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War Powers in the Early Republic

Today, the Framers' war-powers blueprint is often idealized as if it drew crisp lines that were later blurred. In reality, the Constitution operated awkwardly from the start, and many of its supposed prescriptions were immediately contested.

Strategic priorities for the new republic included consolidating the union of states, safeguarding its borders and frontiers, and protecting maritime trade. As the United States encountered its first challenges on each of these fronts, some of the Framers' common assumptions about war and the Constitution turned out to be flawed. Gaps in the Constitution were also filled in ways that many of its architects had failed to fully anticipate – or that many scholars today fail to appreciate. Military conflict rarely arose as tidy choices for Congress to declare war or not. Instead, it grew out of a series of moves and countermoves by the United States and foreign states – with presidents often taking initiative in the space between war and peace. That raised constitutional questions of how far the President and Congress could go in exercising their own powers without intruding on the other's. And, in the nation's formative foreign crises, rival factions wielded dueling constitutional arguments as political weapons, knowing that controlling the constitutional frame could determine policy outcomes.

In waging war, and especially in the United States' first formally declared war, the vertical division of war powers between the small national government and the states – a bargain necessary to assure the Constitution's ratification – contributed to malfunctions in the American military machinery. That compromise also helped keep the Union from breaking apart in its first major war. Security provided by the vast oceanic moat of the Atlantic allowed the early republic to survive – barely – and begin to learn militarily and legally from that trial by fire.

Because of the Constitution's textual ambiguities, early contests over war powers – and their resolution – remain crucial to understanding war-powers arrangements today.[1] Those episodes established patterns that would endure, including executive initiative in the gray zone between war and peace, legislative calibration through limited authorizations and oversight, and a commander-in-chief power whose limits remained uncertain. Early political and judicial precedents did not permanently fix

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the allocation of powers, which continue to vary as strategic demands do. But these precedents began to fill constitutional silences, close gaps, and clarify uncertainties about who may do what when it comes to war. Later chapters will show that only with great effort by political actors or with shifts in the nation's strategic environment were early practices overturned.

INDIAN WARS ON THE FRONTIER

Those constitutional ambiguities first surfaced not in grand foreign crises but on the nation's raw western frontier.

Just two years after the new U.S. government began operating, its military suffered what remains among its worst battlefield disasters. Writing a century later, the future president Theodore Roosevelt captured the chaos of the defeat:

> Under cover of the smoke of the heavy but harmless fire from the army [the Indians] came up so close that they shot the troops down as hunters slaughter a herd of standing buffalo. Watching their chance, they charged again and again with the tomahawk, gliding in to close quarters, while their bewildered foes were still blindly firing into the smoke-shrouded woods. … There never was a wilder rout.[2]

Even the government forces' commander reported up the chain that it was "as unfortunate an action as almost any that has been fought."[3] The fiasco immediately revealed strains in the Framers' constitutional compromises, exposing how ill-prepared the new machinery was for managing armed conflict. Although a replenished and enlarged U.S. force rebounded the next year – after Congress expanded federal troops and clarified some authorities – the episode became the republic's first major test of how its constitutional structure would function in war.

Wars with Native Americans (so-called Indian wars) rarely feature much in historical discussions of constitutional war powers, but they were among the most urgent crises facing the new republic. Recent scholarship has rightly emphasized their centrality to early war-powers practice.[4] Indeed, some of these military hostilities predated the Constitution – "Deadly but not decisive interior wars characterized the first decade after independence,"[5] writes historian Ned Blackhawk – and they continued at varying intensity for the country's entire first century.

In the years following the Revolutionary War, relations between Native Americans and U.S. settlers worsened in the Northwest Territory, a sparsely populated area beyond the Appalachian Mountains. When the Constitution went into effect in 1789, violent encounters were growing more frequent and intense. Settlers and speculators hungry for Native American land pressed the new national government to do something, while a coalition of tribes in that region organized to resist encroachment.[6] In a September 1789 statute, Congress authorized about 700 federal "regulars" – troops that had already been raised by the Confederation Congress

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to help guard the frontier – and empowered the President to call into service parts of state militias, as he deemed necessary, "for the purpose of protecting the inhabitants of the frontiers … from the hostile incursion of the Indians."

President Washington was unsure that U.S. forces would win against the Native American coalition on unfamiliar turf, and his administration was distracted with establishing the basic machinery of government. He sought to combine diplomacy with demonstrative threats of force, but through a series of failed operations and failed negotiations, the government slid deeper into a war for which it was not prepared.[7]

This first conflict drew in institutional actors still learning their constitutional roles. Washington, mindful that his conduct would serve as a model for future presidents, was at this time also the United States' most experienced military commander. He favored a buildup of the regular, national army but was reluctant to appear too eager in flexing executive muscle. Responding adequately to the conflict required Congress to exercise the centralized military powers it had been granted, but lawmakers were wary of an expensive national force seen as competing with state militias and endangering republicanism. Individual states bordering the Northwest Territory maintained their own poorly trained militia forces and were each reluctant to take on a large share of the burden.

