

## RESPONSE

### THE PRESIDENT'S POWER TO RESPOND TO ATTACKS

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Professor Saikrishna Prakash is a masterful interpreter of our Constitution's historical meaning, and his *Unleashing the Dogs of War*<sup>1</sup> (*Unleashing*) is an important and insightful account of constitutional war powers. It makes three central points. I agree with two of them. In this Response, I will explain why—though I hesitate to disagree with Professor Prakash on anything—I find the third unpersuasive.

*Unleashing* first says, and I agree, that while Article II, Section 1's Executive Power Clause and Article II, Section 2's Commander in Chief Clause generally gave military powers to the President, Article I, Section 8's Declare War Clause gave that power exclusively to Congress.<sup>2</sup> Thus, an evaluation of the textual allocation of war-making power must focus on the eighteenth-century meaning of "declare War." *Unleashing* next says, and I agree, that in eighteenth-century terms to "declare war" meant to initiate war through hostilities as well as by formal proclamation. To "declare" something could simply mean to make it apparent: as Samuel Johnson's 1755 dictionary put it, to "shew in open view."<sup>3</sup> Consistent with Johnson's definition, treatise writers, diplomats, and ordinary speakers labeled attacks as "declarations" of war.<sup>4</sup> The Constitution, therefore, denied the President in-

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<sup>1</sup> Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007).

<sup>2</sup> See U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . ."); *id.* art. I, § 8 ("The Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures . . ."); see also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) (describing the Constitution as giving the President "residual" foreign affairs powers not allocated elsewhere).

<sup>3</sup> 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1773) (defining "declare").

<sup>4</sup> See Prakash, *supra* note 1, at 67–94.

dependent power to attack foreign nations at peace with the United States because an attack “declares” war.<sup>5</sup>

Professor Prakash and I part company, though, on the President’s power to respond to other nations’ attacks on the United States. *Unleashing* argues that the Constitution only empowered the President to respond defensively, not offensively. Although this is an attractive practical position, I find it hard to derive from historical meanings of declaring war or near-contemporaneous interpretations of the Declare War Clause. Instead, as explained below, the better conclusion is that the Constitution gave the President full power to respond if another nation created a state of war with the United States.<sup>6</sup>

This Response proceeds as follows. Part I addresses the textual difficulties of *Unleashing’s* limit on the President’s response power. In particular, *Unleashing* seems necessarily to claim that nations fighting only defensively are not at war—a position contrary to eighteenth-century international law, dictionary definitions, and ordinary usage. Part II addresses post-ratification interpretations of the Declare War Clause on which *Unleashing* relies. It finds that *Unleashing’s* historical evidence is largely not supportive of *Unleashing’s* argument because the examples it emphasizes are not ones in which an enemy’s action unambiguously created a state of war. To the extent there is relevant post-ratification evidence, this Part finds it to favor the President’s offensive-response power rather than to count against it. Part III then summarizes the affirmative textual and historical case for the President’s offensive-response power.

## I

### TEXT AND THE PRESIDENT’S RESPONSE POWER

To begin, let us highlight *Unleashing’s* textual claim. The question is what independent constitutional powers the President possesses when the United States is attacked. *Unleashing* argues that the President has the power to fight defensively to the extent of forces available but lacks the power to take the offensive.<sup>7</sup> I will leave aside, as *Unleashing* does, the exact line dividing the two powers and for convenience will refer to them as the “defensive-response power” and the

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<sup>5</sup> See MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 218–38 (2007); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548–1609 (2002).

<sup>6</sup> This view is advanced (somewhat tentatively) in RAMSEY, *supra* note 5, at 239–45 and Ramsey, *supra* note 5, at 1622–31. *Unleashing’s* powerful contrary arguments inspire me to revisit the issue fully. Like *Unleashing*, I address here only the Constitution’s historical meaning without making claims about modern interpretation.

<sup>7</sup> See Prakash, *supra* note 1, at 56–58.

“offensive-response power.”<sup>8</sup> Under *Unleashing’s* textual framework, the President would have both powers, from the Executive Power and Commander in Chief Clauses, unless exercising either of them were understood to “declare War.” If either were so understood, then that power would belong to Congress, not the President. So the question becomes: to what extent is responding to attack, in constitutional terms, declaring war? I agree with this framing of the question, which follows from the approach to textual foreign affairs powers Professor Prakash and I have developed elsewhere.<sup>9</sup>

Although *Unleashing* calls its position “categorical” and the opposing view “pragmatic,”<sup>10</sup> it actually seeks a middle ground that divides response powers, giving defense to the President and offense to Congress. *Unleashing* thus claims that using the offensive-response power declares war, but using the defensive-response power does not. As *Unleashing* puts it, after the United States is attacked, Congress has “the right to decide when the nation would adopt offensive measures, i.e., go to war.”<sup>11</sup> Sensible as that position may seem, it is hard to tie to any historical meaning of declaring war.

#### A. Defensive Response as a Declaration

Viewing the Constitution’s language in isolation, we might fairly conclude that the decision to meet force with force is a declaration of war. As *Unleashing* rightly says, a nation under attack faces a threshold question whether to defend itself or surrender.<sup>12</sup> If it does not resist, perhaps it is not actually at war: in Johnson’s dictionary definition, “war” is the “exercise of violence under sovereign command against withstanders.”<sup>13</sup> Deciding to resist, not surrender, “shew[s] in open view” (Johnson’s definition of “declare”)<sup>14</sup> the nation’s determination to undertake sovereign violence (“war”). Surely, then, one could call the decision to fight, whether manifested by proclamation or action, a declaration of war. Indeed, as *Unleashing* shows, a nation’s decision to fight *was* sometimes called (or accompanied by) a declaration of war in eighteenth-century conflicts.<sup>15</sup> Perhaps one might then say, as *Unleashing* does at one point, that “when a nation decides to wage war in response to another country’s declaration of war, that nation necessa-

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<sup>8</sup> For example, it is not clear whether counterattacks to recapture U.S. territory from an enemy should be called offensive or defensive; the characterization does not matter, however, for present purposes, either in assessing *Unleashing’s* argument or in correctly describing the President’s constitutional power.

<sup>9</sup> See Prakash & Ramsey, *supra* note 2, at 252–65.

<sup>10</sup> Prakash, *supra* note 1, at 47, 49.

<sup>11</sup> *Id.* at 94.

<sup>12</sup> See *id.*

<sup>13</sup> 2 JOHNSON, *supra* note 3 (defining “war”).

<sup>14</sup> 1 *id.* (defining “declare”).

<sup>15</sup> See Prakash, *supra* note 1, at 94–112 (discussing “response declarations”).

rily has declared war.”<sup>16</sup> This would produce a truly “categorical” rule: the President would lack power to use force to resist attack without congressional approval.

But, as *Unleashing* ultimately accepts, this result cannot be what the Constitution meant by declaring war. First, it is so manifestly impractical—indeed, suicidal—that it seems irrational, especially in a world of slow transportation and communication in which Congress met infrequently and could not easily reassemble. Second, apparently no one at the time read the Constitution this way: despite the intense concern for national defense during the founding era<sup>17</sup> and this reading’s obvious impracticality, no one objected to the Declare War Clause on this ground. Third, James Madison and others specifically said otherwise: at the Philadelphia Convention, Madison and Elbridge Gerry famously moved to replace the word “make” with “declare” in what became the Declare War Clause in order to “leav[e] to the Executive the power to repel sudden attacks.”<sup>18</sup> Of course, the Framers’ Constitution had flaws that may now appear irrational; Madison did not always read its text correctly, and the text meant what it said, even if no one at the time of ratification recited that meaning. On this particular point, though, it strains belief to think that the Constitution erected such a dysfunctional and dangerous limit on national defense without anyone commenting on it.

We must conclude, then, that—although there is some contrary usage—in constitutional terms defensive responses to attack do not “declare War.” Despite occasional rhetoric to the contrary, *Unleashing* apparently agrees, for it gives the President defensive-response power.<sup>19</sup> Thus, in its view (as in mine), the decision whether to resist or surrender—and consequently the decision whether to involve the nation in sustained hostilities in response to attack—lies in the first instance with the President because it does not “declare War.”

## B. Offensive Response as a Declaration

*Unleashing*’s reading, then, is not that directing hostilities in response to attack declares war but that directing *offensive* hostilities in response to attack declares war. This more sensible rule is readily reconciled with Madison’s 1787 statement, and we can easily imagine the Framers adopting it. It is, though, much more difficult to show that

<sup>16</sup> *Id.* at 96.

