

Sec. 2—Powers, Duties of the President

Cl. 1—Commander-In-Chiefship

sensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it.¹⁸⁴

The President as Commander of the Armed Forces

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why he should do so, and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.¹⁸⁵ As against an enemy in the field, the President possesses all the powers which are accorded by international law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States."¹⁸⁶ In the absence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities.¹⁸⁷ He may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.¹⁸⁸ He may, at least with the assent of Congress, authorize commercial intercourse with the enemy.¹⁸⁹ He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theater of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."¹⁹⁰ By the same warrant, he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions that may determine

¹⁸⁴ See, on proposals to amend and on congressional responsibility, J. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

¹⁸⁵ For a review of how several wartime Presidents have operated in this sphere, see *THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF* (E. May ed., 1960).

¹⁸⁶ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

¹⁸⁷ *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952). See also *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

¹⁸⁸ *Totten v. United States*, 92 U.S. 105 (1876).

¹⁸⁹ *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73 (1875); *Haver v. Yaker*, 76 U.S. (9 Wall.) 32 (1869).

¹⁹⁰ *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852); *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871); *Totten v. United States*, 92 U.S. 105 (1876); 40 Ops. Att'y. Gen. 250, 253 (1942).