

THE CONSTITUTION'S FIRST DECLARED WAR: THE NORTHWESTERN CONFEDERACY WAR OF 1790–95

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What counts as the first presidential war—the practice of Presidents waging war without prior congressional sanction? In the wake of President Donald Trump’s attacks on Syria, the Office of Legal Counsel opined that unilateral presidential war-making dates back 230 years, to George Washington. The Office claimed that the first President waged war against Native American tribes in the Northwest Territory without first securing congressional authorization. If true, executive war-making has a pedigree as old as the Constitution itself. Grounded in a systematic review of congressional laws, executive correspondence, and rich context of the era, this Article evaluates the claim that our first President waged war in reliance upon his constitutional authority. In fact, there is little that supports the bold claim. Congress authorized war against Northwestern tribes raiding frontier settlements. In other words, Congress exercised its power to declare war and did, in fact, declare war, albeit without using that phrase. Moreover, Washington and his cabinet repeatedly disclaimed any constitutional power to wage war without congressional sanction, making it exceedingly unlikely that he waged war of his own accord or in sole reliance on his constitutional powers. Washington’s abjurations of power should make executive-branch lawyers blush, for the Commander in Chief and his celebrated advisors, including Alexander Hamilton, Thomas Jefferson, and Henry Knox, consistently observed that Presidents could not take the nation to war and, therefore, could not sanction offensive measures, including attacks. The Constitution’s First War was a congressional war through and through, just as the Constitution requires. It was not a presidential war and cannot be cited as a long-lost precedent for presidential wars in Korea, Libya, or Iran.

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INTRODUCTION

In January of 2020, the United States killed Qasem Soleimani.¹ Soleimani was Iran’s second-most powerful leader and responsible for

¹ Qasem Soleimani: US Kills Top Iranian General in Baghdad Air Strike, BBC (Jan. 3, 2020), <https://www.bbc.com/news/world-middle-east-50979463> [<https://perma.cc/3DMF-URN9>].

killing many American military personnel. The drone strike touched off praise and censure, including doubts about its constitutionality.² Could the President kill a foreign leader with no congressional authorization? Senator Rand Paul insisted that “[i]f we are to go to war [with] Iran the Constitution dictates that we declare war.”³ Senator James Risch disagreed, arguing that “the president . . . has [war] powers under Article 2 of the Constitution.”⁴ He further noted that “[t]his debate [over war powers] started under George Washington.”⁵

The audacious attack was hardly unprecedented. In 2018, the United States launched a missile strike against Syrian chemical weapons facilities.⁶ And the year before, the military attacked a Syrian air base with targeted airstrikes.⁷ Again, no federal law sanctioned any of these earlier strikes. Rather, President Donald J. Trump relied upon his constitutional powers.

In the wake of the 2018 Syrian strikes, the Department of Justice’s Office of Legal Counsel (“OLC”) opined that President Trump had constitutional authority to attack other nations.⁸ The OLC stressed that “[the President] as Commander in Chief, is authorized to

² Merrit Kennedy & Jackie Northam, Was It Legal for the U.S. To Kill a Top Iranian Military Leader?, NPR (Jan. 4, 2020), <https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader> [<https://perma.cc/K5E6-8BZE>]; Oona A. Hathaway, The Soleimani Strike Defied the U.S. Constitution, Atlantic (Jan. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417/> [<https://perma.cc/2268-2TQX>].

³ Rand Paul (@RandPaul), Twitter (Jan. 3, 2020, 9:02 AM), <https://twitter.com/RandPaul/status/1213098238573723649> [<https://perma.cc/8FXY-PK5P>].

⁴ Risch Says Soleimani Was ‘Ratcheting Up’ Attacks on the U.S., PBS NewsHour (Jan. 3, 2020), <https://www.pbs.org/newshour/show/risch-says-soleimani-was-ratcheting-up-attacks-on-the-u-s> [<https://perma.cc/XGD4-TDG3>] (statement of Sen. James Risch). Although the Senator also cited the War Powers Act, the Act conveys no authority to order attacks. *Id.*; War Powers Resolution of 1973, Pub. L. No. 93-148, § 2, 87 Stat. 555.

⁵ Paul Kane & Mike DeBonis, Trump’s Order To Strike Iranian Commander Sparks Fresh Debate in Congress over War Powers, Wash. Post (Jan. 3, 2020), https://www.washingtonpost.com/politics/trumps-order-to-strike-iranian-leader-sparks-fresh-debate-in-congress-over-war-powers/2020/01/03/c8921b82-2e47-11ea-9b60-817cc18cf173_story.html [<https://perma.cc/7FH7-TX54>].

⁶ April 2018 Airstrikes Against Syrian Chemical-Weapon Facilities, 42 Op. O.L.C. 1, 1 (May 31, 2018), https://www.justice.gov/sites/default/files/opinions/attachments/2018/05/31/2018-05-31-syrian-airstrikes_1.pdf [<https://perma.cc/8S83-CJZJ>].

⁷ Michael R. Gordon, Helene Cooper & Michael D. Shear, Dozens of U.S. Missiles Hit Air Base in Syria, N.Y. Times (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html> [<https://perma.cc/VUJ7-QTJ6>].

⁸ April 2018 Airstrikes Against Syrian Chemical-Weapon Facilities, *supra* note 6, at 1.

commit . . . hostilities, without prior congressional approval.”⁹ Although the OLC opinion briefly gestured towards constitutional provisions, it actually relied almost entirely on practice. The claim was that President Trump could order the strikes because his predecessors on “dozens of occasions over the course of 230 years” had done the same.¹⁰ In short, longstanding practices, not specific statutory authorization, set the metes and bounds of presidential war powers.¹¹

This confident claim, that Presidents have waged war on their own authority since the Constitution’s earliest days, rests on an unjustly obscure conflict: the Northwestern Confederacy War (or First War) conducted against several Native American¹² tribes north of the Ohio River.¹³ According to the OLC, “Presidents have exercised their authority to [wage war] without congressional authorization since the earliest days of the Republic.”¹⁴ Specifically, “President Washington [ordered] offensive operations against the Wabash Indians in 1790.”¹⁵ And because

⁹ *Id.* at 7 (quoting Presidential Authority To Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Op. O.L.C. Supp. 313, 331 (1970)).

¹⁰ *Id.* at 3.

¹¹ The administration provided a rather brief legal justification for the Soleimani strike, arguing that under Article II, Presidents could use force to, among other things, “protect important national interests.” White House, Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (2020), https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be02457-05722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf [https://perma.cc/7CA7-NKAQ]. In a call with reporters, National Security Advisor Robert O’Brien cited both the President’s constitutional authority and the 2002 Iraqi Authorization for Use of Military Force (“AUMF”). Maggie Haberman & Catie Edmondson, White House Notifies Congress of Suleimani Strike Under War Powers Act, N.Y. Times (Jan. 4, 2020), <https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html> [https://perma.cc/HK7E-9ELW].

¹² This Article uses the terms “Native American” and “Indian” interchangeably. This is to acknowledge and respect the preferences that different indigenous people have. See Samantha Vincenty, Should You Use Native American or American Indian? That Depends on Who You Ask, Oprah Mag. (Oct. 30, 2020), <https://www.oprahmag.com/life/a34485478/native-american-vs-american-indian-meaning/> [https://perma.cc/7GR4-4DXU]; Native Knowledge 360°: Frequently Asked Questions, Nat’l Museum of the Am. Indian, <https://american-indian.si.edu/nk360/faq/did-you-know#:~:text=In%20the%20United%20States%2C%20Native,preferred%20by%20many%20Native%20people> [https://perma.cc/AU2N-SKRJ] (last visited Feb. 10, 2021).

¹³ The war goes by many names, including the “Northwest Indian War,” the “Little Turtle War,” and “President Washington’s Indian War.” In this Article, we will use either “Northwestern Confederacy War” or “First War.” We delve more deeply into the events *infra* Part II.

¹⁴ April 2018 Airstrikes Against Syrian Chemical-Weapon Facilities, *supra* note 6, at 6.

¹⁵ *Id.*

Presidents since George Washington have authorized military attacks without legislative sanction, modern Presidents likewise enjoy the power to wage war without congressional approval.

If our first President waged war without congressional authorization, that fact undermines a common constitutional assertion—that Presidents cannot take the nation to war.¹⁶ Although many modern scholars and legislators insist that Presidents cannot wage war without congressional authorization, Washington apparently committed the very act that they regard as constitutionally verboten. Further, one might suppose that what was true for Washington must be no less true for Harry Truman, Barack Obama, and Donald Trump. Hence, as a matter of constitutional law, Presidents can wage war as they please against North Korea, Libya, Syria, or, for that matter, Canada.

The OLC's argument could be understood in two different ways. First, the OLC could be asserting that because Presidents have enjoyed the power to wage war from the Constitution's inception, this practice sheds light on the original meaning of "executive power," "Commander in Chief," and "declare war." Second, the OLC could be advancing a different claim, namely that despite the original meaning of these phrases, practice from the government's earliest days has layered a "gloss" on them,¹⁷ meaning that whatever the original scheme, Presidents today enjoy the power to wage war. We believe the 2018 OLC opinion makes the first sort of claim. After all, dutiful and upright Washington would never deliberately violate the Constitution. If he took the nation to war, it would seem that, notwithstanding Congress's power to declare war, the original Constitution truly sanctioned presidential wars. And it follows

¹⁶ A number of scholars have helped establish the dominant view that the original Constitution left the decision to go to war to Congress, to be exercised by bicameralism and presentment. Here is a partial list: Michael D. Ramsey, *The Constitution's Text in Foreign Affairs*, ch. 11 (2007); Louis Fisher, *Presidential War Power* 6–7 (2d ed. 2004); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 3–4 (1993); Michael J. Glennon, *Constitutional Diplomacy* 80–84 (1990); Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 17–18 (2d ed. 1989); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 *Cornell L. Rev.* 45, 48 (2007); William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 *Cornell L. Rev.* 695, 699 (1997); Raoul Berger, *War-Making by the President*, 121 *U. Pa. L. Rev.* 29, 36 (1972); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *Yale L.J.* 672, 679 (1972).

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

that the conventional view about war powers is misguided because Washington's war refutes it.

The OLC's recent invocation of the Northwestern Confederacy War is not exceptional. Other OLC opinions have cited the war, although none have given it the prominence and weight that the 2018 opinion does.¹⁸ These opinions relied upon the work of scholars, most notably Abraham Sofaer and John Yoo, who drew constitutional lessons from the war.¹⁹

Because the OLC has repeatedly cited the First War to justify the executive's unilateral use of military force abroad,²⁰ it is necessary to carefully assess it. There is a considerable risk that an incomplete or mistaken understanding of the war may become embedded in the historical narrative and mislead politicians and scholars. The First War may become the sturdy keystone for a view that Presidents can take the nation to war because that is what Washington supposedly did only a year after the Constitution's inception.

The OLC's opinions, and the underlying scholarship, while rigorous in many respects, rely on incomplete evidence and fail to properly situate the conflict in its historical context. The historical record demonstrates that Congress in fact authorized Washington to start the Northwestern Confederacy War and repeatedly approved the war's continuation. Far from inaugurating the practice of presidential wars, the First War marked the earliest exercise of Congress's power to "declare war."

Consequently, Washington laid no novel gloss on the "executive power" or the "Commander in Chief" Clauses. Claims to the contrary tether the first President to a flawed and anachronistic proposition he never once entertained—that Presidents enjoy constitutional authority to start wars. As we demonstrate, George Washington in fact publicly proclaimed exactly the opposite. He forcefully insisted that Commanders in Chief could not wage war unilaterally. He endorsed this principle categorically, applying it even in the wake of declarations of war issued by other nations. On this point, his cabinet fully agreed. The claim that

¹⁸ John C. Yoo & Robert J. Delahunty, *Authority for Use of Military Force To Combat Terrorist Activities Within the United States* 10 n.15 (Oct. 23, 2001), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011023.pdf> [<https://perma.cc/4QEN-AF-WP>]; *Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327, 333 (2000).

¹⁹ Abraham D. Sofaer, *The Power Over War*, 50 U. Miami L. Rev. 33, 38–41 (1995); John Yoo, *George Washington and the Executive Power*, 5 U. St. Thomas J.L. & Pub. Pol'y 1, 19–20 (2010).

²⁰ See Yoo & Delahunty, *supra* note 18, at 10 n.15; *Authorization for Continuing Hostilities in Kosovo*, *supra* note 18, at 333.

Presidents could lawfully take the nation to war was so outside the mainstream that neither Washington nor anyone else *voiced it*, even to reject it. At the time, no one read the Constitution as the executive branch (mis)reads it today. The debate we have today simply did not exist during the Washington administration because no one at the time claimed that the Constitution authorized Presidents to start wars.

Resting on the first in-depth evaluation of primary materials, this Article corrects the record and sheds new light on the original War Constitution. In our telling, America's First War teaches a number of vital lessons. First, Congress's power to declare war encompassed authority to sanction military expeditions, including the power to authorize offensive measures. Second, despite serving as Commander in Chief and enjoying the "executive power," the President clearly lacked such power. Third, Congress could exercise its authority to "declare war" without using the precise phrase or a formal declaration. Fourth, via its decisions over the army's size and the delegation of authority to summon state militias, Congress regulated the President's conduct of the First War.

The Northwestern Confederacy War witnessed a remarkable number of "firsts." The war marked the first exercise of Congress's power to declare war. As one critic said, it was "the war of the legislature."²¹ As another detractor put it, the new government found the Indians in the Northwest "in a state of disquietude" and "declare[d] war against them, as a display of power."²² The war also marked the first major interplay between the Commander in Chief and Congress, with the latter guiding the former and the former acting under the auspices of legislative decisions. The Commander in Chief was under the command of Congress.

Part I reviews existing treatments of the Northwestern Confederacy War and recounts the First War. Part II discusses the power to declare war and what the Founders said of that power prior to 1789. Part III recounts the statutes that Congress passed to authorize and support the First War. Part IV discusses what Washington and his cabinet said about presidential power to wage war without congressional authorization. Part V draws concluding lessons from America's first war.

²¹ Federal Legislature, *Phila. Gen. Advertiser*, Jan. 4, 1793, at 3 (comments of Rep. Wadsworth).

²² By Particular Desire, *Phila. Gen. Advertiser*, Jan. 7, 1792, at 2.

I. THE NORTHWESTERN CONFEDERACY WAR

Americans can be forgiven for overlooking the First War. America's first *formal* declaration of war came in 1812, in the Second War of Independence.²³ The War of 1812 saw the torching of the U.S. Capitol and the White House. History buffs likely have heard of the Quasi-War with France, waged in the twilight of the eighteenth century.²⁴ This was a limited naval war, where Congress never issued a formal declaration of war.²⁵ These two wars seem quite noteworthy and momentous.

In fact, the First War was far more consequential. It witnessed over a thousand American combat deaths.²⁶ Compare that with twenty-two during the Quasi-War²⁷ and the little over twenty-two hundred during the War of 1812.²⁸ Moreover, the nation suffered two severe defeats, including its worst trouncing, with a field army destroyed and its remnants scattered. Finally, the spoils of victory were far greater than the meager gains of the more well-known wars. Whereas the nation gained little to nothing from the latter wars, it acquired considerable land from the defeated tribes.²⁹

A. *Scholars Spar over the War*

While historians have paid some attention to the First War,³⁰ legal scholars, by and large, have not. With notable exceptions, the constitutional discussions are usually no more than a paragraph, sometimes no more than a sentence. These brief discussions have not led legal scholars to draw in their horns and render only modest conclusions. Rather, much has been made of the war, with the views falling across a broad spectrum: exclusive congressional power over war initiation, a limited presidential power to use the military to wage war without previous sanction, and, finally, a comprehensive executive power to take

²³ Prakash, *supra* note 16, at 96, 105.

²⁴ *Id.* at 101–03.

²⁵ *Id.* at 60.

²⁶ Micheal Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500–2000*, at 150 (2d ed. 2002).

²⁷ *Id.* at 151.

²⁸ Dep't of Veterans Affs., *America's Wars* (2019), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf [<https://perma.cc/KTA7-H4HL>].

²⁹ William Hogeland, *Autumn of the Black Snake: The Creation of the U.S. Army and the Invasion That Opened the West 361–73* (2017).

³⁰ See *id.*

the nation to war. Because the First War seems to support all stances, it suffers from a legal Rashomon effect, albeit without living witnesses.

One of us has written work at the pro-congressional-power end of the spectrum, asserting “that Congress had informally sanctioned [offensive] measures against the [Northwestern Confederacy].”³¹ This treatment was inadequate, doing little more than citing Professor Abraham Sofaer’s work (more on Sofaer below). Adam Mendel agrees that Congress authorized the war. But he claims that Congress did not exercise its power to declare war; instead it was the first authorization to use military force. In our view, Mendel is mistaken. When Congress authorizes force against sovereign nations (including Indian tribes), it has wielded its power to declare war.³²

At the other end of spectrum is Professor John Yoo. He asserts that the First War helps establish a unilateral executive power to make war. In his telling, Congress never “authorized offensive military operations; at most, it had allowed the President to call out the state militia to defend settlers from [American] Indian attacks.”³³ Hence it follows that Washington alone authorized those operations. Though Yoo is right to focus on Congress’s laws, he misreads them. As we shall reveal, although Congress never formally declared war, it authorized offensive measures.

Professors Michael Ramsey and Thomas Franck lie in the middle. Ramsey argues that Presidents have constitutional power to respond to attacks without the need for any legislative sanction. Because certain tribes had attacked the United States, Washington could wage war. To buttress his claim, Ramsey asserts that “Congress never directly authorized” Washington’s offensive measures.³⁴ He also claims that Washington did not seek “approval to act offensively” and Congress never “mention[ed] the Wabash or the Northwest; they empowered the President generally to call the militia to defend the frontier (without mentioning offensive measures or particular locations).”³⁵ In his separate article, Professor Franck argues that because the Constitution authorizes states to defend themselves from invasion without congressional

³¹ Prakash, *supra* note 16, at 98.

³² Adam Mendel, *The First AUMF: The Northwest Indian War, 1790–1795, and the War on Terror*, 18 U. Pa. J. Const. L. 1309, 1310 (2016).

³³ Yoo, *supra* note 19, at 22.

³⁴ Michael D. Ramsey, *The President’s Power To Respond To Attacks*, 93 Cornell L. Rev. 169, 180 (2007).

³⁵ *Id.*

authorization, “[the Framers] could not have intended to withhold [the same power] from the President as Commander in Chief.”³⁶ In support, he cites the First War.³⁷ But both of these claims rest on misapprehensions. Washington *did* seek authority to take the offensive against the tribes.³⁸ Moreover, Congress, in a series of measures, thoroughly (and repeatedly) authorized these offensive measures and the First War.

