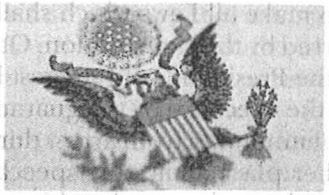

2

Providing for the "Common Defence": The Original Understanding

The purpose of this chapter is to plumb the original understanding of the Constitution's allocation of national security powers. Because the text alone furnishes an incomplete record, our search for the Framers' intent requires a brief review of English history and European political theory that probably influenced the Framers, the American experience with government prior to the Constitution, records of the 1787 Convention, and the subsequent ratification debates. *See* Louis Fisher, *Presidential War Power* 1-16 (2d ed. 2004). We nevertheless begin with the text, as we must in any quest for the meaning of a written constitution.

A. THE CONSTITUTIONAL TEXT

Read the excerpts from Articles I-IV of the Constitution found in the Appendix. Try to suppress what you know about our nation's history since 1787. What are your first impressions? How is the responsibility to "provide for the common defence" allocated among the three branches of government?

Judging simply by the proportion of words, the extensive national security powers given Congress in Article I appear to overwhelm the meager listing for the President in Article II. Article I gives Congress authority to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," which indicates some legislative role in the commitment of American armed forces to combat. Congress also is empowered to "raise and support" the armed forces (and must reappropriate funds for them at least every two years) and to "make Rules for the Government and Regulation of the land and naval Forces." In addition, Congress is authorized to "regulate Commerce with foreign Nations," to provide for the militia and for calling it forth "to execute the Laws of the Union,

suppress Insurrections, and repel Invasions," and "to make all Laws which shall be necessary and proper" for executing any power conferred by the Constitution. Other provisions, particularly the one for impeachment of the President, also suggest legislative dominance. Congress escapes subservience to the executive by the guarantee of meeting "at least once in every Year," by the grant of immunity from arrest during a legislative session and from questioning in any other place about any speech or debate, and by the assignment to each House of control over its membership.

By contrast, the President is provided only one obvious national security power by being designated the "Commander in Chief." Moreover, the President is directed to command the armed forces only when they are "called into the actual Service of the United States." National security powers may be allocated to the President as part of the mandate to "take Care that the Laws be faithfully executed." The other Article II grants that may concern national security seem modest in comparison to powers conferred upon Congress: to appoint and receive ambassadors and ministers, and to make treaties (both powers shared with the Senate).

We now know that the judiciary may have a role in resolving disputes between the other two branches. However, aside from the reference in Article III, section 3, to the crime of treason, there is no indication in the constitutional text that the judiciary is to be involved in decisions about the national defense.

Yet both the executive and the courts have played powerful roles in providing for our national security over the last two centuries. How can this history be reconciled with the language of the Constitution? Closer examination of the text reveals the potential for the allocation of national security powers actually reflected in our history. It also demonstrates the futility of trying to divine the Framers' intent from the text alone.

First, Articles I and II assign overlapping functions. For example, the President becomes a legislator of sorts when recommending to Congress "such measures as he shall judge necessary and expedient" and when vetoing bills and resolutions, subject to a two-thirds override by each chamber of Congress. Further, although Congress may tax to "provide for the common Defence" and direct how monies are spent, the President may argue that the "take Care" Clause permits him to act alone in an emergency, using unappropriated or otherwise obligated funds from the Treasury. Similarly, because the President is required to give Congress information "from time to time," he must have been expected to obtain information of interest to Congress. He may obtain the opinion in writing of the principal officer in each of the executive departments, including the Department of Defense, concerning that department's duties. Finally, while the declaration of war is textually committed to Congress, the Commander-in-Chief power could be read to enable the President to use the military to defend against an attack on the United States. Because Article I, section 10, allows a state to "engage in War" if "actually invaded, or in such imminent Danger as will not admit of delay," it seems reasonable to claim as much power for the President if the nation is attacked, when consultation with Congress is not possible or practical.

Second, the text itself is anything but precise. Many of its words are general, not self-defining, and are capable of supporting multiple meanings. Consider the power to "declare War." While the language clearly allocates control over some important aspects of national security decision making to Congress, the text does not say what constitutes a "war" or, for that matter, what it means to "declare" one. Does "war" include small-scale skirmishes, purposefully limited in duration? Does the "Marque and Reprisal" power instead cover these limited hostilities? Or should "Marque and

Reprisal" be thought of as an anachronism, referring to long-abandoned state-sponsored private battles with pirates? Should "to declare" be read to give Congress merely a right to recognize an existing state of war? Or is that language intended to confer the general control over initiating war? Or something in between these polar extremes? What about uses of the military that do not create or perpetuate a state of war? To what extent does the clause giving Congress the power to "make Rules concerning Captures on Land and Water" enable Congress to control detention of persons and property during wartime? And what is the meaning of the text that empowers Congress "[t]o make Rules for the Government and Regulation" of the military? There is similar textual uncertainty about the reach of congressional fiscal powers. May Congress exercise its appropriation powers to limit executive powers? To what extent must Congress provide basic operating funds for the executive? May funding be conditioned on compliance with congressional wishes?

