

“RESTORING THE CONGRESSIONAL DUTY TO DECLARE WAR”
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Abstract

For more than a century and a half, Congress declared war as the framers of the Constitutional Convention of 1787 directed when they wrote that Congress had the “power to declare war.” But starting in the 1950’s, Congress began authorizing the President to make the determination for war and voters were deprived of the power to influence their Congressional representatives. The result has been labeled an AUMF (Authorization for Use of Military Force). It was used in the Vietnam War of 1965-73 and the 2003 war against Iraq, 2003 to the present.

The Delegates to the Convention of 1787 were determined to create a stronger executive than under the Articles of Confederation, while not copying the European idea that kings had the prerogative to take their nation to war. This tension surfaced on June 1, when the Virginia Delegation recommended that the new president have the “executive powers” of the old Articles of Confederation. Delegate Charles Pinckney of South Carolina protested that such powers might include the power to take the nation to war, which would make the Presidency “a Monarchy of the worst kind.” His objection was supported by all who spoke; the Convention voted to put the war power in Congress. Virginian James Madison then moved to give Congress the power to authorize the new President to make the decision to commence war. The Convention rejected this proposal by a vote of 7 states to 3 states, assuring that the Congress would make the decision to “make war.” Several times during the Convention, the delegates re-affirmed that the war power would be in Congress, including the House of Representatives which, at that time, was to be the only body elected directly by the voters. In August, 1787, when the Convention was working

on the final text of the proposed Constitution, Charles Pinckney pointed out that Congress might not be in session when the nation was attacked. The term "make war" was changed to "declare war" to allow the President to repel sudden attacks, and Congress was allowed to permit the President to call out the Militia to execute federal laws and suppress insurrections.

In using the power to declare war during the "quasi war" with France of 1798-1800, Congress defined in detail the hostile actions that the President could take in seizing French ships and limited the time in which the President could take action. The Supreme Court, in detailed opinions, upheld the Congressional power to determine what Presidential actions could be taken. These cases, *Bas v. Tingy* (1800) and *Talbot v. Seeman* (1801), settled the power of Congress to determine the scope of hostilities.

For over a hundred and sixty years Congress declared war, from the statutory limitations of the quasi-war against France, through the War of 1812 against the British, Algeria in 1815, the Mexican War (1846), the Spanish War (1898), World War I, to the several formal declarations of all-out war in World War II. Since the beginning of the "Cold War," however, in stark contrast with the votes of June 1, 1787 Congress has authorized Presidents to decide whether to use military force against a foreign nation. Presidential decision-making has been disastrous for the nation. Particularly in the Vietnam War of 1965-1973 and the War against Iraq, started in 2003 and continuing today, we have squandered blood and treasure – and interrupted the tranquility of domestic life - in proceeding where we had no Constitutional basis for massive intervention.

The Federal Courts have ignored the history of both the language that was included in the Constitution and the decisions that were made during the first 160 years under the Constitution. Those were years when the nation was fraught with dangers, close to home and on its borders and overseas, that were similar to the present terrors we now face. In addition, the electorate - who was supposed to be able to vote for representatives in Congress who, in turn, were given the veto power over war – is deprived of influence over their representatives.