

Exhuming the Seemingly Moribund Declaration of War

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Abstract

Scholars and politicians insist that declarations of war are relics of the past. As proof, they note that in over two centuries the United States has declared war in a total of five ways and that the nation last declared war over sixty years ago. Perhaps because declarations seem so rare, relatively little scholarly attention has been paid to them. This Article considers the much neglected declaration of war, making two contributions. First, those who assert that Congress has not declared war in sixty years fundamentally misapprehend what it means to “declare war” under the Constitution and what constitutes a declaration of war. Whenever Congress authorizes or commands a war, it has issued a declaration of war, regardless of whether Congress uses the phrase “declare war.” This broader conception of what constitutes a declaration of war means that every war sanctioned by Congress in the past half century was a declared war, even though Congress never passed a formal declaration during that period. Second, congressional declarations of war need not be laconic documents that do no more than authorize warfare, leaving tremendous discretion to the Commander in Chief. Instead, Congress can enact detailed declarations, as was typical in the founding era. Among other things, war declarations may constrain the use of military force and may regulate the wartime rights of citizens and foreigners. By exhuming the declaration of war, we belatedly perceive that reports of its death are quite premature.

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Introduction

Scholars,¹ politicians,² and even judges³ routinely note that declarations of war are relics of a bygone era, and they seem to have rather sound reasons for doing so. Despite having fought many wars in the last half century, the United States has not formally declared war in over sixty years.⁴ The United States is not alone in shunning formal declarations; it seems that no nation has issued them since World War II.⁵ Little wonder that many regard the declaration of war as something akin to the Nehru Jacket or the buggy whip.

¹ See, e.g., BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 34–36 (1998) (noting that formal declarations are no longer issued).

² See, e.g., 140 CONG. REC. 28,527 (1994) (recording Representative Henry Hyde of the House Committee on Foreign Affairs calling declarations of war “anachronistic” in debate over use of force in Haiti).

³ See, e.g., David B. Sentelle, *National Security Law: More Questions than Answers*, 31 FLA. ST. U. L. REV. 1, 5–6 (2003).

⁴ See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2006*, at 15–39 (2007) (noting that the last declaration of war by the United States occurred in World War II).

⁵ See John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 888 n.41 (1990) (“[S]ince World War II declarations of war have essentially vanished, world-wide.”).

Because no nation declares war anymore, scholars seem to assume that declarations of war must be unworthy of scholarly attention. Two different perspectives lead to this conclusion. On one account, the obsolescence of declarations of war makes the power to declare war somewhat, but not entirely, irrelevant. The Founders granted the declare-war power to Congress because they believed that only Congress should decide whether the nation should go to war. In modern times, this decision need not be made via an old-fashioned declaration of war. Instead, all Congress must do is decide that the nation should wage war. This decision might be made in a statute authorizing war, by an appropriations statute that funds a war, or via some joint resolution sanctioning war.⁶ None of these enactments constitutes exercise of the declare-war power, because none of them is a formal declaration of war. In sum, the declare-war power matters not because Congress must formally declare war prior to the nation waging war, but rather because the grant of the declare-war power was premised on the more fundamental proposition that Congress must decide whether the nation will wage war.

On another account, the obsolescence of war declarations makes the power to declare war wholly irrelevant. If nations no longer issue declarations of war, the power to declare war has no relevance, in much the same way the power to ban the importation of slaves (part of the commerce power) became inconsequential after the Thirteenth Amendment. Put another way, under this view, the constitutional policy reasons for granting Congress the declare-war power no longer matter in a world without declarations of war.⁷ The Founding Fathers may have thought that Congress should have a monopoly on the decision to wage war, but changed international practices have made the declare-war power and declarations of war outdated.

Both of these accounts are misguided. The definition of “declare war” that the Constitution incorporates ensures that the power to “declare war” can never be obsolete. Moreover, declarations of war are hardly some antiquated custom that has been consigned to the ash heap of history. Nations continue to declare war and issue declara-

⁶ See, e.g., Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 125–27 (1991) (arguing that Congress must authorize war but need not issue a formal declaration).

⁷ See Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War,”* 25 HARV. J.L. & PUB. POL’Y 519, 537 (2002) (arguing that the power to declare war is an anachronism).

tions of war quite often, albeit in ways that wholly escape modern scholars.

Contemporary scholars fail to recognize the ubiquitous declarations of war because they misapprehend what constitutes a declaration of war. Many erroneously suppose that if a nation does not issue some relatively formal document that uses the phrase “declare war,” then the nation has not declared war, even if it finds itself in the throes of several wars. Indeed, such wars often will be deemed “undeclared wars” precisely because there is no document with the supposedly essential phrase.⁸

During the founding era,⁹ declarations of war were not so narrowly conceived. A document was a declaration of war even if it lacked the “declare war” phrase. In other words, the touchstone that modern scholars use to identify whether some document is a declaration of war was not a necessary component of a declaration (even if it was sufficient).

More importantly, declarations of war did not need to be in writing at all; rather, they came in many forms. For example, a bellicose speech promising warfare was a declaration of war. Likewise, all manner of hostile actions and signals that indicated war would begin (or

⁸ See, e.g., Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1384 (1994) (claiming that the naval war with France at the end of the eighteenth century was an “undeclared” war); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 39–40 (1991) (noting that the wars with Vietnam and Korea were undeclared); Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1819 (2003) (making same point about those two wars).

⁹ By “founding era,” this Article references the late-seventeenth, eighteenth, and early-nineteenth centuries. I use a broader period than many might associate with the Constitution's founding because I want to underscore that the expansive sense of “declaration of war” outlined in this Article did not merely exist in 1789 but had existed (and continued to exist) for quite some time.

The Article focuses on the founding era for two reasons. First, by focusing on a particular period, the inquiry has a manageable scope. A discussion of the forms and functions of declarations of war that extended from the ancient era to the modern era would be too diffuse and unwieldy for a law review article. Second, many are interested in understanding the Constitution's original framework, something made possible by focusing on practices and understandings from the periods that, broadly speaking, bracket the Constitution's ratification. For some, the original framework provides the Constitution's current meaning; for many others, it provides a point of departure, a useful reference point, or merely something to consider in discerning the Constitution's present meaning.

References to what the Constitution means or provides should be understood as claims about the original meaning of the Constitution. Obviously, those who regard original meaning as but one factor in discerning constitutional meaning, and those who reject that methodology entirely, will want to examine other sources of constitutional meaning to discern the Constitution's present meaning.

had begun) were declarations of war. An invasion, an attacking naval armada, or something as seemingly innocuous as the dismissal of another nation's ambassador—each served as a founding-era declaration of war.

In sum, the power to declare war was widely understood to encompass the power to decide to go to war, whether expressed orally, in writing, or via some hostile action. Any statement or action that evinced such a decision was a nation's declaration of war, no matter how informal or crude it might be.

The failure to grasp the many forms that declarations might take has led scholars to neglect declarations of war as subjects of study. It is as if scholars regard declarations as so passé that they assume that little can be learned from them. Moreover, on the few occasions when scholars have considered declarations, they have focused exclusively on the handful of formal declarations of war by the United States. These declarations are then taken as a guide for discerning the typical content of war declarations.¹⁰ Because such declarations have tended to be quite terse and lacked much specificity, many have assumed that declarations must be laconic documents that do no more than generally authorize warfare. Declarations cannot speak to modern issues, such as the treatment of enemy nationals or the type of force that may be used in a war, at least if we look to the formal declarations as a template.

This narrow conception of the features of a war declaration is unsound. Declarations have served many functions beyond merely evincing a decision to wage war. Far from being terse, founding-era declarations were typically quite lengthy, discussing numerous war-related matters and laying down a number of wartime rules. Among other things, formal declarations often contained rules about whether alien enemies could remain in the declarant's territory, how citizens might interact with the enemy, and which enemy goods would be legal prize, even when in the hands of neutrals. Declarations also authorized the use of military force, thereby indicating who might (and might not) fight a war on behalf of the nation declaring war.

This Article seeks to reorient the enduring debate about the declare-war power, shifting the focus away from whether Congress must

¹⁰ See Koh, *supra* note 6, at 128 (drawing conclusions about declarations from a perusal of United States declarations and concluding that declarations necessarily are terse); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2062–63 (2005) (same).

authorize the use of force in wartime¹¹ and towards the forms and functions of declarations of war.¹² The numerous, and largely overlooked, founding-era declarations of war¹³ shed light on the surprising complexity and breadth of traditional declarations of war.

Part I discusses the different forms war declarations might take. As noted, a hostile document or action was a declaration of war if it reflected a decision to wage war. Indeed, the most common declaration of war was the commencement of hostilities. Furthermore, declarations could be written or nonwritten, more formal or exceptionally nonformal.

Part II explores the many functions that a formal declaration of war might serve. Given the multiplicity of functions, war declarations were quite intricate and often dwarfed many statutes, sometimes running a dozen pages in length. Declarations were not the stunted, relatively empty documents that some imagine they must be.

Part III considers declarations of war under the Constitution. Assertions that Congress has not declared war unless it uses the phrase

11 Existing scholarly considerations of the power to declare war have focused almost exclusively on the important question of whether Congress has a monopoly on the commencement of warfare. For some of the best scholarship on this question, see generally MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007) [hereinafter RAMSEY, *THE CONSTITUTION'S TEXT*]; JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) [hereinafter Ramsey, *Textualism*]; and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [hereinafter Yoo, *The Continuation of Politics*]. For my views on this question, see Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007) [hereinafter Prakash, *"Declare War"*] and Saikrishna Prakash, *A Two-Front War*, 93 CORNELL L. REV. 197 (2007).

This Article adds a new dimension by revealing the many forms and functions of declarations of war and by highlighting the implications these forms and functions have for the Constitution's separation of powers. Though both Professor Ramsey and Professor Yoo touch upon such matters as well, their analysis is limited because their primary focus is on the power to start a war. An older article whose title seems quite promising, Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19 (1938), raises more questions than it answers and never conducts a systematic examination of founding-era declarations.

12 The focus of this Article is on the power to declare war and the declaration of war in particular. As such, it does not discuss the Constitution's grant of other war and military powers to Congress. For a discussion of these various powers, see generally Saikrishna Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. (forthcoming 2008).

13 Many declarations from the founding era are found in two multi-volume collections. See generally 1-4 A GENERAL COLLECTION OF TREATYS, DECLARATIONS OF WAR, MANIFESTOS, AND OTHER PUBLIC PAPERS, RELATING TO PEACE AND WAR (2d ed., London, J.J. & P. Knapton 1732) [hereinafter A GENERAL COLLECTION OF TREATYS]; 1-6 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, FROM 1727 TO 1783 (Robert Beatson ed., London, Longman, Hurst, Rees & Orme 1804).

“declare war” are rather mistaken. Declarations are principally decisions to go to war, and any text that indicates such a decision is an appropriate exercise of the power to “declare war.” Congress is free to declare war however it wishes, either using the familiar phrase or eschewing that phrase for a more politic (or more belligerent) declaration of war. When we fixate on the presence (or absence) of particular language—“declare war”—we misapprehend the various forms declarations of war may take.

Furthermore, in its initial declaration (or in separate statutes), Congress may provide a detailed framework for a war’s prosecution. Among other things, Congress may specify whether a war shall consist of a naval war, a land war, or both.¹⁴ Moreover, Congress may regulate the President’s ability to use wartime force, by imposing *ex ante* time constraints on the ability to wage war or by limiting the use of military force to particular theatres. As Commander in Chief, the President must wage the war that Congress has declared, just as military commanders in the founding era had to respect the orders of the sovereign who declared war. In short, war declarations need not be succinct documents that leave everything to the President’s discretion. Congress may enact detailed declarations, both in a bid to avoid some of the ambiguities latent in recent war authorization statutes and as a means of constraining the Commander in Chief’s conduct of the war.

Familiarity with the forms and functions of declarations of war also reveals that declarations of war are by no means relics of the past. As the phrase “declaration of war” was understood at the founding, *all* nations that fight wars necessarily issue some sort of declaration of war. Hence, war declarations are no more obsolete than warfare itself.

I. Declaration Forms

Numerous international law treatises written in the seventeenth and eighteenth centuries discussed declarations of war.¹⁵ Though these tomes provided much useful information about formal declarations of war, most did not provide an accurate account of practice.

¹⁴ See Prakash, “*Declare War*,” *supra* note 11, at 50.

¹⁵ See, e.g., EMMERICH DE VATTTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 316 (London, G.G. & J. Robinson 1797); HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 253 (Kessinger Publ’g 2004) (1625); 2 CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 18–20 (James Brown Scott ed., Tenney Frank trans., Clarendon Press 1930) (1737).

Most failed to account for the changes in international practice that occurred in the founding era—in particular, the waning use of formal declarations to mark the onset of warfare. Moreover, many of these treatises tended to promote desirable rules that were meant to govern the conduct of nations. As one might imagine, some of these rules were meant to regulate recourse to, and the conduct of, warfare. For instance, many treatise writers insisted that the law of nations required nations to issue a formal declaration of war prior to engaging in warfare.¹⁶ Others argued that nations should list conditions necessary to avoid war, as a means of allowing the other side to forestall an impending war.¹⁷

The impulse both to describe the law of nations and to usher in superior international practices gave these international law treatises something of a hybrid quality; part descriptive of earlier and often-times outdated practices, and part reformative. Each impulse drew the writer further away from the realities on the ground. The method by which wars began, and the consequences of war, rarely conformed to the hopes or claims of the treatise writers. National leaders were too pragmatic to give advanced warning of an attack by using a formal declaration of war, understanding rather well that the element of surprise would be totally lost. Likewise, those who could declare war typically saw little need to list conditions necessary to avoid conflict, perhaps believing that the other side would often pay no heed to any conditions and that any ultimatum would make a secret attack impossible.

If we are to gather an accurate sense of founding-era declarations of war and not treat the aspirational and normative elements of the law-of-nations treatises as descriptive of actual practices, we must do more than examine the works of Emmerich de Vattel, Hugo Grotius, and their fellow international lawyers. Rather, we must study actual declarations of war of the founding era, whatever guise or shape they took, and we must consider what diplomats, monarchs, and legislators actually said about the forms and functions of declarations.

