The Constitution seems silent about who may end a war and how they may do so. There is no “declare peace” clause, and scholarship has long neglected this matter. Yet given two “Forever Wars,” considerable fatigue with both, and numerous demands to end them, the question of how to end hostilities is exceptionally salient. We conduct an overdue dissection and reveal that the Constitution charts many paths to peace.

The familiar route consists of the executive negotiating and, with the Senate’s consent, ratifying a peace treaty. But there are other paths, more obscure and less comprehensive but nonetheless viable and valuable. First, the president can end combat via an armistice. Second, Congress can halt war funding, thereby ending U.S. warfighting. Third, Congress can legislatively terminate the use of military force. Whether a peace develops via one of these alternative routes depends upon whether the enemy ends warfare as well and, importantly, whether that mutual cessation of hostilities endures.

In assessing these pathways, the Article underscores an oft-forgotten feature of the Constitution: it does not always neatly separate powers. It sometimes grants multiple institutions independent authority to achieve similar ends, creating an overlap. When it comes to peace, this point has been lost. As the Forever Wars march forward, almost inexorably, federal policymakers should familiarize themselves with the Constitution’s many roads to peace.

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INTRODUCTION

The attack on 9/11, and its thousands of victims, will forever be etched in the hearts of Americans. Those acts of terror spawned two wars, one against the perpetrators of the 9/11 attacks and another against Saddam Hussein and the supposed threat posed by Iraq. Like a juggernaut, the wars have lumbered on for almost two decades, with combatants and victims not even alive in 2001. We have had mission creep (from ousting the Taliban to protecting the Afghan government), enemy creep (fighting the Iraqi Republican Guard and then ISIS), and the death of creeps (Osama Bin Laden, Saddam Hussein, and Abu Bakr al-Baghdadi).

Numerous presidents have resolved to end our involvement in these “forever wars.” While warfare in Iraq continues (albeit with relatively low...
troop levels), the war in Afghanistan seems to have come to a mortifying close. Somehow, the humiliation from the shambolic withdrawal was worse than the disgrace after the fall of Saigon. Our reputation with friends and foes will suffer for decades. And if we ever must fight the Taliban again, they will turn our high-tech weapons against us. As disastrous as the withdrawal was, at least we are finally out of Afghanistan, or so many Americans may suppose.² Think of it as peace with dishonor.

Yet no one should blithely assume we are out of the woods. If the past is prologue, respites from these wars prove to be temporary, for lulls are followed by surges. After President Obama withdrew troops from Iraq in 2011, for example, he reinserted them three years later and they have remained ever since.³ The chaos that attended President Joseph Biden’s withdrawal of all troops from Afghanistan, and the stranding of hundreds of Americans, green card holders, and Afghan allies leaves the fate of that war similarly unsettled.⁴ Some, like former CIA Director Leon Panetta, insist that we will return to Afghanistan because our safety will require it.⁵

The unvarnished truth is that the Afghanistan War is not over. While the President initially boasted that he had “ended the longest war in U.S. history,” he later insisted that the United States will fight terrorists in Afghanistan using “over-the-horizon” technology.⁶ “We can strike terrorists and targets without American boots on the ground—or very few if needed.”⁷ So we may strike Afghanistan with high-tech weaponry and perhaps a “few” American boots will return to Afghanistan. Somehow, some way, these Forever Wars abide.⁸

² “substantial progress” towards fulfilling the promise of ending the war in Afghanistan); President Joseph Biden, Remarks by President Biden on the Way Forward in Afghanistan (Apr. 14, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/14/remarks-by-president-biden-on-the-way-forward-in-afghanistan [https://perma.cc/U7JR-EQMT] (announcing that President Biden intended to end the war in Afghanistan).

³ See U.S. Combat Forces to Leave Iraq by End of Year, BBC (July 27, 2021), https://www.bbc.com/news/world-us-canada-57970464 [https://perma.cc/6LK8-L4LN] (stating that in July 2021 there were 2,500 US troops in Iraq and that number was likely to stay the same).


⁷ Id.

How to finally end these Forever Wars? That question, on the minds of millions, perplexes to no end. No peace treaty seems in the offing, for even though we signed some sort of peace pact with the Taliban, there will never be a treaty with Al-Qaeda or its even more horrific rival ISIS. From time to time, legislators have proposed the repeal of one or both Authorizations for Use of Military Force (AUMFs), and the Obama Administration suggested that Congress authorize a new war against ISIS and simultaneously repeal the 2002 AUMF. But would repeal matter? Some say no, arguing that peace treaties are the sole constitutional means of ending a war and that Congress cannot make peace, through repeal or otherwise. And what to make of the unilateral presidential withdrawal of troops? Is a war legally over when the last boots are off foreign soil?

What does the Constitution say about all this? Not much, or so it seems. The Constitution bristles with references to war: it speaks of Congress “declare[ing] War,” generally bars states from “engag[ing] in War,” and defines “treason” as “levying War.” But it never specifies how to end a war, leaving a deep and unsettling uncertainty. As significant as the war power was at the Founding, the peace power was no less critical. Indeed, the Framers sought a framework that would “facilitat[e] peace.” They succeeded, albeit in ways that elude many modern readers.

“Peace” can refer to many states of the world. As we use it, it encompasses four distinct situations. In a colloquial sense, peace means the prolonged absence of hostilities. Practically, peace prevails when the fighting has long ceased. Hence, even without a formal accord with the enemy, peace nonetheless exists if there is a protracted halt to warfare. In such cases, the war is finished in important, real-world ways—hostilities are over, and troops

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[https://perma.cc/9BU6-ABGS] (Sept. 20, 2021) (explaining that the Pentagon intended to keep troop levels in Iraq the same despite an announced “end to the presence of combat forces”); Jack Goldsmith, The Forever War Is Entrenched, LAWFARE (Oct. 19, 2015, 7:57 AM), http://www.lawfareblog.com/forever-war-entrenched [https://perma.cc/ETN5-YDRZ] (“[The Forever War] will be with us for a very long time, long past the Obama presidency, even without further authorization from Congress.”).


10 See Joint Resolution to Authorize the Limited Use of the United States Armed Forces against the Islamic State of Iraq and the Levant, 161 CONG. REC. 2101-02 (2015).

11 See infra note 41.

12 U.S. CONST. art. I, § 8, cl. 10; id. art. III, § 3.

13 The Records of The Federal Convention of 1787, at 319 (Max Farrand ed., 1911) (statement of Oliver Ellsworth) [hereinafter FARRAND] (remarking that it should be “more easy to get out of war, than into it”).
The Peace Powers: How to End a War

(may) have come home.\textsuperscript{14} When ordinary Americans speak of peace, this is generally what matters to them.

Second, peace has constitutional dimensions. As a matter of the original Constitution, the president may wage war only after Congress has exercised its power to declare war.\textsuperscript{15} After the nation makes peace, however, that domestic authority ceases to exist. War, at least on the part of the United States, cannot legally resume without a new congressional authorization of war. Furthermore, states have additional constitutional authority in times of war, powers which lapse in peacetime.\textsuperscript{16}

Third, peace can refer to a status under ordinary federal law. Many federal statutes operate only during wartime, such as those granting emergency authorities to the executive.\textsuperscript{17} Other federal rules like rent stabilization or price controls likewise have effect only in times of war.\textsuperscript{18} Wartime status also affects the application of the Uniform Code of Military Justice; civil disputes, like those involving claims to insurance or veterans’ benefits; and certain tort claims.\textsuperscript{19} Sometimes overseas hostilities may have ceased, and thus America may be at peace in a practical sense, but may not be at peace for purposes of federal statutes.

Last is an international legal state of peace. Under eighteenth-century international law, a state of peace had significance for international relations. When a treaty made peace, the international legal state of war would cease, and the norms and laws of peacetime would resume. These laws affected relations between the two countries, such as treaty obligations or liabilities for seizures at sea, and dealings with neutral countries.\textsuperscript{20} Given the

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\textsuperscript{14} Michael Reisman distinguishes between “stopping wars” and “making peace.” See W. Michael Reisman, Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics, 6 TUL. INT’L & COMPAR. L. J. 5, 15-29 (1998). Reisman uses “peace” in a narrow sense, to cover warring nations that no longer wish to fight because there is a “qualitative change in their objectives and expectations.” Id. at 21. Because our senses of peace are more pedestrian, stopping wars can, in our view, lead to peace, albeit not in the sense he uses it.

\textsuperscript{15} U.S. CONST. art. I, § 8, cl. 11.

\textsuperscript{16} Id. art. I, § 10, cl. 3 (prohibiting certain state actions “in time[s] of Peace”).

\textsuperscript{17} E.g., First War Powers Act (1941), Pub. L. No. 354, 55 Stat. 838, 838 (repealed 1966) (“That for the national security and defense the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary . . . .”).


\textsuperscript{20} See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170, 174 (1804) (describing the “rights and duties” that attend “a state of war”); The Prize Cases, 67 U.S. (2 Black) 635, 687 (1862) (same); John
importance of the international state of peace in the eighteenth century, the Constitution’s drafters focused on the most surefire way to achieve it: peace treaties. But the Founders were aware of other means of achieving a state of peace under international law. Furthermore, shifts in international law, particularly the adoption of the United Nations Charter, have diminished the significance of peace treaties.

Existing scholarship on these topics suffers from several drawbacks. First, many scholars conflate these distinct senses of peace, treating peace as a singular concept. As a result, some focus on peace treaties and mistakenly assume that they are the only path to peace from a constitutional perspective. Second, some fixate on the Philadelphia Convention and a handful of Founding-era quotations, as if these were the only relevant materials to the constitutional peacemaking inquiry. The record is far richer, with treatises, early practices, and early statements supplying insights about the means of making peace from an originalist perspective. Third, some suppose that peace cannot be made without the president. Yet the Constitution never grants presidents an absolute veto on peacemaking.

As a matter of institutional design, these pinched readings of the Constitution are less than ideal. If the only way to make peace is by a formal treaty, as some argue, then ending many wars often will be all but impossible. Getting two-thirds of the Senate to agree on anything is difficult in the best of times and virtually impossible in the modern era. Moreover, significant changes in practice exacerbate this concern. Traditionally, wars had well-defined aims such as addressing grievances or vindicating territorial claims. These wars were overwhelmingly ended by treaties. But in our era, in part because the United Nations Charter limits resort to force, wars today often have more ill-defined objectives. Relatedly, peace treaties are a rarity.


24 See generally Oona A. Hathaway, Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States, 117 YALE L.J. 1216, 1240 (2008) (observing that the use of the treaty clause has little continuing relevance); Fazal, supra note 22, at 46 (demonstrating that the use of treaties to end war has been declining since the 1950s); Yoram Dinstein, War, Aggression and Self-Defence 34 (3d ed. 2001) (noting that countries avoided peace treaties in the international armed conflicts post–World War II).
Modern international law, including the Charter, diminishes their utility and necessity. Finally, many contemporary enemies are transnational groups and are unlikely to make a treaty, much less a peace treaty. These less determinate and shifting features dominate the legal backdrop of our Forever Wars.

More importantly, the cramped readings of our Constitution are flawed. Scholars are preoccupied with peace treaties, insist upon too much power for the president, and wrongfully minimize Congress’s considerable authority. Further, the legalistic focus of some scholars obscures the more practical senses we care about—and that Americans always bear in mind. For citizens, halting hostilities is the most relevant sense of peace and its significance vastly outstrips all others.

Existing scholarship lacks a comprehensive exploration of the ways to make peace in its many senses. We fill that gap. We reject arguments that impose artificial constitutional limits on the methods of terminating conflicts. We recontextualize the originalist evidence—including the oft-cited debates—to reveal that the Constitution paved many roads to peace.

To be sure, peace treaties were an especially vital method of making peace at the Founding. The fledgling country had just concluded its first peace treaty with Great Britain, one securing invaluable rights, not least of which was recognition of sovereignty. To preserve America’s rights and prevent lopsided treaties, the Founders made peace treaties—no less than regular treaties—difficult to conclude.

Yet Americans were wary of war. Wars took precious lives, expended scarce coin, jeopardized civil liberties, and often were the “nurse of executive aggrandizement.”25 Accordingly, the Framers wanted to make sure that it would be “more easy to get out of war, than into it.”26 As we reveal, early Americans acknowledged the possibility of Congress defunding a war, thereby leading to a halt in hostilities. They also were aware of a Commander in Chief’s power to call an armistice. Finally, they knew that peace treaties were hardly necessary to end war under international law. For instance, “conquest and subjugation of one of the contending parties”27 made peace treaties impossible but nonetheless created a state of peace.

Thus, even though treaties were a prominent means of ending wars, they were hardly the sole avenue. The historical evidence establishes that Articles

26 2 FARRAND, supra note 13, at 319 (statement of Oliver Ellsworth).
27 COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE 3 (1916) (summarizing international law reaching back at least into the eighteenth century); see also 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 275 (1905) (“[A] belligerent may end the war through subjugation of his adversary.”).
I and II chart many paths to peace: (1) a peace treaty; (2) presidential withdrawal or armistice; (3) congressional refusal to appropriate war funds; and (4) statutory termination of conflict. All four paths terminate hostilities, at least on the part of the United States. But each path has different ancillary implications, a feature of our Constitution’s complicated separation of powers.

To be clear, we use “Peace Powers” to refer to these four paths to peace. Further, we use “peace” to cover one or more of the senses discussed earlier—a prolonged halt to hostilities, a constitutional state, a domestic statutory state, and an international legal state. Most often, we refer to the first practical sense—permanently terminating active fighting—because, for us and many others, that is the sense of peace that matters most.

Although we believe that the Constitution grants Congress the exclusive authority to take the nation to war, those who disagree can nonetheless endorse our assessment that there are multiple paths to peace. Relatedly, we suppose that our claims are true without regard to whether Congress issued a formal declaration of war, authorized the use of military force, or implicitly signaled that war should continue or commence. Our claims about peace powers do not turn on how the United States entered a war.

Finally, though we focus on the Constitution’s original meaning, our readings yield a certain flexibility. The suppleness of the original Constitution comfortably explains and rationalizes the many paths that our nation has traversed as it has made peace in its numerous wars. Hence our
claims not only make sense of the original Constitution, they also justify modern practices.

There is a medieval saying: “all roads lead to Rome”—*omnes viae Romam ducunt*. We do not imagine that all roads lead to peace. But we do believe that the Constitution erects many roads to peace—*multae viae pacis ducunt*. Our aim is to map these many roads. Part I considers the Constitution’s text, the views of scholars on the peace power, and arguments for treaty exclusivity. Part II takes up the Treaty Power. Part III turns to the Armistice Power, the executive’s power to (eventually) make peace. Part IV considers the Defunding Power, Congress’s authority to cut off war funding and thereby bring the fighting to a halt. Part V argues that Congress has another peace power, its Termination Power. It can repeal a declaration of war or declare peace by joint resolution. In each Part, we identify the mechanisms and the notably differing effects of each path.

In exploring these routes, we take no position on which is best. The optimal path for any situation turns not on abstract theories but on circumstances and perceived needs. Nor do we address the judiciary’s role in policing these means of making peace. Instead, we regard our task as illuminating and exploring the Constitution’s many paths to peace.

I. MISREADING THE PEACE CONSTITUTION

Decades ago, Louis Henkin observed that the Constitution was “a strange, laconic document” in foreign affairs. It did not delineate and allocate all the branches of foreign affairs power, or so he argued. We believe he was mistaken, for the Foreign Affairs Constitution does convey all foreign affairs powers to the federal government. But perhaps Henkin had a point, at least in one respect. The Constitution’s posture towards peace seems somewhat cryptic.

The Constitution mentions peace, here and there. The concepts of “time of war” and “time of peace” are expressly mentioned as a means of empowering and constraining domestic institutions. In a “time of war,” members of the militias called into federal service may face criminal process

31 See Edward S. Corwin, *The Power of Congress to Declare Peace*, 18 MICH. L. REV. 669, 675 (1920) (briefly making the same point that there are numerous pathways to peace).
without presentment or grand jury indictment. During an invasion or rebellion—both times of war—Congress can suspend the privilege of the writ of habeas corpus. During a “time of peace,” the states cannot “keep troops” or “ships of war” without congressional consent. Further, in a “time of peace,” the federal government cannot quarter soldiers in homes without consent of the owners.

Despite these scattered references to peace (and the many more to war), the Constitution never expressly mentions a peace power. Unlike the Articles of Confederation, which ceded Congress “the sole and exclusive right and power of determining on peace and war,” the Constitution does not declare who may make peace. Why the Framers did not include an explicit peace power in the Constitution is unclear. Peace, it seems, was a neglected stepchild of the Constitution.

Yet no one reads the absence of an express peace power as a denial of such authority. With so many provisions turning on peace, it is impossible to suppose that the Constitution creates a one-way ratchet towards war. It is unreasonable to imagine that while Congress can create a time of war by declaring war, no federal institution can (re)create a time of peace. After all, less than a decade earlier, Americans gave peace pride of place, adopting an Articles of Confederation that mentioned peace before war. A nation born of war put peace first.

Unsurprisingly, everyone who has pondered the matter agrees that there is a power to make peace. No one is a strict constructionist of the Jeffersonian sort or otherwise. The dispute is about who may make peace and how they must make it. And here the disagreements are profound, even if generally undertheorized and underexplored.

A. Conflicting Scholarly Views

Existing literature on the constitutional power to make peace suggests that there are only one or two paths. Some scholars maintain that peace

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34 U.S. CONST. amend. V.
35 Id. art. I, § 9, cl. 2. For an argument that only Congress can suspend the privilege of the writ, see Saikrishna Bangalore Prakash, The Great Suspender’s Unconstitutional Suspension of the Great Writ, 3 ALB. GOV’T. L. REV. 575, 577, 591-613 (2010).
36 U.S. CONST. art. I, § 10, cl. 3.
37 Id. amend. III.
38 ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.
39 The records of the Philadelphia Convention depict the Framers rejecting an explicit Article I peace power. See infra Section I.B. But the delegates never explained why they left out any direct reference to peacemaking. We argue that by not explicitly vesting the peace power in any one branch, the Framers left open many avenues to peace.
40 ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1 (granting Congress the power to “determin[e] on peace and war”).
treaties are the sole constitutional means of making peace. These scholars read the relevant history, particularly the Constitutional Convention debates, to suggest that other possible roads to peace—for example, by the executive or Congress alone—are foreclosed by the Constitution. The stance has its allure, primarily because no one denies that one path to peace lies through treaties and because other paths seem obscure or unknown.

If treaties constitute the only path, the Constitution makes the road to peace rather arduous. No peace may be made over the president’s objections since every treaty requires presidential ratification. Treaties also require a supermajority vote in the Senate. But these hurdles are a feature and not a bug, or so some claim. For “a decision as significant as peace,” both the president—as “the protector and representative of the nation”—and the Senate had to approve.

