

ARTICLES

Reasserting Congressional War Powers: Executive Unilateralism, Judicial Retreat, and the Failure of the War Powers Resolution

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ABSTRACT

The constitutional architecture of American war powers was designed to balance deliberative legislative judgment with decisive executive action. From the earliest days of the Republic, the Framers vested in Congress the exclusive authority to declare war, reserving to the President only the power to repel sudden attacks, suppress rebellion, and command the armed forces offensively pursuant to legislative authorization. This article examines the longue durée of shifting judicial, executive, and legislative interpretations of the Declare War Clause and the resulting transformation of American war powers practice.

Through an analysis of constitutional history, judicial precedent, executive branch legal interpretation and practice, the article argues that the presidency, empowered by sustained congressional silence and judicial retreat, has effectively usurped Congress's exclusive constitutional authority to declare war. It further contends that the War Powers Resolution has failed to serve as a meaningful restraint on unilateral presidential warmaking, functioning instead primarily as a minimal reporting framework.

The article examines the Founding-era understanding of war powers, the role of the judiciary and existing case law in war powers disputes, and the Executive's expansive self-interpretation of the Commander-in-Chief power. It concludes by proposing legislative and procedural reforms through which Congress can reassert its constitutional role, with particular emphasis on strengthening and amending the War Powers Resolution. Reinvigorating congressional war powers, this article contends, is essential to constitutional fidelity and democratic accountability in the conduct of U.S. foreign relations.

I: INTRODUCTION

After the Pasha of Tripoli declared war on the United States in 1801, Thomas Jefferson dispatched a naval squadron to protect U.S. commerce in the

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Mediterranean. However, he explicitly deferred to Congress, holding that he was “unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense” and such power was “exclusive[]” to the Legislature.¹ He was not alone in this deference to congressional war powers. Over a decade prior, George Washington went to Congress to authorize offensive operations against the Northwest Confederacy.² In the Early Republic, there was a shared understanding between the two coequal branches that Congress had the exclusive power to declare war, and Article II authority only extended as far as defensive operations. However, in the subsequent 224 years, this understanding has evolved (or devolved) into two very different views on constitutional war powers. One holds to the traditional Article I deference, while the other, which has emerged in prominence since the Korean War, gives broad deference to Article II.

The progressive dominance and expansion of this Article II interpretation has culminated in a new norm in which the President can invade a sovereign country absent congressional authorization. Since returning to office in January 2025, President Donald Trump has ordered military strikes on two countries with whom the United States was at peace, namely, lacking congressional authorization or active hostilities. On February 28, 2026, he launched sustained military strikes in Iran, including the assassination of Ayatollah Ali Khamenei,³ prompting retaliatory strikes against military and civilian targets in the region not involved in the operations.⁴ This comes about seven months after he ordered the bombing of several sites associated with its nuclear program.⁵ On January 3, 2026, he ordered the invasion of Venezuela without congressional authorization and captured its president, Nicolás Maduro, and his wife, Cilia Flores. They are currently facing trial in the Southern District of New York on drug trafficking and terrorism charges.⁶ Trump has stated plans to “run” Venezuela and its oil sector, but it is unclear if such aims are

1. President Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801) (on file with Am. Presidency Project, <https://perma.cc/VKP5-SECC>).

2. Letter from Arthur St. Clair to George Washington (Sep. 14, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 49 (Dorothy Twohig ed., 1993); see William Hall & Saikrishna Bangalore Prakash, *The Constitution's First Declared War: The Northwestern Confederacy War of 1790–95*, 107 VA. L. REV. 119, 134 (2021).

3. William Branigan, *Ayatollah Ali Khamenei, Iran's Supreme Leader, Is Dead at 86*, WASH. POST (Feb. 28, 2026), <https://perma.cc/PNT7-PHJA>.

4. Mostafa Salem, *Iran's Ferocious Retaliation for US-Israeli Strikes Has Rattled Its Neighbors*, CNN (Mar. 2, 2026), <https://perma.cc/C3GZ-YXQF>.

5. Elena Moore & Megan Pratz, *U.S. Strikes 3 Nuclear Sites in Iran, in Major Regional Conflict Escalation*, NPR (June 22, 2025), <https://perma.cc/88TU-DLMN>. While the Senate would opt not to adopt a resolution that would require the President to seek congressional approval for further military action against Iran, some Republican Members of Congress expressed concerns about Trump's strike. The vote was 53-47 in a near party line vote. Robert Jimison, *Senate Blocks War Powers Resolution to Limit Trump's Ability to Strike Iran Again*, N.Y. TIMES (June 27, 2025), <https://perma.cc/J72Z-LW2A>. In the House, Representative Thomas Massie (R-Ky.) was the lone Republican voice of dissent. Nicole Markus, *'There Was No Imminent Threat,' Thomas Massie Says in Joining Ro Khanna in Decrying Iran Strike*, POLITICO (June 22, 2025), <https://perma.cc/B82P-T6YL>.

6. Ana Herrero, et al., *Trump Says Maduro Captured in 'Large Scale Strike' Against Venezuela*, WASH. POST (Jan. 3, 2026), <https://perma.cc/74U7-EQWC>.

achievable without a second invasion to enforce them, as the Chavista regime was left intact in the initial invasion.⁷ Further, media reports indicate that the Trump administration has been positioning U.S. armed forces to prepare for a potential invasion of Cuba.⁸ While these constitute significant violations of constitutional war powers, they are not isolated within this current administration and have occurred throughout American history, and with increasing frequency.

This article takes the stance that the Presidency, empowered by congressional and judicial silence, has effectively usurped Congress's exclusive constitutional power to declare war, and the War Powers Resolution ("WPR") has failed to protect this power. Part I of this article examines the war powers debate of the Constitutional Convention. Part II examines the development of Declare War Power case law and jurisprudence since 1789. Part III examines the development of the Executive's self-interpretation of its Commander-in-Chief ("CIC") Power over the centuries. Finally, Part IV recommends approaches Congress can take to reassert its exclusive constitutional power to declare war, most notably through the WPR.

II: FROM THE COLONIES TO THE CONSTITUTION

A. Colonial and Confederation War Powers

Colonial America's perception of war powers was heavily influenced by Great Britain. Like most eighteenth-century European states, most British war powers were consolidated in the Executive, or more precisely, the monarch. The power of "war or peace" belonged solely to the British Crown, which likewise exercised CIC powers.⁹ The sole meaningful constraints on the British monarchy's unilateral warmaking ability were Parliament's power of the purse and a concession by the Crown after 1689 not to maintain a standing army during peacetime.¹⁰ Many American colonists, influenced by the seventeenth-century political turmoil of the Stuart Dynasty, the English Commonwealth, and the Quartering Acts of 1765 and 1774, held deep skepticism toward peacetime armies, believing they enabled the abuse of authority and threatened civil liberties.¹¹

7. Gregory Svirnovskiy, *US Could Run Venezuela For Years, Trump Says*, POLITICO (Jan. 8, 2026), <https://perma.cc/8XH9-2LJL>.

8. Paul McLeary, *Pentagon Puts Building Blocks in Place for Cuba Invasion*, POLITICO (May 27, 2026), <https://perma.cc/YQV6-EZMG>; Geoff Dyer & Jacob Judah, *What Are Donald Trump's Military Options in Cuba?*, FIN. TIMES (May 29, 2026), <https://perma.cc/Z6E2-LX5Y>.

9. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 249 (14th ed. 1803) ("[T]he king has also the sole prerogative of making war and peace."); see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1165 (1833) ("In Great Britain [declaring war] is the exclusive prerogative of the crown; and in other countries, it is usually, if not universally confided to the executive department.").

10. Bill of Rights 1689, 1 W. & M. 2d sess., c. 6 (Eng.); see Libr. of Cong., *The Early American Experience with Standing Armies*, CONST. ANNOTATED, <https://perma.cc/3EUS-E48H>.

11. See Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy, and Militia Clauses*, 19 GA. S. L. REV. 1021, 1031–36 (2003). One of the grievances listed in the Declaration of Independence was that the British "kept among us, in times of peace, Standing Armies without the Consent of our legislatures." THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

Given the distance from the British Isles and the persistent threat of frontier conflicts, many colonial charters granted the power to defend from invasion or armed attack to colonial governments.¹² The self-defense norm for unilateral colonial warmaking continued into the Revolutionary period when war powers were loosely consolidated in the Second Continental Congress. While the war had been ongoing since the Battles of Lexington and Concord in April 1775, the Continental Congress issued the Declaration of Independence in July 1776, the United States' first declaration of war.¹³ Further, the Continental Congress raised the Continental Army and appointed George Washington as its Commander-in-Chief.¹⁴ Adopting the Articles of Confederation the following year, the Continental Congress gave the Confederation Congress the "exclusive right and power of determining on peace and war."¹⁵ As the Articles rejected the idea of a centralized executive, leaving Congress as the sole branch of the new government, remaining war powers were delegated to the states. However, the Articles prohibited its constituent states from engaging in war absent congressional authorization by a supermajority vote of nine of thirteen states.¹⁶ The sole exception to this was an allowance for a state to engage in unilateral uses of force in self-defense, either reactive or preemptive, when the danger was "so imminent as not to admit of a delay."¹⁷ By 1787, the Framers inherited a constitutional tradition rooted in skepticism of executive overreach and that treated war powers as principally legislative in character, while preserving a narrow inherent authority for unilateral uses of force in cases of imminent self-defense.

12. See, e.g., THE CHARTER OF MARYLAND — 1632, in 3 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1669 (Francis Newton Thorpe ed., 1909) [hereinafter CHARTER OF MARYLAND] (granting authority "to wage War, and to pursue, even beyond the Limits of their Province, the Enemies and Ravagers aforesaid."); THE CHARTER OF CONNECTICUT — 1662, in 1 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 529, 534 (Francis Newton Thorpe ed., 1909) [hereinafter CHARTER OF CONNECTICUT] (authorization to "Assemble . . . to encounter, expulse, repel and resist by Force of Arms."); THE CHARTER OF GEORGIA — 1732, in 2 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 765, 776 (Francis Newton Thorpe ed., 1909) [hereinafter CHARTER OF GEORGIA] (authorization to "encounter, expulse, repel, resist and pursue by force of arms.").

13. See, e.g., Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 767–68 (2014); Hall & Prakash, *supra* note 2, at 143; Delahunty, *supra* note 11, at 1055 n. 127. Compare THE DECLARATION OF INDEPENDENCE (U.S. 1776) (listing a series of twenty-seven complaints justifying the armed rebellion and separation), with, e.g., 11 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 3–6 (1812) (Great Britain's 1739 declaration of war against Spain based on a list of identified grievances).

14. Commission to George Washington (June 17, 1775), *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 I, 96 (1905).

15. ARTICLES OF CONFEDERATION of 1781, art. IX.

16. *Id.* arts. VI, IX.

17. See *id.* art VI.

B. Constitutional Convention

As the Constitutional Convention was underway in 1787, one of the Constitutional Framers' concerns was ensuring the common defense of the Union through military force.¹⁸ Unlike under the Articles of Confederation, the new Constitution would create a Judiciary and an executive branch, and divide constitutional war powers with the latter. To Congress, they granted the powers to declare war and raise, maintain, and regulate the military.¹⁹ To the President, they granted the power to serve as Commander-in-Chief of the U.S. military.²⁰

While other war powers, such as the Army Clause, were fiercely debated at the Convention, the Framers discussed both the Declare War and the CIC Powers comparatively little.²¹ Their experience during the Revolutionary War already convinced them of the expediency of vesting command authority in a single official, but also the necessity of ensuring popular consent to initiating a war.²² However, the initial debates on whether this power was executive or legislative in nature were inconclusive. These debates emerged from the proposed Virginia Plan, which sought to divide the Confederation Congress's legislative and executive "rights" between the new respective branches. While not directly addressing war powers, several delegates worried that the power over "peace [and] war" would be classified as an executive power, resulting in a delegation akin to European monarchies.²³ The initial draft of the Constitution that emerged from the Committee of Detail gave Congress the power to "make" war; however, some delegates, notably South Carolina delegate Charles Pinckney, worried that the inclusion of the House of Representatives would render quick deliberations impractical and favored the power to rest in the Senate instead.²⁴ In contrast, fellow South Carolinian Pierce Butler believed it was an executive power, arguing

18. See, e.g., THE FEDERALIST No. 3 (John Jay) ("[A] cordial Union, under an efficient national government, affords [the people] the best security that can be devised against hostilities from abroad.").

19. U.S. CONST. art. I, § 8, cls. 11–16.

20. *Id.* art. II, § 2, cl. 1; see THE FEDERALIST No. 69 (1788) (Alexander Hamilton) ("[N]othing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy.").

21. See Libr. of Cong., *Early Debates on War Powers in the Constitutional Convention*, CONST. ANNOTATED, <https://perma.cc/5AU9-RQKV>.

22. 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 318 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (statement of Charles Pinckney of South Carolina); ERNEST R. MAY, THE PRESIDENT SHALL BE COMMANDER IN CHIEF, IN THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 3, 6–7 (E. May ed., 1960); 3 STORY, *supra* note 9, § 1492. During the North Carolina Ratifying Convention, James Iredell said: "From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations can only be expected from one person." 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (2d ed. 1836).

23. 1 FARRAND'S RECORDS, *supra* note 22, at 64–65; see also *id.* at 65 (Pinckney worried such an assignment "would render the Executive a Monarch, of the worst kind . . . an elect[ed] one."); *id.* (John Rutledge of South Carolina advocated that in "vesting the Executive power in a single person," that the Executive should not have "power of war and peace.").

24. 2 FARRAND'S RECORDS, *supra* note 22, at 318.

that the President “will not make war but when the Nation will support it.”²⁵ However, Butler was the lone voice in this assertion, with Massachusetts delegate Elbridge Gerry exclaiming that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”²⁶ In turn, James Madison successfully argued for replacing “make war” with “declare war” to allow the Commander-in-Chief to repel sudden attacks or rescue American nationals abroad, while still making it difficult for the President to engage in war without congressional consent.²⁷

With the exception of Butler, most delegates favored the interpretation of the power to declare war as legislative in nature. Underscoring this, Roger Sherman of Connecticut held reservations that the substitution of “make” war with “declare” war narrowed congressional authority too much, and George Mason of Virginia was “opposed to giving the power of war to the Executive,” because the President could “not (safely) to be trusted with it.”²⁸ Later, Alexander Hamilton, one of the most vocal advocates for executive power, contended in *The Federalist Papers* that Congress “is constituted the guardian of the national security.”²⁹ While some Anti-Federalists, such as Patrick Henry, were skeptical of the fusion of the powers of war and the purse in Congress,³⁰ there was strong agreement between the two camps that the President should not have the power to initiate war on his own.³¹ The shared war powers framework that emerged from the Convention sought to preserve the need for national support from a representative legislature, while enabling energetic executive action in the face of immediate threats.

III: ROLE OF THE JUDICIARY

Despite the frequency of military conflicts throughout American history, war powers cases have rarely been brought before the courts. In fact, most cases addressing the Declare War Power occurred in two periods: before 1866 and after 1945. The former was marked by courts engaging in the issue, while the latter saw a judicial retreat from the arena. Starting in 1800, about a decade after the Convention, the Supreme Court had its first tests on the Declare War Power in a trio of cases emphasizing Congress’s war powers emanating from the Quasi-War. In *Bas v. Tingy*, an 1800 case involving prize money for recapturing U.S. vessels, the Supreme Court held that, despite the lack of an explicit declaration of war, the use of authorizing statutes for an “imperfect war” was within Congress’s

25. *Id.*

26. *Id.*

27. *Id.* at 318–19 (Madison’s notes) (emphasis added); see Libr. of Cong., “Make War” and “Declare War” at the Constitutional Convention, CONST. ANNOTATED, <https://perma.cc/6JYH-97BW>.

28. 2 FARRAND’S RECORDS, *supra* note 22, at 319.

29. THE FEDERALIST No. 29 (Alexander Hamilton).

30. The Virginia Convention (June 5, 1788), reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1050, 1069 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

31. See Cameron Kistler, *The Anti-Federalists and Presidential War Powers*, 121 YALE L.J. 459, 467 (2011) (“[T]he Anti-Federalist arguments in the state ratification debates provide powerful evidence that the Constitution was originally understood to have vested Congress with the power to authorize acts of war.”); Saikrishna Prakash, *A Two-Front War*, 93 CORN. L. REV. 197, 204 (2007) (“Neither Federalists nor Anti-Federalists claimed that the Constitution granted the President the power to decide to wage war against other nations.”).

constitutional authority.³² In another prize money case the following year, the Court reasoned that “[t]he whole powers of war” were vested in Congress and “acts of that body can alone be resorted to as our guides in this inquiry.”³³ Finally, in the 1804 case *Little v. Barreme*, the Court held that a U.S. Navy captain’s capture of a vessel going from a French port to a Danish port pursuant to presidential orders contravened Congress’s authorizing statute.³⁴ Taken together, these early cases established that Congress possessed primary constitutional authority over the initiation and scope of war, while the President’s military actions remained constrained by statutory limits enacted by the legislature.

Sixty years later, the courts engaged on the issue of presidential use of force in two highly consequential cases.³⁵ In the 1860 case *Durand v. Hollins*, the Circuit Court for the Southern District of New York held that the President’s CIC Power allowed the use of force in response to an attack on U.S. citizens or property abroad.³⁶ A few years later, the *Prize Cases* directly addressed the President’s war powers in the absence of congressional approval. In a five-to-four decision, the Court upheld Abraham Lincoln’s April 1861 blockade of Confederate ports while Congress was not in session.³⁷ Although the dissenting Justices argued that an offensive action required congressional authorization,³⁸ the *Prize Cases* majority held that, given the active, de facto state of war between the Union and Confederacy, the blockade was a valid use of unilateral Article II authority.³⁹ However, the Court’s holding extends only to recognizing the President’s unilateral authority in instances of insurrection or invasion.⁴⁰ It recognized that the President has no such authority beyond these two instances without congressional approval, as Lincoln’s authority in this case derived from Congress’s delegations of its Militia Power via previous Acts of Congress.⁴¹

32. 4 U.S. (4 Dall.) 37, 40, 43, 45 (1800) (opinions of Washington, J., Chase, J., and Paterson, J.).

33. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

34. 6 U.S. (2 Cranch) 170, 177–79 (1804).

35. An 1850 case involving tariffs and the Mexican-American War recognized the Commander-in-Chief Power as “purely military.” *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (Presidents are “authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual. . .”).

36. *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.D.N.Y. 1860) (No. 4,186).

37. *The Prize Cases*, 67 U.S. (2 Black) 635, 682 (1863).

38. *Id.* at 688–89 (Nelson, J., dissenting).

39. *Id.* at 671 (majority opinion). The majority cited as precedent the battles of Palo Alto and Resaca de la Palma occurring before Congress’s 1846 act recognizing “a state of war as existing by the act of the Republic of Mexico,” in which U.S. forces repelled an invading Mexican army. *Id.* at 668.

40. *Id.* at 668 (asserting Article II-exclusive authority “whether the hostile party be a foreign invader, or States organized in rebellion.” (emphasis added)). During an 1806 Neutrality Act criminal case, Justice William Paterson opined that the President not only had the authority to resist a foreign invasion but also conduct offensive operations in the enemy’s own country given the state of war regardless of Congress. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342). The issue of war powers was not a question in the case, and it is speculated that he was using the case to lend his voice to the Tripoli war debate. See Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 188 n.83 (2007).

41. *Prize Cases*, 67 U.S. at 647–48; U.S. CONST. art. I, § 8, cl. 15; see Militia Act of 1795, ch. 36, 1 Stat. 424 (codified as amended at 10 U.S.C. § 332); *Texas v. White*, 74 U.S. (7 Wall.) 700, 736 (1869); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 349 (1871).

Conversely, the Court took issue with Congress's retroactive authorization of Lincoln's blockade upon reconvening in July 1861, noting that retroaction "assert[s] that the Constitution contemplated and tacitly provided that the President should be dictator, and all Constitutional Government is at an end, whenever he should think that 'the life of the nation' is in danger."⁴² However, the Court would stop short of declaring the Act unconstitutional.⁴³

In the subsequent century, the courts heard only one case involving presidential use of force, though it had nothing to do with war powers. *Durand* was indirectly affirmed in 1889 by *In re Neagle*, which recognized, *in dicta*, broad presidential authority to deploy force absent congressional authorization to protect or rescue persons with significant ties to the United States. In both the majority opinion and dissent, the Court wrote approvingly of the unilateral Article II action in the 1853 Koszta Affair, in which the U.S. Navy secured the release of a foreign national, who had lawfully declared his intention to naturalize, from Austrian officials, citing the President's foreign relations power.⁴⁴

In the early twentieth century, the Supreme Court would issue one of its most consequential rulings on modern war powers in *United States v. Curtiss-Wright Export Corp.*⁴⁵ While not actually touching on war powers, the Supreme Court's *in dicta* reasoning has been oft-cited by presidential warmaking proponents ever since.⁴⁶ The case emerged from the indictment of a company for transferring arms to Bolivia during the Chaco War in contravention of an embargo established jointly by the executive and legislative branches. The appellant argued that Congress's authorization violated the non-delegation doctrine. In response, the Court controversially reasoned that the President possesses "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."⁴⁷ This came despite the fact that, as legal scholar Harold Koh has noted, the Constitution established a shared-power foreign policy framework with Congress taking the lion's share.⁴⁸

42. Act of July 13, 1861, ch. 3, 12 Stat. 255; *Prize Cases*, 67 U.S. at 647–48.

43. *Prize Cases*, 67 U.S. at 671.