A. *The Declaration Continuum*

Examining actual declarations of war from the founding era, as well as contemporary writings that discuss the forms and functions of such declarations, enables us to piece together a much more compli-

¹⁶ See GROTIUS, *supra* note 15, at 252.

¹⁷ See VATTEL, *supra* note 15, at 315–16.

cated and interesting puzzle. Even before the founding era, there was some confusion about what constituted a proper “declaration of war.”¹⁸ Some international lawyers wanted certain formalities observed. For instance, sixteenth-century Italian jurist Alberico Gentili wanted Roman declaration practices to constitute the proper means of declaring war.¹⁹ By the eighteenth century, however, the dominant view was that there was no prescribed means of declaring war.²⁰ Hence, numerous documents, actions, and signals were seen as declarations of war.²¹ What united these disparate declarations was the sense that each represented a nation’s decision to go to war.

In the founding era, we might say that there was something of a “declaration continuum,” ranging from unambiguous declarations of war to more doubtful statements and actions that, under certain circumstances, could be regarded as declarations of war. To be clear, people never talked about declarations in these terms. Nonetheless, discussions from the era about declarations of war allow us to discern a continuum.

At one extreme was what we might call “unequivocal declarations of war.” There were three types of unequivocal declarations of war: the formal or express declarations of war, the related conditional declaration of war, and those nonformal declarations of war consisting of hostile actions that rather clearly signaled a resolve to wage war.

While the phrase “formal declaration of war” was used at the time, there surprisingly is no canonical definition of the phrase. Most likely, the phrase encompassed those documents that proclaimed that a nation “declare[d] war” against another nation. As discussed later, these declarations often were lengthy documents that served various functions, such as warning of impending hostilities, imposing a war-time legal regime, and ordering the commencement of hostilities.²² Although some treatise writers argued that formal declarations ought to precede the commencement of warfare,²³ European nations often issued formal declarations in the midst of a war. Other times, nations at war never issued a formal declaration of war at all.

¹⁸ See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 104 (2005).

¹⁹ 2 ALBERICO GENTILI, *ON THE LAW OF WAR* 133–35 (John C. Rolfe trans., Clarendon Press 1933) (1612).

²⁰ See NEFF, *supra* note 18, at 104.

²¹ See *id.* at 104–09.

²² See *infra* Part II.

²³ See *supra* text accompanying note 16.

During the founding era, most European formal declarations were written. Yet nothing prevented these nations from issuing oral, formal declarations of war. Indeed, from classical times, some nations had declared war via heralds.²⁴ The heralds would go to the enemy and, presumably with a great deal of ceremony and perhaps with a trumpet, announce the decision to wage war against that nation.²⁵ Heralds also might announce the war to the declarant's populace.²⁶ The last known use of an oral, formal declaration of war occurred when Sweden warred against Denmark in the mid-seventeenth century.²⁷

Also within the category of unequivocal declarations were what treatise writers called "conditional declarations of war" or ultimatums.²⁸ While such documents did not "declare war," treatise writers deemed these documents declarations because they expressly threatened that war would be waged if the declarant's terms were not met. These documents were regarded as declarations of war because they related to the onset of war.

Formal and conditional declarations were not the only unequivocal declarations of war. At the same end of the declaration continuum as these largely familiar declarations were various nonformal statements or actions that likewise signaled unambiguous recourse to war. Most often these statements or actions were simply referred to as "declarations of war" just as their formal counterparts were. But occasionally, to differentiate these declarations from their formal counterparts, they were variously called "informal," "virtual," or "implied."²⁹ What distinguished them from their formal counterparts was the lack of any formality, most notably the absence of a statement that a country had "declare[d] war" on another.³⁰ Another differentiating trait is that unlike formal declarations, which were almost always in writing, nonformal declarations were expressed in many different ways: in writing, orally, or, most interestingly, via some hostile action.

²⁴ See NEFF, *supra* note 18, at 104.

²⁵ *Id.*

²⁶ *Id.* at 72–73.

²⁷ *Id.* at 104–05.

²⁸ See, e.g., GROTIUS, *supra* note 15, at 253 (contrasting "absolute declarations" with conditional declarations); see also NEFF, *supra* note 18, at 105–06 (discussing conditional declarations).

²⁹ JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF NATIONS 68–69 (Boston, Bradford & Read 1812).

³⁰ See *id.*

The strongest and most unequivocal nonformal declaration of war was the commencement of general warfare against another nation. There could be no question that a nation had declared war if its military, under government orders, attacked another nation. As John Adams noted during the Revolutionary War, neither England nor France needed to issue a formal declaration of war against each other because war was “sufficiently declared by actual hostilities in most parts of the world.”³¹ Indeed, the commencement of warfare was the most common form of declaration of war in the eighteenth century, as nations often issued formal declarations after warfare began, if at all. No less an authority than Sir Robert Walpole noted in the mid-eighteenth century that “of late most Wars have been declar’d [sic] from the Mouths of Cannons, before any formal Declaration.”³²

Other patently hostile actions were similarly seen as unequivocal declarations of war. If a nation granted general letters of marque and reprisal—i.e., generally authorized private ship owners to attack and capture another nation’s ships—the nation authorizing such “private” warfare had declared war.³³ How else could one view the indiscriminate (but authorized) plundering of another nation’s shipping, except as a decision to wage, and therefore declare, war against that nation? Similarly, hostile embargoes—the indiscriminate seizure of another nation’s ships in domestic ports—were seen as declarations of war.³⁴

Various insults and signals also served as unequivocal declarations of war, at least to those familiar with the practices. The ancient Romans declared war by throwing a spear into enemy territory.³⁵ In the medieval ages, European nations sometimes unfurled certain flags or threw down the gauntlet as a means of declaring war.³⁶ Some Barbary Coast states declared war by cutting down an enemy state’s flag-

³¹ 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., Washington, Gov’t Printing Office 1889). 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.*

³² Second Parliament of George II: Fourth Session (9 of 9, begins 12/5/1738), in 10 *THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS* (London 1742) (proceedings of May 12, 1738), available at <http://www.british-history.ac.uk/report.asp?compid=37805>. Walpole is regarded as the first English Prime Minister. For a longer discussion of the initiation of warfare as a declaration of war, see generally Prakash, “*Declare War*,” *supra* note 11.

³³ See NEFF, *supra* note 18, at 109.

³⁴ *Id.* at 109–10.

³⁵ JAMES KENT, *DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES* 66 (New York, G. Forman 1795).

³⁶ See NEFF, *supra* note 18, at 72.

pole.³⁷ Certain Native American nations scalped enemy soldiers as a means of declaring war.³⁸ Other tribes apparently declared war by sending certain war belts or sticks to their enemies.³⁹ Each of these signals—the use of spears, the cutting down of flags, war belts—were declarations of war because they, no less than a formal declaration, clearly indicated that one nation had chosen to wage war against another.

As we move away from formal declarations and the various hostile actions that constituted unequivocal declarations of war, and edge towards the middle of the declaration continuum, we find a host of somewhat less certain nonformal declarations of war. Written declarations in this zone lacked the typical boilerplate language found in a formal declaration of war, but they still might be regarded as somewhat formal nonetheless. For instance, a seventeenth century English legislator spoke of a proposed appropriation to fund a war against France as a declaration of war. “[I]f War was declared by sound of trumpet, with a Herald, this Act is as full.”⁴⁰ Why was an appropriation act the equivalent of a herald’s declaration of war? Presumably because when a nation appropriated funds for a war, people generally understood that warfare was forthcoming.

Other statutes and resolutions also might have served as declarations.⁴¹ On the eve of the American Revolution, an author wrote that various harsh English acts directed at the colonies “will be received in

³⁷ See JOSHUA E. LONDON, *VICTORY IN TRIPOLI* 95 (2005); see also MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 13 (2002) (describing cutting down of a flag pole as a “traditional method of declaring war” in North Africa).

³⁸ See George A. Bray, *Scalping During the French and Indian War*, *EARLY AM. REV.*, Spring/Summer 1998, <http://www.earlyamerica.com/review/1998/scalping.html>.

³⁹ See EZRA SAMPSON, *THE YOUTH’S COMPANION, OR AN HISTORICAL DICTIONARY* 398 (3d ed., Hudson, Nathan Elliot, Websters & Skinners 1816).

⁴⁰ 5 *DEBATES OF THE HOUSE OF COMMONS* 223 (Anchitell Grey ed., 1769) (debates of Mar. 14, 1678), available at <http://www.british-history.ac.uk/report.asp?compid=40988>. Another member said that the passing of the appropriations—the “Poll-Bill”—was “declaring War against the French King.” *Id.* at 256 (debates of Mar. 18, 1678), available at <http://www.british-history.ac.uk/report.asp?compid=40989>.

⁴¹ Consider the concern of English members of Parliament that if they published Spanish responses to English complaints about Spanish predations on English shipping, it would appear as if the Parliament had declared war. One said that the publication of such complaints “would be looked upon by them as, and would really I think be, a Sort of Declaration of War.” Second Parliament of George II: Fourth Session (5 of 9, begins 3/3/1738), in 10 *THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS* (London 1742) (proceedings of Mar. 3, 1738), available at <http://www.british-history.ac.uk/report.asp?compid=37801>. Another said, “I think we ought not as yet to do any thing, that may look like a Declaration of War, or even like a Resolution to declare War.” *Id.* The publication of the Spanish answers might look like a declaration of war because it would appear that Britain was attempting to justify a war against Spain by citing

America as a declaration of war.”⁴² Discussing the Prohibitory Act—a law barring commerce and authorizing the seizure of American ships—an eighteenth century English historian regarded it as “an absolute declaration of war” because it forfeited all property of Americans found on the seas.⁴³ For its part, the Continental Congress passed two resolutions seen as declarations of war across the Atlantic—the mostly forgotten Declaration Setting Forth the Causes and Necessity of Taking Up Arms⁴⁴ and the famed Declaration of Independence.⁴⁵ Though neither of these texts used the phrase “declare war,” they were understood as declarations nonetheless.

No less than statutes, the making of new treaties might serve as declarations of war. If a nation made a treaty of alliance with a nation at war, the other party to the war would consider the treaty as a declaration of war against it.⁴⁶ During the Revolutionary War, England cautioned the Dutch that if the latter made a treaty with America, it would be a “commencement of hostilities and a declaration of war.”⁴⁷ Later, an English historian noted that Tippu Sultan, a South Indian monarch, made the “equivalent to a public, unqualified, and unambiguous declaration of war” against England by making a treaty with France and by admitting French soldiers into his army.⁴⁸ Finally, in

Spanish recalcitrance, something typically done in a declaration of war. See NEFF, *supra* note 18, at 107.

⁴² 2 WILLIAM SMYTH, *LECTURES ON MODERN HISTORY* 382 (Cambridge, J. & J.J. Deighton 1841) (describing statutorily authorized blockade of Boston as a declaration of war).

⁴³ 2 WILLIAM BELSHAM, *MEMOIRS OF THE REIGN OF GEORGE III TO THE SESSION OF PARLIAMENT ENDING A.D. 1793*, at 144 (3d ed., London, G.G & J. Robinson 1796). Americans agreed that the Prohibitory Act was an English declaration of war against America. See, e.g., Letter from William Whipple to Joshua Brackett (Apr. 11, 1776), in 3 *LETTERS OF DELEGATES TO CONGRESS* 509, 509–10 (Paul H. Smith ed., 1978) (claiming that people of South Carolina regarded a late act of Parliament—presumably the Prohibitory Act—as a declaration of war).

⁴⁴ See Letter from Joseph Hewes to Samuel Johnston (July 8, 1775), in 1 *LETTERS OF DELEGATES TO CONGRESS*, *supra* note 43, at 612, 613–14 (noting that Congress recently had published a declaration of war). Congress adopted The Declaration Setting Forth the Causes and Necessity of Taking Up Arms on July 6, 1775. See 2 *JOURNALS OF THE CONTINENTAL CONGRESS* 127–57 (Worthington Chauncery Ford ed., 1905).

⁴⁵ See Yoo, *The Continuation of Politics*, *supra* note 11, at 246–47 (describing the Declaration as a declaration of war).

⁴⁶ NEFF, *supra* note 18, at 109.

⁴⁷ Letter from John Adams to the President of Congress (Dec. 18, 1780), in 4 *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES*, *supra* note 31, at 197 (quoting English remonstrance to Holland of Dec. 12, 1780).

⁴⁸ ALEXANDER BEATSON, *A VIEW OF THE ORIGIN AND CONDUCT OF THE WAR WITH TIPPOO SULTAN* 11 (London, W. Bulmer & Co. 1800).

1807, the English asserted that the Dutch had declared war by making a treaty with France.⁴⁹

Speeches or announcements lacking the standard “declare war” language also might serve as declarations. For instance, the French Ambassador’s announcement of a treaty of alliance with the American rebels was seen as a French declaration of war against England.⁵⁰ It was seen as a declaration because by allying with rebels, France was openly siding with England’s enemies. Indeed, the Ambassador’s notice was supposedly delivered in a particularly insulting manner, underscoring the implicit hostility.⁵¹ Predictably, the Crown’s somewhat bellicose address to Parliament (made in response to the French notification) was regarded as an English declaration of war on France.⁵²

Shifting from somewhat uncertain declarations of war to the other end of the continuum, we find the most doubtful nonformal declarations of war. These unfriendly words and actions were fraught with uncertainty about whether war would follow, primarily because the signals were rather ambiguous. When war followed, the hostile signals were regarded as a declaration of war. When war did not occur, however, the hostile words or actions were not seen as declarations of war. In other words, certain documents and actions were treated as equivocal declarations of war until subsequent events either confirmed that war had begun or indicated that the equivocal signals were merely part of a somewhat hostile intercourse between nations.

Different sorts of armed attacks help illustrate the ambiguity. Obviously, if an armada of English ships attacked the vessels and ports of France, there would be little doubt that England had declared war. It would be rather difficult to apologize and explain away the

⁴⁹ J.F. MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR* vi–vii (London, W. Clowes & Sons 1883).

⁵⁰ See, e.g., *THE ANNUAL REGISTER FOR 1779*, at 411 (1780) (describing the announcement of the treaty as a “true declaration of war” on the part of the French).

