

# The Declare War Clause, Part 4: Jurisprudence and Practice and Early American Conflicts

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This Legal Sidebar is the fourth 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 by Congress 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](#).

## Jurisprudence and Interbranch Practice

Historically, many of the most [prominent disputes](#) over the Constitution’s [allocation](#) of war powers to reach the Supreme Court centered on the federal government’s [war powers in their collective capacity](#) rather than on the division of powers between the Congress and the President. In the course of examining those constitutional questions, the Supreme Court has occasionally discussed the interbranch division of war powers, but it has never decided a case that required it directly to resolve the [modern debate](#) over the power to initiate military action. Accordingly, the remainder of this Sidebar series examines the Supreme Court’s jurisprudence related to congressional war powers and highlights cases that relate to the debate over the power to initiate military action. Because courts have been [reluctant to decide](#) interbranch disputes in this area, this section also discusses the executive and legislative branch’s practices that [contribute](#) to the constitutional understanding of these issues.

## The Quasi War with France

A trio of cases arising out of the events known as the Quasi War with France provide some insight into early judicial views about separation of war powers. Angered that the United States did not aid France in its late 18th century war with England, the [French government ordered](#) the seizure of American merchant ships. Congress did not declare war in response, but it did pass a [series of statutes](#) abrogating the United

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States' treaties with France and authorizing limited hostilities against French vessels. In *Bas v. Tingy*, the Court addressed one such statute that authorized a financial award, known as [prize money](#), to those that recaptured U.S. vessels that previously had been seized by "[the enemy](#)." Several Justices in *Bas* [reasoned](#) that France fell within the meaning of "the enemy" because, although Congress had not formally declared war, it had exercised its constitutional power to authorize an "[imperfect](#)" and "[limited](#)" war against France through statutes.

*Talbot v. Seeman* concerned another claim for monetary compensation following recapture of a vessel that had been seized by the French. In concluding that the U.S. commander's reclaiming of a neutral German ship was authorized by Congress, the Supreme Court [stated](#) that "[t]he whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."

The Court's last major Quasi War case, *Little v. Barreme*, addressed a more direct conflict between a congressional authorization and the executive branch's military orders. The [statute](#) in question in *Little* directed U.S. naval commanders to seize vessels on the high seas suspected of violating U.S. trade and travel restrictions while sailing *to* French ports. The Secretary of the Navy's [instructions](#), by contrast, which were based on orders from the President, directed seizure of vessels bound *to or from* French ports. After a U.S. captain, following the Navy's instructions, captured a ship traveling from a French port to Danish territory in the Caribbean, a lawsuit was filed seeking damages against the captain under the theory that the seizure was unlawful because the vessel was not sailing to French territory.

In an opinion by Chief Justice Marshall, the Supreme Court [held](#) that the naval instructions contravened the express provision of a statute, and therefore the captain's seizure was unlawful—even though the instructions might have been a valid exercise of the President's Article II powers in the absence of contradictory legislation. Chief Justice Marshall "[confess\[ed\]](#)" that he was initially inclined to excuse the requirement for paying damages because the captain was following a superior officer's order, but the Supreme Court ultimately concluded that the military order could not "change the nature of the transaction" or immunize the captain from liability for a seizure that exceeded statutory authority.

## The War of 1812

Congress issued its first [formal declaration of war](#) on June 18, 1812, when it declared war on the United Kingdom of Great Britain and Ireland. The War of 1812 had its [roots](#) in the British Navy's impressment of American sailors as well [disputes](#) over trade, westward expansion, and Native American policy. In *Brown v. United States*, the Supreme Court considered whether the declaration of war against the United Kingdom created authority for the United States to condemn a cargo of timber in route to Great Britain. Congress had not enacted a statute authorizing confiscation of enemy property, but the United States argued that, after the declaration of war, the executive branch had the power to "[execut\[e\] the laws of war](#)," which permit condemnation. In an opinion by Chief Justice John Marshall, the Supreme Court rejected this view, [holding](#) that only the legislative branch has the power to confiscate enemy property in wartime, and therefore Congress must enact legislation authorizing condemnation.

## The Mexican War

The United States' next [declaration of war](#) came in the Mexican War, which [arose](#) in the 1840s from a dispute over the United States' [annexation of Texas](#). The United States placed portions of Mexico under military occupation during this conflict, which led to questions of how U.S. law would apply in American-occupied portions of Mexico. In *Fleming v. Page*, an importer of commercial goods argued that a statute imposing tariffs on imports from a "[foreign country](#)" did not apply to goods shipped from a U.S.-occupied port in Mexico. The Supreme Court declined to adopt this interpretation, [reasoning](#) that, while

the port was governed by U.S. military authorities, it did not become part of the United States or cease to be a foreign country.

In reaching its conclusion, the *Fleming* Court rejected the view that the President possesses broad authority to conquer territory akin to a British Monarch, [stating](#) the following:

[T]here is a such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that, it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm are brought into question.

The Court instead described presidential power as “[purely military](#).” Presidents are “authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]” but their conquests cannot enlarge the boundaries of the United States or extend operation of U.S. law beyond its borders.

Some aspects of the War of 1812 and the Mexican War raised constitutional questions that were not addressed by the Supreme Court. For example, after [imposing martial law](#) and suspending the writ of habeas corpus in New Orleans at the end of the War of 1812, then-General Andrew Jackson ordered the [imprisonment](#) of a newspaper editorialist who criticized Jackson’s actions and a federal judge who granted the editorialist’s petition for a writ of habeas corpus. In the Mexican War, the United States used military commissions, then known as “[councils of war](#),” extensively to prosecute offenses by and against U.S. soldiers in occupied Mexico. Both the writ of habeas corpus and military commissions would become a topic of [several](#) Supreme Court [cases](#) during later conflicts.

Click [here](#) to continue to Part 5.

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