<sup>17</sup> *See, e.g.*, THE FEDERALIST, NOS. 2–5 (John Jay) (beginning the defense of the proposed Constitution by discussing its advantages in providing for protection against foreign attack).

<sup>18</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., rev. ed. 1966); *see also* Prakash, *supra* note 1, at 85 (noting other similar statements).

<sup>19</sup> *See* Prakash, *supra* note 1, at 57.

they did, by tying it to any eighteenth-century meaning of declaring war.

Underlying *Unleashing's* reading (though never defended explicitly) is the idea that a nation is not at war if it only defends itself. Indeed, as noted, *Unleashing* expressly equates “go[ing] to war” with deciding to “adopt offensive measures.”<sup>20</sup> If true, this would explain why exercising defensive-response power does not declare war, while exercising offensive-response power does (and thus why the President has the former power and not the latter).

Unfortunately for *Unleashing*, nothing in eighteenth-century language or practice supports this idea of war, and a host of considerations stand against it. To begin, the idea that a nation is not at war unless it takes offensive action is entirely contrary to common usage. In modern terms, for example, no one would say that during World War II the Soviet Union was not at war with Germany in 1941–1943 when it fought defensively, nor that the Soviets only undertook war after their Stalingrad victory enabled them to counterattack (or perhaps when their forces crossed the German border).<sup>21</sup> *Unleashing* provides no reason to think eighteenth-century common usage was any different. Americans surely thought that they were “at war” with Britain during the Revolution even though they fought largely on the defensive.

Dictionary definitions and legal writing confirm the common intuition. Johnson’s definition of “war” did not turn on offensive versus defensive actions: he said that war was the use of sovereign violence against resistance, which would surely include a nation defending itself against invasion, and he made no exception for using defensive force.<sup>22</sup> The English legal scholar Matthew Hale, giving an example of war existing without formal proclamation, pointed to Spain’s 1588 attack on England; Hale emphasized that the laws of war applied to England despite the lack of a formal proclamation. In that conflict, England fought defensively to halt the Spanish Armada’s attack. Hale did not contemplate that England might not have been at war because it only defended itself.<sup>23</sup>

Eighteenth-century international law treatises also undercut the suggestion that nations defending themselves against attack were not at war. They used the term “war” broadly to mean armed conflict—without limitations as to offensive posture. War, important treatise

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<sup>20</sup> *Id.*

<sup>21</sup> See NIAL FERGUSON, *THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST* 432–42, 533–37 (2006).

<sup>22</sup> See 2 JOHNSON, *supra* note 3 (defining “war”).

<sup>23</sup> See 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 162–63 (n.p. 1672).

writers said, is “the state of those who try to determine their differences by the ways of force”<sup>24</sup> or “that state in which a nation prosecutes its right by force”;<sup>25</sup> war results “if one enters into violent contest with another”<sup>26</sup> and is the “[s]ituation of those . . . who dispute by Force of Arms.”<sup>27</sup> All these definitions, and others like them, plainly encompass both defensive and offensive hostilities. Further, treatise writers commonly discussed “defensive war” by name, explaining that it involved both defensive and offensive responses to attack.<sup>28</sup>

More fundamentally, a basic concept in eighteenth-century international law was the distinction between the state of war and the state of peace. In a state of war, soldiers could lawfully kill the enemy and seize enemy property; in a state of peace, with few exceptions, they could not.<sup>29</sup> A nation resisting attack necessarily considered itself in a state of war. Otherwise, its soldiers would not generally be able to use lethal force to repel the enemy.

The Constitution’s Article I, Section 10, clause 3 confirms this understanding of war. It provides that states cannot, without Congress’s consent, “engage in war, unless actually invaded” or in imminent danger of invasion.<sup>30</sup> This clause is conventionally read to give states independent authority to defend themselves against attacks. If that interpretation is correct, founding-era Americans must have understood defensive responses as “engag[ing] in war.” But if *Unleashing* is correct that defending against attack is not engaging in war, another explanation of the clause must be found, and no tenable one exists. Under *Unleashing’s* view, presumably one would have to say that the clause gives states independent power to respond *offensively* to attack (because that is how *Unleashing* understands war). This reading, though, would give states more independent response power than the President has—surely a bizarre result.

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<sup>24</sup> J.J. BURLAMAQUI, *THE PRINCIPLES OF POLITIC LAW* 223 (Nugent trans., London, J. Nourse 1752).

<sup>25</sup> 2 EMMERICH DE VATTTEL, *THE LAW OF NATIONS* Book III, ch. I, at 1 (London, J. Coote 1759).

<sup>26</sup> 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 311 (Joseph H. Drake trans., Clarendon Press 1934) (1749).

<sup>27</sup> RICHARD LEE, *A TREATISE OF CAPTURES IN WAR* 2 (London, W. Sandby 1769); *see also* THOMAS RUTHERFORTH, *1 INSTITUTES OF NATURAL LAW* 470 (Cambridge, W. Thurlbourn 1754) (“War is a contention by force. . . . Nations are said to be at war with one another, not only when their armies are engaged, . . . but likewise when they have any matter of controversy or dispute subsisting between them, which they are determined to decide by the use of force . . .”). On the importance of international law treatises in founding-era America, *see* RAMSEY, *supra* note 5, at 182 & nn.23–24.

<sup>28</sup> *See, e.g.*, BURLAMAQUI, *supra* note 24, at 240; VATTTEL, *supra* note 25, at 23.

<sup>29</sup> *See* HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 456–59 (William Evats trans., London 1682) (1625).

<sup>30</sup> U.S. CONST. art. I, § 10, cl. 3.

It seems inescapable, then, that nations defending themselves against invasion would, in eighteenth-century terms, be described as “at war” (as they would today), and *Unleashing* does not point to any material contrary usage. *Unleashing* thus goes astray in associating the decision to take the offensive with the decision to go to war. When a nation is attacked, the *decision to resist* is the decision to go to war—and *Unleashing* rightly agrees with Madison that the Constitution gave this decision to the President.<sup>31</sup>

If a nation is at war when it defends itself, though, in what sense could subsequently taking the offensive against the attacker “declare” war? True, taking the offensive (especially if one uses that phrase to mean only attacking the enemy’s homeland, as opposed to reclaiming one’s own lost territory) signals a change in the war’s scope. But it is difficult to connect this practical sense of change in scale with any eighteenth-century meaning of “declaring” war.

“Declare,” Johnson’s dictionary says, meant “to make known; to tell evidently and openly . . . [t]o publish; to proclaim; . . . [t]o shew in open view.”<sup>32</sup> These definitions confirm that attacks could declare war; attacks themselves “ma[d]e known” or “shew[ed] in open view” the resort to war as clearly as formal proclamations would.<sup>33</sup> But these definitions do not encompass a decision to shift from defense to offense. When one nation attacks and the other only fights defensively, war already exists as a result of the attack and the defense. The decision to go to war—that is, to resist attack—has been made. The state of war between the two nations has been fully “declared” (“shew[n] in open view”) by their actions. Taking the offensive against an attacker may declare a wider commitment to the conflict, but it does not declare *war*.

Further, eighteenth-century international law made no legal distinction between offensive and defensive war. Nations had the same rights in defensive war as they did in offensive war. Once war began, international law did not limit a nation’s ability to take the offensive against an attacker, and defensive war was not necessarily regarded as more easily justified than offensive war. In sum, no legal consequences turned on whether a nation fought offensively or defensively.<sup>34</sup> Shifting to the offensive did not “declare” anything about the war’s status under international law.

Consequently, when an attacked nation took the offensive after first defending itself, it did not initiate war, change the legal nature or legal consequences of its participation in the war, alter the legal rela-

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<sup>31</sup> See Prakash, *supra* note 1, at 57–58.

<sup>32</sup> 1 JOHNSON, *supra* note 3 (defining “declare”).

<sup>33</sup> Ramsey, *supra* note 5, at 1590–96.

<sup>34</sup> See LEE, *supra* note 27, at 47; VATTEL, *supra* note 25, at 2–3.

tionship between the contending nations, or announce anything relating to these matters. There is no reason to suppose, therefore, that taking the offensive in an ongoing conflict would ordinarily be called “declaring war,” and *Unleashing* provides no evidence that it was. *Unleashing* shows that declarations of war were sometimes associated with the decision to resist, manifested either by proclamation or by action, but it does not show any cases where declarations of war were associated with *shifting from defense to offense* after an attack.