⁵¹ See Letter from George Washington to the Continental Congress (May 12, 1778), available at [http://rs6memory.loc.gov/cgi-bin/query/r?ammem/P?mgw:@field\(DOCID+@lit\(gw1103719:./temp/~ammem_8BWM::\)\)](http://rs6memory.loc.gov/cgi-bin/query/r?ammem/P?mgw:@field(DOCID+@lit(gw1103719:./temp/~ammem_8BWM::))) (noting that the notification was “conceived in terms of irony and derision, more degrading to the pride and dignity of Britain, than any thing she has ever experienced”). Interestingly, Washington went on to note that this was not a declaration of war. *Id.* He was right in the sense it was not a formal declaration of war, but many understood that it was an informal declaration of war nonetheless.

⁵² See 1 *THE LETTERS OF RICHARD HENRY LEE* 267, 423 (James Curtis Ballagh ed., 1911) (noting in July 12, 1778 letter to Francis Lightfoot Lee that France considered the King’s message to Parliament as a declaration of war). See also Letter from John Adams to Samuel Adams (Feb. 14, 1779), in 3 *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES*, *supra* note 31, at 47, 48 (noting that the King’s speech was a declaration of war).

resort to large scale warfare. Yet if a lone English ship had attacked, England could couch the incident as the action of a renegade captain and not a sovereign decision to declare war. If England subsequently disavowed the captain's action and made recompense to France, no one would think that England had declared war. If England did not take such ameliorative steps, however, France might regard the attack as an English declaration of war.

Similarly, consider the withdrawal or dismissal of an ambassador. Withdrawing one's ambassador or dismissing another nation's in hostile circumstances was sometimes seen as a declaration of war because either action might signal the end of diplomatic relations and the onset of a war. For instance, when the English demanded in 1796 that the Genoese dismiss the French Republic's Ambassador, the Genoese refused on the ground that to do so would be "positively declaring war" against France.⁵³ Likewise, when France recalled its Ambassador from England in 1850, the recall was seen as the French declaration of war.⁵⁴

Yet not all such recalls or dismissals served as declarations of war; sometimes, the recall or dismissal did not reflect (and was not seen as reflecting) a desire to break off diplomatic relations and resort to hostilities. For example, President George Washington asked France to recall its Ambassador, Citizen Genet, from the United States because Genet had made statements and had taken actions that were incompatible with his diplomatic status.⁵⁵ No one thought that Washington had thereby declared war—because it was obvious that he was upset with Genet's conduct and had not decided to wage war against France.

Keenly aware of the potential ambiguity in ambassadorial dismissals, Senator John Quincy Adams proposed an 1806 bill that would have made clear that the President could demand the departure of misbehaving foreign ministers.⁵⁶ Adams, who previously had served as ambassador to several countries, noted that the dismissal of a foreign minister at a time of "national differences" was commonly seen as a declaration of war.⁵⁷ Because only Congress could declare war, and because there were some doubts about the President's ability to

⁵³ THE CHRONOLOGIST OF THE PRESENT WAR 211–12 (2d ed., London, G.G. & J. Robinson 1796).

⁵⁴ See MAURICE, *supra* note 49, at 6.

⁵⁵ For a discussion of his recall, see Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 314–15 (2001).

⁵⁶ Mr. Adams's Speech (Mar. 3, 1806), in 3 THE MONTHLY ANTHOLOGY AND BOSTON REVIEW 266–80 (Boston, Munroe & Francis 1806).

⁵⁷ *Id.* at 274.

dismiss ministers for misbehavior (or so he claimed), Adams proposed a bill meant to dispel all uncertainty about the President's power to order the departure of a misbehaving minister.⁵⁸ Whatever the merits of his bill, Adams was certainly correct that ambassador recalls or dismissals might have to be carefully handled to ensure that no inadvertent war subtext was sent or received.⁵⁹

Finally, consider diplomatic documents of various sorts. Such documents could be more or less belligerent, with the less bellicose documents leaving it unclear whether the document ought to be treated as a declaration of war. Subsequent events, particularly the onset of warfare, would clarify whether the ambiguous document ought to be regarded as a declaration of war. For instance, there was some confusion about whether the Suffolk Resolves were a declaration of war.⁶⁰ The Resolves, passed in Suffolk County, Massachusetts, were meant to rouse opposition to the British.⁶¹ The Resolves themselves stated that the colonials were "determined to act merely upon the defensive."⁶² While some regarded the Resolves as a declaration of war,⁶³ others denied this precisely because they promised defensive measures only.⁶⁴

Summing up, it makes sense to regard declarations of war in the founding era as existing along a continuum of certainty. On one end of the continuum was the unequivocal declaration of war, such as the formal declaration of war or the invasion. Neither left any doubt that a nation had declared war. On the other end of the continuum were

⁵⁸ *Id.*

⁵⁹ Michael Ramsey and I have argued that the grant of executive power enables the President to dismiss (and seek the recall) of foreign ambassadors to the United States. Prakash & Ramsey, *supra* note 55, at 313–15. I remain of the view that the President may dismiss foreign ambassadors but would add the proviso that the President cannot do so when the dismissal would be seen as a declaration of war. I do not believe that the President may use his executive power to take actions that trench upon the congressional prerogative of declaring war. For a defense of the claim that only Congress can declare war, see generally Prakash, *supra* note 12.

⁶⁰ See Suffolk Resolves, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 44, at 32–37.

⁶¹ *Id.*

⁶² *Id.* at 35.

⁶³ See Joseph Galloway's Statement on His Plan of Union, in 1 LETTERS OF DELEGATES TO CONGRESS, *supra* note 43, at 119, 120 (describing the Suffolk Resolves as a declaration of war).

⁶⁴ See 5 THE HISTORY OF ENGLAND FROM THE REVOLUTION TO THE END OF THE AMERICAN WAR, AND PEACE OF VERSAILLES IN 1783, at 171–72 (1798) (noting that the Resolves claimed to be acting defensively only). In a previous piece, I argued that a nation does not declare war when all it does is fend off attacks. See Prakash, "Declare War," *supra* note 11, at 94–107.

ambiguous actions or words, such as ambassadorial dismissals or some rather isolated armed hostility, that might be regarded as declarations only under certain circumstances.

B. The Utility and Ubiquity of the Nonformal Declaration of War

As might be clear from the previous discussion, much of the declaration continuum was composed of nonformal declarations. Although most seventeenth and eighteenth century international scholars made only fleeting references to the possibility of nonformal declarations,⁶⁵ their late-eighteenth- and early-nineteenth-century counterparts discussed nonformal declarations at greater length.

In a treatise on comparative executive power written in the late-eighteenth century, a French statesman noted that “hostilities are commonly considered as the strongest declaration of war.”⁶⁶ At the dawn of the nineteenth century, law-of-nations scholar Georg Martens noted that some nations insist “war has been tacitly declared” so that goods taken in war without a formal declaration did not have to be restored.⁶⁷ Similarly, Joseph Chitty observed that “declarations 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 war”⁶⁸ Even military dictionaries understood that nonformal actions could constitute a declaration of war. One early-nineteenth-century American dictionary perceptively noted that “[b]etween nations, the first act of hostility is taken as a declaration of war.”⁶⁹ Hence, by the end of the eighteenth century, nonformal declarations were an entrenched, widely recognized feature of international practice.

The practice of nonformal declarations became well-established in the late-eighteenth century for three reasons. First, the concept of nonformal declarations of war was quite familiar. As we have seen, in ancient and medieval times certain nonformal statements and actions

⁶⁵ See *supra* text accompanying note 29.

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

⁶⁷ GEORG FREDERICH VON MARTENS, A COMPENDIUM OF THE LAW OF NATIONS 282 (William Cobbett trans., London, Cobbett & Morgan 1802).

⁶⁸ CHITTY, *supra* note 29, at 68.

⁶⁹ WILLIAM DUANE, A MILITARY DICTIONARY 279 (Philadelphia, William Duane 1810); see also CHARLES JAMES, A NEW AND ENLARGED MILITARY DICTIONARY (2d ed., London, T. Egerton 1805) (stating entry for “acts of hostility”—defined as “certain overt acts . . . which tend to a declaration of war,” and entry for “hostilities”—noting that “first act of hostility presupposes a declaration of war”).

taken by European nations were seen as declarations of war.⁷⁰ When scholars discussed these nonformal declarations from the past, it would have been clear to their readers that nations might declare war by nonformal means. Reinforcing this lesson from the past, scholars and diplomats recognized that contemporary non-European states regularly declared war without ever issuing a formal declaration of war.

Second, as discussed earlier, European nations of the era largely abandoned the practice of issuing meaningful formal declarations of war. Most European wars, as Walpole noted, began without a formal declaration of war.⁷¹ If a formal declaration of war was issued at all, it might be issued years into the conflict. Such declarations were far less consequential because they did not announce the war as much as they stated the obvious.

Third, as the practice of issuing formal declarations of war prior to the commencement of hostilities waned, there was a need for something else to mark the onset of warfare. Determining the start of a war was important because certain features of international law turned on when a war began. Treaty provisions often turned upon the existence of declarations of war. After a declaration of war, civilians of both countries often were given a set period of time to depart from the enemy nation and ship their effects home. For instance, the 1778 Franco-American Treaty of Commerce provided that citizens of either country had six months to depart after a declaration of war.⁷² Given the relative infrequency of formal declarations of war marking the outset of war in the eighteenth century, these treaty provisions could be useful only if nations were understood as having declared war in nonformal ways.⁷³ Furthermore, it was thought illegal under the law of nations to capture enemy property prior to a declaration of war. By regarding the onset of warfare as a nonformal declaration of war, there would be no occasion to claim that the capture of enemy property was illegal because there had been no previous declaration of war.⁷⁴ The capture itself (and the hostility that necessarily accompanied it) was a declaration of war, albeit an informal, virtual, or implied declaration.

⁷⁰ See NEFF, *supra* note 18, at 72.

⁷¹ See *supra* note 32 and accompanying text.

⁷² See Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty art. XX, Feb. 6, 1778, 8 Stat. 12, 24.

⁷³ See Prakash, "Declare War," *supra* note 11, at 80–84.

⁷⁴ See MARTENS, *supra* note 67, at 282.

Put these three elements together, and it becomes evident that as European nations stopped formally declaring war, observers quite naturally regarded other hostile actions as declarations of war. Rather than just insisting that the wars were “undeclared”—as modern commentators might say—and thus leaving a host of difficult legal questions in their wake, observers found a more satisfying solution: regard these wars as declared by nonformal means. After all, these observers were already in the habit of regarding the hostile signals and actions of non-European nations as declarations of war. Hence, it was hardly surprising that observers would come to see the hostile signals and actions of European nations as declarations of war. All wars were declared, sometimes by formal means, but more often by nonformal means such as invasion or naval attack.

In sum, the founding era lacked a single, customary means of declaring war. Practice was far more complex. Besides the formal declaration of war, any exceptionally aggressive action, document, or speech signaling a resolve to wage war also was seen as a declaration of war. Less hostile actions, documents, and speeches were more ambiguous, making it unclear whether a nation had decided to wage war and therefore had declared war. This more accurate sense of the forms that declarations might take has implications for the Constitution’s separation of powers. But before considering such implications, one needs a sense of the many functions associated with founding-era declarations of war.

II. Declaration Functions

Founding-era declarations ranged from the very simple to the remarkably complex. Nonformal declarations, such as the commencement of warfare or the hostile recall of an ambassador, tended to be quite uncomplicated in the sense that they usually did no more than reveal that war was afoot. To be sure, revealing that war had begun was important, for such knowledge was crucial to citizens and governmental officials. Still, nonformal declarations of the era lacked the richness of formal declarations of war.

To garner a thorough sense of the functions that a declaration of war might serve, one must canvas the era’s formal declarations of war. Formal declarations might contain rules about the rights of citizens and enemy aliens. Moreover, such declarations could declare what types of enemy property could be seized, even when found in the hands of neutrals. Perhaps most important, formal declarations determined who might use force and what type of force could be employed

against the enemy. In short, formal declarations of war did far more than merely “declare war.”

A. *Deciding to Wage War*

When someone said that a nation had “declared war,” the person could have been referring to one of two related understandings. First, the phrase could have referenced nothing more than the internal, domestic decision to go to war. When a nation declared war in this sense, the declaration served what we might call a “decision function.”⁷⁵ If the Roman Senate resolved to go to war, then in the very act of passing the war resolution, the Senate had declared war. Likewise, if a monarch decided to wage war, the monarch had declared war by deciding to wage it.

Under this decision-function sense of “declare war,” legislatures and monarchs issued declarations of war as soon as they decided to wage war. Even if statutes or resolves (the tangible evidence evincing a decision to go to war) were never subsequently published, read, or conveyed to anyone, from the moment they were approved these documents rather clearly served the internal, decision function of deciding to wage war and hence were declarations of war. To put it another way, some words or acts could be declarations of war even if no one outside the decisionmaking process came to know of them.

The 1812 declaration of war issued by the United States against England illustrates how the passage of a declaration serves the decision function.⁷⁶ By enacting the declaration, the House and the Senate decided to go to war. More generally, we might say the same for every formal, congressional declaration of war from the declaration in the Mexican-American War to those in World War II. Likewise, each nonformal congressional declaration of war, including the early statutes authorizing warfare against France, Tripoli, and Algeria,⁷⁷ was a declaration of war precisely because each represented a decision to wage war.

Second, saying that a nation had “declared war” could refer not to the internal decision but to the sometimes-belated external mani-

⁷⁵ See J.W. RICH, *DECLARING WAR IN THE ROMAN REPUBLIC IN THE PERIOD OF TRANS-MARINE EXPANSION* 105–06 (1976) (discussing how “declare war” and its Roman counterpart, *bellum indicere*, could refer either to the decision to wage war or the announcement of that decision and how modern authors do not miss this distinction).

⁷⁶ An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof, and the United States of America and Their Territories, ch. 102, 2 Stat. 755 (1812).

