WAR POWERS OF THE CONSTITUTION IN HISTORICAL PERSPECTIVE

by

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The war clauses of the Constitution seem simple enough. Congress received express power not only to declare war, but also to raise, regulate, and support an army; to provide and maintain a navy; and to call the state militias to enforce the law, suppress insurrections, and repel invasions. States could go to war on their own only if "actually invaded, or in such imminent Danger as will not admit of Delay." Here, the Constitution clearly implied defensive war, which required no justification. Offensive war, however, would be the exclusive domain of Congress. Congress could also apply economic pressure to enemies through discriminatory duties or limited military action by employing letters of marque and reprisal. Such powers were specifically denied to the states. The President was Commander-in-Chief of the armed forces, and of the militia when used in national service. He waged war and was also to be the country's chief diplomat.[1] Collectively, these powers meant that the President could muster America's military strength to sustain national policies as defined by Congress, which embodied the will of the people and the states. Republican ideology lay behind this division of powers, and behind the minuscule standing army, which the framers were convinced would discourage executive adventurism.

The historical backdrop for this delegation of powers can be reconstructed from American experience and the intellectual climate of the time regarding war and peace. First, the framers knew how frequent and useful war had been, even in their own past. During the colonial period, it had been employed to defend the community against native enemies and to support particular or general imperial interests. The colonists themselves had used war to expand territorial claims, deter French encirclement, and open new trading markets. Land speculation in Virginia, for example, played its part in igniting the French and Indian War. Second, war had secured American independence. Third, by the mid-1780's, war seemed likely because of the military threats posed by Spanish, British, and Indian neighbors, and because of the Barbary depredations in the Mediterranean.

Eighteenth-century thought buttressed this historical lesson. Even the apparent pacifism of many Enlightenment writers, whether Continental or British, was little more than a "respectable sentiment," as Peter Gay has termed it.[2] Few expected war to vanish from human affairs. John Locke and Thomas Hobbes both saw the universe as fundamentally predatory. Spinoza, Hume, Montesquieu, Voltaire, de Vattel, Rousseau, and Adam Smith were all convinced that war was a constant force and even a necessary instrument. Many of these writers focused on the military irresponsibility of monarchs, however, thus contributing to the image of the republican bogeyman, the warmongering prince. They came to the false conclusion that republics were inherently pacific because war was seldom in the interest of the people,

except in self-defense. This perspective was an important part of the intellectual baggage carried by the framers of the Constitution to their discussions in Philadelphia in 1787.

Americans themselves believed that human nature was one wellspring of war. The Puritans isolated the fall from grace and omnipresent sin as the culprits. But the secular Benjamin Franklin believed that human avarice and ambition must always compel societies to look to their defenses.[3] During the Revolution, Thomas Jefferson thought that while habit might make men "honor force more than finesse," Americans could hope to avoid only those wars produced by their own folly. Alexander Hamilton in a letter to George Clinton ventured that man's passions constituted "abundant sources of contention and hostility" among nations.[4] John Adams agreed that war flowed from human nature, but thought that by adopting republicanism, the young nation could avoid all save defensive conflicts. George Washington recommended a solid peacetime military structure to the Continental Congress, convinced that his country must maintain adequate defenses. And John Jay saw too much evidence of unprovoked aggression in both history and the contemporary world for Americans to be confident of a peaceful future.[5]

This attitude persisted into the confederation period. As Washington wrote to Sir Edward Newenham, "But what shall we say of Wars and the appearances of wars in the rest of the World? Mankind are not yet ripe for the Millennial State." Reason, let alone impartial benevolence, would not avail much. As Franklin noted, "The hope of glory and the ambition of princes are not subject of arithmetical calculation." John Jay prophesied that "while there are knaves and fools in the world, there will be wars in it; and that nations should make war against nations is less surprising than their living in uninterrupted peace and harmony."[6]

