



Written by [Joe Wolverton, II, J.D.](#) on October 22, 2018

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Who Wields War Powers?

The Congress shall have power to ... wage war.

— U.S. Constitution, Article I, Section 8

On August 24, Bloomberg published the following story about the ongoing “civil war” in Syria:

The U.S. has told Russia it is ready to take strong military action against Syria if President Bashar al-Assad uses chemical weapons to recapture one of his country’s last rebel-held areas, according to four people familiar with the discussions.



U.S. officials say they have information Assad may be planning a chemical attack in the northwestern province of Idlib. At a Thursday meeting in Geneva, National Security Adviser John Bolton told his Russian counterpart, Nikolai Patrushev, that America is prepared to respond with greater military force than it has used against Assad’s regime in the past....

President Donald Trump has said before that he’ll punish Assad for any further use of chemical weapons, after ordering two limited strikes in similar circumstances since taking office early last year. But the latest warning is more specific, and it comes on the eve of what may be one of the bloodiest campaigns in Syria’s civil war.

For decades, American presidents have assumed the authority to deploy the U.S. military into battle, with combat operations being carried out in scores of battlefields across the globe.

As a matter of fact, Congress has not declared war since WWII.

Since the ratification of the current Constitution, the U.S. Congress has formally declared war on 11 occasions as part of five wars: first, the War of 1812; second, the War with Mexico (1846); third, the War with Spain (1898); fourth, World War I (1917); and, finally, as mentioned above, World War II (1941 and 1942).

Since WWII, then, there have been no “wars,” but there have been thousands of American soldiers, sailors, marines, and airmen killed in combat, usually having been sent into harm’s way by the president acting alone.

Despite efforts over the years by presidents from both major political parties to prove the existence of executive war powers, the black letter of the Constitution, as well as the history of that document’s drafting and ratification, makes the locus of war-making power clear: Congress possesses the exclusive power to declare war.

It is true, however, that before putting “boots on the ground” in any of the theaters of combat opened in the last 77 years Congress could have declared war had the representatives and senators wished to do so. They have not done so and don’t appear likely to resume the practice anytime soon.



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Why?

Perhaps part of the answer is found in an op-ed penned in June by George Will in the *Washington Post* entitled “Mr. Trump Goes to War.” Will writes, in response to Senator Lindsey Graham’s warning that if North Korea “plays” President Trump, “we’re going to have war”: “Note the senator’s clear premise: It is for the president to ‘pick’ between war involving millions of deaths, and peace. Congress, its arthritic knees creaky from decades of genuflections at the altar of presidential power, will be a gimpy spectator.”

Not every congressman and senator is content to turn a blind eye to the president’s martial manipulations. In an article published in *Rare* magazine on the 16th anniversary of the September 11 attacks on American soil, Senator Rand Paul, a seemingly inextricable thorn in the side of the Republican Party’s neoconservative leadership (all of whom favor ceding war powers to the president and bombing our way into peace), explained why he continually demands debate on reauthorization of the current Authorization for Use of Military Force (AUMF) that has existed since 2001:

Because these authorizations to use military force are inappropriately being used to justify American warfare in 7 different countries. Sunsetting both AUMFs will force a debate on whether we continue the Afghanistan war, the Libya war, the Yemen war, the Syria war, and other interventions.

Our military trains our soldiers to be focused and disciplined, yet the politicians who send them to fight have for years ignored those traits when developing our foreign policy.

He continued, calling out his congressional colleagues, insisting that they reclaim their constitutional authority over the power to declare war:

It’s time to demand the policymakers take their own jobs as seriously as the men and women we ask to risk it all for our nation.

Doing so means restoring constitutional checks and balances. Congress has no greater responsibility than defending our country, and the Founders entrusted it with the power of declaring war because they wanted such a weighty decision to be thoroughly debated by the legislature instead of unilaterally made by the Executive branch.

Yet Congress has largely abdicated its role anyway, and its sidekick status was plainly evident when former President Obama proposed a new AUMF for the fight against ISIS while insisting he really had all the authority he needed — it being more of a “wouldn’t it be nice” afterthought than an acknowledgement of any required step.

Repealing the 2001 and 2002 AUMFs would restore respect for the balance of power and reassert Congress’ voice by forcing legislators to specifically approve or disapprove the direction of our foreign policy. If my provision passes, the authorizations would sunset six months later, allowing Congress time for a thorough debate about how we will move forward.

To those among his colleagues and among the so-called conservatives who challenge Paul’s patriotism and his commitment to defending the United States, Paul tweeted, “We can defend without question against all invaders. And yet, we are not very good at making countries out of places that aren’t.”