⁷⁷ See *infra* text accompanying notes 189–91.

festation or notification of that decision. By external manifestation of the decision, I mean the notification of the decision to those outside the decisionmaking process. Hence, one might say that Rome “declared war” by throwing a spear into enemy territory, because that was notification to the world of the internal decision to go to war. A nation might also declare war by publishing a manifesto within its borders, informing its citizens of the prior decision to go to war. Finally, a nation could declare war by commencing hostilities, because the hostilities were the external signal of the domestic resolve to go to war. Because each of these signals was the first external, public manifestation of a nation’s decision to go to war, such signals were regarded as declarations of war.

For some people, the internal decision to wage war was far more important than any external manifestation of that decision. Consider the declarant’s officials who would have to prepare for war immediately after they became aware of the decision to declare war. These officials likely would be indifferent to the eventual notification of the decision to the outside world or to the declarant’s citizens. Indeed, these officials might hope to delay public notification of the war. The delay would allow more time to prepare for the rigors of war while the enemy remained in the dark, making it possible to launch a surprise attack.

For other people, the external signal was far more significant, because it was the means by which they learned of the war decision. The formal document published in some newspaper or the armada’s attack would be far more momentous for the enemy and its nationals than the internal deliberations that preceded and generated the external signal. Likewise, citizens of the declarant might be more interested in the news contained in the notice of the declaration and far less concerned about the oftentimes opaque process that culminated in the decision to wage war.

The remaining functions of a formal declaration of war, discussed below, relate primarily to the external functions of a declaration of war and were furthered by the public document discussing the decision to go to war. Propaganda, giving warning, issuing ultimata, creating wartime rules for aliens and citizens—all of these related to the external dimension of declarations.

B. Threatening to Wage War Unless Conditions Are Met

Scholars of the era distinguished “simple” or “absolute” declarations from “conditional declarations” of war.⁷⁸ The former declared war without making any demands. In contrast, conditional declarations listed conditions that the other nation would have to satisfy in order to dissuade the conditional declarant from waging war.⁷⁹ In effect, one nation would declare terms for continued peace and promise war if its conditions were not met. Some theorists advised that nations should make conditional, rather than absolute, declarations, because they believed that potential enemies should be given the chance to satisfy conditions and thereby avoid war.⁸⁰

At one time, conditional declarations might have been made in the genuine spirit of giving the potential enemy a chance to avoid a war. By the eighteenth century, however, it became common to issue ultimatums with demands impossible to satisfy.⁸¹ Furthermore, a nation often would announce that it would deem a rejection of its unreasonable demands as a declaration of war. In this situation, neutral observers could see past the rhetoric and discern reality—the nation issuing the intolerable demands was essentially declaring war unconditionally and was merely seeking to blame the other side’s supposed intransigence for the war’s onset.⁸²

Conditional declarations tended to be in writing, but sometimes they could be made orally by an ambassador or a herald. Such declarations typically were issued prior to the commencement of warfare. Nonetheless, as a theoretical matter, one might issue a formal declaration that spelled out conditions for peace even after the conflict had begun. After all, given that nations often issued formal declarations of war after warfare had begun, it would seem to follow that a nation likewise could issue a conditional declaration in the midst of ongoing warfare as a means of specifying terms for peace. In particular, one might imagine that as a nation was in the early stages of fighting a war, it might issue demands that the other nation would have to satisfy in order to prevent further warfare.

⁷⁸ See Vattel, *supra* note 15, at 316 (contrasting “pure and simple” declarations with conditional declarations).

⁷⁹ See Grotius, *supra* note 15, at 253.

⁸⁰ See, e.g., Vattel, *supra* note 15, at 316.

⁸¹ See Prakash, “Declare War,” *supra* note 11, at 74–75 (discussing how nations sometimes warned that they would treat innocent actions as a declaration of war).

⁸² *Id.*

C. *Warning of an Impending War*

Some scholars associate war declarations with giving the enemy some advanced notice of hostilities. Hence, we sometimes hear the complaint that some nation has unjustly attacked without any previous declaration. In the minds of some, advanced notice of an impending war is the honorable course. On the other hand, the nation that gives no warning of an impending war is sometimes viewed as underhanded, the equivalent of a barroom brawler that sucker punches an unsuspecting patron.

International law scholars of the founding era were preoccupied with the question of whether a nation had to issue a formal declaration of war prior to attacking. Relying upon Roman tradition, several eighteenth-century scholars insisted that advanced warning was necessary, at least as a means of giving the other country a chance of pursuing peace.⁸³ As the eighteenth century progressed, however, it became clear that nations had wholly abandoned the practice of giving some warning of impending warfare.⁸⁴ The last such warning was apparently given in 1635, when France's Louis XIII declared war against Spain by sending a herald.⁸⁵ Hence, some eighteenth-century scholars argued that it was no longer necessary to give advanced warning of an attack.⁸⁶

Nonetheless, even if neither international law nor morality required fair warning of impending warfare, it certainly remained possible for a nation to give advanced notification. Indeed, that some eighteenth-century scholars argued that declarations of war should warn an enemy of a forthcoming war proves that declarations could continue to serve the warning function. If a nation wished, it could issue an unconditional declaration that warned that war would ensue in a week or a month.

D. *Notice of a War's Onset*

Indicating that a war had commenced was a standard function of declarations of war. This function had nothing to do with making de-

⁸³ See Ramsey, *Textualism*, *supra* note 11, at 1570–83 (describing various international law scholars' views on whether a formal declaration of war was necessary).

⁸⁴ See *id.* at 1576, 1585–88 (describing the critique of Burlamaqui and how practice vitiated the claims of Vattel and others).

⁸⁵ ROBERT WARD, AN ENQUIRY INTO THE MANNER IN WHICH THE DIFFERENT WARS OF EUROPE HAVE COMMENCED, DURING THE LAST TWO CENTURIES 11 (London, J. Butterworth & J. Stockdale 1805).

⁸⁶ See Ramsey, *Textualism*, *supra* note 11, at 1576.

mands or giving advanced warning of a forthcoming war. Rather, some declarations simply made it clear that a declarant already had begun to wage war. Such notice was undeniably important, because many decisions depended on confirmation that war had begun.

Consider the choices confronting various officials. Officials of the declarant would know that they were to prepare for war. Troops would have to be mobilized and vessels prepared for sailing. Similarly, officials of the enemy nation would have to consider how to respond to the declaration. Would their nation declare war in response (either formally or nonformally)? Or might their nation try to appease the declarant? Even officials of other nations would have to decide what stance to adopt towards the fighting nations and consider what advice to give their citizens who might become entangled in the war.⁸⁷

Civilians from all nations had their own decisions to make. Importers and exporters would have to think of the increased risk to their goods. Underwriters of shipping insurance would raise their rates.⁸⁸ Manufacturers and farmers would have to factor in the difficulty of selling and shipping their wares and adjust production accordingly. Ordinary civilians had to determine whether they might participate in the war as a soldier, sailor, or militia member and whether their city or hamlet might become a theater for warfare. Obviously, many individuals would be quite interested in knowing that a nation had declared war.

A formal declaration of war clearly could serve the notice function, at least where it marked the onset of one nation's warfare. If issued at the onset of hostilities, the formal declaration often would be the first notice of the war. If, however, a formal declaration was issued after a conflict had begun, as was far more often the case, the declaration might inform very few people. After all, a year or two into an ongoing war, most people would have heard about the war's existence from other sources long before a formal declaration might be belatedly published in a newspaper or announced in a town square.

When a formal declaration of war was not issued prior to, or simultaneous with, the commencement of warfare, a nonformal declara-

⁸⁷ See, e.g., *Neutrality Proclamation* (Apr. 22, 1793), in CHARLES MARION THOMAS, *AMERICAN NEUTRALITY IN 1793*, at 42, 42–43 (1931) (providing Washington's sense of the legal duties and prohibitions on American citizens in light of war in Europe).

⁸⁸ See FRANK LAMBERT, *THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD* 16, 185 (2005) (describing how insurance premiums often rose by astronomical amounts during naval wars with the Barbary states).

tion of war more likely served the notice function. Whether it was an invasion or the seizure of multiple ships pursuant to letters of marque, such actions made it rather clear that a nation had declared war against another. These actions, which constituted nonformal declarations of war,⁸⁹ served the notice function because they first made it apparent that a nation was at war. Upon reading about such actions in newspapers (or learning of them from others), officials and citizens would know that war had been declared in some fashion and that various wartime decisions had to be made.

E. Commanding the Use of Military and Civilian Force

Formal declarations of war not only represented decisions to wage war, they also contained authority to use force.⁹⁰ Authority to use force was important, because a simple formal declaration of war, without more, would not have clearly authorized anybody to wage war on an enemy.⁹¹ Those who committed acts of hostility without authority from their sovereign were unauthorized combatants and not entitled to prisoner-of-war status.⁹² They were no better than pirates or banditti and not entitled to the protections of the laws of war.⁹³

Formal war declarations might command one of two groups to wage war. Such declarations always would command a nation's military officials to wage war against the new enemy nation. Typically, orders would go to admirals, generals, governors, and all other officials to wage hostilities "by land and by sea" against the enemy. For example, the English Crown's 1762 formal declaration against Spain

will[ed] and require[d] . . . generals and commanders of our forces, our commissioners for executing the office of our High Admiral of Great Britain, our lieutenants of our several counties, governors of our forts and garrisons, and all other officers and soldiers under them, by sea and land, to do and execute all acts of hostility against the King of Spain, his vassals and subjects.⁹⁴

⁸⁹ See *supra* notes 31–34 and accompanying text.

⁹⁰ See Bradley & Goldsmith, *supra* note 10, at 2062–63.

⁹¹ See Vattel, *supra* note 15, at 399 (describing why all people, citizens and officials, needed authorization to wage war from a sovereign). Of course, a formal declaration of war was not required to grant authority to use military force. For instance, a monarch with the power to declare war might simply order his generals to wage war. Even in the absence of a formal declaration of war, the monarch's order was sufficient authorization to wage war.

⁹² See *id.*

⁹³ *Id.* at 400.

⁹⁴ 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, FROM 1727 TO 1783, *supra* note 13, at 340, 341–42. The Spanish formal declaration more tersely noted that "proper orders

Occasionally, a war declaration would command only a subset of military officials to wage war. For instance, the 1802 congressional declaration of war against Tripoli only authorized a naval war,⁹⁵ probably because transporting the American army to Tripoli would have been prohibitively expensive and because Congress's express aim in the war was to make the Mediterranean safe for American commerce and seamen.⁹⁶ Not seeking to make Tripoli a colony or to change its regime, perhaps the army's participation was deemed unnecessary.

A less frequent element of war declarations was the sovereign's command to private parties to wage war against an enemy nation and its citizens. For instance, the French monarch's 1744 declaration of war against England "order[ed] and enjoin[ed] all his subjects, vassals, and servants, to fall upon the subjects of the King of England."⁹⁷ Enjoining civilians to wage war created what one might call total war, of the type perhaps seen when ordinary Russians fought invading Germans in World War II.⁹⁸

F. Making Wartime Law

Founding-era declarations of war were vehicles for war-related lawmaking. Declarations would notify citizens, enemy nationals, and neutrals of the legal regime that would exist during the war. Citizens of the declarant might be given a host of rules: do not trade, correspond, supply, or assist the enemy.⁹⁹ Sometimes, merchants were instructed to keep records of when they purchased enemy goods to

should be sent to all parts [of Spanish dominions] . . . for acting offensively against the enemy." *Id.* at 342–43.

⁹⁵ An Act for the Protection of the Commerce and Seaman of the United States, Against the Tripolitan Cruisers, ch. 4, § 2, 2 Stat. 129, 130 (1802).

⁹⁶ *See id.*

⁹⁷ 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, FROM 1727 TO 1783, *supra* note 13, at 44, 45.

⁹⁸ Vattel says that any language found in formal declarations commanding citizens to attack the citizens of another was merely a relic of a bygone era. *See* VATTEL, *supra* note 15, at 400. It was customary, Vattel claims, to read these orders as authorizing no more than citizens to defend themselves. *Id.* But in the next paragraph, Vattel contradicts himself and claims that citizens can attack to reconquer their pacified city if they have a chance of success. *Id.* Whether commands to civilians to participate in the warfare are best understood as hortatory or were really meant to authorize such attacks is difficult to say. Still, a sovereign could make it clear that its command to attack was not merely hortatory. In that case, the citizenry apparently had a duty to wage war.

⁹⁹ *See* Declaration of War for the King of Spain Against France (May 3, 1689), in 1 A GENERAL COLLECTION OF TREATYS, *supra* note 13, at 272, 273 (forbidding "Correspondence, Communication or Commerce" with the French); English Declaration of War Against France (May 7, 1689), in 1 A GENERAL COLLECTION OF TREATYS, *supra* note 13, at 281, 283 (forbidding communication or correspondence with French subjects); Spanish Declaration of War Against

distinguish innocent purchases from purchases made after war had been declared. Likewise, intrusive inspection regimes might be imposed to uncover caches of contraband enemy goods.¹⁰⁰ Some of these prohibitions might have seemed obvious and to be implied by the mere fact of war. Yet, the fact that they are found repeatedly in war declarations suggests that declarants thought such prohibitions ought to be publicly affirmed and disclosed lest there be any doubt about what practices were forbidden.

Declarations of war also regulated enemy nationals. As discussed earlier, enemy nationals were sometimes expressly made targets of attack.¹⁰¹ Other times, enemy nationals residing within the declarant nation were given a period of time to leave the declarant's territory, after which their property might be seized and they might be jailed.¹⁰² Finally, declarations of war would sometimes note that enemy nationals might remain in the declarant's territory so long as they remained peaceful.¹⁰³

The Alien Enemies Act of 1798¹⁰⁴ is an example of a statute that regulated the rights of enemy aliens pursuant to the declare-war power.¹⁰⁵ The Alien Enemies Act, enacted during the naval war with France, laid out a general framework for how to deal with an enemy nation's aliens within the United States. The statute granted the President authority to apprehend and detain aliens and provided that, after a grace period, alien enemies could be deported out of the country.¹⁰⁶ While the Alien Enemies Act hardly evinced the liberality

England (Nov. 28, 1739), in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, *supra* note 13, at 13, 13–15 (forbidding trade and commerce).