Concerning presidential authority, there is also vagueness in the language of Article II, most notably the Commander-in-Chief provision. A narrow reading of the Clause indicates no policy-making authority and relegates the President to the status of first general. A broad reading of Article II, on the other hand, combined with a restrictive reading of Article I—the Declaration, Marque and Reprisal, and Rules and Regulation Clauses—would expand the Commander-in-Chief power to include all military actions not unequivocally given to Congress. A similar range of constructions may be afforded the "take Care" language, the power to "receive Ambassadors and other public Ministers," and the statement in Article II, section 1, vesting "[t]he executive Power" in the President. Because the parallel Article I language vests in Congress "[a]ll legislative Powers herein granted," the omission of the words "herein granted" from the text of Article II could be construed to allow the President to do virtually anything "executive" in nature, so long as such action is not assigned exclusively to Congress by explicit Article I language. *See* Alexander Hamilton, *Pacificus No. 1*, Gazette of the United States (Philadelphia), June 29, 1793, *reprinted in* 15 *The Papers of Alexander Hamilton* 33-43 (Harold C. Syrett ed., 1969).

Third, the text fails altogether to prescribe or allocate power over some important areas of national security. For example, while Article I, section 9, forbids suspending the privilege of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it," the text does not say who possesses the power to suspend the writ or to assess when the prescribed conditions are satisfied. In addition, the meager text is by itself inadequate for deciding the scope and locus of authority for deploying American troops abroad or in defense of the homeland, contracting for private or foreign fighting forces, engaging in covert paramilitary actions (or, for that matter, any intelligence activities), interdicting convoys, engaging in airlifts or blockades, or threatening or promising to do any of the above.

May Congress delegate power to the President? In part because there is no explicit rule in the text forbidding congressional delegations to the executive, such delegations are routinely upheld. But how far may Congress go in delegating its own powers? May the power to declare war be delegated, or would such a wholesale transfer violate the Constitution? The text itself provides little guidance, although the structure of the Constitution may be read to forbid such a sweeping delegation. When Congress merely remains silent while the President takes some national security initiative committed by the Constitution to Congress, is the President acting legally? The answer depends on the construction given to the vague text, since the Constitution fails to describe the effect of legislative inaction. What if the President

acts unilaterally in an area not explicitly prescribed or allocated by the Constitution to any branch?

All these uncertainties provoke spirited debates at both ends of Pennsylvania Avenue and among academics. Most national security disputes are resolved in the political process. But when persuasion fails, and the political process will not yield a clear or generally acceptable answer, these disputes end up in court, where the Framers arguably meant for them to be resolved.

Fortunately, the three branches have usually cooperated in making and carrying out national security policy. The practical need for effective administration provides an incentive for Congress to nurture executive branch cooperation. Further, the President's participation in the legislative process is textually assured through his powers to call Congress into special session, to recommend legislation, to provide information about the state of the Union, and to veto any legislative measure. At the same time, any tendency of the President to seek autonomy in the wording of ambiguous text is confined by some explicit and crucial grants to Congress—appropriations and declaration of war to name just two.

Thus, the original understanding of the allocation of national security powers cannot be derived solely from the text of the Constitution. We must broaden our search and consider what is likely to have influenced the delegates to the Philadelphia Convention: British history and European political theory, as well as seminal American events such as the Revolutionary War and earlier efforts at self-government. While the effect of these influences cannot be measured precisely in the Constitution or in the views of any single delegate, it is generally accepted that a combination of theory and practical experience weighed heavily in the plan for a new government.

B. PRE-CONSTITUTIONAL HISTORY AND POLITICAL THEORY IN EUROPE

Many of the Philadelphia delegates were well read in history and political philosophy—from ancient Greece and Rome to contemporary Continental Europe. As erstwhile Englishmen, however, the Framers turned to English ideas and experiences above all others.

It is nonetheless difficult to calculate the British influence on the Constitution and on its national security provisions in particular. The allocation of war-making and foreign affairs powers fluctuated widely in England between the fifteenth and eighteenth centuries, and the unwritten British constitution simply reflected rather than guided these changes.

In general, the Crown dominated all foreign and military affairs until the seventeenth century, when Parliament began successfully to assert its constitutional claims to power. John Locke described the early "royal prerogative" expansively:

> Where the Legislative and Executive Power are in distinct hands, . . . there the good of the Society requires, that several things should be left to the discretion of him, that has the Executive Power. For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it. . . .

> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative.* For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution . . . there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe. . . .
>
> The old Question will be asked in this matter of *Prerogative,* But *who shall be Judge* when this Power is made a right use of? I Answer: Between an Executive Power in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no *Judge on Earth:* As there can be none, between the Legislative, and the People, should either the Executive, or the Legislative, when they have got the Power in their hands, design, or go about to enslave, or destroy them. The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to *appeal to Heaven.* [John Locke, *Two Treatises of Government* 392-393, 397 (Peter Laslett ed., 1967).]

