

The Great War Powers Misconstruction

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INTRODUCTION

The term “war” is found at four locations in our Constitution. However, the word alone signals nothing about the powers of the two political branches the Constitution creates, executive and legislative, and nowhere in the Constitution does the term “war powers” appear.¹ At some point in our history, the word “powers” was coupled with “war.” There has ensued a continuing argument about who, as between the President and Congress, owns those powers. But little or no attention has been given to just what powers are being discussed, and no attention at all has been given to what the Constitution itself says about those powers. Yet, a close examination of the Constitution readily reveals the answers. Congress owns *all* of the powers to create and field a military (no matter how the powers are defined), and the President has the executive authority.² The involvement of the United States in multiple military conflicts, ultimately at the behest of the President and not the Congress, is evidence that currently both the executive and legislative branches operate contrary to the mandates of the Constitution. Thus, the notion of war powers must be reconsidered.

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1. In past litigation related to armed conflicts, the executive branch has had complete authority for the actions it took.

2. What constitutes war is an obscure question, and defining the war powers is at least as problematic. How war needs to be defined to give the constitutionally-delineated powers their appropriate weight is not addressed by this article. Particularly in this new century, the meaning of war is necessarily evolving based not simply upon which entity or person is using the term, but, more importantly, on the evolution from major theater conflicts to what is described as “asymmetric warfare.” Some people (not including the President, it would seem) consider what occurred in Libya to be war; however, no war has ever been declared, nor has President Obama sought any other authorization from Congress for this military action. This is not remarkable. For example, the United States undertook repeated and heavy bombings of Iraq in 1998. Many, including Iraqis subjected to those attacks, considered the acts to be ones of war, but when the question was placed before Secretary of State Madeline Albright, her response was: “We are talking about using military force, but we are not talking about a war. That is an important distinction.” See Louis Fisher, Opinion, *Parsing the War Power* 50 NAT’L L.J. (July 4, 2011) (discussing the meaning of war in the modern context of military engagements). See also JOSHUA S. GOLDSTEIN, WINNING THE WAR ON WAR: THE DECLINE OF ARMED CONFLICTS WORLDWIDE (2011).

Periodically, our nation seems to show renewed interest in the “war powers.” Generally, this interest and the resulting endless, and often unproductive arguments occur when the President steps out ahead of Congress in initiating “engagements” with some level of military operations and some exceptional level of costs. The pattern, however, is to say the least, uneven.³ The scenario for the periodic war powers arguments generally includes an executive branch already engaged and a Congress belatedly awakening to the fact that it has been left out of the decision to engage, but given the bill for the costs and the blame for the social ramifications.⁴ In recent times, the rancor over this subject has included a host of commentaries by many who hold themselves out as experts on the subject. Their commentary ranges from full vindication of the President for whatever may have been his unilateral conduct, to thorough condemnation of the President. Both sides invoke such touchstones as war powers, declaration power, and the power of the purse. One side may occasionally suggest that the President should be impeached for his unilateralism. This mélange of commentary contains efforts to reach back to writings from medieval England, Europe of four centuries earlier, and the United States’ two hundred plus years of extraordinarily undisciplined constitutional experience.⁵

3. What makes this pattern of conduct all the more curious is the fact that as our nation responds to the pressures of globalization, these asymmetric engagements have become quite commonplace. In 2009 and 2010, our nation had well over one hundred such engagements ongoing around the world, and there is evidence that the number has grown substantially since then. See, e.g., Zachary Fillingham, *U.S. Military Bases: A Global Footprint*, GEOPOLITICAL MONITOR, Dec. 9, 2009, <http://www.geopoliticalmonitor.com/us-military-bases-a-global-footprint-3138>; Nick Turse, *US Commando War in 120 Countries: Uncovering the Military’s Secret Operations in the Obama Era*, WORLD NEWS DAILY, Aug. 4, 2011, <http://www.informationclearinghouse.info/article28747.htm>; Donna Quexada, *US Has Deployed More than 2,000,000 Troops to Iraq and Afghanistan Since 9/11*, UNITED FOR PEACE OF PIERCE COUNTY, US & WORLD NEWS, Dec. 20, 2009. I define “military engagements” to include the presence of uniformed personnel of any of the five services, functioning in environments in which hostilities are taking place, whether or not our uniformed personnel are actually engaged in those hostilities. This number includes some unacknowledged engagements but does not include the relatively benign presence of uniformed personnel in functions such as embassy operations.

4. Beginning with World War II, virtually every military engagement undertaken by the United States has begun with a covert or semi-covert undertaking by the executive branch. While some of these engagements have been reported contemporaneously to congressional committees (or their staffs), not a single one has been anticipated by formal congressional action.

5. See John C. Yoo, Deputy Assistant Att’y Gen., Memorandum Opinion for the Deputy Counsel to the President, *The President’s Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm>; Caroline Krass, Principal Deputy Assistant Att’y Gen., *Memorandum Opinion for the Attorney General, Authority To Use Military Force in Libya* (Apr. 1, 2011), available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>; JAMES BAKER & WARREN CHRISTOPHER, NATIONAL WAR POWERS COMMISSION REPORT (2008), available at <http://webl.millercenter>.

