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Concerning United States Constitutional War Powers

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ARTICLE

CONCERNING UNITED STATES CONSTITUTIONAL WAR POWERS

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"Great is the Guilt of unnecessary War."[1]

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1. Letter from John Adams to Abigail Adams (May 19, 1794*), in* 10 THE ADAMS PAPERS, ADAMS FAMILY CORRESPONDENCE, JANUARY 1794–JUNE 1795, at 185 (Margaret A. Hogan et. al. eds., 2011).

INTRODUCTION

On September 10, 2013, President Obama delivered an address to the country.[2] In the address, the President sought congressional authorization for military strikes against the Syrian government's chemical weapons stockpile.[3] However, the President made clear that, even though he sought congressional authorization, he did not need such authorization to order the strikes.[4] Rather, he sought congressional authorization because he desired unity, not because he felt there was a constitutional obligation to do so.[5] Thus, President Obama continued a long tradition of executive officers insisting on the President's "inherent" and "broad constitutional power to use military force" without congressional authorization.[6] This position, though, is incorrect. The President does not have broad and inherent constitutional power to use military force without congressional authorization.[7] To the contrary, the President has very limited constitutional

2. President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013) (transcript available in the White House Archives).

3. *Id.*

4. *See id.* ("So even though I possess the authority to order military strikes, I believed it was right, in the absence of direct or imminent threat to our security, to take this debate to Congress.").

5. *See id.* ("I believe our democracy is stronger when the President acts with the support of Congress. And I believe that America acts more effectively abroad when we stand together. This is especially true after a decade that put more and more war-making power in the hands of the President, and more and more burdens on the shoulders of our troops, while sidelining the people's representatives from the critical decisions about when we use force.").

6. John C. Yoo, Memorandum Op. for the Deputy Counsel to the President (Sept. 25, 2001), *in* 25 OPINIONS OF THE OFFICE OF LEGAL COUNSEL OF THE UNITED STATES DEPARTMENT OF JUSTICE 188, 188, 190 (Nathan A. Forrester ed., 2012).

7. One might respond with the War Powers Resolution. *See generally* War Powers Resolution of 1973, 50 U.S.C. §§ 1541–48 (addressing the war powers of Congress and the President). The Resolution requires, in part, that the President submit a written report to Congress when "United States Armed Forces are introduced . . . into hostilities" without a previous declaration of war or other congressional authorization. *Id.* § 1543(a). The President then has sixty days to conduct hostilities without congressional input. *See id.* § 1544(b) (giving the President sixty days to cease military operations once the written report is submitted to Congress but not prohibiting the President from using the armed forces during the sixty-day window). In practice, though, Presidents generally have exceeded the Resolution's grant of powers and instead exercised general war making powers. As a result, in this Article I steer clear of the War Powers Resolution since Presidents claim broader, more general war powers than those granted in the War Powers Resolution. In this Article, I investigate whether Presidents actually possess the authority to exercise these general war powers. For example, during the 2011 Libyan war, the Obama administration argued that the Resolution did not apply because "U.S. military operations are distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision." Report of the Dep't of State and Dep't of Def. on U.S. Activities in Libya (June 15, 2011), at 25, https://man.fas.org/eprint/wh-libya.pdf [https://perma.cc/46GE-78WP]. The Obama administration's report attempted to make the word

authority to use military force without congressional authorization,[8] and the President has no constitutional authority to *initiate* war or hostilities without congressional authorization.[9]

"hostilities" the operative word in the resolution, arguing that, so long as U.S. forces are not engaged in "hostilities" vaguely defined, the War Powers Resolution is not applicable. *Id.* Contrary to the administration's report, though, the phrase "United States Armed Forces are introduced" is the operative metric. 50 U.S.C. § 1543(a). The resolution reads in relevant part: "In the absence of a declaration of war, in any case in which the United States Armed Forces are introduced . . . the President shall submit within [forty-eight] hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report" after which the sixty-day termination period begins. *Id.* In addition, the *War Powers Resolution* clarifies what it means to "introduce" U.S. armed forces:

> [T]he term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

Id. § 1547(c). The War Powers Resolution applies when U.S. forces are introduced, not when "hostilities" occur. In Libya, U.S. armed forces conducting and supporting allied bombing sorties were *introduced* as defined by the Resolution. *See* Letter from President Barack Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-President-regarding-commencement-operations-libya [https://perma.cc/G8FN-CBCA] (directing military forces to commence operations in Libya). In addition, the introduction of U.S. armed forces "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces" also triggers the sixty-day termination provision. 50 U.S.C. § 1543(a)(2). As a result, the presence of armed U.S. aircraft in Libyan airspace either conducting bombing sorties or supporting allied bombing sorties also required the Obama administration to comply with the reporting requirements set forth in the Resolution. However, the administration did not comply, and Congress was unable to enforce the Resolution. Presidents, then, not only can initiate hostilities without congressional authorization, but they can also conduct entire campaigns without congressional authorization. It seems fair to say, then, that the Executive claims broad authority to decide if and when the United States initiates hostilities. *See* Zachary Cohen and Joshua Berlinger, *North Korea's Kim to Trump: It's Your Move*, CNN (Aug. 15, 2017, 9:20 AM), http://www.cnn.com/2017/08/14/politics/mattis-north-korea-guam-game-on/index.html [https://perma.cc/LN2M-DLHQ] (discussing the possibility of war between the United States and North Korea, Secretary of Defense James Mattis said, "War is up to the President, perhaps up to the Congress . . . .").

8. *See infra* Part I (discussing the constitutional war powers granted to the President).

9. *See infra* Part I (explaining Congress's war powers granted to it by the Constitution). Here, one might say the North Atlantic Treaty Organization's (NATO) Article 5 obligation allows the United States President to initiate war or hostilities against a state that attacks a NATO ally. *See* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241 [hereinafter North Atlantic Treaty] (permitting parties to the Treaty to assist another party who has been attacked through the use of armed force). Article 5 of the NATO treaty received significant attention after Russia invaded Ukraine in February 2022. *E.g.,* Paul LeBlanc, *Here's What NATO's Article 5 Is and How It Applies to Russia's Invasion of Ukraine*, CNN (Mar. 7,

Such a position is contested hotly. After decades of argument and counterargument, most scholars consider the war powers debate a "stalemate" between pro-Congress supporters and pro-Executive supporters.[10] However, this stalemate cannot continue for much longer. The United States faces a "difficult future" in which military operations likely will be "prolonged campaigns [rather] than conflicts that are resolved quickly [where] control of escalation becom[es] more difficult and more important."[11] In light of such a future, resolving the war powers debate has become more urgent. Some scholars suggest a resolution lies in adopting a compromise between the pro-Congress and pro-Executive positions.[12] These scholars suggest a "two-tier approach to war powers" that would require congressional authorization to initiate military action with foreign states but allow the President to initiate military action with terrorist groups or rogue nations.[13] In truth, such a compromise is not possible, for "[e]ither the President has such inherent authority [to initiate war or hostilities], in which case Congress cannot limit his use of it, or he lacks it, and Congress

2022, 5:27 PM), https://www.cnn.com/2022/03/07/politics/what-is-nato-article-5/index.html [https://perma.cc/TD6M-9J7B] (discussing Article 5's application to Russia's attack on Ukraine and that an attack on any NATO territory would trigger U.S. involvement). However, no part of the NATO treaty allows the United States President to initiate war or hostilities without congressional authorization. *See generally* North Atlantic Treaty, *supra* (not describing the authority of any of the parties' executives respecting the use of armed force). In fact, any treaty that attempted to give the President such power "probably would be unconstitutional." Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509, 511 (1986). The actual treaty language requires each member only to take "such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." North Atlantic Treaty, *supra*, art. 5. Thus, the treaty language does not require military assistance. In addition, in the United States, the Executive Branch does not decide when war is necessary. Congress makes that decision. Finally, Article 5's security guarantee is geographically limited, requiring member states to secure only "the North Atlantic area." *Id.*

10. *See* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 698 (1997) ("The [war powers] debate has reached a point of stalemate."); Ganesh Sitaraman & David Zionts, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 518 (2015) ("Despite the importance of war powers, the timeliness of the topic, and the expansiveness of the literature, classic legal debates on war powers have largely reached a stalemate.").

11. JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2015: THE UNITED STATES MILITARY'S CONTRIBUTION TO NATIONAL SECURITY, at i (2015); *see* Richard N. Haas, *The Unraveling: How to Respond to a Disordered World*, 93 FOREIGN AFFS. 70, 70–74 (2014) (predicting the difficult issues that are bound to arise in the United States due to the number of meaningful actors).

12. *See, e.g.,* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2536 (2006) (suggesting congressional authorization could assist the Executive Branch).

13. *Id.*

cannot delegate its war-making power to the President."[14] There is, in fact, no middle ground on which to compromise regarding war powers. That is what makes the disagreement between pro-Congress supporters and pro-Executive supporters so difficult to resolve.

That brings us to the primary question I hope to answer in this Article. In the United States, who has the constitutional authority to initiate war or hostilities? I am not the first to ask this question. However, previous scholars have attempted to do too much with too little space. Previous scholars have attempted to deal with textual sources, historical precedents, court decisions, and modern practices all within single articles. As a result, the arguments become diluted, muddled, and ineffective. In addition, the academy's acceptance of the classic debate as a terminal stalemate has fractured the literature into numerous specialized studies that proceed from a false premise that one cannot know whether early American leaders intended for Congress to have primacy in determining to initiate war or hostilities. In this Article, I hope (1) to show the evidence indicates that early American leaders did intend for Congress to have primacy in determining whether to initiate war or hostilities and (2) to correctly situate the pure war powers with Congress. By correctly situating the pure war powers, scholars can more accurately pursue the important questions regarding the practical and legal applications of these pure powers.

In order to accomplish these two goals, I focus on the historical and textual sources.[15] There is significant controversy over the meaning of these sources, and some scholars question whether one can draw a coherent position from these sources.[16] I submit that one can draw a coherent

14. Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L. REV. 693, 699 (1990).

15. I focus on the historical and textual sources because pro-Executive supporters use textualism and originalism as their principal modes of constitutional interpretation. As a result, in this Article I, too, use primarily—but not exclusively—a historical and textualist approach to show that the pro-Executive supporters' chosen modes of constitutional interpretation do not support their position. *See generally* Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331 (2012) (critiquing the pro-Executive position on the issue of war powers using textualism and history).

16. *See* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 111 (1984) ("[E]vidence concerning the original understanding [of which branch possesses the right to commence war] does not come down firmly on one side or the other."); Treanor, *supra* note 10, at 698 ("Although the evidence [regarding whether congress or the executive has the right to commence war] is limited—with the critical part of the constitutional debates consisting of little more than a page of the published record and subject to various plausible readings—this is not the principle cause of the

position from these sources, but scholars have interpreted them incorrectly. I offer a different interpretation. Specifically, I interpret the historical and textual sources according to a group of seventeenth- and eighteenth-century European natural law writers.[17] This group consists of Hugo Grotius,[18] Samuel von Pufendorf,[19] Jean-Jacques Burlamaqui,[20] and Emer de Vattel.[21] The plan of this Article is as follows: Part I deals with the legislative war powers. Pro-Executive supporters argue that legislative war powers are restricted to funding or not funding military operations and issuing a technical declaration of war. In this part, though, we shall see that legislative war powers are far more expansive. Part II deals with the Executive war powers. Pro-Executive supporters argue that the President's designation as commander in chief gives the President the authority to initiate war or hostilities unilaterally. However, we shall see that the authority to initiate war or hostilities is not inherent to the office of commander in chief. In addition, we shall see that the early American leaders intended the presidency to be an inherently peaceful, domestic office. Finally, we shall see that the political philosophers of the day did not consider executive power to be indivisible. Rather, they considered war powers to be a distinct, transferrable power.

As the United States, along with its allies, enters a period in which prolonged military operations are more likely and control over escalation is

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stalemate concerning the original understanding. Rather, the problem is that neither side is able to square its claims fully with the evidence that exists.").

17. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 32–33 (Belknap Press 1967) ("It is not simply that the great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment texts and fought for the legal recognition of natural rights . . . . The ideas and writings of the leading secular thinkers of the European Enlightenment . . . were quoted everywhere in the colonies, [by] everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.").

18. *See generally*, HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE (London, John W. Parker, William Whewell trans., 1853) (1625) (discussing views on war and peace for nations).

19. *See generally*, SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS (London, J. Walthoe & J. R. Wilkin et al., Basil Kennett trans., 1729) (1672) (depicting seventeenth-century views on natural law).

20. *See generally*, J.J. BURLAMAQUI, THE PRINCIPLES OF POLITIC LAW: BEING A SEQUEL TO THE PRINCIPLES OF NATURAL LAW (Thomas Nugent trans., 2003) (1752) (discussing natural law in the eighteenth century).

21. *See generally*, EMER DE VATTEL, THE LAWS OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Joseph Chitty & Edward D. Ingraham eds., 1883) (1758) (writing about the law of nature related to nations in the eighteenth century).

more important, the country's leaders face two significant questions: which branch of government should be trusted to decide when to commit soldiers, matériel, and money to military operations, and which branch of government should be trusted to control if, when, and to what extent an operation should be escalated? I submit that Congress should be trusted to decide these questions. I submit that the Constitution already trusts Congress to decide these questions. The President does not have the constitutional authority to initiate war or hostilities. Congress has that authority. As the United States enters a difficult future, Congress ought to reassert this authority.

I. THE LEGISLATIVE WAR POWERS

The Constitution gives Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[22] Pro-Executive supporters maintain that this power does not give Congress the authority to initiate war or hostilities. Pro-Executive supporters rest their position on two contentions. The first contention is that early American leaders did not believe declarations of war had to precede hostilities.[23] This contention is inaccurate.[24] Hugo Grotius was a Dutch jurist and diplomat who wrote in the early seventeenth century. His work *On the Rights of War and Peace* "is generally regarded as providing the foundation of modern international law."[25] He wrote "before he who

22. U.S. CONST. art. I, § 8, cl. 11.

23. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 208 (1996) ("[S]eventeenth and eighteenth-century writers on international law never implied that a nation had to issue a declaration of war before waging hostilities.").

24. The writings of international jurists from the seventeenth and eighteenth centuries are explored in detail hereafter; however, James Kent gives a solid, brief overview of their respective opinions on the necessity of a declaration of war:

> Grotius considers a previous demand of satisfaction, and a declaration, as requisite to a solemn and lawful war; and Puffendorf holds acts of hostility, which have not been preceded by a formal declaration of war, to be no better than acts of piracy and robbery. Emerigon is of the same opinion; and he considered the hostilities exercised by England, in the year 1755, prior to any declaration of war, to have been in contempt of the law of nations, and condemned by all Europe. Vattel strongly recommends a previous declaration of war, as being required by justice and humanity . . . .

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, at *53 (1848); *see* Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L L. 19, 20 (1938) ("The early writers on international law [such as Emer de Vattel and Hugo Grotius] insisted upon the declaration of war . . . .").

25. R.P. Anand, *The Influence of History on the Literature of International Law*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY

has the supreme power can be attacked for the debt or delict of his subject, there ought to be interposed a formal demand which may put him in the wrong, so that he may be either supposed to be the author of a damage, or to have himself committed a delict . . . ."[26] Samuel von Pufendorf was a German jurist and political philosopher who wrote in the latter part of the seventeenth century. Like Hugo Grotius, he "was one of the most prominent political and legal thinkers" of the time.[27] He wrote that an undeclared war was "like an Incursion or Depredation of Robbers . . . ."[28] Emer de Vattel was a Swiss jurist and diplomat who wrote in the middle of the eighteenth century; his writings were popular among the early American leaders. He wrote that a declaration of war must "necessarily precede the commission of any act of hostility."[29] Jean-Jacques Burlamaqui was another

341, 345 (R. St. J. Macdonald & Douglas M. Johnston eds., 1989). Algernon Sidney considered *On the Rights of War and Peace* "the most important of all books of political theory." JONATHAN SCOTT, ALGERNON SIDNEY AND THE ENGLISH REPUBLIC 1623, at 19 (1988).

26. GROTIUS, *supra* note 18, at 318–19 ("But that a war may be just in this sense, it is not sufficient that it be carried on between the supreme authorities on each side; but it is requisite also, as already said, that it be publicly decreed; and in such manner publicly decreed, that signification of that fact is made by the one party to the other . . . . So Cicero, in his *Offices*, says that by the Fecial Law, no war was just except one preceded by a demand for redress, or by a declaration of war. So in Isidore. So Livy . . . ."). In the event that someone wishes to argue that Grotius does not state explicitly that a declaration of war is necessary, please note that these quotations come from Book III, Chapter III, §§ 5–6 titled, respectively, "Declaration of war required" and "Declaration by Law of Nature and by Law of Nations." *Id.* William Blackstone echoed Samuel von Pufendorf, writing that "those are enemies who have publicly declared war against us, or against whom we have publicly declared war; all others are thieves or robbers." *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *257 (writing in Latin); *see* J.W. JONES, A TRANSLATION OF ALL THE GREEK, LATIN, ITALIAN, AND FRENCH QUOTATIONS WHICH OCCUR IN BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 48 (1823) (translating the foregoing Blackstone quote from Latin to English). Blackstone, discussing Hugo Grotius, wrote, "[A]ccording to the laws of nations a denunciation of war ought always to precede the actual commencement of hostilities . . . ." 1 BLACKSTONE, *supra,* at *258. Thus, Blackstone concluded that "in order to make a war [legally valid], it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority." *Id.*

27. Craig L. Carr, *Introduction* to THE POLITICAL WRITINGS OF SAMUEL PUFENDORF 3 (Craig L. Carr ed., Michael J. Seidler trans., 1994).

28. PUFENDORF, *supra* note 19, at 840. Here, Pufendorf alludes to the passage from Grotius. *See id.*; GROTIUS, *supra* note 18, at 172 (explaining "a robber is not an open enemy, having the rights of war, but a common enemy of all men").

