

# IPS PRINCIPLE PERSPECTIVE

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Exercise of Rights



## WAR AND THE *Constitution*

# WAR AND THE CONSTITUTION

By Michael R. Winther

In modern America, there is considerable confusion about the constitutional requirements related to matters of war. Some people believe that the Constitution gives the President extremely broad power in war-making decisions, while others contend that the Constitution severely limits that power. Sadly, the majority of Americans simply don't care what the Constitution says.

Most Americans are aware that our federal government is divided into three branches: the executive branch, the legislative branch, and the judicial branch. What is not as well known is that the first three articles of the U.S. Constitution define the roles and responsibilities of each of these branches. Article I defines the powers given to the legislative branch, Article II defines the powers of the executive branch, and Article III defines the powers of the judicial branch. The power to declare war is found in Article I, demonstrating that, contrary to the beliefs of many Americans, this power rests exclusively with the legislative branch of our federal government.

Much of our current constitutional confusion stems from our failure to understand the important distinction between declaring war and managing war. Some assume that the President, as commander-in-chief of the military, has the power to decide when to go to war, but this is not the case. Our Founding Fathers believed strongly in the separation of powers, and it should not surprise us that they applied this standard to matters of war. They wisely placed the decision about whether or not to go to war into different hands than those that might manage or prosecute the war, should it occur. The result is that the



Constitution charges the legislative branch with deciding when to use lethal force (Article I) and the executive branch with the job of managing the execution of that force (Article II), but only when deemed necessary by the legislative branch. This provides some level of protection against unnecessary or superfluous military engagements.

It can often be observed that people who excel at a particular activity are predisposed to engage in that activity at which they excel. Those who are skilled in the military arts, for example, are far more likely to advise military measures when international problems arise. Although we do want these artisans of war to direct a war once it has begun, we don't want them making the decision as to when war is necessary.

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**“If your only tool is a hammer, then every problem looks like a nail.”**

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As the Constitutional Convention saw it, two groups must be consulted before going to war: the states and the citizens. It is important to note that each body of the federal government represents a particular constituency. The states created the federal government, and they did



not want to be dragged into conflicts against their will. Additionally, the U.S. Senate was not originally an elected body. Instead, it was composed of people who were appointed by the states, and it was hoped that this body would represent the desires of the individual state governments. For this reason, the Senate must assent to any proposed war. The people, however, were the ones who would pay for the war and who would ultimately die in any conflict. Therefore, the House of Representatives, as the only body of the federal government that was (and always has been) elected by the people, was intended to most directly represent the desires of the citizens—and it was also the most accountable to the citizens on election day. If the citizens didn't think that a potential war was necessary, it was hoped that their representatives would prevent such an action. For this reason, the House of Representatives must also assent to any proposed war. Thus, a declaration of war requires the approval of both the House and the Senate.

### Unconstitutional Wars

Despite the clear intent of the Constitution, it has become a common practice for the United States of America to engage in wars without an official, constitutional declaration. The last constitutionally-declared war in America was World War II. The wars in Korea, Vietnam, Gulf War I, the current Iraq War, and the Afghanistan War have all been undeclared wars. This is a violation both of the clear wording of the Constitution and the intent of those who wrote it.

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“A war by any other name  
is still a war.”

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### Playing games with words

To assuage constitutional concerns over these undeclared wars, many people in the government, the military, and the media attempted to package military conflicts as something different than, or less than, war.

The wars in Korea and Vietnam, for example, were part of this game of semantics. The Korean War was often referred to as a “police action”, and the Vietnam war was often described as the “Vietnam conflict”. The implication seemed to be that “police actions” and “conflicts” were less than war and therefore did not require a formal, congressional declaration of war. The results speak for themselves, however, and those who served and died in these conflicts would certainly attest that these events were indeed war. Despite the efforts of many groups to market Korea and Vietnam as something less than war, the number of casualties and the process of time eventually prevailed until these events were labeled as the wars that they actually were.

In contrast to the Korea and Vietnam-era efforts to downplay these military events and portray them as less than full-scale war, more recent conflicts seem to be marketed with the opposite strategy. In recent decades, our government and our media have no qualms with the use of the word “war”. Even though the military actions in the Middle East are less significant than those in Korea and Vietnam (at least in terms of casualties and expenses), the Middle Eastern conflicts were immediately and readily described by our government as actual wars. There are two likely reasons for this new openness toward calling war what it really is. First, the events of the past 65 years have conditioned Americans to accept, without concern or question, the idea of undeclared wars. Americans today are less familiar with

the Constitution and—even more troubling—are less inclined to believe that this “ancient” document should still regulate modern public policy.

