



## Presidential Declarations of War

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## INTRODUCTION

Has the United States declared war on any occasion since 1941? Modern commentary almost universally assumes it has not.<sup>1</sup> The starting place for almost every discussion of modern war powers under the U.S. Constitution is that wars are no longer formally “declared.” The United States, this commentary observes, has declared war on only five occasions in its history, the last being in World War II, and has fought numerous “undeclared” wars since then. When the modern Congress acts to authorize the use of military force, as it has three times since 1990, it does not characterize what it is doing as “declaring war.”<sup>2</sup> When critics accuse Presidents of engaging in armed conflict without congressional approval, it is the lack of approval, not the lack of a declaration, for which Presidents are criticized.<sup>3</sup>

The supposed fading of the declaration of war greatly troubles modern discussions of constitutional war powers. While modern practice and commentary generally agree that wars are no longer “declared,” there is

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<sup>1</sup> E.g., BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 35 (1998) (stating that worldwide “between 1945 and 1970 only one war was formally declared, and then by only a few of the belligerents involved” and adding that in U.S. practice “wars [have been] declared formally on only the rarest of occasions.”); DONALD WESTERFIELD, *WAR POWERS: THE PRESIDENT, THE CONGRESS, AND THE QUESTION OF WAR* 168 (1996); see Robert Turner, *The War on Terrorism and the Modern Relevance of the Constitutional Power to “Declare War,”* 25 HARV. J.L. & PUB. POL’Y 519, 531 (2002) (“[N]o sovereign state has clearly issued a declaration of war in more than half a century. In state practice as well as theory, the formal declaration of war has become an anachronism.”).

<sup>2</sup> See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Authorization for Use of Military Force Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

<sup>3</sup> Many scholars have taken modern Presidents to task for using force unconstitutionally. See Michael D. Ramsey, *Textualism and War Power*, 69 U. CHI. L. REV. 1543, 1544 (2002) (describing and criticizing this scholarship). Essentially all of these critiques would find it constitutional for the President to use force with congressional authorization but without a formal congressional declaration (as in the Gulf War). Two leading exceptions are HALLETT, *supra* note 1, at 145-68, and J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991). For a discussion of their arguments, see *infra* Part III.B.

little agreement about the implications of this observation, both with respect to the power to initiate the use of armed force, and with respect to powers during wartime.

The Constitution grants Congress the power to “declare War,”<sup>4</sup> and by implication denies it to the President.<sup>5</sup> Yet we are told wars are now no longer “declared”; how, then, can we apply this language to the modern practice of “undeclared” hostilities? Is Congress’ power, like declarations themselves, a historical anachronism<sup>6</sup> — or must we depart from the Constitution’s literal text to capture the general sense of “declaring” war in a post-declaration era (whatever that may be)? Similarly, efforts to impose constitutional limits upon the modern President’s ability to initiate armed conflict may be met with the claim that such initiations do not amount to “declaring” war.<sup>7</sup> If the key modern question is, as one commentator says, “the president’s power to wage formally undeclared wars,”<sup>8</sup> the Constitution’s text may not appear to have much to say on the matter. Further, Presidents may claim that the constitutional Commander-in-Chief authority<sup>9</sup> contains special wartime powers — as, for example, the establishment of military commissions and the detention of enemy combatants.<sup>10</sup> Yet the scope of those wartime powers in modern conflicts may be clouded by the suggestion that a war has not, in fact, been “declared,” and that the President’s extraordinary wartime powers arise only in a declared war.<sup>11</sup>

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<sup>4</sup> U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”).

<sup>5</sup> Even leading advocates of presidential war power agree that the President cannot “declare war,” but read that limitation narrowly to leave substantial war power with the President. See ROBERT TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 80 (1991); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295-302 (1996).

<sup>6</sup> See TURNER, REPEALING THE WAR POWERS RESOLUTION, *supra* note 5, at 85-92; Turner, *War on Terrorism*, *supra* note 1, at 531.

<sup>7</sup> See, e.g., John C. Yoo, *Kosovo, War Powers and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000); Yoo, *Original Understanding of War Powers*, *supra* note 5.

<sup>8</sup> HALLETT, *supra* note 1, at 3.

<sup>9</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>10</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>11</sup> Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that President Bush’s order establishing commissions is unconstitutional but suggesting that “[i]n time of declared war” such arrangements “might be tolerable”); see also *Campbell v. Clinton*, 203 F.3d 19, 30 (D.C. Cir. 2000) (Randolph, J., concurring) (“A declaration of war may also have the effect of decreasing commercial choices and civil liberties.”); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218-19 (1998) (“Without question the government’s

This Article argues that these debates are fundamentally misconceived. Far from being a historical anachronism, the declaration of war, in the constitutional sense, is commonplace in modern practice. The United States has made such a declaration in most if not all of its major modern conflicts. These declarations have been made, however, not by Congress, but by the President. Perhaps out of a sense of constitutional unease, we have avoided actually calling them “declarations of war.” But, as discussed below, the essence of a formal declaration of war has long been simply the public announcement that the nation is entering into sustained military hostilities, together with a statement of the reasons for, and the goals of, the conflict.<sup>12</sup>

In modern practice, the President routinely makes such a formal public statement, as can be seen from events surrounding the 1991 Gulf War, the 1999 campaign to protect Kosovo, the response to the 2001 terrorist attacks, and the 2003 conflict in Iraq. In each of these conflicts, the President issued a statement publicly and formally announcing that the United States was entering into an armed struggle, articulating its reasons for doing so, and describing the conditions upon which peace would be made. This is all that a declaration of war is, and all it was in the eighteenth century when the Constitution was drafted, despite some commentators’ efforts to give it more (or less) meaning.<sup>13</sup>

Once we recognize that modern armed conflicts typically begin with a public presidential proclamation, we can see that much of the modern hand wringing about the difficulty of applying the Constitution’s text to modern practice is simply misplaced. Most modern conflicts are not “undeclared” wars, but rather wars declared by the President.

This conclusion simplifies much of the modern debate over war powers, in three critical respects. First, the central question concerning

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authority to engage in conduct that infringes civil liberty is greatest in time of declared war.”); Yoo, *Original Understanding of War Powers*, *supra* note 5, at 301 (suggesting that formal declaration of war is necessary to trigger certain legal powers of President).

<sup>12</sup> See *infra* notes 40-51 and accompanying text.

<sup>13</sup> In prior articles, I have argued that “declaring” war, in its original constitutional sense, included not only formal declarations of war, but also hostile acts that initiated a state of war. See Ramsey, *Textualism and War Powers*, *supra* note 3, at 1590-1609; Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002); see also TURNER, *REPEALING THE WAR POWERS RESOLUTION*, *supra* note 5, at 80 (“This restriction [that the President could not declare war] would clearly include not only the diplomatic pronouncement but also the substantive act of initiating offensive hostilities against another state in such a manner as to commence a *de facto* war.”). But see John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) (disputing this contention). The present Article leaves aside the declaration-by-act debate and focuses only upon the formal declaration.

most presidential war-initiation power is whether and under what circumstances the President can declare war (not whether the President can fight an “undeclared” war). This question may at times be a difficult one, but it is not divorced from the Constitution’s text. Second, viewing the President’s announcement of war as a “declaration” gives us a way to understand the modern congressional practice of authorizing the President to use force. These authorizations are congressional delegations to the President of the power to declare war. Whether they are constitutional depends upon Congress’ ability to delegate its constitutional war powers — again, a potentially difficult question, but not one beyond the ordinary tools of constitutional law. Finally, the question of the President’s wartime powers in modern conflicts need not be further complicated by the objection that a “war” has not been “declared.” Whatever those wartime powers may be, they should not vary between wars declared by Congress and wars declared by the President (so long as the declaration itself is constitutional).

This Article proceeds in three parts. Part I examines how modern conflicts have begun. In particular, it considers how Presidents have used their communicative powers to announce formally to the nation and to the world the United States’ commitment of forces, the justification for and goals of the conflict, and the conditions for peace. Part II turns to the meaning of the term “declaration of war” at the time of the framing of the Constitution and argues that the presidential announcements examined in Part I meet the eighteenth century definition of a declaration of war: they are formal announcements that the nation has entered a state of war, together with the reasons for, and objectives of, the conflict. Part II then argues that nothing in evolving language or practice suggests that this conclusion should be altered in modern times, as the function served by modern presidential declarations is no different than the function served by eighteenth century declarations.

Part III considers four important implications of this conclusion for modern discourse and practice. First, most modern wars are declared by the President. Second, as a result, claims that the Constitution’s “declare war” power is obsolete (or rarely invoked) are fundamentally misplaced. The constitutional phrase retains its relevance, and the President must look to a constitutional source under which to assert the power “to declare War.” Third, we should describe congressional authorizations of the use of force, not as declarations of war in themselves, nor as “authorizations of the use of force” (a power without direct grounding in the Constitution’s text), but delegations to the President of the power to

declare war. Fourth, once the President locates a constitutional authority to declare war, there should be no doubt that the President's declaration, no less than a congressional declaration, is sufficient to invoke the President's war making powers such as the power to create military commissions and detain enemy combatants.

### I. WAR INITIATION: THE MODERN PRACTICE

This Part reviews the way in which recent U.S. conflicts have begun, and in particular the President's communicative function in announcing the commencement of war. The four most important episodes involving U.S. forces since 1990 are: (1) the Persian Gulf War in 1991; (2) the air campaign against Slobodan Milosevic's Serbia in 1999; (3) the response to the terrorist attacks of September 11, 2001, especially the war in Afghanistan; and (4) the conflict in Iraq in 2003.<sup>14</sup>

As described below, these episodes share common attributes. In each case the President, immediately after the initiation of hostilities, addressed the nation and the world in a formal and widely broadcast speech. He spoke not at a press conference or other impromptu event but in formal surroundings invoking the full dignity of his office. The central points of the President's address, in each case, were to inform listeners that the U.S. military was engaged in sustained hostilities; to clarify who was, and was not, a target of these hostilities; to explain the events leading to the decision to use force, and to justify that decision; and to outline the goals sought to be accomplished and the conditions upon which peace might be established. In each case, the President spoke on behalf of the United States, as the nation's spokesperson in foreign affairs.

#### A. *The Gulf War*

In August 1990, Iraq's President Saddam Hussein directed an invasion and annexation of the neighboring country of Kuwait. U.S. President George H.W. Bush initially ordered a defensive deployment of U.S. troops to Saudi Arabia and elsewhere in the Persian Gulf to deter further

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<sup>14</sup> 1990 is a convenient but ultimately arbitrary starting point. Although 1990 marks the beginning of the post-Cold War era in international relations, I do not argue that any particular constitutional or historical developments make it a turning point for purposes of this Article. This Article's conclusions would also apply to most conflicts prior to 1990, such as the Korean War. See Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J.L. & PUB. POL'Y 533 (1996) (discussing presidential and congressional roles in decision to go to war in Korea).

aggression by Iraq. The United Nations Security Council passed a series of resolutions calling upon Iraq to halt military operations and withdraw from Kuwait. Eventually the Council adopted Resolution 678, which authorized the use of force by member nations to compel an Iraqi withdrawal.<sup>15</sup> At a press conference on November 8, 1990, President Bush announced a substantial increase in troops deployed in the region, effectively shifting the United States to an offensive war footing. The President stated the United States' goals: "the immediate, complete and unconditional withdrawal of Iraqi forces from Kuwait; restoration of Kuwait's legitimate government; protection of the lives of citizens held hostage by Iraq in both Kuwait and Iraq; and restoration of security and stability in the Persian Gulf region."<sup>16</sup> However, Bush at that point did not commit the United States to offensive military action, saying only that he had decided "to increase the size of U.S. forces. . . to ensure that the coalition [opposing Iraq] has an adequate offensive military option should that become necessary to achieve our common goals." In response to questions, he stressed his desire for a peaceful resolution.<sup>17</sup>

On January 12, 1991, at Bush's request, Congress passed a joint resolution stating in material part that "the President is authorized. . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions [relating to Iraq's occupation of Kuwait]."<sup>18</sup> Bush, again at a press conference, then issued his strongest statement to date, saying that "this sends the clearest message to Iraq that it cannot scorn the January 15th deadline [established by the Security Council in Resolution 678 for Iraq to withdraw from Kuwait]. . . . We did not plan for war, nor do we seek war. But if conflict is thrust upon us we are ready and we are determined."<sup>19</sup>

On January 16, 1991, the United States and its allies began aerial bombardment of Iraq. President Bush addressed the nation in a special televised address, saying the following:

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<sup>15</sup> S.C. Res. 661, 665, 678, U.N. SCOR (1990), available at <http://www.un.org/documents/scres/1990/scres90.htm>; see WESTERFIELD, *supra* note 1, at 117-61 (discussing beginnings of Gulf War).

<sup>16</sup> President George H.W. Bush, Press Conference Announcing Major Troop Increase (Nov. 8, 1990), reprinted in FOREIGN POL'Y BULL., Jan./Apr. 1991, at 4.

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a), 105 Stat. 3 (1991).

<sup>19</sup> President George H.W. Bush, Press Conference Following Vote in Congress (Jan. 12, 1991), reprinted in FOREIGN POL'Y BULL., Jan./Apr. 1991, at 49-50.

Just two hours ago, allied air forces began an attack on military targets in Iraq and Kuwait . . . .

. . . .

. . . Five months ago, Saddam Hussein started this cruel war against Kuwait. Tonight, the battle has been joined.

This military action, taken in accordance with United Nations resolutions and with the consent of the United States Congress, follows months of constant and virtually endless diplomatic activity . . . .

. . . .

Now the twenty-eight countries with forces in the Gulf area have exhausted all reasonable efforts to reach a peaceful resolution — and have no choice but to drive Saddam from Kuwait by force.<sup>20</sup>

With this statement, President Bush unambiguously announced the United States' commitment to war. Next, the President set forth the U.S. objectives, and conditions for peace:

Our objectives are clear: Saddam Hussein's forces will leave Kuwait. The legitimate government of Kuwait will be restored to its rightful place, and Kuwait will once again be free. Iraq will eventually comply with all relevant United Nations resolutions.<sup>21</sup>

Bush then outlined the justifications for resorting to armed force: that diplomacy had failed; that "sanctions were tried for well over five months" and "showed no signs of accomplishing their objective"; that "[w]hile the world waited" for these approaches to work, Iraq had completed the conquest and "plunder[]" of Kuwait, had sought to expand its nuclear and chemical capability, and had "dug in and moved massive forces into Kuwait."<sup>22</sup>

Finally, Bush emphasized the limited objectives of the war:

We have no argument with the people of Iraq. Indeed, for the innocents caught in this conflict, I pray for their safety. Our goal is

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<sup>20</sup> President George H.W. Bush, Address to Nation Announcing Allied Military Action (Jan. 16, 1991), *reprinted in* FOREIGN POL'Y BULL., Jan./Apr. 1991, at 51-52.

<sup>21</sup> *Id.* at 51.

<sup>22</sup> *Id.*

not the conquest of Iraq. It is the liberation of Kuwait. It is my hope that somehow the Iraqi people can, even now, convince their dictator that he must lay down his arms, leave Kuwait, and let Iraq itself rejoin the family of peace-loving nations.<sup>23</sup>

In sum, the President's formal address announced the United States' commitment to a sustained military campaign to end the Iraqi occupation of Kuwait, and explained why the United States was undertaking this campaign.