¹⁰⁰ See Spanish Declaration of War Against England (Nov. 28, 1739), in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, FROM 1727 TO 1783, *supra* note 13, at 13, 14–16 (imposing record-keeping requirements and announcing inspections to ensure that new English articles were not being sold).

¹⁰¹ See *supra* notes 97–98 and accompanying text.

¹⁰² See Declaration of War for the King of Spain Against France (May 3, 1689), in 1 A GENERAL COLLECTION OF TREATYS, *supra* note 13, at 272, 273 (ordering all Spanish nationals to leave France within fifteen days of the Declaration's publication).

¹⁰³ See English Declaration of War Against France (May 7, 1689), in 1 A GENERAL COLLECTION OF TREATYS, *supra* note 13, at 281, 283 (noting that French subjects and their effects would be safe as long as they “demean themselves dutifully toward us”).

¹⁰⁴ An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).

¹⁰⁵ See Report of the Committee of the Virginia House of Delegates, in 2 DOCUMENTS OF THE STATE SENATE OF NEW YORK 28, 33 (1833) (distinguishing the constitutionality of the infamous Alien Act from the Alien Enemies Act); see also ANDREW C. LENNER, THE FEDERAL PRINCIPLE IN AMERICAN POLITICS, 1790–1833, at 61 (2001) (noting that power to declare war justified Alien Enemies Act and citing Virginia state legislator for same proposition).

¹⁰⁶ See An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).

evident in British policy, which typically allowed enemy aliens to remain in England so long as they were peaceful and law-abiding, it was not as harsh as some nations' policies towards enemy aliens.¹⁰⁷

Declarations also attempted to regulate the affairs of neutrals. In particular, war declarations sometimes proclaimed that contraband goods, and the ships carrying them, were lawful prize liable to be taken and condemned.¹⁰⁸ This meant that these items could be seized by those invested with the authority to capture enemy property.¹⁰⁹ This aspect of declarations was often critical to neutral shipping, for it greatly increased the cost of transporting goods.

Finally, war declarations could proclaim the declarant's view of the continued legal status of treaties between the declarant and the new enemy. Nations sometimes tried to declare themselves no longer bound to some treaty because of the warfare and various violations by the other party to the treaty. Indeed, some international law scholars argued that when one nation violated a treaty's provisions, say by declaring war, the other nation could consider the treaty as wholly void.¹¹⁰

¹⁰⁷ The potential harshness of the Act may be overstated in that the Act did not actually require the President to deport enemy aliens. Still, the Act authorized this and other hard measures.

Nothing said here is meant to suggest that the Alien Enemies Act was constitutional. In fact, the Act raised serious questions about the extent to which Congress could permit the President to incarcerate and deport in the absence of a meaningful judicial process. Moreover, the Act also raised nondelegation questions. My only point is that incarceration and deportation of enemy aliens was a typical feature of declarations of war, such that members who enacted the Alien Enemies Act likely believed Congress had the authority to issue the Act as part of its power to declare war.

¹⁰⁸ See, e.g., The English Declaration of War Against France (Mar. 29, 1744), in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, FROM 1727 TO 1783, *supra* note 13, at 45, 47 (noting that "whatsoever ship or vessel" shall transport soldiers, arms, and other contraband "shall be condemned as good and lawful prize").

¹⁰⁹ There might be variations in these rules, as some nations tried to establish the principal of "free ships make free goods." Essentially, this rule sought to eliminate attacks on neutrals. Under this rule, what mattered was the ship that transported the goods. If the ship was owned by enemy nationals, it was a lawful prize. If the ship was not owned by enemy nationals, it was free to sail. See 3 GEORGE BANCROFT, HISTORY OF THE UNITED STATES 154 (1879). Nations at war might wish to seize and convert any ship that contained contraband goods going to or coming from the enemy, but neutrals did not like the resulting disruption of their trade and tried to push the principle of "free ships make free goods."

¹¹⁰ See Vattel, *supra* note 15, at 214 (saying that violation by one party of treaty permits other party to declare treaty dissolved); *id.* at 215 (saying if recourse to war is taken, nations strip the other of all treaty rights); *id.* at 372 (saying treaties "are broke or annulled by a war" except for those provisions that regulate the declaration and conduct of war); see also Marks v. United States, 161 U.S. 297, 304 (1896) (noting that no declaration of war had abrogated treaty with

Consistent with the view that the declare-war power encompassed the power to declare treaties void, Congress stated in 1799 that treaties with France were null and void due to France's war on American shipping.¹¹¹ This was an exercise of Congress's declare-war power. Indeed, negotiators subsequently sent to fashion a peace treaty with France argued that Franco-American treaties properly had been declared null by virtue of Congress's power to declare war.¹¹² In an earlier episode, Alexander Hamilton explained to President George Washington in 1796 that Congress could declare treaties null and void as part of its power to declare war, no doubt understanding that declarations of war could signify the declarant's view of the continuing validity of treaties.¹¹³

G. *Invoking the Laws of War*

At one time, formal declarations of war were thought by some to be necessary to invoke the more humane laws of war that applied between civilized nations. These formal declarations made clear that wars were conducted with the assent of the sovereign and were thus legal under international law.¹¹⁴ The formal declaration did not need to expressly invoke the laws of war; rather, the mere existence of a formal declaration ensured that the laws of war automatically applied to protect the declarant's combatants.

Indian tribe, thereby indicating that declarations traditionally could note that treaties were nullified).

¹¹¹ An Act to Declare the Treaties Heretofore Concluded with France, No Longer Obligatory on the United States, ch. 67, 1 Stat. 578 (1798).

¹¹² See Letter from Oliver Ellsworth et al. to John Marshall (Oct. 4, 1800), in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 342, 342 (Washington, Gales & Seaton 1832) (statute declaring treaties void derived validity "from an exercise of the constitutional prerogative of declaring war").

¹¹³ Letter from Alexander Hamilton to George Washington (May 20, 1796), in 10 THE WORKS OF ALEXANDER HAMILTON 165, 168 (Henry Cabot Lodge ed., 1904).

In a previous article, my colleague Michael Ramsey and I suggested that the President had a limited power to declare treaties terminated as part of the general grant of executive power because the treaty termination power was not assigned to Congress. See Prakash & Ramsey, *supra* note 55, at 265. Perhaps it is better to say that the power to terminate treaties is shared. Congress might declare treaties terminated in a declaration of war, and the President arguably has a similar power. But see Letter from Alexander Hamilton to George Washington (May 20, 1796), in 10 THE WORKS OF ALEXANDER HAMILTON, *supra*, at 168 (claiming that the President "is not competent" to annul treaties, "it being the province of Congress, by a declaration of war, or otherwise, in the proper cases, to annul the operation of treaties"); Report of the Minority, in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 112, at 736, 742 (saying that the President must execute treaties until Congress revokes or annuls them).

¹¹⁴ See Ramsey, *Textualism*, *supra* note 11, at 1572-74.

By the late-eighteenth century, however, international practice and the writing of other international theorists revealed that a formal declaration of war was no longer necessary to invoke the laws of war. Instead, authority from the sovereign was all that was required to invoke the protections afforded by the laws of war. Hence, whenever a nation declared war, formally or nonformally, it necessarily availed itself of the benefits of the laws of war.¹¹⁵ Put another way, although declarations of war were still necessary to invoke the laws of war, formal declarations were no longer the sole means of invoking the protections and rules of those laws. Nonformal declarations, such as an invasion, triggered the laws of war no less than a formal declaration could.

H. Justifying War and Vilifying the Enemy

Scholars recognize that founding-era formal declarations often contained propaganda.¹¹⁶ For declarations to serve as effective instruments of propaganda, they would have to be in writing, thus permitting their widespread dissemination.¹¹⁷ Written declarations containing propaganda were issued before warfare began, concurrently with its onset, or after the commencement of hostilities.

Typically, any declaration hoping to serve as propaganda would begin with tales of injustice, malevolence, and treachery on one side and a peace-loving forbearance on the declarant's part.¹¹⁸ Insults to honor, ships, and ambassadors might also be recounted. The declarant might have decried another nation's numerous violations of treaties and the law of nations. Sometimes, the declarant might claim that the other side had declared war through its hostile actions.¹¹⁹ Having

¹¹⁵ *Id.* at 1579–88.

¹¹⁶ See *id.* at 1586 (noting that declarations set rules and served propaganda purposes); Yoo, *The Continuation of Politics*, *supra* note 11, at 206–07 (declarations set rules of intercourse and served as a vehicle for making a complaint).

¹¹⁷ To be sure, nonwritten declarations may have become widely known rather quickly; news of hostile actions that served as a declaration of war could have been spread by newspaper accounts and word of mouth. But the hostile acts themselves could not justify the declarant's conduct. Nor could they give notice of the rules of commerce and interaction.

¹¹⁸ See, e.g., Declaration of War by France Against England and Holland, in A COLLECTION OF ADDRESSES TRANSMITTED BY CERTAIN ENGLISH CLUBS AND SOCIETIES TO THE NATIONAL CONVENTION OF FRANCE 157–61 (2d ed., London, J. Debrett 1793) [hereinafter A COLLECTION OF ADDRESSES] (describing how England and Holland had done all sorts of nefarious things to France); see also Ramsey, *Textualism*, *supra* note 11, at 1587 (making same point).

¹¹⁹ See, e.g., 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, *supra* note 118, at 148, 161 (noting that English and Dutch acts of hostility were declarations of war).

laid the predicate, the reluctant declarant would proclaim that its pacific disposition had its limits and that the other nation had well exceeded them. What usually followed was the predictable conclusion: the patient nation declared war and ordered its forces to wage war.

Propaganda was meant to convince international and domestic opinion of the justness of the declarant's conduct. It might have had some small effect convincing reluctant allies to aid the declarant and in dissuading an enemy's customary allies from joining the battle against the declarant. It also may have drummed up new allies who wished to fight for the principles that the declarant saw itself upholding. The propaganda function also might have bolstered domestic support for what would be a costly undertaking. Citizens might more readily make various sacrifices if they were told how wicked and debased the enemy supposedly was.

To sum up, founding-era declarations of war did not merely "declare war" against another nation. Instead, declarations were often lengthier and more complex than many eighteenth-century statutes. Indeed, several formal war declarations were close to a dozen pages.¹²⁰ Declarations reached this length precisely because they served so many different purposes. As we have seen, declarations were used not only to start a war, but also to provide notice of a forthcoming or ongoing war, to lay down conditions for peace, to propagandize, and to create wartime legal rules for citizens, enemy nationals, and neutrals.¹²¹

¹²⁰ See, e.g., Declaration of War Against France (Mar. 9, 1689), in 1 A GENERAL COLLECTION OF TREATYS, *supra* note 13, at 256–67; Declaration of War Against France and Spain (May 8, 1702), in 1 A GENERAL COLLECTION OF TREATYS, *supra* note 13, at 422–30.

¹²¹ One might read formal declarations of war from the seventeenth and eighteenth centuries as being issued pursuant to multiple sources of authority. For instance, while declarations might have typically regulated the conduct of foreigners, one might argue that the power to regulate foreigners did not follow from the power to declare war but perhaps arose from a separate power to regulate foreigners. Hence, one might suppose that a declaration of war that regulated foreigners drew upon two different sources of authority. If one believes that declarations of war were issued pursuant to multiple sources of authority and not merely under the power to declare war, then one would have a more narrow understanding of the power to declare war.

While theoretically possible, this argument seems ultimately mistaken. Across nations, declarations of war contained similar language and fulfilled similar functions. It seems unlikely that across all these nations, the entities possessing the power to declare war also enjoyed such powers as the ability to regulate commerce and the capacity to establish the rights of foreigners. Moreover, those writing statutes and resolutions often tend to write documents that draw upon one source of constitutional authority. In modern times, tax statutes rarely deal with postal roads; bankruptcy statutes do not grant letters of marque. Likewise, it seems natural to suppose that declarations of war from the seventeenth and eighteenth centuries were understood to have been issued pursuant to the power to declare war. Finally, even if formal declarations of war

The potential complexity, specificity, and breadth of declarations of war have largely been forgotten. Several factors help explain this collective amnesia. First, when most scholars examine declarations of war, they likely limit themselves to this nation's formal declarations, paying particular attention to the most recent war declarations. These more recent formal declarations of war, enacted in the midst of World War II, could fit on a three-by-five card.¹²² Indeed, our formal declarations of war have been issued in wars where the United States felt that it had to commit both the army and navy to the war effort. Because all of the armed forces were put at the President's disposal with no limitations, these formal declarations of war were generally terse documents. Moreover, unaware that something is a declaration of war whether or not it contains the words "declare war," scholars have paid very little attention to the many detailed congressional statutes that constituted nonformal declarations of war.¹²³

Still, as discussed below, nothing prevents Congress from drafting more detailed declarations of war—declarations that reassert congressional control by specifying the manner and means of conducting the war and the wartime rights of enemy nationals. Whether detailed regulation of warfare is wise, more specific declarations might at least clarify some confusion about the extent of presidential power during wartime.

III. Declarations Under the Constitution

When we move from a general, cross-national consideration of the form and function of declarations to the more focused topic of declarations under the Constitution, we confront old and new questions. What must Congress do to declare war? What are the conse-

were at one time understood as documents that implicitly relied upon multiple sources of authority (say, in the sixteenth or seventeenth centuries), over time the extremely close association that formal declarations had with the power to declare war might have led people to believe that all of the content found within declarations could have been derived from the generic power to declare war. In other words, longstanding practice might have led people to an expanded sense of the power to declare war.

¹²² See *Declarations of War Against Bulgaria, Hungary and Rumania*, chs. 323–25, 56 Stat. 307 (1942).

¹²³ See, e.g., *An Act Further to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof*, ch. 2, 1 Stat. 613 (1799); *An Act to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof*, ch. 53, 1 Stat. 565–66 (1798); *An Act More Effectually to Protect the Commerce and Coasts of the United States*, ch. 48, 1 Stat. 561 (1797). All were various statutes authorizing limited naval war against France.

quences of a declaration? An even more basic question: how many times has the nation declared war?