This conclusion, though, seems to lead back to an uncomfortable result: that the *decision to resist* declares war. Almost all of *Unleashing’s* pre-ratification evidence of text, logic, and usage points to that result, not to the result *Unleashing* would like to reach. Yet we have already decided that a reading the Constitution’s text this way is untenable. To solve this puzzle, *Unleashing* appeals to post-ratification commentary, claiming that American leaders articulated the offensive/defensive distinction *Unleashing* would like to find in the Constitution. The next section addresses that history; we may conclude here, though, that *Unleashing’s* textual grounding appears weak and it thus requires powerful support from post-ratification history.

## II

### POST-RATIFICATION HISTORY AND THE PRESIDENT’S RESPONSE POWER

*Unleashing’s* theory of presidential response power rests heavily on post-ratification history.<sup>35</sup> In particular, it claims that leading proponents of executive power, such as Washington and Hamilton, along with an array of other key figures, thought the Constitution denied the President offensive-response power. But in most of the episodes it discusses, no enemy had declared war (formally or by action) against the United States. The President would indeed have acted unconstitutionally by ordering attacks in these situations because the President lacks the power to attack nations with which the United States is at peace. This says nothing about the President’s authority when war is begun by the other side. When the latter question did arise, princi-

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<sup>35</sup> *Unleashing* finds little in the drafting or ratification debates bearing on the matter. The strongest support is probably Madison’s Convention statement, discussed above, that changing Congress’s power from “make” to “declare” war would leave the President the power to repel sudden attacks. See *supra* note 18 and accompanying text. *Unleashing* reads this to mean that the President could make defensive responses but, by implication, not offensive responses. Perhaps so, but perhaps not: a counteroffensive may, for example, be used to “repel” attack by forcing the attacker to defend its own territory. In any event, Madison was not addressing that specific question, and, as discussed below, when that question came up later, Madison came down on the side of allowing the President to make offensive responses.

pally under Presidents Jefferson and Monroe, most commentary did not distinguish between offensive and defensive response.

#### A. Washington's Administration

The centerpiece of *Unleashing's* historical evidence is the Washington administration's treatment of hostilities with Indian tribes—principally the Creeks and Cherokee—on the United States' southwestern frontier in 1792–1794. As *Unleashing* recounts, the tribes were said to have declared war, formally or by attacks, on the United States; southern and western governors urged Washington to authorize offensive responses. Washington and his cabinet agreed that defensive measures were appropriate but offensive measures required Congress's approval. Washington referred the matter to Congress, which could not agree on a course of action, and Washington did not authorize any offensive responses.<sup>36</sup>

All this is true but not directly relevant to our debate. Crucially, Washington and his cabinet did not consider the Creek and Cherokee nations as a whole to be at war with the United States. The communications from governors and other local correspondents sometimes did say that the tribes (or parts of them) had declared war or were at war, but actual events did not fully support these characterizations, and the administration chose not to accept them.

For example, *Unleashing* says that “[t]he Creeks had declared war against the United States in the spring of 1793.”<sup>37</sup> That is how one frontier correspondent described the situation in late April (although he referred only to a small subgroup of the Creek nation, noting that he heard this “from a friend”).<sup>38</sup> But communications from the frontier thereafter did not relate substantial attacks, and by July 1793 Georgia's Governor Edward Telfair (a bit of a warmonger himself) reported that the Creeks were “not confident in their own strength, nor generally, at this period, disposed to war.”<sup>39</sup> Secretary of War Henry Knox wrote the local federal commander in Georgia that the

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<sup>36</sup> See Prakash, *supra* note 1, at 97–101. In assessing these and subsequent events, I am especially indebted to the invaluable legal histories of Abraham Sofaer and David Currie. See DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801* (1997) [hereinafter CURRIE, *FEDERALIST PERIOD*]; DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829* (2001) [hereinafter CURRIE, *JEFFERSONIANS*]; ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976).

<sup>37</sup> Prakash, *supra* note 1, at 97–98 (citing Extract of a Letter from Andrew Pickens to General Clarke (Apr. 28, 1793), in *4 AMERICAN STATE PAPERS: INDIAN AFFAIRS* 369, 369 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832)).

<sup>38</sup> *4 AMERICAN STATE PAPERS: INDIAN AFFAIRS*, *supra* note 37, at 369.

<sup>39</sup> Letter from Edward Telfair to Henry Knox (July 24, 1793), in *4 AMERICAN STATE PAPERS: INDIAN AFFAIRS*, *supra* note 37, at 370, 370; see *4 AMERICAN STATE PAPERS: INDIAN AFFAIRS*, *supra* note 37, at 369–70 (containing letters indicating a lack of material hostilities).

events were “rather the robbery of some marauders[ ] than the result of any design of the Creeks generally” and instructed him “to calm every attempt to raise a storm.”<sup>40</sup> Later that year, Knox told Telfair that

[i]t is not understood that any late invasion of Georgia has taken place, excepting by small predatory parties, and of those, it does not appear that any of considerable moment has happened since the month of May or June last.

On the contrary, it would appear . . . that a great portion of the Creeks are disposed for peace.<sup>41</sup>

The situation with the Cherokee was similar. Tennessee’s territorial governor reported in 1792 that a Cherokee subgroup had formally declared war. However, nothing beyond isolated raids by small parties materialized, and Knox’s letters to the governors of the affected area emphasized that most Cherokee remained peaceful.<sup>42</sup>

<sup>40</sup> Letter from Henry Knox to Major Gaither (Apr. 29, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 367, 367.

<sup>41</sup> Letter from Henry Knox to Edward Telfair (Sept. 5, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 365, 365; *see also* Letter from Henry Knox to Edward Telfair (June 10, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 364, 364 (urging the importance of avoiding war with Creeks); Letter from Charles Weatherford to James Seagrove (June 11, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 395, 395 (Creek chief writing to Indian agent that “[h]ad there been an appearance of war, you should have seen me, but, at present, there is a stop put thereto”); Letter from Henry Knox to Edward Telfair (July 19, 1793), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 365, 365 (“[N]o information ha[s] been received of any late depredations of the Creeks.”).

<sup>42</sup> *See* Letter from Henry Knox to Governor Lee (Oct. 9, 1792), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 261, 261; Letter from Henry Knox to Governor Pinckney (Oct. 27, 1792), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 262, 262. Washington’s message to Congress of November 6, 1792 related that “[a] part of the Cherokees, known by the name of Chickamaugas, inhabiting five villages on the Tennessee River, have long been in the practice of committing depredations on the neighboring settlements” and noted that these depredations had continued despite the 1791 peace treaty with the Cherokee, but Washington did not mention the supposed declaration of war nor indicate that the Cherokee nation as a whole was at war with the United States. George Washington, Fourth Annual Address to Congress (Nov. 6, 1792), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 125, 126 (James D. Richardson ed., D.C., Government Printing Office 1896). Similarly, Washington’s message to Congress of December 3, 1793 referred to “war” with Indians in the Ohio Valley, but only to an “anxiety . . . for peace with the Creeks and the Cherokees,” not to any existing war with those tribes. George Washington, Fifth Annual Address to Congress (Dec. 3, 1793), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra*, at 138, 141. In this context, Washington went on to say that “offensive measures against [the Creeks and Cherokees have been] prohibited during the recess of Congress,” and that while various efforts have been made to encourage good relations with these tribes, “the papers which will be delivered to you disclose the critical footing on which we stand in regard to both those tribes, and it is with Congress to pronounce what shall be done.” *Id.* Notably, Washington did not ask Congress to declare war or authorize hostilities; he merely communicated information. Again, in a message to Congress on January 30, 1794, Washington referred to “difficulties” with the Creeks but not to war. *See* George Washington, Message to Congress (Jan. 30, 1794), in 1 A COMPILATION OF THE MESSAGES

That appears also to have been true in 1794, when Tennessee's governor unsuccessfully sought Washington's permission to attack Cherokee towns: nothing in any of the communications that *Unleashing* mentions contains any indication that Washington or Knox considered the Cherokee nation as a whole to be at war with the United States.<sup>43</sup> In both cases, the administration saw only isolated incidents created by a few malcontents and sought to prevent southern governors from using these incidents as excuses to trigger full-scale confrontation. Similarly, the congressional debates considering expanding the military presence in the Southwest in 1793–1794 also did not refer to the Creeks or Cherokee as being at war with the United States.<sup>44</sup>

Washington and Knox had good reason to avoid confrontation in the Southwest because they were heavily involved in more substantial conflict in the Ohio Valley. Tribes along the Wabash River had been unrelentingly hostile and had attacked American settlements in Kentucky. Washington launched a series of offensive actions against them. The first, led by General Josiah Harmar in 1790, was generally unsuccessful; a second, under Ohio Territorial Governor Arthur St. Clair, met decisive defeat in 1791. Not until 1794 did General Anthony Wayne's offensive overcome the tribes.<sup>45</sup>

Washington was handicapped in pursuing these offensives because he lacked a material standing army and thus needed Congress to authorize new forces for each expedition. Also, his military policy was unpopular in some quarters, especially after the initial defeats. Many people, including many congressmen, thought he should negotiate with the Wabash tribes rather than fight them, and approval of new troops met substantial resistance.<sup>46</sup> Under the circumstances, Washington was in no position to fight a second Indian war in the Southwest, especially without Congress approving additional troops (which Washington rightly considered doubtful).<sup>47</sup> Unsurprisingly, Washington chose not to regard the isolated Indian attacks in the Southwest as actual declarations of war and tried to restrain the aggressive southern governors.

