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The Long History of Presidential Discretion



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In “The Long Descent to Unilateralism,” Professor Sarah Burns argues that our nation has ended up at a constitutional place that the Framers did not intend. For much of the nation’s early history, she believes, presidents sought congressional approval before using force; Congress debated and funded or rejected those ventures, and power rebalanced once wars ended. Burns claims this pattern eroded after the Spanish–American War and is virtually absent today, leaving decisions over war almost entirely in the hands of the president.

But Burns finds us at the wrong destination because she begins the voyage from the wrong launch point. Burns’s account goes awry, first, because she mistakenly believes that the Constitution’s Declare War Clause requires Congress to preauthorize every conflict. The Clause, however, does not bear that weight. Second, she believes that presidents have seized this power because executives have continuously waged war without congressional permission. This imagines that the Framers imposed their approach to domestic policy—Congress authorizes first, the president executes second—upon the very different setting of national security and foreign affairs.

But instead of this strict, legalistic understanding of war, the Constitution adopts a flexible, political system for making the decision to go to war. The Framers deliberately separated the power to declare and fund wars from the power to start and direct them. They created a flexible system in which both branches could influence war policy. The Constitution allows Congress to retain an effective check on war-making through its power of the purse, while allowing the president to act with the speed and energy necessary to protect the nation’s security. Rather than a story of

presidential usurpation, the American practice of war powers shows a president and Congress that have agreed on the basic structure and purpose of the American armed forces, the grand strategy pursued by the nation over decades, and individual wars throughout the twentieth and twenty-first centuries.

It is uncontroversial to observe that Congress has the constitutional authority to check the president on matters of war. The critical question is how. Burns places undue reliance on the Declare War Clause. She claims it was common practice for nineteenth-century presidents to seek Congressional approval before pursuing hostilities and to apologize when they did not. Yet what she takes as evidence of sweeping congressional power is better understood as a reflection of prudence and inter-branch bargaining. Her account assumes that “declare war” requires Congress to authorize military hostilities before presidential action, but history indicates otherwise. The Framers did not demand a legalistic process before the executive could use force; they left such decisions to politics, allowing both the president and Congress to cooperate or contest for primacy over war policy.

By the time the Framers wrote and ratified the Constitution, they would not have understood a declaration of war as necessary to initiate hostilities. The Constitution took the phrase “declare war” from British constitutional practice—Blackstone describes it as one of the powers held by the Crown. In the one hundred years preceding the Constitution, the British waged more than a dozen wars but declared war only once before fighting began. When declarations did appear, they usually came months or years after the start of the conflict. Declarations of war were not understood to serve a domestic function of constitutional authorization, but rather to define the legal status of hostilities under international law. Declarations served as formal notices to other sovereigns of the legal status

between countries at war and provided a public recitation of grievances. This would not have been familiar to the Founding generation, who had fought a war in North America (the Seven Years' War) well before a formal declaration of war was issued. The Declaration of Independence itself was a declaration of war, issued well after fighting had begun at Lexington and Concord.

The Framers created a system in which Congress and the president wield distinct tools within a flexible, political process.

Post-independence history provides no support for reading the Declare War Clause as requiring congressional approval before presidents initiate hostilities. In the initial burst of constitution-making, the revolutionaries rejected the British monarchy and experimented with weakening the executive branch. These state constitutions took simple majoritarian democracy too far by subjecting their governors to legislative selection and control and disrupting their unity by involving councils of state in their decisions. But when the Framers wrote the Constitution eleven years later, they restored an independent, unified chief executive with its own powers—including the authority to wage war as Commander-in-Chief and Chief Executive. In *Federalist* #74, Alexander Hamilton explained that “the direction of war implies the direction of the common strength,” and that the authority to direct and employ this strength is a fundamental aspect of executive power. The president should lead in wartime because, in Hamilton’s words, he can act with “decision, activity, secrecy, and dispatch.” He emphasized that “energy in the executive is a leading characteristic of good government” and is essential for protecting the community against foreign threats.

Compare the Constitution's careful delineation of the process for enacting a statute, appointing officers, or making treaties with the lack of procedures for making war. The Constitution divides powers that had formerly resided in the British Crown—the commander-in-Chief stayed with the executive, while declaring war and raising armies were transferred to Congress—but it does not set out how the powers are to interact. The Framers would have expected the executive and legislative branches to use their constitutional powers to struggle over war policy, just as the Crown and Parliament had.

