

# The Founders' Declaration of War: The Declare War Clause and the Constitutionality of Undeclared War

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## ABSTRACT

*The Constitution grants Congress the power to declare war. Although a plain reading of the Declare War Clause suggests that Congress has the exclusive power to initiate armed conflict, historical practice indicates otherwise. Congress has only declared war five times in American history and every American armed conflict since World War II was waged without a declaration of war. Opposition to the Vietnam War and the 2003 Iraq War raised concerns about unconstitutional wars.*

*This Note examines whether the Founders would have considered it constitutional for the President to initiate military action absent a congressional declaration of war. Analyzing the theoretical and political foundations of the declaration of war reveals that the Founders believed war powers are shared between the executive and legislature. Yet, the geopolitical reality of the early United States influenced how the President exercised war power in practice. The Quasi-War with France set a precedent that the First Barbary War reinforced: the President can initiate armed conflict without a formal congressional declaration of war if force is used defensively, the conflict is limited, and Congress provides partial authorization.*

## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	280
II. THE THEORY AND POLITICS BEHIND THE DECLARATION OF WAR . . . . .	281
A. <i>The British Backdrop</i> . . . . .	281
B. <i>The Articles of Confederation</i> . . . . .	284
C. <i>The Constitutional Convention</i> . . . . .	285
D. <i>The Proclamation of Neutrality Debate</i> . . . . .	287
III. PRESIDENTIAL WAR POWERS IN PRACTICE . . . . .	293

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A. <i>The Quasi-War with France</i> . . . . .	293
B. <i>The Quasi-War Cases</i> . . . . .	296
C. <i>Jefferson's Barbary War</i> . . . . .	300
IV. CONCLUSION . . . . .	303

## I. INTRODUCTION

Every American armed conflict since World War II was waged without Congress declaring war. Throughout the second half of the twentieth century, presidential critics began to worry that each administration was growing more comfortable with unilaterally initiating military operations. In that time, much of the American public began to perceive the declaration of war as an anachronism. Popular opposition to the Vietnam War from the late 1960s to the mid 1970s perpetuated the view that the President could arbitrarily mobilize the country's armed forces.<sup>1</sup> The public echoed those concerns after the 2003 invasion of Iraq, during the U.S. Military's protracted engagement in the Second Iraq War.<sup>2</sup>

Critics of American involvement in conflicts such as Vietnam and Iraq accuse the executive branch of waging "unconstitutional" wars.<sup>3</sup> According to that theory, the President may not initiate armed conflict unless Congress formally declares war because the U.S. Constitution gives only Congress the power to declare war. This criticism is reasonable at first glance. The Declare War Clause, art. I, § 8, cl. 11, is one of the best known passages of the Constitution among the general public. The text reads: "The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."<sup>4</sup>

Indeed, a plain reading of the text suggests that Congress has the exclusive power to initiate armed conflict. However, historical practice flies in the face of that reading. Congress has only declared war five times throughout history: in the War of 1812, the Mexican-American War in 1848, the Spanish-American War in

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1. See Arthur Schlesinger, Jr., *Congress and the Making of American Foreign Policy*, FOREIGN AFFS. (Oct. 1 1972), <https://www.foreignaffairs.com/united-states/congress-and-making-american-foreign-policy> [<https://perma.cc/4NGC-HA2U>] ("[Concerns about] foreign policy becom[ing] the property of the executive [have] acquired special urgency . . . because of the Indochina War, with its aimless persistence and savagery.").

2. See SARAH BURNS, *THE POLITICS OF WAR POWERS: THE THEORY AND HISTORY OF PRESIDENTIAL UNILATERALISM* 18 (2019) ("Presidents George W. Bush, Obama, and Trump asserted breathtaking interpretations of what the executive can do unilaterally.").

3. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 171 (1996) ("Critics of the current war powers landscape accuse Presidents from Harry Truman to George Bush of waging 'unconstitutional' wars.").

4. U.S. CONST. art. I, § 8, cl. 11.

1898, World War I in 1914, and World War II in 1941.<sup>5</sup> An investigation into the Founders reveals that the original understanding of the Declare War Clause is more consistent with historical practice than with modern criticism.

This Note addresses the question of whether the Founders would have considered it constitutional for the President to initiate military action without a declaration of war. The paper is divided into two sections.

Part 1 traces the theoretical and political foundations of the declaration of war, from the British model in the eighteenth-century, through the Articles of Confederation and the Constitutional Convention, and to the period during the Proclamation of Neutrality and Pacificus-Helvidius debate.

Part 2 illustrates how the President's ability to initiate armed conflict unfolded in practice in the Adams and Jefferson administrations. First, the section analyzes the Quasi-War with France from 1798–1800. This paper argues that the Quasi-War set a political and legal precedent that gives the President the power to commence armed conflict absent a Congressional declaration of war under three conditions: for limited wars, for defensive wars, and when Congress provides some degree of authorization short of a declaration of war. The Supreme Court confirmed this in three cases arising out of the Quasi-War: *Bas v. Tingy*, *Little v. Barreme*, and *Talbot v. Seeman*.<sup>6</sup> Second, the section analyzes the First Barbary War during Thomas Jefferson's presidency, in which Jefferson largely adhered to the Quasi-War precedent.

The conclusion proposes an answer to the question guiding this inquiry and imagines how the Founders would have thought about the constitutionality of the Vietnam War and the Second Iraq War. The prevailing consensus among the Founders was that the President could initiate military action without a declaration of war under the conditions that the Quasi-War established and the First Barbary War reinforced.

## II. THE THEORY AND POLITICS BEHIND THE DECLARATION OF WAR

### A. *The British Backdrop*

First, it is useful to understand how the eighteenth-century British government treated war powers to understand the context in which the American Founders designed and implemented the power to declare war in the U.S. Constitution. The king had the exclusive power to declare and wage war in eighteenth-century Britain. This power influenced the Founders in three ways. First, the Founders understood the political theory supporting the British system: under the British social contract, the people surrendered their individual capability to wage war to the king as their sovereign. Consequently, this social contract restricted the British subjects' liberty regarding matters of war. Second, the fact that war

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5. Yoo, *supra* note 3, at 177.

6. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

powers were a royal prerogative meant that the power to declare war was an executive, rather than parliamentary function, in Great Britain. Therefore, by shifting the power to declare war to Congress in the United States, the Founders needed to determine whether they considered war powers an inherently legislative function or merely an executive function that the Constitution granted to Congress as an exception. Third, the Founders recognized that a monarch could easily abuse the power to make war and sought to mitigate the ability of the American President to exploit his authority as Commander in Chief.

The consensus among eighteenth-century political theorists was that war powers properly belonged to the king as the agent of the people.<sup>7</sup> According to John Locke, men voluntarily give up their absolute, but unsecure, freedom in the state of nature and unite in a Commonwealth for mutual protection and preservation of property.<sup>8</sup> Once the Commonwealth is formed, the whole community operates as “one Body in the State of Nature, in respect of all other States or Persons out of its Community.”<sup>9</sup> In other words, the people are subsumed into the state internally, but the state still operates in an anarchic international system externally. Thus, Locke further explains that the king had the power to conduct foreign relations. Locke called the foreign relations powers “federative” powers, which “contain[] the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.”<sup>10</sup> In short, the king has absolute power to act on behalf of the people within the international system. Locke’s theory of government is also consistent with Blackstone’s analysis of the king’s constitutional powers.

In his *Commentaries on the Laws of England*, Blackstone stated that the king “has the sole prerogative of making war and peace.”<sup>11</sup> In Blackstone’s view, this power was based in natural rights that the people granted to the king:

“[T]he right of making war, which by nature subsisted in every individual, is given up by all private persons that enter society, and is vested in the sovereign power: and this right is given up not only by individuals, but even by the intire [sic] body of people, that are under the dominion of a sovereign.”<sup>12</sup>

In other words, although every individual has the right to make war in a state of nature, individuals must give up that right to the king as a precondition for entering society. Locke described how the people relinquish their freedom in

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7. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 245 (University of Chicago Press ed., 1979) (1765) (explaining that the King served as the “delegate or representative of his people.”).

8. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 411 (Peter Laslett ed., Mentor Books 1963) (1689).

9. *Id.*

10. *Id.* § 146.

11. BLACKSTONE, *supra* note 7, at 249–51.

12. *Id.*

exchange for the king's protection and Blackstone specified that this included the freedom to decide whether or not to engage in war at all.

Furthermore, Blackstone believed that the declaration of war was necessary because citizens forgo the right to make war without the sovereign's authorization.<sup>13</sup> Private citizens who use violence without authorization are considered robbers or pirates.<sup>14</sup> In contrast, a declaration of war functions to distinguish military hostilities from private, violent crime. Here, Blackstone draws on the seventeenth-century Dutch writer Hugo Grotius, known as the founder of modern international law,<sup>15</sup> to establish how the declaration of war fit within the prevailing norms of international law: "[A]ccording to the law of nations, a denunciation of war ought always to precede the actual commencement of hostilities . . . that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community."<sup>16</sup>

Blackstone's reference to Grotius has two important implications. One, Blackstone's citation of international law seems to indicate that the concept of declaring war was important to the practice of warfare at the time and somewhat limited the king's power. Although the king possessed the sole power to initiate armed conflict, the phrase "ought always to precede" suggests that under international law, the king was obligated to issue a declaration of war as a precondition to the lawful exercise of his war power. Two, the declaration channeled the will of the people. Since the declaration made clear that war invokes *the will of the whole community*, it functioned as a way for the king to implement the natural right to make war that the people sacrificed to him.

Taken together, Blackstone's and Locke's views of British war powers help illuminate the political theory that influenced how the Founders allocated war powers in the Constitution. On a practical level, both Locke and Blackstone agree that the king had broad authority over foreign relations, including the exclusive power to declare and wage war. On a theoretical level, both authors also admit that the king's war powers derived from natural rights the people sacrificed to the sovereign. The Founders were keenly aware of both points. For example, in his *Letters of Helvidius*, James Madison criticizes Locke's view that the king should have full control of foreign affairs.<sup>17</sup> Madison suggests that Locke would have changed his opinion had he lived through the events exposing the king's avarice leading up to the American Revolution.<sup>18</sup>

However, the Founders didn't uniformly share Madison's critique. Instead, the Founders argued over how much to adhere to the British model. Political scientist

13. *Id.*

14. *Id.*

15. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1570 (2002) (referring to Grotius as "the founder of modern international law").

16. BLACKSTONE, *supra* note 7, at 248.

17. James Madison, *Letters of Helvidius*, nos. 1–4, in 6 THE WRITINGS OF JAMES MADISON 138–77 (Gaillard Hunt ed., 1910) [hereinafter 6 MADISON].

18. *Id.*

Harvey Mansfield explains the situation succinctly in his claim that the Constitution reflected a “struggle between two conceptions of executive power that are identified with two points of view: a weak executive resulting from the notion that the people are *represented* in the legislature and a strong executive from the notion that the people are *embodied* in the executive.”<sup>19</sup> Ultimately, although the Founders generally agreed that it was dangerous to give the executive the sole power to declare war, they were still divided about whether war was an inherently executive or legislative function because of the influence of the British model. Analyzing the Articles of Confederation and the Constitutional Convention helps shed light on the debate.

### B. *The Articles of Confederation*

The Articles of Confederation are instructive because they demonstrated the colonies’ reaction to the British system and because they set the backdrop for the reforms implemented in the Constitution. Under the Articles, the Continental Congress was the sole branch of government.<sup>20</sup> Therefore, the legislature had the full power over matters of war and peace: “The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . .”<sup>21</sup> By limiting questions of war to Congress, the Articles also prohibited any one of the individual states from going to war unilaterally.<sup>22</sup> On one hand, that was a significant centralization of power compared to the colonial era. And since there was only one branch of government, it is unlikely that the Founders considered war powers to be a legislative—rather than executive—function merely because the power was granted to Congress. Former Deputy Assistant Attorney General and law professor John Yoo even suggests that under the Articles, “when the Congress exercised its war powers, it acted as an executive branch, rather than as a legislature.”<sup>23</sup>

Yet on the other hand, the decision to engage in war had the most legislative protections that the Articles provided to any power. Specifically, Congress could appoint a “Committee of the States” that consisted of one delegate from each state and that could make certain decisions during recess.<sup>24</sup> However, the Committee of the States did not have the power to make decisions related to war.<sup>25</sup> Instead, war required the vote of nine states and could only be initiated when Congress was assembled.<sup>26</sup> In fact, the provision that set these strict

19. HARVEY MANSFIELD, *TAMING THE PRINCE* 5–6 (1989).

20. *See* Yoo, *supra* note 3, at 236 (“[T]he Articles vested all national powers in the Continental Congress . . .”).

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

22. *See id.* art. VI (“No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies. . .”).

23. Yoo, *supra* note 3, at 238.

24. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5.

25. *Id.*

26. *See id.* (“The United States in Congress assembled shall never engage in a war . . . unless by the votes of a majority of the United States in Congress assembled.”). Additionally, Article X reiterated that

requirements for engaging in war was in first sentence of the paragraph immediately following the provision that established the Committee of the States.<sup>27</sup> This textual proximity suggests that the drafters of the Articles prioritized the preservation of full legislative input regarding matters of war.

In practice, the Articles of Confederation kept decisions about war as close to the people as possible by requiring the input of all representatives and minimizing the potential for a small group to usurp the process. This was a 180-degree shift from the unilateral power of the British king. Nonetheless, the weak national government under the Articles proved problematic and the states ultimately decided to reform the government by way of the Constitutional Convention in 1787. The Constitution created the executive branch and reallocated war powers by making the President Commander in Chief with the power to make treaties under Article 2, Section II.<sup>28</sup> This represented a pendulum swing regarding how war power was allocated during the transition from British monarchy to the American people under the Articles of Confederation, and finally under the U.S. Constitution. The pendulum swung away from total executive control of war powers in the British system on one end, to total legislative control of war powers under the Articles of Confederation, and finally came to rest in between, with the President and Congress sharing war powers under the Constitution.

### C. *The Constitutional Convention*

The debate during the Constitutional Convention indicates that there was a loose consensus among the Founders recognizing the risk that the President would abuse his position if the executive branch were given the power to declare war. Ironically, this belief was brought to light in 1787 when the delegates in Philadelphia briefly considered empowering the President with the ability to declare war.<sup>29</sup> Given their frustration with the Articles of Confederation, the delegates initially focused on the defects of allocating all war powers to the legislature. South Carolina's Charles Pinckney noted that the full Congress would proceed too slowly, and instead suggested giving the power only to the Senate.<sup>30</sup> South Carolina's Pierce Butler first suggested vesting the power in the President, because he thought the Senate would be just as problematic as the

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The Committee of States was prohibited from any powers that required the vote of nine states assembled in Congress. *See id.*, art. X ("The committee of the States, or any nine of them, shall be authorized to execute in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.").

27. ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 5–6.

28. U.S. CONST. art. II, § 2, cl. 1–2.

29. 1 RECORDS OF THE FEDERAL CONVENTION 19 (Max Farrand ed., 1937); 2 RECORDS OF THE FEDERAL CONVENTION 318 (Max Farrand ed., 1937).