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AND PAPERS OF THE PRESIDENTS, 1789–1897, *supra*, at 150, 151. Congress's reply to Washington's 1793 annual message similarly referred to "war" existing in the Northwest but did not use that term to describe the situation in the Southwest. 4 ANNALS OF CONG. 139 (1793).

<sup>43</sup> See Prakash, *supra* note 1, at 98–101.

<sup>44</sup> See 4 ANNALS OF CONG. 499–504, 696–97, 774–79 (1793–1794).

<sup>45</sup> See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 95–127, 139–57 (1975); SOFAER, *supra* note 36, at 119–27.

<sup>46</sup> See KOHN, *supra* note 45, at 91–157.

<sup>47</sup> Representative Fisher Ames, opposing increases in the military for the southwest frontier, stated: "We have one Indian war already [referring to the conflict in the Northwest], which is enough at a time." 4 ANNALS OF CONG. 776 (1794).

Events in the Ohio Valley also suggest that Washington did not have a constrained view of his response power. *Unleashing* regards Washington's northwestern offensives as authorized by Congress.<sup>48</sup> But Congress never directly authorized them. In each case, Washington provided reports of attacks by the Wabash tribes in the Northwest and asked Congress to approve additional troops. He did not ask for approval to act offensively. Congress responded by merely authorizing troops. Congress's subsequent enactments did not mention 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) and said nothing at all about how to use the regular Army.<sup>49</sup>

Perhaps Washington thought Congress had implicitly authorized his offensives by approving the troops when it knew he intended to use them for offensive actions in the Ohio Valley.<sup>50</sup> But Washington also may have thought he had constitutional power to respond to full-scale attacks—in effect, a declaration of war—by the Wabash tribes.<sup>51</sup> The miniscule Army he inherited in 1789 required that he ask Congress to approve additional troops, but notably he did not ask for—

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<sup>48</sup> See Prakash, *supra* note 1, at 98–99. These were plainly offensive actions, at least by most definitions: they contemplated attacks into territory held by the tribes in order to destroy towns and inflict injury. See CURRIE, *FEDERALIST PERIOD*, *supra* note 36, at 84–85; Letter from Henry Knox to General Harmar (June 7, 1790), in 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1348, 1348 (Charles Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter DOCUMENTARY HISTORY]; Letter from Henry Knox to Governor St. Clair (Aug. 23, 1790), in 5 DOCUMENTARY HISTORY, *supra*, at 1351, 1351–52; see also SOFAER, *supra* note 36, at 121 (calling Harmar's operation “an offensive expedition”).

<sup>49</sup> Act of Sept. 29, 1789, 1 Stat. 96; Act of Apr. 30, 1790, 1 Stat. 119–21; Act of Mar. 3, 1791, 1 Stat. 222.

<sup>50</sup> Sofaer suggests this view but provides little direct evidence for it. See SOFAER, *supra* note 36, at 119–29 (noting that, though Congress never explicitly authorized offensive actions, it had received a letter informing them of St. Clair's lack of sufficient troops). Currie, on the other hand, suggests that Congress thought the President had inherent authority to protect the frontiers (including, presumably, through offensive action). See CURRIE, *FEDERALIST PERIOD*, *supra* note 36, at 83 (“[T]he 1790 statute gave the President no express authority to employ the army to protect the frontiers. At the same, the last section plainly assumed that the President already had that power. . . . [T]he inference is strong that Congress thought the requisite authority inherent in the office of Commander-in-Chief.”).

<sup>51</sup> It appears that the Wabash tribes' attacks were more sustained and coordinated than anything in the Southwest, or at least Washington and his advisors regarded them this way. See Letter from Arthur St. Clair to Henry Knox (Sept. 14, 1789), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 37, at 58, 58 (referring to “constant hostilities” with the Wabash and asking to “carry war into the Indian settlements”); Letter from Henry Knox to Governor St. Clair (Aug. 23, 1790), *supra* note 48, at 1351 (describing Wabash tribes rejecting U.S. offers of peace). Washington later described the northwest Indians' “obstinacy in waging war against the United States.” George Washington, Sixth Annual Address to Congress (Nov. 19, 1794), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, *supra* note 42, at 162, 167.

and Congress did not provide—authority to use the troops offensively (even though that was what he intended to do with them). It seems at least as likely that he (and Congress) thought granting that authority was unnecessary.

Further, if one regards the Wabash offensives as implicitly approved, it is hard to see why Washington thought the same implicit authority did not extend to the Southwest. It is not obvious from the materials available to Congress when it expanded the Army in 1790–1791 that the new troops would be used only for northwestern, and not southwestern, offensives. In requesting additional troops, Knox's 1790 report to Congress discussed Indian hostilities in both the Northwest *and* the Southwest, and it specifically mentioned the potential need for offensive actions against the Creeks.<sup>52</sup> The congressional debates over what became the Military Establishment Act of 1790 were at the time called debates on the *southwest* frontier.<sup>53</sup> The 1790–1791 authorizing statutes, as noted above, said nothing about how Washington could use the regular troops and provided for militia to defend the frontier generally. Any implied authorization seems as valid for the Southwest as for the Northwest.

The situation makes more sense if Washington thought the Constitution gave him offensive-response power and thought the Wabash tribes were at war with the United States but the Creeks and Cherokee were not. That would explain why he did not request approval to act in the Northwest; and because he apparently thought the President could not start wars where none already existed, it would also explain why he thought he could not act independently in the Southwest. Thus, Washington's activities do not appear to call into question the President's offensive-response power—if anything, they seem to support it.

## B. Adams and Madison: Responding to Ship Seizures

Neither the Adams nor Madison presidencies provide much insight into the President's ability to respond to declarations of war.

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<sup>52</sup> See Report of the Secretary of War (Jan. 12, 1790), in 5 DOCUMENTARY HISTORY, *supra* note 48, at 1279, 1279–81; CURRIE, FEDERALIST PERIOD, *supra* note 36, at 82–83. Referring to the Creeks, Knox asked for more troops so that he would “be in a situation to punish all unprovoked aggressions” and “to march into their country and destroy their Towns.” Report of the Secretary of War, *supra* at 1280. Knox also contemplated offensive operations against the Wabash tribes “to inflict that degree of punishment which may be necessary” to deter future aggressions. *Id.* at 1282. In a later report prior to the 1791 military augmentation statute, Knox asked for troops sufficient to “awe the Creeks.” Report of the Secretary of War on the Frontiers with Enclosures (Jan. 24, 1791), in 5 DOCUMENTARY HISTORY, *supra* note 48, at 1366, 1369.

<sup>53</sup> See, e.g., Gazette of the United States (Mar. 27, 1790), in 12 DOCUMENTARY HISTORY, *supra* note 48, at 856, 856 (noting debate “on the bill respecting the South Western frontiers”).

Both Adams (prior to the “Quasi-War” with France) and Madison (prior to the War of 1812) confronted a foreign nation seizing and otherwise interfering with U.S. merchant shipping.<sup>54</sup> Both Presidents asked Congress for authority to respond, but this shows nothing about the President’s offensive-response power because that power was not at stake.

