WAR AND THE CONSTITUTION: A HISTORICAL AND MODERN PERSPECTIVE



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I. GOALS OF THE COURSE

A. Understand that whatever a use of military combat forces may be called—"war," "peacekeeping operations" or anything else—there is still a real cost in blood and treasure.

B. Understand the Declare War Clause of the Constitution.

C. Understand United States Supreme Court cases pertaining to the Declare War Clause.

D. Understand the meaning and effect of the Political Question Doctrine.

E. Understand Separation of Powers issues, particularly with respect to Congressional authorizations for the use of military force.

F. Be empowered as citizens (not just lawyers) to have informed views and opinions pertaining to the historical and modern decision-making processes to use American military force.

II. OVERVIEW OF THE COURSE

A. Background Of The Speaker

B. The Inescapable Costs To Keep In Mind

C. The Declare War Clause Of The Constitution

D. A Historical Perspective

E. The Tonkin Gulf Resolution

F. The Pentagon Papers

G. The War Powers Act Of 1973

H. Authorization Of The Use Of Military Force ("AUMF")

I. Conclusion

III. DECLARATION OF WAR—THE LEGISLATIVE BRANCH

A. Article I of the Constitution pertains to the legislative branch of government, *i.e.*, Congress.

B. Article I, Section 8 sets forth the specific powers of Congress.

C. Article I, Section 8 gives to Congress the power "[t]o declare war."

D. This has become known as the "Declare War Clause."

E. However, the Constitution does not define any required form, process or procedure that Congress must use to declare war.

F. In Bas v. Tingy (1800), the U.S. Supreme Court discussed the concept of a "perfect war" where Congress declares war and an "imperfect war" where Congress authorizes the use of military force but does not declare war, and essentially treated both situations the same. Bas has been read to mean that the United States can use military force abroad without a formal declaration of war by Congress, and remains in effect today.

IV. DECLARATION OF WAR—THE EXECUTIVE BRANCH

A. Nowhere does the Constitution give the executive branch, more specifically, the President of the United States, the power to declare war.

B. Article II of the Constitution pertains to the executive branch of government.

C. Article II, Section 2 states the following: "[t]he President shall be 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."

D. In The Prize Cases (1863), the U.S. Supreme Court addressed President Abraham Lincoln's decision to blockade southern ports (traditionally considered an act of war) when he did not request that Congress declare war on the Confederacy. President Lincoln's concern was that a declaration of war would give the Confederacy recognition as a separate nation, as opposed to it being viewed as a collection of rogue American states in rebellion against the federal government. The Court held: "[t]he President was bound to meet it [the war] in the shape it presented itself, without waiting for Congress to baptize it with a name." The Prize Cases have been interpreted as giving the President wide latitude to act—including the use of military force—in carrying out his duties as Commander in Chief when the United States is threatened with attack, or under attack, regardless of whether Congress has formally declared war or given prior authorization to the President to use military force.

V. DECLARATION OF WAR—THE JUDICIAL BRANCH

A. There is nothing in the Constitution allocating any specific power pertaining to war to the judicial branch, *i.e.*, to the courts.

B. Historically, the courts have been reluctant to exercise any authority they may have in determining the validity of laws and the acts of either the legislative or executive branch of the United States pertaining to the use of the military in connection with foreign policy.

C. When asked to opine on such issues in lawsuits, a court will often hold, in whole or in part, that such issues are "nonjusticiable political questions" that they have no jurisdiction to decide, meaning that the issues are best left to a coordinate branch of government—the legislative or executive branch—to work out.

D. This has become known as the political question doctrine, and it especially applies in the area of foreign relations, which area often encompasses decisions to use military force.

E. The political question doctrine is a separation of powers issue.

F. Also, any court rulings are typically deferential to the legislative and executive branches, such as Bas (Congress can authorize use of military force short of any formal declaration of war without violating the Constitution) and The Prize Cases (the President has wide discretion to use military force to protect the United States from attack or threat of attack even if there has been no declaration of war or prior authorization to use military force by Congress without violating the Constitution).

VI. THE POLITICAL QUESTION DOCTRINE

A. The political question doctrine is a judicially created rule that courts should refuse to hear a case if it presents a political question.

B. A political question is one that presents an issue for the court to resolve that is so politically charged that the courts—which are theoretically supposed to be an "apolitical" branch of government—should not hear and decide the issue.