44. *In re Neagle*, 135 U.S. 1, 64 (1889); *id.* at 84–85 (Lamar, J., dissenting). During the Koszta Affair, Congress commended the action. Act of Aug. 4, 1854, 10 Stat. 594.

45. 299 U.S. 304 (1936).

46. See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION IN THE TWENTY-FIRST CENTURY 39 (2024); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 110–13 (1973); see, e.g., Memorandum from Attorney General Katzenbach to President Johnson (June 10, 1965) [hereinafter Katzenbach Memo], in 2 FOREIGN RELATIONS OF THE UNITED STATES, 1964–1968 752 (Glenn W. LaFantasie ed., 1996); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 186 n.3 (1980) [hereinafter 1980 WPR Memo]; The President's Constitutional Authority to Conduct Military Operations Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188, 195–96 (2001) [hereinafter 9/11 Memo]; Authority of the President Under Domestic & International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 150–51 (2002) [hereinafter Iraq Memo].

47. While a *Curtiss-Wright* citation has not appeared in a published OLC opinion since 2002, it almost certainly continues to influence Executive interpretation of its war powers. *Curtiss-Wright*, 299 U.S. at 320.

48. KOH, *supra* note 46, at 39.

Although *Curtiss-Wright* supplied later advocates of expansive presidential warmaking with sweeping dicta on executive authority, the Court would later push back against this unilateral vision by reaffirming limits on presidential power within the constitutional separation of powers. Amid the Korean War, Harry S. Truman sought to use the CIC Power to seize steel mills that were striking while the United States was at war, albeit an undeclared one. The high court invalidated the seizure in *Youngstown Sheet & Tube Co. v. Sawyer*, adopting a stricter view of the domestic exercise of presidential foreign affairs powers.⁴⁹ Justice Robert Jackson, in his concurrence, noted that *Curtiss-Wright* “involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress.”⁵⁰ The Court rejected the Truman administration’s CIC Power justification for its seizure, noting that the government’s case citations upheld “broad powers in military commanders engaged in day-to-day fighting in a theater of war,” but not to intervene in domestic labor disputes.⁵¹ However, the *Youngstown* court avoided any determination of the Declare War Power and the constitutionality of Truman’s commitment of forces to the Korean Peninsula.⁵² *Youngstown*’s reassertion of a shared foreign powers framework stood in sharp contrast to *Curtiss-Wright*’s unilateralism in principle. However, as the two cases addressed different legal questions and compartmentalized foreign and domestic affairs,⁵³ it resulted in *Curtiss-Wright*’s contention of “plenary” foreign affairs authority continuing to justify presidential warmaking through to the present day.⁵⁴ The *Youngstown* Court’s return to a shared-powers framework for foreign affairs was but a brief one, with various courts since *Curtiss-Wright* offering, *in dicta*, statements aggrandizing presidential powers in both foreign policy and warmaking, including the 1971 *Pentagon Papers* case.⁵⁵

With the 1973 passage of the WPR,⁵⁶ one might expect to see increased litigation to restrain presidential warmaking. On one hand, we do see increased attempts at litigation, and the courts have heard several cases from Members of Congress and private citizens seeking to prevent or otherwise end presidential warmaking absent congressional authorization. However, on the other hand, nearly every single case has been dismissed. Even prior to the WPR, Korean- and

49. In its reasoning, the Court differentiated between seizures made during the World Wars and the *Youngstown* mill seizure. It argued that Woodrow Wilson and Franklin D. Roosevelt’s seizures occurred in a time of congressionally declared war or their seizures were otherwise authorized by Congress. 343 U.S. 579, 611–13 (1952).

50. *Id.* at 635 n.2 (1952) (Jackson, J., concurring).

51. *Id.* at 587 (majority opinion).

52. *Id.* at 643 (Jackson, J., concurring).

53. *Id.* at 635 n.2 (Jackson, J., concurring).

54. The sole mention of *Curtiss-Wright* in the *Youngstown* opinion occurred in a footnote of Justice Jackson’s concurrence and did not mention the “plenary” authority assertion. *Id.*

55. See KOH, *supra* note 46, at 111–13; *N.Y. Times Co. v. United States*, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (“Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief.”).

56. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1550).

Vietnam-era courts held that war powers represent a nonjusticiable political question.⁵⁷ The Supreme Court had initially opined on the political question doctrine in foreign affairs in 1918 when it held that foreign relations is constitutionally committed to the “political” branches and the propriety of which “is not subject to judicial inquiry or decision.”⁵⁸ However, in 1962, the high court recognized that not “every case or controversy which touches foreign relations lies beyond judicial cognizance,” and instead should consider them on a case-by-case basis.⁵⁹ While some lower courts would reject the application of the political question doctrine to war powers, their rulings would be overturned on appeal.⁶⁰ In 1971, the Second Circuit Court of Appeals argued that military appropriations were “sufficient to authorize or ratify the military activity” in Southeast Asia.⁶¹ The Supreme Court in this era routinely declined to review lower court decisions on the Declare War Power.⁶²

The passage of the WPR did naught to rectify this reticence. In 1981, eleven Members of Congress sued the Reagan administration over its deployment of military advisers to the Salvadoran Civil War, which was done without a WPR report.⁶³ Although the district court asserted the political question doctrine did not apply in the case,⁶⁴ its dismissal cited the WPR and reasoned that Congress as a whole, not the courts, must take action to show its opposition to Reagan’s use of force.⁶⁵ In the end, Congress was unable to generate the political will to contest the deployment. This judicial retreat continued in similar cases emerging from the 1984 invasion of Grenada, the 1987–88 Tanker Wars, and the 1990 lead-up to the First Gulf War. Again, some Members of Congress sued to challenge the

57. See, e.g., *United States v. Bolton*, 192 F.2d 805, 806 (2d Cir. 1951); *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (“[T]he Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.”), *cert. denied*, 87 S. Ct. 2078 (1967) (mem.); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (“Congress . . . can take some action to deal with what has been characterized as a usurpation of power by the President.”), *aff’d sub nom.*, *Atlee v. Richardson*, 411 U.S. 911 (1973).

58. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); see Libr. of Cong., *Foreign Affairs as a Political Question*, CONST. ANNOTATED, <https://perma.cc/3J2B-2UY9>.

59. *Baker v. Carr*, 369 U.S. 186, 211–12 (1962); see Libr. of Cong., *Foreign Affairs*, *supra* note 58.

60. See, e.g., *Holtzman v. Richardson*, 361 F. Supp. 544, 552 (E.D.N.Y. 1973), *supplemented sub nom.*, *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev’d*, 484 F.2d 1307 (2d Cir. 1973).

61. *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971); see also *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971) (“[T]here was sufficient legislative action . . . in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution.”).

62. Some scholars have argued that this refusal goes against precedent. See, e.g., Kenneth L. Heisz, *Congressional Standing to Litigate War Powers Resolution Claims*, 11 LOY. L.A. INT’L & COMP. L. REV. 613, 630 (1989).

63. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). *Crockett* has been criticized for reducing the application of the WPR to a Vietnam-like situation. Heisz, *supra* note 62, at 633.

64. *Crockett*, 558 F. Supp. at 898 (“The Court disagrees . . . that this is the type of political question which involves potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making.”).

65. *Id.* at 896–903.

constitutionality of the executive deployment of forces into hostilities, but the courts held that Congress, in its entirety, must exercise its legislative powers before the courts can weigh in.⁶⁶ However, in *Dellums v. Bush*, a case seeking to prevent George H.W. Bush from invading Iraq without congressional authorization, Judge Greene, while holding congressional plaintiffs' challenge was unripe, did recognize that an injunction may be issued "at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization."⁶⁷ In the 1999 case *Campbell v. Clinton*, twenty-six Members sued the Clinton administration to prevent further military operations in the former Yugoslavia absent congressional authorization.⁶⁸ The D.C. District Court dismissed the suit on the grounds that congressional plaintiffs lacked standing, stating that "Congress . . . could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign."⁶⁹

An additional complicating case affecting Congress's assertion of its constitutional war powers is the 1983 case *INS v. Chadha*, in which the Supreme Court held that "legislative vetoes"—statutory provisions allowing a concurrent resolution to nullify an executive action—are unconstitutional.⁷⁰ This ruling has been interpreted by some legal scholars as nullifying section 5(c) of the WPR,⁷¹ which allowed Congress to order the removal of U.S. forces engaged in hostilities, absent congressional authorization, by concurrent resolution.⁷² Section 5(c) was the WPR's main enforcement mechanism, and the possible loss of it significantly hinders Congress's ability to assert its authority through the WPR. Congress sought to rectify the possible invalidity later that year by adopting a free-standing measure to allow for a joint resolution, which requires presidential presentment.⁷³ Given that a president is certain to veto any joint resolution, the joint resolution option requires a supermajority to compel the withdrawal of U.S. forces. However, the application of *Chadha* to the WPR has not been tested, and some scholars take the view that it does not apply.⁷⁴

66. See, e.g., *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

67. *Dellums*, 752 F. Supp. at 1149.

68. *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

69. *Campbell*, 203 F.3d at 23.

70. 462 U.S. 919, 952 (1983) (ruling that whenever congressional action has the "purpose and effect of altering the legal rights, duties and relations" of persons outside the legislative branch, Congress must act through both houses in a bill or resolution submitted to the President).

71. Pub. L. No. 93-148, § 5(c), 87 Stat. 555, 556 (1973).

72. See, e.g., Heisz, *supra* note 62, at 621 n.48; Chris Smith, Note, *Litigating War: The Justiciability of Executive War Power*, 14 DUKE J. CONST. L. & PUB. POL'Y 179, 194 (2019); Seth Victor, *War Powers and Congressional Acquiescence*, 51 U. MEM. L. REV. 301, 302 (2021); Brian J. Litwak, *Putting Constitutional Teeth Into a Paper Tiger: How to Fix the War Powers Resolution*, 2 NAT'L SEC. L. BRIEF 1, 7-8 (2012). In his dissent, Justice White included section 5(c) in his list of legislative vetoes that *Chadha* represented a "death knell" for. *Chadha*, 462 U.S. at 967, 1003 (White, J., dissenting).

73. State Department Authorization Act for FY 1984, Pub. L. No. 98-164, § 1013, 97 Stat. 1017, 1062 (1983) (codified at 50 U.S.C. § 1546a).

74. See, e.g., *Hearing Before the H. Comm. on Foreign Affs.*, 98th Cong. 155-57 (1983) (statement of Eugene Gressman); G. Sidney Buchanan, *In Defense of the War Powers Resolution: Chadha Does Not Apply*, 22 HOUSTON L. REV. 1155 (1985); John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1395-98 (1988).

Congress has only passed a section 5(c) concurrent resolution twice. The first occurred in 1993 to compel Bill Clinton to withdraw U.S. forces from Somalia.⁷⁵ The resolution, however, was a meaningless gesture as the House Foreign Affairs Committee had amended its set withdrawal date from January 31 to March 31, 1994—the date Clinton had already agreed to for withdrawal.⁷⁶ The Committee’s rationale was that the “action was premised on a determination that neither individual Members of Congress nor Committees of Congress should make unilateral judgments about the constitutionality of provisions of law.”⁷⁷ The second was on June 23, 2026, to direct the removal of “United States Armed Forces from hostilities with Iran.”⁷⁸ However, the latter has been denounced by the Trump administration and is unlikely to have a binding effect without a court order due to *Chadha*.⁷⁹

Courts have continued to dismiss war powers cases on the basis of standing or the political question doctrine in the twenty-first century.⁸⁰ This current jurisprudence set up by post-1945 courts effectively, as reflected in the *Campbell* opinion, and erringly requires Congress to generate a veto-proof supermajority to contest presidential warmaking absent its assent. While the Framers opposed giving the President the power to make war without Congress declaring war, the courts and decades of the Executive interpreting its own war-making powers have created this direct inversion of constitutional war powers.

IV: EXECUTIVE SELF-INTERPRETATION

As noted earlier, early American presidents recognized Congress’s exclusive constitutional power to declare war and authorize offensive operations.⁸¹ Washington required congressional appropriation and authorization to conduct offensive operations against the Northwest Confederacy, as did John Adams in prosecuting the Quasi-War with France.⁸² Both Jefferson and Madison recognized the constitutional necessity for congressional action before deploying forces to the Mediterranean to conduct offensive operations to counter Tripolitanian and Algerian hostilities.⁸³

75. H.R. Con. Res. 170, 103d Cong. (1993).

76. *Id.* (as introduced in the House, Oct. 22, 1993).

77. H.R. Res. 293, 103d Cong. (1993).

78. H.R. Con. Res. 86, 119th Cong. (2026).

79. Donald Trump (@realDonaldTrump), TRUTH SOCIAL (June 23, 2026, at 22:39 ET), <https://perma.cc/ED2P-CX54> (calling it a “poorly timed and meaningless War Powers Act Vote”).

80. *See, e.g.*, Mahorner v. Bush, 224 F. Supp. 2d 48 (D.D.C. 2002); N.J. Peace Action v. Obama, 379 F. App’x 217 (3d Cir. 2010); Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016), *order vacated, appeal dismissed sub nom.* Smith v. Trump, 731 F. App’x 8 (D.C. Cir. 2018); Maxwell v. Trump, No. 17-CV-628-JL, 2017 WL 6816484 (D.N.H. Nov. 29, 2017).

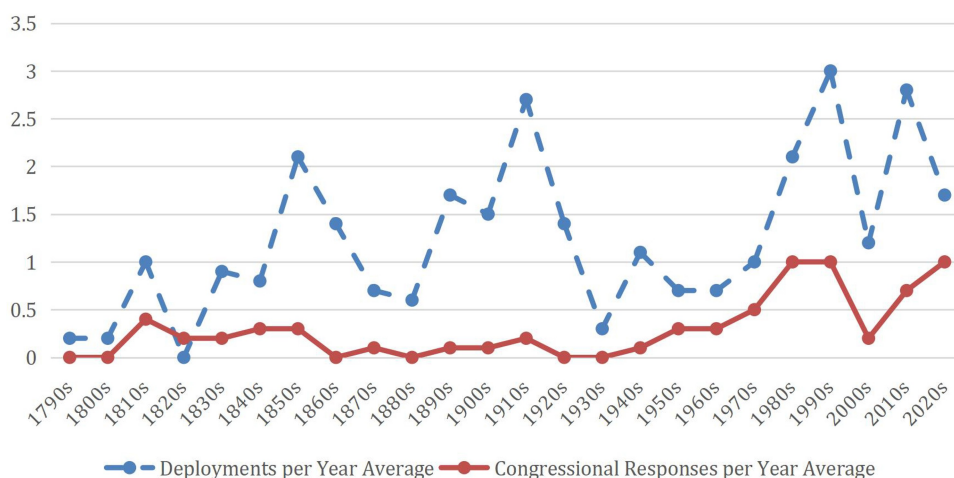
81. *See supra* I: Introduction.

82. *See* Hall & Prakash, *supra* note 2, at 134; President John Adams, Special Message (Mar. 19, 1798) (on file with Am. Presidency Project, <https://perma.cc/HWN7-EY9W>). During the Quasi War, Alexander Hamilton argued that the President has the “authority to *repel* force by force,” but “[a]ny thing beyond this must fall under the idea of *reprisals* & requires the sanction of that Department [(Congress)] which is to declare or make war.” Letter from Alexander Hamilton to James McHenry, Sec’y of War (May 17, 1798) (on file with Nat’l Archives, Founders Online, <https://perma.cc/8TAY-YBN8>).

83. Letter from James Madison to Congress (Feb. 23, 1815) (on file with Nat’l Archives, Founders Online, <https://perma.cc/7MD8-H694>). This view was not universal among the Founding Fathers. Some

However, as legal scholar Michael Ramsey has indicated, these deferrals regarding Article II “offensive-response” power were not always reflected in their communications with Congress.⁸⁴ Prior to the Tripolitanian declaration, Jefferson’s orders to Commodore Richard Dale granted him offensive powers should war break out.⁸⁵ Madison, who served as Jefferson’s Secretary of State during the Second Barbary War, later recollected that “[t]he only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has been ‘actually produced’ by the conduct of another power.”⁸⁶ During his presidency, Madison militarily annexed part of western Spanish Florida in 1810 while Congress was out of session,⁸⁷ although he deferred to Congress prior to engaging in other offensive hostilities throughout his administration.⁸⁸

Article II Deployments v. Congressional Response



argued that offensive military operations did not necessitate congressional approval when the United States was the target of a war declaration. Compare Jefferson, *supra* note 1 (deferring “the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment”), with Lucius Crassus, *The Examination No. 1*, N.Y. EVENING POST, Dec. 17, 1801, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 444, 455 (Harold C. Syrett ed., 1974) (“[W]hen a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory: it is at least unnecessary.”). See also Ramsey, *supra* note 40, at 180–88 (differentiating between early presidential thought on responding to “short of war-declaring attacks” and attacks “that have already created a state of war.”).

84. Ramsey, *supra* note 40, at 184–88.

85. Letter from the Secretary of Navy to Commodore Dale (May 20, 1801), reprinted in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 359, 359–60 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832). Jefferson also planned not to seek authorization from Congress for offensive operations should war break out with Morocco in 1802, although the conflict never materialized. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 222–23 (1976).

86. Letter from James Madison to James Monroe (Nov. 16, 1827), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 599, 600 (1865).

87. Discussed *infra* notes 112–113 and associated text.

88. See Letter from James Madison to Congress (Feb. 18, 1815) (on file with Nat’l Archives, Founders Online, <https://perma.cc/7C5L-S9L3>); Act of Mar. 3, 1815, ch. 90, 3 Stat. 230.

Over the following century, multiple presidents pushed the boundaries of their CIC Power to engage in warmaking absent congressional authorization. However, major intrusions into Congress's Declare War Power were relatively uncommon in this period, and no such pattern emerged until after the Second World War. While a "counter image of unchecked executive discretion . . . surface[s] from time to time since the early Republic, it did not fully crystallize until" *Curtiss-Wright*.⁸⁹ Unilateral uses of force by the executive branch in several decades during this period could range from thirteen to twenty-three deployments in a decade.⁹⁰ However, most of these deployments sought to protect Americans abroad during unrest with little to no debate in Congress.

With the start of the Cold War, Executive encroachment of the Declare War Power became more assertive. While the frequency of Article II-exclusive uses of force remained relatively low from 1946–1972 compared to the 1900s–1920s (sixteen v. fifty-one, respectively),⁹¹ the Executive began taking a far more expansive view of the CIC Power, culminating in its abuses of the 1964 Gulf of Tonkin Resolution during the Vietnam War.⁹² Congress passed the Resolution after the Johnson administration deceptively claimed U.S. forces were attacked in the titular Gulf. The Resolution's grant was extremely broad in "approving . . . all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" without a clear time limit.⁹³ Despite its deceptive efforts to secure this authority, the Johnson State Department asserted that it did not even

89. KOH, *supra* note 46, at 14.

90. Use-of-force totals in this article are primarily derived from government and academic lists of military action. BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2023 (2023), <https://perma.cc/YE82-FHMM>; 48-Hour Report Database, REISS CTR. ON L. & SEC.: WAR POWERS REPORTING PROJECT, <https://perma.cc/G366-TJ79>. These lists do not cite the American Indian Wars, but as they were military deployments against sovereign peoples they will be counted for the purposes of this article. Deployments of U.S. forces abroad for humanitarian aid in peace, training, force rotation, routine military assistance, covert operations, and cyber operations are omitted from the count. Further, deployments that are treated as distinct in War Powers Resolution (WPR) reports are consolidated if they are closely linked to the initial deployment. The counts within this article reflect deployments of U.S. forces abroad that would likely meet the requirements of section 4 of the WPR. Use-of-force instances were categorized according to the cited domestic authority (Article I and/or II), starting year of the use of force, type of action (*i.e.*, respond to threat, protect U.S. citizens/property); and whether or not there was congressional response. As to determination of domestic authorization, emphasis is placed on initial use of force, so even if a deployment was approved retroactively, it is treated as unauthorized for the purposes of this essay. For instances prior to the passage of the WPR, authority is determined by either an explicit executive branch citation or to a prior authorization that could be reasonably inferred as a legal basis. This flexibility is due to the non-existence of reporting requirements prior to the WPR. Further, for uses of force after the passage of the WPR, the determination of authorization is derived from the executive branch's own citations in its reports. See 48-Hour Report Database, *supra*. Additionally, the six World War II declarations are treated as one deployment. Any debate in Congress over executive uses of force, even in minority, is considered a congressional response for the purposes of this article.