In the law and practice of the time, nations at war commonly stopped neutral shipping to enforce blockades or rules against carrying contraband and seized violators.<sup>55</sup> Of course, the rights of neutral shipping were greatly disputed, and powerful nations often used pretexts to take advantage of neutrals or enforce rules that were unjustified in international law but beneficial to their war aims. Unjustified stops and seizures did not, however, amount to war. They could be causes of war (that is, something making it legal under international law for the aggrieved nation to go to war), but there was a difference between causes of war and war itself—if causes of war were not acted upon, then no war resulted.<sup>56</sup>

Adams and Madison both faced this situation as America attempted to stay neutral in the hostilities between Britain and revolutionary France and yet continue trade with each. To varying degrees during this period, both Britain and France refused to acknowledge the supposed neutral rights that the United States claimed. At the outset of Adams’s administration in 1797, for example, France substantially increased interference with U.S. shipping on various pretexts (likely out of frustration over the U.S. rapprochement with Britain reflected in the Jay Treaty). After failure of an American mission to France (in the notorious XYZ affair), France adopted even more sweeping policies that allowed almost unbounded seizures of American commercial shipping.<sup>57</sup>

Adams and his cabinet debated the appropriate response. Secretary of State Thomas Pickering and Attorney General Charles Lee fa-

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<sup>54</sup> On Adams, see CURRIE, *FEDERALIST PERIOD*, *supra* note 36, at 239–88; ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801* (1966); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM 529–690* (1993); and Dean Alfange, Jr., *The Quasi-War and Presidential Warmaking*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 274, 274–90 (David Gray Adler & Larry N. George eds., 1996). On Madison, see CURRIE, *JEFFERSONIANS*, *supra* note 36, at 164–95; REGINALD HORSMAN, *THE CAUSES OF THE WAR OF 1812* (1962); and J.C.A. STAGG, *MR. MADISON’S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783–1830*, at 3–119 (1983).

<sup>55</sup> See Alfange, *supra* note 54, at 279; Letter from Timothy Pickering to Alexander Hamilton (Apr. 29, 1797), in 21 *THE PAPERS OF ALEXANDER HAMILTON* 68, 68 (Harold C. Syrett ed., 1974) (describing “the right of a belligerent power to visit and examine neutral vessels, to ascertain whether they have on board contraband goods”).

<sup>56</sup> See VATEL, *supra* note 25, at 10–11 (discussing the difference between causes of war and war itself).

<sup>57</sup> See ELKINS & MCKITRICK, *supra* note 54, at 581–86.

vored declaring war, while Secretary of War James McHenry, and ultimately Adams, favored vigorous defensive measures. The debate makes clear, though, that no one regarded France as *already* at war with the United States: the question was whether to initiate war in response to France's unjustified seizures. While U.S. merchant shipping was in some sense under attack, neither the United States nor its forces were.<sup>58</sup> Similarly, congressional debate on the matter reflected an understanding that the nations were at peace but that France's illegal seizures might justify the United States going to war.<sup>59</sup> In this context, as *Unleashing* says, it is true that Adams and his advisors, including Hamilton, had a (rightly) limited view of the President's independent power, but that view had no bearing on the President's power to respond to another nation declaring war on the United States.<sup>60</sup>

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<sup>58</sup> See DECONDE, *supra* note 54, at 8–10, 17–24; ELKINS & MCKITRICK, *supra* note 54, at 581–86. *Unleashing* says that France was “waging war against the United States,” Prakash, *supra* note 1, at 102, but this surely exaggerates: France had merely seized private merchant ships on the grounds that the ships had violated rules of neutrality. These grounds were perhaps largely pretextual and unjustified, but that was manifestly different from being at war under eighteenth-century international law. Indeed, the period's leading historian confirms that “the French government did not consider itself at war with the United States.” DECONDE, *supra* note 54, at 23. Leading legal accounts of the episode likewise do not describe France's actions as initiating war. See CURRIE, FEDERALIST PERIOD, *supra* note 36, at 239–44; SOFAER, *supra* note 36, at 151–53; Alfange, *supra* note 54, at 274–79. Limited war did result once Congress authorized the U.S. Navy to attack French warships and privateers in defense of U.S. shipping, see Act of May 28, 1798, 1 Stat. 561, but the key point here is the nations' status before this occurred.

<sup>59</sup> See 8 ANNALS OF CONG. 1319–72 (1798); SOFAER, *supra* note 36, at 151–52. Although Representative Sewall stated that the French actions “amounted to a declaration of war on the part of France against this country,” 8 ANNALS OF CONG. 1326 (1798), he was the only person in a long debate who put the matter that way. Representative Albert Gallatin seemed to capture the sense of both sides in the debate when he “differed in opinion from the gentleman last up [Sewall], that this was a declaration of war. He allowed that it would be justifiable ground of war for this country.” *Id.* at 1328. As Gallatin put it, the question was whether, in response to France's conduct, the United States should “go to war . . . [or] remain at peace.” *Id.* at 1329; see *id.* at 1320 (Representative Sitgreaves stating that “the time is not far distant when war must be resorted to”); *id.* at 1321 (Representative Baldwin denying “that the present state of things is already a state of war”); *id.* at 1323 (Representative Giles stating that “as far as he understood the situation of the United States at the time, it was a state of neutrality”); *id.* at 1445–46 (Representative Harper, in subsequent debate, finding “this country to be in a state of peace”). Adams's March 19, 1798 message to Congress on relations with France, which initiated this debate, had referred to the “differences between the two nations” and France's “depredations on our commerce,” as well as the failure of the U.S. diplomatic mission, but did not describe France as being at war with the United States. *Id.* at 1271–72.

<sup>60</sup> For example, after the first round of escalated French seizures, Hamilton wrote Secretary of State Pickering to recommend that Adams allow U.S. merchant ships to arm for defense and request a “provisional army . . . to be ready to serve if a War breaks out.” Letter from Alexander Hamilton to Timothy Pickering (Mar. 22, 1797), in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 55, at 545, 546. Pickering responded that arming merchant vessels “will be zealously opposed in the House of Representatives . . . because of the danger of its leading to open war.” Letter from Timothy Pickering to Alexander Ham-

Madison had similar difficulties with Britain, which increasingly interfered with U.S. trade with Europe (then largely controlled by Napoleon) and claimed the right to stop U.S. ships to search for and seize British deserters (so-called "impressment"). These policies reached back to Jefferson's administration; Jefferson had sought to use the infamous Embargo and Non-Intercourse Acts to bring pressure in response.<sup>61</sup> Those measures failed to produce results and in 1812 Madison recommended that Congress declare war. Madison's message to Congress rhetorically accused Britain of making war on the United States, but no actual state of war existed between the two countries prior to the U.S. declaration. Madison cited interference with shipping, impressment, and incitement of Indian hostilities as justifications for war.<sup>62</sup> None of these acts constituted an armed attack or formal proclamation that would have created a state of war under the international law of the time. In essence, Britain and the United States had a dispute over the rights of neutrals, which Britain interpreted very narrowly and the United States interpreted very broadly; the United States ultimately chose to resolve it by starting a war.<sup>63</sup>

Like the events of Adams's presidency, these events confirm that early Presidents, when faced with foreign nations' hostile actions that fell short of war-declaring attacks, thought they needed Congress's approval to escalate to open warfare. That is consistent with a reading of the Declare War Clause that prevents the President from initiating a state of war, but it says nothing about the President's power to respond to attacks on the United States that have already created a state of war. Madison in 1812, like Adams in 1797–1798, did not face the latter situation.

### C. Jefferson and Tripoli

Unlike Madison and Adams, President Jefferson did confront the question of the President's offensive-response power. At the time, the North African states sometimes used formal declarations of war to

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ilton, *supra* note 55, at 68. Plainly neither Hamilton nor Pickering regarded war as already having broken out, despite France's ship seizures.

<sup>61</sup> See CURRIE, JEFFERSONIANS, *supra* note 36, at 145–55.

<sup>62</sup> See 24 ANNALS OF CONG. 1624–29 (1812).

<sup>63</sup> As one historian explains:

England, in spite of the increasing hostility of America, and in spite of the opposition within England herself, persevered relentlessly with essentially the same policy she had pursued since 1807. America had shown great reluctance to go to war, and England frequently expressed the desire to prevent the outbreak of open hostilities, yet the government was prepared to make no concession to attain this desirable end. To America was left the choice of peace or war.

