

War Powers Reform: A Skeptical View

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ABSTRACT. Debates about war powers focus too much on legal checks and on the President's power to start wars. Congressional checks before and during crises work better than many reformists suppose, and there are ways to improve Congress's political checking without substantial legal reform.

INTRODUCTION

The disastrous 2003 Iraq war and the sprawling and perpetual Global War on Terror have rejuvenated calls to reform the balance and operation of war powers between Congress and the President. Amidst widespread anxiety about overextended U.S. military commitments and weakened public trust in the presidency, this may be the most propitious political moment in a half-century for those who would reform war powers, but for a fractious and largely disabled Congress. Under the mantra that Congress must restore its original and exclusive constitutional power “to declare War,”¹ many reformists—including congressional members of both parties—advocate amending the War Powers Resolution (WPR).² Others argue for repealing or revising congressional

1. U.S. CONST. art. I, § 8, cl. 11.

2. War Powers Resolution, 50 U.S.C. §§ 1541-1550 (1973). One example of such reform proposals was a National Security Powers Act of 2021 bill introduced by Senators Chris Murphy (D-Conn.), Mike Lee (R-Utah), and Bernie Sanders (I-Vt.). See Tess Bridgeman & Stephen Pomper, *A Giant Step Forward for War Powers Reform*, JUST SEC. (July 20, 2021), <https://www.just-security.org/77533/a-giant-step-forward-for-war-powers-reform> [https://perma.cc/H9R3-VFYX].

Authorizations for Use of Military Force (AUMFs) against al Qaida and its allies³ and in relation to Iraq.⁴

This Essay considers whether and how statutes governing war powers should be updated. It focuses especially on calls to impose stricter limitations on presidential uses of force by amending the WPR. Whereas Professor Rebecca Ingber argues in her companion essay that checks on executive-branch military action are even weaker than many war powers reformists believe, I argue that they are stronger. This Essay acknowledges the wisdom of some reform proposals, but it concludes that the most ambitious proposals for overhauling the WPR—for instance, proposals to automatically cut off funding for operations that exceed it, or to make it judicially enforceable—are less necessary than often supposed. It recommends an alternative approach: enhancing the efficacy of congressional oversight and political checks, based on existing law, well in advance of war and during war.

This Essay proceeds in three Parts. Part I lays out the background constitutional and statutory law, along with some proposed reforms. Part II then argues that war powers debates tend to focus too narrowly on the power to *start* wars, which leads to misdiagnoses of problems and misprescriptions of remedies. Drawing on a rich body of political science scholarship, it also argues that Congress constrains presidential uses of force with potent political checks, even in the absence of strong legal checks like a strict requirement that Congress expressly authorize military action. Together, these points mean that the practical difference between a world of strong legal checks and one of weak legal checks is narrower than many reformists reckon.

Part III proposes an alternative agenda for improving Congress's role in when and how the United States wages war. It focuses less on overarching statutory frameworks for initiating wars and more on oversight prior to and during wars, including better use of congressional hearings, improved congressional committee organization and resourcing, and greater legislative attention to overall military strategy, force posture, and decision-making processes.

For the half century since the Vietnam War, much of the war powers debate has been highly polarized between those who think that broad unilateral presidential power to use force is a dangerous constitutional failure and those who think that legislative restrictions on that power are perilously unconstitutional.⁵

3. Authorization for Use of Military Force Against September 11 Terrorists, S.J. Res. 23, 107th Cong. (2001).

4. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002).

5. See William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–98 (1977) (citing scholars on both sides of this debate).

I do not fall neatly into either of those polar camps. I have previously argued for substantially amending the 2001 AUMF against al Qaida and its allies,⁶ and I support other fixes like rescinding some ill-conceived, dicta-filled Justice Department Office of Legal Counsel memoranda from the early 2000s on the President's unilateral power to make war.⁷ I also see some merit in a few proposals to amend the WPR in ways that would improve interbranch consultation and push Congress to take nonbinding votes on military interventions even when it does not take binding ones.⁸ Former President Trump's impetuosity caused me to reassess some of my past views of presidential power, but the current Congress's chaos and legislative near-paralysis has caused me to do the same of legislative power.

In other words, the status quo leaves much room for improvement. But, for reasons explained below, the practical benefits of ambitious statutory revisions would not be as great as many reformists claim, especially compared to alternative possible steps that Congress can take within the existing statutory framework.

I. LEGAL BACKGROUND AND REFORM PROPOSALS

Much debate over war powers focuses on three legal layers: (1) executive branch practice and assertions of the President's constitutional powers; (2) the WPR's statutory framework; and (3) specific congressional authorizations for the President's use of military force. What follows is a very brief explanation of all three, the main controversies about them, and some common proposals to reform them. The remainder of the Essay will focus on the second category—where some of the most ambitious reform proposals lie—though any consideration of reform rests on an understanding of how the three layers mix.

6. See Benjamin Wittes, Robert Chesney, Jack Goldsmith & Matthew Waxman, *A Statutory Framework for Next-Generation Threats*, LAWFARE (Feb. 25, 2013, 5:30 PM), <https://www.lawfaremedia.org/article/statutory-framework-next-generation-threats> [https://perma.cc/84DH-FDA9]; Benjamin Wittes, Robert Chesney, Jack Goldsmith & Matthew Waxman, *A Draft AUMF to Get the Discussion Going*, LAWFARE (Nov. 10, 2014, 1:00 PM), <https://www.lawfaremedia.org/article/draft-aumf-get-discussion-going> [https://perma.cc/58RG-K53D].

7. See The President's Const. Auth. to Conduct Mil. Operations Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188 (2001); Auth. of the President Under Domestic & Int'l L. to Use Mil. Force Against Iraq, 26 Op. O.L.C. 143 (2002); see also BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 282-83, 299 (2020) (critiquing these memoranda and calling for their withdrawal).

8. See *infra* notes 25-27 and accompanying text.

A. *Constitutional Foundations*

The way that the Constitution distributes the power to use military force or initiate armed conflicts is hotly contested. Modern presidents assert a broad constitutional power, though recent presidential administrations have acknowledged some possible limits noted below. Meanwhile, many scholars and members of Congress argue that only Congress may decide to take significant military action.

There is strong evidence that the Founders gave Congress the power to “declare war” because most of them thought it would be too risky (or too monarchical) to place it in the President’s hands.⁹ Whatever the Constitution originally meant, presidents have asserted that a combination of Article II constitutional powers, including the President’s designation as commander in chief and the vesting of “executive powers” in the presidency, confer some power to use military force abroad.¹⁰ Since the earliest years of the Republic, presidents have used many levels and types of military force without explicit congressional approval, accompanied by varying claims of legality and degrees of congressional pushback.¹¹

The high water mark for presidential use of force was the Korean War, launched by President Truman in 1950 without a congressional war declaration or express authorization. It ultimately killed nearly 40,000 Americans and well over a million Koreans.¹² After Truman dispatched sizable U.S. combat forces to Korea, Congress passed emergency funding for the war and took other actions, such as extending the draft, that arguably provided implicit congressional approval for the conflict. By that time, though, U.S. forces were already engaged in large-scale military operations on the ground, and the executive branch took the position that the President’s constitutional powers as commander in chief and to conduct U.S. foreign relations gave him expansive unilateral authority to use military force to defend American interests abroad. In justifying that authority,

9. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-5 (1993); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 1-12 (2004 ed.).

