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U.S. v. Smith: No Presidential Power to
Initiate War

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American legal history firmly rejects the view advanced by some commentators and politicians that the president, not Congress, may decide when to initiate war. It was, of course, decided by the U.S. Supreme Court in a series of rulings at the dawn of the republic that Congress alone possesses the constitutional authority, by virtue of the War Clause, to declare war and to determine its nature and scope.

In 1806, in U.S. v. Smith, Justice William Paterson, who had been a leading delegate to the Constitutional Convention, held, while riding circuit, that the president has no legal authority to initiate war. The president, he wrote in this landmark case, was granted by the Commander in Chief Clause only the authority to respond defensively to a sudden attack on the United States.

Colonel William S. Smith was alleged to have assisted an effort to outfit an expedition in New York against the Spanish province of Caracas and was indicted under a statute that forbade setting on foot a military expedition against a nation with which the United States was at peace.

Col. Smith argued that the expedition "was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States." Justice Paterson crisply dismissed Smith's argument in terms that speak forcefully to Americans across generations.

"Supposing then that every syllable of the affidavit is true, of what avail can it be to the defendant on the present occasion? Does it speak by way of justification? The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. Does he possess the power of making war? That power is exclusively vested in congress."

Justice Paterson observed that there is a "manifest distinction" between the initiation of war and defense against an "actual invasion" of our nation. "In the former case," he wrote, "it is the exclusive province of Congress to change a state of peace into a state of war."

An "invasion" of the United States, Patterson explained, constitutes a general war, and justifies the president in his role as Commander in Chief, not only "to resist such invasion, but also to carry hostilities into the enemy's country; and for this plain reason, that a state of complete and absolute war exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other."

As a prominent framer of the Constitution, Justice Paterson well knew the aims and purposes of the Constitutional Convention. He grasped what James Madison, Alexander Hamilton and James Wilson, three delegates who played a critical role in drafting the War Clause (Article I, section 8), and the Commander in Chief Clause (Article II, section 2) sought to avoid: initiation of war by the president. Indeed, the framers granted to Congress the sole and exclusive authority to go to war because they prized solemn discussion and debate among members of Congress before risking the blood and treasure of the United States.

In addition to the affirmation of the framers' purposes in drafting the War Clause, Justice Patterson's opinion in the Smith case, provided another fundamental constitutional lesson. The president, who takes an oath to defend the Constitution, and is, under the Take Care Clause (Article II, section 3), duty bound to "take care that the Laws be faithfully executed," may not refuse to execute a law. As Patterson wrote: "The president" may not "control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."

President Thomas Jefferson did not in fact authorize Col. Smith and others to mount an expedition against Caracas, but even if he had, as Justice Patterson emphasized, such an order would have lacked legal authority. The president may not control, that is, violate a statute. To wring from a duty faithfully to execute the laws a power to defy them would be utterly illogical. In *Kendall v. United States* (1838), the Court rightly stated: "To contend that the obligation imposed upon the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

Justice Patterson's landmark opinion teaches that there is nothing in the Constitution that empowers the president to repeal an act of Congress. Such authority would convert the executive into a lawmaker, make hash of the separation of powers doctrine and eviscerate the rule of law.