HORSMAN, *supra* note 54, at 203.

cover their effectively piratical activities. In 1801, at the outset of Jefferson's presidency, Tripoli—one of those states—formally declared war on the United States.<sup>64</sup> Jefferson, anticipating trouble, had already sent U.S. naval ships to the Mediterranean. After one of these ships, the *Enterprise*, engaged a Tripoli vessel, Jefferson told Congress that he needed approval for offensive actions against Tripoli: U.S. forces were, he said, “[u]nauthorized by the constitution, without the sanction of Congress, to go beyond the line of defence.” The *Enterprise*, he added, had defended itself but had not taken prisoners or prizes.<sup>65</sup> *Unleashing* emphasizes Jefferson's statement,<sup>66</sup> but there are substantial reasons to discount it.

First, Jefferson's cabinet had privately concluded (over Attorney General Levi Lincoln's dissent) that Jefferson did *not* need congressional approval to order offensive actions if war was initiated by the other side: U.S. commanders “may be authorized, if war exists, to search for and destroy the enemy's vessels wherever they can find them.”<sup>67</sup> As Secretary of the Treasury Albert Gallatin put it, “The exve can not put us in a state of war, but if we be put into that state either by the decree of Congress or of the other nation, the command & direction of the public force then belongs to the exve.”<sup>68</sup> Madison (then Secretary of State), Secretary of Navy Smith, and Secretary of War Dearborn all agreed.<sup>69</sup> Madison later wrote of the episode: “The only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has been actually produced by the conduct of another power . . . . Such a case was the war with Tripoli during the administration of Mr. Jefferson.”<sup>70</sup>

Second, Jefferson apparently agreed with his cabinet. His orders to naval commander Richard Dale specifically encompassed offensive

<sup>64</sup> See CURRIE, JEFFERSONIANS, *supra* note 36, at 123–30; SOFAER, *supra* note 36, at 208–16; Montgomery Kosma, *Our First Real War*, 2 GREEN BAG 169 (1999). For historians' accounts, see RAY IRWIN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS* (1931) and MICHAEL KITZEN, *TRIPOLI AND THE UNITED STATES AT WAR: A HISTORY OF AMERICAN RELATIONS WITH THE BARBARY STATES* (1993). For my prior assessments, see RAMSEY, *supra* note 5, at 244–45, and Ramsey, *supra* note 5, at 1628–31.

<sup>65</sup> See Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), in 3 *THE WRITINGS OF THOMAS JEFFERSON* 327, 329 (Paul Leicester Ford ed., N.Y., G. P. Putnam's Sons 1892). Congress adopted a broad authorization of force against Tripoli. See Act of Feb. 6, 1802, 2 Stat. 129–30.

<sup>66</sup> See Prakash, *supra* note 1, at 103–04.

<sup>67</sup> Thomas Jefferson, The Anas (May 15, 1801), in 1 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 65, at 154, 294 (recording Jefferson presenting this question to the cabinet and the cabinet's affirmative answer).

<sup>68</sup> *Id.* at 293.

<sup>69</sup> See *id.* at 293–94 (recording Gallatin's comments and concurring votes by Madison, Smith, and Dearborn).

<sup>70</sup> Letter from James Madison to James Monroe (Nov. 16, 1827), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 599, 600 (Phila., J. B. Lippincott & Co. 1865) (internal quotation marks omitted).

actions: if Tripoli declared war, Dale was authorized to proceed “by sinking, burning, or destroying their ships and vessels wherever you shall find them,” as well as by employing other aggressive action such as blockading enemy ports.<sup>71</sup> Implementing these orders, Dale blockaded Tripoli and directed his ships to attack Tripoli’s vessels.<sup>72</sup> Pursuant to these directions, in the incident to which Jefferson’s message referred, the *Enterprise* attacked a Tripoli vessel (rather than defending itself against attack).<sup>73</sup> Legal historian David Currie concludes: “Jefferson did not tell Congress the whole truth. Neither the Administration’s orders nor the Navy’s actions reflected the narrow view of presidential authority Jefferson espoused in his Annual Message.”<sup>74</sup>

Third, similar events occurred a year later with respect to Morocco. Jefferson learned of a likely Moroccan declaration of war and requested advice. Gallatin recommended a blockade, repeating his earlier view: “The Executive cannot declare war, but if war is made, whether declared by Congress or by the enemy, the conduct must be the same, to protect our vessels, and to fight, take, and destroy the armed vessels of that enemy.”<sup>75</sup> Once he confirmed Morocco’s declaration, Jefferson directed U.S. ships to respond “by all the means in

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<sup>71</sup> Extract of a Letter from the Secretary of Navy to Commodore Dale (May 20, 1801), in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 359, 359–60 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832).

<sup>72</sup> See Letter from David Humphreys to James Madison (May 8, 1801), in 1 THE PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES 147, 147 (Robert J. Brugger et al. eds., 1986) (reporting Tripoli’s declaration of war); Circular Letter from James Madison to American Counsuls, Mediterranean (May 21, 1801), in 1 THE PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES, *supra*, at 209, 209 (noting that “Commodore Dale is instructed to make the most effectual use of his force”); Letter from David Humphreys to James Madison (Sept. 10, 1801), in 2 THE PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES, *supra*, at 95, 96 (reporting the blockade).

<sup>73</sup> See IRWIN, *supra* note 64, at 106–10 (recounting Dale’s offensive actions); KITZEN, *supra* note 64, at 46–53 (same).

<sup>74</sup> CURRIE, JEFFERSONIANS, *supra* note 36, at 128. Sofaer’s view is similar: “[T]he Cabinet had authorized offensive actions, and Dale had been instructed accordingly. Sterrett [the *Enterprise*’s commander] released the corsair for purely tactical reasons . . . . These facts undermine the importance widely attributed to Jefferson’s statements to Congress regarding Sterrett’s conduct.” SOFAER, *supra* note 36, at 212–13. Moreover, whatever Jefferson said, the papers he submitted to Congress in connection with his message revealed his approval of offensive actions, including attacks on ships and blockades. See 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 71, at 347, 359–60. Congress nevertheless approved continued operations without objecting to Jefferson’s (or Dale’s) actions.

<sup>75</sup> Letter from Albert Gallatin to Thomas Jefferson (Aug. 16, 1802), in 1 THE WRITINGS OF ALBERT GALLATIN 86, 88–89 (Henry Adams ed., Phila., J. B. Lippincott & Co. 1879) [hereinafter WRITINGS OF GALLATIN]; see Letter from Thomas Jefferson to Albert Gallatin (Aug. 9, 1802), in 1 WRITINGS OF GALLATIN, *supra*, at 83, 83–84 (requesting advice); Letter from Albert Gallatin to Thomas Jefferson (Aug. 20, 1802), in 1 WRITINGS OF GALLATIN, *supra*, at 90, 90–91 (recommending blockade). Secretaries Dearborn (War) and Smith (Navy) agreed with Gallatin. See SOFAER, *supra* note 36, at 222.

your Power” without any apparent limit to defensive action.<sup>76</sup> Several months later, Jefferson drafted a message to Congress requesting approval for offensive actions against Morocco. Gallatin objected, again endorsing the President’s offensive-response power:

[W]henever war does exist, whether by the declaration of the United States or by the declaration or act of a foreign nation, I think that the Executive has a right, and is in duty bound, to apply the public force which he may have the means legally to employ, in the most effective manner to annoy the enemy. If the instructions given in May or June, 1801, by the Navy Department to the commander of the Mediterranean squadron shall be examined, it will be found that they were drawn in conformity to that doctrine; and that was the result of a long Cabinet discussion on that very ground. It is true that the message of last year adopted a different construction of the Constitution; but how that took place I do not recollect.<sup>77</sup>

Gallatin added pointedly: “What have been the instructions given in relation to Morocco, in case war had been found to exist?”—likely he knew that Jefferson’s orders did not limit the Navy to defensive operations.<sup>78</sup> Jefferson deleted his request for authorization.<sup>79</sup> These events suggest that Jefferson was (not uncharacteristically) of two minds on the matter but allowed himself to be persuaded by Gallatin and Madison (neither of whom inclined to expansive pro-Executive positions).

Finally, the same period produced two strong statements supporting the President’s power by former constitutional framers outside the administration. First, Hamilton’s *The Examination*, published in December 1801, criticized Jefferson’s message to Congress on this ground. Hamilton explained: “The moment . . . that two nations are, in an absolute sense, at war, the public force of each may exercise every act of hostility, which the general laws of war authori[z]e, against the persons and property of the other.”<sup>80</sup> As a result, he continued, “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:

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<sup>76</sup> SOFAER, *supra* note 36, at 222 (quoting Secretary Smith’s orders to Mediterranean commander Morris).

