

UNLEASHING THE DOGS OF WAR: WHAT THE CONSTITUTION MEANS BY “DECLARE WAR”

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Does Congress’s power to “declare war” extend beyond the ability to issue formal declarations of war and include the power to decide whether the United States will wage war? Relatedly, does the “declare war” power subsume the authority to decide whether the United States will wage war even when another nation already has declared war on the United States? Using a host of overlooked historical materials, this Article answers both questions in the affirmative. In the eighteenth century, the power to declare war was a power to decide whether a nation would wage war, and any decision to wage war, however expressed, was a declaration of war. While the commencement of warfare was the strongest declaration of war because it unmistakably signaled a decision to wage war, other words and deeds could likewise constitute a declaration of war. The Constitution grants the “declare war” power to Congress only, and hence only Congress can decide whether the United States will start a war or wage war against a nation that already has declared war against the United States. Under the original Constitution, the President cannot make these fateful choices.

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Readers might wish to examine two responses to this Article published in this issue of the *Cornell Law Review*. See Michael Ramsey, Response, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007); Robert J. Delahunty & John Yoo, Response, *Making War*, 93 CORNELL L. REV. 123 (2007). I am grateful for their responses and willingness to reengage in the debate about what it means to declare war, especially as their scholarly work has greatly influenced my own thinking on these matters. A sur-reply follows their responses. Saikrishna Prakash, Reply, *A Two-Front War*, 93 CORNELL L. REV. 197 (2007). Special thanks to the *Cornell Law Review* for making this back and forth possible.

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INTRODUCTION

Writing to James Madison in 1789, Thomas Jefferson extolled the Constitution for providing "one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body."¹ Evidently, Jefferson had concluded that the Constitution's grant of power "[t]o declare war"² meant that Congress, and not the President, would decide when the nation would wage war.

Some scholars argue that Jefferson's reading of "declare war" was spectacularly mistaken, at least as a matter of the Constitution's original meaning.³ They believe that the President, as Commander in

¹ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) (endnote omitted). Jefferson was likely drawing from William Shakespeare. See WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 1, line 273 (Burton Raffel ed., Yale Univ. Press 2006), available at http://shakespeare.mit.edu/julius_caesar/full.html (Marc Antony proclaiming, "Cry 'Havoc,' and let slip the dogs of war").

² U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . [t]o declare War . . .").

³ See, e.g., ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 109–10 (1991); JOHN YOO, THE POWERS OF WAR AND PEACE 7–11 (2005); Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 *passim* (1970); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 848–57 (1972); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 173–74 (1996) (arguing that the President may start a war).

Chief,⁴ certainly could let slip the dogs of war. The President had merely to order the Army to invade another nation or the Navy to attack another nation's ships to unchain fully the war dogs. On this view, the congressional power to "declare war" poses no barrier to the President's starting a war. Congress merely has the power to issue formal declarations of war, determining whether wartime statutes will come into play.⁵ So while the President could take the nation to war, only Congress could decide that certain wartime powers and limitations will apply. This "formalist theory" of the "declare war" power supposes that congressional declarations of war were always formal documents of marginal significance.⁶

Other scholars regard Jefferson as only partially mistaken.⁷ They argue that only Congress can take the nation from a state of peace into a state of war.⁸ Hence, consistent with the grant of the "declare war" power to Congress, the President cannot order the Air Force to launch a first strike on Pyongyang. Such an order would be contrary to the constitutional allocation of the "declare war" power to Congress because the very act of bombing the North Korean capital would itself be an informal declaration of war. Bombing would be no less a declaration of war than if the President had uttered the words "I declare war on North Korea." Yet, if North Korea declared war against the United States first, the President could order the military to wage war against North Korea without securing a prior congressional declaration of war. The President could order a blockade, a ground invasion, even a nuclear strike. Why? Because North Korea, through its declaration of war, would have thrust the United States into an unavoidable war. This "pragmatic theory" supposes that the "declare war" power was irrelevant in this situation because nations could not declare war in response to other nations who have already declared war.⁹

⁴ See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

⁵ See Yoo, *supra* note 3, at 244–46.

⁶ See *id.* at 247. I call this theory the "formalist theory" not as a pejorative but merely because the theory stresses that the "declare war" power only enables Congress to issue formal declarations of war. As "formalism" or "formalist" are ordinarily used, all three theories discussed here—the formalist, pragmatic, and categorical theories—offer formalist accounts of "declare war" because each is a theory that takes text, structure, and history seriously.

⁷ See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 239–45 (2007) (arguing that President can wage war in response to another nation's declaration of war); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1549–50 (2002).

⁸ See Ramsey, *supra* note 7, at 1546.

⁹ Some scholars insist that only Congress can decide that the nation will wage war but do not focus on the situation when another nation has declared war first on the United States. See, e.g., MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 80–84 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 74–77 (1990); W. TAYLOR REVELEY

“[T]here is nothing to ‘declare’—the state of war already exists.”¹⁰ If the “declare war” power is immaterial because the United States is at war, Congress has no *ex ante* check on going to war, and the President may prosecute the war without constraint, or so the pragmatic theory maintains.

Thomas Jefferson was not mistaken on the meaning of “declare war”—only Congress has the power to decide when the nation will wage war. Using untapped eighteenth-century materials, this Article answers two questions about the original meaning of “declare war.” First, did the power to declare war extend beyond the ability to issue formal declarations of war to include the authority to determine whether a nation would wage a war? Second, did the power to declare war encompass the authority to decide whether a nation would wage war even in those situations where another nation had already declared war?¹¹

This Article answers both questions in the affirmative. While the ability to issue formal declarations of war certainly was part of the “declare war” power, that power extended beyond the mere issuance of formal declarations. Any decision to wage war, however expressed, was a declaration of war. Contrary to what some might imagine, there were no prescribed words or phrases that governments needed to utter in order to declare war. Many words and actions looking nothing like a formal declaration of war were declarations of war nonetheless. Indeed, it was far more common for nations in the eighteenth century to declare war via informal means than by a formal declaration.

The most forceful and unambiguous declaration of war was the commencement of general hostilities. In the mid-eighteenth century, Sir Robert Walpole, commonly regarded as the first English Prime Minister, observed

that of late most Wars have been declar'd from the Mouths of Canons, before any formal Declaration; and, Sir, it is very probable,

III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 55–115 (1981); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 39–47 (1972); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 677–88 (1972); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 740–56 (1997).

Other scholars have argued that Congress must make all decisions relating to whether the nation will wage war. See JOHN HART ELY, *WAR AND RESPONSIBILITY* 3–9 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 3–12 (2d ed. 2004); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 72–75 (2d ed. 1986).

¹⁰ RAMSEY, *supra* note 7, at 241.

¹¹ A companion essay discusses other questions related to declarations of war. In particular, it considers all of the functions that a declaration of war played in the eighteenth century, what Congress must do to declare war, and whether proposed declarations of war are subject to the Presentment Clause. See Saikrishna Prakash, *Declarations of War: A Primer* (Sept. 13, 2007) (unpublished manuscript, on file with author).

that if we are obliged to come to an open Rupture with Spain, our first Declaration of War made on our Parts will be from the Mouth of our Cannon.¹²

Or consider what John Adams wrote during the Revolutionary War. He opined that the war between England and France was “sufficiently declared by actual hostilities in most parts of the world.”¹³ A little later, a French statesman noted that “hostilities are commonly considered as the strongest declaration of war.”¹⁴ Nations also regarded a number of hostile actions short of general warfare as declarations of war. Among other things, making an alliance with a nation at war was a declaration of war against that nation’s foes.¹⁵

The “declare war” power also encompassed the ability to determine whether and how to wage war in response to another nation’s declaration of war. Even after another nation had declared war, the targeted nation had a decision and a possible declaration to make because war was not always an obvious response. An entity with the power to declare war on behalf of Prussia could decide to wage war against a nation that had declared war against Prussia. Alternatively, that entity might decline to declare war, thereby limiting the Prussian military to defensive measures. At the extreme, Prussia might decide to sue for peace. Accordingly, an entity empowered to declare war could decide when and under what circumstances a nation would wage a war.

This “categorical theory” regards the “declare war” power as the power to control all decisions to enter into a war. The “declare war” power included the power to start a war—to issue declarations that start a war, termed here “initiation declarations.”¹⁶ The “declare war” power also encompassed the authority to enter a war against a nation that had already declared war—to issue declarations in response to another nation’s initiation declaration, termed here “response decla-

¹² The Second Parliament of George II: Fourth Session (9 of 9), Begins 12/5/1738, 10 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, <http://www.british-history.ac.uk/report.asp?compid=37805> (last visited Aug. 25, 2007).

¹³ Letter from John Adams to Samuel Adams (Feb. 14, 1779), in 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 47, 48 (Francis Wharton ed., Wash. Gov’t Prtg. Office 1889) [hereinafter REVOLUTIONARY DIPLOMATIC CORRESPONDENCE]. He added, “I suspect there will never be any other declaration of war. Yet there is in fact as complete a war as ever existed.” *Id.*

¹⁴ 1 JACQUES NECKER, AN ESSAY ON THE TRUE PRINCIPLES OF EXECUTIVE POWER IN GREAT STATES 273 (London, G.G.J. & J. Robinson 1792).

¹⁵ See *infra* text accompanying notes 117–27.

¹⁶ See TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 60–62 (2d ed., London, Longman’s, Green & Co. 1875) (noting that declaration of war serves the function of commencing war and noting instances when formal declaration actually served that purpose).

rations.”¹⁷ Finally, the “declare war” power subsumed the ability to decide what level of hostilities a nation will bring to bear in a war. Someone with the power to declare war may declare a limited land or naval war¹⁸ or may declare an all-out general war.

In the context of the Constitution, the grant of “declare war” power means that only Congress can decide whether the United States will wage war. The President cannot make this crucial decision because the Constitution never grants the Commander in Chief the power to declare war. Accordingly, the President cannot unilaterally order an airstrike on Tehran because such an attack would amount to a declaration of war. Moreover, even if Iran declared war on the United States, either formally or informally, the President could not attack Iran merely because the latter had already declared war. The decision whether to go to war always rests with Congress. Finally, as part of its authority to declare war, Congress may choose what type of war to fight. Congress may authorize a general war—land, sea, and air—against an enemy. Or Congress may authorize only limited offensive measures, such as a sea war only.¹⁹ And Congress might choose not to declare war at all and instead urge the Executive to negotiate a settlement, leaving the Executive to order defensive measures coupled with treaty talks.²⁰ In sum, under the Constitution, the decision to wage war, and the type of war to be fought, rests with Congress, creating what we might call a “unitary war power.”

Early Commanders in Chief well understood that the Constitution did not permit them to wage war unilaterally. In fact, these Presidents believed that they could not wage war even in response to another nation’s declaration of war. Though two Indian nations declared war on the United States, President George Washington consistently maintained that Congress had to authorize offensive measures against these nations. “The constitution vests the power of declaring war in Congress; therefore no offensive expedition of im-

¹⁷ See, e.g., Act of April 6, 1917, 40 Stat. 1, 1 (“Resolved . . . That the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared . . .”).

¹⁸ For example, in 1799, Congress authorized a limited naval war with France. See, e.g., Non-Intercourse Act, 1 Stat. 613, ch. 2, § 1 (1799).

¹⁹ See, e.g., *id.* § 5 (allowing naval officers to stop and seize American ships bound for French ports during the naval war with France); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 173, 177 (1804) (discussing the United States’ limited naval war with France).

²⁰ As discussed in Part III, early Presidents understood that they could not order a general war against even those nations that had declared war against the United States. Instead, early Presidents distinguished between offensive and defensive measures. While the President might authorize defensive measures designed to thwart attacks and repel invasions, only Congress could authorize offensive measures meant to take the fight to the enemy. These Presidents believed that only the Congress could authorize offensive measures because only Congress had the power to take the nation to war. See discussion *infra* Parts II.B.4, III.A.2.

portance can be undertaken” against the “refractory part of the Creek nation . . . until after [Congress] shall have deliberated upon the subject, and authorized such a measure,”²¹ he observed. Presidents John Adams, Thomas Jefferson, and James Madison hewed to this line as well.²² Across these administrations, nations (France, Tripoli, England, Algeria) declared war on the United States, formally and informally, and in each instance, the sitting President went to Congress for authority to wage war. No early President felt free to wage war merely because another nation had declared war on the United States. Each understood that to wage war was to declare it, a power the Constitution granted Congress and not the President.

Part I of this Article considers constitutional text and structure. Part II, using seventeenth, eighteenth, and early nineteenth-century historical materials, argues that the power to declare war included the power to issue initiation declarations. Drawing upon the same set of materials, Part III contends that the power to declare war included the authority to decide whether and how to wage war in response to another nation’s declaration of war, i.e., included the power to issue response declarations. Part IV considers some implications of the original meaning of “declare war.”²³

Rather than merely relying upon familiar originalist sources, this Article unearths the original meaning of “declare war” by tapping new sources. First, it examines actual declarations of war that nations issued in the eighteenth century. Second, it considers what a broad spectrum of Europeans said about declaring war—not just those writers devoted to international law, but monarchs, legislators, ministers, and historians of the era. Third, it sheds light on American treaties which contained provisions dependent on the existence of a declaration of war. Fourth, the Article recounts diplomatic letters written during America’s Revolutionary War. Finally, the Article considers documents from early administrations in which executive officers, in-

²¹ Letter from George Washington to William Moultrie (Aug. 28, 1793), in 10 THE WRITINGS OF GEORGE WASHINGTON 366, 367 (Jared Sparks ed., Boston, Little, Brown, & Co. 1855), available at [http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw330067\)\)](http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw330067))).

²² See *infra* Part III.A.2.

²³ Some caveats are in order. This Article never argues that the original Constitution (and its meanings) ought to apply today. Instead, the Article makes claims about the late eighteenth-century meaning of “declare war” and assumes that this meaning should continue to apply today. Given the central role that originalist arguments have played in war powers scholarship, the peculiar relevance of the original meaning of the Constitution in this area is perhaps obvious. Moreover, this Article does not discuss whether the United States properly declared various wars. That would require an examination of the events leading up to these wars, an inquiry well outside this Article’s scope. Finally, this Article does not address whether there should be judicial review over whether the political branches properly declared war.

cluding Presidents, endorsed the idea that the Constitution created a unitary war power vested with Congress.

Current events suggest that this is an opportune time to reconsider the meaning of “declare war.” The Bush Administration maintains that the Constitution empowers the President to start a war.²⁴ Although the Administration secured congressional approval for the Afghani and Iraqi wars,²⁵ it may yet wage war on another nation without first securing such approval. Indeed, Washington buzzes with speculation about whether the President will order a military strike on Iran.²⁶ One reason for such a strike might be the alleged Iranian assistance to Iraqi Shia militias,²⁷ assistance that could be seen as an informal Iranian declaration of war against the United States. An attack on Iran made without congressional approval would trigger a firestorm precisely because of profound disagreement about what it means to “declare war.”

I

THE CATEGORICAL THEORY OF “DECLARE WAR”

While the ultimate objective of this Article is to establish what “declare war” and “declaration of war” meant in the late eighteenth century, this Part does not attempt to establish those definitions. It has more modest objectives: (1) to introduce (without substantiating) the categorical theory of declare war, namely the idea that the power to declare war encompassed the power to decide to wage war; (2) to establish that nothing in the Constitution precludes such a meaning; and (3) to argue that as a matter of structure, the formalist and pragmatic theories of “declare war” lead to incongruous and improbable allocations of war powers.

A. The Decision to Wage War as a Declaration of War

In the eighteenth century an entity with the power to declare war could issue declarations of war. Although declarations of war could serve many functions, the principal function was to announce that a nation had chosen to wage war against another nation. Among other

²⁴ See, e.g., Memorandum Opinion from the Office of Legal Counsel to the President, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, <http://www.usdoj.gov/olc/warpowers925.htm> (last visited Aug. 25, 2007) (concluding that because “[d]eclaring war is not tantamount to making war,” the President may wage war notwithstanding the Constitution’s grant of “declare war” authority to Congress).

²⁵ Cf. Christopher Shea, *War Counsel*, BOSTON GLOBE, Oct. 23, 2005, at E1.

²⁶ See, e.g., Peter Baker, Dafna Linzer & Thomas E. Ricks, *U.S. Is Studying Military Strike Options on Iran*, WASH. POST, Apr. 9, 2006, at A1.

²⁷ See, e.g., Borzou Daragahi, *Iran Readies Military, Fearing a U.S. Attack*, S.F. CHRON., Feb. 21, 2005, at A1.

things, declarations notified the enemy, the declaring party's own nationals,²⁸ and the rest of the world²⁹ that one nation had decided to wage war on another.³⁰

In ancient times, heralds sent to the enemy made these declarations.³¹ Later declarations were written and delivered to the enemy prior to the beginning of hostilities.³² By the eighteenth century, nations had almost wholly abandoned the practice of giving warning of impending warfare³³ and the practice of issuing formal declarations waned, although it did not disappear entirely.³⁴

Nonetheless, as shown in Part II, declarations of war continued to be associated with the onset of war. In particular, it became common to regard as a declaration of war any words or actions that signaled that a nation had decided to wage war. These signals could be formal or informal. Formal declarations usually would contain a statement like "we declare war on France" or "we declare that a state of war exists with Holland." Such formal declarations remain familiar to this day. Indeed, if such words are not uttered or written in a war, many are likely to regard the war as an "undeclared war."

Yet "declare war" was not understood so narrowly in the eighteenth century. Although one could say that wars without formal declarations were "undeclared wars," one equally could say that some declaration of war, be it formal or informal, always coincided with or preceded the commencement of warfare. In other words, even if there were no formal declaration of war (as there often was not), nations at war necessarily had informally declared war by their words or actions.³⁵ Because the decision to wage war was itself a declaration of war, nations informally declared war in the very act of going to war.

²⁸ See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 73 (2005).

²⁹ See *id.* at 106 ("In practice, declarations were often pitched at least as much to the world at large as to the enemy state.")

³⁰ See Yoo, *supra* note 3, at 245. Note that the Roman expression "indictio belli," meaning "declaration of war," could be defined as either a pronouncement of hostilities to Roman nationals or to the enemy. See NEFF, *supra* note 28, at 28.

³¹ See NEFF, *supra* note 28, at 26. According to Neff, the last recorded use of heralds as a method for declaring war was when Sweden declared war against Denmark in 1657. See *id.* at 104–05; ERNEST NYS, *LE DROIT DE LA GUERRE ET LES PRÉCURSEURS DE GROTIUS* 111–12 (Paris, Durand et Pedone-Lauriel 1882).

³² See NEFF, *supra* note 28, at 71–72; see also NYS, *supra* note 31, at 105–12 (discussing medieval declarations of war); 2 CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 18–20 (James Brown Scott ed., Tenney Frank, trans., Clarendon Press 1930) (1737) (noting various ways that wars begin).

³³ See Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 19–20 (1938).

³⁴ See THE FEDERALIST NO. 69, at 418, 422 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁵ See Letter from John Adams to Samuel Adams, *supra* note 13, at 48.

There were two categories of informal declarations. The first consisted of written or oral informal declarations. However official and weighty these documents or speeches were, they did not formally proclaim that one nation was "declaring war." Nonetheless, these informal declarations made it clear that one nation had decided to fight a war. Thus, an assembly speech bristling with belligerence could serve as a declaration, as could a written defense of why one nation would fight another. The second category of informal declarations consisted of declaring war via some hostile act. An authorized invasion of another nation, even if no formal declaration of war preceded or followed it, was a declaration of war. If France invaded Holland, that was a French declaration of war against Holland. An invasion was an unequivocal declaration of war because it rather unmistakably signaled a resolve to wage war.

Less belligerent acts, such as ambassadorial dismissals, blockades, and aiding a nation at war, also might serve as informal declarations of war. When these acts signaled that a nation had chosen to wage war, individuals regarded these hostile actions as informal declarations of war.

Another dimension of declarations of war was the decision of what types of hostile actions to order. Declarations typically commanded a nation's land and naval forces to attack the enemy. They also might authorize private parties to wage war, such as permitting them to take the enemy's naval vessels. Those vested with the "declare war" power were authorized to make these crucial decisions.

B. Constitutional Text

The categorical theory's claim about the meaning of "declare war" hardly emerges from the constitutional text. After all, the Constitution never defines "declare war." Hence, it will be impossible to establish, from an examination of text alone, what "declare war" means. The most that can be said at this point is that nothing in the Constitution's text casts doubt on the categorical theory. Thus, if the categorical theory is correct, then Congress may decide whether the nation will wage war.

Still, a textual theory's plausibility can be judged, in part, by how well it fits with other textual pieces. The Constitution mentions numerous wartime authorities and restrictions elsewhere. How well do these other textual pieces cohere with the categorical theory? There are congressional, executive, federalism, and individual rights pieces. None of them poses any difficulties for the claim that the original meaning of "declare war" was to decide to go to war.

Consider other grants of authority to Congress. The power to grant letters of marque and reprisal³⁶ permits Congress to grant private parties the right to seize and profit from enemy shipping. When a nation concludes that another has injured it, granting letters of marque and reprisal to select individuals can be a measured means of seeking recompense—more harsh than negotiations but less extreme than a full-scale war.³⁷ In the absence of this separate grant, Congress likely would have had this power as part of its authority to declare war.³⁸ The same may be said of Congress's power to regulate captures³⁹—the power to declare war arguably encompassed the power to regulate captures.⁴⁰ Finally, a separate grant of the power to govern and regulate the armed forces⁴¹ may have been necessary because the power to declare war, considered by itself, would not have implied a power to govern and regulate the armed forces, especially in a Constitution that creates a Commander in Chief.⁴²

³⁶ U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [to] grant Letters of Marque and Reprisal . . .”).

³⁷ See REVELEY, *supra* note 9, at 63. Of course, a nation might both declare war and generally issue letters of marque and reprisal, in which case the letters would not be a step toward a full-scale war but would be part of a strategy of total war. For an excellent treatment of the meaning of marque and reprisal authority, see Ramsey, *supra* note 7, at 1613–19.

³⁸ See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 98–99 (3d ed., Boston, Little, Brown & Co. 1858) (saying as much). Blackstone also noted that the power to issue letters of marque and reprisal “is nearly related to, and plainly derived from, that other of making war.” WILLIAM BLACKSTONE, 1 COMMENTARIES *250. The decision to separately vest the power to issue letters of marque and reprisal likely resulted from an abundance of caution—*ex abundanti cautela*. See HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 27 (New York, McDermut & D.D. Arden 1815).