Professor Sofaer’s work is equivocal.³⁹ Writing in response to Professor John Hart Ely’s book, *War and Responsibility*, Sofaer sought to counter the argument that the “Constitution demands prior legislative approval for every use of force.”⁴⁰ He accepts that “[the Establishment Act of 1789], along with the requests and debates that accompanied it, and the appropriations that followed its adoption, made clear that Congress approved the military engagements Washington undertook against the Wabash.”⁴¹ Yet this statement is murky, at least on the question of whether Congress sanctioned the expeditions *before their commencement*. Moreover, Sofaer also argues that “Washington [took] risks without prior legislative authorization . . . [And] despite [the Establishment Act’s] defensive cast, Washington treated it as permitting offensive actions.”⁴² Whatever Sofaer’s precise position, we think his second point is mistaken. Congress sanctioned the expeditions from the outset and the Establishment Acts did not have a defensive cast; they authorized protection of the settlers. This was an expansive authorization of what federal forces might do. As was said repeatedly at the time, *protection* of settlers across a frontier might require *offensive measures*, expeditions onto Native soil.

The OLC opinions that cite the First War do not analyze the war as much as they seek to exploit its supposed lessons. A 2000 OLC opinion,

³⁶ Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 *Am. J. Int’l L.* 605, 608 (1977).

³⁷ *Id.* at 608 n.18.

³⁸ Letter from Arthur St. Clair to George Washington (Sept. 14, 1789), in 4 *The Papers of George Washington: Presidential Series* 38, 39 (Dorothy Twohig ed., 1993).

³⁹ We should say the same of David Currie’s masterpiece. See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 81–84 (1997) (reaching no firm conclusion about whether Congress conveyed authority to attack the Indians or whether the President relied upon his constitutional power as Commander in Chief).

⁴⁰ Sofaer, *supra* note 19, at 38.

⁴¹ *Id.* at 41.

⁴² *Id.* Sofaer’s seminal book is less equivocal. See Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 122–24 (1976).

authored by Randolph Moss, sought to justify continued operations in Kosovo. Moss asserted that because Congress had funded military operations in Kosovo, it had approved of their use under the War Powers Act.⁴³ Quoting Sofaer's paper, Moss drew a parallel with the First War: "[George Washington] used force against the Wabash Indians pursuant to a statute that provided forces This statute, along with the requests and debates that accompanied it, and the appropriations that followed its adoption, made clear that Congress approved the military engagements Washington undertook against the Wabash."⁴⁴ This treatment neglects a crucial distinction. In 1789, President Washington set in motion a war against the tribes *after* Congress had authorized it. The later appropriations furthered a *congressional* policy. Conversely, Bill Clinton started the U.S. involvement in the Kosovo war. That sequence has implications for whether the Kosovo War violated the Constitution and the War Powers Act.⁴⁵

A 2001 OLC opinion suffers from a similar flaw.⁴⁶ The authors, John Yoo and Robert J. Delahunty, articulate a view that aligns with Yoo's scholarly work. They assert, "the clauses of Article I . . . flow together with Article II's Commander in Chief and Executive Power Clauses to empower the President to use the armed forces to protect the nation . . . whether domestically or abroad."⁴⁷ Yoo and Delahunty observe that "Washington used force against the Wabash Indians pursuant to a statute that provided forces and authorized the call-up of militia to protect frontier inhabitants from hostile incursions."⁴⁸ Again, in our view, Washington acted in reliance on congressional authority. He did not invoke any constitutional powers.

Despite their many differences, these treatments demonstrate that the Northwestern Confederacy War matters. Misunderstood, the executive may cite the war to justify a constitutional power to violate the War

⁴³ Authorization for Continuing Hostilities in Kosovo, *supra* note 18, at 333.

⁴⁴ *Id.* at 333 (emphasis omitted) (quoting Sofaer, *supra* note 19, at 41).

⁴⁵ War Powers Resolution, 50 U.S.C. §§ 1541–48, declares that Presidents may introduce the armed forces of the United States into hostilities only pursuant to a declaration of war, congressional authorization, or an attack on U.S. soil or troops. See *id.* § 1541(c). In Kosovo, President Bill Clinton waged war in violation of this principle. Congress never approved of the bombing campaign prior to its commencement and the Serbians never attacked the United States. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 *Harv. L. Rev.* 2047, 2090 (2005).

⁴⁶ Yoo & Delahunty, *supra* note 18, at 1.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 10 n.15.

Powers Act, use military forces domestically, and start foreign wars without congressional approval. When properly understood, the First War will shed light on the original meaning of “declare War,” the “Commander in Chief,” and “executive Power.” Far from a matter of legal esoterica, the war goes to the heart of how our nation’s leaders may send citizens to war.

B. A Brief Account of the War

To glean constitutional lessons from the First War, we must engage with it, not only the events on the battlefield but also the correspondence and laws that encircle it.⁴⁹ Before turning to the war, we make three points. First, we write from the perspective of modern Americans. We fully recognize that every American defeat was the cause of celebration for the tribes, each of which likely supposed that it was defending its lawful and ancient rights. Second, some Americans sought to obliterate Native American towns, presumably because this would demoralize the warriors, destroy their supplies and thereby weaken their fighting capacity, and revenge atrocities. Our description of these acts and proposals should not be understood as endorsement of them. Lastly, we aim to be respectful, both to Native American warriors and federal officials. In our reading of primary materials, we were heartened to discover that many Americans struggled with the First War’s morality, with several condemning it as unjust. We salute this aspect of the era, for it reflects a welcome willingness to wrestle with war and also reveals a rich and enduring tradition of criticizing high officials on matters of principle.

1. Intermittent Warfare

One war begat another. American officials believed that by winning the Revolutionary War they had gained title to tribal lands along the Ohio River.⁵⁰ Native American tribes in the region, including the Iroquois,

⁴⁹ Our recounting relies largely upon several excellent books, including Colin G. Calloway, *The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation* 384–85 (2018); Hogeland, *supra* note 28, at 97; Wiley Sword, *President Washington’s Indian War: The Struggle for the Old Northwest, 1790–1795*, at xiii–xiv (1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802*, at 58 (1975); Walter H. Mohr, *Federal Indian Relations: 1774–1788*, at 127–28 (1933).

⁵⁰ Hogeland, *supra* note 29, at 98–99.

Ottawa, Chippewa, Huron, Potawatomie, Miami, and Delaware tribes, had fought alongside the British.⁵¹ With Great Britain defeated, American officials assumed that they also had conquered its Native American allies.

The tribes knew better.⁵² Not only did the Native Americans retain a robust war-making capacity, the British had informed them that the Americans would negotiate a separate peace.⁵³ Nonetheless, continental officials initially interacted with Native Americans on the assumption that the tribes owed significant concessions. In September of 1784, American commissioners met Native American representatives at Fort Stanwix, where the former proclaimed that the meeting would formalize *tribal surrender*.⁵⁴ The commissioners demanded that the tribes renounce their claims to lands and vacate settlements. Some Native Americans present signed the treaty.⁵⁵ Many others refused and were outraged by the gall.⁵⁶ The Americans persisted in their stance, concluding another treaty at Fort McIntosh in 1785,⁵⁷ and one at Fort Harmar in 1789.⁵⁸ The latter treaty ostensibly handed over much of the Ohio to the United States.⁵⁹ Tribal elders later denied that the native signatories were empowered to act on behalf of their tribes and hence denied the validity of these treaties.⁶⁰

These compacts had two baneful effects. First, they provided legal cover, however dubious, for westward expansion. To the Americans, the collection of treaties confirmed the end of the war with the Northwest tribes.⁶¹ This cleared the way for settlers. In 1785, Congress passed the Land Ordinance, creating a survey of the western lands that simplified land purchases.⁶² The 1787 Northwest Ordinance recognized existing settlements and encouraged more by establishing a territorial government.⁶³ Second, the participation of some tribes in the treaty

⁵¹ Id. at 81, 99; Mohr, *supra* note 49, at 87–95.

⁵² Hogeland, *supra* note 29, at 82.

⁵³ Id. at 81–82.

⁵⁴ Id. at 97–99; J. David Lehman, *The End of the Iroquois Mystique: The Oneida Land Cession Treaties of the 1780s*, 47 *Wm. & Mary Q.* 523, 523–24 (1990).

⁵⁵ Hogeland, *supra* note 29, at 99.

⁵⁶ See *id.* at 98–99.

⁵⁷ Treaty with the Wyandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, 7 Stat. 16.

⁵⁸ Treaty with the Wyandots, Delawares, Ottawas, Chippawas, Pottawatimies, and Sacs, Jan. 9, 1789, 7 Stat. 28.

⁵⁹ Hogeland, *supra* note 29, at 110–13.

⁶⁰ Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* 106 (2013).

⁶¹ Id. at 113.

⁶² See Mohr, *supra* note 49, at 104–05.

⁶³ See *id.* at 127–28.

process spawned divisions and galvanized armed resistance.⁶⁴ Leaders like Joseph Brant, Blue Jacket, and Little Turtle cited unfair terms to underscore the dangers of parleying. They favored unified military action.⁶⁵

Simultaneously, the end of the Revolutionary War freed up thousands of land-hungry Americans. Veterans utilizing their land bounties, and settlers purchasing tracts from governments desperate to pay down war debts, settled in large numbers.⁶⁶ These groups established sizable settlements, such as Marietta, and exacerbated tensions with tribes that refused to abandon their homes.⁶⁷ Unsurprisingly, this influx—coming on the heels of an uncertain peace—sparked conflict.⁶⁸ A 1786 letter from settlers petitioning for assistance is illustrative:

Danger and Distruction stears [stares] Every [A]merican [here] in the face, And Every Night we Look for a General attack on our small Garrison. . . . [A] party of men was at work at their Corn, and was attacked by a party of Indians, they wounded two men, one of which they scalped and shot in several places⁶⁹

Reprisals were no less severe. That same year, Kentuckian Benjamin Logan led a large force into the Ohio, destroying Shawnee towns and killing men, women, and children.⁷⁰ Settlers and Native Americans quickly descended into a cycle of raids and retaliation, culminating in a full-scale war.⁷¹

Congress's decision to shrink the Continental Army arguably made matters worse. As the conflict with Britain wound down in late 1782, some in Congress argued that the army should be dissolved to save money, restore authority to the states, and prevent the evils of a standing

⁶⁴ Hogeland, *supra* note 29, at 112–13.

⁶⁵ *Id.*

⁶⁶ Timothy J. Shannon, *The Ohio Company and the Meaning of Opportunity in the American West, 1786–1795*, 64 *New Eng. Q.* 393, 394–401 (1991).

⁶⁷ *Id.* at 407.

⁶⁸ William H. Bergmann, *A “Commercial View of This Unfortunate War”: Economic Roots of an American National State in the Ohio Valley, 1775–1795*, 6 *Early Am. Stud.* 137, 146 (2008).

⁶⁹ Leonard C. Helderman, *Danger on Wabash: Vincennes Letters of 1786*, 34 *Ind. Mag. Hist.*, Dec. 1938, at 455, 460.

⁷⁰ Hogeland, *supra* note 29, at 82–83; 1 Logan Esarey, *A History of Indiana: From Its Exploration to 1922*, at 107 (1922).

⁷¹ Hogeland, *supra* note 29, at 82–84.

army.⁷² In April of 1783, George Washington and the Secretary of War began to furlough soldiers until Congress passed a formal resolution in October 1783, mostly disbanding the force.⁷³

In 1784, Congress chose to retain a seven-hundred-man regiment.⁷⁴ This was a temporary expedient, because the recruits only had a twelve-month service obligation.⁷⁵ The regiment, under the command of General Josiah Harmar, demonstrated what Congress might have done had it retained more soldiers. Rather than acting as solely a tool of expansion, the soldiers removed American squatters from Native lands and facilitated communications with tribes.⁷⁶ Yet because it was a tiny force, the regiment could not rein in all settler excesses or wholly deter Native American raids.⁷⁷

Such incursions on American settlements proved troublesome. The Continental Congress twice authorized officials to request the aid of state militias in offensive operations.⁷⁸ A 1787 resolve authorized the commanding officer of the army to request “operations as [he] may judge necessary for the protection of the frontiers,” including “making such expeditions against the [Native Americans] in case they continue hostile as Congress shall [direct].”⁷⁹ A 1788 resolve requested that the state executives furnish militia to the Governor to conduct “such operations as the gov[ernor] . . . may judge necessary for the protection of the [frontier] inhabitants.”⁸⁰ The troops could be used to defend the frontiers and conduct “expeditions” if the tribes should “continue hostile.”⁸¹ No major expeditions took place under either resolve.⁸²

⁷² Kohn, *supra* note 49, at 56–62.

⁷³ Robert K. Wright Jr., *The Continental Army 179–80* (1983).

⁷⁴ 27 *Journals of the Continental Congress 1774–1789*, at 538, 538–40 (June 3, 1784) (Gaillard Hunt ed., 1928) [hereinafter *Journals of the Continental Congress*].

⁷⁵ *Id.* at 538–39.

⁷⁶ See Alan S. Brown, *The Role of the Army in Western Settlement: Josiah Harmar's Command, 1785–1790*, 93 *Pa. Mag. Hist. & Biography* 161, 166–68 (1969). This is not to say the troops were friendly towards the Indians. *Id.* at 165 (“The soldiers were not particularly impressed with the tribesmen. Ebenezer Denny, who became Harmar’s adjutant and firm friend, found them an ‘ugly set of devils.’”).

⁷⁷ *Id.* at 173.

⁷⁸ 33 *Journals of the Continental Congress*, *supra* note 74, at 385, 386–87 (July 21, 1787) (Roscoe Hill ed., 1936); 34 *id.* at 410, 412–13 (Aug. 12, 1788) (Roscoe Hill ed., 1937).

⁷⁹ 33 *Journals of the Continental Congress*, *supra* note 74, at 386 (July 21, 1787) (Roscoe Hill ed., 1936).

⁸⁰ 34 *id.* at 412 (Aug. 12, 1788) (Roscoe Hill ed., 1937).

⁸¹ *Id.*

⁸² See Brown, *supra* note 76, at 174 (stating that a nominal peace was maintained until 1790).

By 1789, the situation along the Northwest frontier gave lie to any sense that the United States was at peace.⁸³ The ongoing violence led angry settlers to demand that their new government act decisively against the Native Americans.⁸⁴ Complicating matters further, the nation was transitioning to a new Constitution. As discussed below and in Part III, these developments would yield the nation's first war under the Constitution and a rich record of how the nation's statesmen understood the War Constitution.

2. Reestablishing the Army To Protect the Frontiers: A Wave of Expeditions

In April of 1789, the United States inaugurated the presidency of George Washington. In the ensuing months, Congress created the executive's substrata. One task consisted of reestablishing the military. Although the Continental Congress had provided for an army, one that remained in the field, the legal authority for it had expired. Similarly, the frontier resolutions that Congress had passed in 1787 and 1788 lacked continuing legal force.⁸⁵ Although the Supremacy Clause grandfathered treaties, it did not grant legal status to any of the old Congress's ordinances or resolves.⁸⁶ As a result, the territorial Governor could not carry out an expedition. In a legal sense, he had no army or militiamen. In fact, he was no longer the Governor. He was but a common citizen.

Arthur St. Clair, whom Washington reappointed in September of 1789 to continue serving as Governor for the Northwest Territory,⁸⁷ played a significant role in the transition. That month, St. Clair asked Washington to request that Congress reinstate authority to mobilize state militias for use in offensive operations.⁸⁸ Washington agreed, forwarding the letter to Congress in mid-September.⁸⁹ The legislators concurred in Washington's assessment. Congress authorized a small army to last until the end of its

⁸³ *Id.* at 173–74.

⁸⁴ Helderman, *supra* note 69, at 456–57; Kohn, *supra* note 49, at 96.

⁸⁵ 33 *Journals of the Continental Congress*, *supra* note 74, at 386–87 (July 21, 1787) (Roscoe Hill ed., 1936); 34 *id.* at 412–13 (Aug. 12, 1788) (Roscoe Hill ed., 1937).

⁸⁶ U.S. Const. art. VI, § 2 (providing that while “all Treaties made, or which shall be made” shall be “supreme Law,” only “Laws of the United States which shall be made in Pursuance” of the Constitution enjoy that status).

⁸⁷ Brown, *supra* note 76, at 173–74.

⁸⁸ Letter from Arthur St. Clair to George Washington, *supra* note 38, at 39.

⁸⁹ Letter from George Washington to the U.S. Senate & House of Representatives (Sept. 16, 1789), *in* 4 *The Papers of George Washington*, *supra* note 38, at 49.

next session and granted power to call up state militias for the protection of the frontier inhabitants.⁹⁰ Shortly thereafter, Washington penned a letter to St. Clair:

I would have it observed forcibly that a War with the Wabash Indians ought to be avoided by all means But if after manifesting clearly to the [I]ndians the dispositions of the general government for the preservation of peace . . . they should continue their incursions, the United States will be constrain'd to punish them with severity.⁹¹

In another portion, Washington ordered that

The said militia [are] to act in conjunction with the federal troops in such operations, offensive or defensive, as you and the Commanding officer of the troops conjointly shall judge necessary for the public service, and the protection of the inhabitants and the posts.⁹²

The President wanted peace but was willing to wage war if the tribes proved intransigent. He delegated his authority from Congress to St. Clair and General Harmar (the “Commanding officer”) to engage in offensive operations likely because he did not want delays to plague decision making.⁹³ His authority revived, St. Clair traveled to the frontier to gather information.⁹⁴

St. Clair spent months in talks as reports of Indian attacks mounted.⁹⁵ On May 1, he asserted, “the United States must prepare effectually to chastise [the tribes], and the consequence of not doing it may, very probably, be the defection of those who are now at peace with the entire loss of the affections of the people of the frontiers.”⁹⁶ In other words, absent an expedition, hitherto peaceful tribes might join in hostilities and settlers might seek protection via other means, perhaps from foreign powers.

⁹⁰ Act of Sept. 29, 1789, ch. 25, §§ 1, 5, 6, 1 Stat. 95, 95–96.

⁹¹ Letter from George Washington to Arthur St. Clair (Oct. 6, 1789), *in* 4 *The Papers of George Washington*, *supra* note 38, at 140, 141.

⁹² *Id.*

⁹³ See Michael S. Warner, *General Josiah Harmar's Campaign Reconsidered: How the Americans Lost the Battle of Kekionga*, 83 *Ind. Mag. Hist.*, Mar. 1987, at 43, 45.

