

Afghanistan on a Global Stage: The End of Armed Conflict and Congress's Constitutional Powers

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On August 15, 2021, the Taliban took control of Kabul, ending their weeks-long takeover of Afghanistan. Distraught by the quick offensive, United States forces and their allies quickly secured the Kabul airport and were forced to accelerate their planned withdrawal from the country in a makeshift manner. Afghan civilians, particularly those who had supported the efforts of U.S. forces, desperately attempted to get out of the country. The chaotic and disorganized withdrawal was not well received, both in the United States and internationally.

Prior to the Taliban takeover, President Joe Biden had ordered the U.S. withdrawal, with an expected end date of September 11, 2021. Congress had been left out of the withdrawal decision-making process.

Since the mid-twentieth century, and particularly after the September 11 terrorist attacks, congressional war- and treaty-making powers have dwindled substantially. This is due not only to executive expansion over the course of many wars, but also due to Congress's willingness to abdicate its power.

The chaotic withdrawal of U.S. forces from Afghanistan uncovered many issues in the executive branch's extensive war and treaty powers. It highlighted that the president can now launch offensives and define the scope of armed conflict without any guidance from Congress, in direct defiance of the Constitution.

In the past century, the United States has involved itself in many conflicts around the world. Increasingly, the decisions to start and stop these conflicts have been concentrated in the hands of the president alone. This has often led to devastating effects and is contrary to checks and balances under the Constitution. Congress should reassert its constitutional war and treaty powers and eliminate the unconstitutional, unilateral decision-making of the executive branch that has increasingly led to situations like the withdrawal from Afghanistan.

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I. INTRODUCTION

The U.S. Constitution makes clear that the executive and legislative branches share war powers, in keeping with the spirit of democratic checks and balances.¹ The president is the commander in chief of the armed forces,² while Congress has the power to regulate and maintain these forces.³ The Constitution demands cooperation between the branches, ensuring the president's power to direct the military does not usurp the civilian right to govern it.⁴ But the president's power to conduct

1. U.S. CONST. art. I; *id.* art. II.

2. *Id.* art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

3. *Id.* art. I, § 8, cl. 11–14 (“[Congress has the power] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . . ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; . . .”).

4. *Id.*; see also John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 608 (2011) (explaining one reason for the constitutional arrangement was to prevent executive misuse of military in both domestic and international affairs);

war operations expanded profoundly in the mid-twentieth century, beginning under President Truman's direction during the conflict in Korea.⁵ Post-9/11, this power expanded even further, partially due to Congress's own role in abdicating its war powers to the Bush administration.⁶ At the center of the debate surrounding executive war powers is whether the president can authorize military use absent a declaration of war from Congress.⁷

Treaty powers are no less muddy. The president may make treaties with the advice and consent of two-thirds of the Senate.⁸ The House of Representatives is not involved in the treaty-making process.⁹ More recently, however, presidents have started using "executive agreements," which become effective when signed by the president and the head of the foreign nation with which the agreement is conducted.¹⁰ There are two types of executive agreements: (1) sole-executive agreements and (2) congressional-executive agreements.¹¹ Sole agreements are very rare and

THE FEDERALIST NO. 8, at 40 (Alexander Hamilton) (Benjamin Warner ed., 1818) ("It is of the nature of war to increase the executive, at the expense of the legislative authority.").

5. See Louis Fisher, *Sidestepping Congress: Presidents Acting under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1259 (1997) (noting that even with treaty and statutory safeguards, President Truman sent U.S. troops to Korea in 1950 without congressional authorization); see also Matthew Waxman, *NATO and War Powers: Remembering the 'Great Debate' of the 1950s*, LAWFARE BLOG (July 11, 2018, 6:30 AM), <https://www.lawfareblog.com/nato-and-war-powers-remembering-great-debate-1950s> [<https://perma.cc/JJ3Z-S63G>] (showing that in response to Truman's deployment of troops to Korea, the Senate only passed a non-binding resolution that congressional authorization would be needed for future conflicts).

6. S.J. Res. 23, 107th Cong. (2001) (enacted), Authorization for Use of Military Force, 50 U.S.C. § 1541 [hereinafter AUMF]; see also The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 188 (2001) ("Congress has acknowledged this inherent executive power [to use military force] in both the War Powers Resolution . . . and in the Joint Resolution passed by Congress on September 14, 2001.").

7. See Comm. on Int'l Sec. Affs. of Ass'n of Bar of City of N.Y., *The Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq*, 41 COLUM. J. TRANSNAT'L L. 15, 16 (2002) (explaining why President Bush needed congressional authorization to invade Iraq in 2001); Graham T. Allison, *Making War: The President and Congress*, 40 LAW & CONTEMP. PROBS. 86, 89 (1976) (arguing that going to war involved many national decision-making processes on the deeper values and views of the president, Congress, and the country, while also considering the merits of the potential conflict in question).

8. U.S. CONST. art. II, § 2 ("[The president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

9. *Id.*

10. *Distinguishing Treaties from Executive Agreements*, GEO. UNIV. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=365734&p=3644814> (last updated Jan. 25, 2022, 12:45 PM) [<https://perma.cc/DR5Z-C8LL>]; see also *The Use (and Abuse) of Executive Agreements*, BROOKINGS INST. (Dec. 30, 2020), <https://www.brookings.edu/research/the-use-and-abuse-of-executive-agreements/> [<https://perma.cc/7KC9-WUT7>] (stating that executive agreements are usually authorized through international relations).

11. *The Use (and Abuse) of Executive Agreements*, *supra* note 10; GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 30 (2009).

can only be used pursuant to Article II powers.¹² Still, Congress may attempt to invalidate sole-executive agreements through its legislative or purse powers.¹³ Congressional agreements are more common and are made either pursuant to a statutory grant of power to the president, or with congressional approval from a majority of both houses.¹⁴ As presidents sought to work around the legislative branch by using executive agreements, the trend of dwindling congressional power seeped into foreign relations and treaty powers.

The withdrawal from a twenty-year war in Afghanistan had significant implications on American foreign policy, constitutional war powers, and international law. Congress's minimal involvement in the withdrawal decision highlights that the authority of the president in times of war has grown substantially.

Congress should take initiative to reassert its constitutional war powers alongside the executive branch in order to avoid future premature presidential actions regarding war and foreign policy. Additionally, Congress should assert its constitutional responsibility to advise on and consent to war-ending treaties and related executive agreements, playing a greater logistical role and preventing impulsive exercises of executive authority at war's end.

This Comment primarily examines the trend of decreasing congressional war powers since the mid-twentieth century,¹⁵ and Congress's all-but-disappearing powers in the days after 9/11 under the Authorization for Use of Military Force (AUMF).¹⁶ Part II addresses the history of executive war powers leading up to the War Powers Resolution of 1973. This Part examines the purpose and provisions of the Resolution that ultimately foreshadowed the issues we see today in Afghanistan. Finally, this Part addresses the 9/11 terror attacks and the AUMF of 2001 that

12. A sole-executive agreement is an agreement between the president and the head of a foreign nation that is not approved or ratified by the Senate under Article II treaty powers. *The Use (and Abuse) of Executive Agreements*, *supra* note 10; *see also* Morris D. Forkosch, *Treaties and Executive Agreements*, 32 CHI.-KENT L. REV. 201, 214 (1954) (arguing that legislative delegation to the president to create an executive agreement, or a "congressional-executive agreement," is the most accepted basis for its source of authority).

13. Forkosch, *supra* note 12, at 206, 209–10; *see also* CLARE LAKEWOOD, CTR. FOR BIOLOGICAL DIVERSITY, YES, HE CAN: PRESIDENT OBAMA'S POWER TO ENTER A LEGALLY BINDING AGREEMENT WITHOUT WAITING FOR CONGRESS 3 (2009), https://www.biologicaldiversity.org/programs/climate_law_institute/to_paris_and_beyond/pdfs/YesHeCanFactsheet.pdf [<https://perma.cc/83US-TTXM>] ("Congress could attempt to pass a statute invalidating a sole executive agreement after it is entered into. . . . It is possible that Congress may seek to block a budget bill that appropriates funds . . .").

14. *See* Forkosch, *supra* note 12, at 216 ("[C]ompacts designated as 'legislative' executive agreements, i.e., agreements made by the executive department but deriving their power from Congressional delegation, are probably the ones least known but those most frequently concluded.")

15. *See infra* Part II (examining the trend of decreasing congressional war powers).

16. *See infra* Section II.C (discussing effect of the AUMF on Congress's war powers).

gave President Bush and his successors immense powers to act as they saw fit against a broadly defined “terrorist” enemy.

Part III follows with an in-depth discussion of the War in Afghanistan, beginning with a history of American intervention, the start of Operation Enduring Freedom, and the final withdrawal process in 2021. It also examines constitutional war powers and treaty powers, with relevant Supreme Court case analysis.

Part IV looks to the past and the future. This Part argues that Afghanistan could have gone differently with a more robust congressional hand in the withdrawal process, showing how expanded authority will hopefully prevent emotion-filled, politically motivated interventions and hasty, uncoordinated withdrawals in the future.

Finally, Part V shows the actions, or lack of actions, that Congress has recently taken to restore its war and treaty powers. Though Congress has begun the process of reasserting its constitutional war powers, this Part argues that more must be done under Congress’s treaty obligations.

II. HISTORY OF EXECUTIVE WAR POWERS

To begin, executive war powers have expanded broadly in the past eighty years, with presidents seeking authority beyond Congress.¹⁷ Between the rise of multinational organizations like the United Nations (UN) and the North Atlantic Treaty Organization (NATO), and the legislative branch’s willingness to abdicate power, Congress has practically stripped itself of the essential powers to declare and regulate war.¹⁸ The trend became unmistakable after 9/11, when Congress granted President Bush the power to intervene throughout the world on behalf of “fighting terror.”¹⁹

This section begins with a focus on mid-twentieth century and the initial expansion of the executive war-making power, including specific focus on how Truman was able to grant himself power through the UN and NATO. Then, it looks at the War Powers Resolution, through which Congress first attempted to restore its dwindling constitutional responsibilities. Finally, it turns to the post-9/11 world and the immense presidential undertaking to fight terror on a global scale, with a contextual focus on the foreshadowing of Afghanistan.

17. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“Now, it is the President [and not Congress] whose power has expanded and who therefore needs to be checked.”). See generally William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

18. See generally Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), <https://today.law.harvard.edu/feature/presidential-power-surges/> [<https://perma.cc/6HXG-NC2Q>].

19. AUMF, *supra* note 6.

A. Post-World War II War Powers

The expansion of executive war powers dates back to the Truman administration and America's growing optimism in the ashes of World War II about its role in neoliberalist, democracy-touting missions. One reporter stated that the executive role in armed conflict "developed into an undefined power . . . to employ without [c]ongressional authorization the armed forces in the protection of American rights and interests abroad whenever necessary."²⁰

In 1950, Truman unilaterally deployed troops to the Korean peninsula without congressional authorization.²¹ As Truman put it, he was simply following unofficial orders from the UN Security Council, which had "called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution [to uphold rule of law in Korea]."²²

1. The United Nations

The Senate first formally introduced the UN Charter in 1943.²³ There was extensive debate about how the United States would participate, with members of Congress finally agreeing that it would be done "through [the nation's] constitutional processes."²⁴ Therefore, Congress's war powers, and the Senate's treaty powers, would remain intact even in the international arena.²⁵ The Connally Resolution provided that Congress, whether through senatorial treaty or by a majority of each house voting on a joint resolution, still had the power to prevent aggression in the international

20. Edward S. Corwin, *Who Has the Power to Make War?*, N.Y. TIMES, July 13, 1949, at 14.

21. See Andrew D. LeMar, *War Powers: What Are They Good For?: Congressional Disapproval of the President's Military Actions and the Merits of a Congressional Suit Against the President*, 78 IND. L.J. 1045, 1049 ("Truman, singlehandedly involved the United States in the Korean War without seeking Congress's approval, beginning a 'new era in the exercise of presidential prerogative.'" (quoting Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely?*, 24 OKLA. CITY U. L. REV. 233, 279 (1999))); see also Fisher, *supra* note 5, at 1259 ("[Truman] announced that the UN Security Council had ordered North Korea to withdraw its invading forces . . . and that 'in accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace.'" (quoting PUB. PAPERS 491 (1950))).

22. Statement by the President on the Situation in Korea, 173 PUB. PAPERS 492 (June 27, 1950).

23. *Preparatory Years: UN Charter History*, UNITED NATIONS, <https://www.un.org/en/about-us/history-of-the-un/preparatory-years> (last visited Mar. 26, 2022) [<https://perma.cc/RWK6-UXE9>]; Fisher, *supra* note 5, at 1242.

24. 89 CONG. REC. 7646–47 (1943); see Fisher, *supra* note 5, at 1256 (stating that it is obvious from UN Charter's creation as an international treaty—entered into by way of advice and consent from the Senate—that a president would not be able to act unilaterally under the Charter).

25. See U.S. CONST. art. II, § 2 (delineating Senate's role in treaty-making); see also Fisher, *supra* note 5, at 1243 ("[A]ny commitment to join the United Nations, made either by agreement or by treaty, 'must go through in a constitutional way, either by a two-thirds vote of the Senate or by the approval of the entire Congress.'" (quoting 89 CONG. REC. 7647 (1943))).

community.²⁶ But little consideration was given to the question of deploying troops in a UN action.²⁷ Most senators agreed that American troops could be used without congressional approval if they were deployed only as a “police force” to limit aggression, not in a full-scale armed conflict.²⁸

2. NATO

Created in 1949, the NATO alliance brought together the United States and other European powers to ensure an integrated and economically strong Western bloc.²⁹ From this agreement arose a powerful group of nations willing to aid in struggles against economic and military subjugation, especially when threatened by communist regimes.³⁰ The Soviets retained veto power at the UN Security Council, so through the NATO alliance, the United States and Western Europe were able to achieve a resolution that existed outside the Security Council, yet still followed the

26. S. Res. 192, 78th Cong. (1943) (enacted) (“That, pursuant to the Constitution of the United States, any treaty made to effect the purposes of this resolution, on behalf of the Government of the United States with any other nation or any association of nations, shall be made only by and with the advice and consent of the Senate of the United States, provided two-thirds of the Senators present concur.”).

27. See Fisher, *supra* note 5, at 1244–45 (“Senator Claude Pepper . . . opposed any delegation of Congress’s war-declaring power to an international body but believed that it would be permissible for American troops to be used, without prior congressional approval, as a ‘police force’ to combat aggression in small wars.”); see also John T. Correll, *Police Action*, AIR FORCE MAG. (June 1, 2000), <https://www.airforcemag.com/article/0600edit/> [<https://perma.cc/6GV9-XGC8>] (“To get around the necessity of asking Congress to declare war, President Truman called it a ‘police action.’”); Leon Edel, Letter to the Editor, *Truman’s ‘Police Action’*, N.Y. TIMES, June 10, 1990 (§ 7), at 54 (clarifying that Truman deliberately called fighting in Korea a “police action,” contradicting correspondent who claimed Truman had accidentally mislabeled it as such).

28. See sources cited *supra* note 27 and accompanying text (explaining constraint on president’s unilateral power to deploy military in context of UN action).

29. By signing the North Atlantic Treaty in 1949, the United States, Canada, Belgium, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom agreed to collectivize military operations. See *North Atlantic Treaty Organization (NATO), 1949*, OFF. OF THE HISTORIAN, [hereinafter *NATO, 1949*], <https://history.state.gov/milestones/1945-1952/nato> [<https://perma.cc/QY2B-AY3X>] (last visited Sept. 24, 2021); see also Dru Brenner-Beck, *Federalism and the Treaty Power: Breaking the “Bond(s)” Between Nations: The Treaty Power and Status of Forces Agreements*, 5 AM. U. NAT’L SEC. L. BRIEF 1, 6 (2014) (“[T]he United States sought to incorporate the lessons drawn from its experience in the recent devastating total warfare of World War II and establish a world-wide standard of humanity in warfare.”); Olivier Barsalou, *Making Humanitarian Law in the Cold: The Cold War, The United State and the Genesis of the Geneva Conventions of 1949* 11–12 (Inst. for Int’l L. & Just. Emerging Scholars Working Paper No. 11, 2008), <http://ijl.org/wp-content/uploads/2016/08/Barsalou-Making-Humanitarian-Law-in-the-Cold-2008.pdf> [<https://perma.cc/6XVM-8LRK>] (explaining that NATO countries were committed to preventing future wars as a collective).

30. See sources cited *supra* note 29 and accompanying text (discussing NATO founding members’ commitment to avoid future international wars).

UN Charter.³¹

Congress was concerned with the creation of NATO, primarily because the European bloc wanted clear assurances that the United States would intervene if and when an attack occurred on European soil.³² This sort of “automatic” declaration of war did not sit well with members of Congress, as it directly contravened their constitutional war powers.³³

Shortly thereafter, North Korea attacked South Korea, and Truman, along with NATO allies, committed forces to the peninsula before the UN Security Council had officially authorized the military action.³⁴

Later, Truman excused the action as an “emergency case” such that retroactive authority from Congress was permissible.³⁵ He argued that Korea was merely a “police action,” attempting to characterize the affair as something short of all-out armed conflict.³⁶ Therefore, congressional

31. See *Geneva Conventions for the Protection of War Victims: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 4 (1955) (statement of Robert Murphy, Deputy Under Sec’y of State) (noting that the Korean War outbreak at the time of Geneva Convention ratification raised issues for Convention’s viability in a war with non-parties); see also Barsalou, *supra* note 29, at 12 (“With the advent of the Cold War, U.S. officials working in the DoS slowly came to the conclusion that the unity of international law should be read in conjunction with the preservation of Western values against the communist threat.”); Brenner-Beck, *supra* note 29, at 6–7 (“The commencement of both the Cold War and the Korean War resulted in the creation of new multi-lateral alliances designed to meet the challenge of global communism . . .”).