### B. *The Campaign To Protect Kosovo*

In early 1998, the United States and various European countries became increasingly concerned about the deepening crisis in Kosovo, the southernmost part of what remained of the Federal Republic of Yugoslavia after that nation's violent breakup in 1991-92. Serbian forces began systematically expelling the ethnic Albanian population of the region. After the United States and its European allies, acting through the North Atlantic Treaty Organization (NATO), threatened force to stop Serbian operations, Serbian President Milosevic agreed to a ceasefire in October 1998. The ceasefire quickly collapsed; and after several more rounds of diplomacy, the NATO countries decided that only actual force would stop the Serbian campaign. They did not, however, seek approval of the United Nations Security Council, fearing a veto by Russia or China. Nor did President Clinton seek congressional authorization.<sup>24</sup>

NATO began its air campaign on March 24, 1999. President Clinton immediately thereafter gave a brief but widely broadcast televised address, saying in relevant part: "United States forces, acting with our NATO allies, have commenced air strikes against Serbian military targets."<sup>25</sup> Clinton detailed the troubles in Kosovo, the attempts to reach a diplomatic solution, and the deepening crisis. He then outlined the U.S. goals:

Our strikes have three objectives: First, to demonstrate the seriousness of NATO's opposition to aggression and its support for peace; second, to deter President Milosevic from continuing and escalating his attacks on helpless civilians by imposing a price for

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<sup>23</sup> *Id.* at 52.

<sup>24</sup> On events leading to the conflict over Kosovo and their constitutional implications, see Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000); Yoo, *Kosovo*, *supra* note 7, at 1679-85.

<sup>25</sup> President Bill Clinton, Address to Nation Announcing Commencement of Air Strikes (Mar. 24, 1999), reprinted in FOREIGN POL'Y BULL. May/Aug. 1999, at 58.

those attacks. And third, if necessary, to damage Serbia's capacity to wage war against Kosovo in the future by seriously damaging its military capability.<sup>26</sup>

Like Bush in 1991, Clinton included specific justifications for the decision to use force: "I have concluded that the dangers of acting now are clearly outweighed by the risks of failing to act — the risks that many more innocent people will die or be driven from their homes by the tens of thousands; the risks that the conflict will involve and destabilize neighboring nations. . . . [W]e and our allies have a chance to leave our children a Europe that is free, peaceful and stable."<sup>27</sup> Later that day, Clinton delivered a longer address, also nationally televised, essentially repeating these basic points.<sup>28</sup> Although somewhat more equivocal than Bush's 1991 statement, Clinton's announcement had the same basic tone and message: he formally announced the United States' commitment to a sustained military campaign to achieve specified goals and explained the reasons behind this commitment.<sup>29</sup>

### C. *The Campaign in Afghanistan*

Following the terrorist attacks on the Pentagon and the World Trade Center on September 11, 2001, Congress approved a resolution "that the

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> President Bill Clinton, Address to Nation (Mar. 24, 1999), reprinted in FOREIGN POL'Y BULL., May/Aug. 1999, at 63-65.

<sup>29</sup> As noted, President Clinton did not seek congressional authorization of the campaign against Serbia. Congress considered several responses, including a formal declaration of war (using those terms), but could not agree upon an approach. The Senate (but not the House) approved a concurrent resolution authorizing the President to "conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia." S. Con. Res. 21, 106th Cong. (1999). On Mar. 24, 1999, the House passed a resolution expressing "support[] [for] the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia." H.R. Res. 130, 106th Cong. (1999). On Apr. 28, 1999, the House considered and rejected various proposals that would have, among other things, declared war on Yugoslavia; approved the language previously passed by the Senate; or ordered the President to cease operations against Yugoslavia. *Id.*; H.R. J. Res. 44, 106th Cong. (1999); H.R. Con. Res. 82, 106th Cong. (1999). However, Congress did continue military appropriations in support of the President. In particular, on May 20, 1999, Congress enacted the Emergency Supplemental Appropriations Act, providing funds for the Yugoslavia operations. 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, § 2005, 113 Stat. 57, 80 (1999) (approving funds for operations "conducted against the Federal Republic of Yugoslavia. . . during the period beginning on March 24, 1999 and ending on such date as NATO may designate to resolve the conflict with respect to Kosovo."). See Fisher, *supra* note 24, at 1668-70; Yoo, *Kosovo*, *supra* note 7, at 1679-81.

President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . .<sup>30</sup> As in the case of Kosovo, there was some informal talk of Congress actually declaring war, but no one introduced any formal measures toward this goal.

On September 20, 2001, President George W. Bush spoke to a joint session of Congress in a formal and widely-televised address in which he identified Osama bin Laden and his al-Qaeda terrorist network as responsible for the attacks, and identified Afghanistan under the ruling Taliban party as its base of operations.<sup>31</sup> He continued:

[T]he United States of America makes the following demands on the Taliban: Deliver to the United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.<sup>32</sup>

The Taliban did not meet these demands, and the United States initiated military strikes against Afghanistan on October 7, 2001. On that day Bush again formally addressed the nation, announcing the action:

On my orders, the United States military has begun strikes against al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban

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<sup>30</sup> Authorization for Use of Military Force Resolution, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

<sup>31</sup> President George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001), reprinted in *FOREIGN POL'Y BULL.*, Winter 2002, at 74-77.

<sup>32</sup> *Id.* at 75.

regime.<sup>33</sup>

As in previous presidential speeches, Bush outlined the events leading to the conflict, in this case his prior demand to the Taliban to hand over terrorists and the Taliban's refusal. He emphasized the objectives of the campaign: "disrupting" the terrorist network to prevent future attacks, and "sustained, comprehensive and relentless operations to drive them [the terrorists] out and bring them to justice." In keeping with similar statements of U.S. goals in previous conflicts, Bush added that while "the Taliban will pay a price" for their refusal, "[t]he United States of America is a friend to the Afghan people, and we are friends of almost a billion [people] worldwide who practice the Islamic faith. The United States of America is an enemy of those who aid terrorists . . . ."<sup>34</sup>

#### D. *The War in Iraq*

In 2002, the United States became increasingly concerned that Iraq was pursuing a campaign to acquire chemical, biological, and nuclear weapons, and that this campaign, together with Iraq's longstanding enmity toward the United States and its potential ties to terrorist organizations, posed a substantial risk to the United States. Acting on this concern, President Bush sought and obtained a congressional resolution authorizing the use of military force against Iraq.<sup>35</sup> The United States also sought a resolution from the United Nations Security Council directing Iraq to abandon such weapons and to allow U.N. inspectors to verify its disarmament. The Council approved that resolution in November 2002.<sup>36</sup> The United States began to build up its forces in the Persian Gulf region, while U.N. inspectors attempted to verify Iraq's denial of any banned weapons programs.

After protracted diplomatic maneuvering, the United States decided that the situation could be resolved only by forcibly removing Iraqi President Saddam Hussein from power. In the face of strong opposition from some members of the Security Council, President Bush decided not

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<sup>33</sup> President George W. Bush, Address to Nation Announcing Commencement of Air Strikes (Oct. 7, 2001), reprinted in FOREIGN POL'Y BULL., Winter 2002, at 116-17.

<sup>34</sup> *Id.* at 116.

<sup>35</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498 (2002) (resolving that "[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq; and . . . enforce all relevant United Nations Security Council resolutions.").

<sup>36</sup> S.C. Res. 1441, U.N. SCOR (2002), available at <http://www.un.org/documents/scres>.

to seek further Council resolutions, but to act together with Britain and other like-minded countries. On March 17, 2003, the President delivered a televised address broadcast to Iraq, as well as throughout the United States, setting forth an ultimatum in unmistakable terms:

All the decades of deceit and cruelty have now reached an end. Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict, commenced at a time of our choosing.

....

The United States and other nations did nothing to deserve or invite this threat. But we will do everything to defeat it.... The American people can know that every measure has been taken to avoid war, and every measure will be taken to win it.<sup>37</sup>

The Iraqi leadership remained defiant, and military operations began on March 19. That evening, shortly after attacks began, President Bush again made a formal, nationally televised statement from the oval office. He said:

[A]t this hour American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.

On my orders, coalition forces have begun striking selected targets of military importance to undermine Saddam Hussein's ability to wage war. These are opening stages of what will be a broad and concerted campaign.<sup>38</sup>

As in prior presidential statements, Bush emphasized the campaign's goals and the conditions for peace:

We come to Iraq with respect for its citizens, for their great civilization and for the religious faiths they practice. We have no ambition in Iraq, except to remove a threat and restore control of that country to its own people.

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<sup>37</sup> Dana Milbank & Mike Allen, *President Tells Hussein to Leave Iraq Within 48 Hours or Face Invasion; Ultimatum Is Delivered After U.N. Effort Fails*, WASH. POST, Mar. 18, 2003, at A1.

<sup>38</sup> "Forces are in the Early Stages of . . . Operations to Disarm Iraq": *The Text of President Bush's Announcement Last Night of the Start of Military Action in Iraq*, WASH. POST, Mar. 20, 2003, at A22.

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Our nation enters this conflict reluctantly, yet our purpose is sure. The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder.

....

Now that conflict has come, the only way to limit its duration is to apply decisive force. And I assure you, this will not be a campaign of half measures and we will accept no outcome but victory.<sup>39</sup>

### *E. Conclusion*

The similarities among the foregoing presidential statements are striking. In each case, the President, immediately upon the commencement of hostilities, made an official, formal, and widely broadcast statement. In each case the President announced that sustained conflict had begun. Speaking on behalf of the United States, the President outlined the goals of the military operation: in the Gulf War, the liberation of Kuwait; in Kosovo, the protection of the ethnic Albanians; in Afghanistan, the disruption of the terrorist base and the bringing of terrorists to justice; in Iraq, the dismantling of weapons of mass destruction and the removal of Saddam Hussein from power. Each presidential address also described the events leading to the conflict and explained why military action was the only option given the failure of diplomacy and the exigency of the situation. Finally, each address emphasized, again on behalf of the United States, the limited objectives of the conflict, making clear that the U.S. attack was directed against specific regimes — Saddam Hussein, Milosevic, the Taliban — and was not a war of conquest.

At no point in any of these episodes did Congress address any sort of statement to the nation or the world that military force was being or would be used. When Congress did act in anticipation of hostilities, it only issued a resolution authorizing the President to use force. In no case did these authorizations purport to *require* the use of force, nor to create a state of war between the United States and another country. Presidents treated the resolutions as discretionary, and in two cases

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<sup>39</sup> *Id.*

continued vigorous diplomacy to attempt a peaceful solution. Indeed, after the 2002 congressional resolution on Iraq some five months elapsed before conflict began.

## II. PRESIDENTIAL ANNOUNCEMENTS AS “DECLARATIONS OF WAR”

This Part considers whether the foregoing presidential announcements were declarations of war. This question has two components. First, this Part examines whether they would have been understood as declarations of war in the eighteenth century, when the relevant constitutional provisions were adopted. Second, it considers whether changes in the modern conduct of war have altered the context so that the presidential announcements cannot be understood as declarations of war today.

As set forth below, this Part concludes that the presidential announcements are declarations of war, in both an eighteenth century and modern sense. The formal declaration of war, in the eighteenth century, was simply an announcement that war had begun, together with a statement of the reasons for undertaking war and the conditions for peace. It was, in other words, an official statement on behalf of the nation, marking a shift from a state of peace to a state of war, and giving reasons for that shift. This is exactly the sort of statement U.S. Presidents made in the episodes examined above. Eighteenth century writers would have had no difficulty identifying today’s presidential announcements as declarations of war.

Further, nothing in modern practice or terminology changes the essential meaning of declaring war. The ordinary meaning of the terms “war” and “declare” remain fundamentally what they were in the eighteenth century. To “declare” means to “announce,” and “war” means a sustained military campaign to settle sovereign differences. The terrible experiences with war in the twentieth century may have made policymakers shy about actually using the phrase “war,” at least prospectively, to describe their intentions, but there is little doubt that the modern conflicts this Article has examined fall within that term’s ordinary meaning. Moreover, although the contrary is frequently asserted, nothing in the modern development of international law has made declarations of war obsolete and meaningless. International law may aspire to outlaw war, yet war (or at least some kinds of wars) persist, both with and without its blessing. Similarly, international law’s aspiration may make leaders reluctant to use the actual phrase “declare war,” with its overtones of an earlier legal era. Nonetheless, nations do begin wars and leaders do announce that wars have begun, in a manner not functionally distinct from the practice of the eighteenth century. In

sum, this Part concludes that the presidential statements canvassed in Part I should be given their proper name: declarations of war.

*A. Presidential Announcements as "Declarations of War" in the Eighteenth Century*

This Part begins by considering whether the modern presidential announcements discussed above, if made at the time of the Constitution's ratification, would have been described as formal declarations of war. Drawing on the leading writers on the law of nations (as international law was then known), it describes that era's understanding of the essential components of a declarations of war: a formal announcement of the beginning of the war, the reasons for going to war, and the conditions for peace. The modern presidential announcements, as we have seen, do all of these. This Part then considers and rejects three possible objections: that an announcement did not count as a declaration of war in the eighteenth century unless it actually used the words "declaration" and "war"; that an announcement did not count as a declaration of war unless it preceded the actual beginning of hostilities; and finally, that an announcement did not count as a declaration of war unless it signaled commitment to "total" war. As set forth below, none of these claims finds support in the core eighteenth century meaning of declaring war. As a result, this Part concludes that the modern presidential announcements are what the eighteenth century would have called declarations of war.

1. The Meaning of the Formal Declaration of War

The modern presidential announcements discussed above, if made at the time of the Constitution's ratification, would have been described as formal declarations of war. Three of the leading writers on the international law of war in the eighteenth century — Jean Jacques Burlamaqui, Emmerich de Vattel and Christian Wolff<sup>40</sup> — each described

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<sup>40</sup> See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 147-64 (rev. ed. 1954) (discussing role of Vattel, Wolff, and Burlamaqui among eighteenth century international writers). These three, of course, were not the only leading scholars of the law of nations at the time, but they devoted the most attention to the idea of declaring war. Others, such as Cornelius van Bijnkershoek and Thomas Rutherford, accorded the concept little importance. See CORNELIUS VAN BIJNKERSHOEK, *2 QUAESTIONUM JURIS PUBLICI LIBRI DUO* 19-25 (Tenney Frank, trans., 1964) (1737); THOMAS RUTHERFORTH, *2 INSTITUTES OF NATURAL LAW* 577 (J. Bentham ed., 1756). Earlier scholars, such as Hugo Grotius and Samuel Pufendorf, who wrote in the seventeenth century but remained influential in the eighteenth, emphasized the declaration of war, but in less detail. See HUGO GROTIUS, *THE*

the declaration of war in essentially the same terms.<sup>41</sup> According to Vattel:

As it is possible that the present fear of our arms may make an impression on the mind of our adversary, and induce him to do us justice, — we owe this further regard to humanity, and especially to the lives and peace of the subjects, to declare to that unjust nation, or its chief, that we are at length going to have recourse to the last remedy, and make use of open force, for the purpose of bringing him to reason. This is called *declaring war*.<sup>42</sup>

Vattel added that in addition to notifying the enemy, “it is necessary for a nation to publish the declaration of war for the instruction and direction of her own subjects” and “also to make known [the] declaration of war to the neutral powers, in order to acquaint them with the justificatory reasons which authorize it, — the cause which obliges [the nation] to take up arms, — and to notify to them that such or such a nation is [an] enemy, that they may conduct themselves accordingly.” He concluded that “war is at present published and declared by manifestoes. These pieces never fail to contain the justificatory reasons, good or bad, on which the [sovereign] grounds his right to take up arms. . . . The manifesto. . . printed, published and circulated throughout the whole state, contains also the sovereign’s general orders to his

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LAW OF WAR AND PEACE [DE JURE BELLI ET PACIS] 450-52 (William Evats, trans., 1682) (1625); SAMUEL PUFENDORF, 2 DE JURE NATURAE ET GENTIUM LIBRI OCTO 1300 (Clarendon ed., 1934) (1688). As a result, examination of Vattel, Wolff, and Burlamaqui produces the best picture of the eighteenth century declaration of war in international law scholarship of the time.

