

Sec. 8—Powers of Congress

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

poused a different interpretation, contending that the Constitution vested in Congress the power to initiate war but that when another nation made war upon the United States we were already in a state of war and no declaration by Congress was needed.¹⁵⁰⁷ Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli “and also to cause to be done all such other acts of precaution or hostility as *the state of war will* justify”¹⁵⁰⁸ But no formal declaration of war was passed, Congress apparently accepting Hamilton’s view.¹⁵⁰⁹

Sixty years later, the Supreme Court sustained the blockade of the Southern ports instituted by Lincoln in April 1861 at a time when Congress was not in session.¹⁵¹⁰ Congress had subsequently ratified Lincoln’s action,¹⁵¹¹ so that it was unnecessary for the Court to consider the constitutional basis of the President’s action in the absence of congressional authorization, but the Court nonetheless approved, five-to-four, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact. “The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.”¹⁵¹² The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the enforcement of order against insurgency, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.¹⁵¹³

The view of the majority was proclaimed by a unanimous Court a few years later when it became necessary to ascertain the exact dates on which the war began and ended. The Court, the Chief Justice said, must “refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade

¹⁵⁰⁷ 7 WORKS OF ALEXANDER HAMILTON 746–747 (J. Hamilton ed., 1851).

¹⁵⁰⁸ 2 Stat. 129, 130 (1802) (emphasis supplied).

¹⁵⁰⁹ Of course, Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf. Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

¹⁵¹⁰ *Prize Cases*, 67 U.S. (2 Bl.) 635 (1863).

¹⁵¹¹ 12 Stat. 326 (1861).

¹⁵¹² *Prize Cases*, 67 U.S. (2 Bl.) 635, 669 (1863).

¹⁵¹³ 67 U.S. at 682.