Thus, before the seventeenth century surge in parliamentary strength, the "prerogative" powers of the Crown permitted it to exercise unilaterally, among other things, most national security powers—declaring wars, issuing letters of marque and reprisal, making treaties and appointments, and raising armies and navies. The prerogative powers were generally accepted as being free from limitation by Parliament or the courts.

From the mid-seventeenth century onward, Parliament and the Crown alternately dominated decision making about national security matters. When Parliament asserted itself it often relied on its control of the purse and its ability to obtain information from the executive. The Parliament taxed for military programs, controlled the raising and keeping of standing armies in times of peace, and successfully placed restrictive conditions on military appropriations. If the Crown ignored legislation restricting a foreign affairs initiative, the Parliament could and on occasion did resort to impeachment, dismissal, or execution. On the other hand, if Parliament was uncooperative, the Crown might secure funding for its ventures from local governments or by borrowing, and it could dismiss Parliament for any reason—if Parliament had not acted first. Further, secret initiatives were sometimes undertaken, and information was often withheld from Parliament under a claim of executive discretion.

In addition to their legacy of shifting royal and parliamentary powers, which had so affected war-making and foreign affairs, the British brought with them theoretical principles central to their own constitutional development that greatly influenced the Americans. The most important intellectual contribution was the idea of separation of powers. The theory of separation assigned different powers to different institutions and persons in government in order to forestall tyranny, to promote the government's legitimacy, and to make government more efficient. John Locke, writing between 1679 and 1683, relied on his theory of separation to advance the argument for the Whig view of government. His ideas significantly influenced constitutional development in England and in America.

> In all Cases, whilst the Government subsists, *the Legislative is the Supream Power.* For what can give Laws to another, must needs be superiour to him. . . .
>
> But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution,* or an attendance thereunto: Therefore 'tis necessary there should be a *Power always in being,* which should see to the

Execution of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.

There is another *Power* in every Commonwealth, which one may call *natural,* because it is that which answers to the Power every Man naturally had before he entered into Society. For though in a Commonwealth the Members of it are distinct Persons still in reference to one another, and as such are governed by the Laws of Society; yet in reference to the rest of Mankind, they make one Body, which is, as every Member of it before was, still in the State of Nature with the rest of Mankind. Hence it is, that the Controversies that happen between any Man of the Society with those that are out of it, are managed by the publick; and an injury done to a Member of their Body, engages the whole in the reparation of it. So that under this Consideration, the whole Community is one Body in the State of Nature, in respect of all other States or Persons out of its Community.

This therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called *Federative,* if any one pleases. So the thing be understood, I am indifferent to the Name.

These two Powers, *Executive* and *Federative,* though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without,* with all those that it may receive benefit or damage from, yet they are always almost united. And though this *federative Power* in the well or ill management of it be of great moment to the Commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive;* and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. For the *Laws* that concern Subjects one amongst another, being to direct their actions, may well enough *precede* them. But what is to be done in reference to *Foreigners,* depending much upon their actions, and the variation of designs and interests, must be *left* in great part *to* the *Prudence* of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.

Though, as I said, the *Executive* and *Federative Power* of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the Society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands; or that the *Executive* and *Federative Power* should be *placed* in Persons that might act separately, whereby the Force of the Publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine. [Locke, *supra,* at 382-386.]

The judicial power was born as the third real power in England when Parliament assured the independence of the judges from the King's previously unfettered control over their removal. Yet the judges still were viewed as executive officers while in office. It was Montesquieu in his *Spirit of Laws,* published in 1748, who provided the theoretical challenge to the distinct federative power of the executive described by Locke. Montesquieu's theory subdivided the federative and the law enforcement powers of the executive, treated the judiciary as a distinct branch, and offered the tripartite separation that is reflected in the American Constitution. For Montesquieu, the preservation of liberty required such a separation:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest

the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. [Charles Louis de Secondat, Baron de Montesquieu, *The Spirit of Laws* 202 (David Wallace Carrithers ed., 1977).]

The problem with the separation of powers theory, however, was that it failed to account for the real class conflicts and overlapping authority that actually characterized the British system. A second theory, that of mixed government, helped to harmonize theory and practice. According to mixed government theory, balance in government could be maintained by mixing classes and institutions of society—kings, lords, and commoners—and combining various primary forms of government, namely monarchy, aristocracy, and democracy. A systematic attempt at creating "counterpoisal pressures . . . might keep the system stable and healthy." Bernard Bailyn, *The Origins of American Politics* 20 (1970). Thus, separated branches would share all the government's powers, checking against abuses by any single group in society or in government. For example, broad prerogative powers did not necessarily always belong to the King unchecked by the Parliament. The King or his ministers could be criticized or even impeached for their misuse of power. Moreover, either branch could initiate or exercise a prerogative power.

Locke recognized the importance of balancing and mixing powers when he conceded that many things must be left to executive discretion, subject to nullification or modification by legislation. For Locke, both separation of powers and mixed government served to make the King subject to the representative Parliament. Thus, assuming that both the separation and mixed government theories of Locke and Montesquieu influenced the U.S. Constitution, the ambiguities of the American text might be quite intentional reflections of the essential fluidity of these concepts.