29. VATTEL, *supra* note 21, at 420. Vattel goes on to caution that "[l]egitimate and formal warfare must be carefully distinguished from those illegitimate and informal wars, or rather predatory expeditions, undertaken either without lawful authority or without apparent cause, as likewise without the usual formalities, and solely with a view to plunder." *Compare id.* at 423, *with* JOHN YOO, THE POWERS OF WAR AND PEACE 33 (2005) ("Significantly, neither Grotius nor Vattel discussed declarations of war as necessary to the initiation of hostilities."). Indeed, the United States Department of Defense referred to Vattel as being among "the most highly qualified publicists"—a distinction

Swiss legal theorist whose writings were also well known in the middle of the eighteenth century. His writings, like those of Vattel, were popular among the early American leaders. He wrote: "[I]f . . . we are absolutely constrained to undertake a war, we ought first to declare it in form to the enemy."[30] In fact, more people than just these natural law writers shared the opinion that a declaration of war ought to precede hostilities. During the Enlightenment, Jean-Jacques Rousseau wrote: "The foreigner (be he king, private individual, or a people) who robs, kills, or detains subjects of another prince without declaring war on the prince, is not an enemy but a brigand."[31] The Abbe Raynal, another Enlightenment writer, characterized England's attack on Dutch settlements and ships without a declaration of war as "cowardly and perfidious," and warned that an acceptance of undeclared wars would lead to an era of perpetual war.[32] Contrary to the

made by the International Court of Justice for those writers whose works serve "as subsidiary means for the determination of rules of law." GEN. COUNSEL OF THE DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 36, 36 n.158 (June 2015) [hereinafter DOD LAW OF WAR MANUAL].

30. BURLAMAQUI, *supra* note 20, at 269.

31. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 9 (Donald A. Cress trans., Hackett Publ'g Co. 2d ed. 2019) (1762).

32. 2 ABBÉ RAYNAL, A PHILOSOPHICAL AND POLITICAL HISTORY OF THE SETTLEMENTS AND TRADE OF THE EUROPEANS IN THE EAST AND WEST INDIES 259–60 (J. Justamond trans., 1783) (1770). England's actions commenced the Second Anglo-Dutch War. Since pro-Executive supporters also use the Second Anglo-Dutch War as an example of European acceptance of undeclared wars, I believe it prudent to cite most of Raynal's commentary. Raynal reported:

> [W]ith one consent, [Charles II and his brother] ordered that the settlements and ships of the Dutch should be attacked, without any previous declaration of war. Hostilities begun in this manner are both cowardly and perfidious. They are the act of a hord of savages, and not of a civilized nation; of a dark assassin, and not of a warlike prince. No person who puts any confidence in his strength, and who hath any elevation of soul, will surprise a sleeping adversary. If any one may be allowed to take advantage of my security, may I not also avail myself of his? Such conduct compels both parties to be incessantly in arms; the state of war becomes permanent, and peace is no more than a word, devoid of meaning. There is either a just reason for attacking an enemy, or there is none. If there be none, the party that begins the attack is nothing more than a dangerous robber, against whom all ought to unite, and whom they have a right to exterminate. If, on the contrary, there be a reason for commencing hostilities, it ought to be notified. Nothing can authorize the seizure of possessions, except the refusal to repair an injury, or to restore any thing that is usurped. Before you become the aggressor, let the world be convinced of the injustice that is done to you. The only thing that can be allowed, is to make secret preparations for revenge, to dissemble your projects, if they cause any alarm, and to leave no interval between the refusal of justice and the beginning of hostilities. If you should be weaker than your adversary, you must intreat and suffer with patience. Must you be a traitor, because another person is an usurper?

pro-Executive position, then, influential seventeenth- and eighteenth-century writers did believe that a declaration of war ought to precede hostilities. Still, pro-Executive supporters press the argument further, saying by the late eighteenth century "hostilities in the absence of a declaration of war were the norm."[33] To support this claim, pro-Executive supporters lean heavily on the examples of England's entry into the Thirty Years' War and British actions at the outset of the Seven Years' War.[34] The example of England's entry into the Thirty Years' War is a very poor example. First, England played only a minor role, both militarily and

5 ABBÉ RAYNAL, A PHILOSOPHICAL AND POLITICAL HISTORY OF THE SETTLEMENTS AND TRADE OF THE EUROPEANS IN THE EAST AND WEST INDIES (J. Justamond trans.) (1784) Immanuel Kant, another Enlightenment writer, also believed declarations of war were required prior to initiating war or hostilities. IMMANUEL KANT, THE PHILOSOPHY OF LAW, AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 217 (W. Hastie trans. 1887) (1796) ("As such [the citizens] must give their free consent, through their representatives, not only to the carrying on of war generally, but to every separate declaration of war; and it is only under this limiting condition that the State has a Right to demand their services in undertakings so full of danger."). Finally, Cicero, a man whose ideas the early American leaders embraced, wrote in *De Officiis (On Obligations)*—a book that the early American leaders held in high esteem—that "no war is just unless it is preceded by a demand for satisfaction, or unless due warning is given first, and war is formally declared." CICERO, ON OBLIGATIONS 14 (P.G. Walsh trans., Oxford Univ. Press 2000) (44 B.C.).

33. Yoo, *supra* note 23, at 208. In addition to the Thirty Years' War and the Seven Years' War, pro-Executive supporters favor a quote by John Adams in a letter to Samuel Adams to show the obsolescence of declarations of war. *See* Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 99 (2008) ("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.'" (quoting 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., 1889))). However, this is a truncated picture of what John Adams actually wrote. *See* Letter from John Adams to Samuel Adams (Feb. 14, 1779) *in* 7 THE ADAMS PAPERS: THE PAPERS OF JOHN ADAMS 412 (Harv. Univ. Press 1989) ("You say that France should be our Pole Star in Case War should take Place. I was I confess, surprized at this Expression. Was not War sufficiently declared in the King of Englands Speech, and in the answers of both Houses, and in the Recall of Ambassadors, and in actual Hostilities in most Parts of the World? I think there never will be any other Declaration of War. . . ."). First, we see that John Adams is reacting against Samuel Adams's inference that war currently is not taking place. Next, we see that John Adams lists four different actions by England considered declarations of war, three of which are diplomatic maneuvers and precede hostilities. Finally, we see John Adams's belief that "there never will be any other Declaration of War" does not mean he believes that declarations of war are obsolete. *Id.* John Adams meant that he did not believe England would issue another declaration of war in addition to those already issued.

34. Michael D. Ramsey, *Textualism and War Powers*, 69 UNIV. CHI. L. REV. 1543, 1591 (2002); Yoo, *supra* note 23, at 214 (1996).

diplomatically, in the Thirty Years' War.[35] Second, England's actions in 1624 predated any international order with which the early American leaders

35. Though it is far too complicated to give a complete historical account in the available space, it still will be worthwhile to provide a brief historical overview in support of the present point. It is inaccurate to speak of England's 1624 "entry into the Thirty Years' War" as an entry into hostilities. James I married his daughter Elizabeth to Frederick V, elector of the Palatinate. L.J. REEVE, CHARLES I AND THE ROAD TO PERSONAL RULE 9 (2003). In 1618, Frederick accepted election to the Bohemian crown, putting him into conflict with Ferdinand II of the Holy Roman Empire. *Id.* In 1620, Ferdinand's Imperial army decisively defeated the Bohemian Revolt, forcing Frederick and Elizabeth into exile. *Id.* at 9–10. Later in 1620, a Spanish army invaded the Palatinate, effectively confiscating the holdings of James's daughter and son-in-law. *Id.* at 10. From that point, James' foreign policy consisted of trying to restore Elizabeth's and Frederick's Palatine holdings by creating a marriage alliance with Spain. *Id.* Now, to backtrack a bit, the Thirty Years' War was not one large, self-contained conflict. Rather, it was a collection of peripheral conflicts that, at different times, orbited around the Austrian Hapsburg's conflict in the Holy Roman Empire against varying alliances of German principalities, Denmark, Sweden, and France. For a brief catalog of these various conflicts, *see* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 22 (2002) (describing how different groups of historians classify the various conflicts occurring in Europe in the seventeenth century). One of those peripheral conflicts was the Eighty Years' War between Spain, the United Provinces, and England. The Eighty Years' War predated the Thirty Years' War and was, itself, composed of three separate conflicts: the Dutch Revolt (1568–1648), and two Anglo-Spanish wars (1585–1604 and 1625–1630). HUGH DUNTHORNE, BRITAIN AND THE DUTCH REVOLT 1560–1700, at 63 (2013). For the first twenty years, Elizabeth I maintained neutrality; however, in 1585, "faced by an increasingly hostile and powerful Spain," Elizabeth entered into a political and military alliance with the United Provinces by signing the Treaty of Nonsuch. *Id.* at 71. After entering into this treaty, Elizabeth issued a declaration "published in no fewer than six languages" that explained why "the Dutch Revolt was not an illegal rebellion against an anointed king but rather a just war of self-defence." *Id.* at 181. In 1604, James, then the King of England, signed the Treaty of London, making peace with Spain. THOMAS COGSWELL, THE BLESSED REVOLUTION: ENGLISH POLITICS AND THE COMING OF WAR, 1621–1624, at 13 (1989). However, James made clear that the treaty did not preclude future defensive aid to the United Provinces. Letter from Viscount Cranborne to Mr. Winwood (Sept. 4, 1604), *in* 2 MEMORIALS OF AFFAIRS OF STATE IN THE REIGNS OF Q. ELIZABETH AND K. JAMES I 27, 27–28 (Sir Ralph Winwood ed., 1725) (describing how King James I's interpretation of the Treaty of London will be friendly to the Dutch). In addition, the treaty allowed those English soldiers already serving in the United Provinces to continue serving, and it allowed the Dutch to continue recruiting in England. *Id.* In 1609, the United Provinces and Spain agreed to a twelve-year truce. PETER H. WILSON, THE THIRTY YEARS WAR: EUROPE'S TRAGEDY 164 (2009). In 1618, the Bohemian Revolt—the first phase of the Thirty Years' War–began. *Id.* at 269. In 1620, after the overwhelming Imperial victory forced Frederick and Elizabeth into exile, the Spanish Army previously mentioned invaded the Palatinate, the holdings of James's daughter and son-in-law. REEVE, *supra*, at 10. James sought to solve the issue by marrying his son, Charles I, to the Spanish Infanta. *Id.* During that time, in 1621, the twelve-year truce between Spain and the United Provinces expired just as the Bohemian Revolt ended, and the war widened. WILSON, *supra*, at 317. James attempted to stay out of the renewed fighting between Spain and the United Provinces and pursue negotiations with Spain. *Id.* at 364. However, after the marriage negotiations with Spain finally collapsed, James entered into "a defensive treaty" with the United Provinces that "stipulated that James would maintain 6,000 English troops to serve in the United Provinces for at least two years." COGSWELL, *supra*, at 256. This did not begin hostilities; indeed, "[h]ostilities with Spain had not commenced when James died in early 1625. . . ."

would have been familiar. It predated the publication of Hugo Grotius's *On the Rights of War and Peace*, and it predated the birth of John Locke, Baron de Montesquieu, and the early American leaders themselves. In short, England's entry into the Thirty Years' War predated the very international order in which the early American leaders lived, and it predated the very beginnings of the intellectual tradition that the early American leaders followed.[36] It is a very poor example, indeed. With regards to British actions at the outset of the Seven Years' War, the pro-Executive position is specious. It argues that the British government's initiation of hostilities prior to a declaration of war illustrates the accepted practices of the day.[37] Balthazard Emerigon, a French lawyer whose writings had a considerable impact on early United States jurisprudence,[38] commented on the British government's actions, writing that "hostilities not preceded by declaration of war are true *brigandages*," and "[t]he hostilities exercised by the English in

REEVE, *supra*, at 11. Thus, it is inaccurate to speak of English actions in 1624 as "entering the Thirty Years' War" in the sense of entering hostilities. Rather, English actions in 1624 were confined to diplomatic efforts to restore the Palatinate to Frederick and Elizabeth, to parliamentary preparations for war, and to entering into a defensive alliance with the United Provinces to check Hapsburg military expansion.

36. BAILYN, *supra* note 17, at 34 (explaining "[t]he ultimate origins of [the early American leaders'] distinctive ideological strain lay in the radical social and political thought of the English Civil War and of the Commonwealth period"). The English Civil War began in 1642 and the Commonwealth was founded in 1649. SIMON JENKINS, A SHORT HISTORY OF ENGLAND 176–77, 353 (2011) Thus, the example of England's entry into the Thirty Years' War predates the very beginnings of the early American leaders' intellectual tradition by twenty years. One of the early American leaders' "intellectual heroes and major influences" was James Harrington. THEODORE DRAPER, A STRUGGLE FOR POWER: THE AMERICAN REVOLUTION 44 (1997). JGA Pocock, in his classic study, called Harrington "[t]he crucial figure" in demonstrating "that the English-speaking political tradition has been a bearer of republican and Machiavellian, as well as constitutionalist, Lockean[,] and Burkean, concepts and values." J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION, xxiv (2016). In fact, Pocock wrote that Harrington's *The Commonwealth of Oceana* "is one of those works that transcend their immediate context. The book's historical significance is that it marks a moment of paradigmatic breakthrough, a major revision of English political theory and history in the light of concepts drawn from civil humanism and Machiavellian republicanism." *Id.* at 384. Thus, Harrington's *The Commonwealth of Oceana* was an important work that was very influential to the early American leaders. It was published in 1656, more than thirty years after England's actions in 1624.

37. Yoo, *supra* note 23, at 214.

38. Courts cited Emerigon's work 144 times in decisions prior to 1860. M.H. Hoeflich, *Translation and the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 772 (2002).

1755, without declaration of war, revolted all Europe."[39] In fact, "by the autumn of 1755 the situation of the [British] ministry appeared unenviable"

39. BALTHAZARD MARIE EMERIGON, A TREATISE ON INSURANCES 437 (Samuel Meredith trans., 1850) (1783). British actions at the outset of the Seven Years' War created a domestic and international atmosphere to which the United States should hardly aspire:

> Without realizing any substantial gain, the British had muddled their way into the posture of an international aggressor, while the French had landed sufficient men and arms to defend Canada and enable Onontio's allies to threaten the frontier of every American colony from New Hampshire to North Carolina. British policies had, in short, handed both the casus belli and the strategic advantage to France, giving the French court occasion and motive to declare war. Newcastle's relations with the man he blamed for these disasters—the duke of Cumberland—had deteriorated so far that they had become the subject of common gossip. At home, the British government was paralyzed; abroad, Britain's diplomatic position was in disarray.

FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754–1766, at 124 (2001). Lord Mahon wrote:

> But only a few days later counter-instructions were sent in all haste for Hawke, directing him to seize and destroy every thing French, trade or men of war, between Cape Ortegal and Cape Clear. These last orders produced a large number of lucrative captures; but as they were still unaccompanied with any notice or declaration of war they gave some handle to the French Government for inveighing against the perfidy and Punic faith of our's, and of calling us robbers and pirates.

4 LORD MAHON, HISTORY OF ENGLAND FROM THE PEACE OF UTRECHT TO THE PEACE OF VERSAILLES 48–49 (3d ed. 1853). The pro-Executive argument regarding the Seven Years' War betrays a misunderstanding of the war's admittedly complicated history. The pro-Executive supporters seem to misunderstand that the absence of a declaration of war was not because British or French leaders considered it unimportant—in fact, quite to the contrary. British leaders believed that a declaration of war likely would begin a continental war for which they were ill-prepared and indeed, when the declaration did come, it led to a global war that spanned five continents. JAMES, 2ND EARL WALDEGRAVE, MEMOIRS OF 1754–1757, *reprinted in* THE MEMOIRS AND SPEECHES OF JAMES, 2ND EARL WALDEGRAVE, 1742–1763, at 146, 169 (J.C.D. Clark ed., 1988) ("After mature Deliberation, it was resolved *that* [Sir Edward Hawke] *should sail with hostile orders; but War was not to be declared.* Either Extreme had been better than this compromise for it was in our Power to have remain'd quite till we had been thoroughly prepar'd for Action . . . ."). French leaders, on the other hand, avoided declaring war because doing so would mean that the French ships captured by the British would become legitimate war prizes, ensuring that French leaders would never recover the ships. *See* ANDERSON, CRUCIBLE OF WAR, *supra*, at 127 (2000) (stating "the French . . . were refraining from a formal declaration of war solely to build up their navy."). In addition, French leaders were in the middle of reforming the French navy, and the loss of so many ships would significantly diminish the French Navy's ability to challenge the British Navy. *See id.* (characterizing the bolstering of its navy as a high priority for France). Finally, these naval reforms meant that taxes already were high; any war would require French leaders to borrow money at a time when they were trying to pay down debts. FRED ANDERSON, THE WAR THAT MADE AMERICA: A SHORT HISTORY OF THE FRENCH AND INDIAN WAR 55 (2006). Thus, the lack of a British declaration of war was an attempt to avoid starting a continental war over minor colonial frontier skirmishes. At the same time, British leaders attempted to use small frontier actions, as well as naval actions, to convince France to abandon its colonial claims

