

# CRS Report for Congress

Congressional Research Service • The Library of Congress

## **The Barbary Wars: Legal Precedent for Invading Haiti?**

Louis Fisher  
Senior Specialist in Separation of Powers  
Office of Senior Specialists

### **SUMMARY**

The claim that President Clinton has constitutional authority to invade Haiti without first obtaining congressional authority is often linked to early presidential actions. Supporters of broad executive power argue that a President may deploy troops on his own authority and that Congress can restrain him only after he acts. As support for this position, the Barbary Wars during the time of Presidents Jefferson and Madison are often cited. However, the historical record demonstrates that these military operations received advance authority from Congress. To the extent that presidential initiatives were taken before congressional action, they were defensive in nature and not offensive (as contemplated for Haiti).

### **BACKGROUND**

During the presidencies of George Washington and John Adams, U.S. military action conformed to the framers' expectation that the decision to go to war or to mount military operations was reserved to Congress and required advance authorization. For example, President Washington's military actions against Indian tribes were initially authorized by Congress. 1 Stat. 96, § 5 (1789); 1 Stat. 121, §16 (1790); 1 Stat. 222 (1791). Consistent with these statutes, military operations were confined to defensive measures. Offensive action required authority from Congress. 33 The Writings of George Washington 73 (John C. Fitzpatrick ed. 1939).

Similarly, when President Washington used military force in the Whiskey Rebellion of 1794, he acted on the basis of statutory authority. 1 Stat. 264, § 1 (1792). President John Adams engaged in the "quasi-war" with France from 1798 to 1800. Although Congress did not declare war, military activities were fully authorized by more than two dozen statutes in 1798. 1 Stat. 547-611.

### **ACTIONS BY JEFFERSON AND MADISON**

Elected President in 1800, Thomas Jefferson inherited the pattern established during the Washington and Adams administrations: Congress had to authorize offensive military actions in advance. One of the first issues





awaiting Jefferson was the practice of paying annual bribes ("tributes") to four states of North Africa: Morocco, Algiers, Tunis, and Tripoli. Regular payments were made so that these countries would not interfere with American merchantmen. Over a period of ten years, Washington and Adams paid nearly \$10,000,000 in tributes.

In his capacity as Secretary of State in 1790, Jefferson had identified for Congress a number of options in dealing with the Barbary powers. In each case it was up to Congress to establish national policy and the executive branch to implement it:

Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers. If tribute or ransom, it will rest with them to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage. 1 American State Papers: Foreign Relations 105 (Walter Lowrie & Matthew St. Clair Clarke, eds. 1832).

On March 3, 1801, one day before Jefferson took office as President, Congress passed legislation to provide for a "naval peace establishment." 2 Stat. 110, § 2 (1801). On May 15, Jefferson's Cabinet debated the President's authority to use force against the Barbary powers. The Cabinet agreed that American vessels could repel an attack, but some departmental heads insisted on a larger definition of executive power. For example, Albert Gallatin, Secretary of the Treasury, remarked: "The Executive can not put us in a state of war, but if we be put into that state either by the decree of Congress or of the other nation, the command and direction of the public force then belongs to the Executive." Other departmental heads expressed different views. Franklin B. Sawvel, ed., *The Complete Anas of Thomas Jefferson* 213 (1903).

After hearing these opinions from his Cabinet, Jefferson chose to rely on statutory authority rather than theories of inherent presidential power. Citing the statute of March 3, the State Department issued a directive on May 20 to Captain Richard Dale of the U.S. Navy, stating that under "this [statutory] authority" Jefferson had directed that a squadron be sent to the Mediterranean. If the Barbary powers declared war on the United States, American vessels were ordered to "protect our commerce & chastise their insolence -- by sinking, burning or destroying their ships & Vessels wherever you shall find them." 1 Naval Documents Relating to the United States Wars With the Barbary Powers 467 (1939). Having issued that order, based on congressional authority, Jefferson also wrote that it was up to Congress to decide what policy to pursue in the Mediterranean: "The real alternative before us is whether to abandon the Mediterranean or to keep up a cruise in it, perhaps in rotation with other



powers who would join us as soon as there is peace. But this Congress must decide." 8 *The Writings of Thomas Jefferson* 63-64 (Ford ed. 1897).