Given Senator Paul’s repeated reference to the Founding Fathers in support of his call to force his congressional colleagues out of their stupor, a survey of the provenance of the war-making power and its constitutional collocation is in order.



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What the Founders Thought About Starting War

It was Friday, August 17, 1787 when delegates representing 10 of the 13 states began deliberation “on the clause ‘to make war.’”

First to speak on the subject, as recorded in James Madison’s *Notes of Debates in the Federal Convention of 1787*, was Charles Pinckney, a 29-year-old lawyer and planter from Charleston, South Carolina. Pinckney roared from the stall, favoring placing the power to make war exclusively in the hands of the Senate.

Pinckney argued that in the House of Representatives, the “proceedings were too slow” and that its size “would be too numerous for such deliberations.”

Pierce Butler, Pinckney’s fellow representative from South Carolina, rose next to advocate the endowment of the executive with the power to make war.

Butler stated that he “was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it.”

Elbridge Gerry of Massachusetts jumped to his feet, declaring that he “never expected to hear, in a republic, a motion to empower the Executive alone to declare war.”

As he so often did, George Mason of Virginia stood and put a fine point on the subject.

He was, he said, “against giving the power of war to the Executive, because [he is] not safely to be trusted with it; or to the Senate, because [it’s] not so constructed as to be entitled to it.” He added that he “was for clogging, rather than facilitating war; but for facilitating peace.”

Finally, he, along with Gerry and James Madison, announced his preference for substituting the words “declare war” for the phrase “make war,” as was written in the clause under consideration.

Photo: AP Images

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Gerry and Madison, joined at this point by the renowned Roger Sherman of Connecticut, reasserted their desire that the word “make” be struck out and replaced with the word “declare,” “leaving to the Executive the power to repel sudden attacks.”

Here, Sherman echoed Madison’s motion, stating that the executive “should be able to repel, and not to commence, war.”

At this point, the president of the convention, George Washington, called for a vote on the question of substituting the word “declare” for the word “make” in the clause under consideration. The proposal passed, eight states in favor, one (New Hampshire) opposed, and one state, Massachusetts, absent.

It is of note, though it is rarely mentioned in modern commentaries on the Constitutional Convention’s debates on the war-making power, that Rufus King explained that the legislature was to “declare” war, but the “conduct” of war was to be an executive function.

After that bit of clarification and the recording of the vote, the convention stood adjourned.

It is a sure sign of the near-universal agreement with the Constitution’s placement of the power to declare war in the hands of the legislature that not one of the ratifying conventions held in the states



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proposed altering the war-making clause.

The men attending those conventions would have learned the same lesson from the same books, namely that war must be declared so as to inform all other nations — including the enemy — that acts that would otherwise be immoral and unconscionable (the killing of one's fellow beings and the destruction of their property) would now be permissible. In fact, the declaration of war was a legal pronouncement of a temporary change in the normal conduct of international affairs.

One of the books read most often and quoted most frequently by the Founding generation was *The Law of Nations*, or the *Principles of the Law of Nature Applied to Conduct and Affairs of Nations and Sovereigns*, by Emmerich de Vattel. In Section 51 of that influential work, de Vattel sets forth the accepted law of nations regarding the justification of declaring and waging war:

THE right of making war belongs to nations only as a remedy against injustice: it is the offspring of unhappy necessity. This remedy is so dreadful in its effects, so destructive to mankind, so grievous even to the party who has recourse to it, that unquestionably the law of nature allows of it only in the last extremity, — that is to say, when every other expedient proves ineffectual for the maintenance of justice....

We owe this further regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force, for the purpose of bringing him to reason. This is called declaring war.

Therefore, as the Constitution grants “all legislative power” to Congress, a declaration of war, which has the effect of changing the legal position of a country in relation to another, may only be made by Congress!

This arrangement was well-settled and not the source of any significant disagreement until Alexander Hamilton attempted to leverage his position in President George Washington's Cabinet to redefine the power to declare war, placing it within the constitutional bailiwick of the president, as it had been within the power of the king under the English constitution that Hamilton so fondly wished to foist upon the United States.

It was Alexander Hamilton's zeal for converting the president into a monarch and consequently empowering the former to wage war unilaterally as did the latter that brought about one of the most enlightening and now forgotten episodes in the history of the early Republic, an episode that pitted Publius (the writers of *The Federalist Papers*) against himself!

Within five years of the publishing of *The Federalist Papers* (and four years of the ratification by the states of the Constitution), the co-authors of those seminal and influential essays on American political theory and constitutional interpretation were back at their desks once again, writing letters to the editors of newspapers.

This time, however, James Madison and Alexander Hamilton were not allies working to persuade others to commit to their common constitutional cause, but they were opponents, striving through their letters to reveal each other's perceived constitutional misdeeds to the American people.

