



# CONSTITUTIONAL ACTION REPORT

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HOWARD PHILLIPS, PRESIDENT

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## UNDECLARED WARS TEND TO BE “NO-WIN” WARS

The U.S. Constitution clearly gives to Congress, and only to Congress, the power of declaring war. Article I, Section 8 states “The Congress shall have Power . . . to declare War”. The debate that took place in the Constitutional Convention on August 17 reached a deliberate conclusion that Congress should make the decision to go to war and the President should be assigned the task of carrying out the war, once declared. The only exception was a defensive one, allowing the President to fight off sudden attacks.<sup>1</sup>

The United States has gone to war five times through such a declaration. However, the last formal declaration of war took place on June 5, 1942, when Congress added Bulgaria, Hungary, and Romania to the list of enemy nations.<sup>2</sup> All wars fought since 1945 have been undeclared wars, entered into through Presidential decisions and actions.

Unfortunately, the history of undeclared war is almost as old as the Constitution itself. Both President John Adams and President Thomas Jefferson carried on wars without an official declaration from Congress. However, it is worth noting that both of those Presidents did get Congressional authorization of a different sort.

### THE WAR WITH FRANCE, 1798-1801

When Adams became President in 1797, relations between the United States and France had become greatly strained by the Jay Treaty, which made many concessions to Britain. France began to retaliate against American ships, capturing and confiscating them. Adams dealt with the problem by sending a three-man diplomatic team to negotiate a settlement.<sup>3</sup>

On March 4, 1798, President Adams received news that negotiations with France had broken down, that French plundering of American commerce would not end, and that France was threatening to go to war against the U.S. Attorney General Charles Lee gave his opinion that a declaration of war was now the only proper response.<sup>4</sup> President Adams sent Congress a message on March 12, 1798, calling upon Congress to pass laws necessary “for the protection of our seafaring and commercial citizens, for the defense of any exposed portions of our territory, for replenishing our arsenals, establishing foundries and military manufactures, and to provide such sufficient revenue as will be necessary to defray extraordinary expenses and supply the deficiencies which may be occasioned by depredations on our commerce” but not asking for a declaration of war.<sup>5</sup>

Congress acted swiftly. Laws were passed increasing the size of the navy, arming merchant ships, enlarging the regular army, creating the Navy Department, fortifying harbors, acquiring arms, authorizing a Provisional Army to supplement the regular army, and assisting the militia. A final act allowed the President to

<sup>1</sup> Farrand, Max, ed., *The Records of the Federal Convention of 1787, Vol. II* (Yale University Press, 1937), pp. 317-320.

<sup>2</sup> Hull, Cordell, *The Memoirs of Cordell Hull, Vol. II* (The MacMillan Company, 1948), pg. 1176.

<sup>3</sup> McCullough, David, *John Adams* (Simon & Schuster, 2001), pp. 474 and 477 and Dupuy, R. Ernest and Baumer, William H., *The Little Wars of the United States* (Hawthorn Books, 1968), pp. 6-7.

<sup>4</sup> Elkins, Stanley & McKittrick, Eric, *The Age of Federalism: The Early American Republic, 1788-1800* (Oxford University Press, 1993), pp. 553, 585 and DeConde, Alexander, *A History of American Foreign Policy* (Charles Scribner’s Sons, 1971), pp. 67-69.

<sup>5</sup> Richardson, James D., ed. *A Compilation of the Messages and Papers of the Presidents, 1789-1897, Vol. I* (Government Printing Office, 1896), pp. 264-65.

order American ships to attack the French navy.<sup>5</sup> To pay for all of this, Congress levied a tax on land, real property, and slaves, and authorized additional borrowing.<sup>6</sup> Adams sent the American Navy into the West Indies for combat against the French navy, which resulted in significant success.<sup>7</sup>

Adams treated Congress as a full partner in the war, and firmly resisted those in Congress who wished to move beyond its limitation as a purely naval activity. He eventually succeeded in reopening negotiations and signed a treaty concluding the war just before leaving office.<sup>8</sup> Despite having violated the letter of the Constitution, he could claim to have acted within its spirit by seeking Congressional action for each step taken. He probably had no idea he had laid the foundation for future Presidential excesses.

## WAR AGAINST THE BARBARY PIRATES, 1801-1815

As a U.S. diplomat in France following American independence, Thomas Jefferson had been a strong advocate of going to war with the Barbary Pirates of North Africa. Their attacks on American commerce and enslavement of their prisoners were intolerable to him.<sup>9</sup>

Lack of funds made it impossible for the United States to carry on such a war in 1786, but the situation was entirely different when Jefferson became President in 1801. When news came that Tripoli was once again preying on American merchant ships, Jefferson dispatched a naval expedition. His orders were to act only in defense of American commerce, on the grounds that defensive action was within Presidential authority but offensive action was not. This included instructions that American vessels were allowed to sink, but not capture, Tripolitan ships.