32. *NATO, 1949*, *supra* note 29; *A Short History of NATO*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/declassified_139339.htm (last visited Nov. 1, 2021) [<https://perma.cc/AXX4-RP9Y>].

33. See *NATO, 1949*, *supra* note 29 (“Negotiations worked toward finding language that would reassure the European states but not obligate the United States to act in a way that violated its own laws.”); see also Fisher, *supra* note 5, at 1255 (explaining that senators vehemently argued that automatic war declaration would not result from a NATO response).

34. See Fisher, *supra* note 5, at 1261 (“The fact is that President Truman committed U.S. forces to Korea before the Council called for military action.”); see also MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 276 (1973) (explaining that Truman was overtly willing to invade Korea without UN support).

35. Compare LOUIS FISHER, *PRESIDENTIAL WAR POWER* 1–2 (2d ed., rev. 2004) (arguing that president may have to act without congressional approval in certain urgent and compelling emergency circumstances) with Elizabeth Goitein, *The Alarming Scope of the President’s Emergency Powers*, *THE ATLANTIC*, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> (last visted Mar. 23, 2022) [<https://perma.cc/S2XS-9B6B>].

Congress legislated powers that would lie dormant until the president activated them by declaring a national emergency. . . . [H]undreds of statutory emergency powers, and four clearly obsolete states of emergency, were in effect. For instance, the national emergency that Truman declared in 1950, during the Korean War, remained in place and was being used to help prosecute the war in Vietnam.

36. Harry S. Truman, *The President’s News Conference of June 29, 1950*, *TEACHING AM. HIST.*, <https://teachingamericanhistory.org/document/the-presidents-news-conference-of-june-29-1950/> (last visited Nov. 1, 2021) [<https://perma.cc/7T8G-JM2C>]; see also Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 *AM. J. INT’L L.* 21, 25 (1995) (explaining that Senator Pepper first used term “police action” and argued that police actions would be permissible without congressional authorization, but not armed conflict); see generally *US Enters the Korean Conflict*, *NAT’L ARCHIVES*, <https://www.archives.gov/education/lessons/korean-conflict> (last updated May 19, 2021) [<https://perma.cc/Q6KY-5UEW>].

authorization was not necessary.³⁷ The argument would take hold throughout the rest of the twentieth century in later unilateral executive declarations of war, with President Kennedy, and later President Johnson, using the same analysis to justify interventions in Cuba and Vietnam.³⁸

3. Kennedy, Johnson, and Vietnam

Kennedy assumed the same role as Truman: a democracy-touting, freedom-loving leader, hungry to transplant American democracy around the world. He announced that the United States was “willing to defend freedom anywhere in the world,” preparing the stage for an eventual invasion of communist Vietnam.³⁹ This same idea propelled Kennedy into action with Cuba, signaling a determination to prevent Marxist-Leninist regimes in the Western hemisphere.⁴⁰ Without prior authorization from the UN or Congress, Kennedy ordered a naval response to the Soviet’s strategic missiles in Cuba, referring to it only as a “defensive action,” not as armed conflict.⁴¹ Later, Kennedy justified his action with remarks stating that he conformed to the principles of the Rio Treaty and its relevant UN provisions on acts of self-defense, even though the Security Council had never authorized the act.⁴²

37. Brian Finucane, *The Limited War Powers Precedent of the Korean “Police Action”*, JUST SEC. (Apr. 5, 2019), <https://www.justsecurity.org/63527/the-limited-war-powers-precedent-of-the-korean-police-action/> [<https://perma.cc/9BMC-KLLR>] (remarking that police action was a key term used to justify unilateral presidential action in Korean peninsula without congressional authorization).

38. See Graham T. Allison, *Making War: The President and Congress*, 40 LAW & CONTEMP. PROBS. 86, 88 (1976) (stating that Kennedy’s command authority in Cuba did not include consultation from Congress, and Johnson acted unilaterally under Congress’s “approval” of Gulf of Tonkin Resolution); see also ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 176 (1973) (“Kennedy’s action [in Cuba], which should have been celebrated as an exception, was instead enshrined as a rule. . . . The very brilliance of Kennedy’s performance appeared to vindicate the idea that the President must take unto himself the final judgments of war and peace.”).

39. See Marcella Murphy Agerholm, Note, *Domestic and International Law Implications of a Presidentially Declared Blockade of Cuba*, 3 J. INT’L & COMP. L. 547, 556 n.70 (1982) (quoting DAVID M. ABSHIRE, *FOREIGN POLICY MAKERS: PRESIDENT VS. CONGRESS* 46 (1979)).

40. See Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba, 1962 PUB. PAPERS 809, 809–10 (Oct. 23, 1962) (“[T]he United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or threat of force, its aggressive or subversive activities to any part of this hemisphere.”); see also Agerholm, *supra* note 39, at 560 (arguing that Cuba Resolution empowered president to act without congressional authorization).

41. See Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT’L L. 515, 524 (1963) (explaining that UN Charter’s limitation on use of force was designed to prevent further creation of strategic missile bases in Cuba); see also Agerholm, *supra* note 39, at 564 (stating that Kennedy carefully construed his military action as defense, grounded in UN justifications).

42. See sources cited *supra* note 41 and accompanying text (explaining that Kennedy justified military action based on self-defense); see also Agerholm, *supra* note 39, at 564 (“Careful not to imply a state of war or belligerency, President Kennedy referred to this [order of naval operations in Cuba] as a defensive quarantine and grounded its justification on two legal structures of major world importance: the Rio Treaty of 1947 and the Charter of the United Nations.”).

The following year, in 1962, Kennedy began sending military advisors to Vietnam in the fight against communism.⁴³ After the 1964 elections, Kennedy had planned to withdraw U.S. military forces from the region.⁴⁴ But in August 1964, Congress passed the Gulf of Tonkin Resolution under Johnson's insistence, giving Johnson the unilateral authority to "prevent further aggression [against the United States]."⁴⁵ Under this guise, Johnson proceeded to act without a congressional declaration of war in Vietnam, seeing the Resolution as a preemptive war declaration.⁴⁶

The 1960s and 70s brought the first example of congressional efforts to reassert its control in the form of withdrawal politics. Congress held hearings to pressure the president to end a wildly unpopular war.⁴⁷ Senator Fulbright, the chair of the Senate Foreign Relations Committee, grilled policymakers and executive officials about American interests in Vietnam and the imperialist democratic agenda.⁴⁸

When Republicans gained a majority in the House after the 1966 midterm elections, they joined forces with congressional moderates to question Johnson on the war's budget.⁴⁹ The War on Poverty at home meant Johnson had to decide between domestic or international spending, and Congress made him clearly aware of the moral conundrum.⁵⁰

After President Nixon was elected in 1969, a slow-rolling withdrawal

43. Gerald L. Angst, *1973 War Powers Legislation: Congress Re-Asserts Its Warmaking Power*, 5 LOY. U. CHI. L.J. 83, 84 (1974).

44. Allison, *supra* note 38, at 101.

45. H.R.J. Res. 1145, 88th Cong., 78 Stat. 384 (1964) (enacted); *see also* LeMar, *supra* note 21, at 1050 ("Under the Gulf of Tonkin Resolution, President Johnson felt that he did not need a congressional declaration of war to lawfully engage in military operations in Vietnam.")

46. *See* sources cited *supra* note 45 and accompanying text (explaining Johnson's reasoning for acting unilaterally in Vietnam without a congressional declaration of war).

47. *See* Julian E. Zelizer, *Congress and the Politics of Troop Withdrawal*, 34 DIPLOMATIC HIST. 529, 530 (2010) (explaining that Vietnam War hearings captivated American public); *see also* RANDALL BENNETT WOODS, *FULBRIGHT: A BIOGRAPHY* 411 (1995) ("[The hearings] opened a psychological door for the great American middle class. . . . If the administration intended to wage the war in Vietnam from the political center in America, the 1966 hearings were indeed a blow to that effort.")

48. *See* *Vietnam Hearings*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Vietnam_Hearings.htm (last visited Nov. 1, 2021) [<https://perma.cc/W79G-HWZS>] ("Attempting to forestall a buildup of American forces, Fulbright launched a high-profile series of widely televised public 'educational' hearings in February 1966."); *Legislative Proposals Relating to the War in Southeast Asia: Hearings Before the S. Comm. on Foreign Relations*, 92d Cong. 686 (1971) ("The Administration proclaims that its goal in Vietnam is the assurance of self-determination for the South Vietnamese people. That is a plain deception."). *See generally* 112 CONG. REC. 10615-16 (1966); Videotape: Reel America: 1966 Fulbright Vietnam Hearings, Dean Rusk (C-SPAN 1966), <https://www.c-span.org/video/?404584-1/1966-fulbright-vietnam-hearings-dean-rusk> [<https://perma.cc/EKX3-KA46>].

49. Zelizer, *supra* note 47, at 533.

50. *See id.* at 533 ("Johnson agreed to a tax surcharge to quell the inflationary impact of the war and to continue to fund the War on Poverty."); *see generally* Tom Riddell, *The Inflationary Impact of the Vietnam War*, 1 VIETNAM GENERATION 42, 55-57 (1989).

from Vietnam began, but congressional Democrats demanded more.⁵¹ They rallied to cut defense spending, passed a resolution to reclaim their power,⁵² and pressed for military reductions in Southeast Asia after threats of hostility in Thailand began brewing.⁵³

The end of 1969 finally brought tangible bills to cut off spending on foreign policy.⁵⁴ In 1971, Congress strongly pressured Nixon to withdraw troops within nine months after the passage of the Cooper-Church Amendment.⁵⁵ Nixon protested, so Congress watered it down to a policy statement rather than a congressional rule.⁵⁶ By 1972, the Senate supported the Case-Church Amendment, which sought to end all funding for war operations in Southeast Asia except as it related to withdrawal.⁵⁷ In 1973, Congress passed the Amendment, prohibiting the use of more funds in Southeast Asia after August 15.⁵⁸ Finally, in 1973 the U.S. Supreme Court considered whether Nixon's action could be enjoined by the vote of Congress.⁵⁹ The Court found that congressional appropriations for the military "constitute a form of authorization for the conduct of hostilities."⁶⁰ It was in this context that Congress began to more seriously assert its power, both in times of war and withdrawal, by passing the War Powers Resolution of 1973.

B. *The War Powers Resolution*

Nixon's Congress was fed up with unregulated executive war-making powers, and in 1973, the legislature passed the War Powers Resolution

51. Zelizer, *supra* note 47, at 535 (arguing that congressional Democrats wanted more spending cuts on defense because of spiraling arms race during Cold War).

52. S. Res. 85, 91st Cong. (1969) (enacted).

53. *Id.*; see also LEWIS L. GOULD, *THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE* 259 (2005) (explaining Democrats' persistence boded well for their Senate power during 1970 elections, allowing them to place more pressure to leave Southeast Asia).

54. See GOULD, *supra* note 53, at 258 (stating that Senators Church and Cooper were convinced they could cut off Vietnam funding); see also Zelizer, *supra* note 47, at 536 ("In a closed-floor session, Senators Church and . . . Cooper . . . offered an amendment to a defense spending bill to prevent the further use of money in Laos or Thailand.").

55. Special Foreign Assistance Act of 1971, Pub. L. 91-652, 84 Stat. 1942 (1971).

56. *Id.*

57. Pub. L. 93-52, § 108, 87 Stat. 130, 134 (1973).

58. *Id.*

59. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1304 (1973).

60. Seth Weinberger, *Restoring the Balance: The Hamdan Decision and Executive Powers*, 42 *TULSA L. REV.* 681, 688 (2007). The court found that

Congress in appropriation bills from 1965 through 1969 had shown "its continued support of the Vietnam action" and that Congress' choice of appropriations bills rather than a formal declaration of war to effectuate its intent involved a political question which did not prevent the finding that the fighting in Vietnam was authorized by Congress and that such fighting was not a usurpation of power by either of the Presidents who had been in office after 1964.

Id. (citing *Holtzman v. Schlesinger*, 361 F. Supp. 553, 561 (E.D.N.Y. 1973)).

over Nixon's veto.⁶¹

Among the Resolution's provisions is a requirement that the president issue a detailed report to the speaker of the House of Representatives and the president pro tempore of the Senate within forty-eight hours of committing troops absent congressional declaration.⁶² Additionally, all troops must be withdrawn from hostilities within sixty days unless Congress authorizes otherwise.⁶³ The president may also request a thirty-day extension if necessary.⁶⁴ Only three circumstances allow a president to commit troops without a declaration of war:

- 1) Hostilities where involvement is imminent, based on the context.
- 2) Combat deployments to territory, airspace, or waters of a foreign state, barring those solely for supplies or training of foreign forces.
- 3) Enlargement of armed forces currently located in a foreign state that are prepared for combat.⁶⁵

Many scholars have argued that the Resolution is only "a congressional view of the war powers," and therefore does not impose mandatory limitations on the executive branch.⁶⁶ Some scholars have posited that the

61. Joint Resolution Concerning the War Powers of Congress and the President, H.R.J. Res. 542, 93d Cong., Pub. L. 93-148, 87 Stat. 555 (1973); *see also War Powers Resolution of 1973*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (July 27, 2021), <https://www.nixonlibrary.gov/news/war-powers-resolution-1973> [<https://perma.cc/X9X4-Y7D3>] ("Congress overrode [Nixon's] veto, and the resolution became law following the U.S. withdrawal from Vietnam in early 1973.")

62. H.R.J. Res. 542; *see also* LeMar, *supra* note 21, at 1050 ("[W]hen there is no congressional declaration of war, the War Powers Resolution requires the President to submit a report to the Speaker of the House of Representatives and the President Pro Tempore of the Senate within forty-eight hours of any introduction of American troops into hostilities.")

63. H.R.J. Res. 542; LeMar, *supra* note 21, at 1050-51.

64. H.R.J. Res. 542; LeMar, *supra* note 21, at 1051.

65. LEGISLATIVE HISTORY OF THE S. COMM. ON FOREIGN RELATIONS, 93D CONG., JAN. 3, 1973-DEC. 20, 1974, at 115. *But see also* H.R.J. Res. 542 ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.")

66. John Norton Moore, *The War Powers Resolution of Doubtful Constitutionality*, 70 A.B.A. J. 10, 12 (1984). *See also id.* ("The essence of the resolution is an effort by Congress to define the war powers of Congress and the president. But nothing could be clearer, as enunciated by the Supreme Court in *Myers v. United States*, than that the constitutional scheme of separation of powers cannot be altered by one branch or indeed by anything short of constitutional amendment." (citation omitted)); *c.f.* Frederick S. Tipson, *The War Powers Resolution Is Constitutional and Enforceable*, 70 A.B.A. J. 10, 12 (1984)

[I]f the president is presumed to derive different, and at times plenary, authority in foreign affairs from the fact of congressional inaction, it should also follow that the Congress can effectively remove such an implication by registering its disapproval—or lack of support—by majority vote—that is, concurrent resolution. Even if Congress could not completely confine the president's actions in any given case, it should certainly be able to counter any suggestion that he is acting with the 'implied consent' of the legislative branch and thereby the full authority of the United States government.

Resolution falls within Congress's power to define the word "war" within their Article I powers.⁶⁷ Other scholars have maintained that even if the Resolution does not fully bind the executive branch, Congress can still enforce its position through the purse power.⁶⁸ Regardless of whether the Resolution is effective as enforceable law, it nevertheless created a level of cooperation and synergy between the two branches, balancing action with restraint.⁶⁹

In terms of the Resolution's real purpose, many critics have contended that it was nothing more than a cover for the embarrassment and shame Congress felt for supporting the unsuccessful war in Vietnam, as members of the body attempted to paint themselves as victims of a sneaky president who acted without congressional consent.⁷⁰ Nonetheless, the Resolution remains good law today and serves as confirmation that the president can affirmatively command armed forces, execute statutes, and initiate action, subject to Congress's regulations.

C. 9/11 and Its Aftermath

Initial planning for the 9/11 attacks began in 1996, when Osama bin

67. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 103 (1972) (arguing that the Resolution falls within Congress's constitutional powers, but it is possible for president to exploit its vagueness); see also Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 101–02 (1984) (“[The War Powers Resolution] is constitutional because it defines the war power. The War Powers Resolution is nothing more or less than a congressional definition of the word ‘war’ in article I. A definition of this kind coupled with a reasonable enforcement mechanism is well within the power of Congress . . .”).

68. See Tipson, *supra* note 66, at 14 (“[I]f the Court were unwilling to [resolve a confrontation between the President and Congress] . . . Congress would have little choice but to enforce its position through the funding process.”); see also Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-String Restrictions*, 60 MINN. L. REV. 1, 30 (1975)

Far from giving the President power over the purse so that he could carry out the commander-in-chief clause . . . the Framers believed it “particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands.” As a result, they transferred the war power, in the words of Jefferson, “from the Executive to the Legislative body, from those who are to spend to those who are to pay.” (first quoting THE FEDERALIST NO. 38, at 247 (James Madison) (J. Cooke ed., 1961); and then quoting THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed., 1958)).

69. See Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1299–1300 (1997) (“[I]f one reviews the actual behavior of the two branches, it is clear that they have achieved a *modus vivendi*, an ‘effective law’ of war powers that balances a *de facto* legislative delegation of ‘strike operation’ discretion to the executive against a significantly constraining process within which the executive must proceed if it is intent on any lengthy or massive military deployment.”).

70. See Andrew K. Schiff, *The War Powers Resolution: From the Halls of Congress to the Hills of Bosnia, Inertia Should Give Way to Post-Cold War Reality*, 11 AM. U. J. INT'L L. & POL'Y 877, 907 (1996) (“The Resolution is a failed attempt to assuage the post-Vietnam shame and grief that followed the nation's Indochina experience.”); cf. Carter, *supra* note 67, at 102 (“To cynics, [the Resolution] was Congress' way of pretending that the Vietnam War had somehow been a fast one pulled by the executive branch, rather than a disaster jointly managed by two Presidents and five Congresses.”).