30. *See supra* note 29.



whole Congress and the President had all “the requisite qualities” for war.<sup>31</sup> Elbridge Gerry of Massachusetts and George Mason of Virginia opposed the proposal.<sup>32</sup> Gerry believed that empowering the executive with the power to declare war was contrary to the principle of a republic and Mason thought the President could “not safely be trusted” with the power.<sup>33</sup>

When Butler returned to South Carolina to recommend ratifying the proposed Constitution, he recounted the debate in a different light: “Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.”<sup>34</sup> Butler’s use of the phrase “throwing into his hands the influence of a monarch” conveyed that the Founders—due to their experience with the British monarchy—were apprehensive about empowering the executive branch to declare war. Moreover, the fact that Butler so quickly reversed his position and embraced Gerry’s and Mason’s skepticism suggests that there was likely overwhelming aversion to executive authority among the delegates in Philadelphia.

The works of legal scholars who analyzed the Constitution in the decades immediately following ratification also confirm that the Founders’ decision to grant the war-declaring power to Congress was largely due to a fear of executive overreach. For example, the early-nineteenth-century jurist St. George Tucker reflected on the king’s unchecked war power in his revised edition of Blackstone’s Commentaries.<sup>35</sup> In his analysis of the Declare War Clause, Tucker described the history of war as the people suffering at the whim of those in power:

The personal claims of the sovereign are confounded with the interests of the nation over which he presides, and his private grievances or complaints are transferred to the people; who are thus made the victims of a quarrel in which they have no part, until they become principals in it, by their sufferings.<sup>36</sup>

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31. *Id.*

32. *Id.*

33. *Id.*

34. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 263 (Burt Franklin 1888).

35. See 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 269–72 (Rothman Reprints 1969) (1803) (“The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress; and happy it is for the people of America that it is so vested.”). Tucker was a law professor at The College of William and Mary and supplemented his teaching of Blackstone with lectures analyzing how American law departed from English law. See also Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1113 (2006). He published his lectures in an edited volume of Blackstone’s Commentaries, known as “America’s Blackstone” in 1803. *Id.* at 1114.

36. TUCKER, *supra* note 35, at 269–72.



Coupled with the two concepts Blackstone described above—that the sovereign derives his power to engage in war from the people's natural right to conduct violence and the declaration of war channels the will of the whole nation—Tucker's commentary reveals the disadvantage of the British system. That is, when the people sacrifice their liberty to declare war, the king is apt to use military force without considering the people's well-being. William Rawle, another prominent nineteenth-century jurist, seemed to agree with this view.

In 1825, Rawle published an early analysis of American law, *A View of the Constitution of the United States of America*.<sup>37</sup> Rawle echoed Tucker's perspective that kings use war to pursue personal interests: "In monarchies, the king generally possesses this power, and it is as often exercised for his own aggrandizement as for the good of the nation."<sup>38</sup> Rawle published *A View of the Constitution* more than two decades after Tucker published *America's Blackstone*, which indicates that Tucker's ideas withstood the test of time in the early independence period.

Additionally, both jurists agreed that, by granting the war-declaring power to Congress, the Constitution created a safeguard against the executive's impulse to wage war for personal benefit. Tucker celebrated how the Constitution restored the people's right to decide on matters of war by announcing, "[h]appy the nation where the people are the arbiters of their own interest and their own conduct!"<sup>39</sup> Similarly, Rawle made the practical point that the country is less likely to go to war when voters contribute to the decision-making process: "Republics, though they cannot be wholly exonerated from the imputation of ambition, jealousies, causeless irritations, and other personal passions, enter into war more deliberately and reluctantly."<sup>40</sup>

#### D. *The Proclamation of Neutrality Debate*

Despite the broad consensus that the executive might abuse the power to declare war, the Founders disagreed about how far constitutional protections should extend. This debate played out after France and England went to war in 1793 and President George Washington issued a Proclamation of Neutrality that generated a polarized response from his contemporaries. Whereas Washington and Hamilton believed that all war powers inherently belonged to the executive and the Constitution merely made a practical exception for the role of *declaring* war, Madison and Jefferson believed that war powers inherently belonged to the legislature. At first, this disagreement may seem semantic, since both sides concluded that it was the right decision to grant the declaration power to Congress. Yet, the difference in the two beliefs had larger implications on whether the

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37. Charles E. Shields III, *Chancellor Kent's Abridgment of Emerigon's Maritime Insurance*, 108 PENN ST. L. REV. 1123, 1152 n.222 (2004). Rawle's analysis was "one of the most discussed works" on the Constitution; both George Washington and Alexander Hamilton were acquainted with the book. *Id.*

38. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 109–11 (2d ed. 1970).

39. TUCKER, *supra* note 35, at 269–72.

40. RAWLE, *supra* note 38, at 109–11.

President would be allowed to initiate hostilities at all without a Congressional declaration—as discussed further in the next section.

When France declared war on Great Britain in early 1793, the United States was a formal ally of France under the 1778 Treaty of Alliance.<sup>41</sup> According to the Treaty, in the event of war between France and Great Britain, the United States would be obligated to defend the French West Indies from Great Britain, France would have the right to use American ports to transport seized property, and France's enemies could not use American ports for wartime activity.<sup>42</sup> If the United States were to take an active role in the conflict under these provisions, Britain may have waged war against the United States in response. But a formal declaration of neutrality would constitute a breach of the Treaty. Washington conferred with his cabinet, which unanimously decided to proclaim neutrality and not to call Congress into session.<sup>43</sup> Washington issued the Proclamation of Neutrality on April 22, 1793.<sup>44</sup> And the Proclamation sparked an intense debate about the nature of war powers.

Washington's views about the President's war powers set the foundation for this debate. Overall, Washington favored a strong executive. He believed that the President had some ability to make decisions about initiating armed hostilities within the confines of constitutional limitations.<sup>45</sup> For example, many Americans were averse to a powerful executive branch in the years before the Constitution was drafted, but Washington demonstrated that he welcomed executive power by advocating for a standing army with mandatory conscription: "It may be laid down as a primary position, and the basis of our system, that every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal services to the defence of it."<sup>46</sup> In contrast, Brutus epitomized the anti-Federalist view that "[k]eeping up a standing army, would be in the highest degree dangerous to the liberty and happiness of the community[.]"<sup>47</sup> Washington's conclusion that citizens owe the government—in spite of the widespread concern that a standing army inhibits liberty—evokes the British model of a strong executive that *embodies* the people.<sup>48</sup>

Given Washington's preference for a strong executive role in military affairs, the Proclamation of Neutrality caused the other Founders to debate whether the Constitution granted the President the power to declare neutrality. If the President

41. Treaty of Alliance between the United States and France (Feb. 6, 1778), in TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1–40 (Hunter Miller ed., 1931).

42. BURNS, *supra* note 2, at 258 n.9.

43. *Id.* at 82–83.

44. The Proclamation of Neutrality 1793, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (1897).

45. BURNS, *supra* note 2, at 80.

46. George Washington, Sentiments on a Peace Establishment, in 26 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 374–76, 388–91 (John C. Fitzpatrick ed., 1944).

47. Brutus, no. 8, in 2.9 THE COMPLETE ANTI-FEDERALIST 96–101 (Herbert J. Storing ed., 1981).

48. See MANSFIELD, *supra* note 19, at 6.

could declare neutrality, did this imply that he believed he could also declare war? And by declaring neutrality, was the President preventing Congress from exercising its right to declare war?

Alexander Hamilton defended Washington's view by arguing that the Constitution granted the President broad authority over war and peace. Writing under the title *Pacificus*, Hamilton was the leading proponent of the position that war powers were inherently executive in nature. Accordingly, Hamilton's position aligned with Locke's and Blackstone's understanding of government. In Hamilton's outlook, the Constitution was part of this tradition regardless of the formal distribution of powers:

It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.<sup>49</sup>

Thus, Hamilton considered the Declare War Clause to be an *exception* to what would otherwise be the President's executive prerogative. In *Pacificus no. 1*, Hamilton argued that the President had constitutional authority to issue a neutrality proclamation because the executive branch was empowered to perform any foreign affairs function that was not explicitly delegated to Congress.<sup>50</sup> But this argument also has implications for the President's war powers beyond the Proclamation of Neutrality.