and its Indian alliances in North America, thus eliminating any need for declaring war. *See id.* at 55–57 (describing French reasons for not declaring war and Britain's desire to accomplish its goals in North America without declaring war); *see also* ANDERSON, CRUCIBLE OF WAR, *supra*, at 127–29 (describing France's decision to delay declaring war until after it finished naval reforms and describing the delicate diplomatic and military alliances Britain faced in Europe). The lack of a French declaration of war was because French leaders did not want to legitimize British actions against French shipping, and because ongoing reforms to the French Navy meant that the navy was not prepared for war. ANDERSON, THE WAR THAT MADE AMERICA, *supra*, at 55. They preferred to use the international community's public opinion to halt British actions and recover their ships and sailors. Neither the British nor French approach succeeded; however, the British leaders' approach harmed Britain militarily and diplomatically in the first part of the war while the French leaders' approach increased sympathy for France, giving France the stronger position in the first part of the war. The subsequent history of the Seven Years' War further undermines the pro-Executive argument. The European theater of The Seven Years' War began with Prussia's invasion of Saxony and the commencement of the Third Silesian War (1756-63). *Id.* at 101; SHARON KORMAN, THE RIGHT OF CONQUEST 72 n.24 (1996). In August 1756, only a few months after Britain and France declared war, Britain's ally Frederick II, contrary to British wishes, launched an undeclared invasion of Saxony (though it seems Frederick may have drafted a war manifesto in July 1756, one month before the invasion). ANDERSON, THE WAR THAT MADE AMERICA, *supra*, at 105; FRANZ A.J. SZABO, THE SEVEN YEARS WAR IN EUROPE: 1756–1763, at 19 (2013). However, other European leaders did not accept this undeclared invasion as legitimate. Rather, they considered it "a breach of the Law of Nations," and the international resistance to the invasion was so great that Frederick felt compelled to publish a defense of his actions. 3 ANTHONY GUGGENBERGER, A GENERAL HISTORY OF THE CHRISTIAN ERA 70 (2d ed. 1902). Indeed, "[o]nce in Prussian hands the most damaging [Saxon] documents were published as 'Detailed Memoir on the Conduct of the Courts of Vienna and Saxony,' which again sought to establish that Prussia had been forced into war by the aggressive designs of her neighbours." SZABO, *supra*, at 38. Even Frederick's later history of the war attempted to justify the invasion by establishing several actions as "declarations of war" against Prussia that forced Frederick's invasion of Saxony. 2 FREDERIC II, POSTHUMOUS WORKS OF FREDERIC II KING OF PRUSSIA 66–96 (Thomas Holcroft trans., 1789). These defenses did not work, and "Prussia found itself even more isolated and cast in the role of brutal aggressor" and facing a coalition arrayed against it. MICHAEL HOCHEDLINGER, AUSTRIA'S WAR OF EMERGENCE 1683–1797, at 337 (2003). It is telling that contemporaries considered Frederick's invasion of Saxony the beginning of the war rather than the actions in North America, even though Frederick attempted to justify his invasion by claiming the war already had started in North America: "The contemporary European public gave little credence to [Frederick's] justificatory writings and posterity, apart from the admirers of the king who wanted to put him morally in the right, also saw Frederick as the person who had unleashed the war." Jürgen Luh, *Frederick the Great and the First 'World' War*, *in* THE SEVEN YEARS' WAR: GLOBAL VIEWS 1, 3 (Mark H. Danley & Patrick J. Speelman eds., 2012). By the latter part of the war, Britain had gained an upper hand. But in 1761, Spanish leaders signed a treaty with France declaring, among other things, their intent to enter the war as France's ally if the war was not concluded by 1762. ANDERSON, CRUCIBLE OF WAR, *supra*, at 484. Some senior British officials (William Pitt chief among them) felt that this alliance posed a great danger and recommended initiating hostilities against Spain at once. *Id.* However, these officials still believed that a declaration of war against Spain was necessary before initiating hostilities. *Id.* The vast majority of British senior officials, though, refused several times to support a declaration of war against Spain. *Id.* at 484–85. Thus, if the British senior leadership felt, as pro-Executive supporters believe, that declarations of war, on the whole, were unnecessary, it is unclear why they felt that one was necessary in order to initiate hostilities against a country whose leaders already had declared their intent to enter the war as a belligerent within the next

and "[i]n the first place its American policies [that led to credible charges of piracy against the British] had not succeeded."[40] Partly as a result of those policies, "[Britain] did not have a dependable ally in Europe."[41] Thus, the international community that the early American leaders joined was not as accepting of undeclared hostilities as pro-Executive supporters contend.[42]

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year and who were already providing aid to Britain's primary enemy. Hostilities did not begin until circumstances led the British leaders to declare war on Spain in January 1762. RICHARD MIDDLETON, THE BELLS OF VICTORY: THE PITT-NEWCASTLE MINISTRY AND CONDUCT OF THE SEVEN YEARS' WAR 192–94 (1985); MARK H. DANLEY & PATRICK SPEELMAN, THE SEVEN YEARS' WAR: GLOBAL VIEWS 430–32 (2012).

40. MIDDLETON, *supra* note 39, at 3; s*ee also* DANIEL BAUGH, THE GLOBAL SEVEN YEARS' WAR 1754–1763: BRITAIN AND FRANCE IN A GREAT POWER CONTEST 147 (2014) (discussing Britain's operations in 1755). Baugh writes:

> Although the effort to intercept and defeat French naval squadrons was an utter failure, the seizing of French merchant ships and their seaman was a significant success. Of course, it was far from heroic; the surprised French vessels were helpless, their crews stunned. Understandably, Versailles deemed these seizures piracy . . . . But otherwise the French government did nothing. Its submissive inactivity was excused in the name of peace but the policy was also consistent with hopes of recovering the captured vessels and crews by negotiation . . . . Unchecked, the Royal Navy continued to take French ships and crews. Of course, as the months passed the idea that these were temporary detentions lost credibility.

41. MIDDLETON, *supra* note 39, at 3.

42. In fact, Vattel believed that attacking without a declaration of war was an unpardonable act. A leader that launched an informal war could become an "enemy of mankind," and the defensive state was relieved from following the laws of war. VATTEL, *supra* note 21, at 359. As an envoy for Saxony during the Seven Years' War, Vattel employed his theory practically, denouncing Prussia's undeclared invasion of Saxony as illegitimate. WALTER RECH, ENEMIES OF MANKIND: VATTEL'S THEORY OF COLLECTIVE SECURITY 132 (2013). By labeling such leaders enemies of mankind, Vattel "stated that such international criminals should be repressed by a coalition of states relieved from any obligation to observe the laws of war in retaliation" *Id.* at 1. As an example, Vattel, describes Savoy's 1602 surprise attack on Geneva, writing:

> The inhabitants of Geneva, after defeating the famous attempt to take their city by escalade, caused all the prisoners whom they took from the Savoyards on that occasion to be hanged up as robbers, who had come to attack them without cause and without a declaration of war. Nor were the Genevese censured for this proceeding, which would have been detested in a formal war.

VATTEL, *supra* note 21, at 424. Still, others may object, as Michael Ramsey does, that eighteenth century Europe saw several undeclared wars, or at least wars declared after hostilities actually had begun. Ramsey, *supra* note 34, at 1544–47. For this reason, Ramsey finds it "a stretch" to imagine that the early American leaders insisted on congressional authorization before any offensive military action. *Id.* at 1552 n.36. This position, though, puts Ramsey at odds with Cornelius van Bynkershoek. Though Bynkershoek did say that a declaration of war was not part of the Law of Nations, he also noted that declaration of war prior to the initiation of hostilities was the accepted custom among European nations. *See* CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 11 (Peter Stephen Du Ponceau trans., Farrand & Nicholas 1810) (1737) ("[A]s far as I have been able to learn, none but the *European* nations declare war; nor even do they all or always do it, but they are accustomed so to

Nonetheless, pro-Executive supporters press the argument one step further. They argue that declarations of war had two primary purposes.[43] The first was to "[notify] the enemy that a state of war existed between them" in order to "receive the protection of international law."[44] The second purpose was to "inform[] citizens of an alteration in their legal rights and status."[45] However, this argument, too, is inaccurate. Notification to the enemy and appraisal to a state's citizens of their altered legal status were purposes of a declaration of war but neither was the primary purpose. The primary purpose of a declaration of war was, in fact, to avoid hostilities.[46]

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do after the example of the *Romans*, for no other reason perhaps than because the *Romans* did so before them.") Indeed, Bynkershoek's criticism of Grotius was not that Grotius wrote that declarations of war prior to the initiation of hostilities was common in Europe, rather Bynkershoek's criticism of Grotius was that Grotius tried to take a regional custom and make it a universal law binding all states. *See id.* at 11 ("[Grotius attempted] to deduce the necessity of declaring war, from its being commonly done among *European* nations, though he well knew that that was not sufficient to constitute the general law."). It is not at all clear then why saying that the early American leaders insisted on congressional authorization prior to conducting offensive military operations would be a stretch. According to Bynkershoek, such a practice was, at the very least, a regional European custom, and there is little evidence that the early American leaders approved of the instances in which European powers did fight undeclared wars. *Id.* However, there are examples of the early American leaders contrasting their new state with the European powers' predisposition for war and admonishing that a similar predisposition for war on the part of the United States would result in the same loss of liberties experienced by the citizens of the European powers. *See* The Federalist No. 34, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? No reasonable man would hastily pronounce that we are entirely out of its reach."). Thus, one of the great difficulties in the war powers debate arises from the assertion that the early American leaders must have approved of fighting undeclared wars because other states fought undeclared wars. *See* Ramsey, *supra* note 34, at 1558 ("The 'undeclared' war was very much a part of eighteenth-century reality, as eighteenth-century Americans surely knew."). Scholars make this assertion even though no mechanism for fighting an undeclared war appears in the U.S. Constitution. *See generally* U.S. CONST. arts. I–II (failing to prescribe any powers relating to undeclared war); *see also* Ramsey, *supra* note 34, at 1560 (acknowledging the competing argument that "Congress seems to have most of the war powers specifically allocated by the text").

43. *See* Yoo, *supra* note 23, at 206–07 (explaining how a "declaration of war played a dual legal purpose").

44. *Id.* at 206.

45. *Id.* at 207.

46. *See* PUFENDORF, *supra* note 19, at 839 n.2 (stating prudence and equity are demanded before declaring war). Specifically, Pufendorf states:

> The Declaration of War, considered in itself, and independently of the particular Formalities of every People, does not simply belong to the *Law of Nations*, taking this Word in the Sense that *Grotius* and others give it, but to the Law of Nature. Indeed, Prudence and natural Equity, equally demand, that before we take up Arms against any one, we should try all amicable Ways, to avoid coming to such grievous Extremities. We ought to summon him that has done us any Damage,

Hugo Grotius considered it "decent and laudable" that a declaration of war be made "in order, for instance, to avoid offense, or to give room for making atonement for the delict by repentance and satisfaction as we have said in speaking of the ways of avoiding war."[47] Emer de Vattel believed a "declaration of war [to be] necessary, as a further effort to terminate the difference without the effusion of blood."[48] By declaring war, "we provide for our own safety and equally attain the object of a declaration of war, which is, to give an unjust adversary the opportunity of seriously considering his past conduct, and avoiding the horrors of war, by doing justice."[49] Indeed, "the principal end of declarations of war . . . is to let all the world know that there was just reason to take up arms, and to signify to the enemy himself, that it had been, and still was, in his power to avoid [hostilities]."[50] If the seventeenth- and eighteenth-century natural law writers intended for declarations of war to serve as a last chance to avoid hostilities, then what good would a declaration of war be if it did not precede the initiation of hostilities?

The seventeenth and eighteenth century natural law writers also taught that "the Declaration of War has no place but in *Offensive War*."[51] In earlier eras, "the powers of Europe used to send heralds, or ambassadors to declare

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> to make us a speedy Satisfaction, to see if he will have regard to himself, and not put us to the hard Necessity of pursuing our Right by forcible Means . . . . From thence it also follows, that we must not begin Acts of Hostilities immediately upon declaring War; but must stay till he from whom we received the Damage, plainly refuses to give us Satisfaction, and has put himself in a Condition to receive us with Bravery and Resolution: Otherwise the Declaration of War would be nothing but a vain Ceremony, without any Effect.

Id.

47. GROTIUS, *supra* note 18, at 319.

48. VATTEL, *supra* note 21, at 418.

49. *Id.* at 420.

50. BURLAMAQUI, *supra* note 20, at 272.

51. PUFENDORF, *supra* note 19, at 840 n.2; *see* BURLAMAQUI, *supra* note 20, at 269 ("From what has been said it follows, that this declaration takes place only in *offensive wars*. . . ."); *see also* VATTEL, *supra* note 21, at 419 ("He who is attacked and only wages defensive war, needs not to make any hostile declaration,—the state of warfare being sufficiently ascertained by the enemy's declaration. . . ."). In addition, Montesquieu implies that declarations of war are synonymous with offensive war. 1 M. DE MONTESQUIEU, THE COMPLETE WORKS OF M. DE MONTESQUIEU 175 (London, T. Evans & W. Davis 1777) ("[W]ith states, the right of natural defense carries along with it sometimes the necessity of attacking; as, for instance, when one nation sees that a continuance of peace will enable another to destroy her, and that to attack that nation instantly is the only way to prevent her own destruction. From thence it follows, that petty states have oftener a right to declare war than great ones, because they are oftener in the case of being afraid of destruction.").

war" to an opposing state.[52] Over time though, this formality fell out of practice and that of domestically publishing declarations of war, also called manifestos, replaced it.[53] This was the situation that concerned Alexander Hamilton when he wrote "the ceremony of a formal denunciation of war has of late fallen into disuse."[54] Hamilton was dealing with the anti-federalist position that standing armies should be outlawed in times of peace.[55] Hamilton responded by arguing that the days of formal denunciations of war were over.[56] Instead, European powers published declarations of war domestically, and it was the enemy nation's responsibility to become aware of the declaration.[57] Since an ocean separated the United States from Europe, it was possible that enemy soldiers would reach the United States before news of a declaration of war.[58] Thus, contrary to the

52. VATTEL, *supra* note 21, at 419.

53. *See id.* ("[A]t present, [the powers of Europe] content themselves with publishing the declaration in the capital, in the principal towns, or on the frontiers: manifestoes are issued; and, through the easy and expeditious channels of communication which the establishment of posts now affords, the intelligence is soon spread on every side."); *cf.* BURLAMAQUI, *supra* note 20, at 271 ("As to the formalities observed by different nations in declaring war, they are all arbitrary in themselves. 'Tis therefore a matter of indifference, whether the declaration is made by envoys, heralds, or letters; whether to the sovereign in person, or to his subjects, provided the sovereign cannot plead ignorance of it."). Regarding the synonymy of "manifesto" with "declarations of war": "[T]he word 'manifesto' [was] normally used in declarations of war between states. . . ." CAMBRIDGE UNIV., THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY POLITICAL THOUGHT 469 (Mark Goldie & Robert Wokler eds., 2006); *see also* Oona A. Hathaway et. al., *War Manifestos*, 85 U. CHI. L. REV. 1139, 1139 (2018) (defining "war manifestos" as "documents that set out the legal reasons sovereigns provided for going to war from the late fifteenth through the mid-twentieth centuries")

54. THE FEDERALIST NO. 25 (Alexander Hamilton).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* Hamilton's discussion on declarations of war specified:

> If . . . it should be resolved to extend the prohibition to the *raising* of armies in time of peace, the United States would then exhibit the most extraordinary spectacle, which the world has yet seen—that of a nation incapacitated by its constitution to prepare for defence, before it was actually invaded. As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger, and meet the gathering storm, must be abstained from, as contrary to the genuine maxims of a free government. We must expose our property and liberty to the mercy of foreign invaders, and invite them, by our weakness, to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice—dependent on our will—might endanger that liberty, by an abuse of the means necessary to its preservation.

pro-Executive interpretation, Alexander Hamilton was not saying that declared wars by that time were obsolete. He was saying that the way in which wars were declared had changed.[59] One also must differentiate between the contemporary concept of offensive war and the seventeenth and eighteenth century natural law writers' concept of offensive war. The contemporary international community generally agrees that the state that commits the first aggression commences an offensive war.[60] This, however, was not the case in the seventeenth and eighteenth centuries.[61] Rather, in the seventeenth and eighteenth centuries, a state that first sought to resolve a dispute primarily through force, whether that state did so justly or unjustly,

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> Here I expect to be told, that the Militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine in substance had like to have lost us our independence.

Id.

59. In previous eras, formal denunciations of war required one sovereign to notify another sovereign that a state of war existed between them. By the eighteenth century, though, international law required sovereigns "to issue a manifesto for the benefit of the general public describing the rights that they aimed to maintain." JAMES Q. WHITMAN, THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR 125 (2012). Thus, whereas formal denunciations of war previously had been made directly to the enemy, international law in the eighteenth century "required sovereigns to declare their cause to the world, not to their enemy." *Id.*

60. Indeed, the contemporary international community categorizes aggression as "the supreme international crime." Benjamin B. Ferencz, *A Nuremberg Legacy: The Crime of Aggression*, 15 WASH. U. GLOB. STUD. L. REV. 555, 558 (2016). The contemporary international community considers offensive military action tantamount to aggression. *See* G.A. Res. 3314 (XXIX), art. 3(d) (Dec. 14, 1974) (qualifying "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" as "an act of aggression").

61. BURLAMAQUI, *supra* note 20, at 248–49 (discussing the seventeenth and eighteenth century view on offensive war). Specifically, Burlamaqui stated:

> Neither are we to believe, that he who first injures another, begins by that an offensive war, and that the other, who demands satisfaction for the injury received, is always upon the defensive. There are a great many unjust acts which may kindle a war, and which however are not the war; as the ill treatment of a prince's ambassador, the plundering of his subjects, etc. If therefore we take up arms to revenge such an unjust act, we commence an offensive, but a just war; and the prince who has done the injury, and will not give satisfaction, makes a defensive, but an unjust war.