The second reason to unabashedly label these events as wars is that, by elevating these conflicts to war status, Americans have both explicit and implied reasons to surrender both their rights and resources for the war effort. Although it is hard for this author to envision a situation in which the surrender of rights would enhance a truly necessary war effort, there are many Americans who have now been convinced that the surrender of rights is actually a necessary part of war. Many of these people will not tolerate the garnishing of their rights unless our nation is at war; therefore, the best way to reduce or remove these rights is to place our nation in a perpetual state of war. The war (or series of wars), of course, is only necessary as long as the memory of and desire for the surrendered rights still exists. The war excuse (and thus the war itself) is no longer necessary once a substantial portion of the population is willing to live without the right(s) they have surrendered.

From the perspective of the statist, we now seem to be at a place in history where we no longer need to worry about admitting that we have engaged and are engaging in an unconstitutional war. We have now arrived at a time in which we can use the claim of being “at war” to promote a political and social agenda.

### **Tacit approval**

Some might argue that Congress, as a body, has tacitly approved these undeclared wars by its silence, which is true, but does this make these wars constitutional?

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“If the federal government violates the Constitution and there is no one to object, is the violation still unconstitutional? . . .  
**Yes!**”

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There is an old philosophical brain teaser that asks, “If a tree falls in the forest and no one is there to hear it, does it still make a noise?” We might alter the question to ask: “If the federal government violates the Constitution and there is no one to object, is the violation still unconstitutional?” My answer is a resounding, “Yes!” Even if the House of Representatives and the Senate allow the executive branch to overstep its legitimate powers, these executive actions are no less illegitimate. Congressional approval of an unconstitutional action does not make it constitutional.

Acquiescence, in other words, is not declaration. The Constitution does not say that the Executive can go to war unless the Congress objects. Rather, a constitutional war requires a definitive declaration on the part of Congress. Silence is not consent!

There is a small handful of Congressmen who continue to attempt to uphold the Constitution, and who make some noise when it is violated. Unfortunately, this group of Constitutionlists is very small. This causes me to wonder: if a Congressman complains about unconstitutional government actions but the media gives him no coverage, is he still complaining?

A parallel example might be helpful in understanding the logic of my argument. If the White House were to ban all religious

speech and send agents across the land to enforce the ban (a clear violation of the Constitution and the First Amendment), and yet no one in the House or Senate objected, would it still be unconstitutional? The answer should be obvious.

Some argue that the undeclared wars of the last 65 years were still constitutional because the legislature approved the funding for these actions. This is another faulty argument, however. If a government action, whether foreign or domestic, is made constitutional merely by a congressional spending authorization, then there would be no limits to the power of the federal government. (This is one of the errors in Justice Robert's opinion on the constitutionality of "Obamacare".) If I return to my First Amendment example, we still would not accept the constitutionality of the President's actions to ban religious speech, even if Congress were to vote to fund the agents who would enforce the ban.




The congressional power to declare war is found in Article I, section 8, clause 11, but the power to spend money is found in Article I, section 8, clause 1. If the power to tax and spend money was the only war approval intended by the Constitution's framers, there would be no need to add Article I, section 8, clause 11.

The truth of the matter is that some members of Congress want to support these undeclared wars, but they know that a vote to actually declare war would be so unpopular back home that they might not be re-elected. They know that a vote on a spending bill is much less controversial. They can tell their constituents: "I oppose going to war, but I don't want our troops to be left without supplies." In this way, they lend tacit approval to the war effort without ever having to engage in a debate about the merits of the conflict—and without taking the political heat back home from those who will pay the price for the conflict. (25 million "Support our Troops" bumper stickers make this a politically-successful strategy.)

## Conclusion

Our Constitution is quite clear in assigning the power to declare war to the Congress and not to the President. However, our elected officials on both sides of the aisle have advocated for an interventionist foreign policy, and for more than half a century, they have been willing to violate the Constitution to achieve their goals. For these interventionists, the ends justify the means. They appeal to the Constitution as authoritative when it suits their purpose, but ignore it when it gets in their way. This is not a liberal versus conservative issue, nor is it a Republican versus Democrat issue. Those who favor undeclared wars are in the majority on either side of the political spectrum. It should be no surprise, then, that those who favor government intervention at home would also favor it in our foreign policy, but it does seem strange that American "conservatives" who oppose interventionist government at home will often advocate it overseas.