A. *Form*

As noted at the outset, most people suppose that the United States has not declared war since World War II. Yet our nation has fought a number of wars, large and small, in the more than six decades since 1945. In those wars (e.g., Korea, Vietnam, Granada, the first Gulf war), Congress never uttered the talismanic words—“declare war”—with respect to the relevant enemy. This explains the common claim that the United States has not declared war in over six decades.

The absence of such words has led some critics to grouse that those wars, including the current Iraqi and Afghani wars, were (or are) unconstitutional because Congress did not issue formal declarations of war. The argument is a fairly intuitive one. Congress must declare war if the nation is to go to war, and Congress must issue a formal declaration of war if it is to declare war.

Such claims are wholly mistaken. Founding-era practice clearly reveals that a nation could declare war without ever uttering the words “declare war.” As discussed earlier, nations declared war by written documents, oral statements, and hostile actions;¹²⁴ recall Sir Robert Walpole’s claim that most wars were declared from the mouths of cannons.¹²⁵ Moreover, written documents, such as the Declaration of Independence, were declarations of war even though they lacked the familiar “declare war” phraseology.¹²⁶

Given the flexibility of founding-era practices, there is no reason to think that the federal Constitution requires Congress to use a particular set of words to declare war. The Constitution grants Congress the power to “declare war,” not the more limited power to “formally declare war.” Nor does the Constitution contain anything suggesting that Congress may declare war only via a document resembling a traditional formal declaration of war.

Congress declares war whenever it passes a measure that signals a decision to wage war. If cannon fusillades could serve as a declaration, why not something less lethal but no less equivocal, such as a statute commanding the use of the military to wage hostilities, an ap-

¹²⁴ See *supra* text accompanying notes 31–32.

¹²⁵ See *supra* note 32 and accompanying text.

¹²⁶ See, e.g., The King of Spain’s Declaration of War Against Great Britain (Nov. 28, 1739), in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN, FROM 1727 TO 1783, *supra* note 13, at 13.

appropriation in support of a war,¹²⁷ or a resolution bristling with hostility and promising war? Whether such measures are passed before or after a war has begun, Congress has declared war by passing these statutes and resolutions.¹²⁸

Though nations could declare war in the founding era without using any text, the Constitution permits Congress to declare war only via some text. Because Congress only acts when it passes resolutions, bills, and the like, Congress can declare war only by enacting text that signifies a desire to wage war. Hence, *Congress* does not declare war when many of its members fire cannons, even if such actions might have constituted declarations at the founding. Yet while Congress must use language to declare war, Congress need not use particular language to do so. If Congress passed a three-word measure—“*Delenda est Iran*”—such a measure might very well constitute a congressional declaration of war against Iran.¹²⁹

Nothing said here should be surprising. The Constitution grants Congress the power to enact various statutes across a range of subject matters. Statutes are textual compositions. No one has ever claimed that the Constitution somehow requires Congress to use particular phrases in order to exercise these other powers. Congress can regulate commerce using whatever text it likes, subject to the difficulties always present when one uses languages that have words capable of multiple meanings and laden with ambiguities. Indeed, nothing prevents Congress from passing statutes in a language other than English, in which case Congress certainly would not use the phrase “declare war.” If Congress used German or Sanskrit to craft its declarations of war, those enactments would not be any less declarations of war merely because they lacked the supposedly key phrase.

¹²⁷ See, e.g., 5 DEBATES OF THE HOUSE OF COMMONS, *supra* note 40, at 223–50 (proceedings of Mar. 14, 1678), available at <http://www.british-history.ac.uk/report.asp?compid=40988> (member of Commons claiming that appropriation for war in France was a declaration of war).

¹²⁸ There remains the important question of whether an *ex post* congressional declaration can cure a war unconstitutionally begun by the President. Although war is especially important in the life of a nation, this matter parallels any situation where the executive might take unauthorized actions and seek congressional approval after the fact. For instance, the Executive might expend funds without an appropriation and seek congressional absolution and support after the fact. For an argument that the Korean War was authorized by Congress after the fact, see *The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 10–12 (1991) (statement of Harold H. Koh).

¹²⁹ I am drawing upon Cato the Elder’s famous phrase “*Delenda est Cathago*”—Carthage must be destroyed. See Charles Van Doren, *Carthage*, in *AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN-AMERICAN EXPERIENCE* 387, 388 (Henry Louis Gates & Anthony Appiah eds., 2003).

More generally, the Constitution never requires that particular phrases be uttered or printed in order for a governmental action to have effect. Although it does require a particular oath of the President,¹³⁰ the Constitution permits governmental actors to take all sorts of actions without prescribing how the decisions to take such actions must be expressed. Vetoes, pardons, treaties, judicial judgments, and constitutional amendments may each be expressed however the relevant actors wish. The same is true of the power to declare war. Congress may express its declaration of war as it sees fit.

The logical difficulty with the insistence that Congress must use certain talismanic words in order to declare war is more obscure but seemingly devastating. If the United States only declares war by issuing a formal declaration of war, as some critics of modern American wars insist, then the President clearly does not declare war when he unilaterally plunges the nation into war. Indeed, no President, either before or after 1945, has ever, acting on his own constitutional authority, issued a document with the words that supposedly must be part of a formal declaration of war. That is to say, no President has ever purported to “declare war” against another nation. If one can declare war only by using the words “declare war,” it follows that no President has usurped congressional power by taking the nation to war. Ironically, the insistence that Congress must use certain words to declare war strongly suggests that other entities (the President, the military, the states) *do not declare war* unless they issue documents that contain those words.

The way to avoid this conundrum is to realize that when the Constitution grants Congress the power to “declare war,” it grants Congress the power to declare war both formally and nonformally. Because the Constitution is best read as not granting the President a concurrent power to declare war, it follows that Congress controls whether the nation will wage war. This is true not merely because this was intended or because this was a negative implication of the grant to Congress, but because the best reading of the text, given founding-era usage, was that only Congress could declare war (i.e., decide to wage war).¹³¹ Accordingly, Congress does not merely have the power to

¹³⁰ See U.S. CONST. art. II, § 1, cl. 8 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”).

¹³¹ For a defense of the claim that only Congress can declare war, see Prakash, *supra* note 12.

issue formal declarations, as many currently suppose; rather, it has the power to declare war, formally and nonformally, and thus has the power to decide whether to go to war.

Having said all of this, might there be sound policy reasons for forcing Congress to use the phrase “declare war” if a measure is to be taken as a declaration of war? Of course there are; after all, Congress might try to mask the import and effect of its declaration of war by not using the phrase “declare war.” Knowing the tendency of politicians to deflect and escape responsibility for decisions, some scholars wish to saddle Congress with yet another clear-statement rule.¹³² Any such requirement, however, cannot be traced to the Declare War Clause itself. Instead, any such rule arises from the policy impulses of those who would advance it.¹³³ For good or ill, the Constitution no more requires a clear and discernible declaration of war than it requires a clear and discernible tax code.

B. Functions

Recent authorizations to use military force have been relatively short on substance and long on rhetoric. The lack of substance perhaps resulted from a desire to grant authority in the most general terms so as to vest maximum discretion with the Executive. But it also might have stemmed from a sense that Congress’s options were limited. Members of Congress and the President might have supposed that Congress could decide to go to war but could not specify much else about the war they started or joined. Indeed, had they examined prior formal declarations of war issued by Congress, they might very well have come to the conclusion that Congress had to leave many (if not all) wartime details to the Commander in Chief.

The earlier review of founding-era declarations makes clear that Congress can be far more detailed in its declarations. Because Congress has the power to declare war, and thus has the power to issue declarations of war, Congress may decide what founding-era functions its declarations of war will serve.¹³⁴

As we have seen, as part of its power to declare war, Congress may decide whether the nation will wage war. In particular, Congress can decide whether to issue a conditional or absolute declaration of

¹³² See generally Sidak, *supra* note 8 (arguing that Congress should authorize war only through formal declaration).

¹³³ For a critique of the claim that Congress ought to or must use the words “declare war” in order to authorize war, see Koh, *supra* note 6, at 125–26.

¹³⁴ See *supra* note 121 and accompanying text.

war.¹³⁵ For instance, Congress might decide that a nation ought to be given an unambiguous chance to avoid war by satisfying certain demands. Imagine what might have transpired if Congress had enacted a conditional declaration of war that set stringent conditions on Saddam Hussein and promised war if Iraq did not meet those demands. Moreover, even when Congress enacts an absolute declaration of war, Congress might choose to give the enemy time to ponder its options prior to the onset of warfare by restraining the Executive's prosecution of the war until some date after the absolute declaration of war.¹³⁶ Though such advanced warning would make an eventual war more difficult to win, it might satisfy a desire to give the enemy some meaningful forewarning and might give the enemy a chance to appease the United States prior to the onset of warfare.

Additionally, Congress can use the declaration of war as a vehicle to make all manner of wartime announcements and rules. First, and perhaps most obviously, Congress can use the declaration as a propaganda vehicle and thus highlight all the considerations that led Congress to declare war. In the first and second Iraqi war declarations, Congress certainly attempted to spell out the many misdeeds of the Saddam Hussein regime as a means of justifying its resolutions.¹³⁷ Second, Congress could declare whether treaties with the enemy remain valid, as Congress did in 1799 during the naval war with France.¹³⁸

Third, Congress might limit the Executive's conduct of the war by constraining the use of force in various ways. For instance, Congress might, in the manner of early American wars, limit warfare to the seas.¹³⁹ Likewise, Congress might limit offensive measures to particular theatres in the hopes of containing the war to particular regions of

¹³⁵ See *supra* note 28 and accompanying text.

¹³⁶ In some respects, the Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002), can be seen as giving Iraq advanced warning of impending warfare. To be sure, the resolution did not expressly promise warfare, but given the President's publicly stated position, the international community undoubtedly surmised that President Bush was going to use the military authority delegated by the Act to wage war against Iraq.

¹³⁷ See *id.*; Authorization for Use of Military Force Against Iraq, Pub. L. 102-1, 105 Stat. 3 (1991).

¹³⁸ See An Act Further to Suspend the Commercial Intercourse Between the United States and France, ch. 2, § 1, 1 Stat. 613 (1799). A draft of the Act reads very much like the propaganda section of a declaration of war, reciting all the instances of French misconduct as justification for the declaration of nullity. See 8 ANNALS OF CONG. 2035-37 (Washington, Gales & Seaton 1851).

¹³⁹ See, e.g., An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, 2 Stat. 129, 129-30 (1802) (authorizing naval war against Tripoli).

the globe.¹⁴⁰ Indeed, Congress might authorize the use of force only for a period of time, say for two years.¹⁴¹ Unless Congress reauthorized the use of force, United States participation in the war would end upon a date certain. Finally, Congress might provide that the authority to use force terminates upon the attainment of certain benchmarks, signaling that these benchmarks are the reasons why Congress has declared war. Such benchmarks were occasional features of early (nonformal) declarations of war.¹⁴²

Fourth, Congress might specify the rights of enemy nationals residing in the United States. Traditional declarations typically specified the rights of enemy nationals who resided in the declarant's territory at the time of the declaration. As noted earlier, declarations often notified enemy nationals that they were the legitimate targets of attack, that they had to leave immediately, or that they might remain so long as they remained peaceful.¹⁴³ Congress might enact similar rules, perhaps taking into account changed conceptions about how one ought to treat enemy aliens.¹⁴⁴

Fifth, declarations might lay down rules regarding the treatment of enemy combatants and civilians outside the United States. Given that Congress has the power to declare war and thus regulate the war-time relationship with the enemy, it would seem to follow that Congress can decide the manner in which enemy nationals, of whatever sort, are to be treated. Indeed, regulating the treatment of enemy nations and their nationals can be seen as just another limitation on the use of force, constraints regularly found in declarations of war. Congress might require particular judicial procedures to determine if someone is a combatant and to ascertain whether a person has committed war crimes. It also might constrain the types of targets that the executive may strike against, in much the same way that founding-era

¹⁴⁰ For instance, American vessels were authorized to attack French armed vessels on the high seas and in American waters. *See* An Act to Further Protect the Commerce of the United States, ch. 68, § 1, 1 Stat. 578 (1798). American vessels apparently could not attack French armed vessels in the waters of other nations.

¹⁴¹ Although time-constrained declarations of war are apparently unprecedented, there is no reason to think that authority to use military force must be granted for an indefinite period of time. Like any other authority, it may be granted for a limited time.

¹⁴² *See, e.g.,* An Act to Suspend the Commercial Intercourse Between the United States & France, ch. 53, § 5, 1 Stat. 565, 566 (1798) (providing that if France should halt her predations on U.S. shipping, the statute's restraints on commerce and the ability to seize French ships would lapse).

¹⁴³ *See supra* text accompanying notes 101–03.

¹⁴⁴ If modern Congress enacted new rules, they likely would modify the Alien Enemies Act, which remains in force. *See* 50 U.S.C. §§ 21–24 (2000).

declarations of war sometimes barred attacks against certain enemy nationals in the declarant's territory.

The advantage of using the initial declaration of war as the vehicle for limiting or constraining the war is that it is much easier to enact *ex ante* restrictions on warfare than to enact them *ex post*. If a President resents congressional micromanagement of an ongoing war, as will often be the case, he will likely be unwilling to brook such interference after he has become accustomed to a relatively free hand. Predictably, the President will veto such regulation as interfering with his conduct of the war. Overcoming such a veto often will prove quite daunting.

Yet if restrictions on the use of force are introduced at the outset as part of the declaration of war, the President must take the good (the ability to use military force) with the bad (the various restrictions and checks on the use of such force). If the President wishes to wage war, but vetoes circumscribed authority to use force, he runs the risk that Congress will not declare war at all. Presidents will understand that some members of Congress may prefer no war at all to a war fought without various *ex ante* legislative constraints.

Sixth, and finally, congressional declarations might force the President to wage war. Something lost in more recent war resolutions is the sense of command found in older declarations. Founding-era declarations of war did not merely authorize the use of military force; they *commanded* the use of force.¹⁴⁵ Those with the power to declare war were understood as having the power to order the commencement of warfare. Indeed, members of Congress seem to have understood this, as some formal declarations have ordered the President to use military force.¹⁴⁶ Members of Congress apparently understood that because Congress possessed the power to declare war, Congress could therefore order the use of military force in the wars it declared, much as European monarchs commanded the use of military force in the wars they declared.