Laden introduced his first Islamic law opinion, or *fatwā*, in which he demanded American soldiers leave Saudi Arabia.⁷¹ Under the teachings of Ayman al-Zawahiri, bin Laden's opinions became more radicalized, until he eventually called for his followers to attack American citizens in pursuit of *jihad*⁷² against the foreign enemy responsible for imperialist agendas in the Middle East.⁷³ Though bin Laden never formally admitted to his orchestration of the 9/11 attacks, videotapes revealed that he planned to "hit the economy" of the United States to deal a heavy blow to the military, which he saw as the main agent of American foreign policy.⁷⁴

After the 9/11 terrorist attacks on the World Trade Center, the shock and anger produced a national fervor against bin Laden and al-Qaeda.⁷⁵ The country's leaders were intent on destroying a common enemy.⁷⁶

1. The Authorization for Use of Military Force

The first government response to the terror attacks came with the Authorization for Use of Military Force (AUMF) of 2001.⁷⁷ The AUMF was a joint resolution of Congress passed by the legislature on September 14, 2001, and subsequently signed into law by President Bush on September 18, 2001.⁷⁸

71. J.M.B. Porter, *Osama bin-Laden, Jihād, and the Sources of International Terrorism*, 13 IND. INT'L & COMP. L. REV. 871, 871 (2003); see 9/11 COMM'N, THE 9/11 COMMISSION REPORT 48 (2002), <https://www.9-11commission.gov/report/911Report.pdf> [<https://perma.cc/2YVF-3MH3>] (stating that bin Laden had issued his own fatwa calling on Muslims to drive Americans out of Saudi Arabia and condemning Saudi monarchy).

72. Though the term *jihad* is widely stereotyped as an Arabic word for "terrorism," it is defined as "a holy war waged on behalf of Islam as a religious duty" or "a personal struggle in devotion to Islam especially involving spiritual discipline." See *Jihad*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/jihad> (last visited Feb. 21, 2022) [<https://perma.cc/ZC99-2EQP>].

73. See THE 9/11 COMMISSION REPORT, *supra* note 71, at 47 ("Claiming that America had declared war against God and his messenger, [bin Laden and al Zawahiri] called for the murder of any American, anywhere on earth, as the 'individual duty for every Muslim who can do it in any country in which it is possible to do it.'").

74. MARTIN C. LIBICKI ET. AL., EXPLORING TERRORIST TARGETING PREFERENCES 60 (2007); see also Julian Borger & Rory Carroll, *US at a Loss Despite Claims bin Laden Is in Pakistan*, THE GUARDIAN (Dec. 27, 2001, 8:06 PM), <https://www.theguardian.com/world/2001/dec/28/afghanistan.rorycarroll3> [<https://perma.cc/WH48-YHHY>] (reporting bin Laden's call for Muslims to continue targeting U.S. economy following 9/11 attacks).

75. See generally Douglas Kellner, *9/11, Spectacles of Terror, and Media Manipulation*, 1 CRITICAL DISCOURSE STUD. 41, 44–51 (2004).

76. See, e.g., Jim Rutenberg, *A NATION AT WAR: THE NEWS MEDIA; Cable's War Coverage Suggests a New "Fox Effect" on Television Journalism*, N.Y. TIMES (Apr. 16, 2003), <https://www.nytimes.com/2003/04/16/us/nation-war-media-cable-s-war-coverage-suggests-new-fox-effect-television.html> [<https://perma.cc/9PJA-4973>] (describing media discourse following 9/11 attacks). For an analysis of the political barbarism associated with the Bush administration in the aftermath of 9/11, see generally DOUGLAS KELLNER, FROM 9/11 TO TERROR WAR: THE DANGERS OF THE BUSH LEGACY (2003).

77. AUMF, *supra* note 6.

78. *Id.*

The sole dissenting vote against the AUMF came from Representative Barbara Lee. Representative Lee argued that the AUMF gave the president unlimited power to wage war without any checks and balances.⁷⁹ She believed that emotions were too high to pass such an extreme law, and the nation needed to settle itself before moving forward with any concrete action.⁸⁰ As the only representative to vote against the resolution, many Congress members attacked her for being anti-American, and she received countless death threats from American citizens who called her a communist and traitor to the nation.⁸¹ Capitol Police eventually provided her and her family bodyguards because of the hostility surrounding her vote.⁸²

The AUMF ultimately raised many questions of interpretation about the geographic scope and duration of armed conflict that remain unanswered to this day.

2. Executive Action Under the AUMF

The AUMF broadly 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸³

The language of the AUMF allows the president to use force against nonstate actors not limited to Afghanistan, but rather anywhere in the world, that may have any linkage to 9/11.⁸⁴ The prevention clause is of particular note, authorizing the president to act preemptively against terrorist threats.⁸⁵

79. Mike Ryan, *Rep. Barbara Lee's Speech Opposing the Post 9/11 Use of Force Act*, NUCLEAR AGE PEACE FOUND. (Sept. 14, 2001), <https://www.wagingpeace.org/rep-barbara-lees-speech-opposing-the-post-9-11-use-of-force-act/> [<https://perma.cc/VQA4-LTHM>].

80. *Id.*

81. For copies of some of the letters received by Rep. Lee, see Conor Friedersdorf, *Angry Letters to the One Member of Congress Who Voted Against the War on Terror*, THE ATLANTIC (Sept. 14, 2014), <https://www.theatlantic.com/politics/archive/2014/09/the-vindication-of-barbara-lee/380084/> [<https://perma.cc/NZK3-46KR>] (describing letters expressing both support and disapproval for Lee's dissenting vote).

82. Peter Carlson, *The Solitary Vote of Barbara Lee*, WASH. POST (Sept. 19, 2001), <https://www.washingtonpost.com/archive/lifestyle/2001/09/19/the-solitary-vote-of-barbara-lee/fb86aee7-3cc5-4cbd-98f1-e2650e545f42/> [<https://perma.cc/4PGP-MRYG>]; see Austin Wright, *How Barbara Lee Became an Army of One*, POLITICO MAG. (July 30, 2017), <https://www.politico.com/magazine/story/2017/07/30/how-barbara-lee-became-an-army-of-one-215434/> [<https://perma.cc/24ZG-EJV3>] (describing how Capitol Police accompanied Rep. Lee to her office, house, church services, and grocery store).

83. AUMF, *supra* note 6.

84. *Id.*

85. *Id.*

With this backing, Bush invaded Afghanistan on October 7, 2001.⁸⁶ By December 9, 2001, U.S. forces had driven the Taliban from power, forcing al-Qaeda into the Tora Bora mountainous region of Afghanistan.⁸⁷ Under the AUMF, Bush also indefinitely detained hundreds of prisoners of war at Guantánamo Bay.⁸⁸ American forces denied prisoners their right to a trial and tortured many detainees in violation of international human rights and the Due Process Clause of the Constitution.⁸⁹ Additionally, the AUMF was invoked to authorize trial by military commission.⁹⁰ During this period, the Supreme Court in *Hamdi v. Rumsfeld* interpreted the AUMF to allow detention of al-Qaeda enemy fighters for the duration of the relevant conflict.⁹¹ However, in *Boumediene v. Bush*,⁹² the Court held that Guantánamo detainees had the right to seek a writ of habeas corpus in U.S. federal courts, even though the Bush administration argued that Guantánamo fell outside U.S. jurisdiction, and its detainees were therefore not subject to constitutional protections.⁹³

President Obama was more covert in his executive action under the AUMF, using it as the legal foundation to apply force against multiple terrorist organizations throughout the world.⁹⁴ The Obama administration expanded the meaning of “al-Qaeda enemy fighters” under *Hamdi*,

86. *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/time-line/us-war-afghanistan> (last visited Sept. 26, 2021) [<https://perma.cc/9VUE-32R5>].

87. *Id.*

88. See generally Jonathan Masters, *Guantánamo Bay: Twenty Years of Counterterrorism and Controversy*, COUNCIL ON FOREIGN RELS. (Oct. 5, 2021, 3:55 PM), <https://www.cfr.org/article/guantanamo-bay-twenty-years-counterterrorism-and-controversy> [<https://perma.cc/2D92-LS7D>].

89. See generally *World Report 2003: United States*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/wr2k3/us.html> (last visited Sept. 11, 2021) [<https://perma.cc/32CN-ZMDE>]; Masters, *supra* note 88.

90. See Haridimos V. Thravalos, Comment, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737, 738 (2006) (stating that Bush’s issuance of a military order authorizing commissions to try al-Qaeda members was constitutionally controversial). See generally OFF. OF PUB. AFFS., U.S. DEP’T OF JUST. THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS MYTH V. REALITY (2006), https://www.justice.gov/archive/opa/docs/nsa_myth_v_reality.pdf [<https://perma.cc/FM2U-FC3S>]; JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31600, THE DEPARTMENT OF DEFENSE RULES FOR MILITARY COMMISSIONS: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PROPOSED LEGISLATION AND THE UNIFORM CODE OF MILITARY JUSTICE 9 (2006).

91. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

92. *Boumediene v. Bush*, 553 U.S. 723, 723 (2008).

93. *Id.* at 732–33, 739. See also REED BRODY, HUM. RTS. WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 49 (2011), https://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf [<https://perma.cc/K746-8BS8>] (“The 2006 Military Commissions Act revised the War Crimes Act and limited the definition of war crimes, with retroactive effect. As a result, humiliating and degrading treatment of detainees in US counterterrorism operations following the September 11 attacks can no longer be charged as war crimes under the statute.”).

94. See generally Curtis A. Bradley & Jack L. Goldsmith, *Obama’s AUMF Legacy*, 110 AM. J. INT’L L. 628 (2016).

arguing that the authorization to detain also applied to any “associated forces,” whether inside Afghanistan or not.⁹⁵ Additionally, Obama relied on the AUMF in preemptive counterterrorism efforts, most notoriously with drone strikes and cyberoperations.⁹⁶ These target missions frequently occurred in areas outside of active hostilities, such as Somalia, Yemen, and Syria.⁹⁷ Later, the AUMF was construed to authorize military force against the Islamic State, which had once been an “associated force” with al-Qaeda but had subsequently disbanded from the same network.⁹⁸

President Trump used the AUMF of 2002, otherwise known as the Iraq Resolution, to direct the fatal drone attack of Iranian major general Qasem Soleimani outside Baghdad International Airport.⁹⁹ The Iraq Resolution authorized executive use of force against Saddam Hussein and the Iraqi Government in what became known as Operation Iraqi Freedom.¹⁰⁰

95. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 1–2, *In re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009), ECF No. 1690; *see* Bradley & Goldsmith, *supra* note 94, at 633 (“The Obama administration . . . [construed] the AUMF to authorize the U.S. military to detain four groups of individuals: (1) members of Taliban forces; (2) members of Al Qaeda forces who are engaged in hostilities against the United States or its coalition partners; (3) members of associated forces; and (4) those persons who have given substantial support to one of the other groups.”).

96. *See* Micah Zenko, Opinion, *Obama’s Embrace of Drone Strikes Will Be a Lasting Legacy*, N.Y. TIMES (Jan. 12, 2016, 2:57 PM), <https://www.nytimes.com/roomfordebate/2016/01/12/reflecting-on-obamas-presidency/obamas-embrace-of-drone-strikes-will-be-a-lasting-legacy> [<https://perma.cc/S657-TFY9>] (“Obama has authorized 506 strikes that have killed 3,040 terrorists and 391 civilians.”); *see also* Bradley & Goldsmith, *supra* note 94, at 635 (arguing that counterterrorism targeting became more controversial during Obama’s presidency due to his increased use of drones under the AUMF).

97. CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* 224–27 (Little, Brown & Co. 2015); *see* Bradley & Goldsmith, *supra* note 94, at 635 (“[Actions included] air strikes against al-Shabaab in Somalia, Al Qaeda in the Arabian Peninsula in Yemen, and the Khorosan Group in Syria.”).

98. Bradley & Goldsmith, *supra* note 94, at 637.

99. *See* U.S. DEP’T OF STATE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 3 (2018), <https://www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf> [<https://perma.cc/J76D-HVCC>]

Although the threat posed by Saddam Hussein’s regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and for the purpose of addressing terrorist threats emanating from Iraq. . . . [The 2002 AUMF] contains no geographic limitation on where authorized force may be employed.

See also Warren P. Strobel, *White House Cites 2002 Iraq War Measure to Justify Killing Soleimani*, WALL ST. J. (Feb. 14, 2020, 3:23 PM), <https://www.wsj.com/articles/white-house-cites-2002-iraq-war-measure-to-justify-killing-soleimani-11581711789> [<https://perma.cc/4A86-VYCT>] (explaining that White House justified drone strike that killed Soleimani under 2002 AUMF).

100. *See* CLAYTON THOMAS, CONG. RSCH. SERV., R46148, *KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS* 14 (2020) (“Congress enacted the 2002 AUMF prior to the 2003 U.S. invasion of Iraq that toppled the government of Saddam Hussein, authorizing the President to

The Trump administration justified the strike as a necessary preemptive measure to stop an “imminent attack” after Iranian Hezbollah militia were alleged to have launched a rocket, killing an American on Iraqi soil.¹⁰¹ The U.S. Embassy in Baghdad was later targeted, which subsequently led to Trump’s decision to launch a drone strike on Soleimani.¹⁰² However, this attack has been widely condemned on a national and international level, with the UN calling it a likely violation of international and domestic law.¹⁰³ The U.S. House of Representatives later voted to repeal the Iraq Resolution; Representative Lee sponsored the repeal bill.¹⁰⁴

III. AFGHANISTAN AND THE SUPREME COURT

This section sets out the historic background of the war in Afghanistan, retelling turbulent events from the Soviet-Afghan War, the rise of the Taliban, the U.S. invasion of Afghanistan, and the withdrawal process of 2021, with a more contextualized focus on America’s ineffective foreign policy. Then, it turns to a constitutional analysis of relevant war-powers and treaty-powers cases decided by the Supreme Court as early as the French-American conflict of 1798. This analysis takes note of the interpretation of congressional power since the nation’s beginnings, as well as the vague legal precedent on war and treaty powers from the nation’s early cases.

use the U.S. military to enforce United Nations Security Council resolutions targeting the Hussein regime”); see also *Operation Iraqi Freedom*, NAVAL HIST. & HERITAGE COMMAND (Aug. 6, 2020, 11:21 AM), <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/middle-east/operation-iraqi-freedom.html> [<https://perma.cc/K384-JHQ3>] (describing beginning of Operation Iraqi Freedom in March 2003).

101. See *Statement by the Department of Defense*, U.S. DEP’T OF DEF. (Jan. 2, 2020), <https://www.defense.gov/News/Releases/Release/Article/2049534/statement-by-the-department-of-defense/> [<https://perma.cc/56B2-MX48>] (announcing air strike that killed Soleimani); see also Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?*, LAWFARE BLOG (Jan. 3, 2020, 4:49 PM), <https://www.lawfareblog.com/did-president-have-domestic-legal-authority-kill-qassem-soleimani> [<https://perma.cc/2JHE-3WQC>] (explaining that Trump administration blamed Soleimani for killing American service members and authorizing a rocket attack and embassy assault in Baghdad).

102. Anderson, *supra* note 101; see also Merrit Kennedy & Barbara Campbell, *U.S. Sends Reinforcements as Protesters Try to Enter U.S. Embassy Compound in Baghdad*, NPR (Dec. 31, 2019, 8:45 PM), <https://www.npr.org/2019/12/31/792579958/mob-angered-by-airstrikes-tries-to-storm-u-s-embassy-compound-in-baghdad> [<https://perma.cc/N62H-JMFA>] (reporting attack on U.S. Embassy in Baghdad by group of protesters suspected to be backed by Iranian-affiliated Kataib Hezbollah, and following earlier attack that killed U.S. military contractor).

103. Agnès Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Use of Armed Drones for Targeted Killings*, ¶¶ 60–64, U.N. DOC. A/HRC/44/38 (Aug. 15, 2020), <https://undocs.org/en/A/HRC/44/38> [<https://perma.cc/78WX-YRQW>] (concluding that U.S. justification for drone strikes against Soleimani was a prohibited use of force as set out in Article 2(4) of the UN Charter, implicating expansionist military efforts in international arena).

104. H.R. Res. 256, 117th Cong. (2021).

A. *The War in Afghanistan*

In 1979, at the height of the Cold War, the Soviet Union invaded Afghanistan.¹⁰⁵ A communist regime had overtaken the Afghan government the year before, and its fierce brutality prompted uprisings, eventually causing the Soviets to intervene to quell the dissent.¹⁰⁶

The Afghan Communist Party had formed in 1965, led primarily by Babrak Karmal and Nur Mohammad Taraki.¹⁰⁷ In 1973, the previous king, Mohammed Zahir Shah, was overthrown and a democratic republic was established in Afghanistan.¹⁰⁸ After Nikita Khrushchev had formally agreed in the 1950s to help the State bring about stability, Afghanistan remained closely tied to the Soviets, particularly following the 1973 uprising.¹⁰⁹ While the new democratic regime led by Mohammad Daoud Khan granted many rights and freedoms, it also brutally cracked down on dissenters.¹¹⁰ By 1977, the Afghan Communist Party had gained

105. Benjamin Parkin, *Afghanistan: A History of Failed Foreign Occupations*, FIN. TIMES (Aug. 19, 2021), <https://www.ft.com/content/aa351a06-29b4-435d-a3fb-df87425cee38> [https://perma.cc/KY6X-9UQ8]; *A Historical Timeline of Afghanistan*, PBS NEWSHOUR (Aug. 30, 2021, 5:27 PM), <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan> [https://perma.cc/S4F7-T36A].

