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The Specter of a Generalissimo: The Original Understanding of the President's Defensive War Powers

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NOTE

THE SPECTER OF A GENERALISSIMO: THE ORIGINAL UNDERSTANDING OF THE PRESIDENT'S DEFENSIVE WAR POWERS

Jonathan G. D'Errico^{*}

ABSTRACT

The late twentieth century and early twenty-first century bore witness to a flurry of small-scale conflicts, many of which were initiated by the President of the United States without a formal declaration of war from Congress. A host of legal scholars have decried these hostilities and harshly admonished presidential initiative in war-making. However, this state of affairs is not a modern phenomenon, but rather a fate entirely anticipated by the Framers of the US Constitution. By exploring a plethora of historical authorities and framing-era sources, this Note distills an original understanding of the President's defensive war powers: the executive's limited prerogative to unilaterally repel an imminent foreign threat.

Before delving into the Framers' understanding of constitutional war powers, the plain language of the Constitution is scrutinized to discern the basic division of war powers amongst Congress and the President. Next, this Note examines the failures of the Articles of Confederation, which forced the Framers to acknowledge the hazards posed by a weak government unable to protect its national interests. An investigation of debates at the Constitutional Convention of 1787 reveals the Framers' solution to these earlier shortcomings: constraining the reach of Congress' war powers so the President would be free to swiftly rebuff imminent foreign aggression. This original understanding is further clarified by the Federalist Papers, which not

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only endorse presidential initiative in national defense but also acknowledge Congress' substantial power to temper extended presidential war-making. After the Constitution was ratified, an informal war with France led the newly-minted Supreme Court to refine both the application of the President's inherent defensive powers and Congress' role in sanctioning limited hostilities.

Finally, a comparative analysis with the eighteenth-century British Constitution and the military authority of the British Crown—a weighty foreign influence on the Framers—is employed to further define the edges of the President's original war powers. This comparison highlights both the necessary strength of the President's defensive war powers while also acknowledging that such authority is hardly a license for plenary military power or the royal prerogative for war-making enjoyed by the eighteenth-century British Crown.

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I. INTRODUCTION

In summarizing the Constitution's war powers, Justice Frankfurter once remarked: "The war power is the war power."¹ Four years after this fine explanation, Justice Jackson apparently remained perplexed over the President's war powers, which he described as "cryptic words" that have led to "some of the most persistent controversies in our constitutional history."² Over the course of the Constitution's nearly 230-year long history, Congress has formally declared war only five times: the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II.³ However, a 1966 report from the US State Department estimated that the United States had deployed military forces into foreign hostilities at least 125 times.⁴ A modern evaluation from the Congressional Research Service strikingly concluded that military forces have been committed abroad over 200 times since our nation's founding.⁵

Many of these informal hostilities were small-scale conflicts undertaken by the President to protect American citizens or property.⁶ The President's defensive power—the ability to unilaterally commit military forces to rebuff foreign aggression—has become especially pronounced with the establishment of a large standing army in the twentieth century.⁷ Indeed, the last seventy years have seen a torrent of undeclared wars, many of which were initiated by the President without congressional approval and certainly without a formal proclamation of

1. *Ludecke v. Watkins*, 335 U.S. 160, 171 (1948).

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

3. See Official Declarations of War by Congress, U. S. SENATE https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm [https://perma.cc/8QZ8-7U73] (last visited Apr. 18, 2018). Of the eleven total declarations, six pertain to World War II, and two pertain to World War I. *See id.*

4. *See Leonard C. Meeker, The Legality of United States Participation in the Defense of Viet-nam*, 54 DEPT STATE BULL. 474, 484 (1966).

5. *See generally BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD* (2017).

6. *See W. Taylor Reveley III, Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1257-58 (1969); Meeker *supra* note 4; *see also* TORREON, *supra* note 5.

7. *See Brendan Flynn, The War Powers Consultation Act: Keeping War out of the Zone of Twilight*, 64 CATH. U.L. REV. 1007, 1023-34 (2015); Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U.L. REV. 141, 160-76 (1988) (surveying presidential war-making and non-compliance with congressional regulation in the late-twentieth century).

war.⁸ Some critics have argued that the President's defensive power is a tragic invention of the modern era, egged on by a degrading adherence to the separation of powers.⁹

However, the President's defensive power is neither a twentieth-century development nor the spawn of a floundering constitutional system. As evidenced by a plethora of framing-era authorities, the original understanding of the President's war powers included the limited authority to suppress an imminent foreign threat.¹⁰ The Constitution was designed to encourage presidential initiative in the immediate defense of national borders while necessitating congressional approval to sustain longer conflicts.¹¹ In cultivating this original understanding of the Constitution's war powers, this Note addresses three critical pieces of history: (1) the flimsy Articles of Confederation, (2) the debate over war powers at the Constitutional Convention, and (3) the understanding and application of war powers in the post-drafting era. To further reveal the contours of the President's original defensive war powers, a pervasive foreign influence is introduced and compared—the eighteenth-century British Constitution and the military authority of the British Crown. This comparison illuminates the scope of the President's defensive war powers and showcases the capacious influence the British Crown had on the Framers.

Part II inspects the plain language of the Constitution to sketch the basic war powers framework. Part III advances an original understanding of the President's defensive war powers by consulting a variety of framing-era sources. Specifically, Part III.A examines the severe military deficiencies of the Articles of Confederation and Part III.B investigates how the Framers resolved these inadequacies at the Constitutional Convention and originally conceived of the President's defensive power. Part III.C explores the endorsement of this inherent

8. See Robbins, *supra* note 7, at 162-76; see also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 177-82 (1996). See Mark T. Uyeda, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 781, 803-05 (1995); see also Joseph R. Biden, Jr., *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 374-85 (1988).

9. See generally J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991); see also generally HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

10. See *infra* Parts II and III.

11. See *infra* Parts II and III.

executive authority in the Federalist Papers and subsequent refinement in early Supreme Court jurisprudence.

Part IV introduces the eighteenth-century British Crown's war powers as both a considerable influence on the Framers and a comparative tool to contextualize the original understanding of the President's defensive war powers. Part IV.A details the British Constitution's historic division of war powers and Part IV.B analyzes the scope of the President's original defensive war powers alongside the eighteenth-century military authority of the British Crown.

II. THE PLAIN LANGUAGE OF THE CONSTITUTION

Deciphering the “cryptic words”¹² that give rise to the President’s defensive war powers requires delving into their foundation: the basic text and structure of the Constitution. Articles I and II of the Constitution largely divide war powers amongst Congress and the President, while Article III circumscribes a more limited role for the federal judiciary.¹³ Article I provides Congress with a number of explicitly enumerated war powers, such as the authority to “declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.”¹⁴ Congress is also singularly empowered to lay taxes to provide for the defense of the United States.¹⁵ The list of congressional war powers does not stop there. In addition to regulating local militias¹⁶ and significant aspects of foreign affairs,¹⁷ Congress is also vested with the coveted “purse” power: the authority to raise and support military forces via monetary appropriations.¹⁸ The purse power

12. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

13. See generally U.S. CONST. art. I-III. However, the federal judiciary’s jurisdiction can certainly extend to controversies which implicate foreign affairs. See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”). But see *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (“[P]olicies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).