<sup>77</sup> Letter from Albert Gallatin to Thomas Jefferson (Dec. 1802), in 1 WRITINGS OF GALLATIN, *supra* note 75, at 104, 105.

<sup>78</sup> *Id.* at 106.

<sup>79</sup> See SOFAER, *supra* note 36, at 222–23. By this time, matters with Morocco had been settled peaceably. See Letter from Thomas Jefferson to Albert Gallatin (Sept. 8, 1802), in 1 WRITINGS OF GALLATIN, *supra* note 75, at 96, 96.

<sup>80</sup> LUCIUS CRASSUS, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 55, at 444, 455.

it is at least unnecessary.”<sup>81</sup> Although *Unleashing* discounts this explanation as idiosyncratic,<sup>82</sup> it is strikingly parallel to the private advice Jefferson received from his cabinet (especially Gallatin) and Madison’s later description of the episode. Second, William Paterson’s 1806 circuit court opinion in *United States v. Smith* again parallels Hamilton and Gallatin:

If, indeed, a foreign nation should invade the territories of the United States, it would I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy’s own country; and for this plain reason, that a state of complete and absolute war actually exists between the two nations. . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration.<sup>83</sup>

Thus, the Tripoli episode and related events show that Madison, Gallatin, Hamilton, and Paterson, along with other members of Jefferson’s administration, thought the President had offensive-response power; Jefferson himself was at best unsure, and the only quasi-prominent person to adopt *Unleashing’s* reading was Levi Lincoln.

#### D. The Seminole War

Although *Unleashing* stops with Madison, it may be appropriate to look one administration further into post-ratification history. The offensive-response issue arose directly under President James Monroe in connection with the Seminole War in 1819. Andrew Jackson, commanding U.S. forces in the Southwest, led an expedition against the Seminole tribe in Spanish Florida. In addition to pursuing the Seminoles, Jackson attacked several Spanish posts, claiming that the Spanish were aiding the Seminoles. Congress had not authorized any of these actions. Some congressmen objected to Jackson’s supposed infringement of Congress’s war power, resulting in an extended debate in the House over a motion to condemn Jackson’s activities.<sup>84</sup>

Even those who objected to Jackson’s conduct seemed generally to concede two things. First, few members criticized Jackson’s attack on the Seminoles; most conceded that it was constitutional because it responded to Seminole attacks on the United States.<sup>85</sup> Although Con-

<sup>81</sup> *Id.* at 456.

<sup>82</sup> See Prakash, *supra* note 1, at 108–10.

<sup>83</sup> 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342). Paterson may have been using the case to add his voice to the recent debate over the Tripoli episode: *Smith* did not implicate the question, and Paterson went well out of his way to engage it.

<sup>84</sup> See 33 ANNALS OF CONG. 583–1138 (1819) (recording debate over the Seminole War); CURRIE, JEFFERSONIANS, *supra* note 36, at 197–200; SOFAER, *supra* note 36, at 342–63.

<sup>85</sup> See, e.g., 33 ANNALS OF CONG. 621 (1819) (Representative Johnson commenting that “nobody entertains a doubt” that attacking the Seminoles was constitutional); *id.* at 648

gress was aware of Jackson's expedition by the time it happened, Monroe had authorized the U.S. attack on the Seminoles in Florida without consulting Congress, presumably exercising his offensive-response power, and Congress never explicitly approved offensive action.<sup>86</sup> Nonetheless, Monroe's power to act against the Seminoles was not seriously contested. Second, Jackson's critics agreed that if the Spanish had attacked the United States or U.S. forces, Jackson would have been able to respond offensively against them as well. Representative Cobb, who introduced the motion condemning Jackson, explained that Spain's acts

were none of them direct and open acts of war. They were only causes of war. I will not deny that . . . if the Spanish authorities in East Florida had . . . either attacked us, or . . . repelled our attack upon the Indians; in that event, we should be compelled to make war upon them by a regard to our own safety. No declaration of war would be necessary.<sup>87</sup>

Even if Congress had implicitly authorized attack on the Seminoles, it plainly had not authorized hostilities with Spain, so Cobb must have understood offensive response as a presidential power; his claim that Jackson acted unconstitutionally arose from Cobb's belief that Spain had not attacked U.S. forces. Similarly, Jackson's defenders emphasized that because the Seminoles began the war and the Spanish collaborated with them, an offensive response against both parties was justified despite the lack of congressional approval.<sup>88</sup> In short, it seems that by the time of Monroe's presidency, general agreement existed on the President's offensive-response power: the Seminole War debate was largely over whether the facts showed an offensive response to a Spanish attack (regarded as constitutional) or simply a unilateral attack on Spanish forces (regarded as unconstitutional).

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(Representative Clay approving the attack on the Seminoles but not the attack on the Spanish posts). Representative Mercer did object to attacking the Seminoles because, according to him, they had not "ma[de] war" on the United States nor "invaded our frontiers." *See id.* at 802.

<sup>86</sup> *See* SOFAER, *supra* note 36, at 342–44.

<sup>87</sup> 33 ANNALS OF CONG. 594 (1819).

<sup>88</sup> *See id.* at 601, 603 (Representative Holmes defending Jackson by saying that "[i]t is, then, incumbent on me to show that the Indians commenced the war"; that "[w]hen war is commenced by savages, it becomes the duty of the President to repel and punish them"; and finally that Spain used the posts to support the Seminoles' attack); *id.* at 678 (Representative Smyth stating that "[s]hould Spain commence war against us after the rising of Congress, no doubt the President, with his fleets and armies, would be authorized to fight, before the meeting of Congress, and to continue fighting, whether the war was ever declared or not"; and concluding that Spain's threat to attack Jackson amounted to a Spanish declaration of war). Both Holmes and Smyth referred to Washington's offensive expeditions against the Wabash tribes, discussed in Part II.A., as precedent for offensive responses without congressional authorization. Ultimately, Cobb's motion failed, *id.* at 1138, though it is not clear on what basis.

Though this is only weak evidence of the text's original meaning—coming some thirty years after ratification—it indicates at minimum that the preceding presidencies did not witness a consensus in the other direction.

### III

#### THE CASE FOR THE PRESIDENT'S OFFENSIVE-RESPONSE POWER

This Part restates the case for the President's offensive-response power. Specifically, it argues that under the Constitution's historical meaning, the President has independent power to respond, offensively and defensively, when another nation unambiguously declares war (by proclamation or attack) against the United States.

To begin, this reading seems the best way to make sense of the text. It is clear that founding-era Americans did not think a *defensive* response to attack declared war—otherwise, the President would not have this power, and they plainly thought the President had it. That creates a puzzle, though, because—as explored in Part I.A—the decision to resist attack appears to commit the nation to war: why would that *not* be a declaration? Answering this question helps solve the difficulty of offensive-response power.

As discussed, eighteenth-century international law sharply distinguished between the state of war and the state of peace. A declaration of war, in its legal sense, announced—whether by attack or proclamation—a shift from a state of peace to a state of war. Once a nation declared war against another, a legal state of war existed between them. Making a defensive response did not alter the legal relationships between the contending nations. As a result, one might say that making a defensive response was not, in a legal sense, a declaration of war: it did not initiate (or announce or make clear) a state of war because the state of war was already manifest. And indeed international law treatise writers commonly said that a declaration was superfluous when a nation defended itself.<sup>89</sup>

It is true, as *Unleashing* says, that a nation might choose to surrender rather than resist. This does not mean, though, that the state of war never existed in such a case. Rather, the state of war was triggered by the attack and ended (perhaps quite quickly) by the attacked nation taking steps to satisfy the attacker.<sup>90</sup> It is also true, as *Unleashing* documents, that proclamations or actions made in response to attack were sometimes called declarations of war. That only shows there was

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<sup>89</sup> See RAMSEY, *supra* note 5, at 223.

<sup>90</sup> If one doubts this, consider the situation of soldiers in a border fort who, upon attack, surrender without resistance. Surely they would be prisoners of war in eighteenth-century—and modern—terms.

a wider informal meaning of declaring war in addition to its narrow legal meaning.

If this captures the eighteenth-century understanding, it provides (as *Unleashing* cannot) a textual basis for the President's widely assumed defensive-response power. We can think of the "declare war" power as the power to create a state of war by word or action. Since defending the nation after the enemy creates a state of war does not itself create a state of war, it falls within the President's executive and commander-in-chief powers and is not assigned to Congress by the Declare War Clause.