10. See Michael D. Ramsey & Matthew C. Waxman, *Delegating War Powers*, 96 *SO. CAL. L. REV.* 741, 748 n.19 (2023).

11. See SCHLESINGER, *supra* note 9, at 35-67.

12. See generally Mary L. Dudziak, *The Gloss of War: Revisiting the Korean War’s Legacy*, 122 *MICH. L. REV.* 149 (2023) (describing in detail this history and how executive-branch lawyers have subsequently interpreted it).

the executive branch cited nearly one hundred much smaller presidential uses of force undertaken without express congressional approval.¹³

Since the Korean War, presidents of both parties have continued to claim broad unilateral power to send armed forces into conflict to defend American national interests. Modern presidential administrations have asserted that the President has constitutional authority to do so at least if the anticipated “nature, scope, and duration” of military operations lies below some indeterminate threshold of “war” in Article I’s Declare War Clause; at that point, congressional approval is probably required.¹⁴ For instance, recent administrations have asserted that the President had the power to launch a humanitarian intervention in Libya and to strike Syria in response to its use of chemical weapons.¹⁵ Congress has resisted with inconsistent vigor such claims of presidential power. Courts, meanwhile, have largely stood aside, sometimes based on holdings that the issue is a nonjusticiable political question.¹⁶

One way that war powers might be reformed is therefore internal to the executive branch: it might pull back on some of its past expansive claims of presidential power to use military force. For example, the Justice Department might withdraw some of its past memoranda containing its broadest assertions of such power, especially in dicta, or adopt new standards in issuing such advice.¹⁷

B. *The War Powers Resolution Framework*

Congress tried to rebalance war powers in its favor with a legislative framework contained in the WPR. In 1973, in the Vietnam War’s wake, Congress enacted that law over President Nixon’s veto.¹⁸ Among other requirements, the WPR stipulates that when the President sends U.S. armed forces into actual or imminent hostilities, he must generally withdraw those forces within sixty days unless Congress expressly authorizes continued use of force.¹⁹ According to its text, the WPR aimed “to fulfill the intent of the framers of the Constitution of

13. See Brian Finucane, *Presidential War Powers, The Take Care Clause, and Article 2(4) of the U.N. Charter*, 105 CORNELL L. REV. 1809, 1845-47. For a critique of this historical practice methodology, see STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 78 (2013).

14. See, e.g., Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 20 (2011).

15. See *id.*; Apr. 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 O.L.C. 1 (2018).

16. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 302 (3d ed. 2013).

17. See BAUER & GOLDSMITH, *supra* note 7; Brian Finucane & Stephen Pomper, *Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the “War on Terror,”* JUST SEC. (Sept. 10, 2021), <https://www.justsecurity.org/78169/crossing-back-over-time-to-reform-the-legal-culture-and-legal-practice-of-the-war-on-terror> [<https://perma.cc/DVY3-4SF3>].

18. 50 U.S.C. §§ 1541-1550 (2018).

19. *Id.* § 1544(b).

the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”²⁰

Executive practice has mitigated the impact of the WPR by, among other ways, defining flexibly its statutory triggers and congressional-approval requirements, and Congress has not zealously or consistently pushed back.²¹ For example, when President Clinton’s 1999 intervention in Kosovo extended beyond sixty days, the Justice Department reasoned that Congress’s decision to fund that operation constituted sufficient legislative approval to satisfy the WPR.²² When President Obama’s 2011 Libya intervention extended beyond that time limit, the Obama Administration argued to Congress that the limited air operations did not constitute “hostilities” for the WPR’s purposes.²³ Again, courts have not yet stepped in to enforce the Resolution.²⁴ The WPR therefore has not imposed the legally binding constraints that its architects expected.

In light of the WPR’s weaknesses and erosion, some members of Congress, scholars, and commentators advance various proposals to cure its defects.²⁵ Most advocates of WPR reform agree that the WPR’s terms should be more carefully defined. Beyond that, one type of proposal would bolster congressional consultation requirements before and during military interventions and perhaps require Congress to take votes on them even if those votes are nonbinding.²⁶ Other proposals lean much further toward congressional primacy and would impose

20. *Id.* § 1541(a).

21. See MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 9-62 (2019). Some observers note that the WPR’s legislative veto provision is, after *INS v. Chadha*, 462 U.S. 919 (1983), probably unconstitutional, but Curtis A. Bradley argues persuasively that this has not likely made much difference in practice. See Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 466-72 (2021).

22. See Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 346-65 (2000).

23. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Rels.*, 112th Cong. 7-11 (2011) (statement of Harold Koh, Legal Advisor, U.S. Dep’t of State).

24. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 23-24 (D.C. Cir. 2000) (dismissing, without reaching the merits, a suit challenging the Kosovo intervention as violating the Constitution and the War Powers Resolution (WPR)).

25. See, e.g., WEED, *supra* note 21, at 63-67 (enumerating several proposed reforms).

26. See, e.g., *infra* notes 108-109 and accompanying text; Blaise Malley, *Bipartisan Effort to Claw Back War Powers from White House Launched Today*, RESPONSIBLE STATECRAFT (July 27, 2023), <https://responsiblestatecraft.org/2023/07/27/bipartisan-effort-to-claw-back-war-powers-from-white-house-launched-today> [https://perma.cc/8SVE-K6KF] (proposing a funding cutoff mechanism); Tess Bridgeman & Stephen Pomper, *2022 Update: Good Governance Paper No. 14: War Powers Reform*, JUST SEC. (Jan. 21, 2022), <https://www.justsecurity.org/79933/2022-update-good-governance-paper-no-14-war-powers-reform> [https://perma.cc/PJZ4-QN2M] (same).

strict or automatic funding cutoffs for unauthorized uses of force or would provide for judicial enforcement of statutory requirements.²⁷ Automatic funding cutoffs and judicial enforcement would severely restrict the President's legal room to maneuver beyond the WPR's statutory confines.

C. Congressional Force Authorizations

Sitting atop the constitutional foundation and the WPR framework are several congressional force authorizations. Among the most significant is the 2001 AUMF, passed after the September 11 terrorist attacks. That AUMF authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."²⁸ In 2002, Congress passed an AUMF authorizing the President to use force to "defend the national security of the United States against the continuing threat posed by Iraq."²⁹ More than twenty years later, both force authorizations remain on the books.³⁰

The executive branch has stretched the 2001 AUMF to justify continued use of force in many places around the world, including Afghanistan, Yemen, Somalia, Iraq, and Syria.³¹ It has also interpreted that AUMF to justify the use of force against terror groups that did not exist when al Qaida attacked in September 2001, most notably the Islamic State terrorist organization, and to engage in combat operations only indirectly related to counterterrorism.³² The executive branch also still draws on the 2002 AUMF, two decades after the overthrow of

27. For examples of such proposals, see Malley, *supra* note 26; Bridgeman & Pomper, *supra* note 26; *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, CONST. PROJECT 42 (2005), http://constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf [<https://perma.cc/V89B-K7QS>] (proposing judicial enforcement); Tom Campbell, *Responsibility and War: Constitutional Separation of Powers Concerns*, 57 STAN. L. REV. 779, 781 (2004) (same); and Oona A. Hathaway, *How to Revive Congress's War Powers* (Yale L. & Econ. Rsch. Paper, 2019) (manuscript at 10-14), <https://ssrn.com/abstract=3436924> [<https://perma.cc/6QAF-CERC>] (proposing a default sunset for new force authorizations).

28. Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

29. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, § 3, 116 Stat. 1498, 1501 (2002).

30. Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001), codified at 50 U.S.C. § 1541 note (2018); Pub. L. 107-243, § 3, 116 Stat. 1498, 1501 (2002), codified at 50 U.S.C. § 1541 note (2018).

31. See Charlie Savage, *Biden Seeks Update for a Much-Stretched Law that Authorizes the War on Terrorism*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/us/politics/biden-war-powers.html> [<https://perma.cc/UZ7Q-953V>].

32. See *id.*

Saddam Hussein's Iraqi government, to justify military operations in and around Iraq, including against agents of Iran.³³

Many reformists believe that the AUMFs encourage modern presidents to engage in conflict beyond the original (or present) intent of Congress. Thus, they advocate rescinding the 2002 AUMF and at least substantially amending the 2001 AUMF. For example, commonly proposed reforms to the 2001 AUMF include adding a sunset clause and specifying certain terror groups against which force may still be used, or restricting the geographic territories where force may be used.³⁴ The Biden Administration, too, has called for repealing the 2002 Iraq AUMF and replacing other "outdated authorizations" with a narrower and more specific statutory authorization for the use of force against terrorist threats.³⁵

D. *Stakes and Principles*

War power reform advocates emphasize a range of stakes or imperatives, so before turning to arguments about policy risks – the main focus of this Essay – I will first mention some arguments based on principle. One argument is an originalist one: that the Constitution's drafters rejected ideas of monarchical prerogatives and placed the power to start or enter war in the basket of exclusive legislative prerogatives, and that this original meaning is decisive. Another argument based on principle is that placing the power to take a nation to war in one person alone is antithetical to core constitutional values of dispersed power. A common corollary intuition of some reformists is that the larger the military

33. See STEPHEN P. MULLIGAN & JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10391, RECENT U.S. AIRSTRIKES: LEGAL AUTHORITIES AND QUESTIONS 1-2 (2020).

