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Revolutionary War Powers

The Constitutional Blueprint

In the very first paragraph of what we now call the *Federalist Papers*, Alexander Hamilton presents the Constitution as a daring experiment in republican self-government – a test of whether societies could establish good government by "reflection and choice" rather than resign themselves to "accident and force."[1] Among the ideas tested would be the Constitution's unproven theories about national defense.

The imperatives of defense had to a large extent animated the Constitution's drafting in the first place. Many of the Constitution's architects and backers believed that the Articles of Confederation, which joined the thirteen newly independent states, were inadequate to prepare for and wage war. But strong political currents continued to resist standing armies and the transfer of individual state military powers to a centralized government. Could the new national charter defend the Union, and do so without destroying its own essential features?

The Framers built no single "war powers clause" but a layered architecture of interlocking features – many designed for military utility, others for political restraint, and all conditioned by the strategic environment they expected the young republic to face. The resulting blueprint is clear on some matters, but unclear on many, and the ambiguities reflect not just disagreements among the drafters about how to allocate and control government power; they also reflect differences and uncertainty about how the new United States would actually use its military capabilities. After this chapter lays out the constitutional blueprint, subsequent chapters will show that there was never a stable understanding of it – in part because the security environment and strategies for managing it were unstable.

REVOLUTIONARY POWERS

At dawn on April 19, 1775, roughly 700 British regulars marched onto the town green in Lexington, Massachusetts, where about 70 militiamen stood waiting. No one knows who fired first, but minutes later eight colonists were dead. Two months on, the Continental Congress elected George Washington as commander in chief and

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funded a Continental Army. The war had begun. What followed quickly exposed how military necessity could collide with political structure.

Both sides saw their hopes for a short war slip away. King George dispatched a massive expeditionary force of more than 30,000 troops and almost half the Royal Navy. After narrowly escaping total defeat in the 1776 battle of New York, Washington and his forces spent the next eight grinding years avoiding direct clashes that favored the British, aiming to outlast them until the protracted war sapped political resolve in London.

To carry out this strategy, the budding American government had to work through many foundational questions. How would responsibility for military decisions be allocated between the Continental Congress (later the Confederation Congress) and the commander it had appointed? Who would be responsible for raising troops? Under whose control would they operate? Who would pay for them? Who would conduct wartime foreign diplomacy? These intertwined problems of strategy and authority – the solutions that Americans initially tried, and how they succeeded or failed – would go on to shape later debates over constitutional structure.

Part way through the war, the thirteen states negotiated and ratified the Articles of Confederation – a "league of friendship with each other, for their common defense" – to better coordinate their activities. But the states refused to give up much control of their own resources, limiting how deeply this new relationship could form. Meanwhile, General Washington chafed at micromanagement of the war effort by Congress, which was slow to act, lacking administrative capacity or power to compel the states to provide troops and supplies, and composed of delegates who clung to state loyalties.[2] Despite the Americans' patchy battlefield performance through much of the conflict, the war's tide turned decisively in their favor in 1781. The stunning surrender of British forces at Yorktown, Virginia, was a breaking point back home. Two years later, the Treaty of Paris formally ended the Revolutionary War.

After the war, the Confederation Congress demobilized the army almost entirely – retaining only a single regiment – and mothballed the tiny navy. Within a few years, though, concerns about internal and external security threats convinced many political leaders that the Articles of Confederation needed overhaul. Critical defects included a weak central government with no real power to amass armed forces, plan for defense, or conduct diplomacy. To address these and other shortcomings, delegates to a Constitutional Convention assembled in Philadelphia for the summer of 1787 to draft a new republican charter.

CONTROLLING MILITARY POWER

The Framers approached military power with equal parts urgency and alarm. In crafting the Constitution, they set out to build a government strong enough to defend the republic, yet constrained enough to resist the temptations and tyrannies of war. This dual imperative – capacity without tyranny – drove every design choice.

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Many members of the Founding generation had experienced war firsthand. Conflicts with Native Americans had raged continually since early British settlement, and many of the Constitution's drafters had lived through the French and Indian War, decades before the Revolutionary War arrived. Most free, able-bodied men trained and served part time in local militias – essentially hybrid police–military units – which required members to arm themselves and prepare to defend territory or restore order when called upon by colonial leaders.