14. U.S. CONST. art. I, § 8, cl. 11.

15. See *id.* § 8, cl. 1.

16. See *id.* § 8, cl. 15-16. See also *infra* note 29 and accompanying text for further discussion.

17. See, e.g., U.S. CONST. art. I, § 8, cl. 33 (regulating international commerce), cl. 4 (establishing immigration rules), cl. 10 (punishing piracy and maritime felonies).

18. *Id.* § 8, cl. 12-13.

is an indispensable element of war—financial support is the lifeblood of extended military affairs.¹⁹

At first blush, the President’s Article II war powers may seem somewhat meager in comparison to Congress’ formidable enumerations. Although Article II unambiguously defines the President as the “Commander in Chief of the Army and Navy of the United States,”²⁰ the executive’s remaining war powers are more nebulous. The Constitution vests the President with the murky “executive Power”²¹ and the duty to “take Care that the Laws be faithfully executed.”²² Finally, upon assuming office, the President is constitutionally required to take an oath of office that instills a mandate to “preserve, protect and defend the Constitution of the United States.”²³

The President’s role as national Commander in Chief, perhaps the most famous of these enumerations, is an unqualified grant of authority.²⁴ Although some provisions of the Constitution distinguish between a “time of peace”²⁵ and a “time of war[,]”²⁶ the Commander in Chief clause is not among them.²⁷ The President is always the United States’ Commander in Chief, regardless of whether it is a time of tranquility or battle.²⁸ Although the Constitution limits executive control over state militias,²⁹ there are no temporal restrictions on the President’s authority over the national military.³⁰ The Commander in

19. See *infra* notes 101-106 (describing the Framers’ appreciation of the incredible control commanded by Congress’ purse power).

20. U.S. CONST. art. II, § 2, cl. 1.

21. *Id.* § 1, cl. 1.

22. *Id.* § 3.

23. *Id.* § 1, cl. 8.

24. See *infra* text accompanying notes 25-30.

25. See, e.g., U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from engaging in various wartime measures during times of peace, provided there is no threat of imminent danger or invasion).

26. See, e.g., *id.* amends. III (quartering soldiers), V (grand jury indictment); see also *id.* art. 1, § 9, cl. 2 (providing that the writ of habeas corpus may be suspended during times of conflict).

27. See *id.* art. II, § 2, cl. 1.

28. See *supra* notes 25-27.

29. The President is only Commander in Chief of state militias when such forces are called into service of the United States. See U.S. CONST. art. II, § 2, cl. 1. Only Congress can call forth local militias. See *id.* art. I, § 8, cl. 15.

30. See *supra* notes 25-27 and accompanying text.

Chief clause ensures that the nation's armed forces continually serve under the President's direction.³¹

The "executive Power" clause is similarly exclusive—the entirety of executive power is vested in the President, thereby creating a *de jure* Chief Executive.³² This executive power suffers few limits: it is generally enumerated but not defined in its entirety.³³ Nothing explicitly outlines or confines the President's executive power.³⁴ In contrast, Article I limits congressional authority to the "legislative Powers herein granted."³⁵ The inclusion of "herein" indicates that Congress' war powers are limited to the Constitution's explicit enumerations.³⁶ Although the President's executive power is not similarly confined by the constitutional text, it necessarily excludes Congress' explicitly enumerated war powers to effectuate the separation of powers.³⁷ The President's oath to protect and defend the Constitution, as well as the responsibility to take care that the laws are faithfully executed, further inform the bounds of the executive power.³⁸ The Constitution does not prescribe these weighty duties on any other organ of the federal government, implicating their importance as matters of presidential discretion.³⁹ It follows that, as Chief Executive, the President is uniquely empowered to enact policies outside Congress' purview which serve to protect and defend the Constitution and ensure the laws are faithfully executed.⁴⁰ As discussed below in Part III, the Framers understood that the gravitas of the President's exclusive duties as Chief Executive and Commander in Chief would

31. See *supra* notes 25-30 and accompanying text.

32. See U.S. CONST. art. II, § 1, cl. 1; see also *The Brig Amy Warwick*, 67 U.S. 635, 668 (1862) ("The Constitution confers on the President the whole Executive power.").

33. See *Myers v. United States*, 272 U.S. 52, 138 (1926) ("The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms. . .").

34. See *supra* notes 32-33 and accompanying text.

35. U.S. CONST. art. I, § 1.

36. See, e.g., *supra* notes 14-17; see also *Myers*, 272 U.S. at 138-39.

37. See *supra* notes 14-17 and accompanying text; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government."); *Springer v. Government of Philippine Islands*, 277 U.S. 189, 202 (1928).

38. See U.S. CONST. art. II, § 1, cl. 8; *id.* § 3; see *Myers*, 272 U.S. at 138.

39. See *supra* notes 37-38.

40. See *supra* notes 37-39 and accompanying text.

become infinitely weightier when the United States is confronted with an imminent foreign attack.⁴¹

III. DISTILLING THE PRESIDENT'S DEFENSIVE POWER

Gleaning the original understanding of the Chief Executive's defensive power demands exploration of more than just the Constitution's text. Crucial moments in constitutional history must also be examined: namely, the Articles of Confederation that governed during and after the Revolutionary War, the Constitutional Convention of 1787, and influential authorities from the post-drafting period. Part III.A details the military deficiencies of the Articles of Confederation and Part III.B inspects the Framers' response to such failings when drafting the Constitution in 1787. Finally, Part III.C analyzes two preeminent sources of original understanding from the post-drafting period: the Federalist Papers and early Supreme Court jurisprudence.

A. The Follies of the Articles of Confederation

The Articles of Confederation were ratified in 1781 and governed the United States for seven years before the Constitution became the "law of the land."⁴² The Articles vested all federal power—legislative, executive, and judicial—in a national assembly, the Continental Congress.⁴³ The Continental Congress had "the sole and exclusive right and power of determining on peace and war."⁴⁴ This grant included the singular authority to raise and support armed forces, make requisitions from states to support the war effort, and enter into treaties or alliances.⁴⁵ Many of these war powers required the assent of at least nine states before they could be effectuated.⁴⁶ Individually, the states

41. See *infra* Part III.

42. OFF. OF THE HISTORIAN, *Articles of Confederation, 1777–1781*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1776-1783/articles> [<https://perma.cc/73UV-H8UR>] (last visited Mar. 27, 2018).

43. See ARTICLES OF CONFEDERATION of 1781, art. IX.

44. *Id.*

45. See *id.*

46. See *id.*

were mostly barred from engaging in war absent congressional consent.⁴⁷

The gross failures of this system informed the Framers' intent and goals when eventually crafting the Chief Executive's war powers in the Constitution.⁴⁸ Alexander Hamilton noted several "material defects"⁴⁹ pertaining to war powers under the Articles, namely, the inability to reclaim territories held by foreign powers, lack of adequate military funding, and powerlessness to swiftly repel foreign aggression.⁵⁰ Hamilton asserted that the inability to coerce financial support in times of public crisis was nothing short of a fatal flaw.⁵¹ The Articles were deemed "neither fit for war, nor peace."⁵² Hamilton's avowals evidence a desire for a fast-moving national government capable of rapidly subordinating states when necessary to end a public crisis or rebuff foreign invasion.⁵³

Hamilton's vocal criticisms were supported by a chorus of fellow Framers similarly frustrated with the lack of national security under the Articles.⁵⁴ James Madison joined Hamilton in observing that "[t]he small body of national troops, which has been judged necessary in time of peace, is defectively kept up, badly paid, infected with local prejudices, and supported by irregular and disproportionate

47. See *id.* art. VI (prohibiting state war-making absent congressional authorization unless the state was invaded or under threat of imminent attack). States could not maintain a navy or standing army during peacetime without congressional consent. *See id.*

48. See *infra* notes 49-63 and accompanying text.

49. THE FEDERALIST NO. 15, at 15-17 (Alexander Hamilton) (Ian Shapiro ed., 2009). A significant portion of the Federalist Papers—discussed *infra* Part III.C.1—are explicitly dedicated to addressing the many "insufficiencies" and "defects" of the Articles. *See generally* THE FEDERALIST NOS. 15-17, 21-22 (Alexander Hamilton), NOS. 18-20 (Alexander Hamilton and James Madison). Part III.A identifies the critiques most distinctly related to the Articles' war powers.

