

# The Declare War Clause, Part 5: The Civil War

September 30, 2024

This Legal Sidebar is the fifth 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](#).

## Outbreak of the Civil War

Upon the outbreak of hostilities in the Civil War, Congress did not formally declare war on the Confederate states [due to](#) the internal nature of the conflict, because Congress was not in session at the conflict’s onset, and because the war disrupted Congress’s normal functioning. Instead, President Lincoln took the initiative by [issuing](#) a set of proclamations in spring 1861 [calling forth the militia](#), instituting a [naval blockade](#) of ports in states that had seceded from the Union, and calling for volunteers and enlistment in the military. When Congress returned in session later that summer, it passed legislation authorizing the President to declare the inhabitants of rebelling states to be in a “[state of insurrection](#)” and stating that Congress “[approved and in all respects legalized](#)” the President’s earlier proclamations.

## *The Prize Cases*

The absence of a formal declaration of war led to some dispute over the legality of the Union military’s actions. After Union forces seized neutral ships and their cargo to enforce the naval blockade of Confederate ports, a group of shipowners filed suit challenging the seizures’ lawfulness. A consolidated set of these challenges, known as [The Prize Cases](#), reached the Supreme Court in 1863 in the midst of active conflict. The claimants [argued](#) that the President had no authority to order their ships’ seizure without a declaration of war, especially during the period before Congress ratified the President’s proclamations. The Supreme Court rejected this formalistic interpretation of the Constitution and

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LSB11234

reasoned that the primary issue was whether factual circumstances demonstrated that “a state of war existed” justifying use of force, not whether Congress had made a legislative pronouncement of war.

Civil wars are “never solemnly declared,” the Supreme Court stated in *The Prize Cases*, and Congress has no constitutional power to declare war against a state of the Union. Instead, civil wars arise when rebelling forces grow in such size and power that they are able to hold territory, declare independence, and organize their own armed forces. The Supreme Court reasoned that it must defer to President Lincoln’s conclusion that the Confederacy rose beyond an insurrection to a state of civil war.

Having determined that a state of war existed, the Supreme Court next addressed whether those conditions empowered the President to order and enforce a naval blockade. The Court observed that the President “has no power to initiate or declare a war” but if war is brought to the United States by invasion or rebellion, the President is not merely “authorized but bound to resist force by force.” The President does not initiate the war, the Supreme Court explained, “but is bound to accept the challenge without waiting for special legislative authority.” Based on this reasoning, the Court held that the President had authority for the blockade under the Constitution and existing statutes.

## Challenges to Civil War-Era Economic Legislation

The Supreme Court also decided several challenges to Congress’s Civil War-era economic legislation. In *Hamilton v. Dillin*, the Court addressed a challenge to licensing fees the executive branch imposed under a statute authorizing trade restrictions on commercial transactions with states declared to be in an insurrection. The Court stated “there can be no question” that the executive branch’s fees were “competent to the war power of the United States government to impose.” According to *Hamilton*, the U.S. government possessed certain inherent rights to pursue the war effort, and this “war power vested in the government . . . without any specific mention of it in the Constitution.” The Court then discussed separation of war powers between the legislative and executive branch, stating that the power to declare war is confided in Congress, but the President “is constitutionally invested with the entire charge of hostile operations . . .” Ultimately, the Court concluded that it was not necessary to resolve any acute separation of powers dispute because the executive branch’s actions were statutorily authorized.

The Supreme Court also upheld the constitutionality of other Civil War-era economic measures as valid exercises of congressional power. In *Miller v. United States*, the Supreme Court deemed constitutional a set of statutes authorizing seizure and confiscation of Confederate property without a jury trial, reasoning that “the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.” The Court also upheld the 1862 Legal Tender Act, in which Congress authorized production of paper currency as a part of a response to the economic crisis caused by the Civil War.

## *Ex parte Milligan*

Although the Supreme Court upheld government action in several Civil War-era cases, not every exercise of the Union war effort withstood judicial scrutiny. In *Ex parte Milligan*, the Supreme Court addressed whether an Indiana man could be tried by a military commission established under a presidential order rather than a federal court for conspiring to commit acts of sabotage and fomenting rebellion in states under Union control. The accused argued that he had been denied his constitutional rights to habeas corpus, trial before jury, and to have his case heard in a judicial tribunal created under Article III of the Constitution. The United States responded that the President possessed broad wartime emergency powers justifying the military tribunal, even going so far as to argue that “[d]uring the war [the President’s] powers must be without limit.”

The Supreme Court [rejected](#) the United States' far-reaching assertion and held that the accused could not constitutionally be tried by a military commission, in part, because federal courts were not obstructed from operating in Indiana at the time of his trial. The *Milligan* Court also [stated](#) that, even if Congress had passed legislation authorizing the military commission system, Congress had no constitutional power to authorize trials of American civilians in areas where federal courts are open and unobstructed.

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