NOTE

THE POWER TO (NOT) DECIDE: IMPLICATIONS OF *BAKER*'S FIFTH FACTOR FOR WAR POWERS REFORM

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ABSTRACT

Though the Constitution charges Congress with the responsibility to "declare War," modern Presidents have unilaterally deployed sustained military force around the world with regularity. Greater presidential unilateralism in armed conflict is not without controversy, and Congress has passed legislation to rein in the Commander in Chief. Efforts to shift the allocation of the war powers away from the President have not been successful, however, partially because the courts are rarely willing to reach the merits of suits challenging the President's authority to act on his own. Relying on a handful of (non)justiciability doctrines—most notably, the textual considerations set out in Baker v. Carr*—the courts have almost universally dismissed such disputes as beyond the judicial power to decide, and war powers reformers have crafted their efforts accordingly.*

This Note argues that Baker*'s textual factors do not tell the whole story. The courts' lack of military expertise or political accountability make it infeasible for them to adjudicate war powers disputes without endangering U.S. lives and foreign policy interests.* Baker*'s more prudential fifth factor, therefore, counsels against ruling at all in such cases, even if the textual factors do not. By elaborating and responding to these prudential arguments for nonjusticiability in the war powers arena, this Note offers a more complete account of justiciability issues in war powers disputes and highlights a shortcoming of recent war powers reform efforts. The Note concludes, however, that the fifth factor is not an insurmountable barrier: by codifying the remedy applicable where courts find violations of the WPR, Congress can take critical value judgments out of courts' hands and thereby empower them to finally adjudicate war powers suits on their merits.*

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I. Introduction

During his most recent campaign for President, Donald Trump promised that, if elected, he would use military force to attack Mexican drug cartels, choosing from a "menu" of options from bombing campaigns to boots on the ground.[1] This promise prompted questions at a 2023 United States House of Representatives Foreign Relations Committee hearing for the General

[1] Asawin Suebsaeng, *Trump is Planning to Send Kill Teams to Mexico to Take Out Cartel Leaders*, Rolling Stone (May 7, 2024), https://www.rollingstone.com/politics/politics-features/trump-mexico-kill-teams-drug-cartels-1235016514/ [https://perma.cc/A49J-CMN3]. As President, Trump has carried out these threats with a number of strikes against small vessels in the Caribbean allegedly operated by drug traffickers and terrorists. *See* Jeremy Chin & Margaret Lin, *Timeline of Vessel Strikes and Related Actions*, Just Sec. (Nov. 6, 2025), https://www.justsecurity.org/124002/timeline-vessel-strikes-related-actions/ [https://perma.cc/K8SQ-JAMX]; Helene Cooper, Eric Schmitt, Edward Wong & Alan Feuer, *Trump Says U.S. Attacked Boat Carrying Venezuelan Gang Members, Killing 11*, N.Y. Times (Sept. 2, 2025), https://www.nytimes.com/2025/09/02/us/politics/trump-venezuela-boat-drugs-attack.html [https://perma.cc/XF59-9MKX]. These strikes have killed dozens of people, lack authorization from Congress, and are of dubious legality. Ellen Nakashima & Noah Robertson, *Trump Administration Tells Congress War Law Doesn't Apply to Cartel Strikes*, Wash. Post (Nov. 1, 2025), https://www.washingtonpost.com/national-security/2025/11/01/trump-venezuela-war-drugs-law/ [https://perma.cc/Y7S6-8DLV]; *see also* Gabor Rona, *Venezuelan Boat Attacks: Utterly Unprecedented and Patently Predictable*, Lawfare (Oct. 2, 2025), https://www.lawfaremedia.org/article/venezuelan-boat-attacks--utterly-unprecedented-and-patently-predictable [https://perma.cc/A57A-FEHN].

Counsel of the Department of Defense about the permissibility of such action if taken without congressional approval. The General Counsel's response echoed a doctrine often repeated by the Executive Branch over the past several decades: a president may use military force absent congressional authorization if it (1) "would serve an important national interest," and (2) does not rise to "war in the constitutional sense."[2] The apparent simplicity of this two-pronged formulation (which represents the settled view of the Department of Justice's Office of Legal Counsel ("OLC"))[3] obscures the fact that the test (particularly its second prong) implicates one of the most hotly contested separation of powers disputes of the modern age: the allocation of the authority to engage the United States and its troops in armed conflict (the "war powers").

As the OLC acknowledges, the meaning of "war in the constitutional sense" is significant because it demarcates the line where the President's share of the war powers ends and Congress's begins. This is because the Constitution makes the President the Commander in Chief,[4] but it reserves for Congress the authorities "to *declare War*, . . . to raise and support Armies; [and] to provide and maintain a Navy."[5] Thus, while the President may issue binding commands to troops and direct the scope, nature, and objectives of armed conflict when it arises, it remains (in theory) Congress's prerogative to establish the armed forces and to decide when, and against whom, they will fight.