91. See TORREON & PLAGAKIS, *supra* note 90.

92. See, *e.g.*, William W. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 UNIV. PENN. L. REV. 1, 2 (1972).

93. Pub. L. No. 88-408, 78 Stat. 384 (1964).

need the Resolution to make war in Southeast Asia.⁹⁴ While Congress deliberately intended this grant to be broad, it is doubtful Congress foresaw the escalation that would soon follow, most notably the expansion of operations into Laos and Cambodia.⁹⁵ However, the legislature would find itself unable to generate the political will until 1971 to begin rectifying that mistake with the repeal of the Resolution, followed by the enactment of the WPR two years later.

In the minds of its supporters in the ninety-third Congress, the WPR was meant to restrict presidential warmaking and prevent abuses of authorization as occurred in Southeast Asia. However, some of its contemporary opponents raised prescient concerns about its potential abuse. Senator James Abourezk (D-S.D.) warned that the WPR would be “a blank check which will implicate Congress in whatever aggressive war-making a president judges to be necessary.”⁹⁶ Senator J. William Fulbright (D-Ark.) also feared that it would serve as a “de facto grant of expanded Presidential authority.”⁹⁷ Even one of the Resolution’s key sponsors, Senator Thomas Eagleton (D-Mo.), denounced the version that emerged from conference as giving the President “unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 to 90 days.”⁹⁸ In fulfillment of these fears, the executive branch has read unilateral warmaking authority into the lines of the WPR since its passage. In 1994, the Department of Justice’s Office of Legal Counsel (“OLC”) opined that “in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed.”⁹⁹ Seventeen years later, it further argued that sections 4 and 5(b) of the WPR—requiring forty-eight-hour reports upon insertion of forces into hostilities and the termination of force within sixty days—“implicitly ‘recognize[] and presuppose[] the existence of unilateral presidential authority to deploy armed forces’” not only in the Militia Power’s exceptions, but also in circumstances similar to prior unilateral presidential warmaking.¹⁰⁰

The Executive’s abuses of the WPR are not rare and have used the Act’s text and gaps to expand its unilateral warmaking, absent meaningful oversight. In the early Cold War, Article II use of force abroad averaged 0.58 initial uses of force per year;¹⁰¹ however, this would increase drastically after the passage of the

94. The Legality of United States Participation in the Defense of Viet-Nam, 54 DEP’T ST. BULL. 474, 484 (1966).

95. See 110 CONG. REC. 18403–04, 18409 (1964); see also Thomas Eagleton, *Congress and the War Powers*, 37 MO. L. REV. 1, 12–14 (1972) (discussing the history of the Gulf of Tonkin Resolution).

96. 119 CONG. REC. 25052–53 (1973).

97. *Id.* at 25095.

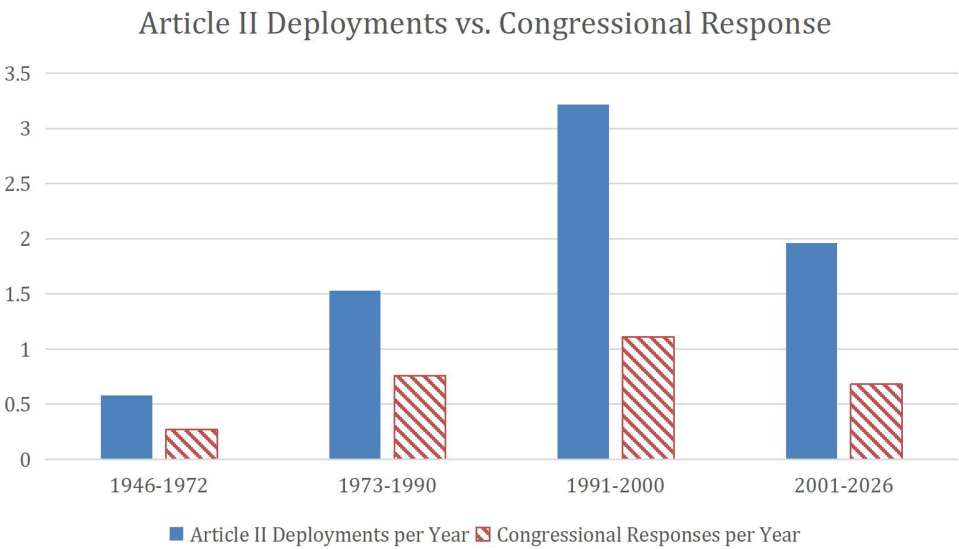
98. *Id.* at 36177.

99. Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 177 (1994) [hereinafter *Haiti Memo*].

100. Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 30, n.1 (2011) [hereinafter *Libya Memo*]; see Rebecca Ingber, *The Insidious War Powers Status Quo*, 133 YALE L.J. F. 747, 757–58 (2024). OLC opinions are considered binding on the executive branch and have precedential value. CTR. ON NAT’L SEC. AT FORDHAM L., SECURING AMERICAN DEMOCRACY—THE DEPARTMENT OF JUSTICE: INDEPENDENCE, INTEGRITY, AND ACCOUNTABILITY 136 (2024), <https://perma.cc/EL4B-UQ8H> [hereinafter *CNS REPORT*].

101. For the purposes of this analysis, “initial uses of force” refers to initial military action by U.S. Armed Forces in a conflict. This includes separate strikes over a period of time that are closely and

WPR, with averages of 1.53 in the latter half of the Cold War, 3.22 in the 1990s, and 1.96 after 9/11 thus far.¹⁰² Simultaneously, Congress has not proven more responsive to presidential warmaking under the auspices of the WPR. Prior to the WPR (1946–1972), Congress debated these deployments 47% of the time. While this would increase slightly to 50% in the late Cold War, it has since dropped to 35% since the 1990s.¹⁰³ Congress has generally preferred to leave foreign policy decisions, and the associated blame, to the President.¹⁰⁴ The *Youngstown* Court admonished the “long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.”¹⁰⁵ In fulfillment of *Youngstown*’s fears, the pattern of war powers silence Congress has exhibited since 1946 has emboldened the Executive’s self-interpretation of its powers through vague, easily met pseudoconstitutional criteria with little disincentive.



reasonably linked. For example, while the Tanker Wars strikes consist of multiple different WPR reports, they are consolidated under a single “initial use of force” in that conflict. Likewise, conflicts that have separate distinct stages of escalation would be considered under the earliest introduction of U.S. Armed Forces into hostilities. For example, the initial use of force by U.S. Armed Forces is treated as occurring in the 1950s with the introduction of military advisors under the Eisenhower administration.

102. Averages were calculated by taking the totals derived from the lists referred to *supra* note 90 and subsequently categorized as Article II-exclusive, divided by the years within the time frame.

103. Percentages were calculated by dividing Article II-exclusive uses of force with recorded congressional debate in opposition by the totals of Article II-exclusive uses of force derived from the lists referred to *supra* note 90.

104. See KOH, *supra* note 46, at 108.

105. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952).

A. Self-Defense

National self-defense is a recognized aspect of the CIC Power.¹⁰⁶ The Executive's authority to use force to protect Americans without legislative consent dates back to the colonial period and was directly stated in the Articles of Confederation of 1777.¹⁰⁷ Of the 138 unilateral presidential deployments to protect U.S. citizens and property abroad since 1789, only six have prompted some form of congressional debate.¹⁰⁸ Separately, a president has some authority to use force to respond to threats, whether a recent or imminent attack. This latter application of the CIC Power is more controversial among Members of Congress. Of the forty-five historical instances of a president using force without authorization to respond to an attack or alleged threat, over half (twenty-seven) prompted congressional debate. The "respond to threat" rationale has greatly expanded since World War II, with seventeen such uses in the Cold War, and twenty-nine since then.

While early American presidents recognized Congress's exclusive constitutional power to declare war and authorize offensive operations,¹⁰⁹ the Madison administration adopted an urgent and necessary exception to address potential threats abroad. Under the Articles of Confederation, state governors were allowed to launch preemptive strikes against threats "so imminent as not to admit of a delay" while waiting for approval from the Confederation Congress.¹¹⁰ As noted earlier, Madison argued at the Constitutional Convention on the importance of allowing the President some authority to make war in defense.¹¹¹ In 1810, part of western Spanish Florida revolted while Congress was out of session. As war with Britain loomed on the horizon, the U.S. government was concerned that Florida would fall into British hands as the Spanish Empire gradually lost control of its American colonies. As such, Madison opted to deploy U.S. forces to occupy the territory in revolt without waiting for Congress to reconvene. Congress, however, did not take a dim view of the move. Instead, it accepted the immediate need for action in the interest of national security and retroactively authorized the action and similar future actions in respect to Florida in January 1811 with the No Transfer Resolution.¹¹² Beyond this instance, Madison sought congressional

106. See *Prize Cases*, 67 U.S. 635, 668 (1863); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.D.N.Y. 1860).

107. ARTICLES OF CONFEDERATION of 1777, art VI.

108. See TORREON & PLAGAKIS, *supra* note 90; *48-Hour Report Database*, *supra* note 90. The six instances of congressional debate to these missions were the deployment of Marines to New Grenada (1856); the occupation of Matamoros, Mexico (1876); deployment of Marines to Panama (1903); naval evacuation of Americans from Cyprus (1973); Iran hostage rescue operation (1980); and some anti-ISIS security deployments in Iraq (2014). Opposition to the Cyprus operation was primarily due to the lack of a WPR report and the 2014 Iraq operations were not limited to citizen/embassy protection.

109. Hall & Prakash, *supra* note 2; Jefferson, *supra* note 1; *James Madison to Congress*, 23 February 1815, *supra* note 83.

110. ARTICLES OF CONFEDERATION of 1781, art. VI.

111. See 2 FARRAND'S RECORDS, *supra* note 22, at 318–19 (Madison's notes); *Libr. of Cong.*, *supra* note 27.

112. 2 Stat. 666 (1811).

authorization for offensive military action in the War of 1812 and the Second Barbary War.¹¹³

Despite a few instances of apparent abuse in the nineteenth century of the self-defense authority recognized in *Durand*,¹¹⁴ most of the fifty-seven self-defense deployments without congressional authorization in this period were to protect U.S. citizens and embassies during revolutionary turmoil abroad. In fact, only five of these self-defense uses of force were in response to an apparent threat, compared with fifty-two citizen protection missions.¹¹⁵ However, the historical infrequency of such abuse should not discount the consequences when this exception is abused. One early example of this authority being abused was in 1844. After negotiating a later-rejected treaty of annexation with Texas, President John Tyler deployed U.S. ground and naval forces to the U.S.-Texas border using illegally funneled funds in anticipation of Mexico invading in retaliation.¹¹⁶ Just over a year later, his successor, James Polk, on the back of a successfully ratified treaty of annexation, deployed Army forces to the disputed territory between the Nueces River and the Rio Grande to provoke Mexican forces into attacking.¹¹⁷ Congress shortly thereafter declared war without knowing the truth of the engagement.¹¹⁸ In 1848, the House resolved that the war was “unnecessarily and unconstitutionally begun.”¹¹⁹

Later in 1893, American businessmen launched a coup and overthrew the Kingdom of Hawaii with support from the U.S. Marines. While President Benjamin Harrison argued the Marines’ actions were only to protect Americans’ lives and property, his successor, Grover Cleveland, condemned the Marines’ actions as “act[s] of war . . . with out the authority of Congress.”¹²⁰ In one strange exception where abuse was desired but not achieved, President James Buchanan twice unsuccessfully sought an AUMF in 1858 to protect U.S. citizens,

113. Letter from James Madison to Congress, *supra* note 88. For the Barbary War, Congress instead opted for a more narrowly constrained Authorization for the Use of Military Force (“AUMF”) to allow the Navy to protect U.S. commerce and seamen in the Mediterranean. Act of Mar. 3, 1815, ch. 90, 3 Stat. 230.

114. See *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.D.N.Y. 1860) (arguing that the President may be required to ensure the “protection of the lives or property of the citizen” abroad from “[a]cts of lawless [sic] violence . . . [which] cannot be anticipated and provided for; and the protection . . . require[s] the most prompt and decided action.”).

115. See TORREON & PLAGAKIS, *supra* note 90. The five instances of alleged threat responses are the First Seminole War (1817), the occupation of Nacogdoches (1836), deployments of U.S. forces to the Texas border (1844), Battle of the Barrier Forts in Canton (1856), and anti-bandido raids into Mexico starting in 1873.

116. Tyler financed it by illegally funneling Secret Service funds and Treasury Secretary John Spencer resigned in protest. See Jordan Cash, *The Isolated Presidency: John Tyler and Unilateral Presidential Power*, 7 AM. POL. THOUGHT 26, 47 (2018). While resolutions denouncing the use of force as unconstitutional were not received, significant debate occurred in both chambers. CONG. GLOBE 28th Cong., 1st Sess. 649, 703, 710 (1844).

117. See Matthew Waxman, *The Mexican-American War and Constitutional War Powers*, LAWFARE (Feb. 2, 2020), <https://perma.cc/ZDA8-QEB3>.

118. *Id.*

119. *Id.*

120. Grover Cleveland, Message to Congress Regarding Hawaiian Annexation (Dec. 18, 1893) (transcript on file with Miller Ctr., <https://perma.cc/62JH-8NK4>).

commerce, and property in Nicaragua, Panama, and Tehuantepec from lawlessness, stating that the “Constitution has confided to [Congress] alone the power to make war.”¹²¹ Congress generally opposed these proposals on the basis that they could expand into a war with several Central American states.¹²² In its debates of these proposals, some Members of Congress opposed such resolutions in part due to Buchanan’s apparent abuse of an 1858 authorization to “adopt such measures and use such force as, in his judgment, may be necessary and advisable” to “adjust[] the differences” with Paraguay three years after a minor skirmish there.¹²³ Buchanan’s deference in seeking authorization from Congress may have come less from constitutional convictions and more from the political reality of congressional preoccupation with slave revolts and lack of appropriated funds for his desired expeditions.¹²⁴

The “respond to threat” rationale for executive unilateralism began to become more prominent in the 1940s with President Franklin D. Roosevelt’s declaration of an “unlimited national emergency” and the deployment of the U.S. military to occupy Dutch Guiana, Greenland, Iceland, and various British islands ahead of U.S. entry into World War II, citing *Curtiss-Wright*.¹²⁵ A major reason for these occupations was to keep the sea lanes open for aid to the British, including convoys operating under “shoot-at-sight” orders against German U-boats.¹²⁶ In Attorney General Robert Jackson’s 1940 Destroyers-for-Bases opinion, while he does not address the use of force and instead focuses on executive agreements, he does recognize the CIC Power as “plenary.”¹²⁷ The following year, Jackson concluded that the President “has supreme command over the [U.S. military] and may order them to perform such military duties as, in his opinion, are necessary

121. James Buchanan, Second Annual Address (Dec. 6, 1858) (transcript on file with Miller Ctr., <https://perma.cc/2GL5-T2UD>); CONG. GLOBE 35th Cong., 2d Sess. 1118 (1859). It is unclear why Buchanan used the word “make” in lieu of “declare” here.

122. CONG. GLOBE 35th Cong., 2d Sess. 1120 (1859) (statement of Senator William Seward). There was even some inconclusive debate as to whether the President had Article II authority to repel attacks outside of U.S. territory. *Id.* at 1121–22.

123. *Id.* at 1120–22, 1374; S.J. Res. 15, 35th Cong., 11 Stat. 370 (1858); see Michael D. Ramsey & Matthew C. Waxman, *Delegating War Powers*, 96 S. CAL. L. REV. 741, 768 (2023). At the time of its authorization, Congress believed only one ship would be dispatched; however, the expedition, ongoing at the time of the Central America proposals debate, amounted to being the largest U.S. fleet ever deployed at the time. CONG. GLOBE 35th Cong., 2d Sess. 1120 (1859) (statement of Senator William Fessenden). Democratic Senator John Pettit argued that the expedition was outside the scope of the authorization and violated the Constitution because Congress did not “confer on the President war-making authority, because, constitutionally, Congress cannot delegate this delicate power.” *Id.* at 1374. Some historical scholarship believes that the 1858 Paraguayan expedition was intended to distract the American public from the domestic failings of his administration. See, e.g., Gene Allen Smith & Larry Bartlett, “A Most Unprovoked, Unwarrantable, and Dastardly Attack”: *James Buchanan, Paraguay, and the Water Witch Incident of 1855*, 19 THE N. MARINER/LE MARIN DU NORD 269, 288–89 (2009).

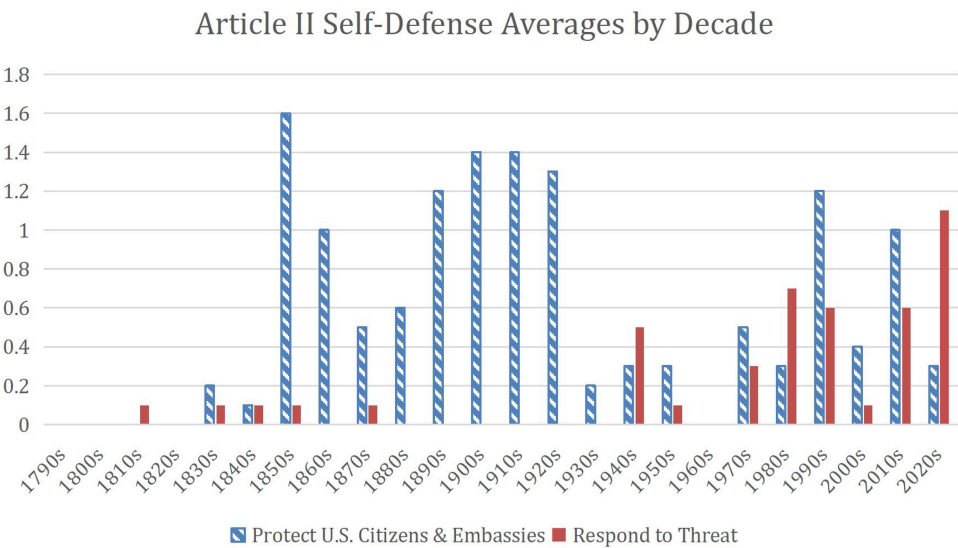
124. William Cooper, *James Buchanan: Foreign Affairs*, MILLER CTR., <https://perma.cc/BZG8-NQXU>.

125. See KOH, *supra* note 46, at 39; SCHLESINGER, *supra* note 46, at 110–13.

126. SCHLESINGER, *supra* note 46, at 112.

127. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att’y Gen. 484, 489–90 (1940).

or appropriate for the defense of the United States . . . in time of peace as well as in time of war.”¹²⁸ These actions were not without controversy in Congress,¹²⁹ and as historian E.S. Corwin noted, “may have produced a serious constitutional crisis had not the Japanese obligingly come to the rescue.”¹³⁰ While a preemptive defense assertion lulled in the twenty-five years after the war, its application would trend upwards starting in the 1970s, with its use now being as frequent as deployments to protect U.S. citizens and embassies.



Controversy over the Executive’s preemptive or reactive responses to threats tends to surround instances in which the use of force is not of “*urgent and absolute necessity*.”¹³¹ Since 9/11, it has been increasingly stretched beyond the Founders’ ability to recognize it. The Executive’s “self-defense” theory of Article II war powers centers on two seminal OLC memoranda, which I will refer to as the 9/11 Memo and the Iraq Memo.¹³² These memos have stretched the President’s “repel attacks” authority far beyond early interpretations, citing “anticipatory self-defense” and “whatever actions he deems appropriate to pre-empt or respond to terrorists.”¹³³

128. Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 61–62 (1941) [hereinafter Flying Students Memo].

129. SCHLESINGER, *supra* note 46, at 112.

130. E.S. CORWIN, TOTAL WAR AND THE CONSTITUTION 33 (1947).

131. 33 ANNALS OF CONG. 803 (1819) (statement of Rep. Charles Mercer (Federalist-Va.) in criticism of Gen. Andrew Jackson’s attack on Negro Fort in 1816 and subsequent attacks on Spanish forts in the First Seminole War).

132. Ingber, *supra* note 100, at 747; 9/11 Memo, *supra* note 46, at 212–13; Iraq Memo, *supra* note 46, at 153–59.

133. Iraq Memo, *supra* note 46, at 195; 9/11 Memo, *supra* note 46, at 213.

The 9/11 Memo marks one of the OLC's most expansive interpretations of the CIC Power in addressing overseas threats. It asserted that the Framers understood that "the power to initiate hostilities and to control the escalation of conflict . . . rest [ed] in the hands of the Executive Branch" and that declarations of war are "only necessary to 'perfect' a conflict under international law."¹³⁴ Flowing from this, the OLC concluded that Congress's Declare War Power "does not constrain the President's independent and *plenary* constitutional authority over the use of military force," including the deployment of troops overseas, preemptive strikes, and retaliatory strikes.¹³⁵

The Iraq Memo, authored shortly after Congress passed the 2002 AUMF against Iraq,¹³⁶ asserted that the President had unilateral authority to initiate hostilities against Iraq even without Congress's grant on the basis of "anticipatory self-defense," citing the alleged threat of weapons of mass destruction ("WMD") and international terrorism.¹³⁷ In this, OLC Deputy Assistant Attorney General John Yoo put forth a test that examines the probability of an attack, the increase in risk, windows of opportunity, practical diplomatic alternatives, and the magnitude of potential harm.¹³⁸ His test rejected the one put forth by Secretary of State Daniel Webster in 1837, dubbed the *Caroline* Test,¹³⁹ which emphasized the imminence of the threat in justifying a preemptive defense.¹⁴⁰ Yoo, in contrast, argued that with "developments in offensive arms and their means of delivery, . . . the importance of the temporal factor [is] diminished" with emphasis on the presence of WMDs.¹⁴¹

Taken together, the 9/11 Memo and the Iraq Memo give the Executive broad "self-defense" powers that far outpace the intended scope of Congress's authorizations. The Iraq Memo itself effectively justifies unilateral presidential warmaking up to and including full-scale invasions of sovereign states that have not attacked the United States.¹⁴² While these memoranda have rarely been directly cited in subsequent, published OLC use-of-force justifications,¹⁴³

134. 9/11 Memo, *supra* note 46, at 190, 192. These assertions are antihistorical. American Colonial and Confederation governments had varied approaches to war powers before the Constitution, and the Constitutional Convention made clear its aversion to the war-initiating powers seen within the monarchies of Europe. See *supra* notes 11–13 and associated text; see also JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–5 (1993); SCHLESINGER, *supra* note 46, at 1–12.