In short, American declarations need not be documents that tersely "declare war," thereby ceding great discretion to the Executive. Nor need they leave a whole host of ambiguities in their wake.

¹⁴⁵ See *supra* Part II.E.

¹⁴⁶ See, e.g., An Act Declaring that War Exists Between the United States of America and the Kingdom of Spain, ch. 189, 30 Stat. 364 (1898) ("direct[ing]" the President to wage war); Joint Resolution Declaring that a State of War Exists Between the Imperial Government of Japan and the Government and the People of the United States, ch. 561, 55 Stat. 795 (1941) (same).

While some uncertainty is perhaps inevitable, Congress can provide detailed instructions and rules in its declarations, as was typical in the founding era.

C. Process

Although congressional declarations of war need not contain any particular text, they must be formalized in one sense. To begin with, both the House and the Senate must agree to an identical measure that declares war. Unless they both enact identical language, “Congress” cannot declare anything.¹⁴⁷ Whether the Congress labels the proposed declaration of war a “bill” or a “resolution” does not matter.¹⁴⁸

Even after the House and the Senate enact an identical declaration of war, the declaration has no constitutional validity until it is presented to the President, giving him the chance to sign or veto the measure.¹⁴⁹ Article I, section 7 of the U.S. Constitution provides as much,¹⁵⁰ and there are ratification statements confirming this reading.¹⁵¹ Consistent with this claim, Congress presented the 1812 declaration of war, widely seen as the nation’s first formal declaration, to the President.¹⁵²

One consequence of a legislative process for declarations of war is that secrecy often will be difficult to maintain. As Columbia Law School Professor James Kent wrote in 1795, because under the Consti-

¹⁴⁷ U.S. CONST. art. I, § 1 (providing that Congress is composed of the House and the Senate and implying that Congress acts only when both act together).

¹⁴⁸ See JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 2 (2007), available at <http://fpc.state.gov/documents/organization/82969.pdf> (noting that in the nineteenth century, declarations were styled as bills, while in the twentieth century, formal declarations were styled as joint resolutions).

¹⁴⁹ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, APP. 269–72 (1803) (noting that the President can veto but cannot make a declaration of war). But see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 724–29 (1997) (arguing that declarations need not be presented to the President).

¹⁵⁰ U.S. CONST. art. I, § 7, cl. 3 (“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.” (emphasis added)).

¹⁵¹ See Notes of Rufus King and Nathaniel Gorham, in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 186, 190 (John P. Kaminski & Gaspare J. Saladino eds., 1997) (noting that the Constitution “requires the joint consent of both branches of Congress [sic] together with ye. [sic] of the Presidt. [sic] to declare war”).

¹⁵² See HARRY L. COLES, THE WAR OF 1812, at 25 (Daniel J. Boorstin ed., 1965).

tution “war can only be commenced by an act or resolution of [C]ongress,” the congressional declaration will “have all the publicity of the most solemn declaration.”¹⁵³ This potential publicity prior to the commencement of hostilities makes it unlikely that the United States could mount a surprise attack on an enemy, because Congress’s decision to wage war might become quickly known to the enemy. Indeed, it has long been understood that when assemblies have the declare-war power, nations often lose the advantages of declaring war via hostile actions, because the internal deliberations may become public knowledge.¹⁵⁴

Still, the Constitution makes it possible to try to keep some legislative proceedings secret.¹⁵⁵ Indeed, the debates preceding the 1812 declaration of war were kept secret.¹⁵⁶ It perhaps would have been possible to attack British ships and invade Canada before ever informing any British official. Despite the tactical advantages of such a course, the Secretary of State informed the British Ambassador the very afternoon the President signed the declaration.¹⁵⁷ While America could have made a public, external declaration of war at the mouth of a cannon, as the British often had done, the executive branch chose to provide formal notification before hostilities commenced.

D. The President’s Duty Towards Declarations

The President’s duty regarding a declaration of war turns on its language. If a congressional declaration of war merely grants the President the option of fighting a war, the declaration does not require any warfare. Instead, the declaration would seem to raise nondelegation issues, because it might be understood as delegating to the President the power to decide whether to declare war. The recent authorizations to use force can be read as conditional declarations of

¹⁵³ KENT, *supra* note 35, at 66.

¹⁵⁴ 1 NECKER, *supra* note 66, at 271 (noting that while monarchs could declare war by commencing it, assemblies would have a debate to declare war and then commence it afterwards, giving the enemy a chance to learn of their decision well before the declarant started waging war).

¹⁵⁵ See U.S. CONST. art. I, § 5, cl. 3 (providing that each chamber publish a journal but that members may keep some portions of their proceedings secret).

¹⁵⁶ See FRANK A. UPDYKE, *THE DIPLOMACY OF THE WAR OF 1812*, at 127, 130 (1915).

¹⁵⁷ See WALTER R. BORNEMAN, *1812: THE WAR THAT FORGED A NATION* 52 (2004).

war that delegate to the President the decision whether to wage war.¹⁵⁸

If Congress requires the President to wage war, the President must both wage the war that Congress declared and adhere to the restrictions on the use of military force contained in the declaration. Military commanders from the founding era did not have the freedom to ignore orders to wage war found within declarations of war merely because they might have disagreed with the policy behind such orders. As a matter of constitutional law, there is no good reason to think that the Commander in Chief can choose to ignore a congressional declaration of war that orders hostilities. Indeed, if the declaration of war has become law, either over the President's veto or with his signature, it creates binding law that the President must enforce. The Faithful Execution Clause requires the President to take care that a war declaration be faithfully executed no less than he must take care to execute bankruptcy, commerce, and tax laws.¹⁵⁹

Early declarations, both formal and informal, authorized the President to use the armed forces to carry the declaration into effect.¹⁶⁰ While such declarations could be read as merely giving the President the option to wage war, they are better read as implicitly triggering the duty to faithfully execute the war. By recognizing that a war existed, and by authorizing the President to use the armed forces, these declarations essentially required the President to wage war. Confirming this view is a statement by Justice Joseph Story. Speaking of the 1812 declaration in particular, Justice Story noted that because Congress had declared war, the President "is bound to carry it into effect."¹⁶¹ In short, when Congress declares that the nation is at war and authorizes the use of force, it has implicitly directed the President to wage war.

As noted earlier, more recent formal declarations were straightforward because they not only "authorized" warfare but actually "di-

¹⁵⁸ See Michael Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 325 (2003) (discussing practice of congressional delegation to President).

¹⁵⁹ See U.S. CONST. art II, § 3, cl. 4 ("[H]e shall take Care that the Laws be faithfully executed.").

¹⁶⁰ See, e.g., An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, § 2, 2 Stat. 129, 130 (1802) (recognizing that a state of war exists and authorizing the use of the Navy against Tripoli); An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof, and the United States of America and Their Territories, ch. 102, 2 Stat. 755 (1812) (declaring that war exists and authorizing President to use armed forces to wage war).

¹⁶¹ See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting).

rected” the President to wage war against the enemy.¹⁶² In these declarations, Congresses made clear that the President was to wage war.

The more general point is that the President generally must execute congressional directions relating to war. When one early governor sought authority to mount an offensive expedition against an Indian nation that had declared war against the United States, President Washington’s Secretary of War, Henry Knox, wrote back that such operations could not be ordered until Congress authorized them.¹⁶³ Should Congress order something, however, the President would see to its execution. “Whatever they [Congress] direct, will be executed by the Executive.”¹⁶⁴

Of course, the President’s faithful execution of his duty does not negate his various constitutional powers. For example, Congress can pass a statute criminalizing some conduct and yet the President might excuse such conduct by granting a pardon. More controversially, one can imagine a President refraining from enforcing a recently enacted statute pending congressional reconsideration of its merits, especially where new facts might cause Congress to reconsider the wisdom of its statute.

Similarly, the President may invoke his constitutional powers to end the warfare that Congress has commanded. Shortly after the 1812 congressional declaration of war, President James Madison supposedly sought a quick resolution of the differences with Great Britain, albeit on terms favorable to the United States.¹⁶⁵ If Madison successfully had negotiated a treaty, and the Senate consented to it, he could have ratified a treaty that ended the state of war recognized by the congressional declaration of war. Alternatively, the President might agree to an armistice of the type that brought hostilities to a close in the Spanish-American and Korean Wars. The President presumably has this power to make armistices as part of his grant of generic executive power.¹⁶⁶

So while the Congress can force the President to wage war in one sense, the President might be able to exploit changes in circumstances

¹⁶² See, e.g., An Act Declaring that War Exists Between the United States of America and the Kingdom of Spain, ch. 189, 30 Stat. 364 (1898) (directing the President to wage war).

¹⁶³ See Letter from Henry Knox to William Blount (Dec. 29, 1794), in 4 AMERICAN STATE PAPERS, *supra* note 112, at 634.

¹⁶⁴ See *id.*, in 4 AMERICAN STATE PAPERS, *supra* note 112, at 634, 635.

¹⁶⁵ See UPDYKE, *supra* note 156, at 136–37.

¹⁶⁶ See generally RAMSEY, THE CONSTITUTION’S TEXT, *supra* note 11, at 174–93 (describing why the President may make international agreements that do not constitute treaties).

or public sentiment to take a different course. He might convince the Senate to consent to a treaty ending the war, or he might negotiate an armistice using his executive power. By imposing diverse duties and dividing various powers, the Constitution simultaneously imposes duties, and also creates the means of blunting, overcoming, or nullifying those obligations.

E. The Possibility of Multiple Declarations

Consider the following scenario. On January 1, 1800, Congress enacts a conditional declaration of war against England, listing various conditions that England must satisfy to avoid war. On January 20, Congress, believing that England has failed to satisfy the ultimatum, enacts an absolute or unconditional declaration of war. On January 21, Congress publishes the declaration of war in the United States. On January 22, Congress instructs the Secretary of State to inform his English counterpart of the decision to declare war on England. Under this scenario, when has the nation declared war?

Or consider the same question in circumstances where Congress enacts an uncomplicated absolute declaration on December 1, then soon thereafter passes a statute outlining the rights of enemy nationals on December 2, and then a month later enacts a statute describing what forms of enemy property are lawful prize. In this sequence of events, when has Congress declared war?

The correct answer for both of these scenarios is that the United States has declared war each time it passed a new statute or resolve. Essentially, Congress has disaggregated functions that might have been furthered in a single declaration and exercised them across multiple declarations. The notion that Congress can enact multiple declarations in a war against a single country may seem odd, but it is a necessary consequence of the multiple functions of a declaration of war. With multiple functions comes the possibility of multiple declarations. Just as the power to “regulate commerce” can be exercised multiple times with respect to the same subject, say interstate shipping, so, too, can the power to declare war be exercised multiple times with respect to the same adversary.

Consistent with this conclusion, it was clear in the founding era that nations might declare war multiple times in a war against a single nation. The international law treatises, discussing both conditional and absolute declarations of war, rather clearly contemplated that nations might issue both against an enemy. Others noted that nations might issue both formal and informal declarations of war in the same

way. An English diplomat observed that England declared war against Holland twice in the same war. “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, in consequence of that . . . by a formal declaration.”¹⁶⁷ Walpole made much the same point when he discussed declaring war from the mouths of cannon before “any formal declaration” and noted that England’s “first declaration” against Spain would be by cannon.¹⁶⁸ Colonel George Washington was instructed to declare war (i.e., commence hostilities) against the French in Virginia, well after King George III had issued his formal declaration.¹⁶⁹

There are other American precedents for multiple declarations in a single war. As discussed above, Congress declared a limited naval war against France in 1798.¹⁷⁰ From April through July of 1798, Congress enacted a series of wartime statutes. While France was in the midst of a naval war against the United States, Congress began with a statute authorizing the acquisition of up to twelve naval vessels to be used to protect United States commerce.¹⁷¹ Edward Livingston, an opponent of the naval armament bill, noted, “[L]et no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case.”¹⁷² In another act, Congress declared treaties with France “no longer obligatory on the United States.”¹⁷³ Finally, Congress repeatedly adjusted the types of force the President could use against French armed vessels. Rather than enact-

¹⁶⁷ 2 THE WORKS OF SIR WILLIAM TEMPLE 255 (Jonathan Swift ed., London, S. Hamilton 1757).

¹⁶⁸ The Second Parliament of George II: Fourth Session (9 of 9, begins 12/5/1738), in 10 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, *supra* note 32.

¹⁶⁹ Letter from George Washington to Robert Dinwiddie (Aug. 14, 1756), in George Washington Papers at the Library of Congress, 1741–1799: Series 2 Letterbooks, *available at* <http://rs6.loc.gov/ammem/gwhtml/gwseries2.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 this button).

¹⁷⁰ *See supra* note 140.

¹⁷¹ An Act to Provide an Additional Armament for the Further Protection of the Trade of the United States, ch. 31, § 1, 1 Stat. 552 (1798).

¹⁷² 8 ANNALS OF CONG., *supra* note 138, at 1519.

¹⁷³ An Act to Declare the Treaties Heretofore Concluded with France, No Longer Obligatory on the United States, ch. 67, 1 Stat. 578 (1798). While discussing this Act, members of Congress understood that the power to declare the treaties void arose from the power to declare war. Indeed, several mentioned that Congress ought to declare war, and the nullity of the treaties would follow as a matter of course. Others said that declaring the treaties void was the same as a declaration of war. *See generally* 8 ANNALS OF CONG., *supra* note 138, at 2116–27.

ing all of these rules in an initial statute or resolution, Congress felt free to exercise its power to declare war over time.

More recently, congressional actions in the Iraqi and Afghani wars suggest the possibility of multiple declarations. Congress initially granted the President the ability to use the armed forces as “necessary and appropriate” to wage war against those nations or persons who “planned, authorized, committed, or aided” the terrorist attacks of September 11, 2001.¹⁷⁴ Thereafter, Congress has tried, with limited success, to constrain how the Executive conducts the war in various ways—constraints that might have been imposed at the outset. Each of these attempts can be seen as attempts to revise the initial declarations of war.