This episode in American history is known as the Pacificus-Helvidius debates, named for the pen names adopted by Alexander Hamilton and James Madison, respectively.



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In the earliest days of the Republic, the precise balance of powers between the legislative and executive branches in the arena of foreign affairs was unsettled. The Constitution, many argued, wasn't clear on the point and the various views on the matter created controversy.

George Washington issued the Neutrality Proclamation of 1793 after France declared war on Holland and Great Britain. According to Washington's way of thinking, it was in the best interest of the country to avoid war at all costs, and he did not want the belligerents to be unsure of the official American position.

While certainly laudable, some of Washington's colleagues considered the Neutrality Proclamation to be hostile to the French, as the Treaty of Alliance signed by France and the United States in 1778 prohibited peace treaties and commercial agreements between the United States and England.

Thomas Jefferson was among the most vociferous of the officials calling out Washington for allegedly violating the prior agreement. Some of the opposition, including Jefferson and Madison, believed that the advice and consent of the Senate should have been sought before President Washington issued any declaration of the official American position on any topic touching upon foreign affairs.

Alexander Hamilton was one of the first president's most ardent advocates, however. And that's where the trouble started. Just weeks after the Neutrality Proclamation was published, Hamilton wrote a letter defending the document. Then, beginning in June 1793, he wrote an essay almost once a week, under the pen name "Pacificus," in support of President Washington, his administration, and his policies. After the seventh "Pacificus letter" was published on July 27, 1793, Thomas Jefferson wrote a now-famous letter to James Madison, pleading, "my dear sir, take up your pen." Madison took up his pen and on August 24, 1793, he responded to Hamilton's "Pacificus" essays using the pseudonym "Helvidius."

In the first letter, Madison wrote that the first Pacificus essay "may prove a snare to patriotism" and warned that Hamilton advocated principles "which strike at the vitals of its constitution."

Later in the essay, Madison recommended that in all questions concerning the correct conduct of federal officials, Americans must be guided by "our own reason and our own constitution."

And in a statement that is as timely now (perhaps more so) as it was then, Madison wrote that the power to declare war (war with France, in this case) is "of a legislative and not an executive nature." He continued on that subject:

Those who are to conduct a war [the executive branch] cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

Madison was so strident in his insistence that the power to make war not be placed in the presidency, that his next letter (Helvidius No. 2) began with the bold pronouncement that if any president were to presume the warmaking power, "no ramparts in the constitution could defend the public liberty or scarcely the forms of republican government."

In the modern era, notably, it is typically the president who initiates the commitment of American troops to combat zones and who orders the military might of the United States of America to deploy here or there to fight this or that foreign foe. The Congress is rarely involved in that decision, with the exception of allocating money to supply the armed forces with requisite equipment, ammunition, and



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other necessary supplies.

Continuing on the same subject, Madison once again made a clear and constitutionally sound statement: “Until war be duly authorized by the United States, they are actually neutral when other nations are at war, as they are at peace (if such a distinction in terms is to be kept up) when other nations are not at war.” Finally, Madison explained, in *Helvidius No. 4*, why Americans must remain vigilant, keeping close watch over the actions of their elected representatives.

To equal degree, though, Americans must be familiar with the powers granted to those representatives lest they claim to possess constitutional powers that are not enumerated in that document. Regarding the duty of Americans to learn for themselves and enforce on their elected leaders the limits of federal power set out in the Constitution, Madison wrote:

It is also to be remembered, that however the consequences flowing from such premises, may be disavowed at this time, or by this individual, we are to regard it as morally certain, that in proportion as the doctrines make their way into the creed of the government, and the acquiescence of the public, every power that can be deduced from them, will be deduced, and exercised sooner or later by those who may have an interest in so doing. The character of human nature gives this salutary warning to every sober and reflecting mind. And the history of government in all its forms and in every period of time, ratifies the danger. A people, therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power.

Now, it must be understood while the two men — once collaborators, now combatants — were writing and disagreeing with each other, there was not a sense that either of them undertook to embarrass or personally insult the other. They knew each other well, and they respected each other even more. They simply supported opposing views on a question of constitutional ambiguity and took to the press to attempt to persuade the public.

Today, we likewise read articles and watch interviews where pundits, politicians, and professors make their cases for the constitutionality of the president’s sending troops into combat. The foregoing recitation of the historical record should, however, make it very clear that neither the framers of the Constitution, the delegates at the state ratifying conventions, nor the authors of the seminal texts by which they were all educated ever intended to place the power to declare war — to use the potentially fatal power of the U.S. military on the people and property of another nation — in the hands of a single man. Rather they realized that such an obligation should be placed exclusively within the authority of the legislature, the representatives of the people whose lives may be required to be given in the waging of such a war.

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