Id.; *see also* PUFENDORF, *supra* note 19, at 834–35 ("[Offensive wars] are, when men extort their Rights that are denied by Force, attempt to recover what hath been unjustly taken from them, and require *Caution* for the future."). Pufendorf's editor cites the previous quotation from Burlamaqui with a minor difference: "Neither must we believe, that he who is the first Aggressor begins by that an *offensive* [w]ar." *Id.* at 835 n.1.

commenced an offensive war.[62] Simple provocations, then—even to the point of military encounters—did not constitute the commencement of a war.[63] Alexander Hamilton, in 1793, expressed this same understanding.[64]

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62. A good example is the lead-up to the United States Revolutionary War. Pro-Executive supporters argue that the Revolutionary War began without a declaration of war—that war already was under way when the early American leaders wrote the Declaration of Independence. This is true; however, it is also true that the Declaration of Independence was not the only thing the delegates wrote between 1774 and 1776. When the delegates convened in the summer of 1776 they already had authorized military action. Pro-Executive supporters mistakenly interpret the first skirmishes at Lexington and Concord as the beginning of the war (this is the same mistake pro-Executive supporters make regarding the Seven Years' War, confusing the colonial skirmishes for the beginning of the war rather than as the occasions leading to the war). The mistake is understandable, and, though today people generally consider the skirmishes at Lexington and Concord as the beginning of the Revolutionary War, such was not the case at the time. While some, such as John Adams and Thomas Jefferson, did believe the skirmishing at Lexington and Concord had begun the war, the majority of delegates at the Second Continental Congress did not. *See, e.g.,* 1 PAGE SMITH, JOHN ADAMS 198–99 (1962) (describing how much apprehension there was among the delegates of the Second Continental Congress, particularly the New Englanders and the Pennsylvanians, after the battle of Lexington and Concord). They believed that war had become inevitable, but it had not yet begun. 1 WORTHINGTON CHAUNCEY FORD, GEORGE WASHINGTON 162 (1900). On June 14, 1775, in response to the skirmishes at Lexington and Concord, Congress created the Continental Army by adopting the Massachusetts militia, currently blocking the land routes to and from Boston. Report (June 14, 1775), *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 (William Chauncey Ford ed., 1905), https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00235)) [https://perma.cc/TQ72-S89L]. Congress also appointed George Washington as the new army's commander in chief. Letter to George Washington (June 17, 1775), *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 96 (Worthington Chauncey Ford ed., 1905). On June 17, 1775, British forces in Boston attacked colonial positions on Bunker Hill and Breed's Hill. NATHANIEL PHILBRICK, BUNKER HILL, at xiii (2014). On July 6, 1775, the Continental Congress approved The Declaration of Causes and Necessity of Taking Up Arms. STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 255 (2005). This was a declaration of war on parliament. Indeed, one delegate called the declaration "a manifesto or declaration of War." Letter from Joseph Hewes to Samuel Johnston (July 8, 1775), *in* 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 160 (Edmund C. Burnett ed., Carnegie Inst. 1921). John Adams also called it a "Spirited Manifesto." Letter from John Adams to James Warren (July 6, 1775), *in* 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, *supra*, at 151, 152. The declaration reads, in part:

> With hearts fortified with these animating reflections, we must solemnly, before God and the world, *declare*, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ from the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves.
>
> Lest this declaration should disquiet the minds of our friends and fellow-subjects in any part of the empire, we assure them that we mean not to dissolve that union which has so long and so happily subsisted between us, and which we sincerely wish to see restored. —Necessity has not yet driven us into that desperate measure, or induced us to excite any other nation to war against

> them. —We have not raised armies with ambitious designs of separating from Great Britain, and establishing independent states. . . .
>
> In our own native land, in defence of the freedom that is our birthright, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our forefathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before.

Declaration of Causes and Necessity of Taking Up Arms (July 6, 1775), *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 10, 16 (Charles C. Tansill ed., 1927). Two days later, on July 8, 1775, Congress sent the Olive Branch Petition to King George III asking him to mediate the now-declared conflict between the colonies and Parliament. Petition to the King (July 8, 1775), *in* 2 Journals of the Continental Congress, *supra*, at 158, https://avalon.law.yale.edu/18th_century/contcong_07-08-75.asp [https://perma.cc/DR9H-UHJE]. On August 23, 1775, in response to news of the fighting at Bunker Hill, King George III issued A Proclamation for Suppressing Rebellion and Sedition. KING GEORGE III, A PROCLAMATION, BY THE KING, FOR SUPPRESSING REBELLION AND SEDITION (Aug. 23, 1775), *in* 3 AMERICAN ARCHIVES, FOURTH SERIES 240, 240–41 (Peter Force ed., 1840). On September 1, 1775 he refused the Olive Branch Petition. JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY 1774–1776, at 59 (2014). In early September 1775, two months after Congress adopted The Declaration of Causes and Necessity of Taking Up Arms, the first engagements of the United States invasion of Canada occurred, and the Revolutionary War began in earnest. MARK ANDERSON, THE BATTLE FOR THE FOURTEENTH COLONY: AMERICA'S WAR OF LIBERATION IN CANADA 1774–1776, at 93–101 (2013). As a result, on October 27, 1775, King George III extended his proclamation of August 23, and, in response, the Second Continental Congress began moving towards independence, thus extending the objectives of the already-declared war to include independence. His Majesty's Most Gracious Speech to Both Houses of Parliament (Oct. 27, 1775), https://www.loc.gov/resource/rbpe.10803800?st=image&pdfPage=1 [https://perma.cc/LFQ4-9ZTD] (proclaiming the colonies to be in open rebellion). Throughout the entire process, the early American leaders closely followed the seventeenth- and eighteenth-century natural law writers' teachings on how and when to issue a declaration of war. As a final aside, some may respond that the Revolutionary War was, essentially, a civil war and therefore not subject to the customs of interstate war. Emer de Vattel, however, believed the opposite. He wrote that the two sides in a civil war form "two distinct societies" and that these two societies "stand therefore in precisely the same predicament as two nations, who engage in a contest, and, being unable to come to an agreement, have recourse to arms." VATTEL, *supra* note 21, at 542–43. Indeed, the Revolutionary War is a "notable early illustration of a rebellion being treated on par with an interstate war." NEFF, *supra*, at 225.

63. *See, e.g.*, BURLAMAQUI, *supra* note 20, at 248 (describing the early views of the beginning of offensive wars). In fact, this distinction survives today, as not every offensive use of military forces qualifies as aggression. The International Court of Justice ruled that "it [is] necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other lesser grave forms." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 (June 27). The court stated it saw "no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27). Thus, similarly to the eighteenth century understanding, armed forces can participate

These seventeenth and eighteenth century natural law writers' ideas permeated early American government.[65] In the early republic, "[a]n essential part of a sound legal education consisted of reading Vattel, Grotius, Pufendorf, and Burlamaqui, among others. Quotations from these sources appeared not only in briefs and opinions, but also in discussions of critical foreign policy matters by the President's Cabinet . . . ."[66] Among these writers, "Vattel [was] the most often consulted by Americans."[67] John Adams described feeling Vattel's disapproval when he "employed . . . too little of my time in reading and in thinking."[68] Members of the Continental Congress consulted Vattel's treatise while the Congress was in session,[69] and James Madison quoted Vattel in a set of instructions to John Jay sent on behalf of the Continental Congress.[70] Indeed, Vattel's treatise "was

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in armed cross-border confrontations that are not tantamount to a "use of armed force," but are simply "mere frontier incidents," and so do not rise to the level of aggression (i.e. war).

64. Hamilton echoes the ideas of the seventeenth- and eighteenth-century treatise writers:

> No position is better established than that the Power which *first declares* or *actually begins* a WAR, whatever may have been the causes leading to it, is that which makes an *offensive war*. . . . Upon this point there is apt to be some incorrectness of ideas. Those, who have not examined subjects of such a Nature are led to imagine that the party which commits the first injury or gives the first provocation is on the offensive side in the war. . . . But the cause or occasion of the War and War itself are things entirely distinct. Tis the commencement of the War itself that decides the question of being on the offensive or the defensive.

Alexander Hamilton, *Pacificus No. II*, *in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 18, 20 (Morton J. Frisch ed., 2006).

65. Stewart Jay, *The Status of the Law of Nations in Early America*, 42 VAND. L. REV. 819, 823 (1989).

66. *Id.*

67. *Id.*

68. John Adams, Diary entry (Feb. 1, 1763), *in* 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 140, 141 (Charles Francis Adams ed., 1850).

69. Letter from Benjamin Franklin to Charles-Guillaume-Frederic Dumas (Dec. 9, 1775), *in* 22 THE PAPERS OF BENJAMIN FRANKLIN 287–91 (William B. Willcox ed., 1982) (discussing the use of Vattel's treatise among members of the Continental Congress). Franklin wrote to Dumas:

> I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept, (after depositing one in our own public library here, and sending the other to the college of Massachusetts Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author.

Id.

70. Draft of Letter to John Jay, Explaining His Instructions (Oct. 17, 1780), *in* 2 THE PAPERS OF JAMES MADISON 127–36 (William T. Hutchinson et al. eds., 1962).

unrivaled among such treatises in its influence on the American founders."[71] Of course, I do not mean to suggest that only these writers substantially influenced the early American leaders, but I do mean to suggest that these writers substantially influenced how the early American leaders understood international law.[72] Therefore, I submit that the opinions of these writers, rather than the diplomatic history of Great Britain, better illustrate the early American leaders' understandings of what it meant to declare war. Understanding "to declare war" in this manner provides an interpretation that best harmonizes the early American leaders' attitudes on the subject. It even helps navigate the notoriously controversial passage from the convention record in which James Madison and Elbridge Gerry changed "make" war to "declare" war.[73]

A. *The Power to Repel Sudden Attacks*

The Articles of Confederation and the revolutionary state constitutions had a strong influence on the delegates' thinking at the Constitutional Convention. Therefore, though I discuss these subjects in greater detail elsewhere, it is prudent to mention them briefly here. The Articles of Confederation gave Congress "the sole and exclusive right and power of determining on peace and war."[74] The states that formed constitutions just before, and immediately after, the Declaration of Independence exhibited the same basic philosophy of the Articles of Confederation. They created weak executives—if, indeed, they even had an executive—and placed most war powers in the legislatures.[75] However, Congress and the state legislatures proved inept at conducting war, and as the war progressed the early American leaders took note of the legislatures' ineptitude. As a result,

71. PETER S. ONUF & NICHOLAS GREENWOOD ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN THE AGE OF REVOLUTIONS 1776–1814, at 11 (1993).

72. *See supra* note 17 and accompanying text (describing the influence of enlightenment writers, including Grotius, de Vattel, and Puffendorf, on the early American leaders).

73. Report of James Madison (Aug. 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314, 318 (Max Farrand ed., 1911).

74. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

75. Pennsylvania, for example, created an executive council. *See* PA. CONST. § XIX (1776), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW HERETOFORE FORMING THE UNITED STATES OF AMERICA 3086–87 (Francis Newton Thorpe ed., 1909); *see also* Yoo, *supra* note 23, at 222–23 (citing Pa. Const. § XIX (1776)) (discussing Pennsylvania's "most radical reform by replacing the single governor with a twelve-man executive council elected by . . . the People").

the later revolutionary state constitutions created stronger executives.[76] This trend culminated in 1778 when Massachusetts voters rejected a state constitution, in part, because the executive's war powers were too weak.[77] Two years later, in 1780, Massachusetts voters approved a state constitution with stronger executive war powers.[78] Pro-Executive supporters argue that the Massachusetts voters' rejection of the 1778 state constitution proves the pro-executive position.[79] Pro-Executive supporters rest their argument on select passages from the Essex Result,[80] a report credited with ensuring the rejection of the 1778 Massachusetts state constitution; however, pro-Executive supporters misread the actual issues involved. The 1780 Massachusetts state constitution was a war-time document, and the Essex Result a war-time report. Thus, neither the 1780 Massachusetts state constitution nor the Essex Result dealt with commencing war—war already had been commenced.[81] Rather, they dealt with the conduct of the war, and in that capacity they were a reaction against the various legislatures' ineptitude. Thus, the writers of the Essex Result condemned the Legislature

76. Yoo, *supra* note 23, at 228–34.

77. *Id.*

78. *Id.*

79. Yoo, *supra* note 23, at 233–34.

80. *See generally The Essex Result*, *in* MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME COURT OF MASSACHUSETTS 359, 359–402 (1859) (containing passages calling for the rejection of the Massachusetts state constitution of 1778 because the governor's war powers were too limited).

81. Theophilus Parsons, long thought to be the primary author of the Essex Result, also was a great admirer of the seventeenth- and eighteenth-century natural law writers—especially Burlamaqui. John Quincy Adams, in a letter to James Bridge, described the curriculum Parsons created for students in his law office:

> You enquire what was the first book, which I undertook upon entering the office. It was the first volume of Robertson's Charles V after which I perused Vattel's law of nature and of Nations, and then began upon Blackstone, with whom I am still engaged, and have but just begun upon the third volume. Parsons usually recommends his students to read [Burlamaqui], Vattel, and Montesquieu, [and] sometimes Hume's and Robertson's Histories before Blackstone. As I had read them all except Vattel, I did not go over them again. Of [Burlamaqui] in particular Parsons has a very high opinion.

Letter from John Quincy Adams to James Bridge (Nov. 17, 1787) (on file with The Gilder Lehrman Institute of American History), https://www.gilderlehrman.org/content/james-bridge-2?back=/mweb/search%3Fneedle%3Djohn%2Bquincy%2Badams%2526fields%3D_t301001080%2526era4%3DThe%2BNew%2BNation%252C%2B1783-1815 [http://perma.cc/Y88V-5C3A].

for being too slow to respond to an attack.[82] Charles Pinckney and Rufus King leveled the same criticism during the Constitutional Convention.[83]

At the time of their criticism, the Constitution gave the House the power of war[84] and the Senate the power of peace.[85] Charles Pinckney, though, believed that the power of war should be vested in the Senate and not in the House.[86] He gave two reasons when he suggested transferring the power to make war to the Senate. The first was that the House was too big and too slow.[87] The second was that giving the powers of war and peace to two separate authorities was uncommon, even bizarre.[88] Pinckney's observation suggests that, contrary to the pro-Executive position, the constitutional framers did not intend to follow the tradition of joining the powers of war and peace in one executive. Pierce Butler opposed Pinckney's suggestion,[89] saying instead that the President should have the power to make war.[90] Oliver Ellsworth responded to both Pinckney and Butler, defending the separation of the powers of war and peace.[91] A large body like the House,

82. *The Essex Result*, *supra* note 80, at 396 ("Should Providence or Portsmouth be attacked suddenly, a day's delay might be of most pernicious consequence. Was the consent of the legislative body, or a branch of it, necessary, a longer delay would be unavoidable."); *c.f.* ANDRO LINKLATER, AN ARTIST IN TREASON: THE EXTRAORDINARY DOUBLE LIFE OF GENERAL JAMES WILKINSON 75 (2009) ("Yet the failure of Virginia's government to operate either virtuously or decorously was precisely what infuriated Kentucky settlers. The most serious failing was the absence of protection against Indian attacks, principally by the Shawnees, who claimed hunting rights and saw their game increasingly frightened off by European settlers. Located two or three weeks away across the Allegheny Mountains, the Virginia legislature could not call out the militia in time, and left to their own defenses, more than one third of the two hundred pioneers round Lexington had been killed in a single Shawnee attack in 1782.").

83. Report of James Madison (Aug. 17, 1787), *supra* note 73, at 314, 318.

84. Report of the Committee of Detail, IX, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 167–68 ("The Legislature of the United States shall have the (Right and) Power to . . . make war. . . .").

85. *Id.* at 169 ("The Senate of the United States shall have the Power to make Treaties; to send Ambassadors; and to appoint the Judges of the Supreme (national) Court.").

86. Report of James Madison (Aug. 17, 1787), *supra* note 73, at 318.

87. *Id.*

88. *Id.*

89. *Id.*

90. At this time, the President was not elected independently; rather, the Legislature elected the President. Report of the Committee of Detail, IX, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 171.

91. Report of James Madison (Aug. 17, 1787), *supra* note 73, at 319 ("[T]here is a material difference between the cases of making *war*, and making *peace*. It [should] be more easy to get out of war, than into it. War also is a simple and overt declaration. [P]eace attended with intricate [and] secret negociations.").

Pinckney said, made it more difficult to go to war;[92] however, as Ellsworth pointed out, the House's size was not prohibitive to possessing the power of war because war was a simple declaration.[93] A smaller body like the Senate made it easier to achieve peace and was more conducive to negotiating the intricate details accompanying treaties.[94] Just before Ellsworth's response to Pinckney and Butler, James Madison and Elbridge Gerry moved to change the phrase "make war" to "declare war," thus "leaving to the Executive the power to repel sudden attacks."[95] Pro-Executive supporters argue that, at that point, the constitutional framers transferred the right to initiate war or hostilities to the President.[96] However, Madison's and Gerry's change only allowed the President to repel sudden attacks—it did not allow the President to repel an invasion unilaterally. Congress maintained sole responsibility for repelling an invasion.[97] Congress still bears sole responsibility for repelling an invasion.[98] Of course, the power to repel a sudden attack but not an invasion seems contradictory. Indeed, it is very confusing unless one considers it in the context of the seventeenth- and eighteenth-century natural law writers. As the seventeenth- and eighteenth-century natural law writers noted, sudden

92. *Id.* at 318.

93. *Id.* at 319.

94. *Id.*

95. *Id.* at 318.

96. *See* Yoo, *supra* note 23, at 261 ("We can interpret the thrust of Madison's amendment as *at least* expanding the executive's power to respond unilaterally to an attack. Madison's notes, however, fail to answer two significant questions about his proposed change. Madison does not elaborate on what type of attack would trigger the executive's war-making authority. While an invasion of American soil would seem to qualify, it is unclear if assaults on American forces, citizens, or property overseas could justify unilateral executive war-making as well.").

97. Report of the Committee of Detail, IX, *supra* note 84, at 168.

98. U.S. CONST. art. I, § 8, cl. 15. The President can repel an invasion but not because of the "declare war" clause or inherent executive war power. Rather, the President's authority to repel an invasion rests on a succession of congressional acts. *See* An Act to Provide for Calling Forth the Militia, to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, ch. 28, § 1, 1 Stat. 264 (1792); An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions; and to Repeal the Act Now in Force for Those Purposes, ch. 36, § 1, 1 Stat. 424 (1795); An Act to Amend the Act calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, Approved February Twenty-eight, Seventeen Hundred and Ninety-five, and the Acts Amendatory Thereof, and for Other Purposes, ch. 201, 12 Stat. 597600 (1862); A Bill to Promote the Efficiency of the Militia, and for Other Purposes ch. 196, § 4 32 Stat. 776 (1903). However, the growth of the United States Armed Forces since the end of World War II has lessened the President's reliance on Congress's authority to call out the militia in order to repel an invasion.

attacks were a fact of life.[99] Sudden attacks occurred at sea and on the frontiers, but they did not constitute a war.[100] Such attacks required quick action, and as the writers of the Essex Result noted, the Legislature was ill-suited to such swift action.[101] Thus, it was the President's duty to repel the attacks. However, since the attacks did not constitute war, the President inherited no war powers beyond what was strictly required to repel the attack. George Mason spoke in favor of Madison and Gerry's motion.[102] He believed that it kept the power of war out of the Executive's and the Senate's hands and slowed the path to war.[103] Nobody challenged either of those beliefs[104] and the motion to replace "make war" with "declare war" passed soon after.[105]

After the motion passed, Pierce Butler "moved to give the Legislature power of peace, as they were to have that of war."[106] This was a very curious motion. Why would Butler, a man who had just advocated for giving the power of war to the President, suddenly try to move the power of peace from the Senate to the House? There is, in fact, only one way this motion makes sense: if Butler attempted to unite the powers of war and peace in the same body as was tradition. In order to give this power to the House, Butler moved to simply add "and peace" to the declare war clause so that the clause would have read "To declare war and peace."[107] If "declare war" was not understood to give the House the power of war, then adding "and peace" would not have provided the House with the power of peace as Butler intended. Thus, after the convention voted to change "make war" to "declare war," the House still retained the power to initiate war or hostilities. The delegates simply clarified that the House did not have the power to conduct war or hostilities. The convention unanimously voted down

99. *See supra* notes 63–64 and accompanying text (explaining how not every act of aggression constituted a commencement of an offensive war historically).