135. 9/11 Memo, *supra* note 46, at 188, 190, 193 (emphasis added).

136. Pub. L. No. 107-243, 116 Stat. 1498 (2002).

137. Iraq Memo, *supra* note 46, at 152, 194.

138. *Id.* at 194–95.

139. *Id.* at 180 ("necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment of deliberation . . .") (quoting Letter from Daniel Webster, Sec'y of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841) (citation omitted))).

140. *Id.* at 194.

141. *Id.* at 183.

142. Ingber, *supra* note 100, at 753.

143. The sole instance of the 9/11 Memo being directly cited was in the 2002 Iraq Memo. Iraq Memo, *supra* note 46, at 150. It is suspected that most of the OLC's legal advice remains unpublished, either due to national security exceptions, statutory prohibition, deliberative process or attorney-client privilege, or lack of public interest. Sarah Patrick, *The DOJ OLC Transparency Act: Is Transparency*

these opinions have not been withdrawn and likely still influence Executive “self-defense” unilateralism.¹⁴⁴

The dangerous implications of the broad “anticipatory self-defense” interpretations appear to be heavily influencing the second Trump administration’s wars. Mirroring Yoo’s WMD justifications in the Iraq Memo, the WPR report following the June 21, 2025, strikes on Iran’s nuclear facilities justified it as having been “taken to advance vital United States national interests . . . by eliminating Iran’s nuclear program.”¹⁴⁵ Eight months later, the Trump administration’s statements at the outbreak of the U.S.-Israeli war with Iran parallel those of the Bush administration in 2002. Trump stated the operation’s “objective is to defend the American people by eliminating *imminent* threats from the Iranian regime,” with particular grievance to its international “terror sponsor[ship]” and “pursuit of nuclear weapons” as well as calls for regime change.¹⁴⁶ In its March 2 WPR report to Congress, Trump appealed to his authority under the CIC Power, specifically citing allegations of Iranian pursuit of nuclear weapons. More generally, he claimed the strikes were to protect U.S. forces, the U.S. homeland, undefined national interests, maritime commerce, and in collective self-defense with Israel.¹⁴⁷ Further, he cited the failure of diplomatic solutions, despite strikes occurring during the then-ongoing bilateral negotiations in Switzerland with apparent progress.¹⁴⁸ In a March 2 press briefing, Secretary of State Marco Rubio admitted the imminent threat

Enough to Combat Problematic Norms in the Office of Legal Counsel?, 19 NW. J. L. & SOC. POL’Y 121, 127 (2023). The OLC has also increasingly turned to less-than-formal legal advice, such as emails, phone calls, and in-person briefings, which are not governed by the already-limited transparency policies for memoranda. These less-than-formal opinions are still “authoritative” and “binding.” CNS REPORT, *supra* note 100, at 150–51 (quoting Karl Thompson, Acting OLC Assistant Attorney General in 2015); see Memorandum to Att’y’s of the Off. from David J. Barron, Acting Assistant Att’y Gen., Dep’t of Just. (July 16, 2010), <https://perma.cc/LK7L-6XVG>. A recent appellate court ruling likely will further impede OLC opinion transparency in its holding that the OLC is not required to proactively publish its legal opinions. *Campaign for Accountability v. DOJ*, No. 24-5163, 2025 WL 2942433 (D.C. Cir. Oct. 17, 2025).

144. See Letter to Merrick Garland, Att’y Gen., from Richard Durbin, Chair, S. Comm. on the Judiciary (Jan. 7, 2025), <https://perma.cc/S57L-22D9>.

145. Compare Iraq Memo, *supra* note 46, at 152, 194 (asserting Article II-exclusive authority to wage war on Iraq to “destroy its WMD capability”), with Memorandum from Donald Trump, President, to Mike Johnson, Speaker, and Charles Grassley, President Pro Tempore (June 23, 2025) (justifying air strikes on Iranian nuclear facilities in “collective self-defense” with Israel), <https://perma.cc/UJ3H-KZ7C>.

146. Compare Read Trump’s Full Statement on Iran Attacks, PBS (Feb. 28, 2026) (citing “*imminent*” threats from Iran (emphasis added)), <https://perma.cc/L2VM-JAAB>, with George W. Bush, President’s Remarks at the United Nations General Assembly (Sep. 12, 2002) (“With every step the Iraqi regime takes toward gaining and deploying the most terrible weapons, our own options to confront that regime will narrow. And if an emboldened regime were to supply these weapons to terrorist allies, then the attacks of September the 11th would be a prelude to far greater horrors.”), <https://perma.cc/59MR-24KQ>.

147. Letter from Donald Trump, President, to Charles Grassley, President Pro Tempore, Senate (Mar. 2, 2026) [hereinafter 2026 Iran WPR], <https://perma.cc/E6TD-KSSD>.

148. *Id.*; Farnaz Fassihi & David E. Sanger, *Iranians Cite Progress in Talks, but a Marathon Session Produces No Deal*, N.Y. TIMES (Feb. 26, 2026), <https://www.nytimes.com/2026/02/26/world/middleeast/iran-us-talks.html>. Mediator Oman stated the day before the start of the war that Iran had agreed to zero stockpiling of any uranium and to degrade current stockpiles into fuel. *Mediator Oman Hails ‘Breakthrough’ in US-Iran Nuclear Talks*, LE MONDE (Feb. 27, 2026), <https://perma.cc/A99R-YDHY>.

actually originated from Israel, stating, “the imminent threat was that we knew that if Iran was attacked [by Israel]— and we believe they would be attacked – that they would immediately come after us.”¹⁴⁹ Separately, he stated the necessity of the war was born from concerns that “in about a year or a year and a half” Iran would have too “many short-range missiles [and] drones.”¹⁵⁰

These rationales are both problematic and non-reflective of a reasonable imminency exception to the Declare War Power. First, an ally’s military actions do not allow the President to engage in war absent congressional authorization. The legislative history of the North Atlantic Treaty and its deliberate rejection of an imminency standard, even in cases of collective self-defense, reflects the poor legal basis of such a justification. During the negotiation and ratification of the treaty, it was concluded that Article V’s commitment to assist an attacked NATO ally includes the phrase “such action as it deems necessary” so as not to require the United States to enter into a war without congressional authorization.¹⁵¹ It is important to note that the United States does not have a defense treaty with Israel. Secondly, citing potential expansion of short-range military capabilities well over a year in the future is far from imminent under the *Caroline* Test.¹⁵² While the Iraq Memo’s test effectively rejected a temporal constraint on imminency, Yoo based his test on the risk of a WMD attack,¹⁵³ which, by all accounts, is not at issue in the war with Iran.¹⁵⁴ Additionally, Yoo’s test factors in “whether diplomatic alternatives are practical,”¹⁵⁵ which, given the promising developments of the negotiations in Switzerland,¹⁵⁶ further undermines an imminency exception.

Both the House and Senate held votes on their respective WPR resolutions the following week, but were unable to secure sufficient votes to end the operation, let alone the supermajority required to overturn an expected presidential veto.¹⁵⁷ Within seventy-two hours of the start of the war, over a dozen countries had been dragged into the war, resulting in significant casualties among civilians and U.S. military personnel across the region. The casualties, risks of prolonged conflict, and regional destabilization resulting from the present framework allow the

149. Secretary of State Marco Rubio Remarks to Press (Mar. 2, 2026), <https://perma.cc/FTF4-987T>.

150. *Id.*

151. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; see KAREN SOKOL, CONG. RSCH. SERV., LSB11256, THE NORTH ATLANTIC TREATY: U.S. LEGAL OBLIGATIONS AND CONGRESSIONAL AUTHORITIES 2 (2025).

152. Iraq Memo, *supra* note 46, at 180 (“necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment of deliberation” (quoting Letter from Daniel Webster, Sec’y of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841) (citation omitted))).

153. *Id.* at 183, 195.

154. U.S. intelligence agencies in 2025 concluded that Iran is “not building a nuclear weapon and that Khamenei has not reauthorized the nuclear weapons program he suspended in 2003.” OFF. OF THE DIR. OF NAT’L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 26 (2025), <https://perma.cc/Y2QY-TVXM>.

155. Iraq Memo, *supra* note 46, at 194.

156. See 2026 Iran WPR, *supra* note 147; Fassihi & Sanger, *supra* note 148; LE MONDE, *supra* note 148.

157. Caitlin Yilek & Kaia Hubbard, *Senate Rejects Attempt to Rein in Trump’s Power to Wage War on Iran*, CBS (Mar. 4, 2026), <https://perma.cc/M4X8-VYHP>.

President to start a war absent either evidence of the claimed imminent threat or congressional authorization or consultation.

On September 2, 2025, the Trump administration announced that it had launched a military strike against alleged drug traffickers off the Venezuelan coast, claiming it represented an “immediate threat to the United States.”¹⁵⁸ A few weeks later, the Trump administration sent a confidential WPR report to Congress explaining that the United States is in a formal “armed conflict” with drug cartels, specifically Tren de Aragua (“TdA”), whose smuggling operations “constitute an armed attack against the United States,” asserting the strikes were in self-defense.¹⁵⁹ However, the report notes that the strikes were not isolated acts of self-defense, but part of a sustained, active conflict.¹⁶⁰ The stated aims of the operations are undermined by the fact that the routes being attacked are not used to traffic to the United States, Venezuela is not a major supplier of fentanyl or cocaine, and TdA, per the Trump administration’s own admission, is comprised of decentralized small cells “focus[ed] on low-skill criminal activities.”¹⁶¹ Even if one were to accept the absurd notion that drug trafficking is tantamount to an armed attack on the United States, a sustained Article II war born from self-defense is a direct contradiction of over two centuries of precedent going back to America’s first military conflict in 1789.

Fears that the Venezuela-Caribbean operations, since dubbed Operation Southern Spear, could escalate into an outright war with the Venezuelan state proved true. It is important to note that Venezuela had not attacked nor had plans to attack the United States. The week before Southern Spear’s section 5(b) clock expired on November 4, 2025, Donald Trump said in a press briefing that he did not plan on seeking a declaration of war on Venezuela or TdA, but “we’re just going to kill people.”¹⁶² While he said he would notify Congress when operations on Venezuelan

158. John Hudson, Samantha Schmidt & Alex Horton, *Trump Ordered Strike on Suspected Drug Boat to Send a Message, Rubio Says*, WASH. POST (Sep. 3, 2025), <https://perma.cc/PM4S-JZKP> (quoting Secretary of State Marco Rubio).

159. The designation effectively would allow the Trump administration to target suspected cartel members with lethal strikes, indefinite detention without trial, and military court prosecution. Charlie Savage & Eric Schmitt, *Trump “Determined” the U.S. Is Now in a War with Drug Cartels, Congress Is Told*, N.Y. TIMES (Oct. 2, 2025), <https://perma.cc/VHU5-8XUG>. Since September 2, the Trump administration has killed at least 100 people as part of this “conflict” as of this writing. Joe Walsh, *U.S. Strikes 2 More Alleged Drug Boats in Pacific, Bringing Total Death Count to Over 100*, CBS (Dec. 18, 2025), <https://perma.cc/7U8R-EF42>.

160. Tara Copp & Noah Robertson, *U.S. Kills 4 Alleged Drug Smugglers Near Venezuela, Hegseth Says*, WASH. POST (Oct. 3, 2025), <https://perma.cc/5FNQ-PN9F>; see also Jeremy Chin, Margaret Lin, Aidan Arasasingham & Marie Miller, *Timeline of Boat Strikes and Related Actions*, JUST SEC. (June 17, 2026), <https://perma.cc/43XD-CEH5> (tracking 64 strikes and 210 killed as of writing).

161. Terrence McCoy, Ana Vanessa Herrero & Samantha Schmidt, *Officials, Locals Undercut Trump Claims About Venezuela Drug Boats*, WASH. POST (Oct. 20, 2025), <https://perma.cc/LNC5-LD49>; John Haltiwanger, *Three Key Questions About Trump’s War Against Drug Boats*, FOREIGN POL’Y (Oct. 23, 2025), <https://perma.cc/3EJL-9VN9>; NAT’L INTEL. COUNCIL, SOCM 2025-11374, VENEZUELA: EXAMINING REGIME TIES TO TREN DE ARAGUA (2025), <https://perma.cc/JA24-N27N>.

162. Adam Cancryn, Avery Schmitz & Natasha Bertrand, *Trump Insists He Can Strike Alleged Drug Traffickers Without Congress Declaring War*, CNN (Oct. 23, 2025), <https://perma.cc/SHN3-QBVC>.

land start,¹⁶³ Trump stated his strong belief that Congress will not resist him.¹⁶⁴ Following the January 3 invasion, Congress, for its part, lacked the political will to assert its exclusive war powers against such constitutional violations.¹⁶⁵ Further, the operation left the Maduro regime, minus Maduro himself, in power with Trump's expectation that it would bend the knee. However, outstanding questions on the regime's compliance with Trump's satisfaction keep the specter of another invasion looming on the horizon.¹⁶⁶ A follow-up invasion to enforce Trumpist policy goals maintains the risks of open-ended durations, including devolution into a quagmire with escalatory risks increasing the longer U.S. forces are deployed in Venezuela.¹⁶⁷

The *Prize Cases* Court recognized that the President is both "authorized [and] bound to resist force by force" by the Constitution without waiting for special legislative authority when facing an invasion by a foreign nation or rebellion.¹⁶⁸ This self-defense holding does not extend to drug trafficking and certainly could not be placed on equal footing with al-Qaeda and ISIS. The OLC has reportedly created a memorandum justifying Operation Southern Spear, but it has not been published.¹⁶⁹ The classified opinion reportedly argues that the strikes serve an important national interest and do not meet the constitutional threshold of "war."¹⁷⁰ Additionally, it reportedly asserts a self-defense justification through claims that the cartels are using drug proceeds to finance violence and extortion in the United States.¹⁷¹ The opinion also reportedly includes an expansive secret list of cartels that the President is justified in using deadly force against, including many not designated as foreign terrorist

163. Trump announced plans on October 24, 2025, to strike cocaine facilities and trafficking routes inside Venezuela. Alayna Treene, Kylie Atwood & Katie Bo Lillis, *Trump Considering Plans to Target Cocaine Facilities Inside Venezuela, Officials Say*, CNN (Oct. 24, 2025), <https://perma.cc/4Q8T-8Q3Y>.

164. Cancryn et al., *supra* note 162. Several Republican Members of Congress have expressed concerns about these operations. Rebecca Schneid, *Republicans Are Starting to Speak Out Against Trump's Boat Bombing Campaign*, TIME (Oct. 27, 2025), <https://perma.cc/96HM-WE5J> (citing statements by Senators Susan Collins (R-Me.), Mike Rounds (R-S.D.), Thom Tillis (R-N.C.), James Lankford (R-Okla.), Rand Paul (R-Ky.), and Lisa Murkowski (R-Alaska)).

165. Jason Breslow, *Senate Republicans Block Venezuela War Powers Resolution*, NPR (Jan. 14, 2026), <https://perma.cc/7U7S-5WLY>.

166. On June 12, 2026, U.S. Southern Command conducted a lethal airstrike killing TdA leader Niño Guerrero with Venezuelan military support. Deepa Shivaram & Elissa Nadworny, *U.S. Forces Kill Alleged Tren de Aragua Leader With Venezuela Cooperation*, NPR (June 13, 2026), No WPR report or legal rationale has been published on the strike at the time of writing.

167. For example, after a twenty-year war, the United States military failed to effectively disrupt the Taliban's opium operations. Craig Whitlock, *Overwhelmed by Opium*, WASH. POST (Dec. 9, 2019), <https://perma.cc/6DWC-Z9MM>.

168. 67 U.S. 635, 668 (1863).

169. The 2011 Libya Memo was published within two weeks of its creation. Libya Memo, *supra* note 100; Sarah Harrison & Mark Nevitt, *The Caribbean Strikes and the Collapse of Legal Oversight in U.S. Military Operations*, JUST SEC. (Oct. 23, 2025), <https://perma.cc/Q45P-LXCD>.

170. Ellen Nakashima & Noah Robertson, *Trump Administration Tells Congress War Law Doesn't Apply to Cartel Strikes*, WASH. POST (Nov. 1, 2025), <https://perma.cc/ZT5W-8UU2>.

171. Reporting has also indicated that the classified memo provides legal immunity for alleged war crimes committed by U.S. troops in carrying out these strikes. Ellen Nakashima, Dan Lamothe, John Hudson & Noah Robertson, *U.S. Troops Not Liable in Boat Strikes, Classified Justice Dept. Memo Says*, WASH. POST (Nov. 12, 2025), <https://perma.cc/E55X-L3HR>.

organizations.¹⁷² Sarah Harrison, a former Defense Department associate general counsel, interpreted the OLC opinion as allowing the President unilateral discretion “to prosecute a war far broader than what Congress authorized after the attacks on 9/11.”¹⁷³ Further, as the sixty-day clock expired, the Trump OLC asserted before a small group of lawmakers that the WPR does not apply to the operations as they do not meet the definition of “hostilities.”¹⁷⁴

The OLC’s lack of transparency leaves Congress and experts guessing at the extent to which the Executive is interpreting its war powers and whether the Executive truly believes it is acting in “self-defense” or merely deceiving Congress and the American public for imperial warmaking without oversight.

The steady expansion of the Executive’s “self-defense” authority from its narrow constitutional and historical roots in repelling sudden attacks to its modern invocation as justification for preemptive strikes and even sustained conflicts represents a profound departure from the Framers’ intent, eroding Congress’s constitutional war powers and threatening to normalize unilateral presidential warmaking under the guise of national defense.

B. Historical Gloss and the Constitutional War Threshold

A notable issue in assessing the constitutionality of presidential uses of force is determining whether a deployment is a war measure or something less than war in the constitutional sense. Whether an action falls in either category is largely determined by a historical gloss standard applied by the executive branch in the face of congressional and judicial silence.

The “high water mark” for executive interpretations of uses of force not reaching a constitutional war threshold is President Harry S. Truman’s military intervention in the Korean War.¹⁷⁵ When North Korea invaded South Korea in 1950, Truman did not seek congressional authorization to join the war. While Congress would continue to appropriate funds for the response, some Members criticized the action as unconstitutional.¹⁷⁶ The State Department responded by defending Truman’s action as an international police action to enforce United Nations (“UN”) Security Council resolutions

172. Natasha Bertrand & Zachary Cohen, *Exclusive: Classified Justice Department Opinion Authorizes Strikes on Secret List of Cartels, Sources Say*, CNN (Oct. 7, 2025), <https://perma.cc/GNL6-W4Q3>. Observers have expressed concerns that these strikes are extrajudicial killings that violate Due Process rights, as drug trafficking is a noncapital offense in the United States and guilt is not being determined by a court. See Press Release, Wash. Off. on Latin Am., Lethal U.S. Military Strike on Alleged Drug Traffickers Sets a Dangerous Precedent in the “War on Drugs” (Sep. 3, 2025), <https://perma.cc/CY8E-J9KT>; Press Release, N.Y. City Bar Ass’n, Unlawful Attacks on Venezuelan Vessels (Oct. 6, 2025), <https://perma.cc/7KUG-ZG6F>.

