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## What's So Great About the Declare War Clause?

Matthew C. Waxman  
*Columbia Law School*, [mwaxma@law.columbia.edu](mailto:mwaxma@law.columbia.edu)

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# *What's So Great About the Declare War Clause?*

MATTHEW C. WAXMAN

Review of Noah Feldman, *The Three Lives of James Madison: Genius, Partisan, President* (Harper Collins, 2017)

## I

I have long believed two things about constitutional war powers, which my reading of Noah Feldman's "[The Three Lives of James Madison](#)" largely confirmed. First, James Madison was brilliant and prescient about many things, but the strategy and politics of war were not among them. Second, modern constitutional critics of an imperial presidency place too much weight on the declare war clause—and especially Madison's statements about it.

Madison, indeed, worried deeply about unchecked presidential war powers. But Feldman's book shows that Madison did not emphasize the same risks and checks so often ascribed to him today, especially by congressionalists who invoke Madison's statements about war-initiation.

### *Feldman's Madisons*

Let me start with a preliminary note about the book, which I really enjoyed. Discussions of constitutional war power issues make up only a very small part of the

book, but they are important moments. I also interpret some of the relative silence about war powers as itself revealing.

Feldman divides the book into three "lives" of Madison: genius, partisan, and president. Those descriptors largely correspond to three periods of Madison's tremendous constitutional influence. The first focuses on Madison as constitutional architect, in which he devoted his potent intellect to solving, through structural divisions and overlapping powers, a core dilemma: how to centralize certain powers needed for the new republic to survive and thrive, while at the same time preserving broad distribution of power, including among the states. The second describes Madison as a political partisan in Congress—one who originally feared the rise of "factions" but comes to lead one with Jefferson, "the Republicans," against Alexander Hamilton and "the Federalists." The third covers Madison as a foreign policy executive, including eight years as President Jefferson's secretary of state and

eight years as president. Much of that decade and a half is spent wrestling with how to protect U.S. interests against stronger foreign powers, ultimately including waging a Second Revolutionary War against Britain (the War of 1812) that Madison had tried unsuccessfully to avoid.

Feldman's book traces several evolutions in Madison's thinking, including his thinking about war. Overall it is a story of grand theory and idealism yielding some ground to experience and pragmatism. I came away from it unimpressed by Madison's early thinking about war powers but respecting his willingness to revisit and even reverse some of his prior assumptions while also holding firm to certain key principles.

*Madison and War Powers in Theory*

Tellingly, the declare war clause doesn't feature heavily in the book. It doesn't really come up at all in Feldman's story of Madison's first "life" as constitutional inventor. That is because Madison expected other, more important structural checks to operate before war declaration even became an option. It's Congress's control of spending on military preparedness and the preservation of state militias that appear many times, that loom much larger in Madison's thinking about checks, and that were nearly his own undoing as commander in chief.

Pretty much every student of the U.S. Constitution knows that the declare war clause (Article I, Section 8, Clause 11) grants Congress the power to declare war. Less remembered and certainly less discussed these days is that the militia clauses then provide that Congress shall have power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" (Clause 15) and 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 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" (Clause 16).

The militia clauses should be read in tandem with the Army and Navy clauses, which give Congress the powers to "raise and support Armies" (Clause 12) and to "provide and maintain a Navy" (Clause 13). The Army clause contains an important restriction—a restriction applicable to only one power—that "no Appropriation of Money to that Use shall be for a longer Term than two Years."

Article II Section 2 later familiarly states that, in addition to holding "the Executive power," the President "shall be Commander in Chief of 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."

Though Part I of Feldman's book hardly mentions the declare war clause—and with it, the broader issue of war initiation—I suspect this is not because Madison the constitutional architect thought it unimportant. Quite the contrary, he and many other drafters thought it so clearly necessary that it didn't generate as much debate or require as much defense as some other provisions related to war and defense—even though it was quite a radical departure from the British system and predominant thinking. True, there was some disagreement (a small minority of delegates proposed vesting the power to declare war in the president or the Senate, and there is a famous moment when a proposal that Congress be given power to "make war" was changed to "declare" it). But Madison and most other constitutional architects who thought it much safer to place the war declaration power in Congress's hands met with little resistance, and therefore didn't need to devote much energy to defending that allocation or its precise boundaries. In fact, from the framing and ratification periods we have very little hard evidence of what Madison said about the declare war clause's meaning, let alone what he really thought.