In short, because the power to declare war gives Congress the authority to control a set of war-related functions (e.g., military use, rights of aliens, etc.), Congress can exercise these powers over a series of war declarations or statutes. Congress is not limited to one declaration issued at the outset of a war that cannot be revisited and revised at later points in a war.

F. *The Possibility of Default Declarations*

Congress not only may exercise its power to declare war in more than one declaration, it also may enact default rules relating to future wars. For instance, Congress may provide, in advance of any particular conflict, that whenever another nation declares war on the United States, any existing treaties with that nation are null and void.

The Alien Enemies Act provides an example of what one might call a default-declaration statute.¹⁷⁵ The Act provided that whenever there is a declared war between the United States and another nation, alien enemies residing in the United States might be arrested and deported pursuant to rules promulgated by the President.¹⁷⁶ Essentially, by passing the Act, Congress provided a rule to apply in future wars,

¹⁷⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (approved by both houses of Congress on September 14, 2001, and signed by the President on September 18, 2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498 (2002) (resolving that “the President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq; and . . . enforce all relevant United Nations Security Council resolutions”).

¹⁷⁵ An Act Respecting Alien Enemies, ch. 66, § 1, 1 Stat. 577 (1798).

¹⁷⁶ See *id.* The delegation of rulemaking authority to the President was controversial at the time. There did not seem to be any doubt that Congress might regulate alien enemies. See generally 8 ANNALS OF CONG., *supra* note 138, at 1786–92, 1793–96.

thus avoiding the need to have to speak to the question of the status of enemy aliens in the context of future wars. The Alien Enemies Act, as amended, continues to regulate the Executive's treatment of alien enemies in times of war.¹⁷⁷

Other default-declaration statutes might add additional default rules. One can imagine Congress providing that whenever another nation declares war against the United States, either formally or nonformally, the United States automatically declares war in response. Congress might also enact rules relating to what kind of force the United States will use in future wars.

The simple point is that Congress may choose to exercise its declare-war power in advance of any particular war by laying down rules that will apply in future wartime situations, unless future Congresses provide otherwise.¹⁷⁸ While there will be disagreements about the extent to which Congress should lay down rules in advance of actual warfare, there should be little doubt that Congress can lay down default rules.¹⁷⁹

G. *The Purported Obsolescence of Declarations*

As noted at this Article's outset, there is an inclination on the part of some to regard declarations of war as obsolete and archaic.

¹⁷⁷ See 50 U.S.C. §§ 21–24 (2000).

¹⁷⁸ Not every statutory provision that turns on the existence of a declaration of war should be considered an exercise of Congress's power to declare war. For instance, Congress's decision that the President can sell national defense stockpile material during a declared war, see 50 U.S.C. § 98f(a)(2), is more appropriately understood as an exercise of Congress's power to dispose of United States property.

¹⁷⁹ The text of the default declaration establishes its sweep. If a default declaration speaks of limiting civil liberties or expanding presidential power should Congress "declare war," there will be a question of whether the statute only references a formal declaration, or whether it also encompasses informal declarations triggering the statutory provision. For instance, the Enemy Aliens Act grants the President authority to detain enemy aliens whenever either a "declared war" exists between the United States and foreign nations, or when the nation has been invaded or is under threat of invasion. See 50 U.S.C. § 21. This text suggests that Congress meant to incorporate only the formal understanding of declarations of war because there would have been no need to speak of invasions separately if the broader understanding of declarations of war had been contemplated.

But other statutory provisions that turn on whether someone or something has "declared war" may incorporate the broader definition of "declare war." For instance, one can imagine that the suspension of the statutes of limitation for commencing various contract actions turns on whether the Congress has declared war in the broad sense, and not merely on whether the Congress has formally declared war. See 28 U.S.C. § 2416(d) (2000). For a discussion of how some early treaties used "declare war" and "declarations of war" in the broad senses and others used them more narrowly, see Prakash, "*Declare War*," *supra* note 11, at 83 n.196 and accompanying text.

After all, formal declarations of war have become exceedingly rare since World War II.¹⁸⁰ For many, this fact suggests that the declare-war power is a somewhat dated constitutional concept.¹⁸¹ If nations never formally declare war anymore, of what relevance can the declare-war power be?

Declarations of war only seem a relic from the past because people assume that the only declarations that count are formal declarations of war. Yet, as discussed earlier, there is no reason for this fixation on formal declarations when the Constitution grants the generic power to declare war. As the Constitution uses “declare war,” every nation that fights a war has necessarily declared war in some way, either formally or nonformally. Given the Constitution’s sense of “declare war,” and given the continued involvement of the United States in various wars around the world, neither the declare-war power nor declarations of war have become antiquated.

Indeed, the only way the declare-war power and declarations of war can become archaic or irrelevant is if war itself becomes a relic of the past. As long as the United States continues to fight wars, however, the declare-war power can continue to have the same relevance that the rest of the Constitution enjoys.

H. Reassessing America’s “Undeclared” Wars

There is a somewhat related critique about the typically “undeclared” nature of American wars. Depending upon how one considers the question, the nation has fought in either five or eleven declared wars.¹⁸² Yet the nation clearly has fought many more wars. Hence, most American wars were not preceded by or accompanied with a formal declaration of war, making these wars constitutionally suspect in the eyes of some.¹⁸³ Whether one agrees with this critique or not, it seems clear to many that war declarations are the exception and not the rule.

¹⁸⁰ See Ely, *supra* note 5, at 888 n.41 (claiming that since World War II, declarations of war have essentially vanished, worldwide).

¹⁸¹ See, e.g., Turner, *supra* note 7, at 537 (claiming that the power to declare war is an anachronism).

¹⁸² The United States has issued eleven declarations of war in five conflicts—the War of 1812, the Mexican American War of 1846, the Spanish-American War of 1898, World War I, and World War II. See GRIMMETT, *supra* note 4, at 15–39. Six of these declarations occurred in World War II. *Id.*

¹⁸³ See, e.g., Ron Paul, U.S. Congressman, Is Congress Relevant with Regards to War?, Speech Before the U.S. House of Representatives (Oct. 3, 2002), *available at* www.house.gov/paul/congrec/congrec2002/cr100302.htm (claiming that the then-impending failure to declare war on Iraq was a “circumvention” of the Constitution).

This common claim about so-called “undeclared” wars is without merit, at least if we utilize the original meaning of “declare war.” As we have seen, something was a declaration of war regardless of whether it included the familiar “declare war” phraseology typically found in formal declarations of war. Indeed, nations declared war all the time without using these familiar words. More to the point, as noted earlier, it was impossible for a nation to wage war without also explicitly or implicitly declaring war. In other words, it is impossible to have an “undeclared war.”

American resolutions typically regarded as declarations of war reveal the flexible, functional nature of declarations. For instance, the declaration of war against Mexico in 1847 never used the phrase “declare war.” Nonetheless, the resolution is widely considered a declaration of war,¹⁸⁴ presumably because its preamble observed that a “state of war” existed with Mexico.¹⁸⁵

Yet similar language can be found in other war resolutions and statutes, none of which are commonly regarded as declarations of war. In 1798, Congress enacted various laws that permitted the United States government and private parties to wage a limited naval war against French vessels.¹⁸⁶ Though there was evidently some congressional reluctance to admitting that the nation was at war with France, the Supreme Court, Cabinet Secretaries, and diplomats had no such qualms.¹⁸⁷ President John Adams himself said 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.”¹⁸⁸

The Tripoli and Algeria war statutes are even more similar to the Mexican declaration that would follow them much later. In 1802,

¹⁸⁴ See, e.g., Bradley & Goldsmith, *supra* note 10, at 2063 (claiming that Congress passed a statute declaring war against Mexico).

¹⁸⁵ An Act Providing for the Prosecution of the Existing War Between the United States and the Republic of Mexico, ch. 16, 9 Stat. 9 (1846).

¹⁸⁶ See, e.g., An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578 (1798).

¹⁸⁷ See ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801*, at 281–82 (1966); 1 *NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE* 194, 204, 452, 454, 501 (1935) (offering repeated statements by the Navy Secretary that United States was at war with French armed vessels only); 1 *Op. Att’y Gen.* 84 (1798) (opinion of Charles Lee) (arguing that France and America were waging an “actual maritime war”); Letter from Oliver Ellsworth et al. to John Marshall (Oct. 4, 1800), in 2 *AMERICAN STATE PAPERS: FOREIGN RELATIONS*, *supra* note 112, at 342, 342–43 (describing America as at war with France).

¹⁸⁸ DECONDE, *supra* note 187, at 281–82.

Thomas Jefferson went to Congress for authority to conduct offensive operations against Tripoli, which had declared war on the United States the year before. The preamble of the authorization statute noted that Tripoli had “commenced a predatory warfare” against the United States.¹⁸⁹ The statute itself permitted the President to wage naval hostilities “as the state of war will justify.”¹⁹⁰ The Algerian statute, passed in 1815 at the prompting of James Madison, was *mutatis mutandis*.¹⁹¹ Not surprisingly, some regarded the statutes authorizing war against Tripoli and Algeria as declarations of war.¹⁹²

There are no sound reasons for treating the Mexican resolution as a declaration of war but treating the French, Tripoli, and Algerian statutes as mere congressional authorizations to use force that are either constitutionally ambiguous or suspect. None of the latter three used the familiar phrase, but all made clear that the nation was at war and directed the President to wage it. All should be seen as declarations of war; whether they also were *formal* declarations is a matter that may engage scholars of international law, but it should not long detain the interest of constitutional scholars.

¹⁸⁹ An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, 2 Stat. 129 (1802).

¹⁹⁰ *Id.* § 2, 2 Stat. at 130.

¹⁹¹ See An Act for the Protection of the Commerce of the United States Against the Algierine Cruisers, ch. 90, § 2, 3 Stat. 230 (1815). Recently, Peter Irons has suggested that Congress declined to declare war against Algeria after being requested to do so by Madison. Instead, Congress enacted “blank-check” authority to use the navy as the President saw fit. See PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* 31 (2005). But Irons is wrong on many fronts. Madison merely asked Congress to recognize that a state of war existed and authorize the use of force. See Message from the President of the United States (Feb. 23, 1815), in 5 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 687 (Washington, Gales & Seaton 1821). Moreover, the Congress complied with his request because the statute it passed authorized the President to order hostilities as the “state of war will justify.” See § 2, 3 Stat. at 230.

Finally, Irons is mistaken in implying that declarations of war cannot likewise have a blank-check aspect to them. In fact, the 1812 Declaration of War was a bigger blank check because it authorized the President to use the army, militia, *and* the navy, while the Algerian statute only authorized the navy. Many (but not all) U.S. declarations of war, whether formal or informal, have had something of a blank-check aspect to them. But as this paper has argued, that quality arises from a congressional choice not to exercise the declare-war power to put constraints on presidential conduct of a war.

¹⁹² See 2 ABIEL HOLMES, *ANNALS OF AMERICA* 419 (Cambridge, Hilliard, Metcalf & Co. 1829) (claiming that Congress declared war in June of 1801); 33 *ANNALS OF CONG.* 929 (Washington, Gales & Seaton 1855) (comments by John Tyler that Congress declared war after Tripoli attacked); GREGORY FREMONT-BARNES, *THE WARS OF THE BARBARY PIRATES* 77 (2006) (noting that President James Madison told the Dey of Algeria that the United State had declared war); J. FRANKLIN JAMESON, *DICTIONARY OF UNITED STATES HISTORY 1492–1897*, at 16 (Boston, Puritan Publ’g 1897) (claiming that Congress declared war on Algeria).

Other authorizations to use military force in a war likewise should be regarded as declarations of war by any other name. Those who would compile master lists of all American declarations of war should rethink their categories, at least if the Constitution's understanding of "declare war" is the touchstone used to determine when Congress has declared war. The first part of this more generic reexamination would ask if the United States was at war; the second part would ask if Congress had somehow authorized the use of military force in the war. Whenever the answer to both questions is "yes," Congress has declared war. This reconceptualization of the number of declared wars would treat many wars hitherto considered undeclared as wars that were in fact declared by Congress. The only category of wars that would be unaffected by this approach would be those wars where Congress never authorized the warfare, either before or after the commencement of hostilities.

Conclusion

This Article seeks to jumpstart a conversation about declarations of war: What text must they contain? To what extent may they regulate the conduct of the war? Must a President obey the commands and constraints found in a declaration of war?

By using founding-era war declarations as a guide, this Article argues that "declarations of war" were understood to be any document or action that signaled a decision to wage war. Hence, some text could be a declaration of war even if it lacked the familiar "declare war" language. Moreover, most founding-era declarations were atextual, as nations typically declared war via any number of hostile actions.

Of course, in the context of our Constitution, Congress must use text to enact a declaration. That is so because Congress can act only via texts. Nonetheless, a declaration need not include any set of words that were typically found in most formal declarations. All that matters is whether Congress authorizes or commands the use of military force; where Congress has done either, it has declared war.

Moreover, when we examine formal declarations from that era, it is clear that declarations of war need not be the terse documents vaguely familiar to modern readers. Declarations of war were often long documents, listing grievances, commanding military forces, and regulating many war-related matters, such as the rights of alien nationals. Indeed, once we understand that the category of declarations of war encompassed more than just formal declarations of war, it be-

comes clear that many of this nation's declarations of war were not terse at all. For instance, the detailed statutes enacted by Congress during the naval war with France in 1798 are no less declarations of war than the Declaration of 1812.

Finally, the President must execute a congressional declaration of war that purports to be mandatory. Declarations of war typically commanded the use of military force. Because Congress may declare war, Congress may command the use of force in wars it declares. Additionally, declarations of war are law and subject to the President's faithful execution duties, such that he must carry the declared war into execution. Hence, there are no sound reasons for supposing that the President may ignore a declaration of war or treat it as advisory.

This expansive understanding of "declaration of war" makes it impossible for declarations or the declare-war power to become obsolete,¹⁹³ at least so long as we suppose that nations will continue to war with each other. More accurately, as long as the United States wages war, the declare-war power can have as much relevance as the rest of the Constitution. Which is to say, the declare-war clause can be as relevant (or irrelevant) as we wish it to be.

¹⁹³ *But see* Turner, *supra* note 7, at 537 (arguing that the declare-war power is an anachronism).