173. Bertrand & Cohen, *supra* note 172.

174. *Id.* An unnamed Trump official separately commented that the WPR does not apply as “even at its broadest, . . . [it] has been understood to apply to placing U.S. service-members in harm’s way,” noting the current low risk to U.S. military personnel. *Id.*

175. See Matthew C. Waxman, *War Powers Reform: A Skeptical View*, 133 YALE L.J.F. 776, 779 (2024).

176. See, e.g., 96 CONG. REC. 9319–23 (1950) (Senator Robert Taft criticizing Truman’s “de facto war . . . without consulting Congress and without congressional approval” as a “complete usurpation.”).

despite Truman having ordered the use of force before any UN authorization,¹⁷⁷ citing historical examples of deployments of U.S. forces abroad absent authorization.¹⁷⁸ There are two inherent issues with the rationale of the State Department memorandum. First, it relies on historical gloss, which it applies selectively,¹⁷⁹ and ignores whether or not the prior instances were constitutional.¹⁸⁰ Second, its examples are either deployments in defense of U.S. citizens or upon invitation of the host country to defend against a potential threat to the U.S. homeland.¹⁸¹ Certainly, none of the cited examples remotely rose to a years-long military conflict involving nearly two million Americans deployed and over 137,000 American casualties. However, the rationale goes further. Citing UN advocate Senator Warren Austin (R-Vt.), the Truman State Department “recognized that a breach of peace anywhere on earth . . . is an attack upon us.”¹⁸² Such an expansive view of exceptions to the Declare War Clause is rife with the potential for (and history of) abuse.

There is some constitutional basis for an international police action found within the Executive Vesting Clause — the President’s power and responsibility to enforce the laws of the United States.¹⁸³ However, this authority is derivative

177. See Mary L. Dudziak, *The Gloss of War: Revisiting the Korean War’s Legacy*, 122 MICH. L. REV. 149, 174–75 (2023).

178. Authority of the President to Repel the Attack in Korea (July 3, 1950), *reprinted in* 23 DEP’T ST. BULL. 173 (1950) (citing 87 CONG. REC. 5930–31 (1941)) [hereinafter Korea Memo]. Truman’s initial use of force occurred before the Security Council authorized any intervention. See Dudziak, *supra* note 177, at 153.

179. For example, in 1858, James Buchanan sided with Congress in condemning Commodore Hiram Paulding in his arrest of American adventurer-turned-Nicaraguan President William Walker for the latter’s violation of the Neutrality Act of 1795. In what could normally be interpreted as a potential precedent for international police action on foreign soil, Buchanan and Congress instead largely held the view that Paulding’s actions violated the Declare War Power. CONG. GLOBE, 35th Cong., 2d Sess. 216 (1859). There was general agreement that Walker’s actions were also illegal under the Neutrality Act; however, his newfound role as a foreign sovereign, albeit a disputed one, complicated the war powers debate. See John M. Bass, *William Walker*, 3 AM. HIST. MAG. 207, 213, 217, 220 (1898), <https://perma.cc/RAD7-MGRY>. Southerners were generally supportive of William Walker as there was a view he would annex Nicaragua to the United States as a slave state. See Elliot Andrew Anderson, *Filibustering to the Forefront of National Attention*, 1 IOWA HIST. REV. 83, 84 (2007).

180. Justice Felix Frankfurter argued in his *Youngstown* concurrence that an executive’s actions could not be unconstitutional if there was unchallenged historic precedent. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”). However, in 1969’s *Powell v. McCormack*, the Supreme Court ruled that an unconstitutional action is still unconstitutional even if it has historic precedent. 395 U.S. 486, 546–47 (1969) (“That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 461–68 (2012) (rejecting executive arguments of congressional acquiescence and emphasizing the role of congressional oversight short of legislation).

181. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 100 (3d ed. 2013) (citing E.S. Corwin, *The President’s Power*, NEW REPUBLIC (Jan. 29, 1951)).

182. *Id.* at 176 (quoting 91 CONG. REC. 8064–65 (1945) (statement of Senator Warren Austin)).

183. See U.S. CONST. art. II, § 1, cl. 1.

of laws passed by Congress. In the early nineteenth century, Congress enacted legislation authorizing force to punish piratical crimes, and early American presidents recognized the Declare War Clause's boundaries for such actions.¹⁸⁴ In 1824, for example, Commodore David Porter attacked a Puerto Rican town while conducting anti-piracy operations absent fresh pursuit. Taking the issue seriously, the Monroe Department of the Navy court-martialed him for contravening the Constitution, on which he was found guilty. While the charge did not specify how he contravened the Constitution, Porter's own defense assumed it referred to Congress's Declare War Power.¹⁸⁵ However, President Monroe soon went to Congress to amend its 1819 anti-piracy statute to allow landings not in fresh pursuit and to permit attacks on private property in Spanish territories in reprisal.¹⁸⁶ Congress rejected the proposal as both its supporters and opponents recognized it as a war measure against Spain.¹⁸⁷ Other examples of such police actions include the United States assisting Canada in putting down a U.S.-based rebellion in the 1838 Patriot War pursuant to the Neutrality Act of 1794,¹⁸⁸ securing the release of Martin Koszta in 1853,¹⁸⁹ anti-bandido excursions into Mexico in the late nineteenth century,¹⁹⁰ and the seventy-two instances of deployments to protect Americans and embassies abroad during unrest prior to 1945.¹⁹¹

However, this history does not inherently reflect a constitutional precedent for executive unilateralism. As mentioned, actions like anti-piracy and neutrality enforcement were derived from Acts of Congress. In essence, under such uses of force, the President's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹⁹² Other actions, such as the defense of citizens and embassies abroad, can be reasonably derived from the Executive Vesting and CIC Clauses.¹⁹³ Historical gloss arguments put forth by the Truman administration and its congressional allies fall short because they conflate all preceding unilateral presidential uses of force and fail to consider whether those uses were constitutional.¹⁹⁴ As reflected by the Supreme Court in

184. See Act of March 3, 1819, ch. 77, 3 Stat. 510.

185. ROBERT BEALE, A REPORT ON THE TRIAL OF COMMODORE DAVID PORTER 7, 3* (1825).

186. See *id.*; S. 19, 18th Cong. (1825).

187. See U.S. CONG., 6 AMERICAN STATE PAPERS: FOREIGN RELATIONS 490 (1998); 1 REG. DEB. 303–04 (1824) (statement of Senator Littleton Waller Tazewell); *id.* at 387–88 (statement of Senator Martin Van Buren).

188. See Patrick Lacroix, *Choosing Peace and Order: National Security and Sovereignty in a North American Borderland, 1837–42*, 38 INT'L HIST. REV. 943, 948–49 (2016), <https://doi.org/10.1080/07075332.2015.1070892>.

189. See Curtis A. Bradley, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 714–16 (2016).

190. See *The Mackenzie Raid*, N.Y. TIMES, June 22, 2019, at E37.

191. See TORREON & PLAGAKIS, *supra* note 90.

192. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

193. See *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.D.N.Y. 1860) (arguing that the President may be required to ensure the "protection of the lives or property of the citizen" abroad from "[a]cts of lawless [sic] violence . . . [which] cannot be anticipated and provided for; and the protection . . . require[s] the most prompt and decided action."); *In re Neagle*, 135 U.S. 1, 64 (1889); *id.* at 84–85 (Lamar, J., dissenting); Act of Aug. 4, 1854, 10 Stat. 594.

194. See Dudziak, *supra* note 177, at 178.

Powell v. McCormack, “an unconstitutional action [that] has been taken before surely does not render that same action any less unconstitutional at a later date.”¹⁹⁵ Likewise, proponents of this view fail to consider that Members of Congress may choose not to vote for denouncing or denying funding for an unauthorized use of force for reasons beyond support for such action, such as concerns for creating a strategic vacuum that could worsen regional instability or humanitarian crises,¹⁹⁶ as well as reticence to take political responsibility for a conflict.¹⁹⁷ As such, the lack of congressional denial is not synonymous with authorization. Further, authorization by some international authority is not a constitutional substitute for congressional authorization.¹⁹⁸

Nonetheless, Truman was able to establish this war powers precedent through Congress’s relative silence. Congress’s (in)action was due to the permeation of the Second Red Scare throughout American politics and to the influential Senator Arthur Vandenberg (R-Mich.), an isolationist-turned-Truman Doctrine advocate. While some Members of Congress from the President’s party vocally offered support on the floor, citing the same historical gloss as the State Department, the support of a leading figure in the political opposition, Vandenberg, was instrumental in shaping the bipartisan internationalist foreign policy.¹⁹⁹

However, bipartisan support for Truman’s so-called police action was not absolute in Congress. Representative Frederic Coudert, Jr. (R-N.Y.), lamented “how devastating a precedent they have set in remaining silent while the President took over the powers specifically reserved for Congress.”²⁰⁰ Other Members of Congress, such as Senator Robert Taft (R-Ohio) and Representative Vito Marcantonio (ALP-NY), vocally opposed Truman’s action at the outset on constitutional grounds.²⁰¹

195. 395 U.S. 486, 546–47 (1969).

196. See, e.g., 145 CONG. REC. 4284 (1999) (statement of Rep. Henry Hyde (R-Fl.) opposing withdrawal legislation during the Kosovo War on the basis that it would weaken NATO’s credibility and worsen regional stability and the humanitarian crisis).

197. See, e.g., *id.* at 7801 (“I think there are too many Members in this House who have enjoyed the fact that they have delivered the responsibility to the President . . . They want the President to do the dirty work, but they do not want the Congress to stand up and decide one way or the other.”) (statement of Rep. Ron Paul (R-Tex.)).

198. Examples include the Korean War, quarantine of Cuba during the Cuban Missile Crisis, and the Bosnian intervention. See Patrick Hulme, *No Substitute for the Real Thing: International and Congressional Use of Force Authorizations*, LAWFARE (Oct. 15, 2019), <https://perma.cc/B2AK-6FFG>.

199. Compare Korea Memo, *supra* note 178, at 174 (citing a “tabulation of 85 instances” of use of force without congressional authorization in the *Congressional Record* for July 10, 1941), with 96 CONG. REC. 9229 (1950) (statement of Senator Scott Lucas (D-Ill.)) (“[H]istory . . . show[s] that on more than 100 occasions in the life of this Republic the President as Commander in Chief has ordered the fleet or the troops to do certain things which involved the risk of war.”). Prior to the Korean War, Truman wanted to send U.S. forces to Palestine in 1948 as part of a UN force, which Vandenberg supported, although no forces would end up being sent. *Truman Sees Right to Dispatch Troops; Cites Other Military Missions in Answer to Question on Palestine Force*, N.Y. TIMES (Apr. 23, 1948), <https://perma.cc/C48L-5DG5>.

200. SCHLESINGER, *supra* note 46, at 135 (quoting Rep. Frederic Coudert, Jr.). Coudert introduced a resolution at the start of the 82nd Congress to prevent U.S. involvement in wars abroad absent Congressional approval. H.R. Res. 9, 82d Cong. (1951). Senator Ken Wherry (R-Neb.) introduced a mirror resolution in the Senate a few days later. S. Res. 8, 82d Cong. (1951).

201. See FISHER, *supra* note 181, at 100.

Skepticism in Congress towards Truman's executive unilateralism and foreign policy emerged more prominently in the "Great Debate" in the early 1950s as Vandenberg became incapacitated due to illness.²⁰²

While questions on Korea permeated the chambers, the crux of the debate focused on Truman's proposed enlargement of the U.S. military contingent in Europe to deter potential Soviet attacks on the fledgling North Atlantic Treaty Organization ("NATO"). Opponents in Congress argued that Truman was usurping congressional war powers with these moves. While Truman premised his Korean intervention on UN authorization and his assertion that the war was not a war in the constitutional sense, he argued that his European deployments were an extension of the CIC Power to deploy forces where he saw fit.²⁰³ Senator Taft countered with his concerns that the unauthorized building up of the United States' European forces was constitutionally problematic "because the fact that these countries are threatened by an actual attack is the very justification and reason for sending the troops."²⁰⁴ Controversy surrounding the force enlargement was in large part due to questions on the interpretation of Article V of the recently ratified North Atlantic Treaty. The United States had deliberately sought the inclusion of the phrase "such action as it deems necessary" into Article V so as to not require the United States to enter into a war without congressional authorization, even in collective self-defense.²⁰⁵ Opponents to Truman's troop movements concluded that the presence of U.S. forces would mean a Soviet attack on Western Germany, for instance, would hit or threaten U.S. forces there, thereby rendering their approval moot.²⁰⁶ The Truman administration, however, contended that its goal in these deployments was to "deter the aggressors from attacking Europe."²⁰⁷ In a joint hearing before Congress, Secretary of State Dean Acheson asserted that the President "possessed unique constitutional and precedential authority to send troops abroad . . . without congressional approval."²⁰⁸ In the end, on both Korea and Europe, congressional opposition failed to garner sufficient political strength to impose any meaningful restraint on executive unilateralism.

In stark contrast to Truman, President Dwight D. Eisenhower, himself a general, did not embrace his predecessor's expansive view of the CIC Power. He had been opposed to Truman's so-called police action in Korea, believing it set a poor

202. About 120 Republican congressmen and several Democrats supported a declaration in February 1951 demanding the full participation and approval of Congress on U.S. foreign policy. *Troops to Europe*, in CQ ALMANAC, <https://perma.cc/MEL8-L8T6>.

203. See Matthew Waxman, *NATO and War Powers: Remembering the "Great Debate" of the 1950s*, LAWFARE (July 11, 2018), <https://perma.cc/2FTR-FXV2>.

204. ROBERT TAFT, A FOREIGN POLICY FOR AMERICANS 34 (1951).

205. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; see SOKOL, *supra* note 151, at 2.

206. This was Truman's rationale, believing the assurance of U.S. co-belligerency in such a conflict would deter Soviet aggression. See Waxman, *supra* note 203.

207. *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings on S. Res. 8 before the S. Comm. on Foreign Rels. and S. Comm. on Armed Servs.*, 82d Cong. 78 (1951) (statement of Secretary of State Dean Acheson).

208. *Id.* at 88–93.

precedent for war powers.²⁰⁹ He also believed that congressional authorization signaled greater readiness to potential enemies and, in effect, enhanced deterrence.²¹⁰ This is illustrated by his approach to Communist China. After the Chinese Communist forces gained ground on the Kuomintang in 1948, Congress was generally far more in favor of supporting the Kuomintang than Truman.²¹¹ After the Kuomintang government retreated to Formosa (now Taiwan), Eisenhower sought Congress's advance authorization to defend the island in the event of a Maoist invasion, resulting in the 1955 Formosa Resolution.²¹² While Eisenhower's views relatively favored Congress's war powers, he also favored broad grants of authority in AUMFs. The Formosa Resolution lacked a sunset and was very broad in its grant of military force. Two years later, a divided Congress granted him another broad preemptive AUMF without a deadline to fight against Communist forces in the Middle East.²¹³

In determining whether to adhere to the Truman or Eisenhower precedent, later administrations would decisively favor the former and use the Korean War standard to justify their own unilateral presidential warmaking.²¹⁴ From the Kennedy administration onwards, the OLC and State Department would cite the Korean War as evidence of use-of-force circumstances that did not qualify as war.²¹⁵ Additionally, successive administrations would assert from this precedent that unilateral presidential warmaking could be justifiable where the United States

209. See PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER (1954) 306 (1959) (“[T]here is going to be no involvement of America in war unless it is a result of the constitutional process that is placed upon Congress to declare it.”); see Fisher, *supra* note 181, at 116–17; see also *Applying the War Powers Resolution to the War on Terrorism: Hearing Before the Subcomm. on the Const., Fed., and Prop. Rts. of the S. Comm. on the Judiciary*, 107th Cong. 15 (2002) (statement of Louis Fisher) (explaining Eisenhower thought Truman’s decision was “a constitutional mistake”).

210. Matthew Waxman, *Remembering Eisenhower’s Middle East Force Resolution*, LAWFARE (Mar. 9, 2019), <https://perma.cc/SB2S-Q9JP>.

211. Truman was concerned that American intervention on behalf of the Kuomintang risked Soviet intervention on behalf of Maoist forces. SCHLESINGER, *supra* note 46, at 130. In 1945, Truman had deployed 110,000 U.S. forces to China to aid in the stabilization and peace process shortly after Japan surrendered. Some parts of Congress took issue, noting the absence of American lives and property to protect in North China. A pressure campaign led by Representative Mike Mansfield (D-Mont.) in conjunction with several House resolutions forced Truman to adopt a China policy that largely mirrored the resolutions provisions. James R. Compton, *Marines and Mothers: Agency, Activism, and Resistance to the American North China Intervention, 1945–46*, 8 MARINE CORPS HIST. 21, 39 (2022); Harry S. Truman, Statement by the President: United States Policy Toward China (Dec. 15, 1945) (on file with Am. Presidency Project, <https://perma.cc/R894-PWFX>).

212. Ch. 4, 60 Stat. 7 (1955).

213. Pub. L. No. 85-7, 71 Stat. 5 (1957); see Waxman, *supra* note 210.

214. See Dudziak, *supra* note 177, at 196–203.

215. See, e.g., Legal and Practical Consequences of a Blockade of Cuba, 1 Op. O.L.C. Supp. 486 (1962); Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP’T ST. BULL. 474 (1966); Effect of a Repeal of the Tonkin Gulf Resolution, 1 Op. O.L.C. Supp. 499 (1970); Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Op. O.L.C. Supp. 313 (1970); 1980 WPR Memo, *supra* note 46; Iraq Memo, *supra* note 46.

had an interest — an arbitrary standard that is nigh-impossible not to meet.²¹⁶ In a 1965 memorandum from Attorney General Nicholas Katzenbach to President Lyndon B. Johnson, Katzenbach argued that unilateral use of force is justified so long as it does not cross a constitutional threshold into Congress's Declare War Power.²¹⁷ Katzenbach interpreted the Declare War Power as "the power to confer substantially unlimited authority to use the armed forces to conquer and, if necessary, subdue a foreign nation."²¹⁸ Absent the use of such "substantially unlimited" authority, he concluded unilateral presidential use of force is legally sustainable based on historical precedent.²¹⁹ In other words, warmaking is not warmaking even if it contains "acts of war" if it is not "all-out war."²²⁰ His interpretation of the Korean War as not an "all-out war" is telling of how impossibly high a bar the Executive was setting for the limits of the CIC Power.

The 1973 passage of the WPR did not stop this trend. In fact, each successive presidency has used the statute's text and gaps to justify its warmaking without congressional authorization. Where the WPR recognized warmaking powers only pursuant to a declared war, specific statutory authorization, or a national emergency created by an attack,²²¹ the Executive inserted its own interpretation that it is also authorized to act under the gloss of history.²²² Each successive act of congressional silence in the face of presidential warmaking since the WPR has strengthened the Executive's interpretation of its unilateral war powers. In its

216. Curtis Bradley & Jack Goldsmith, *OLC's Meaningless "National Interest" Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018), <https://perma.cc/2GGQ-NGXU>; April 2018 Airstrike Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 48–50 (May 31, 2018) [hereinafter Syria Memo] (citing a non-exhaustive list of national interests "that have supported sending U.S. forces into harm's way:" protection of U.S. persons and property, 1980 WPR Memo, *supra* note 46, at 187; "assistance to allies," *id.* at 187–88; "support for the United Nations," Authority to Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6, 11 (1992) [hereinafter Somalia Memo], "promoting regional stability," Haiti Memo, *supra* note 99, at 32; and "mitigating humanitarian disasters," Authority to Order Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 101–06 (Dec. 30, 2014)); *see also* Somalia Memo, *supra* at 11–12 ("Against the background of this repeated past practice under many Presidents, this Department and this Office have concluded that the President has the power to commit United States troops abroad for the purpose of protecting important national interests."). OLC admits that the broadness of its listed potential national interests "give[s] the President a great deal of discretion." Syria Memo, *supra* note 216, at 48. Further, the President is not legally bound by OLC's advice and OLC is not well-equipped to conduct the fact-finding necessary to properly vet presidential assertions of national interest. *See* Bradley & Goldsmith, *supra*.

217. Katzenbach Memo, *supra* note 46, at 751, 753 (distinguishing the President's proposed course of action from an "all-out war," which would require congressional authorization).

218. *Id.* at 752.

219. *Id.* The Katzenbach Memo built upon the Korea Memo's stance that a "police action" is not a "war." *See* Korea Memo, *supra* note 178, at 174; *see also* Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Op. O.L.C. Supp. 313, 317 (May 14, 1970) ("Since judicial precedents are virtually non-existent on this point, the question is one which must of necessity be decided by historical practice. Viewed in this light, congressional acquiescence in President Truman's action furnishes strong evidence that this use of his power as Commander in Chief was a proper one.").

220. *See* Katzenbach Memo, *supra* note 46, at 752–53.

221. Pub. L. No. 93-148, §§ 2(c), 8(d)(2), 87 Stat. 555, 555, 558 (1973).

222. Libya Memo, *supra* note 100, at 28–30; *see* Ingber, *supra* note 100, at 758.

2011 Libya Memo, the OLC reasoned that increased instances of unilateral war-making without congressional authorization since 1980 alongside “200 years of [historical] practice . . . is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding . . . of their respective roles and responsibilities with respect to national defense.”²²³ It further argues that the WPR implicitly recognizes this authority.²²⁴

In an attempt to clarify that unilateral uses of force did not meet a constitutional threshold for war, the OLC put forth the nature, scope, and duration test in the Haiti Memo in 1994.²²⁵ The test recognized certain outer boundaries of action that fall below “war,” including whether the use of force had “the full consent of the legitimate government of the country involved,” “did not involve the risk of major or prolonged hostilities or serious casualties,” a limited risk of resistance, and a lack of “extreme use of force, as for example preparatory bombardment.”²²⁶ This test and its outer limits were but a brief departure for the executive branch. Since then, it has been eroded considerably and has been used to justify the 2011 Libya bombing campaign, 2018 Syria strikes, and the 2020 assassination of Iranian General Qassem Soleimani.²²⁷ For example, the 2018 Syria Memo paid no heed to the “consent” question of the Haiti Memo.²²⁸

With the 2011 Libya Memo, a two-prong test was presented justifying presidential use of force without congressional authorization if 1) it serves a “significant national interest,” and 2) it is not a “war” under the 1994 test.²²⁹ However, the second prong effectively reduced the nature, scope, and duration test to a singular point of exposing “U.S. military personnel to significant risk over a substantial period.”²³⁰ Further, the sole practical requirement for fulfilling the first prong is the President’s arbitrary determination.