<sup>41</sup> JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW (Th. Nugent trans., 1807) (1735); EMMERICH DE VATTEL, THE LAW OF NATIONS (Chitty ed., 1863) (1758); CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph Drake trans., 1934) (1764).

For a more detailed discussion of the evolution of the declaration of war in seventeenth and eighteenth century international theory, see Ramsey, *Textualism and War Powers*, *supra* note 3, at 1569-96. In that article, I make the distinct argument that the Vattel/Wolff/Burlamaqui view of formal declarations of war did not capture all of what the eighteenth century meant by the term. Specifically, I argue that war could also be “declared” by action — that is, by initiation of the use of force — as well as by a formal proclamation. *Id.* at 1590-96; see VATTEL, *supra* at 399 (“[W]hen one nation takes up arms against another, she from that moment declares herself an enemy to all the individuals of the latter, and authorizes them to treat her as such.”); *id.* at 331 (stating that when nation is attacked by others, “war [is] sufficiently declared by their own act”). For present purposes, however, my claim is simply that, even if the idea of “declaring” war is taken in its narrow, formal sense to mean only an official proclamation of war, modern presidential announcements fall well within that meaning.

<sup>42</sup> VATTEL, *supra* note 41, at 315.

subjects relative to their conduct in the war."<sup>43</sup>

Burlamaqui put it thus:

[I]f after having used all our endeavors to terminate differences in an amicable manner, there remains no further hope, and we are in absolutely constrained to undertake a war, we ought first to declare it in form. . . [P]rudence and natural equity equally require, that, before we take up arms against any state, we should try all amicable methods to avoid coming to such an extremity. We ought then to summon him, who has injured us, to make a speedy satisfaction, that we may see whether he will not have regard to himself, and not put us to the hard necessity of pursuing our right by force of arms.<sup>44</sup>

Thus, Burlamaqui continued, "the principal end of a declaration 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 it."<sup>45</sup>

Similarly, Wolff wrote:

[W]e must not resort to [war], which is especially to be avoided, because it draws after it a great mass of evils for each of the belligerent parties, as long as there is even the least hope that without it we can acquire what we are striving to acquire by force of arms; it is therefore necessary that we should indicate that we are going to bring war upon another, in order that, before there may be a resort to arms, he can offer fair conditions for peace, and thus war may be avoided.<sup>46</sup>

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<sup>43</sup> *Id.* at 316, 318.

<sup>44</sup> BURLAMAQUI, *supra* note 41, at 187.

<sup>45</sup> *Id.* at 189.

<sup>46</sup> WOLFF, *supra* note 41, at 367. This sense of the declaration of war is found in leading authorities that both preceded and succeeded the eighteenth century theorists. Hugo Grotius, writing in the seventeenth century, observed that "declarations of war. . . were wont to be made publicly, with a statement of the cause, in order that the whole human race as it were might judge of the justness of it." GROTIUS, *supra* note 40, bk. I, ch. 1, sec. vii. In Grotius' view, the defining characteristic of the formal declaration was that it was an official statement on behalf of the nation entering into war, so that "the fact might be established with certainty that war was being waged not by private initiate but by the will of each of the two peoples or of their heads." *Id.* at bk. III, ch. 3, sec. xi. Speaking of early nineteenth century practice, Henry Wheaton observed that "the present usage is to publish a manifesto, within the territory of the State declaring war, announcing the existence of hostilities, and the motives for commencing them." HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW*, bk. IV, sec. 297 (1836).

There is good reason to think that these ideas underlay the Constitution's conception of the power "to declare War." European writers on the law of nations were well known and influential in eighteenth century America, and Americans frequently consulted them on international questions.<sup>47</sup> The idea of "declaring war" is obviously associated with international law, and, as indicated above, had a prominent place in leading international texts. Although we lack direct evidence, it seems likely that the constitutional generation in America absorbed the core meaning of the declaration of war identified by the international writers.

In sum, the formal declaration of war was an official announcement to the world of the reasons for resorting to force, and an outline of the goals of the conflict. It justified the war and set the terms for peace.<sup>48</sup> On this ground, each of the four presidential statements discussed above qualifies as a declaration of war. For example, Bush's statement at the initiation of the 1991 Gulf War listed Iraq's offenses in Kuwait as the cause of the war, pointed to the withdrawal from Kuwait and the reestablishment of the legitimate Kuwaiti government as the chief U.S. objectives, and called on Saddam Hussein to establish peace by meeting these objectives. In Burlamaqui's terms, it "let all the world know" by means of a formal statement on behalf of the United States "that there was just reason to take up arms" in response to the unprovoked seizure

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<sup>47</sup> On the influence of the writers on the law of nations, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-29 (2d ed. 1992); NUSSBAUM, *supra* note 40, at 161-62 (discussing Vattel's influence and concluding that his work "soon became a textbook in American colleges and, after the establishment of the Republic, the favorite authority in American theory of international law"); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776-1814*, at 11 (1993) (discussing influence of international writers and stating that Vattel's work "was unrivaled. . . in its influence on the American founders"); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *VAND. L. REV.* 819, 823 (1989) ("In ascertaining principles of the law of nations, lawyers and judges of that era [the eighteenth century] relied heavily on continental treatise writers, Vattel being the most often consulted by Americans. An 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 and in the popular press."); see also Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 *N.C. L. REV.* 133, 164-73 (1998); Yoo, *Original Understanding of War Powers*, *supra* note 5, at 242-44.

<sup>48</sup> See HALLETT, *supra* note 1, at 45 (arguing that proper historical function of declaration of war is that it "provides not only persuasive grievances justifying the resort to war but also sensible remedies or peace terms to end the war."); Yoo, *Original Understanding of War Powers*, *supra* note 5, at 206-07 (explaining that declaration "notified the enemy that a state of war existed" and "informed citizens of an alteration in their legal rights and duties").

of Kuwait and to tell Saddam Hussein "that it had been and still was, in his power to avoid" the war.<sup>49</sup> On its face, therefore, it seems that Bush's statement (like the other modern examples)<sup>50</sup> would have been recognized by Burlamaqui, Wolff, and Vattel as a declaration of war, for it was a formal statement on behalf of the United States serving the roles those theorists identified.<sup>51</sup>

## 2. Objection: The Failure to Use the Phrase "Declaration of War"

The most evident objection to labeling modern presidential statements "declarations of war" is that none of them called itself a "declaration of war." None of the modern examples is titled "declaration of war," nor uses the word "declaration" or anything like it. Additionally, the word "war" is used obliquely, if at all. One might say that they are therefore not declarations of war (though perhaps something like a functional equivalent).<sup>52</sup>

This objection, however, assumes a level of talismanic force to the actual words "declaration" and "war" that simply did not exist in eighteenth century writing. The idea of "declaring" war dates at least to Roman times, when it was a formalized ritual accompanied by procedures of great symbolism designed to appeal to the gods.<sup>53</sup> But, as

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<sup>49</sup> BURLAMAQUI, *supra* note 41, at 187.

<sup>50</sup> As discussed in Part I, the presidential announcements in each of the modern episodes share the common characteristics of announcing the beginning of hostilities; justifying the resort to force; identifying the goals of the war effort; and setting the conditions for peace. *See supra* Part I, A-D.

<sup>51</sup> As a practical matter, when nations issued formal declarations of war in the eighteenth century, this was in fact the role they served. *See, e.g.*, BRITISH ROYAL PROCLAMATIONS RELATING TO AMERICA 1603-1783, at 147 (Clarence Brigham ed., 1911) (declaration of war against France, Mar. 29, 1744); *id.* at 203 (declaration of war against France, May 17, 1756).

<sup>52</sup> Professor Hallett argues, for example, that a "presidential message to Congress or a televised presidential address" may be the "functional equivalent" of a declaration of war, but is not the real thing because it lacks "due solemnity and ceremony." HALLETT, *supra* note 1, at 36-37.

In contrast, past congressional declarations of war do use the key phrase. *See* Pub. L. No. 12-102, 2 Stat. 755 (June 18, 1812) (stating "that war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland. . . and the United States of America"); Pub. L. No. 77-328, 55 Stat. 795 (Dec. 7, 1941) (stating "that the state of war between the United States and the Imperial Government of Japan. . . is hereby formally declared.").

<sup>53</sup> HALLETT, *supra* note 1, at 65-68; VATTEL, *supra* note 41, at 315 (discussing Roman practice and its influence); G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas about War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177 (Hedley Bull et al. eds., 1990) (same).

the eighteenth century writers' descriptions confirm, Enlightenment rationalism abandoned this ritual aspect. By the eighteenth century, the idea was simply that the state should announce war and give the reasons for it being undertaken, because this was a rational thing to do. No particular style or ritual was necessary, and there were no magic words as *sine qua non*. As Wolff wrote,

Since a declaration or announcement of war is made with the purpose that the other party may understand that we have determined on war against him and for what reason that has been done, consequently nothing else is required than that this should come to the notice of the other; the method of announcing the war will naturally depend upon the will of the one announcing it, nor does it require special solemnities.<sup>54</sup>

Indeed, "declaration" was not the only, or even the preferred, term. Wolff observed that what was commonly called a "declaration of war" should really just be called an "announcement of war" because the former might imply an unnecessary level of formality.<sup>55</sup> Other writers variously used the terms "manifesto," "proclamation," or "denunciation."<sup>56</sup> Nor did the phrase "to declare," in common usage, connote any particular or ritualized method of proceeding. It simply meant to announce or make known.<sup>57</sup> Finally, while eighteenth century war-announcing proclamations frequently used the title "declaration of war," they did not always do so, and yet their effect was the same.<sup>58</sup> In

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<sup>54</sup> WOLFF, *supra* note 41, at 365.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND, at 249 ("denunciation"); SAMUEL PUFENDORF, *supra* note 40, at 1300 ("proclamation"); VATTTEL, *supra* note 41, at 318 ("publication"); *id.* at 319 ("manifesto"). As Vattel points out, *id.* at 319, the Latin term is *denunciatio belli*, which is closest to "denunciation."

<sup>57</sup> SAMUEL JOHNSON, 1 DICTIONARY OF THE ENGLISH LANGUAGE (Arno Reprints 1979) (1755) (listing as definitions of "declare": "to make known; to tell evidently and openly"; "to publish; to proclaim").

<sup>58</sup> One historian writes of Spain's June 16, 1779, break with Britain: "[Spain informed Britain] of a series of trumped-up grievances, complained that the mediation of Spain [in the Anglo-French war] had been rejected, and concluded that [Spain] was now forced to use every means necessary to procure the justice she had solicited in vain. The language was veiled, but the meaning clear. . . . [A]ll recognized the Spanish note for what it was: a declaration of war." PIERS MACKESY, THE WAR FOR AMERICA 1775-1783, at 262-63 (1964). Britain promptly ordered its forces in Florida to seize Spanish New Orleans, and Spain the following month launched an (abortive) attack on England. *Id.* at 266, 280-81. Similarly, J.F. Maurice reports that in 1744 Frederick of Prussia, without using the phrase declaration of war, "issued a proclamation [that] announced his intention of sending an auxiliary army to the aid of [Austria's] enemies," thus launching a Prussia-Austria war. J.F. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR 16 (1883).

short, an eighteenth century “declaration” of war was an official *announcement* of war, and nothing more. The presidential statements we have examined surely qualify on this ground.<sup>59</sup>

Perhaps, though, the modern presidential “announcements” are not announcements of *war*, since they typically do not use the word “war” to describe the conflicts they announce. Again, this view finds little support in eighteenth century terminology. “War” simply meant, according to its 1755 dictionary definition, “the exercise of violence under sovereign command against resistance.”<sup>60</sup> That is also how writers such as Vattel, Wolff, and Burlamaqui used it.<sup>61</sup> The modern conflicts outlined above plainly constitute (in Vattel’s words) a “state in which we prosecute our right by force”;<sup>62</sup> in Wolff’s words, a “violent contest with another”;<sup>63</sup> or in Burlamaqui’s phrase, “the state of those, who try to determine their differences by the ways of force.”<sup>64</sup> True, the eighteenth century witnessed frequent border skirmishes, naval encounters, and isolated episodes of violence that no one would have called a “war.”<sup>65</sup> But where sovereigns were fully engaged in settling differences by force, that was sufficient to merit the term “war,” as both the dictionary definition and the treatise writers confirmed. In eighteenth century terms, modern Presidents in the episodes considered above announced the determination to settle sovereign differences by a sustained use of force, and hence “declared war,” whether they used that exact term or not.

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<sup>59</sup> Speaking of the decline in the formality of declarations, Vattel wrote: “In former times the European powers sent heralds, or ambassadors, to declare war; at present they content themselves with announcing it in their capital, in their principal towns, or upon the frontier. Manifestos are sent out, and now that communication has become so quick and easy owing to the establishment of a postal service, the news is soon spread on all sides.” VATTEL, *supra* note 41, at 255. Although Hallett argues for restoring an almost Roman level of ritual to the declaration, see HALLETT, *supra* note 1, at 145-68, he agrees that in the eighteenth century it did not have this element of formalism. *Id.* at 77-84.

<sup>60</sup> JOHNSON, *supra* note 57.

<sup>61</sup> BURLAMAQUI, *supra* note 41, at 157 (defining war as “the state of those, who try to determine their differences by the ways of force”); VATTEL, *supra* note 41, at 291 (“war is that state in which we prosecute our right by force”); WOLFF, *supra* note 41, at 311 (explaining that war results “if one enters into violent contest with another”); see also GROTIUS, *supra* note 40, bk. I, ch. 1, sec. ii (defining war as “a contending by force”).

<sup>62</sup> VATTEL, *supra* note 41, at 291.

<sup>63</sup> WOLFF, *supra* note 41, at 311.

<sup>64</sup> BURLAMAQUI, *supra* note 41, at 157.

<sup>65</sup> See generally MAURICE, *supra* note 58.

### 3. Objection: Presidential Announcements Did not Precede the Hostilities

A second possible distinction between modern presidential announcements of war and the eighteenth century "declaration" is that the modern announcements did not *precede* the hostilities. Vattel and his contemporaries argued that the declaration had to be made before hostilities began. As discussed, in modern practice Presidents typically make a formal announcement immediately *after* the fighting has begun (as was done in the Gulf War, Kosovo, Afghanistan, and Iraq).