The United States very nearly lost this first conflict. In 1790, General Josiah Harmar, inexperienced in frontier combat, set off with 1,500 men, mostly militia and a few hundred regulars. After Harmar's forces were routed, Washington reassigned command to General Arthur St. Clair, the territorial governor, who was likewise inexperienced in fighting Native Americans. Although St. Clair now led about 2,000 men (thanks, explained below, to additional authorizations from Congress), they again comprised mostly militia members – poorly trained and prone to desertion. Saint Clair, suffering from painful gout, had to be carried by stretcher. In the critical battle on November 4, 1791, most of St. Clair's forces were annihilated, and the rest fled.

After taking time to prepare, the government escalated again in 1794. Under new leadership, a freshly organized force of around 3,500 – mostly longer-term and better-trained Army enlistees – defeated the outnumbered and outgunned Native American confederacy. This victory cleared the way for further westward expansion.

Although the United States eventually prevailed, the early Northwestern campaigns had already exposed key constitutional uncertainties. Washington did not request, nor did Congress issue, a formal declaration of war or a resolution expressly authorizing any specific conflict. Yet through a series of incremental measures, Congress effectively constructed the republic's first practice of waging war without a declaration. Lawmakers raised and funded federal troops – building on units that had already been fighting under pre-Constitution, Confederation authority – and authorized the President to employ state militia for frontier defense, including against Native American attacks. Taken together, these piecemeal but cumulative legislative actions began to fill constitutional gaps surrounding how the new government would employ armed force.[8]

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Washington was, for both constitutional and political reasons, reluctant to engage in hostilities without congressional backing. Nevertheless, his administration interpreted defensive authorities to include discretion, when necessary, to engage in offensive or punitive forays into Native American-controlled territory rather than simply repelling enemy raids as they occurred. From the start, any legal distinction between defense and offense was a blurry one – blurrier in the complicated world than the Constitution had anticipated.

Meanwhile, St. Clair's ruinous foray rooted a crucial practice for executive-congressional relations and war powers – and one that would prove consequential in later crises: It triggered the first formal congressional investigation of military operations. Asserting implied oversight power – neither the Constitution's text nor recorded debates discuss it – the House convened a committee to examine the debacle, with power "to call for such persons, papers, and records, as may be necessary to assist their inquiries."[9] Washington and his cabinet carefully considered whether to comply, being keenly aware they were setting a precedent. They concluded they were obliged to cooperate because the investigation flowed from Congress's other powers, like the power to create military forces. They further agreed that, although in other circumstances it might be proper to withhold some requested information, Washington should furnish it in this case. Saint Clair himself testified, along with Secretary of War Henry Knox. The committee ultimately pinned blame not on St. Clair personally but on the nascent and thinly staffed War Department.[10]

This was more than a postmortem. Congress discovered that investigation itself – without formally restraining the President's command – could operate as a constitutional instrument of control and a legislative counterweight to executive initiative in military affairs.

Finally, early failures offered Founding-era advocates of a centralized military establishment and standing army a small political consolation. Once state militias proved inadequate, Congress approved increases in the size of regular forces. Meanwhile, the fledgling War Department (little more than Secretary Knox and a few clerks) seized the moment to begin organizing, ever so modestly, a more capable regular force for future conflicts.[11]

Although this episode opened up some political space for nationalizing military power, overreliance on state militia forces would be a recurring lesson in the following decades. Indeed, the most lasting congressional actions resulting from these frontier conflicts were a pair of Militia Acts. Among other things, those early 1790s acts delegated to the President broad authority to call up state militias to defend against invasions or insurrections, and they enshrined the concept of universal enrollment of able-bodied men (in most states, white only) in state militias for possible emergency service. The legislation sought to address an urgent problem of the time: How to maintain a rapidly deployable military force despite limited financial resources and minimal public support for a standing army. Given the lengthy recesses of Congress, which could take weeks to reconvene, lawmakers had no real

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choice but to empower the President to immediately call upon militias in a wide range of situations.

The Militia Acts were one early answer to an enduring and central constitutional dilemma: how to invest the Executive Branch with the flexibility to manage emergencies while still holding it in check. Hardly had those authorities been enacted before the President reached for them – this time, not to confront dangers on the frontier but to suppress uprising at home.

SUBDUING REBELS

On September 25, 1794, Washington proclaimed he was sending state militia forces to quell the "Whiskey Rebellion."[12] A week later, he became the first and only sitting President to command forces in the field. The episode set several precedents and, though nearly bloodless, it revealed some peculiar ways that law bounded military authority in the young republic.

The Whiskey Rebellion began over taxes. Treasury Secretary Alexander Hamilton's financial policy, enacted by Congress in 1791, included a tax on liquor. The tax provoked strong resistance in western Pennsylvania, where communities felt distant from the national government and depended economically on liquor production. (People in these areas also tended to consume a great deal of local product.) Before long, tax opponents in western Pennsylvania resorted to violent reprisals against collectors.

Tensions erupted in the summer of 1794, when hundreds of protesters in Allegheny County attacked a federal tax inspector, and ensuing violence left several people dead. Unwilling to tolerate defiance of federal authority, Washington dispatched nearly 13,000 state militiamen – a force comparable in size to that of his early Revolutionary command – to suppress the uprising. It became the largest armed revolt in the nation's history and prompted the largest military response to one until the Civil War.