Hamilton believed the Vesting Clause, art. II, § 1, cl. 1, gave the President a "general grant" of power because he interpreted the Constitution with a Lockean conception of executive power—which includes "federative" power over foreign affairs.<sup>51</sup> Under this view, the President has free reign over foreign affairs short of the powers enumerated to Congress. But this raises the question of how to define the specific powers retained by the President when the text enumerating Congress's powers is ambiguous. By claiming that the Declare War Clause means that "the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War,"<sup>52</sup> Hamilton leaves open the possibility that defensive military operations fall outside the scope of the declaration. As explained in the next section, Hamilton will later reach for that possibility to

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49. Alexander Hamilton, *Pacificus*, no. 1, in 15 THE PAPERS OF ALEXANDER HAMILTON 33–43 (Harold C. Syrett ed., 1793) [hereinafter 15 HAMILTON].

50. See *id.* at 42 ("[I]t belongs to the 'Executive Power,' to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the UStates [sic] with foreign Powers.").

51. See *id.* at 39. (Explaining that after the President's enumerated powers, the Constitution leaves "the rest to flow from the general grant of that power, interpreted in conformity to other parts of the constitution and to the principles of free government."); see also U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

52. See Hamilton, *Pacificus*, in 15 HAMILTON, *supra* note 49, at 52.

explain the President's unilateral right to decide to engage in armed conflict in retaliation to an attack. In any case, *Pacificus* was influential because it used the Proclamation of Neutrality debate to assert that the President at least has a place at the table in the decision to initiate hostilities.

James Madison entered the debate largely to refute Hamilton. In his Letters of Helvidius, Madison championed the position that the power to declare war is legislative by nature.<sup>53</sup> In that respect, Madison criticized the Lockean model of a powerful executive as distorted by the experience of living under monarchical governments. Finally, Madison argued that the Constitution's delegation of the power exclusively to Congress was a virtuous and practical innovation.

Unlike Hamilton, Madison was less focused on persuading the reader about whether Washington had the constitutional authority to issue a neutrality proclamation. Instead, the primary purpose of the Letters of Helvidius was to refute Hamilton's *Pacificus* argument for broad executive powers. In fact, Madison only drafted the letters after Jefferson implored him to rebut Hamilton's argument.<sup>54</sup> Madison accepted Jefferson's request and seized the opportunity to explain how the *Pacificus* argument had implications beyond the Proclamation of Neutrality "[that] strike[d] at the vitals of its constitution, as well as at its honor and true interest."<sup>55</sup>

Madison begins by explaining why the power to declare war is a legislative function by nature.<sup>56</sup> Since the executive branch executes laws and the legislature makes laws, Madison asserted that the President's powers "must presuppose the existence of the laws to be executed."<sup>57</sup> Yet, a declaration of war does not involve executing preexisting laws.<sup>58</sup> Instead, Madison considered that declaring war more accurately resembled making new laws because it "has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war: and of *enacting*, as a *rule for the executive*, a *new code* adapted to the relation between the society and its foreign enemy."<sup>59</sup>

Consequently, Madison believed that the Constitution represented a break with the traditional British view of executive prerogative over war power.<sup>60</sup> This was the fundamental disagreement between Hamilton and Madison. Where Hamilton thought the Declare War clause was an exception to executive prerogative, Madison thought it was a repudiation of the underlying theory. As explained

53. MADISON, *supra* note 17, at 148.

54. Letter from Thomas Jefferson to James Madison (July 7, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 443–44 (John Catanzariti ed., Princeton Univ. Press 1995) [hereinafter 26 JEFFERSON] ("For god's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to peices [*sic*] in the face of the public.").

55. Madison, Letters of Helvidius, in 6 MADISON, *supra* note 17, at 142.

56. *Id.* at 148 (describing the power to make war and the treaty-making power as "being substantially of a legislative, not an executive nature").

57. *Id.* at 145.

58. *Id.*

59. *Id.*

60. BURNS, *supra* note 2, at 87.

above, Madison criticized Locke's conception of "federative" powers.<sup>61</sup> On this point, Madison claimed that Locke was "warped by a regard to the particular government of England" and his "chapter on prerogative shows, how much the reason of the philosopher was clouded by the royalism of the Englishman."<sup>62</sup> Put differently, it took secession from the British monarchy to reveal the flaws in the traditional approach to war powers under the British system.

Moreover, Madison disputed Hamilton's complicated legal arguments in favor of a simple reading of the constitutional text. Hamilton pointed to the President's "general grant" of power under the Vesting Clause to infer that the executive branch had a role in declaring war. But Madison attacked this logic as unnecessarily complex, when the text of Article 1 squarely gave the declare war power to Congress:

The power of the legislature to declare war and judge of the causes for declaring it, is one of the most express and explicit parts of the Constitution. To endeavour to abridge or affect it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy.<sup>63</sup>

In short, Madison preferred a textualist interpretive approach. As the principal author of the Constitution, Madison arguably had more authority to determine which mode of construction was more suitable to the document.

Finally, Madison defended the Declare War Clause as virtuous and practical because it facilitated peace. Like a modern lawyer making a policy argument to support his legal analysis, Madison warned that the executive branch is more inclined to wage war than are the people. "[I]t has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."<sup>64</sup> This appeal to history aligns with how Tucker and Rawle criticized the British king for abusing the power to make war. Likewise, Madison also agreed with Tucker's and Rawle's assessment that the Constitution created a safeguard against unnecessary wars by shifting the power to declare war to Congress.<sup>65</sup>

Thomas Jefferson was not a public participant in the Proclamation of Neutrality debate, but he supported Madison's position from the background. Jefferson was Washington's Secretary of State at the time and took a deferential stance in the matter out of political prudence.<sup>66</sup> On one hand, Jefferson privately

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61. Madison, Letters of Helvidius, in 6 MADISON, *supra* note 17, at 144.

62. *Id.*

63. *Id.* at 161.

64. *Id.* at 174.

65. *See id.*

66. Letter from Thomas Jefferson to James Madison (July 7, 1793), in 26 JEFFERSON, *supra* note 54, at 403 ("My objections to the impolicy of a premature declaration were answered by such arguments as timidity would readily suggest.").

doubted the President's power to declare neutrality and suggested replacing "neutrality" with "disposition."<sup>67</sup> On the other hand, Jefferson never went as far as requesting that President Washington call Congress into session.<sup>68</sup>

Regarding the declaration of war, Jefferson only went as far as to tell Washington that the President "was bound to preserve" a state of peace until Congress returned to session.<sup>69</sup> This suggests that Jefferson agreed with Madison's legislative conception of the Declare War Clause in theory, but that Jefferson had minimal conviction to defend that position in the context of a debate over neutrality. Nonetheless, we know from his comments several years earlier that Jefferson agreed with the Hamilton–Tucker–Wilson view that the executive was the branch most likely to wage war and that transferring the power to Congress was a useful safeguard. In a 1789 letter to Madison, Jefferson remarked, "[w]e have already given in example one effectual check to the Dog of war, by transferring the power of letting him loose from the Executive to the Legislative body."<sup>70</sup> Jefferson adhered to this view in his written communication to Madison during the Pacificus–Helvidius debate by adamantly objecting to Hamilton's Pacificus arguments.<sup>71</sup> Taken together, it is likely that Jefferson was more opposed to the implications of Hamilton's interpretation of broad Presidential war powers than to the immediate issue of neutrality.<sup>72</sup>

This interpretation seems plausible given that Jefferson had also disagreed with Hamilton's interpretation of the Treaty Power. For example, when Hamilton suggested at a cabinet meeting that the President and Senate could use a treaty to circumvent Congress's power to declare war, Jefferson objected with a plain-meaning argument. Jefferson recalled that "[i]n every event I would rather construe so narrowly as to oblige the nation to amend and thus declare what powers they would agree to yield, than too broadly & indeed so broadly as to enable the Executive and Senate to do things which the constn [*sic*] forbids."<sup>73</sup> This statement gives way to two inferences. First, Jefferson agreed with Madison's plain meaning approach to analyzing the Constitution. Second, Jefferson was also wary of interpreting the Constitution in a way that would favor the executive branch over the legislative branch.