106. Liz Dee, *The Saur Revolution: Prelude to the Soviet Invasion of Afghanistan*, ASS'N FOR DIPLOMATIC STUD. & TRAINING (Apr. 22, 2016), <https://adst.org/2016/04/the-saur-revolution-prelude-to-the-soviet-invasion-of-afghanistan/> [https://perma.cc/6SS4-9QL4].

107. NABI MISDAQ, AFGHANISTAN: POLITICAL FRAILTY AND EXTERNAL INTERFERENCE 107 (2006).

108. *See id.* at 88 (“Saudi officials warned President Daoud, who took power by overthrowing his cousin, King Zahir Shah in 1973, against relying on the Communists to consolidate his rule.”); *see also* CARY GLADSTONE, AFGHANISTAN REVISITED 43 (2001) (“In 1973 Daoud emerged from the political wilderness to overthrow the monarchy and establish the Republic of Afghanistan . . .”).

109. *See* WILSON CTR., HIST. & PUB. POL’Y PROGRAM DIGIT. ARCHIVE, INFORMATION ON KHRUSHCHEV AND BULGANIN’S NOVEMBER-DECEMBER 1955 TRIP TO INDIA, BURMA, AND AFGHANISTAN, FROM THE CENTRAL COMMITTEE OF THE CPSU TO THE CENTRAL COMMITTEE OF THE SED 5 (Jan. 11, 1956), <https://digitalarchive.wilsoncenter.org/document/119273.pdf?v=33d2462fbf232d187cccf15c543566c4> [https://perma.cc/E2EN-E6S5] (“[T]he leading Afghan statesmen are aware of the meaning of maintaining good relations between Afghanistan and the Soviet Union. This fact was given expression through the prolongation by 10 years of the signed 1931 treaty of neutrality and mutual non-aggression . . .”); *see also* R. K. Ramazani, *Afghanistan and the USSR*, 12 MIDDLE E. J. 144, 148–49 (1958) (“In the face of . . . economic strangulation the Afghan Government turned to the Soviet Union for assistance. A transit agreement was promptly concluded, and Afghanistan acquired the right of duty-free transit for her goods over Soviet territory.”); *N.A. Bulganin and N.S. Khrushchev in Afghanistan, Introduction*, WORLD DIGIT. LIBR. (Dec. 19, 2017), <https://www.wdl.org/en/item/19376/> [https://perma.cc/B27F-XVX3] (“At the conclusion of the visit, the two governments issued a joint statement in which they affirmed their agreement on the issues of disarmament, the banning of atomic weapons, and need for peace in the world; signed a protocol on extending for another ten years the agreement on neutrality and mutual nonaggression between the USSR and Afghanistan . . . and released a communiqué on economic relations between the USSR and Afghanistan.”).

110. Parkin, *supra* note 105; *see also A Historical Timeline of Afghanistan, supra* note 105 (explaining that although Khan introduced women’s rights and modernization, he also cracked down on any dissenters of his regime).

underground support and built a coalition to overthrow the government.¹¹¹ In 1978, Khan was killed, and Taraki, one of the original leaders of the Communist Party, took control of Afghanistan.¹¹² Karmal also became deputy prime minister.¹¹³

Following the overthrow, the communists implemented their agenda, declaring equality and enacting land reform, but also doling out harsh penalties for anyone who dissented.¹¹⁴ Local economies of farmers, who made up the vast majority of Afghanistan's population, were largely disenfranchised by the land-reform program, in which the Afghan government nationalized private land.¹¹⁵ During this period, the Soviets invaded Afghanistan to help stabilize the nation's communist rule.¹¹⁶

A group of insurgents began planning a counter-resistance to the communists.¹¹⁷ These informal groups were primarily made up of rural farmers, traders, and young men who wanted to fight for the sovereignty of

111. See BRUCE RIEDEL, *WHAT WE WON: AMERICA'S SECRET WAR IN AFGHANISTAN, 1979–1989*, at 17 (2014), <https://www.brookings.edu/wp-content/uploads/2016/07/Chapter-1-3.pdf> [<https://perma.cc/K8GX-L2UJ>] (remarking that 1978 assassination of Khyber, a prominent communist, was blamed on Khan and the CIA, and communists organized a large demonstration in Kabul that set the stage for a coup); see also Simon Winchester, *Top Communist Politician Named as Leader of Afghan Government*, WASH. POST (May 1, 1978), <https://www.washingtonpost.com/archive/politics/1978/05/01/top-communist-politician-named-as-leader-of-afghan-government/f45ce2f1-de8c-4d6d-a451-efb94757cacf/> [<https://perma.cc/KD42-N34T>] (reporting that Taraki, who became head of Afghanistan's government after the overthrow of President Khan, had been named chairman of the United Communist Party when the various factions merged in 1977).

112. See Winchester, *supra* note 111 (stating that Taraki was declared “founder of the revolution,” President of Afghanistan, and prime minister of newly formed government).

113. See RIEDEL, *supra* note 111, at 17 (“Nur Muhammad Taraki, the leader of the Khalq faction, became president and prime minister, with Babrak Karmal as deputy prime minister . . .”).

114. See *id.* (“The sexes were declared equal, and a minimum age was set for marriage, 16 years for girls and 18 for boys. Dowries were restricted to encourage girls to have more choices. In a deeply religious society, especially among the Pashtuns, the new policies were an affront to religious and tribal customs. The state now seemed determined to decide the terms of marriage and interfere in family decisions. In addition, an ambitious but poorly thought-out land reform program was embarked on . . .”); see also Huma Ahmed-Ghosh, *A History of Women in Afghanistan: Lessons Learnt for the Future or Yesterdays and Tomorrow: Women in Afghanistan*, 4 J. OF INT'L WOMEN'S STUD. 1, 6 (2003) (explaining that this period was considered the second era of women's reform and a time of other revolutionary social change).

115. See RIEDEL, *supra* note 111, at 17 (“Large land holdings were seized by the state, alienating important local power brokers. Widespread arrests were carried out of anyone objecting to the new reforms . . .”); see also M. Siddiq Noorzoy, *Alternative Economic Systems for Afghanistan*, 15 INT'L J. OF MIDDLE E. STUD. 25, 25 (1983) (highlighting the disastrous nature of the hasty land reform programs that were considered unacceptable by many of Afghanistan's rural citizens).

116. See Parkin, *supra* note 105; *A Historical Timeline of Afghanistan*, *supra* note 105.

117. See RIEDEL, *supra* note 111, at 18 (“Resistance to the regime began almost immediately after the coup. By the fall of 1978, Kabul and the communists had lost control of parts of the country . . .”); see also Tahir Amin, *Afghan Resistance: Past, Present, and Future*, 24 ASIAN SURV. 373, 375–79 (1984) (explaining resistance movement's origins and outcome and asserting that resistance movement in fact originated during earlier constitutional period in 1963–73).

Afghanistan as an independent nation.¹¹⁸ The informal collection of groups became known as the *mujahideen*, or “strugglers” in Arabic, who waged a “holy war” against the Soviets on behalf of a religious and national duty.¹¹⁹ The *mujahideen* were supported with arms, funding, and training by the United States, Pakistan, and other allies fighting communist regimes around the globe.¹²⁰ Though the *mujahideen* eventually succeeded in driving the Soviets out of Afghanistan, much of the country was destroyed and civil society was practically nonexistent.¹²¹

Ultimately, the unrest caused a civil war as certain groups vied for positions of power in the Afghan government.¹²² The various *mujahideen* factions fought one another, and one main group rose to power, known

118. See Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN REL. (Sept. 15, 2021, 11:30 AM), <https://www.cfr.org/background/taliban-afghanistan> [<https://perma.cc/56GE-M32M>] (“[The *mujahideen*] were joined by younger Pashtun tribesmen who studied in Pakistani madrassas, or seminaries.”); see also ALI AHMAD JALALI & LESTER W. GRAU, *THE OTHER SIDE OF THE MOUNTAIN: MUJAHIDEEN TACTICS IN THE SOVIET-AFGHAN WAR* 267 (1999) (“The rural population willingly provided food and shelter to the Mujahideen, since the Mujahideen were mostly local residents. The Soviets decided to attack Mujahideen logistics by forcing the rural population off of their farms and into refugee camps . . .”).

119. See Parkin, *supra* note 105 (explaining that loosely organized factions of local insurgents waged war against Soviets and Afghan communists, with U.S. and Pakistani support); see also JALALI & GRAU, *supra* note 118, at xvi (stating that religious leaders issued statements of *jihād* against communist regime in an attempt to gain support for *mujahideen*).

120. *A Historical Timeline of Afghanistan*, *supra* note 105; see also JALALI & GRAU, *supra* note 118, at xviii (“The United States, Peoples Republic of China, Britain, France, Italy, Saudi Arabia, Egypt, and the United Arab Emirates began funneling military, humanitarian and financial aid to the Mujahideen through Pakistan.”).

121. Afghanistan’s sovereignty was threatened immensely from the guerrilla war tactics used by the *mujahideen* and Soviet fighters, quickly eroding the communist regime and any sense of political stability. See Minna Jaffery, *War Haunts Afghanistan 40 Years After Soviet Invasion*, NEWLINES INST. (Jan. 1, 2020), <https://newlinesinstitute.org/civil-military-relations/war-haunts-afghanistan-40-years-after-soviet-invasion/> [<https://perma.cc/3Q2A-NYPW>] (describing struggle for Afghanistan as tied to religious ideology as much as political); see also Alan Taylor, *The Soviet War in Afghanistan, 1979–1989*, THE ATLANTIC (Aug. 4, 2014), <https://www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786/> [<https://perma.cc/H8AW-Y2DU>] (“In the brutal nine-year conflict, an estimated one million civilians were killed, as well as 90,000 Mujahideen fighters, 18,000 Afghan troops, and 14,500 Soviet soldiers. Civil war raged after the withdrawal, setting the stage for the Taliban’s takeover of the country in 1996.”).

122. See NEAMATOLLAH NOJUMI, *THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION* 60 (2002) (“The internal interaction of Afghan armed political forces from the Afghan government and Afghan resistance factions left the UN peace plan without any power or ability to succeed. A bloody civil war shattered this already war-ruined country and forced the Afghans into larger fragmentation.”); see also Nasreen Ghufuran, *The Taliban and the Civil War Entanglement in Afghanistan*, 41 *ASIAN SURV.* 462, 465 (2001) (“[T]he actors in Afghanistan’s civil war do not entertain the route of negotiations and choose instead to continue pursuing war. In the Afghan civil war, different players have participated in it and changed their roles over time, but none have been willing to negotiate in a flexible manner to conclude a settlement.”).

as the Taliban.¹²³ As strict Islamists, the Taliban imposed harsh, inhumane laws on the Afghan people.¹²⁴ Women were barred from schooling and had to be accompanied by a husband or male family member whenever they left the home.¹²⁵ Those accused of crimes were publicly stoned, hanged, or subjected to amputation.¹²⁶

At the same time, the Taliban offered shelter to Islamist extremist groups who were being pursued by other states and multinational organizations.¹²⁷ One group, al-Qaeda, was particularly fierce in its nationalist, pro-Islamic state beliefs.¹²⁸ The group believed that Afghanistan's inability to establish a state based on Islam was directly attributable to external powers.¹²⁹ Al-Qaeda fought against the Soviets during the civil war, and with the Taliban in power, they turned their focus toward America and its Western allies, whose interests in the state were thwarting al-Qaeda's mission.¹³⁰

When al-Qaeda bombed two American embassies in Africa, President Clinton ordered missile strikes against their training camps in Afghanistan.¹³¹ The United States also demanded that the Taliban give Osama bin

123. See NOJUMI, *supra* note 122, at 118 (illustrating that Taliban, a group of religious students, established an administration and military campaign in Qandahar and surrounding provinces); see also Ghufuran, *supra* note 122, at 462 ("The Taliban emerged in Afghanistan's political scene with the avowed objective of ending the civil war and bringing peace to the country.").

124. See *A Historical Timeline of Afghanistan*, *supra* note 105 ("The Taliban outlaw[ed] cultivation of poppies for the opium trade, crack[ed] down on crime, and curtail[ed] the education and employment of women. Women [were] required to be fully veiled and [were] not allowed outside alone. Islamic law [was] enforced via public executions and amputations.").

125. *Id.*

126. *Id.*

127. See Parkin, *supra* note 105 (describing international outrage at Taliban policies that erased women's rights, punished dissenters brutally, and harbored Islamist extremists); see also Bruce Riedel, *The Taliban Affirm Their Alliance with Al-Qaida: Afghan Peace Talks in Doubt*, BROOKINGS INST. (Aug. 20, 2015), <https://www.brookings.edu/blog/markaz/2015/08/20/the-taliban-affirm-their-alliance-with-al-qaida-afghan-peace-talks-in-doubt/> [<https://perma.cc/BXB8-RY4S>] ("The Afghan Taliban never publicly broke with al-Qaida after 9/11, but they rarely mentioned their decades-old partnership. . . . Al-Qaida in contrast always reaffirmed its loyalty to the Taliban, which had harbored it before and after 9/11. Without the Taliban safe haven before 9/11, the attacks would never have occurred; al-Qaida needed its Afghan sanctuary.").

128. Osama bin Laden and other Islamists formed the group al-Qaeda (or "the base"). *A Historical Timeline of Afghanistan*, *supra* note 105. They waged jihad against Soviets and other foreigners whom they saw as the only obstacle to establishing an Islamic state. *Id.* Believing that their jihad was responsible for the Soviets' faltering stance in Afghanistan, they turned their offensive focus toward the United States. *Id.*

129. See sources cited *supra* note 128 and accompanying text.

130. *A Historical Timeline of Afghanistan*, *supra* note 105.

131. *Id.*;

At 10:30 a.m. local time, a massive truck bomb explodes outside the U.S. embassy in Nairobi, Kenya. Minutes later, another truck bomb detonated outside the U.S. embassy in Dar es Salaam, the capital of neighboring Tanzania. The dual terrorist attacks killed 224 people, including 12 Americans, and wounded more than 4,500. The United States accused Saudi exile Osama bin Laden, a proponent of international terrorism against

Laden—the leader of al-Qaeda—over to American authorities to be tried for the embassy bombings.¹³² The Taliban refused and continued to harbor the group within Afghanistan’s borders.¹³³

Three years later, bin Laden and his followers committed the 9/11 terror attacks on the World Trade Center, killing thousands of American civilians and hundreds of first responders. One week after the attacks, President Bush signed the Authorization for the Use of Military Force, giving him broad authority to invade Afghanistan as part of the War on Terror.¹³⁴ U.S. and British forces began launching airstrikes on Afghan land, specifically targeting Taliban bases and regions occupied by al-Qaeda.¹³⁵ Within three months, the Taliban weakened immensely, and the group was forced to surrender its final strongholds in Afghanistan.¹³⁶

Hamid Karzai, a supporter of Western-backed politics and foreign policy, was sworn in as interim president of the new Afghan government.¹³⁷ Karzai was elected leader in June of 2002, and again in October 2004.¹³⁸ U.S. and other Western forces aided Karzai in implementing a democratic government and helped train Afghan military forces to protect the nation’s sovereignty from groups like the Taliban and al-Qaeda.¹³⁹ During

America, of masterminding the bombings. On August 20, President Bill Clinton ordered cruise missiles launched against bin Laden’s terrorist training camps in Afghanistan and against a pharmaceutical plant in Sudan, where bin Laden allegedly made or distributed chemical weapons.

U.S. Embassies in East Africa Bombed, HIST. (Aug. 4, 2021), <https://www.history.com/this-day-in-history/u-s-embassies-in-east-africa-bombed> [<https://perma.cc/VG2A-BHDR>].

132. The United States demanded that bin Laden be extradited for the embassy bombings, but the Taliban declined. Later, the UN punished Afghanistan with sanctions, restricting trade and economic development in the process. See *A Historical Timeline of Afghanistan*, *supra* note 105.

133. See sources cited *supra* note 132 and accompanying text.

134. AUMF, *supra* note 6; see also *The U.S. War in Afghanistan*, *supra* note 86 (“This joint resolution will later be cited by the Bush administration as legal rationale for its decision to take sweeping measures to combat terrorism, from invading Afghanistan, to eavesdropping on U.S. citizens without a court order, to standing up the detention camp at Guantanamo Bay, Cuba.”).

135. *The U.S. War in Afghanistan*, *supra* note 86.

136. See Alissa J. Rubin, *Did the War in Afghanistan Have to Happen?*, N.Y. TIMES (Sept. 2, 2021), <https://www.nytimes.com/2021/08/23/world/middleeast/afghanistan-taliban-deal-united-states.html> [<https://perma.cc/ULJ2-6GDB>] (describing American forces’ quick takeover of Kabul).

137. See *A Historical Timeline of Afghanistan*, *supra* note 105 (“Hamid Karzai, a royalist and ethnic Pashtun, [in December 2001 was] sworn in as the leader of the interim government in Afghanistan. Karzai entered Afghanistan after living in exile for years in neighboring Pakistan. At the U.N.-sponsored conference to determine an interim government, Karzai already ha[d] the support of the United States and by the end of the conference [was] elected leader of the six-month government.”).

138. *Hamid Karzai*, COLUM. UNIV. (Sept. 25, 2003), <https://worldleaders.columbia.edu/directory/hamid-karzai> [<https://perma.cc/KFV5-7GV3>].