Most remarkable in these commentaries, and especially in the usually belated but then critical behaviors of Congress, is the nearly complete lack of attention to the Constitution itself. Indeed, it is generally assumed by many who write and speak on the subject that the Constitution is devoid of instruction and direction, other than its specific language designating the President Commander in Chief and giving Congress the authority to “declare” war. There is surprisingly large support for the notion that the war powers are vested predominantly in the President as Commander in Chief. The opinions in this regard vary from the idea that the President has all “war powers” to the more modest notion that he holds all of the powers subject only to the possibility that Congress might refuse to provide the funds necessary to carry them out. There is also a camp that accords the President the war powers only when necessary to repel sudden attack. Finally, there is a camp that suggests we should not bother to address the subject in its constitutional context, but simply proceed with perfecting a political solution.

The conversation ignores both the very specific language of the Constitution and the Constitution’s history, which, far more than the attenuated references usually made to British and European history, framed the intent and the language of the document.⁶

There is no such thing as “war powers.” The Constitution does not speak in any such terms. Rather, on no other subject is the Constitution more explicit (apart from the conditions of office) than on the subject of the establishment and management of the military. It is a gross mischaracterization to refer to the powers to establish and to manage the military as “war powers” because they extend to every aspect of the creation, dissolution, financing, regulation and operation of the military. The far better term for these powers, found only in Article I, would be the “Military Establishment Powers” (MEP), and that is the term that will be used here. It is true that the President is designated by the Constitution as

org/reports/warpowers/report.pdf. I am especially concerned about the Baker-Christopher Commission because it made no attempt whatsoever to ground its work in the Constitution itself, but went immediately to political solutions to the issues and problems it had, often erroneously, characterized. The report expended exactly two and one half pages on the Constitution, concluding that resort to it would be inconclusive. See Louis Fisher, *The Law: The Baker-Christopher War Powers Commission*, 39 PRES. STUD. Q. 128, 130 (2009).

6. A brief history might be useful. Virtually all of the fifty-five who attended the Convention in 1787 had been adults when the Revolutionary War began in 1775. Most of those in attendance were of a relatively long lineage in the new nation (considering that the country was itself relatively young). Thirty-nine of the fifty-five signed the new Constitution, and, given their ages and individual histories, it is far more likely than not that the primary influences on them were the Revolutionary War and the failures of governance under the Articles of Confederation. See NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *THE FOUNDING FATHERS: DELEGATES TO THE CONSTITUTIONAL CONVENTION*, http://www.archives.gov/exhibits/charters/constitution_founding_fathers.html.

the Commander in Chief, but he is vested with no identified powers in that capacity, and, as will be noted, none can be implied or deemed inherent.

Having vested Congress with all of the MEP, the Framers should not necessarily be idolized for their prescience. They did make some mistakes. In connection with the nation's projection of its world interests, the Framers failed to account for the inevitable intersection between the MEP and foreign affairs powers. Almost immediately, the two sets of powers came into play together.⁷ With rare exceptions, the MEP and foreign affairs powers have been intertwined ever since, and the necessary coalescence of the two sets of powers is certain to govern all of our global transactions in the future. A dormant Commerce Clause and a license to conduct foreign affairs do specify authority for both of the political branches, but here too Congress necessarily dominates.

A necessary corollary of this intersection of the MEP and foreign affairs powers is that the dominant role in the country's projection of its military powers must lie with Congress. Regardless of which of the two branches initiates policy, control necessarily lies with Congress because of the legislative authority required whenever policy manifests itself in military operations. The long history of Congress shirking these responsibilities is inconsistent with the Constitution and, increasingly, casts the nation adrift.

It is time to take a new look at this subject. The prior debates have been based on incorrect historical premises, thus posing the significant threat that the templates we use in the conduct of both our military and diplomatic affairs will be unresponsive to national security needs and impervious to application.⁸

I. HISTORICAL CONTEXT

When we address the MEP of our Constitution, it is important to consider the historical precedents on which its drafters actually relied. These were the recent experiences of the Revolutionary War, the unsatisfactory experience of the Continental Congress in managing and financing that war, and the individual experiences of the several colonies, especially those arrayed along uncertain borders of the new nation. The predecessor constitutional mechanism had been the Articles of Confederation, which had been drafted in a wartime environment (1776-1777). The Articles were, as the name implies, a remarkably loose

7. See *infra* Part II.B.

8. War Powers Resolution, 50 U.S.C. §§1541-1548 (2006). The War Powers Resolution of 1973 will be ignored here. In addition to being unconstitutional (as a delegation of congressional authority, among other things), it is so plainly unworkable as to hold an honored place among the many worthless efforts to march the war powers up and down Pennsylvania Avenue.

arrangement among the thirteen confederates. There had been no ratification of the document until 1781, and the MEP of that document had been substantially honored in the breach, almost to the point of devastating our efforts at independence.

Not only did each of the states have unilateral authority to support (or not support) the Revolution with troops, they also had authority to commit (or refuse to commit) funds for the purpose. The army – such as it was – consisted of the militias of the several states. The leadership of those militias was, and remained, in the officer corps provided by the states. In short, there was no prescribed federal organization, and no written provision designating certain control. The management of the military was so thoroughly localized that eleven of the thirteen states even had their own navies.⁹ One can easily speculate that had the logistics of an ocean crossing not ultimately made the conduct of a war nearly impossible for the British, the outcome might have been very different.