General theories of government were not the only European notions to influence the text of the Constitution. The Framers' views of war and peace, in their declared and undeclared forms, seem to be derived especially from Grotius, Pufendorf, Vattel, and Burlamaqui, scholars of the law of nations. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L.J. 672, 689-697 (1972). For Grotius, declared wars were "perfect," involving committed nations in opposition. Undeclared wars were "imperfect," and occurred in situations where the sovereign authorized private reprisals aimed at claiming property held by subjects of another sovereign. Hugo Grotius, *The Rights of Wars and Peace* 538-549 (Jean Barbeyrac trans., 1738) (1625). Burlamaqui argued that imperfect war and reprisals were often one and the same, but that a sovereign might itself engage in reprisals using its own forces:

A perfect war is that, which entirely interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that, which does not entirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed.

This last species of war is generally called reprisals, of the nature which we shall here give some account. By reprisals then we mean *that imperfect kind of war, or those acts of hostility, which sovereigns exercise against each other, or, with their consent, their subjects, by*

> *seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice. . . .* [II Jean Jacques Burlamaqui, *The Principles of Natural and Political Law* 180 (Thomas Nugent trans., 5th ed. 1807), *cited with approval in* Miller v. The Resolution, 2 U.S. (2 Dall.) 1, 21 (Ct. App. in Cases of Capture 1781).]

There was no consensus among the theorists about whether a declaration was necessary to initiate war, though no one argued that a declaration was required to wage a defensive war. Before the American Revolution, however, when such "declarations" were made, they were usually only formal, largely ceremonial announcements. Lofgren, *supra*, at 691-693.

Contemporaneous writings indicate that "a nation might 'declare' war, not only by a formal announcement, but also by an act of hostility." Michael D. Ramsey, *Textualism and War Powers*, 69 U. Chi. L. Rev. 1543, 1590 (2002). For example, Locke wrote:

> The State of War is a State of Enmity and Destruction; And therefore declaring by Word or Action, not a passionate or hasty, but a sedate settled Design, upon another Mans life, puts him in a State of War with him against whom he has declared such an intention. [Locke, *supra*, at 278.]

According to Professor Ramsey, Locke, Blackstone, and other international law scholars used "declare" to mean "an action (taking up arms) that itself makes a statement." Launching an attack could constitute "declaring" war. Ramsey, *supra*, at 1636.

War making without a formal declaration was common in the eighteenth century, some of it under the collective noses of the soon-to-be American convention delegates. Between 1754 and 1756 the undeclared beginnings of the Seven Years War between Britain and France occurred mostly on American soil, and Americans were exposed to the undeclared war between Britain and France during the Revolutionary War.

The long-standing European practice of state-sanctioned private reprisals to satisfy private claims during peacetime all but disappeared during the first half of the eighteenth century. Yet sovereign states continued to press their own claims by reprisal, either through use of public forces or private ships, or by the issuance of letters of marque and reprisal. Indeed, recent English history known to the Americans included examples of state reprisals that resulted in general war.

This history underscores the importance of the Declaration and the Marque and Reprisal Clauses in the U.S. Constitution. The Framers knew from the European experience that war might be limited or complete, that limited hostilities were often authorized through letters of marque and reprisal, and that minor skirmishes or even major ones could begin by "Word or Action," as Locke put it. Lofgren, *supra*, at 693-697.

C. THE AMERICAN EXPERIENCE PRIOR TO 1787

These British and European influences may have seemed secondary to the Framers compared with the lessons learned firsthand from state, colonial, and national governments prior to the Philadelphia Convention in 1787. Before the Revolution, the mood in the colonies was notoriously antiexecutive. While the structures of colonial governments varied, all but Connecticut and Rhode Island formally placed most

of the important powers in their governors, including command of the military, a veto of legislation, authority to raise and spend funds on certain projects, and discretion to delay enforcement of legislation until approved in England. The colonial governors were mostly British agents and were widely disliked in the colonies, even though the colonists' complaints often were traceable to the actions of Parliament. Yet despite the theoretical preeminence of the governors, the legislatures dominated colonial government through fiscal initiatives, investigations, and various other measures, and they effectively controlled the governors, even in the exercise of war and foreign affairs powers.

After the Revolution, constitutional theories of separation and mixed government seem to have been ignored, as seven of the eight state governments formed between 1776 and 1778 adopted constitutions that subordinated the executive to the legislature. A second wave of state constitution-making, however, including in New York, Massachusetts, and New Hampshire, provided relatively greater authority for the governors. The new state legislatures responded early and often to popular local issues, sometimes restricting interstate commerce and undermining national stability. Eventually, as disorder and instability increased, many began to feel that a stronger national government was needed.

Again, early experiences with a national government had been marked by a pervasive antiexecutive mood. Beginning with the First Continental Congress in 1774, the national legislature was used by the states as a national executive, at first to conduct the Revolutionary War and later to manage other fiscal and national security tasks. But while Congress sought to carry out its policies through committees, boards, and appointed agents, it soon became apparent that the exigencies of the war were beyond the legislature's capacity to manage. Broad powers had to be delegated to the Board of War and to General George Washington. Nevertheless, Washington and other military leaders were often forced to choose between acting on the basis of ambiguous grants of authority or referring questions to Congress for decisions. This arrangement proved to be extremely inefficient.