139. Then-Senator Joe Biden explained his view of the United States’ interest in supporting Karzai and maintaining an American military presence:

The long-term solution is to rebuild Afghanistan’s army and police force—but that can’t happen overnight. In the meantime—at least a year, and probably longer—there are only

this time, however, the Taliban moved into the mountainous regions of Afghanistan.¹⁴⁰ As the years passed, the group gained strength, leading to increasingly hostile outbursts of violence, with NATO-backed forces eventually intervening to restore the peace.¹⁴¹

By 2009, the Taliban had gained considerable strength, leading President Obama to send 17,000 more U.S. troops to the region.¹⁴² On May 2, 2011, U.S. Navy Seals executed Osama bin Laden.¹⁴³ Afghan officials became increasingly concerned with U.S. presence in the nation and asked the military to begin backing out.¹⁴⁴ The Afghan army also began a slow takeover of operations from NATO-backed forces.¹⁴⁵ Though

three alternatives: Use American troops as peacekeepers. Build up a robust international force. Or let Afghanistan revert to chaos. U.S. forces seem to be involved in de facto peacekeeping right now. Wouldn't it be better to clarify the mission, and let our allies share the burden? Afghan leader Hamid Karzai, U.N. Secretary-General Kofi Annan, and nearly every expert on the region has called for expansion of the U.N.-mandated security force, ISAF, both in scope and tenure. In my view, this is clearly in our national interest. We should view ISAF as a force-multiplier. Without U.S. or U.N. peacekeepers, we're left with the third option: letting Afghanistan degenerate into the state of lawlessness that made way for the Taliban. After the Soviet withdrawal in 1989, America turned its back as the country disintegrated. President Bush has rightly promised not to repeat this mistake. If we fail to uphold the President's promise, Afghanistan will again become a den of terrorists, narcotics traffickers, and exporters of violent insurgency.

Afghanistan: Building Stability, Avoiding Chaos: Hearing Before the S. Comm. on Foreign Rels., 107th Cong. 2 (2002) (statement of Joseph R. Biden, Chairman, S. Comm. on Foreign Rels.); see also CLAYTON THOMAS, CONG. RSCH. SERV., R46879, U.S. MILITARY WITHDRAWAL AND TALIBAN TAKEOVER IN AFGHANISTAN: FREQUENTLY ASKED QUESTIONS 3 (2021) (“The creation of the new Afghan government also represented the beginning of a major new mission set for U.S. forces and their international partners: helping defend and develop that government and its nascent military.”).

140. See STAFF OF S. COMM. ON FOREIGN RELS., 111TH CONG., TORA BORA REVISITED: HOW WE FAILED TO GET BIN LADEN AND WHY IT MATTERS TODAY 1 (Comm. Print 2009) (reporting that by early December 2001, al-Qaeda fled to Tora Bora, a complex region of caves and tunnels in dangerous terrain).

141. Parkin, *supra* note 105; see also *A Historical Timeline of Afghanistan*, *supra* note 105 (“Amid increased violence, NATO [took] over security in Kabul in August [2003]. The effort [was] the security organization’s first-ever commitment outside of Europe.”).

142. Helene Cooper, *Putting Stamp on Afghan War, Obama Will Send 17,000 Troops*, N.Y. TIMES (Feb. 17, 2009), <https://www.nytimes.com/2009/02/18/washington/18web-troops.html> [<https://perma.cc/2FEY-7W5U>].

143. Kris Osborn & Ho Lin, *The Operation That Took Out Osama Bin Laden*, MILITARY, <https://www.military.com/history/osama-bin-laden-operation-neptune-spear> (last visited Sept. 21, 2021) [<https://perma.cc/QJ5J-BDEM>] (“[O]n May 2, 2011, during which SEAL Team Six secretly descended upon a compound in Pakistan, blew down doors and engaged enemy combatants. The goal: kill or capture terrorist leader Osama bin Laden. . . . With its successful completion, the operation ended the life of the man regarded as the mastermind behind the terror attacks of September 11, 2001, which claimed thousands of lives.”).

144. See *A Historical Timeline of Afghanistan*, *supra* note 105 (showing that President Karzai wanted American forces out of Afghan villages after a U.S. soldier killed sixteen Afghan civilians inside their homes).

145. *Id.*; see also *NATO and Afghanistan*, N. ATL. TREATY ORG. (Dec. 7, 2021, 2:18 PM), https://www.nato.int/cps/en/natohq/topics_8189.htm [<https://perma.cc/F4H7-6KU5>] (“[The

NATO ended its mission in 2014, Obama rejected his initial plan to withdraw all troops from Afghanistan, leaving roughly 5,000 troops in the country by the end of his second term.¹⁴⁶ By 2016, only 1,000 troops remained to staff Kabul's security office.¹⁴⁷

President Trump did little in this area during the first three years of his term, but in early 2020, he signed an unexpected peace agreement with the Taliban.¹⁴⁸ The agreement had four goals:

- 1) To prevent armed groups from using Afghanistan as a base for acts against the United States and its allies;
- 2) To withdraw foreign forces, including US troops, contractors, and coalition forces, from Afghanistan;
- 3) To schedule intra-Afghan negotiations for March 10, 2020; and
- 4) To discuss within intra-Afghan negotiations the implementation of a permanent and comprehensive cease-fire and a political roadmap for Afghanistan's future.¹⁴⁹

The agreement kickstarted the U.S. withdrawal process from Afghanistan, with full withdrawal scheduled for May 2021.¹⁵⁰ But at the time of the peace deal, the Taliban had already retaken nearly half of the country, with relentless suicide bomb attacks almost daily.¹⁵¹ An agreement was

NATO-led mission] was completed in December 2014 when the Afghan National Defence and Security Forces assumed full responsibility for security across their country.”).

146. See Julie Pace, *Obama Says U.S. “Finishing the Job” in Afghanistan*, PBS NEWSHOUR (May 27, 2014, 2:48 PM), <https://www.pbs.org/newshour/politics/obama-expected-announce-plan-keep-9800-u-s-troops-afghanistan> [<https://perma.cc/8XD7-TJT9>] (“Over the course of [2014–2015], the number of troops would be cut in half [from 9,800] and consolidated in the capital of Kabul and at Bagram Air Field, the main U.S. base in Afghanistan.”).

147. *Id.*

148. Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, U.S.–Taliban, Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [hereinafter *Doha Agreement*]; see also Ctr. for Preventive Action, *What to Know About the Afghan Peace Negotiations*, COUNCIL ON FOREIGN RELS. (Sep. 11, 2020, 8:00 AM), <https://www.cfr.org/article/what-know-about-afghan-peace-negotiations> [<https://perma.cc/Z5NQ-3QUU>] (explaining that the US–Taliban agreement was signed by U.S. Special Representative for Afghanistan Reconciliation Zalmay Khalilzad and the Taliban's Political Deputy and Head of the Political Office Mullah Abdul Ghani Baradar on February 29, 2020, in Doha, Qatar).

149. The explanation of the Agreement's goals can be found at Ctr. for Preventative Action, *supra* note 148; see also *Doha Agreement*, *supra* note 148, at 1 (outlining agreement's goals).

150. *Doha Agreement*, *supra* note 148, at 2; see also *A Historical Timeline of Afghanistan*, *supra* note 105.

151. See U.S. Dep't of Def., Lead Inspector Gen., *Operation Freedom's Sentinel Quarterly Report to the United States Congress, January 1, 2020–March 31, 2020* (May 19, 2020) (“Although U.S. and Taliban representatives signed an agreement on February 29 as a first step toward ending the conflict, a number of events occurred that raised questions over whether the peace process would take place. Taliban violence continued at high levels . . . [I]ncreas[ing] attacks against the Afghan National Defense and Security Forces during this period. The Taliban escalated violence further after signing the agreement.”). See also Ctr. for Preventative Action, *supra* note 148 (“Taliban attacks increased across the country following the signing of the agreement and it remains to be seen whether and how the United States will respond.”).

reached between Afghan government officials and the Taliban, who planned a cease-fire deal and a slow-acting U.S. withdrawal process.¹⁵² In exchange for withdrawal, the Taliban agreed not to harbor, aid, encourage, or protect international terrorist groups on Afghan soil.¹⁵³

With this backdrop, intra-Afghan talks were set to negotiate a formalized government transition.¹⁵⁴ However, Afghan President Ashraf Ghani refused to negotiate unless the Taliban met his conditions, the main one being that the Taliban give up support for *all* terrorist organizations, not just al-Qaeda.¹⁵⁵ Furthermore, the agreed-upon cease-fire had no specific start date, leading the Taliban to continue its attacks on the Afghan government, with U.S. forces conducting air strikes in response.¹⁵⁶

Finally, in September 2020, the intra-Afghan discussions began.¹⁵⁷ The Taliban urged an Islamic state and called for a government based on religious principles.¹⁵⁸ In contrast, Afghan officials pushed for a cease-fire, pleading for the attacks to end and for civil society to rebuild.¹⁵⁹ By November, talks between the two groups had reached a deadlock, but the

152. See Ctr. for Preventative Action, *supra* note 148 (demonstrating that despite short observance of cease-fires since agreement was signed, the Taliban resumed its military campaign against Afghan security forces); see also *The U.S. War in Afghanistan*, *supra* note 86 (explaining that both sides expressed eagerness to bring peace and establish an Afghan society after U.S. withdrawal, with the government specifically pushing for a cease-fire).

153. See THOMAS, *supra* note 139, at 6–7 (“[T]he Taliban committed to prevent any groups, including Al Qaeda, from threatening the United States or its allies by not allowing those groups to reside, train, or fundraise in Afghanistan.”).

154. See *id.*, at 7 (“Per the [Doha] agreement, intra-Afghan negotiations were also to begin [in March 2020], but talks remained unscheduled for months amid political gridlock in Kabul . . .”).

155. *Afghan Govt, Like Taliban, Has Conditions for Peace Talks: Ghani*, TOLONews TV NETWORK (Mar. 30, 2020), https://tolonews.com/afghanistan/afghan-govt-taliban-has-conditions-peace-talks-ghani?utm_source=dailybrief&utm_medium=email&utm_campaign=DailyBrief2020Mar3&utm_term=DailyNewsBrief [<https://perma.cc/V4UF-HVTD>] (explaining that President Ghani was frustrated with Taliban’s unwillingness to cut ties with other terrorist organizations in region).

156. See *The U.S. War in Afghanistan*, *supra* note 86 (“The U.S.-Taliban deal [didn’t] call for an immediate cease-fire, and in the days after its signing, Taliban fighters carr[ie]d out dozens of attacks on Afghan security forces. U.S. forces respond[ed] with an air strike against the Taliban in the southern province of Helmand.”).

157. *Id.*; see generally CLAYTON THOMAS, CONG. RSCH. SERV., IN11502, INTRA-AFGHAN TALKS COMMENCE IN DOHA, QATAR (2020), <https://crsreports.congress.gov/product/pdf/download/IN/IN11502/IN11502.pdf> [<https://perma.cc/T5MZ-PM65>].

158. THOMAS, *supra* note 157, at 3; see also Mujib Mashal, *Afghanistan Peace Talks Open in Qatar, Seeking End to Decades of War*, N.Y. TIMES (Sept. 12, 2020), <https://www.nytimes.com/2020/09/12/world/asia/afghanistan-taliban.html> [<https://perma.cc/7P7C-Z85Z>] (“We seek an Afghanistan that is independent, sovereign, united, developed and free—an Afghanistan with an Islamic system in which all people of the nation can participate without discrimination and live harmoniously with each other in an atmosphere of brotherhood.” (quoting Taliban deputy leader in negotiations Mullah Abdul Ghani Baradar)).

159. THOMAS, *supra* note 157, at 3; see also Mashal, *supra* note 158 (“Members of [the Afghan government] said their priority was to get to a lasting cease-fire . . .”).

Trump administration still announced its intent to pursue withdrawal.¹⁶⁰

The international community began to voice its concern for the withdrawal plan, fearing that a hollow state—if intra-Afghan peace talks broke down—could allow terrorist groups to retake the region easily.¹⁶¹ Nevertheless, President Biden continued Trump’s withdrawal trajectory, with slight modifications.¹⁶² Though the original agreement with the Taliban set full withdrawal for May 1, Biden released a plan for a September 11 deadline.¹⁶³ Whether the intra-Afghan talks continued or not, Biden announced that “[i]t’s time to end America’s longest war.”¹⁶⁴

But the withdrawal process started on bad footing. On July 5, 2021, U.S. forces left Bagram Airfield, the largest American military base in Afghanistan, without informing the base’s new Afghan commander,

160. *The U.S. War in Afghanistan*, *supra* note 86; see David Zucchini & Thomas Gibbons-Neff, *What to Know About the Afghan Peace Talks*, N.Y. TIMES, (Feb. 15, 2021), <https://www.nytimes.com/2021/01/01/world/asia/afghanistan-peace-talks.html> [<https://perma.cc/6BSJ-SL4S>] (explaining that peace talks resumed in January 2021 after having stalled in late 2020).

161. See Ned Temko, *Ignored in Afghanistan Pullout, NATO Allies Fear “America First”*, CHRISTIAN SCI. MONITOR (Aug. 25, 2021), <https://www.csmonitor.com/World/2021/0825/Ignored-in-Afghanistan-pullout-NATO-allies-fear-America-First> [<https://perma.cc/DX3C-7Y7N>]

The core reason for [U.S. allies’] concern is that a war launched and prosecuted for two decades alongside America’s partners in the transatlantic NATO alliance was ended in a matter of weeks—by a unilateral U.S. decision, on a unilateral U.S. timetable, with little consultation and virtually no meaningful input from the allies.

See also Steven Erlanger, *Afghan Fiasco Raises Hard Questions for Europe*, N.Y. TIMES (Oct. 12, 2021), <https://www.nytimes.com/2021/08/23/world/europe/afghanistan-europe-nato-biden.html> [<https://perma.cc/5W9G-WZFD>]

Officials from Britain, Germany, Italy and France have complained that despite Mr. Biden’s promises of consultation, there has been more diktat than conversation on Afghanistan. . . . Josep Borrell Fontelles, the E.U. foreign affairs chief, told the European Parliament that the departure was “a catastrophe for the Afghan people, for Western values and credibility and for the developing of international relations.”

162. *Remarks by President Biden on the Drawdown of U.S. Forces in Afghanistan*, WHITE HOUSE BRIEFING ROOM (July 8, 2021, 2:09 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/08/remarks-by-president-biden-on-the-drawdown-of-u-s-forces-in-afghanistan/> [<https://perma.cc/JBB3-B2ME>]; see also Erlanger, *supra* note 161 (explaining that Biden administration rejected allies’ demands for a “conditions-based withdrawal,” and insisted instead on a firm withdrawal deadline).

163. See *Remarks by President Biden on the Way Forward in Afghanistan*, WHITE HOUSE BRIEFING ROOM (Apr. 14, 2021, 2:29 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/14/remarks-by-president-biden-on-the-way-forward-in-afghanistan/> [<https://perma.cc/X3XC-UC2D>] (“U.S. troops, as well as forces deployed by our NATO Allies and operational partners, will be out of Afghanistan before we mark the 20th anniversary of that heinous attack on September 11th.”); see also Alana Wise, Jason Breslow & Jaclyn Diaz, *“It’s Time to End This Forever War.” Biden Says Forces to Leave Afghanistan by 9/11*, NPR (Apr. 15, 2021, 3:57 AM), <https://www.npr.org/2021/04/14/986955659/biden-to-announce-he-will-end-americas-longest-war-in-afghanistan> [<https://perma.cc/P7RN-XQCD>] (“Biden outlined a drawdown that will begin May 1 and conclude by Sept. 11, but he said it would not be a ‘hasty rush to the exit.’ The U.S. will leave Afghanistan ‘responsibly, deliberately and safely,’ he said.”).

164. *Remarks by President Biden on the Way Forward in Afghanistan*, *supra* note 163.

General Mir Asadullah Kohistani.¹⁶⁵ On August 6, the Taliban took control of their first province, Nimroz, despite the conditions on their agreement with the United States.¹⁶⁶ Following control of Nimroz, the Taliban gained immense strength as Afghan forces laid down their arms.¹⁶⁷ The Taliban took over all other provinces in Afghanistan, finally reaching the capital city, Kabul, on August 15.¹⁶⁸ Admidst the chaos, thousands of American citizens, diplomats, and other government workers were hastily evacuated from the city by helicopter and military plane.¹⁶⁹

The Biden administration did not anticipate the Taliban's plan to take over Kabul's international airport.¹⁷⁰ The State Department had originally

163. See Kathy Gannon, *U.S. Left Afghan Airfield at Night, Didn't Tell New Commander*, PBS NEWSHOUR (July 5, 2021, 3:44 PM), <https://www.pbs.org/newshour/politics/u-s-left-afghan-airfield-at-night-i-tell-new-commander> [<https://perma.cc/N3PK-RPZK>] (reporting that U.S. troops left Bagram Airfield by shutting off electricity and slipping away at night without notifying base's new Afghan commander, who discovered the departure two hours after they left).

166. Eugene Kiely & Robert Farley, *Timeline of U.S. Withdrawal from Afghanistan*, FACTCHECK.ORG (Aug. 17, 2021), <https://www.factcheck.org/2021/08/timeline-of-u-s-withdrawal-from-afghanistan/> [<https://perma.cc/UC4C-TG7B>].

167. See Tom Bowman & Monika Evstatieva, *The Afghan Army Collapsed in Days. Here Are the Reasons Why*, NPR (Aug. 20, 2021, 4:04 PM), <https://www.npr.org/2021/08/20/1029451594/the-afghan-army-collapsed-in-days-here-are-the-reasons-why> [<https://perma.cc/NYA8-CBW8>] (arguing that lack of trust in Afghan government, coupled with other issues like poverty, corruption, and poor education, played role in Afghan army's willingness to let Taliban sweep the country); see also Anatol Lieven, *Opinion, Why Afghan Forces So Quickly Laid Down Their Arms*, POLITICO (Aug. 16, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/08/16/afghanistan-history-taliban-collapse-504977> [<https://perma.cc/H6PR-P6UK>] (“That the U.S. government could not foresee—or, perhaps, refused to admit—that beleaguered Afghan forces would continue a long-standing practice of cutting deals with the Taliban illustrates precisely the same naivete with which America has prosecuted the Afghanistan war for years.”).