The same opinion reasserted presidential use of force to “‘protect[] important national interests’ . . . even without specific prior authorization from Congress.”²³¹ In

223. Libya Memo, *supra* note 100, at 29.

224. *Id.* at 30.

225. Haiti Memo, *supra* note 99, at 173, 177–79.

226. *Id.* at 173, 177–79; *see* Ingber, *supra* note 100, at 755. The OLC applied this test the following year and determined that the deployment of ground forces for peacekeeping in Bosnia did not meet the constitutional threshold for “war,” noting a low risk for “extensive or sustained hostilities.” Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 332 (1995) [hereinafter Bosnia Memo].

227. *See, e.g.*, Ingber, *supra* note 100; January 2020 Airstrike in Iraq Against Qassem Soleimani, Op. O.L.C. (2020) [hereinafter Soleimani Memo], <https://perma.cc/4VQF-GSJ8>; Libya Memo, *supra* note 100; Syria Memo, *supra* note 216.

228. *Compare, e.g.*, Haiti Memo, *supra* note 99, at 173 (arguing that a deployment is not an “act of war” if it was made with the consent of the foreign government), *with* Syria Memo, *supra* note 216, at 39, 48–50 (addressing national interests and the scale of the operation). *See* Ingber, *supra* note 100, at 754–56. The 2011 Libya Memo likewise substitutes UN authorization for the Libyan government’s consent. Libya Memo, *supra* note 100, at 24–25.

229. *See* Erica H. Ma, *The War Powers Resolution and the Concept of Hostilities*, 13 NE. U. L. REV. 519, 533 (2021).

230. Libya Memo, *supra* note 100, at 31.

231. *Id.* at 28 (quoting the Somalia Memo, *supra* note 46, at 9); *see* Ma, *supra* note 229, at 547.

its 2020 justification of the assassination of General Soleimani, the OLC suggested that the President's ability to conduct military strikes outside of self-defense can be satisfied by a broad "national interest" standard.²³² Between 1973 and 2019, 105 reports were made to Congress pursuant to the WPR's forty-eight-hour reporting requirement. Only thirty-eight of the 105 alleged current or imminent "hostilities," nearly all of which (thirty-four) exclusively cited Article II.²³³ Half of the thirty-four relied on a "national interests" test for deployments beyond the historical exceptions of evacuations, rescues of U.S. nationals, and protection of U.S. embassies.²³⁴ As some legal scholars have indicated, the OLC often supports its justifications on the basis of historical gloss, asserting historical precedence through previous uses of force and older opinions asserting "protecting . . . American interests."²³⁵ These assertions are not accompanied by any criteria for qualifying interests or limiting principles. The OLC itself conceded in 2018 that "[t]hese interests . . . give the President a great deal of discretion."²³⁶

The Libya test was reportedly used in the classified opinion in the OLC's determination that the 2025 Caribbean-Venezuela boat strikes advance a significant national interest and do not meet the constitutional threshold for war.²³⁷ The extent to which the test was applied, and whether a more permissive test was applied instead, is unclear given OLC's obfuscation of its legal advice.

However, the Libya test seems to have been applied by OLC in its justification of the January 3, 2026, invasion of Venezuela. In its Venezuela opinion, OLC stated the "President may unilaterally order such an operation" as it "serves important national interests" and the President "reasonably conclude[s] that it does not rise to the level of war in a constitutional sense."²³⁸ In its determination of whether it could be considered a war, OLC acknowledged that a lethal strike on

232. Soleimani Memo, *supra* note 227, at 17; see Scott R. Anderson, *War Powers and the Return of Major Power Conflict*, 2024 U. CHI. LEGAL F. 1, 28 (2024), <https://perma.cc/XJ8G-WKAQ>.

233. TESS BRIDGEMAN, *PRESIDENTIAL PRACTICE AND THE USE OF ARMED FORCES ABROAD*, 1973-2019 (2020), <https://perma.cc/XNF7-W57N>.

234. *Id.*

235. Bradley & Goldsmith, *supra* note 216; Dudziak, *supra* note 178, at 199–203; see, e.g., Flying Students Memo, *supra* note 128, at 62; Korea Memo, *supra* note 178, at 177 ("[T]he continued existence of the United Nations . . . is a paramount United States interest."); Somalia Memo, *supra* note 216, at 9; Bosnia Memo, *supra* note 226, at 334 ("Historical practice reinforces . . . [that] the President may deploy United States forces here without express authorization to protect the national interests, even if the deployment is not without some risk."); Iraq Memo, *supra* note 46, at 152 ("[I]f the President were to determine that military action against Iraq would protect our national interests, . . . he would be acting consistently with the historical practice of the Executive Branch."); Libya Memo, *supra* note 100, at 27 ("Earlier opinions of this Office and other historical precedents establish the framework for our analysis.").

236. Syria Memo, *supra* note 216, at 48. There is also concern that the OLC is at risk of being reduced to a rubber stamp for presidential actions given eroding political insulation and otherwise being ill-equipped to properly assess presidential assertions of "national interest." See CNS REPORT, *supra* note 100, at 138–42, 151–52; Charlie Savage, *Trump Sidelines Justice Dept. Legal Office, Eroding Another Check on His Power*, N.Y. TIMES (Apr. 4, 2025), <https://perma.cc/E723-Z8BZ>.

237. See Nakashima & Robertson, *supra* note 170; Bertrand & Cohen, *supra* note 172.

238. Proposed War Department Operation to Support Law Enforcement Efforts in Venezuela, Op. O.L.C., slip op. at *2 (Dec. 23, 2025), <https://perma.cc/Y6M3-RPH8>.

Maduro could not be justified, as intelligence on his ties to cartels was contradictory.²³⁹ Further, based on this determination, OLC stated that the operation is not a military operation but “a law enforcement operation” with “robust military support.”²⁴⁰ Because of this and that U.S. forces were not likely to “suffer or inflict substantial casualties,” OLC concluded that it was not a constitutional war.²⁴¹ The casualty argument is problematic given that the absence of a meaningfully deterrent military force in the aggressed country effectively gives the President dictatorial authority to invade another sovereign state.²⁴² Additionally, the standard for “suffer[ed]” casualties, though undefined, is suggested to be impossibly high.²⁴³ However, this determination in part depended on assurances from the Trump administration that there were no contingent plans to engage in any “substantial or sustained operation,” including “using U.S. forces to occupy Venezuela.”²⁴⁴ Assurances that were contradicted by Trump himself in his January 3 press briefing.²⁴⁵

While not cited by OLC in its justification, public discourse references the 1989 invasion of Panama, Operation Just Cause, as a parallel. As has been noted by other legal scholars, the similarities end where the two sovereign heads of state, holding domestic power by force after losing elections, are arrested by an invading U.S. force on drug-related charges in U.S. courts.²⁴⁶ In 1980, OLC opined that only the FBI could conduct arrests abroad, but this opinion was quietly rescinded in the months leading up to Just Cause.²⁴⁷ Further, as U.S. forces built up in the country as tensions heightened in the late 1980s, the Reagan and subsequent George H.W. Bush administrations prepared for a possible invasion, citing General Manuel Noriega’s drug-related offenses as acts of aggression against the United States.²⁴⁸ Bush may very well have invaded unilaterally absent Panama’s declaration of war,

239. *Id.* at *9.

240. *Id.* at *7.

241. *Id.* at *13.

242. *See id.* at *14 (“Maduro may not currently have the capacity to engage in the kind of ‘significant armed resistance’ that is likely to lead to war in a constitutional sense.”).

243. *Id.* (“[E]ven the full loss of the strike force would [not] amount to the type of sustained casualties that would amount to a constitutional war.”).

244. *Id.* at *14–*15.

245. Donald Trump Discusses the Capture of Nicolás Maduro in Venezuela (Jan. 3, 2026), <https://perma.cc/K39F-MB9G> (“[W]e are ready to stage a second and much larger attack if we need to do so, so we were prepared to do a second wave if we needed to do so. We actually assumed that a second wave would be necessary, but now it’s probably not. The first wave, if you’d like to call it that, the first attack was so successful we probably don’t have to do a second, but we’re prepared to do a second wave, a much bigger wave, actually.”).

246. Katherine Yon Ebricht, *No Legal Basis for Invading Venezuela*, BRENNAN CTR. FOR JUST. (Jan. 6, 2026), <https://perma.cc/27A3-S3X2>; Bryan McKenzie, *Q&A: How Does the US Military Action in Venezuela Compare to the 1989 Events in Panama?*, UVATODAY (Jan. 9, 2026), <https://perma.cc/WUH2-83RD>.

247. Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163 (1989).

248. *See* Arturo Jimenez-Bacardi, *Imperial Prerogative: How the Panama Invasion and the “Barr Doctrine” Set the Stage for the Maduro “Snatch” Operation*, NAT’L SEC. ARCHIVE (Jan. 16, 2026), <https://perma.cc/G86E-KKXV>; David J. Scheffer, *Maduro’s Capture and International Law: The Noriega Precedent*, COUNCIL ON FOREIGN RELS. (Jan. 6, 2026), <https://perma.cc/N32K-B3TE>.

but the declaration allowed the administration to avoid infringing on the Declare War Power.

The war power activities and interpretations of successive administrations since 1945, in particular those of the Clinton administration, have been embraced by proponents of the Unitary Executive Theory as having effectively rendered the WPR a “dead letter.”²⁴⁹ Consequently, seventy-five years after the Korean War, contemporary executive interpretations of the CIC Power conform more closely to the Framers’ interpretations of a European monarch’s war powers than the executive interpretation of the Early Republic.²⁵⁰

V: RECOMMENDATIONS FOR CONGRESS

Congress’s failure to exercise its war powers in recent decades has created a dangerous precedent for militant presidencies. This power vacuum allows for a sitting president to unilaterally drag the United States into foreign conflicts not in the American interest. Congress may retroactively approve of a military strike through a commending resolution and continued appropriations, but such *faits accomplis* risk further abuse of the CIC Power. As such, Congress should consider legislative options to reclaim its constitutional war powers.

A. Amending the War Powers Resolution

While the passage of the WPR has failed to prevent unlawful presidential war-making, it has successfully compelled inter-branch communication through reporting requirements. The existence of the statute gives Congress a useful tool to compel oversight and forces the White House to expend valuable political capital to maintain its operations, which can, and has, resulted in compromises that allow a degree of congressional control.

Yet the WPR has been repeatedly abused by successive presidential administrations to provide pseudoconstitutional legal cover for executive uses of force without congressional assent. To reassert its exclusive authority to declare war, Congress should amend the statute to address its deficiencies and restore enforcement mechanisms.

1. Reporting and Consultation

Transparency requirements are a valuable tool for Congress to conduct oversight of executive war powers. Within the WPR, these requirements are set out in section 3’s consultation requirements and section 4’s reporting requirements.²⁵¹ Section 3’s requirement that “[t]he President in every possible instance shall consult

249. John Yoo, *Kosovo War Powers and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1674 (2000), <https://perma.cc/M297-456Y>; see Julian D. Mortenson, *Executive Power and the Discipline of History*, 78 UNIV. CHI. L. REV. 377, 429–33 (2011), <https://perma.cc/W2PX-EEKD>.

250. See Jefferson, *supra* note 1; Letter from Arthur St. Clair to George Washington, *supra* note 2; Hall & Prakash, *supra* note 2; CHARTER OF MARYLAND, *supra* note 8; CHARTER OF CONNECTICUT, *supra* note 8; CHARTER OF GEORGIA, *supra* note 8.

251. WPR, Pub. L. No. 93-148, §§ 3, 4, 87 Stat. 555, 555–56 (1973).

with Congress before introducing United States Armed Forces into hostilities”²⁵² has been commonly circumvented by the executive branch. The deficiency is primarily explained by differing interpretations of the statute. The House Foreign Affairs Committee report made clear its intention to not only include being informed in advance, but also that the President ask Congress for its “advice and opinions and, in appropriate circumstances, [its] approval of action contemplated.”²⁵³ However, presidents have rarely complied with this interpretation. Instead, the executive branch has routinely considered its obligation fulfilled by informing Congress *after* an order has been issued.²⁵⁴ Further, presidents have interpreted the phrase “every possible instance” as a grant to avoid it altogether, arguing that immediate circumstances made it impossible or impracticable, despite the House report indicating its applicability even in “extraordinary and emergency circumstances.”²⁵⁵

To address this, Congress should amend the WPR to reflect and clarify the intent of the consultation requirements to apply *before* any decision is made and in all circumstances short of the immediacy standard of the *Caroline* test.²⁵⁶ Presidents, such as George H.W. Bush, have contended the logistical impracticality of “consult[ing] with 535 strong-willed individuals.”²⁵⁷ This impracticality applies most directly to “extraordinary and emergency circumstances,” such as was seen in the Cuban Missile Crisis. Congress could codify an exception that requires only consultation with relevant congressional leadership, including ranking Members. However, the opinions of a small, select group of Members do not reflect those of the whole Congress, effectively granting disparate discretion to a small group over a power the Constitution grants to all of Congress. As such, these leadership consultations should be made immediately available to the whole Congress, and the WPR should allow expedited and privileged motions by Members to compel the opening of leadership consultations to the whole of Congress before a presidential decision is made.

An additional deficiency in the current WPR framework is the vagueness with which it defines its reporting requirements under section 4(a)(3): “(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement” within forty-eight hours of such introduction.²⁵⁸ The White House has historically complied with this, but often only by doing the bare minimum. For example, numerous WPR reports involving the introduction of armed forces into “hostilities” or “[imminent] hostilities”²⁵⁹ were coded as less than two days, thereby rendering the sixty to ninety-

252. *Id.* § 3.

253. H.R. Rep. No. 93-287, at 6–7 (1973).

254. See Eileen Burgin, *Where's the Consultation: The War Powers Resolution and Libya*, 12 U.N.H. L. REV. 175, 180, n.23–24 (2014), <https://perma.cc/4V8E-W236>.

255. H.R. Rep. No. 93-287, at 6 (1973); *The Situation in Iran: Hearing Before the S. Comm. on Foreign Rels.*, 96th Cong. iii (1980), <https://perma.cc/QDA6-MZ8J>; see Burgin, *supra* note 254, at 181.

256. See Iraq Memo, *supra* note 46, at 180.

257. Address by George H.W. Bush, The President's News Conference, to the White House Briefing Room (transcript available at Am. Presidency Project, <https://perma.cc/V45H-88EU>).

258. WPR, Pub. L. No. 93-148, § 4(a)(3), 87 Stat. 555, 556 (1973).

259. *Id.* § 4(a)(1).

day clock for authorization or termination moot.²⁶⁰ Alternatively, other reports have been coded as the undefined “mission-bound,” which could reasonably trigger the clock, but Congress would have no basis for knowing when the contingent operations were expected to end.²⁶¹ Additionally, forty-eight-hour reports have tended to use nonspecific language to describe necessitating circumstances and operations.²⁶² While section 4(b) includes a requirement to furnish Congress with additional information upon request, its effectiveness is dependent on Congress’s political willpower to utilize it. Further, there is no other self-executing compulsory mechanism for reporting between the forty-eight-hour report and the semiannual reports required under section 4(c) for continued engagement in hostilities. Congress could remedy this by amending the statute with clearer definitions, requiring more detail, and requiring reports every thirty days to better inform Congress’s decision to extend the sixty- or ninety-day clock or otherwise pursue termination.

Further, given the importance of OLC memoranda in internal executive branch justifications of its use of force, Congress should amend section 4 to require the White House to append any relevant OLC opinions or legal advice to its WPR reports to better allow Congress to determine for itself whether a presidential use of force was justified and constitutional. This should also require the immediate transmission of any such legal advice authored after an initial WPR report.²⁶³

2. Intermittent Hostilities

A further concern with the WPR is the apparent loophole in section 5(b)’s sixty-day deadline for deployments absent congressional approval. Presidents have repeatedly asserted that uses of force that are in actuality part of a broader operation are detached from one another for purposes of the WPR’s reporting requirements. That means that each use of force has a separate sixty-day clock under section 5(b) running from the date of each action rather than being part of the same single sixty-day clock running from the date of initiation of the broader operation. The effect is to extend the time during which the Executive may operate without Congress’s consent.

For example, when the Reagan administration intervened in the Tanker Wars in 1987–1988, the executive branch asserted that its interventions were discrete instances of hostilities and thus their respective sixty-day clocks were disconnected from one another.²⁶⁴ In 1993, the Clinton administration maintained operations in

260. BRIDGEMAN, *supra* note 233.

261. *Id.*

262. See Matt Gluck, *Seven Observations on WPR Letters Issued Since 2001*, LAWFARE (Nov. 7, 2023), <https://perma.cc/U4SV-N3V4>.

263. The OLC has historically been reluctant to transmit or publish its opinions outside of the executive branch. While it has published approximately 2,000 memoranda under its own discretion since 1933, over 4,500 were published as a result of court orders. CNS REPORT, *supra* note 100, at 146. Legislation was unsuccessfully introduced in the 116th and 117th Congresses to compel greater OLC transparency with the public and with Congress. S. 3334, 116th Cong. (2020); S. 3858, 117th Cong. (2022); S. Amdt. 6246 to National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117th Cong. (2022).

264. See Todd Buchwald, *Anticipating the President’s Way Around the War Powers Resolution on Iran: Lessons of the 1980s Tanker Wars*, JUST SEC. (June 28, 2019), <https://perma.cc/5SMC-S6C7>;

Somalia and the Balkans by arguing its “intermittent military engagements,” in contrast to “sustained hostilities,” negated the running clock.²⁶⁵ Two years later, the Clinton administration’s separate reports after separate strikes in Bosnia have been interpreted as advancing the intermittence theory without directly invoking it.²⁶⁶ Intermittence would be reasserted again by the Obama administration for its 2011 Libya intervention as well as its anti-ISIS strikes in 2014.²⁶⁷ In the 2026 Iran War, the Trump administration made a similar argument as the war passed the sixty-day deadline, arguing that the so-called “ceasefire” starting April 7, 2026, ended “hostilities” and falsely stating there had been “no exchange of fire” since then.²⁶⁸

To resolve this, Congress should amend section 5(b) of the WPR to negate the “intermittent hostilities” argument by specifying the circumstances in which the clock starts or otherwise does not. This would also include amending section 2 to clarify that congressional inaction by default invokes section 4(a)(1).

3. Gray Zone Operations

Another gap in the current WPR framework concerns whether gray zone operations constitute hostilities. Since the legislation was drafted in 1973, conflict has evolved in ways not envisioned by the ninety-third Congress. The digital age has brought a new realm of hostile encounters that do not require the deployment of U.S. forces in harm’s way, namely cyberwarfare. Critics who favor a stronger executive argue both that the fast-paced nature of cyberwarfare requires an unrestrained Commander-in-Chief and that the WPR does not apply to such operations.²⁶⁹ In 2011, the Obama Department of Defense issued a report to Congress that cyber operations in and of themselves did not fall under WPR requirements because they might not “include the introduction of armed forces personnel into the area of

Bridgeman, *supra* note 233 (noting the Tanker Wars WPR reports stating “‘we regard this incident as closed’ or something similar, indicating the intent to ‘stop’ the clock.”). The United States would contradictorily later argue in the *Oil Platforms* case before the International Court of Justice that its actions should be treated as part of an integrated whole in determining the proportionality of its self-defense actions. See Buchwald, *supra* note 264.

265. Letter from Wendy R. Sherman, Assistant Sec’y of State for Legislative Affs. to Rep. Benjamin Gilman, Member, H. Comm. on Foreign Affairs (Sep. 28, 1993), *reprinted in* 139 CONG. REC. 22752–53 (1993), <https://perma.cc/ZD37-VK59>.

266. BRIDGEMAN, *supra* note 233; see also Marty Lederman, *The War Powers Clock(s) in Iraq*, JUST SEC. (Sep. 8, 2014), <https://perma.cc/GZ2Y-9JEE> (suggesting the theory’s role in the 1994 “no-fly” zone over Bosnia).

267. BRIDGEMAN, *supra* note 233; Lederman, *supra* note 266; Robert Chesney, *White House Clarifies Position on Libya and the WPR: US Forces Not Engaged in “Hostilities”*, LAWFARE (June 15, 2011), <https://perma.cc/Z9L2-ZWF3>.