> The subordination of the military to civilian control was a central axiom of the [English constitutional theory] that had led the colonists into rebellion. But broad agreement on this principle hardly provided Congress with useful guidelines for determining how direct and close its supervision of the army should be. . . . From 1775 to 1781, Congress was intimately concerned with the organization and administration of the army. It established rules of war and discipline, pay scales, terms of enlistment, and detailed regulations governing the procurement of supplies and provisions by the quartermaster and commissary departments; it also seemed to be regularly beset with the incessant complaints—sometimes petty, sometimes substantive, but never forgotten—of its officer corps. [Jack N. Rakove, *The Beginning of National Politics: An Interpretive History of the Continental Congress* 196-197 (1979).]

Congressional direction of the war even threatened the loyalty of its soldiers:

> Loyalty to the Congress was constantly strained but it never snapped; every soldier and officer may have cursed Congress fifty times for every word of praise, and most may have thought their hardships stemmed as much from congressional indifference, ineptness, and corruption as from unavoidable difficulties; but discontent rarely threatened to erupt into mutiny. [Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776–1790,* at 12 (1965).]

The Continental Congress's cumbersome executive structures and its inability to raise money for the national government led many influential Americans, including Washington and Hamilton, to urge a strengthened national executive.

One consequence of the Revolutionary War was the emergence of a decidedly American view concerning standing armies. On the one hand, the war served to remind the 1787 Convention delegates that a regular standing army was needed to enable the nation to defend itself against another nation. As Alexander Hamilton later argued, the part-time militia was not an adequate substitute for a regular army:

> These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon or compelled to do it, the increased expense of a frequent rotation of service, and the loss of labor and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as ruinous to private citizens. [*The Federalist No. 24*, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).]

On the other hand, the Americans knew that a standing army could be dangerous if not adequately controlled. They had come to deplore the use of the British army to enforce unpopular policies. The post–Revolutionary War solution, then, was to place responsibility for control of the military in the hands of the legislature. Legislative dominance of the military could be accomplished, it was first thought, by strict control over appropriations. The state assemblies controlled the governors' use of the military by imposing conditions on supply bills and even by specifying the conduct of military operations.

D. THE FRAMERS' VIEW

The adoption of the Articles of Confederation in 1781 did little to satisfy the demand for a stronger executive. First, the states retained sovereignty except to the extent that powers were "expressly" granted to the United States. Second, while Congress was given significant powers, including "the sole and exclusive right and power of determining on peace and war," the national government had no enforcement power and no independent executive. The business of governing thus continued much as it had before, with increasing delegations over foreign and military affairs to agents such as General Washington. As the national debt grew and the states threatened the national economy by disrupting commerce, issuing paper money, and refusing to do their part in funding the national government, the national government proved unable to maintain order in the fragile Union. By early 1787 the Continental Congress could no longer ignore the demand for change.

Congress called upon the states to send delegates to a convention for the purpose of reforming the government of the Union. The 55 delegates representing all states except Rhode Island ranged from 81-year-old Benjamin Franklin to John Dickinson, who had refused to sign the Declaration of Independence. Most of the delegates had served in the Continental Congress, and most were wealthy. So much a part of the American elite were the delegates that Thomas Jefferson, who was in Paris

and did not attend, called the convention "really an assembly of demi-gods." Max Farrand, *The Framing of the Constitution of the United States* 39 (1913).

Widespread demand for a stronger executive forced the Philadelphia delegates to confront basic structural questions: Should the executive be one person or many? Should there be an executive veto? How should the executive be selected, and should the executive serve more than one term? An even bigger issue was how to resolve the federalism question. The federalists wanted a stronger executive than did the states' righters, later known as antifederalists. Compared to these questions, the nature and scope of specific powers for the executive, especially in relation to those of Congress, were peripheral issues in 1787. Indeed, most of the attention given by the Framers and ratifying conventions to issues of national security was directed toward national survival and state responsibilities, state incitements of other states and Indians, and state diplomatic activity.

1. The Convention

Unfortunately, records of deliberations at the Constitutional Convention are few and are unreliable. The meetings themselves were secret, and the Convention Journal recorded only formal motions and votes. Many delegates took notes. The most extensive of these were James Madison's, though his were revised 30 years after the Convention. The various sources are compiled in the four-volume Max Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1937) (hereinafter *Records*).

There was a general consensus among Convention delegates about the need for a strengthened national government. They approved the so-called Virginia Plan, drafted by Madison, to give Congress the rights vested in it by the earlier Articles of Confederation. 3 *Records*, *supra*, at 593. They also agreed in principle to a single executive who would have explicit powers of execution and a conditional veto over legislation. It was clear from the start that the delegates wanted to create an executive who would be more than a mere agent of the legislature. They rejected the New Jersey Plan, which would have provided for a relatively weak, plural, single-term executive, removable by a majority of the states, yet having the power "to direct all military operations." *Id.* at 611-613.