⁹⁴ Letter from Brigadier-General Harmar to Major-General Knox (Jan. 14, 1790), *in* 2 *The St. Clair Papers: The Life and Public Services of Arthur St. Clair* 129, 129 (William Henry Smith ed., Cincinnati, Robert Clark & Co. 1882); Letter from Governor St. Clair to the Secretary of War (May 1, 1790), *in* 2 *The St. Clair Papers*, *supra*, at 136, 137.

⁹⁵ Letter from Governor St. Clair to the Secretary of War, *supra* note 94, at 136–37.

⁹⁶ *Id.* at 136.

The Secretary of War, Henry Knox, agreed. In a May 1790 report, Knox wrote: “The result of this whole information shows the inefficacy of defensive operations against the banditti Shawanese and Cherokees, and some of the Wabash Indians.”⁹⁷ Knox counseled that the President should authorize an “expedition” to “strike a terror in the minds of the Indians hostilely disposed.”⁹⁸

Washington concurred. In June of 1790, Knox sent a letter to St. Clair, informing him that the President again authorized an expedition if St. Clair and Harmar thought it prudent.⁹⁹ In so doing, Washington was relying upon a new, 1790 Establishment Act. Congress had replaced its initial army establishment with a new, more detailed law that provided for more regular army troops and granted the same power to summon the militias to protect the frontiers.¹⁰⁰

St. Clair wasted no time. On July 15, 1790, he requested state militias pursuant to this authority. Because “there is no prospect of peace with the said Indians at present,” Harmar and St. Clair had generated “a plan of offensive operations.”¹⁰¹ State militias mobilized to Fort Washington (modern day Cincinnati), where they joined federal troops.¹⁰² Expecting trained men, Harmar beheld raw and ill-equipped settlers.¹⁰³ In late September, Harmar set aside his concerns and set out to attack Indian towns on the Maumee River, near what is now Fort Wayne, Indiana.¹⁰⁴

For months, the campaign’s progress was unknown.¹⁰⁵ Washington, cognizant of his duty to provide information regarding the state of the union, notified Congress on December 8, 1790, that he had taken military action pursuant to the power it had granted him:

[I]t became necessary to put in force the Act which empowers the President to call out the Militia for the protection of the frontiers. And

⁹⁷ Summary Statement of the Situation of the Frontiers by the Secretary of War (May 27, 1790), *in* 2 *The St. Clair Papers*, *supra* note 94, at 146, 146.

⁹⁸ *Id.* at 147.

⁹⁹ Letter from General Knox to Governor St. Clair (June 7, 1790), *in* 2 *The St. Clair Papers*, *supra* note 94, at 147, 147–48.

¹⁰⁰ Act of Apr. 30, 1790, ch. 10, §§ 1, 14, 16, 1 Stat. 119, 119, 121.

¹⁰¹ Circular Letter from Governor St. Clair to the County Lieutenants (July 15, 1790), *in* 1 *American State Papers: Indian Affairs* 94, 95 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).

¹⁰² Warner, *supra* note 93, at 45.

¹⁰³ *Id.* at 45–47.

¹⁰⁴ *Id.*

¹⁰⁵ Letter from George Washington to Henry Knox (Nov. 2, 1790), *in* 6 *The Papers of George Washington: Presidential Series* 615, 615 (Mark A. Mastromarino et al. eds., 1996).

I have accordingly authori[z]ed an Expedition in which the regular troops in that quarter are combined with such draughts of Militia as were deemed sufficient. The event of the measure is yet unknown to me.¹⁰⁶

Little did Washington know that, a month earlier, the tribes had trounced Harmar.

3. Harmar's Disaster and Congress Continues the Campaign

The expedition initially proceeded as planned. After destroying Native American settlements on the Maumee, Harmar sought a decisive battle.¹⁰⁷ On October 21, a scout reported that over a hundred Native Americans had reoccupied a settlement, Kekionga, that the army had previously looted and burned.¹⁰⁸ But the Americans bungled the attack on the settlement.¹⁰⁹ The shattered American army beat a humiliating retreat to Fort Washington.¹¹⁰ The Indians had inflicted over two hundred casualties.¹¹¹

Although a significant portion of the American force remained intact, the retreat left the impression of a disaster.¹¹² Washington reported some news to Congress on December 14, 1790.¹¹³ Among high executive officials, a consensus emerged. First, the Americans faced a much larger, more organized force than expected.¹¹⁴ Second, a bigger expedition was essential.¹¹⁵

Early in January 1791, Washington directed Knox to prepare a report justifying the initial campaign and laying out the case for a larger

¹⁰⁶ George Washington, Address to the United States Senate and House of Representatives (Dec. 8, 1790), in 7 *The Papers of George Washington: Presidential Series* 45, 47 (Jack D. Warren, Jr. et al. eds., 1998).

¹⁰⁷ Warner, *supra* note 93, at 47.

¹⁰⁸ *Id.* at 48.

¹⁰⁹ *Id.* at 49–54.

¹¹⁰ *Id.* at 55.

¹¹¹ Calloway, *supra* note 49, at 384. American casualties numbered 183 killed, 31 wounded. Brown, *supra* note 76, at 176.

¹¹² Letter from Henry Knox to Josiah Harmar (Jan. 31, 1791), in 21 *The Documentary History of the First Federal Congress 1789–1791*, at 626, 626 (Charlene Bangs Bickford et al. eds., 2017).

¹¹³ Letter from George Washington to the U.S. Senate & House of Representatives (Dec. 14, 1790), in 7 *The Papers of George Washington*, *supra* note 106, at 77.

¹¹⁴ Kohn, *supra* note 49, at 107–08.

¹¹⁵ See *id.* at 108–09.

expedition.¹¹⁶ The report, sent to Congress, concerned the number of men needed to successfully “carry[] the war into the enemy’s country” and thereby “prevent in a great degree their invading the frontiers.”¹¹⁷ Washington also sent along a letter describing attacks on settlements.¹¹⁸

Congress took up the matter behind closed doors. One Senator wrote that “[w]hat [C]ongress will do is yet doubtful; any further measures of a hostile nature will be agreed to with reluctance, if at all.”¹¹⁹ In contrast, a Rhode Island newspaper predicted on February 10, 1791:

That Congress have taken up the Subject of the late Depredation in the Western Territory—and will immediately provide a sufficient Force to protect the Settlers, and give the hostile Invaders different Ideas of the Power of the United States, from those they have entertained since Gen. [Josiah] Harmer’s [sic] Expedition.¹²⁰

On March 3, 1791, Congress met the executive’s request, establishing an additional regiment of infantry (over nine hundred soldiers).¹²¹

After Washington appointed Governor St. Clair to command the expanded expeditionary force,¹²² the President found himself in the same position as in 1790: in the dark. He appeared before Congress, adopting a cautious note: “Offensive operations have therefore been directed; to be conducted, however, as consistently as possible with the dictates of humanity. Some of these have been crowned with full success, and others are yet depending.”¹²³

¹¹⁶ *Id.* at 109; Report from Henry Knox (Jan. 15, 1791), *in* 1 *American State Papers: Indian Affairs*, *supra* note 101, at 112, 112–13.

¹¹⁷ Letter from Henry Knox to George Washington (Feb. 22, 1791), *in* 7 *The Papers of George Washington*, *supra* note 106, at 402, 406; see also Report from Henry Knox, *supra* note 116, at 112–13.

¹¹⁸ Kohn, *supra* note 49, at 110.

¹¹⁹ Letter from Paine Wingate to Governor Josiah Bartlett (Jan. 26, 1791), *in* 21 *The Documentary History of the First Federal Congress*, *supra* note 112, at 548, 548.

¹²⁰ *U.S. Chronicle*, Feb. 10, 1791, *reprinted in* 21 *The Documentary History of the First Federal Congress*, *supra* note 112, at 748, 748 (alteration in original).

¹²¹ Act of Mar. 3, 1791, ch. 28, 1 Stat. 222.

¹²² Calloway, *supra* note 49, at 386.

¹²³ George Washington, Address to the United States Senate and House of Representatives (Oct. 25, 1791), *in* 9 *The Papers of George Washington: Presidential Series* 110, 111 (Mark A. Mastromarino et al. eds., 2000).

4. *Disaster and Disquiet*

Difficulties plagued the second expedition. Discipline broke down, making a gallows necessary.¹²⁴ The terms of militiamen started to end just as the army belatedly marched into hostile territory.¹²⁵ By November, the army was running out of food and confronted severe weather. Men deserted in droves.¹²⁶ Faced with a complete collapse, St. Clair sent a detachment to capture deserters.¹²⁷ This decision proved disastrous. In their pursuit, the disciplinary force marched beyond the point where they could rejoin the main body to respond to an attack.¹²⁸

In that moment of weakness, a large group of tribesmen attacked the main force.¹²⁹ On November 4, 1791, a group of Native Americans opened fire on a contingent of militia.¹³⁰ The fleeing troops ran through the Americans' hastily organized lines, preventing the latter from engaging the tribesmen. Encircling the camp, the Native Americans pressed their advantage, eventually triggering a retreat. The beleaguered and harried American force limped twenty-nine miles to the safety of a fort.¹³¹

Of the roughly fourteen hundred Americans, barely four hundred escaped unscathed. Over six hundred perished, including thirty-five officers.¹³² Only twenty or thirty Native Americans perished.¹³³ To this day, the battle stands as one of the American military's greatest defeats.¹³⁴

Indignation and anger convulsed the country, sparking fierce debate in Congress and newspapers.¹³⁵ Knox prepared another report explaining

¹²⁴ Kohn, *supra* note 49, at 115.

¹²⁵ *Id.*

¹²⁶ William Patrick Walsh, *The Defeat of Major General Arthur St. Clair, November 4, 1791: A Study of the Nation's Response, 1791–1793*, at 31 (1977) (unpublished Ph.D. dissertation, Loyola University of Chicago) (on file with eCommons at Loyola University of Chicago), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=2772&context=luc_diss [<https://perma.cc/4RF5-8GEX>].

¹²⁷ *Id.* at 31–32.

¹²⁸ *Id.* at 32.

¹²⁹ *Id.*

¹³⁰ *Id.* at 33.

¹³¹ *Id.* at 34.

¹³² *Id.* at 35.

¹³³ Calloway, *supra* note 49, at 392; see also Wilber Edel, *Kekionga! The Worst Defeat in the History of the U.S. Army* 89 (1997).

¹³⁴ Walsh, *supra* note 126, at 35; Edel, *supra* note 133, at xii.

¹³⁵ Walsh, *supra* note 126, at 39–40.

why further expeditions were necessary.¹³⁶ Washington forwarded it to Congress in January of 1792.¹³⁷ Knox requested that Congress again expand the size of the army. A bill reflecting that proposal appeared in Congress shortly thereafter.¹³⁸

As judged by the debates in the House, the bill faced heavy opposition. Much of the exchanges focused on whether to continue the war. One Representative noted, “[w]e are preparing to squander away money by millions; and no one, except those who are in the secrets of the Cabinet, knows for what reason the war has been thus carried on for three years.”¹³⁹ But the war had its defenders. Said another Representative: “If the present war be not in every respect justifiable, then there never was, nor ever will be, a just war. It was . . . carried on . . . to defend our fellow-citizens”¹⁴⁰

Several weeks of legislative debate led to another Act increasing the army’s size. In early March, Congress passed “An Act for making further and more effectual Provision for the Protection of the Frontiers of the United States,” which added three regiments and authorized the President to call into service any amount of cavalry to assist in protection of the frontier.¹⁴¹ In May of 1792, Congress set new duties on spirits to raise the funds necessary to support this massive new force.¹⁴²

To lead the army, Washington appointed “Mad” Anthony Wayne, a former Revolutionary War officer.¹⁴³ Wayne arrived at Pittsburgh in the summer of 1792 with instructions to begin training and organizing the new “American Legion.” Wayne focused his efforts on the army’s readiness and awaited the outcome of the multiple peace missions.¹⁴⁴

The last chance for peace came in 1793. Red Jacket, a leader of a neutral tribe,¹⁴⁵ informed that the warring tribes wished to discuss terms.¹⁴⁶ Washington ordered peace commissioners to negotiate until

¹³⁶ Letter from Henry Knox to George Washington (Dec. 26, 1791), *in* 9 *The Papers of George Washington*, *supra* note 123, at 313, 314 & n.1.

¹³⁷ Letter from George Washington to the U.S. Senate & House of Representatives (Jan. 11, 1792), *in* 9 *The Papers of George Washington*, *supra* note 123, at 425.

¹³⁸ 3 *Annals of Cong.* 337 (1849).

¹³⁹ *Id.* at 342.

¹⁴⁰ *Id.* at 343.

¹⁴¹ Act of Mar. 5, 1792, ch. 9, 1 Stat. 241.

¹⁴² Act of May 2, 1792, ch. 27, 1 Stat. 259.

¹⁴³ Calloway, *supra* note 49, at 434–35.

¹⁴⁴ *Id.* at 435–36.

¹⁴⁵ Hogeland, *supra* note 29, at 268–70, 273.

¹⁴⁶ See *id.* at 273.

August 1st. If they were unsuccessful, they were to write Wayne and state that “[w]e did not effect a peace.”¹⁴⁷ This phrase would constitute the signal to launch a third expedition.¹⁴⁸

5. A Belated Victory

Wayne received the signal from the commissioners in September of 1793.¹⁴⁹ Though the force marched off, inclement weather forced the troops to camp through winter.¹⁵⁰ In May of 1794, the Army learned that an enormous Native American force—nearly 1,200 men—gathered at the Glaize, a community on the Maumee River.¹⁵¹ In July, Wayne’s main body set off to destroy the Glaize.¹⁵² The Native American forces retreated. A long pursuit culminated in a short battle amongst fallen trees in August. The Native Americans suffered casualties and retreated for the safety of Fort Miamis, a British-held fort. Expecting sanctuary and military assistance, the Native Americans received a cold welcome. The British kept the fort shut, triggering a keen sense of betrayal.¹⁵³ Though the Native Americans had suffered only a few casualties, the British rebuff and the Americans’ destruction of vast cornfields sapped their will and led to the scattering of their forces.¹⁵⁴

This “Battle of Fallen Timbers” was a turning point. The Americans continued to pursue the tribes, destroying settlements throughout the Ohio. Wayne reached the site of Harmar’s destruction—Kekionga—and met no resistance.¹⁵⁵ He constructed Fort Wayne and remained there as he and Native leaders negotiated.¹⁵⁶ The Treaty of Greenville, ratified in 1795, formally ceded land that America had coveted since the 1780s.¹⁵⁷ An uneasy peace would exist in the region until 1809, when Governor William Henry Harrison sought still more Native American lands.

¹⁴⁷ Id. at 278.

¹⁴⁸ Id.

¹⁴⁹ Id. at 293.

¹⁵⁰ Id. at 313–14.

¹⁵¹ Id. at 318.

¹⁵² Id.; Calloway, *supra* note 49, at 438.

¹⁵³ Calloway, *supra* note 49, at 438.

¹⁵⁴ Id. at 438–39.

¹⁵⁵ Hogeland, *supra* note 29, at 354–55.

¹⁵⁶ Id. at 355–56.

¹⁵⁷ Id. at 362–73.

II. CONTEXTUALIZING THE FIRST WAR: WHAT IT MEANT TO DECLARE WAR

One cannot fully understand the constitutional significance of these events, including congressional and executive responses, unless one bears in mind the rich context that enveloped them. To their credit, textualists have long accepted what intentionalists have long insisted upon: text must be understood in context.¹⁵⁸ As we consider what Congress enacted and as we evaluate Washington's actions, we must bear in mind what it meant to declare war, what authority Congress enjoyed under its constitutional power over war, and what the first President took to be the limits of his constitutional authority over the military.

This Part considers what it meant to declare war and what, prior to ratification, the Founders said about Congress's power to declare war. The next Part does a deep dive into the statutes passed by Congress as they relate to the Northwestern Confederacy War and demonstrates that these statutes, none of which formally "declared war," were nonetheless exercises of the power to declare war. Finally, Part IV brings to the fore the many statements made after the Constitution's ratification about the power to declare war, including comments by George Washington and others.

A. The Power To Declare War in the Eighteenth Century

At the Founding, the power to declare war principally encompassed the power to decide whether a nation would wage war.¹⁵⁹ An entity—a monarch or legislature—that had authority to declare war could choose to wage it. Relatedly, a declaration of war was *any* act or document evincing a decision to wage war. When a sovereign's hostile action, or that of its agent, revealed a choice to go to war, that act was an exercise of the declare-war power and a declaration of war.¹⁶⁰

Formal declarations of war—documents that expressly use the phrase "declare war"—are the most well-known means by which nations signal their decision to wage war. Today, when a formal denunciation does not

¹⁵⁸ For a discussion of the importance of context to textualism, see John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum. L. Rev.* 70 (2006).

¹⁵⁹ Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 *Geo. Wash. L. Rev.* 89, 107–20 (2008).

¹⁶⁰ Stephen C. Neff, *War and the Law of Nations* 108–09 (2005); Prakash, *supra* note 16, at 48.

mark the commencement of hostilities, many complain that it is an “undeclared war.” The complaint suggests something is amiss. People in the eighteenth century had a more pragmatic perspective. While formal declarations certainly could be vehicles for exercising the declare-war power in the eighteenth century, they were hardly the principal means, much less the only means, of declaring war. In fact, warring nations often did not issue formal declarations at all.¹⁶¹ Yet the absence of formal declarations from many eighteenth-century wars did not mean that people of the era regarded such conflicts as “undeclared wars.”

To the contrary, eighteenth-century nations adopted a functional approach. Specifically, informal words and actions could constitute declarations of war. What mattered was whether the words or actions reflected a decision to wage war. If they did, those words or actions were a declaration of war, one no less expressive than a formal declaration.¹⁶² Sometimes a verbal or written statement dripping with enmity signified a choice to wage war. That is why the Declaration of Independence’s full-throated condemnation of the Crown was a declaration of war.¹⁶³ Likewise, France’s treaty of alliance with the United States was seen as an informal war declaration against Great Britain.¹⁶⁴ Disrespectful dismissals of emissaries also were regarded as declarations because such treatment generally presaged conflicts.¹⁶⁵ Similarly, cutting down a flag, throwing down a gauntlet, and hurling a spear were each war declarations because each signaled a recourse to war.¹⁶⁶ The French Minister of Foreign Affairs noted that it was “the common law of Europe” that when nations massed troops along a border, they had declared war, because it was evident that they had resolved to wage it.¹⁶⁷ He meant that just as a formal declaration signaled a choice to wage war, so too did a massive army primed to invade.

¹⁶¹ See *The Federalist* No. 25, at 117 (Alexander Hamilton) (Terence Ball ed., 2003) (“[T]he ceremony of a formal denunciation of war has of late fallen into disuse.”).