A few scholars look beyond treaties. They claim that presidents may halt hostilities, declare peace, and sideline the Senate. These scholars generally advance robust theories of commander-in-chief authority and observe that a president in control of the military can order it far from the battlefield. Moreover, presidents can surely agree to a ceasefire with the enemy. In either case, the Commander in Chief may lawfully command that hostilities cease.

41 John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CALIF. L. REV. 167, 265 (1996) (“The Framers believed that only a peace treaty, signed by the President and ratified by two-thirds of the Senate, formally could terminate a war . . . .”); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 231 (1921) ("[A] formal treaty of peace is the only method contemplated by the Constitution for the termination of a foreign war and the restoration of peace . . . ."); David A. Simon, Ending Perpetual War? Congressional War Termination Powers and the Conflict Against Al Qaeda, 41 PEPP. L. REV. 685, 689 (2014) (arguing that “wars between States should be terminated by treaty” due to “the Framers’ division of the treaty-making authority [and] the principle of the separation of powers”). Some of these authors cabin their argument to what they call “declared wars” in a constitutional sense, as opposed to “undeclared wars” or mere hostilities which allegedly do not require Congress’s involvement. See Simon, supra, at 692-93. We reject that distinction, however, because under the Constitution’s definition of “declare war,” all wars are declared either via formal or informal means. See generally Saikrishna Prakash, Unleashing the Dogs of War: What the Constitution Means by “Declare War”, 93 CORNELL L. REV. 45 (2007). As noted, our claims about multiple Peace Powers do not turn on how a war began.

42 See, e.g., Yoo, supra note 41, at 265-68 (reading the records of the Constitutional Convention to reach this conclusion).

43 Id. at 269.

44 See, e.g., Mark W. Mosier, Comment, The Power to Declare Peace Unilaterally, 70 U. CHI. L. REV. 1609, 1612 (2003) (“[L]egal precedent and sound public policy support a unilateral presidential power to declare peace”); Christopher Rebel J. Pace, The Art of War Under the Constitution, 95 DICK. L. REV. 557, 558 (1991) (“[O]nce war has been declared, only the Executive has the power to withdraw the United States from an active war.”); Adam Heder, The Power to End War: The Extent and Limits of Congressional Power, 41 ST. MARY’S L.J. 445, 449, 464 (2010) (concluding that once war commences, the president’s authority is plenary).

45 Bruce Ackerman and Oona Hathaway assert that Congress may authorize a limited war—in purpose or objective. Such a war ends when its purposes or objectives are satisfied. See generally
Most of these scholars see little or no role for Congress. Some admit that Congress can defund a war and bring it to an abrupt close. But they maintain that Congress cannot thereby make peace. Others deny that Congress can terminate a war legislatively, either by repealing the declaration of war or by declaring that the war is finished and, importantly, that fighting must stop. It seems that Congress can start a war but cannot start a peace.

B. Against Pinched Construction

These theories are mistaken. We are puzzled by assertions that the Constitution clogs the paths to peace, creating one or two exclusive paths. We see no sound reason to insist upon exclusivity concerning peace in the teeth of a Constitution that never expressly grants a power to make peace and, a fortiori, never explicitly declares that one path is exclusive.

Even under the Articles of Confederation, treaties were not the exclusive peace path. Congress could both "determin[e] . . . peace" and make treaties. The express incorporation of a peace power was not a surreptitious reference to treaties. Congress could make peace without making treaties, just as it could make war, establish courts, and coin money without making treaties.

The peace and treaty powers were distinct, with some areas of overlap. Some treaties made peace, but some did not. And some states of peace arose from treaties, and some did not.

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46 See, e.g., Yoo, supra note 41, at 265; Mosier, supra note 44, at 1650; Simon, supra note 41, at 739-41.
47 See, e.g., Yoo, supra note 41, at 265 ("Debates at the Convention reveal an understanding that Congress could not effectively end war simply by passing a resolution declaring the cessation of hostilities."); Mosier, supra note 44, at 1612 (rejecting "a congressional power to declare peace unilaterally."). But see HENKIN, supra note 32, at 370-71 n.66 (briefly suggesting otherwise).
48 A few scholars have explored a related question of when courts find a "state of war" has ended for domestic statutory purposes, a power which generally rests with Congress. Most of this scholarship dates from the end of the two World Wars. See generally Forrest R. Black, The Termination of Hostilities, 62 AM. L. REV. 248 (1928); Theodore French, The End of the War, 15 GEO. WASH. L. REV. 191 (1947) (surveying different understandings of the end of conflicts); Ernest L. Newton, Note, Termination of a War, 4 WYO. L.J. 115 (1949) (exploring court's resolutions with respect to the actual end of hostilities); W. Lewis Roberts, Litigation Involving Termination of War, 43 KY. L.J. 199 (1955). Other more modern scholarship focuses on the life of executive wartime powers. See Stephen I. Vladeck, Ladecke's Lengthening Shadow: The Disturbing Prospect of War Without End, 2 J. NAT'L SEC. L. & POL'y 53 (2006).
49 ARTICLES OF CONFEDERATION OF 1781, art. IX.
50 Id.
More generally, the existence of an express power to take some measure does not preclude other powers to do the same or similar things. Consider, for example, the removal of federal officers. No one today believes that, because the Constitution mentions the removal of civil officers in the impeachment provisions, there are no other means of removing such officers. Everyone agrees that presidents can remove at least certain executive officers. The first Congress not only endorsed this reading of the Constitution, it also provided that conviction in an ordinary court of law would trigger the automatic removal of certain officers, including judges. If mention of removal in Article I via a laborious impeachment process is not read as the sole permissible means of ousting officers, then why should the absence of an express peace power lead to the conclusion that there must be but one means of making peace? We suppose—as did Treasury Secretary Oliver Wolcott writing to George Washington—that where exclusivity is not express or implied by the Constitution, “jurisdiction is concurrent.”

Jurisdiction is concurrent when it comes to peace. The Constitution grants the federal government the exclusive power to make treaties and hence the sole power to make peace treaties. But it never declares that the exclusive means of making peace in all the senses of the term requires the President, acting with the Senate’s consent, to make a peace treaty. Our nation can end wars in many ways because the Constitution does not clog or obstruct peace. On the contrary, it facilitates peace.

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51 See generally Saikrishna Prakash, New Light on the Decision of 1789, 91 CORNELL L. REV. 1021, 1023 (2006) (noting that departmental acts were built on assumption that the president had constitutional authority to remove executive officers).

52 E.g., Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112 (1845) (providing that judges shall “forever be disqualified to hold any office” upon conviction for bribery).

53 Letter from Oliver Wolcott, Jr., U.S. Sec’y of Treasury, to President George Washington (Mar. 26, 1796), in 19 THE PAPERS OF GEORGE WASHINGTON 604, 608 (Daniel R. Hoth & Jennifer E. Sertzer, eds., 2016). Hamilton made a similar point during the Neutrality Proclamation debates. Alexander Hamilton, Pacificus No. I, reprinted in PACIFICUS–HELVIDIUS DEBATES, supra note 25, at 13 (recognizing that Congress’s Declare War power enabled it to determine neutrality, but argued that “it will not follow that the Executive is [therefore] excluded from a similar right of judgment, in the execution of its own functions.”). Madison disagreed. See James Madison, Helvidius No. II (1793), reprinted in id. at 68-69 (making the case against concurrent powers). But his view was likely not representative of the Founders. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 115 (1976) (noting that Madison had advanced this idea at the Convention, and it was rejected); Morton J. Frisch, PACIFICUS–HELVIDIUS DEBATES, supra note 25, at xii (noting that Madison himself later backed down from this position).
Here, as elsewhere, context matters. In the eighteenth century, treaties were not the sole means of ending wars. Writing in 1779, Johann Christoph Wilhelm von Steck devoted an entire essay to “[p]eace concluded without any formal treaty, or in the form of a simple declaration.” He observed that a war’s “conclusion and its completion do not require a solemn treaty,” but rather could end with a “reciprocal promise . . . to lay down arms [and] to cease hostilities.” Indeed, international law recognized three well-settled “ways by which War may be concluded and Peace restored.” It could, of course, end “[b]y the conclusion of a formal Treaty of Peace between the Belligerents.” But war could also end “[b]y a de facto cessation of hostilities on the part of both Belligerents, and a renewal, de facto, of the relations of Peace” or “[b]y the unconditional submission of one belligerent to another.”

We previously mentioned conquest and its role in the eighteenth century. Because treaties could only be forged between recognized sovereigns, they could not make peace when there was no opposing sovereign, as with conquest.

54 JOHANN CHRISTOPH WILHELM VON STECK, PAIX CONCLUE SANS AUCUN TRAITÉ FORMEL, OU EN FORME D’UNE SIMPLE DECLARATION, IN ESSAIS SUR DIVERS SUJETS DE POLITIQUE ET DE JURISPRUDENCE 13 (Halle 1779) (machine translation).
55 Id.
56 3 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 640 (London 1857) (citing August Wilhelm Hefftter, Das Europaische Völkerrecht der Gegenwart § 176, at 298-99 (Berlin 1888)). Many international law treatises of the era speak of the “power of making peace” synonymously with the power to conclude “Articles of Peace,” i.e., a peace treaty. E.g., 3 HUGO GROTIIUS, THE RIGHTS OF WAR AND PEACE 1553, 1558 (Richard Tuck ed., Liberty Fund 2005). Their discussions of how to conclude peace treaties do not mean there are no other ways for a country to cease participation in war. See id. at 1551 (discussing ways other than a “[T]reaty of Peace” that can “finish the War,” such as drawing lots, single combat, or surrender). For his part, Vattel recognized that peace could be achieved by a treaty that “stipulate[s] the conditions of peace, and regulate[s] the manner in which it is to be restored and supported . . . .” 4 EMER DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, ch. 2, § 9, at 432 (London, G.G. & J. Robinson 1797). But he also defined “peace” more broadly as simply the absence of war. Id., ch. 1, § 1, at 429; id., § 8, at 432 (“The general and necessary effects of peace are the reconciliation of enemies and the cessation of hostilities on both sides.”). Wolff agreed:

For when one withdraws from war, he returns to peace. Frequently, indeed, the name ‘a peace’ is applied by some to a compromise [a treaty] concerning the cause of war and concerning those acts which have been committed in it; nevertheless this is not in harmony with the common usage of speech, by which we say that a nation is at peace which is not involved in war . . . .

57 PHILLIMORE, supra note 56, at 640; see also id. at 642 (adding “the incorporation” or “extinction of a state”); id. at 654 (adding “peaceable possession”).
or civil wars. 58 In such cases, there were other means of making peace. 59 While conquest is barred under contemporary international law, it was once a viable option. If America had subjugated another nation in 1789, there could be no government to make peace with at the war’s close. Nonetheless, subjugation would mean that the war was over and that there would be peace. We discuss conquest not to endorse it, but to underscore that treaties were not the sole means of peacemaking in 1789.

We will not return to this possibility, in part because the modern prospect of conquest seems remote. But the third method of peacemaking merits our full attention because it remains viable. In eighteenth-century international law, “mere cessation of hostilities” could end war just as definitively as “a treaty of peace.” 60

Historical examples abound. Von Steck observed that “[t]he Romans in granting peace to enemies often used only the simple and energetic verbal formula: ‘Pax esto et amicitia,’ or ‘ut pax pia aeterna fit.’” 61 Similarly, wars “between the Christians and the Turks” were concluded “[by] long truces” only. 62 This practice continued into the eighteenth century. In 1716, the war between Sweden and Poland ended “by a reciprocal intermission of hostilities,” without any explicit agreement. 63 Eventually, both countries restored amicable relations, resulting in a de jure peace, “valid and binding, between the Christians and the Turks” were concluded “[by] long truces” only. 62 This practice continued into the eighteenth century. In 1716, the war between Sweden and Poland ended “by a reciprocal intermission of hostilities,” without any explicit agreement. 63 Eventually, both countries restored amicable relations, resulting in a de jure peace, “valid and binding, as if a solemn treaty had been made.” 64 In 1720, Spain and France ended their

58 WOLFF, supra note 56, §§ 977, 979, at 494-95; see also S.S. Wimbledon (U.K. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug 17) (noting that international engagements such as peace treaties can only be made between sovereigns).

59 For example, in 1806 the war between France and Prussia ended in subjugation.

Phillipson, supra note 27, at 11-12; see also Letter from Thomas F. Bayard, U.S. Sec’y of State, to Emilio de Muruaga, Spanish Minister to U.S. (Dec. 3, 1886), in H.R. Exec. Doc. No. 50-1, at 1015, 1019 (1887) (noting that the Civil War ended by presidential proclamation). The Supreme Court agreed that peace treaties could not end civil wars and thus “some public proclamation or legislation would seem to be required.” United States v. Anderson, 76 U.S. (9 Wall.) 56, 70 (1869).

60 Phillipson, supra note 27, at 3; 2 OPPENHEIM, supra note 27, at 275.

61 Roughly, “Be Peace and Friendship” and “Wherefore the peace of the pious is eternal.” Von Steck, supra note 54, at 13 (machine translation).

62 3 VATTEL, supra note 56, ch. XVI, §§ 234, 236, at 404 (explaining that this was “sometimes from a false spirit of religion, at other times because neither party were willing to acknowledge the other as lawful owners of their respective possessions.”).

63 PHILLIMORE, supra note 56, at 640; see also Von Steck, supra note 54, at 16 (noting that the two countries “reciprocally enjoyed the advantages of peace” during this time and eventually, “[a]s they had nothing more to discuss and settle with each other, they finally agreed . . . that a mutual declaration of peace would take the place of a formal treaty, and that this declaration would be in the form of a letter that the two Kings would write to each other.” (machine translation)).

64 Letter from King of Sweden to King of Poland (May 29, 1729), reprinted in Von Steck, supra note 54, at 20 (machine translation); see also id. at 19 (“[N]othing is neglected to make the peace reestablished between us and Your Majesty . . . constant and solid, in a way that it can never be disturbed and broken. And as we give to this our declaration a similar force of a formal peace treaty.”); Charles C. Tansill, Termination of War by Mere Cessation of Hostilities, 38 LAW Q. REV. 26, 26 (1922).
war without a treaty.\textsuperscript{65} The trend continued after the Founding,\textsuperscript{66} demonstrating that “the technical status of war” can “merge[e] into a peace status by the mere passage of time.”\textsuperscript{67}

Steepled as they were in international law and events in their century, we believe the Founders knew that peace treaties were not the only means of ending war. They would have known that conquest was a means of making peace and understood that peace can result from a prolonged cessation of hostilities. But this is not mere conjecture; several of them explicitly acknowledged this. Thomas Jefferson observed that under some circumstances, peace could be “restore[d] . . . without the delay, difficulties, & ceremonies of a treaty.”\textsuperscript{68} Alexander Hamilton likewise recognized that if warring nations cease hostilities, they “pass into a state of peace in fact on the basis of the laws of nations.”\textsuperscript{69} As we reveal later, the Founders utilized some of the non-treaty paths in the Constitution’s early years.

2. Against Sideling Congress

Though scholars have largely overlooked these treatises and discussions, some rightly recognize that context matters. For instance, some offer discussions at the Philadelphia Convention as evidence that treaties are the sole method to end wars and that Congress cannot make peace.\textsuperscript{70} But these scholars read too much into these debates. To discuss treaties as a means of

\textsuperscript{65} HENRY BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC 1163 (1914) (machine translation); HEFFTER, supra note 56, at 430 n.1. But see Tansill, supra note 64, at 26-27 (questioning this claim).

\textsuperscript{66} See, e.g., HEFFTER, supra note 56, at 430 (discussing the establishment of diplomatic relations between Russia and Persia at the end of the 18th century); PHILLIPSON, supra note 27, at 4-5 (describing the de-escalation of war between Mexico and Texas through diplomatic instruments around 1843); Tansill, supra note 64, at 34-36 (“The relations between Prussia and Liechtenstein furnish another example of the termination of a state of war by a mere cessation of hostilities.”).

\textsuperscript{67} Tansill, supra note 64, at 37 (describing the 1866 war between Liechtenstein and Prussia).

\textsuperscript{68} Letter from President Thomas Jefferson to Levi Lincoln, Lieutenant Governor of Mass. (Nov. 13, 1808), in 11 THE WORKS OF THOMAS JEFFERSON 73, 74 (Paul Leicester Ford ed., G. P. Putnam’s Sons 1905) (referencing end to hostilities waged via letters of marque and reprisal).

\textsuperscript{69} Alexander Hamilton, France and America, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 131, 139 (Harold C. Syrett ed., 1974); see also Letter from Alexander Hamilton, U.S. Sec’y of Treasury, to Thomas Jefferson, U.S. Sec’y of State (May 20–27, 1792), in 11 id. at 409, 413 (“[A] definitive Treaty may never take place and yet the state of War and all its consequences be completely terminated.”). Jefferson believed that a truce “suspend[ed] acts of hostility, but . . . [did not change] the legal character of enemy into that of friend.” However, the “contradiction of Hamilton was not worth our while to excite in this instance.” Id. at 413 n.17.

\textsuperscript{70} Mosier, supra note 44, at 1614-15; Yoo, supra note 41, at 255.
making peace is not to insist that treaties *alone* can make peace. In fact, not one Framer claimed that treaties are the sole means of making peace.

Naturally, the peace power first came up during a discussion of war. Pierce Butler moved “to give the Legislature the power of peace, as they were to have that of war.”\(^{71}\) His proposal was unanimously defeated, 10–0. At first glance, one might think this event signals that the Framers expressly rejected any congressional peace power.\(^{72}\)

This would be a mistake. At this point in the proceedings, the Senate could make treaties by simple majority.\(^{73}\) In this posture, Butler’s proposal would have been understood by delegates to require a majority of *both* chambers for peace—thus imposing a more onerous process for peace than a simple Senate majority by treaty.\(^{74}\) Earlier, two delegates observed that ending war should be relatively easy.\(^{75}\) In the view of Oliver Ellsworth of Connecticut, “It sh[oul]d be more easy to get out of war, than into it.”\(^{76}\) Virginian George Mason agreed—“[h]e was for clogging rather than facilitating war; but for facilitating peace.”\(^{77}\) Much later, Joseph Story explained the reasoning. It should “be difficult in a republic to declare war; but not to make peace.”\(^{78}\) Hence, while both chambers must take the nation to war, the concerted action of both is unnecessary for peace.\(^{79}\) With this in mind, we believe that the Framers rejected Butler’s proposal to rebuff the notion that in order to make peace the assent of *both* chambers would be necessary. In other words, they rejected the idea that there would be but one path to peace, via the two chambers. This episode should not be read more broadly as denying either the President or Congress the ability to make peace at all.\(^{80}\) After all, some were keen to “facilitat[e]” rather than clog peace—in other words, to leave all avenues open.