Far more than the declare war clause, Feldman's account of Madison's thinking and influence focuses on Congress's other powers over military resources as well as the Militia Clauses. Madison and many fellow Republicans saw peacetime demobilization of military forces—much of them remaining in the form of local, part-time citizen-soldiers organized primarily at the state level—as the more significant check on war-making. Today we are used to thinking about congressional control over military purse-strings as, if anything, mostly a back-end check, or a tool that Congress might try to wield to terminate military adventures. Madison saw it as a front-end check, too, denying the president much actual military power without Congress's considered support.

That is, rather than seeing the declare war clause as *the* key brake on aggressive or unnecessary presidential war-making, Madison saw it as one among layers of checks. At least as important, and probably more important, were structural checks on the very instrument of war-making: namely, an army.

Madison did not expect Congress to raise and support much of an army in peacetime. He and fellow Republicans expected state-level militias to provide much of the defense forces necessary to supplement a small national force. And militias were—in both practical and legal senses—necessarily defense forces: In accordance with ancient British tradition, the militia clauses restricted their national role to executing law, suppression insurrections, and repelling invasions. Madison never went as far as some Republicans who wanted the Constitution to forbid a peacetime standing army altogether (see his debate with fellow Virginian Patrick Henry at page 235 of Feldman's book). But the Army clause contains a two-year appropriation rule to make sure that, even if an army was created and the president was provided by Congress—or assumed authority—to use it, funding for those troops would run out quickly if Congress did not replenish it.

Although Feldman doesn't discuss this part of Madison's *Federalist* 41, it is in that essay that Madison describes these interlocking checks. Madison starts by quickly dismissing any question of whether the national government must have the power to declare war—"No man will answer this question in the negative"—but he doesn't bother here addressing which branch holds that power, because his primary concern here is the instruments of war. Madison's main point is that the Constitution was designed to make a large standing army unnecessary and unlikely.

For starters, Madison argues in *Federalist* 41, "[t]he distance of the United States from the powerful nations of the world"—the Atlantic oceanic moat—would provide a first line of defense. Next, "[t]he Union itself which [the Constitution] cements and secures, destroys every pretext for a military establishment which could be dangerous. America, united with a handful of troops, or even without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with one hundred thousand veterans ready for combat." This last point is a Madisonian assumption that Feldman points out throughout his book: A single, united republic would be such an economic powerhouse and trading partner that extensive national-level military institutions could remain small. "Next to the effectual establishment of the Union" itself as a check, Madison continues, "the best possible precaution against danger from standing armies, is a limitation of the term for which revenue may be appropriated to their support." The Army clause was carefully designed so that no appropriations for it could last longer than any House of Representatives term.

I've wondered in the past how seriously to take these arguments in the *Federalist*: was this truly Madison's thinking or political salesmanship? I find convincing the account in Richard H. Kohn's *Eagle and Sword: The Federalists and the Creation of the Military Establishments in America, 1783-1802* that most of the Framers, and

especially those who experienced the Revolutionary War first-hand, regarded a national army as necessary and the militia system as no substitute (see Kohn's chapter 5). But Feldman's book suggests throughout that Madison's own concern about standing military establishment and his faith in militias were actually quite strong and genuine—even if not to the same extent as more hardcore Republicans.

In sum, Madison's thinking about war powers—perhaps better termed “defense powers”—reflected two basic policies. One was opposition to offensive or aggressive war. The other was aversion to a large standing army. These were closely related, because Madison, like other Republicans, saw standing armies as tools of aggressive war, and both wars and standing armies threatened balances and limitations of domestic governance. Madison and many Republicans were concerned about aggressive war and standing armies not just because they opposed costly, militarily hawkish foreign policy but because they feared resulting tyranny at home.