Americans also saw Europe as a specific source of war, for several reasons. First, the United States had promised to protect the French West Indies by the Treaty of Alliance of 1778 with France. The end of the War for Independence did not terminate the agreement. Given Europe's proclivity for war, if France were to become involved in another major conflict, the Americans might face the Hobson's choice of fighting to preserve the colonial possessions of a European empire, where no direct American interests or sympathies were involved, or of besmirching their national escutcheon by ignoring their treaty obligations. And in the latter case, as Jefferson noted in discussion on this point in Washington's cabinet in 1793, a failure to honor the treaty could give France a just cause of war. Second, overseas commerce might generate trade disputes or seizures which in their turn could develop into war. Third, the Treaty of Paris of 1783 left unresolved several issues which plagued American diplomacy for some time. The British retained the northwest posts, which stung American pride, as well as interests in the land and fur trade. The Spanish continued their control of the lower Mississippi River, posing a barricade to free navigation for Ohio settlers. Finally, frontiersmen continued to shoulder their way onto Indian lands, disregarding treaties and Indian sensibilities alike. As reprisals and retaliation followed, there was the danger of full-scale war on the frontier. American leaders fully appreciated these problems and knew that state particularism, an empty national treasury, absence of taxing power,

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lack of a strong executive, and a miniature military all weakened the central government's efforts to find solutions.[7]

A rising nationalism among American leaders compounded these difficulties by injecting emotion into the issues of territorial control, trading rights, and fiscal prudence. Even as they took the defense of republicanism for granted, these men took their country's honor with increasing seriousness. And they feared that small conflicts might swell into major confrontations. For example, John Adams, despite his faith in the pacific influence of republicanism, thought that Britain's commercial arrogance could "excite passions on both sides which may break out into a military war." And James Madison, equally angry with the British, inquired of James Monroe, "Shall we exert the lawful means which our independence has put into our hands of extorting redress?" Young Monroe was convinced that while Americans must work for peace, they must also preserve national honor and dignity.[8] Monroe did not specify which particular affronts to the national honor might justify a resort to arms, but many Americans blushed over their country's impotence. When Algerian corsairs clapped American sailors into irons in 1786, Congress had neither the ready money for ransom nor the authority and resources to brandish arms. Jefferson in France and John Adams in England were both vexed, though disagreeing on whether the United States should follow the European practice of paying tribute or choose what Jefferson thought was the more dignified course of war.[9]

The fear of entanglement in European affairs led many Americans to wish for isolation from the international world.[10] But for the country's leaders, this alternative was not realistic. They understood that commerce benefited both mercantile and agrarian interests, even though it would entail overseas encounters. Trade was a significant force in early American foreign policy. The later decision to hew to a path of neutrality through the international jungle was not derived solely from a philosophical commitment to nonalignment, but was prudently rooted in American weakness, distance from the epicenters of power in the Western World, and the potential profits available to neutral carriers during wartime.[11] To their sorrow, proponents of neutrality discovered that neutral rights were defined not by the neutrals, nor by the tenets of international law, but by the interests of the belligerents. Therefore, as John Adams noted, "He negotiates ill who is not in a condition to make himself feared." John Jay warned that Americans could not anticipate "peace and security any longer than they may continue prepared for war."[12]

Those whom we collectively identify as "Federalists" at this juncture believed that the Articles of Confederation constituted a principal source of America's international weakness. Some of them understood also that republican anti-militarism was a factor, but faith in the militia for home defense and in privateers for reprisals at sea led them to discount the need for a large army or navy.[13] Fiscal and ideological prudence sustained such policies. Even so, Jay was fully aware that his government's weakness and lack of monetary credit contributed to his failure to pry the privilege of free navigation of the Mississippi River from Don Diego de Gardoqui in 1785. Jefferson traced American helplessness before the Algerian corsairs to these same sources, even as the British defied American protests over the northwest posts with impunity. The Federalists concluded that diplomatic and military security would result from a closer and more efficiently managed union. Along with a reliable revenue must come executive initiative and control over military and diplomatic affairs. Many members of Congress in 1785-86 doubted that the United States would survive for long if such reforms did not develop. The Federalists became convinced that all which had been wagered and won in the gamble for independence would be lost if apathy and disunity dissolved the national cement once provided by the British enemy.