With the disbanding of the national army at the end of the war, no standing army whatsoever remained in the new nation. That condition was known to and considered by the drafters of the Constitution. Certain threats to the new nation remained. Britain continued to maintain a blockade, and some Indian tribes arrayed along our frontiers continued to pose threats, as did the French and British to the North and the Spanish to the South. Invasion from the sea was a primary concern, as was the need to maintain open sea lanes for our own growing commerce. In other words, while the border states could be left to repel invasion from their lands with their own militias, a much more comprehensive force was necessary to address the threat from the Atlantic.

There was one more MEP-related problem that was continuing to manifest itself among the states: insurrection. Those who gathered in Philadelphia might have forgotten their own tea party insurrection, but they were concerned about the unpropertied, undereducated rabble who constituted their majority.¹⁰ As a result, they decided to maintain state militias to “insure domestic Tranquility.”¹¹

9. While estimates vary for the years between 1776 and 1787, it seems likely that as many as eleven states mustered their own navies during that period. *See generally* CHESTER HEARN, *NAVY, AN ILLUSTRATED HISTORY: THE U.S. NAVY FROM 1775 TO THE 21ST CENTURY* (2007).

10. Indeed, the Massachusetts government and militia had just quelled its own set of insurrectionists in Shay’s Rebellion. *See* SHAY’S REBELLION & THE MAKING OF A NATION, <http://shaysrebellion.stcc.edu/index.html>.

11. U.S. CONST. pmb1. The Preamble to the Constitution makes particular note of both common defense and “domestic Tranquility,” the authority and responsibility for which is then assigned to Congress. *See* MORTIMER J. ADLER & WILLIAM GORMAN, *THE AMERICAN TESTAMENT* 63-118 (1975).

The product of the uncertain experience of the prior two decades and the abhorrence of King George's standing and mercenary armies produced a tension between the needs of national defense and of a military that would not itself constitute a threat. The approach selected was a Constitution that enumerated the MEP at a level of detail and with a comprehension that was accorded to no other subject (except the make-up of the two political branches themselves), not even money. It granted no powers whatsoever to the Executive and, while it created a permanent navy, it cleverly prohibited the creation of a standing army. Moreover, it placed the MEP firmly in the hands of civilians, the Congress – not the President, who, as the founders seemed to understand, might well be a military officer.

II. THE CONSTITUTION SPEAKS – FINALLY

A. Congress

Twelve separate provisions of Article I of the Constitution describe the MEP. Some create the core functions of the military; some are seemingly general; some relate to the state militias, and one establishes the participation of Congress in foreign affairs. They will be addressed here, giving special attention to those that most decisively establish the complete control by the Article I branch.

1. *The Common Defense Clause*

Article 1, Section 8, Clause 1 recites that Congress shall have the power to “provide for the common Defence.” That it appears in the Preamble and then as the first power-conferring provision in Article I should suggest its relative importance. Moreover, were there no other MEP provisions, it undoubtedly would have been sufficient by itself to suggest the supremacy of Congress on the subject. The presence of the word “common” is also significant, as the twelve provisions differentiate between “defenses” that are common to the thirteen states and those that are to be retained and maintained by the individual states, presumably by their own militias. Most writers on the war powers ignore completely the individual roles of the thirteen states, which were intended to be at least equal to those provided in common.

2. *The Governance of the Military Clause*

Article I, Section 8, Clause 14 recites that “Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces” This clause should make it abundantly clear that the total authority over our military, the MEP, rests exclusively with Congress until delegated by appropriate legislation to the President. Remarkably,

however, while the Supreme Court has spoken to just about every conceivable permutation of the exclusivity of these MEP provisions, and to this clause in particular, at no time has the Court addressed the contest between executive and legislative power, identified as “war powers,” in the context of the dispute between the two political branches.¹²

It should be stressed that Congress has plainly spoken to each and every aspect of the establishment of the military.¹³ This includes the creation of a physical plant, intricate details of the force structure, weaponry, and occasionally even deployment. What then is left for the Commander in Chief? The answer would seem to be powers only by delegation, none inherent or implied.¹⁴

3. *The Declaration Clause*

Article I, Section 8, Clause 11, referred to as the Declaration Clause,¹⁵ is frequently cited as vesting Congress with its authority, but it is actually of very limited importance in defining the powers and responsibilities of the two political branches.¹⁶ It has been invoked only eight times in our nation’s 235-year history. But we have had several hundred military engagements of various sizes and shapes.¹⁷ Possibly, the foundational problem with the clause is that, being declarative only, it is inherently

12. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918).

13. A prime example of the extent of the congressional involvement in military affairs is the extraordinary length of the annual military authorization acts and appropriations. The 2011 Defense Authorization Act is over 380 pages, and is available at <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt491/pdf/CRPT-111hrpt491.pdf>. The proposed DoD 2012 Appropriations Act is some 365 pages, available at <http://www.opencongress.org/bill/112-h2219/text>.

14. Not addressed here are the potentially significant questions of whether Congress has, from time to time, by delegation given up a foundational power that only the Article I branch may exercise. In some substantial measure, it has done just that, increasingly, in other areas of its assigned powers. That such a cession of power defies the Constitution was addressed in Justice Kennedy’s concurring opinion in *Clinton v. New York*, 524 U.S. 417, 449 (1998). Nevertheless, from time to time the Supreme Court has made it quite clear that, at least when asked, it will look closely at efforts on the part of either political branch to give or receive delegation of the MEP even in time of war. See *Lichter v. United States*, 334 U.S. 742 778-783 (1948).