168. Ahmad Seir et al., *Taliban Sweep into Afghan Capital After Government Collapses*, ASSOCIATED PRESS (Aug. 15, 2021), <https://apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe0c665ee67ba132c51b8e32a5> [<https://perma.cc/URE3-JZEH>].

169. See Robert Burns, Matthew Lee & Ellen Knickmeyer, *US Sending 3K Troops for Partial Afghan Embassy Evacuation*, ASSOCIATED PRESS (Aug. 12, 2021), <https://apnews.com/article/afghanistan-us-troops-embassy-kabul-355c48ec08fb7eb75e1e279e99c3dabf> [<https://perma.cc/5W8V-QMGX>] (explaining that troops' evacuation would limit embassy's ability to conduct normal operations); see also Raju Gopalakrishnan, Alasdair Pal & Cynthia Osterman, *Taliban Enter Afghan Capital as U.S. Diplomats Evacuate by Chopper*, REUTERS (Aug. 15, 2021, 4:53 AM), <https://www.reuters.com/world/asia-pacific/us-troops-arrive-afghan-capital-assist-evacuations-2021-08-14/> [<https://perma.cc/WB9Z-68DK>] (“U.S. officials said the diplomats were being ferried to the airport from the embassy . . . ‘Core’ U.S. team members were working from the Kabul airport, a U.S. official said, while a NATO official said several EU staff had moved to a safer, undisclosed location in the capital.”).

170. See Mark Mazzetti, Julian E. Barnes & Adam Goldman, *Intelligence Warned of Afghan Military Collapse, Despite Biden's Assurances*, N.Y. TIMES (Sept. 8, 2021), <https://www.nytimes.com/2021/08/17/us/politics/afghanistan-biden-administration.html> [<https://perma.cc/2PSX-GYGP>] (reporting that Biden administration made its withdrawal decisions before July, believing Afghan government could hold out for as long as two years); see also Zeke Miller, Jonathan Lemire & Josh Boak, *Biden Team Surprised by Rapid Taliban Gains in Afghanistan*, ASSOCIATED PRESS (Aug. 15, 2021), <https://apnews.com/article/joe-biden-afghanistan-taliban-5934ef05b0094d01>

intended to keep 1,400 embassy employees in Afghanistan, protected by 650 Marines and soldiers.¹⁷¹ But when the Taliban surrounded the civilian airport, it became crucial to evacuate as many Americans as possible.¹⁷² President Ghani also fled Afghanistan as soon as Kabul fell to the Taliban.¹⁷³

Part of America's miscalculation laid with the Biden administration's assuredness that there was time to withdraw and evacuate at a slow pace, allowing the Afghan military to take over operations gradually.¹⁷⁴ Biden frequently stated that *if* the Taliban were to take over, it would take one or two years for them to make considerable gains.¹⁷⁵ The administration was also overconfident in the abilities of the Afghan military, assuring

89b5d900d2380179 [https://perma.cc/4GZS-EY6Q] (“‘We’ve seen that that force has been unable to defend the country, and that has happened more quickly than we anticipated,’ Secretary of State Antony Blinken told CNN, referring to the Afghan military.”).

171. Michael D. Shear et al., *Miscue After Miscue, U.S. Exit Plan Unravels*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/08/21/us/politics/biden-taliban-afghanistan-kabul.html> [https://perma.cc/6XKH-2GNG]; see also Vanessa Romo, *U.S. Is Starting to Evacuate Some Embassy Staff from Afghanistan with Military Help*, NPR (Aug. 12, 2021), <https://www.npr.org/2021/08/12/1027175876/u-s-embassy-kabul-evacuate-staff-afghanistan-military> [https://perma.cc/2T5Q-DEHT]

The U.S. is evacuating a “significant” number of employees from its embassy in Kabul, Afghanistan, as Taliban forces gain ground across the country. The State Department announced . . . it is reducing its civilian footprint of roughly 4,000 personnel to a “core diplomatic presence” given the rapidly deteriorating security situation in Afghanistan.

172.

[The homeland security advisor] called for flying most of the embassy personnel out of the compound, and many out of the country, while a small core group of diplomats operated from a backup site at the airport. . . . By Wednesday, Aug. 11, the Taliban advances were so alarming that Mr. Biden asked his top national security advisers in the White House Situation Room if it was time to send the Marines to Kabul and to evacuate the embassy.

Shear et al., *supra* note 171.

173. See Natasha Turak & Amanda Macias, *Ousted Afghan President Ashraf Ghani Resurfaces in UAE After Fleeing Kabul, Emirati Government Says*, CNBC (Aug. 18, 2021, 2:31 PM), <https://www.cnbc.com/2021/08/18/afghan-president-ashraf-ghani-is-in-uae-after-fleeing-afghanistan.html> [https://perma.cc/UC3J-JZ5H] (clarifying that President Ghani left Afghanistan with no announcement or clear reporting on where he was going, remarking that he fled to prevent bloodshed at the palace).

174. See Nomaan Merchant & Zeke Miller, *Misread Warnings Helped Lead to Chaotic Afghan Evacuation*, ASSOCIATED PRESS (Aug. 18, 2021), <https://apnews.com/article/joe-biden-evacuations-32bb6a22846f649b626a3130f8c5dff> [https://perma.cc/J8TL-FETW] (“A defense estimate that Kabul could be surrounded within 30 days—an assessment that was viewed as pessimistic when it was reported last week—turned out instead to be far too optimistic. In just over a week, the Taliban overran the country and entered Kabul without a fight.”); see also Shear et al., *supra* note 171 (explaining that Biden administration officials believed they had ample time).

175. See Shear et al., *supra* note 171 (“An intelligence assessment presented at [a State Department and White House official meeting] estimated that Afghan forces could hold off the Taliban for one to two years.”); see also *Remarks by President Biden on the Drawdown of U.S. Forces in Afghanistan*, *supra* note 162 (“[T]he likelihood there’s going to be one unified government in Afghanistan controlling the whole country is highly unlikely. . . . [T]he likelihood there’s going to be the Taliban overrunning everything and owning the whole country is highly unlikely.”).

Americans that these forces had been adequately trained under U.S. forces and were prepared to take on Taliban resistance.¹⁷⁶ They were wrong on both counts.

It took the Taliban less than a month to overtake all of Afghanistan's provinces and the capital city.¹⁷⁷ Much of their success was due to the Afghan military's willingness to lay down arms.¹⁷⁸ The Biden administration leaned on this fact considerably, blaming the Afghan military's surrender mentality from the outset.¹⁷⁹ But Americans had trained the

176. See Craig Whitlock, *Unguarded Nation*, WASH. POST (Dec. 9, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-army-police/> [<https://perma.cc/VS76-TE9C>] (“With [U.S., NATO, and Afghan officials] speaking on the assumption that their remarks would remain private, they depicted the Afghan security forces as incompetent, unmotivated, poorly trained, corrupt and riddled with deserters and infiltrators.”); see also Interview of Dr. Thomas Johnson, Special Inspector General for Afghanistan Reconstruction, obtained by WASH. POST 12–13 (Jan. 7, 2016), https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/documents-database/?document=johnson_thomas_ll_01072016 [<https://perma.cc/CQX9-2J8L>] (“[T]he Afghan national police . . . is still the most hated institution[] in [] Afghanistan because they’re an extractive organization, and you know, they take.”).

177. See Seir et al., *supra* note 168 (“In a stunning rout, the Taliban seized nearly all of Afghanistan in just over a week, despite the billions of dollars spent by the U.S. and NATO over nearly 20 years to build up Afghan security forces.”); see also Christina Goldbaum et al., *Kabul Falls to the Taliban as the Afghan Government Collapses and the President Flees*, N.Y. TIMES (Aug. 29, 2021), <https://www.nytimes.com/live/2021/08/15/world/taliban-afghanistan-news> [<https://perma.cc/KM9M-DPJD>] (“In a lightning offensive, the Taliban swallowed dozens of cities in a matter of days, leaving Kabul as the last major redoubt of government control.”).

178. See Max Boot, *How the Afghan Army Collapsed Under the Taliban's Pressure*, COUNCIL ON FOREIGN RELS. (Aug. 16, 2021, 4:45 PM), https://www.cfr.org/in-brief/how-afghan-army-collapsed-under-talibans-pressure?gclid=CjwKCAjw-sqKBhBjE-wAVaQ9a7UTrrNNMWvlyTgLq6bqw6L68m1sX3toMCWSZFQI8dPwIykyObzqJRoc28MQAvD_BwE [<https://perma.cc/H8Q5-XT49>] (“Quite simply, an Afghan military that over the past twenty years had learned to rely on U.S. support for airpower, intelligence, logistics, planning, and other vital enablers was fatally demoralized by the U.S. decision to abandon it.”); see also Bowman & Evstatieva, *supra* note 167 (“The Taliban fought with an ideological fervor and to rid the country of the foreign invaders, values enshrined in Afghan identity. ‘It animated the Taliban. It sapped the will of Afghan soldiers and police. When they clashed, Taliban were more willing to kill and be killed than soldiers and police’ . . .”); cf. Whitlock, *supra* note 176 (showing that Afghan elders believed Afghan military forces were there to sell weapons and fuel, not to defend Afghan people and fight Taliban).

179. See Sami Sadat, Opinion, *I Commanded Afghan Troops This Year. We Were Betrayed.*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/opinion/afghanistan-taliban-army.html> [<https://perma.cc/3PW4-BYAB>]

It pains me to see Mr. Biden and Western officials are blaming the Afghan Army for collapsing without mentioning the underlying reasons that happened. Political divisions in Kabul and Washington strangled the army and limited our ability to do our jobs. Losing combat logistical support that the United States had provided for years crippled us, as did a lack of clear guidance from U.S. and Afghan leadership.

See also Steve Holland & Nandita Bose, *Biden Defends Afghanistan Decision, Blames Afghan Army's Unwillingness to Fight*, REUTERS (Aug. 16, 2021, 9:04 PM), <https://www.reuters.com/world/us/biden-says-us-mission-afghanistan-was-never-supposed-be-nation-building-2021-08-16/> [<https://perma.cc/Y82T-WVTV>] (illustrating that Biden blamed Taliban's takeover in Afghanistan on political leaders who fled and unwillingness of Afghan army to fight); Alex Thompson & Christopher Cadelago, *Biden Tries to Shift Blame on Afghanistan*, POLITICO (Aug. 31, 2021, 7:47 PM),

Afghan military, provided them with arms and technology to carry out operations and monetary support to continue developing.¹⁸⁰ A host of reasons likely influenced the Afghans' choice not to fight: fear, corruption, unpreparedness, or fatigue.¹⁸¹

American withdrawal from Afghanistan also created a devastating humanitarian crisis.¹⁸² Scores of Afghan citizens frantically stormed the international airport, desperately trying to fly their families to safety.¹⁸³ Mothers begged U.S. officials to take their children; one infant was even hoisted over a fence to an American soldier.¹⁸⁴ Afghan men clung to the wings of American military planes as they took off, some falling to their deaths as the planes took to the air.¹⁸⁵

<https://www.politico.com/news/2021/08/31/biden-blame-afghanistan-508204>

[<https://perma.cc/A3XW-V9Q7>] (“Biden’s remarks served as the latest instance of the president digging his heels in on Afghanistan in the face of an unprecedented wave of criticism from traditional allies in the Democratic Party and the media.”).

180. See Whitlock, *supra* note 176 (“Since 2002, the United States has allocated more than \$83 billion in security assistance to Afghanistan, a sum that dwarfs the defense budgets of other developing nations. In 2011, at the peak of the war, Afghanistan received \$11 billion in security aid from Washington . . .”).

181. See sources cited *supra* notes 176, 178 and accompanying text.

182. See Filippo Grandi, *After the Airlift*, UNHCR (Aug. 30, 2021), <https://www.unhcr.org/news/press/2021/8/612c87444/airlift-news-comment-attributable-un-high-commissioner-refugees-filippo.html> [<https://perma.cc/PM4K-7MKF>] (arguing that because some Afghans needed to seek safety across borders, borders must be open so they can exercise their right to seek international protection); see also Abigail Ng, *As U.S. Troops Leave Afghanistan, A “Far Greater” Humanitarian Crisis Is Just Starting, UN Warns*, CNBC (Aug. 31, 2021, 2:48 AM), <https://www.cnbc.com/2021/08/31/afghanistan-faces-great-humanitarian-crisis-as-foreign-troops-leave-un.html> [<https://perma.cc/QF3N-5UV8>] (“[H]alf the country is in need of aid, and half the children are malnourished after ‘decades of conflict and drought.’ The population is ‘very vulnerable’ and does not have access to food, water, education and health care . . .”).

183. Carlotta Gall & Ruhullah Khapalwak, *Chaos Ensues at Kabul Airport as Americans Abandon Afghanistan*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/16/world/asia/afghanistan-airport-evacuation-us-withdrawal.html> [<https://perma.cc/P4G9-V4Y8>]; see also Yaroslav Trofimov, Dion Nissenbaum & Margherita Stancati, “*Saigon on Steroids*”: *The Desperate Rush to Flee Afghanistan*, WALL ST. J. (Aug. 15, 2021, 7:59 PM), <https://www.wsj.com/articles/saigon-on-steroids-the-desperate-rush-to-flee-afghanistan-11629071999> [<https://perma.cc/9R7Q-CY3H>] (“Afghanistan was falling and hundreds of civilians struggled to get on board the few remaining planes waiting to carry people to safety. Afghan security forces and several dozen U.S. Marines rushed through the military terminal to secure the tarmac. A warning boomed in Pashto: ‘Please go back, please go back.’”).

184.

[T]he mass of outstretched hands produced a baby, no more than a few months old, and held the child up for the soldiers to see. As if handling a piece of luggage, a Marine plucked the infant by a single arm, passing the child behind him before turning back to the crowd. The scene is harrowing to watch, which is precisely why a video of it was quickly transmitted around the world, fueling anger at a haphazard evacuation process.

Katie Rogers, *A Baby Passed Over a Wall in Kabul Is Reunited With His Family, the Military Says*, N.Y. TIMES (Aug. 20, 2021), <https://www.nytimes.com/2021/08/20/world/asia/afghanistan-kabul-baby.html> [<https://perma.cc/5A88-JEX6>].

185.

The United States completed its withdrawal on August 30, 2021—a day earlier than expected.¹⁸⁶ But the second week of withdrawal was particularly violent, with an ISIS-K attack outside the Kabul airport killing thirteen U.S. service members and dozens of Afghan citizens.¹⁸⁷ The final military cargo airplane left the international airport on August 30, after having flown more than 120,000 people out of the nation over the two-week withdrawal period.¹⁸⁸ Around 200 Americans were still seeking evacuation from Afghanistan at that time.¹⁸⁹

At the conclusion of the American evacuation process, many Afghan translators who risked their lives for U.S. military forces could not get seats on any planes.¹⁹⁰ Military officers expressed dismay at their

In one extraordinary scene filmed by Afghan media, hundreds of people ran alongside an American military C-17 cargo plane and some tried to climb into the wheel wells or cling to the sides of the plane as it gathered speed, a striking symbol of America's military might flying away even as Afghans hung on against all hope. An American military official confirmed that some Afghans were killed, either crushed by the plane on takeoff or falling to their deaths.

Gall & Khapalwak, *supra* note 183.

186. *Pentagon Press Secretary John F. Kirby and General Kenneth F. McKenzie Jr. Hold a Press Briefing*, U.S. DEP'T OF DEF. (Aug. 30, 2021), <https://www.defense.gov/News/Transcripts/Transcript/Article/2759183/pentagon-press-secretary-john-f-kirby-and-general-kenneth-f-mckenzie-jr-hold-a/> [<https://perma.cc/ZAX4-44TK>]. General McKenzie described the withdrawal's end:

The last C-17 lifted off from Hamid Karzai International Airport this afternoon at 3:29 p.m. East Coast time and the last manner aircraft is now clearing the airspace above Afghanistan. . . . Tonight's withdrawal signifies both the end of the military component of the evacuation but also the end of the nearly 20-year mission that began in Afghanistan shortly after September 11th, 2001.

Id. See also Amanda Macias, *U.S. Ends 20-Year War in Afghanistan with Final Evacuation Flights Out of Kabul*, CNBC (Aug. 31, 2021, 6:52 PM), <https://www.cnbc.com/2021/08/30/afghanistan-update-last-us-troops-leave-kabul-ending-evacuation.html> [<https://perma.cc/PP6S-WXUE>] (“America’s longest war is over. The United States finished its withdrawal efforts from the airport in Kabul, Afghanistan, the Pentagon said Monday [August 30], effectively ending a two-decade conflict . . .”).

187. *Statement by President Joe Biden on the Evacuation Mission in Kabul*, WHITE HOUSE BRIEFING ROOM (Aug. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/28/statement-by-president-joe-biden-on-the-evacuation-mission-in-kabul/> [<https://perma.cc/8FDR-GWG4>]; Yuliya Talmazan et al., *13 U.S. Service Members, Dozens of Afghans Killed in Kabul Airport Bombings*, NBC NEWS (Aug. 27, 2021, 5:16 AM), <https://www.nbcnews.com/news/world/high-threat-terror-attack-disrupts-kabul-airport-evacuations-biden-deadline-n1277670> [<https://perma.cc/RWR2-N38K>].

188. See *Statement by President Joe Biden*, WHITE HOUSE BRIEFING ROOM (Aug. 30, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/30/statement-by-president-joe-biden/> [<https://perma.cc/BUK6-LCHS>] (“The past 17 days have seen our troops execute the largest airlift in US history, evacuating over 120,000 US citizens, citizens of our allies, and Afghan allies of the United States.”); see also Macias, *supra* note 186 (“About 122,800 people have been evacuated since the end of July, including about 6,000 U.S. citizens and their families.”).