This difference does not amount to a material distinction between eighteenth century declarations and modern announcements, for two reasons. First, the eighteenth century theorists insisted that the purpose of the declaration was not to give the enemy time to prepare for an attack, so the declaration could be made *immediately* prior to commencement of hostilities. Vattel observed that "the law of nations does not impose the obligation of declaring war, with the view to give the enemy time to prepare for an unjust defence."<sup>66</sup> In Wolff's words, "war is not announced for the purpose that you may not assail another who is unprepared"; rather, war "is to be announced with no other purpose than that the opposing party can avoid it by the offer of fair conditions of peace," and thus "it is not to be doubted that an announcement of war can be made by one who has already advanced with his army to the boundaries of the territory of the opposing party."<sup>67</sup>

As a result, the difference between an announcement made immediately before hostilities began and an announcement made immediately afterward could not have been, in the mind of the eighteenth century theorists, a critical distinction. True, the theorists preferred a pre-hostilities declaration, as that would give the enemy a chance to make peace without any losses suffered on either side. But since the purpose of the declaration was not to prevent surprise attacks, the core reasons for a declaration remained even after the conflict began:

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<sup>66</sup> VATTEL, *supra* note 41, at 317.

<sup>67</sup> WOLFF, *supra* note 41, at 370; *see also* GROTIUS, *supra* note 40, bk. III, ch. iv, sec. 13 (stating that under law of nations no length of time is required after declaration before attack). To be sure, in other historical periods the idea of chivalry or fair warning may have played a role in the idea of a declaration of war. *See* Hague Convention Relative to the Opening of Hostilities, Oct. 18, 1907, art. 1 (providing that attack may not be made "without previous and explicit warning"); HALLETT, *supra* note 1, at 67-68 (discussing Roman views). However, the eighteenth century writers emphatically rejected this idea as anything more than a spirit of "generosity." HALLETT, *supra* note 1, at 81; *see also* BLACKSTONE, *supra* note 56, at 249-50 (stating that purpose of declaration "is not. . . that the enemy may be put upon his guard (which is matter rather of magnanimity than right).").

namely, to justify to the world the resort to force, and to establish a clear standard under which peace might be made, in order to prevent unnecessary bloodshed. Thus, while the theorists thought a declaration *ought* to be issued before any attack was made, there is no reason to believe that they would have thought an announcement made immediately afterward did not qualify as a declaration (albeit a slightly tardy one).

Second, the theorists' requirement of a pre-hostilities declaration was unworkable in practice, and pre-hostilities declarations were rarely issued. It is commonly said of the eighteenth century (even by some writers of the period) that the formal declaration of war had by that time become obsolete.<sup>68</sup> But in fact, the leading European nations commonly issued declarations of war during the eighteenth century. They simply did not do it *before* the conflict began.

The practical reasons for the delayed declaration were twofold, and remain relevant today. However much the theorists might try to qualify it, the reality was (and is) that *any* advance warning renders an attack less effective. Thus it often was not possible, as Burlamaqui suggested, to give an advance warning without doing oneself prejudice.<sup>69</sup> The purpose of an advance warning may not have been to give the enemy time to prepare, but that was the inevitable effect. As a result, nations were understandably reluctant to announce their intentions in advance.<sup>70</sup> In addition, although some wars began after careful planning and consideration, others did not. The conflict between Britain and France that became the Seven Years' War (1756-63), for example, began as isolated and uncoordinated clashes between outposts and frontier

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<sup>68</sup> HALLETT, *supra* note 1, at 34. Alexander Hamilton wrote in 1788 that "the ceremony of a formal denunciation of war has lately fallen into disuse," but the context shows that he was speaking of a *pre-hostilities* declaration that would give warning of attack. THE FEDERALIST NO. 25, at 194 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

<sup>69</sup> See BURLAMAQUI, *supra* note 41, at 187-88.

<sup>70</sup> See MAURICE, *supra* note 58, at 16-17, 22 (discussing effectiveness of attacks launched without warning in eighteenth century, especially by Frederick the Great of Prussia). As Robert Ward wrote in 1805, arguments for a pre-hostilities declaration "have, however, long been abandoned: and since the rules of chivalry have ceased to be binding, they have met with no support either in law or practice. The common sense of mankind, demonstrates the impropriety of allowing an enemy to strengthen himself in the means of consummating mischief. . . . Shall we then wait till he, who has deserved punishment, deserves it still more, with augmented power to resist our efforts? Or shall we give him, who wills our destruction, the force that is wanting to accomplish that will? The whole doctrine has long, and justly been exploded, by the soundest authorities and the wisest practice." ROBERT WARD, AN ENQUIRY INTO THE MANNER IN WHICH THE DIFFERENT WARS OF EUROPE HAVE COMMENCED IN THE LAST TWO CENTURIES 5 (1805).

patrols in North America, without any central direction or planning. These thrusts and counterthrusts eventually developed into a full-scale war, and at some point both Britain and France announced that they were at war with one another.<sup>71</sup> But it would have been impossible to issue a pre-hostilities declaration of war, since the hostilities began not at the direction of a central command but at the initiative of local commanders.<sup>72</sup>

For these practical reasons, eighteenth century practice did not conform to the theorists' ideal of declaring war in advance. However, nations frequently did make an announcement of war after they began hostilities, and these declarations served the theorists' essential purposes: listing the reasons for war and setting the conditions for peace. Although the theorists no doubt thought these declarations should have come sooner, they would have agreed that the announcements qualified as declarations. Indeed, these announcements were actually called "declarations of war" in so many words, even though they did not precede hostilities.<sup>73</sup>

Measured against this practice, there is no reason to refrain from calling modern presidential announcements "declarations of war" even though they are announced slightly after the beginning of hostilities. In the modern world, as in the eighteenth century, it is unrealistic to expect nations to give advance warning to their strategic and tactical detriment. In any event, eighteenth century statesmen and scholars used the term "declaration of war" to refer to announcements issued long after the start of the fighting.<sup>74</sup>

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<sup>71</sup> See FRED ANDERSON, *CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766*, at 60-87 (2000). The British formally declared war on May 18, 1756, some two years after the initial skirmishes began. *Id.* at 170.

<sup>72</sup> *Id.*

<sup>73</sup> See examples cited *supra* note 51; see also T.J. LAWRENCE, *PRINCIPLES OF INTERNATIONAL LAW* 31-32 (Percy Winfield ed., 7th ed. 1930) (concluding that "such declarations as we do find [in the eighteenth century] were made more often than not some time after acts of hostility had been going on.").

<sup>74</sup> Moreover, at least some eighteenth century writers recognized a "conditional declaration of war," which satisfied the supposed requirement of declaring war in advance. Vattel, *supra* note 41, at 315-16. According to Vattel, the conditional declaration was an announcement that unless a foreign nation did (or refrained from doing) certain things, war would result — in short, an ultimatum. If a nation issued a conditional declaration of war and the opposing power did not satisfy its demands, the law of nations permitted war to commence without further pre-hostilities announcement. In at least two of the conflicts we have examined — Afghanistan in 2001 and Iraq in 2003 — the President made the sort of announcement Vattel described. See *supra* Part I, C&D.

#### 4. Objection: The Failure to Commit to "Total War"

A third objection is that there is a difference between the type of conflicts announced by modern Presidents and the wars "declared" by eighteenth century "declarations of war." The distinction, it might be said, is between "total war" and limited armed conflict. In this view, total war (the complete engagement of a nation's resources with the ultimate objective of overthrowing the enemy) is, as in World War II, declared, while limited war (with some lesser objective) is not declared. An announcement of something less than a total war would, therefore, not be a declaration of war.

At first glance, one finds some support for such a distinction in the writing of the time, some of which expressed a distinction between "perfect" war and "imperfect" war. For example, Justice Bushrod Washington remarked in 1800:

It may, I believe, be safely laid down that every contention by force between two nations, in external matters, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation. . . . In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority and, can go no further than to the extent of their commission.<sup>75</sup>

One might say that this loosely maps onto our modern conception of limited war and total war, the latter being, in Professor Corwin's phrase, "the politically ordered participation in the war effort of all personal and social forces, the scientific, the mechanical, the commercial, the economic, the moral, the literary and artistic, and the psychological."<sup>76</sup>

This suggestion does not hold up when measured against either eighteenth century practice or theory. While some writers did mention the idea of "perfect" war, there is no evidence that they identified it with

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<sup>75</sup> *Bas v. Tingy*, 4 U.S. 37, 40 (1800).

<sup>76</sup> EDWARD CORWIN, *TOTAL WAR AND THE CONSTITUTION* 4 (1947). One might also define total war as a conflict in which the very survival of the nation is at stake. See Katyal & Tribe, *supra* note 11, at 1272.

total commitment in Corwin's sense.<sup>77</sup> Rather, they seemed to mean merely "formally announced" (which would accord with the legal meaning of "perfected").<sup>78</sup> It is unclear what consequences flowed from "perfection," but the distinction did not seem to go to the scale of the war, as a number of quite substantial conflicts were never "perfected," whereas some perfected conflicts were conducted at a relatively low intensity.<sup>79</sup>

The general war of the eighteenth century was not what we now mean by "total war" — it was simply any sustained military campaign. For example, midway through the American Revolution, Britain declared war on the Netherlands, in response to Dutch assistance to France and the United States. This conflict was fought at sea and in a few isolated Dutch colonies. The British never mounted any material attack upon the Netherlands itself, nor was that ever their intent. The only British objective was to interfere with Dutch support to Britain's more serious opponents.<sup>80</sup> Yet plainly this was a "perfect war" (in Justice Washington's sense) because it was declared (announced).

In fact, prior to the French revolution and the Napoleonic wars, it is difficult to describe any eighteenth century conflict as a "total war," particularly with respect to Britain. Eighteenth century Britain never saw material fighting in its home territories, and only rarely did it participate substantially in European land conflict. Rather, British wars were limited in scope, involving naval conflict, low-level colonial fighting, and continental expeditionary forces dispatched on limited budgets.<sup>81</sup> Not until the Napoleonic wars did Britain make anything like a sustained commitment of the type Corwin describes. Yet Britain frequently declared war (albeit not in advance).<sup>82</sup>

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<sup>77</sup> E.g., BLACKSTONE, *supra* note 56, at 249-50; RUTHERFORTH, *supra* note 40, at 576-80.

<sup>78</sup> *Id.*

<sup>79</sup> See Ramsey, *Textualism and War Powers*, *supra* note 3, at 1569-90 (discussing legal consequences of formal declaration of war in eighteenth century).

<sup>80</sup> See MACKESY, *supra* note 58, at 378 (discussing British-Dutch war); HENRY WHEATON, *HISTORY OF THE LAW OF NATIONS* 303 (Wm. Hein ed., 1982) (1845) (discussing British declaration against Netherlands).

<sup>81</sup> Even the Seven Years' War, Britain's greatest commitment before Napoleon, was (from Britain's perspective) more a series of isolated campaigns in distant places than what modern observers would label "total war." See ANDERSON, *supra* note 71; see also MACKESY, *supra* note 58 (describing British commitment in Anglo-French War accompanying American Revolution). On the general conduct of British wars in the eighteenth century, see MAURICE, *supra* note 59.

<sup>82</sup> See MAURICE, *supra* note 58, at 16, 19, 21.

Of course, in the eighteenth century (as in modern times) nations engaged in frequent minor military engagements without making an announcement of war. Justice Washington, in the passage quoted above, was examining one of these: the “quasi-war” between France and the United States in the late 1790s.<sup>83</sup> In response to French seizures of U.S. shipping and other evidences of French hostility, Congress authorized an array of defensive measures, embargoed trade with France, and gave the President the authority to seize French merchant and naval ships.<sup>84</sup> The result was a series of largely uncoordinated naval engagements between U.S. and French shipping. Although fought at sea, this conflict resembled a set of border skirmishes more than a sustained military campaign. Neither side made any announcement of, nor pursued, any sustained conflict or identifiable strategic objectives. Classification of this conflict was difficult, not because it was less than total war, but because there did not seem to be any public commitment to sustained hostilities.<sup>85</sup>

In contrast, the modern conflicts examined above closely resemble the formally declared conflicts of the eighteenth century: each was a sustained military campaign aimed at forcing the enemy to capitulate to a series of substantial demands. Without doubt, the laws of war applied to all of them. True, the United States was not fully engaged in the sense that Corwin describes, but neither was Britain in the wars it declared in the eighteenth century. “Perfect” war, to the extent that term had any useful eighteenth century meaning, referred to whether the war had been officially announced and embraced. It did not describe the extent of the nation’s commitment.

## 5. Conclusion

In sum, eighteenth century usage most likely would have included modern presidential announcements of military conflict as “declarations of war.” Like eighteenth century declarations of war, modern

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<sup>83</sup> See generally ALEXANDER DE CONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE* (1966).

<sup>84</sup> 1 Stat. 565 (1798) (directing embargo of trade with France); 1 Stat. 572 (authorizing defensive measures); 1 Stat. 561 (1798) (authorizing seizure of French warships); 1 Stat. 578 (1798) (authorizing commissioning of privateers to attack French shipping).

<sup>85</sup> In this and related cases, the Supreme Court held that the “quasi-war” was enough of a war to make France an “enemy” for various purposes. See *Talbot v. Seeman*, 5 U.S. 1, 8 (1801); *Bas v. Tingy*, 4 U.S. 37, 37 (1800). That was also the view of the executive branch. 1 Op. Att’y Gen. 84 (1798) (“[T]here exists. . . an actual maritime war between France and the United States.”).

announcements state the determination to go to war, the reasons for that determination, and the conditions for peace. Making these matters known publicly, by way of a formal and official statement, was the purpose and effect of the eighteenth century's declarations.

The modern practice differs slightly from the eighteenth century theory, in that modern announcements omit the key phrase "declaration of war," and typically are made immediately after, rather than before, the initiation of hostilities. But neither difference is material. The eighteenth century saw no magic in the use of the words "declaration" and "war." Writers frequently used words other than "declaration" to describe the official announcements to which they referred, and the word "declaration" itself did not mean anything more than announcement. No significance was attached to the use or non-use of the particular phrase. Similarly, "war" simply meant armed conflict; nothing suggests that an armed conflict would not be a war if the parties refrained from calling it war in their official announcement. Finally, although the eighteenth century theorists preferred a declaration before the beginning of hostilities, the actual practice of nations was to issue one after hostilities began.

#### *B. Presidential Announcements as Declarations of War in Modern Times*

While the foregoing discussion indicates that presidential announcements would have qualified as declarations of war in the eighteenth century, perhaps changing circumstances make it no longer appropriate to describe them this way in the modern world. This section considers two principal arguments: first, that changes in the nature of warfare, or at least in the terminology of warfare, have rendered declarations irrelevant; and second that changes in international law have rendered declarations obsolete. Neither seems persuasive.

##### 1. The Modern Ordinary Meaning

When a modern President announces an armed conflict, one might argue that this is not a declaration of war in the phrase's modern ordinary meaning, whatever its eighteenth century meaning. First, perhaps the presidential announcement is not a "declaration" because only Congress can declare war. Second, perhaps the presidential announcement is not an announcement *of war*, because the conflict is not a war.