Thus the Federalists took it for granted

that the central government should control foreign and military affairs. No state could retain autonomy in these areas. James Madison believed that if the states developed grievances against their European neighbors, they should come to Congress for redress through diplomacy, in accord with the "practice of civilized Nations" and the treaties in effect. James Monroe thought that the Confederation was little better than a defensive alliance; indeed, by Article III the states agreed to a "firm league of friendship," not a union. In 1787 Congress itself resolved that perpetual foreign wars would ensue if states could abrogate national treaties at will.[14] And, as is well known, some Federalists exploited Shays' Rebellion as a harbinger of possible civil war to come if the central government were not given greater unity and coercive authority.

Although the direct evidence is fragmentary, it seems clear enough that certain American attitudes toward war—its origins and functions—can be linked to the thought behind the war clauses of the Constitution. These evoked little dissent in Philadelphia in 1787. In later years, however, extreme controversy developed over allegations that presidential war initiatives usurped congressional prerogatives—the most recent example being, of course, the Vietnam War.[15]

The war powers clauses moved from proposal to finished product with little comment. In his 29 May presentations to the convention, Charles Pinckney of South Carolina proposed that the Senate be made the primary policymaking body regarding war and diplomacy. The President was to be Commander-in-Chief only. Alexander Hamilton suggested on 18 June that the Senate be empowered to declare war, and James Madison, in his extended presentation of the same day, also expressed belief that the war power should rest in the senior legislative branch. Throughout, the assembly seems to have taken Benjamin Franklin's faith in the intrinsic pacifism of republics for granted, just as it assumed that the legislature would control the manner in which the government would wage war and conclude peace. At the same time, the states could defend themselves against invasion. The reports of the Committee on Detail proposed all these powers, with no evidence of prior discussion or subsequent dissent.[16]

On 6 August the Constitution's system of distribution of powers came before the delegates for consideration. On the 17th the framers considered the war powers, which rested with the legislature in general, rather than the Senate in particular. Charles Pinckney still thought that the Senate should make war, since the Congress would be too large, ponderous, and unfamiliar with foreign affairs. Pierce Butler argued that the President should have this power, since he would never make war without national support, but the suggestion was ignored. Elbridge Gerry, of Massachusetts, and Madison moved to substitute "declare war" for "make war" in the phrasing, and this passed after a brief discussion.[17]

Subsequently, only minor aspects of the war powers clauses arose, including letters of marque and reprisal. Such letters were a form of military retaliation which would soon fall into disuse. They arose in the 14th and 15th centuries, when merchantmen could be armed with relative ease, when privateers could be useful in wartime, and when monarchs allowed private reprisal to avoid open war and still compensate mercantile interests for maritime depredations. The Articles of Confederation had given Congress the power to issue letters of marque, and this conformed closely with 18th-century concepts of limited retaliation for national injuries. The framers accepted this principle, for they did not see a sharp dividing line between war and peace.

Gerry thought that letters of marque required specific allocation, since they were not covered by the power to declare war. Madison, arguing for federal control of exports, mentioned parenthetically that an embargo might be necessary to support policy someday, although James McHenry of Maryland believed that embargoes could come from the general war power already granted. The Committee of Eleven presented

further refinements on 5 September, read by David Brearly of New Jersey. These appended a marque and reprisal clause, but did not deal with Madison's point about embargoes. A brief discussion arose two days later over whether treaties of peace should proceed differently from regular treaties regarding ratification, but nothing came of this.[18] By 5 September, apart from stylistic tinkering, the war clauses were in final form.

