

Lesson 6

CONGRESS'S WAR POWERS

Unit 2

Lesson Objectives:

When you complete Lesson 6, you will be able to:

- Understand the elements of Congress's war powers.
- Explain the role of the Define and Punish Clause and the Captures Clause in international affairs.
- Understand the debates about who initiates war as related to the Declare War Clause and the Marque and Reprisal Clause.
- Explain the difference between declaring war and authorizing the use of force as it relates to the Declare War Clause.
- Understand the Founders' concern about standing armies and its influence on Congress's military powers.
- Explain who has the power to call forth the militia under the Militia Clause.
- Understand the scope of Congress's powers to organize the militia and to regulate the Army and the Navy.
- Explain the purpose of the Military Regulations Clause.

Part 1: Piracy and War

Define and Punish Clause

Article I, Section 8, Clause 10

Declare War

Article I, Section 8, Clause 11

Marque and Reprisal

Article I, Section 8, Clause 11

Captures Clause

Article I, Section 8, Clause 11

Unit 2

Define and Punish Clause – Article I, Section 8, Clause 10*Essay by Jack L. Goldsmith III (pp. 126–127)*

The Define and Punish Clause gives Congress the power to define and punish piracy and "Offenses against the Law of Nations." The power to define and punish piracy was not controversial. Piracy was a well-defined crime in international law, so the Framers saw no need to define it when crafting the statute outlining punishment for piracy.

The Framers were more concerned with defining and punishing "Offenses against the Law of Nations." Specifically, they were concerned that states would not adequately punish infractions of the law of nations, such as attacks on ambassadors, and that such neglect would lead to disastrous international consequences. This situation was a risk under the Articles of Confederation, since Congress could not punish infractions of treaties. James Wilson, though, objected that the language of the clause implied that Congress had the power to define the law of nations, which would make the country look arrogant and even ridiculous. Gouverneur Morris responded that the clause allows Congress to define offenses against the law of nations because the law of nations is often vague.

In 1887, the Supreme Court interpreted the clause to mean that Congress had the power to punish violations of the law of nations and also to punish offenses that would trigger the international responsibility of the country if the offense went unpunished. There are two potential limits to the clause. First, legislation enacted pursuant to the Define and Punish Clause may not violate the Bill of Rights. Second, it is questionable whether the clause allows Congress to regulate civil suits.

**Before You Read**

Ask: *Why is piracy a problem?* (Pirates steal property and harm people. Their activities endanger American citizens and commerce.)

**Discussion Question**

If an ambassador from another country visits the United States and is murdered and his murderers go unpunished, what might happen? (Answers will vary. The country may hold the United States responsible for the harm to the ambassador and consider it to be grounds for war. The country may retaliate against the United States.)

Declare War Clause — Article I, Section 8, Clause 11

Essay by John Yoo and James C. Ho (pp. 127–129)

The President certainly has the power to repel invasions by using military action, and such actions do not require a declaration of war. The debate over the Declare War Clause centers on the power to initiate war. On one side of the debate, Congressionalists argue that the clause prevents the President from initiating hostilities without Congress's consent. The clause empowers Congress to issue formal declarations of war and to authorize any military engagement. On the other hand, Presidentialists distinguish between “declaring war” and “engaging in war.” Specifically, declaring war implies a legal relationship that invokes certain rights, privileges, and protections under the laws of war. Declarations of war give notice of legal grounds for war and trigger other legal actions such as the imprisonment or expulsion of enemy aliens, the breaking of diplomatic relations, and the confiscation of enemy property. These alter the legal relationships between the warring nations. The President may therefore engage in hostilities short of declaring war.

Only five wars in the history of the United States have been formally declared. Numerous other hostilities have been authorized by Congress. Interestingly, an authorization for the use of force has accompanied each declaration of war. A large peacetime military force has made these debates more intense. Presidents have been more aggressive about asserting their authority to engage in war without congressional authorization. Congress approved the War Powers Act to reassert control in response to the executive. The courts have never intervened to stop a President from waging war without a declaration from Congress.