C. A court invoking the political question doctrine will typically dismiss the case at an early stage and prior to making any ruling on the merits. In other words, it is a procedural mechanism a court can use to avoid trespassing into areas exclusively reserved for the legislative or executive branches.

D. In Baker v. Carr (1962), the U.S. Supreme Court held that a court should generally refuse to hear a case on the ground of the political question doctrine if at least one of six factors is present

1. The plain text of the Constitution commits the issue to the legislative branch or the executive branch. This is the most important—*i.e.*, strongest—factor indicating that the doctrine should be applied.

2. Lack of a judicially discoverable and manageable standard for resolving the issue.

3. The impossibility of resolving the issue without the court making a policy determination clearly reserved for non-judicial discretion and debate, in other words, the issue is better addressed by legislative or executive branch decision-making processes.

4. The impossibility of a court undertaking independent resolution of the issue without expressing lack of the respect due to the legislative or executive branch.

5. An unusual need for unquestioning adherence to a political decision already made.

6. The potential of embarrassment from multiple different pronouncements by various branches of the government pertaining to a single question.

VII. INTERPRETATIONS OF THE DECLARE WAR CLAUSE

A. It is generally accepted that Article I, Section 8 gives Congress the power to declare war.

B. It is generally accepted that Article II, Section 2, in making the President the Commander in Chief of the armed forces, gives the President power to control the waging of war once it is declared.

C. It is generally accepted that the President cannot unilaterally declare war, and that the President cannot arbitrarily use military force without some prior authorization and/or other emergency circumstance (such as an attack on U.S. territories or forces).

D. The "grey area" is how much authority the President has as Commander in Chief to use military force where there is no formal declaration of war, no time for specific legislative authorization and/or where foreign policy considerations or emerging threats require immediate military action.

VIII. EARLY HISTORICAL CONTEXT OF THE DECLARE WAR CLAUSE

A. Early in the post-ratification period, the Declare War Clause's limitations on war making by the President alone were read as restricting the President's power.

B. Many key Founding Fathers, including Alexander Hamilton, George Washington and James Madison, believed the Declare War Clause provided an important limitation on presidential power.

C. Congress declared war on Great Britain for the War of 1812.

D. However, for lesser uses of American military, it may be said that early Congresses established a "tradition" of approving the use of military force without a formal declaration of war. These are listed in the Table in Section X, below.

E. At the 1787 Constitutional Convention in Philadelphia, Pennsylvania, James Madison, although he generally supported limits on presidential power, assured his fellow delegates that the Declare War Clause left the president with authority to use the military to repel sudden attacks. Yet, afterwards, this statement remained subject to much dispute as to its practical implementation.

1. Was an actual physical attack on the United States or its territories required?

2. What about attacks on American forces abroad?

3. What about attacks on American citizens abroad?

4. What about attacks on American private commercial interests abroad?

5. What about attacks on America's foreign allies?

6. Was the President authorized to use preemptive and offensive military force to prevent an imminent attack?

F. Many of these questions are still wrestled with today.

IX. FORMAL DECLARATIONS OF WAR BY CONGRESS

A. War of 1812 (against Great Britain, 1812-1814).

B. Mexican-American War (against Mexico, 1846-1848).

C. Spanish-American War (against Spain, 1898).

D. World War I (against Germany and Austro-Hungary, 1917-1921)

E. World War II (against Japan, Germany, Italy, Bulgaria, Hungary and Romania, 1941-1945).

X. "UNDECLARED WARS," IN WHICH AMERICAN FORCES ENGAGED IN EXTENDED COMBAT OPERATIONS WITH THE AUTHORITY AND FUNDING PROVIDED BY CONGRESS

Name	Opponent	Date Authorized	Purpose
Quasi-War With France	France	July 9, 1798	To protect American commercial shipping from predation by the French.
First Barbary War	Morocco and Tripoli	February 6, 1802	To protect American commercial shipping in the Mediterranean Sea from North African pirates.

Name	Opponent	Date Authorized	Purpose
Second Barbary War	Algiers	May 1, 1815	To protect American commercial shipping in the Mediterranean Sea from North African pirates.
Illegal Slave Trade	Various slave traders	1819	To stop illegal slave trading and protect the American colony of Liberia in West Africa.
Suppression of Piracy	Various pirates	1819	Authorized the American Navy to suppress piracy in the Caribbean Ocean and in Latin America.
Redress for Attack on the USS Water Witch	Paraguay	1858	An American ship was fired on from a Paraguayan fort, a fleet of gunboats was dispatched to the capital of Paraguay to force an apology and payment of reparations.