50. See THE FEDERALIST NO. 15, at 16 (Alexander Hamilton) (Ian Shapiro ed., 2009). ("[Under the Articles of Confederation.] [w]e have neither troops, nor treasury, nor government."). Hamilton explicitly referenced Spain's exclusion of U.S. passage on the Mississippi River as one such incident that caused the United States to nearly reach "the last stage of national humiliation." *Id.*

51. See *id.* ("[T]he evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.").

52. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), <https://founders.archives.gov/documents/Hamilton/01-02-02-0838> [<https://perma.cc/26J9-2Z5E>].

53. See *supra* notes 49-52 and accompanying text.

54. See *infra* notes 55-62 and accompanying text.

contributions to the treasury.”⁵⁵ Edmund Randolph asserted that the Articles “produced no security against foreign invasion; [the Continental Congress] not being permitted to prevent a war nor to support it by their own authority.”⁵⁶ Foreign aggression was an insurmountably weighty burden under the Articles.⁵⁷

Many Framers recognized that a national legislature, by design, was poorly equipped to handle threats to national security.⁵⁸ John Jay argued that the central government needed a separate branch to engage in “the executive business of sovereignty” for matters outside the reach of a large national assembly,⁵⁹ which Jay viewed as inherently prone to division and susceptible to foreign influence.⁶⁰ Robert Morris lamented that he would be “[h]appy to experience a momentary relief from the clamor and revolt of a starving army[] [and] from the rage and devastation of an inveterate enemy. . . .”⁶¹ Morris aptly characterized the Continental Congress as “cumbersome” and “unwieldy”—for him, like many others, the national legislature was incapable of speedily delivering the necessary support “on which the salvation of country depends.”⁶² The Framers’ grievances about the Articles’ war powers crystallized their intent when crafting the Constitution’s war powers: they wanted a well-equipped, non-legislative branch of national government that could swiftly repel foreign aggression and remain unencumbered by both national and state actors.⁶³

B. Executive Power Reborn: The Constitutional Convention

The Constitutional Convention provided an opportunity for the Framers to correct the vast shortcomings of the Articles.⁶⁴ Throughout

55. THE FEDERALIST NO. 19, at 95 (Alexander Hamilton) (Ian Shapiro ed., 2009).

56. RICHARD J. ELLIS, FOUNDING THE AMERICAN PRESIDENCY 161 (1999).

57. See sources cited *supra* notes 48-56.

58. See sources cited *infra* notes 59-63 and accompanying text.

59. See Letter from John Jay to George Washington (Jan. 7, 1787), <https://founders.archives.gov/documents/Washington/04-04-02-0427> [<https://perma.cc/24FA-HCUP>].

60. See *id.*

61. ELLIS PAXSON OBERHOLTZER, ROBERT MORRIS, PATRIOT AND FINANCIER 125 (2012).

62. *Id.*

63. See notes *supra* notes 54-62 and accompanying text.

64. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., 1911) [hereinafter Farrand] (“[T]he articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely ‘common defence [sic], security of liberty and general welfare.’”). This statement was made by Edmund Randolph

the summer of 1787, delegates converged on Philadelphia with a wealth of proposals concerning executive authority.⁶⁵ Despite hearing from a number of sophisticated political minds—including Edmund Randolph, James Wilson, William Paterson, and Hamilton—none of these early proposals were adopted in their original form.⁶⁶ Promising segments were sent to the Committee of Detail, a small group of delegates charged with merging various proposals into a workable constitutional draft.⁶⁷

The Committee of Detail's early draft of the Constitution provided Congress with the power to "make war."⁶⁸ In subsequent floor debate, Pierce Butler suggested that the power to "make war" should be vested in the President, as political accountability could temper executive discretion and thereby prevent egregious war-making.⁶⁹ After Butler's response, Madison and Elbridge Gerry immediately moved "to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."⁷⁰ Rufus King supported this change, noting that "'make' war might be understood to 'conduct' it which was an Executive function."⁷¹ The Madison-Gerry amendment eventually prevailed in an 8-1 vote: Congress would only have the power to "declare" war, not to "make" war.⁷²

This debate and subsequent amendment constitute the foundation of the President's defensive war powers: the Chief Executive's military

but expressed a sentiment widely shared amongst the Framers. *See, e.g.*, Letter from John Jay to George Washington (Mar. 16, 1787), <https://founders.archives.gov/documents/Washington/04-03-02-0525> [<https://perma.cc/TC9T-65BR>] ("[A]n opinion begins to prevail that a general convention for revising the articles of Confederation would be expedient."); *see also* discussion *supra* notes 49-63.

65. *See, e.g.*, Farrand, *supra* note 64, at 20-23 (the "Virginia Plan"), 242-45 (the "New Jersey Plan"), 291-92 (Hamilton's proposal).

66. Randolph's "Virginia Plan" envisioned a "National Executive" with the executive rights previously enjoyed by the Continental Congress under the Articles. *See id.* at 226-27. Paterson's "New Jersey Plan" provided for a weak executive that would be elected and controlled by Congress. *See id.* at 244. Finally, Hamilton championed an executive "governor" who would possess many of the same war powers enjoyed by modern-day presidents. *See id.* at 291-92.

67. *See id.* at 127-28, 131-32.

68. *See id.* at 318-19.

69. *See id.* at 318.

70. *Id.*

71. *Id.* at 319.

72. *Id.* at 315. *See also* Yoo, *supra* note 8, at 264 (clarifying contradicting reports of whether the Madison-Gerry amendment initially passed and concluding that, per Madison's notes, it initially passed by a vote of 7-2, and again by a vote of 8-1 after King's argument).

authority now encompassed “the power to repel sudden attacks” and to directly oversee the resulting hostilities.⁷³ By explicitly carving this power out from the auspices of Congress,⁷⁴ the Framers created a limited realm of inherent executive authority which could not be trespassed upon by the national legislature.⁷⁵ In doing so, the Framers addressed major deficiencies under the Articles: no longer would a cumbersome legislature be convened when a quick response was needed; a solitary executive would swiftly act to repel an imminent attack and protect national interests.⁷⁶ The limits of the President’s defensive war powers were staked out: the Chief Executive could not single-handedly usher the United States into full-blown war but could engage the nation in more limited hostilities.⁷⁷

C. The Post-Drafting Years

The Framers’ support for the President’s defensive war powers did not end with the conclusion of the Constitutional Convention in September 1787.⁷⁸ From October 1787 until August 1788, Hamilton, Madison, and Jay anonymously published a collection of eighty-five essays entitled the *Federalist Papers*.⁷⁹ These essays urged states to ratify the new Constitution as the “safest course” to secure liberty, dignity, and happiness for the new nation.⁸⁰ Today, these papers proffer vital original interpretations of the Constitution from some of the most prolific and influential Framers.⁸¹ After the Constitution was ultimately ratified, early Supreme Court jurisprudence critically developed the war powers enumerated in the Constitution and refined the President’s

73. See *supra* notes 68-72 and accompanying text.

74. See *supra* notes 68-72 and accompanying text.

75. See *supra* notes 68-72 and accompanying text.

76. See *supra* Part III.A and notes 68-72.

77. See *supra* notes 68-72 and accompanying text. Unfortunately, Madison’s notes do not clarify what type of “sudden attack” he thought would trigger the President’s defensive powers.