100. *See supra* notes 63–64 and accompanying text (including frontier incidents as among the military acts that do not constitute an act of war).

101. *See supra* note 82 and accompanying text (illustrating the Essex Result's point about how leaving decisions to the legislature would create prolonged delay).

102. Report of James Madison (Aug. 17, 1787), *supra* note 73, at 319.

103. *Id.*

104. Roger Sherman did prefer "make war" to "declare war" because he thought "declare war" was too constrictive. However, nobody corrected Ellsworth or Mason in their assumption that the Legislature retained the power of war. *Id.* at 318.

105. *Id.* at 319.

106. *Id.*

107. *Id.*

Butler's motion,[108] cementing the delegates' determination to separate the powers of war and peace. As a result, "war cannot lawfully be commenced on the part of the United States without an act of [C]ongress . . . ."[109] An act of Congress fulfills the seventeenth- and eighteenth-century natural law writers' requirements for a declaration of war because "such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration."[110]

B. *To Make War*

The pro-Executive supporters' second contention is that there is a difference between the power to declare war and the power to make war. Pro-Executive supporters argue that if the early American leaders truly had wanted Congress to have the exclusive right to initiate war or hostilities, they would have given Congress the power to make war.[111] We have already seen that because of Congress's and the state legislatures' inability to conduct war effectively, the early American leaders made sure that the responsibility to conduct military operations belonged to the Executive Branch.[112] However, the early American leaders still believed that Congress possessed all other war powers, and the Pacificus-Helvidius debate best illustrates this belief. Before continuing, it will be prudent to address some preliminary criticisms. The Pacificus-Helvidius debate pitted Alexander Hamilton and James Madison, respectively, against one another over the issue of the United States' neutrality.[113] Though the debate centered around neutrality, the two discussed the federal government's war powers in some detail. Pro-Executive supporters object to using the Pacificus-Helvidius debate when discussing war powers because "[a]t this point . . . Madison was no longer speaking as a Framer during the process of ratification, but as a participant in a contentious, partisan debate that occurred four years later."[114] Pro-Executive supporters also question "why Madison's views as Helvidius in 1793 are to be accorded more weight, as an expression of the original

108. *Id.*

109. KENT, *supra* note 24, at 54.

110. *Id.*

111. John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1208 (1999).

112. *See supra* Part I.A (discussing the early American leaders' intent to vest power to conduct war upon the Executive Branch).

113. *See* Alexander Hamilton, *Pacificus No. I*, *in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, *supra* note 64, at 14 (arguing the "direct and proper end of the proclamation of neutrality").

114. Yoo, *Clio at War*, *supra* note 111, at 1213 n.191.

understanding, than Hamilton's as Pacificus."[115] These criticisms are valid. The Pacificus-Helvidius debate occurred at a time of extreme partisanship, and, indeed, both Hamilton and Madison were the heirs apparent of their respective parties. In addition, it does seem arbitrary to say that one framer argues from original understanding and another does not. For these reasons, I do not concentrate on the points of disagreement between Hamilton and Madison. Rather, for the purposes of this Article, the points on which Hamilton and Madison agreed are much more interesting.

In his first essay as Pacificus, Hamilton wrote, "If the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared."[116] Madison, in his second essay as Helvidius, succinctly agreed with Hamilton.[117] In rhetoric, there is a principle that states there must be an agreement before there can be disagreement.[118] Said another way, every constructive debate rests upon at least one foundational agreement. For example, if two people debate whether a certain team is a good football team, those two people first have to agree that the team in question is, in fact, a football team. Similarly, Hamilton's and Madison's agreement that it was the President's responsibility to preserve peace until war was declared was the foundational agreement upon which the Pacificus-Helvidius debate rested. In this case, the foundational agreement actually consisted of three agreements. The first was that the President's duty is inherently peaceful—the President's primary function is to preserve peace.[119] A naturally peaceful executive bears the

115. *Id.*

116. Alexander Hamilton, *Pacificus No. I*, *supra* note 64, at 13.

117. James Madison, *Helvidius No. II*, *in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, *supra* note 64, at 70.

118. *See* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 27 (Rowman & Littlefield Publishers, Inc. 2005) (1960) ("There can be no argument except on the premise, and within a context, of agreement. *Mutatis mutandis*, this is true of scientific, philosophical, and theological argument. It is no less true of political argument.").

119. Pro-Executive supporters may respond by saying that the President has the power to order a pre-emptive strike. A pre-emptive strike, pro-Executive supporters may say, technically is defensive in nature, and a President may launch one in order to preserve peace. Alexander Hamilton was unconvinced by this argument:

> Those who are disposed to justify indiscriminately every thing, in the conduct of France, may reply that though the war in point of form may be offensive on her part, yet in point of principle it is defensive—was in each instance a mere anticipation of attacks meditated against her, and was justified by previous aggressions of the opposite parties. It is believed that it would be a sufficient answer to this observation to say that in determ[in]ing the *legal* and *positive* obligations of the [United States] the only point of inquiry is—whether the War was *in fact* begun by France or by

influence of the seventeenth- and eighteenth-century natural law writers, who believed that peace was the natural state of relations between mankind and, thus, between nations.[120] Montesquieu famously wrote that "peace and

her enemies; that All beyond this would be too vague, too liable to dispute, too much matter of opinion to be a proper criterion of National Conduct; that when a war breaks out between two Nations, all other nations, in regard to the positive rights of the parties and their positive duties towards them are bound to consider it as equally just on both sides—that consequently in a *defensive* alliance, when *war is made upon* one of the allies, the other is bound to fulfil the conditions stipulated on its part, without inquiry whether the war is rightfully begun or not—as on the other hand when war is begun by one of the allies the other is exempted from the obligation of assisting; however just the commencement of it may have been.

Hamilton, *Pacificus No. II*, *supra* note 64, at 21. Alexander Hamilton, then, did not consider pre-emptive strikes to be defensive actions. In addition, some readers have argued that the President can use force. They point out that the President can "[C]all[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ." U.S. CONST. art. I, § 8, cl. 15. The readers contend that this creates "tension" with the idea of a peaceful President. This line of thought, though, is flawed. First, it restates my thesis as: the President cannot use force. That is not my thesis. Rather, my thesis is that the President does not have constitutional authority to initiate war or hostilities. Second, the list of powers given by these readers are actually congressional powers. *See* U.S. CONST. art. I, § 8, cl. 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. . . ."). Throughout its history, Congress passed a series of acts allowing the President to perform these actions. *See* Bork, *supra* note 14, at 699 (discussing occasions in which the President may declare war and use force). However, these powers belong constitutionally to the Legislature. Thus, the President does not have the constitutional authority even to perform these actions. Rather, the President can perform these actions only because the President has congressional authorization to do so.

120. *See* GROTIUS, *supra* note 18, at xxiv ("And among these properties which are peculiar to man, is a desire for society; that is, a desire for a life spent in common with fellow-men; and not merely spent somehow, but spent tranquilly, and in a manner corresponding to the character of his intellect."); *see also* PUFENDORF, *supra* note 19, at 111–12 (describing the natural state of man as peaceful). Pufendorf's specific description of the natural state of man:

> But the contrary Opinion [to that of Thomas Hobbes'] seems more reasonable, as what is clearly [favored] by the Origin of Mankind, as related in the infallible Records of holy Scripture; which represent the natural State of Man, not hostile, but peaceful, and [show] that Men in their true Condition are rather hearty Friends than [spiteful] Foes. From these sacred Histories we learn, that the first Man being by divine Power [produced] out of the Earth, a Companion was soon [joined] to him different in Sex, whose Substance was therefore taken out of him, to engage him immediately in the deepest *Love* and Affection for her, as being *Bone of his Bone, and Flesh of his Flesh*. This primitive and original Couple GOD Almighty was [pleased] to unite in the most solemn Manner, and with the most sacred Tie; and since from them all human Race orderly descended, we may conceive Mankind mutually [engaged], not only by such a vulgar Friendship as might result from Similitude of Nature; but by such a tender Affection as endears Persons allied by a Nearness of Race and of Blood: [Although] the Sense of this kind Passion may be almost worn off amongst the Descendants, by Reason of their great Distance from the common Stock. Now if any Man should pretend to divest himself of this Affection, and entertain a Temper

moderation [are] the spirit of a republic,"[121] and James Madison wrote, "[T]he best praise then that can be pronounced on an executive magistrate, is, that he is a friend of peace . . . ."[122] The second agreement is that only Congress can change the President's duty from preserving peace to conducting war. Both Hamilton and Madison agreed that the President's primary function is to maintain peace until the moment war is declared[123]—and only Congress can declare war.[124] Finally, Hamilton and Madison agreed that, with the exception of conducting war, Congress possessed the power to make war.[125] And in fact, Hamilton expressed this view throughout his life.[126] The early American leaders, then, used every

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of Hostility against all others, he ought to be [censured] as a Revolter from the primitive and natural State of Mankind.

PUFENDORF, *supra* note 19, at 111–12. Burlamaqui came to a similar conclusion:

> The natural state of nations, with respect to each other, is certainly that of society and peace. Such is the natural and primitive state of one man with respect to every other man; and whatever particular alteration mankind may have made in regard to their primitive state, they cannot, without violating their duties, break in upon that state of peace and society, in which nature has placed them, and which, by her *laws*, she has so strongly recommended to them. Hence proceed several maxims of the law of nations; for example, that all nations ought to look upon themselves as naturally equal and independent of each other, and to treat one another as such on all occasions. That they ought to do no harm to each other, but, on the contrary, repair that which they may have done.

BURLAMAQUI, *supra* note 20, at 221–22 ; VATTEL, *supra* note 21, at 430 ("The nation or the sovereign ought not only to refrain, on their own part, from disturbing that peace which is so salutary to mankind: they are, moreover, bound to promote it as far as lies in their power,—to prevent others from breaking it without necessity, and to inspire them with the love of justice, equity, and public tranquility,—in a word, with the love of peace. It is one of the best offices a sovereign can render to nations, and to the whole universe. What a glorious and amiable character is that of peace-maker!").

121. MONTESQUIEU, *supra* note 51, at 167.

122. James Madison, *Helvidius No. IV*, *in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, *supra* note 64, at 87; Madison, *Helvidius No. II*, *supra* note 64, at 70.

123. *See supra* notes 116–19 and accompanying text (explaining how the Pacificus-Helvidius debates between Hamilton and Madison were based upon the fundamental agreement that the President's primary duty was to preserve peace).

124. U.S. CONST. art. I, § 8, cl. 11.

125. Hamilton, *Pacificus No. I*, *supra* note 64, at 13; Madison, *Helvidius No. II*, *supra* note 64, at 70.

126. Hamilton expressed this view in the plan he presented to the Constitutional Convention. The plan called for a highly centralized national government; however, it gave the Executive only the "direction of war when authorized [by the Senate] or begun [by enemy forces]." Report of James Madison (June 18, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., 1911). Towards the end of the Convention, Hamilton gave Madison a revised copy of his plan. In the revised version of the plan, the Executive only had "the direction of war when commenced." The Hamilton Plan, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 617, 624 (Max Farrand ed., 1911). This revision most likely reflects the war power discussion that

euphemism or colloquial term for "make war" as synonymous with "declare war"—to commence war,[127] to go to war,[128] to authorize war,[129]

occurred after Hamilton first submitted his plan to the Constitutional Convention. As Mary Bilder points out, during this discussion the delegates most likely debated the issue at considerable length. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 130 (2015) (explaining how Madison's imprecise notes about war powers indicated there was an interesting discussion among the delegates about war powers). Thus, Hamilton's revision most likely reflects the delegates' position that the President did not have the authority to initiate war or hostilities, but rather, had the authority to conduct war or hostilities once authorized by congress or begun by enemy forces. Hamilton next expressed this view to James McHenry during the Quasi-War with France:

> Not having seen the law which provides the *naval armament*, I cannot tell whether it gives any new power to the President, that is, any power whatever with regard to the employment of the ships. If not, and he is left on the foot of the constitution, as I understand to be the case, I am not ready to say that he has any other power than merely to employ the ships as convoys, with authority to *repel* force by *force* (but not to capture), and to repress hostilities within our waters, including a marine league from our coasts. Any thing beyond that must fall under the idea of *reprisals,* and requires the sanction of that department which is to declare or make war.

Letter from Alexander Hamilton to James McHenry (May 17, 1798), *in* 10 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 281, 282 (Henry C. Lodge ed., 1904). Finally, Hamilton expressed the same sentiment less than three years before his death. 1 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 249 (Henry C. Lodge ed., 1904).

127. Madison, *Helvidius No. II*, *supra* note 64, at 68, 70.

128. *See* Alexander Hamilton, The Examination Number I (Dec. 17, 1801), *in* 25 THE PAPERS OF ALEXANDER HAMILTON, JULY 1800–APRIL 1802, at 453 (Harold C. Syrett ed., 1977), https://founders.archives.gov/documents/Hamilton/01-25-02-0264-0002#print_view [https://perma.cc/H4NE-93B4] ("[The constitution] has only provided affirmatively, that, '[t]he Congress shall have power to declare war'; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received: in other words, it belongs to Congress only, *to go to [w]ar.*").

129. *See* Letter from Henry Knox to Charles Pinckney (Oct. 27, 1792), *in* 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 262 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) ("The constitution has invested [Congress] with the right of declaring war. Until, therefore, their decision shall be made known, the Executive cannot authorize offensive measures. . . ."); *see also* Letter from Henry Knox to Edward Telfair (Oct. 27, 1792), *in* 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS *supra*, at 262 ("The constitution having invested [Congress] with the powers of war, no offensive operations can be taken, until they shall be pleased to authorize the same."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 93 (The Lawbook Exchange, Ltd. 2d ed. 2005) (1833) ("The power to declare war may be exercised by Congress, not only by authorizing general hostilities, in which case the general laws of war apply to our situation; or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed.").

manifesto,[130]—with each one, early American leaders stated that it was the exclusive right of Congress.

The seventeenth- and eighteenth-century natural law writers, which influenced the early American leaders, taught that a declaration of war was necessary before beginning hostilities.[131] Additionally, a declaration of war was unique to offensive wars.[132] In the seventeenth and eighteenth centuries, the first state to commit an aggression against, or provoke, another state did not start an offensive war.[133] Rather, an offensive war occurred when one state decided to settle its differences—whether big or small, justly or unjustly—with another state primarily through force.[134] Therefore, whenever the United States initiates war or hostilities to settle differences between itself and another entity—whether the United States deploys one soldier or one million soldiers—it commences an offensive war. Consequently, the Constitution requires a declaration of war prior to the initiation of hostilities. And, because only Congress may declare war, the President may not initiate war or hostilities without congressional authorization.[135]

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130. *See* Letter from Joseph Hewes to Samuel Johnston (Jul. 8, 1775), *in* LETTERS OF MEMBERS OF CONTINENTAL CONGRESS (1774–1776), at 160 (Edmund C. Burnett, ed., 21st ed. 1963) ("[W]e have published a manifesto or declaration of War."); *see also* Letter from John Adams to James Warren (Jul. 6, 1775) *in* LETTERS OF MEMBERS OF CONTINENTAL CONGRESS (1774–1776), *supra,* at 152 ("You will also see a Spirited Manifesto."); VATTEL, *supra* note 21, at 316 ("[A]t present, [the powers of Europe] content themselves with publishing the declaration in the capital, in the principal towns, or on the frontiers; manifestoes are issued; and, through the easy and expeditious channels of communication which the establishment of posts now affords, the intelligence is soon spread on every side."); BURLAMAQUI, *supra* note 20, at 272 ("The declaration of war, and the manifesto by the princes. . . .).

131. *See* discussion *supr*a Part I (explaining the enlightenment thinkers' views regarding the necessity of declarations of wars).

132. *See supra* note 51 and accompanying text (describing the natural law writers' views on the direct connection between declarations of war and offensive wars).

133. *See supra* note 61 and accompanying text (noting Burlamaqui and Pufendorf's assertions that an act of aggression did not necessarily start an offensive war).

134. *See supra* note 62 and accompanying text (using the beginning of the American Revolution as an example of how an offensive war was commenced in the eighteenth century).

135. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 962 n.48 (2008) ("Congress alone are competent to decide upon an offensive war [against the Creeks], and congress have not thought fit to authorize it." (quoting *Letter from Timothy Pickering, Sec'y of War, to Gov. William Blount (Mar. 23, 1795), in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 389 (Clarence Edwin Carter ed. 1936)). Michael Ramsey explains that in the eighteenth century, "declare war" meant not only a formal declaration of war, but also declarations by "words or action." Ramsey, *supra* note 34, at 1636. However, this distinction has no bearing on United States war powers because the United States still cannot initiate

war or hostilities without congressional authorization. Congress cannot declare war by action, because Congress does not have the authority to order the military to perform hostile acts. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1951) (Jackson, J., concurring) (explaining how "Congress cannot deprive the President of the command of the army and navy"); *see also* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 254 (2007) (" . . . Congress cannot take tactical command of military operations."). Nor does Congress have the authority to enter the United States into a military treaty unilaterally. *See* JOHN H. JACKSON & ALAN O. SYKES, IMPLEMENTING THE URUGUAY ROUND 178 n.7 (1997) (asserting "Congress cannot on its own enter into international agreements"). In fact, Congress does not have the authority even to initiate such a process. *See* U.S. CONST. art. II, § 2, cl. 2 (vesting the power to make treaties upon the President, so long as two-thirds of the Senate approve). Furthermore, the writers who Ramsey quotes state "[h]ostilties under sovereign command" gave these actions the force of declarations of war. Ramsey, *supra* note 34, at 1596. These same writers also state that where sovereignty is fractured (like in the United States), the branch that possesses the legislative power possesses the largest share of sovereignty. For example, Locke called the legislative power the "supreme power." John Locke, *Two Treaties of Government*, *in* THE WORKS OF JOHN LOCKE 162 (New ed., 1823). Echoing Locke, Vattel wrote that the supreme power consisted of the authority to command—or give laws to—the citizens of a state, and that the person or assembly that possessed this power in a state was the sovereign. VATTEL, *supra* note 21, at 1. Indeed, in a series of letters written to Roger Sherman in 1789 discussing the new constitution, John Adams wrote: "In all governments the sovereignty is vested in that man or body of men who have the legislative power." GEORGE A. PEEK, THE POLITICAL WRITINGS OF JOHN ADAMS 165 (2003). Meanwhile, Alexander Hamilton called the legislative power "the most comprehensive and potent of the three great subdivisions of sovereignty." Alexander Hamilton, The Examination Number XIV (Mar. 2, 1802), *in* 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 128, at 546. These characterizations of the legislative power as a necessary condition for sovereignty echo Jean Bodin, who gave the primogenial modern definition of sovereignty. He wrote that "the first and chiefe marke of a [sovereign] prince, to bee of power to give laws too all his subjects in generall, and to [every] one of them in particular, (yet is not that enough, but that we must [join] thereunto) without consent of any other greater, equall, or lesser than himself." JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE 159 (Kenneth Douglas McRae ed., Harv. Univ. Press 1962) (1576); KINJI AKASHI, CORNELIUS VAN BYNKERSHOEK: HIS ROLE IN THE HISTORY OF INTERNATIONAL LAW 59 (1998). This does not describe the United States President, but it does describe the United States Congress since Congress is able to pass a law without the President's consent. According to Cornelius van Bynkershoek, "any sovereign of Europe" could "make war without previously declaring it," though Bynkershoek noted that doing so would be "contrary to the general customs of European nations." CORNELIUS VAN BYNKERSHOEK, QUAESTIONES JURIS PUBLICI LIBRIS DUO 10 (Tenney Frank trans., Oxford: Clarendon Press 1929). Bynkershoek considered a sovereign to be any person or group that possessed *summum imperium*, or the highest sovereign power. AKASHI, *supra*, at 69. This, too, does not describe the United States President; though it possibly describes the United States Congress if the legislative power is indeed the highest sovereign power. As a result, the President cannot be considered the sovereign of the United States. Thus, unilateral U.S. presidential actions like those committed by Gustavus Adolphus or Fredrick the Great do not carry the force of declaration of war, because the President is not a sovereign, and the President's actions are not those of a sovereign. *See* Ramsey, *supra* note 34, at 1548 (stating the President could only act unilaterally to repel sudden attacks). Only Congress, then, conceivably could declare war by action (though that, too, is subject to strong objections since Congress itself may not be the sovereign of the United States). Although Congress does not need judicial consent to pass laws, the federal judiciary can strike down a law it deems unconstitutional. However, as already stated, Congress cannot command either the military to commit

II. THE EXECUTIVE WAR POWERS

The Constitution places the country's executive power "in a President of the United States of America."[136] Executive power proponents emphasize this allocation because the executive power historically included the power to "commenc[e] and wag[e] war."[137] Where pro-Executive supporters are mistaken, however, is in their references to the executive power as a single, indivisible power. Both John Locke and Montesquieu considered the powers of war and foreign relations distinct from other executive powers. In fact, Locke did not believe the powers of war and foreign relations were executive powers, though he could not fathom any branch other than the

hostile acts nor the President to initiate military treaties or alliances. Therefore, it is not feasible for Congress to declare war by action, and as a result, the option to declare war by action is not available to the leaders of the United States. All that remains, then, is declaration of war by word. This, essentially, would be saying that hostilities exist between the United States and its enemy or enemies. This would be something like an authorization of force, which would require a congressional act. Ramsey, then, ultimately echoes James Kent, that an act of Congress is necessary for the United States legally to commence war. KENT, *supra* note 24, at 165. Finally (as a brief aside), the reasons for Gustavus Adolphus's inclusion as an example of declaring war by action during the Thirty Years' War are unclear. During its history, the Swedish government shifted between the monarch legislating with the consent of the Riksdag, and the monarch as the "sole legislator" or the "living and supreme and immutable fundamental law of [the] hereditary kingdom." NILS HERLITZ, SWEDEN: A MODERN DEMOCRACY ON ANCIENT FOUNDATIONS 22 (1939); ANTHONY UPTON, CHARLES XI AND SWEDISH ABSOLUTISM 248 (Cambridge University Press 1998); *see generally* Andrew Forsse, *Legislation in Sweden*, 41 A.B.A. J. 466 (1955) (discussing the legislative process and checks and balances system in Sweden). When Gustavus Adolphus became king, he "swore not to undertake military campaigns without the Riksdag's consent." MICHAEL A.R. GRAVES, THE PARLIAMENTS OF EARLY MODERN EUROPE 203 (2013). And, in fact, Gustavus Adolphus did not invade Pomerania—initiating the Swedish intervention in the Thirty Years' War—until he received approval from the Riksdag. *See* Brian M. Downing, *Constitutionalism, Warfare, and Political Change in Early Modern Europe*, 17 THEORY & SOC'Y, no. 1, Jan. 1988, at 32–33 (describing Gustavus Adolphus's personal appearance in the *riksdag* to obtain approval for his war policy); *see also* Pärtel Piirimäe, *Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War*, 45 THE HIST. J. 499, 512 (2002) (recognizing unavoidable conflict and a legitimate need for a pre-emptive strike). Additionally, prior to the Swedish invasion of Pomerania, Gustavus Adolphus issued a declaration to European leaders that explained the reasons for the Swedish intervention and listed the grievances for which Gustavus Adolphus sought redress. *See* THE THIRTY YEARS WAR: A DOCUMENTARY HISTORY 99–103 (Tryntje Helfferich, trans. & ed., Hackett Publ'g Co., Inc. 2009) (justifying the need for the Swedish intervention with safety concerns of his people, himself, and liberty); *see also* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 106 (2005) (using Adolphus as an example of "[e]nlisting public opinion on the side of the declaring state"). Thus, the reasons why Gustavus Adolphus is an exemplar of declaring war by action in the Thirty Years' War remain unclear.

136. U.S. CONST. art. II, § 1, cl. 1.

137. Yoo, *The Continuation of Politics by Other Means*, *supra* note 23, at 199.

executive possessing the powers of war and foreign relations.[138] However, one question arises—did Locke have any other choice? The Congress created by the Constitution and pre-1689 English parliament are not comparable institutions. The United States Congress is a permanent body that sets its own dates of assembly and recess. The English Parliament assembled and recessed according to the Monarch's will. Years could, and often did, pass between sessions in the English Parliament. The Monarch could, and did, govern without Parliament.[139] In fact, Locke questioned whether a legislative body that met regularly was necessary or desirable.[140] He wrote that the executive should have the power to assemble and dismiss the legislative body because a legislative body with a fixed schedule could be dangerous to the people.[141] With such beliefs, where else might Locke safely have put the powers of war and foreign relations? That Locke could not imagine the powers of war and foreign relations placed somewhere other than the executive is no great coup for executive power proponents. But, where Locke chose to place the powers of war and foreign relations is not the main concern. That Locke understood the powers of war and foreign relations to be distinct and separate from other executive powers, is of greater interest.

Montesquieu also divided the executive power into two.[142] The first was a power "dependent on the law of nations;"[143] the second was a power "depend[ent] on the civil law."[144] The first concerned war and foreign

138. *See* John Locke, *Two Treaties of Government*, *supra* note 135, at 168–69 (contemplating the role of the "federative" powers and determining "the power of war and peace, league and alliances" should be among them).

139. *See* Stephen Wood, *What is the Monarch's Role in British Government?*, HISTORY (Nov. 17, 2020), https://www.history.com/news/what-is-the-queens-role-in-british-government[https://perma.cc/PT59-XU3P] (recalling how King Charles I ruled without Parliament for more than a decade).

140. *See id.* at 173 ("Constant, frequent meetings of the legislative, and long continuations of their assemblies, without necessary occasion, could not but be burdensome to the people, and must necessarily in time produce more dangerous inconveniences . . . .").

141. *See id.* ("Thus supposing the regulation of times for the assembling and sitting of the legislative is not settled by the original constitution, it naturally fell into the hands of the executive; not as an arbitrary power depending on his good pleasure but with his trust . . . .").

142. *See* MONTESQUIEU, *supra* note 51, at 198 (stating the government has three powers, two of which were executive).

143. *Id.*

144. *Id.*

relations,[145] while the second concerned judicial proceedings.[146] Montesquieu did not specify which executive power was responsible for executing the laws; however, it is fair to assume that the executive power that governed the civil law included the power and responsibility to execute the civil law. Likewise, the writers of the Essex Report divided executive power into two distinct powers: the first was an "external" power and the second was an "internal" power.[147] The external power managed war and foreign relations, and the internal power sought the "peace, security and protection of the subject and his property, and in the defence of the state."[148] Thus, seventeenth- and eighteenth-century writers interpreted the powers of war and foreign relations as either a distinct executive power (separate from domestic executive power) or a power entirely different from—even if traditionally attached to—the executive power. Which executive power, then, did the early American leaders vest in the President? It was the latter executive power—the "internal" power—that the early American leaders vested in the President.

A. *The Evolution of the Presidency*

Some pro-Executive supporters argue that the early American leaders were royalists, not republicans.[149] These pro-Executive supporters base their position, in part, on a quotation by James Wilson during the early days of the Constitutional Convention. In the afternoon on June 1, 1787, Wilson said, "The people of [America] did not oppose the British King but the parliament—the opposition was not [against] an Unity but a corrupt multitude."[150] Accordingly, pro-Executive supporters argue the early American leaders bestowed sweeping powers on the presidency.[151] Under

145. *See id.* (describing the first power of the Executive as to "make[] peace and war").

146. *See id.* ("[H]e punishes criminals, or determines the disputes that arise between individuals.").

147. *The Essex Result*, *supra* note 80, at 373 ("The executive power is sometimes divided into the external executive . . . .").

148. *Id.*

149. *See, e.g.*, ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 2 (2014) (arguing the American Revolution was "a revolution against a legislature, not against a king" and was "indeed, a rebellion in favor of royal power").

150. Report of Rufus King (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 71.

151. NELSON, *supra* note 149, at 5. *But see* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 145–47 (2015) (asserting the President possesses broad, sweeping powers, but the power to initiate war or hostilities is not among them).

the Articles of Confederation, Congress had a mixture of executive, legislative, and judicial powers; however, Executive proponents contend that Congress, under the Articles, was predominately an executive assembly.[152] This position "provide[s] support for the conclusion that war primarily was an executive, rather than a legislative, function."[153] June first was the eighth day of the Convention.[154] The delegates' first business of the day was the consideration of a resolution to establish "a national Executive" that would "possess the executive powers of Congress."[155] Charles Pinckney spoke first. He "was for a vigorous Executive."[156] However, he "was afraid the Executive powers of the existing Congress might extend to peace [and] war . . . which would render the Executive a Monarchy, of the worst kind, towit an elective one."[157] A very brief flurry of parliamentary action followed Pinckney's comments.[158] Then, everything became still, and a nervous silence engulfed the room.[159] After several long moments, George Washington asked if he should put the question to a vote.[160] And then, Benjamin Franklin spoke.[161] Franklin "observed that it was a point of great importance and wished that the gentlemen would deliver their sentiments on it before the question was put [to a vote]."[162] It seems that

152. Yoo, *The Continuation of Politics by Other Means*, *supra* note 23, at 236.

153. *Id.*

154. Although June 1st was the eighth day of the Convention overall, it was only the fourth day in which the delegates actually were engaged in the business of the Convention—and just the third day of actual discussion. The Convention began on May 25th, which the delegates spent electing officers. Report of James Madison (May 25, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 3, 3. The delegates adjourned over the weekend, met again on May 28th, wherein the delegates established parliamentary procedure and rules of conduct and debate. Journal Entry (May 28, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 7, 7–10. Then, on May 29th, the delegates "opened the main business" of the Convention by introducing plans of government submitted by Edmund Randolph and Charles Pinckney. Report of James Madison (May 29, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 17, 18. Thus, the delegates did not first take up "consideration [of] the state of the union" until May 30th. Report of Robert Yates (May 29, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 23, 24.

155. Report of James Madison (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 64, 64.

156. *Id.*

157. *Id.* at 64–65.

158. *Id.* at 65.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

Franklin's words overcame the delegates' nervous hesitancy, and the discussion proceeded rapidly.

John Rutledge began the discussion.[163] He agreed with Franklin, criticizing the delegates' shyness.[164] Then he agreed with Wilson, saying that "he was for vesting the Executive power in a single person."[165] Finally, he agreed with Pinckney, and stated that, notwithstanding his previously expressed opinion, "he was not for giving [the Executive] the power of war and peace."[166] After a few minutes of discussion, James Wilson spoke again.[167] He addressed Pinckney's fear that the executive power might be understood to include the powers of war and peace, thus resulting in an elected monarchy.[168] Wilson said that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."[169] Indeed, Wilson said that "executive powers ex vi termini,[170] do not include the Rights of war & peace &c."[171] He cited the seventeenth- and eighteenth-century natural law writers, saying that "[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."[172] James Madison agreed.[173] And nobody objected. Pro-Executive supporters, then, are correct in one regard. Under the Articles of Confederation, Congress did have executive powers; however, the power of war was not among them. Rather, the delegates considered the power of war to be a legislative power, and they cited the

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 65–66.
168. *Id.*
169. *Id.*
170. *See Ex vi termini*, BLACK'S LAW DICTIONARY (2nd ed. 1910) ("From or by the force of the term. From the very meaning of the expression used."); *see also* 1 OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, AMERICAN CONSTITUTIONAL LAW, at D-9 (5th ed. 2012) ("'By definition'; from the very meaning of the term or expression used.).
171. Report of Rufus King (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 70.
172. Report of William Pierce (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 73, 73–74.
173. Report of Rufus King (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 70.

seventeenth- and eighteenth-century natural law writers as their authorities.[174]

As the Convention continued, the national Executive began to take shape. By the end of June, the delegates had vested the executive power in one person, to be elected by the Legislature.[175] The Senate, at the time, held the power of war and foreign relations.[176] During the first half of July, though, the Convention became contentious as the delegates reached the

174. One finds the idea that the power of war is a legislative power in more sources than just the seventeenth- and eighteenth-century natural law writers. For instance, Immanuel Kant implied that waging war is a legislative function rather than an executive one: "For [citizens] must always be regarded as co-legislating members of a state (not merely as means, but also as ends in themselves), and must therefore give their free assent, through their representatives, not only to waging war in general but also to each particular declaration of war." IMMANUEL KANT, THE METAPHYSICS OF MORALS 116 (Lara Dennis ed., 2017) (1785). In the sixteenth century, Jean Bodin also wrote that the power to declare war was a legislative function:

> For to denounce war[] unto the enemie, or to make peace with him, although it seeme to be a thing different from the name of the law, yet it is manifest these things to be[] done by the law, that is to say by the commaundment of the [sovereign] power.

BODIN, *supra* note 135, at 162. Finally, it is prudent also to deal briefly with the royalist interpretation of James Wilson's comment that the revolution was in opposition to the parliament rather than the king. This comment occurred while the delegates discussed whether the national executive should consist of one person or several. James Wilson supported a single executive. Report of James Madison (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 65. Edmund Randolph supported multiple executives, saying that a single executive would lead to monarchy and tyranny. *Id.* at 66. At the time of the Convention, the beginnings of the rebellion lay twelve years in the past. Many delegates (Edmund Randolph among them) had been only in their late teenage years or early twenties in 1775 (Edmund Randolph was twenty-one when the Continental Congress adopted the Declaration of Causes and Necessity of Taking Up Arms in July of 1775). As a result, the long struggle against the king for independence understandably dominated the younger delegates' memories of the period. James Wilson, though, had been a member of the Second Continental Congress. Lucien Hugh Alexander, *James Wilson, Patriot, and the Wilson Doctrine*, 183 N. AM. REV. 971, 972 (1906). He had participated directly in the early days of the rebellion. *Id.* Thus, Wilson's comment is interpreted best as reminding the younger delegates that the tyranny against which the colonies rebelled did not originate with the king but with parliament. The rebellion against the king, the fight for independence, did not begin until the king refused to protect the colonies from parliament's acts. In other words, Wilson's comment is interpreted best as a warning that an assembly could be just as tyrannical as a single person. Given this context, and James Wilson's repudiation of the British monarch as a suitable example for the United States Executive, the Royalist interpretation of his comment is unconvincing. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 248 (1985) (explaining James Wilson's and others' rejection of the royal prerogative).

