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978-1-107-02692-6 - Declaring War: Congress, the President, and what the Constitution does not say

Brien Hallett

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DECLARING WAR

Declaring War directly challenges the two-hundred-year-old belief that the Congress can and should declare war. By offering a detailed analysis of the declarations of 1812 and 1898 and the War Powers Resolution of 1973, the book demonstrates the extent of the organizational and moral incapacity of the Congress to declare war. This book invokes Carl von Clausewitz's dictum that "war is policy" to explain why declarations of war are an integral part of war and proposes two possible remedies – a constitutional amendment or, alternatively, a significant reorganization of Congress. It offers a comprehensive historical, legal, constitutional, moral, and philosophical analysis of why Congress has failed to check an imperial presidency. The book draws on Roman history and international law to clarify the form, function, and language of declarations of war, and on John Austin's speech act theory to investigate why and how a "public announcement" is essential for the social construction of both war and the rule of law.

Brien Hallett is an Associate Professor at the Matsunaga Institute for Peace at the University of Hawai'i-Manoa, where he teaches courses in peace and conflict resolution, with a special interest in the thought of Gandhi, Martin Luther King, and Vaclav Havel. His primary research interest is the declaration of war and the historical, legal, constitutional, moral, and philosophical issues that surround it. Hallett is the author of *The Lost Art of Declaring War* (1998) and several encyclopedia articles.

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**CONGRESS,
THE PRESIDENT, AND
WHAT THE CONSTITUTION
DOES NOT SAY**

BRIEN HALLETT

University of Hawai'i-Manoa,
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For Peter T. Manicas, PhD
Teacher

21. Second proposition: It is essential for a just war that an exceedingly careful examination be made of the justice and causes of the war and that the reasons of those who on grounds of equity oppose it be listened to. For (as the comic poet [Terence] says) “A wise man must make trial of everything by words before resorting to force”....

24. Again, a king is not by himself capable of examining into the causes of a war and the possibility of a mistake on his part is not unlikely and such a mistake would bring great evil and ruin to multitudes. Therefore, war ought not to be made on the sole judgment of the king, nor, indeed, on the judgment of a few, but in that of many, and they wise and up right men.

Francisco de Vitoria
(1934 (1532), lvii)

Tzu-lu asked Confucius, “If the Lord of Wei was waiting for you to bring order to his state, to what would you give your first priority?”

Confucius replied, “Without question it would be to order names properly.”

“Would you be as impractical as that?” Tzu-lu responded. “What is there to order?”

[Confucius] How can you be so coarse! An exemplary person (*chün tzu*) remains silent about things that he does not understand! When names are not properly ordered, what is said is not attuned; when what is said is not attuned, things will not be done successfully; when things are not done successfully, the use of ritual action and music will not prevail; when the use of ritual action and music does not prevail, the application of laws and punishments will not be on the mark; and when laws and punishments are not on the mark, the people will not know what to do with themselves. Thus, when the exemplary person (*chün tzu*) puts a name to something, it can certainly be spoken, and when spoken it can certainly be done. There is nothing careless in the attitude of the exemplary person (*chün tzu*) toward what he says.

(13/3. Cited in Hall and Ames 1987, 269–70)

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Prologue

The Congress shall have power ... to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water ...
 (article I, section 8, clause 11)

This book is about the power to declare war: who should possess the authority, how they should exercise it, what purposes a declaration serves, and why. This book is, consequently, about the relationships among conflict resolution, speech acts, and the rule of law. This consequence follows from the fact that declarations of war are speech acts. They are public “announcements” of official decisions. As public “announcements,” they can be motivated by either one of two antithetical attitudes: One can declare war as an act of anger and vengeance seeking “victory” over one’s enemy, or one can declare war as the initial step in resolving a serious conflict with one’s conflict partner. In the former case, conflict resolution is irrelevant. A desire for “victory” over one’s enemy turns both speech and the rule of law into obstructions and hindrances. Why would anyone want to speak to the enemy? What could one possibly have to say to an enemy? Since the object is to destroy the enemy, why would anyone submit to the constraints of law? “Bomb them back to the Stone Age,” as General Curtis LaMay used to say. In the latter case, “victory” is irrelevant. A desire for resolution with one’s conflict partner turns both speech and the rule of law into aides and facilitators. Speech facilitates negotiations of the grievances and remedies, and law aids in reducing the necessities of war by restraining intemperate actions.