Many of the Founding generation also feared standing armies. History had repeatedly shown how standing armies could subvert republican government, a lesson reinforced by the colonists' own experience with British troops quartered among them. The Declaration of Independence had cited King George's stationing of standing armies in the colonies in its long list of grievances justifying the rebellion. Although many drafting delegates viewed at least some standing military forces as necessary, these fears still loomed large at the nation's birth.[3]

Meanwhile, the Founding generation had to confront security threats in every direction. True, the country was isolated by the vast Atlantic Ocean from Europe's great armies to the East; shielded by forests, mountains, and swamps on other fronts; and endowed with immense natural resources.[4]

These advantages, however, had limits. The new American government was born impoverished, and there were drawbacks to its location. The young nation faced dangers on every frontier: British forces to the north and at sea, Spanish claims to the south, French fleets in the West Indies (Caribbean), and Native powers along its Western borders. There was also the internal threat of armed insurrection (including slave revolts). "Though a wide ocean separates the United States from Europe," wrote Hamilton, "[t]hese circumstances combined, admonish us not to be too sanguine in considering ourselves as entirely out of the reach of danger."[5]

In drafting a new unifying charter, the delegates were conscious of these dangers. Their new charter had to furnish enough military capacity to survive in a hostile world. But they would also have to guard against the dangers of military establishments and secure the space and conditions for this experiment in representative government to grow and flourish.

With this balancing act in mind, the Constitution's architects created a scheme of constitutional war powers that was groundbreaking in two crucial respects. First, it reflected lessons – some widely agreed upon, others strenuously debated – from the long war of rebellion. The Revolutionary War served as a laboratory for building, sustaining, and using military power. These findings helped shape the Constitution in ways discussed in the next few sections.

Second, the constitutional design embodied a pointed rejection of European monarchical models, which concentrated military authority in ways the Framers believed fostered despotism and needless war. Today, constitutional war powers debates are mostly thought of as foreign policy issues; however, the drafters viewed them equally as questions of domestic governance. For them, the foreign-policy

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concerns and domestic-governance concerns about war powers were also closely entwined.

Among other things, the Constitution divides war powers between Congress and the President, granting Congress the power to declare war and the President the authority of chief executive and commander in chief. A familiar interpretation today – shared especially by those who see a crisis in the modern "imperial presidency" – is that this division gives Congress the power to decide whether to engage in military conflicts, while the President directs the armed forces once war begins. This basic interpretation is supported by historical records of the Founding, though like most areas of constitutional law, it – and possible exceptions to this division of war powers – has been contested ever since.[6] But this reading neglects other critical questions of how to allocate powers of war and peace – as well as specific constitutional provisions about military power that were at least as important at the Founding and in later periods of American history.

Many delegates at Philadelphia wanted to check the government's inclinations toward war not only because of the diplomatic and security dangers of military adventurism or provocations – the external risks of war powers – but also because they feared the internal effects of conflict. War would lead, many feared, to centralization of power, especially in the Executive, and this in turn might produce tyranny. In the words of chief constitutional draftsman James Madison, "Of all the enemies of public liberty war is, perhaps, the most to be dreaded. War is the parent of armies; from these proceed debts and taxes; and armies, debts, and taxes are known instruments for bringing the many under the domination of the few."[7] Many Framers also wanted to check or avoid altogether a standing, national military establishment. Although they realized that a standing army was needed to ensure the young republic could defend its frontiers, suppress insurrections, and deter foreign powers, they feared that it could become an instrument of tyranny or tempt leaders to wage unnecessary wars (which, in turn, posed more risk of tyranny).

Others took a different view: True, war results in a potentially perilous centralization of power, but liberty could not survive unless the government could ensure adequate national defense in the first place. This created a bind. Insufficient military power and security from continual danger, Hamilton wrote in support of a strong national government, "will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights."[8]

A key design challenge for the Convention delegates was to assure the necessary means for national survival against both foreign and domestic threats without destroying republican self-government. Put another way, in peering back across the Atlantic at Europe – aristocratic, despotic, and frequently war-torn – Americans all along the political spectrum saw a relationship between military power, armed conflict, and political repression. They disagreed among themselves about the extent

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and causal directions in that relationship. They also disagreed about which features of republicanism – a stronger national union, stronger checks on centralized power, and a stronger public say in policymaking – were most important to breaking Europe's vicious cycles.