Washington acted under the 1792 Militia Act, which empowered the President to call out state militias to suppress violence within the nation's borders "whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings."[13] The few hundred regular Army troops authorized by Congress were unavailable, most of them on the Ohio frontier. Washington therefore relied on state units from Pennsylvania, New Jersey, Virginia, and Maryland – though his past commands in the Revolutionary War and the French and Indian War had made him wary of militias' reliability in the field.

The domestic political context also shaped Washington's approach. Beyond fears of foreign threats and presidential adventurism, debates over the Constitution and military power centered on opposing internal dangers: anarchy and tyranny. As political factions emerged, Hamilton's Federalists worried more about disorder, while

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Jefferson and Madison's Republicans worried more about despotism. Hamilton saw the rebellion as Republican-backed defiance of centralized authority and an opportunity to prove federal strength; Republicans saw it as his excuse to expand the national military.

Washington leaned heavily toward intervention but – ever conscious of his role as the office's first occupant – moved slowly and cautiously in deciding to send in troops. Two months passed between the height of violence and Washington's proclamation summoning the militia. This delay was deliberate, partly for political reasons. Washington agreed with Hamilton that the "crisis was arrived when it must be determined whether the Government can maintain itself," yet he was determined not to feed Republican anxieties about military rule.[14] Part of Washington's caution was also strategic: He sought to avoid any move that might trigger further violence. And part reflected special safeguards on military force.

First, the 1792 Militia Act imposed a judicial checkpoint that would seem alien today, when the Executive resists suggestions that courts should second-guess presidential uses of force. Under the statute, the President could call in state militias for missions like this one only after a Supreme Court justice or a district judge had confirmed that the conditions were met. Washington approached Supreme Court Justice James Wilson, who issued the required certification days later after scrutinizing evidence he had demanded.

State governments acted as a check as well. Pennsylvania governor Thomas Mifflin was initially uncooperative, and Washington feared that without his support the state militia might refuse to act. Beyond the operational difficulty, this posed a serious political risk. Washington delayed his advance and sent peace commissioners to negotiate with the rebels. Mifflin yielded only after that effort failed.

In the end, the insurgency collapsed without much of a fight. As federalized militia columns crossed the Alleghenies into western Pennsylvania, most rebels fled or surrendered, and several leaders were arrested. Two were convicted of treason and sentenced to death, though Washington later granted them the nation's first presidential pardons. Having effectively demonstrated the government's strength, he also wanted to demonstrate its mercy.

Though unremarkable as a military operation, the expedition's true significance lay in its modest contribution to building a national military establishment. Its success – resolving the crisis without bloodshed or authoritarian overreach – marked an important milestone in affirming through practice something radically new for the republic: the central government's power to use armed force to quell local, domestic unrest. The episode demonstrated that overwhelming federal force could stabilize the republican order without triggering tyranny. Yet the episode also highlighted the fragility of a system so reliant on state militias. Some Republicans at the time saw this tension as a virtue rather than a flaw, an intentional safeguard against impulsive use of federal force. Still, the limitations of varied and part-time units would continue to plague American military efforts well into the following

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century, until shifting strategic demands and political realities made room for a fundamental rethinking of the militia framework.[15]

DECLARING NOT-WAR

The biggest foreign policy crisis of the Washington Administration was not about declaring war. It was about declaring not-war.

In 1793, France was in a state of violent upheaval. Revolutionaries formed a republic, chopped off the head of King Louis XVI, and went to war against most of the powerful European monarchies, including Britain. The new French government sought to enlist support from the United States, in accordance with their treaties dating from the Revolutionary War, when France had come to Americans' aid. Now, the French expected Americans to return the favor.

Specifically, France called upon the United States, in accordance with the 1778 treaties, to assist France in its maritime offensive against British commerce. The revolutionary government in Paris asserted rights to recruit and outfit privateers from within the United States. It also asserted the rights of French naval vessels and privateers to bring seized prizes into American ports, where French consuls would establish prize courts for condemning the captured prey. By the same token, France expected the United States to bar Britain from doing likewise.

The Washington Administration was in a bind. Acceding to French demands would mean taking sides in a European war at a time when the United States lacked adequate means to defend itself if Britain or other belligerents turn their sights against it. Neutrality also promised lucrative commercial advantages: Americans could sell and carry goods to both Britain and France, whereas choosing a side would jeopardize vital trade. Yet public opinion strongly favored France, whose revolutionary government proclaimed ideals reminiscent of those that had inspired America's own rebellion. Washington now had to decide how the United States would respond – and, more fundamentally, who had the authority to make that decision. Not only were the stakes immense; the government also had to act quickly. France's new and strikingly debonair envoy was already courting sympathetic Americans, and French vessels were preparing to prey on British commerce along the U.S. coast.[16]

The main constitutional question was whether the President had the power to declare the United States neutral. Although neutrality in Europe's wars was a prime strategic tenet of the early republic, the Constitution did not clearly assign responsibility for proclaiming and maintaining this crucial impartiality. The Constitution gave Congress the power to declare war, but declaring neutrality was the opposite. So, could the President use his executive power to state publicly American neutrality (and take practical steps to enforce it)? Or did Congress's power to declare war imply its exclusive power to determine the country's status as war *or peace*?