Name	**Opponent**	**Date Authorized**	**Purpose**
Mexican Revolution	Mexico	April 22, 1914	To safeguard Americans and the border from raids and banditry by Mexican paramilitary forces during the Mexican civil war. Ultimately led to a failed expedition to capture one of the leaders of the revolutionaries alleged to be responsible for banditry in northern Mexico and the American southwest near the border, Pancho Villa.
Russian Civil War	Estonia, Latvia, Mongolia, Russia and the Ukraine	1918	Assisting loyalist czarist troops against Bolshevik forces and securing the property and safety of citizens of Europe and the United States in Russia.
Lebanon Crisis of 1958	Lebanese communists	March 9, 1957	To authorize military aid and use of force to fight the spread of communism in Lebanon and the Middle East.

Name	Opponent	Date Authorized	Purpose
Vietnam War/Laotian Civil War/Cambodian Civil War	North Vietnam and various communist insurgent and guerrilla groups	Gulf of Tonkin Resolution, August 7, 1964	After alleged attacks on the USS Maddox and USS Turner Joy by North Vietnamese torpedo boats in the Gulf of Tonkin, Congress gave President Johnson broad powers to escalate military operations in Southeast Asia.
Multinational Operations in Lebanon	Syria-backed militias	September 29, 1983	Deployment of United States Marines as a peacekeeping force during the Lebanese Civil War.
Persian Gulf War	Iraq	January 12, 1991	United Nations operation to protect oil producing Arab states from aggression and invasion by Iraq.
War on Terror	Various Islamic terrorist groups and militias.	September 14, 2001	Global anti-terror military and law enforcement operations.
Iraq War	Iraq	March 3, 2003	To topple the Baathist government of Iraq and, ostensibly, to prevent Iraq from creating or maintaining a stockpile of weapons of mass destruction.

XI. MEMBERSHIP IN THE UNITED NATIONS; OTHER OPERATIONS

A. The United States is a member of the United Nations and may provide troops, materials and sometimes even combat forces in support of United Nations operations.

B. The Korean War falls into this category. President Truman further justified the use of military force without any declaration of war from Congress by calling the use of American troops in Korea a "police action" and not a "war" that implicated the Declare War Clause.

C. Deployment of the American military in support of "peacekeeping operations" or on "humanitarian missions" to global hot spots, war zones or disaster areas often arise as a result of America's obligations as a leading member of the United Nations.

D. However, there are military operations for which the source of legal authorization is vague, such as the recent bombing of Iranian nuclear facilities in conjunction with the Israeli military in the summer of 2025.

E. Yet, such use of military force without a formal declaration of war or any express advance consent from Congress is not unusual in American history.

1. President Reagan ordered the use of military force in Grenada to protect the island and American medical students from Cuban invasion.

2. President Bush ordered the invasion of Panama to topple the government of and arrest Manuel Noriega.

3. President Obama ordered air strikes in Libya to support the ouster of Libyan dictator Muammar Gadaffi.

XII. THE GULF OF TONKIN RESOLUTION (1964)

A. The Gulf of Tonkin Resolution gave President Johnson authorization, without any formal declaration of war by Congress, to use military force in Southeast Asia, including but not limited to in Vietnam, to protect treaty allies in the area from communist incursion or invasion.

B. Resulted from the so-called Gulf of Tonkin Incident.

C. In the early 1960's, the Soviet Union assisted North Vietnam in building radar and other military installations along North Vietnam's coast.

D. An American destroyer, the USS Maddox, was eventually dispatched to the Gulf of Tonkin to conduct surveillance of these installations from off the coast of North Vietnam.

E. In early August of 1964, the USS Maddox and another destroyer, the USS Turner Joy, reported being attacked by North Vietnamese torpedo boats.

F. Shortly thereafter, Congress, at the request of the Johnson Administration, passed the Gulf of Tonkin resolution giving President Johnson broad authority to escalate military operations in Vietnam.

G. In the years following the Gulf of Tonkin Incident, information surfaced that cast doubt on whether the American ships had been attacked by North Vietnamese forces as reported.