Yet for all their disagreements, the charter's architects shared a key judgment: Designing a republic that could defend itself without devouring itself required careful constitutional engineering.[9] Since World War II, many scholars and commentators have cast the Constitution as a blueprint for wartime agility: Congress empowered to marshal and shape the nation's armed forces, and the President elevated as commander in chief to secure a single, decisive chain of command.[10] Such modern incantations tend to paper over a major debate among the Framers about just how militarily efficient their revolutionary form of government should be. Yes, the charter incorporated many features to remedy defects that impaired the war effort for independence and hindered defense under the Articles of Confederation. The Constitution's drafters also recognized that it needed to be versatile in facing new threats. But in part to mitigate the dangers of concentrated government power, the Constitution also incorporated features that were – by design – militarily *inefficient*. This is especially apparent in its approach to building and maintaining a large peacetime army.

CONGRESSIONAL WAR POWERS

The Constitution does not grant explicitly any one, overarching power to wage war, but it contains many express or implied powers related to war and armed forces. War was obviously a critical aspect of "provid[ing] for the common defense," which the Constitution's preamble establishes as a core goal for the charter. A central institutional challenge for the Framers was dividing responsibility for the common defense without creating monarchy or paralysis.

Many of the Constitution's war-powers provisions are found in Article I, which is devoted mostly to the legislative branch. Understanding these legislative powers requires also reading the President's powers in Article II, but first it requires a word about Congress.

Congress is built to be slow and cumbersome. Legislation must make it through two separate chambers, each according to its own internal rules. Even then, the President may veto legislation, subject to Congress's power to override the veto with a supermajority vote in both chambers. The Constitution's designers regarded this slowness as a virtue, because it would promote careful deliberation and ensure broad support of legislation. They wanted it to be difficult to legislate. As Hamilton put it: "In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection."[11] When it comes to war powers, Article I grants

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vast substance but imposes demanding process – a model that enables action while slowing its path.

The first of Congress's major war powers in Article I is its authority to levy taxes to fund national defense. This power may now seem like a given, but at the time, it represented a significant expansion of legislative authority. It remedied a dire weakness of the Revolutionary War and Confederation periods, when the Congress had to rely on individual states to contribute funds for military expenses. Because taxes by a far-off British government were a major precipitant of the rebellion, it was no small matter to grant taxation power to a new national government that to many Americans also seemed distant and detached.[12] The power to declare, threaten, and wage war would each prove impotent without the power to tax.

As to initiating war, Article I, Section 8, Clause 11 – the Declare War Clause – gives Congress the power "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Understanding these terms requires stepping into the international legal vocabulary of the late eighteenth century. The Constitution's drafters were steeped in the law of nations, especially the writings of the era's most influential theorist, Emmerich de Vattel. (New York library records indicate that George Washington borrowed Vattel's *The Law of Nations* in 1789, though he apparently never returned it.)[13]

For the Framers, aligning the new republic with the standards of "civilized" states was not merely a matter of pride but also a strategic imperative. The United States could engage more effectively in trade, diplomacy, and self-defense only if other nations recognized it as operating within the established international legal order.[14] So even as the United States rebelled against Europe's monarchical domestic systems, it sought a place within Europe's shared legal framework governing war and peace. Later chapters will show that the growing United States did not always accept international law's rules on war as they stood, but – in exercising constitutional war powers – it would sometimes actively mold those rules in ways that served American national interests.

In the late eighteenth century, a declaration of war did more than announce the start of armed hostilities; it activated a suite of international rules governing the duties and protections of neutral states, the treatment of prisoners, and the seizure of enemy property. Letters of marque, meanwhile, were government commissions authorizing private individuals – "privateers" – to capture enemy vessels and bring them into friendly ports for condemnation and sale as wartime "prizes." In that era, privateering was a vital way to expand naval power quickly. It was also highly profitable: Revolutionary War privateering drew thousands of sailors away from the struggling Continental Navy into these state-licensed ventures, which struck British commerce with considerable effect.[15]

That the Constitution speaks so explicitly about privateering and about making rules for "Captures" – and places these powers alongside declaring war – underscores the centrality of maritime trade to early American strategy. Many Framers

