

# *Constitutional War-Making Powers*

The United States Constitution grants the power solely to Congress to take the nation into war. The Executive (President) does not have a shred of power granted to him in regards to this most momentous act, nor does an entangling alliance with another nation have the power to automatically draw the nation into war. Article I Section 8 clause 11 of the United States Constitution states:

“Congress shall have Power...To declare War...”

In 1803, St. George Tucker, one of the preeminent constitutional scholars of the founding era of the United States, published his monumental work: *View of the Constitution of the United States*. In that volume, he painstakingly reviews the form of government created by the United States Constitution, the powers granted within that document, and the scope and limits within which each component of the government is to operate. In regards to the matter of war, Tucker notes the following:

“The power declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to Congress; and happy it is for the people of America that it is so vested. The term war, embraces the extremes of human misery and iniquity, and is alike the offspring of the one and the parent of the other. What else is the history of war from the earliest ages to the present moment but an afflicting detail of the sufferings and calamities of mankind, resulting from the ambition, usurpation, animosities, resentments, piques, intrigues, avarice, rapacity, oppressions, murders, assassinations, and other crimes, of the few possessing power! How rare are the instances of a just war! How few of those which are thus denominated have had their existence in a national injury! The personal claims of the sovereign are confounded with the interests of the nation over which he presides, and his private grievances or complaints are transferred to the people; who are thus made the victims of a quarrel in which they have no part, until they become principals in it, by their sufferings. War would be banished from the face of the earth, were nations instead of princes to decide upon their necessity. Injustice can never be the collective sentiment of a people emerged from barbarism. Happy the nation where the people are the arbiters of their own interest and their own conduct! Happy were it for the world, did the people of all nations possess this power.”<sup>1</sup>

During the debates of the Constitutional Convention of 1787, the delegates sought to build into their new constitution the greatest protection against frivolous or unjustified involvement of the nation in war. They sought to make the process for entering into war as deliberative as possible. They sought to place the responsibility for the decision as close to the people as possible, since it would cost the blood and fortune of the people if it were entered into. They sought to remove the ability of one person, or office, to commit the nation to war. They debated and discussed the matter in excruciating detail before arriving at the solution they included in the final form of the Constitution.

Since the U.S. House of Representatives was to be the only department elected directly by the people, and it is constitutionally the department with the power of the purse for the nation, and thus most answerable to the people; and since the U.S. Senate was originally appointed by the respective state legislatures (which state legislatures would be responsible to pay for war by taxing their constituents), the decision was made to require the Congress to declare war if it was to be done.

The founders specifically withheld from the President of the United States the power to commit the United States to war. They did not want to allow conditions to arise under which some future President could act as the monarchs had done in throwing their nations into unjustified war.

So Congress is to determine when the nation goes to war, and only Congress may declare war. The President is the commander of the military, but he has no power to determine when or if the nation goes to war; and Congress constitutionally retains numerous other powers and authority over the armed forces of the nation, including funding decisions, the power to make rules for the government and regulation of the military, the power to mobilize and deploy the Militia, and other important influence. (United States Constitution, Article I Section 8 clauses 11-16)

So, even during war the President of the United States is subject to congressional restraint, and does not possess “plenary” (full and absolute) powers as some have claimed.

James Madison, considered by many to be the “Father of the Constitution,” was an active participant in the Constitutional Convention of 1787. During the debate regarding the war-making powers, he made the following comment regarding the dangers associated with the circumstance of war, the tendency of power to accrue to the Office of the Executive during war, and the concerns he had that war may present opportunities to manipulate trickery and usurpation which would destroy the liberty of the nation:

“In time of actual war, great discretionary powers are constantly given to the Executive magistrate. Constant apprehension of war has the same tendency to render the head too large for the body. A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger have been always the instruments of tyranny at home. Among the Romans it was a standing maxim, to excite a war whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved, the people.”<sup>2</sup>

During the Constitution Convention of 1787, Thomas Jefferson was serving this nation on assignment in France. At the conclusion of the convention, Madison forwarded the new constitution to Jefferson. After he had reviewed the document, Jefferson noted the control placed upon the President in regards to war-making power, and wrote to Madison, saying:

“We have already given, in example, one effectual check to the dog of war, by transferring the power of declaring war from the executive to the legislative body, from those who are to spend, to those who are to pay.”<sup>3</sup>

James Madison continued throughout his life to hold concerns regarding the war-making powers of a nation, expressing his fears of an expanded Executive power during a state of war, and the risks that unremitting war will destroy the freedom of the nation:

“Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people.... No nation could preserve its freedom in the midst of continual warfare.”<sup>4</sup>

Unfortunately, modern Congresses have blatantly disregarded their sole responsibility in the matter of war, lacking the courage to fulfill their constitutionally-mandated duty in this regard. They have failed in the natural tendency to jealously guard their sphere of influence. They have even facilitated the usurpation of power by the Executive branch, claiming that they may delegate their authority in the matter of war to the President, or to please international organizations. Constitutional protocol was well understood by those who founded this nation, and they knew that the authority which was assigned in the Constitution could not legally be delegated to another entity.

Constitutional protocol was well understood by those who founded this nation, and they knew that the authority which was assigned in the Constitution could not legally be delegated to another entity (foreign or domestic). The founders had diligently studied the works of John Locke. John Locke was emphatic in the matter of delegating constitutionally-mandated authority:

“The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, ‘We will submit and be governed by laws made by such men, and in such forms,’ nobody else can say other men shall make laws for them; nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.”<sup>5</sup>

St. George Tucker, one of the preeminent constitutional scholars of the American founding era agreed with that position, stating:

...a delegated authority cannot be transferred to another to exercise.<sup>6</sup>

For many years now, the nation has strayed from these sound principles.

The war-making power of a nation is an awesome force which holds fearsome destructive power. War, particularly modern war, is institutionalized mass murder carried out by the most powerful mortal force on earth—government. While the founders of this great nation knew that the choice of war would sometimes face the nation, or be thrust upon the nation by the wicked

actions of other nations, they wished to constrain and control the natural tendency of human nature to abuse power and exercise it excessively and improperly. The founders had observed the countless times that the destructive forces of war had been unleashed upon humankind by the whim of a monarch or despot, and wished to shield themselves and their posterity, indeed, all of mankind from such a terrible burden, so they devised a marvelous process which would prevent the nation from entering into conflict without a full deliberative process in which the justice, the necessity, the cost, and the facts could be fully reviewed before each member of the Congress solemnly stepped forward and cast their vote in the matter. The founders of this nation fully understood that in matters of war, the blood, the fortune, and the sacred honor of the entire nation is at stake.

For many years now the nation has strayed from these sound principles. If the liberties which were bequeathed to the nation are to be saved, we must immediately restore the foundation upon which the nation was established and built. Congress must again assume its duty in the matter of war, and wrest the war-making power from the hands, both foreign and domestic, which have usurped the congressional Constitutional responsibility.

—Scott N. Bradley

1 - St. George Tucker, *View of the Constitution of the United States with Selected Writings* [1803], ed. Clyde N. Wilson (Indianapolis: Liberty Fund, 1999), Pg. 211

2 - James Madison, *Journal of the Federal Convention*, Vol.1, p.264—p.265

3 - Thomas Jefferson, letter to James Madison, 06 September 1789, Bergh, *Writings of Thomas Jefferson*, vol. 7., pg 461

4 - *Writings of Madison*, Volume 4: 1829-1836, p.491

5 - John Locke, *Second Essay Concerning Civil Government*

6 - Tucker, *View of the Constitution of the United States* Pg. 219 [1803]