Active Reading

Ask: What is the difference between Congress declaring war and Congress authorizing the use of force? (While both actions likely result in the use of force, declaring war implies that certain rights, privileges, and protections will be invoked under the laws of war.)



Active Reading

Ask: When is the President allowed to activate military troops without the approval of Congress? (to repel an invasion)



Check Understanding

Point out that only five wars in United States history have been officially declared by Congress. Ask: In what way might military actions that are not officially declared be legitimate? (Sample answers: The President may approve them as “repelling an invasion,” as in the case of a terrorist attack. Congress may be able to approve the use of force that is short of a full war.)



Discussion Question

What would be a situation in which a country would declare war? What would be a situation in which a country would authorize the use of force but not declare war? (Answers will vary. Students may say that one country might formally declare war against another country if, in addition to attacking the country, it stops all trade and wants to make other countries aware of the war. A country may not formally declare war against a country if the country does not have an organized government against which to declare war.)

Marque and Reprisal — Article I, Section 8, Clause 11

Essay by John Yoo and James C. Ho (pp. 130–131)

The Marque and Reprisal Clause grants Congress the power to legislate the seizure of property during wartime. “Reprisal” is a seizure of property, and “marque” is the French equivalent of reprisal; therefore, “marque and reprisal” is best understood as a single phrase. Letters of marque and reprisal were official documents by which the sovereign authorized private individuals to engage in hostilities against enemies of the state.

The debate about the Marque and Reprisal Clause is related to the debate about the Declare War Clause. Congressionalists argue that the Marque and Reprisal Clause and the Declare War Clause together deny the executive’s ability to initiate hostilities. The former authorizes lower-level hostilities; the latter, higher-level hostilities. Presidentialists argue that the Marque and Reprisal Clause only grants Congress the ability to authorize privateers to engage in military hostilities. The clause is best read in conjunction with Congress’s power of the purse. Congress holds power to fund military hostilities, either with public funds or through private letters of reprisal; the President may initiate hostilities with whatever resources Congress has made available.

The Marque and Reprisal Clause is rarely invoked. The United States has not issued letters of marque and reprisal since the War of 1812. The Declaration of Paris in 1856 prohibited privateers. While the United States did not ratify this declaration, it upholds the ban in practice.



Active Reading

Help students understand the meaning of privateers from the Founding generation. Explain that privateering was a practical option that would keep military engagements small, protect United States citizens, and limit wartime expenditures. By using privateers, the government could reap the benefits of a military action while minimizing risk.



Work in Pairs

Point out that at the end of the commentary about the Marque and Reprisal Clause, the authors say that during the Iran–Contra controversy, President Reagan privately financed hostilities without congressional consent. Pair up students and have them research the Iran–Contra situation on the Internet and write a paragraph about their findings. Then ask whether they think President Reagan needed congressional authorization.



Discussion Question

Why would a nation use privateers? Why would it not? (International declarations often prohibit the use of privateers in order to ensure that wars are fought fairly and openly. Privateers would protect a nation’s citizens from battle and would possibly limit wartime expenditures. By using privateers, the government could reap the benefits of a military action while minimizing risk. On the other hand, the use of privateers may mean that the citizens are less invested in the war effort.)

Captures Clause – Article I, Section 8, Clause 11

Essay by John Yoo and James C. Ho (pp. 131–132)

The Captures Clause gives Congress the power to make rules regarding the capture, disposition, and distribution of enemy property. That is, Congress alone has the power to make rules to govern the circumstances in which wartime captures are lawful prizes. Based on the use of the term “captures” from the Articles of Confederation and the Constitution, “captures” referred to “the taking of property by one belligerent from another.”