The first argument has some resonance with common usage. We say that the United States has not declared war since World War II because

*Congress* has not made such a declaration. But this cannot be correct as a matter of constitutional interpretation, because it reduces the constitutional language to a tautology. Under this view, the President cannot declare war because no action taken by the President can be called a declaration of war (even though it is in all respects identical to what we would call a declaration of war when done by Congress). As a result, in this view the constitutional provision does not act as a limitation, rendering certain actions by the President unconstitutional. Rather, it acts as a definitional term, calling the same action a “declaration of war” if done by Congress and something else if done by the President.

This approach does not accord with the way we ordinarily read the Constitution. For example, the Constitution bars states from entering into treaties.<sup>86</sup> Surely, when a state enters into an international agreement that fits within the ordinary definition of “treaty,” one would say that the state has made an unconstitutional treaty, not that the state’s agreement should not be called a treaty (and thus is constitutional so long as it is not called a treaty). Similarly, whether the President acts constitutionally in declaring war does not change the reality that the President does, in fact, declare war.

Relatedly, one might say that the President is not “declaring” war because in modern practice nations no longer “declare” war, and the presidential announcements are not called “declarations of war.” This, however, is little more than a restatement of the objection considered and rejected above — namely, that an announcement cannot be a declaration unless it says it is a declaration.<sup>87</sup> Such an objection again departs from ordinary constitutional interpretation. Once it is clear that today’s presidential announcements are functionally equivalent to what the founding generation called “declarations of war,” nothing should turn on the fact that we now call them “announcements” instead of “declarations.” For example, the Constitution gives Congress the power to define and punish “Offenses against the Law of Nations.”<sup>88</sup> What the founding generation called the “Law of Nations” we now call “international law.” Yet no one would argue that Congress’ law of nations power is now obsolete, simply because of the change in terminology.

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<sup>86</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>87</sup> See *supra* Part II.A.2.

<sup>88</sup> U.S. CONST. art. I, § 8, cl. 10.

Of course, it would be another matter if the phrase “declaration of war” had a *different* meaning today than it had in the eighteenth century. Even if a declaration of war did not signal a commitment to “total war” in the eighteenth century, perhaps it does today. We would then be faced with a choice between an eighteenth century meaning and a modern meaning of the same phrase. However, there is not much support for the idea that “declaration” has taken on new meaning. True, the United States’ most recent declaration that called itself a declaration, in World War II, did signal a commitment to total war. But prior declarations did not (with the possible exception of 1812). In particular, the United States’ declaration in the Spanish-American War of 1898 opened only limited hostilities in Spanish colonies, and while World War I was surely a total war from the perspective of some countries, the United States’ commitment did not rise to this level. Even in more recent practice there is no particular association of a declaration with a commitment to “total war.”<sup>89</sup>

These observations suggest another evolving-language objection: that the conflicts modern Presidents announce are not “wars” in the modern sense of that term. One might argue that, even if modern Presidents are “declaring,” they are not declaring “war.” But this also has little resonance with modern usage. The ordinary meaning of “war” remains a situation in which sovereigns seek to settle their differences by force, although the phrase has taken on a sufficiently negative connotation that policymakers prefer euphemisms such as “use of force” and “military operations.” Yet war continues to mean a sustained military campaign against a foreign power to achieve a national objective.<sup>90</sup> That is what Presidents have announced (“declared”) in the modern conflicts discussed above. Indeed, President Bush’s March 17, 2003, speech referred to the impending conflict in Iraq as “war,” and a leading U.S.

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<sup>89</sup> For example, writers in the interwar period of the twentieth century described the declaration of war in essentially the same terms as their counterparts of two hundred years earlier. See LAWRENCE, *supra* note 73, at 321-22 (“A declaration of war is a formal notification on the part of a state that it considers itself at war with another state.”); Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT’L L. 19, 22-28 (1938).

<sup>90</sup> See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2012 (3d ed. 1992) (giving primary definition of “war” as “a state of open, armed, often prolonged conflict carried on between nations, states or parties.”); *id.* (defining “at war” as “[i]n an active state of conflict or contention”). Newspaper accounts, for example, called the conflict in Iraq a “war.” See Dan Balz & Mike Allen, “No Outcome but Victory,” *Bush Vows; President Pledges Maximum Force and Warns Public of Difficulties*, WASH. POST, Mar. 20, 2003, at A1; William Booth, *Across the U.S., Reality Sinks In; Glued to TVs, American Watch, Wait*, WASH. POST, Mar. 20, 2003, at A23; Dana Milbank & Mike Allen, *Even with a War, Business as Usual; Iraq Move Reflected Long Planning*, WASH. POST, Mar. 20, 2003, at A22.

newspaper account said that the President's March 19, 2003, statement "announced the war on Iraq."<sup>91</sup>

## 2. Changes in International Law Terminology

Professors Robert Turner and Paul Kahn have, in separate articles, advanced the claim that declarations of war have become obsolete in modern international law as a result of the United Nations charter, and that this has profound implications for the Constitution's "declare War" power. As Kahn explains:

Since the advent of the United Nations (UN) Charter, war has been abolished as a category of international law. A declaration of war serves no purpose under international law; it can have no bearing on the underlying legal situation. No longer a performative utterance, it is only a meaningless utterance — not even descriptive — from the perspective of international law. . . .

War has disappeared from international law because force is no longer a legitimate means of changing state entitlements. The fundamental rule of postwar international law was the prohibition on the use or threat of force. This was enshrined in Article 2(4) of the UN Charter: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."<sup>92</sup>

Kahn argues that the reason wars are no longer declared is that the United Nations Charter outlaws war, replacing it with collective "police action" through the U.N. Security Council. As a result, he says, declarations of war are not only out of style, but fundamentally illegal. Thus, he would allow the President to initiate the use of armed force without a congressional declaration of war or other congressional action, but he sees approval by the Security Council as the new necessary prerequisite. As Kahn explains, the check of the Council replaces the check of the congressional declaration of war. A presidential decision to launch a war is illegal under U.S. law, in this view, not because it violates the declare-war clause, but because it violates the U.N. Charter, a treaty

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<sup>91</sup> Milbank & Allen, *Even with a War, Business as Usual*, *supra* note 90, at A22; Milbank & Allen, *President Tells Hussein to Leave Iraq*, *supra* note 37, at A1 (quoting Bush statement of March 17, 2003); *see also* Balz & Allen, "No Outcome but Victory," *supra* note 90, at A1 (calling the President's statement an "announcement that hostilities had begun" and later referring to Bush's "decision to go to war").

<sup>92</sup> Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 16-17 (2000).

that is part of the supreme law of the land.<sup>93</sup>

Turner essentially echoes these conclusions, albeit somewhat more cautiously. Like Kahn, Turner concludes that under the U.N. Charter, nations “have contracted away their right to wage aggressive war” and that “[f]rom the standpoint of international law, a formal declaration of war is an anachronism in the post-UN Charter world.”<sup>94</sup> Turner further suggests that the constitutional phrase should be read to mean that “congressional approval [is] required in any situation where a formal declaration of war would be considered appropriate under international law” — which, due to changes in international law, is now essentially never.<sup>95</sup> Turner would retain meaning for the Declare-War clause by, in effect, requiring congressional approval to violate the Charter: “if an American President were to make a decision to launch an aggressive war in violation of the Charter, this clause [the Declare-War clause] would remain a check against such behavior.”<sup>96</sup>

As Turner and Kahn suggest, a part of the Constitution that played a critical role at one point in history may be rendered essentially inoperative by the passage of time. Indeed, two companion powers to the power to declare war seem lost in the mists of the eighteenth century. The full text of the relevant clause gives Congress the power “to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>97</sup> Of these powers, “Letters of Marque and Reprisal” refer principally to the licensing of privateers, essentially private shipowners who seize the shipping of opposing powers. Similarly, “Rules concerning Captures” evokes a time in which seizure of enemy property for profit was a central object of war. We have little occasion to refer to these powers in the context of twenty-first century armed conflict. That does not mean that we are misreading or undervaluing the Constitution — only that powers once thought central to the conduct of government are now no longer exercised, and thus the clauses allocating them no longer have consequence in modern separation of powers.

However, Turner and Kahn overstate the impact of the U.N. Charter upon the conduct of modern warfare, in at least three important respects. First, notwithstanding Article 2(4), the Charter permits the offensive use

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<sup>93</sup> *Id.*

<sup>94</sup> Turner, *War on Terrorism*, *supra* note 1, at 530; TURNER, REPEALING THE WAR POWERS RESOLUTION, *supra* note 5, at 85.

<sup>95</sup> TURNER, REPEALING THE WAR POWERS RESOLUTION, *supra* note 5, at 88.

<sup>96</sup> Turner, *War on Terrorism*, *supra* note 1, at 531-32.

<sup>97</sup> U.S. CONST. art. I, § 8, cl. 11.

of force by national armies if approved by the Security Council.<sup>98</sup> The original intent of the Charter was to have threats to international peace and security met by a military force operating under Council direction, composed of forces lent to the Council by the nations of the world.<sup>99</sup> This vision was never realized, because nations were unwilling to dedicate such forces outside of purely peacekeeping operations. Instead, a system has evolved in which national armies, acting on Council approval but not under Council direction, meet threats to peace and security. The leading example is the Persian Gulf War, in which national armies — principally the U.S. army — attacked the Iraqi army in Kuwait after the Security Council had approved the use of force.<sup>100</sup> While this was not a war “of aggression” on the part of the United States, it was a war between the United States (and others) and Iraq, and that war was initiated, from the U.S. perspective, not by anything the Security Council did, but by President Bush ordering U.S. forces into combat and formally announcing that combat had begun.<sup>101</sup> This was not a violation of the Charter, but it was a war.<sup>102</sup>

Second, even in the absence of Security Council approval, the Charter contemplates that a nation may choose to enter into war. Article 51 states that nations do not give up their traditional right of “individual or collective self-defense if an armed attack occurs” against a U.N. member state.<sup>103</sup> As Turner points out, as far back as the eighteenth century, purely defensive war did not require a declaration on the part of the nation attacked, because that nation was not choosing to enter a state of war (but rather having such a state thrust upon it).<sup>104</sup> This suggests that,

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<sup>98</sup> See U.N. CHARTER, arts. 39-42.

<sup>99</sup> *Id.* at art. 43.

<sup>100</sup> See WESTERFIELD, *supra* note 1, at 119-61.

<sup>101</sup> See *id.* The relevant Security Council resolution — which came long before the beginning of the U.S. attack — only “authorized” but did not require the use of military force. See S.C. Res. 678, U.N. SCOR (1990); available at <http://www.un.org/documents/scres/1990/scres90.htm>.

<sup>102</sup> The idea that this was merely a “police action,” in which the United States disinterestedly enforced the will of the Security Council, does not capture the degree of sovereign conflict between the United States and Iraq. President Bush, speaking for the United States (and its allies), demanded Iraqi withdrawal and threatened the use of force; the President then sought and obtained from the Security Council approval to do what the United States wished — in its sovereign interest — to do anyway, which was to settle its dispute with Iraq over the independence of Kuwait by force. Even with the Security Council resolution, this was a use of sovereign force to settle sovereign differences.

<sup>103</sup> U.N. CHARTER, art. 51.

<sup>104</sup> Turner, *War on Terrorism*, *supra* note 1, at 525; see also VATTEL, *supra* note 41, at 316 (“He who is attacked and only wages defensive war, needs not to make any hostile declaration, — the state of war being sufficiently ascertained by the enemy’s declaration.”);

in modern practice, a nation invoking an Article 51 right to defend *itself* against an armed attack would not be “declaring” war. But Article 51 contemplates more than simply fending off an armed attack against one’s own territory. The right of *collective* self-defense indicates that nations may enter a war to assist another nation that has been attacked. As a result, even without Security Council authorization, the United States could have entered the Gulf War in defense of Kuwait. But again, the U.S. entry would not have been triggered by Iraq’s attack (which was not against the United States) but by the U.S. attack on Iraq. And again, this would have been an instance of the United States launching a war (or, more precisely, launching itself into a war), in compliance with the Charter.

Relatedly, although not entirely free from doubt, it seems likely that the Charter permits a nation under armed attack to respond militarily, not only against the attacker but against allies of the attacker.<sup>105</sup> This was the situation for the United States in Afghanistan in 2001. A declaration or similar announcement directed at the al-Qaeda organization was not needed, since the al-Qaeda attack itself established a relationship of war between the United States and al-Qaeda. But the United States also launched an attack against al-Qaeda’s ally, the Taliban government of Afghanistan. The Taliban had not attacked the United States directly; war between the Taliban and the United States began only with the U.S. attacks (and President Bush’s announcement of them). Once again, there was (under most interpretations) no violation of the Charter, but there was a U.S. attack creating a state of war where none previously had existed.<sup>106</sup>

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Ramsey, *Textualism and War Powers*, *supra* note 3, at 1622-26 (making this argument).

<sup>105</sup> *But see* Michael Glennon, *The Fog of War: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y. 539, 542-45 (2002) (arguing that such circumstances are highly limited under strict reading of Charter, and disputing that Afghanistan campaign satisfied them).

<sup>106</sup> *Cf. id.* at 542-45 (arguing that Afghanistan campaign violated literal meaning of Charter). Whether Professor Glennon is correct on this point does not affect the point made in the text: whether or not the campaign violated the Charter, it remains an important example of a nation’s unilateral initiation of war in the modern setting.

Vattel, on the other hand, might not have counted this as an example of a declaration under eighteenth century terminology, for he argued that “associates of my enemy” are automatically made a part of a war because “their own conduct proclaims them my enemies, as they take up arms against me in the first instance, I may make war on them without any declaration: the war being sufficiently declared by their own act.” VATTEL, *supra* note 41, at 331. It is unclear, though, what level of hostility Vattel thought necessary to become an “associate of [one’s] enemy.”

Third, Kahn and Turner may overstate the degree to which the plain language of the Charter governs the modern international use of force. As Professor Michael Glennon's recent work argues, quite a bit of force is used today that cannot be fit within the Charter's requirements.<sup>107</sup> Of course, some of this may simply be in violation of the Charter. But it also may be the case, as Glennon argues, that some of these uses of force have created an unwritten law of force that deviates from the Charter's plain language.<sup>108</sup> The two remaining examples, Kosovo in 1999 and Iraq in 2003, provide examples.

With respect to the Kosovo situation, the United States and its allies used force against Serbia in response to a humanitarian crisis, not in response to armed attack upon a member of the United Nations (as set forth in Article 51). Nor was there any Security Council resolution authorizing the attack. Yet, the United States plainly launched an attack, and declared itself to be doing so. One might argue that this was a violation of the Charter (thus apparently bringing it within the circumstances in which the Kahn/Turner view would require congressional approval). However, one might also say that, although apparently contrary to the Charter's plain language, the Kosovo operation was not contrary to the modern rules on the use of force more broadly read. If so, that would establish yet another situation in which the United States launched an attack that was not illegal, but which created a state of war where none previously existed.

Similarly, in 2003 the Security Council did not approve the U.S. attack on Iraq. The United States argued, among other things, that it was acting upon a long standing right of preemptive self-defense, against an Iraqi threat that was in the making but not yet set in motion.<sup>109</sup> Whatever its relationship to international law, the U.S. attack created a state of war between Iraq and the United States, and the President "declared" it to exist in his televised address.

In sum, despite the apparently sweeping statements of the U.N. Charter, war has not been outlawed or eliminated. There remain many situations in which the United States may choose to move from a state of

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<sup>107</sup> Glennon, *supra* note 105, at 549-53; see also MICHAEL GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001).