78. See discussion *infra* notes 79-97 and accompanying text.

79. See *The Federalist Papers*, CONST. RTS. FOUND., <http://crf-usa.org/foundations-of-our-constitution/the-federalist-papers.html> [<https://perma.cc/5F8T-9ZZD>] (last visited Apr. 4, 2018).

80. See THE FEDERALIST NO. 1, at 9 (Alexander Hamilton) (Ian Shapiro ed., 2009). Hamilton eloquently noted that “in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword.” *Id.* at 8.

81. Primary Documents in History, LIBR. OF CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/federalist.html#American> [<https://perma.cc/KH35-GMWD>] (last visited Apr. 4, 2018).

inherent defensive powers. Part III.C.1 details the Federalist Papers' endorsements of the Chief Executive's unilateral military authority and its relation to Congress' war powers. Part III.C.2 analyzes the Court's early interpretations of the President's inherent defensive power and Congress' authority to sanction informal hostilities.

1. Convincing a Wary Nation: The Federalist Papers

The state debates over ratification bitterly divided the public—many feared that their state's rights would be swallowed up by the new federal government, thereby reinstating a new cycle of tyranny.⁸² In persuading the skeptic public of the new Constitution's merits and assuaging fears of federal oppression, the Federalist Papers provided invaluable articulations of presidential military authority and the separation of war powers amongst Congress and the executive.⁸³ One of the foremost concerns underlying the Federalist Papers was demonstrating the proposed government's ability to protect the United States.⁸⁴ In Federalist No. 41, Madison defined national security as “an avowed and essential object of the American Union.”⁸⁵ But how best to secure one of the most “primitive objects of civil society”?⁸⁶ Hamilton provided a fitting response in Federalist No. 74:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.⁸⁷

82. See Letter from Gouverneur Morris to General Washington (Oct. 30, 1787), <http://teachingamericanhistory.org/library/document/letter-from-gov-morris-to-george-washington/> [<https://perma.cc/WXC2-HF58>] (“I dread the cold and sour temper of the back counties, and still more the wicked industry of those who have long habituated themselves to live on the public, and cannot bear the idea of being removed from the power and profit of state government. . . .”); see also Brutus, *Essay X*, (Jan. 24, 1788), <http://teachingamericanhistory.org/library/document/brutus-x/> [<https://perma.cc/GDE9-RZGS>] (arguing that states should have exclusive control over local militias to offset the inherent danger of military despotism posed by a large national standing army).

83. See discussion *infra* notes 84-97 and accompanying text.

84. See THE FEDERALIST NO. 41, at 207-08 (James Madison) (Ian Shapiro ed., 2009).

85. *Id.* at 206-07.

86. *Id.* at 206.

87. THE FEDERALIST NO. 74, at 375 (Alexander Hamilton) (Ian Shapiro ed., 2009).

Presidential initiative was deemed necessary to shield the United States from foreign attack.⁸⁸ Moreover, Hamilton identified the President's executive authority (or, as vested by Article II of the Constitution, "executive Power"⁸⁹) as encompassing not only the direction of military force, but also discretion in employing such forces.⁹⁰ Hamilton hints that, as the lone Chief Executive, the President should have the power to deploy military forces as deemed necessary to further the "direction of war."⁹¹ Federalist No. 71 similarly endorsed executive discretion: "it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision."⁹² In fact, robust presidential initiative was deemed "essential to the protection of the community against foreign attacks" in Federalist No. 70.⁹³ As recognized in Federalist No. 25, these foreign threats could arise even absent a formal declaration of war.⁹⁴ For some of the most prominent Framers, the President, as Chief Executive and Commander in Chief, was constitutionally empowered to deploy and control military forces to repel a foreign attack, irrespective of whether there was a formal state of hostilities.⁹⁵ Presidential discretion was a felt necessity during times of war.⁹⁶ The Federalist Papers' support of unilateral executive military authority shined a much-needed light upon the cloudy waters of the President's constitutional war powers.⁹⁷

88. *See id.* ("The propriety of [the Article II Commander in Chief clause] . . . is so evident in itself, and it is, at the same time, so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it.").

89. *See supra* notes 32-33 and accompanying text.

90. *See THE FEDERALIST NO. 74*, at 375 (Alexander Hamilton) (Ian Shapiro ed., 2009).

91. *See id.*

92. *THE FEDERALIST NO. 71*, at 362 (Alexander Hamilton) (Ian Shapiro ed., 2009). *See also THE FEDERALIST NO. 70*, at 355 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch [sic] will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . .").

93. *THE FEDERALIST NO. 70*, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . . [and] to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.").

94. *See THE FEDERALIST NO. 25*, at 126 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("[T]he ceremony of a formal denunciation of war has of late fallen into disuse . . .").

95. *See discussion supra* notes 87-94 and accompanying text.

96. *See discussion supra* notes 87-92 and accompanying text.

97. *See discussion supra* notes 87-94 and accompanying text.

Many antifederalists were troubled by the President's proposed control over the military and feared that such authority would enable despotism.⁹⁸ In response, the Federalist Papers emphasized that the separation of vital war powers amongst Congress and the President would prevent federal tyranny.⁹⁹ While describing this divided authority in Federalist No. 78, Hamilton contended that the President "holds the sword of the community" while Congress "commands the purse."¹⁰⁰ In Federalist No. 58, Madison unabashedly defined Congress' purse power as a "powerful instrument" that is the "most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."¹⁰¹ Without Congress' financial support, the executive's extended military efforts are hamstrung.¹⁰² Sustained military engagements are impossible to maintain absent congressional appropriations and taxes.¹⁰³ Thus, congressional control over military funding, and the associated power to raise and regulate wartime forces,¹⁰⁴ serve as the ultimate check on executive war-making.¹⁰⁵ After all, as proclaimed in Federalist No. 51, the legislature is the predominate branch of the federal government—not the executive.¹⁰⁶

Madison also acknowledged in Federalist No. 51 that no arm of the federal government could exist without some form of check on its power.¹⁰⁷ Federalist No. 69 asserted that, in addition to the purse power, Congress' exclusive license to call upon state militias acted as

98. See, e.g., Philadelphiensis, *Essay IX*, PHILA. INDEP. GAZETTEER (Feb. 6, 1788), <http://teachingamericanhistory.org/library/document/philadelphiensis-ix/> [https://perma.cc/XLJ9-TUE2] ("Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kind too; a king elected to command a standing army? Thus our laws are to be administered by this tyrant; for the whole, or at least the most important part of the executive department is put in his hands."). See also An Old Whig, *Essay V*, PHILA. INDEP. GAZETTEER, Nov. 1, 1787, <http://teachingamericanhistory.org/library/document/an-old-whig-v/> [https://perma.cc/5PXZ-8YPV].