189. Macias, *supra* note 184.

190. David Rohde, *Biden’s Chaotic Withdrawal From Afghanistan Is Complete*, THE NEW YORKER (Aug. 30, 2021), <https://www.newyorker.com/news/daily-comment/bidens-chaotic->

inability to help those who had risked so much for their units over the twenty-year war.¹⁹¹ Overall, at least 200,000 Afghans who had worked in some capacity for U.S. forces were left behind in Afghanistan, facing retaliation from the Taliban government.¹⁹²

B. Constitutional Analysis

Before returning to the situation in Afghanistan, understanding the scope of congressional war and treaty powers requires a focus on early Supreme Court cases at the dawn of America's nationhood. Under Chief Justice Marshall, the Court analyzed, decoded, and clarified the smallest details of the U.S. Constitution, providing an important backdrop into constitutional separation of powers.

1. Congressional War Powers

At the dawn of the new republic, war powers were already muddled. Before the Constitution was ratified, Congress had generally approved military operations of nationalized state militias, authorizing the president to "protect border areas."¹⁹³ But the first major debates on war powers did not arise until the "Quasi-War" with France from 1798 to 1800.¹⁹⁴ America never declared war, but the conflict still raised issues of unilateral presidential actions that provoked French military response.¹⁹⁵

Some Americans viewed the Quasi-War as unconstitutional because it lacked a formal declaration.¹⁹⁶ President Adams, however, later went to Congress to obtain support, especially because the young nation was still

withdrawal-from-afghanistan-is-complete [<https://perma.cc/JBA5-R2HC>] (describing plight of thousands of Afghans with connections to U.S. military and diplomatic missions unable to leave when Americans left Kabul).

191. *See id.* ("I am empathetic to the people I've put in this position . . . Where is the moral courage?" (quoting a U.S. colonel who struggled to help his interpreters)).

192. Lauren Leatherby & Larry Buchanan, *At Least 250,000 Afghans Who Worked With U.S. Haven't Been Evacuated, Estimates Say*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/interactive/2021/08/25/world/asia/afghanistan-evacuations-estimates.html> [<https://perma.cc/J8XK-8VNL>]; Rohde, *supra* note 190.

193. Stephen M. Griffin & Matthew C. Waxman, *War Powers: Congress, the President, and the Courts—A Model Casebook Section 3* (Tul. Pub. L. Rsch. Working Paper No. 20-18 & Colum. Pub. L. Rsch. Working Paper No. 14-669, Jan. 12, 2021).

194. *Id.*; *The Quasi-War With France (1798–1800)*, USS CONST. MUSEUM, <https://ussconstitutionmuseum.org/major-events/the-quasi-war-with-france/> (last visited Oct. 20, 2021) [<https://perma.cc/VAN2-Z6Y5>].

195. Kat Eschner, *This Unremembered US-France "Quasi-War" Shaped Early America's Foreign Relations*, SMITHSONIAN MAG. (July 7, 2017), <https://www.smithsonianmag.com/smart-news/unremembered-us-france-quasi-war-shaped-early-americas-foreign-relations-180963862/> [<https://perma.cc/769F-3DVL>].

196. Griffin & Waxman, *supra* note 191, at 3.

lacking in military funds and power.¹⁹⁷ Therefore, some Adams supporters saw this as close coordination between the branches, with Congress ultimately controlling hostilities and authorizing them through its constitutional authority.¹⁹⁸

The Supreme Court decided *Bas v. Tingy* in 1800, a case concerning war powers.¹⁹⁹ During the limited war with France, an American ship recaptured another American merchant vessel from a French private.²⁰⁰ During that time, two statutes regulated the value of property that could be salvaged by a recaptor.²⁰¹ The first statute stated that only one-eighth of the value was allowed, but the second statute stated that a recaptor was entitled to half of the value.²⁰² The relevant statute to be applied depended on whether France was considered an “enemy” under the law.²⁰³ Neither the United States nor France had declared war, but Congress had approved hostile actions against the French.²⁰⁴ The Court held that Congress ultimately had the power to determine the scope and means of executing war, and the Court would interpret Congress’s intent regarding whether a nation was considered an enemy for purposes of legal disputes.²⁰⁵

In 1801, the Court further defined Congress’s power in times of war in *Talbot v. Seeman*.²⁰⁶ In *Talbot*, a Hamburg citizen’s ship was recaptured from the French by the United States.²⁰⁷ In determining whether the captain of the U.S. vessel could salvage the value of the ship, the Court stated

197. *See id.* (“President Adams could only proceed with the war by consulting with Congress to obtain its support. Adams had to carefully design his plans and submit them to Congress partly because the U.S. did not yet have a navy. . . . Adams thus had to have Congress’s legislative backing.”); *see also* Gregory E. Fehlings, *America’s First Limited War*, 53 U.S. NAVAL WAR COLL. REV. 101, 111 (2000) (explaining that in the Quasi-War, Congress never declared war because President never requested it, setting precedent for future conflicts).

198. Griffin & Waxman, *supra* note 193, at 3.

199. 4 U.S. (4 Dall.) 37, 37 (1800).

200. *Id.* at 37.

201.

[T]he plaintiff in error contends, that the compensation should be regulated by the act of the 28th June 1798, (4 vol. p. 154. s. 2.) which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d March, (*ibid.* 456. s. 7.) which makes an allowance of one-half, upon a re-capture from *the enemy*, after an adverse possession of ninety-six hours.

Id. at 40 (Washington, J.).

202. *Id.*

203. *Id.* (questioning whether, at the time of the ship’s recapture, the government considered America at war with France).

204. *See id.* at 41 (Washington, J.) (“[I]t is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprisal [*sic*], and that congress did not mean to consider the hostility subsisting between *France* and the *United States*, as constituting a state of war.”).

205. *Id.* at 39 (Moore, J.); *id.* at 41 (Washington, J.); *id.* at 43 (Chase, J.); *id.* at 45 (Paterson, J.).

206. 5 U.S. (1 Cranch) 1, 1 (1801).

207. *Id.* at 2. Hamburg, a sovereign city at the time, was neutral to the U.S.-France conflict. *Id.*

that “the acts of [C]ongress are to be inspected.”²⁰⁸

Chief Justice Marshall concluded that, under various acts of Congress governing the conflict, the U.S. captain had reason to believe that he could capture the ship from the French.²⁰⁹ Regarding the value of the ship, no Congress had spoken on that issue; therefore, it was governed by common law principles.²¹⁰ But Chief Justice Marshall did not address any orders from the president; he analyzed the right to capture the ship solely on congressional acts.²¹¹

The first time that a conflict arose between the war powers of the president and Congress came in *Little v. Barreme*.²¹² In *Little*, Congress authorized seizure of *American* ships *bound for* French ports, but remained silent on any other circumstances of seizure during hostilities with the French.²¹³ The president’s approach to seizure was more liberal.²¹⁴ Captain Little then seized a Danish ship heading from France to Denmark, thus violating the congressional statute.²¹⁵

The Marshall Court held the seizure unlawful but did not determine whether Congress initially had the power to enact the statute, nor did the Court clearly articulate the President’s war powers.²¹⁶ But many scholars agreed that while Chief Justice Marshall referred to the president’s right to “take care” that the congressional statute is employed, it did not imply that the president would have the authority to independently create a similar policy.²¹⁷ Therefore, Marshall asserted that the scope of a captain’s actions is limited by a congressional act, notwithstanding a president’s order.²¹⁸

208. *Id.* at 29.

209. *Id.* at 31–33.

210. *Id.* at 33–34.

211. *See generally id.*

212. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

213. *Id.* at 170 (recounting stipulations of Non-Intercourse Act of 1799).

214. The president had instructed the Secretary of the Navy to stop ships suspected to be American and travelling to French ports, even if the ship’s ownership and destination were unknown. *Id.* at 177–78.

215. *Id.* at 176.

216. *See Dehn, supra* note 4, at 619 (pointing to Chief Justice Marshall’s lack of opinion on Congress’s substantive or restrictive-implementing measures with a conflicting order from the President).

217. *See* MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 255 (2007) (stating that Marshall ignored the issue of presidential acts without authorization); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 969 (2008) (believing that Marshall supported presidential power to enact orders in the absence of any congressional statute, but that the president could not contradict a congressional enactment).

218. *See* Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT’L L. 5, 9–10 (1988) (“Marshall’s understanding of congressional intent thus sets a stage for direct confrontation between the executive and legislative

Other important early war powers cases included *Murray v. The Schooner Charming Betsy*²¹⁹ and *United States v. Brown*,²²⁰ which both reinforced the Court's earlier applications of Congress's war powers.²²¹ Still, Chief Justice Marshall refrained from drawing any conclusions about the separation of powers between the president and Congress during times of war.²²² These cases suggest an early understanding that the legislative branch retained the authority to regulate the nature and scope of war. Furthermore, the executive power fell under this "umbrella" of congressional authorization: the commander in chief only had the power to act within the terms laid out by Congress.

2. Congressional Treaty Powers

For a war to "officially" end, a peace agreement must be signed and ratified by all relevant hostile nations.²²³ But with the increase of executive control over war powers, executive agreements became the mode of choice for many presidents in ending armed conflict.²²⁴ The Constitution does not explicitly mention executive agreements, but these agreements are seen as an extension of the president's power under the Take-Care

branches over foreign affairs, and on that stage he unfolds the central meaning of his decision, and the proposition that gives it an abiding timeliness: *The will of Congress controls.*"); see also Jane Manners, *Executive Power and the Rule of Law in the Marshall Court: A Rereading of Little v. Barreme and Murray v. Schooner Charming Betsy*, 89 *FORDHAM L. REV.* 1941, 1944–45 (2021) (explaining that the Marshall Court understood that the Constitution gave Congress sole law-making and war-making powers, with executive orders without effect on the scope of those powers).

219. The *Charming Betsy*, a Danish ship, was recaptured from French nationals by an American captain. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 115–16 (1804). The captain was acting pursuant to a statute that prohibited commerce between France and the United States, but because the ship was Danish, the Court held the seizure illegal. *Id.* at 118, 120–21. The Court reasoned that ambiguous congressional statutes should be construed so as to be in harmony with international law. *Id.* at 118; see Dehn, *supra* note 4, at 622 ("[The *Charming Betsy* case] strongly implies that only Congress can dictate the scope and means of hostilities in which the United States will engage.").

220. Here, the Supreme Court held that a congressional declaration of war did not allow the president to seize enemy property without an express authorization. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125–29 (1814) (finding that seizing and condemning property of enemy nationals was improper without congressional authorization).

221. See sources cited *supra* notes 219, 220 and accompanying text.

222. See Dehn *supra* note 4, at 624 (expanding on Marshall's reluctance to consider a separation-of-powers issue).

223. *Understanding Peace Treaties*, A.B.A. (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/understanding-peace-treaties/ [<https://perma.cc/WE52-XAW8>].

224. See Jeffrey S. Peake, *The Decline of Treaties? Obama, Trump, and the Politics of International Agreements* 40 *tbl. I* (Apr. 6, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3153840_code1321157.pdf?abstractid=3153840&mirid=1&type=2 [<https://perma.cc/U7JR-6K6K>] (showing treaties and executive agreements enacted during each presidential term since President Truman); see Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 *HARV. L. REV.* 629, 632 (arguing that executive agreements have been primary choice for presidents in making international commitments).

Clause.²²⁵

There are two types of executive agreements: (1) sole-executive agreements and (2) congressional-executive agreements.²²⁶ The former is usually rare: the president acts entirely on his own and no congressional authorization is needed.²²⁷ The prevailing theory is that the president has the power to implement this type of agreement under his Article II foreign-affairs powers.²²⁸ But there is no clear consensus on what those foreign-affairs powers entail.²²⁹ Sole-executive agreements can be made pursuant to Article II powers *alone*, but the president typically shares powers with other branches under the federalist system.²³⁰

Congressional-executive agreements are more common and are made pursuant to a statutory grant of power to the president by Congress.²³¹ If there is no statutory grant, then congressional-executive agreements require subsequent congressional approval.²³²

The origins of the executive's foreign-affairs powers lay in *United*

225. U.S. CONST. art. II, § 3 (“[The president] shall take Care that the Laws be faithfully executed”); see also sources cited *supra* notes 223, 224 and accompanying text.

226. See *Legal Basis for Executive Agreements*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-3/legal-basis-for-executive-agreements> (last visited June 4, 2022) (describing various types of executive agreements related to peace keeping in hostile nations).

227. See David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1966 (2002) (“[T]he President has a limited power to create binding international obligations by means of sole executive agreements, but the President cannot create binding domestic law by means of sole executive agreements.”); see also Anne E. Nelson, *From Muddled to Medellín: A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035, 1038 (2009) (asserting that early federalist position narrowly defined purpose and use of sole-executive agreements).

228. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 207–17 (1957) (discussing president's Article II powers to enact foreign policy); Sharon G. Hyman, Note, *Executive Agreements: Beyond Constitutional Limits?*, 11 ARIZ. L. REV. 805, 823 (1983) (explaining that a sole-executive agreement is a necessary part of president's ability to direct foreign affairs under the Constitution).

229. For a discussion of relevant sole-executive agreements with significant foreign policy consequences, see Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFFS. 284, 294–95 (1987).

230. *Legal Basis for Executive Agreements*, *supra* note 226; cf. Hyman, *supra* note 228, at 807 (“As a tool used to implement the nation's foreign policy decisions, the international agreement lies at the center of any discussion of the constitutional division of power with respect to foreign affairs. . . . Our constitutional system of checks and balances under the doctrine of separation of powers requires that policymaking *not* be concentrated solely in one branch of the federal government.”).

231. *Legal Basis for Executive Agreements*, *supra* note 226.

232. *Id.*

States v. Curtiss-Wright,²³³ and specifically *United States v. Belmont*,²³⁴ in cases of international agreements that are made absent Senate approval. Though *Belmont* held that the president has the capability to commit the United States to foreign agreements, the Court stipulated that the agreement must accompany either an independent Article II power of the President or congressional acquiescence through statutory authority.²³⁵ But in *American Insurance Ass'n v. Garamendi*, congressional silence was also viewed as acquiescence if Congress had a history of remaining silent on the issue at hand.²³⁶ Justice Ginsburg dissented, arguing that the president's authority to convey agreements required a "more formal and binding federal instrument."²³⁷

The *Garamendi* decision was later narrowed by *Medellin v. Texas*,²³⁸ in which the Supreme Court held that the ability to incorporate non-self-executing treaties by the president to the states is prohibited absent any congressional action.²³⁹ Silence was not seen as acquiescence in this case due to the president's "unprecedented action" in making a claims settlement, a resolution that was not supported by a longstanding history of

233.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of federal power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as the representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

299 U.S. 304, 319 (1936). This case is cited as a principal authority on the president's foreign-affairs power as speaker, listener, and "representative of the nation." See Daniel A. Cotter, *United States v. Curtiss-Wright Export Corp. (1936)*, in CONSTITUTING AMERICA: A 90-DAY STUDY ON THE HISTORY OF OUR COUNTRY'S JUDICIAL SYSTEM 30, 32 (2017), <http://constitutingamerica.org/wp-content/uploads/2018/01/90DayStudySupremeCourt2017-FINAL.pdf>.

234. 301 U.S. 324 (1937). The Supreme Court upheld the president's power to engage in international agreements outside the treaty process, trumping state law:

[T]he President recognized the Soviet Government, and normal diplomatic relations were established between that government and the Government of the United States That the negotiations were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.

Id. at 330.

235. See Daniel Silverberg, *The President as Lawmaker: Moderating Executive Authority in Wartime*, 5 AM. U. NAT'L SEC. L. BRIEF 37, 46–47 (2014) (stating that there had to be independent presidential power under the Constitution, a clear history of congressional acquiescence, or an authorizing statute); see also Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 308 (2007) (arguing that unilateral executive authority contradicts constitutional process for making treaties).

236. 539 U.S. 396, 429 (2003).

237. *Id.* at 442 (Ginsburg, J., dissenting).

238. 552 U.S. 491, 491 (2008).

239. *Id.* at 526.

congressional silence.²⁴⁰

According to some legal scholars, these cases articulate the Court's "middle ground" approach in times of war and national-security crises.²⁴¹ This approach favors cooperative action between the legislative and executive branches, encouraging the executive to involve the legislature and the legislature to proscribe bounds for the executive.²⁴²

IV. CONGRESSIONAL POWER: PROPOSED SOLUTIONS

Though the beginning of the war in Afghanistan started with almost unanimous support from Congress, it increasingly became an unpopular war as subsequent presidents continued their own foreign policy agendas in the region. Eventually, Trump signed a sole-executive agreement with the Taliban to begin a withdrawal process. The move surprised Congress, and as Biden forged ahead with the timeline, he left congressmembers out of the discussion completely.

The dire situation in Afghanistan—both during U.S. invasion and as American forces left the country—could have been more orderly, efficient, and successful had Congress insisted on asserting its own war powers. Just as the war began with emotion-filled hysteria, it ended with a desperate, and ultimately ineffective, effort to withdraw in a state of dignity. The insufficient preparation and inadequate management of the withdrawal process allowed for human-rights considerations and safety precautions to go unheeded.

In the beginning, Congress had strongly supported the invasion.²⁴³ Congress then allowed four presidents to unabashedly forge their own foreign-policy path, involving American troops and money in anti-terror efforts not only in Afghanistan, but across the world. Representative Lee has tried on numerous occasions to repeal the AUMF since that initial vote, but executive war powers have continued unchecked under the AUMF to this day.²⁴⁴

This section introduces the various solutions at Congress's disposal

240. *Id.* at 532.

241. See generally Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1 (2004).

242. *Id.*

243. AUMF, *supra* note 6. The AUMF passed by a unanimous vote in the Senate and a House of Representatives vote of 420-to-1. Carlson, *supra* note 82.