In much the same way, grants of specific executive powers in Article II can be seen as already included in the broad grant of executive power. Arguably, they were listed out of an abundance of caution. For a discussion of this principle as it applies to Article II, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 577 (1994).

³⁹ See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . [to] make Rules concerning Captures on Land and Water . . .”).

⁴⁰ See WHEATON, *supra* note 38, at 27. It is hardly odd or unique for the Constitution to make express certain principles that would have been implicit in the grant of authority to “declare war.” It merely replicates a pattern found elsewhere in the Constitution, particularly the relationship between the vesting clause of Article II and the rest of Article II. As James Madison said, albeit in a different context, “[n]othing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.” THE FEDERALIST NO. 41, at 263 (James Madison) (Clinton Rossiter ed., 1961). In Article I, section 8, clause 11, the “declare war” power precedes the grants of power over marque and reprisal and captures, precisely the structure that Madison described.

⁴¹ See U.S. CONST. art. I, § 8, cl. 14 (“The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . .”).

⁴² See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

Through its power of the purse,⁴³ Congress may check the Commander in Chief's conduct of a war. The Constitution prohibits army appropriations lasting more than two years⁴⁴—a means of ensuring that Congress retains firm and periodic control of the Army's finances. Because the Army requires a new appropriation every two years, Congress can defund the Army by failing to pass a new appropriation, effectively precluding the Army from fighting a war. Congress likewise might withhold funds from all branches of the armed forces and thereby halt the nation's participation in any war.⁴⁵

The ability to defund the armed forces and thereby check the Executive's conduct of a war does not cast doubt on the broad definition of "declare war."⁴⁶ The Congress's ability to declare war and its separate ability to control funding once war is declared provide it two distinct means of controlling the use of military force. The Constitution's belt-and-suspenders approach is designed to ensure that the government commences and conducts wars with some measure of public support. Once declared, a war might not go as planned, and the nation may benefit if Congress can end a war it originally authorized. In sum, none of Congress's other war-related authorities casts doubt on the categorical theory of "declare war."

What of the President? Everyone agrees that under the Constitution the President cannot "declare war."⁴⁷ The key issue is to resolve what words and actions are encompassed within that implied prohibition. If one accepts the categorical theory's definition of "declare war," the President cannot take actions that constitute a declaration of war. Accordingly, the President cannot commence warfare or engage in other patently hostile actions that serve as declarations of war. To take such actions unilaterally would be to assume Congress's power to declare war.

Nonetheless, the President retains significant military authority. The Commander in Chief Clause⁴⁸ that grants the President that fa-

⁴³ For a discussion of how the power of the purse arises from the Necessary and Proper Clause, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1348-50 (1988).

⁴⁴ See U.S. CONST. art. I, § 8, cl. 12 ("The Congress shall have Power . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . .").

⁴⁵ For a longer discussion of this vital principle of congressional control and the role it played in ratification, see Yoo, *supra* note 3, at 279-88.

⁴⁶ *But see id.* at 174 (arguing that impeachment and spending are the exclusive congressional checks on executive war making).

⁴⁷ In my readings, I have never come across any scholar who argued that the President could declare war. It must also be noted that no President apparently has ever claimed such authority. None of this denies that there are serious disputes about what it means to "declare war."

⁴⁸ See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

mous title serves several significant purposes, none of which conflicts with the categorical theory. The Clause makes clear that Congress does not have the authority to choose a Commander in Chief on its own. More substantively, it enables the President to control the nation's armed forces in times of war and peace, subject to Congress's constitutional authorities. The Clause also reveals that the President may command the militia only when the latter is called into federal service to execute federal law, to suppress rebellions, or to repel invasions.⁴⁹

Significantly, the President may order acts of national self-defense, even very destructive acts. Under the categorical theory, the President does not informally declare war against invading nations by instructing the armed forces to defend the nation's borders against an armed invasion.⁵⁰ Likewise, the President does not declare war by instructing the armed forces to act in self-defense. A vessel fired upon may act to destroy the attacking vessel or plane without thereby declaring war.

The difference between these actions and an unauthorized declaration of war reflects the distinction between acting in self-defense and acting in a manner that commits the nation to a war. As discussed in Part III, early Presidents repeatedly distinguished between purely defensive operations and offensive operations designed to take the war to the enemy. The former were always permissible, while the latter the Constitution left exclusively with Congress. Hence, fending off an attack of an aggressor was perfectly acceptable, but the decision to preemptively wage war was always forbidden. In between were sometimes difficult questions about what military measures Presidents could order without the resulting conduct of the armed forces rising to the level of a declaration of war. Admittedly, this distinction—between actions that amount to an informal declaration of war and actions that do not—will sometimes be hard to draw in concrete situations.⁵¹ Nonetheless, it is a distinction found in the Constitution itself. Even though Congress has the power to declare war, it lacks an exclusive power to control all uses of military force.⁵² Conversely, while the President may use military force, the President may not order those uses of force that amount to informal declarations of war.

⁴⁹ See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual Service of the United States . . .*”) (emphasis added).

⁵⁰ See *infra* Part III.A.2.

⁵¹ For a little more detail on this issue, see *infra* Part IV.B.

⁵² In other words, Congress's exclusive power to declare war does not grant Congress a monopoly on the ability to order military force. The President has a right to order certain uses of force as well, so long as he does not informally declare war through his orders to use force.

Finally, we come to the other instances in which the Constitution mentions war. Article I, section 10 provides that states cannot “engage in war” unless certain exceptions apply or Congress consents.⁵³ Professor John Yoo has argued that the Constitution would have paralleled this language in Article I had “declare war” included the decision to wage war.⁵⁴ The Constitution might have provided that absent a congressional declaration of war, the United States could not “engage in war.” That the Constitution did not so provide suggests that the categorical theory of “declare war” is mistaken, or so the argument goes.

By granting Congress the power to declare war and not granting anyone else a concurrent power, the Constitution *does* provide that the United States may not engage in war without a congressional declaration, for the very act of engaging in war was understood as an informal declaration of war. The evidence in Parts II and III will demonstrate this. Though the Constitution could have included other language that would have made this point even clearer, the absence of such text does not weigh against the categorical theory. Indeed, one might say that if the Constitution was meant to authorize the President to start a war, Article II would have provided that the President can “engage in war at his pleasure, subject to funding constraints.” One always can argue that some textual claim is mistaken because the Constitution could have more clearly endorsed the claim. For good reason, such arguments have little purchase.

Finally, a skeptic of the categorical theory might cite the use of “war” in Article III. Article III, section 3 defines treason to include “levying war” against the United States. If Congress enjoys a broad power to declare war, why does not the Treason Clause just provide that “declaring war” against the United States was an element of treason? The best answer is that the Founders wanted to contrast what was treason in England with what would be treason in America. The Founders copied portions of English treason law and omitted others,⁵⁵ thus inviting the inference that the offenses omitted could not constitute treason. The idea that levying war is treasonous is a part of English law that the Founders retained.

But what does it mean to levy war? It means no more than to wage war.⁵⁶ Accordingly, the powers to declare war and levy war over-

⁵³ See U.S. CONST. art. I, § 10, cl. 3.

⁵⁴ See Yoo, *supra* note 3, at 255–56.

⁵⁵ Compare U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”), with 4 BLACKSTONE, *supra* note 38, at *75–94 (describing these two types of treason along with many other actions that were treasonous in England).

⁵⁶ See 4 BLACKSTONE, *supra* note 38, at *81–82 (describing levying war as taking up arms against the King).

lap to some degree, for to wage war is to declare war. But “declare war” meant far more than merely commencing it. Among other things, it included the power to give notice of an impending war and the power to make conditional declarations of war.⁵⁷ Had the Constitution merely granted Congress the power to “levy war,” Congress might lack many of the functions attributable to declarations of war.

The chief difficulty with reading the Constitution as if it somehow refuted the categorical theory of the “declare war” power is that so many people of the era endorsed that theory. As we shall see in Parts II and III, the original understanding of the power to declare war was that it encompassed the power to decide whether to wage war and that this power could be exercised by formal and informal means. The plausibility of an originalist claim must be judged not only by a bare examination of constitutional text but also by the extent to which individuals actually supported or rejected the claim. To suppose that the Constitution’s text somehow refutes or disproves the categorical theory of “declare war” is to imagine that dozens of people in the eighteenth century, including monarchs, presidents, legislators, diplomats, and judges were mistaken about what it meant to “declare war.”

C. Constitutional Structure

Congress’s power to declare war includes the power to decide which means of force will be used against the enemy. Congress not only may decide to wage a full-scale war, but it instead may take more partial and halting steps along the path to such a war. In other words, Congress may judge what level of martial force is appropriate in wars that it commences. In granting Congress the power to decide whether to fight a war and the level of hostilities that will be brought to bear, the Constitution creates a unitary war power.

In contrast to this unitary war power theory, the formalist and pragmatic theories of “declare war” contemplate a divided war power. Each imagines that the Constitution implicitly bifurcates war powers between Congress and the President. Sometimes Congress will make the decision to go to war and sometimes the President will. Sometimes Congress can decide what type of war to fight and sometimes the President can. The division of war powers implied by these theories creates anomalies, suggesting that formalist and pragmatic theories are mistaken.

⁵⁷ A conditional declaration of war was a document that warned that the declarant would wage war against another country unless the other country satisfied certain demands. A nation might issue a conditional declaration with the hopes that the other would see the wisdom of meeting the demands and thereby avoid a war. See 3 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 635–37 (Francis W. Kelsey trans., Bobbs-Merrill Company, Inc. 1925) (1625). For a longer contemporary discussion of conditional declarations, see Prakash, *supra* note 11.

1. *A Unitary War Power*

The Constitution grants Congress the power to decide what type of war America shall fight. At one extreme, Congress may grant a letter of marque and reprisal to one individual nursing a grievance against another nation or its nationals, permitting that individual to make a reprisal sufficient to compensate for a previous injury.⁵⁸ This is perhaps the narrowest form of hostility. At the other extreme is general warfare with Congress requiring the Commander in Chief and private citizens to commit any and all hostilities against the enemy. No further congressional escalation is possible.

In between these extremes lie many war measures. For instance, Congress can authorize some public captures of enemy property, but not others (as was true in the undeclared war with France during the late 1790s).⁵⁹ It can issue general letters of marque and reprisal, permitting any American to capture any and all vessels of a foe. Congress can order a blockade of the enemy's ports, using a combination of the declare war and marque and reprisal powers. Or it can attempt to confine a war to certain locations. In this way, Congress can calibrate the level of warfare that America employs.

Accordingly, the Constitution contemplates that Congress may decide whether the nation will wage war and what levels of force are appropriate in that war to achieve American ends. As Justice Samuel Chase said in *Bas v. Tingy*,⁶⁰ "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time."⁶¹ Because the President lacks the power to declare war, the President lacks the constitutional authority to make these choices. As Justice William Paterson observed in the same case, "[a]s far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations."⁶² The more general point is that Congress may decide the parameters of the war. If Congress grants a letter of marque and reprisal to an individual, the President cannot issue general letters. If Congress only grants general letters, the President cannot use the military to wage war. And most obviously, if Congress never declares war, the President cannot decide that the nation will wage war.

Chief Justice John Marshall neatly summed up the unitary war power view in *Talbot v. Seeman*⁶³ when he observed that the "[t]he whole powers of war . . . , by the constitution of the United States,

⁵⁸ See U.S. CONST. art. I, § 8, cl. 11.

⁵⁹ See *infra* note 311 and accompanying text.

⁶⁰ 4 U.S. (4 Dall.) 37 (1800).

⁶¹ *Id.* at 43.

⁶² *Id.* at 45.

⁶³ 5 U.S. (1 Cranch) 1 (1801).

[are] vested in congress.”⁶⁴ Hence, Marshall had no difficulty concluding that Congress could choose to authorize only limited forms of warfare.⁶⁵ Later, in *Little v. Barreme*,⁶⁶ the Court, per the Chief Justice, held that the President could not sanction captures that Congress had not permitted.⁶⁷ The only lawful captures were the ones that Congress had specifically authorized. *A fortiori*, the President could not have ordered general hostilities because that would have left Congress’s decision to wage a limited war against France in utter tatters.⁶⁸

As a matter of constitutional structure, this allocation of war power is fundamentally sound because it leaves the decision to go to war and the question of what level of warfare is appropriate in the hands of one entity rather than bifurcating those related authorities between two entities. A unitary war power concentrates responsibility on Congress and thus does not permit confusion about who is responsible for going to war and who is accountable for the overall level of force being employed against the enemy. Whether Congress ultimately makes wise decisions or not, at least there is no obscure division of authority that might confuse the people.

2. *Difficulties with the Formalist Theory*

Recall that the formalist view contends that while only Congress can issue formal declarations of war, the President can actually start a war.⁶⁹ One ambiguity with the formalist position is whether Congress, in its formal declaration of war, may start a war and order the Commander in Chief to commence hostilities. On the one hand, if the formalist view denies that Congress may start a war and order hostilities, formalists have the unenviable job of explaining why Congress lacks such power even though these were established features of formal declarations of war.⁷⁰

On the other hand, if the formalist theory accepts that Congress may start a war and order hostilities, then formalists must explain why the Constitution creates two means of going to war, one a formal congressional declaration of war and the other the President’s orders to wage war. The only possible answer—that the Founders wanted to

⁶⁴ *Id.* at 28.

⁶⁵ *See id.* at 28–29.

⁶⁶ 6 U.S. (2 Cranch) 170 (1804).

⁶⁷ *See id.* at 179.

⁶⁸ *See* Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 37 (1976).

⁶⁹ *See supra* text accompanying notes 3–6.

⁷⁰ *See, e.g.*, His Majesty’s Declaration of War Against the French King; Together with the King’s Proclamation for the Distrubtion of Prizes, &c. (May 17, 1756), in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN FROM 1727 TO 1783, at 102, 102–03 (Robert Beatson ed., London, Longman, Hurst, Rees & Orme 1804) (reflecting an order of the English King to his officers to “execute all acts of hostility”).

make it easier to go to war—seems dubious. It makes far more sense to suppose that the Founders would want to shield a weak nation from the ravages of war. Creating two parallel mechanisms for going to war would thwart this goal.

A greater difficulty with the formalist view is that it imagines an inexplicable division of war powers. First, proponents of the formalist theory need to explain why the Constitution does not trust the President with the power to formally declare war. What is it about the power to formally declare war that makes the President unworthy of wielding such power, especially when, by hypothesis, the President has the far more consequential power to start a war? One is hard pressed to rationalize why the chief executive would be denied the traditional executive power of formally declaring war while enjoying the more vital power to wage war.

Second, formalists must explain why the President has the greater power to start a war but wholly lacks the lesser power to grant letters of marque and reprisal.⁷¹ One can debate the merits of a constitution that vests the President with the full panoply of war powers; some will favor such a system and others will oppose it. But what reason can there be for granting the President the power to start and wage a full-scale war while simultaneously denying him the far less consequential power to issue letters of marque and reprisal, a power which would be quite useful to successfully prosecute that war? This is to read the Constitution as if it swung the door wide open to presidential wars but simultaneously, inexplicably, and unhelpfully bolted one window shut.

The formalist theory suffers from two additional problems. First, it is self-contradictory. The formalist theory, while plausible on the surface, actually is at war with itself. If the President can wage a war at will, Congress will lack many of the functions clearly acknowledged to be part of the power to issue formal declarations of war. To see why this is so, we need to explore what the “declare war” power encompasses. At a minimum, Congress may issue formal declarations of war. The power to issue such declarations clearly includes the power to warn of an impending war.⁷² Hence, a formal declaration of war might declare that war will occur in ten days. The power to issue formal declarations also encompasses the ability to issue conditional declarations of war—a declaration that threatens war unless another nation meets certain conditions.⁷³ Yet if the President may wage war without any congressional declaration, Congress will effectively lack both subsidiary powers.

⁷¹ See Yoo, *supra* note 3, at 251.

⁷² See TWISS, *supra* note 16, at 58–60 (noting that declarations traditionally gave notice of impending war).

⁷³ See 3 GROTIUS, *supra* note 57, at 635–37.

For instance, suppose Congress was in the midst of debating the merits of a formal declaration of war that would give advanced warning of a war. Notwithstanding Congress's power to issue such a declaration, a President could preempt the debate by immediately waging war. Likewise, a President could start a war while Congress debated a proposed conditional declaration of war. In either situation, the Commander in Chief could preempt any congressional declaration of war that sought to exercise these two standard functions of a formal declaration. Even worse, the President could thwart congressionally enacted declarations of war. For instance, suppose Congress passed a declaration of war giving another nation thirty days warning of impending warfare. The President might nonetheless start a war right away, thus emasculating Congress's formal declaration. Even more incongruous, Congress could issue a conditional declaration, the other nation might satisfy the ultimatum, and the President might war against the nation nonetheless. Such an action on the President's part would render Congress's conditional declaration a total nullity.

The point is that if the President may start a war at will, the Congress cannot be described as having a power to issue formal declarations of war that encompasses some of the most basic functions of formal declarations. Instead, the President will exercise these functions through the Commander in Chief's supposed ability to wage war at its discretion. The President, rather than Congress, can warn that the United States will wage war in ten days. The President, rather than Congress, can list conditions that another nation must satisfy in order to avoid war.

This flies in the face of our normal conception of constitutional powers. Ordinarily, we do not believe that the President may thwart the exercise of congressional and judicial powers. While the President can exercise a veto, the Executive lacks a generic power to negate or undermine congressional powers. The same is true of Congress—ordinarily it cannot thwart either executive or judicial powers. Hence, Congress cannot, under the guise of carrying into execution its legislative powers, bar pardons or vetoes.⁷⁴

The President's constitutional authorities, however broad they may be, should not be read to permit the President to vitiate functions clearly and uncontroversially associated with the power to declare war. To say that the Congress may issue formal declarations of war but that the President may nonetheless start a war at his discretion is to endorse mutually incompatible propositions. One of them must give way, and since the Constitution clearly grants Congress the power to declare war and does not similarly endorse the claim that the Presi-

⁷⁴ See generally Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWER* (2005)) (arguing the same).

dent may start a war, the latter proposition should be regarded with skepticism. At the very least, that proposition should cede way until there is evidence justifying the counterintuitive idea that although Congress has the power to declare war, the President may vitiate aspects of that power by unilaterally starting a war.

The second problem with the formalist reading is that it makes the power to declare war rather inconsequential. Recall that under the formalist theory, the power to declare war is understood as a power to trigger existing statutes that turn on the presence of a declared war.⁷⁵ For instance, statutes might provide that if there is a declared war, there will be rationing of materials necessary for the war effort, a military draft, and emergency presidential powers. In sum, the power to declare war can be seen as the power to put the nation on an emergency footing.

But Congress does not need the power to declare war to do any of these things. Any legislative power to pass laws includes the power to modify or suspend the operation of such laws depending upon the state of the world. Hence, Congress could provide that bankruptcy laws operate in one fashion in times of prosperity but work differently in times of depression. Or Congress could decree that patent rights are diminished in certain exigent circumstances. In a similar way, Congress could provide that emergency powers, measures, and limitations emerge whenever the nation is at war, whether or not Congress declares war. For instance, Congress could provide that should the President start a war, there shall be rationing, a draft, and emergency presidential powers.

If Congress can accomplish the exact same ends without formally declaring war, that calls into question the usefulness of having a separate power to declare war. The formalist view of “declare war” is dubious precisely because it imagines that the power to declare war is rather empty.

3. *Difficulties with the Pragmatic Theory*

The pragmatic reading of “declare war” has its own set of problems. Recall that the pragmatic theory supposes that once another nation has declared war against the United States, there is no need for Congress to declare war in response because a state of war already exists between the two nations. In fact, according to the pragmatic theory, the “declare war” power has absolutely no relevance in that context because a nation cannot declare war in response to another nation’s declaration. Rather, the President, as Commander in

⁷⁵ See *supra* notes 3–6 and accompanying text.

Chief, can wage war as soon as a nation has declared war against the United States.⁷⁶

As with the formalist theory, the pragmatic theory imagines a puzzling bifurcation of war powers. Congress has the full panoply of war powers before another nation declares war—it can decide what type of war the United States will wage, whether limited or general, and the Constitution does not authorize the President to make these decisions. However, once another nation declares war, the most important of the war powers rest with the President, namely whether and what type of war the nation will wage. However, at the same time, one of the minor war powers curiously remains with Congress, namely the *marque* and reprisal authority.

One can reasonably maintain that the power to declare war and the power to grant letters of *marque* and reprisal ought to rest with the Congress before the start of a war. And one can sensibly suppose that both of these powers ought to rest with the President should another nation “force” us into a state of war. But what theory of the optimal separation of war powers would suggest that once another nation declares war against the United States, the President ought to decide whether to wage war but that Congress ought to control the issuance of letters of *marque* and reprisal? The President can use whatever weapons are in the arsenal, including nuclear weapons, against the enemy but cannot be trusted to augment our naval forces by drawing upon the skill and avarice of private ship owners? The unsound bifurcation of war powers implicit in the pragmatic theory casts grave doubt on its plausibility.

Another difficulty associated with the pragmatic view rests on its implicit premise that certain historical declarations of war were entirely pointless. The pragmatic view supposes that a subcategory of declarations, response declarations of war, served no real purpose. If one nation declared war on another, the victim nation did not need to issue a response declaration of war because the war was already afoot. The victim nation could immediately wage war without any declaration.

