

Sec. 8—Powers of Congress

Cls. 11, 12, 13, and 14—War; Military Establishment

vidual;¹⁵⁰¹ in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of executive efficiency nor to entrust the matter solely to a branch so close to popular passions.¹⁵⁰²

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to “declare war.”¹⁵⁰³ Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to insure that the President was empowered to repel sudden attacks¹⁵⁰⁴ without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.¹⁵⁰⁵

An early controversy revolved about the issue of the President’s powers and the necessity of congressional action when hostilities are initiated against us rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Jefferson sent a squadron of frigates to the Mediterranean to protect our ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.¹⁵⁰⁶ Hamilton es-

¹⁵⁰¹ THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 464–465, 470. During the Convention, Gerry remarked that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (rev. ed. 1937).

¹⁵⁰² The Articles of Confederation vested powers with regard to foreign relations in the Congress.

¹⁵⁰³ 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318–319 (rev. ed. 1937).

¹⁵⁰⁴ Jointly introducing the amendment to substitute “declare” for “make,” Madison and Gerry noted the change would “leav[e] to the Executive the power to repel sudden attacks.” *Id.* at 318.

¹⁵⁰⁵ Connecticut originally voted against the amendment to substitute “declare” for “make” but “on the remark by Mr. King that ‘make’ war might be understood to ‘conduct’ it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed. . . .” *Id.* at 319. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. *Cf.* *Talbot v. Seeman*, 5 U.S. (1 Cr., 1, 28 (1801) (Chief Justice Marshall: “The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

¹⁵⁰⁶ MESSAGES AND PAPERS OF THE PRESIDENTS 326, 327 (J. Richardson ed., 1896).