34. See, e.g., Hathaway, *supra* note 27 (manuscript at 10-14); Tess Bridgeman, Ryan Goodman, Stephen Pomper & Steve Vladeck, *Principles for a 2021 Authorization for Use of Military Force*, JUST SEC. (Mar. 5, 2021), <https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force> [<https://perma.cc/4453-M7QK>]; Paul Kane, *Congress Ceded the Power to Wage Wars to the President After Sept. 11. A Bipartisan Pair of Senators Want to Take It Back.*, WASH. POST (Sept. 11, 2021, 6:46 PM EDT), <https://wapo.st/3QWLxV4> [<https://perma.cc/77XF-JWEB>]. At a recent House hearing on congressional Authorizations for Use of Military Force (AUMFs) reform, some members advocated a 2001 AUMF sunset. See Brian Finucane, *Key Takeaways from September 28 House Foreign Affairs Committee Hearing on AUMF Reform*, JUST SEC. (Oct. 4, 2023), <https://www.justsecurity.org/89148/key-takeaways-from-september-28-house-foreign-affairs-committee-hearing-on-aumf-reform> [<https://perma.cc/9SEG-628V>]. The Obama Administration also proposed sunseting the 2001 AUMF, though the Trump and Biden Administrations pulled back on that idea. See Finucane, *supra*.

35. See Off. Mgmt. & Budget, *Statement of Administration Policy*, EXEC. OFF. OF THE PRESIDENT (June 14, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf> [<https://perma.cc/6TZ3-A7NU>].

intervention or conflict, the more strongly democratic accountability demands that the President obtain formal approval from Congress.³⁶

These arguments based on principle are important, though there are reasonable counterarguments as well. For the remainder of this Essay, however, I want to put them to the side in order to focus on consequentialist arguments for reform. At this moment, when American overseas military commitments and perceived adventurism face intense resistance from both the political left and the right,³⁷ questions of whether and how checks on presidential war-making actually affect military intervention in practice are especially salient. Given the supposed implications for war and peace, moreover, any reform effort should be based on realistic assessments of attendant security risks and rewards.

II. WAR POWER REFORM'S CONSEQUENCES AND RISKS

Besides principle, most war powers reform proposals rest on a belief that presidential unilateralism risks unnecessary, costly, and dangerous conflicts. Those stakes are, of course, momentous, and Part III of this Essay will recommend approaches within existing law to address them.

The consequentialist case for legal reform, however, is weaker than often supposed for two sets of reasons. First, conceptually, the predominant emphasis of reform efforts on the power to start wars is too narrow to capture how and when the United States actually engages in force and obscures the important roles of Congress in constraining executive war powers both before and during wars. Second, empirically, the practical impact of weak legislative checks is often overestimated. Much of the consequentialist debate comes down to assumptions about a practical delta between weak legal checks and strong ones. That delta is smaller than many legal scholars and reformists often suppose.

A. Congressional Checks Before and During War

Focusing narrowly and heavily on war initiation obscures the realities of war and peace. Wars rarely occur suddenly, at a single decision point in which the decision maker chooses yes or no. Though presidents wield immense power once the United States engages in military conflict, Congress retains and often exercises a range of powers that shape how war is waged, the war's aims or

36. Jack L. Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7, 17-18 (2006).

37. See Blaise Malley, *Can the Quincy Institute Survive Putin's War*, NEW REPUBLIC (Sept. 1, 2022), <https://newrepublic.com/article/167612/quincy-institute-survive-ukraine-russia-war> [<https://perma.cc/K3FR-LRUQ>].

outcomes, and how war ends. Examples in this Section show how congressional checks both before and after the point of war initiation can serve to effectively constrain executive war powers and vindicate Congress's constitutional role in war.

A first important point is that wars usually result from, are conducted by, or are ultimately averted by a series of moves and decisions by both branches, each exercising a wide range of constitutional powers—all while adversaries are engaged in their own moves and countermoves.³⁸ The President has some undisputed unilateral powers in advance of actual war to alter the status quo, such as the power to threaten war.³⁹ Congress, too, can pass resolutions (including non-binding ones) that put American credibility on the line or send signals about U.S. resolve.⁴⁰ The President's role is often easier to see, but there is interbranch checking and engagement coursing through many U.S. foreign policy choices.

Consider a constitutional controversy from 1950 that illustrates the importance of the period prior to war initiation. In war powers literature, that year is usually associated with President Truman's unilateral intervention in Korea, but an equally important—maybe more important—precedent was created by Truman's plans to send troops to the opposite side of the globe. Did the President have the constitutional power to indefinitely place more than 100,000 U.S. combat troops in Europe to shore up the new North Atlantic Treaty Organization alliance against possible Soviet invasion?⁴¹

President Truman argued that he could direct geographic placement of peacetime military forces around the world as Commander-in-Chief, but critics in Congress protested that doing so would nullify its power to declare war by precommitting those troops to future battlefields.⁴² The President regarded the move as vital to preventing World War III, but congressional critics thought it

38. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1386 (1994).

39. See generally Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1638-46 (2014) (discussing the President's power to threaten war or military force).

40. See *id.* at 1633, 1664-74 (arguing that various "mechanisms of congressional influence" can impact how foreign nations perceive a President's threats of war).

41. See generally Ted Galen Carpenter, *United States' NATO Policy at the Crossroads: The 'Great Debate' of 1950-1951*, 8 INT'L HIST. REV. 389 (1986) (describing the Truman Administration's foreign-policy decisions and the controversies they stirred between 1950 and 1951).

42. See, e.g., 97 Cong. Rec. 2993 (1951) (statement of Senator Taft). As Representative Frederic R. Coudert, Jr. explained in the *New York Herald Tribune*: "If the President alone is allowed to send anywhere abroad, at any time, hundreds of thousands of American troops without a declaration of war by Congress, pursuant to the Constitution, then, indeed, there is little of American constitutional government or freedom." See 97 Cong. Rec. A153 (1951).

made superpower conflict more likely.⁴³ Asking the Founders to resolve this debate would have been like asking how the Constitution allocated power to put troops on the moon: many of them did not expect the United States to ever have a large standing army or significant treaty alliances, let alone be the principal security guarantor of a dozen-member bloc stretching across two continents. The Senate brandished its powers to slow the deployment and force the executive branch to spend political capital, but the President largely won this particular dispute in practice.

For decades after, both political branches accepted that, at least absent statutory restrictions, the President could decide when and where to station troops in foreign territory – and they both accepted that it was good policy to do so. For nearly seventy-five years, this practice likely helped keep the peace in Europe and other potential conflict zones, avoid spirals of rearmament, and deter wars that would have dragged the United States into armed hostilities.⁴⁴ Conflicts that were *avoided* by the President's unilateral actions in foreign affairs rarely show up in any accounting of constitutional war powers; usually legal scholars study only wars that actually happened. In recent years, as some political leaders have questioned American treaty commitments, the reverse constitutional question has surfaced: Can Congress block the President from bringing troops *home*? That legal question turns Founding Era worries about presidential militarism on their head, and it pits competing views about how best to prevent costly American wars against each other.⁴⁵

Focusing on war initiation also obscures other important roles Congress plays before war in creating a status quo against which uses of force take place. Take the possibility of a major war with the People's Republic of China (PRC)

43. See generally Carpenter, *supra* note 41 (describing these debates); PHIL WILLIAMS, *THE SENATE AND U.S. TROOPS IN EUROPE* (1985) (same).

44. See CAMPBELL CRAIG & FREDRIK LOGEVALL, *AMERICA'S COLD WAR: THE POLITICS OF INSECURITY* 100 (2009); MIRA RAPP-HOOPER, *SHIELDS OF THE REPUBLIC: THE TRIUMPH AND PERIL OF AMERICA'S ALLIANCES* 48 (2020); Mira Rapp-Hooper & Matthew Waxman, *Presidential Alliance Powers*, 42 *WASH. Q.* 67, 67 (2019).