After consulting his cabinet, Washington acted. In April 1793, he issued a proclamation declaring that the United States would "with sincerity and good faith … adopt

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and pursue a conduct friendly and impartial towards the belligerent Powers." He further warned American citizens against taking sides in the war and instructed prosecutors to enforce his decree (a move that Congress would later reinforce with new federal criminal law). Washington's alacrity kept the United States out of war. The situation was tense, and he believed it demanded the agility of which the Executive Branch is uniquely capable. It helped that Congress happened to be out of session at the time.

The Neutrality Proclamation also triggered a deeper constitutional debate about whether presidential diplomacy could shape the landscape in which Congress would later have to decide questions of war and peace. It was in that debate that Washington's action gave rise to one of the most exquisite essays ever written on the Constitution and foreign policy. Drafted and published by Hamilton under the pseudonym "Pacificus," the pamphlet focused on the idea of concurrent powers: that although the power to declare war might belong exclusively to Congress, the powers to shape foreign policy are largely shared and overlapping. Tucked into this essay is the crucial point that in exercising its diplomatic powers, the Executive Branch might "establish an *antecedent state of things* which ought to weigh in the legislative decisions."[17]

In other words, the President may not usurp Congress's prerogative to declare war, but he may take actions that shape the context in which Congress exercises its powers – and with the practical effect of impelling Congress one way or the other on a matter. In this case, Washington's proclamation did not disable Congress; it defined the scene. The rest of this book shows how formidable those effects can be, especially as American military power grew.

Secretary of State Jefferson, concerned that the breadth of Hamilton's conclusions might justify presidential decisions to start wars, urged Madison to pen a rebuttal. Madison reluctantly did so, under the alias "Helvidius." The result was a dueling series of essays by two of the most brilliant Framers only four years after the Constitution's ratification and five years after they joined hands to write what became *The Federalist Papers*. Their exchange became the first major constitutional debate over whether presidential foreign policy actions could shape the landscape Congress then had to navigate.

Madison defended Congress's exclusive prerogative to declare war, and he argued that by extension, the President was obliged to convene Congress to decide on neutrality. By declaring neutrality on his own, Madison argued, Washington had stripped Congress of its ability to decide in this case on war versus peace. Besides the dangers of excessive presidential power to commence and conduct a war, he explained, the Framers lodged the power to declare war in Congress because that decision is a fundamentally legislative act. It carried legal effects for society, such as turning otherwise permissible aid to a foreign country into treason or triggering laws that applied to the capture and sale of enemy property.[18] Although Madison lucidly defended Congress's exclusive power to declare war, he failed to make a serious dent

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in Hamilton's most important point: that even without declaring war, the President's legitimate exercise of his own diplomatic and military powers might set the United States on a course toward or away from war. Congress was not disarmed of its power to pass laws – including declaring war or declaring neutrality – that might override the President's actions. But at least in the absence of congressional action, the President was filling the constitutional gap for declaring not-war.

That was theory. In practice, implementing neutrality still proved difficult, as many Americans were eager to stick it to the British by helping the French. French diplomats exploited holes in American neutrality policy, the federal government lacked capacity to enforce it, and most state prosecutors were slow or unwilling to do so. Nonetheless, Washington's deft action kept the United States out of the war. In his Farewell Address several years later, Washington would emphasize neutrality as a core tenet of American foreign policy – at least until the United States was strong enough that "we may choose peace or war, as our interest, guided by justice, shall counsel."[19]

The whole affair demonstrated that the movement from a baseline condition of peace to an exceptional state of war can take many winding paths, not all of them anticipated by the Framers. The express provisions of the Constitution, notably the Declare War Clause, would cover only some of them. Most conflicts would arise or be averted through a series of diplomatic or military moves and countermoves by the United States and others, whether rivals or partners. Already, just a decade in, the Constitution's key architects were divided over how its interlocking elements applied in such a contest. In contrast to Congress's sluggishness – a sluggishness due to its division into two houses, not being in session year-round, concern for committee process and local interests, lack of information, and other features – the President's agility would give him far more influence over those unfolding events and decisions than many Framers expected. Franco-American relations underscored that point again just a few years later, when Washington's policy of neutrality unraveled.

QUASI-WAR POWERS

During the administration of John Adams, Washington's successor, the United States failed to stay out of Europe's wars. In 1797, amid the ongoing conflict between France and Britain, French privateers began raiding American ships and cargoes, especially in the Caribbean, through which so much American commerce flowed. The resulting "Quasi-War" of 1798–1800 between the United States and France involved few actual battles – all of them at sea – but it set far-reaching constitutional precedents. The episode showed that military conflict can emerge not from a single decisive act but from a chain of incremental measures. It also revealed that such conflicts rarely present a clean binary choice of peace or war. The three branches had to improvise their roles and powers in the murky space between.