99. See *infra* notes 100-106 and accompanying discussion.

100. THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

101. THE FEDERALIST NO. 58, at 298 (James Madison) (Ian Shapiro ed., 2009).

102. See *id.* at 297 ("The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government.").

103. See *supra* notes 15, 18-19 and accompanying text.

104. See *supra* notes 18-19 and accompanying text.

105. See *supra* notes 100-104.

106. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) ("In republican government, the legislative authority necessarily predominates.").

107. See *id.* at 264-66.

a significant limitation on executive military action.¹⁰⁸ However, control over the national military is not among the war powers divided between Congress and the President.¹⁰⁹ In addition, Congress does not enjoy any of the President’s “executive Power,”¹¹⁰ which, per several of the Federalist Papers, could encompass the unilateral deployment of military forces to quickly rebuff foreign aggression.¹¹¹ These essays also recognized that this defensive power would be most effectively employed by a lone Chief Executive, rather than a national legislature.¹¹² Although the Federalist Papers indicated that Congress can utilize their control over local militias and purse power to temper and even terminate presidential war-making,¹¹³ they also acknowledged that the power and discretion to quickly repel a foreign attack is firmly rooted in executive prerogative.¹¹⁴

2. Supreme Court Jurisprudence

The Federalist Papers were ultimately successful in their mission: after a “long and arduous” journey, the Constitution became “the official governing document of the United States” on June 21, 1788.¹¹⁵ However, the post-ratification years would not be a quiet period of nation-building.¹¹⁶ Conflicts with Native Americans and a naval war with France quickly followed the Constitution’s ratification.¹¹⁷ Consequently, litigation concerning federal war powers and presidential authority wove its way into some of the Supreme Court’s earliest dockets.¹¹⁸ As the newly-minted authoritative interpreters of the Constitution,¹¹⁹ the Supreme Court’s jurisprudence from the post-

108. THE FEDERALIST No. 69, at 349-50 (Alexander Hamilton) (Ian Shapiro ed., 2009).

109. *See id.*

110. *See supra* note 32 and accompanying text.

111. *See supra* notes 87-94.

112. *See supra* notes 109-111.

113. *See supra* notes 100-106.

114. *See supra* notes 86-97.

115. *The day the Constitution was ratified*, NAT’L CONST. CTR. (June 21, 2018), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>.

116. *See* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 91-127 (1975); *see also* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801, at 90-105 (1966).

117. *See* sources *supra* note 116.

118. *See* discussion *infra* notes 121-166 and accompanying text.

119. *See* Marbury v. Madison, 5 U.S. 137, 166-67 (1803).

ratification period crucially molded the original understanding of the President's unilateral war powers.¹²⁰

Chief Justice John Marshall critically sculpted the fiber of the presidency in the landmark case *Marbury v. Madison*.¹²¹ Marshall recognized that the President is vested with "certain important political powers, in the exercise of which he is to use his own discretion."¹²² For such matters, the President is "accountable only to his country in his political character" and, of course, "to his own conscience."¹²³ While simultaneously recognizing the federal judiciary's power of supreme review,¹²⁴ Marshall also observed that some presidential actions are necessarily outside the purview of Article III courts.¹²⁵ The Court found that policy determinations, which are constitutionally committed to the President, are ripe for political questions.¹²⁶ The constitutional grants underlying the President's war powers—namely, the "Commander in Chief" and "executive Power" clauses¹²⁷—are prime contenders for such "important political powers"¹²⁸ that are to be exercised solely at the President's discretion.¹²⁹ No other federal branch can ever assume the title of "Commander in Chief" or enjoy any of the President's "executive Power."¹³⁰ As described above, formative Framers understood these exclusive constitutional grants as giving rise to the defensive power to repel imminent foreign attacks.¹³¹ Thus, Marshall's holding implies that the President's exclusive defensive power is a matter of executive discretion and outside the scrutiny of the federal judiciary—it remains answerable only to the political virtues of the American people and the fortitude of the executive's conscience.¹³²

120. See discussion *infra* notes 121-166 and accompanying text.

121. See *Marbury*, 5 U.S. at 170.

122. *Id.* at 165-66.

123. *Id.* at 166.

124. See *id.* at 166-67.

125. See *id.* at 170.

126. See *id.* ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). Marshall provided several examples of political questions in *Marbury*: the President's appointment and nomination powers, as well as the President's power to grant commissions. *Id.* at 155-56, 166-67; see also U.S. CONST. art. II, § 2, cl. 2-3.

127. See discussion *supra* notes 20-21, 26-32.

128. *Marbury*, 5 U.S. at 165.

129. See *id.* at 155-56, 166-67.

130. See sources *supra* notes 20-21, 26-32.

131. See discussion *supra* Parts III.B, III.C.1.

132. See discussion *supra* notes 121-131.

In the years directly preceding *Marbury*, a trio of cases concerning naval hostilities with France clarified Congress' authority to sanction informal military affairs.¹³³ First, in the 1800 case *Bas v. Tingy*,¹³⁴ a dispute over salvage rights prompted the Court to consider whether a congressional declaration of war was necessary to formalize engagement in hostilities.¹³⁵ Even though war was not "declared in form,"¹³⁶ the Court found that Congress had authorized an "imperfect war"¹³⁷ that was "limited as to places, persons, and things"¹³⁸ by enacting a general law regulating the recapture of ships from the "enemy"¹³⁹ and additional legislation clearly indicating that France was the intended "enemy" referenced in the recapture statute.¹⁴⁰ In recognizing the practical effect of this antagonistic legislation, the Court held that "war may exist without a declaration" and that "a defensive war requires no declaration."¹⁴¹ A year later, the Court's decision in *Talbot v. Seeman*¹⁴² again confirmed that Congress could authorize a "partial" war of limited breadth against France without a formal declaration.¹⁴³ These cases unambiguously stand for the proposition that a declaration of war is not required to engage in hostilities; Congress may authorize a war that is "imperfect" or "solemn,"¹⁴⁴ the scope of military campaigns may be "general" and sweeping or "partial" and limited.¹⁴⁵ A formal pronouncement is not required to baptize hostilities.¹⁴⁶

133. See discussion *infra* notes 134-155 and accompanying text.

134. *Bas v. Tingy*, 4 U.S. 37 (1800).

135. See *id.* at 40, 43.

136. *Id.* at 40.

137. *Id.*

138. *Id.*

139. *Id.* at 39.

140. *Id.* at 41 ("[C]ongress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipt [sic] ships of war; and commissioned private armed ships . . . to defend themselves against the armed ships of France . . . and to re-capture armed vessels found in their possession.").

141. *Id.* at 37.

142. 5 U.S. 1 (1801).

143. *Id.* at 28 ("[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."). The Court explicitly drew upon their holding in *Bas v. Tingy* in arriving at this conclusion. *Id.* at 9.