This premise suffers from two problems. First, why should we conclude that declarations of war are quite meaningful in one context—at the outset of a war—but inconsequential once another nation has declared war? Nothing in the constitutional grant of the power to “declare war” suggests this to be the case. Likewise, considerations of constitutional structure supply no reason to suppose that certain declarations of war are meaningless. If we are to embrace the view that response declarations of war are inconsequential, one is

⁷⁶ See *supra* notes 7–9 and accompanying text.

tempted to say that we ought to go further and adopt the formalist view, a view that largely renders all such declarations inconsequential and thus has the virtue of consistency. The pragmatic theory shoulders a difficult burden because, in the face of unqualified and categorical text, it supposes that sometimes Congress may decide to wage war and other times the President may make that decision. A second and more fundamental problem with the premise that response declarations of war were inconsequential is the too-quick assumption that once a nation declares war on another nation, the only possible response is war and the responding nation need not make any choices. This view is untenable. When one nation attacks another, the victim always has choices. Will the victim respond with full-scale war? Will it instead pursue pacific measures, such as negotiations? Or will it pursue a course of defensive measures, coupled with a stern ultimatum?⁷⁷

The pragmatic view assumes that such choices do not exist. It supposes that the President must wage war against a nation attacking the United States. But even if we grant the (mistaken) assumption that the President is in the driver's seat, this conclusion does not follow. A President hopeful for a reconciliation might order a posture of self-defense with no significant offensive measures. A President with pacifist leanings might respond to an attack not by ordering Air Force bombers and the Navy to engage the enemy but by pursuing a negotiated settlement.

This point about the choices the United States must make in response to a declaration of war becomes plainer still when we consider situations where a nation has formally declared war against the United States but has not yet attacked. Suppose Iran issues a conditional declaration of war against the United States with reasonable conditions necessary to avoid a war. Under the pragmatic theory, Iran has declared war and hence has preempted any need for Congress to declare war. The President may start bombing Iran right away. Yet it seems far more sensible to suppose that Congress must decide whether to respond to Iran's conditional declaration with an unconditional declaration of war. In this case, there are obvious decisions to be made about whether to fight a war, and there is little textual reason to suppose that Congress, the body ordinarily empowered to determine whether to wage war, cannot decide this issue merely because Iran issued a conditional declaration of war.

Although the United States' current status as the lone superpower suggests that Congress typically will respond to force with even more force, the seeming inevitability of that response cannot dictate

⁷⁷ As we shall see in Part III, newly independent America did not always wage war in response to another nation's declaration of war. Sometimes it paid tribute, and other times it limited itself to purely defensive measures designed to thwart offensive attacks.

the original meaning of constitutional phrases. The question is whether there is a choice about whether to wage war even when another nation has declared war on the United States. Once it is understood that a choice exists, the only question is whether the Constitution permits the President to make that choice or whether some other entity must make it. If the power to “declare war” includes the power to decide to wage war, any decision to wage war must be left to Congress, the only entity empowered to declare war.

II

THE INITIATION DECLARATION OF WAR

Recall that the formalist theory claims that the power to declare war was nothing more than a power to issue formal declarations.⁷⁸ The “declare war” power did not include the ability to decide whether to wage war.⁷⁹ The formalist view also denies that nations declared war by entering a war. If a nation did not issue a document that expressly “declared war,” that nation had not declared war.⁸⁰

Contrary to what the formalist theory supposes, evidence from the seventeenth, eighteenth, and nineteenth centuries establishes that Europeans and Americans repeatedly used “declare war” or “declaration of war” to encompass much more than formal declarations of war. These figures recognized as a declaration of war any signal that a nation had elected to wage war, however expressed. Consistent with this usage and the Constitution’s allocation of the “declare war” power, the Founders understood that Congress would decide whether the nation would wage war. Finally, the Founders rejected the idea that the President may take the nation to war. They realized that if the Commander in Chief starts a war, the President usurps Congress’s exclusive power to declare war.

A. European Usage

From ancient times, declarations of war were signals that a nation had chosen to wage war. The Romans formally declared war prior to the commencement of warfare.⁸¹ They gave advanced warning to their enemy presumably because they thought this was the honorable thing to do⁸² and because the warning might cause the other nation

⁷⁸ See *supra* Part I.C.2.

⁷⁹ See *id.*

⁸⁰ See *supra* text accompanying note 75.

⁸¹ See J.W. RICH, *DECLARING WAR IN THE ROMAN REPUBLIC IN THE PERIOD OF TRANSMARINE EXPANSION* 56 (1976).

⁸² See *id.*

to sue for peace. As one might expect, there were exceptions to the practice of advance warning.⁸³

European nations inherited and perpetuated this practice, at least for a time. At some point, presumably during the early modern European era, European nations concluded that giving advanced warning came at too high a cost. They would lose the element of surprise, and with it, perhaps the war as well. Hence, the practice of issuing formal declarations of war that gave advanced warning fell into disuse. While formal declarations of war could still serve that purpose, they rarely did.

Though formal declarations of war and the decision to wage war were not as closely associated with each other, the link between them was never totally severed. Europeans continued to associate a nation's decision to wage war with some sort of declaration of war, either formal or informal. Historian Stephen Neff notes that by the eighteenth century, "[i]n practice, it came to be accepted that *any* unambiguous sign or signal of an intention to resort to war could function as a declaration of war."⁸⁴ Indeed, as discussed below, most wars were first declared via some hostile signal rather than by a formal declaration of war. A nation might issue a formal declaration of war years after an informal declaration, if at all.

Still, there was nothing truly new about this practice of informal declarations because from ancient times nonverbal signals had served as declarations of war. The Romans declared war by throwing an iron-tipped or fire-hardened wood spear into enemy territory.⁸⁵ When an enemy state was not adjacent, the Romans designated a spot in the Roman forum as enemy territory and threw the spear into that ground.⁸⁶ In medieval times, the unfurling of flags and the sending of a bloody glove ("throwing down the gauntlet") served as declarations.⁸⁷ Non-European nations had similar war declaration signals. For instance, Tripoli declared war by cutting down a nation's flag.⁸⁸

Seventeenth and eighteenth-century Englishmen well understood that hostile actions could serve as a declaration of war. In his memoirs, a seventeenth-century diplomat described how England had twice declared war against Holland. "No clap of thunder . . . could more astonish the world, than our declaration of war against Holland . . . , first by matter in fact, in falling upon their Smyrna fleet; and

⁸³ See *id.*

⁸⁴ NEFF, *supra* note 28, at 108–09.

⁸⁵ See I LIVY, THE HISTORY OF ROME 49 (Valerie M. Warrior trans., 2006).

⁸⁶ NEFF, *supra* note 28, at 28.

⁸⁷ *Id.* at 72.

⁸⁸ See JOSHUA E. LONDON, VICTORY IN TRIPOLI 95 (2005).

in consequence of that . . . by a formal declaration”⁸⁹ After an Admiral destroyed a Spanish fleet in 1718, he argued “that the destruction of the Spanish fleet was not to be interpreted into such a declaration [of war].”⁹⁰ His denial confirmed that first strikes were normally seen as declarations of war. Discussing the French and Indian war, one author from the era noted that a French armada had sailed toward America “to strike some important blow, that might serve for a declaration of war.”⁹¹ Lord Dartmouth, the Secretary of State for the Colonies, noted in mid-1775 that there was evidence of an “open and declared war” against Great Britain.⁹² Presumably he was referring to, among other things, the famous spring and summer battles, such as the Battles of Lexington and Bunker Hill. A 1795 book argued that Prime Minister William Pitt had tried to provoke a formal French declaration “by acts which were in truth and substance, a declaration of it on his own.”⁹³

Members of Parliament commonly voiced the view that hostile signals served as declarations of war. Sir Robert Walpole’s comments are particularly telling. Speaking in the Commons, Walpole observed in 1738 “that of late most Wars have been declar’d from the Mouths of Cannons, before any formal Declaration” and that if war with Spain occurred, it was very likely that England would begin it in that same way.⁹⁴ Walpole’s comments were hardly isolated. In 1664, Prince Rupert told Parliament that the violent acts of a Dutch admiral were a “denunciation of War.”⁹⁵ In 1677, a member of the Commons claimed “[i]s not our men going into *France* as much a Declaration of War, as the Motion of sending Money into *Germany* [to fund a war there]?”⁹⁶ The next year a member noted that “[i]t is not always requisite in War, that there should be *denuciatio belli*. . . . —When 4 or 500 men declare War, and the King gives his consent to it, the King of

⁸⁹ 2 WILLIAM TEMPLE, *THE WORKS OF SIR WILLIAM TEMPLE*, BART. 259 (London, S. Hamilton 1757).

⁹⁰ J.F. MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR* 14–15 (London, Her Majesty’s Stationery Office 1883).

⁹¹ 1 JOHN ENTICK ET AL., *THE GENERAL HISTORY OF THE LATE WAR* 121 (London, Edward Dilly & John Millan 1763).

⁹² Letter from Earl of Dartmouth to General Howe (Sept. 22, 1775), American Archives, Documents of the American Revolution, <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.7206>.

⁹³ ROBERT ADAIR, *A WHIG’S APOLOGY FOR HIS CONSISTENCY* 84 (London, J. Debrett 1795). Later, the book argued that the “insulting dismissal [sic] of M. Chauvelin [the French Ambassador to England] was the substantial declaration of [war].” *Id.* at 103.

⁹⁴ See *supra* note 12 and accompanying text.

⁹⁵ 3 ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 88 (2d ed., London, Butterworths 1873).

⁹⁶ 4 ANCHITELL GREY, *DEBATES IN THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694*, at 332 (1769), available at <http://www.british-history.ac.uk/report.asp?compid=40399> (debate of March 29, 1677).

France will ask you no more . . . ‘Tis now an actual declared War.’⁹⁷ Another claimed that if “[w]ar is actually made . . . ‘tis then in effect declared.”⁹⁸ And a third said that war had been “proclaim[ed] . . . by our sending men into *Flanders*, to assist the *Spaniards*.”⁹⁹ In 1770, a member complained that the English ought to have regarded Spanish threats and actions relating to the Falklands as “the most explicit and effectual declaration of war.”¹⁰⁰ Speaking of Spanish conduct in 1779, a member asserted that they were “a positive declaration of war . . . only reserving to themselves the precise period, when and where to strike the first blow.”¹⁰¹

As one might expect, English monarchs shared the view that hostile signals were declarations. In 1689, William III regarded “the War to be so much already declar’d by France against England.”¹⁰² France did not formally declare war until a month later,¹⁰³ so William presumably referred to French hostilities. Similarly, George III treated a clash between French and English ships in July 1778 as evidence that the French had “cast off the Mask and declared war.”¹⁰⁴ In both cases, the French had declared war because their actions revealed that they had chosen to wage war.¹⁰⁵

Those on the Continent shared the view that to wage war was to declare it. In 1754, upon learning that England had dispatched a fleet to attack French ships, the French ambassador declared that “his master would consider the first gun that was fired as a *declaration* of War.”¹⁰⁶ In 1788, hostilities that broke out between Russia and Sweden were “considered and treated by each as a declaration of war.”¹⁰⁷

⁹⁷ 5 *id.* at 161, *available at* <http://www.british-history.ac.uk/report.asp?compid=40984> (debate of February 18, 1678).

⁹⁸ *Id.* at 261, *available at* <http://www.british-history.ac.uk/report.asp?compid=40989> (debate of March 19, 1678).

⁹⁹ *Id.* at 248, *available at* <http://www.british-history.ac.uk/report.asp?compid=40988> (debate of March 15, 1678).

¹⁰⁰ Speech of Colonel Barre (1770), in 2 *THE ELOQUENCE OF THE BRITISH SENATE* 74, 75 (William Hazlitt ed., Brooklyn, Thomas Kirk 1810).

¹⁰¹ 12 *THE PARLIAMENTARY REGISTER* 138 (London, J. Almon 1779).

¹⁰² The Convention Parliament (William): The Convention becomes a Parliament, *Begins* 20/2/1689, 2 *THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS*, <http://www.british-history.ac.uk/report.asp?compid=37645> (last visited Aug. 25, 2007).

¹⁰³ 11 *THE HISTORIAN’S HISTORY OF THE WORLD* 601 (Henry Smith Williams ed., 1904).

¹⁰⁴ See Letter from the King to Lord North (July 18, 1778), in 4 *THE CORRESPONDENCE OF KING GEORGE THE THIRD FROM 1760 TO DECEMBER 1783*, at 180, 180 (John Fortescue ed., 1928).

¹⁰⁵ English courts apparently shared the same understanding of “declare war” voiced in Parliament and by monarchs. See RAMSEY, *supra* note 7, at 225–26 (“Where is the difference, whether war is proclaimed by a Herald . . . or whether war is announced by royal ships, and whole fleets, at the mouths of cannon?” (quoting *The Maria Magdalena*, 165 Eng. Rep. 57, 58 (1779))).

¹⁰⁶ 3 PHILLIMORE, *supra* note 95, at 96.

¹⁰⁷ *THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1788*, at 75–76 (London, J. Dodsley 1790).

The Ottomans warned Napoleon that any attack on Egypt would be a declaration of war.¹⁰⁸ Emperor Alexander of Russia noted that Napoleon “by a sudden attack on our troops at Kowno, has declared war.”¹⁰⁹

During its war with virtually all of Europe, Republican France repeatedly regarded hostile acts as declarations. In 1792, the National Assembly cited the King of Hungary and Bohemia’s support of French malcontents and his hostile preparations as a “declaration of war.”¹¹⁰ A French legislator claimed that the English King had “declare[d] war” when he dismissed the French ambassador, expressed grief at the execution of Louis XVI, and demanded that Parliament appropriate funds for a larger army.¹¹¹ Consistent with that legislator’s assertion, France’s formal declaration asserted that English “acts of hostility” were the “equivalent to a declaration of war.”¹¹² France’s formal declaration against Spain likewise accused Spain of declaring war by its hostilities.¹¹³

As the above discussion reveals, a number of hostile signals falling short of actual warfare were regarded as declarations of war. For instance, a nation’s issuance of general letters of marque and reprisal was a declaration of war.¹¹⁴ These letters authorized individuals to capture enemy ships, in return for which the capturing party would share in the proceeds from the sale of the captured goods.¹¹⁵ If a nation generally authorized its populace to capture ships of another nation, the first nation clearly had decided to wage war. Likewise, individuals understood that a blockade could serve as a declaration of war,¹¹⁶ for it suggested that the blockading nation had decided to wage war against the victim.

¹⁰⁸ See 4 WALTER SCOTT, *THE LIFE OF NAPOLEON BONAPARTE, EMPEROR OF THE FRENCH* 90–91 (Edinburgh, Ballantyne & Co. 1827). Egypt was then a part of the Ottoman Empire.

¹⁰⁹ MAURICE, *supra* note 90, at 44.

¹¹⁰ Decree of War Against the King of Hungary and Bohemia (Apr. 20, 1792), in 1 A COLLECTION OF STATE PAPERS RELATIVE TO THE WAR AGAINST FRANCE 18, 19 (London, J. Debrett 1794) [hereinafter A COLLECTION OF STATE PAPERS].

¹¹¹ EXTRACTS FROM THE DISCUSSION IN THE SITTING OF THE CONVENTION OF FEBRUARY 1, ON THE DECLARATION OF WAR AGAINST ENGLAND AND HOLLAND, in A COLLECTION OF ADDRESSES TRANSMITTED BY CERTAIN ENGLISH CLUBS AND SOCIETIES TO THE NATIONAL CONVENTION OF FRANCE 148, 149 (2d ed., London, J. Debrett 1793) [hereinafter A COLLECTION OF ADDRESSES].

¹¹² Decree Which Declares that the French Republic Is at War with the King of England and the Stadtholder of the United Provinces, in A COLLECTION OF ADDRESSES, *supra* note 111, at 157, 161.

¹¹³ Declaration of War by France Against Charles IV, King of Spain, in 1 A COLLECTION OF STATE PAPERS, *supra* note 110, at 98, 99.

¹¹⁴ See NEFF, *supra* note 28, at 109; see also H. W. HALLECK, *INTERNATIONAL LAW* 470–73 (New York, D. Van Nostrand 1861).

¹¹⁵ See NEFF, *supra* note 28, at 109.

¹¹⁶ See 2 WILLIAM SMYTH, *LECTURES ON MODERN HISTORY, FROM THE IRRUPTION OF THE NORTHERN NATIONS TO THE CLOSE OF THE AMERICAN REVOLUTION* 385 (London, William

Another measure nations regarded as a declaration of war was aiding a warring nation when there was no preexisting obligation to do so.¹¹⁷ For instance, if one nation made a treaty of alliance with a nation at war, the other warring nation generally viewed the treaty as a declaration directed against it. During the Revolutionary War, England warned the Dutch that if they ever made a treaty with the rebellious Americans, England would regard it as a “commencement of hostilities and a declaration of war.”¹¹⁸ A 1789 book on the history of Athens noted that when the Athenians entered into a treaty with a state already at war, this “was surely equivalent to a declaration of war.”¹¹⁹ In December of 1791, the French National Assembly issued a Manifesto which asked the rhetorical question “[i]s it not equivalent to a declaration of war, to give places of strength not only to enemies . . . but [also] to conspirators” who fight France?¹²⁰ Tippu Sultan, the scourge of the English in southern India, was said to have made the “equivalent to a public, unqualified, and unambiguous declaration of war” by making a treaty with France and by admitting its soldiers into his army.¹²¹ In 1807, the English said that the Dutch had declared war against England by making a treaty with the French while England and France were at war.¹²²

Perhaps the most famous informal declaration of this type was France’s 1778 notification of its Treaty of Alliance with America. When the French Ambassador notified the English, an English minister almost wept tears of anger (or so the French Ambassador claimed).¹²³ One Englishman said the notification was “justly consid-

Pickering, J & J.J. Deighton 1840) (describing American colonists as likely to perceive the blockade of Boston as a declaration of war); Appendix (Nov. 1774), American Archives, Documents of the American Revolution, <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.1763> (last visited Aug. 26, 2007) (same); The British American, No. 9 (July 28, 1774), American Archives, Documents of the American Revolution, <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.730> (same); Considerations on the Measures Carrying on with Respect to the British Colonies in North America (Apr. 1774), American Archives, Documents of the American Revolution, <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.1762> (last visited Aug. 26, 2007) (same).

¹¹⁷ NEFF, *supra* note 28, at 109.

¹¹⁸ J. Adams to the President of Congress (Dec. 18, 1780), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 13, at 197, 197 (quoting English remonstrance to Holland of December 12, 1780).

¹¹⁹ WILLIAM YOUNG, THE HISTORY OF ATHENS 156 (London, J. Robson 1786).

¹²⁰ THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1791, at 211 (2d ed., London, Baldwin, Craddock & Joy 1824).

¹²¹ ALEXANDER BEATSON, A VIEW OF THE ORIGIN AND CONDUCT OF THE WAR WITH TIPPOO SULTAUN 11 (London, W. Bulmer & Co. 1800). At the time, the English and the French were at war.

¹²² MAURICE, *supra* note 90, at vi–vii.

¹²³ STACY SCHIFF, A GREAT IMPROVISATION 139 (2005).

ered as a declaration of war.”¹²⁴ Another said it was “impossible, without insulting in too gross a manner both truth and reason, to deny that the declaration . . . ought to be received as a true declaration of war.”¹²⁵ George III himself wrote that the notification “is certainly equivalent to a declaration.”¹²⁶ Commenting much later, jurist and international law expert Sir Robert Phillimore observed that France “declared war” against England when she announced the Treaty, sent ships to America to wage war, and recalled her ambassador.¹²⁷

As Phillimore’s last comment suggests, nations saw the withdrawing of one’s own ambassador or dismissing another nation’s ambassador in antagonistic circumstances as a declaration of war, presumably because either action signaled the end of parleying and the onset of a war. When the English demanded that the Genoese dismiss the French ambassador, the Genoese refused on the ground that to do so would be “positively declaring war” against France.¹²⁸ Likewise, when France recalled its ambassador from England in 1850, that recall was the French declaration of war.¹²⁹

Highly provocative measures might serve as a declaration of war, at least where they signified that war was forthcoming. For example, in 1804, an English parliamentarian made this insightful comment about the actions of Francis II, Holy Roman Emperor:

It is the common law of Europe, that every power ought to consider the assembling of troops, the formation of magazines, the baking of biscuits, levies of horses for waggons [sic], as a declaration of war.¹³⁰

Why was this so? Because when nations amassed troops and supplies at a tremendous expense, it was clear they had decided to wage war. Francis’s actions signaled, at least to the English legislator, that he had chosen to wage war and hence Francis had declared it.

At the extreme, nations might regard mere evasion or silence as an implicit declaration of war. In 1756, the Prussian King demanded that if the Austrian Empress wanted peace, she would have to make an unambiguous declaration that she was not about to attack Prussia. On the other hand, “he [would] look upon any ambiguous answer as a

¹²⁴ 3 JOHN ANDREWS, *A HISTORY OF THE WAR WITH AMERICA, FRANCE, SPAIN, AND HOLLAND* 212 (London, John Fielding & John Jarvis 1786).

¹²⁵ *THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1779*, at 411 (2d ed., London, J. Dodsley 1786).

¹²⁶ Letter from George III to Lord North (Mar. 13, 1778), in 2 *THE CORRESPONDENCE OF GEORGE THE THIRD WITH LORD NORTH FROM 1768 TO 1783*, at 148, 148 (W. Bodham Donne ed., London, John Murray 1867).

¹²⁷ 3 PHILLIMORE, *supra* note 95, at 103.

¹²⁸ *THE CHRONOLOGIST OF THE PRESENT WAR* 211–12 (London, J.W. Myers 1796).

¹²⁹ See MAURICE, *supra* note 90, at 6.

¹³⁰ 6 *THE PARLIAMENTARY DEBATES FROM THE YEAR 1803 TO THE PRESENT TIME* lxxiii (T.C. Hansard ed., London, Longman et al. 1806).

declaration of war.”¹³¹ The English gave a similar ultimatum to the Spanish in 1761. England wanted to know if Spain was contemplating an alliance with France against England. The English King declared that he would regard a refusal to answer the question as “an aggression on the part of Spain, and an absolute declaration of war.”¹³² The Spanish ambassador, put off by English “haughtiness,”¹³³ said that this English attitude was itself a “declaration of war.”¹³⁴ In his formal declaration, George III accused Spain of declaring war “in effect” with its response to his query.¹³⁵ Somewhat comically, the Spanish King issued a formal declaration noting that he had already treated England’s disrespectful query as “a declaration of war by England” and that it was unnecessary for England to re-declare war.¹³⁶

There are sound reasons why a nation would treat silence or evasion as a declaration of war. When a nation demands assurances that it will not be attacked and such assurances are not given, it reasonably might conclude that the nation unwilling to give such assurances had decided to wage war and was merely waiting for a propitious moment to attack. Because the decision to wage war was a declaration of war, these nations, by maintaining silence in that context, effectively confirmed that they had secretly decided to go to war and had thereby declared war.