¹⁶² Prakash, *supra* note 16, at 67.

¹⁶³ See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Calif. L. Rev.* 167, 246–47 (1996).

¹⁶⁴ 3 John Andrews, *History of the War with America, France, Spain, and Holland* 212 (1786); *The Annual Register, or a View of the History, Politics, and Literature, for the Year 1779*, at 411 (London, J. Dodsley 1780).

¹⁶⁵ Prakash, *supra* note 16, at 73.

¹⁶⁶ *Id.* at 68.

¹⁶⁷ Note of C.M. Talleyrand (Aug. 16, 1805), in 6 *The Parliamentary Debates from the Year 1803 to the Present Time*, at lxxii–lxxiii (T.C. Hansard ed., London, Longman et al. 1812).

As hinted at above, the commencement of warfare was the “strongest declaration of war” because in fighting a war, a nation had indisputably chosen to wage it.¹⁶⁸ Monarchs, legislators, and diplomats routinely described the commencement of hostilities as a declaration of war.¹⁶⁹ English Prime Minister Robert Walpole noted that “of late most wars have been declared from the mouths of cannons, before any formal declaration.”¹⁷⁰ In other words, *most* wars were declared with hostilities rather than by a wordy formal declaration.

The declare-war power not only encompassed authority to decide to start a war but also included the power to decide whether to wage war in response to another nation’s declaration. We know this as a matter of logic and practice. After one nation declared war, the victim faced a choice: wage war or sue for peace.¹⁷¹ Because nations had a choice, the decision to wage war (or not) in response to a declaration was consequential, even momentous. As a matter of practice, the victim might declare war in one of two ways. Some nations responded to declarations of war by issuing formal declarations.¹⁷² More often, however, nations waged war in response, leading observers to note that the victim also had declared war.¹⁷³ For instance, as discussed more fully later, John Adams described France *and* England as declaring war against each other via hostilities.¹⁷⁴ He did not say that while France had declared war, England had not.¹⁷⁵

¹⁶⁸ 1 Jacques M. Necker, *An Essay on the True Principles of the Executive Power in Great States* 273 (1792).

¹⁶⁹ See, e.g., Letter from King George III to Lord North (July 18, 1778), *in* 2 *The Correspondence of King George the Third with Lord North from 1768 to 1783*, at 205 (W. Bodham Donne ed., London, John Murray 1867) (claiming that, by attacking the British Navy, France had “cast off the mask and declared war”); see also J.F. Maurice, *Hostilities Without Declaration of War* 44 (London, W. Clowes & Sons Ltd. et al. 1883) (quoting Czar Alexander’s claim that “Napoleon, by a sudden attack on our troops at Kowno, has declared war”).

¹⁷⁰ Debate in the Commons for Securing the Trade to America (May 5, 1738), *in* 10 *Cobbett’s Parliamentary History of England* 812, 831 (London, T.C. Hansard 1812) (comments of Sir Robert Walpole).

¹⁷¹ Prakash, *supra* note 16, at 66.

¹⁷² Saikrishna Prakash, *A Two-Front War*, 93 *Cornell L. Rev.* 197, 208–10 (2007).

¹⁷³ Prakash, *supra* note 16, at 94–96.

¹⁷⁴ Letter from John Adams to Samuel Adams (Feb. 14, 1779), *in* 3 *The Revolutionary Diplomatic Correspondence of the United States* 47, 48 (Francis Wharton ed., Washington, Gov’t Printing Off. 1889).

¹⁷⁵ See *id.*

B. America, Declaring War, and Congress

Well before the Constitution was even a flickering possibility, Americans understood that to commence war was to declare it. In 1756, the British dispatched an immature colonial to attack the French.¹⁷⁶ King George II already had formally declared war.¹⁷⁷ Nonetheless, the Virginia Governor told a youthful, impatient George Washington, “[t]he Method You are to declare War, is at the head of Your Companies with three Vollies of Small Arms for his Majesty’s Health & a successful War.”¹⁷⁸ In this way, Washington declared war—commenced warfare—in a particular theater on behalf of the British Crown. In mid-1775, an American claimed that by attempting to destroy some colonial munitions, British General Thomas Gage had declared war against the United States: “The invasion of property, among all Nations, is justly deemed a declaration of war.”¹⁷⁹ In 1784, General Peter Muhlenberg wrote that “cutting off the head of [a man] is looked upon by those who are best acquainted with the customs of the Indians as a declaration of war.”¹⁸⁰

Perhaps the best American discussion of how nations declared war comes from John Adams. Writing to Samuel Adams in 1779, John Adams expressed surprise at his cousin’s failure to appreciate that France and Britain unquestionably had declared war against one another:

Was not war sufficiently declared in the King of England’s speech, and in the answers of both houses, and in the recall of his ambassador? Has it not been sufficiently declared by actual hostilities in most parts of the world? I suspect there will never be any other declaration of war. Yet there is in fact as complete a war as ever existed¹⁸¹

Fully aware that neither England nor France had issued a formal declaration of war, Adams nonetheless had no difficulty concluding that each had declared war. He knew that a nation could declare war without issuing a formal declaration because declaring war was, in part, about

¹⁷⁶ Prakash, *supra* note 16, at 77.

¹⁷⁷ *Id.*

¹⁷⁸ Letter from Robert Dinwiddie to George Washington (Aug. 21, 1756), *in* 3 *The Papers of George Washington: Colonial Series* 372, 373 (W.W. Abbott ed., 1984).

¹⁷⁹ Junius Americanus, Address to General Gage (May 1775), *in* 2 *American Archives: Fourth Series* 741, 741 (Peter Force ed., Washington, M. St. Clair Clark & Peter Force 1839).

¹⁸⁰ Henry A. Muhlenberg, *The Life of Major-General Peter Muhlenberg of the Revolutionary Army* 440 (Philadelphia, Carey & Hart 1849).

¹⁸¹ Letter from John Adams to Samuel Adams, *supra* note 174, at 48.

deciding to wage it, and obviously a nation could choose to wage war without issuing a written document.

The Constitution was written against this backdrop. Consider James Madison's observation at the Philadelphia Convention that the use of force against a "delinquent [American] State . . . would look more like a declaration of war[] than an infliction of punishment."¹⁸² Madison plainly understood that using military force against a state constituted a declaration of war. In a discussion of the Senate majority necessary to make a peace treaty, Gouverneur Morris argued that the "Legislature will be unwilling to make war" if peace treaties were hard to approve.¹⁸³ He thereby made clear that Congress could decide whether to make war because it had power to "declare war."

In the states, Americans continued to read the power to declare war as the power to decide whether to wage it. James Wilson famously observed that the proposed Constitution

will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large¹⁸⁴

Wilson clearly equated declaring war with the power to decide to wage it. Likewise, Pierce Butler at the South Carolina ratifying convention noted that some Philadelphia delegates had opposed granting the President the war power because it would vest him with "the influence of a monarch, having an opportunity of involving his country in a war."¹⁸⁵ Butler evidently supposed the President could not take the nation to war because Congress had the power to declare war.¹⁸⁶ In Massachusetts, Rufus King and Nathaniel Gorham described the bicameralism and presentment needed to declare war and claimed that "as war is not to be desired and always a great calamity, by increasing the Checks, the measure will be difficult."¹⁸⁷ Evidently these two delegates to the Philadelphia

¹⁸² 1 The Records of the Federal Convention of 1787, at 54 (Max Farrand ed., 1966).

¹⁸³ 2 *id.* at 548.

¹⁸⁴ 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 528 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1836).

¹⁸⁵ 4 *id.* at 263.

¹⁸⁶ *Id.*

¹⁸⁷ Rufus King & Nathaniel Gorham, Response to Elbridge Gerry's Objections (1787), in 4 The Documentary History of the Ratification of the Constitution 186, 190 (John P. Kaminski & Gaspare J. Saladino eds., 1997).

Convention knew that the nation could not wage war unless Congress first exercised its power to declare it. In Virginia, Patrick Henry repeatedly equated declarations of war with entering a war. After saying that republics do not enter wars without popular support, Henry noted that in America, Congress could both declare war and fund it.¹⁸⁸ Speaking of the hostile acts of outlaws and banditti, Henry observed that “[t]hose who declare war against the human race may be struck out of existence.”¹⁸⁹ Like others before him, Henry confirmed that one can declare war via hostile deeds and that the power to declare war encompassed authority to decide to wage it.

During the Constitutional Convention and the ratification campaign, not one person said that Presidents could take the nation to war or, for that matter, attack another nation in response to its declaration of war against the United States. Nor did anyone say that a presidentially authorized attack on another nation would be constitutional.

To the contrary, people read the power to “declare war” as it had long been understood. Because Congress had the power to declare war, it could decide whether the nation would wage it. Though Presidents had a role to play in deciding whether the nation ought to wage war—a President could propose a war to Congress or oppose one with his veto—they lacked unilateral constitutional authority to attack other nations. They lacked such authority because the grant to Congress was universally read as exclusive, to be exercised via bicameralism and presentment. After all, if the President ordered an attack on his own say-so, he would have issued the “strongest declaration” of war in the context of a Constitution that assigned that power to Congress.

* * *

No war should be judged in a vacuum, without regard to domestic concerns, economic factors, and geopolitical forces. Likewise, the constitutionality of wars should not be evaluated in splendid isolation. We have considered what it meant to “declare war” and what Americans said of their nascent Constitution, in order to supply part of the context for assessing the First War.

¹⁸⁸ 3 The Debates in the Several State Conventions, *supra* note 184, at 172.

¹⁸⁹ *Id.* at 140.

Declaring war meant, in part, deciding to wage it. Someone who signals a recourse to war, either by word or deed, has declared war. Relatedly, those words or deeds were themselves “declarations of war” because they evinced a choice to wage it. Hence while a formal declaration of war was one means to exercise the power to declare war, it was hardly the only means. Indeed, most nations declared war by waging it, often from the “mouths of cannons.”¹⁹⁰ Waging war was the “strongest declaration”¹⁹¹ because hostilities clearly signaled that the nation had chosen war.

Because Congress could “declare war,” the Founders understood that Congress could decide whether the United States would wage war. Since a nation could declare war by means other than a formal declaration, exercise of the power clearly did not require the invocation of a particular phrase—“declare war”—in order to utilize the underlying authority. Congress could declare war without using the phrase, its components, or their cognates.

Though the Constitution does not expressly declare that Presidents “shall never declare war,” the Founders understood the Constitution as reflecting a judgment that no single person should be able to plunge “We the People” into war.¹⁹² Rather, the drawn-out process of bicameralism and presentment would be necessary. Presidents might advocate war under their authority to recommend measures. They might veto proposed exercises of the power to declare war. What they could never do, as a legal matter, is wage war on their own authority, for the very act of taking the nation to war would itself constitute a declaration of war. A President who orders offensive operations without congressional sanction has declared war, contrary to the Constitution’s exclusive grant to Congress.

Of course, the ultimate question for us is whether (and how well) the *First War* fits with these common understandings of what it meant to declare war and Congress’s exclusive authority to decide to wage war.

III. CONGRESS’S FIRST EXERCISE OF THE POWER TO DECLARE WAR

Does the war against the Northwestern Confederacy cohere with the eighteenth-century meaning of “declare war” and the many public

¹⁹⁰ Debate in the Commons for Securing the Trade to America, *supra* note 170, at 831.

¹⁹¹ 1 Jacques M. Necker, *An Essay on the True Principles of the Executive Power in Great States* 273 (London, G.G.J. & J. Robinson 1792).

¹⁹² U.S. Const. pmb.

statements regarding the allocation of war powers made during the Constitution's drafting and ratification? The answer is an unequivocal "yes." President Washington went to Congress with a request to conduct an expedition against the Northwestern Confederacy. Two subsequent Acts—the Establishment Act of 1789 and the Establishment Act of 1790—constituted two exercises of the power to declare war. Congress authorized war by requiring that the executive protect settlements. As many at the time recognized, settlers could be protected only if America conducted expeditions against the hostile tribes. Hence Congress authorized the First War, Washington acted under the auspices of statutes, and the commencement of the war was wholly consistent with the Constitution's original meaning.

As we shall see in Part IV, Washington's actions against the Northwestern Confederacy also cohere with what he said as President about war powers, congressional authority, and executive impotence. In word and deed, Washington was consistent. As he repeatedly declared, he could not authorize offensive measures against other nations, because only Congress could declare war.

A. The Continental Congress Determines on War

The First War did not spring forth in 1790 fully grown like Athena from Zeus's head. This war was rooted in events that pre-dated the Constitution. Due to its power of "determining on . . . war,"¹⁹³ the Continental Congress sat in the proverbial driver's seat. Recall that in 1784, Congress had authorized a seven-hundred-person army.¹⁹⁴ Congress laid down three purposes: "for taking possession of the western posts, as soon as evacuated by the troops of his [B]ritannic Majesty, for the protection of the northwestern frontiers, and for guarding the public stores."¹⁹⁵ This language hints at offensive action. Why else would the law specify that the army would occupy British posts *and* act "for the protection of the northwestern frontiers"? Had Congress intended the force to operate solely defensively, it could have done no more than state that the army might occupy the forts and guard the public stores. That

¹⁹³ Articles of Confederation of 1781, art. IX, para. 1.

¹⁹⁴ 27 Journals of the Continental Congress, supra note 74, at 538–39 (June 3, 1784) (Gaillard Hunt ed., 1928).

¹⁹⁵ Id. at 538.

might have made clear that Congress had authorized defensive measures only.

In July 1787, Congress confirmed that the army might conduct offensive operations:

[O]n the application of the commanding Officer of the federal troops, the [state] executive [was] to give order that a part of the [state] militia . . . take such positions as the said commanding Officer shall direct for acting in conjunction with the federal troops in protecting and defending the frontier inhabitants and in making such expeditions against the Indians in case they continue hostile as Congress shall hereafter order and direct.¹⁹⁶

Four points emerge. First, Congress made explicit that the army and the militia might need to take offensive measures (“expeditions”). Second, Congress retained ultimate control over when to launch offensive operations. Third, Congress suggested that its decision would turn on whether the tribes “continue[d to be] hostile.”¹⁹⁷ Fourth, Congress seemed to acknowledge that the federal army already had authority to launch expeditions. In particular, rather than conveying authority to use the army to conduct offensive operations, the 1787 resolve assumed the point and granted the commander authority to rely upon state militias to join the army in possible expeditions. This confirms that when Congress used the phrase “protection of the northwestern frontiers” in the 1784 authorization,¹⁹⁸ it likely had a broad understanding of what the army might do under the rubric of “protection,” more capacious than some modern readers might imagine.

It is easy to see why “protection” might encompass offensive measures. In the eighteenth century, a small contingent of troops dispersed along a long frontier would be wholly inadequate for genuine protection. In such cases, “protection” might well require offensive operations. That is to say, sometimes meaningful protection can come only from a strategy of chastising a marauding enemy that speedily attacks and retreats. We are not addressing the morality of the policy, only the perceived efficacy of a protection policy grounded on the utility of punishing expeditions.

¹⁹⁶ 33 Journals of the Continental Congress, *supra* note 74, at 386 (July 21, 1787) (Roscoe R. Hill ed., 1936).

¹⁹⁷ *Id.*

¹⁹⁸ 27 Journals of the Continental Congress, *supra* note 74, at 538 (June 3, 1784) (Gaillard Hunt ed., 1928).

Our reading of “protection” becomes quite compelling in light of the reauthorization for the federal army that Congress passed a few months after the militia authorization. On October 3, 1787, Congress reestablished the seven-hundred-man army with the following purposes:

[T]he interests of the United States require that a corps of seven hundred troops should be stationed on the frontiers to protect the settlers on the public lands from the depredations of the Indians, to facilitate the surveying and selling of the said lands in Order to reduce the public debt and to prevent all unwarrantable intrusions thereon.¹⁹⁹

Nowhere does the reauthorization explicitly state that federal forces can participate in or mount expeditions, yet Congress had just, months earlier, put militiamen on notice that they might be summoned to conduct offensive operations alongside the army. To be sure, the word “protect” might suggest no more than defensive measures. But when Congress used the word in this context, it had a much more expansive view of what it was authorizing: offensive operations or expeditions. In the next Section, we return to this point about “protect” and its cognates.

As the Constitution’s ratification proceeded, Congress reaffirmed this legal framework. In August of 1788, Congress passed another militia authorization which stated:

[O]n the application of the [territorial] Governor the [state] Executives be requested to give orders [to the militia] . . . to take such positions as the Commanding Officer of the federal troops shall direct, for acting in conjunction with the said federal troops in protecting and defending the frontiers . . . and in making *such expeditions* should [the Indians] continue hostile as the said Governor shall direct for repelling such hostilities.²⁰⁰

Again, Congress made clear that offensive measures might be needed, based in part on the disposition of the tribes. Again, Congress implicitly acknowledged that it had already authorized federal troops to launch expeditions. This 1788 measure made only one change. Whereas in 1787, Congress retained control over launching expeditions, in 1788 it left that decision to the Governor.

¹⁹⁹ 33 Journals of the Continental Congress, *supra* note 74, at 602 (Oct. 3, 1787).

²⁰⁰ 34 *id.* at 411–12 (Aug. 12, 1788) (Roscoe R. Hill ed., 1937) (emphasis added).

So, at the time of the Constitution's ratification in 1788, the Continental Congress had determined that a Native American war might be necessary. If tribes in the Northwest could be turned toward peace, America would not wage war. If the tribes remained unreconciled, however, the territorial Governor had full authority to wage war against them. And he could call out portions of the state militias to help subdue them.

In the language of the eighteenth century, Congress had passed something akin to a conditional declaration of war. A conditional declaration of war is a threat that if the declarant's conditions are not met, the declarant will declare (wage) war.²⁰¹ In this case, if the Native Americans remained aggressive, expeditions would follow. If the tribes embraced peace, there would be no war. Implementing the conditional declaration was left to the Governor.

B. Congress Declares War: The Establishment Acts of 1789 and 1790

The reconstructed Congress first exercised its power to declare war on September 29, 1789, when it passed "An Act to recognize and adapt to the Constitution of the United States the establishment of Troops raised under the Resolves of the United States in Congress assembled, and for other purposes therein mentioned."²⁰² Nowhere did this law state that Congress had "declared war." Yet it was an exercise of that alarming but necessary power.

The first several sections reincorporated the army, set pay levels, and imposed various constraints. Only one provision, Section 5, appeared to touch upon the conflict:

And be it further enacted, That for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians, the President is hereby authorized to call into service from time to time, such part of the militia of the states respectively, as he may judge necessary for the purpose aforesaid.²⁰³

This was statutory authority to summon the state militias to protect frontier Americans.