Once we accept this explanation of the President's defensive-response power, though, the President's offensive-response power necessarily follows. If defensive response is not a declaration, neither is offensive response. International law, dictionary definitions, and common usage called both defensive and offensive responses "wars" without distinction. Shifting from defense to offense did not declare war because the state of war already existed.<sup>91</sup> As a result, like the case of defensive-response power, the President has offensive-response power through the Executive Power and Commander in Chief Clauses, and the Declare War Clause does not allocate it to Congress.

The Constitution's text further suggests this reading in Article I, Section 10. According to that section, without the consent of Congress states cannot "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."<sup>92</sup> Apparently, therefore, states can fully and independently "engage in war" without Congress's approval when invaded or imminently threatened: "engag[ing] in war" on its face obviously includes taking the offensive, and nothing in the surrounding text limits states to defensive measures. (True, states can only act in time of invasion, but attacking the enemy homeland is one way to counter invasion.) It would be surprising if states had broader powers than the President in this regard, so Article I, Section 10 indicates that the President similarly is not limited to defensive responses.<sup>93</sup>

*Unleashing* objects that the Marque and Reprisal Clause is inconsistent with presidential offensive-response power.<sup>94</sup> That Clause seems to give Congress exclusive control over the issuance of such letters, including in cases of attack on the United States. Thus, by the proposed reading, the President can make unlimited offensive re-

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<sup>91</sup> See *supra* Part I.

<sup>92</sup> U.S. CONST. art. I, § 10.

<sup>93</sup> To be clear, states have less response power than the President because they can respond only to invasion, whereas the President can respond to any act that creates a state of war.

<sup>94</sup> See Prakash, *supra* note 1, at 65.

sponses to attack *except* by issuing letters of marque and reprisal. That, *Unleashing* says, makes no sense: why single out this one somewhat inconsequential power to deny to the President? Even if this is the correct way to read the text, it poses no peculiarity. Marque-and-reprisal power is unique because it encompasses a way to conduct war unconstrained by Congress's funding power. It makes sense to put this power unconditionally in Congress to protect Congress's power of the purse. If the President had marque-and-reprisal power in response to attack, the response power would not be fully limited by Congress's funding power (a limit the Framers thought exceptionally important). Thus, the allocation is perfectly sensible.

Reading "declare War" to mean creating a state of war, and thus not to include responses to attack, may seem strained to modern ears, especially with the idea of the "state of war" losing much of its formalistic meaning. But post-ratification history confirms that it was consistent with the Framers' thinking.

First, post-ratification speakers directly associated the "declare war" power with the power to place the nation in a state of war. This is, for example, how Hamilton described it in his 1793 *Pacificus* essays: "[T]he Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War."<sup>95</sup> Similarly, Representative Harper said in the 1798 Quasi-War debates that "[t]he President . . . could not alter the existing state of things. Admitting that state to be at peace, the President could not induce a state of war."<sup>96</sup>

Second, as we have seen, the principal post-ratification defenses of the President's response power track the textual argument made here: Hamilton's *Examination*, Gallatin's advice to Jefferson, and Paterson's *Smith* opinion all focus on the idea of the state of war. Their common thread is that Congress's "declare war" power does not allow the President to place the nation in a state of war, but if another nation created the state of war the President could fight without limitation because doing so would not create a state of war.<sup>97</sup>

Third, this view is consistent with post-ratification presidential actions (and inactions). As we have seen, Adams in the Quasi-War, Madison in the War of 1812, and Washington with respect to the Creeks and Cherokee refrained from attacks without Congress's approval when no state of war yet existed. In contrast, Jefferson in the

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<sup>95</sup> Alexander Hamilton, *Pacificus* No. 1 (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 55, at 33, 42. *Unleashing* says Hamilton was inconsistent, but *Pacificus* shows he was not: Hamilton always understood the Declare War Clause to grant an exclusive power to create a state of war. It follows from this view that Adams could not independently act against the French in 1797–98, but Jefferson could respond against Tripoli in 1801; in the latter case, but not in the former, a state of war already existed.

<sup>96</sup> 8 ANNALS OF CONG. 1445 (1819).

<sup>97</sup> See *supra* Part II.C.

Tripoli episode and Monroe in the Seminole War (and probably Washington with the Wabash Indians) took offensive measures without congressional approval when the other side had created a state of war.<sup>98</sup>

Lest this reading be thought to give too much unchecked war power to the President, it is important to state the President's authority precisely. Although sometimes (including by the present author) called the President's power to respond to attack, the President's constitutional authority is to respond *to declared war*. Low-level attacks not amounting to declarations of war do not trigger a presidential power to initiate war in response. Thus, the isolated and unsystematic deprivations of small portions of the Creek and Cherokee nations did not give Washington authority to respond offensively. Similarly, French and British seizures of American merchant shipping did not authorize Adams or Madison to take the United States into war. In none of these cases had the enemy actually declared war (i.e., created a state of war); thus, a U.S. offensive would itself have created a state of war and so would have been seen as declaring war. Washington, Adams, and Madison all understood that they needed congressional approval in these circumstances. Of course, the President has constitutional authority to respond to low-level attacks in ways that do not declare war, and so, as these Presidents understood, low-level defensive responses were constitutionally appropriate.

It is also important to define precisely what constitutes declaring war. While I agree entirely with *Unleashing's* conclusion that declaring war could be done by action as well as by proclamation, some of the examples it uses may suggest too broad a definition. Eighteenth-century speakers surely overstated what could be called a declaration for rhetorical purposes.<sup>99</sup> Some acts they labeled declarations of war cannot reasonably be seen as such in a legal or practical sense because no one at the time believed that a state of war resulted from them. These acts might cause the nation at which they were directed to initiate war itself, but the affected nation might, upon sober reflection, decide instead not to begin war; if it decided not to begin war, no war would exist. And plainly the Constitution did not adopt the rhetorical sweep of "declaring war" as that phrase was sometimes used. If it had, the President could not conduct diplomacy because anything that gave an insult—or even a pretext for insult—could be labeled a declaration of war by the other side. Similarly, it is not the case that any perceived slight to the United States could be labeled a declaration of war (and hence authority for offensive action) by the President. In assessing

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<sup>98</sup> See *supra* Part II.

<sup>99</sup> See Prakash, *supra* note 1, at 69–75.

both Congress's power and the President's power, it is crucial to see the declaration as something that creates a state of war.

As a result, the correct formulation is that the Constitution gave the President the power to respond to another nation's declaration of war against the United States, with declaration of war meaning only a proclamation or attack that created a state of war with the United States. Keeping this limitation in mind may provide some reassurance that the President's offensive-response power would not allow the President to use minor incidents as a pretext for launching unilateral wars.<sup>100</sup>

#### CONCLUSION

In sum, *Unleashing's* intermediate position—that the Constitution gave the President power to respond to attack defensively but not offensively—cannot readily be derived from the text. Launching a counteroffensive in response to an attack, after first fighting defensively, in no eighteenth-century sense “declared” war. War would already exist as a result of the attack and the defense; shifting from defense to offense would not affect its status. As a result, the Declare War Clause, on which *Unleashing* relies, cannot deny the President offensive-response power (unless it also denies the President defensive-response power, which is manifestly untenable).

This textual difficulty might be overcome if *Unleashing* had especially strong post-ratification support, but it does not. Most of the events it recounts did not involve nations declaring war (by proclamation or attack) on the United States. When a nation did unambiguously declare war, as Tripoli did in 1801, the leading views did not limit the President's response power. Similarly, the 1819 Seminole War debates, which *Unleashing* does not consider, show a general consensus that the President could respond offensively to attacks (the question there being whether Spain had participated in attacks on the United States in a way that triggered this power).

Reading the Constitution to give the President the power to respond fully to enemy declarations fits better with its text and history. In eighteenth-century terminology, the Constitution's power to declare war amounted to the power to place the United States in a state of war. When the United States was *already* in a state of war as a result of actions by another nation, the “declare war” power would not be implicated by any U.S. response—as comments by Hamilton, Madison, William Paterson, and Albert Gallatin, among others, con-

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<sup>100</sup> It is also worth noting that the Declare War Clause is obviously not the only check on the President's war power. In the case of offensive operations, Congress's funding power would likely be especially effective, particularly in the eighteenth century when offensive action could not be taken as quickly as it can be taken today.

firm. As a result, in that situation the President's executive and commander-in-chief powers would grant independent authority to respond both defensively and offensively, without being limited by the Declare War Clause.