Sometimes nations sought to shift blame for the start of a war by claiming that some nation’s action or failure to take an action was a declaration of war. The Austrian Emperor in 1784 delivered an “ultimatum” to the Dutch demanding “free and unlimited navigation of the Scheld in both branches to the sea. . . . [If] any insult [was] offered to the imperial flag in the execution of these ideas, he should be obliged to consider it as a formal declaration of war.”¹³⁷ Since the Dutch controlled the Scheld River, the Emperor was acting provocatively. During its war with Europe, France declared that any nation whose ships transported British goods through a particular sound

¹³¹ JOHN ALMON, A NEW MILITARY DICTIONARY 61 (London, J. Cook 1760) (using a pseudonym).

¹³² THE ANNUAL REGISTER: OR, THE HISTORY OF THE PRESENT WAR: FROM THE COMMENCEMENT OF HOSTILITIES IN 1755 AND CONTINUED DURING THE CAMPAIGNS OF 1756, 1757, 1758, 1759, 1760 AND TO THE END OF THE CAMPAIGN, 1761, at 248 (London, R. & J. Dodsley 1762).

¹³³ *Id.* at 248–49.

¹³⁴ *Id.*

¹³⁵ THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1761, at 287 (London, R. & J. Dodsley 1762).

¹³⁶ *Id.* at 288.

¹³⁷ 4 W. BELSHAM, MEMOIRS OF THE REIGN OF GEORGE III. TO THE SESSION OF PARLIAMENT ENDING A.D. 1793, at 167 (5th ed., London, G.G. & J. Robinson 1795). The Emperor then sent a ship which the Dutch stopped. But the Emperor shrank from the fight. *See id.* at 168–78.

would be regarded as declaring war.¹³⁸ In a similar fashion, Sicily demanded that France withdraw from Rome and noted that a “negative answer” to this ultimatum would be “a declaration of war.”¹³⁹ Russia made an incredible demand of the Ottoman Empire: unless the latter declared war against France, Russia would consider the Ottomans as having declared war on Russia.¹⁴⁰ Each of these episodes marked an attempt to stretch the definition of “declare war” beyond all limits. The refusal to satisfy unreasonable demands in no way indicated a decision to wage, and therefore declare, war. Instead, the extreme demands were merely attempts to shift the blame for the beginning of the war onto the other nation.

While authors of international law treatises were primarily concerned with whether and when nations had to issue formal declarations of war, they certainly understood that nations might declare war by informal means. Professor Michael Ramsey has ably canvassed these sources before,¹⁴¹ so only a few comments seem necessary. As Professor Ramsey has demonstrated, Cornelius Bynkershoek believed that Article IX of the Treaty of Utrecht used the phrase “declare war” as a synonym for commencing a war and not merely as the power to formally proclaim war.¹⁴² Hugo Grotius recounted the Roman practice of declaring war by throwing a spear into enemy territory¹⁴³ and also spoke of “formal” declarations, thus implicitly acknowledging that there was a category of informal declarations of war.¹⁴⁴ Emmerich de Vattel claimed that “when one nation takes up arms against another, she from that moment declares herself an enemy to all the individuals of the latter.”¹⁴⁵ Christian Wolff confirmed that allying with a party to war was a declaration of war: “[H]e who allies himself to my enemy, as by sending troops or subsidies, or by assisting him in any other way, declares by that very fact that he wishes to be a participant in the war carried on against me.”¹⁴⁶

Though Blackstone said little about declarations, what he did say confirms that to decide to wage war was to declare it. He noted that

¹³⁸ See Proclamation (May 15, 1798), in 7 A COLLECTION OF STATE PAPERS, *supra* note 110, at 83, 83 (London, J. Debrett 1799).

¹³⁹ Answer of General Mack to General Championet (Nov. 24, 1798), in 8 A COLLECTION OF STATE PAPERS, *supra* note 110, at 108, 108 (London, J. Debrett 1800).

¹⁴⁰ Manifesto of the Sublime Porte, Communicated to Our Esteemed Friend the Minister Plenipotentiary of the Court of Great Britan, in Constantinople (Sept. 11, 1798), in 7 A COLLECTION OF STATE PAPERS, *supra* note 110, at 446, 449–50 (London, J. Debrett 1799).

¹⁴¹ See Ramsey, *supra* note 7, at 1590–95.

¹⁴² See 2 VAN BYNKERSHOEK, *supra* note 32, at 132.

¹⁴³ See 3 GROTIUS, *supra* note 57, at 637.

¹⁴⁴ See *id.* at 636–37.

¹⁴⁵ VATTEL, THE LAW OF NATIONS 399 (London, G.G. & J. Robinson 1797).

¹⁴⁶ 2 CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM § 734, at 377 (Joseph H. Drake & Francis J. Hemelt trans., Clarendon Press 1934) (1764).

pirates declare war on mankind when they engage in their depredations and that mankind may declare war on them in like manner.¹⁴⁷ Clearly, Blackstone referred to hostile actions and not formal declarations, for pirates were not in the habit of issuing the latter. Earlier in his Commentaries, Blackstone discussed why he (erroneously) believed that formal declarations of war were required under the English system. He continued by saying that “wherever the right resides of beginning a national war,” there must also reside a peace power.¹⁴⁸ This sentence, coming as it does on the heels of a discussion of the power to declare war,¹⁴⁹ clearly equates declaring war with the right to begin a war. Like other Englishmen, Blackstone knew that the “declare war” power included the right to decide whether to wage war.

Jacques Necker, a French statesman who authored a two volume treatise on executive power, likewise endorsed this common understanding of “declare war.” Necker criticized the grant of “declare war” authority to the legislature found in the French Constitution of 1791. Under that Constitution, only the Assembly could declare war. Necker complained that this put France at a disadvantage because other countries had monarchs who “declare[d] war by actually commencing it.”¹⁵⁰ He later noted that “hostilities are commonly considered as the strongest declaration of war.”¹⁵¹ Earlier, Necker argued that the French Constitution contained certain provisions that actually permitted the King to commence hostilities.¹⁵² He claimed that these provisions were deliberately left ambiguous because had the Constitution expressly authorized the King to wage war and also vested the Assembly with “declare war” authority, it would have “excited the laughter of all Europe.”¹⁵³ Such wording would have provoked derision precisely because across Europe it was understood that to decide to wage war was to declare it.¹⁵⁴

Necker’s observations (and the practices that underlay them) were confirmed in the writings of nineteenth-century scholars. Georg Martens noted that some nations insist that they need not declare war in certain situations because “war has been tacitly declared,” so that goods taken in war without a formal declaration did not have to be restored.¹⁵⁵ An Oxford scholar observed that “[c]ases have occurred

147 4 BLACKSTONE, *supra* note 38, at *71.

148 1 *id.* at *250.

149 *Id.*

150 1 NECKER, *supra* note 14, at 271.

151 *Id.* at 273.

152 *See id.* at 276–77.

153 *Id.* at 277.

154 *Id.*

155 G.F. VON MARTENS, A COMPENDIUM OF THE LAW OF NATIONS 282 (William Cobbett trans., Pall-Mall, Cobbett & Morgan 1802).

in which a hostile demonstration has been held to amount to a virtual declaration of war.”¹⁵⁶ Francis Wharton, a Department of State solicitor, wrote that a “declaration of war . . . may be implied: as where an act of hostilities takes place which can be explained on no other hypothesis.”¹⁵⁷ Joseph Chitty’s comments bear quoting in full. In “A Practical Treatise on the Law of Nations,” Chitty writes:

[D]eclarations of war are not construed to take effect merely from the time when a formal notification of hostility is given; there are certain preceding acts, of a hostile nature, which are deemed to be virtually declarations of war¹⁵⁸

Chitty went on to note that when a nation has been injured and does not receive redress, “she is reduced to consider hostilities as virtually declared.”¹⁵⁹ Chitty’s comments, written in the early nineteenth century, nicely sum up the practices of European nations for the previous two centuries.

All across Europe, monarchs, ministers, legislators, and many others understood “declare war” to mean that a nation had chosen to wage war. Hence, while a nation might declare war by a formal declaration, many other actions that evinced a decision to wage war were likewise declarations of war. Most significantly, commencing warfare against another nation was an absolute and unequivocal declaration of war.

B. American Usage

Though eighteenth-century America might have seemed far removed from Europe, Americans shared the European understanding of “declare war” and “declaration of war.” They treated documents that evinced a warring disposition as declarations of war even if the documents never said as much. Likewise, the commencement of warfare was an informal declaration of war. Finally, Americans regarded various hostile actions short of actual warfare as declarations of war.

1. *Early American Understandings*

Well before contemplating the Constitution, Americans understood that to commence war was to declare war. In 1756, the English dispatched George Washington to attack the French. George II already had formally declared war on the French. Notwithstanding that declaration, Washington confessed his ignorance to the Virginia Lieutenant Governor regarding the ceremony required “[i]f war is to be

¹⁵⁶ TWISS, *supra* note 16, at 75.

¹⁵⁷ FRANCIS WHARTON, COMMENTARIES ON LAW 302 (Phila., Kay & Brother 1884).

¹⁵⁸ JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF NATIONS 68 (Boston, Bradford & Read 1812).

¹⁵⁹ *Id.* at 69; *see also id.* at 70, 80 (discussing virtual or implied declarations of war).

declared at this place.”¹⁶⁰ Robert Dinwiddie answered, “[t]he Method You are to declare War, is at the head of Your Companies with three Vollies of Small Arms for his Majesty’s Health & a successful War.”¹⁶¹ In this way, the English ordered Washington to declare war—to commence warfare—in a particular theater on behalf of the Crown. In mid-1775, an American pamphleteer claimed that by attempting to destroy some colonial munitions, British General Thomas Gage had declared war: “The invasion of property, among all Nations, is justly deemed a declaration of war.”¹⁶² Richard Henry Lee noted in 1778 that French Admiral D’Estaing had “declared war against G. Britain on board his fleet.”¹⁶³ Though France had not (and never would) formally declared war, orders to commence war were the equivalent. In 1784, Major-General Peter Muhlenberg wrote that “cutting off the head of [a man] is looked upon by those who are best acquainted with the customs of the Indians as a declaration of war.”¹⁶⁴ Muhlenberg evidently meant that when Indians beheaded someone, that action indicated a resolve to wage war.

Americans understood that the seizure of ships could be a declaration of war, albeit perhaps a limited one. In 1776, a delegate to the Continental Congress wrote that “the Portugees have declared War Against us by Seizing Our Vessels in their Ports.”¹⁶⁵ In 1777, the American representative in Martinique thought that if England did not return a ship to the French, the French would deem it “almost a Declaration of War.”¹⁶⁶ Indeed, a much larger English seizure later in the year was met with a French ultimatum—any hesitation in re-

¹⁶⁰ Letter from George Washington to Robert Dinwiddie (Aug. 14, 1756), American Memory from the Library of Congress, <http://rs6.loc.gov/ammem/gwhtml/gw-series2.html> (for a scan of the original document, follow “Letterbook 3”, then enter “329” in the text box next to the “Turn to image” button and click that button).

¹⁶¹ Letter from Robert Dinwiddie to George Washington (Aug. 21, 1756), American Memory from the Library of Congress, [http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(lw010217\)\)](http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(lw010217))) (for a scan of the original letter, follow the “IMAGES” hyperlink).

¹⁶² Junius Americanus, Address to General Gage (May 29, 1775), American Archives, Documents of the American Revolution, <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.3187>.

¹⁶³ Letter from Richard Henry Lee to Francis Lightfoot Lee (July 12, 1778), in 10 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 265, 265 (Paul H. Smith ed., 1983).

¹⁶⁴ HENRY A. MUHLENBERG, THE LIFE OF MAJOR-GENERAL PETER MUHLENBERG OF THE REVOLUTIONARY ARMY 440 (Phila., Carey & Hart 1849). In a similar vein, the Superintendent of Indian Affairs for the Northern Colonies, Sir William Johnson, wrote in 1772 that the Native Americans considered scalping to be “a National Act and Declaration of War.” George H. Bray III, Scalping During the French and Indian War, Archiving Early America, <http://www.earlyamerica.com/review/1998/scalping.html> (last visited Aug. 26, 2007).

¹⁶⁵ Letter from Abraham Clark to Elias Dayton (Aug. 6, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 626, 628 (Paul H. Smith ed., 1979).

¹⁶⁶ Letter from Mann Page to John Page (June 9, 1777), in 25 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 623, 624 (Paul H. Smith ed., 1998).

turning the ships would be a declaration of war.¹⁶⁷ In each of these situations, Americans saw the seizure as a declaration of war because of what they thought the seizure signaled, namely recourse to war.

As in Europe, less hostile actions than outright hostilities were also seen as declarations of war. In 1774, John Adams proposed that if anyone were arrested in any colony and taken to England for trial, such action ought to be considered a declaration of war.¹⁶⁸ During the Revolutionary War, Silas Deane reported that while private Spaniards might lend America ships, the King of Spain would not do so because that “would be the same as a declaration of war.”¹⁶⁹ Deane evidently understood that nations generally viewed providing aid to a party to a war as a declaration of war. In 1787, Ambassador Thomas Jefferson reported to Foreign Affairs Secretary John Jay that the English had withdrawn from a treaty with France requiring notification of naval armament.¹⁷⁰ Apparently viewing the withdrawal as evidence of a design to wage war, the French regarded it as a declaration of war.¹⁷¹

Of course, Americans were well aware of what transpired in England and on the Continent during the Revolutionary War and the period that followed. They knew that France viewed the English reaction to the notification of the American treaty as a declaration of war.¹⁷² Likewise, Americans knew that the Austrian Emperor had warned that he would regard Dutch insults to his ships plying the Scheld River as a declaration of war.¹⁷³

As in Europe, a document could be a declaration of war even if it never used the words “declare war.” One delegate to Congress argued that the Suffolk Resolves were a declaration of war against England.¹⁷⁴

¹⁶⁷ Letter from James Duane to George Clinton (Nov. 23, 1777), in 8 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, at 307, 307 (Paul H. Smith ed., 1981).

¹⁶⁸ John Adams’s Proposed Resolutions (Sept. 30, 1774), in 1 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, at 131, 131 (Paul H. Smith ed., 1976).

¹⁶⁹ Letter from Silas Deane to the Committee of Secret Correspondence (Nov. 27, 1776), in 2 *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE*, *supra* note 13, at 195, 196.

¹⁷⁰ See Letter from Thomas Jefferson to John Jay (Sept. 22, 1787), in 2 *MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON* 240, 240 (Thomas Jefferson Randolph ed., Charlottesville, F. Carr & Co. 1829).

¹⁷¹ See *id.*

¹⁷² See Letter from Richard Henry Lee to Francis Lightfoot Lee, *supra* note 163, at 266–67 (noting that the French considered the King’s message to Parliament a declaration of war).

¹⁷³ See Letter from Richard Dobbs Spaight to Alexander Martin (Dec. 18, 1784), in 22 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, at 79, 79–80 (Paul H. Smith ed., 1995).

¹⁷⁴ See Joseph Galloway’s Statement on His Plan of Union (Sept. 28, 1774), in 1 *LETTERS OF DELEGATES TO CONGRESS, 1774–1789*, *supra* note 168, at 119, 120 (describing the Suffolk Resolves as a declaration of war). The 1774 Suffolk Resolves were a set of resolutions issued by leaders from Suffolk County, Massachusetts. These resolutions denounced the English Coercive Acts, called for a boycott of English goods, and sought a colonial militia. See JOSEPH C. MORTON, *THE AMERICAN REVOLUTION* 140 (2003).

Another regarded the Declaration Setting Forth the Causes and Necessity of Taking Up Arms as America's declaration.¹⁷⁵ John Adams argued that if anyone at an international summit denied American sovereignty, that would be "a declaration of war against" the United States.¹⁷⁶ As one might imagine, Americans fighting for independence were especially sensitive to denials of sovereignty. Most famously, Americans regarded the Declaration of Independence as a declaration of war.¹⁷⁷

Perhaps the best example of the American conception of "declare war" comes from John Adams. Writing to his cousin Samuel Adams in 1779, John Adams expressed surprise at the former's failure to appreciate that France and Britain already had declared war:

Was not war sufficiently declared in the King of England's speech, and in the answers of both houses, and in the recall of his ambassador? Has it not been sufficiently declared by actual hostilities in most parts of the world? I suspect there will never be any other declaration of war. Yet there is in fact as complete a war as ever existed.¹⁷⁸

Well aware that neither England nor France had issued a formal declaration of war, Adams nonetheless had no difficulty concluding that both had declared war.

2. *American Treaties*

Fledgling America took her place on the international stage by making treaties. Even before the 1783 English Peace Treaty, America made treaties with France, the Netherlands, and Sweden. After the Constitution's ratification, the pace of treaty making quickened.¹⁷⁹ These treaties provide useful evidence of the meaning of "declare war," confirming that "declaration of war" was a synonym for the start of warfare.

¹⁷⁵ See Letter from Joseph Hewes to Samuel Johnston (July 8, 1775), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 168, at 612, 613–14 (noting that Congress recently had published a declaration of war). This 1775 declaration explained to the world why Americans had taken up arms against England, and some Englishmen apparently regarded it as a declaration of war as well. See Debate, Comments of Lord Mansfield in the House of Lords (Mar. 14, 1776), American Archives, Documents of the American Revolution, available at <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.16027> (saying that Americans will reprint their "declaration of war" if England wishes to see a list of grievances).

¹⁷⁶ See Letter from J. Adams to Vergennes (July 19, 1781), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 13, at 591, 593.

¹⁷⁷ See Yoo, *supra* note 3, at 246–47.

¹⁷⁸ Letter from John Adams to Samuel Adams, *supra* note 13, at 48.

¹⁷⁹ See *infra* notes 186–91 and accompanying text (discussing the various treaties signed before and after the ratification of the Constitution).

In 1776, Congress approved the outlines of a model treaty.¹⁸⁰ Article 16 provided that goods of the contracting parties found on enemy ships could be confiscated, save for those goods loaded “before the Declaration of War” or where the owner was unaware of the declaration.¹⁸¹ Presumably to prevent confusion, the Article repeated the exception, this time substituting “before the War” for “before the Declaration of War.”¹⁸² Clearly this model treaty regarded these two phrases as synonymous. These phrases could be synonymous only if the drafters understood that all wars begin with some sort of declaration. In other words, the model treaty used the phrases interchangeably because it was generally accepted that every war begins with an informal or formal declaration. Hence, “before the Declaration of War” necessarily meant “before the War.”

Another model treaty provision points to the same conclusion. Article 23 provided that if the two parties to the treaty warred against each other, their citizens had six months after the “proclamation of war” to sell and transport their belongings.¹⁸³ This provision must have endorsed the idea that a nation could informally declare war because it evidently meant to grant citizens six months to gather their property after the formal or informal proclamation of war. If one reads the treaty as referencing only formal declarations of war, the treaty generates rather odd results. First, had the treaty incorporated only the formal sense of “proclamation of war” that would have meant that if there was never a formal declaration in a war, there would be no grace period at all. It is hard to fathom why citizens would be given a grace period only when the parties actually issued a formal declaration of war. To the contrary, a grace period was more important when there was no formal declaration of war that clearly marked the beginning of a conflict because citizens were less likely to know of the war in such a circumstance and thus more likely to need the grace period. Second, and more importantly, a narrow, formal reading would lead to the odd result that had a war been fought for two years and then a formal declaration made in the midst of the war (as was often the case),¹⁸⁴ citizens would have a six month grace period only after the very belated formal declaration of war. But citizens would lack any grace period for the period immediately following the actual commencement of the war, the very moment in which people were most likely to need a grace period because they might not know of the

¹⁸⁰ See Plan of Treaties, in 5 JOURNALS OF THE CONTINENTAL CONGRESS 576, 576 (Washington Chauncery Ford ed., 1906) (Entry for July 18, 1776).

¹⁸¹ See *id.* at 581–82.

¹⁸² *Id.*

¹⁸³ See *id.* at 584.

¹⁸⁴ Yoo, *supra* note 3, at 215 (noting that many nations did not formally declare war until after the commencement of hostilities).

war. There was no reason to give citizens a grace period in the midst of a hotly fought and well-known war. The grace period was clearly meant to begin at the onset of a war because the drafters understood that all wars commenced with some kind of declaration of war.

Finally, and most tellingly, Article 7 of the model treaty provided that if England "should declare war" on France, the United States would not supply men, money, or ships to England.¹⁸⁵ If the treaty meant to apply the narrow, formal definition of "declare war," it would permit America to supply England with these items should England never formally declare war against France. The more appropriate construction would be one that read "declare war" to encompass actions like waging a war, a construction widely shared in Europe and America. This broad understanding would prohibit chicanery on the part of England and America. On this reading, whether England formally or informally declared war against France, America could not aid England.

This model treaty did not rot away in some drawer. Treaties made with France,¹⁸⁶ the Netherlands,¹⁸⁷ and Sweden¹⁸⁸ prior to the Constitution contained analogs of Articles 16 and 23. Treaties made with France,¹⁸⁹ Spain,¹⁹⁰ and Tunis¹⁹¹ after the Constitution's ratification contained analogs of Article 23. The nation and its treaty partners thereby publicly endorsed the prevalent understanding that to wage war was to declare it.

A 1795 American treaty with Algiers was certainly constructed with this understanding of "declare war" in mind. The last Article of this treaty provided that if a party breached the treaty, "war shall not be declared immediately; but every thing shall be searched into regularly: the Party injured shall be made reparation."¹⁹² Apply the broad definition of declare war and the treaty makes clear that there could

¹⁸⁵ See Plan of Treaties, *supra* note 180, at 579. Evidently, the model treaty was made with France in mind.

¹⁸⁶ See Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-Fr., arts. XIV, XX, Feb. 6, 1778, 8 Stat. 12, 20, 24.

¹⁸⁷ See Treaty of Amity and Commerce Between Their High Mightinesses the States General of the United Netherlands, and the United States of America, U.S.-Neth., arts. XII, XVIII, Oct. 8, 1782, 8 Stat. 32, 40, 42.

¹⁸⁸ See Treaty of Amity and Commerce Concluded Between His Majesty the King of Sweden and the United States of North-America, U.S.-Swed., arts. XIV, XXII, Apr. 3, 1783, 8 Stat. 60, 68, 72-74.