45. See Rapp-Hooper & Waxman, *supra* note 44, at 76; see also Ashley Deeks, *Can Congress Constitutionally Restrict the President's Troop Withdrawals?*, *LAWFARE* (Feb. 6, 2019, 11:15 AM) <https://www.lawfaremedia.org/article/can-congress-constitutionally-restrict-presidents-troop-withdrawals> [<https://perma.cc/XX7S-SRU9>] (discussing the constitutional issues). During the Carter Administration, Congress also considered blocking the President's plans to bring ground troops home from South Korea. See Franz-Stefan Grady, *How the 'Deep State' Stopped a US President from Withdrawing US Troops from Korea*, *DIPLOMAT* (June 15, 2018), <https://thediplomat.com/2018/06/how-the-deep-state-stopped-a-us-president-from-withdrawing-us-troops-from-korea> [<https://perma.cc/GD8N-EFD2>]. The most recent defense authorization act now bars the President from withdrawing from NATO without approval by Congress or super-majority Senate consent. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 1250A (2023).

that might erupt if the United States defends Taiwan against a PRC attack. Any presidential decision to use force without formal congressional approval would raise gigantic constitutional questions.⁴⁶ Yet whether Sino-U.S. war breaks out over Taiwan or is avoided, the President's options will be constrained or enabled by a bevy of congressional moves. A congressional act on the books for decades declares "any effort to determine the future of Taiwan by other than peaceful means . . . a threat to the peace and security of the Western Pacific area and of grave concern to the United States,"⁴⁷ and it provides for a U.S. policy to "provide Taiwan with arms of a defensive character" and "maintain the capacity of the United States to resist any resort to force" that would threaten Taiwan.⁴⁸ In recent annual defense authorization acts, Congress has established "the policy of the United States to maintain the capacity of the United States to resist a fait accompli that would jeopardize the security of the people on Taiwan," as well as authorized or mandated other measures to defend Taiwan.⁴⁹ Any U.S. war over Taiwan would be a product not just of a presidential choice at one decisive moment, or even a set of presidential military and diplomatic moves, but also of legislation (and congressional political pressure) that contributes to the conditions before a crisis develops.

Similarly, as war has raged in the Middle East, President Biden launched airstrikes against Houthi rebels in Yemen who were attacking shipping vessels traversing the Red Sea. At the time of this writing, there is a significant possibility that the President will continue to respond militarily to other threats to U.S. forces in the region.⁵⁰ The near-paralyzed Congress has not authorized military

46. For a detailed discussion of these issues, see generally Scott R. Anderson, *Taiwan, War Powers, and Constitutional Crisis*, 64 VA. J. INT'L L. 173 (2023).

47. Taiwan Relations Act, Pub. L. No. 96-8, § 2(b)(4), 93 Stat. 14, 14 (1979) (codified at 22 U.S.C. § 3301).

48. *Id.* § 2(b)(5)-(6). For a discussion of Congress's involvement in setting Taiwan policy, see Anderson, *supra* note 46, at 184-85.

49. See, e.g., James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, §§ 1263, 1264, 5501-5512, 5513, 136 Stat. 2858, 3292 (2022) (codified at 22 U.S.C. §§ 3357a, 3351); National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 1307 (2023). Those provisions, respectively, authorized U.S.-Taiwan joint military exercises; authorized and fast-tracked up to \$10 billion in arms sales to Taiwan; and required the Department of Defense and the intelligence community to implement a strategy countering the People's Republic of China influence and information operations targeting Taiwan. The Fiscal Year 2024 defense authorization act specifically supports joint training between U.S. and Taiwanese military forces.

50. See Jack Goldsmith, *The Middle East and the President's Sweeping Power Over Self-Defense*, LAWFARE (Oct. 23, 2023, 1:53 PM), <https://www.lawfaremedia.org/article/the-middle-east-and-the-president-s-sweeping-power-over-self-defense> [https://perma.cc/BFZ9-8NZA]; Brian Finucane & Michael Wahid Hanna, *Don't Rely on U.S. Law to Prevent Escalation in the Middle*

action against the Houthis, and some members have objected to the airstrikes on policy or constitutional grounds (or have urged consideration of an AUMF).⁵¹ Meanwhile, Congress has largely supported the President using military force, and many members even criticized him for not responding sooner and more forcefully.⁵² In early February 2024, President Biden also launched self-defensive strikes against Iran-backed militias in Iraq and Syria after they executed deadly attacks on U.S. military personnel in Jordan. Some members of Congress, especially from the political poles, again criticized the move for its lack of congressional authorization.⁵³ Counterbalancing these concerns, however, key congressional leaders have backed the strikes, and many Republicans have argued that they were too little, too late.⁵⁴ Panning back, Congress has expressed strong support for U.S. military deployments and other deterrence measures in the region,⁵⁵ which set some of the conditions for possible escalation scenarios in the first place.

East, WAR ROCKS (Oct. 24, 2023), <https://warontherocks.com/2023/10/dont-rely-on-u-s-law-to-prevent-escalation-in-the-middle-east> [<https://perma.cc/M2YB-BLFB>].

51. See Yasmeen Abutaleb & Abigail Hauslohner, *House Members Tell Biden He Must Seek Authorization for Yemen Strikes*, WASH. POST (Apr. 26, 2024), <https://www.washingtonpost.com/politics/2024/01/26/congress-biden-houthis-war-powers> [<https://perma.cc/3LKS-TGV4>].
52. See Anthony Adragna, Joe Gould, Katherine Tully-McManus & Connor O'Brien, *Biden's Yemen Strike Reignites Congress' Battle over War Powers*, POLITICO (Jan. 12, 2024), <https://www.politico.com/live-updates/2024/01/12/congress/congress-on-yemen-strikes-00135332> [<https://perma.cc/PRX9-FE2G>]; Rebecca Kheel & Konstantin Toropin, *Pentagon Reveals More Yemen Strikes Were Carried Out as Progressives in Congress Bristle*, MILITARY.COM (Jan. 12, 2024), <https://www.military.com/daily-news/2024/01/12/pentagon-reveals-more-yemen-strikes-were-carried-out-progressives-congress-bristle.html> [<https://perma.cc/9EF3-XBE5>].
53. See Scott Wong & Kate Santaliz, *Lawmakers Press Biden to Get Congress's Approval for Middle East Airstrikes*, NBC NEWS (Jan. 29, 2024, 6:06 PM EST), <https://www.nbcnews.com/politics/congress/lawmakers-press-biden-get-congress-approval-middle-east-airstrikes-rcna136206> [<https://perma.cc/R7VA-NSS2>].
54. See Léon Bruneau & Bastien Inzaurrealde, *US Strikes in Syria and Iraq Have Biden Walking a 'Fine Line'*, BARRON'S (Feb. 3, 2024), <https://www.barrons.com/news/us-strikes-in-syria-and-iraq-have-biden-walking-a-fine-line-9a725262> [<https://perma.cc/2S95-UU28>]; Christine Zhu, *GOP Lawmakers Say Strikes in Iraq and Syria Aren't Enough*, POLITICO (Feb. 2, 2024, 7:08 PM EST), <https://www.politico.com/news/2024/02/02/gop-strikes-iran-syria-00139437> [<https://perma.cc/TQU3-FD7S>].
55. See Press Release, Sen. Comm. on Foreign Rels., Chair Cardin and Senate Leadership Lead Resolution in Support of Israel: Cardin Delivers Floor Remarks Denouncing Hamas Terror Attack (Oct. 19, 2023), <https://www.foreign.senate.gov/press/dem/release/chair-cardin-and-senate-leadership-lead-resolution-in-support-of-israel-cardin-delivers-floor-remarks-denouncing-hamas-terror-attack> [<https://perma.cc/H2MX-L777>] (expressing strong support for the defense of Israel); Bryant Harris, *House Drafts Bill to Strike Iran Proxies amid Israel-Hamas War*, DEF. NEWS (Oct. 17, 2023), <https://www.defensenews.com/congress/2023/10/17/house-drafts-bill-to-strike-iran-proxies-amid-israel-hamas-war>