15. U.S. CONST. art. 1, §8, cl. 11 (“To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”).

16. Curiously, had the declaration power been given to the President (as William Blackstone would have had it), the power would easily have been all consuming because of its implications in the hands of a king figure.

17. See, e.g., Richard F. Grimmet, *Instances of Use of United States Armed Forces Abroad, 1798-2009*, Cong. Res. Service RL32170 (Jan. 27, 2011).

meaningless and little more than a repetition of the equally meaningless provision that had been included in the Articles of Confederation.

What is most troublesome about the clause is the persistent attempts to give it meaning by the inference that it is essential for any military undertaking by the nation. The 1973 War Powers Resolution implies just such authority. This is plainly not the case nor is it likely that the Framers ever considered that its invocation was a prerequisite to military engagements. We should know this because it was clear that the military engagements that were anticipated by the Framers were most likely those initiated by state militias or engagements at sea for the protection of sea lanes. It was hardly likely in either case that Congress would be convened to declare that a war existed. Equally unlikely would have been the prospect that the new nation would undertake a program of global conquest requiring a war declaration. Indeed, it is not at all clear that the Framers had given particular thought to the qualitative or quantitative nature of just what constituted a war, nor contemplated what the global presence of the United States would be two hundred years later.

4. *The Commerce Clause*

Article I, Section 8, Clause 3, the Commerce Clause, is rarely seen as a MEP provision. This seems peculiar since the fusion of foreign commerce (and foreign affairs) with the MEP has characterized a large percentage of our nation's engagements from the very outset.¹⁸ More importantly, as asymmetric warfare, peacekeeping, and nation-building increasingly dominate our engagements, this relationship becomes crucial.¹⁹ It would seem that the executive branch regards the conduct of foreign affairs as its working leverage also to employ the military as part of these affairs.²⁰ It is

18. Chief Justice Marshall appears to have understood this relationship quite well. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 192 (1824) (the commerce power "may be, and often is, used as an instrument of war").

19. The many problems presented by this fusion are currently poorly addressed. On the positive side, DoD and State have established, jointly, the Center for Complex Operations at the National Defense University. Its charter addresses this subject. On the negative side, then-Secretary of Defense Robert M. Gates's offer of December 15, 2009, to negotiate a modest portion of the subject with the State Department has been poorly received, and there is no reason for optimism that much progress is likely to be made in the near future. This critical subject seems to be floating in the Potomac, midway between the Pentagon and the Truman Building. *See also* Nina M. Serafino, *Peacekeeping/Stabilization and Conflict Transitions* Cong. Res. Service RL32862 (Feb. 2, 2011), at 2-10. The related concepts of mission creep, peacekeeping, and nation-building were reintroduced to the DoD almost three decades ago. While they had been well understood at the end of WWII, today they remain anathema. *See generally* STEPHEN GLAIN, *STATE VS. DEFENSE: THE BATTLE TO DEFINE AMERICA'S EMPIRE* (2011); JEREMI SURI, *LIBERTY'S SUREST GUARDIAN* (2011).

20. The Justice Department's remarkable rationalization for the initiation of military operations in Libya without congressional consent includes a very detailed excursion into the President's foreign affairs powers, as though the fusion of the two sets of powers resolves (in

in anticipating that the foreign affairs and MEP authority would need to coalesce that the Framers left a gap. Legislation could ease the problems that this gap creates; unilateral actions by the President preserve the problems.

Whatever may be the initiation powers of the President under Article II, Section 2, Clause 2 (treaties), it was never intended to be a unilateral province for the President. The earlier drafting of this provision actually did not even *include* the President as part of the treaty-making powers.²¹ By no stretch of imagination can it be argued that by invoking his foreign affairs powers, the President is somehow also thereby entitled to poach what he believes he needs from the MEP. Indeed, it was probably not until the rather miserable thinking embodied in the Supreme Court's decision in *United States v. Curtiss Wright Export Corp.* that the President's unilateral authority achieved any particular grace.²²

5. Prohibiting Standing Armies

The core of the MEP lies in Article I, Section 8, Clauses 12, 13, and 14. Together with the three Militia clauses, these clauses establish, beyond reasonable argument, that the Constitution intended the military powers of the United States to be vested solely and singularly in the Congress. Of these six clauses, the most significant is Article I, Section 8, Clause 12, and it is the one that received the most attention from the Framers.

Clause 12 is the product of the debate over whether the United States would or would not have a standing army. The conclusion was decisively that it would not. The language of the clause itself is only slightly ambiguous: "The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."²³

Of that provision, Hamilton wrote:

The Legislature of the United States will be *obliged* by this provision, once at least every two years, to deliberate upon the

the President's favor) whatever question might have existed as to the MEP. Under that approach, the President could trump nearly any congressional power so long as an engagement is to occur in an extraterritorial setting. *See* Krass, *supra* note 5. This notion not only defies logic, it is inconsistent with the views of the Supreme Court. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

21. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (1911).

22. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

23. U.S. CONST. art. I, §8, cl. 12. What the Framers knew and we occasionally forget, or overlook, is the fact that no executive function, including the maintenance or operation of an army, could occur without appropriations.

propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents.