Insisting on a larger tribute, the Pasha of Tripoli declared war on the United States. Jefferson did not interpret this action as authority for the President to engage in unlimited military activities. He informed Congress on December 8, 1801, about the demands of the Pasha. Unless the United States paid tribute, the Pasha threatened to seize American ships and citizens. Jefferson had sent a small squadron of frigates to the Mediterranean to protect against the attack. He then asked Congress for further guidance, stating that he was "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense . . . ." It was up to Congress to authorize "measures of offense also." Jefferson gave Congress all the documents and communications it needed so that the legislative branch, "in the exercise of this important function confided by the Constitution to the Legislature exclusively," could consider the situation and act in the manner it considered most appropriate. 1 *A Compilation of the Messages and Papers of the Presidents* 315 (James D. Richardson ed. 1897-1925) (hereafter "Richardson").

Alexander Hamilton, writing under the pseudonym "Lucius Crassus," issued a strong critique of Jefferson's message to Congress. Hamilton believed that Jefferson had defined executive power with insufficient scope, deferring too much to Congress. But even Hamilton, pushing the edge of executive power, never argued that the President had full power to make war on other nations. Hamilton merely argued that when a foreign nation declares war on the United States, the President may respond to that fact without waiting for congressional authority:

The first thing in [the President's message], which excites our surprise, is the very extraordinary position, that though *Tripoli had declared war in form* against the United States, and had enforced it by actual hostility, yet that there was not power, for want of *the sanction of Congress*, to capture and detain her cruisers with their crews.

. . . [The Constitution] has only provided affirmatively, that, "The Congress shall have power to declare War;" the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration of the part of Congress is nugatory; it is at least unnecessary." 7 *The Works of Alexander Hamilton* 745-747 (John C. Hamilton ed.).

Congress responded to Jefferson's message by authorizing him to equip armed vessels to protect commerce and seamen in the Atlantic, the Mediterranean, and adjoining seas. The statute authorized American ships to seize vessels belonging to the Bey of Tripoli, with the captured property distributed to those who brought the vessels into port. 2 Stat. 129 (1802). Legislators had no doubt about their constitutional authority and duties. "The simple question now," said Cong. William Eustis, "is whether [the President] shall be empowered to take offensive steps." Cong. Samuel Smith added: "By the prescriptions of the law, the President deemed himself bound." *Annals of Cong.*, 7th Cong., 1st Sess. 328-329 (1801).

Congress continued to pass legislation authorizing military action against the Barbary powers. Legislation in 1803 provided additional armament for the protection of seamen and U.S. commerce. 2 Stat. 106. Legislation the next year gave explicit support for "warlike operations against the regency of Tripoli, or any other of the Barbary powers." 2 Stat. 291. Duties on foreign goods were placed in a "Mediterranean Fund" to finance these operations. *Id.* at 292, § 2. Further legislation on the Barbary powers appeared in 1806, 1807, 1808, 1809, 1811, 1812, and 1813. 2 Stat. 391 (1806); 2 Stat. 436 (1807); 2 Stat. 456 (1808); 2 Stat. 511 (1809); 2 Stat. 616 (1811); 2 Stat. 675 (1812); 2 Stat. 809 (1813).

Jefferson often distinguished between defensive and offensive military operations, permitting presidential initiatives for the former but not for the latter. In 1805, he notified Congress about a conflict with the Spanish along the eastern boundary of the Louisiana Territory (West Florida). After detailing the problem he noted: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided." 1 Richardson 377.