\(^{71}\) 2 FARRAND, supra note 13, at 319.

\(^{72}\) See, e.g., Mosier, supra note 44, at 1614 (reading this event as “unanimously reject[ing]” the “contemporaneous view that . . . [the war and peace] powers should reside in the same hands.”); Heder, supra note 44, at 455 (concluding that “the Framers . . . declined to give this power [to end war] to Congress”).

\(^{73}\) 2 FARRAND, supra note 13, at 183, 235, 297.

\(^{74}\) See JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1173, at 98 (Boston, Little, Brown & Co. 1858) (describing the implied difficulty of treaty-making through a large legislative body such as the House).

\(^{75}\) 2 FARRAND, supra note 13, at 319.

\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) 2 STORY, supra note 74, § 1171, at 97.

\(^{79}\) Id. at 89.

\(^{80}\) Even if one were to interpret this episode differently, it at most stands for a rejection of a *sole* legislative peace power. The legislature already had the sole power to declare war. By refusing Butler’s proposal, the Framers declined to similarly place the “power of peace” solely in the legislature’s hands. 2 FARRAND, supra note 13, at 183 (stating the existing separation of powers with regard to the peace power).
Late in the Convention, the President was added to the treaty process, along with the two-thirds requirement. Both additions made all treaties more difficult to make. In response, James Madison sought to facilitate peace treaties in two ways. Scholars cite the rejection of these two proposed amendments as a reason to reject a congressional peace power. But the context of those proposals signals that this is a misreading.

Madison's first proposal sought to "authorize a concurrence of two thirds of the Senate to make treaties of peace, without the concurrence of the President." Madison argued that the president "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace." Butler agreed that excluding the executive from peace treaties was "a necessary security against ambitious & corrupt Presidents," who might be tempted to "prolong the war of which he had the management." But many demurred. Because the executive "was the general Guardian of the National interests," his input was vital. Others rejected the assumption that presidents could stymie peace treaties and thereby prevent peace. After all, they said, Congress could check the executive's conduct of war via its power of the purse. This point rather favors our reading of the Constitution, for the delegates seemed to understand that Congress might withhold funds and end American hostilities without a peace treaty. Madison's opening proposal failed 3–8.

The other Madisonian proposition sought an exception to the two-thirds threshold by enabling peace treaties to be approved by a simple Senate majority. It initially passed by a vote of 8–3, over the objections of Elbridge Gerry and Hugh Williamson. For them, peace treaties concerned the "dearest interests ... at stake, as the fisheries, territories &c." They continued to actively oppose this amendment. Later in the same day, Williamson moved "that no Treaty of Peace affecting Territorial rights should be made without the concurrence of two thirds of the members of the Senate present." According to Gerry, peace treaties present "more

81 Id. at 495, 538.
82 Id. at 540-41.
83 Id.
84 Id. at 540.
85 Id. at 541.
86 Id.
87 Id. at 540.
88 Id. (“Mr. Gorham thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature.”).
89 Id. at 540-41.
90 Id. at 541.
91 Id.
92 Id. at 543.
danger to the extremities of the Continent, of being sacrificed, than on any other occasions." Rufus King moved to expand the Williamson amendment to shield fisheries, navigation, and borders. The Convention adjourned for the day before any vote.

The next day, King again moved to restore the two-thirds requirement. Some objected, citing the adverse effects of making it harder to strike peace treaties. For one, the legislature may be disinclined to declare war if making peace was difficult. Or "the minority may perpetuate war, against the sense of the majority" by rejecting a peace treaty. If that occurred, Congress might cut off supplies, yielding a less desirable conclusion to the war than if a treaty were made.

This colloquy again demonstrates that a certain type of peace—a unilateral congressional cessation of warfare—was always a possibility.

But too many delegates feared that peace treaties might sacrifice regional interests. Williamson objected that a simple majority—as few as eight Senators—should not be able to consent to a lopsided peace. Gerry likewise harped on "the danger of putting the essential rights of the Union in the hands of so small a number . . . representing perhaps, not one fifth of the people." The simple-majority scheme posed a real risk of "foreign influence" and left "exposed states" vulnerable to a cession. In a remarkable reversal, the states expunged Madison's amendment by a vote of 8–3, leaving peace treaties subject to the same two-thirds requirement as other treaties.

Madison failed to facilitate peace treaties. In fact, he spectacularly failed. From this true point, some scholars conclude the Convention rejected a congressional peace power and rendered treaties, with the president's and two-thirds of senators' approval, as the only means of making peace. But this is a non sequitur. The discussion instead reveals that the Framers' rejection of proposals to make passing peace treaties easier was motivated by their concern with the possible far-reaching consequences of that particular mechanism. If peace treaties had the widest ambit—if they could redraw America's borders

93 Id. at 541.
94 Id. at 543.
95 Id. at 547.
96 Id. at 547-48.
97 Id. at 548 (according to Morris).
98 See id. (according to Wilson & Morris).
99 Id.
100 Id. (statements of Williamson & Gerry).
101 Id. (statement of Gerry) (noting that the "Senate [is] more likely to be corrupted by an [e]nemy than the whole Legislature"); see also id. at 339. Roger Sherman agreed, arguing "ag[ain]st leaving the rights, established by the Treaty of Peace [with Great Britain], to the Senate," and he moved to add an amendment that "no such rights [should] be ceded without the sanction of the Legislature." Id. at 549.
102 See id. at 549-50.
and cede her rights—a deep, nationwide consensus was requisite via a two-thirds Senate vote.

Such apprehensions were sensible. As noted, the Framers wanted to ensure war was easier to end than to start. But even so, they were troubled about entangling long-term commitments. First, peace treaties were more permanent than other mechanisms of peace. As Hamilton put it, a treaty’s “objects are contracts with foreign nations” whose terms would not only “bind[] the nation, [and] . . . the people,” but also “the successors of the ruler of the state.”

Second, they were troubled about onerous concessions. Peace treaties could cede precious lands. America had just confirmed its territory in a peace treaty with Britain. For that generation, “it [was] difficult to conceive of [a treaty of peace], which shall not contain settlement of boundary.” Many were adamantly against the possibility that “8 Senators may . . . give up part of the United States.” This fear of yielding territory in a peace treaty was repeated by Anti-Federalists and in state conventions, and it cropped up in the early republic. Relatedly, peace treaties might jeopardize existing national rights. Delegates were reeling from negotiations with Spain over the Mississippi River, a dispute which pitted northern states against the south.

103 See, e.g., THE FEDERALIST NO. 22, at 148-49 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the difficulty of concluding peace was a defect of the Articles of Confederation's two-thirds requirement, an arrangement which gave a minority of states the ability to continue war against the majority's wishes).


106 2 WOLFF, supra note 56, ch. VIII, § 1017, at 516.

107 See 2 FARRAND, supra note 13, at 548 (“Mr. Williamson remarked that . . . Eight men may be a majority of a quorum [in the Senate, and] should not have the power to decide the conditions of peace.”).

108 The delegates made constant reference to protecting the land the United States received in the Treaty of Paris. See, e.g., id. at 458, 462, 464-65.


110 2 FARRAND, supra note 13, at 319.

111 See, e.g., James Winthrop, Letters of Agrippa No. IX (Dec. 28, 1787), in 4 THE COMPLETE ANTI-FEDERALIST 85, 86 (Herbert J. Storing ed., 1981) (proposing preventing Congress from giving up part of any State without its legislature's consent as one of three limitations on its treaty power).

112 See, e.g., 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 130 (Jonathan Elliot ed., Washington, 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (statement of Porter) (claiming a treaty could be used to give up territory of southern states).

113 E.g., Alexander Hamilton, Pacificus No. II (1793), reprinted in PACIFICUS–HELVIDIUS DEBATES, supra note 25, at 24 (pointing out that treaties of peace were used to "cede or relinquish the conquered territory to the Conqueror"); Benjamin Franklin, For the War, in SAMUEL WOODWORTH, I THE WAR, JULY 4, 1812, at 1, 6, (New York, S. Woodworth & Co. 1812), https://archive.org/details/warvin2wood/page/2/mode/2up [https://perma.cc/75HT-KXJD] (“A peace that would leave Britain in possession of Canada would be worse than war.”).
and led almost directly to the supermajority requirement. New peace treaties could relinquish the treasured access rights to the Mississippi and northern fisheries, “the two great objects of the Union.”

Third, peace treaties could impose rather noxious obligations. The 1783 Treaty of Paris’s treatment of prewar debts was galling to many, and delegates were keen to make it more difficult to enter into such obligations. Finally, treaty violations were a cause of war. Justifiably, the Framers wanted to ensure a broad consensus before making treaty commitments. It would be perverse to imagine that a rule adopted in part to prevent war had the ancillary effect of preventing peace. In sum, the Framers maintained rigorous requirements for peace treaties to make it more difficult for the nation to assent to crushing obligations and to cede prized rights and lands, including state territory.

Clearly, treaties were something of a focal point. Some referred to “peace” as a shorthand for peace treaties, likely because treaties were the most familiar path. In that era, “war [was] waged in order to acquire a right” — and a treaty was the best way to secure that right. Even so, the president or Congress could make a practical peace without making an enduring agreement

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114 Charles Warren, The Mississippi River and the Treaty Clause of the Constitution, 2 GEO. WASH. L. REV. 271, 272 (1934) (demonstrating that the Treaty Clause’s strictures were “to take care of one, specific political situation existing in 1787—namely, to allay the fears of the Southern States lest, under the new Constitution, there might be a surrender of American rights to the free navigation of the Mississippi River.”); R. Earl McClendon, Origin of the Two-Thirds Rule in Senate Action upon Treaties, 56 AM. HIST. REV. 768, 768 (1931); Michael D. Ramsey, The Constitution’s Text in Foreign Affairs 186 (2007); Hathaway, supra note 24, at 1281-86.

115 2 FARRAND, supra note 13, at 548 (statement of Morris); see also Letter from Hugh Williamson to James Madison (June 2, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, App’x A, 306, 306-07 (Max Farrand ed., 1911) (noting the two-thirds requirement “was inserted for the express purpose of preventing a majority of the Senate . . . from giving up the Mississippi . . . [T]he Navigation of the Mississippi after what had already happened in Congress was not to be risqué in the Hands of a meer Majority . . . .”).

116 BRINTON COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION 274 (Philadelphia, Kay & Brother 1893) (“When the Framers met in convention the violation of the treaty of peace by certain of the states was one of the most pressing anxieties of the political situation of the Union.”); Hathaway, supra note 24, at 1276-77, 1277 n.90.


118 See, e.g., supra note 36 (noting that some treatises use the “power of making peace” synonymously with the power to conclude peace treaties).

119 2 WOLFF, supra note 56, ch. VIII, § 969, at 490.
that navigated the Constitution’s treaty process.\textsuperscript{120} And, in fact, delegates mentioned funding cutoffs as a means of ending warfare.\textsuperscript{121} That treaties were difficult to make and necessary to accomplish particular ends did not mean that treaties were the only means of making peace in other senses.

Some proponents of treaty exclusivity also make much of a post-ratification statement by Justice Samuel Chase. In \textit{Ware v. Hylton}, Chase remarked that “[a] war between two nations can only be concluded by treaty.”\textsuperscript{122} This statement cannot bear the weight placed upon it. To begin with, his assertion may be consistent with the notion that war can end in other ways. Chase was perhaps using “concluded” in a narrow sense, referring specifically to when war was not just “ended” but “determined; estopped; [and] prevented from” continuing.\textsuperscript{123} Perhaps he meant no more than that a peace treaty best “abolish[ed] the subject of the war.”\textsuperscript{124}

In any event, Chase’s statement was dictum. As such, it likely did not engage his attention. \textit{Ware v. Hylton} concerned a Virginia law confiscating debt owed to the British.\textsuperscript{125} One question was whether the 1783 Treaty of Paris nullified that state law, such that debts to British creditors were revived.\textsuperscript{126} John Marshall, representing the debtors, argued that the Virginia law prevailed because Congress did not have “a power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts.”\textsuperscript{127}

Chase concluded otherwise. Under the Articles of Confederation Virginia had lost the power to make peace treaties. “This grant [to Congress] ha[d] no

\textsuperscript{120} See, e.g., Letter from John Quincy Adams, U.S. Minister to U.K., to Lord Castlereagh, U.K. Sec’y of State for Foreign Affs. (Jan. 22, 1816), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 356, 357 (Washington, Walter Lowrie & Walter S. Franklin eds., 1834) (noting that “[p]eace could exist between the two nations only by the mutual pledge of faith to the new social relations established between them,” but the Treaty of Paris was important to secure “perpetual obligation[s]”).

\textsuperscript{121} 2 FARRAND, supra note 13, at 548 (recounting Gouverneur Morris’s discussion of cutting off funding).

\textsuperscript{122} 3 U.S. (3 Dall.) 199, 236 (1796).

\textsuperscript{123} See Concluded, BLACK’S LAW DICTIONARY (1st ed. 1891); see also THOMAS SHERIDAN, I A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London 1790) (defining “to conclude” as “to decide, to determine; to end, to finish”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 463 (London, W. Strahan 1755) (defining “conclude” as, inter alia, “[t]o decide; to determine”; “[f]inally to determine”); id. at 580 (defining “to determine” as “to fix; to settle”; “to conclude; to fix ultimately”); id. at 545 (defining “to decide” as “[t]o determine a question or dispute”).

\textsuperscript{124} Ware, 3 U.S. at 230 (Chase, J.). This reading of the statement is consistent with Immanuel Kant’s contemporaneously view that a peace treaty establishes a “perpetual peace” between the nations, “annihilat[ing]” any “causes for making future wars”—“[o]therwise a treaty would be only a truce.” IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH § 1 (Ted Humphrey trans. 2003) (1795).

\textsuperscript{125} Ware, 3 U.S. at 199-200.

\textsuperscript{126} Id. at 235.

\textsuperscript{127} Id. (emphasis omitted).
restriction, nor \ldots any limit."\textsuperscript{128} Therefore, the national government could, by a peace treaty, divest citizens of vested rights. Chase summarized his argument:

A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must of necessity imply a power, to decide the terms on which they shall be made: A war between two nations can only be concluded by treaty. Surely, the sacrificing [of] public, or private, property, to obtain peace cannot be the cases in which a treaty would be void.\textsuperscript{129}

Chase’s point was that whatever limits might apply to other treaties, peace treaties could supersede state laws and vested rights. He was rebutting Marshall’s claims to the contrary. He was not considering, much less rejecting, conquests or armistices as means of making peace. As we shall see, the practices of early Administrations undermine his dictum.

* * *

In the eighteenth century, there were several means of making peace under international law: treaties, conquest, and the prolonged cessation of hostilities. The Constitution contains no text hinting that treaties are the exclusive means of making peace or, for that matter, that the other paths are barred. Relatedly, no one at the Convention declared that treaties were the sole road to peace. That treaties of all sorts, including peace treaties, faced a significant hurdle in the Senate hardly establishes that treaties are the sole means of making peace. Finally, Justice Chase’s dictum cannot bear the weight that some place on it. Chase focused on a question of federalism: whether peace treaties could supersede state laws. He was not addressing the distinct separation of powers question of whether wars could be ended by means other than treaties.

Our three alternatives to peace treaties fit within the capacious law-of-nations category of ceasing warfare: armistices, defunding, and statutory terminations. Each option halts hostilities and gives peace a chance. With the passage of enough time, each can flower into a fragrant peace.

We now turn to each of the peace paths and consider their various mechanisms and effects, for each is different in important ways. Parts II and III consider executive authority, namely treatymaking and armistices. Parts IV and V discuss legislative authority, specifically defunding and terminating wars.

\textsuperscript{128} \textit{Id.} at 236.
\textsuperscript{129} \textit{Id.}
II. THE TREATY POWER

Article II spells out some of the process necessary to make treaties, and, as we have seen, peace treaties must hew to the familiar path. The President can make treaties provided that two-thirds of the Senate consent to presidential ratification. The United States has ratified many peace treaties throughout its history, including in its early days. A 1783 peace treaty with Great Britain brought the Revolutionary War to a formal close. An 1800 treaty with France was concluded at the end of the Quasi-War. And many, many Indian wars concluded with peace treaties.

While some Founders argued that treaties must have a limited scope, others insisted that the peace treaties could cover any subject. For instance, Alexander Hamilton argued that the treaties could encompass matters also granted to Congress. Terms regarding “restitutions or cessions of territory or property, regulations of boundary” would intersect with “the right of Congress to dispose of and make all needful rules and regulations concerning the territory and property of the United States.” Hamilton was right, for treaties could relate to matters that might seem domestic, like the freedom to worship and the ability of one nation to participate in the political institutions of another.

A. Effects

That dispute about the subject matter of treaties is important and endures. We need not wade deeply into it. For our purposes, peace treaties

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130 U.S. CONST. art. II, § 2, cl. 2. The Constitution specifies that the president must secure the Senate’s consent prior to making treaties. But it does not specify how ratification instruments must be exchanged. Nor does it specify whether there is a time frame in which a treaty must be made after the Senate grants its advice and consent to ratification. See Saikrishna Bangalore Prakash, Of Synchronicity and Supreme Law, 132 HARV. L. REV. 1220, 1245 (2019) (stating that scholarship has ignored the timing of treaties because it is not mentioned in the Constitution).


132 See infra note 152.

133 See, e.g., Treaty with the Six Nations, Oct. 22, 1794, 7 Stat. 15 (giving peace); Treaty with the Wyandots, etc., Jan. 21, 1785, 7 Stat. 16 (same); Treaty with the Creeks, Creek Nation of Indians–U.S., Aug. 7, 1790, 7 Stat. 35 (declaring a perpetual peace and friendship); Treaty with the Cherokee, Cherokee Nation of Indians–U.S., July 2, 1791, 7 Stat. 39 (same); Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44 (establishing a firm and permanent peace).


135 Alexander Hamilton, The Defence Number XXXVII (Jan. 6, 1796), reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON, supra note 69, at 18.

136 See generally Saikrishna Bangalore Prakash, The Boundless Treaty Power Within a Bounded Constitution, 90 NOTRE DAME L. REV. 1499 (2015) (arguing that there is little to support the idea that the treaty power has subject limits).
can have far-reaching and comprehensive effects. They can end warfare, supersede domestic wartime statutes, terminate authority to use the military, settle ancillary disputes, and create a legal state of peace. The Treaty Power is the broadest, most conclusive, and most immediate of the peace paths.