268. Monica Alba, Alexandra Marquez, Owen Hayes & Kyla Guilfoil, *Trump Says He Doesn’t Need Congressional Authorization for Iran Operations, Citing Ceasefire*, NBC NEWS (May 1, 2026), <https://perma.cc/8JH4-DZ9V>. Even if exchanges of fire were not still ongoing, the ongoing deployment of U.S. forces in a situation at risk of reescalation qualifies as “hostilities” under the WPR. See H.R. REP. NO. 93-287, at 7 (1973).

269. John Yoo, *On Unilateral Presidential War Powers*, 45 HARV. J. L. & PUB. POL’Y 69, 80–81 (2022), <https://perma.cc/C5FK-DZV8> (“Cyber warfare shows again the weakness of Congress as an institution to exercise the war powers . . .”).

hostilities.”²⁷⁰ This interpretation falls in part under Justice Jackson’s “zone of twilight” in his *Youngstown* concurrence, referring to a situation where congressional silence “enable[s], if not invite[s], measures on independent presidential responsibility.”²⁷¹

Some legal scholars believe that offensive cyber operations are not covered by the WPR, though they should be.²⁷² Others have argued that cyberwarfare *is* governed by the WPR but requires “judicious application” of the WPR by Congress.²⁷³ This argument comes in part from a Fiscal Year 2012 National Defense Authorization Act (“NDAA”) provision that authorizes offensive cyber operations and subjects them to WPR requirements.²⁷⁴ However, 10 U.S.C. § 394, which governs military cyber operations, only requires the Secretary of Defense to report to Congress quarterly on “military cyber activities or operations . . . short of hostilities,” as the term is used in the WPR.²⁷⁵ In addition to carving out multiple exceptions in which “hostilities” are not occurring,²⁷⁶ the oversight requirements are constrained by definitional ambiguities as to what “hostilities” are in the WPR.²⁷⁷ These ambiguities, as reflected in the diverse legal scholarship,²⁷⁸ underscore the need for definitional clarification from Congress in the statute.

An aspect of gray zone operations that was contemplated in 1973 was whether to bring covert actions and private military contractors (“PMC”) under the scope of the WPR. The text of the WPR repeatedly specifies its application to the deployment of “United States Armed Forces.”²⁷⁹ Neither Central Intelligence Agency (“CIA”)

270. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE CYBERSPACE POLICY REPORT: A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, SECTION 934, at 9 (2011), <https://perma.cc/6Y2H-LQFR>. However, the report acknowledged cyber operations may be part of larger operations that could trigger WPR reporting and notification requirements. Although it asserted the Defense Department’s right to assess on its own whether WPR applies in each cyberspace action. *Id.*

271. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

272. Eric Lorber, *Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?*, 15 U. PA. J. CONST. L. 961, 1000 (2013), <https://perma.cc/GW3R-F66F>; Stephen Dycus, *Congress’s Role in Cyber Warfare*, 4 J. NAT’L SEC. L. & POL’Y 155, 162 (2010), <https://perma.cc/2CXB-WR92>.

273. Zach Irwin, *Unraveling the War Powers Resolution’s Role in Cyber Warfare*, 82 WASH. & LEE L. REV. 915, 959 (2025), <https://perma.cc/QB2M-BG6P>; see also Allison Arnold, *Cyber Hostilities and the War Powers Resolution*, 217 MIL. L. REV. 174, 180 (2013), <https://perma.cc/QA2W-DZKY> (“Congress seems to anticipate that some level of military operations in cyberspace could be a use of force sufficient to trigger the War Powers Resolution.”).

274. Irwin, *supra* note 273, at 936–37; Arnold, *supra* note 273, at 180; see National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 954, 125 Stat. 1298, 1551 (2011).

275. 10 U.S.C. § 394.

276. *Id.* § 394(b) (“[F]or the purpose of preparation of the environment, information operations, force protection, and deterrence of hostilities, or counterterrorism operations involving the Armed Forces of the United States.”).

277. See *infra* V.A.5: Definitions.

278. See, e.g., Lorber, *supra* note 272; Dycus, *supra* note 272; Irwin, *supra* note 273; Arnold, *supra* note 273.

279. WPR, Pub. L. No. 93-148, §§ 2, 3, 4, 5, 8, 87 Stat. 555, 555–58 (1973).

contractors nor PMCs fall under this scope.²⁸⁰ As the ninety-third Congress debated the legislation, Senator Thomas Eagleton offered a failed amendment to supplement section 8(c)'s definition of "introduction of United States Armed Forces" to include "any person employed by, under contract to, or under direction of" the United States.²⁸¹ PMCs surged in prominence during the Afghanistan and Iraq Wars, and one U.S.-based PMC attempted a coup in Venezuela in 2020.²⁸² The potential abuse of these irregulars remains a very real risk. It remains possible, under the current WPR framework, that a president could utilize a PMC or CIA operatives to invade a foreign nation without meaningful congressional knowledge or oversight. As Harold Koh wrote: "When covert action takes military or paramilitary forms, it constitutes war making and would thus fall within the realm of the two branches' shared war-making powers."²⁸³

When the CIA was created by the National Security Act of 1947,²⁸⁴ there was uncertainty about what sorts of activities Congress was authorizing the agency to conduct. One of the legislation's drafters attested that it was Congress's intent to authorize covert actions²⁸⁵ rather than exclusively authorize intelligence gathering.²⁸⁶ Congress, however, did not formally acknowledge the CIA's non-intelligence operations until the Hughes-Ryan Amendment to the Foreign Assistance Act of 1974 and the 1976 Church Committee Report.²⁸⁷ The Church Committee Report accepted the necessity for covert actions, but also advocated for greater oversight, as it found a tendency for the executive branch to resort to covert action by the CIA, including operations such as a "large-scale 'secret' war in Laos," because it is "less accountable."²⁸⁸ While the Amendment and later legislation increased congressional oversight of covert actions,²⁸⁹

280. See 1980 WPR Memo, *supra* note 46, at 191; Memorandum from Theodore B. Olson, Assistant Att'y Gen., to Edward C. Schmults, Deputy Att'y Gen. (Oct. 26, 1983), <https://perma.cc/5HQA-JGLE>.

281. 119 CONG. REC. 25079 (1973).

282. See McKinney Voss Wheeler, *Private Military Contractors: The Armed Forces Absent from the War Powers Resolution*, 12 AM. UNIV. NAT'L SEC. L. BRIEF 1, 15–17 (2021), <https://perma.cc/5463-J2DY>; Brian T. Warren, *Reining in the "Third Path": Rethinking the War Powers Resolution and Private Security Contractors*, 80 WASH. & LEE L. REV. 1013, 1026–28 (2023), <https://perma.cc/6WK3-XJCV>. The 2020 coup attempt, dubbed Operation Gideon, has been claimed to have had Trump administration support, but this has never been verified. Antonio Maria Delgado, Kevin G. Hall & Shirsho Dasgupta, *Venezuelan Insurgent Describes How Betrayal in Ranks Produced Failure, Summary Executions*, MIAMI HERALD (Nov. 18, 2020), <https://perma.cc/TZ8C-ZS2V>.

283. KOH, *supra* note 46, at 47.

284. *Id.* at 46–47.

285. Covert actions are statutorily defined as "activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly." 50 U.S.C. § 3093(e). Intelligence-gathering, traditional counterintelligence, and other "traditional" activities are specifically not included under this definition. *Id.*

286. KOH, *supra* note 46, at 46.

287. The Amendment imposed some oversight of CIA covert actions; however, it specifically stated the WPR does not apply. See Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804–05 (1974), <https://perma.cc/R4S5-FWV3>; 1 FINAL REPORT: FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 94-755, at 132 (1976), <https://perma.cc/Y576-H29S>.

288. FINAL REPORT: FOREIGN AND MILITARY INTELLIGENCE, *supra* note 287, at 156, 159–61.

289. See 50 U.S.C. § 3093.

they did not meaningfully constrain presidential warmaking through covert actions, as the Executive continued to assert covert actions as an Article II power and Congress failed to regulate them within the WPR.²⁹⁰ In a recent example, President Trump authorized CIA operations in Venezuela for undisclosed ends in October 2025, and in December 2025, the CIA conducted a drone strike on a Venezuelan port facility, reportedly with intelligence support from U.S. Special Operations Command.²⁹¹

In addressing such activities, Congress should amend the WPR to include Eagleton's proposed amendment and clarify that the WPR's requirements cover "all offensive strikes."²⁹² Regarding cyberspace operations, many are governed by other statutes, such as the Intelligence Oversight Act of 1991,²⁹³ and may not invoke war powers.²⁹⁴ However, such amended text should clarify that cyberattacks with kinetic implications apply.

4. Concurrent Resolution

A further deficiency can be found in the high threshold for a congressional resolution invoking the WPR to take effect. This is illustrated by the only two instances in U.S. history in which Congress has passed a joint resolution invoking the WPR to end hostilities, both of which occurred during the first Trump administration.²⁹⁵ In April 2019, Congress passed a resolution directing the President to remove U.S. forces from hostilities in support of the Saudi-led coalition in Yemen's bloody civil war within thirty days.²⁹⁶ One year later, Congress passed a joint resolution invoking the WPR to remove U.S. forces from hostilities with Iran following the early 2020 assassination of Soleimani.²⁹⁷ However, due to the apparent invalidation of the WPR's "legislative veto" provision in *Chadha*, both joint resolutions were killed by presidential vetoes as Congress could not muster the two-thirds vote required to overturn. Separately, Congress has passed only two concurrent resolutions to compel the withdrawal of U.S. armed forces from

290. See MICHAEL DEVINE, CONG. RSCH. SERV., R45175, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED DEFINITIONS (2022), <https://perma.cc/Q3MV-JX5K>.

291. See Warren P. Strobel, John Hudson & Karen DeYoung, *Trump Says He Has Authorized Covert CIA Action in Venezuela*, WASH. POST (Oct. 16, 2025), <https://perma.cc/9Y4J-B73B>.

292. Eric T. Jensen, *Future War and the War Powers Resolution*, 29 EMORY INT'L L. REV. 499, 550 (2015), <https://perma.cc/NL99-AQ8H>; Julia L. Chen, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B. C. L. REV. 1767, 1802 (2012), <https://perma.cc/83P2-8Y9N>.

293. See MICHAEL E. DEVINE & HEIDI M. PETERS, CONG. RSCH. SERV., R45196, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: FRAMEWORK FOR CONGRESSIONAL OVERSIGHT IN BRIEF (2018), <https://perma.cc/CK8R-S6BJ>. Some legal scholars have argued that the 1991 Act may be insufficient for Congress to provide meaningful oversight to intelligence activities. See Dycus, *supra* note 272, at 159–60.

294. See Lorber, *supra* note 272.

295. At the time of writing, the Senate is considering a joint resolution to end hostilities with Iran. S.J. Res. 184, 119th Cong. (2026).

296. S.J. Res. 7, 116th Cong. (2019).

297. S.J. Res. 68, 116th Cong. (2020).

hostilities: the 1993 Somalia Resolution and the 2026 Iran War Resolution.²⁹⁸ The Somalia Resolution lacked effectiveness due to its alignment with presidential plans and the Iran Resolution has been denounced by Trump and would likely lack legal effect without court affirmation.²⁹⁹ The inherent challenge is that while Congress can declare war through a simple majority, which the President can veto, Congress cannot stop the President from unilaterally starting or entering into a conflict without a veto-proof majority. As the President has the constitutional power to veto any congressional bill, a remedy would likely require a test case decisively determining *Chadha*'s application to the WPR or a constitutional amendment asserting such an exception.

5. Definitions

In addressing the WPR's deficiencies, an amendment should seek to more clearly define the terms utilized in the original legislation, namely "United States Armed Forces," "introduction," and "hostilities."³⁰⁰ As previously noted, these terms are ill-defined in the statute, and successive administrations have used this ambiguity to justify their deployments and use of force absent congressional authorization.³⁰¹

In the 2011 Libya intervention, the Obama administration ignored the sixty-day deadline and, a month later, argued to Congress that the Libya operations should not be considered "hostilities" under the WPR, explicitly citing its statutory ambiguity.³⁰² Likewise, in November 2025, the Trump administration asserted that Operation Southern Spear does not fall under "hostilities" as used by the WPR in ignoring the deadline.³⁰³ Because "hostilities" is not defined in the statute's text, the executive branch has asserted its own definition since 1975.³⁰⁴ The Executive's narrow definition, most recently publicly reaffirmed in 2018, refers to "a situation in which units of U.S. armed forces are actively engaged in

298. H.R. Con. Res. 170, 103d Cong. (1993) (Somalia); H.R. Con. Res. 86, 119th Cong. (2026) (Iran).

299. H.R. Res. 293, 103d Cong. (1993); Trump, *supra* note 79. At the time of writing, no court case has emerged seeking enforcement.

300. See War Powers Resolution, Pub. L. No. 93-148, § 8(c), 87 Stat. 555, 558 (1973).

301. See *supra* V.A.3; Gray Zone Operations.

302. JASON HEALEY & A.J. WILSON, CYBER CONFLICT AND THE WAR POWERS RESOLUTION: CONGRESSIONAL OVERSIGHT OF HOSTILITIES IN THE FIFTH DOMAIN 2 (2013), <https://perma.cc/2EWU-P9LZ>; *Libya and War Powers: Hearing Before the S. Foreign Rels. Comm.*, 112th Cong. 4-6 (2011) (statement of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State); Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <https://perma.cc/4T7Z-9Q8M>.

303. Nakashima & Robertson, *supra* note 170.

304. Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, and Martin R. Hoffman, Gen. Counsel, U.S. Dep't of Def., to Rep. Clement Zablocki, Chairman, House Subcomm. on Int'l Sec. & Sci. Affs. of the Comm. on Int'l Rels., U.S. House of Representatives (June 3, 1975), *reprinted in War Powers, A Test of Compliance: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affs. of the Comm. on Int'l Rels.*, 94th Cong. 38-40 (1975); see also 1980 WPR Memo, *supra* note 46, at 194 ("[T]he term 'hostilities' should not be read necessarily to include sporadic military or paramilitary attacks on our armed forces stationed abroad.").

exchanges of fire with opposing units of hostile forces.”³⁰⁵ The repeated use of this definition comes despite the fact that the House report accompanying the WPR made clear the term also “encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict.”³⁰⁶ It also clarified that “imminent hostilities” includes situations where “there is a clear potential either for such a state of confrontation or for actual armed conflict.”³⁰⁷

To reassert congressional oversight and ensure the application of its own statutes in accordance with congressional intent, Congress should amend the WPR’s text with inclusive definitions, such as those found within the House report and the Eagleton Amendment as well as additional definitions Congress may deem necessary to prevent compliance evasion.³⁰⁸

6. Litigation

Congress should additionally confront the judicial retreat from war powers issues. Recent attempts to end executive warmaking through a joint resolution under the WPR underscore the need for a remedy in the courts. On November 6, 2025, the Senate rejected a bipartisan joint resolution to end the Trump administration’s military operations against Venezuela.³⁰⁹ However, even if it had enacted the resolution, the House of Representatives’ refusal to convene due to political issues stemming from a government shutdown would have prevented it from acting on the resolution in a timely manner.³¹⁰ Further, even if the House acted upon the resolution and passed it, overriding a certain presidential veto would have been unlikely. While the WPR provides for expedited procedures while Congress is not in session and allows the Speaker of the House and President Pro Tempore to reconvene to debate a resolution,³¹¹ the WPR does not address a remedy for when a chamber refuses to reconvene to consider its sibling’s passed resolution. When such a challenge emerges, a court remedy is necessary.

305. Letter from William Castle, Acting Gen. Counsel, U.S. Dep’t of Def., to Sen. Mitch McConnell, Majority Leader, U.S. Senate 2 (Feb. 27, 2018), <https://perma.cc/W65S-3YNS>. In Secretary of Defense Pete Hegseth’s April 29, 2026, testimony before the House Armed Services Committee, he asserted “hostilities” had terminated under the so-called ceasefire with Iran starting earlier that month despite active exchanges of fire. Alba et al., *supra* note 268.

306. H.R. REP. NO. 93-287, at 7 (1973); *see* MATTHEW WEED, CONG. RSCH. SERV., IN12319, U.S. STRIKES ON HOUTHİ TARGETS IN YEMEN RAISE WAR POWERS ISSUES 2 (2024).

307. H.R. REP. NO. 93-287, at 7 (1973); WEED, *supra* note 306.

308. *See* H.R. REP. NO. 93-287, at 7 (1973); 119 CONG. REC. 25079 (1973) (statement of Sen. Thomas Eagleton).

309. S.J. Res. 90, 119th Cong. (2025).

310. While the WPR provides for expedited procedures in considering a resolution in the Senate, it contains no expedited procedures for the House in considering resolutions to withdraw U.S. Armed Forces from hostilities. *See* Pub. L. No. 93-148, § 6, 87 Stat. 555, 557 (1973); MICHAEL GREENE, CONG. RSCH. SERV., R47603, WAR POWERS RESOLUTION: EXPEDITED PROCEDURES IN THE HOUSE AND SENATE 16 (2025).

311. *See* WPR § 6; GREENE, *supra* note 310, at 4.

Congress has substantial authority to regulate standing and jurisdiction before federal courts under the Constitution.³¹² Amending the WPR to clarify the federal judiciary's jurisdiction over disputes arising from war powers issues and to expand the courts' options for remedies would help avoid invoking the political question doctrine.³¹³ In *Dellums*, the D.C. District Court, although rejecting the applicability of the political question doctrine, recognized that the congressional plaintiffs lacked remedial options to prevent a president from initiating a war absent congressional approval if that president believed they only needed Article II authority.³¹⁴ As indicated earlier in this article, the courts have applied the political question doctrine inconsistently in war powers cases.³¹⁵ The Supreme Court found in 2012 that the Judiciary can properly address the constitutionality of a statute "where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'"³¹⁶ A few years later, a district court suggested that the courts lack the competence to second-guess the Executive absent a statutory infringement.³¹⁷ On the issue of standing, while some courts have suggested that Congress as a whole may have a right of action,³¹⁸ absent a clear statutory grant of a private right of action to individual Members or military personnel, only the Department of Justice would have clear authority to file a lawsuit, which it would not do.³¹⁹

To address the problem of standing, Congress should amend the WPR to at least grant individual Members of Congress a private right of action to prevent or halt unauthorized military action absent congressional authorization.³²⁰ Further, such an amendment should clarify that Congress's default position is that

312. U.S. CONST. art. III, § 1; see Libr. of Cong., *Overview of Congressional Control Over Judicial Power*, CONST. ANNOTATED, <https://perma.cc/9LBX-5HLV>. But see Libr. of Cong., *Congressional Control of Standing*, CONST. ANNOTATED, <https://perma.cc/NE4N-FJCR> (describing constitutional limits of Congress's Article III regulatory power).

313. While it is this article's assertion that the political question doctrine does not apply to challenges to presidential warmaking based on the courts hearing and resolving war powers cases prior to the twentieth century. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008); Smith, *supra* note 72, at 202; Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK U. L. REV. 47, 52 (2016).

314. *Dellums v. Bush*, 752 F. Supp. 1141, 1149 (D.D.C. 1990) (Congressional plaintiffs "cannot gain 'substantial relief' by persuasion of their colleagues alone. The 'remedies' of cutting off funding to the military or impeaching the President are not available to these plaintiffs either politically or practically.").

315. See *supra* II: Role of the Judiciary.

316. *Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

317. *Smith v. Obama*, 217 F. Supp. 3d 283, 299 (D.D.C. 2016), order vacated, appeal dismissed *sub nom.* *Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018); see Samuel R. Howe, *Congress's War Powers and the Political Question Doctrine After Smith v. Obama*, 68 DUKE L.J. 1231, 1272 (2019) ("[T]he court's decision in *Smith* was a significant advancement of the proposition that whatever authority Congress may have under the Declare War Clause is *never* judicially enforceable.").

318. See, e.g., *Dellums*, 752 F. Supp. at 1149–50; *Campbell v. Clinton*, 52 F. Supp. 2d 34, 44–45 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

319. See *Private Right of Action*, DEMOCRACY DOCKET, <https://perma.cc/7D3T-ZDPE>.

320. At least one court has recognized an implied private right-of-action in the WPR. See, e.g., *Ange v. Bush*, 752 F. Supp. 509, 511 n.1 (D.D.C. 1990) (holding that a U.S. soldier had standing to challenge

offensive uses of force are unauthorized until Congress enacts a statute authorizing or approving their use. Similarly, Congress can set out its own statutory tests, as noted in the prior sections of this article, for whether a presidential use of force is an act of war in the constitutional sense. In doing so, the plaintiff argues that the questions raised in such cases are legal, rather than political ones, and that an injunctive remedy would stand on stronger ground.

Further, as military operations are often time-sensitive, it would be prudent to establish expedited procedures to allow for quicker adjudication and appeals of challenges involving a congressional plaintiff. For example, Congress could grant the Supreme Court original jurisdiction over challenges in which congressional plaintiffs invoke the Declare War Power and the WPR. Congress has enacted multiple statutes doing so on other issues, as well as requiring the Supreme Court to “advance the appeal on the docket, and expedite the appeal to the greatest extent possible,” and set deadlines for decision arguments.³²¹

B. Other Considerations

1. Repeal Standing AUMFs

For the first time in over fifty years, Congress successfully repealed a standing AUMF with the passage of the NDAA for Fiscal Year 2026, ending the 1991 and 2002 Iraq AUMFs.³²² While this marks a critical step in reclaiming some of Congress’s constitutional war powers, two other AUMFs remain in force: the 1957 Middle East Resolution and the 2001 AUMF Against Terrorists.