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The Quasi-War got its name because Congress never declared war – and President Adams never asked for one. Although Federalists in the administration considered requesting a declaration, war-wary Republicans controlled the legislature. Debates over national defense exposed enduring disagreements about whether the greater danger lay in too little central authority or too much, and whether military strength was necessary to deter aggression and protect commerce or would instead provoke conflict and entangle the nation abroad. In the months before hostilities, wrangling over naval funding repeatedly turned on whether such measures would avert war or invite it.[20] Amid these disputes, Adams sought a posture that would defend American shipping and assert national dignity while avoiding outright war. When diplomatic dispatches surfaced in April 1798 revealing French manipulation, Congress's mood hardened. Yet instead of a formal declaration, executive–legislative bargaining yielded a series of escalating authorizations – including raising troops, expanding the Navy, mobilizing militias, and commissioning privateers.[21]

The Quasi-War firmly established that if Congress can decide to declare all-out war, it can also authorize military measures short of that. In the case of *Bas v. Tingy*, decided in 1800, Supreme Court Justice Bushrod Washington wrote that Congress could authorize hostilities "limited as to places, persons, and things."[22] That case pitted the owner of a private American cargo ship, the *Eliza*, against the commander of an armed American vessel. After the *Eliza* was captured by French privateers, the armed vessel recaptured the commercial ship and returned it to the United States. A 1799 act granted generous bounties for recapturing American ships from "enemy" privateers. But was France an "enemy"? The Court ruled that the statute applied to France, even though Congress had not declared war. Justice Samuel Chase wrote in his concurring opinion that "Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects, and in time." Chase viewed the bounded military force authorizations as "prov[ing] the circumspection and prudence of the legislature," as Congress sought to navigate public tempers and protect American security without needlessly triggering more destructive conflict.

This incident at sea was hardly major, but the principle it established was: Congress need not simply choose whether to flip a switch from peace to full war. It could turn the dials of armed conflict up or down, authorizing only certain types of military operations or restricting them to certain places or purposes.

Viewing congressional power to make war as a set of dials rather than an on/off switch gives Congress a broader set of legislative options for controlling military force and conflict, but it raises other constitutional puzzles. Among them, first, may Congress delegate to the President discretion to tune the dials, or must Congress always set the levels itself? Second, on the flip side, might Congress's efforts to control the intensity or scope of armed conflict unconstitutionally interfere with the President's discretion as Commander in Chief? And, third, alongside Congress's power to set the dials, what independent powers does the President also have to

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tune them? Within the structured legislative arena, rival camps framed and hashed out many of their policy debates in the constitutional language of these questions.

The first issue, delegation, arose in the Quasi-War when Congress weighed granting the President conditional authority to expand the Army and Navy if he deemed it necessary. Some legislators questioned whether Congress could ever delegate such discretion, insisting that the Constitution vests the power to create military forces in the legislature alone.[23] The Framers were deliberate in this design, ensuring that the Commander in Chief, who stood to gain in power and prestige from enlarged forces, could not create or expand military ranks on his own. So, when Congress considered a measure authorizing the President to build additional Navy frigates "whenever, in his opinion, the circumstances of the country shall require the same," Republicans objected that only the legislature could make that decision. Congress soon considered a similar proposal authorizing the President to raise additional troops – a "provisional army" – if he deemed it necessary to deal with French threats. This drew the same constitutional objection: that Congress alone must judge when new forces are needed. Representative Albert Gallatin, a brilliantly fierce critic of Federalists, assailed such proposals that would "transfer[] a power to the Executive which is vested by the Constitution in Congress, viz: to judge of the propriety of raising an army."[24]

These constitutional arguments rested on sharply different assumptions about American security. Opponents insisted that geographic distance and state militias would give Congress enough time to authorize any emergency buildup of the Army or Navy. Conversely, skeptics of those strategic safeguards tended to adopt a more flexible view of the Constitution's rules for military mobilization. In some of these disputes, the riven Congress settled on practical compromises without resolving the underlying constitutional debate. Its Army legislation, for example, ultimately allowed the President to raise additional forces in specific emergencies, but only as a kind of temporary caretaker for the legislature, with authority limited to times when Congress was out of session.[25] Beyond authorizing and funding armed forces, Congress also reached for new oversight tools. In naval affairs, for example, lawmakers relied on special committees, budget negotiations, and executive reports to scrutinize and shape policy throughout the conflict.[26]

Some legislative proposals raised the second big constitutional question, which was almost the opposite of the first: Instead of delegating too much authority, might Congress delegate too little, by unconstitutionally curbing the President's control of military forces? When Congress considered authorizing the President to expand naval forces while limiting their use to American waters or forbidding convoy duty, administration allies protested that such restraints intruded on the President's command prerogatives. On this view, decisions about where and how to use armed forces were basic commander-in-chief judgments. While proposals to restrict naval deployments ultimately stalled, the debates exposed enduring divisions over how far Congress could go in tuning the dials of war.[27]

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The issue of how far Congress can go in legislating limits on military force without unconstitutionally intruding on the President's commander-in-chief powers remains unresolved to this day. The Quasi-War produced one of very few Supreme Court decisions, in *Little v. Barreme*, touching on the issue – though the case doesn't offer much general instruction.[28]

In that case, Congress authorized the capture of vessels sailing *to* French ports, but the President ordered naval captains to seize vessels sailing both to and *from* them. Chief Justice John Marshall read Congress's statute strictly, holding that it authorized captures only of vessels heading toward French ports (even though he acknowledged that the President's order probably made more practical sense), and he therefore ruled the capture unlawful when the vessel had been headed the other way. Marshall hinted that absent legislation, the President's order might well have fallen within his commander-in-chief authority, but in this instance, Congress had granted only narrow military authority.