After additional debate the delegates instructed a Committee on Detail to prepare a draft Constitution. The resulting draft vested "The Executive Power of the United States . . . in a . . . President," who would be "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States." Congress was given the power to "make war," to appropriate funds, and "to call for the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions." 2 *Records*, *supra*, at 167-172.

In the ensuing Convention debates on the draft, James Wilson of Pennsylvania opposed granting the House sole power to initiate revenue bills. Wilson's arguments and Edmund Randolph's prevailing response indicate a general understanding that the appropriations power would be employed to control the military. *Id.* at 273-274, 279.

Charles Pinckney of South Carolina complained that requiring the whole Congress to declare war would be cumbersome:

> Mr. Pinckney. . . . Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the

> best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.
>
> Mr. Butler. The Objections agst the Legislature lie in a great degree agst the Senate. 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.
>
> Mr. M(adison) and Mr. Gerry moved to insert "*declare*," striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.
>
> Mr. Sharman thought it stood very well. The Executive shd. be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.
>
> Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.
>
> Mr. Elseworth. there is a material difference between the cases of making *war*, and making *peace*. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negociations.
>
> Mr. Mason was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "*declare*" to "*make*." [*Id.* at 318-319.]

In support of Madison's motion, Rufus King of Massachusetts argued "that 'make' war might be understood to 'conduct' it which was an Executive function." *Id.* at 319.

Eventually, Pinckney's motion to vest the war power solely in the Senate was overwhelmingly rejected and Madison's motion was approved. The Journal records and Madison's notes unfortunately report inconsistent tallies on the two votes taken on Madison's motion, one before and one after King's speech, making it impossible to be certain about the meaning of the change. Madison and Gerry probably wanted the President to be able to respond to "sudden attacks" without a declaration of war, which some delegates thought was intended by the original language. Others, including King, wanted to be certain it was understood that the conduct of a war after its initiation was for the executive. No better consensus from the debate can be safely stated, although nothing in the change suggests an intention to allow the President to "make" war without a declaration. *See* Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 31-32 (1976). Even Hamilton, ardent advocate of a strong executive, favored limiting the executive in war-making and would have given the Senate the declaration power, leaving to the President the "direction of war when authorized or begun," 1 *Records*, *supra*, at 292, though he knew that many contemporary wars were not technically declared. Lofgren, *supra*, at 680.

Viewing the larger debate and the process of drafting the Constitution does help place the war powers allocation question in some perspective. First, the draft presented to the Convention by the Committee on Detail assigned the power "to make war" to Congress, though the point had scarcely been debated. The same Committee named the President as Commander in Chief without any record of controversy. The President was to be first general, but was not to initiate hostilities. As for military action short of declared war, the Committee on Detail did not include in the list of powers given to the new legislature the power to issue letters of marque and

reprisal, which the old Congress enjoyed under the Articles. At Pinckney's request such language was added and approved without discussion. 2 *Records, supra,* at 324, 326. We cannot ascertain from the Convention records whether this action was meant to ensure congressional primacy over undeclared hostilities. However, the contemporaneous understanding about the use of letters of marque and reprisal suggests that purpose.

Pinckney's motion to vest the war power in the Senate included granting to the Senate the power "to make treaties." 3 *Records, supra,* at 427. As in the debate on the War Declaration Clause, Madison and others eventually cautioned against unfettered Senate power over treaties. After floor discussion, in which Madison urged a role for the President out of fear of parochialism in the Senate, a committee was formed, which reported the following language: "The president, by and with the advice and consent of the Senate, shall have power to make treaties. . . . But no treaty shall be binding without the consent of two-thirds of the members present." 2 *Records, supra,* at 495. James Wilson proposed adding "and House of Representatives" after the word "Senate," on grounds that treaties should be fully sanctioned as laws if they were to operate as laws. Following objections from Robert Sherman and others that the secrecy that would necessarily attend some treaty negotiations made referral to the House impractical, Wilson's motion was defeated. *Id.* at 538. Among several other failed amendments was a proposal by Madison to permit the Senate alone to make peace treaties. Madison argued that the President "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace." *Id.* at 540.

While the treaty-making powers were being shaped, the eventual Supremacy Clause was drafted to make "all treaties made and ratified under the authority of the United States," along with laws enacted by the Congress, "the supreme law." *Id.* at 28. Supported by Madison's admonition that federal dominance in foreign relations was necessary "to the efficacy and security of the general government," *id.* at 27, the Supremacy Clause became a part of the Constitution, along with the provision in Article I, section 10, restricting states from entering into treaties or entering into any "agreement or compact" with a foreign nation without the consent of Congress. Complaints from those who feared the loss of state sovereignty and from others who feared that omission of the House of Representatives from the treaty-making process could lead to abuse of the power, did not sway the delegates. Nor did the Framers prescribe any limits on the subject matter of treaties, or supply a rule for resolving a conflict between a treaty and the Constitution or the laws.