Even those who are traditional defenders of the Constitution on domestic issues fall strangely silent when it comes to defending the Constitution's standards for war and foreign policy. 

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# PRIVATE PROPERTY, MASS TRANSIT, AND THE EXERCISE OF RIGHTS

By Michael R. Winther



The political and civil rights that we cherish cannot be fully exercised without certain tools. These tools are material things that allow or enhance the exercise of a right. These material things are property, which has ownership that can be either public or private. As a society, we must make decisions as to which form of ownership we prefer for these tools. Should they be privately owned or publicly owned? Those who advocate for big government usually prefer public ownership and are waging war against private ownership. Those who prefer smaller government, on the other hand, prefer that these tools be placed under private ownership. Unfortunately, the average citizen is unaware of this battle—and obviously, those who are unaware that a battle even exists are destined to lose it.

## Property is essential to the exercise of rights

Property and the exercise of rights are intertwined, and you cannot infringe upon one without infringing upon the other. However, today's society fails to understand this important relationship. In fact, most of our leaders—on both sides of the political spectrum—have never even considered this relationship.

For example, freedom of the press and freedom of speech are of little value without tools like printing presses, photocopiers, printers, paper, poster-board, radio stations, TV stations, and newspapers. If a government was to ban and confiscate these

tools, citizens would have little ability to exercise their freedom of speech. Even if a government does not enforce a complete ban, regulation of the necessary, physical tools can greatly impair the citizen's freedom of speech.

Consider also the freedom of religion. Since religion is a spiritual matter, one might be inclined to think that the exercise of this liberty would be independent of property. But like other rights, the full exercise of our freedom of religion and freedom of worship requires tangible, material things. Without Bibles to read and buildings in which to engage in corporate worship, this right would also be in great jeopardy. These buildings and Bibles are property, which must be owned and controlled by someone. Additionally, we might note that the freedom of religion is also dependent on other rights like freedom of speech and freedom of movement.

It is difficult to think of a right that is not at least partially dependent on the use of some kind of property. Even the right to bear arms is of no value if guns or ammunition are unavailable or illegal. The full exercise of the right to freedom of movement is also dependent on the citizen's access to certain tools. One can walk from point A to point B, of course, but our movement is greatly enhanced by a horse, a car, a train, or an airplane. The full exercise of this right requires the tools of transportation.

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“If we learn anything from history,  
it is that governments are always  
attempting to limit the rights of their  
citizens.”

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### **The battle to preserve rights**

If we learn anything from history, it is that governments are always attempting to limit the rights of their citizens. One of the most dominant themes in the study of history is the attempt of governments and other organized groups to restrict the rights of the people. This has been clearly demonstrated in every era of time and in every region of the world.

Governments employ two main strategies to infringe upon individual rights. The first strategy involves the direct regulation of the right. This is the most obvious approach, and citizens usually will not tolerate it unless they can be fooled into believing that the violation is necessary to avert some sort of tragedy—usually a tragedy contrived by the government. The second strategy is more subtle and involves gaining control of the tools that people use to exercise their rights. For example, it is not necessary to legislate against the freedom of the press if the government can gain ownership or control of the media.

### **Transportation as one example**

Consider transportation. In our society, there is a persistent push for more and more public transportation. Public transportation includes things like city buses, subway systems, light rail, high-speed rail, and, of course, the Amtrak system. To the extent that these systems are public, they are owned by government at some level—either city, county,

state, or federal. Once people become dependent upon these systems, these levels of government have substantial control over the freedom of movement.

There is nothing inherently or ethically wrong with the use of buses, subways, commuter rail, or other mass transit systems—as long as they are privately owned. Unfortunately, the lion’s share of American mass transit systems are not privately owned, but government owned. These government systems crowd out private enterprise transit systems and force the taxpayer to pay the bill. Private mass transit can never compete with government mass transit systems because the government systems are almost always subsidized by tax revenue, and they frequently receive favored status against zoning and environmental regulations.

There are many dangers that arise when transportation is owned or controlled by government. High costs and inefficiency come immediately to mind as undesirable outcomes, but we should be far more concerned with the risk to our freedom of movement. Access to public transportation systems could become limited for any number of reasons, including political unrest, natural disasters, or environmental concerns. Even a wage dispute and a resulting strike by the union can shut the system down.