67. *Id.*

68. BURNS, *supra* note 2, at 83.

69. Thomas Jefferson, The Anas, in 1 THE WORKS OF THOMAS JEFFERSON 325–30 (Leicester Ford ed., 1905) [hereinafter 1 JEFFERSON].

70. Letter from Thomas Jefferson to James Madison (Sept. 6, 1793), in 12 THE PAPERS OF JAMES MADISON 382–88 (Charles F. Hobson & Robert A. Rutland eds., 1979).

71. 26 JEFFERSON, *supra* note 54.

72. BURNS, *supra* note 2, at 83.

73. Thomas Jefferson, The Anas, in 1 JEFFERSON, *supra* note 69, at 330.



### III. PRESIDENTIAL WAR POWERS IN PRACTICE

#### A. *The Quasi-War with France*

The Founders finally tested their interpretations of the Declare War Clause during John Adams' presidency in an armed conflict with France now known as the Quasi-War.<sup>74</sup> France escalated its naval activity in the war with Britain after the American Proclamation of Neutrality. When the French navy began targeting American merchant ships, the United States responded with naval warfare even though Congress never declared war.<sup>75</sup> In this context, the constitutional theories that the Founders had developed in the years between the Articles of Confederation and the Pacificus–Helvidius debate confronted the geopolitical reality of the late eighteenth century. The result did not neatly fit within either Hamilton's, Madison's, or Jefferson's preferred model. Rather, Adams seemed to implement aspects of each interpretation to balance the country's national-security interests with the separation of executive and legislative war powers. In the process, the Quasi-War established a political and legal precedent for the President's ability to commence military operations in the absence of a Congressional declaration of war.

The Quasi-War defined the conditions under which the President may initiate armed conflict without a formal declaration of war. Specifically, three attributes of the Quasi-War justified the use of force: first, the war was fought for defensive purposes; second, the war was a "limited war" in its scale and objective; and third, Congress authorized hostilities even though it never went as far as to declare war. Contemporaneous legal analysis determined that, because of these three attributes, the conflict did not require a full-scale declaration of war. Moreover, the Supreme Court confirmed this position in a series of cases arising out of the conflict.<sup>76</sup> Nonetheless, Madison and Jefferson disputed the legality of the Quasi-War. Overall, the Quasi-War transformed the founding conceptions of war powers into the first judicial interpretation of the Declare War Clause.

The Quasi-War unfolded during the French Revolutionary wars. As explained above, France and the United States had signed a peace treaty in 1778.<sup>77</sup> But bilateral relations changed in 1793, when the French people overthrew the monarchy.<sup>78</sup> Although France was a decisive American ally when the United States achieved independence from Great Britain, the French government had adopted a different

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74. Historians adopted the name "Quasi-War" because the 1798–1800 naval conflict with France was undeclared, defensive, and limited in scope. This designation itself indicates the ambiguity of whether the conflict was an official or unofficial war. This paper uses the title "Quasi-War" to be consistent with the approach of most historians, not to qualify whether the word "war" is constitutionally appropriate.

75. Gregory Fehlings, *America's First Limited War*, 53 NAVAL WAR C. REV. 101, 110 (2000).

76. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

77. Treaty of Alliance between the United States and France, in TREATIES AND OTHER INTERNATIONAL ACTS, *supra* note 41.

78. Fehlings, *supra* note 75, at 106.



posture by the time President Washington issued the Proclamation of Neutrality in 1793. France had declared war against Great Britain, Austria, Prussia, and the Netherlands, and Washington did not want to be drawn into a war with Britain resulting from the 1778 alliance.<sup>79</sup> Accordingly, the United States refused to perform its treaty obligation to defend French possessions in the Caribbean from British capture.<sup>80</sup> Then, in 1794, Washington signed a commercial treaty with Britain known as the Jay Treaty.<sup>81</sup> Under the Jay Treaty, the United States agreed not to ship the property of Britain's enemies and granted Britain the exclusive use of American ports.<sup>82</sup> France believed the Jay Treaty was a British–American military alliance opposed to France and the French navy retaliated by attacking American merchant ships in a campaign that lasted until John Adams was elected in 1797.

By July 1797, France had captured over 300 American merchant ships.<sup>83</sup> Despite the losses, the United States was unable to defend its commercial shipping because it had no warships.<sup>84</sup> A full-scale war with France would devastate the United States. So, in October 1797, Adams sent a diplomatic delegation to Paris—including future Supreme Court Chief Justice John Marshall—to negotiate an agreement that would safeguard American trade routes.<sup>85</sup> French Foreign Minister Tallyrand refused to deal with the delegation in an infamous episode now known as the XYZ Affair.<sup>86</sup>

Adams proceeded to initiate naval operations against France to protect American merchant ships. In March 1798, Adams requested that Congress enact naval defense measures and unilaterally announced that merchant ships could arm themselves.<sup>87</sup> However, Adams did not request an all-out declaration of war. In July of 1798, Congress finally assented to Adams' requests with two pieces of legislation. First, Congress passed an act that voided all American treaties with France.<sup>88</sup> Second, Congress passed an act authorizing the President to “instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel . . . .”<sup>89</sup> Between April and July of 1798, Congress also established the Department of the Navy and the Marine Corps at Adams' request.<sup>90</sup>

79. *Id.* at 107.

80. *Id.*

81. Yoo, *supra* note 3, at 292.

82. Fehlings, *supra* note 75, at 108.

83. This figure increased to over 2,000 American merchant ships seized by the French navy by the end of 1800. *Id.*

84. *Id.*

85. *Id.* at 109.

86. *See id.* The name “X, Y, Z Affair” was based on the code names of Talleyrand's three agents.

87. *Id.* at 110; Letter from John Adams, President of the U.S., to the U.S. Cong. (Mar. 19, 1798), available at <https://Founders.archives.gov/documents/Adams/99-02-02-2382> [<https://perma.cc/RW88-A2QF>] (urging Congress to adopt measures “for the protection of our Seafaring and commercial Citizens”).

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

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

90. Fehlings, *supra* note 75, at 111.

Over the course of these events, Adams set a political precedent for the legitimacy of an undeclared war. This paper argues that an undeclared war is constitutional when it meets the following three conditions that describe Adams' conduct during the Quasi-War: first, the naval conflict with France was a defensive action because France had attacked American civilians at sea and then refused to consider American attempts to negotiate a diplomatic resolution during the XYZ Affair; second, Adams proposed a limited war in its objective (protecting American merchant ships), forces (just the Navy), and target (armed French vessels); third, Congress authorized the conflict by nearly all means possible short of declaring war. Congress voided the alliance with France, established naval forces, and authorized the President to direct the naval forces against French ships.

American legal experts writing during the Quasi-War and shortly afterward agreed that the conflict amounted to a genuine and lawful war. Adams' Attorney General, Charles Lee, determined that the United States and France were legally in a state of war shortly after the conflict began. Lee referenced both the defensive nature of the conflict and Congressional authorization in a 1798 Attorney General opinion:

Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations.<sup>91</sup>

The purpose of the opinion was to announce that a French national, who was in the United States acting on behalf of France, was liable for treason under the law of war. That determination showed that classifying the conflict as a *war* was not a formality but had important legal implications.