¹⁸⁹ See Convention Between the French Republic and the United States of America, U.S.-Fr., art. XIII, Sept. 3, 1800, 8 Stat. 178, 184.

¹⁹⁰ See Treaty of Friendship, Limits, and Navigation Between the United States of America, and the King of Spain, U.S.-Spain, art. XIII, Oct. 17, 1795, 8 Stat. 138, 144.

¹⁹¹ See Treaty of Peace and Friendship Between the United States and Tunis, U.S.-Tunis, art. XXIII, Mar. 26, 1799, 8 Stat. 157, 160.

¹⁹² A Treaty of Peace and Amity Between the Dey of Algiers and the United States of America, U.S.-Algiers, art. XXII, Sept. 5, 1795, 8 Stat. 133, 136.

be no immediate resort to hostilities. Neither nation could either formally declare war or make an informal declaration through the commencement of warfare. Apply the narrow, formalist definition of “declare war” and the Algerian treaty becomes nonsensical. The narrow definition suggests that warfare is perfectly permissible so long as neither nation ever issued a formal declaration. As applied to the Algerian treaty, the formalist reading of “declare war” leads to a wholly implausible construction.

Lending support to these readings is diplomatic correspondence discussing the 1778 Treaty of Commerce between America and France. The French confiscated an American’s goods found onboard an English ship.¹⁹³ In a letter to France, America’s representatives argued that the confiscation was within the treaty’s safe-harbor provision because the confiscation occurred within two months of the declaration of war.¹⁹⁴ They offered to show when the goods were loaded to prove their point.¹⁹⁵ Had the treaty’s reference to “declaration of war” only encompassed formal declarations of war, the American representatives could have made no argument whatsoever, for neither the British nor the French ever formally declared war on each other during the Revolutionary War. The American representatives were evidently using the start of the war between France and England as the point at which there was a “declaration of war” within the meaning of the treaty. In other words, the safe harbor provided relief precisely because the American representatives read the treaty as covering informal declarations of war, such as the commencement of warfare. The arguments of the American diplomats—Benjamin Franklin, John Adams, and Arthur Lee—count as powerful evidence that “declare war” was understood in a broad sense to include the commencement of warfare.

The point of the preceding discussion is not that every American treaty of the era used “declare war” to include informal declarations of war.¹⁹⁶ Rather, the point is that many if not most treaties that used the phrases “declare war,” “declaration of war,” and their analogs were clearly premised on the understanding that one could declare war either formally or informally. In other words, the vast majority of American treaties that referenced declarations of war regarded actions

¹⁹³ See Letter from Franklin, Lee, and Adams to Sartine (Oct. 12, 1778), in 2 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 13, at 779, 779.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ For instance, there were Indian treaties that used the formal definition. See Treaty with the Cherokees, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaws, U.S.-Choctaw, Jan. 3, 1786, 7 Stat. 21; Treaty with the Chickasaws, U.S.-Chickasaw, Jan. 10, 1786, 7 Stat. 24.

looking nothing like a formal declaration of war as declarations of war nonetheless.¹⁹⁷

3. *The Constitution's Creation*

We have seen that in Europe and in America it was well understood that waging a war was a declaration of war. Moreover, hostile actions short of warfare were understood as declarations when they signaled that a nation had decided to wage a war. Hence, a nation might declare war by making a treaty with a warring nation or recalling an ambassador.¹⁹⁸ While the Founders might have incorporated the narrow, formalist understanding of declare war, the evidence indicates that they incorporated the broader definition of declare war. As discussed below, substantial founding era evidence supports the idea that to start a war was to declare war. More importantly, there is much support for the derivative proposition that Congress, and not the President, could decide whether the nation would wage war. Finally, there is no evidence that anyone, either in Philadelphia or in the states, read “declare war” in the Constitution as only authorizing Congress to issue formal declarations of war.

When it comes to the genesis and meaning of “declare war,” scholars and commentators have extensively examined the Philadelphia Convention.¹⁹⁹ Nonetheless, there is more relevant evidence here than many suppose. Most powerfully, James Madison observed that the use of force against a “delinquent state . . . would look more like a declaration of war[] than an infliction of punishment.”²⁰⁰ This was Madison’s way of denouncing the Articles of Confederation because it regulated the states as political entities rather than regulating individuals.²⁰¹ In any event, Madison clearly understood that the use of force could constitute a declaration of war. Less obvious, but no less illuminating, was Alexander Hamilton’s complaint that the Arti-

¹⁹⁷ American treaties were not the only ones to embrace the categorical theory of “declare war.” A 1786 treaty between France and England was understood as providing that the recall of an ambassador was a declaration of war. See Treaty of Navigation and Commerce Between His *Britannic* Majesty and the Most *Christian* King art II, Gt. Brit.-Fr., Sept. 26, 1786, in 1 GEORGE CHALMERS, A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS 517, 519 (London, 1790); see also THE SPEECHES OF THE RIGHT HONOURABLE CHARLES JAMES FOX 498 (1853). The treaty itself did not expressly provide that the recall would be a declaration of war but made it clear that the recall was equivalent to the commencement of hostilities, which was itself a declaration of war. See Treaty of Navigation and Commerce Between His *Britannic* Majesty and the Most *Christian* King art II, Gt. Brit.-Fr., Sept. 26, 1786, *supra*, at 517, 519.

¹⁹⁸ See *supra* text accompanying notes 117–29.

¹⁹⁹ See, e.g., FISHER, *supra* note 9, at 3–12; Yoo, *supra* note 3, at 256–69.

²⁰⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 54 (Max Farrand ed., 1966).

²⁰¹ See generally ARTICLES OF CONFEDERATION (defining the rights of the states and their relationships as states).

cles of Confederation barred the states from having navies or armies “before war is actually declared.”²⁰² Hamilton thus equated peacetime with the period before war was declared because the Articles’ prohibition only applied during peacetime.²⁰³ His equation only makes sense given the established sense that waging war was itself a declaration of war. Had Hamilton been using the formal, narrow definition of “declare war” his reading of the Articles would have been quite mistaken because, as Hamilton clearly understood, wars were typically fought without a formal declaration.²⁰⁴

Of course, the famous change of language in Article I, section 8 from “make war” to “declare war”²⁰⁵ was accompanied by comments suggesting the President should not be able to start a war. James Madison, Elbridge Gerry, Roger Sherman, and George Mason all opposed giving the President the power to wage a war, with only Pierce Butler speaking in favor of the proposition.²⁰⁶ But more interestingly, scholars have overlooked a statement from Oliver Ellsworth tucked away in that debate that “[w]ar . . . is a simple and overt declaration,” while peace talks often require secrecy.²⁰⁷ Ellsworth could be read as suggesting that warfare was itself a declaration of war.

Subsequent discussions suggest that delegates understood that the grant of “declare war” authority meant that Congress could start a war. In a discussion of the Senate majority necessary to secure a peace treaty, Gouverneur Morris argued that the “Legislature will be unwilling to make war” if peace treaties were hard to approve.²⁰⁸ He thereby implied that Congress could decide whether the nation would go to war. Another delegate argued that both chambers might require secrecy, as when “[m]easures preparatory to a declaration of war” might be necessary.²⁰⁹ This point was premised on the notion that the declaration would commence the war and that secrecy would be necessary until either warfare had begun or the other side had been formally notified of the declaration. If declarations did not sig-

²⁰² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 200, at 298.

²⁰³ See ARTICLES OF CONFEDERATION, ART. VI (“No vessels of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such state, or its trade; nor shall any body of forces be kept up by any state in time of peace, except such number only, as in the judgement of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state . . .”).

²⁰⁴ See THE FEDERALIST NO. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁰⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 200, at 318–19.

²⁰⁶ See *id.*

²⁰⁷ *Id.* at 319.

²⁰⁸ *Id.* at 548.

²⁰⁹ *Id.* at 613.

nal a decision to wage war but were instead meant to trigger the application of domestic statutes, secrecy would have been pointless.

Scholars likewise have combed through the ratification debates. James Wilson's claim—that because Congress had the power to declare war, no one man could involve the nation in a war—is well known.²¹⁰ Slightly less well known are the comments of Pierce Butler at the South Carolina ratifying convention. Butler, who in Philadelphia actually had sought to grant the President the power to make war, noted that some delegates had opposed granting the President the war power because it would grant him “the influence of a monarch, having an opportunity of involving his country in a war.”²¹¹

There are many other hitherto unknown statements pointing in the same direction. In Massachusetts, Rufus King and Nathaniel Gorham described the bicameralism and presentment needed to declare war and claimed that “as war is not to be desired and always a great calamity, by increasing the Checks, the measure will be difficult.”²¹² Clearly, King and Gorham, two delegates to the Philadelphia Convention, thought that America could not wage war unless Congress first declared it. In New York, Robert Livingston talked of Congress “enter[ing] into a war to protect the fisheries,”²¹³ thereby confirming that Congress would decide whether to go to war. Livingston was Chancellor of New York and had served as the Congress's Secretary of Foreign Affairs.²¹⁴ His reading of the Constitution was thus the product of extensive legal and foreign affairs experience. In North Carolina, James Iredell noted a “very material difference” between England and America in that the President could not declare war.²¹⁵ If the proposed Constitution had incorporated the formal reading of “declare war,” it would be impossible to describe it as embodying a “very material difference” from its English counterpart on

²¹⁰ See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 528 (Jonathan Elliot ed., 2d ed. Washington 1836) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

²¹¹ 4 *id.* at 263. In a private letter, Pierce Butler discussed the English's Crown's war authority: The King “has the sole Right of declaring War or making Peace, so that the lives of thousands of His Subjects are at His will.” Letter from Pierce Butler to Weedon Butler (May 5, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301, 302 (Max Farrand ed., 1911). Butler thereby equated declaring war with actually fighting a war, a conflation only possible if one adopts the broad definition of “declare war.” Under the narrow view, the entity that merely declares war is not the one who actually puts people's lives in jeopardy.

²¹² See Rufus King and Nathaniel Gorham, Response to Elbridge Gerry's Objections, in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 186, 190 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

²¹³ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 210, at 292.

²¹⁴ Robert Livingston, [ushistory.org](http://www.ushistory.org/declaration/related/livingston_r.htm), http://www.ushistory.org/declaration/related/livingston_r.htm (last visited Sept. 6, 2007).

²¹⁵ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 210, at 107.

this point. Iredell also said that the power of raising armies was necessary during peace as well as after a declaration of war,²¹⁶ indicating that the declaration of war itself was the dividing line between peace and war. A declaration of war could not play this role if declarations, either formal or informal, did not always mark the onset of war.

The Virginia ratification debates provide us with the largest volume of ratification material. George Nicholas noted that “[t]o make a treaty to alienate any part of the United States, will amount to a declaration of war against the inhabitants of the alienated part, and a general absolution from allegiance.”²¹⁷ Nicholas thereby embraced the notion that hostile actions of various sorts might serve as a declaration of war. Patrick Henry repeatedly equated declarations of war with entering a war. After saying that republics do not enter wars without the support of the entire community, Henry noted that in America the Congress could both declare war and fund it.²¹⁸ He also said that though the King could declare war, he would not enter into any unnecessary war.²¹⁹ Speaking of the hostile acts of outlaws and banditti, Henry observed that “[t]hose who declare war against the human race may be struck out of existence.”²²⁰ He thereby confirmed that one can declare war by one’s hostile actions or signals. James Madison noted that if other nations declared war, Congress would need the ability to raise and support an army.²²¹ Madison’s comments seemed to endorse the categorical theory—had he been endorsing a more narrow reading of “declare war” he would have been arguing that if some other nation issued a formal declaration for internal purposes, America would have to raise an army. Finally, John Marshall noted that there was more security in America because Congress must declare war, where the House of Commons had no such voice in England.²²² He was evidently referring to the power to start a war and not the power to make formal declarations. Marshall also emphasized the need for secrecy in making declarations of war,²²³ a secrecy that would be wholly unnecessary if all Congress could do was issue formal declarations of war after warfare had already begun. Consistent with his latter claims as Chief Justice, convention participant Marshall understood the power to declare war included the power to start a war, a decision where secrecy would be quite useful.

²¹⁶ See *id.* at 96.

²¹⁷ 3 *id.* at 362.

²¹⁸ *Id.* at 172. George Mason and John Dawson made the same point. *Id.* at 379. Mason in particular seemed to equate “declare war” with commencing a war. This reading is consistent with his statements at Philadelphia.

²¹⁹ *Id.*

²²⁰ *Id.* at 140.

²²¹ See *id.* at 367.

²²² *Id.* at 233. Governor Edmund Randolph made the same point. *Id.* at 201–02.

²²³ *Id.* at 231.

Interestingly, delegates from Rhode Island and New York proposed that Congress ought not be able to declare war unless two-thirds of each chamber of Congress assented.²²⁴ There would be no need for this supermajority requirement if all that was at stake was a decision to trigger the application of other statutes, as the formalist theory supposes. The supermajority requirement was proposed precisely because delegates in Rhode Island and New York understood that in declaring war, Congress would be deciding whether the nation would wage war. These delegates evidently wished to make it more difficult to go to war. Had they thought that the President could unilaterally choose to wage war, their proposal would have served no purpose.

The Federalist Papers are replete with statements that support the view that “declare war” referred to the commencement of warfare. The strongest evidence comes from *The Federalist No. 44*. Under the Articles of Confederation, the states could issue letters of marque and reprisal only after a congressional “declaration of war.”²²⁵ In contrast, Madison noted that under the Constitution “these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States.”²²⁶ His point was that Congress controlled these licenses at all times. Given the language he used, this point could be conveyed only if he equated declarations of war with the commencement of the war. In other words, Congress could issue letters either before or after the beginning of a war. On the other hand, if we assume that Madison was using the narrower, “formal” reading of “declare war,” we would have to regard him as asserting that Congress would have the authority to issue letters only when the nation was at war or when a declaration had been issued. This would preclude Congress from issuing letters in times of peace. Given the Constitution’s clear allocation of unfettered authority to Congress to issue such letters,²²⁷ Madison must have used “declaration of war” in the broad sense, i.e., to include decisions to wage a war.

Other Federalist Papers evinced the same understanding. Madison’s *The Federalist No. 41* discussed the powers necessary for “[s]ecurity against foreign danger.”²²⁸ He listed the powers to declare war, raise an army and navy, grant letters of marque and reprisal, raise

²²⁴ 1 *id.* at 330, 336. Other states apparently proposed similar measures, particularly Virginia and North Carolina. See 1 BLACKSTONE, *supra* note 38, at app., Note D, § 10 n.216 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803); JOURNALS OF THE VIRGINIA CONVENTION, Arts. 9, 10.

²²⁵ THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961).

²²⁶ *Id.*

²²⁷ U.S. CONST. art. I, § 8, cl. 11 (giving Congress the power to “grant letters of Marque and Reprisal”).

²²⁸ THE FEDERALIST NO. 41 (James Madison), *supra* note 40, at 256.

taxes and borrow money.²²⁹ Had Madison been using the formal definition of “declare war,” he would have left out one of the most important powers necessary for “security against foreign danger”—the power to decide to go to war. It seems fair to say that Madison’s list of powers was complete because Madison, as he would in *The Federalist No. 44*, used “declare war” in the broad sense.²³⁰

Hamilton agreed with Madison. In *The Federalist No. 69*, Hamilton twice repeated that the President, unlike the English Crown, could not declare war.²³¹ Hamilton never defined “declaring war,” but his meaning is clear from the context. Hamilton juxtaposed different authorities to show that the President had far less authority than the King. Hence, he compared the President’s ability to control the Army and Navy to the far greater authority that the Crown wielded. Had Hamilton been using “declare war” in the formal sense, his comparison would have no persuasive force.

Finally, another hint comes from *The Federalist No. 25*, also Hamilton’s handiwork. Here Hamilton notes that the “formal denunciation of war has of late fallen into disuse.”²³² As discussed earlier, to speak of “formal denunciation[s]” is to confirm that there is a category of *informal* denunciations. As we have seen from Europe and America, informal denunciations of war included the commencement of a war. Moreover, *The Federalist No. 25* colors the way other references to “declare war” or “declaration of war” in *The Federalist Papers* ought to be read. Understanding that Hamilton was well aware that countries rarely issued formal declarations of war affects how we ought to read all *The Federalist* references to the “declare war” power. It is unlikely that either Hamilton or Madison would have discussed declaring war as often as they did if it was a trivial, seldom used authority. Rather it seems clear that both Hamilton and Madison used “declare war” in its broad sense, to encompass decisions to wage war, whether made in a formal or informal declaration.

The Constitution’s drafting and ratification history reveals substantial evidence that delegates and pamphleteers read the Constitu-

²²⁹ *Id.*

²³⁰ In a similar way, THE FEDERALIST NO. 18, apparently written jointly by Madison and Hamilton, helps affirm the broad definition of “declare war.” This paper described the ancient Amphictyonic Council of Greece, a league of Greek states that set rules of international conduct and settled disputes between these states. *See* THE FEDERALIST NO. 18, at 122–23 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961). The authors noted that the council had the power “to declare and carry on war.” *Id.* Here, Hamilton and Madison use “declare war” as a synonym for entering into a war. Otherwise, one would have to read the sentence as referring to a power to issue formal declarations and a power to fight once war had begun. However, the crucial power to wage war would have been missing from the list of authorities.

²³¹ THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 34, at 418, 422.

²³² THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 204, at 165.

tion as incorporating the categorical theory's definition of "declare war." Furthermore, it appears that no delegate or pamphleteer ever asserted either that the authority to declare war extended no further than issuing formal declarations of war or that the Constitution authorized the President to wage war absent a congressional declaration of war.

4. *The Constitution in the New Republic*

This understanding of declare war and the Constitution's grant of "declare war" power to Congress carried over to the New Republic. As noted at the Article's outset, Ambassador Thomas Jefferson observed that the Constitution had provided "one effectual check to the Dog of war by transferring the power of letting him loose [from the Executive to the Legislative body]."²³³ While serving as Secretary of Foreign Affairs, Jefferson wrote that because the "Executive cannot decide the question of war," Congress ought to be convened to answer that question.²³⁴ He also noted that the "Constitution . . . authorised the legislature exclusively to declare whether the nation, from a state of peace, shall go into that of war."²³⁵ Later, he recommended that Washington convene Congress because Congress would have to declare war against the Creek Indians if the United States was to attack them.²³⁶ After leaving office, Jefferson complained that marching the militia into a state was "declaring a civil war" whereas Congress had the "sole right of declaring war."²³⁷

The Secretary of War shared the same understanding of "declare war." Writing to Washington in 1790, Henry Knox described an English plan to march troops through American territory to attack Spain.²³⁸ At the end of his letter, Knox suggested that Washington

²³³ Letter from Thomas Jefferson to James Madison, *supra* note 1, at 397.

²³⁴ Letter from Thomas Jefferson to James Madison (Mar. 24, 1793), American Memory from the Library of Congress, [http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field\(DOCID+@lit\(tj070089\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field(DOCID+@lit(tj070089))) (for a scan of the original letter, follow the "IMAGES" hyperlink).

²³⁵ Letter from Thomas Jefferson to Edmond Charles Genet (June 1, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON 273, 274 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895).

²³⁶ Opinion on Convening Congress, Thomas Jefferson to George Washington (Aug. 4, 1793), American Memory from the Library of Congress, [http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field\(DOCID+@lit\(tj070197\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field(DOCID+@lit(tj070197))) (for a scan of the original letter, follow the "IMAGES" hyperlink).

²³⁷ Letter from Thomas Jefferson to James Madison (Dec. 28, 1794), American Memory from the Library of Congress, [http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field\(DOCID+@lit\(tj080075\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field(DOCID+@lit(tj080075))) (for a scan of the original letter, follow the "IMAGES" hyperlink).

²³⁸ See Letter from Henry Knox to George Washington (Aug. 29, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 365, 365 (Mark A. Mastromarino ed., 1996).

place all the information before Congress.²³⁹ This was prudent because Congress was “vested with the rights of providing for the common defence, and of declaring war,” and hence “should possess the information of all [relevant] facts and circumstances.”²⁴⁰ Knox premised his letter on the view that Washington could not order an attack on the English troops until Congress had first declared war.

Treasury Secretary Alexander Hamilton had no doubt that to start a war was to declare it. Writing as Pacificus, he noted that “the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility.”²⁴¹ During the Jefferson Administration, Hamilton affirmed the same:

[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*.²⁴²

Hamilton’s views are especially probative, given that some scholars regard him as advancing overly expansive views of executive power.²⁴³

His antagonist, Helvidius, agreed with Hamilton on this point. Writing as Helvidius, James Madison argued that “[w]ar is in fact the true nurse of executive aggrandizement.”²⁴⁴ Free states act to counter this tendency by granting the power to declare war to the legislature.²⁴⁵ Moreover, Madison wrote that those who are to conduct a war cannot be proper judges of “whether *a war ought to be commenced, continued, or concluded*.”²⁴⁶ Madison was praising the grant of “declare war” power to Congress and confirming that to start a war was to declare it.

Supreme Court Justice James Wilson, in his famous *Lectures on Law*, adopted the view that “declare war” encompassed the power to start a war. He praised America for having returned to the ancient Anglo-Saxon constitution where the Wittenagemote, the early English

²³⁹ See *id.* at 367.

²⁴⁰ *Id.*

²⁴¹ Letters of Pacificus, No. 1 (June 29, 1793), in 4 THE WORKS OF ALEXANDER HAMILTON 432, 443 (Henry Cabot Lodge ed., 1904).

²⁴² No. 1, Examination of Jefferson’s Message to Congress of December 7, 1801, in 8 THE WORKS OF ALEXANDER HAMILTON, *supra* note 241, at 246, 249.

²⁴³ See, e.g., David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 170–73 (2002).

²⁴⁴ Helvidius, No. 4 (Sept. 14, 1793), in JAMES MADISON’S “ADVICE TO MY COUNTRY” 107, 107 (David B. Mattern ed., 1997).

