

The Declare War Clause, Part 2: Historical Background, Drafting, and Ratification

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This Legal Sidebar is the second part of 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. Additional information on Congress’s [war powers](#) and the President’s powers as [Commander-in-Chief](#) can be found in the [Constitution Annotated](#).

War Powers Before the Constitution

Congress’s authority to declare war has its antecedents in Britain and in Colonial America. Under the British system of government, most essential war powers were lodged in a single individual—the Monarch. The power of “[making war or peace](#)” was the [sole prerogative](#) of the Crown, and the Monarch was the [first in command](#) of British military forces. Great Britain also traditionally allowed its monarchs to raise and support armies; however, by the end of the 17th century, Parliament controlled appropriations of funds for the military, and the Crown [agreed](#) not to maintain a standing army during peacetime without parliamentary consent.

In pre-revolutionary America, many [colonial charters](#) granted certain war [powers](#), such as the [power](#) to defend the colony from invasion or armed attack, to colonial [governments](#). When the American independence movement emerged in the 1770s, colonists formed militias at the local and state level, and revolutionary state assemblies passed laws [organizing](#) the militias and [mandating](#) service for some segments of the population. During this period, the [Second Continental Congress](#) coordinated the militias at the national level. The Second Continental Congress [appointed](#) George Washington Commander-in-Chief and [called upon Americans](#) to take up arms and organize themselves into militia units. The Second Continental Congress also adopted a set of [declarations](#) and [petitions](#) to the British Crown culminating in the [Declaration of Independence](#)—a document that shares elements in common with [18th century](#)

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declarations of war, and which some scholars describe as the equivalent of America's first written declaration of war.

By November 1777, the Continental Congress had adopted the [Articles of Confederation](#), which expressly allocated war-making authorities within the United States. Under the Articles of Confederation, all of the national government's powers were lodged in a unicameral legislative body, which became known as the Confederation Congress. The Articles of Confederation did not use the phrase "declare war," and instead gave the Confederation Congress the exclusive "[right and power of determining on peace and war](#)." The Articles also denied states the power to "[engage](#)" in war unless the Confederation Congress provided consent through a [supermajority](#) vote of 9 of 13 states. There were two [exceptions](#) to this requirement: a state could engage in war without congressional consent if it were "actually invaded by enemies" or if it learned of a planned invasion by a Native American tribe that presented a danger "so imminent as not to admit of a delay" until the Confederation Congress assembled.

Early Debates in the Constitutional Convention

Concerns that the national government lacked sufficient power to protect the United States' national security was one of the [primary reasons](#) state assemblies called for the Constitutional Convention in Philadelphia in 1787. As the delegates to the Convention worked out "[an entire change in the first principles](#)" of the Articles of Confederation, some elements of the governments' new suite of war powers, such as the power to raise and support armies, were [contentious and heavily debated](#). The Declare War Clause, on the other hand, was less controversial. The Articles of Confederation already gave the national government the "power of determining on peace and war," and the Constitution's Framers [did not question](#) whether the new central government they were creating should continue to possess the authority to determine when the United States goes to war.

Although the allocation of the war-making power to the federal government was not contentious, debate did arise at the Constitutional Convention over how to phrase the relevant text and integrate this power in the new constitutional system. The Articles of Confederation created one government body, but the Constitution divided the federal government's power between three distinct branches. This new separation of powers quickly led to questions over which branch of government should receive the Confederation Congress's power to "[determin\[e\]](#)" war and peace.

Early in the Constitutional Convention, the plan for a new form of government submitted by Edmund Randolph on behalf of Virginia became the focal point of debate. The "[Virginia Plan](#)," as it would come to be known, did not address the power to initiate war directly. Instead, it [provided](#) that the Confederation Congress's "Legislative Rights" would be given to a "National Legislature," and the "Executive rights" that the Confederation Congress exercised would be transferred to a newly created "National Executive." Under the Virginia Plan, the executive would also possess "a general authority to execute the National laws."

Several delegates expressed [reservations](#) about how war powers would fit into this division of authority. [Charles Pinckney](#) of South Carolina [stated](#) that, although he supported creating a vigorous chief executive, he feared the Virginia Plan might give the Executive the Confederation Congress's power over "peace [and] war." To Pinckney, such an assignment "would render the Executive a Monarch, of the worst kind . . . an elect[ed] one." [John Rutledge](#), also from South Carolina, [echoed](#) these concerns, observing that, while he was "for vesting the Executive power in a single person," he did not favor "giving him the power of war and peace." In early June 1787, the Convention [debated](#) whether the Confederation Congress's powers over war and peace were [legislative or executive](#) in nature, but it did not reach a consensus.