The Captures Clause applies to property and never to captured enemy soldiers. Part of the executive power to conduct war includes the power to confiscate battlefield property; but, as the Supreme Court has explained, the executive needs congressional authorization to capture property away from the battlefield. Presidentialists read this clause in conjunction with the Marque and Reprisal Clause to conclude that Congress may regulate captures of private parties that are not of the armed forces.



Discussion Question

What does the Captures Clause show about how the Framers thought regarding federal power over conquered territory? (The Captures Clause was explicitly created by the Framers to refer only to property, which reveals a belief in the inalienable rights of life, liberty, and pursuit of happiness for all people—even enemy populations.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 6, Part 1. Review any material for questions they have missed.

Short answer: Write out your answer to each question.

1. Why weren't the Framers of the Constitution concerned with defining piracy after creating the Define and Punish Clause? **(The international definition of piracy was well known.)**
2. What sorts of legal actions are triggered by the declaration of war?
 - **The internment or expulsion of enemy aliens**
 - **The breaking of diplomatic relations**
 - **The confiscation of the enemy's property**
3. List the congressionally declared wars in the history of the United States.
 - **The War of 1812**
 - **The Mexican–American War**
 - **The Spanish–American War of 1898**
 - **World War I**
 - **World War II**
4. Against whom were offensive actions taken by the United States in 1802? **(Barbary Pirates, can also accept Tripoli or Barbary States)**
5. What was the significance of the offensive actions taken in 1802? **(It was America's first real war, but there was no formal declaration of war by Congress.)**
6. The 1856 Declaration of Paris prohibits what? **(Privateering)**
7. When was the last time the United States issued letters of marque and reprisal? **(The War of 1812)**
8. With regard to the allocation of war powers between the President and Congress, what do the Presidentialists maintain? **(The Presidentialists maintain that the Constitution does not prevent the President from initiating hostilities with whatever resources Congress has appropriated.)**

True / False: Indicate whether each statement is true or false.

1. Although the Constitution authorizes Congress to "define" piracy, this proved unnecessary since there was already a well-defined understanding of "piracy" in international law. **(True)**

2. The Supreme Court has intervened on two occasions to stop a war that the President has started without congressional authorization. **(False. The Supreme Court has never intervened to stop a war that the President has started without congressional authorization.)**
3. During the Revolution, captors could not claim lawful title to captured property until after a prize court had granted it. **(True)**
4. The United States maintained a large military establishment during peacetime for the first time in its history during the Cold War. **(True)**

Unit 2

Part 2: Creating, Supporting, and Regulating the Military

Army Clause

Article I, Section 8, Clause 12

Navy Clause

Article I, Section 8, Clause 13

Military Regulations

Article I, Section 8, Clause 14

Militia Clause

Article I, Section 8, Clause 15

Organizing the Militia

Article I, Section 8, Clause 16

Army Clause – Article I, Section 8, Clause 12

Essay by Mackubin Owens (pp. 132–135)

The Army Clause gives Congress the power to raise and support armies. The clause was the solution to the Founders' dilemma of needing a standing army to defend the nation but not allowing that army to be completely subject to the executive. Thus, the Army Clause created a standing army that would be controlled through congressional appropriations.

This clause was very controversial precisely because history had shown that standing armies led by a powerful executive were capable of overthrowing and seizing power and taking liberties away from the people. The Framers would lodge the power of raising and supporting armies in Congress, the branch closest to the people, rather than in the executive.

The Army Clause did not satisfy the Anti-Federalists, who argued that maintaining a military during peacetime would be a tool for tyrants and a threat to the people's liberty. Anti-Federalists preferred state-controlled militias. The Federalists, on the other hand, recognized that the new nation was extremely vulnerable to foreign attack. Raising an army was a prudential consideration. In light of these concerns, the Army Clause contains a time limit on appropriations: Congress can raise and support an army, but that appropriation is limited to two years.

