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Defense Primer: Congress's Constitutional Authority with Regard to the Armed Forces

Article I, Section 8, Clauses 11-14

*The Congress shall have power ***;*

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

The War Powers

In *Lichter v. United States*, 334 U.S. 742 (1948), the Supreme Court discusses the “war powers” of Congress as the sum of many interconnected authorities found in the Constitution. Addressing the constitutionality of the Renegotiation Act, an act allowing the government to renegotiate contracts related to war supplies during WWII, the Court declared that

In view of this power ‘To raise and support Armies, ... and the power granted in the same Article of the Constitution ‘to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,’ ... the only question remaining is whether the Renegotiation Act was a law ‘necessary and proper for carrying into Execution’ the war powers of Congress and especially its power to support armies.

In a footnote, the Court listed the Preamble, the Necessary and Proper Clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander in Chief of the Army and Navy, as being “among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war.”

The power “To declare War” has long been construed to mean not only that Congress can formally take the nation into war, but also that it can authorize the use of the Armed Forces for military expeditions that may not amount to war. While a restrictive interpretation of the power “To declare War” is possible, for example, by viewing the Framers’ use of the verb “to declare” rather than “to make” as an indication of an intent to limit Congress’s ability to affect the course of a war once it is validly commenced, Congress’s other powers over the use of the military would likely fill any resulting void. In practice, courts have not

sought to delineate the boundaries of each clause relating to war powers or identify gaps between them to find specific powers that are denied to Congress.

The Supreme Court has suggested, however, that Congress might overstep its bounds into presidential territory if it were to interfere with the conduct of military operations.

“Congress has the power not only to raise and support and govern armies, but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.”

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring).

Debates relating to legislation regarded by some as interfering with the President’s Commander-in-Chief authority are frequently framed in terms of legislative meddling in military operations, but the line between regulating the Armed Forces and directing campaigns has proved elusive.

Legislation Pursuant to Congress’s War Powers

The Supreme Court held in *Torres v. Texas Department of Public Safety* that “[a]n unbroken line of precedents supports the conclusion [that] Congress may legislate at the expense of traditional state [sovereign immunity] to raise and support the Armed Forces.” Examples of legislation follow.

The Uniform Code of Military Justice

The Uniform Code of Military Justice (UCMJ) is an exercise of Congress’s power to raise and support armies (Art. I, § 8, cl. 12); provide and maintain a Navy (Art. I, § 8, cl. 13); and to make rules for organizing and disciplining their members (Art. I, § 8, cl. 14). Under this authority, Congress enacted the UCMJ (Chapter 47 of Title 10 of the *U.S. Code*), which is the code of military criminal laws applicable to all U.S. military members worldwide.

The President implements the UCMJ through the Manual for Courts-Martial (MCM), which was initially prescribed by Executive Order 12473 (April 13, 1984). The MCM contains the Rules for Courts-Martial (RCM), the Military

Rules of Evidence (MRE), and the UCMJ. The MCM covers almost all aspects of military law. Military courts are not considered Article III courts, but instead are established pursuant to Article I of the Constitution and, as a result, are of limited jurisdiction. In particular, the Supreme Court has limited their use with respect to trials of civilians, finding such trials unconstitutional, at least with respect to civilians who are not accompanying the armed forces in the field either during military operations or in occupied enemy territory.

Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (SCRA), Chapter 50 of Title 50 of the *U.S. Code*, is an exercise of Congress's power to raise and support armies (U.S. Const. Art. I, § 8, cl. 12) and to declare war (Art. I, § 8, cl. 11). The purpose of the act is to provide for, strengthen, and expedite the national defense by protecting servicemembers, enabling them to "devote their entire energy to the defense needs of the Nation." The SCRA protects servicemembers by temporarily suspending certain judicial and administrative proceedings and transactions that may adversely affect their legal rights during military service. The SCRA does not provide forgiveness of all debts or the extinguishment of contractual obligations on behalf of servicemembers who have been called to active duty, nor does it grant absolute immunity from civil lawsuits. Instead, it provides for the suspension of claims and protection from default judgments. In this way, it seeks to balance the interests of servicemembers and their creditors, spreading the burden of national military service to a broader portion of the citizenry. Congress has amended the SCRA from time to time, most recently to include certain protections for spouses of servicemembers and for servicemembers whose relocation orders were stopped due to the COVID-19 pandemic.

The Militia

Article I, Section 8, Clauses 15 and 16, provide that:

*The Congress shall have power *** ;*

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

The Supreme Court, in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), held that Congress's power over the militia is

unlimited, except in the two particulars of officering and training them, ... [and] it may be exercised to any extent that may be deemed necessary by Congress. But as State militia, the power of the State governments to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that

instrument, [] remains with the States, subordinate nevertheless to the paramount law of the general government....

The National Defense Act of 1916 brought the militia, which had been an almost purely state institution, under the control of the national government. The term "militia of the United States" was defined to comprise "all able-bodied male citizens of the United States and all other able-bodied males who have ... declared their intention to become citizens of the United States," between the ages of 18 and 45. The act authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."

Congress provided for calling forth the militia to suppress insurrections and execute federal laws in the Insurrection Act, a series of laws dating from 1795 now codified in Chapter 13 of Title 10 of the *U.S. Code*, which also applies to the regular Armed Forces. The President is also authorized under 10 U.S.C. § 12406 to call the National Guard into federal service to repel invasions, to suppress rebellions, and, when regular forces are unable (or unavailable) for that purpose, to execute federal law.

The militia clauses do not constrain Congress in raising and supporting a national army under the war powers clauses previously discussed. In *Perpich v. Department of Defense*, the Supreme Court approved the system of "dual enlistment," under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard of the United States (reserve components) and, when ordered to active duty in the federal service, are relieved of their status in the state militia. Consequently, the restricted purposes in the first militia clause have no application to the National Guard federalized as a reserve component. There is no constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States, even without a declaration of national emergency or war.

Relevant Statutes

Titles 10 and 32, *U.S. Code*.

Title 50, *U.S. Code*, Chapter 50.

CRS Products

CRS Report R45283, *The Servicemembers Civil Relief Act (SCRA): Section-by-Section Summary*, by Jennifer K. Elsea (2023).

CRS Report R46503, *Military Courts-Martial Under the Military Justice Act of 2016*, by Jennifer K. Elsea and Jonathan M. Gaffney (2020).

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