

The Senate on Mar. 11, 1959,⁶ and the House on Mar. 12, 1959,⁷ agreed to S. 50 admitting Hawaii into the Union. The House agreed

to S. 50 in lieu of H.R. 4221.⁸ S. 50 was approved on Mar. 18, 1959.⁹

B. WAR POWERS

§ 3. In General

Article I, section 8, clauses 11–14 of the Constitution describe the fundamental war powers of Congress, including:

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;⁽¹⁰⁾

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. . . .

Like all powers of Congress, the war power must also be understood in light of the general grant of legislative authority of article I, section 8, clause 18:

The Congress shall have Power . . .
To make all Laws which shall be nec-

essary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

A more general grant of authority appears in article I, section 8, clause 1, “Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States. . . .”

In addition to these powers, article I, section 8, clauses 15 and 16 grant Congress power over the militia, including:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United

the unanimous-consent agreement to consider S. 50 in lieu of H.R. 4221.

6. 105 CONG. REC. 3890, 86th Cong. 1st Sess.

7. *Id.* at pp. 4038, 4039.

8. See 105 CONG. REC. 4005, 86th Cong. 1st Sess., Mar. 12, 1959, for

9. 73 Stat. 4 (Pub. L. No. 86–3).

10. See §5, *infra*, for a discussion of authority to declare war.

States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. . . .

Closely related to authority to protect the states is article IV, section 4, which imposes duties on the United States without specifying a particular political department:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

Significant among constitutional grants of authority are provisions relating to raising and supporting an army and providing and maintaining a navy. Pursuant to this authority Congress prohibited use of conscripts and reserves beyond the Western Hemisphere prior to World War II⁽¹¹⁾ and prohibited expenditure or obligation of funds for military purposes in certain countries of Indochina during the conflict in Vietnam.⁽¹²⁾

Article II, section 2, clause 1 provides that, "The President shall be Commander in Chief of

- 11. See §§9.4, 9.5, *infra*, for illustrations of these restrictions.
- 12. See the precedents in §10, *infra*, for these restrictions.

the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ."

The precedents in this division focus primarily on congressional authorization of and limitations on use of force by the Commander in Chief.⁽¹³⁾

Although the Supreme Court has declined to pass on the constitutionality of the "peacetime" draft, lower courts have uniformly held that the congressional power to raise armies is not limited by the absence of a declaration of war.⁽¹⁴⁾ In upholding a statute prohibiting destruction of a selective service registrant's registration certificate, Chief Justice Warren, speaking for the court majority, observed that, ". . . the power of Congress to classify and conscript manpower for military serv-

- 13. See §§5, 8, *infra*, for discussion of the authorization of use of force by declaration of war and by statute, respectively; and §§9, 10, *infra*, for precedents relating to restrictions on use of force.
- 14. Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong. 2d Sess., p. 331 (1973). See, for example, *Hart v United States*, 382 F2d 1020 (3d Cir. 1967), cert. denied, 391 U.S. 956 (1968); and *United States v Holmes*, 387 F2d 781 (7th Cir. 1967), cert. denied, 391 U.S. 936 (1968).

ice is 'beyond question.'"⁽¹⁵⁾ In a dissent, Justice Douglas denied that the question of peacetime conscription was settled.⁽¹⁶⁾

Wartime conscription does not deprive the states of the right to a well-regulated militia or violate the 13th amendment which prohibits involuntary servitude.⁽¹⁷⁾ In making this determination, the Supreme Court rejected the contention that congressional power to exact compulsory service was limited to calling forth the militia for the three purposes specified in the Constitution,⁽¹⁸⁾ despite the fact that none of these purposes explicitly comprehend service abroad.

The sections in this division focus on the role of Congress in

15. *United States v O'Brien*, 391 U.S. 367, 377 (1967). The internal quotation was taken from *Lichter v United States*, 334 U.S. 742, 756 (1948) which upheld the wartime renegotiation Act as a constitutional exercise of the authority of Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."
16. *United States v O'Brien*, 391 U.S. 367, 389 (1967). See his dissent to the denial of certiorari in *Holmes v United States*, 391 U.S. 936 (1968).
17. Selective Draft Law Cases, 245 U.S. 381 (1918).
18. *Id.* These purposes are to execute the laws of the Union, suppress insurrections, and repel invasions. See U.S. Const. art. I, §8, clause 15.

committing troops to hostilities, and include discussion of institutional means to insure congressional judgment in such circumstances;⁽¹⁹⁾ declarations of war;⁽²⁰⁾ authorization of use of force and activation of reserves by legislation short of declarations of war;⁽¹⁾ restrictions on use of force and deployment of troops before World War II⁽²⁾ and during the Vietnam era;⁽³⁾ receipt of Presidential messages;⁽⁴⁾ and publication of Presidential proclamations.⁽⁵⁾

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19. § 4, *infra*.

20. §§ 5-7, *infra*.

1. § 8, *infra*.

2. § 9, *infra*.

3. § 10, *infra*.

4. § 11, *infra*.

5. § 12, *infra*.

6. The articles in this section relate to war powers generally. See collateral references in § 4, *infra*, War Powers Act, and § 10, *infra*, Vietnam Era Restrictions on Military Activity, for articles relating to these areas.