175. Report of James Madison (June 1, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 126, at 64.

176. *Id.* at 65–66.

climax of the struggle between the Virginia Plan and the New Jersey Plan.[177] The delegates became deadlocked, and the struggle threatened to end the Convention.[178] But on July 16, the delegates reached a compromise; however, the constant work and fighting had exhausted the delegates.[179] The Convention chose a committee of five men known as the Committee of Detail.[180] The Convention tasked these men with assembling a draft constitution out of the various resolutions passed by the delegates.[181] On July 26, the Convention adjourned for ten days, and the Committee went to work.[182] When the Convention reassembled on August 6, John Rutledge presented a draft constitution to the delegates.[183] The House held the power of war,[184] while the Senate held the treaty power.[185] And the Executive held no substantive foreign relations power.[186] At the beginning of the Convention, then, the delegates did not believe that the power of war was an executive power under the Articles of Confederation.[187] Rather, they believed it was a legislative power.[188] When the Committee on Detail met to write a draft constitution, its members still defined the power of war as a legislative power.[189] Every draft of the Constitution gave the Legislature the power of war.[190] In addition, the committee members gave the Senate the treaty power and the power to appoint ambassadors.[191] Thus, the delegates at the Convention divided the "external" executive powers—Locke's federative powers—between the House and the Senate.[192] They vested the "internal," domestic executive power in the presidency.[193] The delegates at the Convention wanted an inherently peaceful national Executive with

177. William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 198 (2014).
178. *Id.*
179. *Id.* at 198, 202.
180. *Id.*
181. *Id.*
182. *Id.* at 198.
183. *Id.* at 203, 217–18.
184. *Id.* at 229.
185. *Id.* at 228.
186. *Id.* at 234.
187. *Id.* at 260.
188. *Id.*
189. *Id.* at 229.
190. *Id.*
191. *Id.* at 228.
192. *Id.* at 228, 229.
193. *Id.* at 234.

domestic powers.[194] They did not consider any role in foreign relations to be inherent to executive power.[195] This view remained unchanged until the closing days of the Convention.

When the delegates did give the presidency a role in foreign relations, they did not do so because of inherent executive powers. The delegates gave the presidency a role in foreign relations because they feared the Senate might transform itself into an aristocracy.[196] Since the House's size prevented it from participating effectively in treaty negotiations, the job fell to the President to check the Senate's power and represent the people's interests in negotiations.[197] So in this, too, the President exercised a domestic power.

194. *But see* Report of James Madison (Aug. 14, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 283, 291–93 (showing Alexander Hamilton's plan which did vest some "external" executive powers in the President). However, the Convention did not endorse Hamilton's plan. Indeed, no president left the country while in office until Woodrow Wilson in 1918. Janet Cooper Alexander, *John Yoo's* War Powers: *The Law Review and the World*, 100 CALIF. L. REV. 331, 476 (2012).

195. *See* Ewald, *supra* note 177, at 234 (discussing the proposed powers given to the Executive Branch by the Committee on Detail).

196. Report of James Madison (Sept. 6, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 73, at 521, 522–23. Madison documented the considerations of giving the presidency a role in foreign relations:

> [James] Wilson said that he had weighed carefully the report of the Committee for remodelling the constitution of the Executive; and on combining it with other parts of the plan, he was obliged to consider the whole as having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate[.] They will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department. They are to make Treaties; and they are to try all impeachments. In allowing them thus to make the Executive [and] Judiciary appointments, to be the Court of impeachments, and to make Treaties which are to be laws of the land, the Legislative, Executive, [and] Judiciary powers are all blended in one branch of the Government. The power of making Treaties involves the case of subsidies, and here as an additional evil, foreign influence is to be dreaded—According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate—He had always though the Senate too numerous a body for making appointments to office. The Senate, will moreover in all probability be in constant Session. They will have high salaries. And with all those powers, and the President in their interest, they will depress the other branch of the Legislature, and aggrandize themselves in proportion. Add to all this, that the Senate sitting in Conclave, can by holding up to their respective States various and improbable candidates, contrive so to scatter their votes, as to bring the appointment of the President ultimately before themselves—Upon the whole, he thought the new mode of appointing the President, with some amendments, a valuable improvement; but he could never agree to purchase it at the price of ensuing parts of the Report, nor befriend a system of Which they make a part[.]

Id.

197. *Id.*

The President was the chief negotiator who represented the people's interest where the House could not. However, the President's negotiations were meaningless without the Senate's consent. Thus, by the end of the Convention, the delegates divided the "external" executive powers between the House and the Senate. The delegates gave the House the power of war, and they gave the Senate the power to make treaties and appoint ambassadors. However, the delegates became concerned about the amount of power they gave to the Senate. As a result, they divided the power further. They made the President responsible for negotiating treaties and nominating ambassadors, and they made the Senate responsible for confirming the President's actions. The presidency, then, was not the source of all foreign relations power, tiny bits of which were given to the House and Senate as checks on executive power. On the contrary, the President's role in foreign relations was only as a popular check on the Senate's power.

B. *The President Shall Be Commander in Chief*

The Constitution makes the President "Commander in Chief of the Army and Navy of the United States; and of the Militia of the several States, when called into the actual Service of the United States."[198] Pro-Executive supporters believe that this authority gives the President the power to initiate war or hostilities unilaterally.[199] Pro-Executive supporters reach this conclusion because the British monarch possessed the power to initiate war or hostilities.[200] However, this pro-Executive position rests on vague assumptions.[201] In order to investigate fully the pro-Executive position, we must answer two questions. First, what is a commander in chief? And second, are war powers inherent to the office of commander in chief?

Concerning the first question, Emer de Vattel gave a commander in chief significant power.[202] He wrote, "[T]he commission of a commander in chief, when it is simple and unlimited, gives him an absolute power over the army—a right to march it whither he thinks proper, to undertake such operations as he finds conducive to the services of the state, &c."[203] This seems to support the pro-Executive position; however, one must note that Vattel qualified this power as representing the "simple and unlimited" extent

198. U.S. CONST. art. II, § 2, cl. 1.
199. Yoo, *Clio at War*, *supra* note 111, at 1172.
200. *Id.*
201. *Id.*
202. VATTEL, *supra* note 21, at 299.
203. *Id.*

of a commander in chief's authority.[204] Vattel qualified a commander in chief's authority further, writing, "[i]t is true, indeed, that the powers of a general are often limited; but . . . when the sovereign is certain of having made a good choice, the best thing he can do in this respect is to give the general an unlimited power."[205] Thus, even the extensive powers that Vattel gave to a commander in chief were not inherent to the office of commander in chief.[206] Rather, the commander in chief's powers depended on how much authority the country's sovereign gave the commander in chief.[207] A commander in chief's power, then, derived from the sovereign, not from inherent power vested in the office itself. During the eighteenth century, the British army had several simultaneous commanders in chief.[208] In general, the British army had one commander in chief in Great Britain and one commander in chief for each theater of war.[209] In the early days of the Seven Years' War, Major General Edward Braddock became the first commander in chief of North America.[210] After colonial forces invaded Canada in 1775, the British appointed two commanders in chief to North America, one tasked with operations in Canada and one tasked with operations in the thirteen colonies.[211] All of these people held the title of commander in chief.

Concerning the second question, then, did these various commanders in chief have the authority to initiate war? Did they have the authority to initiate hostilities? Pro-Executive supporters might respond that the monarch alone had the right to initiate war or hostilities. However, that response is inadequate. Pro-Executive supporters argue that the President's designation as commander in chief gives the President the authority to initiate war or hostilities. They further argue that the early American leaders inherited this understanding from the British tradition. If the designation of commander in chief includes the authority to initiate war or hostilities, and if the early American leaders inherited this understanding from the British tradition, then a British commander in chief should have had the authority to initiate war or hostilities with the military forces under his

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 33–35 (2015).
209. *Id.*
210. ANDERSON, CRUCIBLE OF WAR, *supra* note 39, at 70.
211. JOHN R. ALDEN, A HISTORY OF THE AMERICAN REVOLUTION 194 (1969).

command. So, did the various British commanders in chief have the authority to initiate war or hostilities with the military forces under their respective commands? If yes, then the British monarch's authority to initiate war or hostilities is fragmented. If no, it can only be because the designation of commander in chief does not inherently include the right to initiate war or hostilities. Legally, only a country's sovereign can initiate war or hostilities.[212] The British monarch's authority to initiate war or hostilities, then, came from its status as the sovereign of England and, later, Great Britain. The monarch's designation as commander in chief had nothing to do with its authority to initiate war or hostilities. If this were so, then all British commanders in chief must have had the authority to initiate war or hostilities using the military forces under their respective commands. This is the mistake that pro-Executive supporters make. They conflate the British monarch's power as the country's sovereign with its designation as commander in chief.[213] In reality, the two are separate powers. Of course, the most reasonable answer to the question of whether the various British commanders in chief were authorized to initiate war or hostilities is no.

Nonetheless, pro-Executive supporters may object to this reasoning. They may respond that the British commanders in chief received their commissions from the monarch and, as a result, were subordinate to the monarch. Unfortunately, this objection is inadequate. It does not support the original contention that the office of commander in chief inherently possesses the authority to initiate war or hostilities. Instead, this objection introduces a hierarchy among commanders in chief that was not present in the original contention, so that now only some commanders in chief have the authority to initiate war or hostilities. In addition, it is difficult to understand why such a hierarchy would exist other than as a device to rescue the pro-Executive supporters' original contention. However, no such objection exists for the governors of the individual states. They, too, possess the title of commander in chief, but unlike the various British commanders in chief, the governors' commissions are bestowed

212. *See* JEAN BODIN, ON SOVEREIGNTY 59 (Julian H. Franklin ed. & trans., Cambridge Univ. Press 1992) (explaining why declaring war or peacemaking is a power that must be reserved for the sovereign); *see also* DANIEL LEE, THE RIGHT OF SOVEREIGNTY: JEAN BODIN ON THE SOVEREIGN STATE AND THE LAW OF NATIONS 198–200 (2021) (discussing the seventeenth- and eighteenth-century writers' views on sovereignty vis-à-vis declaring war).

213. It should be noted that much of this applies to the British Monarchy before the nineteenth century, when sovereignty began shifting from the Monarchy to Parliament.

constitutionally and are not subordinate to the President.[214] Do the governors of the individual states, then, possess the authority to initiate war or hostilities? According to the pro-Executive interpretation, they should have that authority because they are commanders in chief. However, the United States Constitution prohibits the governors from "engag[ing] in War" without the consent of Congress.[215] But, if one applies the pro-Executive interpretation, the term "War" does not refer to undeclared war or hostilities; it refers only to a "perfect" war—a legal technicality that applies international laws to ongoing hostilities.[216] As a result, the pro-Executive interpretation of this clause should be that governors cannot declare hostilities to be a perfect war and, in so doing, invoke the privileges and protections of international law. Only Congress can do that.[217] This means, though, that according to the pro-Executive interpretation, the clause does not prohibit governors from initiating undeclared (or "imperfect") war or hostilities with the military forces under their respective commands. And since the governors are constitutionally mandated commanders in chief, they should possess—according to the pro-Executive interpretation—the authority to initiate undeclared war or hostilities using the military forces under their respective commands. Thus, if one follows the pro-Executive interpretation to its end, the governors of the individual

214. *See* Marcus Armstrong, *The Militia: A Definition and Litmus Test*, 52 ST. MARY'S L. J. 1, 43 (discussing how the President does not become commander in chief of state militias until the governors release their state militias into military service); ANGUS HAWKINS, VICTORIAN POLITICAL CULTURE: HABITS OF HEART AND MIND 125 (2015) (explaining the distinction between the English Crown and the English Monarch, and how although the Crown's authority is tempered, the Monarch is still perceived as the "corporation aggregate," representing every arm of the British Government, including the military).

215. U.S. CONST. art. 1, § 10, cl. 3.

216. Yoo, *Clio at War*, *supra* note 111, at 1185.

217. Here, pro-Executive supporters may respond that to "declare war" and "engage in war" are different concepts. They may say that to declare war means making a war perfect, whereas to engage in war means engaging in any type of hostility. But this response, too, is inadequate. According to the pro-Executive interpretation, Congress's only war power (other than the funding power) is making a war perfect. Congress does not, in any capacity, decide whether or not to initiate general hostilities. *Id.* at 1179. Rather, pro-Executive supporters contend that the President decides whether or not to initiate general hostilities. Now, the prohibition on states engaging in war clearly prohibits the same without the consent of Congress. Thus, according to the pro-Executive interpretation, this prohibition cannot be about initiating general hostilities because Congress has no such authority. Therefore, this prohibition only can be about prohibiting states from engaging in a perfect war because that is the only type of war to which Congress can consent. Otherwise, the Constitution would prohibit the states from engaging in war without the President's consent. According to the pro-Executive interpretation, then, this prohibition only restricts states from unilaterally engaging in perfect wars.

states are able to initiate war or hostilities; they just cannot declare such conflicts perfect. This seems an unreasonable interpretation. Thus, like the previous example, the most reasonable answer to the question of whether the governors of the individual states are authorized to initiate war or hostilities is no, because the power to initiate war or hostilities is not inherent to the office of commander in chief.

When the delegates to the Continental Congress commissioned George Washington as commander in chief in the summer of 1775, they did not entrust him with the power to initiate war or hostilities.[218] First, the delegates defined the scope of Washington's command.[219] He was to have command of "the army of the United Colonies, and of all the forces now raised, or to be raised, by them, and of all others who shall voluntarily offer their service, and join the said Army for the Defen[s]e of American liberty, and for repelling every hostile invasion thereof."[220] It is important to note that this commission did not give Washington the authority to repel an invasion.[221] It simply stated that volunteers who joined to repel an invasion fell under the commander in chief's jurisdiction.[222] Next, the delegates defined the scope of Washington's responsibilities.[223] As commander in chief, Washington was "hereby vested with full power and authority to act as [he] shall think for the good and welfare of the service."[224] Finally, the delegates made the commander in chief subordinate to the will of the Congress.[225] As commander in chief, then, Washington had no inherent war powers, and his overall command was subject to the directions of the Congress.[226] Washington did not gain war powers until three days later, as part of his first set of congressional orders.[227] The Congress's fifth order stated that Washington "shall take every method in [his] power consistent with prudence, to destroy or make prisoners of all persons who now are or who hereafter shall appear in Arms against the good people of the united

218. Letter to George Washington (June 17, 1775), *supra* note 62, at 96.

219. *Id.*

220. *Id.*

221. *See id.* (acknowledging Washington must "regulate [his] conduct in every respect by the rules of war, . . . and punctually to observe and follow such orders . . . as [he] shall receive from this, or a future congress").

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 101.

colonies."[228] These instructions coincided with the Congress's decision to declare war by issuing the Declaration of Causes and Necessity of Taking Up Arms.[229] Soon after the delegates issued their instructions to Washington, they resolved "[t]hat a committee of five be appointed to draw up a declaration, to be published by General Washington, upon his arrival at the Camp before Boston."[230] Thus, the delegates closely followed the seventeenth and eighteenth century natural law writers' teachings regarding how to declare war. The seventeenth- and eighteenth-century natural law writers taught that declarations of war should be published domestically or on the frontiers.[231] George Washington was to carry the Congress's declaration of war to Boston (i.e. the frontier between colonial and British forces) and publish it there.[232] At the same time, Washington assumed command of the colonial forces with congressional instructions to pursue hostilities.[233] Washington's power to pursue hostilities, then, came from a congressional directive; it was not inherent in his commission as commander in chief.[234] Thus, in June 1775 Washington became commander in chief of colonial forces, albeit highly restricted by Congress.[235] However, even with all of the congressional constraints, the fear of what Washington may have done with his power was palpable in John Adams' letters.[236] The very man who championed Washington's

228. *Id.*

229. *See supra* note 62 and accompanying text (discussing the Second Continental Congress's declaration of war).

230. Journal Entry (June 23, 1775), *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 62, at 104, 105.

231. *See supra* notes 51–57 and accompanying text (describing the history of how wars were declared).

232. *Compare* Journal Entry (June 23, 1775), *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 62, at 105 (ordering Washington to deliver the declaration to Boston), *with* VATTEL, *supra* note 21, at 317 ("[A state] may content [itself] with publishing the declaration of hostilities within [its] own territories, or on the frontier; and if the declaration does not come to the knowledge of [the enemy] nation before hostilities are commenced, she can only blame herself.").

233. Letter to George Washington (June 17, 1775), *supra* note 62, at 96.

234. Journal Entry (June 20, 1775), *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 62, at 100–01. Indeed, there is one very valuable question to ask. If a commission as commander in chief carried an inherent power to pursue hostilities, why did the Congress find it necessary to give Washington explicit instructions to kill or capture the enemy?

235. *Id.* at 96, 100–01.

236. *See, e.g.*, Letter from John Adams to Abigail Adams (Oct. 26, 1777), *in* 2 THE ADAMS PAPERS: ADAMS FAMILY CORRESPONDENCE (L.H. Butterfield ed., 1963), https://www.masshist.org/digitaladams/archive/doc?id=L17771026ja. [https://perma.cc/G6GF-JTDC] (expressing a general desire that Washington not receive excessive credit or praise for successes of colonial forces).

appointment as commander in chief wrote to Abigail Adams in 1777 that he was happy Washington had not been directly responsible for the victory at Saratoga, lest the commander in chief's power threaten the country's liberties.[237] And yet, pro-Executive supporters argue that less than three years later, John Adams—the man who feared that Washington's greatly restricted power as commander in chief still might have meant the end of United States liberties—created a king-like military executive in the 1780 Massachusetts state constitution.[238]

At first glance, the 1780 Massachusetts state constitution does seem to give the executive king-like powers.[239] Before getting too deep into the discussion, though, one should note first that the pro-Executive supporters, again, have conflated two offices into a single commander in chief. Towards

237. *Id.* ("Congress will appoint a Thanksgiving, and one Cause of it ought to be that the Glory of turning the Tide of Arms, is not immediately due to the Commander in Chief, nor to southern Troops. If it had been, Idolatry, and Adulation would have been unbounded, so excessive as to endanger our Liberties for what I know. Now We can allow a certain citizen to be wise, virtuous, and good, without thinking him a Deity or saviour.").

