

National Security Law

13 January 2022

Why are We Talking about the 17 & 1800s?

- Common law is based on precedent, especially in the absence of specific statutory direction.
 - Civil law should not care about history, but civilians are as obsessed with history as common lawyers.
- The US Constitution is a short, general document that provides little specific direction.
 - The Constitution was written in a time very different from today, based on assumptions that are no longer valid.
 - The Constitution is difficult to amend.
 - It took the bloodiest war in US history to add a few amendments on individual rights, and then it took nearly 100 years for the Court implement key provisions of those amendments.
- Most importantly, Congress has never passed a comprehensive framework for presidential war and emergency powers.
 - Now that the Supreme Court has spent 200 years ratifying the powers of the president in the absence of legislation, the Court might not remember that the founders thought that Congress would control war powers.

The US Colonies



**What is one reason the US colonies were established?
(There are multiple reasons)**

While the colonies were under the legal authority of the Crown, why did they have quite a bit of autonomy?



**What was one of the the grievances that lead the colonies
to seek separation from England?**

What did the colonies believe was their legal status after the Declaration of Independence? (This is clearly their status after the end of the revolutionary war in 1783 and the ratification of the Constitution in 1788.)



What was the governing document for the Colonies between the Declaration of Independence and the Constitution?



Was the legal status of the colonies as independent sovereigns changed by the Articles of Confederation? (This is relevant to the question of whether the Constitution created powers or allocated powers that were already inherent in the states.)

No, they remained independent sovereigns, but the foreign relations power was held jointly.

Yes, they ceded their powers to the Confederation so it could force states to support the revolutionary war.



What problems arose under the Articles of Confederation during the Revolutionary War?



What were the competing interests that had to be balanced at the Constitutional Convention? (Lots of answers)



In the 1700s, what was the primary form of government for most major European powers?

Monarchy

Democracy

Parliamentary government

None of the above

The Nature of Man and the Role of Government in the 18th Century

- Hobbs

- People are inherently fractious and at war. Without a strong hand, life will be nasty, brutish, and short.
- In this period, the model for this strong hand was a monarch.

- Locke and Rousseau

- People are inherently peaceful, but in society they need a social contract to maintain peaceful order.
- A social contract implies consent of the governed, and thus some sort of democracy/representative government.

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Did the Drafters go with Hobbs and make the President a King?

Yes

No

The Drafters Assumptions That Affect National Security Law

- (This is not to downplay the core failure of the drafters to deal with slavery.)
- They appreciated the problem of factions but did not see that political parties could undermine checks and balances when the same party captured more than one branch of government and unified the decisions of that otherwise fractious legislators and jurists.
- They planned for a small country protected mostly by isolation behind its oceans than by active military.
- There is a strong argument that they did not intend the Supreme Court to review Congressional action, but to sort out fights between the states.

Why were the drafters concerned about standing armies?

War Powers and the Control of the Military

- The drafters thought the Constitution did not provide for a standing army.
 - There were provisions for the President to use state militias in emergencies.
 - There were provision (letters of marque and reprisal, among others) to enlist private ships to government service.
- The Congressional Declaration of War
 - The key is not the Declaration of War.
 - It is that Congress has to appropriate money to hire and equip the military before the president can make war.
 - There did not need to be a Congressional declaration of peace because Congress could just stop funding the war.

The Standing Army

- The United States is immediately in conflict with France, and then England, leading to the War of 1812.
 - Had the English not concentrated on the French, they might have retaken the US.
 - Congress builds up a navy and army and never looks back.
- Once there is a standing army, the president can use it without having to ask Congress for a declaration of war and money for troops.
 - While we will see a few old cases of Congressional limits on the use war powers, Congress is mostly silent.
 - The court finds that the use of the military is a political question, thus closing off citizen suits challenging the President's war powers.