First of all, a peace treaty brings about practical peace. It ends fighting. Most peace treaties contain a clause for the permanent cessation of hostilities. This makes sense because making peace is the principal reason for entering into a peace treaty. The 1783 Treaty of Paris, for example, stipulated that “all Hostilities both by Sea and Land shall from henceforth cease” and that the British Army withdraw from the United States.\footnote{Dej

Second, a peace treaty ends the Commander in Chief’s constitutional authority to wage war. Specifically, many early Americans recognized that a peace treaty impliedly repealed Congress’s declaration of, or authorization for, war.\footnote{4 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 478 (Washington, Gales & Seaton, 1849) (statement of Roger Griswold) (noting that a peace treaty repeals the legislative act of war); Letter from Oliver Wolcott, Governor of Conn., to President George Washington (Mar. 26, 1796), 19 THE PAPERS OF GEORGE WASHINGTON 604, 609 (Daniel R. Hoth & Jennifer E. Sertzer, eds., 2016) (same); Letter from President Thomas Jefferson to James Madison, U.S. Sec’y of State (July 15, 1801) in 8 THE WRITINGS OF THOMAS JEFFERSON 73; 73 (Paul L. Ford, ed., 1897) (noting that a peace treaty “is an absolute repeal of the declaration of war, and of all laws authorized or modifying war measures”).} This tacit repeal was meaningful for it would create a state of peace. From that point forward, only Congress could decide to enter or re-enter a state of war. As Hamilton put it: Congress “can alone actually transfer the nation from a state of Peace to a state of War.”\footnote{Alexander Hamilton, Pacificus No. I (1793), reprinted in PACIFICUS–HELVIDUS DEBATES, supra note 25, at 16.}

Third, a peace treaty ends the “state of war” for domestic purposes. Many federal statutes grant wartime authorities to executive officials and establish special legislative rules for the populace. The Courts have uniformly agreed that a ratified peace treaty automatically terminates these wartime authorities.\footnote{See, e.g., Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 165 (1919) (stating that “[i]n the absence of specific provisions to the contrary,” a wartime statute ends with “the ratification of the treaty of peace”); Ludecke v. Watkins, 335 U.S. 160, 168-69 (1948) (holding that war authority can be terminated by treaty, legislation, or a presidential proclamation).} As Madison observed, “a conclusion of peace annuls all the laws peculiar to a state of war, and revives the general laws incident to a state of peace.”\footnote{James Madison, Helvidius No. I (1793), reprinted in PACIFICUS–HELVIDUS DEBATES, supra note 25, at 59 (emphasis in original).}

Relatedly, peace treaties preempt state law. The Founders had divergent views on how treaties interact with other federal legislation past and future,\footnote{For example, John Jay appeared to believe that treaties were binding on the country permanently—“beyond the lawful reach of legislative acts” for alteration. Only a subsequent treaty
and the controversy continues today, at least among scholars. But one thing was clear: the treaty becomes “the supreme Law of the Land” and trumps conflicting state laws. As noted earlier, during the Revolutionary War states “confiscated” debts their citizens owed to British creditors. But the Treaty of Paris provided “that Creditors on either Side, shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money, of all bona fide Debts heretofore contracted.” The Supreme Court found that because the Treaty invalidated contradictory state law American debtors remained liable to British creditors. Treaties of peace thus had a significant impact not only on state law but also on the rights and fortunes of citizens.

The fourth effect of peace treaties stems from their ability to settle ancillary disputes. According to Hamilton, “[t]he most common conditions” of peace treaties—practically universal at the time—were “restitutions or cessions of territory . . . , regulations of boundary, restitutions & confirmations of property—pecuniary indemnifications for injuries or expences.” Such terms were often necessary to foster lasting peace. Again, the Treaty of Paris included terms without which peace would have been impossible.

Foremost, Great Britain acknowledged the independence of the United States. The Treaty also established boundaries, secured rights to fishing on the northeast coast, and ensured freedom of navigation on the Mississippi.


144 U.S. CONST. art. VI; see also Hathaway, supra note 24, at 1285 (noting important early cases that turn on peace treaty with Britain).

145 See supra notes 122–124 and accompanying text.

146 Definitive Treaty of Peace, in 2 TREATIES, supra note 131, art. IV at 154.

147 Ware v. Hylton, 3 U.S. (3 Dall.) 199, 242-43, 282 (1796) (holding that British creditors had a right to recover the full value of what was borrowed by their debtors).

148 See id. at 279 (“Congress possibly might, as the price of peace, have been authorised to give up, even rights fully acquired by private persons during the war.”).

149 Hamilton, Defence Number XXXVII, supra note 135, at 17-18.

150 Definitive Treaty of Peace, supra note 131, 8 Stat. 80-88, at 152.

151 Id., arts. II, III, VIII, at 152-55.
Furthermore, it set terms for paying debts and restitution.\textsuperscript{152} Having settled these matters, the treaty promised a “firm and perpetual Peace.”\textsuperscript{153}

Finally, peace treaties had a special significance in international law. While a declaration of war triggered the law of war, that law immediately ceased to apply when a treaty of peace took effect.\textsuperscript{154} Relatedly, a peace treaty also “establish[ed] a new . . . state of relations between the two countries.”\textsuperscript{155} Thus, according to John Quincy Adams, the terms of the Treaty of Paris—including independence, territory, and access to fisheries—survived even the outbreak of the War of 1812 between the U.S. and Britain.\textsuperscript{156}

B. The Peculiar Utility of Treaties

While a “formal declaration on the part of the Belligerents that War has ceased” might be “usual and desirable,” it “cannot be said to be absolutely necessary for the restoration of Peace.”\textsuperscript{157} Still, treaties were “useful” for two reasons that distinguished them from the other paths to peace.\textsuperscript{158} First, they “final[ly] settle[d] the disputes which caused the war, and . . . determine[d] within what limits the parties have renounced their respective claims.”\textsuperscript{159} By contrast, if the war “ceased” with neither party “disposed to prosecute hostilities further in order to obtain a more decisive solution,” then that may “be interpreted to mean that they are willing to let matters rest where they are, and to remain satisfied with their relative positions.”\textsuperscript{160} Thomas Jefferson likewise recognized that a peace treaty was the last chance to settle disputes, for those left unmentioned were forsaken, with the status quo prevailing:

\begin{itemize}
\item \textsuperscript{152} Id., arts. IV, V, at 154.
\item \textsuperscript{153} Id., art. VII, at 155. The Convention of Mortefontaine, which ended the Quasi-War, also had ancillary terms designed to permanently ease tensions: it secured France’s payment of indemnities for seized ships, restored captured vessels, ensured freedom of passage for vessels and convoys, and reinstated political and commercial relations. E. Wilson Lyon, The Franco-American Convention of 1800, 12 J. MOD. Hist. 316-17, 324-25 (1940).
\item \textsuperscript{154} See 2 WOLFF, supra note 56, § 976, at 494 (stating that all hostilities end when peace is made); The Prize Cases, 67 U.S. (2 Black) 635, 687 (1862) (citing JAMES KENT, COMMENTARIES ON AMERICAN LAW 53 (O. Halsted ed., 1826)) (stating that a treaty of peace nullifies all hostile acts).
\item \textsuperscript{155} PHILLIPSON, supra note 27, at 257.
\item \textsuperscript{156} Letter from John Quincy Adams, U.S. Minister to U.K., to Lord Castlereagh, U.K. Sec’y of State for Foreign Affairs (Jan. 22, 1816), in 4 AMERICAN STATE PAPERS, supra note 120, at 356, 356-57.
\item \textsuperscript{157} PHILLIMORE, supra note 56, at 640; see also Part I.B.1 (describing how in the eighteenth-century treaties were not the sole means of ending wars).
\item \textsuperscript{158} HEFFTER, supra note 56, at 430 (machine translation).
\item \textsuperscript{159} Id.
\item \textsuperscript{160} PHILLIPSON, supra note 27, at 6; see also 2 WOLFF, supra note 55, § 992, at 503 (“Those things concerning which nothing has been said in a treaty of peace remain as they are.”).
\end{itemize}
“nothing [was] more settled [certain] than that things not provided for on a treaty of peace are abandoned.”  

Second, a treaty more immediately and definitively “put an end to the war, and . . . abolish[ed] the subject of it,” such that the nations “cannot lawfully take up arms again for the same [dispute].”  

Justice Samuel Chase said that peace treaties were useful to “abolish[ ] the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again.”  

Hence when nations wanted to settle significant disputes and make renewed conflict a more remote possibility, the peace treaty was the best means.  

In contrast, treaties were “superfluous and useless” when “there [was] nothing to discuss,” meaning the parties did not wish to resolve any disputes. Von Steck explained that peace could be made without treaties in cases where  

the belligerent parties do not consider it appropriate to discuss and decide their disputes, or when they postpone their discussion to another time; or when the disputes, which gave rise to the outbreak, are not likely to merit a solemn and definitive transaction; or when the subjects of complaint and discord cease, and the obstacles to conciliation are lifted.  

In sum, when nations wished to resolve festering disputes, a peace treaty was the sole means. But treaties were “superfluous and useless” if the nations did not, or could not, settle peace conditions. In the latter situation, a prolonged cessation of hostilities would suffice to generate a state of peace.

III. THE ARMISTICE POWER

A second route to peace rests with the president alone. Under the right circumstances, the executive can halt American hostilities. If that armistice (literally calling a halt to arms) endures—and if the enemy likewise stops waging war for a lengthy period—the president has made peace without the Senate’s consent or leave of Congress. So while presidents cannot make a full peace without the enemy’s cooperation, they can take an action—
ordering a halt to warfare—that may eventually lead to a state of peace in many senses of that word.

We use “armistice” to encompass bilateral and unilateral decisions to halt fighting.\textsuperscript{167} A bilateral armistice is a compact with the enemy to suspend hostilities.\textsuperscript{168} How long that armistice will last is often an open question. A bilateral armistice may lead to a peace treaty. But occasionally a treaty never materializes, leaving the armistice to stand alone.

In contrast, a unilateral armistice is a one-sided halt to arms. Sometimes the executive orders a unilateral halt to hostilities but keeps the troops nose-to-nose with the enemy. Active warfare is more likely to resume in such circumstances. Other times a unilateral armistice may involve a wholesale withdrawal from scenes of active fighting, thereby rendering renewed fighting unlikely. If in the early twentieth century the executive withdrew forces from an overseas conflict against a weaker nation, that decision constituted a unilateral armistice consisting of a withdrawal. Warfare likely would not resume because the other nation would not (or perhaps could not) bring the war to our shores. In every case, whether there actually is a pause in fighting turns in large measure on the response of the enemy. If the enemy pauses as well, the unilateral armistice becomes a bilateral halt to fighting.

That military commanders enjoyed the power to halt fighting was well established in the eighteenth century. Emmerich de Vattel, author of a treatise influential on the Founders,\textsuperscript{169} explained that “put[ting] a stop to all hostilities . . . is easily done by means of the generals who direct the operations, or by proclaiming an armistice at the head of the armies.”\textsuperscript{170} Vattel further observed that while generals could establish a partial truce of a short duration, only the sovereign could declare a general truce applicable to all hostilities.\textsuperscript{171} Even though generals could not decide to wage war, they could nonetheless impose a partial stop of hostilities because they are implicitly “invested with all the powers for the reasonable and salutary exercise of [their] functions—for everything which naturally follows from [their] commission.”\textsuperscript{172}

As explained later, we believe that both the power to adopt lesser international agreements and compacts—today called sole executive

\begin{footnotesize}
\begin{itemize}
\item[167] Militaries have used “armistice” and related terms, like “truce,” “ceasefire,” “cessation of hostilities,” and “suspension of arms,” somewhat interchangeably. DEP’T OF DEF., LAW OF WAR MANUAL 864-65 nn.163-64 (2016) Although the U.S. military insists that an armistice cannot be unilateral, see id. at 864, we do not adhere to that distinction. People have long spoken of unilateral armistices. This again shows that these terms are a bit indistinct.
\item[168] Id. at 864.
\item[169] See RAMSEY, supra note 114, at 182 (explaining the influence of Vattel, Wolff, Grotius, and Pufendorf on the Founders).
\item[170] 4 VATTEL, supra note 56, ch. 3, § 25, at 440.
\item[171] Id., ch. 16, § 233, at 405.
\item[172] Id.
\end{itemize}
\end{footnotesize}
agreements—and a president’s status as Commander in Chief of the entire armed forces mean that presidents can declare and conclude an armistice. Further, we believe that a presidential armistice need not be partial but can extend to all hostilities with the enemy.

Early recognition of the President’s power to halt hostilities arises during the ratification struggle, with a commentator asserting that while presidents should be able to make truces, they should not be able to make treaties without legislative approval. The topic also cropped up during the first and second Administrations. In 1793, American negotiators were told to offer a truce to the warring Wabash Indians. A truce was made without Senate approval, with a Washington Administration official crowing that “[t]hus we have peace in all our borders.” In 1800, Alexander Hamilton told John Marshall that the president might strike a truce with France to end the Quasi-War. John Adams, said Hamilton, had power “to proclaim temporary suspensions of hostilities. Generals of Armies have a right ex officio to make truces. Why not the Constitutional Commander in Chief?” Hamilton forgot that Washington, by making a truce with the Wabash Indian tribe, had already traversed this ground.

In his 1825 View of the Constitution of the United States, William Rawle confirmed that the president may make truces. “Hostilities may be terminated by a truce, which the president alone (it is conceived) may make,” he explained. Such a truce may last indefinitely and “suspends all hostilities while it continues in force.”

Likewise, the Great Emancipator certainly knew that he could make peace with the South and end the horrific Civil War merely by the cessation of hostilities. In his 1864 annual message to Congress, he pointed out that the rebels could “have peace simply by laying down their arms and submitting to the national authority under the Constitution.” He also said that he would never permit the re-enslavement of those freed by the

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174 Henry Knox’s Heads of Instructions for the Commissioners to the Western Indians (Feb. 16, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, supra note 161, at 221, 222.
Emancipation Proclamation. These were Abraham Lincoln’s unconditional demands for peace. Had the South agreed to them, peace could have been established via armistice. Instead, the Civil War continued, with peace coming via a form of conquest.

A. Mechanisms

The executive power to halt warfare, either unilaterally or bilaterally, derives from three sources, two constitutional and one statutory.

First, the Commander in Chief has some operational control over the military. Accordingly, the president can halt active military operations. This would include a unilateral ceasefire meant to gain a tactical or diplomatic advantage. It would also encompass a bilateral armistice, meant to further peace. Relatedly, any statutory command to use force should be read to authorize the Commander in Chief to exercise at least some of the usual incidents of warfare. When Congress authorizes warfare, it grants the president a host of implicit or subsumed authorities, like authority to detain prisoners—and, we would say, the initiation of armistices.

Second, presidents can make international compacts that do not rise to the level of treaties, what people today call “sole executive agreements.” This authority arises from the grant of “executive [p]ower” plus the Constitution’s failure to strip away the power to make sub-treaty international agreements. The Constitution expressly distinguishes treaties from other international agreements: while states can never make treaties, they can make binding compacts. Similarly, while presidents can make treaties only after the Senate’s consent, they can make lesser (but still binding) agreements without the Senate.

To the Founders, treaties—agreements subject to the demanding Article II process—constituted the most important subcategory of international contracts. They were more durable and binding, and touched upon the most vital matters—alliances, lasting peace, and commerce. That left lesser international contracts outside the ambit of the Treaty Clause, and presidents

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179 Id.
180 U.S. CONST. art. II, § 2.
182 U.S. CONST. art. II, § 3; see also Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 111-12, 139-40 (2015) [hereinafter Prakash, Imperial].
183 U.S. CONST. art. I, § 10, cl. 1, 3. In the case of the states, they need Congress’s consent. Id.
184 See Federalist No. 64, at 390 (John Jay) (Clinton Rossiter ed., 1960).
have long made such international contracts without Senate approval.\textsuperscript{185} Perhaps as many as fifty executive agreements were made before the Civil War.\textsuperscript{186} The volume of sole executive agreements has ballooned in modern times.\textsuperscript{187}

The line between executive agreements and treaties is uncertain. The Supreme Court has suggested that the executive's power is at its zenith when drawing on other Article II executive powers.\textsuperscript{188} We believe that bilateral armistices constitute a paradigmatic case of reliance on other Article II authorities.\textsuperscript{189} In making a bilateral ceasefire agreement, say an armistice to last for months, the president utilizes his residual power over foreign affairs and his authority as Commander in Chief.

The Constitution constrains what an armistice may accomplish, for the Armistice Power is not interchangeable with the Treaty Power. As noted earlier, if the president wanted to bind the United States to a truly long-term agreement, including ceding territory, drawing boundaries, or establishing navigation rights, a treaty would be necessary. The executive cannot reach these matters through any sort of limited bilateral armistice.\textsuperscript{190}

Consider the 1817 Rush–Bagot Agreement, a compact with Britain to demilitarize the Great Lakes.\textsuperscript{191} Both sides immediately conformed to the agreement.\textsuperscript{192} President James Monroe “did not think it necessary” that the Senate consent.\textsuperscript{193} Michael Ramsey posits his reasoning:

\begin{quote}
[A]s President, he surely could withdraw U.S. ships from the Lakes; equally, combining his diplomatic and military power, he could announce that he would withdraw U.S. ships so long as Britain withdrew its ships. Therefore, he might fairly ask, why did he not have power to make an agreement for reciprocal withdrawal?\textsuperscript{194}
\end{quote}

\textsuperscript{\textsuperscript{185} See Henkin, supra note 32, at 220; Ramsey, supra note 114, at 174-94; United States v. Belmont, 301 U.S. 324, 330 (1937) (upholding the president’s power to make a sole executive agreement incidental to recognizing the Soviet Union).}

\textsuperscript{\textsuperscript{186} Michael D. Ramsey, Executive Agreements and the (Non)treaty Power, 77 N.C. L. REV. 133, 173-83 (1998). Ramsey lists as many as twelve agreements before 1839. Id. at 174-75. From 1840 to 1860, he claims there were thirty-five. Id. at 180.}

\textsuperscript{\textsuperscript{187} Id. at 135-36.}

\textsuperscript{\textsuperscript{188} United States v. Pink, 315 U.S. 203, 218-29 (1942); Belmont, 301 U.S. at 330.}

\textsuperscript{\textsuperscript{189} John Hart Ely, War and Responsibility 35 (1993) (“[A]rmistice agreements are generally adduced as the paradigm case . . . appendant as they seem to be to the president’s authority as commander in chief.”); Henkin, supra note 32 at 220.}

\textsuperscript{\textsuperscript{190} See generally Ramsey, supra note 114, at 189-93 (explaining potential differences between sole executive agreements and treaties); Ely, supra note 188, at 35-36 (same).}

\textsuperscript{\textsuperscript{191} Letter from Richard Rush, Acting U.S. Sec’y of State, to Charles Bagot, Brit. Minister to the U.S. (Apr. 28, 1817), in 2 TREATIES, supra note 131, at 646, 646-47 (agreeing “by direction of The President” to a reciprocal demilitarization with Britain).}

\textsuperscript{\textsuperscript{192} Id. at 647.}

\textsuperscript{\textsuperscript{193} Id. (citing 4 MEMOIRS OF JOHN QUINCY ADAMS 41-42 (Jan. 14, 1818)).}

\textsuperscript{\textsuperscript{194} Ramsey, supra note 114, at 190.}
A year later, Monroe submitted the agreement to the Senate, indicating that he was unsure whether its consent was required. Ten days later, the Senate unanimously consented.