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viewed protecting American commerce as essential to national security, even as they disagreed over the best means of accomplishing those goals.[16]

The Declare War Clause lacks some of the textual directness of the earlier Articles of Confederation, which had provided that the Congress "shall have the sole and exclusive right and power of determining on peace and war." That provision, however, served primarily as a limit on individual states' powers, since the Confederation lacked a separate executive branch. Some contemporary lawyers and scholars disagree with this interpretation, but the evidence strongly indicates that the drafting delegates vested Congress alone with the power to move the nation from peace to full-blown war. This was a radical departure from European tradition in which most monarchs held this power.[17]

Because decisions to initiate war carried grave risks for the republic, the Framers sought to place that authority where it would be least susceptible to impulsive use. Many believed that presidents, in particular, might be tempted to seek glory or to expand their authority by launching military ventures as commanders in chief. Lodging the power to initiate full-scale war in Congress – with its inflexible procedures – was meant to slow such decisions and force collective judgment. George Mason, a Virginia delegate to the Constitutional Convention who feared centralized military powers and later refused to sign the Constitution, approvingly described this process as "clogging" decisions for war.[18] Pennsylvanian James Wilson, who played a major drafting role, extolled how this system "will not hurry us into war"; instead "it is calculated to guard against it." The House of Representatives – the national government body most directly accountable to the public through frequent and direct elections – was expected by many on the Convention floor to play a special role in checking drives toward war, because local constituents would directly suffer war's consequences in blood and treasure.[19] By contrast, if war was to be difficult, peace was meant to be straightforward.[20] The Constitution therefore contains no express procedural hurdles to ending conflict (though many later chapters show that this textual silence led to its own disputes).

Although the Framers intended to lodge decisions to wage full-blown war in Congress, they also very likely agreed on a sensible exception: that if the United States were directly attacked, the President could take military action in defense. One often-cited piece of evidence is that during the Constitution's drafting, a proposal to grant Congress the power to "make" war was changed to "declare" war.[21] This implied exception for repelling attacks was especially needed in the eighteenth century, when it might have taken weeks for Congress to even assemble (with many members arriving from remote locations by horse-drawn carriages) if it were not already in session.

It is well documented that, over time, control over initiating military conflict has gradually shifted from Congress to the President – a process that accelerated dramatically during the Cold War. This shift is, as the introductory chapter explained, often regarded today as *the* central issue of constitutional war powers. Almost immediately

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after the Constitution's drafting, however, events forced the Founding generation to grapple with some of the lingering uncertainties around the Declare War Clause.

As discussed in Chapter 2, one question was whether the President could use *any* hostile force at all – perhaps well short of all-out war – without congressional approval. If so, when and how much? Then there was the issue of how explicit Congress had to be in its approval to use force. Could Congress's approval for war, for example, be implied from appropriations alone? And, if the President could respond militarily to sudden attacks without advance congressional approval, could he also initiate war to head off imminent threats before they actually struck? The following chapters will also show that these and other seemingly narrow issues quickly became major ones. Large-scale wars and invasions were rare in early American history; small-scale uses of force were not.

Having granted Congress the power to declare war, the Constitution then provides the legislature with the power to create national military forces: to "raise and support Armies" and to "provide and maintain a Navy." This power to fund and create national military forces – and then keep them – rectified a major deficiency from the Revolutionary War and Confederation periods, when any national military capability depended on financial or personnel requisitions from the states. As Supreme Court Justice Joseph Story put it in his encyclopedic 1833 treatise on the Constitution: "The experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition. It was equally at war with economy, efficiency, and safety."[22]

Note that the wordings for the two branches of armed forces are different. As to the Army, the power is not merely to create forces temporarily in wartime but to keep them in peace, a controversial authority that conjured widespread suspicion of standing armies. Debate over peacetime armies pervaded the ratifying conventions, where nearly every state proposed amendments to curb or condition Congress's new authority. "[S]carcely any power of the national government," wrote Story about the power to create peacetime armies, "was at the time more strongly assailed by appeals to popular prejudices." The drafters therefore added a caveat on Army spending, that "no Appropriation of Money to that Use shall be for a longer Term than two Years." This means that the Executive Branch must continually return to Congress to keep the Army funded. It is no coincidence that the two-year limit matches the term of office for House of Representatives members – who the Framers believed were most directly accountable to the public. The time limit serves as an automatic "kill switch" for turning off an Army run amok. Only Congress may spend money from the treasury, and without new legislative appropriations, the Army would simply run out of money. Nothing about this two-year limit is militarily efficient; it is a check on military capability.[23]