The 1789 Act was a stopgap. By its terms, the Act was to expire at the end of the next session of Congress, and hence had a likely expiration date

²⁰¹ Neff, *supra* note 160, at 105.

²⁰² Act of Sept. 29, 1789, ch. 25, 1 Stat. 95.

²⁰³ *Id.* § 5.

of no more than a few months.²⁰⁴ Before the 1789 law lapsed, Congress acted on April 30, 1790. This second Act repealed the first and re-enacted an army with the same authority to take offensive actions. Congress stated that “for the purpose of aiding the troops now in service, or to be raised by this act, *in protecting the inhabitants of the frontiers of the United States*, the President is hereby authorized to call into service from time to time such part of the militia” as he judges necessary.²⁰⁵ This was a second exercise of the declare-war power, with the President meant to try negotiations but wage war should peace initiatives fail.

The most significant difference between the first and second exercises of the declare-war power is that an expedition actually occurred under the auspices of the second declaration. Recall that in 1789, the President had given orders to wage war if both the Governor and the commander agreed that it was necessary. But no expedition took place under the first Establishment Act. After the passage of the second Act, in June of 1790, Washington ordered Harmar to launch an expedition if St. Clair and Harmar thought it necessary.²⁰⁶ After securing St. Clair’s approval, Harmar launched his doomed invasion.

Why did President Washington suppose that these two Acts authorized the use of the army and state militias to conduct offensive operations against the warring tribes of the Northwest? As we have stressed throughout, Congress did not pass these two Acts in a vacuum. In ways that may seem obscure to the modern reader, but were not murky at the time, Congress clearly authorized expeditions, and other offensive measures, against the warring tribes. Washington, and his aides, understood this because they were fully aware of the background. In fact, they had helped to frame that context. Six clues demonstrate that Congress had approved expeditions.

First, the 1789 Act incorporated prior resolves, resolves that authorized expeditions. Consider the title of the 1789 statute: “An Act to Recognize and Adapt to the Constitution of the United States the establishment of the Troops raised under the Resolves of the United States in Congress assembled, *and for other purposes therein mentioned.*”²⁰⁷ Hence the 1789 Act reestablished an army for the very purposes stated in those previous, pre-Constitution resolves. Recall that expeditions were one of those pre-

²⁰⁴ Id. § 6.

²⁰⁵ Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121 (emphasis added).

²⁰⁶ Letter from General Knox to Governor St. Clair, *supra* note 99, at 147–48.

²⁰⁷ Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (emphasis added).

Constitution purposes, for the Continental Congress had repeatedly granted express authority to conduct expeditions. Likewise, the 1789 Act's first section stated "[t]hat the establishment contained in the resolve of the late Congress of the third day of October, [1787] . . . is hereby recognized to be the establishment for the troops in the service of the United States."²⁰⁸ Again, the holdover armed force that the 1789 Establishment Act reestablished had enjoyed explicit authority to engage in expeditions against Native Americans.²⁰⁹ Hence the 1789 statute re-adopted ("recognized") that offensive authority, *mutatis mutandis*.

Second, consider a crucial piece of evidence, the correspondence between Governor Arthur St. Clair and Washington. Recall that in mid-1789, the army remained in the field but without any legal authority; St. Clair likewise lacked power to call out the state militias. While Congress was considering what to do, he wrote to Washington:

By a resolution of the late Congress the Governor of the western Territory, had power, in case of hostilities, to call upon Virginia and Pennsylvania for a number of men to act in conjunction with the continental Troops, and *carry war into the indian settlements*. that [sic] resolution, it is now supposed, is no longer in force. . . . The handful of [regular] Troops . . . tho' they may afford protection to some Settlements, cannot possibly act offensively by themselves.²¹⁰

St. Clair was right, and Washington agreed. None of the Continental Congress's resolutions had any legal force. The President sent St. Clair's letter to Congress as the latter was discussing (re)establishing the army.²¹¹ Washington expressly asked for a provision that "would embrace the cases apprehended by the Governor"—thus endorsing the latter's request to "carry war" to the Native Americans, to act "offensively."²¹² The result was a 1789 Establishment Act that both authorized an army *and* authorized the President to summon the militias to protect the frontiers. In other words, Congress received a request sent from the former Governor—and forwarded by an approving President—to authorize the

²⁰⁸ *Id.* § 1.

²⁰⁹ 34 *Journals of the Continental Congress*, *supra* note 74, at 412 (Aug. 12, 1788) (Roscoe R. Hill ed., 1937); 33 *id.* at 602 (Oct. 3, 1787) (Roscoe R. Hill ed., 1936).

²¹⁰ Letter from Arthur St. Clair to George Washington, *supra* note 38, at 39 (emphasis added).

²¹¹ Letter from George Washington to the U.S. Senate & House of Representatives, *supra* note 89, at 49.

²¹² *Id.*

initiation of hostilities (“carry war” and “act offensively”) and passed a bill to that effect a few weeks later. The 1789 Establishment Act established purposes—the protection of the frontiers—and granted the authority Washington and St. Clair sought—to use the army and the state militias to carry war into Native American towns, so long as doing so would protect frontier settlers.

Third, Washington evidently read the 1789 Act as authorizing expeditions. Immediately after its passage, he wrote a letter to St. Clair. He did not inform the Governor that Congress had denied him the authority to “carry war” into the enemy’s settlements. On the contrary, Washington notified St. Clair that Congress had vested the President with the power the Governor had sought. Washington wrote, the militia is “to act in conjunction with the federal troops in such operations, offensive or defensive, as you and the Commanding officer of the troops conjointly shall judge necessary for the public service, and the protection of the inhabitants and the posts.”²¹³ Washington thus made clear that he understood the Act’s reference to protecting the inhabitants of the frontiers as authorizing “such operations, offensive or defensive,”²¹⁴ as the President deemed necessary. Indeed, he tied the two—the operations, whether offensive or defensive, were as he put it, precisely *for* the “protection of the inhabitants.”²¹⁵

Fourth, before reestablishing the army in 1789, Congress had re-enacted the Northwest Ordinance,²¹⁶ conforming it to the Constitution.²¹⁷ In so doing, Congress had changed the method of appointing officials—the President could now appoint, by and with the Senate’s consent. It also made clear that the President could remove officers wherever Congress could do so under the old regime. Finally, it declared that all territorial communications would be sent to the President rather than Congress.²¹⁸ Congress, however, did not refashion one crucial element. Article III of the “compact” was left untouched. It promised: “The utmost good faith shall always be observed towards the [Northwest] Indians . . . their property, rights and liberty, they never shall be invaded or disturbed,

²¹³ Letter from George Washington to Arthur St. Clair, *supra* note 91, at 141.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See 32 *Journals of the Continental Congress*, *supra* note 74, at 334–43 (Northwest Ordinance) (Roscoe R. Hill ed., 1936); Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51.

²¹⁷ Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51.

²¹⁸ *Id.* § 1.

unless in just and lawful wars authorised by Congress.”²¹⁹ In re-enacting the Northwest Ordinance, Congress endorsed text making clear that it would authorize any warfare against the tribes. It left this text in place because the Constitution continued the regime wherein Congress decided whether recourse to warfare was necessary. The power to “determin[e] on . . . war” from the Articles of Confederation²²⁰ was no different than the power to “declare war.” Hence there was no need to modify this article of the Ordinance.

Because President Washington signed this revised Ordinance into law, he must have supposed that the Northwest Ordinance, as modified, was constitutional. We rather doubt that Washington, two months after the Ordinance’s passage, would have authorized warfare against tribes in direct violation of it; that is, without congressional authorization. We think it clear that Washington read the Establishment Act of 1789 (and its 1790 successor) as reauthorizing the military expeditions previously authorized by the Continental Congress. He read the two Acts to authorize the executive to “carry war” to the tribes, just as he and Governor St. Clair had requested. He read the 1789 Act to reincorporate the “purposes” of previous resolves, just as the Act declared.

Fifth, in 1791, after the Harmar expedition proved a failure, Congress appropriated funds for it. “[F]or defraying the expenses incurred in the defensive protection of the frontiers against the Indians, during the years [1790 and 1791], by virtue of the authority vested in the President of the United States, by the acts relative to the military establishment [from 1789 and 1790].”²²¹ This provision suggests three things. Congress characterized Harmar’s failed expedition as being undertaken for “protection of the frontiers.” Hence, Congress knew that protection might require offensive expeditions. Moreover, Congress expressly understood its prior Acts as granting authority to conduct expeditions useful for “protection.” The statute described the expedition as having been undertaken “by virtue of” congressionally granted authority. Finally, we know of no other act that appropriated funds for the Harmar expedition. Hence, if the 1791 Act did not supply funds for the Harmar expedition, Congress never appropriated funds for it and any monies disbursed to

²¹⁹ 32 Journals of the Continental Congress, *supra* note 74, at 340 (Northwest Ordinance) (Roscoe R. Hill ed., 1936).

²²⁰ Articles of Confederation of 1781, art. IX, para. 1.

²²¹ Act of Dec. 23, 1791, ch. 3, § 4, 1 Stat. 226, 228.

defray the costs violated the Constitution's Treasury Clause.²²² After all, that would mean that the administration withdrew monies from the Treasury in the absence of any appropriation.

Finally, and perhaps most importantly, numerous discussions of "protect" and its cognates reveal that "protecting the inhabitants," found in both the 1789 and 1790 Establishment Acts, encompassed offensive measures, such as expeditions. The government, including Congress, had come to the conclusion that "protecting" settlers might *require offensive measures*, like invasions to destroy Native American warriors and incursions to extirpate tribal towns.

In Henry Knox's 1790 letter to St. Clair commanding an expedition against the Northwest Confederacy, he justified the need for an invasion with this: "[N]o efficient defensive protection can be afforded the frontiers . . . against the depredations" of Native American parties.²²³ Why did he suppose this? Because it had proved impossible to protect a long, porous border with a few hundred men dispersed along it. In a report for Washington, shared with Congress, Knox wrote that while the United States was bound to "protect effectually" its citizens, it was burdened with "a frontier of immense extent, surrounded by barbarous Indians."²²⁴ In these circumstances, "defensive measures only . . . appear utterly inadequate to such protection."²²⁵ St. Clair already had concluded the same. Writing to Knox in 1788, the Governor had said "very little protection" will come from "[d]efensive measures" when the enemy acts in "small detachments, along so extended and weak a frontier."²²⁶

What would supply genuine protection? A "strong coercive force."²²⁷ What would the coercive force do? Invade and destroy. As Knox put it to Washington in 1791, by "carrying the war into the enemy's country, [the nation could] prevent in a great degree their invading the frontiers."²²⁸ An American invasion of Native American lands would put the tribes on the defensive, by forcing them to retain warriors to protect their own settlements; discourage Native American warriors from attacking across the weakly defended frontier; display American willingness to retaliate;

²²² U.S. Const. art. I, § 9, cl. 7.

²²³ Letter from General Knox to Governor St. Clair, *supra* note 99, at 147, 148.

²²⁴ Report B, *in* 9 *The Papers of George Washington*, *supra* note 123, at 317, 320.

²²⁵ *Id.*

²²⁶ Letter from Governor St. Clair to the Secretary of War (Sept. 14, 1788), *in* 2 *The St. Clair Papers*, *supra* note 94, at 87, 88–89.

²²⁷ Report B, *supra* note 224, at 320.

²²⁸ Letter from Henry Knox to George Washington, *supra* note 117, at 406.

and spur the tribes to sign a peace treaty.²²⁹ In other words, incursions and expeditions would yield protection.

This connection between “protection” and offensive action was long a staple of government discussions. In a 1788 report to Congress on the dangerous situation with tribes in the South, Knox said if “the protection to be afforded the State of Georgia” was to “be complete” it would be necessary to authorize “all operations offensive as well as defensive that may be deemed necessary for the full accomplishment of the object.”²³⁰ In 1790, Knox informed local militia officers in Virginia and Kentucky that “as experience has demonstrated the inefficiency of defensive measures” in the northwest, the President had concluded “offensive[]” measures were requisite. The President, said Knox, “is anxiously desirous of effectually protecting the frontiers, and he will take all such reasonable measures as, in his judgment, the case may require.”²³¹

Recall that Washington had said that offensive measures he authorized in 1789 were meant expressly for the “protection of the inhabitants.”²³² Likewise, in a 1790 address to Congress, Washington said it was “essential to the safety of the Western settlements that the aggressors should be made sensible that the Government of the Union is not less capable of punishing their crimes.”²³³ The tribes would not become “sensible” of this capacity to chastise from “defensive measures” alone.²³⁴ Hence the President had “authorised an Expedition” under “the Act which empowers the President to call out the Militia for the protection of the frontiers.”²³⁵ For Washington, it was clear that the “safety” of the settlements might be best secured by an invasion.

Most importantly, Congress saw the connection between protection and expeditions. In 1788, Congress had spoken of “operations” that might be necessary for the “protection of the inhabitants,” a reference to offensive measures.²³⁶ Another 1788 resolve promised that if the Creek Nation did not make peace, “the Arms of the United States shall be called

²²⁹ Report B, *supra* note 224, at 322–23; Report A, *in* 9 *The Papers of George Washington*, *supra* note 123, at 316.

²³⁰ 34 *Journals of the Continental Congress*, *supra* note 74, at 362 (Roscoe R. Hill ed., 1937).

²³¹ Letter from Henry Knox to Militia Leaders (July 17, 1790), *in* 1 *American State Papers: Indian Affairs*, *supra* note 101, at 102, 102.

²³² Letter from George Washington to Arthur St. Clair, *supra* note 91, at 141.

²³³ *George Washington*, *supra* note 106, at 45, 47.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ 34 *Journals of the Continental Congress*, *supra* note 74, at 412 (Roscoe R. Hill ed., 1937).

forth for the protection of that frontier.”²³⁷ The threat to summon the “Arms” of America was likewise a reference to offensive measures as a means of protection, for no tribe would be pressured to make peace by a vow to station guards along a frontier. When Congress in 1789 reiterated the goal of “protection of the frontiers” in the context of an Act that referenced a Continental Congress resolve speaking of expeditions, it was undoubtedly authorizing Washington to protect the frontiers by coercive means, including invasion of Native American settlements. “Protection” came not merely from bearing a shield or adopting a defensive crouch. Rather, meaningful protection sometimes demanded taking up the sword and taking the fight to the opponent.

When modern scholars argue that the 1789 and 1790 Establishment Acts authorized defensive measures only, they misread those Acts. For instance, John Yoo and Michael Ramsey assert that Congress only authorized defensive measures.²³⁸ But, as Congress, Washington, Knox, and St. Clair claimed, “protecting the inhabitants” might require vigorous expeditions to punish and destroy Native American warriors and towns. Hence to interpret “protecting” as doing nothing more than authorizing purely defensive measures is to read it outside its particular context.

Besides not squaring with what Congress, Washington, and others said, the narrow reading of “protecting” yields the embarrassing conclusion that Washington acted unconstitutionally and that no one uttered a peep. On this reading, President Washington apparently ordered militiamen to engage in acts they were never congressionally authorized to perform, namely invade Native American lands three separate times. Under the Constitution, *Congress* decides when to summon the state militias.²³⁹ Presidents have no constitutional authority to call forth the state militias and hence are wholly reliant upon Congress. When Congress authorizes the President to summon the militias for one purpose, say to execute the laws, the President cannot use them for other purposes, say suppressing an insurrection. Despite Congress expressly authorizing the summoning of the militias only for the purpose of “protecting” frontier inhabitants—which on the Yoo and Ramsey view meant that Congress had authorized the use of the state militias for defensive measures only—Washington actually ordered them to invade Native American lands. They must

²³⁷ *Id.* at 326.

²³⁸ Ramsey, *supra* note 34, at 180; Yoo, *supra* note 19, at 22.

²³⁹ U.S. Const. art. I, § 8, cl. 15 (providing that Congress may summon the militias for executing the laws, suppressing insurrections, and repelling invasions).

suppose that Washington thereby *violated* the second Establishment Act by summoning and utilizing the state militias for an *ultra vires* act. Further, they must imagine that while Washington knew that the Act only encompassed defensive measures, he nonetheless misused the militias for unauthorized, offensive purposes. It would be as if, in the face of a law authorizing the use of the militia solely to protect settlers, Washington had deployed the militias to erect a grand presidential palace.

In sum, if Yoo and Ramsey are right, our first President violated the Constitution in 1789 by authorizing officials to summon the state militias to conduct an invasion. And he compounded that mistake in 1790, an error that yielded a war fought via the use of illegal means. Finally, no one criticized Washington for this unauthorized use of the state militias. In contrast, our interpretation, one that coheres with many statements of the era, does not require readers to imagine that Washington was engaged in constitutional malfeasance. Under our reading, Washington did nothing amiss when he used the militias to attack warring tribes. He was executing a law of Congress, one that required that he act to protect settlers, including by launching expeditions.²⁴⁰

* * *

When one reads the Establishment Act of 1789 in its proper context, it is easy to see why the law constituted the country's first exercise of the declare-war power. Recall that the Continental Congress had authorized

²⁴⁰ Perhaps Yoo and Ramsey might respond that Congress cannot limit the purposes for which the militia may be called forth from the states. At first blush, this runs contrary to the clear text of the Constitution, which makes it abundantly clear that the militia can be summoned only for three particular purposes. See *id.* As John Marshall said in *McCulloch v. Maryland*, the enumeration presupposes something unenumerated, a principle that applies no less to the Militia Clauses. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819). In any event, if the statutory provisions on summoning the militias were somehow unconstitutional, we have the embarrassing situation where *both political branches acted unconstitutionally, not once but twice*. Congress passed supposedly unconstitutional bills—the two Establishment Acts—and the President signed both, despite his constitutional obligation to preserve, protect, and defend the Constitution. And no one uttered a peep about the supposed unconstitutionality of the restriction that Congress imposed on the means that the Commander in Chief might use.

We rather doubt that Congress violated the Constitution by limiting the purposes for which the President might summon the militias and we do not suppose that President Washington signed into law two unconstitutional bills. Rather, we believe the two Establishment Acts were entirely constitutional and that both authorized offensive measures. In issuing his orders, Washington was implementing both Acts, neither violating them nor evading their strictures.

expeditions as a means of protecting frontier inhabitants. That Congress understood that failure to protect frontier inhabitants would lead those settlers to attack Native Americans, often without distinctions between friend and foe, thereby poisoning relations with friendly tribes. Officials also worried that Americans might seek foreign intervention and succor, perhaps from Spain, in order to protect them from Native American attacks.