Monroe’s initial decision demonstrates the executive’s limited ability to unilaterally withdraw or cease hostilities. As Ramsey notes, “Monroe had unilateral power to announce a policy of demilitarization” and “to commit himself to following that policy.” But “he did not have unilateral power to commit future Presidents to his policy as a matter of international law.” A long-term obligation required a treaty because only the latter “possesses binding force, and must be faithfully observed. It is not made only for the life of the sovereign who is a party to it, but is binding equally on his successors.” Consider, in this regard, a letter to John Adams from his son, Thomas Boylston Adams. “Treaties, which have hitherto been considered the most solemn pledges of fidelity between Nations, [may now be considered] as of no higher obligation than temporary truces.”

The younger Adams was complaining that Britain had lowered the value and permanence of a treaty to a mere truce. In so doing, he helpfully distinguished some species of agreements (treaties) from others (truces).

The Armistice Power faces another constraint: the Faithful Execution Clause. In the eighteenth century, declarations of war might contain commands to wage war; the sovereign power was deciding to wage war and would command subordinate officers, including generals and admirals, to wage it. Some American authorizations for war could be read as merely empowering or inviting the Commander in Chief to fight an enemy. Yet others explicitly or implicitly enjoined the president to wage war. In those

195 Letter from Richard Rush, Acting Sec’y of State, to Charles Bagot, Brit. Minister to the U.S. (Apr. 28, 1817), in 2 TREATIES, supra note 131, at 646, 646 (citing Executive Journal III, at 132 (Apr. 6, 1818)).
196 Id. at 648 (citing Resolution of the Senate, 2 Stat. 134 (Apr. 16, 1818)).
197 RAMSEY, supra note 114, at 191
198 Id.
199 PHILLIPSON, supra note 27, at 164.
200 Letter from Thomas Boylston Adams to John Adams (Nov. 2, 1794), in 10 ADAMS FAMILY CORRESPONDENCE 244, 245 (Margaret A. Hogan et al. eds., 2011).
201 U.S. CONST. art. II, § 2, cl. 3.
202 See, e.g., King of Great Britain’s Declaration of War against the King of Spain, in 3 NAVAL AND MILITARY MEMOIRS OF GREAT BRITAIN FROM 1727 TO 1783, at 341-42 (London, J. Chalmers & Co., Robert Beaton, ed., 1804) (“And we do hereby will and require our generals and commanders of our forces . . . to do and execute all acts of [hostility] . . . .”).
204 See id. at 2074 (2005) (describing how Congress “authorized and directed” the President to use military force against Germany during World War I); Act of Apr. 25, 1898, ch. 89, 30 Stat. 364 (“direct[ing]” the president to wage war against Spain).
cases, the Faithful Execution Clause imposes a duty to wage the war. As Justice Joseph Story put it, once Congress declares war, the president is “bound to carry it into effect.” While the president can veto a declaration of war, once the declaration becomes law he cannot negate it by refusing to fight.

Yet Story’s claim lacks nuance. Declarations of war may contain certain goals and objectives, either explicit or implicit. They may relate to commerce, territory, reparations, or surrender. Perhaps the president may stop fighting if he concludes that Congress’s goals are reachable through negotiations, have already been won on the battlefield, or are all but impossible to achieve. In each case, faithful execution does not compel a war’s continuance, or so we would argue.

The War of 1812 tackled the question of an early armistice. Angered primarily by British orders in council, blockades, and impressment of American seamen, Congress declared war against the United Kingdom in June of 1812. The Administration hoped for a quick and peaceful resolution. Days after the declaration, Madison met with A. J. Foster, the British minister. The President “desired to eliminate the causes of war in order to restore peace.”

Sometimes words that might imply discretion were thought to contain a command. The 1812 declaration against Britain “authorized” the President to wage war. See Mark Zuehlke, For Honour’s Sake: The War of 1812 and the Brokering of an Uneasy Peace 85 (2006) (describing Madison’s view that the 1812 “war declaration granted the presidency a specific mandate that must be carried out without compromise or modification”).

265 U.S. CONST. art. II, § 3; see also Prakash, Imperial, supra note 182, at 160–62 (“The president’s role as commander in chief does not . . . exempt him from his faithful-execution duties.”).

266 Brown v. United States, 12 U.S. (3 Cranch) 110, 153 (1814) (Story, J., dissenting).

267 The president’s commander-in-chief powers do not overcome this duty: the Commander in Chief was conceived as a relatively weak office, one put in charge of the armed forces but still subject to congressional mandates. See Prakash, Imperial, supra note 182, at 154–55, 164 (describing the limitations constraining the Commander in Chief and emphasizing that eighteenth-century British commanders in chief were wholly subordinate to the Crown).

268 Indeed, Bruce Ackerman and Oona Hathaway have argued that the war must end when Congress’s objectives, if explicitly laid out in the authorization for war, have been met. See Ackerman & Hathaway, supra note 23, at 457 (“All these cases add up to a clear principle: the president must respect congressional limits on the use of military force . . . .”).


270 See Updyke, supra note 209, at 136 (“The American Government, in declaring war, entertained the hope that Great Britain would remove the causes of grievance sooner than take up arms against the United States.”); Zuehlke, supra note 204, at 83–85 (“[I]t the moment of the declaration of war . . . the President, regretting the necessity which produced it, looked to its termination.”).

271 Zuehlke, supra note 204, at 84–86. See A. J. Foster, Minute of Conversation (Washington, June 23, 1812), in 68 House of Lords: The Sessional Papers 1801–1813, at 107–08 (“Mr. Madison expressed his regret at the situation in which the two countries were placed, and his sincere
The Declaration did not lay out the war’s objectives or goals. Nonetheless, Madison acknowledged that while American injuries persisted, he was constrained. He noted that “the Act of Congress was specified, and allowed of no modifications,” but that “his desire was to avoid as much [hostilities] as possible.”

“Peace [would] be restored” if Britain revoked its orders in council and negotiated on impressment, but he declined an “immediate armistice” grounded on a mere revocation of orders in council. Foster countered that “the President [was] only authorised by the Act of Congress, but not directed to carry on the war, [so] it would seem that he might . . . have suspended all military and naval operations.”

According to Foster, Madison gave “no satisfactory answer.” The President perhaps felt obliged to wrest more from Britain or else fight the war. He must have suspected that he might induce greater concessions if he insisted upon more.

Days later, James Monroe continued the effort. Writing to Jonathan Russell, chargé d’affaires at London, the Secretary of State authorized a conditional armistice. If Britain terminated its orders in council, blockades, and impressment, then “there is no reason why hostilities should not immediately cease.” Monroe “hoped that the British” would “terminate the war by an armistice . . . on the conditions proposed.” Of course, more “[d]efinitive arrangements” would be part of a treaty. The Administration’s stance illustrates that the chief executive has the power to end warfare, but must take care to be faithful to Congress’s explicit and implicit objectives.

As with many of the paths to peace, this one has its limits. In our view, Congress may check the president’s armistice power. We believe that
Congress has broad authority over the military, including the power to compel warfare. As Secretary of War Henry Knox observed during the Washington Administration, “Whatever they [Congress] direct [with respect to hostilities], will be executed by the Executive.” Given its sweeping war authority, we believe that Congress may bar the executive from making a future armistice, in its declaration or otherwise. Moreover, just as it may declare war notwithstanding a peace treaty, Congress can pass a law that countermands any negotiated armistice by ordering that hostilities resume. Despite this theoretical possibility, Congress typically confronts strong political incentives against using this authority. To our knowledge, Congress has never declared war in a manner that bars an armistice. Specifically, it has never declared that the president cannot halt fighting until the warring parties ratify a peace treaty.

B. Effects

The most prominent consequence of the Armistice Power is a practical peace. A bilateral armistice halts hostilities. A unilateral ceasefire or withdrawal merely terminates American hostilities. In the latter case, the Commander in Chief’s power to halt American hostilities cannot stop other nations from continuing the battle. But sometimes the other nation may also pause either for tactical reasons or in the hopes of a peaceful resolution. If the halt to hostilities is sufficiently enduring, it generates a practical peace.

The Armistice Power carries limited immediate legal effect. First, the Supreme Court and lower courts have concluded that a cessation of hostilities does not end a legal state of war. From this, many scholars reason that an armistice cannot end a war. But judicial statements that cessation of hostilities have no legal effect should not be overread. In nearly all these cases, the courts were considering only one limited sense of peace: domestic legal relations. When the Supreme Court stated that “[w]ar does not cease with a cease-fire order,” its pronouncement was in the context of the legal rights and obligations of Americans under federal wartime statutes. For example, in 1948 (addressing wartime authorizations under the Act of 1798); see also Com. Cable Co. v. Burleson, 255 F. 99, 103 (S.D.N.Y. 1919) (Hand, J.), rev’d
Ludecke v. Watkins, the Court faced a statute that, by its terms, applied only during a “state of war.” The Court refused to look at the facts on the ground to judge whether a “state of war” no longer existed. Instead, a statutory “state of war” must be terminated by “a political act,” whether a treaty, presidential proclamation, or legislation. Similarly, Judge Learned Hand recognized that “a war may end by the cessation of hostilities, or by subjugation,” but that the executive’s statutory war powers would only cease when peace was unequivocally declared. None of these statements, or others, signal that the fighting has not ended, maybe even permanently. None preclude a peace in its other senses.

Second, an armistice neither amends nor repeals a declaration of war. The president retains authority to fight and may resume hostilities at any time without running afoul of the Declare War Clause. Even so, if the armistice is made because Congress’s goals in declaring war have been met, then perhaps the authorization should be considered lapsed. As we discuss later, if Congress wanted to avoid any possibility of renewed hostilities, it could repeal the war authorization.

Third, the international dimensions of a bilateral armistice are somewhat limited. Some eighteenth-century international scholars argued that “by a truce war is not ended, but continues,” so that “during the time of a truce there is not peace.” War could resume if either side broke the armistice.
Thus, bilateral armistices were often seen as precursors to a peace treaty: both sides stopped fighting in anticipation of formal negotiations. This was true in many wars, including the Revolutionary War and the War of 1812. The rationale for a treaty after an armistice was twofold. As explained, only a treaty could definitively settle ongoing disputes, meaning that an armistice might create "a condition of uncertainty." For example, eighteenth-century international law differed on whether the status quo ante bellum or post bellum should prevail. States may wish to have that lingering issue resolved and in writing. Second, in peace treaties "both Parties agree never to take up Arms again upon that Controversy which first gave birth to the War."

Even so, in some situations a bilateral armistice could eventually end a war. As noted, Von Steck explained peace could sometimes be made "by the simple declaration" which "takes the place and has the force of a formal treaty." This was possible where "there is nothing to discuss, and there is a lack of subjects of transaction" necessary to end the war, or when underlying disputes faded away. Vattel noted that a "general truce, made the war; it only suspends its operations."); id. § 260, at 412 ("As the truce only suspends the effects of war . . . , hostilities may be renewed without any fresh declaration of war . . . ").

233 PHILLIPSON, supra note 27, at 56.

234 See George Washington, General Orders (Apr. 18, 1783) 26 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1938) (proclaiming a cease fire but noting that “[i]t extends only to the prohibition of hostilities and not to the announcement of a general peace”).

235 Monroe originally desired an agreement to cease hostilities that addressed the United States’ three chief concerns (blockades, impressment, and British orders in council), “with a view to arrange by treaty, in a more distinct and ample manner, and to the satisfaction of both parties, every other subject of controversy.” Letter from President James Monroe to John Borlase Warren, Brit. Admiral (Oct. 27, 1813), in 3 AMERICAN STATE PAPERS, supra note 120, at 596, 596–97. But Monroe also made clear that “if Great Britain was willing to enter into negotiations upon the subject of impressment, but unwilling to suspend the practice during an armistice, the United States stood ready to treat without an armistice.” UPDYKE, supra note 209, at 142 (citing id. at 397).

236 PHILLIPSON, supra note 27, at 3, 5.

237 Compare PHILLIMORE, supra note 56, at 640 (“[T]he presumption of law would be, that both parties had agreed that the status quo ante bellum should be revived.”) with PHILLIPSON, supra note 27, at 6 (“[T]he position of the States in question is to be considered that which exists at the time hostilities have actually terminated. . . . The fact that war has ceased and that neither party is disposed to prosecute hostilities further in order to obtain a more decisive solution, may justifiably be interpreted to mean that they are willing to let matters rest where they are . . . .”). Justice Chase’s opinion in Ware v. Hylton, 3 U.S. (3 Dall.) 199, 231 (1796), provides some support for Phillipson’s view.

238 PUFENDORF, supra note 232, at 699; see also PHILLIMORE, supra note 56, at 640 (“[I]n the absence of any formal declaration [of peace] it would not be concluded that the claims which had given occasion to the War, or which had grown out of the War, were abandoned, but they must be considered as in abeyance.”).

239 VON STECK, supra note 54, at 14 (machine translation); see also PHILLIPSON, supra note 27, at 7 (asserting that “it is desirable that a formal declaration of the resumption of peace should be made by the belligerents” to clarify the legal status for citizens and third-party states).

240 VON STECK, supra note 54, at 14 (machine translation).

241 Pufendorf observed that “there can hardly be any Injury, but must be worn out of Memory, in so long a course of Time.” PUFENDORF, supra note 232, at 699.
for many years, differs from a peace in little else than in leaving the question which was the original ground of the war still undecided.”242 Often the countries resume diplomatic relations, commerce, and other norms of peacetime243 and the armistice itself can include terms and conditions.244 Indeed, formal peace and truce were interchangeable for some purposes, and history includes examples of both a “Hundred Years Truce” and a “Peace for an Hundred and One Years.”245 Lengthy truces may be a way for belligerents to end a war without “see[m]ing] to lessen their own Authority, by appearing easy in pardoning . . . Injury [inflicted by the other nation].”246 Thus, Christian Wolff concluded that “if a truce should be made for a long time, since during the time we must refrain from war, that truce is equivalent to peace.”247

Some Americans seemed familiar with this point. Secretary of State William Seward observed in 1868, “It is certain that . . . peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences.”248 Whether any war has actually ended depends on the facts of the case.249 It is not a rule, but a standard: war is legally ended by “mere cessation of hostilities” simply if the conditions make “clear that [hostilities] are

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242 3 VATTEL, supra note 56, ch. XVI, §§ 234, 236, at 404; id. § 260, at 412.
243 See, e.g., 3 GROTIIUS, supra note 56, at 1598 (recognizing that international laws of peacetime may apply for the duration of a truce); PUFENDORF, supra note 232, at 699 (same); 3 VATTEL, supra note 56, ch. XVI, § 245, at 408-09 (“[T]he general rule is, that, during the truce, each party may, within his own territories, and in the places where he is master, do whatever he would have a right to do in time of profound peace.”); id. § 242, at 411 (“During the truce, especially if made for a long period, it is naturally allowable for enemies to pass and repass to and from each other's country, in the same manner as it is allowed in time of peace.”).
244 QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 241 (1922); 3 VATTEL, supra note 56, ch. XVI, § 259, at 412 (explaining that conditions in “articles of truce” are “obligatory on the contracting parties”). Early Americans appeared to recognize the possibility of an informal agreement settling terms for stopping hostilities. For example, in negotiations over the end of the War of 1812, the Madison Administration entertained a proposal by the British minister to leave the subject of impressments to “an informal understanding with Great Britain, which he thought would have been as efficient in practice as a solemn article.” Letter from Albert Gallatin, U.S. Sec'y of Treasury, to President James Monroe (May 2, 1813), in 1 WRITINGS OF ALBERT GALLATIN 39, 540 (Philadelphia, J.B. Lippincot & Co, Henry Adams ed. 1879). He reiterated in a later letter that the British “viewed an informal arrangement as equally efficient and more practicable than a solemn article.” Letter from Albert Gallatin, U.S. Sec'y of Treasury, to President James Monroe (May 8, 1813), in id. at 544, 544-45.
245 PUFENDORF, supra note 232, at 855.
246 Id.; see also 3 VATTEL, supra note 56, ch. XVI, § 236, at 404 (“When two nations are weary of hostilities, and yet cannot agree on the points which constitute the subject of their dispute, they generally have recourse to this kind of agreement.”).
247 2 WOLFF, supra note 56, ch. VIII, § 960, at 486.
249 See Manley O. Hudson, The Duration of the War Between the United States and Germany, 39 HARV. L. REV. 1020, 1029, 1030 n.32 (1926) (citing Seward's statement that “[w]hat period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances”).
not to be resumed or there [is] a lapse of time indicating the improbability of resumption.” If the “armistice becomes so definitely established” and “occupies such a great length of time,” then other states may “begin to regard it as a practical termination of the war, especially so when commercial intercourse is to some extent re-established between the two parties.”

Sometimes an armistice seems enough like peace that renewed fighting demands a new declaration. For Samuel Pufendorf, “where the Truce is of long Date, and hath entirely put a stop to the progress and appearance of War,” and especially where it was made with lasting peace in mind, then “if it be not Necessary, it is at least Honourable” to re-declare war if it resumes. Vattel agreed, citing the Roman practice of re-declaring war before “taking up arms again” after a long truce. Rawle, commenting on the United States Constitution, likewise observed that although it is technically “unnecessary to repeat the declaration of war [after a lapsed armistice], . . . it would be inconsistent with good faith to renew hostilities” without a new declaration.

The idea that a prolonged truce might generate peace was known to early Americans. In 1792, Alexander Hamilton observed that “an indefinite cessation . . . put[s] an end to the State of War” even when a peace treaty is never made. In a letter to commissioners, Henry Knox wrote that if a truce was made with the Wabash Indians, “it might be extended . . . to three or seven years . . . . If so, the effect would be a peace to all intents and purposes.” In 1793, Thomas Paine suggested that the United States help broker a truce between France and much of Europe: “Perhaps a long truce . . . would have all the effects of a Peace, without the difficulties” attendant to striking a peace treaty.

These observations give the lie to the trope that an armistice has no international legal effect. Long-lasting cessation of hostilities can end a war. As one treatise explains, “War may be concluded and Peace restored . . . [by] a de facto cessation of hostilities . . . and a renewal, de facto, of the relations of peace.”