144. See *Bas*, 4 U.S. at 40.

145. See *Talbot*, 5 U.S. at 8.

146. See *id.*; *Bas*, 4 U.S. at 40.

Finishing the trio of cases is *Little v. Barreme*,¹⁴⁷ wherein the Court held a naval officer personally liable for following a presidential order that went beyond Congress' authorization for limited sea captures in the unofficial war with France.¹⁴⁸ Much like the preceding controversies in *Bas* and *Tingy*, *Little* is centered upon the legal effect of war once it has already commenced, not the power of actually going to war.¹⁴⁹ The focal point of these cases is not inherent war powers, but rather legislation arising from Congress' authority to "make Rules concerning Captures on . . . Water."¹⁵⁰ The Court's jurisdiction is derived from its power to hear "all Cases of admiralty and maritime Jurisdiction"¹⁵¹—not the President's or Congress' constitutional power to initiate hostilities. By focusing on Congress' statute providing for limited captures, the Court avoided directly assessing constitutional war powers and sidestepped a political question.¹⁵² Moreover, even when holding a naval officer personally liable for following a presidential war order, the Court refrained from enjoining enforcement of the President's original military command.¹⁵³ Marshall intentionally left the issue of the President's inherent war powers open:

It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.¹⁵⁴

147. 6 U.S. 170 (1804).

148. *See id.* at 178-79.

149. *See id.* at 176-78; *Talbot*, 5 U.S. at 27-29; *Bas*, 4 U.S. at 40-42.

150. U.S. CONST. art. I, § 8, cl. 11.

151. *Id.* art. III, § 2, cl. 1.

152. *See id.* art. I, § 8, cl. 11.; *id.* art. III, § 2, cl. 1.; *Little*, 6 U.S. at 177-79; *see also* J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 483 (2005) ("*Bas* was a case of statutory construction, not constitutional interpretation."); Yoo, *supra* note 8, at 294 ("Rather than making grand pronouncements on the separation of powers, cases such as *Bas*, *Talbot*, and *Little* underscored Congress' role in deciding on the legal state of relations with a hostile nation."); sources *supra* notes 125-132 and accompanying text. Professor Yoo aptly noted that "[n]either *Bas*, *Talbot*, nor *Little* (nor all three added together) constituted the *Marbury* of foreign relations law." Yoo, *supra* note 8, at 294.

153. *See Little*, 6 U.S. at 179.

154. *Id.* at 177.

The President's inherent war powers, and the executive's authority to venture beyond congressional authorization, remain untouched by *Little*.¹⁵⁵

Judicial recognition of the President's defensive war powers came at the twilight of the framing era. The 1827 case *Martin v. Mott*¹⁵⁶ arose from a militiaman's refusal to answer a President's call to service after the militiaman deemed the emergency insufficient to justify the use of the militia.¹⁵⁷ In an unanimous decision, the Court held that, under the Militia Act of 1795 ("Militia Act"), the President is "the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts."¹⁵⁸ As such, the Court held that the President was vested with the exclusive authority to declare an emergency.¹⁵⁹ The determination of a state of emergency was necessarily conclusive upon all subordinate officers¹⁶⁰ and mandated an appropriate military response to suppress the imminent threat.¹⁶¹ However, the Court found that this authority to rebuff foreign aggression did not derive solely from the Militia Act, but also from the "nature of the power itself"¹⁶²:

If we look at the language of . . . [the Militia Act], every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c. [sic] it shall be lawful for the President, &c [sic] to call forth such number of the militia, &c [sic] as he may judge necessary to repel such invasion." *The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander in chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose*

155. *See id.* at 177-79.

156. 25 U.S. 19 (1827).

157. *See id.* at 28.

158. *Id.* at 31.

159. *See id.*

160. *Id.* at 31-32.

161. *See id.*

162. *Id.* at 30 ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress.").

*responsibility for an honest discharge of his official obligations is secured by the highest sanctions.*¹⁶³

Notwithstanding the Militia Act, the Court suggests that the President's constitutional roles as Chief Executive and Commander in Chief provide independent authority to repel foreign attacks.¹⁶⁴ The inherent defensive power could only be exercised in true exigencies: “upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.”¹⁶⁵ The close of the framing era brought with it an implicit recognition of the President's limited constitutional authority to repel foreign invasions and the narrow circumstances that justify the exercise of such power.¹⁶⁶

The failure of the Articles of Confederation to provide for even basic national protection offered a cautionary tale of the dangers posed by a feeble federal government.¹⁶⁷ The Framers heeded these warnings when drafting the Constitution and explicitly created a Commander in Chief who could unilaterally repel foreign aggression,¹⁶⁸ yet remained sufficiently tethered to congressional purse strings to prevent hostilities outside the interests of the people.¹⁶⁹ Leading Framers advocated for an “energetic”¹⁷⁰ Chief Executive empowered to rebuff sudden attacks¹⁷¹ while soothing fears that the Constitution would enable federal tyranny.¹⁷² Finally, the Supreme Court recognized the boundaries of the President's defensive power: even in an era of “imperfect” wars and “partial” conflicts,¹⁷³ only “sudden emergencies” and “great occasions of state” triggered the executive's inherent

163. *Id.* at 31. Michael Bahar, former Deputy Legal Advisor to the National Security Council, pinpointed the same language in *Martin* to similarly conclude that the President possesses inherent constitutional authority to repel foreign attacks. See Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT'L SEC. J. 537, 553-54 (2014).

164. See *Martin*, 25 U.S. at 31.

165. *Id.* at 30.

166. See discussion *supra* notes 156-165.

167. See *supra* notes 50, 54-62 and accompanying text.

168. See *supra* notes 68-77 and accompanying text.

169. See *supra* notes 17-19, 99-105 and accompanying text.

170. See sources *supra* notes 92-93.

171. See *supra* notes 84-97 and accompanying text.

172. See *supra* notes 98-113 and accompanying text.

173. See *supra* notes 134-146 and accompanying text.

defensive power.¹⁷⁴ Even if likely outside the judiciary's purview, the presidential defensive power would be held accountable by the scrutiny of the American people, further tempering the Chief Executive's discretion.¹⁷⁵ Constitutionally charged with a robust mandate to protect national borders, the institution of the President was designed to speedily rebuff foreign aggression, with a wary Congress guiding the tiller for the journey ahead.

IV. A COMPARATIVE ANALYSIS ACROSS THE ATLANTIC

The Framers did not create the Constitution in a vacuum—as former English colonists, the British Constitution loomed over nearly every aspect of their pre-revolution lives.¹⁷⁶ Even when the Framers shed the shackles of British rule, they did not abandon the treasure trove of political knowledge embedded in the British Constitution.¹⁷⁷ Familiar terms such as “Commander in Chief,” “executive Power,” and “declare War” were sown from the bedrock of the British Constitution.¹⁷⁸ As such, the original understanding of the President’s defensive war powers can be further illuminated by comparing its contours with the contemporaneous military authority of the British Commander in Chief—the royal Crown.¹⁷⁹ Part IV.A describes the division of war powers in the eighteenth-century British Constitution and Part IV.B juxtaposes royal war powers with the President’s defensive military authority.

A. The British Crown’s Royal Prerogative

While the American executive’s war powers are founded in a written constitution, the British Crown’s military authority stems from

174. *Martin v. Mott*, 25 U.S. 19, 30 (1827).

175. *See supra* notes 121-131 and accompanying text.

176. *See* M.E. Bradford, *The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law*, 27 BYU STUD. Q. 51, 58-64 (1987); *see generally* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (masterfully detailing the colonists’ intellectual determinism to reclaim crucial liberties from their British overseers).

177. *See* Bradford, *supra* note 176, at 63 (“If there is one constant in the political discourse of eighteenth-century Americans it, is a generous and undeviating admiration for the British constitution as they knew it.”).