## MEDITERRANEAN FUND HELPED MILITARY ACTION

Congress bolstered this authority by an act of February 6, 1802, authorizing such use of the navy (as well as letters of marque and reprisal) and allowing captures.<sup>10</sup> Defensive action, however, was broadly interpreted to include blockading Tripoli<sup>11</sup>, and Jefferson found that he could not prevent the men on the spot from going beyond his “defensive” intentions. The campaign eventually escalated to include an attempt to capture Tripoli via a land expedition.<sup>12</sup>

Jefferson sought further Congressional involvement in 1804 when the cost of the war became a problem. The solution was the Mediterranean Fund, a surtax on the tariff, with the money collected being designated to pay for “warlike operations against . . . the Barbary Powers”. The tax was to expire three months after the ratification of a peace treaty.<sup>13</sup> Jefferson also obtained Congressional approval that same year for the construction of four ships specifically intended for use in the Mediterranean campaign.<sup>14</sup> In 1806, an end to the war was negotiated and the treaty was approved by Congress.<sup>15</sup>

## JEFFERSON INTENDED FIDELITY TO THE CONSTITUTION

President Jefferson demonstrated an understanding that the Constitution did not allow him to declare war, and he attempted to stay within Constitutional boundaries. However, the line between defensive and

<sup>5</sup> *Statutes at Large, Vol. I* (Little and Brown, 1845), pp. 547, 549, 552-63, 569, 572, 574-6, 578-80,

<sup>6</sup> *Ibid.*, pp. 580-94, 597-604, 607, 609.

<sup>7</sup> Dupuy and Baumer, *Little Wars*, pg. 9 and following.

<sup>8</sup> McCullough, *John Adams*, pp. 552-560.

<sup>9</sup> Boyd, Julian P., ed., *Papers of Thomas Jefferson, Vol. X* (Princeton University Press, 1954), pp. 566-68.

<sup>10</sup> *Statutes at Large, Vol. II*, pg. 130.

<sup>11</sup> McDonald, Forrest, *The Presidency of Thomas Jefferson* (University Press of Kansas, 1976), pp. 61, 76-80 and Dupuy and Baumer, *Little Wars*, pg. 36.

<sup>12</sup> Malone, Dumas, *Jefferson the President: Second Term, 1805-1809* (Little, Brown & Company, 1974), pg. 43 and Dupuy & Baumer, *Little Wars*, pp. 54-60.

<sup>13</sup> McDonald, *Presidency*, pp. 79-80 and Malone, *Jefferson*, pg. 43 and *Statutes at Large, Vol. II*, pp. 291-92..

<sup>14</sup> *Statutes at Large, Vol. II*, pg. 206.

<sup>15</sup> Malone, *Jefferson, Vol. V*, pg. 43.

and offensive action proved to be elusive.

An uneasy peace between the United States and the Barbary entities continued until 1815, when renewed piracy by Algiers caused President Madison to ask Congress for a declaration of war.<sup>10</sup> Astonishingly, Congress responded by granting the President warlike authority without actually declaring war.<sup>11</sup> Within a few months the U.S. Navy had forced Algiers to agree to a new treaty of peace, intimidated the other Barbary powers, and ended forever their threat to American commerce.<sup>12</sup>

## WOODROW WILSON WAS A WARMONGER

For the next hundred years undeclared wars against recognized foreign nations were avoided. The Indian Wars were recognized as a special case, being carried on within the borders of the United States. The War Between the States was conducted under the legal fiction that secession was illegal, and that the war was merely the suppression of a “rebellion”. Likewise, suppression of the Philippine insurrection was treated as reaction to rebellion.

This restraint ended when Woodrow Wilson became President in 1913. Wilson intervened with military force in Mexico to undermine Mexican dictator Victoriano Huerta. He was able to use an incident involving U.S. sailors in Tampico to obtain Congressional authorization to begin the intervention.