Meanwhile, the delegates were gradually constructing an executive branch that would be unitary and independent and vested with considerable authority. In keeping with their general interest in balancing the powers of government, the President's selection, vested in the Congress by the Committee on Detail, became an election by state electors for an unrestricted number of four-year terms. The President was also given a conditional veto over legislation. Once the independence of the office was established, the delegates broadened the grounds for impeachment by the legislature to provide a check in the other direction. But they voted down proposals to allow Congress to define the content of "executive power," and no general argument was advanced against Congress's ability to delegate powers to the executive. Sofaer, *supra,* at 36-38, 56. In the end, the delegates themselves did little to define the executive.

2. Ratification

There remained the difficult task of persuading the state ratifying conventions to approve the new Constitution. The ensuing debates in the states, like those in Philadelphia, scarcely addressed the question of how and by which institution the new government would initiate war. Indeed, the Confederation government already had the war-making power, and the question of initiating war was eclipsed by the more immediately volatile issues of federal, state, or civilian-military sovereignty. At the same time, there was debate about supporting an existing war through taxation, about control of the military, and about the use of standing armies.

Despite the limited debates on war-making powers, there is indirect evidence from the ratification period that reveals more clearly how the war-making provisions were understood. Because the Philadelphia debates were secret, the ratifiers themselves had to rely on the words of the Constitution and on the propaganda of the time to establish the meaning of the document.

The Federalist Papers, written by Madison, Hamilton, and Jay to promote ratification, indicate that the new war declaration clause was practically the same as the earlier Articles' grant to Congress of "determining on" war. In *The Federalist No. 41*, Madison wrote: "The existing confederation establishes this power in the most ample form." *The Federalist No. 41*, at 256 (James Madison) (Clinton Rossiter ed., 1961). Delegate Wilson made the same point at the Pennsylvania convention. He rejected the notion of a unilateral presidential power over war-making, remarking that the new "system will not hurry us into war. . . . It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large." 1 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 528 (Jonathan Elliot ed., 1888) (hereinafter *Elliot's Debates*).

There is similar evidence that the Commander-in-Chief power was viewed narrowly. In *The Federalist No. 69*, Hamilton compared the Commander in Chief's prerogative to that of the British Crown, finding the former "much inferior."

> It would amount to nothing more than the supreme command and direction of the military . . . while that of the British King extends to the *declaring* of war, and to the *raising and regulating* of fleets and armies—all which by the Constitution under consideration, would appertain to the legislature. [*The Federalist No. 69*, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961).]

The fact that the authors of the *Federalist Papers* described the assignment of war powers in such terms suggests that they believed this view would be well received in the states.

Madison insisted in general argument that pure separation of the nation's powers was neither desirable nor intended by the theorists. Instead, mixed powers and checks and balances were essential:

> Ambition must be made to counteract ambition. . . . But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but

experience has taught mankind the necessity of auxiliary precautions. [*The Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961).]

For Madison, the balance was completed by having a dominant bicameral legislature and a partial veto in the executive. The House retained the original appropriations power, while the Senate had a special role in treaties and appointments. Similarly, the strong and independent President would be able to prevent legislative tyranny. Thus, separation ensured independence while it divided responsibilities along functional lines.

To be sure, there were arguments during this period that a stronger executive would promote governmental efficiency and dispatch. For example, it might have been inferred from the proposed government's ability to raise and support armed forces, and thereby to deter a surprise attack on the United States, that the President was empowered to respond to such a sudden attack. However, the arguments based on efficiency and dispatch were not made in connection with initiating war. *See, e.g., The Federalist No. 64*, at 12-13 (John Jay) (Clinton Rossiter ed., 1961) (discussing the treaty power).

During the South Carolina debate on the Constitution, convention delegate Major Pierce Butler explained that, while the initial proposal to vest the treaty power solely in the Senate was defeated as "inimical to the genious of a republic, by destroying the necessary balance," a motion to give the power to the President was overcome as "throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished. . . ." 4 *Elliot's Debates*, *supra*, at 262-263. Only when it was suggested that the House of Representatives join the Senate in approving treaties was it noted that "negotiations always required the greatest secrecy, which could not be expected in a large body." *Id.*

Throughout the ratification process, the objective of the federalists was to defend the entire proposed national government, not one branch of it at the expense of another. For example, Hamilton argued that the two-year limit on military appropriations would prevent the legislature from giving the executive power to build a large standing army. But his objective was to persuade ratifiers to support the proposed new government, not to aggrandize legislative power. In addition, to the extent that the vagueness in describing the President's powers caused fears among the ratifiers, they were substantially mollified by the comforting, though unspoken, assumption that Washington would become the first President, and that he would never abuse his powers.

The ratification debates tend to confirm that the "declare" language could not fairly be read to limit Congress to formal war-initiation. No ratifier argued that the President has unilateral power to engage in hostilities without congressional approval in the absence of a sudden attack. Undeclared wars were thought to be possible, but it is not altogether clear under what circumstances and by whom they could be initiated. *See* Lofgren, *supra*, at 694-700.

