentieth century, legislative war powers enabled conversion of a largely *laissez faire* system to a centrally administered one and subordinated state militias to the federal government's authority to draft anybody into military service. These were radical assertions of power – national conscription and sweeping economic controls – undertaken on the home front. The most controversial war powers were not about actions "over there" but about actions at home. They were domestic national powers deemed essential to waging modern combat thousands of miles away – necessary because twentieth-century industrial warfare bore little resemblance to anything the Framers could have imagined.[70]

In World War I, all three branches embraced the view that the Constitution could stretch as needed to win modern wars – and then, gradually, contract again. That same elastic machinery would be retested in an even greater conflict still to come. But before that, political leaders would push and pull constitutional levers in a contest to control whether and when the nation went to war at all.

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