XIII. NEW YORK TIMES V. U.S. (1971)

A. This U.S. Supreme Court case is also known as the "Pentagon Papers" case.

B. In this case, the New York Times came into possession of the so-called "Pentagon Papers."

C. The "Pentagon Papers" as a whole were an analysis of the history of U.S. military involvement in Vietnam, as well as an evaluation of the strategy, tactics, policies and goals of this intervention and, ultimately, of the Vietnam War.

D. The "Pentagon Papers" consisted of numerous studies, memoranda, observations and analyses by various authors over time.

E. In summary, the Pentagon Papers criticized the United States' involvement in Vietnam; generally concluded that the government of South Vietnam would not be able to stay in power without continuing American military and financial support; and opined that there was no clear "exit strategy" or ability to define "success" with respect to the ongoing Vietnam War. The "Pentagon Papers" cast substantial doubt on what the Johnson and Nixon Administrations, and military leaders (such as General William Westmoreland, who was in charge of American military operations during some of the heaviest fighting of the Vietnam War) were telling the public.

F. Daniel Ellsberg, at the time an employee of a think tank known as the RAND Corporation, leaked the "Pentagon Papers." Aside from charging Ellsberg with various criminal offenses, the government attempted to enjoin their publication.

G. The government argued that the "Pentagon Papers" were classified and that it would damage national security if they were published.

H. The newspaper argued that keeping the "Pentagon Papers" secret would allow the government to mislead the public regarding the Vietnam War.

I. The federal district court (the trial court) granted an injunction in favor of the government that prevented publication, and the question presented to the U.S. Supreme Court was whether the injunction—which was a content-based prior restraint on speech—violated the 1st Amendment.

J. The U.S. Supreme Court recognized the need to protect national security, but also recognized the need for citizens to be informed as to issues of national importance. After weighing these two issues, the U.S. Supreme Court struck the injunction as an unconstitutional prior restraint on speech and allowed publication of the "Pentagon Papers."

K. The case does not provide much concrete guidance, other than when such conflicts between a free press and national security arise, both interests must be carefully weighed and balanced.

XIV. WAR POWERS ACT OF 1973

A. The War Powers Act of 1973, also known as the War Powers Resolution of 1973, is a federal law intended to limit the President's power to commit the military to extended combat operations without the consent of Congress.

B. The War Powers Act provides that the President can send the armed forces into action: (i) with the statutory authorization of Congress; or (ii) in case of a national emergency created by an attack upon the United States, its territories or possessions or its armed forces.

C. If the President sends the armed forces into action without the prior authorization of Congress, the War Powers Act requires the President to notify Congress within 48 hours, and forbids continuing military action after a period of 60 days, with an additional 30 days allowed to withdraw the armed forces from the area of operations, unless Congress either passes an authorization for use of military force (an "AUMF") or declares war as provided for in the Constitution.

D. President Nixon vetoed the War Power Act, believing that it put too many restraints on the President's power to commit the armed forces into action, but this veto was overruled by 2/3 of the House and Senate.

E. The War Powers Act arose out of the Vietnam War, where the United States had been involved in intense armed conflict for many years without a declaration of war by Congress. Congress also felt that high-ranking military members and members of the President's cabinet had misrepresented the true state of the war in informal reports and statements to the press, and wanted to formalize a process where Congress could directly question witnesses from the military and the executive branch under oath.

F. The legislative concern behind the passage of the War Powers Act was how to practically manage the seeming concurrent authority given to both Congress and the President pertaining to the use of the armed forces in sustained combat operations that fell short of declared "total war" (such as World Wars I and II).

G. The specific requirements of the War Powers Act are as follows:

1. In the absence of a declaration of war by the Congress, in any case in which the Armed Forces of the United States are introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, such use of the Armed Forces of the United States in hostilities pursuant to this Act shall be reported within 48 hours in writing by the President to the Speaker of the House of Representatives and the President *pro tempore* of the Senate, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope and duration of such hostilities, and the constitutional and legislative authority under which the introduction of hostilities took place.

2. The President is to routinely consult with Congress until U.S. armed forces are no longer engaged in hostilities or have been removed. Reports are given to the House Committee of Foreign Affairs and to the Senate Foreign Relations Committee.