To many scholars today, Marshall's opinion stands for the general proposition that Congress may restrict how military forces may be used, even in engaging the enemy, but the case did not establish whether there were limits to that legislative power.[29] There remains no clear answer on that question because the Supreme Court has said so little on the matter in the past two centuries. Like so many other major war-powers issues, questions of how far Congress can go in restricting the President's freedom of military action have been continually negotiated between the elected branches in ever-changing types of conflict.

Viewing decisions about military force as dials rather than a single switch raised a third constitutional question, this one about the President's powers to change the settings. Whereas Washington had previously turned *down* the dials of conflict with his Neutrality Proclamation, it was early in this brewing partial war that the republic faced its first major controversy about the President's power to turn them *up*.

As tensions with France mounted, Adams controversially suspended his earlier order limiting the arming of merchant ships. Adams regarded it as a pragmatic defensive response to French hostility – a far less dramatic alternative to immediately declaring war. Adams's critics, though, saw it as a ploy to bait France into a wider conflict.[30] The President viewed his unilateral step as making war less likely, even as his opponents insisted it made war more likely. In a March 1798 letter to Madison, Jefferson called Adams's claimed legal authority "insane." Madison in reply penned perhaps his strongest statement about the Declare War Clause: "The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the legislature."[31] Modern-day critics of presidential wars often cite this line as evidence of the Framers' intent. In the lines that follow, Madison goes even farther. Allowing the President to take even small military steps, like allowing merchant ships to arm themselves, "strike[s] at the root" of Congress's war powers "and will deposit the peace of the country in

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that department which the Constitution distrusts as most ready without cause to renounce it." In other words, allowing the President even modest power to turn up the dials of conflict would erode congressional checks on war-making.

The legal controversy over arming merchant vessels was short-lived. Soon after Adams allowed it, public sentiment swung dramatically against France and Congress itself began ratcheting up the undeclared war, even approving more aggressive measures than those Adams requested. But the dispute exposed a profound question about war powers that would arise again and again: How much independent discretion may the President exercise if his actions *might* lead to war, or make war more *probable*? The Quasi-War revealed that as crises unfold, presidents make any number of military and diplomatic judgment calls as to what will or will not inflame tensions. Formulas based on distinctions between "offense" and "defense" or based on probability of causing war did not work because neither line is easy to draw, and not for lack of trying by Congress. Moreover, the principle that the President cannot, acting alone, steer the nation toward war proves hard to apply, quickly getting caught up in strategic disputes. Opponents feared Adams's saber-rattling would trigger an unnecessary war; he saw tougher policies as small defensive steps needed to avert one.

Across all of these issues, the Quasi-War laid down some general precedents for how the branches jointly controlled military power. With courts offering only sparse guidance, most constitutional boundaries were bargained in politics rather than fixed in doctrine. The Republican-led Congress – favoring a strategy of de-escalation, negotiation, and coastal defense rather than projecting military reach – used a range of powers to shape U.S. security policy vis-à-vis France. Well short of declaring all-out war, but without accepting complete peace, Congress authorized a spectrum of military actions, determined the size and structure of the armed forces, and delegated limited discretion to the President over their use. The Federalist president – favoring military buildup, measured escalation, and deterrence – possessed a range of powers to steer policy, too. Within the legal limits and material constraints imposed by Congress, the President directed attacks, signaled intention or willingness to push the conflict into higher gear, and conducted military operations (and diplomacy) in other ways intended to influence France's calculus. Events finally unified the political factions at home, but until then, neither branch was politically interested in pushing their constitutional claims beyond what the other would reluctantly accept.

By 1800, tensions between the United States and France had eased enough to yield a treaty affirming American neutral rights at sea. Yet the underlying strategic challenges endured, including the ongoing need to safeguard maritime commerce against European rivals and others. American seafarers also faced rising threats from the corsairs of the Barbary States in North Africa and from pirates stalking the Caribbean, and in the decades after the Quasi-War, the United States decided to go on the offensive in both regions. At the President's urging, Congress authorized

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targeted naval campaigns to suppress these dangers. Such decisions became possible, however, only after Congress overcame domestic political resistance to building and maintaining a capable Navy.[32] Meanwhile, enduring distrust of a standing Army continued to shape military policy on land, as the United States drifted toward a "Second War of Independence" against Britain.

MADISONIAN WAR POWERS IN "MADISON'S WAR"

The War of 1812 was the country's first formally declared war. It is remembered by Americans today as a victory, though militarily it was a draw – and nearly a shattering defeat. Unlike the Quasi-War's controversies over the horizontal division of war powers between the President and Congress, this conflict was defined by contests over the vertical division of war powers between the federal government and the states. In what was sometimes dubbed "Madison's War," the Constitution failed to perform as Madison himself – the document's principal engineer, and now President – originally expected.