The power to create and maintain a Navy contains no such caveat. This is partly because the delegates and the Revolution-era public saw land armies more than sea-based vessels as agents of political repression. Navies, which at the time also

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operated like roving embassies to protect commerce, required longer-term capital investments that were nearly impossible under the Articles of Confederation. An Army regiment could be recruited and trained in a matter of weeks or months, but large warships – and the dockyards needed for them – took years to design and build. Funding gaps would disrupt construction.[24]

Finally, Article I's long list of congressional powers ends with a critical catch-all: Congress has the power to enact laws that are "necessary and proper" to carrying out other powers contained in the Constitution. Although this is a general clause not specific to military affairs, it would eventually become among the most significant war-powers provisions – particularly as new technologies revolutionized what would be "necessary" to triumph in new forms of conflict.

Reading each of these Article I powers in sequence, it is easy to miss some key features of the whole. First, Congress's war powers contain very few express substantive restrictions. Congress may declare war for any reason, for example, and it may create armed forces of any size or for any purpose. The main checks are procedural: The legislative process is not only cumbersome but also rigid. Many other democratic constitutions provide for curbing or shelving certain parliamentary procedures during war or emergencies, and in some cases for suspending parliament altogether. By contrast, a distinctive facet of the U.S. Constitution is that although constitutional powers and rights often bend in war, some basic constitutional processes do not. The constitutional requirements for passing legislation are constant, in war or peace, just as the constitutional terms for members of the House, senators, and presidents – two, six, and four years, respectively – remain fixed, no exceptions, even in war. Article I war powers are in some ways flexibly open-ended but in other ways inflexibly strict.

Another key feature of Article I is how much text is devoted to building or mobilizing national armed forces – not because it was expected that they would be large in peacetime but because it was expected that they would remain small. Although the Declare War Clause gets the most attention today, Article I, Section 8's list of Congress's powers contains more detail on how the national government may assemble and maintain military manpower than on any other public policy issue. That textual attention had much to do with checks and separation of powers not only among the branches but also between the national government and states.

STATE WAR POWERS AND THE VERTICAL DIMENSION

Of the three *Federalist Papers* authors, Madison and Hamilton typically get the most credit. Together, they wrote eighty of the eighty-five essays. Yet it was John Jay – who filled out the trio even though he was absent from the Constitutional Convention – who authored the most strategically astute essays about the Constitution and war.

Jay was a seasoned international diplomat, having served as minister to Spain during the Revolutionary War and later negotiating the Treaty of Paris that ended

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it. He then spent five frustrating years as Secretary of Foreign Affairs to the Congress under the Articles of Confederation. Whereas Madison and Hamilton's respective experience legislating and fighting during the Revolution greatly influenced their thinking on how a national government would govern matters of war, Jay reasoned from an overseas vantage. His essays presciently emphasized that amid inevitable frictions with other nations over trade, territory, security, and other interests, the new American states would need to prioritize deterring conflict with potential adversaries. That required projecting an image of strength abroad. And *that* required individual states to yield military management to a strong national government.[25]

The Constitution distributes military authority not only horizontally among the branches but also vertically between nation and states – a distinctive feature of American war powers.[26] In this respect, debates over war powers reflected broader discussions about the division of power between the national government and the states – the most important and contentious meta-issue at the Philadelphia Convention.

The Constitution bars individual states from engaging in their own wars while it also directs the federal government to safeguard states. Article I forbids states from engaging in war without congressional consent "unless actually invaded, or in such imminent Danger as will not admit of delay." Article IV then obligates the national government "to protect each [state] against Invasion." These provisions aimed to centralize security decisions and responsibilities in the national government.

The Constitution also, however, preserves each state's local defense force. Militias – part-time citizen-soldiers who owed mandatory service to the state – had a deep history in the American colonies, with traditions inherited from Britain.[27] Many Americans continued to glorify the local citizen-soldier, like the Massachusetts militiamen who confronted British forces at Lexington. In some southern states, militias were viewed as essential to controlling the enslaved population, too.