Additionally, William Rawle cited the Quasi-War in the section of his 1825 Constitutional analysis that addressed the war powers.<sup>92</sup> Recall that Rawle's perspective was that the Constitution sought to check the executive's proclivity to unilaterally wage war.<sup>93</sup> Still, Rawle conceded that the Quasi-War demonstrated that in the United States, "we may be involved in a war without a formal declaration of it."<sup>94</sup> Reflecting on the conflict three decades later, Rawle emphasized the fact that the conflict was defensive and limited. It was defensive because "[i]t was founded on the hostile measures authorized by congress [sic] against France, by reason of her unjust aggressions on our commerce—yet there was no declaration of war."<sup>95</sup> And it was limited "because it was only waged on the high seas."<sup>96</sup>

On the other hand, James Madison and Thomas Jefferson evaluated the Quasi-War from the perspective they had articulated during the Proclamation of

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91. Treason, 1 Op. Att'y Gen. 84 (1798) (emphasis in original).

92. RAWLE, *supra* note 38, at 109.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Neutrality debate. In an April 1798 letter to then-Vice President Jefferson, Madison criticized the steps President Adams was taking that eventually led to the war.<sup>97</sup> Madison believed that Adams's announcement permitting merchant vessels to arm themselves was "a virtual change of the law, & consequently a usurpation by the Ex. of a legislative power."<sup>98</sup> In this way, Madison adhered to the position he developed in *Helvidius No. I*, that the power to declare war is legislative in nature because it involves making laws rather than executing laws.<sup>99</sup>

Jefferson seemed to agree with Madison in principle. However, the Vice President also acknowledged that President Adams had enough political support to commence hostilities even if Congress did not declare war. In his reply to Madison's April letter, Jefferson expressed agreement by admitting that, "[i]t is a pretty strong declaration that a neutral & pacific conduct on our part is no longer the existing state of things."<sup>100</sup> Nonetheless, Jefferson conceded that after Adams made the announcement, "[t]he vibraters [sic] in the H. of R. have chiefly gone over to the war party."<sup>101</sup>

Again, Jefferson characteristically prioritized political considerations over constitutional theory. Just as Jefferson privately agreed with Madison regarding the Proclamation of Neutrality but refused to criticize President Washington publicly, Jefferson also agreed with Madison ahead of the Quasi-War but refused to criticize President Adams publicly. Once more, Jefferson calculated wisely. Although Madison remained committed to a strict textual reading of the Constitution, Adams won the political battle when Congress acquiesced by authorizing naval operations in July 1798. In effect, geopolitical reality got in the way of Madison's principled constitutional interpretation.

### B. *The Quasi-War Cases*

The Quasi-War also gave rise to the Supreme Court's first judicial interpretation of the Declare War Clause. Three cases arose from property disputes by American commanders who had seized ships during the conflict: *Bas v. Tingy*, *Talbot v. Seeman*, and *Little v. Barreme* (the Quasi-War Cases).<sup>102</sup> Where *Bas* and *Talbot* established that the Quasi-War was an actual war because Congress could authorize a limited war, *Little* restricted the President's discretion during limited wars.<sup>103</sup>

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97. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON, 312–14 (Gaillard Hunt ed., 1910) (1798).

98. *Id.* at 313; see also Letter from John Adams to the U.S. Cong., *supra* note 87 (rescinding instructions that merchant vessels were prohibited from "[s]ailing in an armed condition").

99. Madison, Letters of Helvidius, in 6 MADISON, *supra* note 17, at 146.

100. Letter from Thomas Jefferson to James Madison (Apr. 19, 1798), in 8 THE WORKS OF THOMAS JEFFERSON 409 (1905).

101. *Id.*

102. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

103. See *Bas*, 4 U.S. (4 Dall.) at 37; *Talbot*, 5 U.S. (1 Cranch) at 1; *Little*, 6 U.S. (2 Cranch) at 170.

In the progression of the Quasi-War Cases, the Supreme Court confirmed that it considered the naval conflict with France to be a lawful war even though Congress never formally declared war. In doing so, the Court expounded on the Declare War Clause. The Court's analysis of Congressional war powers suggests that the Court approved the three conditions that President Adams set at the outset of the Quasi-War. Specifically, an undeclared war may be constitutional if it is defensive, limited, and nominally authorized by Congress. In the Quasi-War Cases, the Court explicitly acknowledged that the latter two conditions—limited war and Congressional authorization—influenced the conclusions of the cases. Further, although the Court did not assert that the defensive nature of the conflict influenced the holdings, the context of the cases indicates that it was an implicit consideration in the Court's analysis.

In *Bas v. Tingy*, the owner of an American merchant ship seized by a French privateer disputed the salvage value with the commander of an American warship that had recaptured the merchant vessel.<sup>104</sup> Commanders who recaptured seized ships were entitled to compensation from the original owner, but two statutes assigned different salvage values based on the circumstances. A 1798 statute assigned a salvage value of one-eighth the value of the ship whenever a ship was recaptured “by any public armed vessel of the United States.”<sup>105</sup> But a 1799 statute assigned a more generous one-half salvage value when a ship was specifically recaptured “from *the enemy*.”<sup>106</sup> The case turned on whether France was officially an “enemy” of the United States during the Quasi-War. The owner argued that the term “enemy” only applies when Congress declares war.<sup>107</sup> The commander argued that France and the United States were enemies because they were lawfully at war.<sup>108</sup> The Court ultimately sided with the commander.<sup>109</sup> The justices unanimously agreed that the United States and France had been in a state of war.<sup>110</sup>

*Bas* established two points that impact the meaning of the Declare War Clause. First, the Court considered the Quasi-War to be an actual war—even though Congress had not declared war.<sup>111</sup> This implies that a declaration is *not* a necessary precondition of a state of war. Second, Congress has the power to authorize

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104. *Bas*, 4 U.S. (4 Dall.) at 37.

105. *Id.*

106. *Id.*

107. *Id.* at 38.

108. *Id.* at 38. The defendant, Commander Tingy, was represented by counsel “Rawle, and W. Tilghman.” *Id.* It is possible that Tingy’s counsel Rawle was the same William Rawle discussed above, author of *A View of the Constitution of the United States of America*. Rawle served as U.S. District Attorney for Pennsylvania under President George Washington until 1799, in which capacity Rawle prosecuted the Whiskey Rebellion trial. Univ. of Pa. Archives & Records Ctr., *William Rawle 1759–1836*, <https://archives.upenn.edu/exhibits/penn-people/biography/william-rawle> [https://perma.cc/KB9X-AKQK]. Nonetheless, the identity of Tingy’s counsel Rawle remains unclear after a review of the public historical record.

109. *Bas*, 4 U.S. (4 Dall.) at 43.

110. *Id.*

111. *Id.*

either a general war or a limited war.<sup>112</sup> A Congressional declaration of war establishes a general war while lesser forms of Congressional authorization establish a limited war, such as the Quasi-War.

The justices highlighted the distinction between general and limited war in seriatim opinions. Justice Washington defined the two categories:

If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation . . . . But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.<sup>113</sup>

Thus, in a general war every member of the nation is authorized to commit hostilities against the enemy nation “in every place, and under every circumstance.”<sup>114</sup> In contrast, combatants in a limited war cannot exceed the narrow scope of the conflict.<sup>115</sup> This distinction makes sense in light of Blackstone’s assertion that a declaration of war invokes the will of the whole community.<sup>116</sup> It seems that Justice Washington understood the traditional purpose of a declaration but still acknowledged that the Constitution did not prohibit military action on a smaller scale.

Justice Chase concurred more concisely: “Congress is empowered to declare a general war, or [C]ongress may wage a limited war; limited in place, in objects, and in time.”<sup>117</sup> He concluded that the Quasi-War was a limited war because Congress only sanctioned naval hostilities and only permitted soldiers or citizens acting in self-defense to fight.<sup>118</sup> This suggests that the exclusively defensive nature of the conflict was part of what made the Quasi-War limited.