Military conflicts in the Mediterranean continued after Jefferson left office. The Dey of Algiers made war against U.S. citizens trading in that region and kept some in captivity. With the conclusion of the War of 1812 with England, President Madison recommended to Congress in 1815 that it declare war on Algiers: "I recommend to Congress the expediency of an act declaring the existence of a state of war between the United States and the Dey and Regency of Algiers, and of such provisions as may be requisite for a vigorous prosecution of it to a successful issue." 2 Richardson 539. Instead of a declaration of war, Congress passed legislation "for the protection of the commerce of the United States against the Algerine cruisers." The first line of the statute read: "Whereas the Dey of Algiers, on the coast of Barbary, has commenced a predatory warfare against the United States . . . ." Congress gave Madison authority to use armed vessels for the purpose of protecting the commerce of U.S. seamen on the Atlantic, the Mediterranean, and adjoining seas. U.S. vessels (both governmental and private) could "subdue, seize, and make prize of all vessels, goods and effects of or belonging to the Dey of Algiers." 3 Stat. 230 (1815).



An American flotilla set sail for Algiers, where it captured two of the Dey's ships and forced him to stop the piracy, release all captives, and renounce the practice of annual tribute payments. Similar treaties were obtained from Tunis and Tripoli. By the end of 1815, Madison could report to Congress on the successful termination of the war with Algiers.

## LEGISLATIVE CONTROLS ON PROSPECTIVE ACTIONS

Can Congress only authorize and declare war, or may it also establish limits on prospective presidential actions? The statutes authorizing President Washington to "protect the inhabitants" of the frontiers "from hostile incursions of the Indians" were interpreted by the Washington administration as authority for defensive, not offensive, actions. 1 Stat. 96, § 5 (1789); 1 Stat. 121, § 16 (1790); 1 Stat. 222 (1791). Secretary of War Henry Knox wrote to Governor Blount on October 9, 1792: "The Congress which possess the powers of declaring War will assemble on the 5th of next Month -- Until their judgments shall be made known it seems essential to confine all your operations to defensive measures." 4 The Territorial Papers of the United States 196 (Clarence Edwin Carter ed. 1936). President Washington consistently held to this policy. Writing in 1793, he said that any offensive operations against the Creek Nation must await congressional action: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure." 33 The Writings of George Washington 73.

The statute in 1792, upon which President Washington relied for his actions in the Whiskey Rebellion, conditioned the use of military force by the President upon an unusual judicial check. The legislation said that whenever the United States "shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe," the President may call forth the state militias to repel such invasions and to suppress insurrections." 1 Stat. 264, §1 (1792). However, whenever federal laws were opposed and their execution obstructed in any state, "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act," the President would have to be first notified of that fact by an Associate Justice of the Supreme Court or by a federal district judge. Only after that notice could the President call forth the militia of the state to suppress the insurrection. *Id.*, § 2.

In the legislation authorizing the Quasi-War of 1798, Congress placed limits on what President Adams could and could not do. One statute authorized him to seize vessels sailing *to* French ports. He acted beyond the terms of this statute by issuing an order directing American ships to capture vessels sailing *to or from* French ports. A naval captain followed his order by seizing a Danish ship sailing from a French port. He was sued for damages and the case came to the Supreme Court. Chief Justice John Marshall ruled for a unanimous Court that President Adams had exceeded his statutory authority. *Little v. Barreme*, 6 U.S. (2 Cr.) 169 (1804).

The Neutrality Act of 1794 led to numerous cases before the federal courts. In one of the significant cases defining the power of Congress to restrict presidential war actions, a circuit court in 1806 reviewed the indictment of an individual who claimed that his military enterprise against Spain "was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government." *United States v. Smith*, 27 Fed. Cas. 1192, 1229 (C.C.N.Y. 1806) (No. 16,342). The court repudiated his claim that a President could authorize military adventures that violated congressional policy. Executive officials were not at liberty to waive statutory provisions: "if a private individual, even with the knowledge and approbation of this high and preeminent officer of our government [the President], should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law?" The court said that the President "cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount." The President could not direct a citizen to conduct a war "against a nation with whom the United States are at peace." *Id.* at 1230. The court asked: "Does [the President] possess the power of making war? That power is exclusively vested in congress. . . it is the exclusive province of congress to change a state of peace into a state of war." *Id.*