Besides obscuring the many ways that decisions by both political branches – often made jointly – in advance of crises often determine whether and how wars break out, the analytical focus on war initiation also diverts attention from Congress’s ability to constrain presidential war strategy and conduct during conflict. As political scientist Douglas L. Kriner notes, “[v]irtually every prior study of the dynamics governing American uses of force abroad has focused exclusively on the politics driving the *initiation* of military action.”⁵⁶ And so, he continues, “[w]hen constitutional scholars discuss war powers, they begin and all too often end with the power to initiate military actions abroad.”⁵⁷ In Vietnam, congressional threats of – and in some cases passing of – legislation contracted the geographic scope of war and eventually pushed Nixon to end it.⁵⁸ After President Reagan intervened in Lebanon, congressional opposition following violent escalation pushed President Reagan to redeploy some forces offshore and negotiate an authorization with an eighteen-month exit; Congress also restricted the President from expanding the mission’s scope.⁵⁹ Evidence suggests that congressional opposition in that case did not just mirror drops in public opinion or the deterioration of the situation on the ground.⁶⁰ During the Somalia intervention in the early 1990s, once U.S. military casualties mounted, Congress successfully pressured President Clinton to end the U.S. military intervention after a six-month transition period.⁶¹ In the ongoing war against al Qaida and its spin-offs or remnants, Congress effectively outlawed very aggressive interrogation

[<https://perma.cc/T5QC-V972>] (describing congressional support for deterring an Iranian attack); *House Votes Down Bill Directing Removal of Troops from Syria*, AP NEWS (Mar. 8, 2023, 6:50 PM), <https://apnews.com/article/congress-syria-troop-withdrawal-matt-gaetz-609353065981287eac3060c7eb6d9f09> [<https://perma.cc/6R59-QTU3>] (discussing congressional support for keeping forces in Syria); Nahal Toosi & Wesley Morgan, *Congress-Appointed Panel Rips Trump’s Syria Strategy*, POLITICO (Sept. 24, 2019, 2:39 PM), <https://www.politico.com/story/2019/09/24/congress-study-syria-trump-1507920> [<https://perma.cc/DMF2-YXHM>] (discussing congressional support for keeping forces in Syria); Karoun Demirjian, *House Declares Solidarity with Israel in First Legislation Under New Speaker*, N.Y. TIMES (Oct. 25, 2023), <https://www.nytimes.com/2023/10/25/us/politics/house-israel-vote.html> [<https://perma.cc/YUF4-UGP6>] (noting overwhelming congressional support for defending Israel).

56. DOUGLAS L. KRINER, *AFTER THE RUBICON: CONGRESS, PRESIDENTS, AND THE POLITICS OF WAGING WAR* 3-4 (2010).
57. *Id.*
58. Julian E. Zelizer, *Congress and the Politics of Troop Withdrawal*, 34 *DIPLOMATIC HIST.* 529, 530-39 (2010).
59. See Jack Goldsmith, *A Way Out of the Libya Conundrum: The Lebanon and Somalia Analogies*, *LAWFARE* (June 21, 2011, 2:55 PM), <https://www.lawfaremedia.org/article/way-out-libya-conundrum-lebanon-and-somalia-analogies> [<https://perma.cc/35TZ-RLUT>].
60. See KRINER, *supra* note 56, at 194, 229.
61. See Thomas L. Friedman, *Clinton Sending More Troops to Somalia; a Firm Deadline for a Pullout Will Be Set*, N.Y. TIMES, Oct. 7, 1993, at A1; Goldsmith, *supra* note 59.

techniques, despite President George W. Bush's insistence that they were critical to U.S. security.⁶²

I pick these examples because each is often associated with the abrogation of Congress's role in foreign affairs. Vietnam is widely seen as a problem of congressional fecklessness and impotence; Reagan is viewed as having eroded the WPR; the Clinton Administration's legal justification for presidential interventions in regional crises remains influential in executive branch constitutional interpretation; and Bush is associated with presidential unilateralism. No doubt, the President wields immense power to dictate the course of war once begun, but that does not mean that Congress only recedes to the background.

Finally, presidential sensitivity to the threat of congressional checking once conflict begins in turn affects future decisions to use military force. Reagan Administration officials concluded that congressional opposition to the Lebanon intervention would narrow options for military intervention and operations in other crises.⁶³ Clinton acknowledged that he "had to consider the consequences of any action that could make it even harder to get congressional support for sending American troops to Bosnia or Haiti, where we had far greater interests at stake."⁶⁴ True, Clinton eventually intervened in those crises, but in the aftermath of Somalia, the President had to spend considerable political capital "fending off efforts in Congress to limit [his] ability to commit American troops to Haiti and Bosnia."⁶⁵

I do not mean to suggest that the moment at which war is initiated is unimportant. Obviously, it is. Nor am I arguing that Congress's powers are always even with the President's. But a narrow focus on the ultimate decision to intervene militarily or not often misses substantial congressional involvement or checking before, during, and after conflicts. Interbranch moves before and during conflicts are often as consequential as decisions to initiate conflicts. And, as the following Section argues, focusing on formal votes by Congress overlooks important political checking.

62. See Josh White, *Bush Relents, Backs Torture Ban*, WASH. POST (Dec. 16, 2005), <https://www.washingtonpost.com/archive/politics/2005/12/16/president-relents-backs-torture-ban/df74d809-e500-4113-bddd-140f358f2829> [https://perma.cc/HBN3-R5LL]; see also Jack Goldsmith, *Congress's Intimate Involvement in Managing the Forever War* (Apr. 25, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4428965> [https://perma.cc/S4JX-4ZUK] (discussing Congress's support for the continuing war against al Qaida and its remnants or offshoots).

63. See KRINER, *supra* note 56, at 230.

64. BILL CLINTON, *MY LIFE* 552 (2004). Clinton also cites opposition from Congress as among the reasons he did not intervene militarily in Rwanda. *Id.* at 593.

65. *Id.* at 555.

B. Congress's Political Checks

Reformists fixated on legal checks like the WPR's time limits and congressional force authorizations often discount Congress's political checks and the many ways beyond legal checks that Congress influences presidential decisions on force. By "political checks" I mean non-legally-binding efforts in the political sphere that prevent concentration of power and make presidential decision-making responsive to congressional and, ultimately, public will. By "legal checks" I mean primarily legislative enactments or judicial enforcement that authorize or restrict presidential action—though one point of this Section is that the two types of checks are not neatly separable. One consequentialist argument for requiring formal congressional authorization is that presidential unilateralism makes war more *likely*, as presidents bypass veto-gates embedded in the more restrictive and measured legislative process. A second, related argument is that the formal legislative process leads to *sounder* decisions by encouraging careful deliberation about whether war is justified. Both points may have some validity, but they are often much overstated.

As an initial matter, there is weak empirical evidence that formal congressional approval has led to a more thorough consideration of means and ends. Historically, some of the most ill-conceived American wars (the War of 1812, Vietnam, and the 2003 Iraq War) were declared or legislatively authorized by Congress. The War of 1812 and the Spanish-American War were pushed by congressional war hawks more than reluctant presidents. The congressional war declaration or approval processes preceding the Mexican-American War, the Spanish-American War, World War I, and the two Iraq Wars failed to generate consensus between the branches about the endgames. Since the Korean War—which Congress almost certainly would have approved had President Truman requested it—the United States has not fought a single major ground war that was not formally authorized by Congress; whatever the Constitution requires, subsequent presidents understood that Truman erred by acting without Congress's express approval in Korea. Of the major congressionally approved wars since then, two of them, Vietnam and the second Iraq War, were blunders based on faulty assumptions. Of course, this very cursory survey is hardly systematic, and it neglects the possibility that perceived legal or political requirements for congressional approval may have prevented wars altogether. Indeed, an earlier point of this Essay is that one can draw few conclusions by studying only conflicts that actually occurred. But we should at least question idealistic notions that war-making expressly approved by Congress is consistently better reasoned.

As for the likelihood of military conflict, empirical studies show Congress wields significant political checks over U.S. military decisions in the absence of strong legal checks. On this point, legal scholars and political scientists often talk

past each other. Legal scholars naturally focus on constitutional doctrine or statutory enactments and the actual cases that generate legal claims and counterclaims.⁶⁶ Political scientists naturally focus on partisanship or public opinion and are often skeptical of legal constraints on foreign policymaking. Combining the disciplines yields important insights and exposes significant knowledge gaps.