*Talbot v. Seeman* reaffirmed the two *Bas* conclusions.<sup>119</sup> In *Talbot*, an American warship recaptured a neutral Hamburg ship that had been seized and armed by the French navy.<sup>120</sup> The American captain sued the Hamburg owner for salvage, arguing that Congress had authorized the capture of any armed vessel under French control, not merely French naval warships or seized American

112. *Id.*

113. *Id.* at 40.

114. *Id.*

115. *Id.*

116. BLACKSTONE, *supra* note 7, at 249–51.

117. *Bas*, 4 U.S. (4 Dall.) at 43.

118. *See id.* (“There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture *French* armed vessels lying in a *French* port; and the authority is not given, indiscriminately, to every citizen of *America*, against every citizen of *France*; but only to citizens appointed by commissions, or exposed to immediate outrage and violence.”).

119. *See Talbot*, 5 U.S. (1 Cranch) at 28 (explaining that Congress may authorize general or partial hostilities).

120. *Id.* at 2.

ships.<sup>121</sup> The ship's owner argued that the Acts of Congress did not apply to neutral vessels and that therefore salvage was not warranted.<sup>122</sup> As in *Bas*, the Court again sided with the American captain.<sup>123</sup>

Chief Justice John Marshall wrote the *Talbot* opinion.<sup>124</sup> Marshall based his analysis on the precedent the Court set in *Bas* by explaining, "Congress have the power of declaring war. They may declare a general war, or a partial war . . . . This court, in the case of *Bass* and *Tingey*, have decided that the situation of this country with regard to France, was that of a partial and limited war."<sup>125</sup> Once Marshall established that the conflict was a lawful war, he then addressed the recapture question.

Even though the statutes authorizing the Quasi-War did not address neutral vessels,<sup>126</sup> the Chief Justice determined that recapture was lawful since the Hamburg ship "was an armed vessel under French authority, and in a condition to annoy the American commerce."<sup>127</sup> Marshall even suggested that recapture was a necessary defensive measure, adding that "it was [the captain's] duty to render her incapable of mischief."<sup>128</sup>

Recall that Marshall participated in the events that encouraged President Adams to launch the Quasi-War because Marshall was part of the American delegation that French Foreign Minister Talleyrand scorned during the XYZ Affair in 1797.<sup>129</sup> Consequently, it would be reasonable to infer that Marshall had a strong sense of the defensive importance of the Quasi-War and was biased towards finding it constitutional for defensive purposes.

Finally, *Little v. Barreme* closed out the Quasi-War cases by confining the President's power to direct military operations during a limited war to only those operations that Congress had expressly authorized.<sup>130</sup> In *Little*, the commander of an American warship captured a Danish ship, which he suspected was actually American, when it was returning from a French port.<sup>131</sup> Congress passed a statute in February 1799 that authorized the President to instruct naval commanders to search American ships suspected to be "engaged in any traffic or commerce" with France and to seize those "bound or sailing to any port or place within the territory of the French republic."<sup>132</sup> The Secretary of the Navy then implemented the act by ordering commanders to prevent trade with France "where the vessels are apparently as well as really American . . . and bound to or from French

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121. *Id.* at 7–8.

122. *Id.* at 11.

123. *Id.* at 32.

124. *Id.* at 26.

125. *Id.* at 8–9.

126. *Id.* at 31.

127. *Id.* at 32.

128. *Id.*

129. Fehlings, *supra* note 75 at 109.

130. *Little*, 6 U.S. (2 Cranch) at 170.

131. *Id.* at 178–79.

132. *Id.* at 176–77.



ports.”<sup>133</sup> The question was whether the American commander was liable for complying with an executive order that conflicted with the statute. This time, the Court ruled against the commander.

Chief Justice Marshall again wrote the opinion in *Little*.<sup>134</sup> Marshall acknowledged that “[i]t is by no means clear” that the President’s authority as Commander in Chief does not contain the power to order more effective means to achieve a military objective.<sup>135</sup> However, in this case “the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a *French* port.”<sup>136</sup> Thus, the Supreme Court affirmed the circuit court’s holding that the commander was liable for damages.<sup>137</sup> Overall, *Little* established that the President may not supersede the restrictions that Congress sets on a limited war. Nonetheless, Justice Marshall’s opinion left the door open to the possibility that the President retains the authority to take unilateral action absent unambiguous Congressional parameters.<sup>138</sup>

### C. Jefferson’s Barbary War

President Thomas Jefferson led the United States into its second undeclared war in a naval conflict in the Mediterranean known as the First Barbary War. Like the Quasi-War, the First Barbary War was fought for defensive purposes, was limited in scale and objective, and was authorized by Congress to a lesser degree than a full-scale declaration of war. In that respect, President Jefferson affirmed that the Quasi-War set sufficient political and legal precedent for the President to initiate armed hostilities without a Congressional declaration of war. But the First Barbary War differed from the Quasi-War because Tripoli unilaterally declared war on the United States.<sup>139</sup> The Mediterranean conflict, therefore, paints a more comprehensive picture of the Founders’ debate over the President’s power to commence hostilities when another country declares war first.

The Barbary States—comprised of present-day Morocco, Algeria, Tunisia, and Libya—practiced state-supported piracy.<sup>140</sup> Britain and France paid tribute to the Barbary States in exchange for free passage of merchant vessels in the Mediterranean.<sup>141</sup> After the United States declared independence, Barbary ships

133. *Id.* at 178.

134. *Id.* at 170.

135. *Id.* at 177.

136. *Id.* at 177–78.

137. *Id.* at 179.

138. See Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 933, 943 (2007) (“Marshall plainly suggested that the issue might be different had Congress not interposed any limits on the Navy’s authority to capture suspected French ships.”).

139. U.S. Dep’t of State, Office of the Historian, *Barbary Wars, 1801–1805 and 1815–1816*, <https://history.state.gov/milestones/1801-1829/barbary-wars> [<https://perma.cc/5SP3-BL76>].

140. *Id.*

141. *Id.*



began attacking American vessels, which were no longer under British protection.<sup>142</sup> Three months into Jefferson's presidency, the President ordered a small naval squadron to defend American commerce in the Mediterranean.<sup>143</sup> The expedition's initial instruction was to only use defensive force.<sup>144</sup> But then President Jefferson ordered the expedition to respond to aggression "by sinking, burning or destroying their ships & Vessels wherever you shall find them" if one of the Barbary states declared war first.<sup>145</sup> The order was prescient because Tripoli soon declared war against the United States on May 14, 1801.<sup>146</sup>

An instructive debate ensued among Jefferson's cabinet when the President learned about Tripoli's declaration of war. In the President's first annual message to Congress on December 8, 1801, Jefferson stated that he was "unauthorised by the [C]onstitution, without the sanction of Congress, to go beyond the line of defence."<sup>147</sup> This view is consistent with Jefferson's positions during the Proclamation of Neutrality and Quasi-War when the future President favored limited executive power.<sup>148</sup> However, this was at odds with his cabinet's consensus, that the President did not need any statutory authority to fight in a war initiated by another state.<sup>149</sup> In fact, University of Virginia Law Professor Robert Turner surmises that Jefferson intentionally misrepresented the Declare War Clause as a political maneuver to accelerate Congressional action.<sup>150</sup>

In his notes from a May 15, 1801, cabinet meeting, Jefferson recorded that, "if war exists," can the squadron constitutionally "search for [and] destroy the enemy's vessels wherever they can find them?—all except L[incoln]—agree they should; M[adison], G[allatin], [and] S[mith] think they may pursue into the harbours, but M[adison] that they may not *enter* but in pursuit."<sup>151</sup> Jefferson's Treasury Secretary, Albert Gallatin, took the position that the President has equal power to direct military forces, whether Congress declares war on another state or another state declares war on the United States.<sup>152</sup>

142. *Id.*

143. BURNS, *supra* note 2 at 96.

144. BURNS, *supra* note 2 at 95.

145. Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L. L. 903, 911 (1994) (emphasis omitted).