New Hampshire became the necessary ninth state to ratify the Constitution in June 1788, and the new government officially commenced in March 1789. In that year, Jefferson wrote to Madison that "[w]e have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." 15 *The Papers of Thomas Jefferson* 397 (Julian P. Boyd ed., 1958).

Still, careful analysis of the original understanding leaves much unsettled. No provision or argument was made against legislative delegations of military matters to the executive; nor were the required indicia of a valid delegation spelled out.

Similarly, there is no evidence that Congress was barred from authorizing hostilities without a declaration of war. The President's authority to "repel sudden attacks" was not clarified; nor was there any indication of what constitutes an attack, or when an attack should be considered imminent. Yet *The Federalist* strongly suggests that the textual uncertainties and overlaps in function and power were intended as an integral part of the overall design. Sofaer, *supra*, at 58-59.

Notes and Questions

1. The Preamble. Does the language of the Preamble to the Constitution help to describe the locus or scope of authority for keeping the nation secure? Suppose that some government action demonstrably harmed the "common defence," or threatened to do so. Could the Preamble be invoked to stop it?

2. Textual Conflicts and Silences in the National Security Constitution. Can you say exactly what provisions of Articles I and II might bring the President and Congress into conflict in providing for the national security, and why?

Various national defense issues are not addressed at all in the text of the Constitution. For example, may the President solicit the financial support of foreign countries for military initiatives not authorized by Congress? May the Congress authorize and appropriate funds for the purchase of military hardware and then restrict its use by the President? May the courts direct the President to disclose sensitive information about foreign affairs to Congress? How should such questions be resolved?

3. Antiexecutive Sentiments. Are you clear on the reasons for the strong antiexecutive sentiment in America before the 1787 Constitutional Convention? Can you see any of that sentiment reflected in the text of the Constitution or in the ratification debates? Do you see evidence of it in political debates today about national security issues?

4. A Merely "Juridical" War Power? Professor John Yoo maintains that the Declaration Clause reflects the Framers' understanding of eighteenth century practice that a declaration of war is not required to authorize combat. Instead, he argues, a declaration simply reflects Congress's "judgment of a current status of relations, not an authorization of war." John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers,* 84 Cal. L. Rev. 167, 248 (1996). According to Professor Yoo, in this role Congress performs a judicial function rather than its typical enactment of positive law. *Id.* at 248-249. How would you respond to Professor Yoo's assessment?

Professor Yoo argues further that the Constitution permits the President to initiate wars unless Congress acts through an appropriations restriction or impeachment to stop him. *Id.* at 174. He finds partial support for his conclusion in Article I, section 10, which states, "No State shall . . . engage in war." Thus, "if the Framers intended to require congressional consent before war, they . . . were perfectly capable of making their wishes known. . . . Had the Framers intended to prohibit the President from initiating wars, they easily could have incorporated a Section 10 analogue into Article II." *Id.* at 255. What are the strengths and weaknesses of this argument?

5. *Tactical War Powers.* There is ample evidence that the legislature was not meant to make tactical military decisions once war was initiated. But where exactly

does the legislature's responsibility stop? Just how much autonomy should the President enjoy as Commander in Chief? If the Framers had addressed these questions, what basic political values would have shaped their debate?

6. *An Obsolete War Power?* "That was then; this is now," the saying goes. Why should we care what the Framers intended? Of what relevance today is the "original understanding" of the Constitution when, from a distance of two centuries, we have to decide whether the President can unilaterally send American warships into the Persian Gulf, or whether Congress can limit the President's ability to use nuclear weapons first, or whether the courts can help decide either question?

PROVIDING FOR THE "COMMON DEFENCE" — THE ORIGINAL UNDERSTANDING: SUMMARY OF BASIC PRINCIPLES

- The constitutional text divides war powers between Congress and the President (quantitatively assigning the greater number to Congress), leaving the courts to decide federal questions. However, the text is ambiguous and omits important national security powers, including, for example, powers to repel attacks, collect intelligence, and safeguard national security secrets.
- Pre-constitutional history and political theory differentiated between a broad royal prerogative to exercise national security powers (especially abroad) and legislative power to make domestic laws and provide funds for government.
- The American colonial experience taught the Framers of the Constitution to be suspicious of a broad executive prerogative and of a standing army, and that the legislature should control funds for national security, but also that legislative (committee) command of troops in the field — as opposed to unified command — was inefficient and impractical.
- The Framers therefore assigned Congress the power to Declare War (formerly a royal prerogative), as well as to issue letters of marque and reprisal, but made the President the Commander in Chief. Notes of the Constitutional Convention — though not the constitutional text itself — suggest that this designation included some power to repel sudden attacks.
- It is likely that the Framers understood "Declare" to mean either an official announcement of a commitment to war or an act of war, suggesting that the Declare War Clause vests in Congress the power to authorize war either by formal declaration or by a statute authorizing the President to order an act of war.
- Some scholars have argued, however, that the Declare War Clause vests Congress only with the juridical power to determine legal status or relations in war, leaving to the President the power to decide on war subject only to Congress's power to control or deny funding the war.