<sup>108</sup> *Id.*

<sup>109</sup> See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, al-Qaeda, and Iraq*, 4 SAN DIEGO J. INT'L L. 7 (2003). As Professor Greenwood points out, a strong argument also existed that the attack had been authorized by prior Security Council resolutions regarding Iraq, notably Resolution 678 (1990) and 686 (1991). The present Article takes no position on these debates.

peace to a state of war. Each of the cases discussed earlier — the Gulf War, Kosovo, Afghanistan, and Iraq — is an example. When the United States chooses to move from a state of peace to a state of war; and announces that it is doing so, it is doing exactly what the eighteenth century writers called “declaring war.” There is no reason to think that changes in the international system compel a fundamental rethinking of the constitutional language.

### III. IMPLICATIONS FOR WAR POWERS DEBATES

The foregoing sections have argued that, in modern practice, Presidents declare war on behalf of the United States. As discussed in this Part, that conclusion has implications for three central aspects of the war powers debate.

#### A. *The President’s Power to Declare War*

Recognizing presidential announcements of war as literal exercises of the power “to declare War” simplifies much of the debate over presidential war powers. In particular, it shows that the question of presidential war initiation powers can be understood in terms of the Constitution’s text, without stumbling over the supposed obsolescence of declarations of war. In one respect this simplification works against the President; in another respect it works in the President’s favor.

Essentially everyone in the war powers debate agrees that in assigning Congress the power “to declare War,” the Constitution’s text not only gives this power to Congress but also denies it to the President. Although the language standing alone does not necessarily compel this result, the Constitution’s structure, together with an array of statements by leading framers and ratifiers, confirm that this is the correct reading.<sup>110</sup> Advocates of broad presidential war power do not dispute this, but instead argue that the President’s power to initiate hostilities is separate from Congress’ power to declare war. The power to declare war, they argue, refers only to the act of issuing a formal declaration, which is distinct from, and not prerequisite to, the act of initiating hostilities.<sup>111</sup> On this basis, one might contend that most modern uses of force — including the Gulf War, Kosovo, Afghanistan, and Iraq conflicts — would have been constitutional even without the authorization of Congress, because the President never exercised any congressional

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<sup>110</sup> See Ramsey, *Textualism and War Powers*, *supra* note 3, at 1597-1606.

<sup>111</sup> See Yoo, *Original Understanding of War Powers*, *supra* note 5, at 295-302.

power.

We now see, though, that the President did declare war (that is, issue a formal announcement that the United States was at war, together with a statement of justifications and goals) in the Gulf War, Kosovo, Afghanistan, and Iraq conflicts. Advocates of presidential war power make the contrary claim only by trading upon the common assumption that no war has been declared since World War II. But, as we have seen, that assumption arises from a misunderstanding of the historical nature of a declaration of war, and an extreme formalism that counts as declarations only statements that contain the talismanic phrase "declaration of war."

Once we have established that the President declared war in each of these major recent episodes, it seems evident that the President cannot simply rely on residual executive and military power for that authority, but must find some affirmative constitutional justification for exercising a power that seems specifically reserved for Congress. In short, the rhetorical move of distinguishing between declaring war and initiating hostilities no longer works, once we see that, in typical modern conflicts, the President does both together. Most modern uses of force have been accompanied by presidential announcements of the reasons for the use of force, and indeed such announcements are likely viewed by Presidents as politically necessary to mobilize support for the conflict. When these statements announce the creation of a state of war, they are declarations of war in the constitutional sense. Even if the Declare-War clause only refers to the power to issue such a formal proclamation, the modern President has assumed that power.<sup>112</sup>

This conclusion, and the accompanying simplification of the debate, is illustrated by the conflict with Serbia over Kosovo. If one views that conflict as an "undeclared" war, one risks serious constitutional confusion. While Congress has the power to declare war, one might conclude that this power was not directly implicated by the campaign to protect Kosovo. President Clinton did not seek such a declaration from

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<sup>112</sup> This conclusion lessens the significance of another sharp disagreement in war powers scholarship — namely whether "declaring" war can mean anything in addition to the issuance of a formal announcement. Compare TURNER, REPEALING THE WAR POWERS RESOLUTION, *supra* note 5, at 80 (indicating that public initiation of hostilities amounts to declaration for constitutional purposes), and Ramsey, *Textualism and War Powers*, *supra* note 3, at 1590-96 (demonstrating that eighteenth century meaning of "declaring" war included public initiation of hostilities), with Yoo, *War and the Constitutional Text*, *supra* note 13 (arguing that "declaring" means only issuing formal declaration). But at least in the four episodes since 1990, that debate is simply irrelevant, since the President has also claimed the power to make the formal announcement.

Congress, but instead used force on his own initiative. Thus, the Kosovo question is usually framed as whether the President had the power to initiate hostilities without a declaration of war. The Constitution's text may appear not to speak to the matter. However, once one acknowledges that Clinton himself declared war (albeit a limited war) against Milosevic's Serbia, these difficulties are resolved. The only question is whether Congress properly delegated that power to the President. One need not decide whether or not the President can initiate hostilities *without* a declaration of war, because that is not what happened in Kosovo. As a result, Presidents must look for congressional authorization more frequently than they care to admit.<sup>113</sup>

On the other hand, simplification of the war powers debate works to the President's advantage on another front. Advocates of congressional war power frequently say that Congress must approve *all* hostilities (a sentiment endorsed by the 1973 War Powers Resolution).<sup>114</sup> Of course, the Constitution's text does not say this — it says that Congress has the power to declare war. If we concede that the Constitution's text refers to an outdated eighteenth century concept, we may think that a rough translation of the Framers' intent into modern times demands that Congress have power over "hostilities." On the other hand, if we see

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<sup>113</sup> The foregoing discussion, and the Kosovo illustration, further undermine the narrow reading of the Declare-War clause advanced by advocates of strong presidential power such as Professor Yoo. We have seen that presidential advocates argue for separating the act of initiating hostilities and the act of announcing hostilities in a declaration of war; they would give the latter to Congress and the former to the President. Yet we have further seen that modern Presidents have exercised both powers, and thus (unless authorized) have trespassed upon a congressional domain. If the presidential advocates' view is correct, though, the *only* thing constitutionally problematic about a unilateral presidential use of force is the announcement. That is, President Clinton (for example) would have been perfectly within his constitutional power to initiate the air war against Milosevic, as long as he was not so foolish as to say anything about it; but once he addressed the nation and announced the war's beginning and objective, he acted unconstitutionally.

I have elsewhere argued that the presidential advocates' view is flawed because eighteenth century theory and practice recognized that a war could be "declared" by announcement or simply by the open use of force. This Article's analysis of presidential declarations of war confirms this view. To say that the President can initiate the use of force but cannot *announce* the decision to use force seems an odd reading of the text, for it is difficult to identify the constitutional value served by such a rule. See Ramsey, *Textualism and War Powers*, *supra* note 3, at 1600-01.

<sup>114</sup> War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555. In general, the War Powers Resolution requires congressional approval, by declaration of war or otherwise, within 60 (or in some cases 90) days after U.S. forces are introduced into "hostilities or into situations where imminent involvement in hostilities is clearly indicated. . . ." See TURNER, REPEALING THE WAR POWERS RESOLUTION, *supra* note 5, at 109-19 (discussing constitutionality of Resolution).

that the Constitution's Declare-War clause retains a powerful literal meaning, no "translation" is necessary. As a result, when the President is *not* declaring war, there may be greater reason to think the President can act unilaterally.

As an example, consider two additional uses of force by the United States in the 1990s: President Clinton's missile strikes in Afghanistan and Sudan in August 1998, and his three-day bombing of Iraq in December of that year. In response to the terrorist attacks on U.S. embassies in Kenya and Tanzania, Clinton ordered missile strikes against a suspected terrorist training camp in Afghanistan and a suspected chemical weapons facility in Sudan. Following the strikes, Clinton announced:

Today I ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the imminent threat they presented to our national security.

I want to speak with you about the objective of this action and why it was necessary.

Our target was terror. Our mission was clear — to strike at the network of radical groups affiliated with and funded by Osama bin Laden. . . .

. . . .

Earlier today, the United States carried out simultaneous strikes against terrorist facilities and infrastructure in Afghanistan. Our forces targeted one of the most active terrorist bases in the world. . . .

. . . .

Our forces also attacked a factory in Sudan associated with the bin Laden network. The factory was involved in the production of materials for chemical weapons. . . .

. . . Let me express my pride in our Armed Forces who carried out this mission while making every possible effort to minimize the loss of innocent lives.<sup>115</sup>

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<sup>115</sup> President Bill Clinton, Address to the Nation Announcing Missile Strikes Against

Unlike the prior examples, these comments do not appear to be declarations of war. They did not announce any sustained conflict with or hostilities against a foreign nation, nor point to any sovereign differences the United States sought to resolve by force. They did not announce military objectives, nor conditions for peace. They did not, in short, establish a war-like relationship between the United States and either Sudan or Afghanistan. Clinton's comments made clear that what he called "today's strike"<sup>116</sup> was an isolated incident that had already been completed at the time he spoke (hence his repeated use of the past tense in describing the attacks), and that was not the prelude to a sustained campaign to settle differences with a foreign sovereign by force. And indeed, as Clinton's comments indicated, the strikes proved to be isolated events. No further hostilities resulted on either side. In short, the President's statement did not announce the commencement of war.

Similarly, in December 1998, in response to Iraq's expulsion of U.N. weapons inspectors, President Clinton ordered a series of air strikes against Iraq, and announced them in a formal address. As in the previous episode, Clinton's address indicated the limited nature of the actions. He described them only as a "strong sustained series of air strikes. . . designed to degrade Saddam's capacity to develop and deliver weapons of mass destruction and to degrade his ability to threaten his neighbors."<sup>117</sup> He then raised the possibility (but only the possibility) of further military action:

I hope Saddam will come into cooperation with the inspection system now. . . . But we have to be prepared that he will not, and we must deal with the very real danger he poses. So we will pursue a long-term strategy to contain Iraq. . . .

First, we must be prepared to use force again if Saddam takes threatening actions. . . .

Second, so long as Iraq remains out of compliance, we will work with the international community to maintain and enforce economic

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Terrorist Training Camps in Afghanistan (Aug. 20, 1998), *reprinted in* FOREIGN POL'Y BULL., Sept./Oct. 1998, at 6-7.

<sup>116</sup> *Id.* at 7.

<sup>117</sup> President Bill Clinton, Address to Nation Announcing Air Strikes Against Iraq (Dec. 16, 1998), *reprinted in* FOREIGN POL'Y BULL., Jan./Feb. 1999, at 40.

sanctions.<sup>118</sup>

Although this action by the President seems closer to declaring war than the Sudan/Afghanistan example, it still falls short. Clinton's statement did not announce a sustained military effort — at most, it suggested that a sustained military effort might be forthcoming if Iraq did not meet U.S. demands. Unlike the Kosovo example, there was no indication that the air campaign would continue until Iraq complied with U.S. demands.<sup>119</sup>

As a result, Clinton would seem to have much stronger grounds to argue that these actions fell within his own independent authority. The Constitution does not give Congress power over all forms of hostilities, only declarations of war. If the "declaration of war" can be given a coherent and relevant modern meaning that does not encompass the President's 1998 actions, those presidential actions would lie firmly beyond a claim of congressional power based on the Declare-War clause.<sup>120</sup>

### B. Congress' Power to Authorize War

Recognizing modern presidential declarations of war also clarifies the role of Congress. The modern war powers debate struggles to explain what Congress is doing (as a constitutional matter) when it authorizes the use of military force by the President, as occurred in the Gulf War in 1991, Afghanistan in 2001, and Iraq in 2002.<sup>121</sup> It is not immediately apparent how Congress' "authorizations" of presidential use of force relate to Congress' textual power to "declare War." Whatever these congressional resolutions may be, they are not declarations of war. They do not purport to create, announce, or explain a state of war, nor do they as a practical matter create a state of war.<sup>122</sup> While it has occasionally

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<sup>118</sup> *Id.* at 41.

<sup>119</sup> This was, moreover, how Clinton's announcement was understood in the United States. *See id.* at 43-44 (statement of Sen. Lott referring to the action as a "cursory air strike"; statement of Sen. McCain suggesting that the action was likely to be "an inconclusive air strike followed by a period for Saddam to reflect and call our bluff").

<sup>120</sup> I do not consider here the suggestion that the 1998 strikes were "reprisals" and thus required the approval of Congress under the *marque and reprisal* clause. My point is simply to show that the Declare-War clause cannot be the basis of an objection to the President's action.

<sup>121</sup> *See supra* note 2.

<sup>122</sup> For example, Congress' October 2002 authorization of the use of force against Iraq did not have any effect on the status of relations between the United States and Iraq. Nor did it direct the President to begin war against Iraq upon the occurrence of certain conditions (such that it might be considered a conditional declaration of war). *Cf. supra*

been suggested that the modern Congress should “declare war” in so many words (in particular, after the September 11 attacks and in response to Serbia’s actions in Kosovo), Congress has not seriously considered these suggestions. Because Congress does not appear to be exercising its declare-war power, it is unclear what power it *is* exercising, or why such an “authorization” should be prerequisite to presidential action.

Although many scholars advocate broad congressional control over initiating hostilities,<sup>123</sup> the supposed obsolescence of the declaration of war means that they have great difficulty relating their normative prescriptions to the Constitution’s text. As Professor J. Gregory Sidak points out, few advocates of congressional war power think that Congress actually must “declare War” prior to armed conflict. Nor do these scholars claim that the President is “declaring war” in Congress’ place. Rather, they describe the presidential wars as “undeclared wars,” and say that what the President must obtain is not a “declaration” but an “authorization” from Congress.<sup>124</sup>

This claim seems divorced from constitutional language. While the Declare-War clause indicates that the President cannot “declare” a war (since that is Congress’ power), it does not say that the President cannot fight an undeclared war. Similarly, Congress appears to have no textual power over war initiation other than the power to declare war; there is no mention of war “authorizations.” Advocates of congressional war power might escape this box if they thought all wars must be “declared.” But as Sidak further emphasizes, this is not what they think: rather, they argue that “undeclared” wars authorized by Congress are constitutional, and “undeclared,” unauthorized wars are not.<sup>125</sup> Nothing in the Constitution’s text says anything like this.

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note 74 (discussing conditional declarations of war). Rather, it authorized (but did not require) the President to begin hostilities, if he thought it appropriate. As the resolution stated: “The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate to — (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” Authorization of Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>123</sup> See, e.g., JOHN ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); HAROLD HONJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

<sup>124</sup> Sidak, *supra* note 3, at 63-73 (discussing views of Louis Fisher, John Hart Ely, and Harold Koh, among others).

<sup>125</sup> See Sidak, *supra* note 3, at 63-73.

Sidak and his allies are on no firmer textual ground, however. According to Sidak, Congress must formally declare wars, not merely authorize them. Thus, any use of force without a formal declaration is unconstitutional, whether or not Congress has passed some other form of authorization.<sup>126</sup> But unless something else in the Constitution's text prevents the President from fighting "undeclared" wars, that claim is also hard to tie to the Constitution's text. All the Declare-War clause says is that if a declaration is made, Congress must do it. And there is little textual basis to say (as Sidak does) that hostilities cannot commence without a formal declaration. Without acknowledging presidential declarations of war, the Constitution's text does not support Sidak's position any more than it supports the conventional view.