This potential effect of an armistice is more pronounced given developments in international law. Some supposed principles of international law
law—such as the idea that hostilities could resume if an armistice were breached\(^\text{259}\)—have been superseded by the United Nations Charter.\(^\text{260}\) The Charter generally bars the use of force, and lays out a handful of instances in which members may resort to force, such as cases “of individual or collective self-defense if an armed attack occurs.”\(^\text{261}\) Thus, the “conception of the United Nations Charter [is] that the five Permanent Members of the Security Council . . . together use the ample powers assigned them . . . to stop wars and make peace.”\(^\text{262}\) In this regime, states need not negotiate and conclude a bilateral peace treaty for international law to recognize that a state of war has been terminated.\(^\text{263}\) Instead, the United Nations itself can proclaim peace and set the terms and conditions.\(^\text{264}\) The bottom line is that today, as opposed to 1789, a conclusive peace treaty is far less important in international law. Concomitantly, armistices have a greater role.

Take the first Persian Gulf War. Active hostilities against Iraq ended in a practical sense on February 27, 1991, when President George Bush proclaimed a cease-fire.\(^\text{265}\) In April of the same year, the United Nations legally pronounced the end of the war, at least for international law purposes.\(^\text{266}\) The Security Council—rather than a treaty—set conditions for the end of the war, including cessation of hostilities, the return of seized property and territory,

\(^{259}\) Hague Convention IV, art. 40, Oct. 18, 1907 (“Any serious violation of the armistice by one of the parties gives the other party the right . . . of recommencing hostilities immediately.”).


\(^{261}\) U.N. Charter art. 31. Even in those cases, international law only justifies hostilities “until the Security Council has taken the measures necessary to maintain international peace and security.” Id.

\(^{262}\) Reisman, supra note 14, at 29-30.

\(^{263}\) See id. at 40 (“[T]erms of peace] need not be incorporated into a formal agreement between combatants. They may be concluded between one of the combatants and third parties who have an interest in bringing the war to an end . . . ;”); see also Morriss, supra note 260, at 804 (“[O]nce the Security Council acts to maintain international peace . . . the parties to the conflict are no longer free to fight, kill, and bargain for terms ending hostilities purely as an exercise of their sovereignty.”).

\(^{264}\) See Christine Bell, Peace Agreements: Their Nature and Legal Status, 100 AM. J. INT’L L. 373, 394 (2006) (noting that the modern “peace process’ is rooted in binding UN Security Council resolution”). See generally Reisman, supra note 14, at 6, 9, 15 & n.18, 29-30 (describing the increased role of exogenous, international bodies in the formerly bilateral peace process); see also Morriss, supra note 260, at 807.


\(^{266}\) Murphy, supra note 260, at 192 (stating that the U.N. definitively ended conflict in Kuwait with Security Council Resolution 687); S.C. Res. 687 (Apr. 8, 1991) (recognizing Iraq and Kuwait as independent sovereignties and demanding each respect their international boundaries).
release of prisoners of war, and liability for loss.\textsuperscript{267} Under international law, hostilities could not resume.\textsuperscript{268}

The conclusion that an armistice can eventually lead to a conclusive end to war, both under eighteenth-century and modern international law, supports the idea that the executive has—and has always had—a unilateral power to make peace on behalf of the United States.\textsuperscript{269} Understanding this executive Peace Power helps make sense of several modern wars.

Most notably, a prolonged armistice ended the Vietnam War. The Senate never ratified the 1973 Paris Peace Accords.\textsuperscript{270} The Nixon Administration categorized the Accords as an “executive agreement” that required no Senate approval.\textsuperscript{271} Its rationale was that the agreement was not a treaty,\textsuperscript{272} and it committed the United States to no lasting obligations (other than withdrawing troops).\textsuperscript{273} The United States ceased fighting and withdrew troops, thus putting an end to America’s warfare at least from a practical perspective.\textsuperscript{274}

\begin{footnotes}
\item[267] See Brian Orend, Terminating Wars and Establishing Global Governance, 12 CANADIAN J.L. \& JURIS. 253, 278-79 (1999) (“[T]erms of the cease-fire were hammered out under the auspices of the UN Security Council.”); see also Moriss, supra note 260, at 891 (“[T]he Security Council . . . set[] out the formal requirements for a military cease-fire . . . .”).

\item[268] See Murphy, supra note 260, at 201 (“[W]here two contending parties have concluded a cease-fire agreement and the Security Council directs them to abide by that agreement, then the parties may not resume hostilities.”); see also Moriss, supra note 260, at 822-23 (“The existence of a U.N. cease-fire narrows the justification for renewing hostilities . . . .”). Some hostilities did, in fact, resume—for example, when the U.S., U.K., and France enforced a no-fly zone over Iraq. But those countries attempted to legally justify renewed hostilities on the theory that Iraq was in material breach of Resolution 687’s cease-fire conditions, thereby “reviving” the original Resolution authorizing “all necessary means” to bring peace to the area. Murphy, supra note 260, at 176-78.

\item[269] To the extent modern international law is clearer than Founding-era law about the consequences of an armistice, the executive’s Article II power may have acquired new significance. Even so, the constitutional armistice power has always existed, even if its precise effects have changed.

\item[270] See Briefing on Major Foreign Policy Questions: Hearing Before the S. Comm. on Foreign Relations, 93d Cong., 1st Sess. 28-30 (1973).

\item[271] Id.

\item[272] Id. at 28 (statement of Sen. Church and William Rogers, Secretary of State) (“With regard to the cease-fire agreement, how would you categorize it? Is it a treaty? Is it an executive agreement? . . . Secretary Rogers: I think I would call it an executive agreement.”). Secretary Rogers also noted the need for speed and the fact that the executive knew Congress would approve of the Accords regardless. Id. at 28-30, 49-50.

\item[273] Id. at 4, 6-11. Even though the Accords, in Art. 21, say that the U.S. “will contribute to healing the wounds of war and to postwar reconstruction of the Democratic Republic of Vietnam,” Secretary Rogers was careful to assure the Senate, “[W]e are not committed . . . . We have always made clear that this cannot be done without congressional approval so to that extent we are not committed.” Id. at 22; see also HALL, supra note 223, at 80 (noting that lasting aid to Vietnam was in fact never provided).

\item[274] As noted above, the war continued to go on from a Vietnamese perspective. See HALL, supra note 223.
\end{footnotes}
In the immediate aftermath, most Senators agreed that the president acted within his power.275 Still, some took the reasonable view that the Accords established a permanent peace, since “the negotiators on both sides clearly understood that our goals were more enduring” and intended the agreement “to end the war and restore peace.”276 Because it established a permanent peace, it ought to have been submitted to the Senate for its consent. Others argued that the Accords signified “a statement of intention of the parties” to formally end the war via treaty in the near future.277 But no peace treaty ensued.

Soon after the armistice, the State Department expressed its belief that, consistent with domestic law, the executive could resume hostilities.278 But in this day and age, no one should doubt that the Vietnam War has been over for quite a while. Long ago, Congress repealed the Gulf of Tonkin Resolution and cut off funding.279 In 1975 Gerald Ford said that because “America is no longer at war,” he would bar veteran benefits for new members of the armed forces.280 President Bill Clinton lifted the trade embargo and normalized diplomatic relations.281 All these steps signal that we are no longer at war with Vietnam.

The Korean War is trickier. The last significant shots of the War were fired more than seventy years ago.282 In 1953 the Eisenhower Administration signed an armistice with North Korea, ceasing hostilities and reducing U.S. forces in South Korea.283 The agreement established a demilitarized zone and arranged for the exchange of prisoners.284 But a treaty was never signed,

275 See, e.g., Congressional Oversight of Executive Agreements: Hearing on S. 3475 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 117 (1972) (statement of Adrian S. Fisher, Dean, Georgetown University Law Center) (“[The President] do[es] not have to keep shooting, and, as Commander-in-Chief, he can make a deal to see that the shooting is stopped.”).


277 See, e.g., War Powers Legislation, 1973: Hearing on S. 440 Before the S. Comm. on Foreign Rel., 93d Cong., 1st Sess. 83 (1973) (“It is not a treaty or agreement of peace. Nor does it ‘end’ the war. According to its preamble, the signatories entered into the agreement ‘with a view to ending the war and restoring peace in Vietnam . . . .’ It is a statement of intention of the parties, a binding international agreement, under which the parties accept certain international obligations.”) (emphasis added)).


279 See infra notes 376–79 and accompanying text.


281 HALL, supra note 223, at 89.


284 Cohan, supra note 20, at 315.
much less ratified. That fact leads to disagreement about whether the Korean War continues. On the one hand, the state of emergency lives on, soldiers receive combat pay, and “[h]ostilities, though infrequent, occasionally erupt.” On the other hand, there are indications “of the resumption of a state of peace,” such as the United Nations “yield[ing] administrative control to the Republic of Korea” and America terminating service awards and veterans benefits. Importantly, the armistice “has been durable enough to . . . prevent the eruption of another full-scale war on the Korean peninsula.”

We take no stance on whether the Korean War is over. But as a general matter, if enough time has passed and the warring parties have reverted to a de facto state of peace, we would say that the underlying conflict is over for purposes of domestic and international law. As Hamilton put it in 1800, if two nations cease hostilities and “pass into a state of peace in fact,” they are in some measure “as well off . . . as if a treaty had been made,” save for the failure to solve lingering disputes.

Our discussion underscores that one should not overstate the differences between armistices and treaties. Even if the executive concludes an armistice with the intention of later ratifying a peace treaty, as was true in the Korean War, the fact that a peace treaty never materializes may not matter on the ground. As for the Vietnam War, the fact that the Senate never consented to the Paris Peace Accords does not matter. Because for decades neither nation has warred against the other, America and Vietnam are at peace.

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285 On the one hand, the armistice anticipated a “political conference” to ensure “the peaceful settlement of the Korean question.” No such conference ever occurred. See Military Armistice in Korea and Temporary Supplementary Agreement, June 27, 1953, in 4 TREATIES, supra note 283, at 260. On the other hand, the armistice also provided that it would “remain in effect until expressly superseded.” Id. § 62, at 261; see also Pye, supra note 224, at 57 (explaining that no peace agreement was reached within the recommended timeframe or at the Geneva conference).

286 See, e.g., Pye, supra note 224, at 58 (arguing that the Korean War is ongoing); Blakemore, supra note 282 (same); GIBBONS & FARLOW, supra note 278, at 2 (noting disagreement within the political branches). At the time, the Secretary of State was careful to note that “the present armistice is by no means the equivalent of assured peace. So, we shall not relax our vigilance nor shall we reduce our strength in Korea until future events show that this is prudent.” 29 DEP’T STATE BULL. 132 (1953).

287 GIBBONS & FARLOW, supra note 278, at 7.

288 Pye, supra note 224, at 57-58; see also United States v. Shell, 23 C.M.R. 110, 112 (C.M.A. 1957) (finding that the Korean War terminated with the armistice under military law, based on a “complete cessation of all hostilities”).

289 Morris, supra note 260, at 887.

290 Cf. Pye, supra note 224, at 59 (“[T]he termination of the state of war should not be entirely dependent upon such an act where no hostilities have existed for a long period of time and no political act seems likely in the future because of peculiar domestic and international factors.”).

291 France and America, supra note 69, at 158-59.

292 Cf. WRIGHT, supra note 244, at 241 (raising the issue of the Senate, in ratifying a final peace treaty, rejecting the terms upon which the president and the enemy nation originally agreed to stop fighting). In international law, “[w]here the authorization of the legislature is necessary to
The nation’s twenty-year conflict in Afghanistan has sparked renewed interest in the Armistice Power. In February 2020, President Trump unilaterally signed a “peace deal” with the Taliban, setting terms for a complete withdrawal of U.S. troops by May 1, 2021. The agreement was not a peace treaty, in part because the United States does not recognize the Taliban as the established government of Afghanistan. By the following January, the Trump administration had reduced troops in Afghanistan to 2,500. But because this was a unilateral presidential action, it could not bind the United States to long-term commitments. Like the Rush–Bagot Agreement, it perhaps could not constrain successor presidents to its policy, and President Biden indeed pushed the withdrawal deadline back to September 11, 2021. But Biden still chose to honor the general contours of the agreement, and he withdrew troops from Afghanistan during the late summer of 2021, without congressional consent or formal peace treaty.

Does the Biden withdrawal signal that the Afghan war is finally over? Not quite. To be sure, cessation of hostilities can end a war from a legal perspective. But as described above, the cessation must endure for some sustained period. Recall that President Obama withdrew troops from Iraq only to reintroduce them later. If the same were to happen in Afghanistan, as some have dolefully predicted, we would say that the Afghan war continues—not that a new Afghan war has commenced. In any event, rather than clearly disclaiming any intention to resume hostilities in Afghanistan, President Biden has promised renewed warfare if the situation warrants it. Indeed, he has not ruled out new boots on the ground.

give binding force to the international transactions effected by the treaty-making authority of a State, it is generally implied, and even sometimes expressly stipulated, that they shall not become operative if the authorization is withheld.” PHILLIPSON, supra note 27, at 26. Still, typically “hostilities should entirely cease with the signing of the definitive treaty,” even before “the exchange of ratifications.” Id. at 188. So even if the Senate rejects a peace treaty, hostilities need not resume.

Agreement for Bringing Peace to Afghanistan, supra note 9, § 1(B)(1).


Remarks by President Biden on the End of the War in Afghanistan, supra note 6.


Remarks by President Biden on the End of the War in Afghanistan, supra note 6 (discussing putting troops on the ground “if needed”); see also Samuel Moyn, Biden Pulled Troops Out of Afghanistan. He Didn’t End the ‘Forever War’, WASH. POST (Aug. 17, 2021, 1:27 PM),
conundrum. When the President makes clear that America may continue to strike targets and that he may reinsert ground troops at any time, one must wonder if we ever really left Afghanistan.

IV. THE DEFUNDING POWER

Next, we map a path that rests exclusively with Congress. The executive, which manages a war, has no constitutional right to access the Treasury to conduct it. Rather, Commanders in Chief are completely dependent on Congress for funds. Thus if Congress cuts off funding for a war, it ends our participation in it. The Founders knew that because Congress provided the sinews of war, it could end warfare by cutting off funding. Though many have discussed the possibility that Congress might cut off war funds, some have overlooked what this means in the broader context of the powers to make peace.

The legislative power to defund a war has its roots in England, where the Parliament held this power as a check on the Crown’s power to declare war. The Crown, vested with the “sole power of raising . . . fleets and armies,” kept standing armies. But by the eighteenth century, the Crown’s own funds were insufficient for domestic purposes, what to speak of the prodigious costs of war. Because Parliament was responsible for raising and supplying additional revenue, the Crown was dependent upon it to fund the military. Indeed, the Crown often would seek Parliamentary approval before declaring

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299 U.S. CONST. art. I, § 8, cl. 12-13; id. art. I, § 9, cl. 7; see also Peter Raven-Hansen & William C. Banks, Pulling the Purse Strings of the Commander in Chief, 80 VA. L. REV. 833, 835 (1994) (explaining that Congress controls war powers by restricting funding).

300 See generally, e.g., id. (discussing "the Constitution's arrangement of the powers of sword and purse"); Ackerman & Hathaway, supra note 23, at 477 (suggesting that Congress adopt a practice of limiting war by restricting funds); Reid Skibell, Separation-of-Powers and the Commander in Chief: Congress’s Authority to Override Presidential Decisions in Crisis Situations, 13 GEO. MASON L. REV. 183, 194 (2004) ("There is generally academic consensus that Congress can countermand an executive decision to commit troops abroad through spending restrictions."); sources cited supra note 49.


302 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *262.

303 Prakash, Separation and Overlap, supra note 301, at 321-22.

304 Id. "This power led some in America to believe that Parliament actually held the power to raise armies. See, e.g., Letter from the Federal Farmer to the Republican, No. XVIII (Jan. 25, 1788), in 2 COMPLETE ANTI-FEDERALIST, supra note 111, at 339. 342-43 (attributing to the British legislature the "power to raise and keep up regular troops").
war. While the formal power rested with the Crown, practical authority over war lay with Parliament.

The Framers wrote this legislative check into the Constitution. Article I, section 8 gives Congress the power “[t]o provide and maintain a Navy” and “[t]o raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years.” Section 9 makes explicit what was implicit, namely that the appropriations power rests exclusively with Congress, for no monies may be withdrawn from the Treasury except in consequence of a congressional appropriation.

Control over funds grants Congress a trump card. The Framers recognized that by those provisions, “the whole power of raising armies was lodged in the legislature, not in the executive.” This funding power necessarily implies a Defunding Power. Because “the means of carrying on the war would not be in the hands of the President, but of the Legislature,” some Framers thought additional precautions against executive aggrandizement were unnecessary. And others explicitly recognized that Congress could terminate a conflict by simply “negativing the supplies for the war.” No money means no war.

Participants in the state conventions agreed that the appropriations power gave Congress control over war-making. Joseph Story later confirmed the

307 Id. art. I, § 9.
308 THE FEDERALIST NO. 24, at 158 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contrasting the power of the English Crown, which “extends to . . . the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.”); see also Letter from Thomas Jefferson, U.S. Minister to Fr., to James Madison, U.S. Rep. (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) ("[W]e have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.").
309 2 FARRAND, supra note 13, at 540 (statement of Nathaniel Gorham).
310 Id. at 548.
311 See, e.g., 4 ELLIOT’S DEBATES, supra note 112, at 107–08 (observing that the power of “raising and supporting armies, and of providing and maintaining a navy” was not vested in the president, but “expressly delegated” to Congress) (statement of James Iredell); id. at 114 (noting that “it was true that the command of the army and navy was given to the President; but that Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President—that they alone had the means of supporting armies”) (statement of Richard Spaight); id. at 329–30 (“With [Congress] all grants of money are to originate: on them depend the wars we shall be engaged in, the fleets and armies we shall[ ] raise and support, the salaries we shall pay . . . . With this powerful influence of the purse, they will be always able to restrain the usurpations of other departments.”) (statement of Charles Pinckney); 3 ELLIOT’S DEBATES at 455 (noting “that the army and navy were to be raised by congress, and not the president,” and arguing that “[I]t was on the same footing with our state government”) (statement of George Nicholas). But see id. at 455
exclusivity of Congress’s funding power over the military.\textsuperscript{312} Early Congresses used their appropriations power to exert continuing control over war.\textsuperscript{313} Sometimes they expanded the army to help wage wars they had authorized, and other times they disbanded portions of it.\textsuperscript{314} The first war under the Constitution, the war against the Wabash Indians, was a product not only of a congressional decision to wage it, but also repeated legislative choices to increase the army’s size and fund the army throughout the bloody conflict.\textsuperscript{315}

Some opponents of the Defunding Power argue that any termination of funds for an ongoing war would constitute a grave policy error.\textsuperscript{316} Others go further, claiming that Congress cannot cut off war funding or limit a war that it previously authorized the president to fight.\textsuperscript{317} In their opinion, some cutoffs constitute an “unconstitutional condition” on the Commander in Chief—interfering with his control over warfare and his duty to defend the nation—that violates the separation of powers.\textsuperscript{318}

Such assertions are at war with text and history. As a matter of text, the Constitution is crystal clear. Congress decides funding, and unlike (noting the “danger” that “[a]lthough congress are to raise the army . . . no security arises from that: for in time of war they must and ought to raise an army”) (statement of George Mason).

