



MILITARY POWER AND CONGRESS

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When most people think about who in the United States oversees the military, they think about the president. As commander in chief of the U.S. Armed Forces, the president has wide authority to make decisions that affect the various branches of the military, which is especially true when it comes to fighting an enemy. Determining troop movements or strategy for engaging in combat are classic aspects of the commander in chief power.

But that is not the only military power contained in our Constitution. Indeed, the Constitution gives Congress multiple powers for overseeing the military and ensuring its functionality. These powers are found in Article 1 - the Article that focuses on Congress and its role in our government - and includes the power to provide for the common defense, declare war, raise and support an Army and Navy, make rules and regulations for the military, and to purchase land for military bases.

So how does this divide work in reality? Let's look at two of those powers and see how they have been utilized throughout U.S. history.

The Power to Declare War

The most striking and seemingly straightforward power on the list is the one for Congress to declare war. The principle here is simple: no one person should be able to put the burden of war on the whole country and should instead require the approval of the masses. As U.S. Supreme Court Justice Joseph Story wrote in 1838, "[i]t should therefore be difficult in a republic to declare war; but not to make peace." Hence why the Constitution gives Congress the power to declare war and not the president.

However, like many aspects of American law and history, this seemingly simple and straightforward power is neither simple nor straightforward. Throughout U.S. history, Congress has only declared war 11 times, with the last time being June 1942. Even a casual

observer of the news would note that there have been multiple wars over the last eight decades, so how did they happen without a declaration of war?

This simple answer is that in some cases, Congress gave a different form of authorization (similar to a declaration of war, just by a different name), and in another case, the president went ahead with military action without ever getting congressional approval. In response to these various forms of congressional approval (or inaction), Congress passed the "*War Powers Resolution*." While the law itself has some complexities to it, this was Congress's way to modernize the declaration of war power and to proscribe rules for when the president can use the military to engage enemies in combat.

The Power to Raise and Support an Army and Navy

To quote Joseph Story again, "[t]he power to raise an army is an indispensable incident to the power to declare war; and the latter would be literally [ineffective] without the former." What Story means here is that the power to declare war is essentially meaningless without an Army to fight it. This view led to Congress having the power to establish an Army and Navy and be responsible for paying for it.

This is evidenced by an interaction between George Washington and the First Congress in 1789. In order to transfer the troops provisioned under the Continental Congress to the U.S., Congress needed to pass a law. Because Congress delayed in passing such a law and because he did not believe he had the power to do it as president, Washington sent two separate letters to Congress requesting the passage of the law that would give him an Army. Ultimately, the First Congress passed "*An Act to recognize and adapt to the constitution of the United States, the establishment of the troops raised under the resolves of the United States in Congress assembled and for other purposes, 29 September 1789*," which despite being a mouthful was an accurate description of the law.

A more modern example of this power is the legislative framework for the U.S. Department of Defense and the different branches of the military. Every year, Congress passes a National Defense Authorization Act (NDAA). The NDAA sets forth the policy and funding priorities that Congress has for the military for the next year. Notably, while the president has the power to veto the NDAA, similar to any other bill, the actual policy and funding goals come

from Congress. This can create an interesting dynamic because even when the president vetoes the NDAA, he/she can still be on the hook for enforcing and implementing those provisions if Congress overrides the veto (which is exactly what happened with the most recent NDAA).

The topic of appropriating money for the military can be explored in more depth at a later date, but it is important to stress that Congress is ultimately responsible for raising and supporting the U.S. military. This has been true since the first year of our country's founding and has continued ever since.

Conclusion

As you can see, Congress has a massive amount of influence over the U.S. military. We have yet to discuss the Uniform Code of Military Justice, military courts, U.S. Senate confirmation of high-ranking appointments, differences in power between times of war and peace, and whether to provide forces via a draft or the more modern practice of recruiting volunteers, or the two-year limit on appropriating money for the Army. It suffices to say that there is a lot here that can be examined in more depth in future articles.

Resources

For a discussion on the limited view of the commander in chief power as one that is “purely military” see *Flemming v Page*, 50 U.S. 603.

The U.S. Constitution, specifically Article 1 §8.

Story, J. (1833). *Commentaries on the Constitution of the United States* (Vols. 1–3).

U.S. Senate: About Declarations of War by Congress. United States Senate.

<https://www.senate.gov/about/powers-procedures/declarations-of-war.htm>

The Gulf of Tonkin Resolution. <https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg384.pdf#page=1>

Lindsay, J. M. (2020, June 27). TWE Remembers: Truman’s Decision to Intervene in Korea. Council on Foreign Relations. <https://www.cfr.org/blog/twe-remembers-trumans-decision-intervene-korea>

U.S. Code 50 U.S.C. §1541(a).

For a more thorough description of events surrounding George Washington and the First Congress, see *Today in History - September 29*. The Library of Congress. <https://www.loc.gov/item/today-in-history/september-29/>

McGarry, B., & Heitshusen, V. (2021, January). *Defense Primer: Navigating the NDAA*. Congressional Research Service. <https://crsreports.congress.gov/product/pdf/IF/IF10516/8>

The legislative history of the 2021 NDAA can be found at *Actions - H.R.6395 - 116th Congress (2019–2020): National Defense Authorization Act for Fiscal Year 2021*. Congress.Gov. <https://www.congress.gov/bill/116th-congress/house-bill/6395/actions?q=%7B%22search%22%3A%5B%22H.R.+6395%22%5D%7D&r=3&s=2>



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