Since the time of the Constitutional Convention, the legislature has initiated most legal developments affecting the Army Clause. Military appropriations are considered annually by a congressional committee. Since the establishment of the Department of Defense, Army appropriations have been included in a single department-wide appropriation to cover the Army, Navy, and Air Force. Moreover, Army appropriations are annual.

The U.S. Army has changed both in mobilization and in orientation and purpose. The Army relies on professional soldiers rather than on drafting citizens to be soldiers. The draft is controversial; compulsory military service usually occurred only in state militias. The United States did not have a national draft until the Civil War and did not resort to a peacetime draft until 1940. Soldiers are no longer used in domestic policing to enforce the nation's laws; instead, the Army is used only in foreign conflicts.



Before You Read

Ask: What do you think the phrase "army appropriations" means? (money set aside to raise an army)



Active Reading

Be sure students understand why the Framers were hesitant about creating a standing army. **How would have their experiences under the rule of King George III have shaped their understanding of a standing army?** (King George III used the army to suppress the people; for instance, he quartered troops in their homes as a form of punishment.)



Make an Inference

Your book discusses the use of a draft. **When is a draft issued?** (A draft is implemented when Congress needs to raise an army quickly and lacks the volunteers to do so.)



Write About It

Have students use the Internet or the library to research the draft. Have them answer the following questions about the draft.

1. Who must register for the draft?
2. When are you supposed to register?
3. Where do you register?



Discussion Questions

1. What is the significance of the time frame of military appropriations? (The Army Clause is the only clause in the Constitution that specifies a time frame for action. The unusual appearance of such a stipulation highlights the Framers' distrust of standing armies.)
2. How did the Framers guard against the threat of standing armies? (The Framers were hesitant about allowing for a standing army because of historical experience. The Army Clause recognized the necessity of a national defense but subjected it to Congress without allowing the military to act unchecked.)

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Navy Clause — Article I, Section 8, Clause 13*Essay by Mackubin Owens (pp. 135–136)*

Although the Founding generation was deeply suspicious of standing armies, standing navies did not elicit the same level of concern. The Navy Clause of the Constitution complements the Army Clause, granting Congress authority over military activities on the seas. Unlike the Army Clause, the Navy Clause does not include a time limit for peacetime appropriations, though Anti-Federalists argued that a navy would provoke Europe. The Navy would protect American commerce, independence, and interests.

The Framers recognized the practicality and importance of a standing Navy when the young nation became embroiled in a series of maritime conflicts with Britain. Despite technological changes, the character of the Navy has changed little from its original design. The biggest changes in the Navy involve defense organization.

**Work in Pairs**

Have students compare and contrast how Federalists and Anti-Federalists viewed standing armies. (Students may say that the Anti-Federalists were strongly against standing armies; standing armies were used to oppress the people. They preferred state militias to defend the nation. While the Federalists also feared standing armies, they saw them as necessary to defend the nation. They worried that the country would be invaded by enemies and its citizens would need protection.) **How did each group view standing navies?** (Standing navies were less controversial. Federalists supported navies because they believed that they were essential to the nation's security; Anti-federalists believed that a navy would provoke European powers and invite war.)

**Active Reading**

Ask: Why would a standing navy be less dangerous than a standing army? (Navies are limited to the sea, so they are less likely than standing armies to infringe upon citizens' rights. The Framers were also aware of the importance of maritime trade.)

**Discussion Question**

Suppose the United States needed to expand the size of its Army and Navy quickly. **How might it do this?** (It could offer incentives to people who enlist in the Army or Navy. It could enact the draft.)

Military Regulations – Article I, Section 8, Clause 14

Essay by David F. Forte and Mackubin Owens (pp. 136–139)

The Military Regulations Clause of the Constitution explicitly gives Congress the plenary power to govern and regulate the military. The main purpose of the clause is to establish a system of military law and justice separate from and outside of the ordinary jurisdiction of the civil courts. Tradition and experience taught the Founders that military discipline required a separate system of jurisprudence.

