NOTE: This transcript was generated using an automated transcription service, and may contain typographical errors.

**Civics 101**

**Episode 33: Declaring War**

[Listener] My question is: To what extent can the president take the country to war or deploy military forces without Congress. And what is required for declaring war? Thank you, and I look forward to the lesson.

***[Virginia Prescott] For a country that spent a significant amount of its history engaged in conflict, the U.S. has only officially been at war less than a dozen times. Albin Kowalewski is a historical publication specialist at the U.S. House of Representatives and is here to help us understand why. Albin, ready to do this thing?***

**[Albin Kowalewski]** I am. Thank you for having me.

***[VP] Let's start with that question. What happens when the U.S. declares war?***

[AK] When the United States declares war it sets in motion a process that the framers of the Constitution first envisioned in 1787. Declaring war is, it kind of follows a standard legislative procedure actually. Any time Congress has declared war it's always been preceded by, by either a written statement or an address in front of Congress by the president asking for that conflict. And before I get into kind of the nitty gritty of it I think it's important to kind of take a step back and to really put ourselves in the shoes of these 50 or so odd men that were at the Constitutional Convention. For them war was not an abstract concept at all. You know, these guys, almost to a man, had served in some capacity during the American Revolution. The vast majority of them had military experience either with the Continental Army or with state militias if they couldn't serve for one reason or another, you know, in the military they would serve in the safety councils. And I think even one or two of them have been surgeons as well. So these guys had seen the face of war upfront. This is something real to them. They'd seen the destruction that war could bring to a people. And so the overriding thought at the Constitutional Convention was to make war difficult to enter. You know, peace, peace should be easy and that should be the easy part that should be the status quo. A war should be difficult to enter and so they began considering ways to make that happen. One of the ideas that they settled on was that open debate among the people's representatives could really kind of cool temperatures cool the push for war. So what the framers ended up doing is that they gave the war powers to the legislative branch; you know the founders divided the government the legislative the executive and the judicial. And so there was some discussion of whether or not they should give the war powers to the president, or whether or not they should give the war powers to Congress. And they quickly got rid of the idea of giving it to the president I think only one person brought up the idea at the convention. Everybody more or less seemed convinced that Congress the legislative branch should have that power.

***[VP] So that's stipulated in Article 1. But then they named the president commander in chief in Article 2?***

[AK] Yeah in Article 2 they gave the president the power as commander in chief. And so you have kind of from the start you have this idea of checks and balances. I think it's also important to remember kind of the context in which the framers were living. For them, you know for their entire lives a handful of European monarchs, King of England, kings of France and Spain, they had really kind of controlled the fate of North America and when they were envisioning the Constitution the framers wanted to move as far away from that model as possible. So then they started to discuss what are the mechanisms that we should use to declare war. Should we even declare war, what's the language that we should use in the Constitution, and so for the first draft of the Constitution actually had somewhat different language. The first draft would give the legislative branch the power to make war. And so they started debating this and they were wondering well what does it mean to make war. You know what are the powers involved in that. So what they ended up doing is Elbridge Gerry and James Madison came up with a compromise and they submitted to the convention the idea that you take out ‘make’ and you insert the word ‘declare.’ So the Constitution then read Congress would have the power to declare war. And that kind of freed up the commander in chief clause for Article second to conduct the war. But the idea that Congress could declare war, they put in Article 1 kind of with some of the most important legislative powers of the United States Congress has.

***[VP] OK so the president's slash you know the king could not say “this means war I'm declaring it” that there's a check and balance against that. But has that ever come into opposition. You know conceivably could Congress declare war without the president or the president without the Congress.***

[AK] Well you know it's interesting you should bring that up because this is a debate that has not stopped more or less since 1787. When Abraham Lincoln was a one term congressman in the house from Illinois, he served during what we call the Mexican-American War during the late 1840s and Congress had declared war against Mexico in 1846. And Lincoln is serving during that Congress. And so at one point he's discussing the Mexican-American War with his law partner back home. It's a guy named William H. Herndon. And apparently in an earlier letter Hernan had written him and he sounded like he'd been advocating for a really strong president that you know the president's discretion is what mattered he should be the one to carry out the war. And so Lincoln I mean Lincoln is famous for loving the intellectual back and forth the tussle of debate. But he responded, and I have the exact quote here for you I'll read it for you “in the provision of the Constitution giving the warmaking power to Congress was dictated as I understand it by the following reasons. He said Kings had always been involving in impoverishing their people in wars, pretending generally if not always that the good of the people was the object. This, our convention understood, to be the most oppressive of all kingly oppressions and they resolved to frame the Constitution that no one man should hold the power of bringing this oppression upon us.” And so you've got this great debate happening in 1848 and the best part of that is his head at the end of the letter he just writes “Write again soon!” He loved it he loved talking about this stuff and I think if we take a step back and we kind of see what's going on here you have Lincoln in the Congress debating war and debating war powers at an institutional level at a constitutional level. And here you have Lincoln debating with a constituent of his with a friend with a law partner, kind of the same issues. And I think if James Madison had been alive then and had known what was going on, I think he would have loved the idea that you have citizens debating this power that they had that the Constitutional Convention had kind of struggled with a little bit at the start but knowing that the power still rested with Congress.