The oldest of these—the Middle East Resolution—was passed in 1957 to authorize U.S. military force against “armed aggression from any country controlled by international communism” in the Middle East.³²³ When Eisenhower requested the Formosa and Middle East Resolutions, he did not do so on the basis of constitutional necessity, but rather on the basis of enhanced deterrence.³²⁴ Neither Resolution has been directly cited in any operation, and the latter has been considered “functionally obsolete” as a result.³²⁵ Further, some scholars argue that any repeal of the Middle

the 1990 deployments ahead of an invasion of Iraq, although it would dismiss his claim as a “political question.”).

321. See JOANNA R. LAMPE, CONG. RSCH. SERV., IF12624, EXPEDITING CASES AND SETTING DEADLINES FOR COURT ACTIONS (2024), <https://perma.cc/HBD2-K4UY>. One such deadline statute requires appellate courts to render a decision within four days of arguments on appeal in criminal cases involving charges of providing material support to a foreign terrorist organization. 18 U.S.C. § 2339B(f)(5)(B).

322. National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60, § 8370, 139 Stat. 718, 1906 (2025). Prior to this, Congress had last repealed an AUMF in 1974 by revoking the 1955 Formosa Resolution. Andrew Solender, *Chart: It’s Been 47 Years Since Congress Repealed an AUMF*, AXIOS (Nov. 16, 2021), <https://perma.cc/FKJ9-FWKS>.

323. Joint Resolution to Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, § 2, 71 Stat. 5, 5 (1957).

324. See Waxman, *supra* note 210.

325. U.S. Marines were deployed to Lebanon in 1958 to guard against a threatened Communist insurrection. While the Eisenhower administration did not directly cite the 1957 Middle East Resolution, it instead loosely referenced it in part as a congressionally-stated interest in preserving “the independence and integrity of the nations of the Middle East.” Dwight D. Eisenhower, Statement by the President Following the Landing of United States Marines at Beirut (July 15, 1958) (on file with Am.

East Resolution is simply a matter of “housekeeping.”³²⁶ However, there have been some concerns that its textual vagueness could be exploited.³²⁷ The current administration has shown a willingness to resurrect long-dormant “zombie” laws to further presidential policy.³²⁸ Theoretically, the 1957 Resolution could be used to justify military action against Chinese assets in the region absent actual congressional approval.

While the Middle East Resolution has not been remotely relied upon in nearly seventy years, the 2001 AUMF Against Terrorists has been widely used by the executive branch to conduct military operations abroad. The 2001 AUMF, issued in the aftermath of the 9/11 terrorist attacks, enables the President to use force against nations, organizations, and persons responsible for the attacks or who harbored them in order to prevent future international terror attacks against the United States by such entities.³²⁹ The AUMF, a sweeping grant of authority, was in fact pared back from the Bush administration’s much more open-ended request. Congress had initially wanted to extend authority only to go after those directly responsible for 9/11, but instead compromised to allow for military force against al-Qaeda, the Taliban, and their affiliates.³³⁰ Since then, the 2001 AUMF has been used to justify U.S. military operations in at least twenty-two countries (far beyond just Afghanistan) as well as to justify extrajudicial detention, torture, and surveillance of U.S. citizens.³³¹ It has also been used to justify attacks against ISIS, which has been in open war with al-Qaeda and the Taliban, and the Syrian state.³³²

While the Iraq AUMFs are now abolished, they have been abused in their lifetimes. Unlike the 2001 AUMF, which played a role in the Bush administration’s justification of use of force and was directly quoted in the White House’s March

Presidency Project, <https://perma.cc/J3DL-XJR9>). When consulting Members of Congress before deploying forces, the Eisenhower administration expressed doubts of the role of Communist forces in the crisis, as required under the Middle East Resolution, but also noted concerns about nonintervention benefiting International Communism. Memorandum of a Conference With the President (July 14, 1958), in 11 FOREIGN RELATIONS OF THE UNITED STATES, 1958–1960, LEBANON AND JORDAN, Dkt. No. 127 (Louis Smith & John Glennon eds., 1992), <https://perma.cc/VE69-FV4D>.

326. *Reforming the Authorizations for Use of Military Force*, BROOKINGS INST. (May 11, 2022), <https://perma.cc/S3GA-JFZ3> [hereinafter *Reforming AUMFs*] (citing statement of Oona Hathaway); Matthew Petti, *Congress Moves to Revoke Eisenhower’s Blank Check for Middle East Wars*, RESPONSIBLE STATECRAFT (May 18, 2021), <https://perma.cc/KYV3-R4LM>; Morgan G. Baker, *Regulations or Delegations?: How Congress Delegated Its War Powers to the President Through Discretionary AUMFs* 183 (2020) (Ph.D. thesis, University College London), <https://perma.cc/VGV7-UM8H>.

327. *Reforming AUMFs*, *supra* note 326 (citing statement of Oona Hathaway); Petti, *supra* note 326; Baker, *supra* note 326.

328. See, e.g., Press Release, Brennan Ctr. for Just., President Trump Illegally Invokes Alien Enemies Act; Brennan Center Reacts (Mar. 15, 2025), <https://perma.cc/M66X-TNUA>.

329. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

330. See RICHARD GRIMMETT, CONG. RSCH. SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 3 (2006).

331. STEPHANIE SAVELL, THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: A COMPREHENSIVE LOOK AT WHERE AND HOW IT HAS BEEN USED 1 (2021), <https://perma.cc/AD2A-RVNC>; *How a Single Phrase Defined the War on Terror*, COUNCIL ON FOREIGN RELS. (Sep. 11, 2025), <https://perma.cc/9GD4-WPG2>; ALEXANDRA STARK, MANAGING U.S. SECURITY PARTNERSHIPS: A TOOLKIT FOR CONGRESS 36 (2020), <https://perma.cc/K5H9-5N95>.

332. Syria Memo, *supra* note 216, at 52.

2003 letter to Congress announcing the start of the invasion,³³³ their limitation to Iraq meant they were far less cited than the 2001 AUMF. However, even though Obama formally declared the Iraq War over in 2011, he and each subsequent president used the Iraq AUMFs to strike at will against any target of their choosing in Iraq. Illustrating this, each administration since 2002 used the second Iraq AUMF to strike against ISIS, insurgents, and Iranian assets there, including the 2020 assassination of General Soleimani in Baghdad.³³⁴

When President James Buchanan requested AUMFs to police Central America in 1858, Senator William Seward (R-N.Y.) strongly opposed “the idea [of] the President of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared; or the time, or place, or manner, or circumstance of the duration of it, the beginning or the end; and without limiting the number of nations with which war may be waged.”³³⁵ With the repeal of the Iraq AUMFs, the only AUMFs left on the books can be and have been used to justify the “hypothetical” wars that Seward feared.

With the exception of the repeal of the Iraq AUMFs, attempts to repeal outstanding AUMFs in recent years have been unsuccessful.³³⁶ Reassertion of congressional war powers cannot come without the repeal of all outstanding AUMFs. However, given the continuing threat of international terror groups such as ISIS, Congress should accompany such repeals with more narrowly tailored authorizations to allow for the Executive to address such threats, but with meaningful and robust congressional oversight. Such tailoring could include sunset provisions, which Congress could vote to extend as necessary, as well as restrictions to conduct operations only where a sovereign state invites the U.S. military. Additionally, while recognizing the need for “self-defense” military action to prevent a planned terror attack on the United States, a replacement anti-terror AUMF could include a required consultation with relevant congressional leadership to allow for expedited authorization procedures in such instances. Further, Congress should clarify in legislation that no AUMF can be used to strike a sovereign state without Congress explicitly and specifically authorizing it.

2. Revoke Funding for Nonsanctioned Operations

One of the most important powers that Congress has is the power of the purse.³³⁷ All military operations, whether with or without the assent of Congress, require funding. Should Congress disapprove of a deployment, it could stipulate conditions in appropriations legislation that prevent the use of funds for that

333. Letter from President George W. Bush to Rep. Dennis Hastert, Speaker, U.S. House of Representatives, and Sen. Theodore Stevens, President Pro Tempore, U.S. Senate (Mar. 21, 2003), <https://perma.cc/E9LJ-NZWP>.

334. Soleimani Memo, *supra* note 227, at 20.

335. CONG. GLOBE, 35th Cong., 2d Sess. 1120 (1859).

336. *See, e.g.*, Outdated AUMF Repeal Act, H.R. 2014, 117th Cong. (2021) (seeking repeal of Iraq AUMFs and Middle East Resolution); H.R. REP. NO. 114-571, at 19 (2016) (amendment proposed by Rep. Barbara Lee (D-Cal.) to repeal 2001 AUMF).

337. U.S. CONST. art. I, § 9, cl. 7.

operation. In fact, there is a rich history of Congress leveraging this power to assert its constitutional war powers or otherwise restrain the excesses of Article II war powers, dating back to the first war of the Early Republic.

All four uses of force that occurred in the first two decades of the Early Republic were statutorily authorized. A major reason was the critical importance of congressional appropriations for the executive branch to undertake anything militarily at the time. Operations in the Northwest Indian War were enabled by Congress's 1790 act establishing the military.³³⁸ Conversely, after Algiers declared war on the United States in 1785, the Congress of the Confederation and, later, the Washington administration were unable to take any military action against Algiers due to the complete lack of a Navy and ultimately agreed to pay tribute to protect U.S. commerce.³³⁹ Due to financial constraints, Congress was unable to fund the Navy's first six frigates until the Naval Act of 1794.³⁴⁰ However, because peace was established before the vessels were completed, construction was halted under section 9 of the Naval Act until Congress reappropriated funds to complete three of them in 1796.³⁴¹ The other three uses of force in this period—the Quasi-War, the First Barbary War, and the Gulf of Mexico anti-piracy campaign—were naval operations in which the President had to seek congressional appropriations to build or convert armed ships.³⁴²

Since these early days, Congress has sought to restrain, regulate, or end presidential warmaking through its appropriations powers. In 1843, President John Tyler ordered the U.S. Africa Squadron to demonstrate along the African coast to discourage and punish piracy and the slave trade in the region.³⁴³ However, there was debate within Congress about whether to withhold appropriations for it out of concern that the maneuvers were appeasement for the Holy Alliance to prevent the search of American ships and impressment of U.S. sailors by the British.³⁴⁴ A decade later, Buchanan's desired Latin America operations were held back by the lack of congressionally appropriated funds.³⁴⁵

Since the Vietnam War, Congress has increasingly used the threat of withholding appropriations to regulate presidential warmaking. After President Richard Nixon ordered U.S. forces into Cambodia, a neutral state, Congress passed the Cooper-Church

338. Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121; see Hall & Prakash, *supra* note 2.

339. See Carl Herzog, *A Tale of Two Navies*, USS CONST. MUSEUM (Oct. 27, 2025), <https://ussconstitutionmuseum.org/2025/10/27/a-tale-of-two-navies/> [<https://perma.cc/S2EU-83UR>].

340. Naval Act of 1794, ch. 12, § 1, 1 Stat. 350, 350 ("Whereas the depredations committed by the Algerine corsairs on the commerce of the United States render it necessary that a naval force should be provided for its protection"); see Marshall Smelser, *The Passage of the Naval Act of 1794*, 22 MIL. AFFS. 1, 6 (1958).

341. § 9, 1 Stat. at 351; Act of Apr. 20, 1796, ch. 14, § 2, 1 Stat. 453, 454.

342. See, e.g., Act of April 27, 1798, ch. 31, § 1, 1 Stat. 552, 552; Act of June 13, 1798, ch. 53, § 5, 1 Stat. 565, 566; Act of July 9, 1798, ch. 68, §§ 1, 2, 1 Stat. 578, 578–79.

343. See David F. Ericson, *The United States Navy, Slave-Trade Suppression, and State Development*, 44 J. OF POL'Y HIST. 231, 240–41 (2021).

344. CONG. GLOBE, 27th Cong., 3d Sess. 63–65 (1842).

345. Cooper, *supra* note 124.

Amendment in 1970 to prohibit funding for ground operations in Cambodia.³⁴⁶ Three years later, Congress would pass both the WPR and the Case-Church Amendment, which denied funding for further military activity in Southeast Asia.³⁴⁷

Since then, Congress has either restricted or seriously threatened to restrict funding for operations in at least five instances. After Reagan deployed U.S. Marines to Lebanon in 1982 without a WPR report under section 4(a)(1), several amendments to appropriations legislation that threatened to end funding for the deployment gained significant support. While those amendments did not pass the House, the associated political pressure in Congress forced the White House into compromises.³⁴⁸ That same year, Congress became concerned that U.S. military activity in Honduras was designed to provoke a war between Honduras and Nicaragua. In response, Congress passed the Boland Amendment to the Defense Appropriation Act for 1983, which prohibited funds for military and covert operations to overthrow the Nicaraguan government or provoke a war, including support for Nicaraguan Contra rebels.³⁴⁹ Similar amendments were passed in subsequent years. In 1994, after Clinton deployed U.S. forces to Burundi to conduct evacuations in Rwanda, Congress included a provision in the Defense Appropriations Act for Fiscal Year 1995 that barred the use of funds for U.S. military operations in or around Rwanda after October 7, 1994, except to protect U.S. citizens.³⁵⁰ Over the course of the Yugoslav Wars, Congress used its appropriations power to regulate and restrain U.S. operations in the conflict without congressional authorization.³⁵¹ Additionally, in 1995, a House bill narrowly defeated that would have prohibited peacekeeping funds in Bosnia, while a Senate joint resolution passed restricting troop use to peace implementation with a one-year deadline.³⁵² Four years later, after Clinton reported to Congress that he had launched airstrikes in Yugoslavia due to the Kosovo Crisis, Congress passed legislation that prohibited funds for the introduction of ground forces.³⁵³

However, in the twenty-first century, legislation that ties constitutional war powers to appropriations has been effectively nonexistent.³⁵⁴ As history shows,

346. Act of Jan. 5, 1971, Pub. L. No. 91-652, §§ 7–8, 84 Stat. 1942, 1943.

347. Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134.

348. See WEED, *supra* note 72, at 13–14.

349. Further Continuing Appropriations Act, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982).

350. Defense Appropriations Act of 1995, Pub. L. No. 103-335, tit. 9, 108 Stat. 2599, 2659–60 (1994).

351. Defense Appropriations Act of 1994, Pub. L. No. 103-139, § 8146, 107 Stat. 1418, 1474 (1993) (stating a sense of Congress that no funds may be used in the implementation of a peace settlement without Congress's approval); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1404, 108 Stat. 2663, 2910–12 (1994) (stating a sense of Congress that if Bosnian Serbs did not accept a Contact Group proposal then no funds could be used to enforce an arms embargo); Defense Appropriation Act of 1995 § 8100, 108 Stat. at 2643.

352. H.R. 2770, 104th Cong. (1995); S.J. Res. 44, 104th Cong. (1995).

353. H.R. 1569, 106th Cong. (1999).

354. There have been several attempts to impose funding restrictions on military operations in the twenty-first century, but none have been successful in restraining presidential warmaking. See, e.g., 160

the mere threat of withholding funds puts significant pressure on the Executive to seek compromise with Congress. Reviving this practice could serve to reassert congressional oversight of presidential warmaking. As this article takes issue with the “shoot first, don’t ask permission” approach to contemporary presidential war-making, it is within Congress’s constitutional war and spending powers to include provisions in NDAA’s to deny funding for any offensive military operation absent congressional authorization. Naturally, there must remain a carveout for limited operations that are urgent and necessary to protect Americans. To help avoid exploitation of such self-defense operations, Congress could enact provisions that terminate funding within twenty days of a forty-eight-hour report unless Congress agrees to an extension.³⁵⁵ Like the earlier-proposed WPR amendment, NDAA’s could implement a provision that requires a president to consult with relevant congressional leadership ahead of an operation, time permitting, and a WPR report must be furnished explaining in detail the case specifics necessitating such action.

However, an issue with relying on appropriations as a warmaking restraint is that Congress has been reluctant to revoke funding for deployed forces, as this would be seen as abandoning American service members and as showing weakness towards enemies. This runs a significant risk of political (and electoral) blowback, which Members of Congress are painfully aware of. As a result, while the power of the purse is theoretically the most powerful tool Congress has to restrain war-making, it is, in practice, far less so. That does not mean that it cannot be used as part of the solution. As mentioned, it has historically and successfully been used to pressure the Executive into oversight of war powers. Further, revoking appropriations for operations that are already low risk to U.S. forces, such as drone strikes, has less risk of an electoral reaction, which may be more appealing to risk-averse Members. Funding restrictions have the additional benefit of the Anti-Deficiency Act, which prohibits government

Cong. Rec. H5526 (Defense Appropriations Act of 2015 amendment number 33, proposed by Rep. Barbara Lee, to prohibit use of funds to be obligated or expended pursuant to the Authorization for Use of Military Force Against Iraq Resolution of 2002); 160 CONG. REC. H5534 (Defense Appropriations Act of 2015 amendment number 34, proposed by Rep. Barbara Lee, to prohibit use of funds to be obligated or expended pursuant to the Authorization for Use of Military of Force after December 31, 2014); 162 CONG. REC. H3926 (Defense Appropriations Act of 2017 amendment number 41, proposed by Rep. Ted Yoho (R-Fl.), to block funds from being used to engage in hostilities in Libya in contravention of the War Powers Resolution). The FY2026 NDAA’s appropriations restrictions on Secretary of Defense Pete Hegseth’s travel budget contingent on his release of unedited footage and orders of the September 2, 2025 boat strike—in which he reportedly gave an order to take no quarter, a war crime under international law—is limited to congressional oversight on a singular instance rather than a broader violation of the Declare War Powers. Further, Hegseth reportedly has no intentions of complying given the relatively low risk to him entailed by this provision. National Defense Authorization Act for Fiscal Year 2026, Pub. L. No. 119-60, § 1052, 139 Stat. 718, 1043 (2025); Connor O’Brien, Joe Gould & Leo Shane III, *Hegseth Says He Won’t Release Full Boat Strike Video*, POLITICO (Dec. 16, 2025), <https://perma.cc/D9CN-3L2Z>.

355. See, e.g., National Security Powers Act of 2021, S. 2391, § 106(b) 117th Cong. Most military operations reported under the WPR since 1973 that are truly defensive in nature, such as “repelling a sudden attack, evacuating an embassy, [and] rescuing hostages[,] . . . take only a few days.” *Hearing on Article I: Reforming the War Powers Resolution for the 21st Century: Hearing Before the H. Comm. on Rules*, 117th Cong. 38 (2021) (testimony of Dr. Tess Bridgeman, Co-Editor-in-Chief, *Just Security*).

officials from spending money they were not appropriated.³⁵⁶ Additionally, Congress could incorporate preemptive provisions into its defense appropriations that deny funding in advance for offensive military operations within particular regions or against particular targets in the form of a negative AUMF.

VI: CONCLUSION

The constitutional architecture of American war powers was designed to ensure a balance between deliberative legislative judgment and decisive executive action. From the earliest days of the Republic, the Framers intended Congress to be the sole branch empowered to declare war, reserving to the President only the authority to repel sudden attacks on Americans at home and abroad, suppress rebellion, and command the armed forces offensively with authorization. Over two centuries, however, this balance has steadily eroded. Judicial abdication, executive aggrandizement, and congressional acquiescence have together produced a dangerous inversion of constitutional design where the President now routinely initiates hostilities, and Congress merely reacts, often with little effect. The gradual normalization of unilateral presidential warmaking, justified through ambiguous doctrines of “self-defense” and “national interest,” has undermined democratic accountability and the rule of law in matters of war and peace.

The WPR was enacted to restore Congress’s intended primacy, yet its structural weaknesses, vague definitions, and limited enforcement mechanisms have instead provided successive administrations a veneer of legality for unauthorized conflicts. The courts’ consistent invocation of the political question doctrine has further insulated executive actions from judicial review, effectively denying Congress meaningful remedies. As demonstrated through historical and contemporary practice, without legislative and procedural reform, the WPR functions more as a minimal reporting framework than a genuine restraint. Each unchallenged act of unilateral force reinforces a precedent that widens the scope of executive power at the expense of Congress’s constitutional prerogative.

To reclaim its rightful authority, Congress must take deliberate and comprehensive action. This includes amending the WPR to close loopholes, clarify definitions, and reinstate enforceable mechanisms such as a revised concurrent resolution provision. It must also repeal or replace outdated AUMFs, strengthen consultation and reporting requirements, and tie appropriations more directly to compliance with constitutional war powers. Restoring the separation of powers envisioned by the Framers is not merely a matter of institutional pride—it is essential to preserving democratic legitimacy in the gravest decision a republic can make: to wage war. Only through renewed legislative will and constitutional fidelity can the United States ensure that decisions of war and peace are once again made by the representatives of the people, as the Constitution demands.

356. 31 U.S.C. § 1341.