Beyond these possible causes of access limitation, there are also more extreme possibilities, such as a government’s refusal to transport those who might be considered political dissidents. Some people would say that this would never happen in America, but I would answer: turn the calendar back to 1980 and consider history. In 1980, Ronald Reagan had just been elected president, and many Americans could not have even imagined that in just a few decades, we



would have state endorsed homosexual marriage, search and seizure without a warrant, or socialized national healthcare. Almost everything that we would have said “could never happen in America” has, in fact, happened. We must always be jealously vigilant against even the smallest infringement of our rights and liberties, even if an extreme outcome or abuse seems unlikely.

### Subsidies and taxes

There is a long-recognized truism that states: if you subsidize something, you will get more of it, but if you tax something, you will get less of it. What is our current transportation policy in America? We tax private transportation, and we subsidize public transportation. According to Wendell Cox, a visiting fellow at the Heritage Foundation:

*The federal government has been providing subsidies to mass transit since the 1960s. The principal justification was originally to reduce traffic congestion and to provide mobility alternatives to cars for low-income citizens. In addition, transit has been subsidized to reduce automobile emissions.*

*Since 1983, transit has received a share of the federal user fees paid by drivers, principally through fuel taxes. Additional diversions from federal user fees have been authorized by the Congestion Mitigation and Air Quality Improvement (CMAQ) program. In 2010, the latest year for which data are available, the total diversion from federal user fees approached \$6 billion. This left \$29 billion for expenditures on highways and roads. The 17 percent share of federal user fees was much greater than transit’s little more than 1 percent of the*

*nation’s surface travel. Overall, highway user fees supported each transit passenger mile 17 times more than each highway passenger mile (\$0.1130 for transit; \$0.0067 for highways).<sup>1</sup>*

The original intent of gas taxes and highway user fees was to fund the building and maintenance of roads. Because fuel was taxed by the gallon, each driver would pay in proportion to their use of the roads. Unfortunately, many of these funds are now used to subsidize public mass transit—effectively punishing private transportation and subsidizing public transportation. Secretary of Transportation Mary Peters told a congressional hearing that 40 percent of highway user fees collected from drivers are diverted for uses other than roads and bridges.<sup>2</sup>

There is ample evidence of the war on private transportation. Portland, Oregon is just one example of this. According to a report published by the Heritage Foundation, “Portland’s leaders have embraced an anti-highway ideology on the assumption that they can get people to ride transit instead. Portland went so far as to cancel a freeway and use the money to build its first light rail line, which opened in 1985.”<sup>3</sup>

The push to “free” Americans from their private cars and “direct” them into public transportation is no small effort. This is a coordinated agenda, in which many statist think-tanks and government agencies are working toward the same goal.

Increasingly, land use and zoning officials are using their powers to promote this public transportation agenda as well. In some instances, cities and counties are granting favoritism to housing development that is

close to public transportation, while limiting housing development they deem to be too far from these transit stations. In other cases, commuter colleges are refusing to add parking spaces to their campuses, in an effort to increase ridership on mass transit. Highway departments are often choosing to exchange automobile lanes for light rail tracks—and the list could go on and on.

This agenda is, of course, supported by most of our nation's media. Even private groups are now promoting this public agenda. Private think-tanks, energy conservation groups, and environmental organizations are touting the evils of the private automobile and the virtues of mass transit—even though there is little evidence that mass transit actually saves fuel.

Although energy conservation, traffic mitigation, and cleaner air are often cited as arguments for these policies, a mountain of evidence suggests that public mass transit systems don't actually achieve any of these objectives. Some of the conservation-minded environmentalists who promote mass transit do so with the honest belief that they are making the world a better place. Those at the top of the public transportation agenda, however, know that the majority of these mass transit systems actually produce more pollution and consume more energy than private automobiles. (Semmens 2005<sup>4</sup>, Cox 2001<sup>5</sup>, O'Toole 2008<sup>6</sup>, O'Toole 2009<sup>7</sup>) If this is true, then there must be another agenda. That agenda is to make more Americans dependent on the government—in this case, specifically dependent on government transportation. To put it another way, they want to add the transportation industry to the growing list of American industries that are based on the socialist economic model.