Once we see that modern presidential announcements are declarations of war, the textual basis of this debate is more apparent. When Congress authorizes the President to use armed force, it is delegating to the President its power to declare war. Similarly, when the President announces a state of war, the President is exercising the delegated power to declare war. To take the Iraq example, President Bush's statement on March 19, 2003, constituted a declaration of war against Iraq, but it was made pursuant to the prior authorization by Congress. While it was a presidential declaration of war, it was an exercise of delegated authority, and thus was entirely constitutional, if the delegation itself was constitutionally valid.<sup>127</sup>

Because Congress' statutory authorizations of war have not usually been described as a delegation to the President of its power to declare war, scholars have not generally analyzed them in those terms. Once we

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<sup>126</sup> Sidak, *supra* note 3, at 63-73; see also HALLETT, *supra* note 1, at 145-68 (arguing also that Congress must formally declare war prior to any major hostilities). This claim arose in a recent court case, although it was quickly dismissed without an opinion on the merits. In *Doe v. Bush*, various plaintiffs (including several members of Congress) argued that President Bush lacked authority to go to war in Iraq, despite the October 2002 congressional authorization, because Congress had not "declared war." See Complaint and Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *Doe v. Bush*, 257 F. Supp 2d 436 (D. Mass 2003) (No. 03-10284) (on file with author); *Judge Rejects Lawsuit Seeking to Bar President From Launching War*, available at <http://www.cnn.com/2003/LAW/02/24/anti.war.lawsuit.ap/html> (Feb. 24, 2003) (reporting dismissal).

<sup>127</sup> In *Doe v. Bush*, discussed *supra* note 126, plaintiffs recognized that the President might claim delegated authority, and explicitly asserted that Congress' declare-war power is non-delegable. See Memorandum of Law, at 12, *Doe v. Bush*, (No. 03-10284) ("Congress may not delegate to the President the decision to commence a war."). However, they did not provide meaningful support for this assertion. *Id.* at 13 (arguing in effect that only "solemn declaration" by Congress, made after "considered deliberation," is sufficient, without explaining why Congress, after "considered deliberation," cannot delegate ability to make "solemn declaration" to President).

describe them this way, it should be clear that any constitutional objections center upon the so-called nondelegation doctrine. That doctrine, many scholars contend, provides a constitutional limit on the ability of Congress to delegate its powers to other branches.<sup>128</sup> The doctrine is conventionally traced to John Locke, who declared:

The power of the Legislative [branch] being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative [branch] can have no power to transfer their Authority of making Laws, and place it in other hands.<sup>129</sup>

And Madison observed (albeit in 1799, long after the drafting of the Constitution), that “[i]f nothing more were required, in exercising a legislative trust, than a general conveyance of authority — without laying down any precise rules by which the authority conveyed should be carried into effect — it would follow that the whole power of legislation might be transferred by the legislature from itself” with a corresponding collapse of the constitutional structure of separation of powers.<sup>130</sup>

But even court decisions and commentary most favorable to the nondelegation doctrine do not suppose it imposes an absolute limitation

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<sup>128</sup> The conventional view is summarized and critiqued in Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). For the evolution of the Supreme Court’s view, see *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 472-476 (2001); *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Zemel v. Rusk*, 381 U.S. 1 (1965); *id.* at 20-22 (Black, J., dissenting); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928); *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). For leading recent commentary endorsing at least some aspects of the nondelegation doctrine, see Larry A. Alexander & Saikrishna B. Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. (forthcoming 2003); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); John F. Manning, *The Nondelegation Doctrine as Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>129</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381 (Peter Laslett ed., 1967) (1690). See Posner & Vermeule, *supra* note 128, at 1727-28 & n. 19 (tracing nondelegation doctrine to Locke).

<sup>130</sup> 4 JONATHAN ELIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 560 (1888) (Madison to Virginia House of Delegates).

on delegation of congressional powers, in the sense of not allowing Congress to confer any policymaking discretion elsewhere. Rather, the conventional statement of the rule is that "Congress must supply an 'intelligible principle' to guide its agents' exercise of statutory authority."<sup>131</sup> The debate focuses primarily upon the question of how strictly to apply the "intelligible principle" requirement.<sup>132</sup>

How this broader debate relates to the delegation of the Declare-War power is not immediately obvious. Almost all scholarly and judicial discussions of delegation have addressed Congress' delegation of lawmaking authority. If similar considerations are applied to Declare-War delegations, the debate is fairly easily understood. Under most versions of the "intelligible principle" rule, Congress probably could not authorize the President to use force against any nations that the President at any time in the future determined to pose a threat to U.S. interests.<sup>133</sup> But in the case of war powers, Congress' practice has been to speak specifically. The resolution authorizing the Gulf War, for example, linked the use of force to enforcement of specific U.N. Security Council resolutions that required Iraq to withdraw from Kuwait and to take certain other related actions. It was directed against only one country, and permitted the President to act only if he determined that military force was necessary to achieve specified goals.<sup>134</sup> Similarly, the September 2001 resolution, while broader in that it did not mention any particular country, tied any use of force to complicity in the September 11 attack.<sup>135</sup> The 2002 Iraq resolution, like the authorization in 1991, tied

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<sup>131</sup> Posner & Vermeule, *supra* note 128, at 1721, quoting *J.W. Hampton*, 276 U.S. at 409. As the Supreme Court recently held, "Article I, § 1, of the Constitution vests 'all legislative Powers herein granted. . . in a Congress of the United States.' This text permits no delegation of those powers, . . . and so we repeatedly have said that. . . Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Am. Trucking*, 531 U.S. at 472, quoting *J.W. Hampton*, 276 U.S. at 409 (citations and emphasis omitted).

<sup>132</sup> See sources cited *supra* note 128. A related debate concerns the extent to which the nondelegation doctrine, even if constitutionally well founded, is judicially enforceable. See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (courts have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

<sup>133</sup> *But see* Posner & Vermeule, *supra* note 128 (arguing for complete abandonment of nondelegation doctrine).

<sup>134</sup> See Pub. L. No. 102-1, § 2(a), 105 Stat. 3, 3-4 (1991).

<sup>135</sup> Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). A much broader delegation occurred in the Gulf of Tonkin Resolution prior to the Vietnam War, in which Congress resolved that "the United States is. . . prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member of protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its

the use of force to the threat posed to U.S. national security by Iraq and to enforcement of specific U.N. Security Council resolutions, in that case relating to disarmament.<sup>136</sup> Each of these delegations allowed the President to make the decision to declare war only within fairly narrow parameters, and likely would be constitutional under loose versions of the nondelegation doctrine found in many modern court decisions and commentary.

The principal objection is that Congress' war authorizations do not *require* the President to do anything. The decision to declare war is entirely up to the President, assuming certain conditions are met.<sup>137</sup> Thus, the President is not exercising discretion in carrying out a congressional directive, but rather has been vested with the ultimate policy decision (within a narrow subject). A strict interpretation of the legislative nondelegation doctrine would likely find this constitutionally objectionable, although it is consistent with much modern practice.<sup>138</sup>

The matter is further complicated because the power to declare war is not a conventional lawmaking power, so it is not clear that the conventional nondelegation power (however defined) applies to it. This could militate either for or against Congress' power to delegate. On one hand, the theory of statutory delegation is that the President exercises executive power in implementing a statute, even when the statute leaves some policy discretion to the President. Thus, so long as the President acts pursuant to an "intelligible principle," the President exercises executive rather than legislative power, and constitutional strictures are satisfied. Only when the President has no statutory intelligible principle is the President actually exercising a legislative power of Congress. This

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freedom." Pub. L. No. 88-408, § 2, 78 Stat. 384, 384 (1964). This might seem problematic under some stronger versions of the nondelegation doctrine.

<sup>136</sup> See Authorization of Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) ("The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to — (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions against Iraq."). Congress declined to approve wider language suggested by the Bush administration that would have authorized the use of force broadly to restore international peace and security to the Persian Gulf region.

<sup>137</sup> See *id.* (allowing President to use force against Iraq "as he determines to be necessary").

<sup>138</sup> See Lawson, *supra* note 128, at 378-95 (discussing and criticizing important modern statutes that contain this level of discretion). For example, the Securities and Exchange Act of 1934 authorizes (but does not require) the Securities and Exchange Commission to prohibit deceptive practices in the sale of securities "as necessary or appropriate in the public interest of for the protection of investors." 15 U.S.C. § 78j(b) (1994).

theory fits poorly with the Declare-War delegations. When the President acts pursuant to a Declare-War delegation, it is hard to say that the President is executing a law; rather, it seems fairly clear that the President is exercising a congressional power. Thus, Declare-War delegations may seem more problematic than law-making delegations, even if guided by an “intelligible principle.”

On the other hand, one might argue that delegations to the President in the field of foreign affairs should be *easier* than conventional law-making delegations, because the President’s executive power itself carries broader foreign affairs authority.<sup>139</sup> This approach seems consistent with early practice. From the beginning, Congress made strikingly broad delegations in foreign affairs.<sup>140</sup> For example, in 1794, Congress delegated to the President the power to impose an embargo “whenever, in his opinion, the public safety shall so require. . . under such regulations as the circumstances. . . may require.”<sup>141</sup> Similarly, Congress authorized (but did not require) the President to construct up to ten warships if it “shall appear to him necessary for the protection of the United States,” and to permit the export of arms contrary to a statute “in cases connected with the security of the commercial interests of the United States.”<sup>142</sup>

These historical delegations, like modern Declare-War delegations, leave the decision to act or not to act solely with the President. Moreover, they are not as specific as the modern Declare-War delegations, since they do not establish specific factual criteria necessary to trigger the President’s discretion, nor do they limit themselves to responses to specific threats against U.S. interests. If one accepts this

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<sup>139</sup> See Rappaport, *supra* note 128 (arguing that eighteenth century practice in Britain and United States supports broader delegations in “executive” areas such as foreign affairs than it does in lawmaking).

<sup>140</sup> For a discussion of the practice of early Congresses, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 186-87 (1997). See also Lawson, *supra* note 132, at 395-403 (finding support for nondelegation principle in early practice); Posner & Vermeule, *supra* note 128, at 1733-36 (giving additional examples of early delegations).

<sup>141</sup> 1 Stat. 372 (1794).

<sup>142</sup> 1 Stat. 376 (1794); 1 Stat. 444 (1795). As Currie recounts, no one raised any serious constitutional objections to any of these delegations. See CURRIE, *supra* note 140, at 186. See also *id.* at 244-46 (discussing foreign affairs activities of 1798 Congress, and concluding that “[t]he bellicose legislation of the Fifth Congress [in 1798] was riddled with broad delegations of authority.”). Currie concludes that “Congress had in fact given the President a great deal of discretion in a variety of different fields that Article I committed to Congress” but that “[e]ven the proponents of broad delegation had acknowledged that there had to be limits if Congress was not to abdicate its intended functions; . . . it was up to Congress to lay down guiding principles for the executive to apply.” *Id.* at 246-47.

early practice as constitutional, that would seem to validate modern Declare-War delegations as well. In any event, we may conclude that modern Declare-War delegations are not out of step with historical practice in other foreign relations matters.<sup>143</sup>

Two delegation-related questions remain. First, must Congress' authorization/delegation be explicit (as it was in the 1991, 2001, and 2002 resolutions), or may it be implied from other statutory actions such as military appropriations? Second, must Congress' authorization/delegation, whether implicit or explicit, arise from an enactment — or can it also arise informally through acquiescence in presidential action?

In modern practice, these questions are posed by the Serbia campaign. As discussed, the campaign to protect Kosovo (like the other modern conflicts) involved a presidential declaration of war. Unlike the other three, it did not involve an explicit statutory authorization (i.e., a statutory delegation of the Declare-War power by Congress).<sup>144</sup> Congress did, however, take various statutory actions consistent with the President's decision to go to war over Kosovo. In particular, it appropriated money explicitly identified as funding for military operations in Serbia. Moreover, although some members of Congress

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<sup>143</sup> There also seems little support for the idea that war power is uniquely nondelegable. Congressman Richard Brent, in the 1798 debate over authorizing warlike measures against France, observed that "if a proposition was made to transfer to the President the right of declaring war in certain contingencies, the measure would at once appear so outrageous, that it would meet with immediate opposition." 8 ANNALS OF CONG. 1638 (1798). Brent was almost certainly overstating, as the bills then under consideration did almost what he proposed, by delegating to the President the authority to order the capture of French warships. See 1 Stat. 578 (1798); CURRIE, *supra* note 140, at 245 (observing that this "looked suspiciously like a delegation of the power to determine whether or not to go to war"). As Professor Currie says, the power to declare war "was given to Congress in order to assure that the decision was made by a representative assembly [and] it may be that delegation is more suspect, and must accordingly be more narrowly defined, when the authority in question is one the Framers specifically meant to keep out of executive hands." CURRIE, *supra* note 140, at 247. But this is as far as most nondelegation scholars are willing to go: there has been no sustained argument that the power cannot be delegated.

It may be noted that such delegations are not a modern invention. In 1858 Congress considered a resolution authorizing the President to use force against Paraguay, phrased almost in parallel with modern resolutions: "[F]or the purpose of adjusting the differences between the United States and the republic of Paraguay, in connexion with the attack on the United States steamer Water Witch, and with other matters referred to in the annual message of the President, he . . . is hereby, authorized to adopt such measures and use such force as, in his judgment, may be necessary and advisable, in the event of a refusal of just satisfaction by the government of Paraguay." 11 Stat. 370 (1858). Although the resolution was not adopted, no one voiced constitutional objections.

<sup>144</sup> See *supra* Part I, B.; Yoo, *Kosovo*, *supra* note 7, at 1680-85.

attempted to put Congress on record as opposing the conflict, that effort failed, implying congressional acquiescence to the President's actions.<sup>145</sup> The question is whether either of these points matters for constitutional purposes.

While a full evaluation of these points is beyond the scope of this Article, some observations are appropriate here. As to the first, the question of implicit statutory approval of presidential war powers was widely debated in the Vietnam War, particularly after the repeal of the Tonkin Gulf Resolution (which had previously provided explicit congressional authorization for military operations).<sup>146</sup> Although the Supreme Court never considered the issue, it appears to accept implicit statutory approvals in other foreign affairs areas. In *Dames & Moore v. Regan*, for example, the Court considered the President's authority to enter into executive agreements settling claims between U.S. citizens and the government of Iran.<sup>147</sup> Although the Court found that Congress had not explicitly authorized the settlement by statute,<sup>148</sup> and seemed to doubt whether the President had an independent power over settlement,<sup>149</sup> the Court nonetheless upheld the presidential action. At least part of that decision appeared to rest on the fact that Congress had enacted statutes that clearly contemplated claims settlement by executive agreements, both generally and in the specific context of Iran claims.<sup>150</sup> One way to understand this reasoning is to say that Congress' implicit statutory approval of executive claims settlements amounted to a delegation to the President of the claims settlement power. If one accepts that basis of the *Dames & Moore* decision,<sup>151</sup> it seems likely that

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<sup>145</sup> See *supra* note 29 (discussing congressional actions taken in connection with military action against Serbia).

