

The Declare War Clause, Part 1: Overview and Introduction

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This Legal Sidebar is the first installment in an eight-part series that discusses the Declare War Clause in Article I, Section 8, Clause 11 of the Constitution, which grants Congress the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water[.]” The power to take the nation to war is a central element of the Constitution’s scheme of war powers, but interpretation of the Declare War Clause is complex and evolving. This Sidebar series discusses the Supreme Court’s jurisprudence related to declarations of war and highlights interbranch practices that illuminate the executive and legislative branches’ sometimes differing interpretations of the clause.

Part 2 of this series discusses the Declare War Clause’s [background, drafting, and ratification history](#). Part 3 introduces authorizations for use of military and force and [examines](#) the ongoing debate over initiating military action. Parts 4 through 8 cover relevant jurisprudence and interbranch practice by surveying [early American conflicts](#); the [Civil War](#); the [Spanish-American War through the Second World War](#); the [Cold War and Korean War](#); and the [Vietnam War through 21st-century conflicts](#). Additional information on Congress’s [war powers](#) and the President’s powers as [Commander-in-Chief](#) can be found in the [Constitution Annotated](#).

Overview of Congressional War Powers

When the Framers of the Constitution gathered in Philadelphia to draft the document that would become the Constitution, one of their [principal objectives](#) was to improve the United States’ ability to ensure its peace and security through military force, if necessary. In line with that aim, the Constitution’s [Preamble](#) makes securing the common defense one of the Union’s principal purposes, and the articles that follow the Preamble allocate [broad control](#) over [national security](#) to the federal government while [denying](#) most war powers to the states.

Although courts and commentators occasionally discuss the “[war power](#)” as if it were a unified authority, the Supreme Court has [explained](#) that “the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions.” In Article I, the Constitution empowers Congress to [provide for the common defense](#) through a series of enumerated war and national security powers. Central among these is [Clause 11](#) of Article I, Section 8, which authorizes Congress to declare war. Clause 11 also

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empowers Congress to issue instruments, known as letters of marque and reprisal, which [permit](#) private citizens to capture or destroy enemy property, and authorizes Congress to [make rules concerning captures](#) of enemy property on land or at sea.

Apart from Clause 11, other clauses in Article I, Section 8 grant Congress the power to [define and punish](#) offenses against the law of nations; [raise and support armies](#); [establish and maintain a navy](#); make [rules](#) for the armed forces; “[provide for calling forth the Militia](#)”; and “[provide for organizing, arming, and disciplining, the Militia, and for governing](#)” the militia when in the service of the United States. General congressional authorities, such as the [power over appropriations](#) and the [Necessary and Proper Clause](#), supplement these enumerated war powers. Finally, the Supreme Court has [sometimes stated](#) that the United States possesses inherent war powers that derive from its role as a sovereign country rather than from an affirmative grant in the Constitution. Other times, however, the Court has [expressed the view](#) that the federal governments’ war powers, while expansive, “are only those which are to be derived from the Constitution”

Breadth of Congressional War Powers

Congress’s collective war powers provide it with broad authority to support the country’s war efforts in a variety of ways. The Supreme Court has held congressional war powers include the power to provide for [compulsory military service](#) through the draft, protect servicemembers’ health and needs [during](#) and [after](#) active duty, control domestic [industry](#) and [infrastructure](#) to support war needs, [close nonessential industries](#), impose [rent](#) and [price](#) controls, permit the government to [renegotiate war contracts](#) to recoup excessive profits, and enact other [trade](#) and [economic](#) legislation. Although these powers are extensive, the Supreme Court has also stated that the Constitution [applies equally](#) in times of war and peace, and that there are [constitutional limits](#) on congressional war authority. For example, the Court has held that protections of individual rights in the [Bill of Rights](#) limit Congress’s power to use [military commissions](#) to try American civilians when federal courts are open and functioning and [prohibit](#) Congress from imposing cruel and unusual punishment on deserters from the military.

Introduction to the Declare War Clause

The Declare War Clause is a central element of Congress’s war powers and has been [heavily debated](#). The Supreme Court has [observed](#) that only Congress has the power to declare war, but the implications of this exclusive assignment are not well-settled. In particular, the relationship between Congress’s power to declare war and the [President’s war powers](#) granted under [Article II](#) of the Constitution is the subject of significant disagreement.

The [first draft](#) of the Constitution considered in Philadelphia in 1787 would have given Congress the power to “[make war](#),” but the Framers substituted the word “[declare](#)” in what James Madison described as an effort to ensure that the President was empowered to repel sudden attacks. Under Congress’s [interpretation](#) of the Constitution, the President may only introduce troops into hostilities in three circumstances: (1) following a congressional declaration of war; (2) following congressional authorization of the use of force; or (3) following a national emergency created by an attack on U.S. territory. The executive branch [claims](#) much broader authority and asserts that the Constitution empowers the President to initiate and engage in many types of military action without congressional authorization.

While this interbranch debate remains active, other questions concerning the Declare War Clause have been settled by long-standing practice and judicial opinions. For example, the Supreme Court has [recognized](#) that Congress need not issue a full declaration of war to authorize the United States to engage in military action. Congress can also enact [statutory authorizations for the use of force](#) that permit the President to use force within defined parameters, but do not constitute a formal declaration of war. [The United States](#) [has](#) issued [declarations of war](#) against [11](#) countries [during](#) [5](#) conflicts, but it has not formally

declared war since the Second World War. As a result, statutory authorizations have become the predominate method for Congress to permit military action since the mid-20th century.

The Supreme Court has also observed that the Declare War Clause permits Congress do more than simply place two nations in a state of war. “The power to declare war,” the Supreme Court [stated](#) in 1870, “involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.” In line with this interpretation, Congress has enacted an extensive set of statutes that [trigger](#) a [host](#) of [special](#) wartime [authorities](#) concerning the [military](#), [foreign trade](#), [energy](#), [communications](#), [alien enemies](#), and [other](#) issues [if](#) Congress [declares](#) war.

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