\textsuperscript{312} See \textit{3 STORY}, supra note 74, §§ 1177–79, at 91–92 (explaining that the power to raise armies is indispensable to Congress’s exclusive power to declare war).

\textsuperscript{313} See Prakash, \textit{Separation and Overlap}, supra note 301, at 322 (providing examples of early military appropriations bills that employed an astounding degree of specificity); Ackerman & Hathaway, supra note 23, at 479–82 (providing further examples of early, specific military appropriations bills).

\textsuperscript{314} See, e.g., Act of Apr. 30, 1790, §1, 1 Stat. 119 (providing that soldiers would be discharged after three years unless discharged sooner by law); Act of Mar. 27, 1794, § 9, 1 Stat. 350, 351 (providing for the Navy’s termination if peace was reached with Algiers); Act of Sept. 29, 1789, ch. 25, § 6, 1 Stat. 95–96 (authorizing frontier militia on the Western Frontiers “until the end of the next session of Congress, and no longer”).


\textsuperscript{316} See, e.g., Mosier, supra note 44, at 1670 (arguing that reduction in funding would “[p]ut[] the lives of American soldiers in danger?”); William C. Banks & Peter Raven-Hansen, \textit{National Security Law and the Power of the Purse} 150 (1994) (arguing that funding restrictions may “intrude[] deeply into the . . . power of the president to defend and protect Americans against attack.”).


presidential and judicial salaries there is no constitutional obligation to fund conflicts. To say otherwise would allow Congress to turn the volume up—expand a war by appropriating greater funds—but not to turn the volume down. Nothing in the text supports the idea that Congress's considerable war powers are a one-way ratchet. The two-year limit on army appropriations exists precisely to prevent Congress from passing a permanent appropriation, thereby ensuring that Congress must periodically reassess the situation and decide whether to continue army funding. While the navy lacks a similar limit, the global principle—that Congress decides funding—is no less true. Further, arguments against funding cutoffs lack any historical grounding. As we have seen, many Founders recognized that Congress might use its power of the purse to cut the sinews of war.

Relatedly, funding cutoffs are not unconstitutional conditions. First, as a matter of constitutional law, wars are waged by Congress even if supervised day-to-day by the Commander in Chief. The Commander in Chief is subservient to Congress, both in the decision to wage war and the supplies necessary to carry it out. Second, even if the president has the constitutional power to wage war, Congress is not obligated to facilitate its exercise. The Defunding Power applies not only to war but to foreign diplomacy, regulatory agencies, and every other resource-dependent executive function. Consider the Supreme Court's correct observation in Zivotofsky ex rel. Zivotofsky v. Kerry: notwithstanding the executive's recognition of Israel's claim to Jerusalem, Congress could choose not to fund an embassy in Jerusalem. Congress may exercise an influence over the executive by the things it chooses to pay for and the things it does not. As Zachary Price rightly notes, when presidents are “constrained by statutory funding directives,” they “will generally have no sound basis to complain either about burdens on their rightful powers or coercion of some independent judgment guaranteed to them by the Constitution.”

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320 Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).
321 See Zachary S. Price, Funding Restrictions and Separation of Powers, 71 VAND. L. REV. 357, 361-62 (2018) (“[S]ome executive powers . . . . may be exercised only insofar as Congress provides resources for their exercise—and Congress accordingly holds near-complete discretion to impose whatever limits and conditions it chooses with respect to use of those resources.”).
323 See Charles L. Black, Jr., Some Thoughts on the Veto, 40 L. & CONTEMP. PROBS. 87, 89 (1976) (arguing that, with the appropriations power, Congress could reduce the executive to nothing but a secretary and desk).
324 Price, supra note 321, at 419.
A. Mechanisms

There are two ways to cut off funding. The easiest path is to do nothing—that is, failing to pass a war appropriation. For instance, Congress could neglect to pass an appropriation for the army. As noted, funds for the army must, as a constitutional matter, expire after two years. This limit was designed to align with House elections and give new members the chance to reassess any ongoing land wars.

This first route can be exercised by either house of Congress, acting alone. If one chamber refuses to appropriate war funds, the war will wither because, without the concerted action of both, an appropriation cannot pass. Moreover, given the way the chambers operate, sub-majorities in either might prevent war funding. In the Senate, a minority might successfully filibuster a war appropriation. In the House, the Speaker largely controls what gets to the floor. In sum, mere inaction will eventually be enough to defund the army and grind the war to a halt.

There are high principles of supreme law and there are the often-inexorable compulsions of conventional politics. There are a bevy of political factors that temper the utility of the defunding option. For one, many legislators wish to avoid the charge of leaving troops defenseless. Inaction—failing to pass an appropriation—thus may prove electorally noxious. Moreover, because Congress has granted the executive some discretion to transfer funds between accounts, the executive sometimes can rummage about and find pockets of funding to continue the war.

Consequently, although it may be easier for Congress to terminate a war by inaction, legislators may choose a more arduous route that is more politically palatable. Congress may pass a law cutting off war funding on some
future date. On the one hand, this defunding route is procedurally more difficult, as it requires the President’s signature or a supermajority of both houses. On the other hand, this means of ending warfare can circumvent a recalcitrant Senate that refuses to approve a peace treaty. After all, one-third plus one Senators can stymie a treaty. With this defunding route, a majority of each house, acting with the president, may halt fighting.

The difficulties of exercising the Defunding Power were on display during the Vietnam War. A decade into the war, Congress approved a measure that cut off war funding. But President Nixon vetoed the bill, and Congress could not override. Congress and the President then settled on a compromise. Instead of cutting off funds immediately, Congress passed a bill to halt funding

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329 See, e.g., Pub. L. No. 103-335, § 8135, 108 Stat. 2599, 2653 (1994) (“None of the funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994.”); Pub. L. No. 103-335, 108 Stat. 2699, 2660 (1994) (“[N]o funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”). Charles Tiefer also discusses the use of Appropriations Riders to exit Iraq. See generally Tiefer, supra note 318.

330 Given current Senate rules, a supermajority of sixty Senators may be necessary to pass such legislation. See S. Res. 285, 113th Cong. (2013) (describing how sixty Senators may invoke cloture and end debate).

331 Our claim raises the question of why the president would ever sign a bill that terminates a war when he more expeditiously could declare the war over, impose a unilateral armistice, and withdraw from the scenes of combat. We think presidents might want to deflect some measure of responsibility for such decisions. Presidents may wish to share the domestic blame (or credit) that comes from withdrawal, in much the same way that modern presidents often go to Congress before the initiation of conflict. See generally Jide Nizelibe, Are Congressionally Authorized Wars Perverse?, 59 STAN. L. REV. 907 (2007). Given that a unilateral armistice will not bind the opposing nation (or stateless actors), we could see why presidents would want a congressional imprimatur.

As a thought experiment, imagine if President Biden had gone to Congress and asked them to declare the war over in Afghanistan. Had he done that, he would have diffused at least some responsibility for the catastrophic withdrawal and any terrorist attacks on the United States that might ensue. As it stands now, he will receive all the credit and blame.

332 Eagleton Amendment, 29 CONG. Q. ALMANAC 95, 102 (1973) (“None of the funds herein appropriated under this Act or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos by United States forces.”).

333 One example of such a compromise can be found earlier in the Vietnam War. In 1970, the Senate passed the Cooper–Church Amendment, an attempt to halt all funding for ground or air troops in the Cambodian theater of the Vietnam War. S. Rep. No. 91-865, at 15 (1970). The House did not pass the Amendment, but in 1971 both houses and the President agreed to a provision that forbade any appropriated funds from being “used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.” Pub. L. No. 91-652, § 7, 84 Stat. 1942, 1943 (1971). Presumably, President Nixon would have vetoed the broader Cooper–Church Amendment. See Ackerman & Hathaway, supra note 23, at 477.
within a few months. President Nixon signed this bill. Despite the delay, Congress used its Defunding Power to force a president’s hand.

B. Effects

To defund a war is to *practically* end it, at least on the American side. Without funds for waging war, American fighting stops. How this plays out depends on the method Congress uses. Total defunding has different consequences than targeted defunding. If Congress simply fails to pass an appropriation at all—action by inaction—then there is no money for any military action, not even bringing troops home. Alternatively, if Congress passes an appropriation with expressly limited uses—for example, a line item saying that no funds can be used for combat—then there would be funds for other military activities, like withdrawal. As we have seen, Congress can also pass legislation cutting off existing funding streams on some future date, in which case money can be expended until then.

Without more, exercises of the Defunding Power may not have any further domestic or international legal effects. For instance, if Congress previously authorized a war, that authorization would remain in place. Theoretically, if Congress later resupplied war funds the president (or a future president) could resume the war without the need for a new congressional authorization. In contrast, the resumption of hostilities after a peace treaty requires a new congressional exercise of the power to declare war.

Nonetheless, the distinction between a practical and legal peace may be inconsequential. For one, some war authorizations take the form of appropriations. The Office of Legal Counsel took the sensible position that Congress, via emergency appropriations, had authorized hostilities in Kosovo. Such an assertion is by no means new—Attorney General

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334 Joint Resolution Making Continuing Appropriations for Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973) (“Notwithstanding any other provision of law . . . no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.”). U.S. aerial bombing ceased on August 14, 1973, the day before that specified in the act. STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, PETER RAVEN-HANSEN & STEPHEN I. VLADECK, NATIONAL SECURITY LAW 348 (6th ed. 2016).

335 In 1993, Congress returned to defunding as an instrument of peace. After American troops were killed in Somalia, Congress defunded Somalia operations effective in April of 1994. See CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 693 (7th ed. 2020).

Benjamin Butler made the same claim about the so-called Indian Wars in the early nineteenth century—nor is it uncommon. When appropriations constitute legislative authorization, then defunding has a similar effect as repealing a declaration of war. No more appropriations means no more authorization. The expiry of the appropriation, either because the funds appropriated have been spent or because the set period of the appropriation has lapsed, means the war’s legal authorization has expired.

Even when an appropriation is not the sole authorization for war, the risk of resumption following a defunding may be low to nil. Congress can craft its defunding restrictions to be indefinite, refuting any argument that a war remains authorized. Further, after a successful defunding, a majority of both houses of Congress would have to resupply funds for the war to resume, something that seems unlikely.

The Defunding Power is limited in one final but significant way. It only affects the American side of the equation. The other nation can continue to wage war. After America’s withdrawal from the Vietnam War, the Viet Cong and North Vietnamese continued to attack U.S. forces. This is less than ideal, to say the least. Despite the bar on expenditures for “combat activities,” American forces defend themselves. Such defense might not have constituted “combat activities,” for combat might imply aggression; those fending off attacks are not typically considered “combative” or eager to fight. Of course, Congress can make crystal clear that while defunding bars all offensive operations, funds remain available for self-defense. In any event, with time, the eventual cessation of hostilities on both sides blossomed into a state of peace.

V. THE TERMINATION POWER

Congress wields yet another Peace Power from a different source. Its separate power to unilaterally end a war comes as an implied part and parcel of the Declare War Clause. Congress has the exclusive power to take the country into war. And if Congress can take the nation to war, it seems
reasonable to suppose that it can decide to end it by the same means used to enter it. This is Congress's powerful, but obscure, Termination Power.

The Framers originally described Congress's power as that of "mak[ing] war." That power to "make war" implies a power to unmake it—a power to make a practical peace. Indeed, at the time of the Philadelphia Convention, it was a common assumption that the powers to make war and peace were coextensive. William Blackstone explained that "wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace," and Montesquieu also presupposed that the two powers were in the same hands. Vattel also placed a peace power with "[t]he same power who had the right of making war, of determining on it, of declaring it, and of directing its operations . . . . These two powers are connected together, and the latter naturally flows from the former." Indeed, the leader who is "empowered to judge of the causes and reasons for which war is to be undertaken, of the time and circumstances proper for commencing it, of the manner in which it is to be supported and carried on" must also have the ability "to set bounds to its progress, to point out the time when it shall be discontinued, and to conclude a peace." In England, for example, the king had "the sole prerogative of making war and peace." Following suit, the Articles of Confederation likewise vested the Continental Congress with both authorities.

The assumption that the power to make war implied a power to end it was evident at the Philadelphia Convention. Charles Pinckney, for one, opposed giving Congress the power to make or declare war at all—and his rationale was rooted in concerns about how a war might end. He instead advocated for vesting the power to "make war" in the Senate, because that body would be "most capable of proper resolutions." The explicit premise of his argument was that "[i]t would be singular for one—authority to make war, and another peace." Other discussions in the Convention likewise reflect the assumption that the power over war and peace went hand-in-

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342 The language was changed to its current form only to "leav[e] to the Executive the power to repel sudden attacks." 2 FARRAND, supra note 13, at 318.

343 1 BLACKSTONE, supra note 302, at *250; id. § 257-58 n.11; MONTESQUIEU, SPIRIT OF LAWS 185 (1750) ("By the [executive power, the king] makes peace or war[.]").

344 4 VATTEL, supra note 56, ch. 2, § 10, at 432.

345 Id.

346 1 BLACKSTONE, supra note 302, at *257.

347 ARTICLES OF CONFEDERATION OF 1781, art. IX, § 1 (vesting Congress with "the sole and exclusive right and power of determining on peace and war"). It should be noted that the Continental Congress served as the legislature and executive; therefore, this clause was most likely intended to foreclose the states from "determining on peace and war."

348 2 FARRAND, supra note 13, at 318.

349 Id.
As explained earlier, although the Convention declined to facilitate peace treaties, that decision was meant to safeguard territory and other interests—they did not reflect a desire to divest Congress of power to end American warfare.

James Madison later expanded on this view in the Neutrality Proclamation controversy. He explained that the war powers rested with the legislature. As a “fundamental doctrine of the constitution,” “the power to declare war including the power of judging of the causes of war is fully and exclusively vested in the legislature.” And in his view, this legislative power encompassed both “the question of war or peace.” Likewise, an early Supreme Court opinion observed that “[t]he authority to make war, of necessity implies the power to make peace.”

Notably, the fact that the Constitution separated the power to declare war from that to conclude peace treaties was a departure from British custom. Many commentators noted this partial uncoupling. William Rawle asked, “whether the power to make war and peace should not be the same, and why a smaller part of the government should be entrusted with the latter, than the former.”

St. George Tucker likewise found it “extraordinary” that the assent of the House would be necessary to declare but not to end war, such that if through timidity, venality, or corruption, the president, and two thirds of a majority of the senate can be prevailed upon to relinquish the prosecution of the war, and conclude a treaty, the house of representatives have not power to prevent, or retard the measure; although it should appear to them, that the

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350 See, e.g., id. at 94 (arguing that a “small number” of Senators “was most convenient for deciding on peace & war &c. which he expected would be vested in the [Senate]”) (statement of Nathaniel Gorham); Ezra Stiles, December 13–21, 1787 in 3 THE LITERARY DIARY OF EZRA STILES 293–95 (Franklin Bowditch Dexter ed., 1901) (noting that the Convention was initially “pretty unanimous” that Congress should have “the Power of . . . mak[in]g War & Peace”).

351 See supra subsection I.B.2.

352 See Madison, Helvidius No. IV, reprinted in PACIFICUS–HELVIDIUS DEBATES, supra note 25, at 87.

353 Id. Madison was discussing a slightly different context—which branch could decide whether the country should go to war or remain at peace—rather than ending an ongoing war. Still, his comments lend support for the proposition that the war and peace powers were viewed, even by the Founders, as two sides of the same coin.

354 Ware v. Hylton, 3 U.S. (3 Dall.) 199, 232 (1796) (Chase, J.). Chase made this statement in the course of determining powers Congress had vis-à-vis the states in the period between its formation and the Articles of Confederation. He concluded that during that time, Congress was “absolutely and indispensably” given “the power of conducting the war against Great Britain.” And that power must imply a peace power, “or the war must be perpetual.” Id. at 231–32.

355 See PHILLIPSON, supra note 27, at 156 (explaining that in Great Britain, it was “the Crown’s prerogative to make peace and war,” including most treaties “without the express authorization of Parliament”).

356 RAWLE, supra note 177, at 107.
object for which the war hath been undertaken, hath not been attained, and that it was neither relinquished from necessity, or inability to prosecute it, with effect.\textsuperscript{357}

Joseph Story later defended this uncoupling. In most cases, “[i]t requires one party only to declare war; but it requires the cooperation and consent of both belligerents to make peace. No negotiations are necessary in the former case; in the latter, they are indispensable.”\textsuperscript{358} Where such negotiations and obligations attended peace, there was “[e]very reason” for keeping the power in the treaty-making body.\textsuperscript{359} Rawle agreed: “only . . . the president and senate” were equipped to handle such negotiations, which were “often of length and difficulty” and must be shielded from public fervor and prejudice.\textsuperscript{360} But these assertions do not exclude the possibility, and indeed the assumption, that war could also be ended by the war-making body itself when a treaty was superfluous. They simply reveal, yet again, that a formal, solemn peace in the form of a peace treaty, with all its immediate and prolonged consequences, could be made by a different process than that used to declare war.