The Militia Clauses give Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Militias were thus a standby force against internal and external threats. A natural reading of this provision is that Congress's power to call militias into federal service is limited to their customary *defensive* roles. Congress also has the power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," while the Constitution reserves "to the States respectively, the Appointment of [militia] Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." The Second Amendment in the Bill of Rights underlines the constitutional permanence of militias, calling "A well regulated Militia … necessary to the security of a free State."

Control of militias was thus shared between the national government and individual state governments. All states retain such units, subject to some limited regulation by the national government, which can use them for particular purposes.

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These militia provisions were a compromise without which the Constitution could not have been adopted. Most delegates to the Constitutional Convention saw the need for at least a small, standing, national military force. Washington, Hamilton, and many others of the Founding generation who would a few years later form the "Federalist" party were deeply skeptical of poorly trained state militia forces, which had performed unevenly in the Revolutionary War.[28] Yet many Framers were also wary of – or even openly hostile to – the alternative of a regular national army, expecting instead that state militias would supply much of the defensive force needed to supplement only a minimal federal establishment. Some delegates opposed a national army so strongly that they refused to sign the final Constitution, and several states would not have ratified it without firm guarantees protecting their own militias.[29]

Disagreements over how to divide military power and responsibility reflected not only competing theories of national defense but competing theories of nationhood and governance. One camp generally viewed the development of standing, national military forces as vital for a defense strategy stressing national preparedness, and also as a way to bind the states together and expand the central government's power. A competing camp viewed the independence of state militias, and federal reliance on them only when necessary, as adequate for a defense strategy stressing localized crisis management, and also as a tool for resisting centralized control in favor of state power and identity.[30]

In the end, a national army and navy are optional under the Constitution. State militias are presupposed and guaranteed.

Today, the reservation of certain powers and responsibilities to state governments is called "federalism." Although federalism has always been a core American constitutional principle, in other areas of shared national-state power the Constitution does not spell out the dividing lines with similar specificity to the Militia Clauses. To contemporary eyes, there is also something very peculiar about vertically dividing power and responsibility for military defense, now mostly regarded as a quintessentially *national* function.

Although many other democracies have borrowed from the American federalism model, virtually none have adopted anything like it for organizing their military. In his splendid 1957 study of American state militias – which would later evolve into the modern National Guard – political scientist William H. Riker observed that "the United States is the only great power that relies on a corps with dual loyalties and dual commanders. Among the smaller nations, the only one with even slightly similar military institutions is Switzerland. But the defense system of Switzerland consists not so much of soldiers as of diplomacy, neutrality, geography, and the beneficent indifference of the great powers." In that respect, "the National Guard of the United States is unique, for it is the only force with a divided command actually used in warfare."[31]

Few Framers defended the Constitution's militia provisions as a streamlined way to prepare for or to wage war. The vertical sharing of military power even violates a cardinal rule of war: a military force ought to have one commander. Yet rather than

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seeing this tension as a flaw, some militia advocates saw its organizational friction as a virtue, serving as another check against temptation toward war. These constitutional provisions would be subject to intense pressure over time, ultimately bending considerably to changing military needs.

PRESIDENTIAL WAR POWERS

The presidency stands alongside Congress as a primary locus of constitutional war authority. If Congress's war powers are enumerated, then those of the President are framed in broad and undefined strokes. Instead of a lengthy list of specific powers, like those assigned to Congress in Article I, Article II contains general statements about the President's role, some of them written so vaguely that it is unclear if they were meant to convey substantive powers at all. And although discussions of the Executive Branch took up much time at the Convention, the records provide few clear answers to what some key provisions meant.

While precise original meaning is elusive, it is reasonably certain what general outcomes the drafters intended to avoid. First, the constitutional drafters wanted to create a presidency that was stronger and more agile, particularly in military affairs, than the weak and multiheaded executive functions performed by the Confederation Congress. This effort was about ensuring that the President was not too weak. Second, though, many constitutional drafters – but not all of them – also wanted to avoid recreating a king and endowing the presidency with the same powers held by European monarchs. This effort was about ensuring that the President was not too strong.[32] Within those goalposts, Article II is filled with compromises, disagreements, and uncertainties.