²⁴⁵ See *id.*

²⁴⁶ Helvidius, No. 1 (Aug. 24, 1793), in JAMES MADISON’S “ADVICE TO MY COUNTRY”, *supra* note 244, at 107, 107.

assembly, had the power to declare war.²⁴⁷ Wilson's claim in the *Lectures* was consistent with his claim during the ratification fight.²⁴⁸

In *Rights of Man*, Thomas Paine criticized the English Constitution for permitting the Crown to declare war and granting the Parliament only an ex post appropriations check on warmaking.²⁴⁹ Paine argued that an ex post check was not as good as an ex ante safeguard:

[I]f the one rashly declares war as a matter of right, and the other peremptorily withholds the supplies as a matter of right, the remedy becomes as bad, or worse, than the disease. *The one forces the nation to a combat*, and the other ties its hands; but the more probable issue is that the contest will end in a collusion between the parties, and be made a screen to both.²⁵⁰

In the next paragraph, Paine said there are three questions when it comes to war: the right to declare it, the right to fund it, and the right to conduct it.²⁵¹ He says the former two ought to be with the legislature and the latter ought to be with the executive.²⁵² Evidently, Paine concurred with the general view that to wage war was to declare it.

What Jefferson, Hamilton, Madison, and others said about the Constitution and the meaning of "declare war" was reaffirmed by constitutional commentators Joseph Story,²⁵³ William Rawle,²⁵⁴ and St. George Tucker.²⁵⁵ Even British international law scholars had this understanding of the American Constitution.²⁵⁶

Finally, one should note that all the evidence discussed in Part III relating to response declarations of war likewise favors the notion that the power to declare war includes the power to decide to go to war.²⁵⁷ In particular, many in the founding era, including the first four Presidents, believed that even after another nation had declared war

²⁴⁷ Justice James Wilson, On the Constitution of the United States and of Pennsylvania—of the Legislative Department, Lectures on Law Delivered in the College of Philadelphia (1790–1791), in 1 THE WORKS OF JAMES WILSON 399, 434–35 (Robert G. McCloskey ed., 1967).

²⁴⁸ See *supra* note 210 and accompanying text.

²⁴⁹ See THOMAS PAINE, RIGHTS OF MAN 39 (Hypatia Bradlaugh Bonner ed., 1906) (1791).

²⁵⁰ *Id.* (emphasis added).

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See 2 STORY, *supra* note 38, at 96–98, 361.

²⁵⁴ See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 109 (Phila., Philip H. Nicklin 1829).

²⁵⁵ See 1 BLACKSTONE, *supra* note 38, at app., Note D, § 14–15.

²⁵⁶ TWISS, *supra* note 16, at 73 (noting that because only Congress could declare war, "a war cannot be regularly commenced by the Federal Union without an Act of Congress").

²⁵⁷ See *supra* Part III.A. That evidence is discussed in Part III because it peculiarly relates to the idea of response declarations of war. Yet if the power to declare war includes the power to issue response declarations of war, it likewise must be the case that the "declare war" power also includes the power to issue initiation declarations of war.

against the United States, Congress still had to decide whether the United States would wage war in response.²⁵⁸

To sum up, it appears that in the Constitution's early years, people understood that the "declare war" power granted Congress the authority to decide whether the nation would wage war. Furthermore, no one in the early years ever asserted that Congress could issue only formal declarations. Finally, no one maintained that the President might start a war without a previous congressional declaration.

* * *

As we have seen, Europeans understood that the power to declare war encompassed the power to decide to wage war. Hence, when nations entered a war, they had declared war or issued a declaration of war. The writings of historians and lawyers, as well as monarchs, ministers, and legislators contain this usage. This understanding of "declare war" was also prevalent in America, as diplomatic writings and treaties attest. Consistent with this definition, Americans read their Constitution as incorporating the idea that only Congress could let loose the dogs of war.

None of this denies that individuals might still use "declare war" and "declaration of war" in the narrow sense of formally declaring war. Even after a war began, there might still be comments to the effect that a nation had not declared war yet. But none of these narrow uses of "declare war" deny the prevalence of the broader meaning. The decision to use a phrase capable of multiple meanings in a particularly narrow fashion in no way refutes the proposition that the word in question also had a broader alternative meaning. Accordingly, when individuals used "declare war" in its formal sense their usage did not mean that they were rejecting the possibility that it had a broader understanding that one might use in other sentences and contexts. Indeed, people who used "declare war" in the narrow, formal sense of that phrase in one instance also used the phrase to encompass all manner of informal declarations of war.²⁵⁹

The key originalist question is what the Constitution meant when it was ratified. Did the Constitution incorporate the narrow, formal definition of "declare war" or the broader definition encompassing the power to start a war? On every originalist level, the evidence favors the categorical theory. If one looks to the Framers, it is clear that

²⁵⁸ See discussion *infra* Parts II.B.4, III.A.2.

²⁵⁹ See, e.g., Letter from Richard Henry Lee to Thomas Jefferson (July 20, 1778), in 10 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 163, at 322, 322–23 (noting that the "Court of France consider the Message of the King of England to his Parliament and their answer . . . as a denunciation of War on the part of G. Britain, and that they mean to Act accordingly, without an express declaration, leaving this last to England").

they regarded the power to “declare war” as encompassing the power to start a war. The same is true of the Ratifiers—they too believed the Constitution granted Congress the power to start a war. If we look for the original public meaning, public usage in Europe and America confirms that to enter into a war was to declare it. Finally, if we look to those who implemented the Constitution in its early years, we see a consensus that only Congress could take the nation from peace into war. While a constitution surely could incorporate the narrow, formal definition of “declare war,” there is no evidence that the federal Constitution did or that anyone regarded it as so doing.

III

THE RESPONSE DECLARATION OF WAR

When another nation declares war on the United States, there is the question of how to respond. Is the decision to wage war in these circumstances, however expressed, itself a declaration of war? If so, who may issue this response declaration of war? This Part considers these two questions, concluding that Congress may issue response declarations of war and that only Congress may decide whether the nation will wage war after another nation declares war.

A. Text, History, and Response Declarations

The textual argument is simple but worth reviewing lest we forget first principles. Given that the Constitution grants “declare war” authority to Congress and never grants the President that power, only Congress can declare war. Hence, whatever constitutes a declaration of war must be issued by Congress, if at all. If the power to declare war includes the power to issue a response declaration, then only Congress may issue response declarations of war. The only question left to be answered is whether, historically, the power to issue response declarations of war was part and parcel of the general power to issue declarations of war.

Evidence from the eighteenth century indicates an affirmative answer. While response declarations might assume different forms—sometimes they were formal documents, more often they were informal statements, documents, or actions—European nations issued response declarations of war and regarded these response declarations as issued pursuant to the power to declare war.²⁶⁰ Consistent with this understanding, Americans regarded their Constitution as granting to Congress the right to decide when the nation would adopt offensive measures, i.e., go to war.²⁶¹ When another nation declared war, for-

²⁶⁰ See *infra* Part III.A.1.

²⁶¹ See *infra* Part III.A.2.

mally or informally, Presidents did not regard themselves as constitutionally authorized to take offensive measures. Instead, Presidents believed that the Constitution authorized them to order defensive measures only. Their inability to order offensive measures against other nations stemmed from the grant of “declare war” power to Congress. Early Presidents understood that had they ordered offensive measures, they would have informally declared war.

1. *European Understandings*

Europeans recognized that the power to declare war included the power to issue response declarations of war. After England declared war against Spain in the mid-eighteenth century, Spain issued a formal declaration of war of its own.²⁶² Likewise, Republican France formally declared war on Britain in 1793, arguing that Britain had informally declared war.²⁶³ In response, Britain declared war against France.²⁶⁴ More generally, European history provides numerous examples of formal response declarations of war.²⁶⁵

Informal declarations offer even more evidence that the power to declare war encompassed the power to issue response declarations. That is to say, nations were repeatedly seen as informally declaring war in response to another nation’s declaration of war. For instance, after France informally declared war on England during the Revolutionary War, England was said to have informally declared war against France in the Crown’s message to the Parliament, in the Parliament’s response, and in the hostilities that England committed against France.²⁶⁶ Similarly, Russia and Sweden declared war against each other via actual warfare.²⁶⁷ And, of course, there are many statements recognizing that hostilities are the most common and obvious declaration of war,²⁶⁸ statements which do not merely refer to the initial aggressor’s hostilities as a declaration. The simple point is that when a nation decides to wage war in response to another country’s declaration of war, that nation necessarily has declared war, either formally or informally.

Admiral Horatio Nelson’s dealings with Neapolitan generals perhaps best reveals that “declare war” encompassed the response func-

²⁶² See *supra* text accompanying notes 132–36.

²⁶³ Decree Which Declares that the French Republic is at War with the King of England and the Stadtholder of the United Provinces, in *A COLLECTION OF ADDRESSES*, *supra* note 111, at 157, 161.

²⁶⁴ I W. H. Fitchett, *HOW ENGLAND SAVED EUROPE* 37 (1900).

²⁶⁵ See Prakash, *supra* note †, at 209 n.73 (citing more wars).

²⁶⁶ See Letter from John Adams to Samuel Adams, *supra* note 13, at 48.

²⁶⁷ See *THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1788*, *supra* note 107, at 75–76.

²⁶⁸ See, e.g., I NECKER, *supra* note 14, at 273; Letter from John Adams to Samuel Adams, *supra* note 13, at 48.

tion. Nelson was exasperated because these generals refused to seize French vessels, claiming that their King had not yet declared war.²⁶⁹ Nelson's view of the matter bears quoting in full:

I have been thinking all night of the General and Duke of Sangro's saying, that the King of Naples had not declared war against the French. Now, I assert that he has, and in a much stronger manner than the ablest minister in Europe could write a declaration of war. Has not the King received, as a conquest made by him, the Republican flag taken at Gozo? Is not the King's flag flying there and at Malta . . . ? Is not the flag shot at every day by the French, and returned from batteries bearing the King's flag? [Neapolitan ships would] fight the French meet them where they may. . . . If those acts are not tantamount to any written paper, I give up all knowledge of what is war.²⁷⁰

Nelson's discussion clearly reflects the understanding that all parties waging war necessarily declare war. He did not try to determine who declared war first and then say that only that nation had declared war. His arguments only made sense precisely because he understood that a nation might informally declare war against another, even after war had previously been declared on it.

Similarly, that the Neapolitan generals were reluctant to wage war indicated that they too understood that their King had to issue a response declaration of war (of some sort) if they were to fight a war. If response declarations of war served no purpose, these generals ought not to have questioned whether their King had declared war; they ought to have fought the French without hesitation. These generals understood that their King had other options besides waging war, and hence they wondered whether he had decided to wage war. Nelson's description of the warfare reveals his belief that the King had chosen to wage war and had therefore declared it.

2. *American Understandings*

The United States has its own experiences with the response declaration of war. Its first formal declaration of war, the declaration against England in 1812, was a response declaration of war.²⁷¹ In that war, Congress regarded America as the victim of unprovoked war-

²⁶⁹ See MAURICE, *supra* note 90, at 32–33.

²⁷⁰ *Id.* (final alteration in original). Nelson was not alone in concluding that the Neapolitans had declared war. See *id.* at 32.

²⁷¹ Act of June 18, 1812, 3 Stat. 755 (stating that “war is . . . hereby declared to exist,” indicating that England had started the war prior to America engaging in war). See also Special Message to Congress (June 1, 1812), in 8 THE WRITINGS OF JAMES MADISON 192, 199–200 (Gaillard Hunt ed., 1908) (Madison noting that England was already in a state of war with the United States).

fare.²⁷² Nonetheless, no one thought that the President could unilaterally decide that the nation would fight England. Instead, President James Madison went to Congress and sought a declaration of war. He realized that he could not declare war and hence could not decide whether the nation would wage war.²⁷³

This understanding of the “declare war” power did not originate with the War of 1812. Despite the many formal and informal declarations of war against America in its early years, every President before James Madison likewise understood that if the nation was to go to war, the Congress would have to authorize as much. There were three components of this shared understanding. First, because only Congress could declare war, only Congress could authorize offensive measures against other countries. Second, if Congress chose to authorize limited offensive actions against a foe, those were the only offensive measures permitted. Third, whatever Congress might do, the President was constitutionally empowered to adopt defensive measures meant to protect American lives, property, and territory so long as such measures did not amount to an informal declaration of war.

Practice in the Washington Administration is especially illuminating.²⁷⁴ The Creeks had declared war against the United States in the spring of 1793.²⁷⁵ Writing to South Carolina Governor William Moultrie in the summer of that year, President Washington noted that he hoped to launch an “offensive expedition against the refractory part of the Creek Nation, whenever Congress should decide that such measure be proper and necessary. The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.”²⁷⁶ Washington

²⁷² See Act of June 18, 1812, 3 Stat. 755; see also REPORT OF THE COMM. ON FOREIGN RELATIONS, TO WHOM WAS REFERRED THE MESSAGE OF THE PRESIDENT OF THE UNITED STATES, OF THE 1ST OF JUNE, 1812, in OFFICIAL LETTERS OF THE MILITARY AND NAVAL OFFICERS OF THE UNITED STATES DURING THE WAR WITH GREAT BRITAIN IN THE YEARS 1812, 13, 14, & 15, at 15, 20 (John Brannan ed., D.C., Way & Gideon 1823) (noting that England had declared war through her hostilities).

²⁷³ See *infra* text accompanying footnotes 326–33 (discussing Madison’s request for authority to fight England).

²⁷⁴ Many, but not all, of these episodes were first recounted in Abraham Sofaer’s masterful work on war and foreign affairs in the early republic. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 122–24 (1976).

²⁷⁵ Extract of a letter from Andrew Pickens, Esquire, to General Clarke (Apr. 28, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 369, 369 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1834).

²⁷⁶ Letter from George Washington to William Moultrie (Aug. 28, 1793), American Memory from the Library of Congress, [http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw330067\)\)](http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw330067))) (for a scan of the original letter, follow the “IMAGES” hyperlink).

recognized that if the nation was to use more than defensive measures against the Creeks, Congress would have to authorize as much.

Washington's 1793 State of the Union address revealed the same line between defense and offense. In his message, he simultaneously noted that troops had taken offensive measures against the Wabash Indians north of the Ohio River and that "offensive measures" were prohibited against the Creeks and the Cherokees during the recess of Congress.²⁷⁷ Washington concluded that it was for "Congress to pronounce what shall be done" with respect to the latter Indians.²⁷⁸ Why did Washington order offensive measures against the Wabash but bar such measures against other tribes? Because Washington had concluded that Congress had informally sanctioned such measures against the Wabash²⁷⁹ but had not authorized war against any other tribes.

Washington's cabinet agreed that he lacked the constitutional authority to order offensive measures, even in the face of a declaration of war. In 1792, Governor William Blount of the Tennessee territory had written to War Secretary Knox, informing him that several Cherokee tribes had "declared war" against the United States. Knox wrote a letter to the President stating that the Governor should be instructed that "all measures of an offensive nature be restrained until the meeting of Congress, to whom belong the powers of war."²⁸⁰ Knox reported that this was the unanimous opinion of the Secretary of State, Thomas Jefferson, and the Treasury Secretary, Alexander Hamilton.²⁸¹

In his reply to Blount, Knox observed that until Congress passed judgment on the matter "it seems essential to confine all your operations to defensive measures—This is (intended) to restrain any expedition against the Indian Towns—but all incursive parties against your frontiers are to be punished with the greatest severity."²⁸² These limitations were necessary because Congress "possess[es] the power[] of declaring war."²⁸³ In separate letters to nearby governors, Knox simi-

²⁷⁷ See Fifth Annual Message of George Washington to the Congress (Dec. 3, 1793), Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/presiden/sou/wash05.htm>.

²⁷⁸ *Id.*

²⁷⁹ See SOFAER, *supra* note 274, at 122–24. Sofaer also notes that further reasons the government did not take additional offensive actions were that these actions "may have been regarded as too dangerous" and Washington was concerned that state governments would be unfair and excessively brutal. *Id.* at 124.

²⁸⁰ Letter from Henry Knox to George Washington (Oct. 9, 1792), in 11 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 238, at 212, 212.

²⁸¹ See *id.*

²⁸² Letter from Henry Knox to William Blount (Oct. 9, 1792), in 11 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 238, at 212, 213 n.3 (containing quoted excerpts of that letter).

²⁸³ *Id.*

larly explained that though defensive measures were fine, offensive measures were forbidden until Congress approved because only Congress had the war power.²⁸⁴ Thus, even though Cherokee tribes had declared war against the United States, Knox and the cabinet did not think that Washington unilaterally could choose to wage war against them.

Recognizing that his constitutional authority was limited, Washington sought authority from Congress to conduct offensive measures against the Indian tribes. Before he sent a message to Congress, he apparently asked Jefferson to draft a message for him. Consistent with his earlier opinion, Jefferson wrote that “[t]he Question of War, being placed by the Constitution with the legislature alone . . . made it my [i.e., Washington’s] duty to restrain the operations of our militia to those merely defensive.”²⁸⁵ Washington’s actual message noted that militia had been used to repel Indian invasions, as provided by statute and that Congress would have to approve any further measures.²⁸⁶ He closed by noting that the “future conduct of the Executive will . . . materially depend” on Congress’s decision.²⁸⁷ Washington accompanied this message with the letter from Governor Blount about the Cherokee declaring war.²⁸⁸

Congress apparently agreed with Washington that it had the power decide whether to authorize offensive measures. While Congress implicitly authorized offensive operations against the Wabash Indians,²⁸⁹ on other occasions it rejected provisions that authorized offensive expeditions against the Indian nations that had declared war.²⁹⁰ Congress’s refusal to authorize additional wars suggests that

²⁸⁴ See Letter from the Secretary of War to the Governor of Virginia (Oct. 9, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 261, 261; Letter from the Secretary of War to the Governor of South Carolina (Oct. 27, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 262, 262; Letter from the Secretary of War to the Governor of Georgia (Oct. 27, 1792), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 262.

²⁸⁵ Thomas Jefferson, Draft of Message on Southern Indians (Dec. 7, 1792), in 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 235, at 144, 144.

²⁸⁶ Message of the President to the Senate and the House of Representatives (Dec. 7, 1792), 3 ANNALS OF CONG. 740 (1849).

²⁸⁷ *Id.*

²⁸⁸ See *id.* Washington was quite consistent in his views about the “declare war” power. During the Adams Administration, Hamilton broached the idea of invading Louisiana and the Floridas with Washington. See ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801, at 122 (1966). Washington, however, “opposed all offensive operations against Spanish territory without a declaration of war.” *Id.*

²⁸⁹ See SOFAER, *supra* note 274, at 122–23.

²⁹⁰ *Id.* at 123; see also *id.* at 412 n.292 (citing votes and debates in Annals of Congress where Congress refused authority for offensive expeditions against the Indians).

members perhaps thought that one Indian war was all that the United States ought to wage.²⁹¹

The Washington Administration realized that the congressional refusal to authorize offensive expeditions against warring Indians on the southern frontier meant that they could use only defensive measures against such Indians. For instance, in a 1793 letter to the Virginia Governor, Washington noted that his Administration's "hands are tied to defensive measures."²⁹² The Administration's hands were tied to defensive measures because Congress had failed to approve offensive measures. Likewise, consider the response to Georgia Governor Edward Telfair's 1793 request for permission to conduct an offensive expedition against the Creeks. Secretary Knox wrote back on behalf of the President, saying that the President "utterly disapproves the measure at this time."²⁹³ The first reason was that "an expedition is unauthorized by law. The right of declaring war, and making provision for its support, belong to Congress. No such declaration has been made against the Creeks, and, until this shall be done, all offensive expeditions against their towns will be unlawful."²⁹⁴

Finally, there is a parallel letter written by Secretary Knox to Governor Blount in 1794. Blount apparently sought approval for laying waste to certain Cherokee towns.²⁹⁵ Knox wrote back that, however useful such destruction might be, "I am instructed, specially, by the

²⁹¹ See *id.* at 123–24. A letter written by Jefferson supports this potential explanation. Jefferson wrote that the United States finds "an Indian war too serious a thing to risk." Letter from Thomas Jefferson to David Campbell (Mar. 27, 1792), American Memory from the Library of Congress, [http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field\(DOCID+@lit\(tj060218\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mjtj:@field(DOCID+@lit(tj060218))) (for a scan of the original letter, follow the "IMAGES" hyperlink). Instead, he advised that "it will ever be preferred to send an armed force and make war against the intruders as being more just & less expensive." *Id.* Jefferson apparently meant that Congress preferred to fend off invaders rather than taking the fight to the enemy. By not authorizing offensive measures against the Indians in the southwest frontier, Congress limited the President to his constitutional power of defending United States territory.

²⁹² Letter from George Washington to Henry Lee (May 6, 1793), American Memory from the Library of Congress, [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw320345\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw320345))) (for a scan of the original letter, follow the "IMAGES" hyperlink).

²⁹³ Letter from Henry Knox to William Telfair (Sept. 5, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 365, 365. Knox did suggest that it might be permissible to engage in what one might call "hot pursuit" of retreating invaders. See *id.* ("[C]ases may exist to render a pursuit of Indians who have been invading the frontiers, into their own country without a formal declaration of war . . .").

²⁹⁴ *Id.* In subsequent letters, Knox noted that an offensive expedition against the Creeks would be "unauthorized by law." See Letter from the Secretary of War to James Seagrove, temporary agent to the Creek Nation (Sept. 16, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 366, 367; Statement to the President (Dec. 16, 1793), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 361, 362 (same).

²⁹⁵ See Letter from Henry Knox to William Blount (July 26, 1794), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 634, 634–35.

President, to say, that he does not conceive himself authorized to direct any such measure, more especially, as the whole subject was before the last session of Congress, who did not think it proper to authorize or direct offensive operations.”²⁹⁶ Writing of these events in 1798, Secretary of War James McHenry noted that Washington had consistently limited the measures in the southwestern frontier to “defensive operations” only and had refrained “from those which were offensive.”²⁹⁷

So, notwithstanding two declarations of war, one by the Creek and one by the Cherokee, Washington and his cabinet believed that the Constitution limited him to defensive measures; he could not order offensive expeditions merely because of their declarations of war. Moreover, in rejecting language that would have authorized offensive expeditions, Congress seemed to agree. This conception of presidential and congressional authority arose from a shared understanding of the Declare War Clause. Because only Congress could declare war, only Congress could decide whether war was appropriate against nations that had already declared war. Absent such a congressional declaration, the President was limited to authorizing defensive measures, i.e., measures not rising to the level of a declared war.