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Termination of State of War With Germany

§ 3.1 The House and Senate agreed to a House joint reso- lution terminating the state of war between the United States and the government of Germany.

On July 27, 1951,⁽⁷⁾ the House by a vote of yeas 379, present 1, not voting 53, agreed to a House joint resolution, terminating the state of war between the United States and the Government of Germany. On Oct. 18, 1951,⁽⁸⁾ the Senate by voice vote passed the measure⁽⁹⁾ which was approved by the President in the following form:⁽¹⁰⁾

JOINT RESOLUTION 289

To terminate the state of war between
the United States and the
Government of Germany.

*Resolved by the Senate and House of
Representatives of the United States of*

7. 97 CONG. REC. 9036, 9049, 9050, 82d Cong. 1st Sess.
8. 97 CONG. REC. 13438, 13443, 82d Cong. 1st Sess.
9. See 97 CONG. REC. 13785, 82d Cong. 1st Sess., Oct. 20, 1951, for notification to the Clerk of Presidential approval.
10. This excerpt is taken from 65 Stat. 451, 82d Cong. 1st Sess. (Pub. L. No. 82-181).

America in Congress assembled, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however*, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

Approved October 19, 1951.

Attorney General's Opinion Re- garding President's Authority to Exchange Ships for Bases

§ 3.2 The House received an opinion of the Attorney General outlining the President's authority to acquire offshore naval and air bases from Great Britain and transfer

American destroyers to Great Britain.

On Sept. 3, 1940,⁽¹¹⁾ the House received an opinion from the Attorney General⁽¹²⁾ as to the authority of the President to enter into agreements for the acquisition of offshore military bases (see below). The opinion accompanied the President's message regarding the agreements in question.⁽¹³⁾

AUGUST 27, 1940.

The PRESIDENT,
The White House.

MY DEAR MR. PRESIDENT: In accordance with your request, I have considered your constitutional and statutory authority to proceed by Executive agreement with the British Government immediately to acquire for the United States certain offshore naval and air bases in the Atlantic Ocean without awaiting the inevitable delays which would accompany the conclusion of a formal treaty.

The essential characteristics of the proposal are:

(a) The United States to acquire rights for immediate establishment and use of naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, Santa Lucia, Trinidad, and

British Guiana, such rights to endure for a period of 99 years and to include adequate provisions for access to and defense of such bases and appropriate provisions for their control.

(b) In consideration it is proposed to transfer to Great Britain the title and possession of certain over-age ships and obsolescent military materials now the property of the United States and certain other small patrol boats which, though nearly completed, are already obsolescent.

(c) Upon such transfer all obligation of the United States is discharged. . . . [Our Government] undertakes no defense of the possessions of any country. In short, it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance.

The questions of constitutional and statutory authority, with which alone I am concerned, seem to be these:

First. May such an acquisition be concluded by the President under an Executive agreement, or must it be negotiated as a treaty, subject to ratification by the Senate?

Second. Does authority exist in the President to alienate the title to such ships and obsolescent materials; and if so, on what conditions?

Third. Do the statutes of the United States limit the right to deliver the so-called mosquito boats now under construction or the over-age destroyers by reason of the belligerent status of Great Britain? . . .

Accordingly you are respectfully advised:

(a) That the proposed arrangement may be concluded as an Executive

11. 86 CONG. REC. 11355-57, 76th Cong. 3d Sess.
12. See Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 *American Journal of International Law* 690 (1940).
13. See §11.7, *infra*, for the text of the President's message.

agreement, effective without awaiting ratification.

(b) That there is Presidential power to transfer title and possession of the proposed considerations upon certification by appropriate staff officers.

(c) That the dispatch of the so-called mosquito boats would constitute a violation of the statute law of the United States, but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery.

Respectfully submitted.

ROBERT H. JACKSON,
Attorney General.

§ 4. War Powers Act

To ensure proper legislative branch participation in decisions to deploy American forces, legislation on war powers was introduced in the 91st and 92d Congresses.⁽¹⁴⁾

In 1973 the House approved House Joint Resolution 542. The Senate struck all after the enacting clause and inserted in lieu thereof the language of S. 440. Following a conference, a compromise between the House and Senate versions was agreed to.⁽¹⁾

14. See, for example, H.J. Res. 1355, 91st Cong. 2d Sess. (1970); S. 2956, 92d Cong. 1st Sess. (1971); H.J. Res. 1, 92d Cong. 1st Sess. (1971); S. 731, 92d Cong. 1st Sess. (1971).

1. See §4.2, *infra*, for the vote overriding the President's veto of the compromise, H.J. Res. 542.

The conferees resolved a major difference in the two measures which related to defining the authority of the Commander in Chief to deploy troops. S. 440, section 3, provided that in the absence of a congressional declaration of war armed forces could be introduced only in certain circumstances, including repulsion of an armed attack, protection of American citizens being evacuated in situations of danger abroad, and pursuant to specific statutory authorization. Sections of the Senate bill which related to reporting, period of commitment, termination dates, and congressional procedures were expressly tied to section 3. House Joint Resolution 542 did not contain a similar provision.

Section 2(c) in the "Purpose and Policy" provisions of the resolution agreed to by the conferees states:

The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Unlike the Senate bill, no subsequent section of the resolution re-