They [Congress] are not *at liberty* to vest in the executive departments permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence.²⁴

The conclusion is inescapable that such a federal army as might be raised would have a life expectancy concurrent only with each term of Congress and that any continuation or renewal would require new legislation. The limitation of the provision is remarkable in two respects. First, it bespoke the understanding that the new nation was not to have a standing army – at all.²⁵ Second, it carried the clear inference that such established land armies as might be necessary as a continuum would consist of the state militias. This meant that the means to repel sudden attack (particularly from land) and the quelling of insurrection were, at least initially, to be the responsibilities of the states and *not* those of the federal system, including the executive branch.

The most foundational error of writers on this topic thus far is the assumption that the President has some inherent or implied power to repel sudden attack. While such an assumption may owe its origins to the thinking and speech of some of the founders (two in particular), no support for the assumption can be found in the Constitution, and indeed an opposite conclusion is very clear from the language of this clause and the three Militia clauses.²⁶

A much more profound problem with the application of this clause is found both in its total abandonment by the two political branches and its lack of interpretation by the courts. Indeed, all we have is meager, results-oriented opinions from two attorneys general who seemed not to understand at all the intended scope of the limitation.²⁷ Both the army and the air force are now clearly permanently invested. Virtually nothing about their structures or their congressional funding (beyond operations and

24. THE FEDERALIST NO. 26, at 217 (Alexander Hamilton) (John C. Hamilton ed., 1864) (emphasis in original).

25. See JOSEPH STORY, *Power To Declare War and Make Captures – Army – Navy*, in 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1163-1193 (1883).

26. See 2 FARRAND, *supra* note 21, at 317. It is true that Gerry and Madison thought that the substitution of the term “declare” (in lieu of “make”) in the Declaration Clause meant that the President would have initiating powers to repel sudden attacks but there is no support for this assumption in the language of the Constitution, and this “repel” argument has become a critical, but mistaken, basis for other assumptions of initial presidential powers, which simply do not exist.

27. Constitutional Prohibition – Appropriations for Armies, 25 Op. Att’y. Gen. 105, 108 (1904). Attorney General Clark in 1948 seemed to accept the obvious fact that the new Air Force was derivative of the Army and therefore covered by Clause 12.

maintenance accounts, which are appropriated on an annual basis) suggests that any consideration is given to this very clear prohibition of a standing army. The reality today is that the limitation is impervious to application; it should be amended. The episodic encounters, which were the sum of what the Framers anticipated, are today transmogrified into asymmetric warfare, which is, in this century, a constant, not likely to abate. The global nature of our relationships plainly dictates some modicum of a standing army. It is time, finally, for us to abandon our “minuteman mentality.”²⁸

It should be very clear that power to oversee and direct land armies is hardly likely to be singularly in the hands of the Commander in Chief when their very existence is cabined by the two-year creation authority of Congress.

It is clear that our Constitution permitted only two-year armies, a close control of Congress that eliminated any notion that plenary control might lie with the executive branch. As we have managed to abandon entirely the obligation of Congress to renew armies every two years, we seem also to have given over to the executive branch the plenary control of a standing army that the Constitution forbade.

6. *A Standing Navy*

In contrast to the limitation on the existence of an army, the Constitution, in Article I, Section 8, Clause 13, did provide for a permanent navy. By inference, it eliminated the eleven state navies that appeared to have grown up at the time. Separately, it provided for shipyards and docks to support a critical naval infrastructure.²⁹

The permanence of the Navy was dictated even in 1787 by the continuing hostilities at sea conducted by some European nations. Not only did our shorelines require protection (presumably from predation and invasion), but so did our sea lanes, offering our commerce access to the markets of Europe. Our ability to project this protection was soon to be tested in the Barbary Wars, which began in 1801.

It would be a leap, however, to assume that, because we were creating a permanent (standing) Navy, we were giving over its control to the Commander in Chief. There is nothing in the Constitution to suggest any

28. See Herbert L. Fenster, *Reforming the Management of the National Defense*, AMERICAN BAR ASSOCIATION SECTION ON PUBLIC CONTRACT LAW (Feb. 3, 1989), available at http://www.dnipogo.org/fcs/fenster_congress_natl_def.htm.

29. We continue to give some – declining – lip service to the fact that the Constitution established the Navy entirely independently from the Army. This was a great deal more obvious in 1960 (when I first came to Washington) because the U. S. Navy was supported by its own separate physical headquarters infrastructure, then a falling-apart relic preserved from two World Wars.

such intent, and Clauses 10, 11, 13, 14, and 17 clearly place the control and management of the naval forces in the Congress.