After [William Paterson](#) of New Jersey and [Alexander Hamilton](#) of New York presented alternative plans of government, a five-person Committee of Detail was formed to translate agreed-upon resolutions and

various proposals considered at the Convention into a draft constitution. The [draft](#) that emerged from the Committee of Detail set the stage for a renewed debate on how to assign and structure the power over war and peace.

The Transition from “Make War” to “Declare War”

In its report containing the first full draft of the Constitution considered at the Constitutional Convention, the Committee of Detail included a provision assigning to Congress the power “[To make war\[.\]](#)” The assignment of this power to the legislative branch and the clause’s phrasing, which differed from its predecessor under the Articles of Confederation, prompted debate among the delegates.

Charles Pinckney made the first remarks when the Convention turned its attention to the clause. He [objected](#) to including the House of Representatives in the power to “make war” because he believed it to be too large a body for the quick deliberations necessary for the task. The Senate alone would be the better option, Pinckney maintained, because it would be “more acquainted with foreign affairs, and most capable of proper resolutions.” Pinckney also argued that, because both small and large states face existential risks from war, the composition of the Senate, with its equal representation of the states, made it a more appropriate body. [Pierce Butler](#) of South Carolina voiced an objection to *either* chamber of Congress being assigned the power to make war. Butler advocated instead 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.”

After Butler’s comment, [James Madison](#) of Virginia and [Elbridge Gerry](#) of Massachusetts [moved](#) to change the clause to give Congress the power to “declare” war rather than “make” war. According to Madison’s notes, the change was intended to “leav[e] to the Executive the power to repel sudden attacks.” [Roger Sherman](#) of Connecticut spoke in opposition to the motion, contending that substituting the term “declare” would narrow congressional authority too significantly. Sherman argued that the original term “make” better captured the formulation in which the President was empowered to repel attacks but could not “commence war” on his own.

At this point, Elbridge Gerry objected to the earlier-raised proposition that the clause be shifted to a presidential power. Gerry [remarked](#) that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” [Oliver Ellsworth](#) of Connecticut [spoke next](#) and highlighted the distinction between “making *war*, and making *peace*.” To Ellsworth, it should be “more easy to get out of war, than into it.” [George Mason](#) of Virginia then responded to the several lines of argument that he been raised in response to the motion to substitute “declare” for “make.” Mason maintained that the President could not be trusted with “the power of war,” and that the Senate was “not so constructed as to be entitled to it.” Mason endorsed Ellsworth’s view that the Constitution should facilitate the process of making peace while making it more difficult to engage in war, and he concluded by stating that he preferred the phrase “declare war” over “make war.”

The delegates then voted on the motion to substitute “declare” for “make.” Two rounds of votes were held, and, although the records of the Constitutional Convention provide [inconsistent accounts](#) of the [first round](#) of voting, the motion passed on the second vote with eight states in favor and one against.

Debating the Power to End Wars and Make Peace

The delegates to the Constitutional Convention also debated which branch of government should be empowered to end wars and make peace. The same day that the Constitutional Convention voted to substitute “declare” for “make,” the Convention held two additional votes on the Declare War Clause. Charles Pinckney moved to strike the Declare War Clause entirely, but his motion was [rejected](#) without a roll call of votes. Pierce Butler then moved to add “and peace” after “war” in an attempt to “give the

Legislature power of peace, as they were to have that of war.” Butler’s proposal would have brought the Declare War Clause more in line with the Articles of Confederation, which allocated the power to determine “peace and war” in the same clause.

Alluding to the possibility that wars would be ended through treaties that were approved by the Senate but not considered in the House of Representatives, Elbridge Gerry seconded Butler’s motion. Gerry argued that the House should be included in peacemaking because the Senate was more likely to succumb to foreign corruption than the full Congress and a small number of Senators might cede part of United States territory in a peace treaty. The Constitutional Convention, however, [unanimously rejected](#) the motion to insert a peacemaking power in the Declare War Clause.

The Framers revisited the peacemaking issue later in the Convention when Madison put forward two proposals designed to make it easier to enter into treaties of peace. While this debate centered on Article II’s [Treaty Clause](#), it also prompted a broader discussion of separation of powers over war and peace. For example, Madison sought to remove the President from the process for making peace treaties because he [believed](#) the President “would necessarily derive so much power and importance from a state of war that he might be tempted . . . to impede a treaty of peace.” Pierce Butler agreed and [argued](#) that removing the President from the peacemaking process would guard against corruption and excessive ambition in the presidency.