Article I, Section 10 of the Constitution confirms the point. It declares: “No State shall, without the Consent of Congress, ... engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” This provision shows that the Framers knew exactly how to write a text that would require Congress's authorization before military hostilities could begin. It even contains the implicit exception for sudden attacks that all pro-Congress scholars acknowledge must reside within the Declare War Clause (even though it isn't there). If Burns and others were right in their reading of the Constitution, it should have contained a parallel clause to Article I, Section 10 that declared “the President shall not, without the Consent of Congress, engage in War, unless the United States is actually invaded or in such imminent Danger as will not admit of delay.” Instead, the Framers gave Congress the power to “declare” war and vested the power to conduct military operations in the executive. Chief Justice Marshall properly observed in *McCulloch v. Maryland* that identical words in the Constitution should carry the same meaning, and different words carry different meanings. By deliberately distinguishing “declare” war from “engage,” the Framers created a system in which Congress and the president wield distinct tools within a flexible, political process.

This is not the time to encourage sweeping, untested changes by stoking fears that Congress has conceded a war power it never possessed.

History confirms this design. For more than two centuries, no president or Congress has acted under the belief that the Constitution requires a declaration of war before the United States can engage in military hostilities abroad. Although this nation has used force abroad more than a hundred times, Congress has issued declarations on only five occasions: the War of 1812, the Mexican–American and Spanish–American Wars, and World Wars I and II. Many other conflicts—such as the Persian Gulf War and the war in Afghanistan—received congressional authorization but not declarations of war. And in still others, presidents acted without either, sending troops to oppose the Russian Revolution, intervene in Mexico, remove Manuel Noriega from power in Panama, or prevent human rights disasters in the Balkans.

This record shows continuity, not collapse. From Jefferson’s naval expeditions to Lincoln’s conduct of the Civil War, from Truman’s Korea intervention to the long struggle of the Cold War, presidents have acted with initiative while Congress has retained ultimate control through funding. Far from abandoning its role, Congress has exercised it as the Framers intended: not by preauthorizing every conflict, but by deciding whether to sustain or terminate wars once underway. Unless Congress creates and funds the armed forces, presidents have nothing with which to fight wars.

If Burns were correct and war powers mirrored domestic lawmaking, Congress’s power to declare war should include the right to set war aims

and means. In practice, however, neither branch has ever believed Congress's Article I powers include control over tactics and strategy. Congress's real strength lies in the purse, not in dictating which units fight when or where. Its size and structure make it too unwieldy for decisions requiring speed, secrecy, and force. Yet its funding power provides a flexible and decisive check: Congress can reduce or cut off resources, shrink the military, or halt supplies. It used these tools to end the Vietnam War and to block James Polk's attempt to occupy all of Mexico.

The ratification debates further confirm the Framers' intent to maintain foreign affairs powers in the executive branch, with a check from funding and legislation. At the Virginia convention, anti-Federalist Patrick Henry warned that presidential command of the military would invite reckless wars. Federalist George Nicholas replied that Congress's regulation and funding powers provided the safeguard. James Madison likewise argued that liberty was preserved so long as "the sword" and "the purse" rested in different hands—just as in Britain, where the King commanded the military and Parliament controlled funding. Even in Virginia, where ratification passed by a narrow 88–80 vote, Madison did not invoke the Declare War Clause as a check on presidential power. He pointed instead to the legislature's control of funding as the primary restraint on warmaking by the executive.

If presidents lead the nation into disasters, Congress can cut off funds, impeach, or call for the voters' judgment. The Framers did not expect Congress to preauthorize every use of force or to manage military campaigns. They expected presidents to take the initiative in crises, and Congress to exercise checks afterward, primarily through control of resources. Congress's use of these tools has always turned on politics—at times asserting its powers forcefully, as in Vietnam, and at times remaining silent. Both approaches fit within the system the Framers

designed. When Congress chooses to declare war, fund conflicts, or do nothing after the president has already acted, it is not surrendering authority; it is exercising it.

Presidents have not always judged wisely, and some wars have proved costly mistakes. But errors of policy do not mean the Constitution has failed. They mean the political process must run its course. The Framers built overlapping powers, not a rigid process, and trusted politics to resolve disagreements over war. That design has carried the Republic through its greatest challenges.

In an age of nuclear weapons and resurgent great-power rivalry, the need for an energetic executive is clearer than ever. This is not the time to encourage sweeping, untested changes by stoking fears that Congress has conceded a war power it never possessed.

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Instead of demanding a legalistic process to initiate war, the framers left the decision to wage war to the discretion of politics. They granted war powers to both the President and Congress, allowing them to either cooperate or contest for primacy over war policy. The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative, and Congress can use its funding power to check them. If Presidents lead the nation into disastrous mistakes, Congress can impeach them, and the people can reject them at the ballot box.

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