Upon the establishment of the new government, St. Clair, Knox, and Washington came to the same conclusions. Washington endorsed and forwarded St. Clair's request for offensive measures. Congress crafted an Act that incorporated the purposes of the resolves of the Continental Congress as they related to the army and Native Americans and authorized the President to summon the militias to protect frontier inhabitants. In that context, with a long porous border and inadequate funds and personnel, "protecting the inhabitants" would be impossible without offensive measures. Or so many supposed, including St. Clair, Knox, Washington, and members of Congress.

We know of only one legislator who objected to the war's legality, Senator William Maclay.²⁴¹ But as discussed later, there was some reason for his confusion. In contrast, we believe that most legislators understood that protection might come from offensive measures and that Congress had authorized measures to protect the frontier inhabitants, including incursions into Native American lands. As one member of Congress put it, this was not only "the President's war." Rather, it was also the "war indeed of the house, the war of the legislature."²⁴²

This is not to deny that there were many other complaints. But critics voiced grievances that generally assumed the legality of the expeditions. One critic, writing in January of 1792, focused on the morality of the war. "[T]he United States are prosecuting a disgraceful Indian war" in order to exercise the right of conquest. "[D]id the federal government on its first organization, find these people [the Indians] in a state of disquietude; and under the impulse of first impression, declare war against them, as a display of power?"²⁴³ This was a rhetorical question, to which all readers

²⁴¹ Journal of William Maclay: United States Senator from Pennsylvania 1789–1791, at 396 (Edgar Maclay ed., New York, D. Appleton & Co. 1890); see also *id.* at 409 (saying that war was started "without the authority of Congress"); *id.* at 349 (claiming the same: war was "undertaken . . . without any authority of Congress").

²⁴² Federal Legislature, *supra* note 21.

²⁴³ By Particular Desire, *supra* note 22.

knew the answer. Whatever the truth of the assertion about motives—whether officials were motivated by a desire for land or a desire to protect settlers—there is no doubt that Congress in 1789 and 1790 exercised the power to declare war. It declared war against the warring Native American tribes, albeit with a faint hope that Washington might be able to protect the frontier without a punitive expedition.

Another critic, writing in April of 1792, focused on shortcomings of Congress. Congress had “the power of the purse and the sword,”²⁴⁴ meaning it decided whether to wage war. Hence Congress was constitutionally responsible for the war and various misguided decisions about the features of the fighting force.²⁴⁵ Even though Congress had largely endorsed executive proposals, Congress could not slough off blame on the executive. It should have done more. By virtue of congressional statutes, “[t]he President was, indeed, required to administer protection, without being vested with adequate means.”²⁴⁶ In other words, as we have argued throughout, Congress obliged the President to protect, including, if necessary, ordering offensive operations. But Congress had not supplied an adequate fighting force to wage war against the Native American tribes.

We understand that some will be loath to accept our assertion that by requiring protection of settlers, Congress authorized the executive to engage in defensive and offensive measures against the Native Americans. Readers will be repelled, in part, because America is no longer an imperial power and does not covet territory. It seems wrong to war with Native American tribes and use a victory as a means of imposing a victor’s peace. But, as we have argued throughout, the phrase “protecting the frontier inhabitants” must be understood in its context. One American, bemoaning the failure of the 1790 Harmar expedition into Native American lands, eulogized the fallen, claiming that they had fallen “in the discharge of the duties of their stations, in the *defence* of their country & protecting the defenceless inhabitants from the depredations of” the Indian tribes.²⁴⁷ This mourner evidently regarded the invasion of Native American lands as a means of protecting settlers. Again, in that era, a purely defensive protection was seen as chimerical.

²⁴⁴ Sidney, Observations on the Indian War, *in* 1 The American Museum 165, 167 (Phila., M. Carey 1792).

²⁴⁵ *Id.* at 166.

²⁴⁶ *Id.* at 168.

²⁴⁷ Letter to Messieurs Printers, *Conn. Courant*, Dec. 28, 1790 (emphasis added).

In context, it is hardly surprising that many statesmen thought it might be cheaper and more effective to invade the Native American towns in the Northwest Territory than to adopt a prolonged and ineffective defensive crouch. This was especially true if the goal was to secure a peace treaty with still more Native American land concessions. This mode of *offensive* protection—an invasion—was in line with the modern adage that the best defense is a good offense. This maxim had many advocates at the Founding. Writing six months before he passed away in 1799, George Washington wrote that “offensive operations, often times, is the *surest*, if not the *only* (in some cases) means of defence.”²⁴⁸ For our purposes, he and many, many others concluded that offensive measures were the surest, perhaps the only, means of protecting the frontier inhabitants.

IV. CONTEXTUALIZING THE WAR: THE WASHINGTON ADMINISTRATION AND DECLARING WAR

Prior to ratification, everyone addressing the matter said that only Congress, via bicameralism and presentment, could put the United States into a state of war. Moreover, the two Establishment Acts were exercises of Congress’s power to declare war. Via the text that directed him to protect frontier inhabitants, the Acts authorized Washington to order offensive operations. In that context, “protecti[on]” sanctioned offensive measures against the invading tribes.

In this Part, we recount what was said in the administration and elsewhere about Congress’s authority to declare war and the President’s power to authorize hostilities. There was a consensus that Presidents could not order offensive operations without first securing congressional authorization. Indeed, what is striking is that executive officers, including the chief magistrate, repeatedly stipulated that only Congress could authorize offensive measures. This is remarkable because it is something of an admission against interest. When one branch conspicuously abjures power, we must take notice of the now strange phenomena, because the recent pattern is for government institutions to seize power, not shun it.

We place great weight on this striking abjuration because we rather doubt that Washington was publicly denying that he could order offensive operations in one region of the nation (the Southwest) while publicly

²⁴⁸ Letter from George Washington to John Trumbull (June 25, 1799), in 37 *The Writings of George Washington* 247, 250 (John C. Fitzpatrick ed., 1940).

ordering them in another (the Northwest). And we rather doubt that this occurred with no one pointing out the hypocrisy or inconsistency. Our theory offers a better explanation, one not grounded on insincerity or contradiction. Warfare was constitutional in the Northwest because Congress had authorized it. In contrast, wars against other nations would be unconstitutional because Congress had not authorized them.

A. Averting a Second and Third War

The situation in the Southwest was scarcely less fraught. The Creeks and Cherokees were restless, confronting the familiar problem of aggressive settlers. The Washingtonian strategy was again to negotiate for peace, bolster defenses, and prepare for possible war. In the South, the peace efforts seemed to bear fruit. The Creeks signed a peace treaty in 1790, with the Cherokees doing the same in 1791. Given these perceived successes, offensive measures would be unnecessary.

But the clashes between tribes and frontiersmen could not be suppressed by gifts or papered over by lofty words. Southerners wanted more land and refused to honor federal treaties. When settlers suffered at the hands of particular tribes, many retaliated against Indians indiscriminately. For their part, many Indians were unhappy with the terms of these treaties and understandably wished to exact retribution against aggressive settlers. This led to a combustible situation.

In 1792 and in 1793, portions of the two tribes declared war against the United States. The Washington administration invariably responded by declaring that no state or federal territory could engage in offensive measures. Both were to confine themselves to defensive measures only. Why? Because only Congress had the power to declare war, meaning that only Congress could authorize offensive measures like punitive expeditions or invasions.

In September of 1792, Governor William Blount of the Tennessee Territory wrote to Henry Knox, informing him that several Cherokee tribes had “declared war.”²⁴⁹ The “declaration” was “unexpected” and was unprecedented because it was done “in so formal a manner.”²⁵⁰ Knox advised Washington that the Governor should be instructed that “all measures of an offensive nature be restrained until the meeting of

²⁴⁹ Letter from Governor Blount to the Secretary of War (Sept. 11, 1792), *in* 1 American State Papers: Indian Affairs, *supra* note 101, at 276.

²⁵⁰ *Id.*

Congress, to whom belong the powers of war.”²⁵¹ This, in fact, was also the opinion of Alexander Hamilton and Thomas Jefferson.²⁵² In early October, Knox ordered Blount “to confine all your operations to defensive measures—This is (intended) to restrain any expedition against the Indian Towns.”²⁵³ These limitations were necessary because Congress “possess[es] the power[] of declaring War.”²⁵⁴ Hence, even though several Cherokee towns had declared war, Washington’s principal advisors did not suppose that he unilaterally could wage war in response. As we discussed in Part III, to take offensive measures was to declare war. In contrast, troops that fended off an attack or merely repelled an invasion had not declared war. Hence the command to stick to “defensive measures” only.

State governors were given the same constitutional lesson. The same day he wrote to Blount, Knox wrote to the Virginia Governor, Henry Lee. Knox noted that Blount had “ample . . . powers” for “defensive protection.”²⁵⁵ For “offensive measures,” however, it was “essential to wait the . . . deliberations” of Congress, “who only are invested with the powers of war.”²⁵⁶ In late October of 1792, Knox wrote additional letters. South Carolinian William Moultrie was told that “[t]he [C]onstitution has invested them [Congress] with the right of declaring war. Until, therefore, their decision shall be made known, the Executive cannot authorize offensive measures.”²⁵⁷ Georgian Edward Telfair was instructed that despite the Cherokee declaration, no “offensive operations can be taken.”²⁵⁸ Why? “The [C]onstitution having invested that body [Congress] with the powers of war,” offensive measures would have to wait “until they shall be pleased to authorize the same.”²⁵⁹

²⁵¹ Letter from Henry Knox to George Washington (Oct. 9, 1792), *in* 11 *The Papers of George Washington: Presidential Series* 212, 212 (Christine Sternberg Patrick ed., 2002).

²⁵² See *id.*

²⁵³ *Id.* at 213–14 n.3 (containing quoted excerpts of letter from Henry Knox to William Blount).

²⁵⁴ *Id.* at 214.

²⁵⁵ Letter from the Secretary of War to the Governor of Virginia (Oct. 9, 1792), *in* 1 *American State Papers: Indian Affairs*, *supra* note 101, at 261.

²⁵⁶ *Id.*

²⁵⁷ Letter from the Secretary of War to the Governor of South Carolina (Oct. 27, 1792), *in* 1 *American State Papers: Indian Affairs*, *supra* note 101, at 262.

²⁵⁸ Letter from the Secretary of War to the Governor of Georgia (Oct. 27, 1792), *in* 1 *American State Papers: Indian Affairs*, *supra* note 101, at 262.

²⁵⁹ *Id.*

In late 1792, Washington sought directions from Congress. He asked Jefferson to draft a message. Consistent with his longstanding views, Jefferson wrote that “[t]he Question of War, being placed by the Constitution with the legislature alone . . . made it my [i.e., Washington’s] duty to restrain the operations of our militia to those merely defensive.”²⁶⁰ Washington’s actual message to Congress noted that militia had been used to repel Native American invasions and that Congress would have to approve any further measures.²⁶¹ He closed by observing that “the future conduct of the Executive will . . . materially depend” on Congress’s decision.²⁶² Washington accompanied this message with the letter from Governor Blount about the Cherokee declaring war.²⁶³ This was Washington supplying Congress with information about the state of the union so it could decide how best to respond to the Cherokee declaration of war.

Congress never authorized offensive measures against the Cherokee. Hence, Governor Blount ought to have stood down. Yet the Governor repeatedly pressed for an expedition. In May of 1793, Knox wrote to Blount and explained the consequences of congressional inaction:

You have been fully informed of the difficulties which . . . prevent the President of the United States from giving orders . . . for the most vigorous offensive operations against the hostile Indians. If those difficulties existed while Congress were in session, and which it was conceived they alone were competent to remove, they recur, in the present case . . . : for all the information . . . were laid before both Houses; of consequence his [the President’s] authority remains in the same situation²⁶⁴

The administration rightly perceived congressional inaction as an endorsement of the status quo. More precisely, if the President lacked

²⁶⁰ Thomas Jefferson, Draft of Message on Southern Indians (Dec. 7, 1792), *in* 6 *The Writings of Thomas Jefferson* 144 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895).

²⁶¹ Letter from George Washington to the U.S. Senate & House of Representatives (Dec. 7, 1792), *in* 11 *The Papers of George Washington*, *supra* note 251, at 480.

²⁶² *Id.*

²⁶³ Letter from Henry Knox to George Washington (Oct. 9, 1792), *supra* note 251, at 212–13 n.2.

²⁶⁴ Letter from the Secretary of War to William Blount (May 14, 1793), *in* 1 *American State Papers: Indian Affairs*, *supra* note 101, at 429.

authority to authorize an expedition in 1792, and Congress had done nothing subsequently, he continued to lack such authority.

Governor Blount was persistent, even pesky. His concern for settlers may have motivated this behavior. But his conduct also likely reflects his ownership of frontier land, meaning he had a strong pecuniary incentive for expansion westward. The Indians called him the “dirt king” and one writer has said “he was more interested in land than peace.”²⁶⁵ In 1794, Blount again sought approval for an expedition to extirpate Cherokee towns.²⁶⁶ Knox wrote back in stinging terms: “I am instructed, specially, by the President, to say, that he does not conceive himself authorized to direct any such measure, more especially, as the whole subject was before the last session of Congress, who did not think it proper to authorize or direct offensive operations.”²⁶⁷ Washington could not have been clearer. Because Congress had refused to sanction or command offensive operations against the Cherokee, such measures were forbidden.

Blount was hardly alone in seeking an expedition. In April of 1793, a portion of the Creeks attacked the United States.²⁶⁸ Writing to Governor Moultrie in August, President Washington noted that he hoped to launch an

offensive Expedition against the refractory part of the Creek Nation, whenever Congress should decide that such measure be proper & necessary. The Constitution vests the power of declaring War with Congress, therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.²⁶⁹

In writing this letter, Washington denied any constitutional power to wage war, to order offensive actions on his own. If Congress did not authorize an expedition, neither the army nor the federalized militias could attack the Creek.

Such letters from the administration were remarkably common because settlers importuned Governors to protect them via punitive expeditions

²⁶⁵ Calloway, *supra* note 49, at 339.

²⁶⁶ See Letter from Henry Knox to William Blount (July 26, 1794), *in* 1 American State Papers: Indian Affairs, *supra* note 101, at 634.

²⁶⁷ *Id.*

²⁶⁸ Extract of a Letter from Andrew Pickens, Esquire, to General Clarke (Apr. 28, 1793), *in* 1 American State Papers: Indian Affairs, *supra* note 101, at 369.

²⁶⁹ Letter from George Washington to William Moultrie (Aug. 28, 1793), *in* 13 The Papers of George Washington: Presidential Series 570 (Christine Sternberg Patrick ed., 2007).

onto Indian soil. To Virginian Henry Lee, Washington noted that “our hands are tied to defensive measures.”²⁷⁰ Of course, Congress had never expressly forbidden offensive measures in the South. Precisely because Congress had never approved offensive operations against the Southern tribes—it had never exercised its power to declare war against them—the administration was left with defensive measures.

A similar letter went to Georgian Edward Telfair. The Governor was planning a Creek expedition. Secretary Knox wrote back averring that the “[President] utterly disapproves the measure at this time.”²⁷¹ Why? Because “an expedition is unauthorized by law. The right of declaring war . . . belong[s] to Congress. No such declaration has been made against the Creeks, and, until this shall be done, all offensive expeditions against their towns will be unlawful.”²⁷² Again, Knox made clear that authorized defensive measures were fundamentally different than an offensive expedition.

Washington’s late 1793 address to Congress, likewise, drew a line between defense and offense. He first noted that he had ordered offensive measures against the Northwestern Confederacy, under St. Clair’s command.²⁷³ Pivoting to the South, he observed that he had prohibited “offensive measures” against the Creeks and the Cherokees during the recess of Congress.²⁷⁴ Washington concluded that it was for “Congress to pronounce[] what shall be done” with respect to the latter tribes.²⁷⁵ The divergent actions and treatment were grounded on Congress’s action and inaction. Whereas Washington (and many others) concluded that Congress had authorized expeditions in the North, he knew that it had not sanctioned war in the South.

Congress agreed with Washington that it had the power to decide whether to authorize offensive measures. On multiple occasions it rejected provisions that authorized offensive expeditions against the

²⁷⁰ Letter from George Washington to Henry Lee (May 6, 1793), in 12 *The Papers of George Washington: Presidential Series* 532, 533 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

²⁷¹ Letter from Henry Knox to Edward Telfair (Sept. 5, 1793), in 1 *American State Papers: Indian Affairs*, supra note 101, at 365.

²⁷² *Id.*

²⁷³ George Washington, Address to the United States Senate and House of Representatives (Dec. 3, 1793), in 14 *The Papers of George Washington: Presidential Series* 462, 465 (David R. Hoth ed., 2008).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

warring Southern tribes.²⁷⁶ Congress's refusal to authorize additional expeditions suggests that many legislators supposed that one invasion against an enemy was all that America could handle. We have found no one who said that Washington could order offensive operations against the Southern tribes in reliance upon his constitutional authority, either because the tribes had declared war or otherwise.

One mystery remains: Why didn't Washington (and his cabinet) read the 1790 Establishment Act to authorize offensive measures in the South? As one scholar has pointed out, those enactments do not explicitly limit their scope to operations against the Wabash Indians.²⁷⁷ In other words, if they authorized expeditions in the North, why not the South as well? This is a fair question. Two reasons help explain Washington's actions.

First off, the legal framework in the South differed significantly from that in the North. Although both regions saw significant conflict in the 1780s, the Creek and the Cherokee agreed to put differences aside and sign peace treaties in 1790 and 1791.²⁷⁸ Those treaties came into effect *after* Congress passed the two army Establishment Acts that authorized military offensives in the North.²⁷⁹ The earlier Acts now had to be read in light of two peace treaties. Did Congress mean to grant authority to launch expeditions everywhere along the frontier and for all time? We think the last in time rule perhaps suggested to Washington (and others) that he could not cite some generic statutes, written in response to explicit requests to carry war into the Northwest, as if they authorized expeditions in the South, and that too after the apparent establishment of peace.

Second, ground realities made it rather unlikely that the executive would adopt aggressive readings of the 1789 and 1790 Acts. Remember

²⁷⁶ See Sofaer, *supra* note 42, at 123–24; see also Committee Report Extract (Feb. 19, 1794), *in* 1 American State Papers: Indian Affairs, *supra* note 101, at 475, 475 (“That the President of the United States be authorized . . . to carry on offensive operations against such tribes or towns of Indians as may continue hostile”); Committee Report Extract (Apr. 8, 1794), *in* 1 American State Papers: Indian Affairs, *supra* note 101, at 476 (same); Committee Report (Jan. 17, 1797), *in* 1 American State Papers: Indian Affairs, *supra* note 101, at 621, 623 (recounting that the House, in December of 1792, “rejected a motion for authorizing the President to carry on offensive operations against some of the Southern tribes” but also speculating whether the President had such authority already).