Although Congress refused to approve broader authority for more general intervention, Wilson exploited this resolution as a means to bring down Huerta.<sup>13</sup> He was on stronger ground when he sent the Punitive Expedition into Mexico to hunt down Pancho Villa following Villa’s attack on Columbus, New Mexico, since the Punitive Expedition was arguably a defensive measure.<sup>14</sup> Wilson also sent U.S. troops to conduct small wars in Haiti and the Dominican Republic. President Calvin Coolidge followed suit with a Nicaraguan intervention.<sup>15</sup>

## HARRY TRUMAN RELIED ON UN, NOT CONGRESS TO INITIATE FOREIGN CONFLICT

President Truman broke new ground by ordering U.S. troops into Korea in 1950. When he brought in Congressional leaders to “inform” them, Truman cited a United Nations resolution as sufficient authority for going to war.<sup>16</sup> Never before had an American President put the nation into a major foreign war without some form of Congressional authorization. Congressional criticism soon forced Truman into the ridiculous position of publicly denying that the U.S. was at war.<sup>17</sup> By 1952, the unpopularity of Truman’s war was one of the reasons he decided not to run for reelection.

At first, Truman’s experience taught future Presidents a lesson concerning the need to make Congress at least appear to be a partner in an undeclared war. President Johnson obtained the Gulf of Tonkin resolution before sending ground troops into South Vietnam. George H.W. Bush insisted on a Congressional resolution supporting the liberation of Kuwait.

## CLINTON’S YUGOSLAV INTERVENTION WAS TOTALLY UNCONSTITUTIONAL

Bill Clinton, however, went beyond President Truman when he began a war against Yugoslavia without even the cover of a United Nations resolution, and continued the war when Congress refused to pass an even the

<sup>10</sup> Richardson, *Messages*, Vol. I, pg. 554. For the background to this request, see Dupuy and Baumer, *Little Wars*, pp. 60-61.

<sup>11</sup> *Statutes at Large*, Vol. III, pg. 230.

<sup>12</sup> Dupuy and Baumer, *Little Wars*, pp. 61-64.

<sup>13</sup> Link, Arthur S., *Wilson: The New Freedom* (Princeton University Press, 1956), pp. 398-413. See especially the footnote on page 399 regarding the failure of the Lodge amendment for a more general grant of authority.

<sup>14</sup> Mason, Herbert Molly, Jr., *The Great Pursuit* (Random House, 1970), pp. 68-69.

<sup>15</sup> Dupuy and Baumer, *Little Wars*, pp. 144-168.

<sup>16</sup> Truman, Harry S., *Years of Triumph and Hope: 1946-1952* (Signet, 1956), pp. 384-85.

<sup>17</sup> Donovan, Robert J., *Tumultuous Years: The Presidency of Harry S. Truman, 1949-1953* (W.W. Norton, 1982), 218-224.

authorizing resolution. George W. Bush also set a precedent in 2002 when he persuaded Congress to pass a resolution (H.J. Res. 114) explicitly delegating to him, “as he determines to be necessary and appropriate”, the power to begin a war.

## **OBAMA’S LIBYAN WAR IS IN THE CLINTON TRADITION**

Barack Obama’s choice of war with Libya must rank with that of President Clinton in Yugoslavia. He has obtained no form of Congressional authorization. NATO, which was formed as a defensive alliance, provides no authority for an unprovoked, offensive war.

Congress has never been willing to impeach a President for usurping the power to declare war, nor to end that war by denying appropriations. The Libyan War offers the best opportunity ever seen for cutting off funding, since it would in no way place any American forces at risk. Impeachment can be more easily justified than against any President except Clinton. If Congress refuses to act now, future Presidents will understand that they can go to war with no fear of ever being called account.

## **KEY FEDERAL BUDGET INFORMATION AVAILABLE**

The Conservative Caucus Foundation’s Constitutional Budget Project has reviewed Barack Obama’s proposed 2012 budget for the Departments of Commerce, Education, Housing and Urban Development, Interior, and Labor. We have found that the spending in these Departments is almost entirely for unconstitutional programs and should be ended.

TCCF has also prepared an analysis of the Balanced Budget amendments that have been introduced in the 112<sup>th</sup> Congress and concluded that they would fail to bring about a balanced budget but could have severely negative side effects.

A copy of the Constitutional Budget Report and TCCF’s comments on the Balanced Budget Amendment may be obtained at no cost by calling TCCF at 703-703-6782, emailing to [info@ConservativeUSA.org](mailto:info@ConservativeUSA.org), or mailing to the Vienna address.

## **TCCF MEMBERS SAY STOP OBAMACARE AT ALL COSTS**

TCCF members responded to the poll in the March *Constitutional Action Report* as follows.

1. Should the House of Representatives starve ObamaCare by refusing to appropriate even one penny for its programs?  
   Yes 97%    No 2%    Undecided 1%
2. Should the House insist on no appropriations for ObamaCare even if the Senate and Barack Obama shut down the government by blocking appropriations bills?  
   Yes 95%    No 1%    Undecided 4%
3. If Barack Obama defies the Constitution by spending funds on ObamaCare without an appropriation, should Congress begin impeachment proceedings?  
   Yes 95%    No 2%    Undecided 3%

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