The War of 1812 against Britain should never have happened. It had many causes, including Britain's practice of seizing American seamen and forcing them into British service, and its support for hostile Native American tribes. Yet as Congress moved toward war, a central diplomatic grievance was already disappearing. Several days before the United States declared war, the British government revoked the decrees that had so sharply restricted American trade. But the news did not reach Washington in time.[33]

When it came to declaring war, the country split sharply along partisan and regional lines. Republicans in the South and West mostly supported war, while Federalists opposed it, especially in the Northeast where mercantile interests ran against conflict with Britain. This remains the closest war-declaration vote in American history, taken after both chambers debated in secret: 19–13 in the Senate and 79–49 in the House.[34] In theory, the Constitution's placement of the declare war power in Congress was supposed to avoid wars lacking very broad political support. Although the so-called War Hawks in Congress did not force the conflict on Madison, Congress certainly did not operate as a brake on ill-considered military conflict.[35]

More remarkable than how the United States entered the war was how it waged it. America lacked the large administrative capacity to run a major war, and compromise arrangements between federal and state military powers nearly ruptured.

Even while busy fighting Napoleon in Europe, Britain vastly overmatched the United States in raw military might. The British Navy was roughly fifty times the size of America's. The U.S. Army, only a few thousand strong, was mostly a constabulary force in western frontier forts with little management, planning, or logistics capacity. The war's strongest supporters were generally those who placed their faith in militia forces and privateers (sometimes called "militia of the sea"), and they had resisted aggressive efforts to prepare for the war.

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Despite a lopsided matchup, the United States had some naval success in the war's first years. A few victorious encounters between warships helped buoy American spirits. Those battles made little dent in Britain's superiority in large gunships, though. More important to the war effort were American raids on British shipping, especially by American privateers with letters of marque authorized by Congress.[36]

But while the young nation held its own at sea, the land war opened terribly. Initial U.S. plans to invade Canada aimed to seize Britain's remaining colonies. But the northward assault collapsed due to poor coordination and politically connected but inexperienced commanders. What the War Hawks expected to be a cakewalk became a rout, with each offensive repulsed or stalled at the border.

Poor American performance on land reflected a breakdown in the basic machinery needed to field effective forces. The war underscored the limits of relying on state militias, whose part-time troops lacked training and morale, even as Congress expanded the regular Army. Meanwhile, the War Department struggled to meet the enlarged demands of training, equipping, supplying, and paying servicemembers. Although it had grown since St. Clair's defeat, the department in 1812 still employed fewer than a dozen inexperienced clerks to support the Secretary of War.[37]

What's more, the peculiar constitutional status of militias contributed directly to the failure of the Canada invasion: As the most important of the American columns advanced northward, some state forces abruptly halted when they reached the national border, asserting that the Constitution allowed them to operate only on U.S. soil. Their resistance drew on the Constitution's text, which allows them to be called forth only to "execute the Laws of the Union, suppress Insurrections, and repel Invasions" – functions they read narrowly as confining militia service to American territory. The national government read the clause broadly, to include not only driving back invasions but also carrying the fight across the border in the cause of security. As discussed in Chapter 5, it would take another century – and a very different political and geostrategic context – to finally resolve this legal issue through creative lawyering and new institutional arrangements that favored the national government. In the meantime, the rigid constitutional arguments helped derail an already ill-conceived war plan.

In the first two years of the land war, the strain on America's weak military system only deepened, and once Britain poured more forces into the fight in 1814, its campaign through the middle states produced the war's worst American humiliation: the capture and burning of the capital. Madison, the Commander in Chief, had to flee town – briefly a wartime fugitive from British troops. The torching of Washington might have been more militarily disastrous, rather than largely symbolic, had the national government been larger or Madison a stronger wartime manager. It was not a decapitating blow only because the war effort did not have much of a head.

As the war wore on, manpower shortages grew, and constitutional protests shaped the politics of how to fix them. Late in the war, Secretary of War James Monroe proposed a national draft. Leading Federalist Senator (and future Secretary of State) Daniel Webster – who channeled Northeastern anti-war sentiment – condemned

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the proposal as "nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form."[38] True, most state militias required some compulsory service, but Webster and his allies argued it extended only to local defense. Their constitutional critique of a national draft blended rights talk with federalism: While conscription promised efficiency, it threatened to sideline local forces. As Chapter 1 noted, reserving militia control to the states, except in narrow constitutional circumstances, was a key concession in establishing national military powers. Weak for waging war, that arrangement gave states sway over defense policy and sometimes even a veto over federal military action – leverage now prized by New Englanders in a war they viewed as thrust upon them by southern and western states. Constitutional objections, though not decisive, helped scuttle Monroe's conscription plan.[39] Congress instead promoted voluntary enlistments, and the constitutionality of a national draft – like sending militias abroad – remained unsettled for another century.

State leaders in New England raised still more constitutional objections to the war effort. When the federal government summoned their militias into national service, several governors dragged their feet and, citing state prerogatives, demanded special command arrangements to keep their forces under state officers. Some also argued that although the Constitution empowered Congress to summon state militias in an emergency, states could decide for themselves whether such an emergency existed.[40] The claim was weak, and the Supreme Court later held that only the national government could make that determination – one that Congress had delegated to the President in the Militia Acts.[41]

These wartime disputes were partisan to be sure, but they also touched the core constitutional relationship between national defense and the states.[42] If states were being directed to yield their own defense forces to a national war effort, who was then responsible for local defense, and what recourse did state governments have in the event of federal–state disagreements over how to provide for it? If the Massachusetts militia were sent to the Canadian border, for example, was the state wholly dependent on the national government to fill in the gap and defend Boston Harbor? In theory, national primacy in wartime decision-making made strategic sense. Yet politically, the Union was not mature enough for states to cede all control of armed force to a distant national government.