***[VP] So help me understand you know when war gets declared which I understand the last time it happened was 1942, so not Korea not Vietnam not Iraq not Afghanistan. Those are not officially wars. But what distinguishes them from other conflict?***

[AK] So throughout the course of American history America has used its military two different ways. So you have the declaration of war and Congress declared war 11 times against 10 countries during five separate conflicts since 1789. And those, those five separate conflicts or the War of 1812 the Mexican-American War the Spanish-American War World War One and World War II. Declarations of war I think carry with it like a terrible scale. Right like a war vote is something big and it's imposing. It's the idea of marshalling resources of one nation state against the resources of another nation state kind of a Clash of the Titans sort of deal. But for the vast majority of the times that America has used its military it’s been through a simple authorization. Today we call these things authorizations for the use of military force

***[VP] Or AUMF***

[AK] Or an AUMF, yeah and the term AUMF is kind of a product of the modern era. I think it kind of came into use during the Gulf War in 1991. But this is the interesting thing. Congress has never declared war without also including an authorization for the use of force but it has authorized force many many times without formally declaring war so declaring a state of war is one thing. You're basically taking you know a state of peace and turning it into a state of war. And then Congress has also always authorized the president to employ the military.

***[VP] So you could actually declare war but have no military force?***

[AK] Yeah you know I sometimes wonder if we’ll ever reach a point where we will declare war but we won't use the military. I don't know what kind of situation that would be but something interesting to think about.

***[VP] So what are the political benefits or drawbacks of not officially declaring war but authorizing the use of military force?***

[AK] Well I think we should go back to what the founders had envisioned. So the idea for declaring war is that by giving Congress the power to declare war what you're essentially doing is you're getting the American people behind you. You know you look at the transitive property voters elected representatives. If a majority of the representatives vote to support war then technically the voters the American people will have supported war. But in going to war taking unilateral action as a president without the support of Congress or without authorization, it can be dangerous. It can be tricky. Think about what happened when Truman went into Korea in 1950. He sent troops in in 1950 without asking for Congress's permission. But instead he cited the UN Security Council. And there was was a terrible war that was a bloody war. And by the end of it you know people were calling it Truman's war. And so without the support of Congress the president will then take on the responsibility for it completely. But in going through an authorization or through a declaration the president can then kind of share that responsibility with the legislative branch.

***[VP] So this is the official political language: Authorizing Military Force, or responding to a strike. But your everyday American walking around you know they think we're engaged in the war on terror. We were at war in Iraq. Now we are still at war in Afghanistan. Is this just the way that politicians speak that they're avoiding declarations of war?***

[AK] Legal scholars who are much smarter than I am who have looked into this you know they've called the awkward powers between Congress and the president vague and ambiguous. One called it a paradoxical mix of clearly defined war powers for Congress, and you know implied perogatives for the president. That's a direct quote but I don't think anybody would deny that the Vietnam War was not a war. There was no declaration of war during that conflict. But you know I think if we go back and we look at how Congress has declared war in the past it's always included an authorization some, some really smart legal minds now seemed to argue that an authorization is akin to a declaration of war now, that it carries with it the fighting capacity the permission to use the military

***[VP] Albin, are we past the days of formally declaring war?***

[AK] That, that is a great question. That is a great question. And you know people from what I can tell you know there's a lot of debate going on about that. I think it comes down to a number of reasons. On one level the nature of war has changed since 1787. Back then it was a lot of state versus state actors. Since then America has gone to war or engaged in conflicts with non-state actors. You know the rise of these international obligations that the United States now has to meet with the United Nations or NATO the world is far more interconnected than the founders could have ever have imagined back in the 18th century when Congress declared war. It's set in motion a whole bunch of these different provisions in international law about belligerency and about neutrality. And nowadays the United Nations kind of manages that. But I think the biggest change has to do with the rise of of nuclear warfare. It requires quick decision making, a ballistic missile is not going to wait for Congress to get together to vote to draft legislation and to vote on that legislation. In addition to that you know America has never really demobilized after World War II. We went from World War II straight into the Cold War and now it has military installments across the globe. It's also the case that as soon as you give the president the source of power to commit the military overseas without necessarily having to consult Congress or even if you know the president doesn't consult Congress initially but then goes and asks Congress to retroactively authorize that decision. It's incredibly difficult for Congress to get those powers back again. It's a great question whether or not we've moved past the point in which we will no longer declare war. I guess that's to be determined.

***[VP] Albin thank you for such a thorough answer to those questions.***

[AK] Yes thank you for having me. You bet this has been great.