3. Based on such notice and reports, Congress must authorize any continuing use of military force past the 60 day operational/additional 30 day withdrawal periods set forth in the War Powers Act via an appropriate AUMF or actual declaration of war.

XV. 2001 AUTHORIZATION OF USE OF MILITARY FORCE

A. As a result of the September 11, 2001 terrorist attacks, Congress adopted a joint resolution authorizing the use of the armed forces against those responsible for the attacks.

B. This joint resolution is codified as Public Law 107-40 and is known as the AUMF (although prior AUMFs have been adopted under the War Powers Act,, the 2001 AUMF has, essentially, been used as the single authorization for virtually all post-9/11 military operations).

C. The AUMF grants the President authority to use all necessary and appropriate force against those whom he determines planned, authorized, committed or aided the September 11th attacks, or who harbored said persons or groups.

D. The AUMF grants power to the President to determine both who to target and what actions to take.

E. The AUMF was passed by the 107th Congress on September 18, 2001 and signed into law by President George W. Bush on September 18, 2001.

F. Presidents have interpreted their authority under the AUMF to extend beyond al Qaeda and the Taliban in Afghanistan (believed to be the perpetrators of the 9/11 attacks) to apply to numerous other groups as well as other geographic locales. Notably, the AUMF does not require the targets to be state actors or traditional military targets, but can include non-state actors and non-military targets, such as individual persons believed to be terrorists.

G. The AUMF is still in effect today, with the full list of state and non-state actors the American military is fighting or believes itself authorized to fight being classified.

H. Reportedly, the AUMF has been used to authorize military deployments to Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq and Somalia.

I. The 2001 AUMF has been interpreted by presidential administrations to allow the President to unilaterally launch military operations across the world with little or no ongoing Congressional oversight or transparency.

J. While the AUMF (arguably) complies with the War Powers Act, it has been criticized as allowing the President, the executive branch and the military to wage unlimited war without the requisite oversight and approval by Congress. There have been calls to repeal or amend the AUMF, but there has been no will in Congress to address the matter.

K. Constitutional scholars have criticized both the War Powers Act and the 2001 AUMF as violations of the separation of powers envisioned by the Founding Fathers, who gave Congress the power to declare war and the President the power to wage war as Commander in Chief of the armed forces. There have been calls to amend the War Powers Act as a reaction to perceived "shortcomings" in the current AUMF:

1. There is no temporal limit on the AUMF. The AUMF does not have a "sunset clause," which is a mechanism built into laws and resolutions passed by Congress that require Congress to periodically vote to reauthorize the law or resolution. If Congress does not reauthorize, the law or resolution expires.

2. There are no geographic restrictions on the AUMF. Military force can be used anywhere the executive branch and military leadership deem necessary and appropriate.

3. There are few restrictions on means or methods. For example, the AUMF makes no distinctions between use of "standoff" or "remote" weapons systems versus use of troops (the so-called "boots on the ground") or putting manned aircraft in harm's way.

4. The War Powers Act envisioned separate, smaller AUMFs would be enacted. However, the coverage of the 2001 AUMF has expanded so much that few (if any) additional specific AUMFs have been required.

5. There are no meaningful continuing reporting requirements to Congress as envisioned by the War Powers Act under the current AUMF.

XVI. CONCLUSION

A. While it would appear that the decision to commit American forces to combat operations would be one of the most important decisions political leaders can make, and one in which separation of powers and checks and balances should be present, the historical trend has been for Congress (the legislative branch) to cede and provide power to the President (the executive branch).

B. Courts rarely weigh in on the constitutional or legal framework required to commit American forces to combat, under the political question doctrine, believing such issues are better worked out between the legislative and executive branches.

C. As a consequence, the United States has a history of fighting major conflicts deemed to be wars (such as the Korean War, the Vietnam War, Desert Storm, the Iraq War and the Global War on Terror) without any formal declaration of war and little meaningful oversight of the executive branch by the legislative branch.

D. Scholars and historians both tend to explain this state of affairs as the executive branch seeking to expand its power over the military at the expense of the legislative branch, with the legislative branch allowing this to happen because this enables Congress to shift blame and responsibility for failed or unpopular military operations away from themselves and to the President.

E. On the other hand, modern realities require, at times, quick and decisive military action to respond to evolving threats, especially terrorist threats which are difficult to detect and prevent. To a certain extent, this reduces the opportunity for considered legislative debate over whether and how the American military should be used.