As Feldman puts it:

To Madison, the message for Americans was to avoid war, which not only destroyed lives, wasted treasure, and corrupted morals, but destroyed “the equilibrium of the departments of power.” This was a typically Madisonian argument: War was hell—especially because it broke down the separation of powers. Even the mere threat of war could produce the same results: “An alarm is proclaimed—Troops are raised—Taxes are imposed—officers military and civil are created.” Then, even after “the danger is repelled or disappears,” the standing army, the taxes, and the government offices ripe for political corruption would all persist. (423)

With these *internal* dangers of war—and even preparedness for war—in mind, Madison envisioned a set of overlapping checks that operated prior to any war declaration process (and afterwards if

necessary).

This vision sets up one of the great Madison-Hamilton divides over grand strategy and the Constitution that continues throughout American history. For Madison, some limited, standing military establishment was necessary, but too much of it would result in unwarranted militarism. His rival Alexander Hamilton feared too little of it would undermine deterrence and invite aggression by others.

## II

Madison's theory of war powers was focused heavily on internal dangers to liberty and republican governance from war or standing armies. The allocation of the declare war power to Congress played only a small role in his theory. More important were structural checks on national-level military establishments, especially constitutional provisions that preserved state militias as the primary source of military manpower and that required Congress to fund—and then keep funding—a national army. Without an army, the president couldn't fight a war regardless of where the declare war power laid.

Despite some important continuities, many of parts of Madison's theory failed in practice during the early republic, including his own presidency.

### *Madison and War Powers in Practice*

Even in an 18th-century world in which the international legal distinction between war and peace was sharper than it is today, Madison seemed caught off guard during the Washington and Adams administrations by the degree to which presidents could make major decisions for the nation about war absent any declaration by Congress. Upon his own rise to the presidency, the state militia system in which he placed much faith betrayed him.

### *Neutrality Controversy*

The first major war episode that Feldman details is the 1793 Neutrality Controversy, in which President Washington

unilaterally announced a policy of impartiality in the European war, rejecting the view of Jefferson and substantial public opinion that the United States should align with France. To Washington and his chief adviser Hamilton, this exercise of presidential executive and diplomatic powers was, in effect, declaring “*not war*”—but to opponents like Madison it was a usurpation of power over war/peace decisions, nonetheless.

This was Madison’s first big practical lesson that the movement from baseline peace to exceptional war can take many non-linear paths. The express provisions of the Constitution—in particular the declare war clause—would cover only some of them.

In my view Hamilton bested Madison in their dueling constitutional commentary during this incident under the pseudonyms Pacificus and Helvidius. Feldman also points out, however, that the embryonic executive branch was already nimble enough to exercise foreign policy leadership, and to fill in constitutional gaps through its actions. Arguments were important, but deeds were establishing precedents for expanded presidential diplomacy regarding war and peace. This was especially true during the so-called “Genêt affair,” when the French minister to the United States tried to undermine American neutrality by commissioning privateers and threatening to take his case directly to the public. “The theoretical nature of Madison’s constitutional critique of Pacificus was particularly ill-timed,” writes Feldman. “As Madison was ruminating about obscure details of the separation of powers, Hamilton was turning the Genêt affair into concrete political gain.” (Page 381).

#### *Quasi-War with France*

During the first Adams administration, the United States and France waged an undeclared military conflict mostly at sea (1798-1800). French attacks on American shipping, especially in the West Indies, combined with other factors leading to

armed hostilities. Congress provided the executive branch with naval and other military resources and authorized, in an escalating series of legislative acts, more and more forceful measures.

Note that this was primarily a naval conflict, which itself posed some challenges for Madison’s war powers ideas (which were mostly about armies). President Adams had to convince Congress to continue funding a Navy, and he was cautious to get specific authorization for using it. But that was probably an easier political lift than supporting ground hostilities, because armies were generally seen as a greater risk to liberty (a feature that, besides the need for longer-term capital investment, is probably one reason why the Navy Clause does not contain the Army’s two-year limitation).