7. *The Militia Clauses – Calling Forth the Militia*

There is another of the MEP that has not yet been addressed – the militia. The very notion of a militia in this century seems almost laughable. The original notion of the militia as a first line of defense and for peacekeeping has been eliminated as a logical element in even the force structure of the military. The courts, beset by the realities of the overwhelming need for a national army and the seeming lack of logic to the continuation of a state-bound armed force, responsible to a governor and not a President, have come close to sweeping the constitutionally-based establishment of militias aside.³⁰

Yet it is clear beyond reasonable argument that the Framers in fact composed the militia provisions of the Constitution precisely for purposes that included national defense and did so with the understanding that there might not be a national force at all when initially needed. It should be borne in mind that the Constitution made no attempt whatsoever to establish, control, or finance the militias so long as they were state organizations. It was assumed, without provision, that these state military forces would be created by state legislatures, financed thereby, and under the control of the states.³¹

Three separate provisions of the Constitution, not two as is commonly believed, establish the militia.³² Clause 15 of Section 8 recites that Congress may call forth the militia to execute the laws of the nation, suppress insurrections, and, importantly “repel Invasions.” We have come to accept that Congress triggers this provision in essence by nationalizing the militias, but there is no instruction provided by the Constitution about how (or when) this is to happen in any particular instance.³³ What is important is the very clear assumption that it was the militias of the several states that were to be the first line of defense to “repel,” and the context in 1787 would not have included major warfare, directed by the Commander

30. See *Perpich v. Dep’t. of Def.*, 496 U.S. 334, 326 (1990). The erosion of the state militias as a first line of defense probably began almost as soon as the ink was dry on the Constitution. Shays’ Rebellion (1786-1787) had already signaled that none of the states was well-equipped either in establishment or finance to field a timely force that could provide first response capability. Current legislation so dilutes the authority and capabilities of the militia that they are, as a practical matter, little more than federal reservists.

31. We still had a “minuteman mentality” twelve years after the incident at Concord Bridge, thinking that we could arm and fight at a moment’s notice. See Fenster, *supra* note 28. Even today, our Supreme Court gives the idea some heed. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

32. U.S. CONST. art. I, §8, cl. 15-16; U.S. CONST. art. I, § 10, cl. 16.

33. See *Perpich*, 496 U.S. at 350-352.

in Chief. No such land-originated enemy existed or was contemplated to warrant such an interpretation.

8. *Nationalizing the Militia*

Article I, Section 8, Clause 16 provides further instruction about the relationship between the state militias and the federal government. In terms that are less than clear, it provides that when the militias are nationalized, the federal government will organize, arm, govern, and discipline them, but that the appointment of officers and the authority for training will remain in the states. It would appear that there was some original intent to achieve a level of uniformity among the thirteen militias, at least as to training, but this too is uncertain. No part of the triggering mechanism was prescribed, however, and the dichotomy between the needs of a national, standing army and the constitutional control over the militias was cast aside in 1916 with the passage of the National Defense Act.³⁴ That statute, passed largely in support of WWI, effectively put an end to the constitutionally-based division of authority between the states and the federal government in the control of the militias. Nevertheless, if we are to consider the constitutional division of authority over our land-based military, no authority at all over the militias was vested even in Congress without the invocation of Clause 15, and no authority of the Commander in Chief could exist without the invocation of both Clauses 15 and 16.

9. *Repelling Sudden Attack*

What is quite certain is the fact that it was the militias and *not* some vague principle of Commander in Chief's inherent or implied authority that were responsible for repelling invasion, including sudden attack, until Congress could act to nationalize and otherwise authorize a national fighting force. If that conclusion was not certain from the two preceding militia provisions, it was made certain by the limitation provision contained in Article I, Section 10, Clause 3, which recited that: "No State shall, without the consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or Engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."³⁵ The intent of the provision was, in the first instance, to assure the states that they would be entitled (and obliged) to repel invasion and suppress insurrection when their own civil authorities were inadequate to the task.³⁶ But it is also clear that the

34. National Defense Act of 1916, 39 Stat. 166 (1916).

35. U.S. CONST. art. I, §10, cl. 3.

36. *See* Luther v. Borden, 48 U.S. 1, 45 (1849).

partial prohibition on keeping troops was not intended in any way to impair the authority of the states to establish and maintain their own militias.³⁷

10. Equipping the Military

Not addressed thus far is the provision of the Constitution that establishes a physical plant and weapons infrastructure. That too was comprehended expressly by the Constitution. We should realize, however, that in 1787 there were few weapons that were unique to the purposes of war (certainly not compared to weapons of war today, which are all unique). Article I, Section 8, Clause 17, provided that the new federal government would establish forts, magazines, arsenals, and dockyards. Because no temporal limitation was placed on this physical plant, it can be assumed that this physical infrastructure was to be permanent, even though the Army, for which some of it would be built, would not be permanent. Little did the Framers understand that not only would weapons of war become unique, but also that the construct of government-owned and government-operated manufacturing plants (arsenals) would prove unworkable by WWI and would require the creation of an industry.³⁸

11. The Piracy Clause

While this provision is largely military and involves extraterritorial powers originally to be executed by the Navy, the provision has been of only minimal consequence as a part of the MEP. The recent piracy litigation and convictions suggest the potentially important reach of the Navy in protecting U.S. commerce as sea lanes become a more significant component of globalized enterprise.³⁹ But even here, there is nothing to suggest that the President has some unilateral authority that has not previously been expressly delegated under the MEP. Indeed, the authority of the President and the Navy to interdict piracy must necessarily lie with Congress.