Not all agree, but many political scientists, reinforced by scholars of other disciplines, have shown in recent decades that notwithstanding the often-weak electoral incentives of congressional members to formally approve or disapprove military interventions at their outset, congressional politics weigh substantially in presidential decision-making on the use of military force.⁶⁷ Congress can influence presidential uses of force not only through legislation and appropriations measures, but also through hearings and public appeals in which “members of Congress can substantially increase the political costs of military action – sometimes forcing presidents to withdraw sooner than they would like or even preventing any kind of military action whatsoever.”⁶⁸ Vietnam is usually remembered as a case of congressional abdication, but during the course of it, high-profile Senate investigations and hearings led by Foreign Relations Committee Chairman J. William Fulbright helped make disapproval of the war more

66. See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1665 (2014).

67. For views casting doubt on the extent to which this is true, see, for example, SARAH BURNS, *THE POLITICS OF WAR POWERS: THE THEORY AND HISTORY OF PRESIDENTIAL UNILATERALISM* 1 (2019), arguing that “presidents have become accustomed to initiating military action unilaterally, safe in the knowledge that Congress and the Supreme Court hesitate to support or oppose these initiatives”; James Goldgeier & Elizabeth N. Saunders, *The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump*, 97 FOREIGN AFFS. 144, 156 (2018), contending that although “Presidents will anticipate pushback from Congress and restrain themselves accordingly,” legislative checks on presidential foreign-policy decision-making have eroded; and Sarah E. Kreps, *Legality and Legitimacy in American Interventions*, 49 PRESIDENTIAL STUDS. Q. 551, 552 (2019), showing that presidents have relied on many sources of legitimacy besides legality to justify military interventions. For a twentieth-century perspective reflecting a similar view, see Aaron Wildavsky, *The Two Presidencies*, TRANS-ACTION 7, 7 (Dec. 1966), finding, “In foreign affairs . . . [the President] can almost always get support for policies that he believes will protect the nation . . .”

68. William G. Howell & Jon C. Pevehouse, *When Congress Stops Wars*, 86 FOREIGN AFFS. 95, 97 (2007); see also David H. Clark, *Agreeing to Disagree: Domestic Institutional Congruence and U.S. Dispute Behavior*, 53 POL. RSCH. Q. 375 (2000) (finding that U.S. militarized dispute behavior is a function of congruence between presidential and congressional preferences); KENNETH SCHULTZ, *DEMOCRACY, AND COERCIVE DIPLOMACY* 57 (2001) (describing institutional mechanisms that prevent monopolization of political discourse by any single government actor in a democratic state). *But see* Goldgeier & Saunders, *supra* note 67, at 145 (“In Congress, the combination of declining foreign policy expertise among members and increasing political polarization has reduced the ability of legislators to supervise the executive branch even if they had the appetite to do so.”).

politically acceptable and to boost public opposition to the war.⁶⁹ Congress's power to check the President in this way is arguably stronger today than in that conflict. True, some light-footprint operations like drone strikes and cyberattacks have less public visibility and therefore face less scrutiny than major combat operations.⁷⁰ But advances in information and communication technology (as well as in investigative journalism) also make it harder today than in earlier eras to keep military operations secret.⁷¹

Legislative processes bolster congressional political checks in other ways. Even if the WPR is not enforceable, its sixty-day clock and special legislative procedures help ease congressional collective-action problems and make congressional opposition to ongoing military operations less politically risky.⁷² Furthermore, legislative mechanisms themselves, such as debates and hearings, make it difficult to conceal or misrepresent congressional preferences about war and peace. Congressional action or inaction thus sends signals about domestic resolve to foreign parties—both adversaries and allies alike—thereby affecting the President's calculus regarding using force.⁷³ Faced with such institutional constraints, presidents will incline to be more selective about making military threats so as to avoid being undermined later.⁷⁴ “Legislatures,” in other words,

69. See RANDALL BENNETT WOODS, J. WILLIAM FULBRIGHT, VIETNAM, AND THE SEARCH FOR A COLD WAR FOREIGN POLICY 106-23 (1998); JULIAN E. ZELIZER, ARSENAL OF DEMOCRACY: THE POLITICS OF NATIONAL SECURITY—FROM WORLD WAR II TO THE WAR ON TERRORISM 195-96 (2010). Julian E. Zelizer notes that around the same time, Republican Senator John Stennis used hearings to move opinion in the opposite direction. ZELIZER, *supra* at 201.

70. See Goldsmith & Waxman, *supra* note 36, at 18.

71. See JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 73-82 (2012); Oriana Pawlyk, *The Days of Secret Military Operations May Soon Be Over. Does that Matter?*, MILITARY.COM (Dec. 1, 2018), <https://www.military.com/daily-news/2018/12/01/days-secret-military-operations-may-soon-be-over-does-matter.html> [<https://perma.cc/73B7-ADXA>].

72. See David P. Auerswald & Peter F. Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 505 (1997); cf. Aziz Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 833 (2012) (“Accounts of war powers often omit this history of [WPR compliance in some cases] and thus may be missing evidence of a more subtle interaction between law and politics in the absence of outright interbranch confrontations.”).

73. KRINER, *supra* note 56, at 161, 233; Dino P. Christenson & Douglas L. Kriner, *Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action*, 61 AM. J. POL. SCI. 769, 769 (2017).

74. See Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829, 830 (1998); see also David P. Auerswald, *Inward Bound: Domestic Institutions and Military Conflicts*, 53 INT'L ORG. 469, 494-98 (1999) (detailing the effect of congressional moves on coercive diplomacy during the Bosnian crisis).

“need not necessarily exercise their constitutional war powers to influence the conduct of military affairs.”⁷⁵

True, political checks often swap any initial (many would argue crucial) need for Congress’s affirmative blessing with a desire merely to avoid Congress’s opposition. Still, when Congress does not formally approve interventions, thus shouldering less political responsibility, the President, who then bears the brunt of the political risks, must take special care to nurture congressional and public backing. Although findings of public attitudes toward presidential unilateralism are mixed,⁷⁶ evidence indicates that the public has a negative view of presidential unilateralism in general, and that this negative view is especially pronounced for unilateral military intervention.⁷⁷ Studies suggest that “congressional policy challenges may resonate with the public, despite most members’ limited access to information concerning and engagement with military matters, precisely because the Constitution so plainly entrusts to Congress an important role in war powers.”⁷⁸ Findings also suggest that congressional objections to presidential unilateralism tap into public unease about assertions of expansive executive power, and that members of Congress are more politically effective when they raise these objections than when other actors do.⁷⁹ As Richard A. Pildes has argued, “perceptions of whether presidents are complying with law are not utterly divorced from political and public responses to presidential action. To the contrary, perceptions about lawful authority—about whether the President is following the law or not—are inextricably intertwined with political and public responses to presidential action.”⁸⁰ According to another empirical study, “By challenging the constitutionality of executive action, members of Congress can

75. KRINER, *supra* note 56, at 64.

76. Compare Andrew Reeves & Jon C. Rogowski, *Unilateral Powers, Public Opinion, and the Presidency*, 78 J. POL. 137, 137 (2016) (finding low levels of support for assertions of unilateral power), with Dino P. Christenson & Douglas L. Kriner, *Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action*, 61 AM. J. POL. SCI. 335, 335 (2017) (finding little evidence that the public intrinsically opposes unilateral action).

77. ANDREW REEVES & JON C. ROGOWSKI, NO BLANK CHECK: THE ORIGINS AND CONSEQUENCES OF PUBLIC ANTIPATHY TOWARDS PRESIDENTIAL POWER 166-69 (2022).

78. Douglas L. Kriner, *Congress, Public Opinion, and an Informal Constraint on the Commander-in-Chief*, 20 BRIT. J. POL. & INT’L RELS. 52, 65 (2018).

79. See Christenson & Kriner, *supra* note 73; cf. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1147 (2013) (“[T]he fact that the law in this area is interrelated with politics does not show that it is unimportant.”).

80. Richard A. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1409 (2012); see also Huq, *supra* note 72, at 825-36 (2012) (describing legal and political constraints on presidential action as “complements”).

significantly erode public support for the president's unilateral initiatives."⁸¹ Constitutional law and the politics of military force are not so neatly separated.

Partly as a result of the public's attentiveness to war powers issues described above, empirical studies generally reveal that congressional politics affect both the frequency with which presidents use force abroad and the probability that they will respond militarily to crises.⁸² Congressional politics also constrain how much force presidents are willing to employ.⁸³ Such political checks are especially pronounced when Congress and the presidency are controlled by opposing parties,⁸⁴ which is also when it would be most difficult for presidents to get formal congressional approval.