During that episode, Madison penned a letter to Jefferson in which he famously wrote his strongest statement about the declare war clause:

The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the legislature. (Page 424, citing a 1798 letter to Jefferson).

In some ways it is no surprise that Madison emphasized Congress’s war power here: Having realized what presidents could do without formally declaring war, he emphasized more than before that Congress should be in charge.

Modern-day lawyers who oppose unilateral resort to armed force by the president often cite this statement about the war declaration power in support of their views. But Feldman’s book places it in context. The legislature was, in fact, already quite involved in decision-making, having fulfilled requests for armaments and authorized limited military actions. Moreover, Adams was actually struggling to avoid open conflict with France, not

baiting the nation into one.

Madison seems blinded to these factors because he wanted war to be a binary condition—we were either at (declared) war or not. He thought that approach would make war easier to control. “Madison reviled the idea of undeclared war,” explains Feldman (Page 414). That’s why Madison says the framers “vested *the* question of war in the legislature” (my emphasis). It is also why he goes on to say that “the doctrines lately advanced,” by which he means congressional authorization of limited military actions without declaring war, “strike at the root of all these provisions, and will deposit the peace of the country in that department which the Constitution distrusts as most ready without cause to renounce it.”

But the Constitution needed to better fit the realities and strategy of conflict, not the other way around. And those realities included that interstate conflict entails a set of moves and countermoves, threats and counter-threats, only sometimes resulting in full-scale conflict for which a legal declaration would be advantageous.

#### *Madison’s First Term as President*

Madison served as secretary of state throughout the Jefferson administration, during which the United States was pushed around by Britain on many fronts, including in maritime commerce. Feldman describes in detail how Madison and Jefferson sought and failed to negotiate British concessions through economic coercion, and Madison inherits the challenge when elected president.

Notwithstanding these and other security challenges, in his 1809 inaugural address, Madison clings to his republican concerns about centralized military establishment, warning that a standing army was a danger to liberty and must therefore be kept “within the requisite limits” while “remembering that an armed and trained militia is the firmest bulwark of republics” (504).

As Feldman notes, of course, “[w]ar was not a viable option for a republic without a

standing army” (504). That may not have seemed so problematic to Madison, who had no intention of going to war. But coercive diplomacy or deterrence backed up by the threat of force were not possible without a standing army, either. Nor was an aggressive foreign economic policy that risked escalating to or provoking war.

So by 1811 Madison had learned a key strategic lesson that cuts at his republican theory of war powers: that a standing military may be necessary for strategies—like deterrence, or threatening an escalation of economic measures—that could prevent war. “With every avenue of economic sanctions apparently exhausted, all that remained to alter British policy was war.” Feldman continues, “Ideally, Madison would not actually have to use force, just threaten it. To threaten credibly, however, Madison would need to motivate Congress to create a functional military” (529)—something he had stood against.

#### *War of 1812*

Having exhausted every form of economic coercion he could muster, Madison turned in 1812 to Congress for a war declaration, which passed narrowly in both houses. Although United States ultimately emerges victorious, it suffered major setbacks throughout the war, including the burning of Washington, D.C. Feldman notes that “Congress had refused to give Madison the troops he needed. Most of the public had refused any sacrifice and avoided military service. The militia had frequently fled the field. The regular army had performed doubtfully at best” (606-07).

The biggest military blunders involved reliance on state militias, which Madison’s republican theory of war powers placed at the center of national defense. His military strategy entailed invasion of Canada, but New York militiamen refused to cross the border, arguing that constitutionally they could not be sent abroad on offensive campaigns (recall that the militia clauses restrict the purposes for which Congress can call them forth: “to execute the Laws of the Union, suppress Insurrections and

repel Invasions”). Those militias that were willing to cross the Canadian border fought poorly—as one might expect of forces designed for local defense. Madison “was beginning to recognize that the federal government might not be able to rely on militia as he expected” (552).