12. The Appropriation Clause

Left for last in this analysis is the money. It is often argued that, even if Congress lacks the war powers, Congress still could exercise plenary authority by the expedient of pulling closed the purse strings. Unquestionably, what is being invoked here is Article I, Section 9, Clause 7

37. See *Presser v. Illinois*, 116 U.S. 252, 264 (1888).

38. See Fenster, *supra* note 28.

39. See *U.S. v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

of the Constitution which recites that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .”⁴⁰

While this argument is frequently cited, little of substance is made of it. That may be because the provision is not well understood.⁴¹

The ability of Congress to exercise the MEP through its funding authority is poorly comprehended even by Congress. Not only does the provision prohibit the expenditure of any sum by the executive branch if there is no appropriation to support it, the provision necessarily includes a prohibition on the “augmentation” of that which is appropriated by acts of the executive branch that would bypass the need for appropriations. In short, the President cannot raise his own funds.⁴²

But seemingly never discussed, even in these rare invocations of the power of the purse, is the very detailed panoply of laws intended to implement the Appropriations Clause. These laws further restrict the spending of funds that *are* actually appropriated by Congress. First of all, the funds may be spent only for the purposes recited in the authorization and appropriation bills that create them.⁴³ Second, Congress has legislated to make it illegal to spend any appropriated funds before such funds are apportioned, allocated, committed, and obligated to statutorily specified objectives.⁴⁴ While no study has been done – that would require something akin to auditing the Department of Defense accounts, an unwieldy task to be sure⁴⁵ – it seems likely, to the point of a near certainty, that at the commencement of the Libyan engagement there were no appropriated funds left available for that purpose.

B. The Commander in Chief

There is an overwhelming belief that the war powers are vested in the President as Commander in Chief. Article II, Section 2, Clause 1 of our Constitution recites: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several

40. U.S. CONST. art. I, §9, cl. 7.

41. See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988).

42. See Jim Schweiter & Herbert Fenster, *Government Contract Funding Under Continuing Resolutions*, 95 Fed. Cont. Rep. (CCH) 180 (Feb. 2, 2011), available at http://www.mckennalong.com/media/resource/1437_BNA_CRs.pdf.

43. See 31 U.S.C. §1301.

44. See 31 U.S.C. §§1512-1515. In the almost non-existent case law on this subject, at least one court has demonstrated a remarkably cavalier attitude about this set of provisions, even though their violation may carry criminal penalties. See *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997).

45. U.S. GOV’T ACCOUNTABILITY OFFICE, DOD FINANCIAL MANAGEMENT: IMPROVEMENTS NEEDED IN DOD COMPONENTS’ IMPLEMENTATION OF AUDIT READINESS EFFORT (2011) (GAO-11-851).

States, when called into the actual Service of the United States.”⁴⁶ Varying opinions emerge. Some give the President all such powers, reserving only the power of declaration and of the purse strings to Congress. Others are reluctant to give the President more than the power to act to repel sudden attack. Others suggest we should not bother to address the subject in its constitutional context; we should simply proceed to a political solution.

Remarkably, none of these theorists has given much if any attention to the actual language of Article I, other than to note that Congress does have some vague and underutilized power to declare war and could, in the view of most, cut off funding for a war. The meaning of the twelve-clause panoply has not been addressed, and there seems to be no thought given to the possibility – let alone the certainty – that the Framers actually intended to vest all the MEP, or so-called war powers, in Congress.

In the far margins of this presidential debate are those who would simply ignore the congressional MEP and rely instead on sixteenth- and seventeenth-century European monarchical commander-in-chief theories and the uncertain history of our nation’s conduct of military engagements. The most ardent current proponent of this approach appears to be a former Justice Department official who now teaches at Berkeley.⁴⁷ Because the theory fails entirely to address even the possibility that the legislative branch has any such powers, let alone the twelve discussed above, that marginal theory will not be addressed here.

Perhaps somewhat more important is the theory propounded by the Justice Department’s Office of Legal Counsel (OLC), now in support of an engagement in Libya for which there appears to have been no congressional consent.⁴⁸ This theory comes close to ignoring the MEP entirely. It relies instead on what is euphemistically referred to as an “historical gloss,” supposedly supported by a long series of references to Supreme Court decisions not a single one of which, in any manner whatsoever, addressed – as an issue – which of the two political branches actually owns the MEP. The OLC initiates its creative departure point with the following statement:

The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to “declare War,” “raise and support Armies,” and “provide and maintain a Navy,” as well as general authority over the appropriations on which any military operation necessarily depends. U.S. Const., art. I, §8, Cl. 1, 11-14. Yet, under “the *historical gloss* on the ‘executive Power’ vested in Article II of the Constitution,” the President bears the “vast share of responsibility for the conduct of our foreign relations,” *Am. Ins. Ass’n v.*

46. U.S. CONST. art. II, §2, cl. 1.

47. Yoo, *supra* note 5.

48. Krass, *supra* note 5.

Garamendi, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)), and accordingly holds “independent authority ‘in areas of foreign policy and national security.’” *Id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); *see also, e.g., Youngstown Sheet & Tube Co.*, 343 U.S. at 635-36 n.2 (Jackson, J., concurring) (noting President’s constitutional power to “act in external affairs without congressional authority”). Moreover, the President as Commander in Chief “superintend[s] the military,” *Loving v. United States*, 517 U.S. 748, 772 (1996), and “is authorized to direct movements of the naval and military forces placed by law at his command.” *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); *see also Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 184 (1996). The President also holds “the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action,” given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require swift response by the United States without the opportunity for congressional deliberation and action. *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980) (“*Presidential Power*”); *see also Haig*, 453 U.S. at 292 (noting “the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature” (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965))). Accordingly, as Attorney General (later Justice) Robert Jackson observed over half a century ago, “the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests.” *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941).⁴⁹

This is nothing more than a concocted witch’s brew of bits and pieces from a series of cases which, considered individually or even together, do nothing whatsoever to support the OLC’s theory. The attempt, obviously, was to make impenetrable a mysterious fusion of the war powers with the foreign affairs powers. Apart from the imagination and remarkable

49. *Id.* (emphasis added).

creativity that went into the attempt, any reasonable scholarship easily demonstrates that the effort immediately fails.