<sup>146</sup> See *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971) (discussing Congress' military appropriations and approval of draft as implicit approvals of Vietnam War); ELY, *supra* note 123, at 27-30 (discussing implicit approvals by appropriations, specifically in context of Vietnam War).

<sup>147</sup> 453 U.S. 654 (1981).

<sup>148</sup> *Id.* at 676-77.

<sup>149</sup> See David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003).

<sup>150</sup> 453 U.S. at 679 ("the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility") (internal citations omitted).

<sup>151</sup> *Dames & Moore* has been sharply criticized. See KOH, *supra* note 123, at 139-40; Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982); Ramsey, *Executive Agreements*, *supra* note 47, at 156-59.

congressional enactments clearly contemplating the exercise of war powers by the President would also serve as constitutional authorizations/delegations. The congressional enactments associated with the Serbia campaign might then qualify as authorizations under this view.<sup>152</sup>

The idea that Congress can authorize presidential activity other than through the statutory process is even more controversial, but also potentially supported by *Dames & Moore*. In addition to emphasizing that Congress had enacted statutes that seemed to contemplate executive claims settlement power, the Court noted that the President had a longstanding practice, dating to 1799, of settling claims by executive agreement, and that Congress had not objected to that practice.<sup>153</sup> The Court appeared to conclude that this amounted to approval by acquiescence. One way to read *Dames & Moore*, therefore, is to recognize Congress' ability to delegate certain powers to the President, both informally, by not objecting to their exercise, as well as by statute.<sup>154</sup> If one accepts that this theory of congressional acquiescence extends to war power, it would be an additional way to find approval for a presidential declaration of war.<sup>155</sup>

### C. The Wartime Powers of the President

Finally, recognition of presidential declarations of war clarifies the debate over presidential wartime powers. In the context of the

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<sup>152</sup> Subject, however, to the further objection that they occurred after the beginning of hostilities and the President's announcement, and thus at best were a ratification of an otherwise unconstitutional action rather than a delegation of power in advance of its existence.

<sup>153</sup> 453 U.S. at 678-82 & n.8 (discussing "history of congressional acquiescence in conduct of the sort engaged in by the President"). I have elsewhere argued that the President has a limited independent power to settle claims by executive agreement, arising from the "executive Power" granted to the President by Article II, Section 1 of the Constitution. See Ramsey, *Executive Agreements*, *supra* note 47. On this view, the historical practice identified in the Court in *Dames & Moore* was evidence of an original understanding of this independent power, rather than evidence of congressional delegation-by-acquiescence. I further argue, however, that neither Article II, Section 1, nor the historical practice supports the scope of claims settlement power claimed by the President in *Dames & Moore*. *Id.* at 156-59.

<sup>154</sup> 453 U.S. at 678 ("failure of Congress specifically to delegate authority does not, especially... in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive") (internal quotations omitted).

<sup>155</sup> Once the congressional approval is entirely disconnected from a congressional enactment, however, it is likely to become much more controversial. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) (emphasizing importance of lawmaking through formal statutory processes).

Afghanistan conflict, for example, the President asserted the power to establish military commissions and detain enemy combatants.<sup>156</sup> Critics questioned this power, in part because (they claimed) there had been no declaration of war, and thus the President lacked the full panoply of wartime powers.<sup>157</sup>

In particular, in a recent article in the *Yale Law Journal*, Professors Katyal and Tribe appear to argue that the absence of a declaration of war in the Taliban/al-Qaeda conflict denies the President the power to establish military commissions.<sup>158</sup> Katyal and Tribe seem to concede that in a "declared" war, the President has a full range of wartime powers including the power to establish military commissions.<sup>159</sup> On the other hand, they argue that the President's 2001 order authorizing military commissions for Taliban and al-Qaeda captives is unconstitutional, in part because "the country [is] embroiled in military conflict but not a declared war."<sup>160</sup>

The question of a declaration arises because presidential authority over military commissions in prior "declared" conflicts appears settled. In *Ex Parte Quirin*, the Supreme Court upheld the President's power to establish military commissions to try enemy combatants.<sup>161</sup> The Court hardly broke new ground here, for, as its opinion pointed out, wartime military commissions date to the nation's earliest years.<sup>162</sup> While the Court found the commissions in *Quirin* had been authorized by

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<sup>156</sup> See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (presidential order authorizing military commissions to try enemy combatants); Katharine Q. Seelye, *Detainees Are Not POW's, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (discussing presidential decision to detain Taliban and al-Qaeda captives at Guantanamo, Cuba).

<sup>157</sup> Cf. *Ex Parte Quirin*, 317 U.S. 1 (1942) (approving commissions in context of declared war). See generally Daryl A. Mundis, *Agora: Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320 (2002).

<sup>158</sup> Katyal & Tribe, *supra* note 11. I say "appear" because the argument is not entirely explicit, and (as they point out) one might read the Supreme Court's decision in *Quirin* to require specific congressional authorization even in time of "declared" war.

<sup>159</sup> *Id.* at 1275-76 ("In declaring war, Congress for all practical purposes determines that we should deem conclusive the President's unilateral judgment as Commander in Chief that a given wartime measure must be taken without further congressional authorization."); *id.* at 1266 ("Congress at a minimum must clearly provide by law for the trial of [enemy] combatants by military commissions; it can do so either through formal declaration of war or by specific authorizing legislation."); see also *id.* at 1259 ("In time of declared war. . . reposing this extraordinary mix of powers in the President as Commander in Chief [ ] might be tolerable.").

<sup>160</sup> *Id.* at 1273. See also *id.* at 1282 (emphasizing that in *Quirin*, unlike present situation, "war had been declared").

<sup>161</sup> 317 U.S. 1 (1942).

<sup>162</sup> See A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948).

Congress, its opinion strongly implied that the President's independent power as Commander-in-Chief during wartime, standing alone, might suffice. As the Court observed: "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in the attempt to thwart or impede our military effort have violated the law of war."<sup>163</sup> Thus, the military commission power might best be viewed as one manifestation of a broader presidential power to act to defeat enemies and protect the nation in wartime.

But *Quirin* arose during World War II, a declared war.<sup>164</sup> The Court observed that war had been declared and that the President's Commander-in-Chief power included broad power to fight a war once declared. It did not say, however, whether the declaration (as opposed to another form of authorization) made any difference.<sup>165</sup> As a result, the question remains — even if one accepts the President's independent wartime powers — whether the President's wartime powers also exist in an "undeclared" war. That question is particularly important in the context of the post-September 11 conflict with al-Qaeda and the Taliban, in which President Bush has signed an order authorizing commissions to try al-Qaeda captives.<sup>166</sup> Katyal and Tribe argue that these commissions are unconstitutional because the present war, not being a "declared" war, does not give rise to the sort of wartime powers discussed in *Quirin*.<sup>167</sup>

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<sup>163</sup> 317 U.S. at 8.

<sup>164</sup> *Quirin* involved German soldiers who, during the war between Germany and the United States, entered the United States by submarine, dressed in civilian clothes, with the purpose of sabotaging key facilities. *Id.* at 30-31. See also *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (upholding detention of U.S. citizen captured while fighting with Italian army during World War II).

<sup>165</sup> 317 U.S. at 26 ("[T]he Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared. . .").

<sup>166</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001) (Military Order of President George W. Bush).

<sup>167</sup> Katyal & Tribe, *supra* note 11 at 1275-76; see also AM. BAR ASS'N, TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (2002), available at <http://www.abanet.org/leadership/military.pdf> (last visited October 21, 2003) (suggesting that President's current power to establish military commissions to try al-Qaeda captives may be reduced because there has been no declaration of war); AM. BAR ASS'N, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, PRELIMINARY REPORT, August 8, 2002 (on file with author) (suggesting that President's current authority to detain members of al-Qaeda as enemy combatants may be limited because there has been no declaration of war, and suggesting that *Quirin* "may not provide the clear precedential

Though raised in the context of military commissions, this argument may sweep much more broadly. For example, the President, as Commander-in-Chief, plainly has the power during wartime to detain enemy soldiers outside of the normal judicial process as prisoners of war; the power is so obvious that it has never been seriously contested. But does this power, like the power to establish military commissions, also depend upon the presence of a declaration of war? No one has clearly asserted that it does, and Presidents have held prisoners of war in prior “undeclared” conflicts. Yet if one views the declaration of war as the legal trigger for presidential wartime powers, as Katyal and Tribe appear to argue, one might say that a declaration is a necessary prerequisite.<sup>168</sup>

Of course, Congress authorized the President’s use of force after the 2001 terrorist attacks, and one might suppose that Katyal and Tribe would be open to the argument that this authorization counts as the congressional action they require. After all, the central point of their article is that the President should not be able to enlarge his own powers by “*his own* commitment of the Nation’s armed forces to some foreign venture.”<sup>169</sup> That sort of unilateral action obviously did not occur in 2001. But in fact Katyal and Tribe do not view the 2001 congressional resolution as sufficient, because it was not a declaration of war.

Acknowledging presidential declarations of war, however, helps sort out these arguments. Katyal and Tribe suggest that President Bush lacks the full range of wartime powers to prosecute the war against al-Qaeda and the Taliban because the war was not declared. This position now

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value claimed by the government” in part because “there was a formal congressional declaration of war against Germany.”).

<sup>168</sup> Katyal and Tribe appear to agree that even in “undeclared” war, the President may detain (but not try) enemy combatants. Katyal & Tribe, *supra* note 11, at 1270. Their distinction is that trials (by military commission) involve a lawmaking and adjudicatory role, and thus require the involvement of at least one other branch of government for authorization. As discussed below, their argument attempts to avoid the rejoinder that Congress has in fact authorized all necessary wartime measures against the Taliban and al-Qaeda by insisting that Congress can only act through formal declarations of war.

<sup>169</sup> Katyal & Tribe, *supra* note 11, at 1274 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring) (emphasis added)). Katyal and Tribe’s heavy reliance on the *Youngstown* case, which arose during a conflict that Congress had not authorized by statute, strongly suggests that a statutory authorization should make a difference. See *id.* at 1295 (charging President with “a dramatic disregard of *Youngstown*”); see also *id.* at 1295-97 (listing parade of horrors in which President might “unilaterally” assert right to restrict civil liberties in name of security). Yet Katyal and Tribe themselves disregard Congress’ authorization of the use of military force in Afghanistan, presumably because they think a congressional “declaration of war” is the only way Congress can act in this regard.

seems wrong, because war *was* declared (by the President, pursuant to a delegation). Similarly, one may read Professor John Yoo's work as recognizing a substantial difference between the domestic legal status of declared war and undeclared hostilities.<sup>170</sup> That view seems to suggest that the legal status of war did not (and does not) exist in most modern conflicts, including the current one. But even if Yoo is correct about the legal difference between declared and undeclared war, we see now that this view has far fewer implications for modern practice, because modern wars are declared by the President, and the President's declaration (if constitutional) should surely be sufficient to trigger whatever additional legal consequences may exist in a declared war.

Although Katyal and Tribe do not engage this point, they presumably would respond that the presidential announcement of war does not count as a "declaration," because the President's announcement (and Congress' delegation) does not use the magic words "declaration of war."<sup>171</sup> But the congressional delegation surely contemplated that the President would initiate a state of war and make an official announcement of the new status. The President's announcement, as discussed, had all the essential historical characteristics of a declaration of war. To discount either because they did not use the precise phrase seems an unjustified semantic technicality.<sup>172</sup>

Recognizing presidential announcements of war as presidential declarations of war thus simplifies and strengthens the argument for presidential wartime powers such as the power over military commissions. But paradoxically presidential advocates may not wish to rely heavily upon it, due to the necessary link between war making powers and war initiation powers. If the President's announcement is a

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<sup>170</sup> See Yoo, *Original Understanding of War Powers*, *supra* note 5, at 301 (stating that declaration is "authorization for the exercise of emergency powers of the federal government").

<sup>171</sup> That this is their view is confirmed by their reliance on Sidak's article, discussed above. Katyal & Tribe, *supra* note 11, at 1271 n.51.

<sup>172</sup> Katyal and Tribe might also argue that Congress' power to declare war is nondelegable. See *supra* Part III.B. This claim, though, would render unconstitutional not only the military commissions, but all the President's war-related action. As a result, Katyal and Tribe might be better off abandoning the "declaration of war" distinction altogether, and arguing that military commissions, because of their unique mix of judicial, legislative, and executive powers, require specific congressional authorization whether or not war is declared. See *Brown v. United States*, 12 U.S. 110 (1814) (holding that seizure of property during wartime requires specific authorization). This Article takes no position on that debate, nor on the various other grounds Katyal and Tribe advance for finding the commissions unconstitutional. Cf. Katyal & Tribe, *supra* note 11, at 1298-1310 (discussing challenges under Equal Protection Clause).

declaration, as this Article has argued, then no limit upon the President's wartime powers arises as a result of an absence of a congressional declaration. Yet, if the President's announcement is a declaration, it must be authorized by Congress under most circumstances. As a result, claiming broad presidential war making powers undercuts the claim of broad presidential war initiation powers (and *vice-versa*).

But this relationship further suggests that the reading advanced in this Article is the correct one. Giving "declaration of war" its historical, non-ritualistic meaning shows that most substantial presidential uses of force involve declarations, and thus must depend upon congressional action. This conclusion limits presidential war initiation power. But once congressional action to approve a declaration by delegation is required (and recognized for what it is), we may feel more comfortable with broad presidential war making ability, in matters such as military commissions. In short, it is natural and logical that reduced presidential war *initiation* power implies broader presidential war *making* power — but that is a result that neither supporters nor opponents of presidential power would rush to acknowledge.

#### CONCLUSION

In modern conversations about constitutional war powers, at some point the objection is likely to arise: "But there has not been a declaration of war." If the topic is war *initiation* power, the objection is likely to come from advocates of presidential power, and the implication is that the President's power may be greater than supposed because Congress' textual power "to declare War" is not implicated. If the topic is war *making* power, the objection is likely to come from opponents of presidential power, and the implication is that the President's power may be less than supposed, because the President's power as Commander-in-Chief may be less extensive absent a formal declaration.

This Article argues that both sides are wrong, in the context of most modern U.S. conflicts, because there almost always is a declaration of war. Modern practice is that, immediately after the opening of a major conflict, the President will deliver a formal address, announcing to the nation and the world that the United States has begun a sustained military campaign against a foreign adversary, to achieve specified goals by force. Although these announcements do not use the phrase "declaration of war," this is what they are. Eighteenth century theory and practice confirm that at the time the Constitution was drafted, such a formal announcement would have been recognized as a declaration of war. Nothing in the modern development of language or of warfare

suggests that we should read the constitutional language differently today.

As a result, modern U.S. wars *are* declared — but they are declared by the President, not by Congress. This simplifies the modern war powers debate in four ways. First, concerns over the constitutional status of “undeclared” war are largely misplaced: wars are declared. Second, arguments that the President has a residual power to initiate armed conflict without a declaration of war are, at least as a practical matter, also largely misconceived: modern conflicts are declared by the President, and so the President must find constitutional authorization to make such declarations. Third, congressional authorizations of the use of force by the President can be given a constitutional explanation: they are delegations to the President of the congressional power to declare war. Fourth, whatever the scope of presidential war *making* powers may be, they should not be undermined by claims that modern wars are “undeclared.”

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