Eventually the United States repulsed British forces and scored enough victories to force a negotiated settlement. Feldman describes how, in an important concession to his experience over prior assumptions, Madison acknowledged in a post-war speech to Congress that: “Experience has taught us” ... that the “pacific dispositions of the American people” and “their political institutions” would not exempt the United States from the need to fight wars. “A certain degree of preparation” was “indispensable to avert disaster” and would also give “the best security for the continuance of peace” (607).

Madison’s proposals, ultimately adopted by Congress, called for a modest standing army (on the order of ten thousand troops) and a small standing Navy. “The recommendations were altogether logical in the light of the experience of the previous decade” (607)—not only the military setbacks during the war but the efforts to avoid war to begin with.

This concession to standing national forces struck a balance in the decades that followed between defense needs (and even some territorial expansions through force) and concerns about domestic centralization of power. But it also laid the seeds for greater and greater presidential discretion in foreign policy as those standing forces grew larger.

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Reality was tough on Madison’s theory of war powers. Madison never proposed a wholesale departure from reliance on structural mechanisms to ensure that defensive measures would not encroach on American liberties, but he realized the limits of his assumption that opening up trade would prevent war. He came to accept that significant adjustments in how

those structural checks operated were inevitable. The executive branch was filling gaps in clear constitutional allocations of war-related powers. Clear delineations between war and peace were poorly matched with the realities of conflict. Heavy reliance on state militias had to give way to standing national forces.

### III

“Congressionalists”—or those who hold that Congress must authorize any significant, hostile military intervention—often overstate the historical importance of the Declare War Clause and overvalue Madison’s arguments for that position. Indeed, many of today’s congressionalists are doing what Madison did when he was out of Congress and watching President Adams wage an undeclared war against France: falling back on formal text when constitutional structure wasn’t working as they would hope.

#### *The Congressionalist View and Madisonian War Powers*

I do not mean to suggest that the congressionalist view is singular and unified; there are variations of it, with different thresholds, standards, and normative justifications. And my intent here is not to litigate the entire debate between congressionalists and presidentialists, who hold that the president has vast unilateral power to use military force.

I do, however, think Feldman’s book helps to debunk some common myths that congressionalists often deploy. It also bolsters several arguments that Philip Bobbitt makes in his incisive review of John Hart Ely’s “War and Responsibility” (Michigan Law Review, 1994). Among Bobbitt’s most important points is that, yes, the framers intended war to be legislatively authorized, but that legislative authorization role is more complex and broader than the declare war clause. Moreover, if we take Congress’s other war-related powers seriously—in particular, its control over creating and equipping the military—we cannot just

ignore the fact that Congress *has* affirmatively authorized a standing military force without putting restrictions on it.

Congressionalists sometimes begin by noting that the declare war clause—and, they argue by extension, the decision to initiate military conflicts—was among the most important power constitutional allocations decided by the framers. Louis Henkin asserted in his “Foreign Affairs and the U.S. Constitution” that “[t]o the Constitutional Fathers, one might guess, the most important power in foreign relations was the power to declare war.” In his account of the Framers’ allocation of powers in “The Imperial Presidency,” Arthur Schlesinger called the declare war clause “of prime importance.”

This is exaggerated and ahistorical, at least as to Madison. Of greater importance to Madison and his fellow Republicans were the Constitution’s allocation of and limitations on war-waging tools: congressionally checked spending on military instruments (the Army Clause) and reliance on state militias for military manpower (the militia clauses).

Returning, however, to the declare war clause, perhaps no quotation on war powers by Madison gets more attention than this one, discussed in the previous essay: “The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the legislature.” It is one of those statements so venerated by many lawyers because Madison said it; it must therefore be compelling.