Professor Ingber and others may be correct that once the President sends U.S. forces into hostilities, it is politically difficult for Congress to openly oppose the operations,⁸⁵ but the empirical evidence suggests that much of the congressional checking occurs *before* the President initiates military action. Reformists often also argue that the sparse number of cases in which Congress positively restricted presidential action, either before the President used force or once an operation began, is evidence of Congress's impotence, but that sparsity is also consistent with the hypothesis that presidents anticipate congressional political opposition or the possibility of restrictive legislation and adjust their actions prospectively.⁸⁶ Studying only the military interventions and conflicts that actually occurred, as well as the way in which they were conducted, overlooks evidence of the variety of ways in which Congress checks the President in matters of war.⁸⁷

An upshot of the empirical record is that although U.S. military intervention – or at least wars of choice – may be more likely in a world of weak legal

81. Christenson & Kriner, *supra* note 73, at 782.

82. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007) ("Using a variety of original datasets and drawing from diverse literatures within political science, this book demonstrates that Congress continues to play an important role in shaping the domestic politics that precede military action, and in influencing the willingness of presidents to embark on new ventures abroad."); see also Michael P. Hulme, *In the Shadow of Congress 11* (2023) (Ph.D. dissertation, U.C. San Diego), <https://escholarship.org/uc/item/o6vov7n2> [<https://perma.cc/ARC6-BHX7>] (showing that "Congress is far more influential in the use of military force context than often realized").

83. Hulme, *supra* note 82, at 302.

84. HOWELL & PEVEHOUSE, *supra* note 82, at 49-55.

85. See Ingber, *infra* note 100; see also Tom Campbell, *Responsibility and War: Constitutional Separation of Powers Concerns*, 57 *STAN. L. REV.* 779, 779-83 (describing first-hand congressmembers' political difficulties opposing military interventions once begun).

86. See James M. Lindsay, *Congress and Foreign Policy: Why the Hill Matters*, 107 *POL. SCI. Q.* 607, 613-16 (1992).

87. Hulme, *supra* note 82, at 305.

checks than a world of strong ones, that delta is smaller than often supposed. Proponents of legal reform would be right to point out that, if true, it also means that opponents of legal reform tend to exaggerate the dangers of handcuffing the President.⁸⁸ An issue for further study, however, is how foreign states and actors might perceive stronger legal checks, and how those perceptions of legal checks may increase or decrease the probability of war. Regardless of whether additional legal checks meaningfully constrain U.S. military responses to threats, for example, would-be adversaries may think they do and may therefore be emboldened in their own aggression.⁸⁹ This was among the arguments that President Nixon made in vetoing the WPR,⁹⁰ though empirical evidence for or against it is sparse; scholarship on deterrence rarely considers whether and why law affects the credibility of threats in adversaries' eyes.⁹¹ Besides deterrence, legal checks may also undermine the credibility of commitments to allies' defense; even a small actual delta between political and legal checks on presidential behavior might matter quite a bit to allies heavily dependent on the American security umbrella.⁹²

Moreover, prior studies of congressional political checks on the use of force raise at least the possibility that presidents are more likely to escalate the magnitude, riskiness, or duration of congressionally authorized military interventions compared to unilateral ones, because legislative authorization spreads political risk to Congress. That is, formal congressional authorization may increase the

88. See *supra* note 5 and accompanying text.

89. See Waxman, *supra* note 66, at 1669-75 (discussing the literature).

90. Richard Nixon, *Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT (Oct. 24, 1973), <https://www.presidency.ucsb.edu/documents/veto-the-war-powers-resolution> [<https://perma.cc/66FW-6CB6>]. Note that in Senate debates over alliance treaty negotiations, administration officials conceded that the treaties did not confer on the President authority to use force, and the WPR states that such authority should not be inferred from treaties. See Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1254-59 (1997).

91. One exception is David P. Auerswald, who argues that U.S. legal debate in Congress affects adversaries' perceptions of U.S. resolve and that, for example, congressional opposition to President George H.W. Bush's claims of unilateral power to use force against Iraq in 1990-1991 undermined the credibility of U.S. threats. DAVID P. AUERSWALD, *DISARMED DEMOCRACIES: DOMESTIC INSTITUTIONS AND THE USE OF FORCE* 91-97 (2000). I have not seen good empirical evidence to support this claim, though there is some suggesting the Iraqi leadership paid close attention to whether the President obtained congressional authorization to use force in 1990-1991, see *THE SADDAM TAPES: THE INNER WORKINGS OF A TYRANT'S REGIME, 1978-2001*, at 38 (Kevin M. Woods, David D. Palkki, & Mark E. Stout eds., 2011), and there is empirical evidence that the Iraqi government was very poor at reading American politics, see Charles A. Duelfer & Stephen Benedict Dyson, *Chronic Misperception and International Conflict: The U.S.-Iraq Experiences*, 36 INT'L SEC. 73, 81-92 (2011).

92. See Patrick Hulme & Matthew Waxman, *War Powers Reform, U.S. Alliances, and the Commitment Gap*, *LAWFARE* (July 5, 2023, 8:01 AM), <https://www.lawfaremedia.org/article/war-powers-reform-u.s.-alliances-and-the-commitment-gap> [<https://perma.cc/Y32S-EERP>].

possibility that otherwise small-scale interventions will turn into big ones.⁹³ There are other potent arguments for reforming war powers, and this Essay does not claim to comprehensively catalogue them, but the common assumption that weak legal checks create the conditions for more (or bigger) wars is much overstated.⁹⁴

III. AN ALTERNATIVE REFORM AGENDA

Especially given that major statutory revamping of the President's power to launch interventions is politically unlikely anyway, congressional (and academic) energy would be better spent instead improving the use of Congress's existing tools for overseeing security and defense policy well before crises develop and throughout military campaigns. This upshot is of a piece with recent legal scholarship emphasizing the role of congressional oversight as both a policy-auditing tool and a public-education or public-swaying tool.⁹⁵ Aside from legislative authorizations and restrictions, Congress should use more energetically a range of means already available to shape and restrain military policy and its administration, such as reporting requirements, spending restrictions, hearings, and other actions to shape public opinion.⁹⁶ Unlike legislative overhaul proposals, some of these tools do not require congressional majorities or bicameralism and presentment; they can in some cases even be wielded by individual members, especially in key committee positions.⁹⁷

93. See Hulme, *supra* note 82, at 312.

94. I have argued elsewhere that additional legal checks, on top of political checks, could affect the credibility of presidential threats of force. See Waxman, *supra* note 66, at 1674-80. Patrick Hulme and I recently argued that deleterious credibility effects are likely to be felt especially in alliance relationships: "War powers and alliances . . . are more than just adjacent discussions: They are fundamentally intertwined and, perhaps, irreconcilably in tension with one another." Hulme & Waxman, *supra* note 92.

95. See, e.g., Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 NOTRE DAME L. REV. 127, 135-39 (2021) (emphasizing all of these roles). See generally Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020) (same).

96. As just one example referenced earlier, the most recent defense authorization act prohibits the President from unilaterally withdrawing from NATO without Senate approval or an act of Congress, and it bars funding from being used to do so. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 1250A (2023).

97. See Matthew C. Waxman, *War Powers Oversight, Not Reform*, WAR ROCKS (Nov. 19, 2019), <https://warontherocks.com/2019/11/war-powers-oversight-not-reform> [<https://perma.cc/H9WG-WC5U>]; see also RALPH G. CARTER & JAMES M. SCOTT, CHOOSING TO LEAD: UNDERSTANDING CONGRESSIONAL FOREIGN POLICY ENTREPRENEURS 239 (2009) ("[C]ongressional foreign policy entrepreneurs . . . significantly shape United States foreign policy in ways that many fail to recognize or appreciate" including, for example, by "ending wars").

In recent years, Congress’s foreign policy and defense committees have atrophied, holding fewer oversight hearings than in the past.⁹⁸ More frequent use of open hearings can play an important role in subjecting executive-branch policy to greater public scrutiny; more frequent closed-door hearings can allow Congress to examine executive-branch policy outside the spotlight that often produces unproductive grandstanding.⁹⁹ In both settings, Congress can and should play hardball to secure from the executive branch more regular and detailed reports – including the types of reporting requirements that Professor Ingber recommends in her companion essay¹⁰⁰ – containing underlying diplomatic, military, intelligence, and legal analysis.¹⁰¹ In other words, there are steps that Congress could take to get its own house(s) in order besides looking to impose new legislative frameworks on executive-branch actions.