244. *Congresswoman Barbara Lee Continues Efforts to Stop Endless Wars*, CONGRESSWOMAN BARBARA LEE (Jan. 12, 2021), <https://lee.house.gov/news/press-releases/congresswoman-barbara-lee-continues-efforts-to-stop-endless-wars> [<https://perma.cc/Z995-NZWQ>]; see also Joshua Keating, *Barbara Lee's Long War on the War on Terror*, SLATE (Aug. 7, 2017, 5:50 AM), <https://slate.com/news-and-politics/2017/08/barbara-lees-long-war-on-the-war-on-terror.html> [<https://perma.cc/6RJS-JGTN>] (stating that Rep. Lee sponsored many bills to overturn AUMF of 2001 in years that followed).

that could have been utilized in Afghanistan, such as an update to the War Powers Resolution, clearer funding guidelines, or regulation of foreign aid and cooperation. Additionally, it explores how withdrawal from Afghanistan could have gone differently had these solutions been applied.

A. Solutions Under War Powers

Under Congress's war powers, the legislature could have provided clear withdrawal guidelines well in advance, rather than relying on multiple intelligence-agency reports that came to different conclusions only weeks beforehand. (President Biden ultimately ignored most of these reports.)²⁴⁵

First, Congress could have drafted withdrawal guidelines by updating the War Powers Resolution, requiring (1) clear evidence that withdrawal is feasible from a logistical and humanitarian perspective and (2) congressional consultation before any withdrawal from U.S. military bases. In relation to the withdrawal from Afghanistan, these requirements would have forced the executive to produce concrete evidence that a withdrawal process would not bring undue harm to Afghan citizens and would be feasible within the scheduled timeline. Congress could have also required congressional consultation before abandoning Bagram Airfield, ensuring that Congress played an active role in the initial withdrawal procedure. Had Biden consulted with Congress, there would have been a waiting period allowing for communication with and notification to the Afghan military of America's exit from the airfield.²⁴⁶ Afghan forces would then have had more time to prepare, thus ensuring the Afghan military had a fighting chance against the Taliban.

Second, Congress could have allocated specific funding toward withdrawal procedures, allowing for a more robust contact-tracing process for American citizens in Afghanistan, heightened evacuation resources, and additional support for the State Department's emergency visa program.²⁴⁷ Furthermore, the purse power could have included restrictions to induce the withdrawal process, such as a cutoff of funds toward troop

245. See Mazzetti, Barnes & Goldman, *supra* note 170 (stating that intelligence reports had a pessimistic view of Afghan military's strength, but Biden argued that Afghan government was unlikely to fall, raising questions about why the Biden administration chose to ignore warning signs).

246. Gannon, *supra* note 165.

247. For information on the contact-tracing process, see Jack Detsch, Kelly Kimball & Robbie Gramer, *State Department: Thousands of U.S. Residents Still Stuck in Afghanistan*, FOREIGN POL'Y (Nov. 3, 2021, 3:37 PM), <https://foreignpolicy.com/2021/11/03/state-department-afghanistan-us-residents/> [<https://perma.cc/7FNJ-VVU5>]. For information on the special immigrant visas, see *Special Immigrant Visas for Afghans Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html> (last visited May 29, 2022) [<https://perma.cc/G22S-2UX2>].

deployment or military-resource spending.²⁴⁸ This is a broad solution that could still be formalized through new legislation or with an amendment to the War Powers Resolution.

Finally, Congress could have insisted—through its war-power and legislative-oversight functions—that American intelligence and executive agencies coordinate closely with multinational organizations like the UN, and with U.S. allies present in Afghanistan, like NATO. A well-coordinated, streamlined communication system with the international community could have led to less global outrage, as well as a more cohesive, organized, and humane evacuation process. While the president holds foreign-affairs powers, Congress may direct funding toward security-related international activities, with a particular focus on military cooperation.²⁴⁹ Funding for foreign aid and international action could have ensured that NATO allies and other nations involved in defense from the Taliban were prepared for the large-scale withdrawal effort. Additionally, international resources and logistical solutions could have been provided in the operation, allowing for a more robust and capable undertaking.

With these solutions, it is unlikely that U.S. forces would have left behind 200,000 Afghan allies in the evacuation process. Though Afghan citizens still would have wanted their families out of the country, it is unlikely that images of people clinging to military cargo planes and hoisting their children into the arms of soldiers would have been captured. With proper funding and early action, humanitarian disaster could have been avoided or at least mitigated.

B. Solutions Under Treaty Powers

Within the legislature's treaty powers, Congress could have argued that Trump's peace deal with the Taliban was an unconstitutional sole-executive agreement. This would have allowed Congress to intervene in the Afghanistan withdrawal process as early as February 2020.

There are two possibilities to explain the Taliban peace deal's legal foundations. The first asserts that the Taliban peace agreement signed by President Trump was a congressional-executive agreement based on the AUMF of 2001. Under the AUMF, the president had the authority both to use necessary force and to terminate that force by agreement.²⁵⁰

248. See generally Pub. L. 93-52, § 108, 87 Stat. 130, 134 (1973); see also Section III.B.1 *supra* for a discussion on Congress's purse powers in relation to armed conflict.

249. Toni Johnson, *Congress and U.S. Foreign Policy*, COUNCIL ON FOREIGN RELS. (Jan. 24, 2013, 11:34 AM), <https://www.cfr.org/background/congress-and-us-foreign-policy#chapter-title-0-4> [<https://perma.cc/L4BM-5UC7>]; see generally Norman J. Ornstein & Thomas E. Mann, *When Congress Checks Out*, 85 FOREIGN AFFS. 67 (2006), <https://www.foreignaffairs.com/articles/united-states/2006-11-01/when-congress-checks-out> [<https://perma.cc/37A3-M5YP>].

250. AUMF, *supra* note 6.

Therefore, by this rationale, the deal to end the War on Terror in Afghanistan was preemptively authorized by Congress when it passed the AUMF twenty years ago.

The second—and more compelling—argument is that the Taliban peace deal was an unconstitutional sole-executive agreement. The AUMF did not directly acknowledge Congress's stance on war-ending maneuvers or withdrawal processes.²⁵¹ To argue that the president has an implied power to engage in unilateral war-ending measures without congressional authorization, based solely on the vague (and overly broad) wording of the AUMF, goes beyond its statutory meaning. Therefore, the Taliban agreement arguably lacked statutory authorization or subsequent congressional approval as required by *Belmont*.²⁵² Moreover, because war powers are shared between the executive and legislative branches, President Trump did not have the unilateral authority to broker this deal without congressional authorization. War powers are not solely an Article II power, and consequently, this sole-executive agreement was an unconstitutional violation of Congress's war and treaty powers.

By arguing that the Taliban peace deal was an unconstitutional sole-executive agreement, the legislative branch has multiple options to assert its powers in withdrawal operations. First, Congress could require that the executive branch publish the agreement with a note on the congressional statute authorizing the agreement. This would allow for more public oversight and could even place restraints on funding for any agreement or entry into force until the note is published. Additionally, relevant congressional committees could also elect to publish the executive agreements and notes they receive, making demands of executive agencies for specificity regarding legal authority in their actions.

Second, Congress could issue a resolution clarifying the AUMF's statutory language and legislative intent. In relation to treaties and executive agreements, this could include clearer language on how the president communicates with legislators regarding any war-ending maneuvers, or a stipulation reserving Congress's right to approve or disapprove of any executive agreement related to the statutory matter at hand.²⁵³

251. *Id.*

252. *See United States v. Belmont*, 301 U.S. 324, 330 (1937) (stipulating that an agreement must accompany either an independent Article II power of the president or congressional acquiescence through statutory authority).

253. Congress is critical of the executive branch's more significant foreign-policy decisions—most of which lacked congressional consultation—such as the United States's previous involvement in Vietnam. Therefore, a negative history, including the more recent withdrawal from Afghanistan, may compel Congress to adopt stricter statutory guidelines. *See* 121 CONG. REC. 11973 (1975) (statement of Senator Glenn); *see also* Eugene Lang, *How Afghanistan Is—And Isn't—Vietnam All Over Again*, THE CONVERSATION (Aug. 24, 2021, 10:32 AM),

Third, a case like *Dames & Moore v. Regan* may reach the Court and force a return to the case's broad opinion.²⁵⁴ In *Dames & Moore*,²⁵⁵ the Court recognized the president's ability to enter into executive agreements without Senate approval if "such claims [were] integrally connected with normalizing United States relations with a foreign state."²⁵⁶ But the bounds of that statement are purposefully vague and subject to narrowing.²⁵⁷ Furthermore, the Court heavily relied on previous congressional sanctions of these types of agreements, recognizing that congressional approval, even if implicit, is still a major factor in authorizing a president's executive agreement.²⁵⁸ If a case arrives at the Court in which it is argued that congressional authorization was not granted for the Taliban peace deal, the Court may have to reexamine its *Dames* opinion, potentially narrowing the language and meaning of "integrally connected."

As *Dames* also suggests, silence from Congress does not equal acquiescence when it comes to unilateral executive action, particularly when

<https://theconversation.com/how-afghanistan-is-and-isnt-vietnam-all-over-again-166455> [<https://perma.cc/H88N-MMM2>] (comparing the fall of Saigon and Kabul, both of which had chaotic evacuations, thousands of local civilians trying to board military aircraft, and a strong military presence that lost the will to continue fighting after Americans left).

254. *Dames & Moore v. Regan*, 453 U.S. 654, 654 (1981).

255. *Id.* In *Dames*, the Supreme Court considered, among other issues, the president's decision to suspend all claims against Iran in the International Claims Tribunal in order to comply with an executive agreement between the United States and Iran to release American hostages held in the country. *Id.* at 660.

256. *Id.* at 683.

257. See Rebecca A. D'Arcy, Note, *The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 300 (2003) ("The question nonetheless remained as to what 'species' of power such executive orders constituted."); see also James D. Redwood, *Dames & Moore v. Regan: Congressional Power over Foreign Affairs Held Hostage by Executive Agreement with Iran*, 15 LOY. L.A. L. REV. 249, 277 (1982) ("[T]he *Dames* Court's finding of congressional approval in the working of executive agreements, through inertia and acquiescence, further adds to '[t]he murkiness of the judicial waters [and enables] the determined executive branch to accomplish what it otherwise might be unable to do . . .'" (citing Morris D. Forkosch, *The United States Constitution and International Relations: Some Powers and Limitations Explored*, 5 CAL. W. INT'L L.J. 219, 269 (1975))).

258. See *Dames*, 453 U.S. at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."). In this case, the Court relied on a history of congressional acquiescence in executive claims settlements, including Congress's enactment of the International Claims Settlement Act. *Id.* at 678–80. This Act created a procedure for future settlement agreements, suggesting that Congress had preemptively approved future executive actions in this area. See *id.* at 680 ("By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements."). Additionally, Congress had acquiesced in previous executive claims settlements, including settlements with China, East Germany, and Vietnam. *Id.* at 681. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (noting that the validity of a president's action hinges on multiple considerations, including congressional indifference or acquiescence).

the action is not normally undertaken by the president.²⁵⁹ Here, it can be argued that the president took an unprecedented action in signing a peace deal with an internationally recognized terrorist organization, and therefore, silence from Congress in this matter does not suggest implicit approval of the agreement. Congress should not only assert its stance on the Taliban peace deal, but also argue that future executive agreements with foreign enemies require a similar level of congressional input to be binding.

V. TODAY'S SOLUTIONS AND CONSTITUTIONAL ANALYSIS

Indeed, Congress has already moved forward in pursuit of a stronger position on both the legislature's war powers and treaty powers. This section explores Congress's actions and argues that early Supreme Court cases support these actions. Congress's current acts will be discussed in turn.

A. Reasserting Congress's War Authority

It is imperative that Congress reestablish its legislative authority to declare war under the Constitution. Over the past century, Congress increasingly abdicated its own decision-making powers to the executive, resulting in disastrous foreign-policy choices and costly wars. While reestablishment of authority can be accomplished in a variety of ways, the Senate has introduced one promising solution.

The National Security Powers Act, a bipartisan bill introduced by Senators Chris Murphy, Mike Lee, and Bernie Sanders, aims to "recalibrate[] the balance of power, putting Congress on near-equal footing with the Commander-in-Chief as the driver of Washington's posture toward the world."²⁶⁰ The Act reviews reform of three areas: (1) war powers, (2) arms exports, and (3) national emergencies.²⁶¹ All three are governed by congressional authorization, meaning that the president must obtain

259. *See Dames*, 453 U.S. at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent" (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))); *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (explaining that when Congress has acquiesced in long-standing executive action, the president can presume congressional consent).

260. Andrew Desiderio, *Unlikely Senate Alliance Aims to Claw Back Congress' Foreign Policy Powers "Before It's Too Late"*, POLITICO (July 20, 2021, 6:00 AM), <https://www.politico.com/news/2021/07/20/bipartisan-senators-congress-war-powers-500214> [<https://perma.cc/FN66-SJKJ>].

261. National Security Powers Act, S. 2391, 117th Cong. (2021); SEN. CHRIS MURPHY, NATIONAL SECURITY POWERS ACT ONE-PAGER (2021), <https://www.murphy.senate.gov/imo/media/doc/NSPA%20one%20pager.pdf> [<https://perma.cc/S56T-HNWW>] [hereinafter NSPA ONE-PAGER].

Congress's authorization through consultation.²⁶²

Regarding war-powers reform, the Act would automatically sunset (i.e., repeal) any and all existing AUMFs, including the AUMF of 2001, that granted immense powers to the executive branch under the umbrella of fighting terror.²⁶³ The Act would also narrow the War Powers Resolution significantly.²⁶⁴ "Hostilities," the notoriously vague term in the Resolution that allowed the executive branch to argue intervention as a police action rather than an armed conflict, would be defined to include "any situation involving any use of lethal or potentially lethal force by or against United States forces"²⁶⁵ Additionally, the sixty-day limit on hostilities not authorized by Congress would lower to a twenty-day limit, making it significantly harder for a president to begin armed conflict that is not short-term in nature.²⁶⁶ Finally, Congress's purse power would automatically cut off funding if a president failed to seek or obtain authorization from Congress.²⁶⁷ Under the Resolution, Congress is required to seek a veto-proof majority to terminate funding, but under the Act, funding cuts would become automatic.²⁶⁸

The National Security Powers Act is a good start for Congress to claw back its war powers. Still, more action to ensure that the executive branch is limited in its abilities to conduct any type of invasion or intervention without congressional authorization—through a language update of the War Powers Resolution, a designation of specific funding toward withdrawal procedures, or coordination with multinational organizations—is suggested.²⁶⁹ Overall, repealing the AUMF of 2001 and upgrading the War Powers Resolution would provide an avenue for Congress to reassert its constitutional powers and deal equally with the executive branch.²⁷⁰

Early case law on war powers supports the constitutionality of the National Security Powers Act. The Supreme Court was clear in its assertion that Congress held the role as primary overseer of armed conflict, from its declaration to its conclusion.²⁷¹ Though the president takes care to execute the laws, he is still subject to the legislature's statutory

262. See NSPA ONE-PAGER, *supra* note 261, at 1 ("In each case, the president is required to consult congressional leaders and obtain congressional authorization before exercising the powers in question.").

263. National Security Powers Act, § 103; NSPA ONE-PAGER, *supra* note 261, at 1.

264. National Security Powers Act, § 103; NSPA ONE-PAGER, *supra* note 261, at 1.

265. National Security Powers Act, § 101(2).

266. National Security Powers Act, § 106(c); NSPA ONE-PAGER, *supra* note 261, at 1.

267. National Security Powers Act, § 108; NSPA ONE-PAGER, *supra* note 261, at 1.

268. National Security Powers Act, § 108; NSPA ONE-PAGER, *supra* note 261, at 1.

269. See generally discussion *supra* Section IV.A.

270. See Desiderio, *supra* note 260 ("[The bill] aims to reverse the decades-long erosion of the House and Senate's authority to shape American foreign policy.").

271. See generally discussion *supra* Section III.B and cases cited therein.

limitations.²⁷² Creating structural guidelines, funding procedures, and international cooperation techniques as it relates to war are well within Congress's powers. No case law currently suggests that Congress is *unable* to enact these procedures.²⁷³ Moreover, these limitations do not infringe on the president's ability to command the armed forces as he sees fit.²⁷⁴ The nature, mode, method, and means of combat still fall within the president's control.

B. *The Legal Argument for Additional Treaty Powers*

Congress should also assert that the Constitution grants the legislative branch powers to regulate the "back end" of hostilities, or the withdrawal process. Congress can use its treaty powers to advocate for this position.

If Congress has any hope of maintaining a more powerful position in relation to the president at a war's conclusion, lawmakers should require executive briefs on the legal authority for entering into a treaty with a foreign nation. Congress should also revisit its statutory language regarding treaty powers, requiring clearer communication between the executive and legislative branches. Most importantly, a legal challenge of the Taliban peace deal may cause the Court to reconsider its vague language under *Dames*, asserting that sole-executive agreements to end armed conflict are unconstitutional.²⁷⁵

Congress has so far failed to take any of these actions, but these various solutions should be contemplated by the legislative branch in the future, especially if and when the United States enters another armed conflict.

VI. CONCLUSION

Congressional war powers have withered not only due to expansive, unilateral executive action, but also from Congress's own decisions to rid itself of power in the War on Terror. The lesson to be gleaned from Afghanistan is that the president's authority in times of war has allowed for ill-advised, temperamental interventions and floundering withdrawals. If the U.S. government has any desire to improve its foreign-policy standing around the world, Congress must reaffirm its constitutional war powers alongside the executive branch and reassert its logistical role in war-ending agreements.

272. *See generally* Little v. Barreme, 6 U.S. 170, 170 (1804).

273. *See generally* discussion *supra* Section III.B and cases cited therein.

274. *Id.*

275. *See generally supra* Section IV.B.