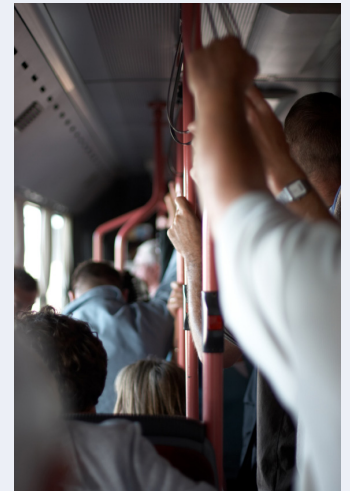
If we look at air transportation, the details are

slightly different, but the dangers are similar. Although we don't yet have any government owned airlines in America, our privately owned air carriers do fly out of publicly owned airports, and access to these private planes is strictly regulated by a government agency—the TSA.

### Transportation and ideas

Transportation is a powerful tool in the dissemination of ideas. I recently traveled over 1,500 miles to deliver a series of lectures to an audience in another state. While I was traveling, it occurred to me that without the freedom to travel, this new audience would not be exposed to my political views. (Ironically, I was lecturing about transportation policy at the time.) Without the use of cars and airplanes, I could not have made the trip. These tools enabled me to propagate my ideas—ideas that could be considered a danger to the job security of many government bureaucrats—to more people in less time.

If the state were to limit travel, though, it could severely restrict the expression of all ideas, but most particularly those ideas with which the state disagrees. Second only in importance to the mass media, travel (and therefore transportation) has always been a critical part of the wars of ideas. Without travel, the early church could not have spread the Gospel to the world. Without travel, the heroes of the protestant Reformation could not have confronted the papists in debate or



organized lectures and discussions. Without travel, the American founding fathers could not have carried out a successful revolution. Media and movement are the primary means of spreading ideas and information, and we should be zealous to protect these tools from the controlling hand of government.

It is important to note that government control can be just as dangerous as government ownership. Control is ultimately more important than ownership. If the tools that support our rights come under government control, it matters little whether or not we can maintain private ownership.

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“Control is ultimately more important than ownership.”

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## Root Principles

Regardless of the pragmatic implications of government transportation, there are some important matters of principle that we should address. First, taxing private transportation and redistributing the funds to public transportation is a clear example of wealth redistribution, a practice very consistent with the tenants of Marxism. Second, this practice of asset redistribution is a direct violation of property rights. The money that is being redistributed is

some citizen's property. We are forcibly taking this money without respect to whether the taxpayer will ever use the public transportation they are indirectly funding.<sup>8</sup>

Third, we must always inquire as to the proper role of government. Is civil government biblically authorized to engage in the provision of this kind of service? I would submit that providing transportation services is not necessary for the protection of our life, our liberty, and our property, which three areas are the only areas government is meant to protect. In fact, as discussed above, government owned transportation systems actually violate the property rights of citizens. Fourth, the Constitution does not enumerate federal power to fund or subsidize transportation. The Constitution's only mention of ground transportation is to authorize the building and maintenance of post roads. This is hardly an argument for mass transit of passengers.

## Conclusion

If we want to protect our God-given rights, then we must promote and preserve private property. We must prohibit civil government from owning or controlling any property that is not absolutely necessary for carrying out its proper tasks. This is universally true, but especially true for property that could be a tool for the exercise of an individual's rights. Our governments should divest themselves of both ownership and control of these tools. 

<sup>1</sup> <http://www.heritage.org/research/reports/2013/01/transit-policy-in-an-era-of-the-shrinking-federal-dollar>

<sup>2</sup> <http://www.heritage.org/research/reports/2007/09/mass-transit-separating-delusion-from-reality>

<sup>3</sup> <http://www.heritage.org/research/reports/2007/09/mass-transit-separating-delusion-from-reality>

<sup>4</sup> [http://www.fee.org/the\\_freeman/detail/does-light-rail-worsen-congestion-and-air-quality#axzz2NvNfG8Nj](http://www.fee.org/the_freeman/detail/does-light-rail-worsen-congestion-and-air-quality#axzz2NvNfG8Nj)

<sup>5</sup> <http://www.publicpurpose.com/ut-ieee.htm>

<sup>6</sup> <http://www.cato.org/publications/policy-analysis/does-rail-transit-save-energy-or-reduce-greenhouse-gas-emissions>

<sup>7</sup> <http://www.cato.org/publications/congressional-testimony/transit-climate>

<sup>8</sup> This article does not attempt to deal with the debate over the appropriateness of public roads. Although this is a legitimate issue for discussion, it is beyond the scope of this article. Without commenting on the practicality or ethics of public roads, I would like to point out that a system of funding road building and maintenance through a fuel tax does generally charge people in proportion to their use of the roads. As long as this system devotes all of the fuel tax to roads for the vehicles that pay the tax, this system is probably not a redistribution of wealth.



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