Of most obvious relevance to war powers, Article II designates the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." In some respects, this clause is straightforward. It says that the President – a civilian leader elected every four years – is at all times the top military commander, thus ensuring some civilian control of the armed forces. It does not say that he is the top military commander only in wartime or when Congress takes some action. It affirms that he holds this role even in peacetime. The Commander-in-Chief Clause also links clearly and directly to Congress's Article I powers to create the Army and Navy in the first place and to provide for calling state militias into federal service. Yet in other respects, this clause is frustratingly vague. It does not establish what it means to be commander in chief, and neither the text itself nor records from the Convention give many hints as to whether Congress may limit the President's freedom of action in carrying out this role.

The Revolutionary War experience gives some clues, but not enough to resolve those questions. During that conflict, Washington had held the title of Commander in Chief and found his authority encumbered by micromanagement of the

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Continental Congress, which often directed him on many facets of the war. It is true that Washington bristled at strict orders on matters such as whether or not to burn New York City during his retreat, how to negotiate with the British on treatment of captured officers, and many other military decisions throughout the conflict. At the end of the conflict, though, he blamed Congress's lack of power for the war's greatest challenges. The delegates may have envisioned a President empowered to steer the military's day-to-day operations with considerable freedom, but how far that freedom was meant to stretch remains uncertain.[33]

These questions grow more complex as war itself evolves. What count as "military activities," and does that definition expand as the nature of conflict changes or with new developments in the international rules of warfare? Day-to-day military operation and management of military forces in the eighteenth century were, by today's standards, quite straightforward: The bulk of the work involved the recruitment, training, supply, and direction of military forces on the march and on the battlefield. As war has grown more complex over time, in some eras requiring mobilization of entire economies and societies, to what extent should the President's command powers expand, too?

Presidential military power is even harder to pin down, because the relevant constitutional clauses are vague and overlapping. Article II vests "[t]he executive Power" in the President. Advocates of expansive presidential war powers have often read this clause as a broad grant of substantive power, arguing that this term includes general control of foreign policy. An alternative reading of "executive power" is that the President is the national manager and implementer only of policies – including those related to war – prescribed by Congress. There are many other possible readings in between, and the entire range reflects differing assumptions about how this general clause about the presidency connects with the specific congressional powers, like the power to declare war, enumerated in Article I.

Article II further requires the President to "take Care that the Laws be faithfully executed." Like "executive power," this could be read very narrowly, as a requirement to follow Congress's statutes, and perhaps also international law. But it also can, and has been, read very expansively, granting to the presidency some emergency powers, to take steps necessary to protect the republic and its proper functioning.

Emergencies hold one key to understanding the meaning of presidential war powers. It is natural to expect the government – especially the Executive Branch – to take urgent action to protect its very survival. Military conflict is one example of the kind of emergency that could trigger such a response. How far those emergency powers stretch depends on a deeper premise: whether the Constitution accounts for all contingencies or not.

If one believes that the Constitution was built to handle all exigencies, then one might reasonably interpret flexibly and spaciously the President's powers to respond to them. Some constitutional Framers, however, held a different view: That in emergencies, the President or his subordinates might have to act beyond their

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constitutional powers, outside the law, and perhaps seek congressional blessing of that moral imperative after the fact. That latter view – once influential but eclipsed over time by the former view – offered a way to square a strict, inflexible interpretation of presidential powers with emergency action.[34]

In sum, Article II's provisions – designating the President commander in chief as well as chief executive and directing him to take care that the laws are faithfully executed – can be interpreted very narrowly (to implement the will of Congress), very broadly (to protect the republic), or somewhere in between. Moreover, there is substantial overlap of these powers with those in Congress, including some congressional powers over whether to use force and how to organize and control the military. Article II's vague terms have become a key feature in refitting the Constitution to changes in American military and security strategy.

COURTS, RIGHTS, AND WAR POWERS

The rest of the Constitution says very little about war powers, but two further aspects of its design shape the exercise of those powers. One is the creation of an independent judiciary, and the other is enumeration of individual rights.