Relevant congressional committees – in particular, the committees on armed services, intelligence, and foreign affairs (which is where AUMFs usually originate) – are also limited in their power to effectively oversee armed conflicts because of their jurisdictional siloes. These problems are magnified when it comes to “light-footprint” warfare.¹⁰² As a recent report on congressional oversight of national-security policy defined the problem:

Oversight requires a broad contextual picture of risks and opportunities, yet committee jurisdictional lines routinely cut off access to reporting and experts that would generate such understanding. If a priority country

98. See Tressa Guenov & Tommy Ross, *At a Crossroads, Part I: How Congress Can Find Its Way Back to Effective Defense Oversight*, WAR ROCKS (Mar. 9, 2018), <https://warontherocks.com/2018/03/at-a-crossroads-part-i-how-congress-can-find-its-way-back-to-effective-defense-oversight> [<https://perma.cc/U6GA-HFRN>] (noting a decline in congressional defense oversight); Molly E. Reynolds, *How Congress Could Get Some of Its Power Back*, LAWFARE (Aug. 25, 2020, 8:01 AM), <https://www.lawfaremedia.org/article/how-congress-could-get-some-its-power-back> [<https://perma.cc/5RKY-HJB>] (same). See generally LINDA L. FOWLER, WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U.S. FOREIGN RELATIONS (2015) (detailing this atrophy).

99. *Stop Fighting Blind: Better Use-of-Force Oversight in the U.S. Congress*, INT’L CRISIS GRP. 26 (Oct. 26, 2022), <https://www.crisisgroup.org/sites/default/files/2022-10/006%20N0%20More%20Fighting%20Blind.pdf> [<https://perma.cc/N7JB-XT8N>].

100. Rebecca Ingber, *The Insidious War Powers Status Quo*, 133 YALE L.J.F. 747, 772-73 (2024).

101. Cf. Heather Brandon-Smith & Brian Finucane, *Opaque Transparency on the Use of Force: Observations on the 2022 “1264” Report*, JUST SEC. (Mar. 14, 2023), <https://www.justsecurity.org/85448/opaque-transparency-on-the-use-of-force-observations-on-the-2022-1264-report> [<https://perma.cc/5QZ6-PQNN>] (“If Congress wants to better inform itself and the U.S. public—as it should—about these matters of war and peace, it will need to be more assertive in extracting relevant information from the executive branch through sustained and disciplined oversight . . .”).

102. See Goldsmith & Waxman, *supra* note 36, at 18.

receives a significant assistance package, for example, hosts special operations forces performing both advisory roles and partnered operations, and has targets for lethal drone operations, each of those activities will be overseen by a separate committee, and the relevant reporting and briefings may not be shared across jurisdictional lines.¹⁰³

“Twenty-first century warfare,” in other words, “no longer maps onto committee structures that were created to oversee twentieth-century warfare.”¹⁰⁴

One way sometimes proposed to address this deficiency is committee restructuring, either consolidating committee responsibility for national-security matters that have significant military, diplomatic, and intelligence aspects,¹⁰⁵ or perhaps also unifying a joint House-Senate committee of that sort.¹⁰⁶ A stronger, more centralized committee might have greater leverage, expertise, and oversight responsibility. Critics often respond that committee leaders will be loath to give up their power notwithstanding any advantages – and I agree with that assessment – but one could just as easily point out that many members of Congress will be reluctant to bind themselves to strict requirements that they take a formal vote on any use of force.

As a less ambitious but more politically plausible step to boosting committee influence, Congress should ensure that foreign relations, armed services, and intelligence committee members have adequate experience, resources, and information necessary to scrutinize and shape policy.¹⁰⁷ Such steps should be viewed not simply as a means for consultation with the executive branch once large-scale military intervention is imminent or has begun. They are also mechanisms enabling Congress to collaborate with the Executive on the matching of foreign-policy means and ends well in advance of crises and throughout military campaigns once commenced. Congress should focus more heavily on overall defense

103. Richard Fontaine & Loren D. Schulman, *Congress's Hidden Strengths: Wielding Informal Tools of National Security Oversight*, CTR. NEW AM. SEC. (July 30, 2020), <https://www.cnas.org/publications/reports/congresss-hidden-strengths> [<https://perma.cc/WLM8-W2HQ>].

104. Oona A. Hathaway, Tobias Kuehne, Randi Michel & Nicole Ng, *Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform*, 63 WM. & MARY L. REV. 137, 217 (2021).

105. See *id.* at 201-13 (proposing congressional committee restructuring to address these issues); see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 167-68 (1990) (advocating committee consolidation to improve national security oversight).

106. See generally Miller Ctr. of Pub. Affs., *National War Powers Commission Report*, UNIV. OF VA. (2008), <http://web1.millercenter.org/reports/warpowers/report.pdf> [<https://perma.cc/Z3BB-U364>] (proposing a “Joint Congressional Consultation Committee”).

107. Cf. Goldgeier & Saunders, *supra* note 67, at 147-48 (arguing that Congress’s foreign-policy influence is declining in part due to declining congressional expertise).

strategy and how American military resources are wielded, rather than treating the outbreak of a crisis as Congress's moment for influence. Regularly scheduled posture hearings and annual defense authorization bills, for example, should be understood and treated as core parts of Congress's war powers.

One might respond that however much other war-related policy decisions and powers besides war initiation matter, the legal power over whether to use military force is a fulcrum; it is only by controlling that decision — one that captures public attention — that Congress obtains more political leverage over other decisions. This gets it backwards. By asserting greater influence over U.S. security policy in advance of crises and during military campaigns, Congress would gain more effective influence over decisions about whether to use military force and even perhaps whether disputes evolve into crises in the first place. A Congress that is more deeply focused on U.S. security policy in general would be better prepared to deliberate later about force authorization proposals, too, if and when the political branches consider them. And, fixating on congressional authorization of conflicts risks distracting or relieving lawmakers from the important duty of overseeing the President's conduct in foreign affairs during peacetime.

One might also respond that this proposed agenda and its emphasis on political checks is not mutually exclusive with calls to reform the WPR and amend or repeal defunct or overstretched AUMFs. In theory that is true. Indeed, there are some ways to amend the WPR to augment political checks and accountability while even loosening rather than tightening statutory restrictions on presidential uses of force. For example, an expert commission co-chaired by two former secretaries of state proposed in 2008 replacing the WPR with a new war powers act that would (a) strengthen reporting requirements to Congress, (b) clarify lower thresholds to trigger the statute, (c) create a joint House-Senate committee to consult on and oversee military interventions, and (d) require both houses of Congress to take nonbinding votes on military interventions. This proposal would not, however, require cessation of military operations unless Congress passed a joint resolution and, if necessary, overrode a presidential veto.¹⁰⁸ A 2014 bill proposed by Senators Tim Kaine and John McCain had similar features.¹⁰⁹ Some WPR reformists might criticize these proposals as insufficient or even a step backward, but the bargain would enhance the part of the WPR — its political checking — that is functioning, even if insufficiently.

In practice, the necessary political bandwidth to effect any of the reform agendas discussed in this Essay is limited. In the foreseeable future, neither WPR reform nor my proposed agenda for boosting congressional oversight is likely.

¹⁰⁸. Miller Ctr. of Pub. Affs., *supra* note 106, at 39-40.

¹⁰⁹. War Powers Consultation Act, S. 1939, 113th Cong. (2014).

Revising or repealing existing AUMFs is the most attainable, but its proponents in Congress are wrong to think that it would be a transformative step in fundamentally rebalancing or restoring its war powers. On the contrary, addressing existing AUMFs would probably drain urgency for other structural reforms. Given Congress's general reluctance to bind itself when it does not need to, members might regard or portray the more modest AUMF reform as at least partially restorative of its proper constitutional role, therefore relieving pressure for more ambitious restoration.

CONCLUSION

There is much room for improvement to the existing war powers system. But this Essay has made three arguments that should be considered in any effort to reform it. First, it is a mistake to focus too much on war initiation, as there are many other upstream and downstream questions that matter at least as much. Second, strengthening requirements that Congress formally approve military actions will make less of a difference than often supposed. And third, there are many things that Congress could and should do to make better use of existing tools before considering any major statutory war powers overhaul.

In sum, congressional political checks on presidential war powers – checks that may be enabled or strengthened by law, even if that law is not strictly enforceable – work better than many reformists credit, and there are ways to improve them without substantial legal reform.

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