178. *See* discussion *infra* notes 186-193.

179. *See* *infra* Part IV.B for this comparative analysis.

the unwritten principles of the British Constitution.¹⁸⁰ The British Constitution is not a single document, but rather an abstract set of practices, common law jurisprudence, and conventions that evolve over time.¹⁸¹ In a similar vein to the American Constitution, the eighteenth-century British Constitution apportioned military powers between Parliament and the Crown.¹⁸² Britain survived near-continuous warfare from the mid-seventeenth century until the end of the eighteenth century,¹⁸³ which heavily influenced and dictated the division of war powers between the Crown and Parliament.¹⁸⁴

Renowned jurist William Blackstone masterfully articulated the division of war powers within the eighteenth-century British Constitution in his seminal *Commentaries on the Laws of England*.¹⁸⁵ Blackstone powerfully described the Crown as a “generalissimo” that supremely reigned over all British military forces.¹⁸⁶ The British generalissimo’s royal prerogative included the exclusive authority to raise, regulate, and command all manner of military forces—armies, fleets, forts, and any “places of strength.”¹⁸⁷ All military installations were subject to the Crown’s approval.¹⁸⁸ The Crown’s mighty domestic power was even more pronounced abroad: the Crown was a binding and necessary element for all foreign matters.¹⁸⁹ This sweeping

180. See Robert Blackburn, *Britain’s Unwritten Constitution*, BRIT. LIBR. (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> [https://perma.cc/8G9E-DXDG]; see also Yoo, *supra* note 8, at 198.

181. See Blackburn, *supra* note 180.

182. Yoo, *supra* note 8, at 198.

183. See *id.* at 212 (observing that Britain was engaged in war from “1665-67 (Second Anglo-Dutch War), 1672-74 (Third Anglo-Dutch War), 1689-97 (War of the Grand Alliance), 1702-13 (War of the Spanish Succession), 1718-20 (War of the Quadruple Alliance), 1739-48 (War of the Austrian Succession), 1754-63 (Seven Years’ War), 1775-83 (the American Revolution), and 1793-1801 (War with revolutionary France)”).

184. See *id.* at 198.

185. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *230-70. See also Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-8 (1996) (discussing the impact of Blackstone’s tremendous recapitulation of British common law that, at the time, was arguably unparalleled in its clarity, breadth, and structure).

186. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *262. Blackstone’s spelling and grammar has been modernized for the purposes of this Note.

187. *Id.* at *262-63.

188. See *id.*

189. See *id.* at *252 (“What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king’s concurrence is the act only of private men.”). The Crown also had the sole power of treaty-making, as well as sending and receiving ambassadors. *Id.* at *257, *253.

authority included the singular prerogative of declaring war and peace.¹⁹⁰ For all matters, it was impossible for the Crown to do any wrong.¹⁹¹ The Crown remained “inferior to no man” and “accountable to no man.”¹⁹² The Crown’s military decisions were utterly outside the realm of public scrutiny.¹⁹³

Despite ascribing the Crown with absolute perfection,¹⁹⁴ Blackstone was not immune to notions of divided authority and separation of powers.¹⁹⁵ Blackstone incorporated theories from fellow enlightenment thinkers John Locke¹⁹⁶ and Montesquieu¹⁹⁷ when articulating the limits of the Crown’s power and the role of Parliament in the British Constitution.¹⁹⁸ For instance, only Parliament could authorize the levying of taxes, a necessary element of maintaining and outfitting military forces.¹⁹⁹ The Crown could raise military forces but needed Parliament’s financial support to sustain them.²⁰⁰ Parliament could thus voice their support (or lack thereof) for hostilities by tailoring their level of financial support for the conflict.²⁰¹

Beyond the purse power, Parliament could promulgate any domestic law that did not diminish or interfere with the Crown’s authority.²⁰² The Crown’s near-plenary power was “created for the benefit of the people, and therefore cannot be exerted to their prejudice.”²⁰³ As such, Parliament retained the power to impeach the

190. *Id.* at *257. Officers of the Crown could issue letters of marque and reprisal when quick action was needed, however, this could only result in an “incomplete state of hostilities.” *Id.* at *258.

191. *See id.* at *246-47.

192. *Id.* at *242.

193. *See sources supra* notes 191-192 and accompanying text.

194. *See sources supra* notes 191-192 and accompanying text.

195. *See infra* notes 196-206 and accompanying text.

196. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES, *122, *243, *252 (acknowledging and incorporating Locke’s theories by explicit reference).

197. Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 17-18 (1990).

198. *See discussion infra* notes 199-206 and accompanying text.

199. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *160-62.

200. *See id.*; *see also* JEREMY BLACK, A SYSTEM OF AMBITION?: BRITISH FOREIGN POLICY 1660-1793, at 18-19 (1991) (detailing Parliament’s role as a financier and the control associated with this financial power); J.L. DE LOLME, THE CONSTITUTION OF ENGLAND 72 (1821) (“The King of England . . . has the prerogative of commanding armies, and equipping fleets—but without the concurrence of his Parliament he cannot maintain them.”).

201. *See supra* notes 199-200.

202. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *246-47.

203. *Id.* at *246.

Crown's ministers for taking part in "improper or inglorious conduct" when engaging in war-making pursuant to the generalissimo's royal prerogative.²⁰⁴ Thus, the eighteenth-century Crown's war-making was subject to two legislative checks: Parliament's purse power and limited impeachment power.²⁰⁵ All other military functions—raising troops, declaring war, regulating armies, commanding forces, concluding hostilities—were exclusively matters of royal prerogative.²⁰⁶

B. The Edges of the Defensive Power: Comparing Two Commanders in Chief

It is no coincidence that the Framers' system of constitutional checks and balances created an executive whose war powers, on the whole, paled in comparison to the eighteenth-century British Crown's dominion over the military.²⁰⁷ The abuses of the British Crown and royal army remained painfully fresh memories for many former colonists long after the Revolutionary War.²⁰⁸ Hamilton explicitly noted the differences between the two executives in Federalist No. 69:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.²⁰⁹

204. *Id.* at *258. The Crown's treaty-making was subject to the same "constitutional check" of ministerial impeachment. *Id.* at *257.

205. See *supra* notes 198-204.

206. See *supra* notes 185-192.

207. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2005-09 (1999) (detailing how the British Crown incrementally tightened its vice on the American colonists' right to self-assembly and self-government in the years leading up to the American Revolution).

208. See, e.g., THE DECLARATION OF INDEPENDENCE para. 3-30 (U.S. 1776) (listing twenty-seven specific transgressions by the British Crown that amounted to "absolute tyranny"); THE FEDERALIST NO. 39, at 193 (James Madison) (Ian Shapiro ed., 2009) ("If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible."); see generally BAILYN, *supra* note 176.

209. THE FEDERALIST NO. 69, at 350 (Alexander Hamilton) (Ian Shapiro ed., 2009).

Hamilton described the President as a second-rate king.²¹⁰ Perhaps in an intentional effort to inflate the British Crown's war powers and soothe the fears of antifederalists, Hamilton ignored Parliament's funding powers and limited impeachment authority as critical checks on the Crown's war-making.²¹¹ However, Hamilton appropriately noted that a President could not formally sanction hostilities in the same manner as a British Crown—the President has no constitutional authority to declare war.²¹² Hamilton also recognized the contrast between the President's limited control over local militias and the British generalissimo's unrestrained command of all military forces as a core difference amongst the two executives.²¹³ Generally speaking, Hamilton correctly analogized the relationship between the President's more limited war powers and the British Crown's extensive military authority, especially for longer, formalized conflicts.