[Nathanial Gorham](#) of Massachusetts, by contrast, believed it unnecessary to exclude the President because Congress already controlled the power of the purse, and therefore the “means of carrying on war would not be in the hands of the President, but of the Legislature.” [Gouverneur Morris](#), a Pennsylvania delegate, also alluded to the possibility that Congress might end wars by withholding appropriations, but he [described](#) this prospect as a more “disagreeable mode” of concluding conflicts compared to peace treaties. Ultimately, neither of Madison’s proposals to alter the process for concluding peace treaties was successful, and the Framers did not allocate an express peacemaking power.

The absence of a peacemaking clause has led to some debate over the proper constitutional method for terminating armed conflicts. Some [argue](#) that the Framers believed wars could only be concluded through peace treaties, but the Supreme Court [stated](#) in a 1948 case that a “‘state of war’ may be terminated by treaty or legislation or Presidential proclamation.” The Supreme Court has also reasoned that termination of a military conflict is a “[political act](#),” and it historically has [declined](#) to exercise judicial review of the political branches’ determinations of when a conflict has official ended.

The Declare War Clause in the State Ratification Debates

During the debate over ratification of the Constitution, the states considered whether to give their assent to a new system of government in which the United States’ suite of war powers was divided between the legislative and executive branches, and Congress’s power to “declare War” had replaced its “right of determining on peace and war” under the Articles of Confederation. Although [many delegates](#) to the state ratification conventions [raised concerns](#) about the Constitution’s broader centralization of military powers, the Declare War Clause’s meaning was not often discussed. Instead, opponents of the Constitution, who became known as Anti-Federalists, frequently [criticized](#) the breadth of the federal government’s powers to *carry out* and *sustain* wars using its powers over standing armies, the militia, taxation, and other means, but they did not often attack its ability to *declare* them.

A [common](#) Anti-Federalist [critique](#) was that, by [giving](#) a single branch of government the power to declare war and raise funds to support it, the Constitution [combined](#) the “sword” and the “purse” in a single branch, which made it too easy for the national government to pursue ill-guided wars that did not benefit the general populace. The British model of government provided a better system of checks and balances, Anti-Federalists [argued](#), by giving the Monarch the power to declare war and Parliament the power to choose whether to fund the Crown’s military campaigns.

Supporters of the Constitution, known as Federalists, [responded](#) that they had [sufficiently separated](#) the sword from the purse by making the President “[Commander in Chief of the Army and Navy](#)” while giving Congress control over war funding. Federalists [argued](#) that the dangers of the British system did not apply to the Constitution because a politically accountable body of representatives in Congress, rather than an unelected monarch, would wield the power to declare war. When Anti-Federalists [suggested](#) that the powers over the sword and the purse should be retained by the states or the general populace, Federalists [responded](#) that the United States would [lose](#) an essential element of its sovereignty and be unable to defend itself if deprived of these core war powers.

While much of the debate addressed the Declare War Clause’s place in the Constitution’s broader scheme of war powers, Anti-Federalists occasionally criticized the text of clause itself. The pseudonymous Anti-Federalist author Cincinnatus [observed](#) that the Declare War Clause placed no limit on the type of wars that Congress could declare and did not prevent the United States from attempting to conquer other nations. Federalists, including Alexander Hamilton and James Madison, [countered](#) this line of reasoning by [contending](#) that limitations on congressional war powers would be unwise because it was impossible to predict what types of military action might be necessary to defend the United States and protect its interests in the future.

In the New York ratifying convention, Anti-Federalists [suggested](#) that Congress was too small a body to be trusted with the power to declare war and that a small number of elected officials could be induced to declare war through bribery or corruption. The Federalist (and later Chief Justice of the Supreme Court) John Jay [responded](#) that the Constitution would *decrease* risks of corruption because an even smaller group of individuals already had the power to decide upon war and peace under the Articles of Confederation. The New York Convention was sufficiently concerned about the issue that it [proposed to amend](#) the Constitution to require a two-thirds supermajority vote in both chambers of Congress before declaring war. Of the [124 amendments](#) state ratifying conventions proposed to the Constitution, this was the only proposal to amend the Declare War Clause, but it was not adopted at the national level.

Click [here](#) to continue to Part 3.

Author Information

Steve P. Mulligan
Attorney-Adviser

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