Through its power to make and declare war, Congress was vested with a corollary peace power. That peace could also be achieved by treaty—and indeed in some cases, as with settling disputes permanently, must be achieved by treaty—does not foreclose a congressional Termination Power. Several early Americans recognized that Congress had power over war and peace.\textsuperscript{361} For as Story recognized, “peace is so important to the welfare of a republic, and so suited to all its truest interests as well as to its liberties, that it can scarcely be made too facile.”\textsuperscript{362} In making this point, Story echoed sentiments of Oliver Ellsworth and George Mason at the Convention. Attorney General

\textsuperscript{357} ST. GEORGE TUCKER, Appendix, Note D: View of the Constitution of the United States, 1 BLACKSTONE’S COMMENTARIES 258 n.25, App’x (Philadelphia, W.Y. Birch 1803).
\textsuperscript{358} 2 STORY, supra note 74, § 1518, at 382.
\textsuperscript{359} Id.
\textsuperscript{360} RAWLE, supra note 177, at 106-07.
\textsuperscript{361} See, e.g., John Jay, Charge to Grand Jury, Richmond, Virginia (May 22, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 479, 483-84 (Henry P. Johnston ed., G. P. Putnam’s Sons 1891) (stating that “[q]uestions of peace and war . . . do not belong to courts of justice, nor to individual citizens, nor to associations of any kind, and for this plain reason: because the people of the United States have been pleased to commit them to Congress”); Thomas Hartley, Observations on the Propriety of Fixing upon a Central and Inland Situation for the Permanent Residence of Congress (1789), in 15 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, MARCH 4, 1789-MARCH 3, 1791 170, 176 (New York, Charlene Bangs Bickford et al. eds., 2004) (stating that because the important “prerogatives of making peace and war, . . . being invested in Congress” the new national capital ought to be placed at York, Pennsylvania).
\textsuperscript{362} 2 STORY, supra note 74, § 1518, at 382.
Ebenzer Hoar, the first head of the Department of Justice, likewise concluded that:

The power [of Congress] to declare war undoubtedly includes, not only the right to commence a war, but to . . . determine, so far as the nation can assert and enforce its will, how long the war shall continue, and when peace is restored . . . . It is for Congress, the department of the National Government to which the power to declare war is intrusted by the Constitution, to determine when the war has so far ended that this work [of restoring peace] can be safely and successfully completed.363

Like the Defunding Power, this conclusion follows from accepted separation-of-powers principles. By the Constitution’s terms, the executive can only wage war when so authorized by Congress. The early Supreme Court recognized as much in 1800 when it noted that it is “Congress” which “wage[s]” war.364 That broad power implies a lesser ability to “wage a limited war; limited in place, in objects, and in time.”365 For example, it can create statutory triggers that automatically constrain warfare if certain events occur, or it can impose an ex ante time limit.366 Congress wages war on its terms. And we believe that Congress can un-wage, or un-declare, war too.

The reasons underlying the grant to Congress of the power to wage war bolsters this point. Since the Commander in Chief conducts wars, the Framers feared giving the president too much power over peace. Madison in particular emphasized that the Constitution did not give the president a monopoly over peace.367 Doing so would be quite dangerous, as “[t]he trust in this instance . . . would be too great for the wisdom, and the temptations too strong for the

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363 Case of James Weaver—Reconstruction Laws, 13 Op. Att’y Gen. 59, 63, 65 (1869). A Civil War-era treatise writer agreed that the Legislative Termination Power flowed easily from Article I text. See 2 JOHN RANDOLPH TUCKER, 2 THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION 718 (Chicago, Callaghan & Co., Henry St. George Tucker ed., 1898) (“[M]ust war continue until the President and Senate agree to the terms of peace? Is there no end to the war except at the will of the President and Senate? . . . [T]he writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war.”).

364 Bas v. Tingey, 4 U.S. (4 Dall.) 37, 43 (1800).

365 Id.

366 Prakash, Separation and Overlap, supra note 301, at 346 (describing ways in which Congress can escalate and deescalate war); HENKIN, supra note 32, at 76 (explaining that Congress can decide when wars should end by imposing time limits or determining the purposes of war that, once achieved, imply when it should end). For a historical example, see Act of Sept. 29, 1789, ch. 25, § 6, 1 Stat. 95, 95-96 (providing funding in response to President Washington’s request to defend the Western Frontiers against Indians, but only “until the end of the next session of Congress, and no longer”).

367 Madison, Helvidius No. IV, reprinted in PACIFICUS–HELVIDIUS DEBATES, supra note 25, at 88 (“The constitution has manifested a similar prudence in refusing to the executive the sole power of making peace.”).
virtue, of a single citizen.” This is why the president could not make treaties unilaterally—for he “might be tempted to betray the interests of the state to the acquisition of wealth.” Hamilton echoed this sentiment, as did Pierce Butler in support of Madison’s proposal to exclude the president from peace treaties. The same concerns counsel against reading the Constitution as if the president enjoyed an absolute veto over war termination:

War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

When it comes to ending a war, “the trust and the temptation would be too great for any one man.” The executive might be predisposed “to prolong the war of which he had the management.” Thus, it was important that Congress have the tools to check a war-hungry Commander in Chief.

A. Mechanisms

Congress can terminate wars in one of three ways. First, when Congress authorizes a war, it can embed a statutory sunset. There are policy reasons for refraining from including a war sunset, particularly the sense that it will...
embolden the enemy. But we are making constitutional claims and not discussing sound policy. Second, Congress can repeal its war authorization. This is the functional equivalent of the first option. Third, Congress could pass a joint resolution declaring a war to be over, meaning that the fighting must stop. When Congress terminates a war, either ex ante or ex post, the President cannot continue to wage war because he lacks authorization from Congress, the entity charged with the decision whether to wage war or not; if Congress revokes its authorization, then the president’s power to wage it ceases.375

The last two methods are generally interchangeable. But sometimes there will be confusion about whether Congress is acting symbolically or means to proscribe warfare. The third option might be the clearest, one that no president (or advisers) can misinterpret. This point is demonstrated by Congress’s first supposed attempt to end the Vietnam War. Congress repealed the Gulf of Tonkin Resolution—which served as Congress’s authorization for war—seven years after it was enacted.376 But people disputed its legal effect. Some argued that the repeal withdrew authorization for war.377 Others thought that the repeal “did not in fact constitute (or imply) a Congressional decision to end the war,” since Congress simultaneously rejected joint resolutions affirmatively declaring it over and continued to appropriate funds for the war.378 A federal court took the latter view.379 Mere repeal of authorization, if attended with other legislative acts that may be construed as continuing authorization for war, sends mixed messages. In contrast, an affirmative declaration that a war is over cannot be pettifogged even by a Philadelphia lawyer.

All three methods of legislative termination require either the president’s signature or a supermajority of both houses.380 Procedurally, passing ex post
legislation declaring an end to hostilities seems more difficult than withholding funds, which can be accomplished by mere inaction of a single house. But legislators may prefer delayed termination to immediate defunding because they fear the potent accusation that they rendered the men and women fighting in the field utterly defenseless. Indeed, it might be easier to get a supermajority for ex post termination, to take effect several months later, than a simple majority for immediate defunding.

Like the Defunding Power, the Termination Power is also useful for another reason: overcoming a hawkish Senate minority or executive. If both chambers and the president agree to terminate a war, they can circumvent a Senate minority blocking a peace treaty. Moreover, like the Defunding Power, Termination is possible without the president—something that cannot be said of a peace treaty. A supermajority of both chambers can override a president's fiery preference to keep waging war.

B. Effects

No one doubts that Congress can revoke statutory powers conferred, or controls imposed by, domestic wartime statutes; the Supreme Court has held as much. We assert that Congress can go further: it can end authorization for the president to fight, thereby entirely terminating the war, at least from a domestic legal perspective. The president would be obligated to end American warfare.

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(1971). Assuming a president will always want to fight a war (i.e., a president’s signature is guaranteed for a declaration, and a veto is guaranteed for a repeal of the declaration), Ratner notes that Congress would need half of each house to declare war but two-thirds of each house to end it. Id. Nonetheless, the text of Article I, section 7 says that “[t]he power which declared the necessity of the Act is the power to declare its cessation, and what the cessation requires. The power is legislative.”), and Ludecke v. Watkins, 335 U.S. 160, 169 n.13 (1948) (“[W]hen the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.”); see also Gibbons & Farlow, supra note 278, at 1 (“There can be no question about the power of Congress to terminate any war with respect to war-related grants of power to the President and the regulation of legal consequences within the legislative jurisdiction of Congress.”); John M. Mathews, The Termination of War, 19 Mich. L. Rev. 809, 823 (1921) (noting Congress’s ability “to determine the period during which one of its acts should remain in force”).
Some claim that terminating an authorization can have no legal effect. As the argument goes, repealing a declaration of war does not alter the existing legal state just as repealing legislation admitting a state into the Union would not expel that state from the Union. Under this argument, a declaration of war creates a “status or condition” which cannot be reversed by congressional repeal.\(^{384}\) But the two situations—state admission and a declaration of war—are easily distinguished. The analogy is inapt because it uses as a comparator a status (statehood) that is thought to be irreversible. Yet a state of war is always reversible: peace treaties certainly may alter it. Moreover, while statehood vests rights in citizens of the new state—rights to have a state government, for instance—the authorization of war does not create vested rights. The executive has no right to continue waging war; it can only fight with approval from Congress. True, Congress’s repeal of a declaration of war likely cannot have a retroactive effect; it perhaps cannot make a wartime act illegal that was legal before the repeal.\(^{385}\) But Congress can certainly remove authorization for future warfare. In this way, the Termination Power does have domestic legal effect. It eliminates the executive’s ability to fight a war. Without the constitutional authority to wage war, the president must stop waging war.

The Termination Power is not an all-encompassing peace power; it is not akin to a power to make peace treaties. Congress, in declaring war is at an end, may not negotiate. It has no diplomacy power, and it may not negotiate or ratify a treaty.\(^{386}\) Hence it may not resolve outstanding disputes bilaterally in an enduring agreement. Relatedly, Congress cannot stop other belligerent nations from fighting. Rather, as Quincy Wright noted, the international effect “depends upon the attitude of the enemy.”\(^{387}\) For this reason, an early legislator pointed out that the Termination Power should be disfavored. If the enemy will continue hostilities, termination could “disarm the nation, and leave the frontier unprotected.”\(^{388}\) To stop the other side from fighting, he

\(^{384}\) WRIGHT, supra note 214, at 244; see also Mathews, supra note 383, at 831 (noting the limits of the congressional repeal power).

\(^{385}\) The Court has suggested that Congress can retroactively sanction previously unsanctioned executive acts. See The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (discussing Congress’s “vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress”).

\(^{386}\) Although Congress has considerable authority over foreign affairs, it does not have a power to engage in diplomacy. Nor does it have power to make treaties. See Prakash & Ramsey, supra note 33, at 317-24 (discussing diplomatic communications); SAIRKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 193-94 (2020) (discussing why Congress lacks a parallel treaty power).

\(^{387}\) WRIGHT, supra note 244, at 292.

\(^{388}\) 4 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, supra note 138, at 478 (statement of Roger Griswold).
said, the president must make a treaty limiting both sides. He was wrong, for a bilateral armistice could do the same. But he had a point.

The Termination Power has cropped up many times in history, without receiving the credit it is due. The Quasi-War supplies some early evidence of the Termination Power. After years of war, President Adams sent a commission to Paris to negotiate terms for peace. Negotiations were drawn out, punctuated by stalemates and scandals. In the meantime, Congress terminated the Provisional Army, which had been raised at the war's outset. Further, Congress recalled American warships and reestablished commercial relations. Congress never explicitly declared the war over, but it had never used the words “declare war” in the first place. It had declared the war via a series of statutes and its actions at the end of the war revoked the statutory authority that the executive had to attack French vessels. Eventually, the Convention of Mortefontaine made a formal peace, but for all practical purposes Congress's legislation effectively terminated the war.

More notably, both World Wars concluded via legislative terminations. World War I ended on an international scale with the Treaty of Versailles. Upon its signing by negotiators, hostilities permanently ceased. As far as Germany was concerned, the war was over— it was bound by the Treaty of Versailles and all of the terms therein. “[F]or practical purposes actual warfare was at an end.”

But the Senate rejected the treaty. And courts continued to hold that the war continued for statutory purposes, as no political act had declared its end. Congress debated whether it had the power to end the war by joint

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389 Id.
390 Lyon, supra note 153, at 305-06.
392 Lyon, supra note 153, at 330.
393 Id.
394 See Bas v. Tingey, 4 U.S. (4 Dall.) 37, 41 (1800) (concluding that Congress had declared an “imperfect” war on France, in part, because “congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships”).
396 See Chandler P. Anderson, United States Congressional Peace Resolution, 14 AM. J. INT’L L. 384, 385 (1920); see also H.R. DOC. NO. 1339 (“The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it.” (statement of President Woodrow Wilson)).
397 Mathews, supra note 383, at 820.
398 Hudson, supra note 249, at 1031 n.40 (citing 59 CONG. REC. 4600).
399 See, e.g., Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 165 (1919) (“In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace.”); see also GIBBONS & FARLOW,
resolution—a debate which mostly reflected disappointment in the failure of the Treaty of Versailles and League of Nations. President Woodrow Wilson vetoed the bill, supposing that it established peace “without exacting from the German Government any action by way of setting right the infinite wrongs.” But he raised no constitutional objection. The following year Congress again passed the legislation, and Warren Harding signed it. This bill, passed March 3, 1921, ended the war for domestic purposes—all wartime statutes were rendered inoperative. A second act, passed July 2, 1921, repealed the earlier declaration of war, terminated the nation’s belligerency for international legal purposes, and prescribed conditions for relations with Germany and other enemies. Although the nation eventually made treaties with Germany and Austria-Hungary, they merely “... embodied the terms which Congress had [previously] proscribed ...” President Harding later regarded the end of the war as of July 2, 1921—the date of Congress’s second resolve.

A similar story can be told about World War II, at least the war against Germany. In 1952, America made a treaty with Japan. But to this day, the United States has never made a peace treaty with Germany.

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400 GIBBONS & FARLOW, supra note 278, at 4.
401 Wright, supra note 244, at 292.
403 Wilson also stated that he believed he did “not [have] the power by proclamation to declare that peace exists, [and] that [he] could in no circumstances consent to take such a course prior to the ratification of a formal treaty of peace.” 58 Cong. Rec. 4176 (1919). Wilson’s statement was in response to a question from Senator Fall, who asked why the President could not just declare peace without the Senate ratifying the Treaty of Versailles. Id. at 4176. Wilson’s response was less about constitutional allocation of powers, and more an attempt to convince the Senate to ratify the treaty—which importantly included the League of Nations. Wilson states only that he could not “settle[] the terms of peace” on his own, which is consistent with our view. Id. at 4177.
405 Act of July 2, 1921, ch. 40, 42 Stat. 105 (1921); see also GIBBONS & FARLOW, supra note 278, at 4 (discussing how the act prescribed conditions for the relations of the United States with Germany).
406 GIBBONS & FARLOW, supra note 278, at 5.
408 See GIBBONS & FARLOW, supra note 278, at 6 (noting the war with Germany was concluded with a joint resolution).
ended with a joint resolution in 1951. That resolution explicitly terminated the 1941 declaration of war against Germany.

Both world wars are examples of Congress conclusively ending major declared wars by joint resolution. Congress's acts had legal effect, both in the domestic sphere by terminating wartime statutes and revoking the authorization for war, and in the international sphere by ending the state of war despite the failure to ratify a peace treaty and regardless of whether hostilities had ceased for a period sufficient to constitute legal peace. Still, both examples are somewhat limited: they each occurred far after active warfare was over in a practical sense. Hostilities were already over and at no risk of resumption. In our view, the Termination Power could go even further and be used at any phase of a war. Congress could terminate an ongoing, hot war by joint resolution. If it did this, the Commander in Chief would no longer be constitutionally authorized to fight the war.

CONCLUSION

The French Prime Minister, George Clemenceau, said at Verdun that "[i]t is easier to make war than to make peace." Perhaps Clemenceau was right as a matter of psychology and politics. Some scholars suppose his assertion fully applies to our Constitution. But we think such claims are mistaken. To the contrary, our Constitution clogs war and facilitates peace. It insists upon a single road to war—bicameralism and presentment—and yet charts many roads to peace.

We have illuminated those many paths. To better perceive them, we shed light on the many facets of peace: practical versus legal and domestic versus international. The pathway with the broadest implications—the peace treaty—is the most difficult to traverse. That was a purposeful decision, because the Founders knew that treaties could cede territory and limit the rights of states and citizens. The narrowest means of ending warfare—cutting off funds or an armistice—are the easiest to effectuate, likely because they have few collateral consequences for the permanent rights and duties of the United States. In these instances, one institution (Senate, House, or president), acting alone, can end American warfare.

In between these two extremes are statutes. Understandably, Congress has resorted to ordinary legislation only when the president agreed that a war should end or had already concluded. But if legislators are sufficiently united, they can override the Commander in Chief’s contrary view. Just as a war

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410 THE NEW YALE BOOK OF QUOTATIONS 165 (Fred R. Shapiro, ed., 2021).
declaration can be passed over a veto, so too may war termination and war
defunding statutes. Table 1 summarizes the effects of each of these options.
The result is that while the Constitution obstructs the path to war—it requires bicameralism and presentment—it leaves open many routes to peace.

Perhaps the Afghan war has finally concluded, however bitter its ending. Only time will tell. But the war against Al-Qaeda and its foul offshoot, ISIS, continues to this day, as does executive reliance on the 2001 and 2002 AUMFs. Tomorrow, President Biden could attack Iran and Pakistan, citing their support for those who carried out the 9/11 attacks. The 2001 AUMF arguably authorizes as much.\textsuperscript{411}

As the Forever Wars march into their third decade, four constitutional paths offer a way out. Though a peace treaty or bilateral armistice with Al-Qaeda seems impossible, there are more viable options. President Biden may conclude that the war objectives have been met and may—consistent with the Faithful Execution Clause—unilaterally withdraw from all our wars. Perhaps more likely, Congress may belatedly defund participation in the wars, either in limited theaters or altogether. Lastly, Congress may pass a joint resolution declaring the AUMFs, and the wars, at an end. If all sides terminate hostilities for a prolonged period of time, the wars are over, peace treaty or not. Nothing, not even the Forever Wars, truly lasts forever.

\textsuperscript{411} Cf. Scott R. Anderson, \textit{When Does the President Think He Can Go to War with Iran?} (June 24, 2019, 9:28 AM), LAWFARE, https://www.lawfareblog.com/when-does-president-think-he-can-go-war-iran [https://perma.cc/N3JL-WM37] (noting that the Trump administration viewed the argument against Iran as at least “legally available”).
Table 1: The Constitution's Four Pathways to Peace and Their Possible Effects

**PATHWAYS TO PEACE**

<table>
<thead>
<tr>
<th>EFFECTS</th>
<th>Treaty</th>
<th>Durable Armistice</th>
<th>Defunding</th>
<th>Termination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ends all hostilities</td>
<td><em>Always</em></td>
<td><em>Always</em></td>
<td><em>Sometimes</em></td>
<td><em>Sometimes</em></td>
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<tr>
<td>Resolves ancillary disputes</td>
<td><em>Always</em></td>
<td><em>Sometimes</em></td>
<td><em>Never</em></td>
<td><em>Never</em></td>
</tr>
<tr>
<td>Terminates domestic legal state</td>
<td><em>Always</em></td>
<td><em>Never</em></td>
<td><em>Sometimes</em></td>
<td><em>Always</em></td>
</tr>
<tr>
<td>Terminates domestic constitutional state</td>
<td><em>Always</em></td>
<td><em>Sometimes</em></td>
<td><em>Sometimes</em></td>
<td><em>Always</em></td>
</tr>
<tr>
<td>Achieves international state of peace</td>
<td><em>Always</em></td>
<td><em>Sometimes</em></td>
<td><em>Sometimes</em></td>
<td><em>Sometimes</em></td>
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