238. In 1787, John Adams published several essays defending the state constitutions. 4 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR (Boston, Charles C. Little & James Brown 1851). In these essays, Adams quoted James Harrington in detail and at length, writing that the "reasons [Harrington] assigns in support of his judgment are often eternal and unanswerable by any man." *Id.* at 410. James Harrington, in his work *The Commonwealth of Oceana and a System of Politics*, described the ideal republic. *See generally* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (London, George Routledge & Sons 1887) (1656). He set up two houses of government. *See* generally *id.* One was a popular house whose explicit consent was needed to enact any law. *See id.* at 137–38 ("But they shall have no power to engage the commonwealth in a war without the consent of the senate and the people."). The other was a senate comprising various councils of knights. *See id.* at 145 ("[W]hereas in this of Oceana it is not otherwise entrusted than when the Senate, in the election of nine knights extraordinary, gives at once the commission, and takes security in a balance, added to the council of war . . . ."). One of those councils—the Council of State—had the power "to consider upon . . . war or peace." *Id.* at 137. However, even though the senate had the power to "consider upon . . . war or peace," *id.* at 137, and it had "[no] power to levy war, men, or money, otherwise than by the consent of the [popular house] so given, or by a law so enacted." *Id.* at 179. Thus, in Harrington's ideal republic—so influential to early American leaders like John Adams—hostilities could not be initiated without the explicit approval of the popular house. *See id.* at 179 (stating the Senate could not initiate war without majority vote). By the time of the Constitutional Convention, "[The Commonwealth of] *Oceana* had already been used to guide the construction of several of the individual states' constitutions; citizens of Massachusetts were so taken with its precepts that in a 1779 convention to adopt a new state constitution, one delegate even proposed that the state change its name from the Commonwealth of Massachusetts to the Commonwealth of Oceana." ZACHARY MCLEOD HUTCHINS, INVENTING EDEN PRIMITIVISM, MILLENNIALISM, AND THE MAKING OF NEW ENGLAND 233 (2014). Thus, the pro-Executive contention that the 1780 Massachusetts state constitution writers created a monument to unilateral executive war powers is unconvincing.

239. MASS. CONST. pt. 2, ch. 2, § 1, art. VII (1780).

the end of Article VII of the 1780 Massachusetts state constitution, one reads that the Massachusetts governor is entrusted with the powers "incident to the offices of captain-general and commander-in-chief."[240] By use of the word "offices" the state constitution writers showed that they understood captain-general and commander in chief to be wholly separate positions, each with its own respective powers. And, in fact, captain-general and commander in chief were two distinct ranks.[241] In the British constitution, "the King is Captain-General of all the Forces of Great Britain."[242] No doubt, pro-Executive supporters are ready to pounce at the mention of the monarch; however, the monarch could—in fact, did—entrust the rank of captain-general to "various distinguished characters at different periods."[243] If the rank of captain-general carried with it the sovereign right to initiate war or hostilities, did the British monarchy then, also cede its sovereignty to these various distinguished characters? Again, the most reasonable answer is no. Thus, the authority to initiate war or hostilities is not inherent to the rank of captain-general. Rather, the rank of

240. *Id.*

241. ALAN J. GUY, OECONOMY AND DISCIPLINE OFFICERSHIP AND ADMINISTRATION IN THE BRITISH ARMY 1714–63, at 28 (1985). 21 H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 34 (Routledge 2016) (1977).

242. 2 JOHN PHILLIPART, THE ROYAL MILITARY CALENDAR 240 (1815).

243. *Id.*; *see also* CLIFFORD WALTON, HISTORY OF THE BRITISH STANDING ARMY A.D. 1660 TO 1700 779–83 app. 1 (1894) (reprinting a commission declaring Geo. Monck the Duke of Albemarle). The commission gave the Duke of Albemarle standing orders "both to resist and withstand all invasions, tumults, seditions, conspiracies, and attempts, that may happen within our said realms." WALTON, *supra*, at 779. In addition, the commission gave the Duke of Albemarle standing orders "to invade, assault, repell, resist, fight with, subdue, slay and kill, all, every, or any enemies or rebels against us . . . that in our said kingdoms, dominions, and territories, or any of them, or any part or parts thereof, shall raise, make, cause, adhere to, or be part of any insurrection, commotion, tumult, sedition, conspiracy, or attempt whatsoever against our person, state, safety, crown, and dignity." *Id.* Thus, the Duke of Albemarle's commission gave him standing orders to defend the country against invasion or rebellion as well as against any enemies that were party to an invasion or rebellion. *See id.* (enumerating the Duke's general authority to defend against war and hostilities). When discussing the initiation of war or hostilities, though, Albemarle's commission reads a bit differently. The commission allowed Albemarle "to rule, govern, command, dispose, and employ, in, for, or about such defences, offences, invasions, executions, and other military and hostile acts and services, as are or shall be by us, from time to time, and at any time, respectively directed, limited, or appointed, in or by these our letters-patents, or by our instructions which we have delivered unto you under our sign manual." *Id.* In other words, the commission to be captain general did not authorize the Duke of Albemarle to initiate war or hostilities unilaterally. The remainder of the commission gave Albemarle far-reaching powers in training, organizing, disciplining, positioning, and administering the entire armed forces—the traditional purview of captains general. *See* GUY, *supra* note 241 ("When a Captain General or Commander-in-Chief was appointed[,] he enjoyed great if rather ill-defined power over the administrative machine.").

captain-general mentioned in Article VII of the 1780 Massachusetts state constitution referred to the rank and power held and exercised by figures such as the Duke of Albemarle, the Duke of Monmourth, and the Duke of Marlborough, which were generally wartime ranks.[244] Pro-Executive supporters conflated the expansive powers of a captain-general with the more limited powers of a commander in chief in order to fabricate their desired powers for the United States President.

At that time, the Massachusetts governor did not have the authority to initiate war or hostilities. In fact, close examination of Article VII of the 1780 Massachusetts state constitution shows that the governor did not have offensive powers.[245] The state constitution writers created an impressive list of military actions that the governor could perform—"encounter, repel, resist, expel and pursue . . . kill, slay, and destroy."[246] However, the governor could perform these actions only against certain people. The governor could "kill, slay, and destroy" only those who "shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction,

244. The Duke of Albemarle's appointment as captain general became a lifetime appointment, with Albemarle serving as captain general from August 1660 to his death in January 1670. In 1709, John Churchill, Duke of Marlborough, aware of this precedent, asked Queen Anne to commission him as captain general for life. STEVEN SAUNDERS WEBB, MARLBOROUGH'S AMERICA 193 (2013). The difference, though, was that Charles II commissioned Albemarle as captain general for life in appreciation for Albemarle's efforts to restore the monarchy. In addition, there was uncertainty regarding future uprisings or rebellions (hence, the heavy emphasis in Albemarle's commission on suppressing "tumults, seditions, conspiracies, and attempts"). WALTON, *supra* note 243, at 779. There also were ongoing, simmering tensions between England and Spain that threatened to erupt into war. Thus, there were significant differences in circumstance between Albemarle's lifetime appointment as captain general and Marlborough's attempt to obtain a similar commission. It is telling, though, that in spite of his distinguished service, Marlborough did not ask for this commission as a reward for such meritorious actions. This suggests that receiving such a commission as a reward was not common, and Marlborough did not believe it the best justification for asking for the commission. Rather, Marlborough justified asking for the commission by "intimating the war would last not only the duration of [his and Anne's] lives, but probably [forever]." 8 AGNES STRICKLAND AND ELISABETH STRICKLAND, LIVES OF THE QUEENS OF ENGLAND, FROM THE NORMAN CONQUEST 337 (Cambridge Univ. Press 2010) (1854). Thus, Marlborough felt that the best way to obtain a lifetime commission as captain general was to convince the monarch that the war necessitating the rank likely would last the rest of their lives. This, then, seems to tie the rank of captain general closer still to wartime exigency. Indeed, when James, Duke of York, sought to keep his nephew, the Duke of Monmouth, from attaining the office of captain general, he did so by arguing that the rank was unnecessary in peace time. ANNA KEAY, THE LAST ROYAL REBEL THE LIFE & DEATH OF JAMES, DUKE OF MONMOUTH 182 (2016).

245. *See* MASS. CONST. pt. 2, ch. 2, § 1, art. VII (1780) (describing the powers of the governor of the Commonwealth and the authority to initiate war is not amongst them).

246. *Id.*

invasion, detriment, or annoyance of this commonwealth."[247] In other words, the governor could engage militarily only those people who showed themselves to be hostile and who attempted to destroy, invade, or raid Massachusetts.[248] Thus, the governor's military power was not as expansive as pro-Executive supporters characterize it. On the contrary, the governor's military power was defensive. Therefore, the 1780 Massachusetts state constitution is best understood as a war-time document, and the governor's grant of power is best understood as a war-time grant of power.[249] Thus, the state constitution writers commissioned the governor as captain-general, a British rank usually reserved for war-time commanders, and assigned the governor temporary war powers. The 1780 Massachusetts state constitution was not the monument to unilateral executive war powers that pro-Executive supporters believe it to be.

However, William Rawle, wrote of one circumstance in which the President could unilaterally take the country into war.[250] He warned that through "[t]he intercourse with foreign nations [and with] the direction of the military and naval power . . . being confided in the president, his errors or misconduct may draw hostilities on us."[251] The President, then, could involve the United States in a war unilaterally only through the President's mistakes or through abuse of the President's office. And so, the President does not have the constitutional authority to initiate war or hostilities unilaterally. The designation of commander in chief does not allow the President to initiate war or hostilities. Rather, the designation of commander in chief amounts "to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy."[252] The President, when "left on the foot of the Constitution," may "*repel* force by *force*, (but not capture)."[253] The President

247. *Id.*

248. *Id.*

249. RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 61 (1974).

250. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 109 (1829).

251. *Id.*

252. THE FEDERALIST NO. 69 (Alexander Hamilton).

253. Letter from Alexander Hamilton to James McHenry (May 17, 1798), *in* 21 THE PAPERS OF ALEXANDER HAMILTON, APRIL 1797–JULY 1798, at 461 (Harold C. Syrett ed., 1974), https://founders.archives.gov/documents/Hamilton/01-21-02-0255#print_view [https://perma.cc/JN9Y-55XX].

may "repel sudden attacks,"[254] but may not take offensive action. Any operation beyond strictly repelling an attack "requires the sanction of that Department which is to declare or make war."[255] It is so because, as Thomas Jefferson wrote to James Madison, "[w]e have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[256] Pro-Executive supporters might respond that Jefferson meant the legislative body could check the initiation of war with its funding power. That response is inadequate. The absolutely critical part of the pro-Executive position is that the early American leaders understood the Legislature's role in war-making to be restricted to funding or not funding military operations.[257] Pro-Executive supporters argue this was the traditional role of the English, and later British, parliament, and the

254. Report of James Madison (Aug. 17, 1787), *supra* note 73, at 318.

255. Letter from Alexander Hamilton to James McHenry (May 17, 1798), *supra* note 253, at 461.

256. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd et al. eds., 1958). Here, pro-Executive supporters commit their own error of engaging a document independent of its historical context. Pro-Executive supporters argue that Jefferson misunderstood the war powers in this letter; however, it is difficult to establish any evidence proving this, and the historical context of the document makes it unlikely as well. When Jefferson wrote this letter, he was nearing the end of his tenure as Minister to France and would become Secretary of State within six months. Having served four years as Minister to France—and two years under the new constitution—it is unlikely that Jefferson misunderstood the clause's common interpretation among government officials. In addition, Jefferson wrote this to James Madison, the man very much at the center of the clause's meaning. It seems unlikely that Madison would have allowed his friend to operate under an erroneous interpretation, especially as minister to one of the United States' most important allies. Still, the pro-Executive supporters run into more problems. On the one hand, they call Jefferson's interpretation of the War Powers Clause too narrow. On the other hand, they say that other early American leaders such as George Washington broadly interpreted the war powers clause due to "political and strategic considerations." Ramsey, *supra* note 34, at 1559. Both Jefferson and Washington agreed that Congress controlled the ability to initiate war or hostilities. The problem is that Jefferson can hardly be accused of broadly interpreting the Constitution. Thus, pro-Executive supporters have a situation where Jefferson's interpretation is too narrow while Washington's interpretation is overly broad—even though both Jefferson and Washington interpreted the war powers similarly. Either Washington's reading also must be narrow, thereby defeating the argument that he interpreted the war powers broadly due to political exigency; or, Jefferson's reading must be overly broad, which would be very much against Jefferson's normal philosophy—and indeed, would be very much against the rest of Jefferson's letter to Madison, which proposed the narrow constitutional view that one generation should not be able to approve any expenditures that would bind the next generation with debt (such as war debt). The pro-Executive criticisms of Washington's understanding as overly broad and Jefferson's as narrow and erroneous, then, are unconvincing.

257. *See, e.g.*, Yoo, *supra* note 23, at 170 (asserting as a fundamental point that "Congress was given a role in war-making decisions not by the Declare War Clause, but by its powers over funding").

early American leaders continued this traditional legislative war-making role in the United States Congress.[258] However, Jefferson stated that the early American leaders were responsible for transferring the power of letting loose the dog of war from the Executive to the legislative body.[259] How, then, can a power that traditionally was vested in a legislative body be transferred from an executive to a legislative body? Thus, the early American leaders vested in the Legislature a war power beyond funding; they vested in the Legislature the power to let loose the dog of war and initiate war or hostilities.[260]

III. CONCLUSION: THE DESTROYER OF REPUBLICS

Classical republican writers believed military conflict was the greatest threat to republican institutions and liberty.[261] Algernon Sidney, for example, wrote that the Spartan[262] lawgiver Lycurgus made good laws that formed good institutions.[263] For seven hundred years, the Spartans remained faithful to their institutions, and in so doing, they acquired power,

258. *See id.* at 198 (explaining how the "British Constitution provided . . . important precedents and models for the Framers," one of them being that during war the executive had the power to "lead[] in the initiation and conduct of war, while the legislature was relegated primarily to funding the wars and impeaching ministers").

259. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 256, at 397.

260. *Id.*

261. *See, e.g.*, Cato's Letter No. 87, *in* 3 CATO'S LETTERS, at 176, 179 (5th ed. 1748) ("War is comprehensive of most, if not all the Mischiefs which do or ever can afflict Men: It depopulates Nations, lays waste the finest Countries, destroys Arts, Sciences, and Learning, butchers Innocents, ruins the best Men, and advances the worst; effaces every Trace of Virtue, Piety, and Compassion, and introduces Confusion, Anarchy, and all Kinds of Corruption in publick Affairs; and indeed is pregnant with so many Evils, that it ought ever to be avoided, when it can be avoided . . . .").

262. While historians today generally classify Sparta as an oligarchy, not a republic, Sparta's classification was less clear for classical republican writers. Many classical republican writers, such as Jean-Jacques Rousseau, believed that Sparta demonstrated the kind of zeal and courage, virtue and equality that a republic required from its citizens. *See* Arthur M. Melzer, *The Origin of the Counter-Enlightenment: Rousseau and the New Religion of Sincerity*, 90 AM. POL. SCI. REV. 344, 347 (1996) ("For Rousseau, there can be no true political liberty outside Sparta."). As a result, Sparta's discipline and civic virtue and egalitarianism became examples for other republics, and an ideal emerged of Sparta as a republic that had a monarchy (a conception of a republic that was within the mainstream thought of the time). Even towards the end of the eighteenth century, this image of Sparta persisted. *See* J.A., *On the Words Republic and Commonwealth*, 1 THE MONTHLY MAG. & BRITISH REG. FOR 1796, at 180 (1796) ("[T]he office of *king*, as meaning only the visible head of a state, and administrator of its executive power, was not at all incompatible with the *republica*; and therefore the term *republic* is, without scruple, applied to Sparta and other Grecian states, which admitted kings into their form of government.").

263. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 470 (1996).

influence, and reputation.[264] However, this power, influence, and reputation caused the Spartans to recede from their institutions and fight wars they could not afford that demanded forces they could not produce.[265] As a result, the Spartans borrowed money and hired mercenaries, corrupting Sparta's institutions, and the once powerful Sparta slipped thusly into obscurity.[266] The Roman republic, on the other hand, was able to produce the finances and forces necessary to fight many large wars and win many glorious victories. However, "[n]ot less true is it, that the liberties of Rome proved the final victim of her military triumphs."[267] The classical republican writers' warnings of the consequences that military conflict imposes on republican institutions and liberty is especially relevant for the United States.

The decision to go to war is "in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation."[268] A decision to go to war is a decision to impose great hardship on a country; for "[w]ar, in its best estate, never fails to impose upon the people the most . . . personal sufferings."[269] And for a republic "whose institutions are essentially founded on the basis of peace,"[270] war can be "fatal to public liberty itself,"[271] possibly putting the very existence of the country at risk.[272] And we have said nothing yet of the lives that war destroys. With so much potentially at risk every time the United States initiates war or hostilities, we must ask two questions: Which branch of government should be trusted to decide when to commit soldiers, matériel, and money to military operations? And which branch of government should be trusted to control if, when, and to what extent an operation should be escalated?

The early American leaders approached these questions according to the writings of a group of seventeenth- and eighteenth-century European

264. *Id.* at 422.
265. *Id.* at 198.
266. *Id.* at 195.
267. THE FEDERALIST NO. 41, at 196 (Alexander Hamilton).
268. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 60 (1833).
269. *Id.*
270. *Id.* at 61.
271. *Id.*
272. 12 REG. DEB. 4031, 4038 (1836) (statement of Rep. John Quincy Adams) ("The [war] power is tremendous: . . . it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.").

natural law writers.[273] These writers taught that declarations of war ought to precede hostilities;[274] they taught that undeclared wars violated the law of nature and the law of nations;[275] and they taught that the primary purpose of declarations of war was to avoid hostilities.[276] In addition, the early American leaders agreed in debates, letters, and internal government communications that the Constitution entrusted Congress with the authority to initiate military operations. For these reasons, Congress should be trusted to decide these questions. This Article argued the Constitution already trusts Congress to decide these questions.

273. *See supra* notes 17–21 and accompanying text (listing the natural law writers whom the early American leaders relied on).

274. *See supra* notes 24–32 and accompanying text (explaining the natural law writers' points about when declarations of war were supposed to be given).

275. *See* VATTEL, *supra* note 21 ("But no person being exempted from his duty for the sole reason that another has been wanting in *his*, we are not to omit declaring war against a nation, previous to a commencement of hostilities, because that nation has, on a former occasion, attacked us without any declaration. That nation, in so doing, has violated the law of nature; and her fault does not authorize us to commit a similar one.").

276. *See supra* notes 46–50 and accompanying text (emphasizing the natural law writers' arguments about the purposes of declaring war).