Military law existed in the United States prior to ratification of the Constitution. In 1775, the Continental Congress adopted codes of military law for the Army and Navy that were based on British codes. Revised systematically several times, the *American Articles of War* remained the basic code for the U.S. Army until 1917, when they were revised again to deal with a mass army of civilian soldiers.

However, some people thought that the *Articles* were too harsh. Criticisms of the *Articles* and the creation of the Department of Defense led Congress to enact the Uniform Code of Military Justice (UCMJ) in 1950. The UCMJ is a series of federal statutes establishing uniform policies, procedures, and penalties within the military system.

Crimes committed by soldiers while on a military base, in a theater of war, or overseas fall under the jurisdiction of the military. Civil courts have deferred to the decision of the military justice system, particularly relating to issues of military orders. Until 1863, military personnel charged with committing civil crimes were turned over to state courts for trial. Congress expanded court martial trials to cover civil crimes. It is questionable whether civilian offenses, such as robbery or rape, committed by military personnel are within a military court's jurisdiction. In most cases, the civilian dependents of a soldier have access to civilian courts. The Military Extraterritorial Jurisdiction Act imposes a federal jurisdiction for other crimes of military personnel charged with civil crimes. In 1987, the Supreme Court ruled in *Solorio v. United States* that the military status of the defendant in a case was sufficient to establish a military court's jurisdiction over the case.

Military courts and tribunals are established pursuant to Congress's Article I, Section 8, Clause 9 powers. These courts do not have the same protections or independence as Article III courts and fall into two categories: martial and military courts of inquiry for military personnel and military commissions and provost courts for civilians under military jurisdiction. The UCMJ established what is now the U.S. Court of Appeals for the Armed Forces. This body is a civilian court with appellate jurisdiction over military justice. It may review decisions from the Court of Military Review.

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Make a Real-Life Connection

Point out that David Forte and Mackubin Owens discuss the controversy about using military tribunals for the war on terrorism and some of the court decisions on the issues. The Supreme Court has upheld the use of military tribunals to try enemy aliens and United States citizens aiding them and has also held that enemy aliens are not entitled to prisoner of war status. The Court later ruled that detainees had access to federal courts because of federal habeas statutes and that U.S. citizens may contest their status of enemy combatant.



Active Reading

Ask: Why did the Framers give Congress the power to make regulations for the military? (The ability to regulate the military was the logical result of the ability to declare war, raise the Army, and maintain a Navy, but the Framers explicitly granted Congress the power to regulate the military. Placing the power in Congress's hands helped to define the roles of the other branches with respect to the military. Congress, rather than the executive or the judiciary, would govern and regulate the military.)



Write About It

Have students use the Internet to research *Hamdi v. Rumsfeld* (2004) and write a paragraph or two about the facts, issues, and ruling of the case.



Discussion Question

Why does the military use special courts to try soldiers instead of simply sending the accused to civilian courts? (The military uses special courts to try offenses that are "service related" in order to make allowances for situations that are not applicable to civilian life, such as military orders and regulations.)

Militia Clause — Article I, Section 8, Clause 15

Essay by Mackubin Owens (pp. 139–140)

The term "militia" refers to a citizen army. The Militia Clause gives Congress the power to call forth the militias to execute laws, suppress insurrections, and repel invasions. The Anti-Federalists favored state control of the militia. The Federalists disagreed. The Militia Clause created a system in which the militias resided in the states but could be called forth by Congress in moments when the nation as a whole was threatened. In the "Calling Forth" Act of 1792, Congress empowered the execu-

tive to call forth the militia in case of invasion; but the use of the militia to combat an insurrection requires a federal judge to certify that the civil authority cannot meet the threat, and the President must order the insurgents to disband before mustering the militia. In 1795, Congress further authorized the President to federalize the militia.