In December 1814, delegates from the New England states intensified their opposition to the war by convening in Hartford, Connecticut, to coordinate a common position. Although a few of the most radical delegates even floated secession, the convention ultimately proposed a series of constitutional amendments instead. Among them was a requirement that Congress secure a two-thirds vote to declare war. Opponents of the conflict argued that, even with war-making authority lodged in Congress – a body meant to be deliberate and broadly representative – the nation could still be drawn into war too easily, and that this power was too vulnerable to narrow political interests.

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These arguments and proposals would echo in later moments of American history, but at the time the Hartford Convention's appeals went nowhere. Worse, their timing proved politically disastrous: Just as the delegates finalized their demands, the war was ending on a high note down south.

In the final days of 1814, American and British negotiators reached the Treaty of Ghent, essentially restoring the *status quo ante bellum*. On one level, a costly war had produced no tangible gains. On another, the United States – despite serious shortcomings – had held its own against a major European empire. Meanwhile, before news of the treaty crossed the Atlantic, General Andrew Jackson won the war's largest American battlefield victory at New Orleans, routing British forces. Ironically, the war itself might have been avoided but for delays in transatlantic communications over Britain's concessions, and for the same reason, its greatest victory proved unnecessary. Although Jackson's triumph carried little strategic weight, it propelled him to national prominence – eventually to the presidency – and helped cement the public sense that the war had ended in success.

In the end, Republicans got their war, but Federalists won their case for a standing army. The nation was learning from its near-catastrophic failures and beginning to recalibrate its military apparatus. "Experience has taught us," said Madison in his message to Congress announcing the war's end, "that a certain degree of preparation for war is not only indispensable to avert disasters in the onset, but affords also the best security for the continuance of peace."[43] Some concerns that military power bred militarism were fading, in part because the war had not led to despotic centralization. Indeed, Madison had faced more criticism for being too weak as commander in chief than for being too strong. Faith in militia forces had somewhat evaporated, too, because they performed so poorly.

Remedies for these military defects would have to come by way of Congress's Article I powers to create and organize armed forces, informed by Congress's own inquiries into military performance in the late war. Madison called on the legislature to "provide for the maintenance of an adequate regular force," and Congress partially obliged.[44] It increased the Army's peacetime size and its administrative staff. Going forward, the Army would be led by better trained, more seasoned officers. Important as they were, these legislative reforms were incremental rather than transformative.[45] It would still be deep into the century before the American military became, like its European counterparts, "professionalized" and led by career officers practiced in military arts. The Navy gained valuable combat experience, too, and postwar reforms enhanced its planning capabilities. The state militia system remained intact, but never again would the United States rely so heavily upon it in major wars.[46]

One might be tempted to view the Constitution's split of military power between a national army and state militias as a major defect. Militias performed poorly (as many Federalists predicted) in frontier skirmishes and major battles. Yet this design feature was also a political bargain without which the Constitution could not have been created at all. Though that system hampered battlefield performance in the

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War of 1812 – and would eventually be overhauled in response to new political and security realities – it also served a hidden strength. It gave state governments a measure of control over the conflict's local execution, easing sectional tensions and helping to keep the fragile Union intact.

CONCLUSION

Because the Constitution left so many silences and ambiguities about the conduct of war, early disputes and practices took on outsized significance. These early episodes did more than test the machinery of government; they forged precedents that clarified who could act, and how, with respect to war. Where the Constitution's text ran thin, practice would prove the more durable guide. The incidents in this chapter, though sometimes messy and inconclusive, are thus foundational to understanding the later exercise of war powers.

In none of the Republic's early security crises did the practical constitutional formula reduce to Congress raising forces and deciding on war, with the Commander in Chief merely directing campaigns thereafter. Internally divided on constitutional questions, Congress sometimes exercised its powers only partially or conditionally. Coming to office with widely ranging views of war powers, presidents sometimes used their own authority to constrain congressional options or steer the nation on a course toward peace or war.

More generally, through the new republic's first generation, real-world events strained the Constitution's interconnected war powers in ways that neither conformed to the Framers' theories nor offered easy legal interpretation. In the fiercest policy disputes over how to confront a wide range of security challenges, political partisans often used constitutional arguments to press their case. Again and again, even when its meaning was unclear, the Constitution structured and set terms of debates about military force.

Experimentation through practice established a few clear constitutional principles. Congress could authorize limited war, for example, and investigate campaigns after-the-fact. The President could take some military or diplomatic actions that increased or decreased the likelihood of war in the absence of legislative prohibitions. But strategic and constitutional improvisation also left open some questions that would remain unanswered and contested throughout American history. When, for example, does a legislative restriction on military activities unconstitutionally tie the Commander in Chief's hands?

The United States had the luxury of conducting these experiments with a degree of freedom from existential threats. Thanks especially to the vast oceanic barrier to the East, the new republic could try out different constitutional interpretations for war and military power with less risk than European counterparts trapped in that continent's hazardous snake pit. In the following decades, the United States would continue that experimentation in very different types of conflicts as it expanded its territory across North America and extended its maritime influence in far-flung regions.

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