146. BURNS, *supra* note 2 at 95.

147. Thomas Jefferson, First Annual Message to Congress, in 36 THE PAPERS OF THOMAS JEFFERSON 58, 59 (Barbara B. Oberg, ed., 2009).

148. *See supra* notes 73, 100.

149. Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT'L. L. 121, 130 (2003).

150. Turner, *supra* note 145, at 912.

151. Thomas Jefferson, Notes on a Cabinet Meeting, in 34 THE PAPERS OF THOMAS JEFFERSON 114, 115 (Barbara B. Oberg, ed., 2007) [hereinafter 34 JEFFERSON]; *see also* Turner, *supra* note 145, at 911 (naming the cabinet members based on the initials in Jefferson's notes).

152. Thomas Jefferson, Notes on a Cabinet Meeting, in 34 JEFFERSON, *supra* note 151, at 114–15.

Alexander Hamilton, then Jefferson's Secretary of War, disagreed with Jefferson's statement to Congress and used the opportunity to interpret the Declare War Clause in a public paper titled *The Examination, no. 1*:

[T]he plain meaning of [the Declare War Clause] is that, it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war . . . in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary.<sup>153</sup>

Hamilton concluded that the United States can be brought into a state of war against its will if another country commences hostilities first. That helps to explain why the rest of the cabinet was not apprehensive about the constitutionality of the President's power to direct the military when attacked by a foreign adversary. Under this view, once Tripoli declared war, the United States was at war and a Congressional declaration would have been a redundant formality.

*Examination, no. 1* also completes the argument Hamilton began in *Pacificus no. 1*. In *Pacificus*, Hamilton opened the door to the possibility that the President has the power to initiate defensive military action absent a declaration of war because the Vesting Clause gives the executive broad authority over powers not granted to Congress.<sup>154</sup> In *Examination, no. 1*, Hamilton made that point in explicit terms. The Founders were divided over how far the President's executive authority extends into decisions to make war or peace during the Proclamation of Neutrality debate. But by the First Barbary War, the Founders coalesced behind Hamilton. As Jefferson's notes indicate, even Madison—the chief defender of limited executive war power—agreed that the President could order commanders to pursue Tripolitan ships “in pursuit” of an enemy that struck first.<sup>155</sup>

Whether Jefferson's address to Congress was a sincere interpretation of the Constitution or just political posturing, his plea to Congress succeeded. In February 1802, Congress gave Jefferson statutory authority to seize all Tripolitan ships.<sup>156</sup> Jefferson continued to send additional frigates to the Mediterranean until the two parties concluded a peace treaty in 1805, which did not require the United States to pay Tripoli tribute.<sup>157</sup> Overall, the First Barbary War adhered to the

153. Alexander Hamilton, *The Examination No. 1* (Dec. 7 1801), available at <https://founders.archives.gov/documents/Hamilton/01-25-02-0264-0002> [<https://perma.cc/2W45-RUSV>].

154. See *supra* text accompanying notes 4–51.

155. See Thomas Jefferson, *Notes on a Cabinet Meeting*, in 34 JEFFERSON, *supra* note 151 (“[Madison] [thinks] that they may not enter but in pursuit.”) (emphasis omitted).

156. Thomas Jefferson, *Circular to Naval Commanders*, in 36 THE PAPERS OF THOMAS JEFFERSON 605 (Barbara B. Oberg ed., 2009).

157. U.S. Dep't of State, *Barbary Wars*, *supra* note 139.

Quasi-War precedent. The Mediterranean conflict was limited to naval actions directed to prevent piracy; it was defensive because the pirates had attacked American ships before Tripoli even declared war; and Jefferson insisted on getting Congressional authorization in the face of resistance from his cabinet.

#### IV. CONCLUSION

The theoretical and political foundations of the Declare War Clause are rooted in the eighteenth-century British model, where the king had absolute power to make war. Blackstone and Locke illuminated how a powerful executive embodied the will of the people in matters of war and peace. The American Founders designed the Articles of Confederation to reallocate the war-making power to the people by vesting it in Congress. Yet, the Constitutional Convention debates indicated that experience had convinced the Founders to adopt a system where war powers were shared between the executive and legislature. In this way, the allocation of war powers followed a pendulum-like development: absolute executive control under the British model, to total Congressional control under the Articles of Confederation, and finally a shared model under the Constitution.

The *Pacificus-Helvidius* debate that unfolded after President Washington issued the Proclamation of Neutrality revealed the Founders' impression of the Declare War Clause in the early years of American independence. Washington and Hamilton favored a traditional system with a powerful executive, while Madison and Jefferson believed that the declare war power more naturally belonged to the legislature, so they favored a plain meaning interpretation of the text.

As the United States began to operate as an independent entity within commercial and foreign affairs, geopolitical reality influenced how the President exercised war power in practice. The Quasi-War with France was America's first undeclared war and it set a precedent that the President can initiate armed conflict without a Congressional declaration of war if three conditions are met: force is used defensively, the conflict is limited, and Congress provides a modicum of authorization. The Supreme Court confirmed that war fought under these conditions is constitutional, which set the first legal precedent for undeclared war.

Finally, the First Barbary War demonstrated that the fluid perceptions of undeclared war were beginning to solidify under sustained geopolitical pressure for the President to act pragmatically on the world stage because Jefferson adhered to the Quasi-War precedent. Despite this growing consensus, during the First Barbary War, the Founders did not unanimously agree on the scope of the President's power to commence military operations for defensive purposes.

With the Quasi-War criteria in mind, the Founders likely would not be surprised by the American interventions in Vietnam and Iraq. Both conflicts loosely qualify as defensive, limited, and congressionally authorized. In Vietnam, American military action was limited in scope because the War was essentially

contained to the territory of Vietnam<sup>158</sup> and the objective was to prevent the Communist Vietcong from controlling the country. Foreign policy merits aside, there is a reasonable argument that Vietnam was a limited engagement. Congress also authorized military intervention by passing the Tonkin Gulf Resolution, which approved of “all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Treaty Organization.”<sup>159</sup> The most controversial element is whether preventing the spread of communism was sufficient to consider intervention in Vietnam defensive in nature. Madison and Jefferson would almost certainly not accept this argument, although Hamilton may have been amenable to it.

This analysis is similar for the Second Iraq War. American military action was initially limited to toppling the Saddam Hussein regime and was intended to be contained to Iraq. Congress authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate” in the 2002 Authorization for the Use of Military Force.<sup>160</sup> Again, the defensive purpose of the Second Iraq War is more controversial. The initial invasion was predicated on eliminating the threat of Saddam Hussein’s weapons of mass destruction, although the U.S. military never uncovered any such weapons. But given the scope of Congressional authorization, the Founders probably would have considered the conflict to be a legitimate limited war.

In any case, the Founders of the Constitution interpreted the Declare War Clause in a way that would surprise most modern critics of unilateral Presidential military action. As the Quasi-War and First Barbary War demonstrate, the Founders were not categorically opposed to military action absent a Congressional declaration of war. Rather, they would have considered it constitutional for the President to initiate military action without a declaration of war under the conditions that President Adams exemplified in the Quasi-War. If military action is defensive, limited in scope and purpose, and authorized by Congress in some form, then it remains consistent with the original understanding of art. I, § 8, cl. 11.

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158. Admittedly, this argument does not reflect the full history of the Vietnam War. American military force spilled over into Cambodia and Laos during the Vietnam War, although those incursions purportedly targeted only Vietcong operations across the border. Still, the war was at least limited to the region surrounding Vietnam. This analysis is a rhetorical exercise meant to put the Quasi-War in a modern context, not to make historical judgments.

159. Pub. L. No. 88–408, §2, 78 Stat. 384 (1964).

160. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, §3(a) 116 Stat. 1498 (2002).