The tension in this book is that both speech act theory and, especially, conflict resolution theory are overwhelmed by concern for the rule of law. This occurs because the starting point for this book is the two-hundred-year-old

congressional failure to discharge its constitutional responsibility “to declare war.” There is so much that has to be said about this congressional failure that rule of law pushes speech act and conflict resolution theory very far into the background. A need, therefore, exists to underline the foundational roles of both at the very beginning.

The conflict-resolution theory that underpins this book is based loosely on Louis Kriesberg’s *Constructive Conflict: From Escalation to Resolution* (1998). All conflicts begin as vague and ambiguous unconscious feelings of discomfort. For one reason or another, most of these unconscious feelings never develop into conscious feelings. When they do, the most frequent and natural response is to ignore them, denying, suppressing, or avoiding them in the hope that the conflict will go away. Yet, some conflicts simply will not go away. Moreover, some conflicts neither can nor should be avoided. They demand resolution. But how? One’s conflict partner is not a mind reader. He may have the same feeling of discomfort for his own reasons, but he cannot possibly know why you are upset. He cannot possibly know what your reasons are as long as they remain locked up inside your head. The indispensable first step in resolving any conflict, then, is to make the conflict manifest.

A number of ways exist to do this. What ties all of these methods together is that they are all what John Austin (1975) called speech acts. Here, “speech act” is taken to mean any languagelike medium of communication. For example, one can roll one’s eyes or squirm in one’s chair to manifest the existence of a conflict. A sharp jab to the jaw or a carrier-based air attack on Pearl Harbor is also an unmistakable way to manifest the existence of a conflict. While these “physical” speech acts are excellent ways to manifest a conflict and to confirm the worst fears of an enemy, they are less than optimal ways to initiate the resolution of a conflict. A more effective way is a simple natural language declaration, “I am upset.” Still more effective is to articulate both the grievances perceived to have caused the conflict and one’s preferred remedies, “I am upset because.... My proposed remedy is....” This gives the conflict partner something substantive to respond to, to negotiate over. Even more effective is to articulate one’s perceived grievances and preferred remedies in a tentative and conditional manner. If one’s conflict partner responds in like manner, tentatively, with a conditional declaration of his own perceived grievances and preferred remedies, negotiations can begin in earnest with a view to finding a just settlement. A declaration of war, therefore, is not best thought of as a trigger, as the official announcement that the bombing is to commence because a friend is now an enemy to be destroyed. Rather, a declaration of war is best understood as the instrument by which a socially authorized declarer speaks to transform a latent into a manifest conflict. If well spoken, especially if the grievances and remedies are spoken conditionally, a declaration of war becomes the necessary first step to resolving the

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conflict in hand. Peace, not war, is the objective of a well-written declaration of war; war, not peace, is the objective of a poorly written declaration.

But if this book is ultimately about the relationships among conflict resolution, speech acts, and the rule of law, the foreground story is a troubling tale of tyranny, of dictatorship, and of men ruling in defiance of the law. For the Constitution of the United States strongly implies that the U.S. Congress is the socially authorized speaker who articulates and makes manifest the nation's grievances and peace terms. And the Congress could have done so, had it followed the example of the Second Continental Congress. Over the past two centuries, the U.S. Congress could have declared its perceived grievances and preferred remedies conditionally to foster negotiations, before declaring them absolutely, after negotiation had failed, as the Second Continental Congress did in 1775 and 1776. But the example of the Second Continental Congress was not followed; the Declaration of Independence did not become the congressional model for the declaring of war, and the rule of law was overturned by the tyranny of presidential war making.

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