²⁷⁷ Ramsey, *supra* note 34, at 180.

²⁷⁸ Treaty with the Creeks, Creek Nation-U.S., Aug. 7, 1790, 7 Stat. 35; Joshua S. Haynes, *Patrolling the Border: Theft and Violence on the Creek-Georgia Frontier, 1770–1796*, at 130–54 (2018); Treaty with the Cherokees, Cherokee Nation-U.S., July 2, 1791, 7 Stat. 39.

²⁷⁹ Compare Act of Sept. 29, 1789, ch. 25, 1 Stat. 95, and Act of Apr. 30, 1790, ch. 10, 1 Stat. 119, with Treaty with the Creeks, *supra* note 278, at 38, and Treaty with the Cherokees, *supra* note 278, at 41–42.

that by 1793, Native American forces had routed two invasions, legislators had expressed displeasure regarding the war's cost, and Washington had dispatched commissioners to the Northern tribes to try to end the war without further bloodshed. In other words, the nation was losing a costly war in the North, making the prospect of additional offensive expeditions in the South extremely unappealing, to say the least. Imagine if George W. Bush had sought an Iraqi AUMF in 2008, rather than in 2001, and one can see that the context of executive requests to Congress matters for their success. Given the precarious state of the Northwestern Confederacy War, expeditions against the Creek and Cherokee made no military or political sense.²⁸⁰ This was true even if Southern settlers (and Governors) believed otherwise.

Relatedly, the federal government needed to marshal its soldiers and other resources for the next offensive in the North.²⁸¹ Although Washington had dispatched peace commissioners to resolve the war, he and his advisors had little hope they would succeed.²⁸² Mindful of this reality, Washington had solicited intelligence about how much a Southern expedition would cost, how many men it would require, and how strong a force they would face.²⁸³ His advisors did not have good news: over five thousand soldiers would be needed to combat a hostile force of about six thousand, at a pay similar to that needed in the North.²⁸⁴ Struggling to obtain men (and authorization) for Wayne's legion, Washington could ill-afford a strategy that would demand another, larger force.

All told, Washington likely did not want a war in the South. And in any event, it was for Congress to decide the question, as he himself noted. That is why he sent materials to Congress in 1792 and 1793 related to the Creek and Cherokee, allowing Congress to judge whether to authorize one or more expeditions. Despite the insistence of some Southerners that only offensive measures could protect settlers in the South, Congress declined to authorize offensive campaigns. Congress's inaction spoke volumes, and Washington drew the right lessons. One costly and

²⁸⁰ See Letter from Henry Knox to Edward Telfair (May 30, 1793), in 1 *American State Papers: Indian Affairs*, supra note 101, at 364.

²⁸¹ See *id.*

²⁸² Hogeland, supra note 29, at 268–78.

²⁸³ See Memorandum from Henry Knox & Andrew Pickens to George Washington (July 24, 1793), in 13 *The Papers of George Washington*, supra note 269, at 281, 281–83.

²⁸⁴ *Id.* at 281–85.

uncertain offensive war was enough. By no means would the President start or sanction an illegal war.

In sum, Washington and his cabinet believed that he could not order offensive expeditions merely because other nations had declared war. Moreover, in failing to authorize offensive expeditions in the South, Congress agreed. This conception of presidential and congressional authority arose from a shared understanding of the Declare War Clause. Because only Congress could declare war, only Congress could decide whether *federal* expeditions were appropriate against nations that had already declared war.²⁸⁵ Absent such a congressional declaration, the President was limited to defensive measures, namely measures not rising to the level of declaring war.

B. The Nootka Sound Controversy

We opened with the Creek and Cherokee situation because, in some respects, it parallels the Northwestern Confederacy War. Washington fought one war, and refused to fight others, based on what Congress did (and did not) enact. But other events also confirm that statesmen read the Constitution as vesting the choice to wage war with Congress, including the decision whether to engage in invasions and expeditions. Here we consider the 1789–90 spat between Spain and Britain as well as the U.S. reaction to it. It too parallels the First War, in the sense that it overlaps with some discussions and decisions in the Washington administration.

In the late eighteenth century, both Spain and Great Britain tried to assert control over the Pacific Northwest. Between 1774 and 1789, Spain sent several expeditions to the area to reassert its long-held navigation and territorial claims.²⁸⁶ Britain likewise claimed the area, having sent a

²⁸⁵ Washington's claims about congressional supremacy in war were certainly correct when it came to federal institutions. Neither he nor the territorial Governor nor any other federal officer could wage war (order offensive measures) merely because another nation had declared war on the United States. Yet Washington and the cabinet were likely mistaken about the interplay of federal and state authorities. The Constitution gives states the right to wage war once attacked. U.S. Const. art. I, § 10, cl. 3 (permitting states to wage war when invaded or in imminent threat of invasion). Hence if the Cherokee or the Creek invaded states in the South (or those states were in imminent danger of an invasion), then those states could "engage in war" without regard to whether Congress exercised its power to declare war. In a sense, Washington and his cabinet read too much into the power to declare war, failing to see how it worked in conjunction with a state's continued authority to wage war in response to invasions, both real and imminent.

²⁸⁶ William Ray Manning, *The Nootka Sound Controversy* 308–12 (1905).

ship in the mid-1780s.²⁸⁷ Spain dispatched ships to the Nootka Sound, on the west coast of Vancouver Island, with orders to capture British vessels.²⁸⁸ The Spanish warships seized two British merchant vessels, triggering a crisis with Great Britain. The two nations seemed on the verge of war.²⁸⁹

In the aftermath, Great Britain seemed likely to retaliate. Washington asked officials how the United States should respond if Britain requested permission to move her troops from Detroit across American soil to attack Spanish Mississippi. His advisors differed.²⁹⁰ Ultimately, because Britain and Spain resolved the matter through diplomacy, the United States never had to react to an unauthorized British march across American territory.²⁹¹

Nonetheless, internal deliberations revealed one common thread. If Britain moved troops into the United States without asking permission (or moved them after permission had been denied), the President ought to summon Congress. Secretary of War Henry Knox wrote that if Britain marched troops without seeking permission, or in the face of a refusal, “it might be proper . . . to convene immediately the legislature . . . to lay the whole affair before them For the Congress are vested with the right of providing for the common defence, and of declaring war, and of consequence they should possess the information of all facts and circumstances thereunto appertaining.”²⁹² Evidently Knox thought that Congress would have to decide whether to punish an arrogant Britain. Vice President John Adams agreed. In the case of a march across the United States without permission, there are “but two Ways for Us to proceed one is War and the other negotiations.”²⁹³ Despite the violation of its sovereignty, however, America would not be obliged to “declare War at once.”²⁹⁴ Adams thereby equated going to war with declaring war. Finally, Alexander Hamilton noted that if Britain humiliated the United States by marching across American soil, there was “no alternative but to

²⁸⁷ *Id.* at 287.

²⁸⁸ Sofaer, *supra* note 42, at 101.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 101–02.

²⁹¹ *Id.* at 103.

²⁹² Henry Knox, Opinion of the Secretary of War (Aug. 29, 1790), in 17 *The Papers of Thomas Jefferson* 140, 142 (Julian P. Boyd ed., 1965); Letter from Alexander Hamilton to George Washington (Sept. 15, 1790), in 4 *The Works of Alexander Hamilton* 313, 342 (Henry Cabot Lodge ed., 1904).

²⁹³ John Adams, Opinion of the Vice President (Aug. 29, 1790), in 17 *The Papers of Thomas Jefferson*, *supra* note 292, at 137, 139.

²⁹⁴ *Id.*

go to war” and hence Congress would have to be convened to “take the most vigorous measures for war.”²⁹⁵

We doubt that in 1790 the cabinet thought that the President could take the nation to war against Native American tribes but not against Great Britain. Instead, officials recognized that while Congress had authorized warfare against certain tribes, it had not done so vis-à-vis Britain. In this context, calling Congress into session would have been necessary because it would have to decide whether to war against Britain.

C. The Neutrality Crisis of 1793

In 1793, France and Great Britain declared war against each other.²⁹⁶ Many Americans joined the French navy, hoping to injure Albion. George Washington admonished Americans that because the United States was at peace with both nations, Americans should not help either wage war. His message, later styled the “Neutrality Proclamation,” triggered a dispute about presidential power. The controversy triggered a debate between Pacificus (Hamilton) and Helvidius (Madison).

Too often forgotten is the consensus expressed across three branches: only Congress could take the nation to war. First, consider Chief Justice John Jay’s grand jury instructions. Jay told the jury that “Questions of peace and war . . . do not belong to courts of justice, nor to individual citizens . . . because the people . . . have been pleased to commit them to Congress.”²⁹⁷ In other words, neither an individual nor a group could resolve the question of war because it was “committed exclusively to Congress.”²⁹⁸ Should America “*immediately* . . . declare war? . . . Are we ready for war? These . . . considerations ought to . . . govern . . . those who . . . declare war.”²⁹⁹ Unless “war is constitutionally declared, the nation and all its members must observe and preserve peace.”³⁰⁰ Jay thus confirmed that questions of war rested with Congress, and everyone, the

²⁹⁵ Alexander Hamilton, Answers to Questions Proposed by the President of the United States to the Secretary of the Treasury (Sept. 15, 1790), in 6 *The Papers of George Washington*, supra note 105, at 440, 459.

²⁹⁶ See Charles Marion Thomas, *American Neutrality in 1793: A Study in Cabinet Government* 24 (1931).

²⁹⁷ John Jay, Charge to Grand Jury, Richmond, Virginia (May 22, 1793), in 3 *The Correspondence and Public Papers of John Jay* 478, 483–84 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891).

²⁹⁸ *Id.* at 484.

²⁹⁹ *Id.* at 484–85.

³⁰⁰ *Id.* at 485.

President included, had to preserve peace until Congress exercised its power to declare war.

On this point, members of the other two branches agreed. Writing as *Pacificus*, Alexander Hamilton said that “the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility.”³⁰¹ Though they differed greatly on the constitutionality of the Proclamation, Representative James Madison as *Helvidius* said the same: “In no part of the constitution is more wisdom to be found than in the clause which confides the question of war . . . to the legislature, and not to the executive department.”³⁰²

The basic point, which as we have seen, many people articulated in numerous contexts, is that Congress, via bicameralism and presentment, decided whether the nation should wage war. The President, in contrast, could not “declare war.” Relatedly, the President could not take the nation to war, for to wage war against a foe would be to declare war against it.

* * *

Repeatedly and publicly, our first President abjured authority to wage war. He understood that he lacked constitutional power to authorize a first strike, an expedition, or a march to destroy Indian towns. In fact, he knew that he lacked such power even when a nation already had declared war. Though several Native American nations declared war on the United States, Washington invariably looked to the constitutional authority—Congress—for the nation’s response. He sought no solutions through an aggressive reading of his own powers, nor to wrest away a new power from Congress. Troops could repel an invasion and defend themselves, and thereby kill the enemy. But if they were to invade the enemy, engage in offensive operations, Congress needed to stir itself.

We end this Part with two discussions of the war power, one from citizens and one from Washington. In 1793, Hartford citizens wrote to Washington to praise the Constitution:

The prerogative of Kings to make war at their sole will and pleasure, has for ages been wantonly exercised . . . Happy is the condition of

³⁰¹ Alexander Hamilton, *Pacificus* No. 1 (June 29, 1793), in 4 *The Works of Alexander Hamilton*, supra note 292, at 432, 443.

³⁰² James Madison, *Letters of Helvidius*, No. 4 (1793), in 6 *The Writings of James Madison* 171, 174 (Gaillard Hunt ed., 1906).

our country! whose free Constitution secures to the People the sole right of declaring war by the voice of their Representatives, and imposes the most solemn obligations on the supreme Executor of its laws, to guard its peace, till such declaration be made of the public will.³⁰³

In other words, Presidents—the “supreme Executor[s]”—could not “make war” at their pleasure. Rather, Presidents were to safeguard peace until Congress declared war.

Later in his presidency, Washington said the same. He told a southern tribe in 1795 that if he gratified their desire for an American attack on their rivals, he would enmesh the United States in a “general war.”³⁰⁴ “But the power of making such a war belongs to Congress (the Great Council of the United States) exclusively. I have no authority to begin such a war without their consent.”³⁰⁵

There is no way that Washington was repeatedly declaring that he could not wage war because only Congress could declare it while simultaneously waging (and therefore declaring) it against the Northwestern Confederacy. Washington was nothing if not punctilious. When he violated the Constitution, he publicly admitted it.³⁰⁶ He confessed constitutional error because he strove to establish practices that reflected the Constitution’s true meaning and knew that wrongful practices would pervert how people read the Constitution.

Some modern lawyers have woefully misread the legal basis for the expeditions against the Northwestern Confederacy. But we cannot blame Washington for that misperception. He repeatedly voiced the consensus view that only Congress could take the nation to war, even when another nation had attacked the United States. And he repeatedly denied having a war power or authority to wage war against the enemies of the United States. Washington preserved, protected, and defended the Constitution, including its provision that only Congress could declare war.

³⁰³ Letter from the Citizens of Hartford, Connecticut, to George Washington (Aug. 2, 1793), in 13 *The Papers of George Washington*, supra note 269, at 319, 319–20.

³⁰⁴ George Washington, Address to the Chickasaw Nation (Aug. 22, 1795), in 18 *The Papers of George Washington: Presidential Series 576, 577* (Carol S. Ebel ed., 2015).

³⁰⁵ *Id.*

³⁰⁶ See, e.g., Letter from George Washington to the U.S. Senate (Feb. 28, 1793), in 12 *The Papers of George Washington*, supra note 270, at 238 (because the Constitution forbade his nominee to the Supreme Court from serving on it, Washington deemed the nomination “null by the Constitution”).

V. OTHER WAR-POWERS LESSONS

Thus far, our discussion of America's earliest war under the Constitution yields two chief lessons. First, that Congress's power to declare war encompassed authority to decide whether to wage war. Rather than enjoying the trifling power to issue a high-sounding decree with some seemingly portentous words ("declare war"), Congress's power to declare war was principally a power to *choose* to fight a war. That is clear from the eighteenth-century sense of the phrase and the many discussions of Congress's authority. Through bicameralism and presentment, legislators would decide whether the nation ought to wage war against another nation.

Second, and relatedly, that Congress's power to declare war was *exclusive*. While the Constitution never explicitly prohibited presidential wars, the grant to Congress was universally understood as having negative implications. To grant this power to Congress was to deny it to the President. For good reason, it never occurred to Washington that he had constitutional authority to declare wars, either via formal declarations or via invasions. That is why he (and his cabinet) repeatedly denied that Presidents had power to order offensive actions, even after other nations had declared war. That is why Washington never waged war against the Northwestern Confederacy on his own authority. And that is why he never ordered offensive operations against the Creeks or Cherokee, both of whom had declared war. Taking the war to the enemy via incursions, expeditions, offensive operations—even when done to protect citizens and frontiers—was permissible only after Congress authorized such measures. Presidents could thwart, repel, and kill invaders, but no more.

The combination of congressional power and presidential inability revealed how the Constitution had curbed the "dog of war." Though Thomas Jefferson described the Constitution as "transferring the power of letting [the dog of war] loose from the Executive to the Legislative body,"³⁰⁷ a more accurate description is that Congress, acting as a plural executive, enjoyed the executive power of declaring war as had its predecessor, the Continental Congress. Except that now, the dog of war was chained via the prosaic power of process, namely bicameralism and presentment.

³⁰⁷ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *The Papers of Thomas Jefferson* 392, 397 (Julian P. Boyd ed., 1958).

In this Part, we draw additional lessons. Among other things, we consider how to declare war, implied duties, and the regulation of warfare.

A. How To Declare War

In 1789, and again in 1790, Congress authorized President Washington to use the army and the militias to wage war against the Northwestern Confederacy. This was an exercise of its power to declare war. To be sure, Congress did not deploy the precise phrase found in the Constitution. But the Constitution authorizes governmental actions of various sorts; it does not prescribe the words that must be used to take those actions. Presidents can appoint to offices without using the word “appoint.” Judges can wield the “judicial power” without using the phrase.

The same principles apply to Congress. It can “regulate commerce” without using either word. In deciding *Gibbons v. Ogden*, John Marshall concluded that a 1793 shipping statute was a proper exercise of Congress’s power to “regulate commerce,” despite the fact that the Act nowhere mentions “commerce.”³⁰⁸ The point is no less true for “laying taxes.” Anyone familiar with modern politics understands the tendency to use other labels—“shared responsibility payments,” “fees,” “revenue enhancements.” Yet no one should doubt that Congress is laying taxes.

What is true for appointing, judging, regulating (interstate) commerce, etc., is equally true for declaring war. That power can be exercised without ever using “declare war” or its components. While modern commentators focus obsessively on the presence or absence of a particular phrase or word, the Founding generation was more perceptive. They knew that, in this case at least, substance trumped form. After all, as noted earlier, nations generally declared war *without issuing any words*, say, by launching an invasion. Given that most nations declared war in the eighteenth century without the use of words, it was obvious that a nation could use a text to declare war without necessarily using the phrase or its components. All that mattered is whether the document promised, commanded, or authorized warfare. Recall that the Declaration of Independence was seen as a declaration of war.

Admittedly, whenever one does not use the phrase (or an extremely close equivalent), there is a risk of confusion. For instance, Senator

³⁰⁸ 22 U.S. (9 Wheat.) 1, 1–2 (1824); see also Act of Feb. 18, 1793, ch. 8, 2 Stat. 305 (requiring the enrollment, licensing, and regulation of ships or vessels in the coasting trade).

William Maclay of Pennsylvania complained that the Native American “war is undertaken without the shadow of authority from Congress.”³⁰⁹ Had Congress used “declare war” or a very close approximation, Maclay would not have been misled. But Maclay’s misperception does not undermine our conclusion that Congress must order or authorize war if the President is to fight it. In fact, his complaint clearly *confirms* our constitutional point (Presidents cannot take the nation to war) even if some might suppose it casts doubt on our statutory claim.

On that latter point—whether there was statutory power to conduct a war—Maclay was utterly mistaken. Congress granted authority to the President in the face of an express request to conduct offensive operations and “carry war” into Native American territory.³¹⁰ Congress authorized measures to protect inhabitants in a context where it was clear that defensive measures would be insufficient. Hence Congress knew that the President might order expeditions to protect the frontiers. There was far more than the shadow of authority—there was the actual substance.

It was far more common for American statesmen to understand that Congress had authorized the war, for Maclay’s comment stands alone. Consider this complaint voiced in 1792, by an American who regarded the war as evil: “Could the late Congress [the first Congress] when they commenced this war, like the patriotic Congress of 1775, with confidence appeal to the Ruler of the Universe for the purity of their intentions[?]”³¹¹ The critic’s point is that whereas the War of Independence was just, the First War was not. Our point is that *Congress* had “commenced this war,” had set the wheels in motion by granting Washington the authority that he and St. Clair sought, namely the power to act offensively and thereby carry war into Native settlements.