There are many reasons to question the persuasiveness of that statement, however. As explained in the previous essay, Madison pens it during an episode—the Quasi-War with France during the John Adams administration—in which Congress *had* extensively deliberated and legislated about the military action, and the

president’s strategy is best understood as intended to avoid full-scale war. More generally, given how wrong Madison turned out to be about the strategy of war-prevention and the wielding of war threats, the politics of going to war, and the defensive needs even of the early Republic in which he served, it is surprising that so much stock is placed on these words.

#### *Declare War Clause as the Key Check?*

In any event, congressionalists often take the view that the Constitution was and should be designed to make it hard to initiate war. They interpret the declare war clause as a brake—or a second congressional key that must be turned—on initiating military conflict.

Elsewhere, from a strategic perspective, I have written about how this view vastly oversimplifies war-prevention. Empirically, political scientists have shown that even absent formal congressional declarations and authorizations of force, Congress still wields substantial influence over presidential decisions to use force. From a historical perspective, Feldman’s Madisons illustrate that if the Constitution was designed to make war difficult to initiate, the declare war clause was never expected to do all, or even a lot, of that work itself.

Feldman’s story ends with the erosion of other checks—most significantly the acceptance of a standing, national army, which gave presidents more unilateral freedom of action. This has ever since put a lot of strain on the declare war clause as a final check. It has also produced the illusion that the declare war clause is Congress’s key power—and a dangerously degraded one—rather than seeing Congress as continually exercising the other important war powers vested in the legislature. As Bobbitt describes it:

Recall now that Congress’s role in raising armies was, in the original contemplation of the Framers, by no means routine. The Framers did not anticipate that the United States would employ a large standing army, or

that Congress would have to declare war before raising one. Funding armed forces was deemed to be of such significance that any decision to field an army had to be revisited every two years (1390).

Bobbitt continues:

What confuses us today is the presence of standing armies whose authorizations and appropriations have become more or less routine, even permanent parts of the statutory background. Thus members of Congress are inclined to feel they have authorized nothing—certainly not hostile action—when they have approved large, heavily armed forces whose only justification can be that they are prepared to fight (1390).

In other words, it is in part because other checks on presidential war-making no longer operate as originally envisioned that the declare war clause now seems of towering importance—it is, to many critics of imperial presidentialism, the last check standing.

But if the relative importance of the declare war clause over other war power checks has increased over time, a final lesson is that the stakes of that power allocation have changed dramatically since the founding era, too. It is usually assumed that the risks associated with war-initiation powers have increased because war itself has become so much more potentially destructive. But in other ways the stakes are much lower today than Madison assumed.

Madison was concerned, of course, with the foreign policy consequences of war, but Feldman's book shows that his bigger concern was internal power balances. He was concerned about the centralizing effect of war on the instruments of government and war preparation as well as about the aggrandizement of executive power. But as the growth in standing U.S. military forces have enabled greater presidential discretion in U.S. security policy abroad, the growth of the federal administrative

state, as well as expanded emergency powers independent of war, have also given the modern president levers of internal control unimaginable to Madison.

Put another way, Madison feared that presidents would be prone to war justify their accumulation of resources and power domestically; but modern presidents already have so much of that at their disposal. Sure, war is used to justify additional exceptional measures (such as expanded wartime detention or surveillance powers) and there may be other political reasons why presidents might find war advantageous. But a state of war no longer unlocks anywhere near the otherwise-sealed domestic presidential power that it might have before the modern administrative and national security state.

### *Conclusion*

To be clear, my point here is not an outright defense of presidentialism, or that congressionalists are wrong to push for stronger legislative involvement in force authorization. I think Congress does not exercise its powers over war as much as it should. My point is, rather, to cast doubt on undue veneration for Founding Era statements, especially taken out of their historical and strategic context, and on a false formalism with regard to the declare war clause that many congressionalists would not apply to other provisions.

Feldman's Madison is one who was prepared to acknowledge—eventually—that some of his war power principles needed to be adapted to experience and strategic reality. Those who revere Madison today ought to bring that same adaptive approach to interpreting constitutional war powers, including the declare war clause.

Matthew C. Waxman is the Liviu Librescu Professor of Law at Columbia Law School.

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