

Sec. 8—Powers of Congress

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

on the high seas, and crimes of every grade committed on them while in foreign territorial waters.”¹⁴⁷⁹ Within the meaning of this section, an offense is committed on the high seas even when the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.¹⁴⁸⁰

Clauses 11, 12, 13, and 14. The Congress shall have power

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To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

THE WAR POWER

Source and Scope

Three Theories.—Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in *The Federalist*,¹⁴⁸¹ Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by Article I, § 8. Not many years later, in 1795, the argument was advanced that the war power of the National Government is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.¹⁴⁸² Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In *McCulloch v. Maryland*,¹⁴⁸³ he listed the power “to declare and conduct a war”¹⁴⁸⁴ as one of the “enumerated powers” from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War, the two latter theories were both given countenance by the Supreme Court. Speaking for four Justices in *Ex parte Mil-*

¹⁴⁷⁹ *United States v. Flores*, 289 U.S. 137, 149–50 (1933).

¹⁴⁸⁰ *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 200 (1820).

¹⁴⁸¹ *THE FEDERALIST*, No. 23 (J. Cooke ed. 1937), 146–51.

¹⁴⁸² *Penhallow v. Doane*, 3 U.S. (3 Dall.) 53 (1795).

¹⁴⁸³ 17 U.S. (4 Wheat.) 316 (1819).

¹⁴⁸⁴ 17 U.S. at 407. (emphasis supplied).