Better that we should keep in mind John Adams’s perceptive remark from 1800. In several laws, Congress had authorized limited offensive measures against French vessels. Though it never expressly “declared war,” it clearly had done so. Said Adams, “Congress has already in my judgment, as well as in the opinion of the judges at Philadelphia, declared war within the meaning of the constitution against [France], under certain

³⁰⁹ Journal of William Maclay: United States Senator from Pennsylvania, *supra* note 241, at 396; see also *id.* at 409 (saying that war was started “without the authority of Congress”); *id.* at 349 (same).

³¹⁰ Letter from Arthur St. Clair to George Washington, *supra* note 38, at 38, 39.

³¹¹ Observer No. 1, Phila. Gen. Advertiser, Feb. 20, 1792, at 2.

restrictions & limitations.”³¹² Adams was summarizing opinions in *Bas v. Tingy*, where the Justices noted that France was an enemy because Congress had authorized a limited war.³¹³ The same could be said of the Northwestern Confederacy War. In 1789 and 1790, Congress had “declared war within the meaning of the Constitution.”

In short, there is nothing magical about the phrase “declare war,” and it is a mistake to say that Congress’s first declared war was the War of 1812. The War of 1812 was the first time Congress actually used something like the phrase “declare war.” Specifically, Congress said, “war . . . is hereby declared to exist.”³¹⁴ But the fact remains that Congress first exercised its power to declare war in the Republic’s earliest years, when it authorized offensive measures necessary to protect frontier inhabitants from the attacks of Native American tribes.

B. Implied Duty and Discretion

In the eighteenth century, those with the power to declare war commanded the use of force. For instance, when monarchs declared war, they invariably ordered their militaries (and sometimes their citizens) to wage it.³¹⁵ In creating a military and granting the President the authority to call forth the state militias to protect frontier inhabitants, we think the President was obliged to use his authority—constitutional and statutory—to protect those citizens. To be sure, the Act does not, by its express terms, impose a duty to protect settlers.³¹⁶ But it was implied, in much the same way that a law prohibiting some immoral conduct and imposing punishment implicitly calls upon the executive to enforce the prohibition and the penalty.

In satisfying his duty, Washington had discretion. He chose an initial strategy of pursuing peace—negotiations—as a means of achieving congressional ends—protecting the inhabitants. Washington wrote to St. Clair, “I would have it observed forcibly that a War with the Wabash Indians ought to be avoided by all means consistently with the security of the frontier inhabitants, the security of the troops and the national

³¹² Letter from John Adams to John Marshall (Sept. 4, 1800), <https://founders.archives.gov/documents/Adams/99-02-02-4565> [<https://perma.cc/8RBX-GJ62>].

³¹³ 4 U.S. (4 Dall.) 37, 42–43 (1800).

³¹⁴ Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring war between the United States and the United Kingdom).

³¹⁵ Prakash, *supra* note 159, at 113–14.

³¹⁶ Act of Sept. 29, 1789, ch. 25, 1 Stat. 95.

dignity.”³¹⁷ But Washington understood that more extreme measures might be necessary: “[I]f after manifesting clearly to the [I]ndians the dispositions of the general government for the preservation of peace . . . they should continue their incursions, the United States will be constrain’d to punish them with severity.”³¹⁸ Again, if negotiations were fruitless, merely patrolling the frontier would be ineffective. In that case, Washington would be obliged to “punish” the tribes with an invasion. After all, at that point no other measure (to his mind) could protect the frontier inhabitants.

Did Congress essentially delegate its war power to the President? In his book on early military policy, Richard Kohn reports that after the Senate amended the House bill to add authority to call forth the militia to protect the frontiers, the “House objected, some Federalists included.” Why? “[B]ecause the wording gave the President unconstitutional power to start a war.”³¹⁹ Kohn argues that only later did Congress understand “that it had given the President permission to wage war.”³²⁰

We do not believe that Congress did anything amiss. For present purposes, we assume that the Constitution implicitly forbids Congress from delegating its powers. But we do not suppose that Congress actually delegated the power to declare war. As noted, the statutes are not best read as telling the President: do whatever you wish, including leaving settlers unprotected. Instead, the President had a duty to protect the settlers, but discretion as to the best means of doing so. Hence rather than a simple transference of the power to declare war, this was more in the nature of a duty to wage war should that be the best means of protecting the frontiers.

To be sure, Congress could have asked Washington to negotiate and then exercised its power to declare war only if those negotiations proved fruitless. That would have left the decision to wage war entirely in its hands. But given the context and the perceived need to give peace one more chance, we do not believe Congress delegated its power to declare war. The simple fact that is that no matter how detailed a statute, it is always the case that Congress could have written a more detailed version. Its failure to pass a more precise law is not, without more, necessarily an unconstitutional delegation of legislative power. If it were, every law would constitute an unconstitutional delegation of legislative power

³¹⁷ Letter from George Washington to Arthur St. Clair, *supra* note 91, at 141.

³¹⁸ *Id.*

³¹⁹ Kohn, *supra* note 49, at 97.

³²⁰ *Id.* at 98.

because, again, every law could have been more precise, thereby granting less discretion.

In any event, we believe that many legislators rather expected that the President might have to wage war. While negotiations would be tried, many must have recognized that American and Native American claims were irreconcilable. It seems to us that because a lasting peace *on American terms* was but a faint hope, it was almost certain that Congress expected the President to “carry war,” to act “offensively” against the tribes. That is, of course, what happened.

C. Regulating War

Despite granting the President authority to decide how best to protect the frontier, Congress’s full control over the war remained intact. It remained deeply involved, particularly as defeats accumulated. Congress’s principal levers were the size of the army, the supply of pay and materiel, and the authority to call forth the militia. Per the Constitution, Congress decided all three.

Consider the reaction after Harmar’s 1790 failure. Behind closed doors, Congress weighed the President’s request for additional forces.³²¹ Paine Wingate, a Senator from New Hampshire, summarized the level of scrutiny in a letter to New Hampshire’s Governor, Josiah Bartlett:

The Secretary at war has reported as his opinion that there will be occasion for another expedition against the western Indians and that three thousand men will be necessary for the purpose, though we have been told that the object of the former expedition has been accomplished. . . . What congress will do is yet doubtful; any further measures of a hostile measure will be agreed to with reluctance, if at all. The former expedition was undertaken by the direction of the President under the general power he had of ordering the regular troops & of calling out the militia for the defence and protection of the frontiers. No doubt he was persuaded [sic] that this was the most adviseable mode of accomplishing the purpose, though the event has not been correspondent with his wishes.³²²

Wingate’s description reveals that congressional agreement to a new expedition would be requisite. As a practical matter, the President could

³²¹ *Id.* at 110.

³²² Letter from Paine Wingate to Governor Josiah Bartlett, *supra* note 119, at 548.

not have mounted another expedition using the depleted forces that survived the first expedition. Hence when Congress authorized a larger army, it was deciding to approve another expedition.

In 1792, the process repeated. Recall that extended debate arose after legislators introduced a bill to meet the request for additional forces, an increase of about three thousand.³²³ Some members favored trying to purchase a peace, to pay subsidies to the Native Americans. Others said that the nation should stick to purely defensive protection. Both groups wanted no more expeditions, a desire that would require a new statute that would retract (and thereby deny) offensive authority.³²⁴ After a vigorous debate, Congress authorized the creation of three new regiments, each with 960 soldiers, thereby leaving in place the pre-existing duty to protect the frontier and grants of authority to conduct an expedition.³²⁵ Again, the grant of additional troops constituted approval of a third expedition.

More generally, we think it evident that the President and legislators supposed that Congress could direct the Commander in Chief. In a letter to a Governor requesting authority to invade Native American towns in the South, Henry Knox, the Secretary of War, said the following: “The subject of the Southwestern frontiers is before Congress. Whatever they direct, will be executed by the Executive.”³²⁶ This is the language of an agent subservient to Congress’s statutes, not the language of someone who imagines that Congress cannot “direct” the Commander in Chief. As noted earlier, Knox later said he was “instructed, specially, by the President, to say, that he does not conceive himself authorized to direct any [an expedition], more especially, as . . . Congress . . . did not think [it] proper to authorize or *direct* offensive operations.”³²⁷ Knox spoke of Congress’s failure to “direct,” a verb that suggests authority to *compel* an expedition. “Direct” also signals a power to micromanage, going beyond simply commanding an expedition to specifying its particulars.

Knox had been Secretary of War twice—he was the Secretary before and after the Constitution’s creation. In the Continental Army, he had earned a generalship and had famously transported needed cannon

³²³ 2 Annals of Cong. 337–39 (1792).

³²⁴ Id. at 338, 339.

³²⁵ Act of Mar. 5, 1792, ch. 9, 1 Stat. 241 (providing for the protection of the frontiers with additional troops).

³²⁶ Letter from Henry Knox to William Blount (Dec. 29, 1794) in 1 American State Papers: Indian Affairs, supra note 101, at 634, 634–35.

³²⁷ Letter from Henry Knox to William Blount, supra note 266, at 634 (emphasis added).

hundreds of miles to Boston during the early days of the war, over snow-covered mountains and frozen rivers.³²⁸ Knox knew something of war, commanders in chief, and the power to declare war. And he was admitting that Congress could “direct” an expedition.

We must also bear in mind that the second letter was written based on instructions from Washington. Washington “specially” told Knox to inform the Governor that only Congress would decide whether they would be offensive operations and that Congress had neither “authorize[d] or direct[ed] such operations.” There is no need to recount Washington’s military career. His instruction to Knox reveals that he too knew that Congress could “direct” a military expedition.

Similarly, Washington’s 1792 message to Congress spoke of the executive conforming to congressional will. Governor William Blount had told Washington of the Chickamauga Cherokee declaring war against the United States.³²⁹ Washington wrote to the chambers, saying, “The nature of the subject does, of itself, call for your immediate attention to it; and I must add, that, upon the result of your deliberations, the future conduct of the Executive will, on this occasion, materially depend.”³³⁰ The President enclosed his response to Blount: The President “does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.”³³¹ Clearly Washington was saying that Congress would decide whether offensive operations ought to be conducted. His “future conduct” would turn on congressional instructions.

Our reading has the added benefit that it is consistent with the thoroughgoing regulation of warfare during the Quasi-War with France. In that naval war, Congress exercised its power to declare war via a series of statutes.³³² Congress regulated the means of warfare—the President

³²⁸ Noah Brooks, *Henry Knox: A Soldier of the Revolution, Major-General in the Continental Army, and Washington’s Chief of Artillery* 40–41 (1900).

³²⁹ See Letter from George Washington to the U.S. Senate & House of Representatives, *supra* note 261, at 480.

³³⁰ *Id.*

³³¹ Letter from Henry Knox to William Blount (Nov. 26, 1792), *in* 4 *The Territorial Papers of the United States, 1790–1796*, at 220, 220–21 (Clarence Edwin Carter ed., 1936).

³³² Act of June 25, 1798, ch. 60, 1 Stat. 572 (authorizing private seizure of French armed vessels); Act of June 28, 1798, ch. 63, 1 Stat. 575 (appropriating funds for additional regiments); Act of July 9, 1798, ch. 68, 1 Stat. 578 (authorizing public seizure of French armed vessels).

could use the navy to fight.³³³ It regulated targets—American ships could attack armed French vessels only.³³⁴ And it prescribed the military theater—ships could be captured on the high seas and in American waters.³³⁵

The other two branches agreed that Congress could micromanage the war's conduct. President John Adams signed these bills into law, never raising any constitutional objection to the regulation of military operations. In *Bas v. Tingy*, Justice Samuel Chase said, “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If . . . a partial war is waged, its extent and operation depend on our municipal laws.”³³⁶ In the same case, Justice Oliver Paterson noted, “As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations.”³³⁷ In *Little v. Barreme*, Chief Justice John Marshall held that a navy captain's capture of a ship during war was “unlawful.”³³⁸ Why? Because Congress had authorized the capture of certain ships and not others.³³⁹ Evidently the entire Court agreed that Congress could authorize a limited war, leaving other measures “unlawful” as they were not authorized by the entity empowered to declare a general or partial war.

That Congress, from 1789 to 1795, chose not to micromanage the First War reflects a commendable forbearance on its part. Congress often is poorly positioned to micromanage. But that wise self-control was not borne from a *constitutional* sense that Congress could not regulate the conduct of military operations.

* * *

We draw several lessons. First, the Founders did not believe Congress had to use the words “declare war” or issue a “declaration” to exercise its underlying power. Given global practices, the absence of a constitutional

³³³ While Congress augmented the army at the time, in anticipation of a possible invasion, it never authorized the army to attack France or its possessions. In contrast, Congress authorized a limited war against France on the seas. Act of July 9, 1798, ch. 68, 1 Stat. 578.

³³⁴ *Id.* (authorizing the armed forces to seize “armed French vessel[s]”).

³³⁵ *Id.* (authorizing capture within the jurisdictional limits of the United States or the high seas).

³³⁶ 4 U.S. (4 Dall.) 37, 43 (1800).

³³⁷ *Id.* at 45.

³³⁸ 6 U.S. (2 Cranch) 170, 179 (1804).

³³⁹ *Id.* at 177–78.

requirement to use specific words makes sense.³⁴⁰ While many modern commentators imagine that a nation does not declare war unless it uses the phrase or similar phrases, in the eighteenth century most understood that a nation could declare war without uttering the phrase.³⁴¹

Second, Congress supposed that it could impose an implicit duty to protect frontier inhabitants and grant discretion to decide the best means of fulfilling the duty. This was not quite a delegation as much as it was a reliance on Washington's sound judgment. The last pre-ratification resolve authorized the frontier's commanding officer to decide what operations would best protect settlers.³⁴² The new Congress saw no reason to deviate from these practices in its first declaration of war, leaving it to the President to try negotiations and promise war should peace prove impossible.

Third, Congress, and the executive branch, recognized that the former might direct the conduct of the war. Congress could manage operations through actual legislation, as Washington and Knox noted. Moreover, by failing to grant the executive authority that it requested, Congress could essentially veto those executive initiatives that turned on the grant of additional powers or resources. In this way, through action and inaction, Congress could direct and influence the conduct of the war that would be under the day-to-day control of the Commander in Chief.

CONCLUSION

By today's standards, the Northwest Confederacy War seems tiny, with American field strength never more than a few thousand. Although this conflict may not comport with modern conceptions of a "war," *the size of a conflict* does not matter for constitutional purposes. A small war, one which witnessed the greatest battlefield defeat of the United States Army, is no less a war. And its seeming smallness supplies no reason for us to minimize that war's profound constitutional lessons.

Certainly, no one at the time minimized the First War. From the perspective of Americans of that era, it was absolutely horrific. There were over one thousand U.S. combat deaths. An equivalent loss of life today would run over eighty-three thousand fatalities. If the nation lost

³⁴⁰ Maurice, *supra* note 169, at 12–33.

³⁴¹ *Id.*

³⁴² 34 Journals of the Continental Congress, *supra* note 74, at 412 (Aug. 12, 1788) (Roscoe R. Hill ed., 1937).

over eighty-three thousand soldiers in a conflict today, no one would regard it as a minor skirmish. If one considers its cost, the federal government spent upward of five million dollars. Astonishingly, this was almost five-sixths of total federal expenditures for that period.³⁴³ Imagine the size of a modern war that would constitute eighty-three percent of federal expenses. Finally, the Treaty of Greenville, ratified in the wake of Anthony Wayne's triumph, was styled a "treaty of peace" and designed to "put an end to a destructive war."³⁴⁴

For our purposes, the Northwest Confederacy War stands as a critical war for understanding the allocation of war powers. With offensive operations beginning the year after the Constitution went into effect, the war represents the first exercise of each branch's authority over warfare. As a result, the First War helps shed light on the original meaning of the War Constitution.

First, Congress had the exclusive power to declare war. Washington and his subordinates did not take offensive operations until Congress authorized them to do so, despite having a force in the field and ongoing attacks on Americans. Second, the power to declare war—to decide to wage it—authorized Congress to grant the President some discretion. The issue was whether expeditions would serve the goal of protecting frontier inhabitants. The first and second Establishment Acts vested the President with the discretion to go to war if he thought it would serve the statutory purpose of protecting frontier inhabitants. Third, Congress did not have to use the phrase "declare war" to exercise its power to declare war. Indeed, neither Establishment Act referred to "war." Nonetheless, Washington used his statutory authority to launch multiple expeditions into enemy territory with the purpose of destroying their settlements. Finally, Congress had power to superintend the war through its ability to change the size of the military, fund the military, and direct military operations.

These early practices, ones that reflect the contours of the original War Constitution, stand in stark contrast to the Office of Legal Counsel's understandings. Per the OLC, the President can initiate hostilities without congressional approval. In fact, the OLC cites the First War for the proposition that the President may wage hostilities without congressional

³⁴³ Calloway, *supra* note 49, at 446.

³⁴⁴ Treaty with the Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Pottawatimies, Miamis, Eel-Rivers, Weeca's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, 7 Stat. 49.

approval. But as we have revealed, this war was not started on the President's constitutional authority. Rather, Washington relied upon congressional grants, repeatedly stating as much. Moreover, during the war Washington denied that he could order offensive operations, noting that only Congress had the power to declare war. His cabinet members repeatedly expressed the same view, both in the context of Native American wars and in other contexts. George Washington—"First in war, first in peace, and first in the hearts of his countrymen"³⁴⁵—was not the first President to usurp Congress's power to declare war and to illegally call forth and utilize the militias.

We are originalists. Faithful originalists should acknowledge that only Congress may take the country to war, that it may phrase its exercise of its power to declare war as it sees fit, and that it may convey discretion to President, or alternatively, direct his conduct of Congress's war.

For those who suppose that practice can alter the Constitution's meaning, it may well be that there have been so many presidential wars that chief executives have by now acquired a power to wage war unilaterally. Those who believe in practice-makes-perfect—that practice amends the Constitution—can cite wars like Korea, Kosovo, Libya, and now Syria and perhaps Iran. The one war they cannot rely upon is the Constitution's First War. Our first Commander in Chief did not profane his oath to preserve, protect, and defend the Constitution by flagrantly breaching the original Constitution. The Father of the Nation is not the Father of the Modern War Constitution and the claim that Presidents can make war at pleasure.

³⁴⁵ Henry Lee, *Funeral Oration on the Death of General Washington* 14 (Boston, Joseph Nancrede & Manning & Loring 1800).