International law, codified in such treatises as Emerich de Vattel's *Law of Nations*, argued for stages of protest, diplomacy, remonstrance, ultimata, private reprisal, and limited action with public force before resorting to open war. Subsequent American diplomacy would follow such steps, and the war clauses of the Constitution created the tools to permit such action.[19] By making the President chief diplomat and first warrior, the framers deliberately presented the executive with the potential for using force as an instrument of policy, trusting to legislative counterbalance as a deterrent against foreign adventurism.

The debates over ratification of the Constitution did not challenge the war clauses, despite skepticism on other points. Some of the framers, such as Elbridge Gerry and Patrick Henry, feared that the President might acquire too much power, but this apprehension was a general criticism of the office, rather than of the war clauses. In all the state conventions, Federalists stressed America's international weakness. James Wilson asserted that with the new Constitution, the country would be invulnerable, although few took such hyperbole seriously. When critics argued that insulation from Europe and the nature of republicanism would prevent all conflicts, the Federalists quickly dismissed such fantasies. Thomas MacKean of Pennsylvania, for example, stated flatly that wars were inevitable. And in Virginia, John Marshall told such critics to examine history: "The nature of man forbids us to conclude that we are in no danger from war."[20] Since wars were to be expected, the country must have the means of self-defense, and these would flow from the new, more vigorous government.

The war and policy argument was not stressed in the debates over ratification because most who commented along such lines were thinking in defensive terms. Marshall noted that remove from Europe would be a safeguard, and only national interest could henceforth draw America into wars.[21] Ratifiers seemed content that the people through their elected representatives retained control of the power to declare war, and there is little evidence that Americans thought that their country might wage offensive wars in support of state policy.[22] The Constitution permitted both, but no serious questions arose about the war clauses. There was a rough consensus that the country was weak and vulnerable, that republicanism was worth defending, that specific interests should be pursued, and that future wars were likely. Both the framers and the ratifiers left specifics up to Presidents and Congresses to come.

A final word on these themes should come from the *Federalist Papers*. They are still the most coherent, comprehensive, sophisticated, and systematic presentation of the thought behind the Constitution. The war clauses as such received little specific attention, but the *Federalist* authors clearly saw war as a part of the human condition. Hamilton, duplicating the thoughts he expressed to George Clinton on the subject, wrote that the "fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace." James Madison, though less gloomy, saw Europe's turbulent politics as an ever likely source of danger for the nation; man had a powerful impulse to quarrelsomeness and violence, he averred in Number Ten. John Jay, always consistent on the subject, thought that nations would launch wars whenever they sniffed profit from such actions.[23] In sum, these Federalists believed it was necessary for the country to possess an effective government, one capable of self-defense, if it was to survive.

The link between force and policy was a

minor theme, but Hamilton was emphatic on the point. After arguing that nations needed force to sustain their interests, he even ventured that the United States would be able, by judicious use of what military power it could muster, to carve a niche for itself in the balance of power in the Atlantic world. He warned that countries must define their interests carefully, because popular pressures had in the past forced even monarchs into wars "contrary to their inclination, and sometimes to the real interests of the state."[24] Hamilton knew that the structure of government could not insure peace. Madison, on the other hand, was more naive. He argued for a universal republican revolution as the only certain way to avoid war.[25]