But what of the limited instances where a President faces "sudden emergencies," "great occasions of state," or "circumstances which may be vital to the existence of the Union"?²¹⁴ As a matter of necessity, the President's war powers swell during such tumultuous times to fend off foreign aggression.²¹⁵ When faced with an imminent foreign attack, the President's military authority briefly shares some of the eighteenth-century British Crown's power: Congress' "declare war" power is negligible as the President determines the appropriate military response, the control of the legislature's purse power stills for a fleeting moment, and a more limited accountability reigns for the Chief Executive's actions.

By holding that "a defensive war requires no declaration,"²¹⁶ the Supreme Court recognized that the imminency of a sudden military crisis may render a formal declaration of war infeasible.²¹⁷ The Framers understood that the President's constitutional responsibilities as Commander in Chief and Chief Executive would prevail in such circumstances and enable the limited deployment of US military forces

210. *See id.* at 349-51.

211. *See supra* notes 196-201 and accompanying text.

212. *See THE FEDERALIST NO. 69*, at 350 (Alexander Hamilton) (Ian Shapiro ed., 2009).

213. *See id.*

214. *Martin v. Mott*, 25 U.S. 19, 30 (1827).

215. *See supra* Parts III.B, III.C.

216. *Bas v. Tingy*, 4 U.S. 37, 37 (1800).

217. *See id.*

to suppress the incoming threat.²¹⁸ As the singular Chief Executive and Commander in Chief of the United States' military forces,²¹⁹ the President exclusively determines the military response needed to suppress the imminent foreign threat.²²⁰ For a brief moment, Congress' power to declare war is of little importance as the President alone decides how best to respond to the exigency. In this small defensive window, similarities with the British Crown bubble to the surface. The eighteenth-century British Crown alone decided the level of force mandated by an international conflict.²²¹ As was often the case with the British Crown's orders, this immediate decision was conclusive and unchallengeable.²²² Although the President lacks the British Crown's authority to bind the entire nation to war, both the British Crown and the President were the sole decision-makers when evaluating and committing an appropriate military response to rebuff imminent foreign aggression.

Both Congress and Parliament could not exercise their funding powers to intervene during this narrow response window. Although Congress has significant latitude to sanction or proscribe any manner of hostilities,²²³ the Framers believed a President's initial rebuff of foreign aggression to be outside the realm of congressional control.²²⁴ Similarly, Parliament's purse strings could not temper the British Crown's initial decision to commit military forces into hostilities.²²⁵ Only after the chief executives had responded to the imminent threat could the national legislatures employ their weighty purse powers to control the duration and intensity of the hostilities.²²⁶ When faced with an imminent foreign threat, presidential military authority briefly surges above the reach of Congress' purse power and, for a moment, shares a plateau with the British Crown.²²⁷

218. See *supra* notes 68-77, 87-97, 156-166 and accompanying text.

219. See *supra* notes 26-41, 89-95, 156-166 and accompanying text.

220. See *supra* notes 121-132 and accompanying text.

221. See *supra* notes 189-191 and accompanying text.

222. See *supra* notes 191-193 and accompanying text. See *infra* notes 228-232 and accompanying text for an analysis comparing the President's and British Crown's political accountability.

223. See *supra* notes 98-106, 133-146 and accompanying text.

224. See *supra* notes 70-72, 87-93 and accompanying text.

225. See *supra* notes 186-201 and accompanying text.

226. See sources *supra* notes 223-225.

227. See sources *supra* notes 223-226.

Congress does not stand alone as the sole federal branch affected by this executive authority—the judiciary also falls under the shadow of the Chief Executive’s defensive power. The judiciary is very likely barred from scrutinizing the President’s defensive power because it is a policy decision founded upon constitutional grants exclusively vested in the President and thus constitutes a nonjusticiable political determination.²²⁸ Absent judicial inquiry, the President faces limited accountability for committing military forces to repel a pressing foreign threat—the Chief Executive remains answerable only to the political character of the American people and self-morality.²²⁹ The President’s limited accountability was also shared by the eighteenth-century British Crown, albeit on a much greater scale.²³⁰ Royal prerogative ensured that the Crown’s military decisions could not be directly questioned.²³¹ Beyond the purse power, the most Parliament could do to voice their discontent with the Crown’s war-making was to impeach his ministers—absent a revolution, the Crown could never be held personally accountable for its actions.²³² Although the President never reaches such perilous heights of political immunity, both chief executives enjoyed limited accountability when rebuffing foreign aggression.

The President’s military authority never summits the peaks reached by the eighteenth-century British Crown. However, the distance between the two chief executives is certainly narrowed when the President’s defensive powers are triggered by national exigency. An impending foreign attack activates a surge of presidential authority to quell the immediate hostilities: the President is free to craft an appropriate military response absent formal congressional authorization or interference. The defensive power of the American Commander in Chief is momentarily untethered from congressional purse strings and only subject to limited accountability via the political virtues of the American people. The British Commander in Chief was no stranger to these privileges, as the Crown freely responded to hostilities and could initially commit military forces unburdened by Parliament’s powers. Despite several core differences—such as the

228. See *supra* notes 121-132 and accompanying text.

229. See *supra* notes 122-123 and accompanying text.

230. See *supra* notes 191-194, 202-205 and accompanying text.

231. See *supra* notes 191-194, 202-205 and accompanying text.

232. See *supra* notes 204-206 and accompanying text.

Crown's supreme political immunity—the President's defensive power stands closer to the eighteenth-century British Crown's military authority than Hamilton, or his fellow federalists, may have felt comfortable admitting to a leery public.²³³

V. CONCLUSION

An original understanding of the Constitution would necessarily be incomplete without recognition of the President's defensive war powers. The failures of the Articles of Confederation informed the Framers of the peril posed by a weak government unable to secure its borders or protect its national interests. In response, the Framers fashioned a Chief Executive exclusively empowered to lead the nation's armed forces as Commander in Chief. This inherent constitutional authority was designed to serve as a national aegis and swiftly rebuff foreign threats. The Framers wanted a true “sword of the community”²³⁴: a vigorous and energetic Commander in Chief unafraid to repel a hostile onslaught.

Although the awakening of the President's inherent defensive authority momentarily quiets Congress' war powers, the Framers ensured this hush does not last for long. Outside immediate exercises of the President's defensive power, the Framers intended Congress to guide the “sword of the community” by either funding or frustrating war. Congress' critical limitations on executive authority ensure that the President's war powers could never subsume the tall shadow cast by the eighteenth-century British Crown. The original understanding of the defensive power reveals formidable authority, but, as evidenced by comparison with the British Crown, it is hardly a license for plenary military power or a royal prerogative for war-making. The “cryptic words”²³⁵ underlying the President's constitutional war powers have been further confounded by a modern history of informal war-making and executive boundary-pushing. Delving into the original understanding of such powers cuts through the quagmire: the Framers' design ensures that the President's defensive war powers only manifest the specter of a generalissimo, even during the most trying of times.

233. See THE FEDERALIST No. 69, at 350 (Alexander Hamilton) (Ian Shapiro ed., 2009).

234. See THE FEDERALIST No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

235. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