John Adams understood that hostilities were themselves declarations of war, having said as much during the Revolutionary War.²⁹⁸ As noted earlier, he described both France and England as declaring war through their hostilities and did not distinguish the first declarer from the second.²⁹⁹ Adams thus recognized that once one nation declared war on another, the victim still had to decide whether to declare war in kind. The mere fact that one nation had declared war in some manner did not mean that the victim necessarily had to fight the war.

President Adams stayed true to this understanding during the undeclared war with France. Even before Adams assumed office in early 1797, France had been waging war against American shipping. By June of that year, French vessels had captured some 316 American ships over the course of a year.³⁰⁰ Little wonder that in mid-1797, Adams felt that France was already “at war” with the United States.³⁰¹

²⁹⁶ *Id.* In a later letter to Blount, written after Blount had authorized the offensive expedition, McHenry said the “subject of the Southwestern frontiers is before Congress. Whatever they direct, will be executed by the Executive.” Letter from Henry Knox to William Blount (Dec. 29, 1794), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 275, at 634–35.

²⁹⁷ 8 ANNALS OF CONG. 1523 (1851).

²⁹⁸ See *supra* notes 13, 178 and accompanying text.

²⁹⁹ See *supra* note 178 and accompanying text.

³⁰⁰ 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 57–61 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832) (listing 316 ships).

³⁰¹ See DECONDE, *supra* note 288, at 23.

In April 1798, Congress authorized the purchase of ships to defend American shipping from French predations.³⁰² The question was what orders naval commanders should receive. War Secretary James McHenry sought advice from Hamilton as to what Adams ought to do. Confining himself to construing Adams's constitutional authority, Hamilton stated,

I am not ready to say that [the President] has any other power than merely to employ the Ships as Convoys with authority to *repel* force by *force*, (but not to capture), and to repress hostilities within our waters including a marine league from our coasts. Any thing beyond this must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war.³⁰³

Hamilton understood that only Congress could authorize the capture of French vessels and that only Congress could authorize the Navy to make war on French shipping generally. So even though Hamilton believed that France was waging war against the United States,³⁰⁴ he concluded that the President could do nothing more than repel French ships and suppress French hostilities within our territorial waters. Hamilton apparently did not believe that the Constitution authorized Adams to wage war against a nation already waging war on the United States. Hamilton's advice about the President's constitutional powers was consistent with the opinion that Knox had earlier ascribed to Hamilton regarding the proper executive response to the Cherokee declaration of war.³⁰⁵

McHenry conveyed this advice to Adams.³⁰⁶ Adams apparently agreed with it as he issued narrow instructions to a captain in the Navy.³⁰⁷ After first reciting Congress's powers to declare war, grant letters of marque and reprisal and make rules concerning captures, Adams noted that the captain's operations must be "partial and limited."³⁰⁸ Adams authorized defensive measures and did not permit the general capture of French ships or other offensive operations.³⁰⁹ As noted earlier, Adams held this narrow view of his constitutional

³⁰² See Act of Apr. 27, 1798, 1 Stat. 552, 552 (obsolete).

³⁰³ Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 461, 461-62 (Harold C. Syrett ed., 1974).

³⁰⁴ See Americus, *The Warning*, in 6 WORKS OF ALEXANDER HAMILTON, *supra* note 241, at 229, 243.

³⁰⁵ As we shall see later, Hamilton did not stay true to this reading of the "declare war" power. See *infra* notes 334-51 and accompanying text.

³⁰⁶ See SOFAER, *supra* note 274, at 155.

³⁰⁷ See *id.* at 156.

³⁰⁸ See *id.*

³⁰⁹ See *id.*

authority even though he believed that France already was at war with the United States.³¹⁰

Congress would subsequently declare a limited war, granting narrow authority to capture French vessels and constrained authority to attack French military vessels.³¹¹ This authorization suggests that members of Congress grasped that the President could neither wage a limited war nor escalate and wage a general war. All that President Adams could do was dictate defensive measures of the type he had already ordered. Had members of Congress thought that Adams could order offensive measures, they would have declined to pass legislation authorizing the limited naval warfare and instead would have told Adams to rely upon his own powers.

Adams regarded Congress's legislation as a declaration of war. Writing to Secretary of State John Marshall in 1800, Adams explained that "Congress has already, in my judgment, as well as in the opinion of the judges at Philadelphia . . . declared war within the meaning of the Constitution against [France] under certain restrictions and limitations."³¹² Summing up, Adams thought France was waging war, concluded that he could not order the Navy to wage war in response, and described congressional legislation as a declaration of war. Hence, Adams clearly believed that only Congress would decide whether war was appropriate, even in the face of France's naval war. Moreover, by describing congressional legislation as a declaration of war, Adams confirmed the view that only Congress could issue response declarations of war.

As President, Thomas Jefferson acted consistently with the repeated advice he gave Washington and the path Adams trod. In 1801, Tripoli declared war against the United States.³¹³ American ships had been sent to the region and had captured a Tripolitan cruiser.³¹⁴ After disabling the Tripolitan ship, the American forces released it and its crew.³¹⁵ Jefferson thought that no other measures were appropriate because offensive measures were left to Congress's discretion:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel, being disabled from committing further hostilities, was liberated with its crew. The

³¹⁰ See DECONDE, *supra* note 288, at 23; see also 1 OP. ATT'Y GEN. 84 (1798) (reflecting the opinion of Charles Lee that the French were waging an "actual maritime war"); 1 NAVAL DOCUMENTS RELATED TO THE QUASI WAR WITH FRANCE 194, 204, 452, 454, 501 (Navy Secretary repeatedly noting that United States was at war with French armed vessels only).

³¹¹ See Act of May 28, 1798, 1 Stat. 561, 561 (obsolete); Act of June 13, 1798, 1 Stat. 565, 565-66 (expired); Non-Intercourse Act, 1 Stat. 613, 613 (expired).

³¹² DECONDE, *supra* note 288, at 281-82.

³¹³ See 11 ANNALS OF CONG. 11 (1851).

³¹⁴ See *id.*

³¹⁵ See *id.*

Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries.³¹⁶

Jefferson evidently thought that the Constitution barred him from taking offensive actions that would amount to declaring war.³¹⁷

Congress concurred. In December of 1801, Congress considered, as one Representative put it, whether the President “shall be empowered to take offensive steps.”³¹⁸ Congress made it lawful for the President to use the Navy to capture Tripolitan ships and goods and to take any other “acts of precaution or hostility.”³¹⁹ Had Congress disagreed with Jefferson’s view of his own authority—had members believed that the Constitution itself authorized the President to order full warfare against Tripoli—most of the informal declaration of war would have been wholly superfluous.

On a number of other occasions, Jefferson expressed similar sentiments. After the British vessel *Leopard* attacked the Chesapeake, an American naval vessel,³²⁰ Jefferson noted in a letter that “[w]hether the outrage is a proper cause of war, belonging exclusively to Congress, it is our duty not to commit them by doing anything which would have to be retracted.”³²¹ In the face of Spanish possession of the disputed West Florida, Jefferson argued that he could not author-

³¹⁶ *Id.* It should be noted that certain members of Jefferson’s cabinet, in advice previously given to him, disagreed with Jefferson’s claim that the President needed congressional authority to order offensive measures against a nation that already had declared war. *See infra* note 334.

³¹⁷ Sofaer argues that Jefferson’s speech to Congress was less than candid because orders to an American commodore authorized the general destruction of Tripolitan ships. *See SOFAER, supra* note 274, at 210–13. Moreover, Jefferson lamented that other ships were not captured. *See id.* at 210. But the question is why Jefferson failed to reveal that the orders permitted the destruction of enemy ships. In this case, it seems that his dissembling stemmed from a desire to appear a scrupulous observer of the Constitution’s limits on his authority. Jefferson said that disarming the ship was all that could be done because he thought that anything more would intrude upon congressional prerogatives. In other words, the best explanation for why Jefferson hid the truth is that Jefferson understood that the actual orders to naval officers were or might have been constitutionally suspect.

Sofaer also points out that Jefferson was not consistent in opposing congressionally unauthorized captures. When a naval captain had seized a Moroccan ship guilty of capturing an American brig, Jefferson praised the captain in messages to Congress. *See id.* at 223–24. To be sure, Jefferson never intimated that the captain had unconstitutionally ventured beyond the line of defense. *Id.* Yet Jefferson did say it was for Congress to “consider the provisional authorities which may be necessary to restrain” Morocco, suggesting that, once again, Jefferson believed that Congress would have to authorize offensive warfare. *See id.* at 224.

³¹⁸ 11 ANNALS OF CONG. 327 (1851) (comments of Representative Eustis).

³¹⁹ Act of Feb. 6, 1802, 2 Stat. 129, 130 § 2 (obsolete).

³²⁰ *See SOFAER, supra* note 274, at 198.

³²¹ *Id.* at 199 n.†. In another letter, Jefferson observed “[t]hat the power of declaring war being with the Legislature, the executive should do nothing, necessarily committing them to decide for war in preference of non-intercourse.” *Id.*

ize “offensive” force but could order defensive measures.³²² He also told Congress that because it “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.”³²³

Finally, as noted at the outset, James Madison shared the view that only Congress could decide whether to wage war against a nation that waged war against the United States. In his 1812 message to Congress that preceded America’s formal declaration of war, Madison recounted a host of indignities meant to show that Britain was waging war against the United States.³²⁴ He cited impressments, blockades, and other measures as evidence that Great Britain was in a state of war with the United States.³²⁵ At the end of his message, Madison noted that whether the United States would “continue passive” or “oppos[e] force to force in defense of their national rights” was a “solemn question which the Constitution wisely confides to the legislative department of the Government.”³²⁶ Plainly, Madison believed that it was for Congress to decide whether to declare war even in a situation where Great Britain was waging war (albeit a limited one) against the United States.

Once again, Congress agreed with this categorical reading of “declare war.” A committee report had noted that “it would be superfluous . . . to state, that . . . the British government [has] declared direct and positive war against the United States.”³²⁷ Yet rather than informing Madison that he was mistaken and that the President could wage war at will because England had already informally declared war, Congress famously enacted a formal declaration of war, which “authorized” the President “to use the whole land and naval force of the United States to carry the [declaration] into effect.”³²⁸ Such a declaration would have been wholly unnecessary had the informal British declaration of war been sufficient for the President to take America into a war.

³²² *Id.* at 200.

³²³ *Id.* at 200 n.* (quoting 15 ANNALS OF CONG. 19).

³²⁴ See Special Message to Congress (June 1, 1812), in 8 THE WRITINGS OF JAMES MADISON 192, 199–200 (Gaillard Hunt ed., 1908).

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ REPORT OF THE COMM. ON FOREIGN RELATIONS, TO WHOM WAS REFERRED THE MESSAGE OF THE PRESIDENT OF THE UNITED STATES, OF THE 1ST OF JUNE, 1812, *supra* note 272, at 20. The committee report referred to a British order in council from 1807 that “consummated” a system of hostility on American commerce. *Id.* at 19.

³²⁸ Act of June 24, 1812, 2 Stat. 755 (obsolete) (declaring War between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories).

The Algerian war teaches the same lessons. In 1812, the Algerians declared war against the United States.³²⁹ When the war with England ended, Madison went to Congress in 1815 complaining of Algerian “acts of more overt and direct warfare against the citizens of the United States trading in the Mediterranean.”³³⁰ He recommended that Congress pass “an act declaring the existence of a state of war between the United States” and Algeria and “such provisions as may be requisite for a vigorous prosecution” of the war.³³¹ Within days, Congress enacted a statute permitting the President to employ the Navy to protect commerce near Algeria and permitting him to instruct naval commanders to capture Algerian vessels and to take “all . . . other acts of precaution or hostility, as the state of war will justify.”³³²

These events parallel those that led to the declaration of war against England. They once again show that President Madison did not believe that he could wage war merely because another nation had declared war and was waging war against the United States.³³³ Moreover, the episode confirms that Congress understood that only it had the power to determine whether to wage war (i.e., authorize offensive measures) against Algeria.

That Washington, Adams, Jefferson, and Madison (and many of their assistants) were of the view that they could not take actions that would amount to a response declaration of war is powerful evidence that early Americans regarded such declarations as committed to congressional discretion. These Presidents arguably had the incentive to voice readings that maximized executive power and minimized the import of the “declare war” power. Yet each adopted self-abnegatory readings of “declare war.” Each confirmed that the President could not take actions that would amount to a response declaration of war because the power to declare war was committed to Congress *in toto*.

It also bears repeating that Congress agreed with the presidential endorsement of the categorical theory of declarations. Congress

³²⁹ 2 THEODORE LYMAN, JR., *THE DIPLOMACY OF THE UNITED STATES* 369 (2d ed., Boston, Wells and Lilly 1828).

³³⁰ Confidential Message of the President to the House and Senate (Feb. 23, 1815), in 9 *JOURNAL OF THE HOUSE OF REPRESENTATIVES* 783, 783 (D.C., Gales & Seaton 1815).

³³¹ *Id.*

³³² Act of Mar. 3, 1815, 3 Stat. 230 (obsolete).

³³³ A decade after Madison left office, he wrote a letter to James Monroe in which he claimed that the President can “enter on a war” when a “state of war has ‘been actually’ produced by the conduct of another power.” Letter from James Madison to Mr. Monroe, in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 599, 600 (Phila., J.B. Lippincott & Co. 1867). As evidence, he cited the “war with Tripoli” during Jefferson’s administration. *Id.* Yet Madison also stated that “it ought to be made known as soon as possible to the Department charged with the war power,” suggesting perhaps that Congress might still have to declare war or authorize more limited hostilities. *Id.*

never told Washington, or any of his successors, that the Constitution granted the President the right to wage war as soon as another nation declared war against the United States. Instead, members of Congress realized that they could decide whether something more than defensive measures were necessary. Congress sometimes declined to do anything, as with the Creeks and Cherokee, leaving the Executive to continue implementing a purely defensive strategy in the face of their warfare.

On other occasions, Congress authorized warfare after other nations began a war against the United States. Indeed, in the declarations of war against England, Tripoli, and Algeria, Congress laid the onus for starting the war on these other countries. By authorizing the President to fight those wars, Congress thereby confirmed that even when another nation declares war against the United States, only Congress may decide whether the United States would wage war in response.

B. Arguments Against the Idea of Response Declarations

Those inclined to resist the categorical theory of “declare war” might respond with a number of arguments. First, one might argue that once another nation had created a state of war through its declaration, it was impossible, given conventional understandings of “declare war,” for the victim nation to respond with a declaration of its own. Alexander Hamilton could be read as arguing as much when he mocked Jefferson’s claim that Congress would have to approve offensive measures against the Tripolitans.³³⁴ An English judicial opinion’s claim that “[a] declaration of war by one country only is not . . . a mere challenge, to be accepted or refused at pleasure by the other”³³⁵ perhaps points to the same conclusion. Second, one might contend that customary international law did not require a nation that was at-

³³⁴ See Lucius Crassus, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 303, at 444, 455–56.

Hamilton was not alone in the view that when another nation declared war on the United States, no congressional response declaration was necessary. Jefferson wrote of a cabinet meeting in which most of the cabinet believed that he could order U.S. ships to search for and destroy Tripolitan cruisers. See Entry of May 15, 1801, in THE COMPLETE ANAS OF THOMAS JEFFERSON 213, 213 (Franklin B. Sawvel ed., 1903). The lone dissenter was Jefferson’s Attorney General, Levi Lincoln, who argued American vessels could repulse an attack but could not destroy the attackers. *Id.* Madison apparently registered a partial dissent: although Jefferson listed Madison as agreeing that Jefferson could order American captains to search and destroy the enemy, Madison also said that American vessels could not go into Tripoli’s harbors, unless in pursuit of an enemy vessel. See *id.* Perhaps Madison thought that going after Tripolitan ships in harbors was too close to an offensive measure and hence would amount to a declaration of war. For a slightly more fulsome discussion, see SOFAER, *supra* note 274, at 209.

³³⁵ The “Eliza Ann”, (1813), 165 Eng. Rep. 1298, 1299–300, 1 Dodson 244, 247 (Adm.).

tacked to respond with a declaration of war. Under this view, because international law did not require declarations of war, the President did not need to wait for Congress to issue a declaration. Instead, he could immediately wage war in response to another nation's declaration against the United States. Third, one might admit that although a nation could issue response declarations, the phrase "declare war" somehow encompassed fewer functions in the response context. In particular, if a nation did nothing more than wage war in response to a declaration, its war making would not itself constitute a declaration of war.

The first argument defies history. As discussed in the previous subpart, response declarations were quite common. When another nation declared war, the victim nation might respond by trying to sue for peace and the like. But if the victim nation decided to wage war, this decision, however made or expressed, was the victim's declaration of war. There is no historical warrant for supposing that a nation could not "declare war" on its enemy after its enemy had declared war on it.

While Alexander Hamilton may have argued otherwise, his claims do not withstand scrutiny. Writing as Lucius Crassus, Hamilton ridiculed Jefferson's request for congressional authority to fight the Tripolitans, arguing that it was "impossible to conceive the idea, that one nation can be in full war with another, and this other not in the same state with respect to its adversary."³³⁶ If both nations were in a state of war, he argued, there was no need to declare war.³³⁷ Hence, there was no need for Jefferson to go to Congress because he could prosecute the war as he saw fit.

The problems with this argument are legion. To begin with, it rests on an easily contestable claim about when a nation was at war. One might say that every nation that is attacked is *ipso facto* in a state of war, as Hamilton insisted. But one might just as easily say that the nation attacked is not in a state of war until it decides to wage war against the aggressor. The proper way to characterize this situation is not obvious. For instance, consider a nation of Quakers. When attacked by an aggressor, the Quaker nation might not resist out of respect for its principles. As far as this nation is concerned, it is not in a state of war. And outsiders may agree that while the aggressor is at war with the Quakers, the Quakers are not at war.

Interestingly enough, Presidents John Adams and James Madison voiced the exact distinction that Crassus wholly disparaged. Adams observed that France "is at war with us, but we are not at war with

³³⁶ Lucius Crassus, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 303, at 444, 455-56.

³³⁷ See *id.*

her.”³³⁸ In his war message of 1812, Madison said much the same thing: “We behold, in fine, on the side of Great Britain, a state of war against the United States, and on the side of the United States a state of peace toward Great Britain.”³³⁹ Neither Adams nor Madison believed that because the aggressor nation was in a state of war it followed that the victim was in the same state. The victim had to decide whether to wage war in response.

Even more interesting, in the midst of France’s naval war against American shipping, Hamilton voiced the distinction he would later mock. Writing as *Americus*, Hamilton claimed that France’s policy of attacking American ships was “war of the worst kind, *war on one side*.”³⁴⁰ Writing as *Titus Manlius*, he noted that while France was waging war on the United States, some Americans were doing the utmost to avoid war with France.³⁴¹ Each of these statements adopts the view that though France was at war against the United States, the latter was not at war with the former.

In any event, if one accepted Crassus’s claim that a nation attacked is necessarily in a state of war, one can still challenge his assumption that the state of war matters for purposes of discerning what a nation’s armed forces may do in this state of war. The questions of who may order the use of force and what kinds of force they may authorize are questions that have nothing to do with whether one is in a state of war or not. They are questions about a nation’s internal constitutional structure. Hence, Crassus’s insistence that the United States was in a state of war was irrelevant. Crassus himself admitted this when he observed that a constitution may limit the use of force even when a nation was in a state of war.³⁴² His subsequent claim that the Constitution did not do this was utterly conclusory.

As evidence that Lucius Crassus was wrong on the constitutional point, one could not only cite Presidents and Congresses, one also could cite Hamilton and his previous alter ego, *Pacificus*. Recall Hamilton’s views about presidential power in the wake of the Cherokee declaration of war. Hamilton concurred in War Secretary Knox’s opinion that Congress would have to approve any offensive measures against the Cherokees because only Congress could declare war.³⁴³ Moreover, recall his advice to War Secretary McHenry during France’s

³³⁸ DECONDE, *supra* note 288, at 23.

³³⁹ See Special Message to Congress (June 1, 1812), *supra* note 324, at 199–200.

³⁴⁰ *Americus*, *The Warning*, in 6 WORKS OF ALEXANDER HAMILTON, *supra* note 241, at 229, 243.

³⁴¹ *Titus Manlius*, *The Stand*, N.Y. COM. ADVERTISER, Mar. 10, 1798, reprinted in 6 WORKS OF ALEXANDER HAMILTON, *supra* note 241, at 259, 263, 265.

³⁴² See *Lucius Crassus*, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 303, at 444, 455.

³⁴³ See *supra* text accompanying notes 280–81.

undeclared war against U.S. shipping.³⁴⁴ Even though Hamilton thought that France was waging war on the United States, Hamilton was sure that Adams could not order captures, much less plunge the United States into a general war. Finally, Pacificus wrote that “the Legislature can alone declare war, *can alone actually transfer the nation from a state of peace to a state of hostility*.”³⁴⁵ This statement denies that any other nation can place America in a state of war and affirms that only Congress can accomplish as much. Ironically, Crassus mocked Jefferson for defending a vision of limited presidential power that Hamilton had endorsed on numerous occasions.

In discussing the Tripolitan affair, Crassus wholly missed the import of earlier difficulties with the Barbary nations. Rather than fight a war declared by the Barbary States, America previously thought it better to pay tribute to them.³⁴⁶ He also ignored the import of the congressional decision to not wage war against the Cherokee and Creek and Washington’s respect for that choice.³⁴⁷ These earlier episodes furnish an effective refutation of Hamilton’s narrow reading of “declare war.” Once one concludes that a nation can do something besides waging war, it becomes quite obvious that the decision to declare war in response to another nation’s previous declaration is an important and often difficult one. While trying to score points against Jefferson, Hamilton insisted that the decision rested with the President. The Constitution’s grant of “declare war” power to Congress indicates otherwise.

The second argument—one that contends that response declarations were not required under international law—makes an irrelevant (albeit interesting) point without ever calling into question the principal meaning of “declare war.” Certain international law theorists maintained that a nation attacked did not need to issue a declaration of war in response. As Emmerich de Vattel wrote, “[h]e who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy’s declaration or open hostilities.”³⁴⁸ Christian Wolff similarly claimed that a declaration “is superfluous for the party waging the

³⁴⁴ See *supra* note 303 and accompanying text.