Scholars have often stressed the high idealism of the framers regarding their perceptions of foreign policy and the use of power.[26] The cynical diplomacy practiced in Europe repulsed Americans, but they accepted the general tenets of their age. American foreign policy was based upon the character of the country, which obviously was republican. But policy was based as well on more pragmatic concerns such as national survival, territorial security, and the expansion of trade. The framers knew that the United States could not be easily conquered, but it could be badly damaged by a powerful maritime antagonist. And American interests, even by the 1780's, projected beyond the country's geopolitical boundaries—to the West Indies, to the Mediterranean, and to the North American colonies of European states. These shaped the themes of American foreign policy over the next 30 years and either involved or implied the use of force. Future Presidents drew upon the powers of the Constitution to pursue ambitions or meet emergencies, and during this period they and their principal advisors were the same generation of leaders who had conceived, drafted, and implemented the Constitution of 1787. So the idealism of the framers must be married to their pragmatism, which included a belief in the efficacy of force as an instrument of national policy. Thus Thomas Jefferson revealed more than he knew when he later added a fourth figure to the statuettes of Minerva, Diana, and Apollo, which he had selected to send to Abigail Adams. He explained his choice this way:

> At length a fine Mars was offered, calm, bold, his faulchion not drawn, but ready to be drawn. This will do, thinks I, for the table of the American Minister in London, where those whom it may concern may look and learn that though Wisdom is our guide, and the Song and the Chase our supreme delight, yet we offer adulation to that tutelar god also who rocked the cradle of our birth, who has accepted our infant offerings, and has shewn himself the patron of our rights and the avenger of our wrongs.[27]

NOTES

1. US Constitution, Art. I, secs. 8, 10; Art. II, sec. 2; Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale Univ. Press, 1911), II, 655-59.

2. Peter Gay, *The Enlightenment: An Interpretation* (New York: Knopf, 1969), II, 40-41, 50-51, 401-04.

3. John A. T. Alexander, "Colonial New England Preaching on War as Illustrated in Massachusetts Artillery Election Sermons," *Journal of Church and State*, 17 (Autumn 1975), 426-27; Franklin to Edmund Burke, 15 October 1781, in *The Complete Works of Benjamin Franklin*, ed. John Bigelow (New York: G. P. Putnam's, 1887-89), IX, 36.

4. Jefferson, "Notes on the State of Virginia," in *The Works of Thomas Jefferson*, ed. Paul L. Ford (New York: G. P. Putnam's, 1892-99), III, 438-39; Hamilton to George Clinton, 3 October 1783, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett (New York: Columbia Univ. Press, 1960-), IV, 468.

5. Adams to Abigail Adams, 23 October 1775, in *Adams Family Correspondence 1761-1782*, ed. L. H. Butterfield (Cambridge, Mass.: Harvard Univ. Press, 1963), I, 312; II, 320-21; Washington to President of Congress, 20 August 1780, in *The Writings of George Washington*, ed. John Fitzpatrick (Washington: US Government Printing Office, 1931-44), XIX, 133, 410; XXVII, 187-88; Jay to John Adams, 17 July 1780, and to William Greene, 4 March 1783, in *The Correspondence and Public Papers of John Jay*, ed. Henry P. Johnston (New York: G. P. Putnam's, 1890-93), I, 380; III, 33.

6. Washington to Newenham, 29 August 1788, *The Writings of George Washington*, XXX, 71; Franklin letter, 15 December 1787, *The Complete Works of Benjamin Franklin*, XI, 396; Jay to Gouverneur Morris, 24 September 1783, *The Correspondence and Public Papers of John Jay*, III, 84, and to John Adams, 23 June 1785, in *Journals of the Continental Congress*, ed. Worthington C. Ford (Washington: US Government Printing Office, 1934-37), XXVIII, 475.

7. Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Baton Rouge: Louisiana State Univ. Press, 1973).

8. Adams to John Jay, 6 August 1785, in *The*

Revolutionary Diplomatic Correspondence of the United States (hereafter cited as *Diplomatic Correspondence*), ed. Francis Wharton (Washington: US Government Printing Office, 1889), IV, 279; Madison to Monroe, 7 August 1785, in *The Papers of James Madison*, ed. William T. Hutchinson and William M. E. Rachal (Chicago: Univ. of Chicago Press, 1962-), VIII, 334; Monroe to Madison, 15 November 1784, in *The Writings of James Monroe*, ed. S. M. Hamilton (New York: G. P. Putnam's, 1901), I, 49.