Youngstown, principally relied upon by OLC, clearly speaks to an opposite result.⁵⁰ There, in several voices, the Court actually rejected the attempt by President Truman to apply the war powers to the now infamous attempt to take over the steel industry. No Justice, including those in the dissent, would have permitted this remarkable excursion on the basis of the war powers. And, with regard to the effort to apply the foreign affairs powers, Justice Jackson, speaking with considerable prescience, noted that those powers are not unilateral, but rather shared with Congress and when Congress has spoken, the President's power, to the extent that it remains at all, is "at its lowest ebb . . ."⁵¹

The other primary reference is to the Court's opinion in *Garamendi*, which makes even less sense.⁵² That case involved no war powers, and not even a contest between the two political branches. It was a preemption case that pitted California law against a highly disputed construct of the President's foreign affairs powers. The decision was 5-4 and quite likely wrongly decided. While invoking the preemptive quality of the foreign affairs powers in the hands of the two political branches, it ignored the fact that the powers asserted by California had actually been delegated to the states under the McCarren-Ferguson Act.⁵³

The remainder of the OLC's theory returns to its own prior boosting of the powers of its client.

When the language of the Constitution is read and perhaps understood, it becomes remarkably clear that the Framers intended to accord to Congress a comprehensive set of powers, the MEP, to create and thoroughly control the military might of our nation. Nothing was omitted from the twelve clauses, not even the matter of sudden attack. Had this comprehensive structuring of the MEP not been placed in the Article I branch, it would have been possible to argue that the mere recitation in

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

51. *Youngstown*, 343 U.S. at 637. It is useful here to point out that Justice Jackson had a notable advantage on the subject of presidential war powers from his own experience as an advisor to the President when Jackson occupied a position at the Justice Department. Reflecting on that experience, he added: "The clause on which the Government next relies is that 'The President shall be Commander in Chief of the Army and the Navy of the United States.' These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy." *Id.* at 641-642.

52. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

53. *McCarren-Ferguson Act*, 15 U.S.C. §§1011-1015 (2006).

Article II that the President was to be the Commander in Chief would have necessitated – or at least enabled – the idea that there must be some powers that are inherent or implied in the title. The Framers left no such option to future thinkers. The reality is that the constitutional function of the Commander in Chief is executory only.

What has happened in the intervening two and a quarter centuries is that Congress has been slow and often mindlessly negligent in using the MEP in a manner that is sufficiently comprehensive to control the conduct of the Commander in Chief. A void has been created into which the President has stepped on literally hundreds of occasions to assure the nation's timely defense and the enablement of its foreign affairs objectives.

In this regard, the President has taken his supposed war powers into his inventory of foreign affairs assets. That is a fusion that began almost immediately upon the ratification of the Constitution and continues unabated. The Libyan engagement is a recent prime example. But the management of the nation's foreign affairs provides no additional license to reach into the MEP and employ those powers to meet foreign affairs objectives.⁵⁴

CONCLUSION

Given the lassitude of congressional action in exercising its MEP, and the President's activism in expanding his "war powers," the entire notion of control over U.S. military power must be reconsidered. It is beyond rational argument that the President has no powers other than those that might be delegated to him by Congress. That Congress has failed so thoroughly and consistently to understand or exercise its MEP hardly changes the content of the Constitution. Writers, including all too often careless courts, need to rethink this subject. Whether by error or great prescience, the Framers of the Constitution gave no war powers to the President; they all reside within the Article I branch. With the current environment of global military involvement in direct contradiction to the Constitution, either Congress needs to exercise its given duties, or rethink the original delegation.

The condition of a thoroughly globalized world in this new century has made an abstraction of the subject. The MEP can no longer be cabined within militias, non-standing armies, a navy with line-of-sight missions, and a physical plant that simply builds ships-of-war, manufactures weapons in arsenals, and occasionally houses and feeds nationalized militias.

54. Justice Jackson pointed to President Jefferson's conduct of the Barbary pirates adventure, where Jefferson's unilateral action was followed by an apology to Congress for his failure timely to obtain permission. *See Youngstown*, 343 U.S. at 643 (Jackson, J., concurring).

The military is a component of the national defense and, now, also a component of national security. It is also a component of our foreign affairs and diplomacy. It responds to emergencies, carries on peace keeping, and constructs and reconstructs foreign physical and political infrastructures. It includes in its numbers and functions those without uniforms and those who perform military missions without military licenses. Today, some “military” operations are carried on by civilians in a civilian agency, directing remote attacks by uniformed personnel, often in the nature of assassinations, against non-state opponents. That such activities are imperative to both national defense and national security cannot reasonably be questioned. But who is in charge and in which branch of government did the authority originate?

It would now make very little sense to solve the war powers enigma in isolation from the emerging construct of the new military. Whatever may have been the historical and definitional errors of the past, a very new construct is now essential.