Article III empowers Congress to create federal courts and empowers the President to nominate judges, who, once confirmed by the Senate, may serve for life as a way of protecting their independence. Initially, courts played a specific wartime role that is largely forgotten today: They would serve in wartime as "prize" courts to which American privateers and naval officers could bring captured enemy vessels for reward. The Constitution's drafters knew that at least some war-powers disputes, like those arising in maritime operations, would end up in court that way.[35] Indeed, the chapters that follow show that in the nation's first century, the judiciary's role as prize courts bore some profound war-powers precedents. In the years after the Constitution's ratification, once the Supreme Court established that courts had power of judicial review – to strike down laws and government action as unconstitutional – the judiciary became a more substantial player in shaping and reshaping war powers.

Just how powerful a player courts would and should be in war powers has been subject to fervent debate throughout most of American history. At various times, courts have stepped in to patrol boundary lines of some war powers – such as limits on the use of military tribunals to prosecute individuals for war crimes or on the President's power to take control of war-critical industries when Congress has legislated otherwise. Later chapters will show, however, that such rulings on key issues are rare. Especially in wartime or in dealing with some of the most vexing war-powers questions, courts have more often been passive, allowing the elected branches to work out these issues on their own or deferring to their judgments. Even when judges intervene, their decisions seldom draw sharp or fixed lines. This judicial restraint often allows political actors greater flexibility – sometimes constructive and sometimes perilous – in shaping war powers.

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Although courts have been especially cautious in patrolling the boundaries of congressional and presidential war powers, they have sometimes been thrust into the fray when individual rights are at stake. The original Constitution, before the addition of the Bill of Rights, spoke of one very special right that relates directly to courts and war.

Having established Congress's powers for regulating military forces and authorizing their use, Article I states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This "Suspension Clause" is oddly written. Nowhere does the Constitution say that citizens have a right to habeas corpus, an ancient British right to challenge one's unlawful imprisonment in court. The clause instead assumes the right exists in the first place, then limits the government's ability to suspend it – but without saying explicitly which branch is empowered to suspend the right.

When viewed in the context of the original Constitution as a whole, the provision stands out as the only feature that may expressly be toggled off during certain war emergencies. One might read this clause as simply about a special judicial remedy for improper detention decisions. Or one might view habeas corpus suspension as a master switch that controls all liberty: Without judicial supervision, the elected branches are freer to imprison people for any reason during crises.[36] The chapters that follow show that the meaning and extent of other enumerated constitutional rights besides habeas corpus may change in wartime, but the Constitution does not provide categorically for their total freezing.

Although the Bill of Rights was not included in the original Constitution, the amendments were part of the ratification debates and they would become – sometimes – constraints on war powers. Later chapters show that these rights, like protections for free speech and criminal defendants, would come under pressure in wartime and be tested in court. In those cases, the Constitution's text would offer little guidance as to whether the protections should stand rigid or bend against pressures of military necessity.

The Bill of Rights also contains a few military-specific rights, though their obsolescence today shows how far war powers have evolved. The Second Amendment has in modern times become synonymous with gun rights, but its main purpose was to preserve state militias, affirming that a "well regulated Militia" is "necessary to the security of a free State." The Third Amendment restricts quartering of soldiers in Americans' homes, highlighting Founding-era concerns about standing armies and the threat to liberties domestically from military establishments.

Beyond that, none of the seventeen amendments since the Bill of Rights have had anything to say directly about war or military affairs. The United States wages twenty-first–century warfare with an eighteenth-century constitutional text.

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CONCLUSION

The Constitution's architects recognized the need to provide for the common defense, and many of them saw the answer in a national military establishment and national governmental powers that could expand to meet unpredictable yet inevitable security needs. But many delegates and their constituents were also deeply distrustful of concentrated military power. It was an open question whether America could be both militarily strong and politically free. For the Framers as a whole, war powers were therefore just as much about internal governance as about foreign affairs.

The Constitution equips the nation for war, but embeds friction so that power is contested and moderated, not automatic. Today it is natural to focus on how the Constitution allocates power to make and conduct war, but the document also has much to say – some to enable, some to encumber – about creating and mobilizing the armed forces without which the United States could not wage war at all. The Constitution's architects provided for unlimited military potential, which could be used to serve a wide range of national defense strategies, but the drafters also laced the system with brakes.

Still, the Constitution's Framers disagreed over how exactly these design features would function in practice, both in the rare crises that threatened the republic's survival and in other circumstances that did not. Many critical war-powers questions were left not only unanswered but undebated. It would not take long before security crises – and strategic choices – forced the country to confront those questions.

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