³⁴⁵ Letters of Pacificus No. 1, *supra* note 241, at 432, 443 (emphasis added).

³⁴⁶ See FRANK LAMBERT, *THE BARBARY WARS* 49–78 (2005) (describing how America paid tribute to the Barbary powers).

³⁴⁷ See *supra* notes 278–79 and accompanying text.

³⁴⁸ VATTEL, *supra* note 145, at 317. Vattel, properly understood, denies that a declaration is needed only in the context of a purely defensive war. His writings indicate that when one wishes to provide for one’s safety by punishing an aggressor or to recover territory or property, one is no longer waging a defensive war. See *id.* at 302–03. When one is pursuing one of those ends, Vattel’s exception no longer applies, and he argued that a formal declaration was required.

defensive war.”³⁴⁹ Because the victim of aggression “necessarily wages defensive war . . . it certainly seems incongruous to announce to another that we intend to do what we cannot omit without neglect of duty, nor without injury to our citizens.”³⁵⁰ Speaking of the Tripolitan war, Crassus confirmed that international practice established that a nation did not have to declare war once another nation had declared war against it.³⁵¹

Read in context, the statements from Vattel and Wolff clearly related to whether a nation had to issue a *formal* declaration of war in response to a declaration of war.³⁵² Indeed, the focus of international lawyers was always on the formal declaration. These theorists were merely saying that as a matter of international law, a victim of aggression did not need to give notice of its intention to respond with warfare. This was an eminently sensible principle.

Yet the real question is not whether, as a matter of international law, the United States had to formally declare war upon Great Britain after Great Britain already had declared war against the United States. Instead, the relevant question is whether one could sensibly say that a nation upon whom war was declared could in turn declare war on its avowed enemy. The reasonable principle that a formal declaration was unnecessary in this context is wholly irrelevant to this question.

A moment’s reflection makes the answer to the relevant question obvious. Of course it was possible for a nation to respond with a declaration of war of its own. One does not need to recount the many historical incidents proving as much, for the statements of the international law scholars themselves supply the proof. In asking whether a nation *had* to declare war after being the victim of a declaration of war, the scholars made it rather clear that a nation *could* declare war. If a nation could not declare war in these circumstances—because the phrase “declare war” was not used in these circumstances—then there would have been no occasion to inquire whether a declaration of war was required.

If it was possible to have response declarations of war and if the power to declare war was the power to decide to go to war, then an entity with the “declare war” power had to decide whether to fight a

³⁴⁹ 2 WOLFF, *supra* note 146, § 713, at 368.

³⁵⁰ *Id.*

³⁵¹ See Lucius Crassus, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 303, at 444, 456.

³⁵² Whether Crassus’s point was so limited is unclear. If Crassus was only speaking of formal declarations of war, he obviously was correct. If, however, Crassus was referring to declarations of war generally, he was clearly wrong. The evidence is clear that the decision to go to war was itself a declaration of war, even when made in response to another nation’s declaration of war. Accordingly, if Crassus was speaking of both formal and informal declarations of war, practice actually refuted his claim.

war, even after another nation declared war. Within our constitutional regime, the grant of the power to declare war to Congress means that only Congress can decide to wage war, whatever the circumstances. The President is limited to those measures that do not constitute a declaration of war.

The last argument against the idea that the power to declare war includes the power to issue response declarations fares no better. Recall that this argument supposes that “declare war” in the response context encompasses some of the functions normally associated with declaring war but excludes the function of deciding whether to wage a war. It seems implausible to suppose that “declare war” had some more limited meaning in one isolated context. Indeed, there is no good reason to think that “declare war” meant something broad in the context of starting a war but something far narrower in the context of a war already declared by an aggressor. This is a little like saying that the power to raise taxes means one thing in times of budget surplus and another thing in times of deficit. In any event, historical evidence discussed in the previous subpart coheres with the intuition that when two nations fight a war, both the aggressor and the victim thereby “declare war.” In contrast, there is no evidence supporting the speculative assertion that “declare war” had a narrower compass in the response context.

Ultimately, none of the objections to the notion of response declarations of war bears any scrutiny. Given the grant of “declare war” power to Congress, Congress must determine whether offensive measures are the appropriate response to another nation’s declaration of war. The President cannot usurp this decision by waging a full-scale war in response to an informal or formal declaration of war. Instead, the President can do no more than take those defensive measures that do not constitute an informal declaration of war.

IV

SOME CONSEQUENCES OF THE ORIGINAL MEANING OF “DECLARE WAR”

If one accepts the claim that to wage war was to declare war, what implications and difficulties follow? This Part begins by briefly highlighting some surprising implications arising from the definition of “declare war” advanced here. Next, it addresses the difficulties in determining what military measures the President may order, consistent with Congress’s “declare war” power. Finally, it considers whether the Constitution’s method of going to war is outdated.

A. Implications of the Categorical Theory

The original meaning of “declare war” gives rise to a number of interesting implications for how to discuss declarations and warfare. The first such implication is that every American war was a declared war, at least in the constitutional sense. It has been a common complaint that America has fought many so-called undeclared wars. The examples are familiar: Korea, Vietnam, etc. Some might add the two Iraq wars and the Afghan conflict to this list. If we use the original meaning of “declare war” as a guide, however, the United States has never fought an undeclared war because that is logically impossible. Whenever the United States started a war, it necessarily declared war either formally or informally. Likewise, whenever the United States decided to enter a war started by another nation, that decision was itself a declaration of war.

This does not mean that all such wars were constitutionally declared. The complaints against America’s undeclared wars should perhaps be restated as complaints that Presidents usurped the authority of the constitutional organ enjoying the sole power to declare war. In other words, the claim should not be that Presidents have fought undeclared wars, but that *Presidents have declared war* when only Congress ought to have done so. Whether these complaints have merit turns on whether, during the relevant periods, Congress passed measures that served as informal declarations of war.

A second implication is that even though the Constitution supposes all wars are declared, it is still possible to say that a warring nation has not declared war. When someone observes that a warring nation has not declared war, they typically mean no more than that the nation has not yet issued a formal declaration of war. Or perhaps they are complaining that the warring nation gave no formal warning that they were about to attack. Either way, such observations do not call into question the broad understanding of “declare war” found in the Constitution. That a warring nation has not issued a formal declaration of war does not mean that it has not issued an informal declaration of war.

Indeed, it is possible for the same person to say that a nation has declared war in the informal sense and has not declared war in the formal sense. During the Revolutionary War, some said that both En-

gland³⁵³ and France³⁵⁴ had declared war but had not formally declared war. This was not a sign of some mental confusion. Rather speakers were using “declare war” in two different senses.

The claim that the “declare war” power included the power to issue informal declarations of war might seem to generate an odd result. In particular, a nation might be regarded as having informally declared war and yet never actually wage war. For example, should a nation in the eighteenth century dismiss an ambassador in a hostile manner, that nation could be said to have declared war. But warfare might never ensue, making this something of a phony declaration.³⁵⁵

Although this oddity might seem something peculiar to the broad definition, it is in fact possible with respect to the narrow, formal definition of “declare war” as well. Under the formal definition, a nation might unconditionally declare war and yet never actually commence warfare. Why might this happen? The declarant nation might have a change of heart; the declarant might have been bluffing, hoping to coerce the other nation; the other nation might have successfully pacified the declarant; and other nations might have intervened to stave off warfare.

In one way, the possibility of a declared war without actual hostilities is more acute once one accepts that a nation can declare war informally because many more actions might be mistaken for declarations of war when no such declaration was intended. In another way, however, the possibility of a phony war is eliminated in the case where actual offensive warfare constitutes the declaration of war. Unlike a formal declaration which leaves open the possibility of no ensuing warfare, an informal declaration of war that occurs via warfare leaves no gap between intent and reality. When offensive warfare constitutes the declaration, there is no chance of a false declaration of war. In any event, the fact that there might be more non-wars after some kinds of informal declarations does not call into question the category of informal declarations. Just as a formal declaration of war

³⁵³ See Letter from Richard Henry Lee to Thomas Jefferson (July 20, 1778), in 10 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, *supra* note 163, at 322, 322–23 (noting that the “Court of France consider the Message of the King of England to his Parliament and their answer . . . as a denunciation of War on the part of G. Britain, and that they mean to Act accordingly, without an express declaration, leaving this last to England.”).

³⁵⁴ See Letter from Richard Henry Lee to Francis Lightfoot Lee, *supra* note 163, at 266–67 (noting that a French Count had declared war on board his fleet but also noting that there had been no formal declaration of war).

³⁵⁵ There was something of a phony war in 1775, or so a member of Parliament argued. Speaking before the House of Commons in early 1775, the member argued that America and England were both in an “open and declared war” but that no blood had yet been spilt. See House of Commons, American Archives, Documents of the American Revolution, <http://colet.uchicago.edu/cgi-bin/amarch/getdoc.pl?/projects/artflb/databases/efts/AmArch/IMAGE/.1850> (last visited Aug. 27, 2007) (comments of Governour Pownall). As we know, actual warfare eventually did break out.

is a declaration of war regardless of whether warfare ensues, informal declarations of war are no less declarations of war even if no warfare actually results. Because, historically, declaring war was merely a decision to wage war, it always was possible that a nation making such a decision might have second thoughts prior to actually waging war.

B. Difficulties Associated with the Categorical Theory

The grant of “declare war” authority to Congress reflects a principle that the President should not embroil the nation in a war. Decisions about whether to resort to warfare rest with Congress. The primary difficulty with implementing this principle lies in discerning which statements and actions are forbidden to the President because they constitute declarations of war. The following discussion considers this question while generally refraining from offering definitive answers.

Although the President has executive power to communicate with foreign nations and can say all manner of things to them,³⁵⁶ the exclusive grant of “declare war” power to Congress makes it clear that there are some things that the President cannot utter. Under any theory of the meaning of “declare war,” the President cannot make speeches or issue announcements, the substance of which would amount to a declaration of war. The President, acting alone, certainly cannot say “I declare war” against another nation. Moreover, acting alone, the President cannot threaten the resort to warfare should another nation not comply with certain demands. A demand that a nation do something on pain of war is a conditional declaration of war. Only Congress can make a conditional declaration of war.³⁵⁷

The greater difficulty lies not with statements but with actions. As we have seen, the Constitution uses “declare war” to encompass all actions that signal a war’s onset. It is easy enough to say that the Commander in Chief cannot start a war or join one without some congressional declaration. Implementing that principle is far more difficult and raises thorny questions.

In discerning what actions are forbidden to the President, should we be governed by the generic principle reflected in the Declare War Clause or by the specific actions that would have been regarded as declarations of war in the eighteenth century? The general principle

³⁵⁶ See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231 (2001) (arguing that the President has executive power to communicate with foreign nations and wide latitude in what to say).

³⁵⁷ The President could still threaten to lobby Congress to declare war should another nation not comply with the President’s admonitions and demands. But this threat will be less worrisome precisely because the President cannot wage war without first getting Congress to authorize the warfare.

is that Congress must decide whether the nation is to wage war. While nations generally regarded making a treaty of alliance with a warring party as a declaration of war in the late eighteenth century,³⁵⁸ the question is whether we should continue to regard such treaties as declarations of war today even if no existing government continues to regard such treaty making as an informal declaration of war. On the other hand, there may be actions that nations did not regard as declarations of war in the eighteenth century that the modern world would generally regard as such today.³⁵⁹ This poses a difficult, if familiar, question of how to make sense of ancient constitutional text that appears to enshrine concepts whose content may change over time. Similar questions arise in discerning the original meaning of the ban on cruel and unusual punishment.

A related question is what to make of a situation where a foreign nation warns that it will regard certain U.S. actions as a declaration of war. As we have seen, nations sometimes warned that they would regard seemingly innocuous statements or actions as declarations of war.³⁶⁰ The better view is that such threats are really attempts to shift blame for the start of a war. If the President takes the action the opposing nation warned against, the President has not declared war in the constitutional sense, for another nation cannot make some action a declaration of war merely because it announces its eager willingness to treat it as such. Of course, should the other nation declare war in response to the supposed declaration of war by the United States, the Congress would face the question of whether the nation would wage war in response.

Another issue concerns how to understand “declare war” when powers committed to other actors might enable them to declare war through their actions. For instance, if the making of treaties of alliance with warring parties was (and is) a declaration of war, one might doubt whether the President and Senate could make such a treaty.³⁶¹ Another question relates to actions that the President might take unilaterally that might constitute declarations of war, such as the dismis-

³⁵⁸ See NEFF, *supra* note 28, at 109.

³⁵⁹ This possibility—that there might be new actions that constitute informal declarations of war—seems less likely given that many seem to be unaware of the possibility of informal declarations of war.

³⁶⁰ See *supra* text accompanying notes 131–36.

³⁶¹ See U.S. CONST. art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”). Washington’s second Attorney General, William Bradford, apparently doubted that the Executive could, via treaty, commit the United States to wage war. He observed that such a question “would perhaps come more properly before that body in whom the right of declaring war is vested.” Letter from William Bradford to Edmund Randolph (July 5, 1794), <http://memory.loc.gov/mss/mgw/mgw4/105/1100/1142.jpg> & <http://memory.loc.gov/mss/mgw/mgw4/105/1100/1143.jpg>.

sal of foreign ambassadors. Of course, such questions about the interaction of powers arise all the time, as when scholars discuss whether the treaty power can legislate upon subject matters committed to Congress, like the taxing power.³⁶²

Perhaps the most vexing issue is the extent to which the President can order the use of military force without that use constituting a declaration of war. Without attempting to provide a definitive treatment, a few comments seem in order. First, it is clear that nations did not view all uses of force as declarations of war. Although one commentator remarked that “hostilities are commonly considered as the strongest declaration of war,”³⁶³ no one ever claimed that *all* hostile actions were regarded as declarations of war.

For instance, consider a wayward cannonball shot across a nation’s frontier by mistake. No one would say that the nation from whence the cannonball came had thereby declared war, for a nation cannot accidentally declare war. Likewise, consider a renegade French captain who attacked English naval ships. If France disclaimed the attack and offered restitution, the captain’s actions could not properly be attributed to France. This would mean that France had not declared war through the actions of its renegade captain. Furthermore, any English ships that might attack the French ship in self-defense would not thereby have declared war against France. Neither the attack nor the vigorous defense would amount to a declaration of war because neither nation actually sought to immerse itself in a war.

Early American history indicates that the President might order the armed forces to defend themselves against attack without such orders themselves constituting a declaration of war. Delegates at the Philadelphia Convention recognized that not all uses of force constituted declarations of war. Without being contradicted by their comrades, some delegates said the President could repel “sudden attacks” without running afoul of Congress’s authority to declare war.³⁶⁴ Similarly, Washington and his aides noted that governors could take defensive measures to thwart Indian raids because such measures did not constitute a declaration of war.³⁶⁵ Jefferson drew the same line with respect to Tripoli. Even Hamilton agreed with this general division, at least until Jefferson voiced it to Congress.³⁶⁶ What unites the errant cannonball, the actions of a renegade captain, and those soldiers who defend themselves and their nation’s territory is that

³⁶² See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1959 (1999) (discussing the complicated interaction between the treaty power and Congress’s legislative powers).

³⁶³ 1 NECKER, *supra* note 14, at 273.

³⁶⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 200, at 318.

³⁶⁵ See *supra* notes 274–97 and accompanying text.

³⁶⁶ See *supra* notes 280–81, 303 and accompanying text.

each of these actions in no way resembles a decision to wage war. A nation's armed forces can be quite lethal without ever informally declaring war.

On the other hand, a decision to "take the fight to the enemy" and indiscriminately attack that nation's ports, territory, etc., would constitute a declaration of war. That is so because any such decision would be a decision to wage war and, as such, a declaration of war. That is why Washington, Jefferson, Knox, and even Hamilton argued that the President alone could not order offensive measures against those that had declared war against the United States.

We might profitably draw upon the criminal law concept of self-defense. Under the generic concept of self-defense, someone attacked may respond with proportional force to ward off or disable the attacker. A person must use no more force than appears reasonably necessary in the circumstances. When the danger has passed, the person seeking to use the self-defense argument cannot continue to pursue the original aggressor on grounds of self-defense, for at this point the victim becomes the aggressor.

In the same way, we might say that a nation has not declared war when it responds to an attack with defensive measures designed to thwart the attack. It may destroy the advancing enemy and may take prisoners. None of these measures would be viewed as a declaration of war. But if the victim nation creates a new front or decides to attack the aggressor after the aggressor has withdrawn, then the victim has itself declared war. While such actions may well be justified under principles of international law or under conceptions of morality, those matters are not in dispute. The inquiry is whether creating a new front or pursuing aggressors long after they have retreated would constitute a declaration of war. Materials from the eighteenth century suggest that the answer is "yes."

Accordingly, in response to hostilities initiated by another nation, the President is limited to a lethal but calibrated defensive response, reserving to Congress the decision whether to wage an offensive war. This fuzzy dividing line leaves much up in the air. But this is hardly something peculiar to the categorical theory of "declare war." *Any theory* that hopes to explain what it means to "declare war" will have to explain what actions constitute "war" and why certain actions fall short of being termed "war." Of more relevance, any theory that accepts that certain acts of hostilities rise to the level of a declaration of war will have to explain which acts of hostilities by other nations amount to an informal declaration of war. This inquiry somewhat mirrors the questions that scholars might ask of the President's ability to order the use of force short of an informal declaration. Hence, any plausible

theory about “declare war” will face the problem of blurry lines in a world where many prefer distinct, easily discernible ones.

The fact that there will be difficult questions about what military measures the President can order in response to an attack does nothing to call into question the idea that certain uses of force constituted a declaration of war. The existence of difficult cases cannot alter the eighteenth-century consensus that countries could (and did) issue response declarations of war and that waging war was a response declaration of war.

C. Is the Constitution’s Mechanism for Going to War Outdated?

Some will no doubt applaud the constitutional scheme outlined here. For various reasons, they will prefer a regime where Congress, rather than the President, must decide whether and how the nation will wage war. Others will have a very different reaction, condemning this system for going to war as unworkable, impractical, and downright harmful to the nation’s interests.

Without wading too much into what is, at its heart, a policy dispute over the desirability of a constitutional provision and its implications, a few comments seem appropriate. There is much to be said *against* the constitutional scheme outlined here. Anecdotal evidence suggests that members of Congress are not always attuned to the international interests of the United States and are far more obsessed with local matters. And handcuffing the President’s ability to use force will predictably make it more difficult for the United States to use force effectively and to threaten the use of force to achieve desirable objectives. Writing over two centuries ago, Frenchman Jacques Necker lamented that France had handicapped itself by requiring that all declarations be made by the Assembly when other nations could declare war by simply attacking.³⁶⁷ Moreover, he noted that there could be no secret attacks if the debate about whether to declare war was conducted in an assembly.³⁶⁸ The same complaints apply to the U.S. Constitution.

Because these are policy objections, they properly belong in a discussion about whether we ought to follow the Constitution’s original meaning or depart from it in the face of harmful consequences. It is no fatal objection to the categorical theory of “declare war” that some might think that it leads to a suboptimal constitutional scheme, especially when there are many who would contest that negative assessment. In any event, even if there were some contemporary consensus that the constitutional scheme for going to war was downright dread-

³⁶⁷ See 1 NECKER, *supra* note 14, at 271.

³⁶⁸ *Id.*

ful, we should hardly be surprised by this negative consensus. We ought to expect that what many may have regarded as optimal in the eighteenth century might be regarded by many as quite detrimental in our very different twenty-first century. Evidence of this phenomenon is to be found in the regular rejection of the Constitution's original meanings on the ground that they generate ruinous constitutional rules.³⁶⁹ Why should the original meaning of the Declare War Clause be any different?

CONCLUSION

In one sense, the eighteenth-century categorical meaning of "declare war" has become obscured. Today, many scholars and ordinary Americans think of a declaration of war as a formal document that promises war against another nation or that proclaims that a state of war already exists. Anything else is not a declaration of war. This accounts for the common view that the nation has declared war so few times over its long history. This also accounts for the notion that even when Congress has expressly called for war, it has not declared war.

In another sense, however, the eighteenth-century meaning of "declare war" is alive and well. People sometimes speak of a nation declaring war through hostile acts. For instance, some have called Israel's 2006 incursions into Lebanon a "declaration of war"³⁷⁰ even though Israel never issued a formal declaration of war.³⁷¹ For whatever reason, however, this broader sense of "declare war" generally is shunted aside when people discuss the Constitution. Politicians, scholars, and ordinary citizens are inordinately fixated on formal declarations of war.

This Article has demonstrated that in the eighteenth century all sorts of hostile statements and actions were seen as declarations of war. Individuals not only regarded the actual commencement of warfare as the strongest declaration of war; they also viewed other less hostile actions as declarations. Hence, individuals understood as declarations of war the recall or dismissal of ambassadors, the cutting down of another nation's flag, the grant of general letters of reprisal,

³⁶⁹ See generally CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) (arguing that the Constitution, as originally understood, leads to horrible results, such as permitting segregation and allowing restraints on all manner of speech, and using these results as the principle reason for rejecting originalism). For a critique of Sunstein's consequentialist theory of interpretation, see Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207 (2006).

³⁷⁰ See Joshua Partlow & Saad Sarhan, *Attacks Target Worshipers at Iraqi Mosques*, WASH. POST, July 15, 2006, at A14.

³⁷¹ See Dan Izenberg, *High Court Rejects Beilin's Petition to Declare War*, JERUSALEM POST, Aug. 3, 2006, at 7.

and the making of a treaty of alliance with a warring nation. These signals were regarded as declarations of war because they evinced a resort to warfare to settle differences.

All this still leaves open the difficult question of what to do with this more accurate and comprehensive sense of the original meaning of “declare war.” There are those originalists who seem intent on emphasizing recent patterns of presidential war making either as a means of casting doubt on the original meaning claimed here or as a means of minimizing the continued relevance of that original meaning. And there are those non-originalists who condemn recent practice as an aberration and maintain a steadfast, if awkward, fidelity to original meanings only in the narrow context of the “declare war” power.³⁷² The claims made here about the original meaning of “declare war” may serve to perpetuate this odd and somewhat comical role reversal.

³⁷² See Yoo, *supra* note 3, at 172 (pointing out for the first time this role reversal).