9. Jefferson to James Monroe, 11 November 1784, in *Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton Univ. Press, 1950-), VII, 511-12.

10. Thomas Jefferson to G. K. Van Hogendorp, 13 October 1785, in *Papers of Thomas Jefferson*, VIII, 633; John Adams to John Jay, 6 December 1785, in *Diplomatic Correspondence*, IV, 453.

11. Paul Varg, *Foreign Policies of the Founding Fathers* (East Lansing: Michigan State Univ. Press, 1961), chap. i; James A. Field Jr., *America and the Mediterranean World 1776-1882* (Princeton: Princeton Univ. Press, 1969).

12. Adams to John Jay, 3 May and 6 December 1785, in *Diplomatic Correspondence*, II, 177; IV, 453; "Report of John Jay," 22 September 1785, *Papers of the Continental Congress*, National Archives, Item 81, Roll 107, I, 298-99.

13. Richard Kohn, *Eagle and Sword: The Beginning of the Military Establishment in America 1783-1802* (New York: Free Press, 1975), chap. iv.

14. Madison to James Monroe, 7 August 1785, in *The Papers of James Madison*, VIII, 333; Monroe to Thomas Jefferson, 16 June 1785, in *The Writings of James Monroe*, I, 84; Congressional Resolution, 13 April 1787, *Journals of the Continental Congress*, XXXII, 178-80.

15. Merlo J. Pusey, *The Way We Go To War* (Boston: Little, Brown, 1971); and Jacob Javits, *Who Makes War? The President versus Congress* (New York: William Morrow, 1971), are two examples.

16. Farrand, I, 70, 285, 292, 307; III, 558-60, 622, 624. Also, Benjamin Franklin, "Proposals," 26 June 1787, in *The Complete Works of Benjamin Franklin*, XI, 341.

17. "Reports of Committee on Detail to 23 July," in Farrand, II, 143, 145, 157, 168-69; 6 August 1787, in Farrand, II, 182, 185; and "Debate," 17 August 1787, in Farrand, II, 318-19.

18. Gerry, 18 August 1787, in Farrand, II, 326; Madison and McHenry, 21 August 1787, in Farrand, II, 361-62; Brearly Report, in Farrand, II, 508; on treaties 7-8 September 1787, in Farrand, II, 540-43, 548-49.

19. Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), pp. 55-90.

20. Jonathan Elliot, comp., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (Philadelphia: Lippincott, 1896), I, 328, 335, 501; II, 62, 185, 189, 209-12, 520-23, 526-28, 536; III, 132, 227-28, 611, 634-38.

21. Ibid., III, 227.

22. Ibid., II, 209, 528, 536; III, 290, 611; IV, 107-08, 263.

23. Benjamin F. Wright, ed., *The Federalist* (Cambridge, Mass.: Harvard Univ. Press, 1966), No. 3, pp. 97-98; No. 4, pp. 101-02; No. 6, pp. 109-11; No. 10, p. 131; No. 15, p. 159; No. 24, pp. 206-08; No. 34, pp. 250-51; No. 41, pp. 295-99; No. 62, p. 411.

24. Ibid., No. 6, p. 112; No. 11, pp. 138-39; No. 16, pp. 164-65; No. 22, p. 195; No. 25, p. 211.

25. Ibid., No. 3, p. 99; No. 4, pp. 103-04; No. 41, p. 295; No. 43, p. 314. Madison, "Universal Peace," in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G. P. Putnam's, 1906), VI, 88-91.

26. Adrienne Koch, *Power, Morals and the Founding Fathers: Essays in the Interpretation of the American Enlightenment* (Ithaca: Cornell Univ. Press, 1961); and Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy* (Princeton: Princeton Univ. Press, 1961).

27. Jefferson to Abigail Adams, 25 September 1785, in *Papers of Thomas Jefferson*, VIII, 548.