During the War of 1812, state governors challenged the President's authority to call up the militia, claiming that governors, not the President, had the authority to determine a state of emergency. In 1827, though, the Supreme Court affirmed that the President had the exclusive authority to determine whether the emergency was sufficient to call forth the militia. State governors maintain concurrent authority for civil or military emergencies.

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Organizing the Militia – Article I, Section 8, Clause 16

Essay by Mackubin Owens (pp. 141–143)

The purpose of the militia was to protect a state's citizens from other citizens and citizens from the federal government. Anti-Federalists were concerned that Congress would allow the militia to atrophy and therefore advocated an amendment to protect citizens' right to bear arms. The Second Amendment did guarantee the right, but this did not remove Congress's control of the armed forces or the militia. While the militias would still serve their original function at the state level, the Organizing the Militia Clause allows Congress to organize, discipline, and arm the militia for federal purposes. Through this clause, the Federalists sought to make the militia into a national reserve of uniform, interchangeable units.

The Uniform Militia Act of 1792 established an "obligated" militia, in which all able-bodied white men between the ages of 18 and 45 were required to enroll, but this did not accomplish the Federalists' goals. The militia's poor performance during the War of 1812 was the end of the obligated militia. The uniformed militia replaced the obligated militia, and the National Guard replaced the uniformed militia. State control of these units lessened, and the National Security Act of 1916, which made state forces available for duty overseas as well as domestic disturbances, functionally stripped the states of all militia powers. States may call up the National Guard, but the federal government's demands take precedence.



Active Reading

Ask: Your book uses the terms "obligated" militia and "uniformed" militia in very different ways. What do these terms mean? ("Obligated" militia historically applied to all able-bodied white males between the ages of 18 and 45 who were required to serve; "uniformed" militia applied to individuals who chose to serve.)



Check Understanding

Read aloud the quote by Luther Martin on page 139. Ask: **What was Martin's objection to the Militia Clause?** (Martin feared that Congress could unilaterally jeopardize the security of a state by ordering its militia to a distant part of the Union thereby leaving the state effectively defenseless.)



Discussion Question

Why do you think the Calling Forth Act of 1792 allowed the President to call forth the militia in cases of invasion, but required a federal judge to certify that the civil authority could not quell a domestic insurrection before the President could call forth the militia? (Answers will vary. Students should note the difference between an invasion, which threatens the entire nation, and a domestic insurrection, which threatens one state or one city. The Clause allows the President to fulfill his duty to protect the nation, but also prevents the President from abusing militia power in order to interfere in local affairs.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 6, Part 2. Review any material for questions they have missed.

Short answer: Write out your answer to each question.

1. A soldier who commits a crime on a military base will most likely be tried in what type of court? **(military)**
2. Why would Americans living during the time of the Revolution be apprehensive about a standing army? **(There had been many circumstances in history where the "executive" or leader in power used an army to gain rule over the country and set up a dictatorship or empire. They wanted to avoid the possibility of this occurring in the new country.)**
3. In what two fundamental ways has the United States Army changed significantly since the constitutional period? **(its way of mobilizing and its orientation and purpose)**

True / False: Indicate whether each statement is true or false.

1. During the time of the Constitutional Convention, people feared a standing navy more than a standing army. **(False. Because standing armies were on land, they were more likely to infringe upon people's homes and lives. Standing armies were more of a threat than standing navies were.)**

2. The Military Regulations Clause establishes a military system that is separate from the ordinary jurisdiction of the civil courts. **(True)**
3. The Anti-Federalists preferred that states rather than the federal government have control of the militias. **(True)**
4. The Army Clause gave the President control of armies. **(False. The Army Clause gave Congress control of armies.)**
5. The National Guard eventually replaced the uniformed militia. **(True)**
6. Since navies were just as much a tool of tyrants as were armies, the Framers debated whether or not the federal government should maintain a Navy. **(False. Armies were the preferred tool of tyrants, and Navies were therefore considered by the Founding generation to be less dangerous to republican liberty than standing armies.)**

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