In practice, however, the distinction between declaring and waging war has rarely been so simple. To begin with, Congress has passed just eleven declarations of war—relating to only five distinct conflicts—in the nation's history, representing a small share of the dozens of conflicts that the United States has engaged in since its founding.[6] Most of those conflicts have been waged on the basis of either congressional authorizations for the use of military force (AUMFs)[7] or the President's Commander in Chief authority to act unilaterally to protect U.S. foreign policy interests and citizens overseas.[8] This latter category is controversial: when the President engages in continuous,

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[2] *Reclaiming Congress's Article I Powers: Counterterrorism AUMF Reform Before the H. Comm. On Foreign Aff.*, 118th Cong. 30 (2023) (statement of Caroline Krass, Gen. Counsel, Dep't of Def.).

[3] *E.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 39, 39 (2018) [https://perma.cc/V9A3-LZ9B]; Authority to Use Military Force in Libya, 35 Op. O.L.C. 23, 31 (2011) [https://perma.cc/6P7S-S9NF]; *see also* Brian Finucane, *Key Takeaways from September 28 House Foreign Affairs Committee Hearing on AUMF Reform*, Just Sec. (Oct. 4, 2023), https://www.justsecurity.org/89148/key-takeaways-from-september-28-house-foreign-affairs-committee-hearing-on-aumf-reform/ [https://perma.cc/Y4TN-T3ZT].

[4] U.S. Const. art. II, § 2, cl. 1.

[5] U.S. Const. art. I, § 8, cl. 11–13 (emphasis added).

[6] Jake Novack, Note, *Exploring Executive War Power: The Rise and Reign of the Presidentialist Interpretation*, 53 Cal. W.L. Rev. 247, 262 (2017); *About Declarations of War by Congress*, United States Senate, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm [https://perma.cc/4D4E-WJPE].

[7] *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

[8] *See* discussion *infra* notes 39–60.

long-term armed conflict without express approval from Congress or even in the face of Congress's disapproval, her authority to act is murky.[9]

The scholarly debate on this issue—competing attempts to more clearly elaborate the constitutional distribution of the war powers—is extensive.[10] And this Note does not enter into that debate—it does not seek to define "War" in the constitutional sense or otherwise to resolve disputes about the extent of the President's Commander in Chief authority. Instead, this Note addresses a second-order question about justiciability: when cases raise this separation of powers question, what authority do courts have to decide the issue? Despite being on the "back burner" of "legal scholarship in the war powers area,"[11] justiciability is an issue on which no clear consensus has emerged. As an empirical matter, courts are generally—but not universally—unwilling to resolve war powers disputes.[12] Some scholars argue that this reluctance aligns with the original intent of the Constitution's framers[13] or constitutional structure;[14] others advocate for greater judicial intervention to protect Congress's Declare War Clause powers on functionalist grounds.[15] Courts, for their part, tend to

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[9] *See infra* Part II.A.3; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, 642 (1952) (Jackson, J., concurring).

[10] *See generally, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097 (2013); Matthew Fleischman, *A Functional Distribution of War Powers*, 13 N.Y.U. J. Legis. & Pub. Pol'y 137 (2010); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008) (hereinafter Barron & Lederman, *Framing the Problem*); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 Ind. L.J. 1199 (2006); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001); Novack, *supra* note 6.

[11] J. Richard Broughton, *What Is It Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 Okla. L. Rev. 685, 691–92 (2001).

[12] Stephen I. Vladeck, *War and Justiciability*, 49 Suffolk U. L. Rev. 47, 48–51 (2016). *But see, e.g.*, Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971) (finding a justiciable question in a war powers dispute).

[13] *E.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 287–88 (1996); *cf.* Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. Rev. 1551, 1615–16 (2011) (arguing, from a "Madisonian" perspective, that "more deferential" judicial review is constitutionally appropriate "when Congress has delegated authority to executive officials to act during crisis").

[14] *E.g.*, Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place*, 21 Chap. L. Rev. 55, 80 (2018); Broughton, *supra* note 11, at 722–24.

[15] *See, e.g.*, Craig Martin, *A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 Brook. L. Rev. 611, 693 (2011); Jonathan L. Entin, *War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations*, 45 Case W. Res. J. Int'l L. 443, 458 (2012); Michael Hahn, *The Conflict in Kosovo: A Constitutional War?*, 89 Geo. L.J. 2351, 2381 (2001); Chris Smith, *Litigating War: The Justiciability of Executive War Power*, 14 Duke J. Const. L. & Pub. Pol'y Sidebar 179, 205 (2019); *cf.* Ronald J. Sievert, Campbell v. Clinton *and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War*, 105 Dick. L. Rev. 157, 179 (2001) ("Congress' abdication of authority for reasons of politics and expediency has created the danger that the framers sought to prevent; that one man could bring the country into an unjustified and catastrophic war.").

rely on the political question doctrine—which was famously elaborated in the 1962 redistricting dispute *Baker v. Carr*[16] and describes six types of issues that courts lack jurisdiction to address[17]—to dismiss war powers disputes.[18] But they are not unanimous in doing so.

This latter disagreement about the political question doctrine is the most substantial disagreement in war powers litigation and is the subject of this Note. Courts—including judges serving together on the same courts—and scholars alike have disagreed about how to apply *Baker*'s political question doctrine to war powers disputes, and whether to apply it at all.[19] This uncertainty itself has troubling implications: it calls into doubt the courts' ability to play their important role in maintaining the "equilibrium established by our constitutional system."[20] Furthermore, as the Supreme Court (speaking through Justice Kennedy) has commented, the evolving nature of recent (and, presumably, future) warfare makes the justiciability question not only desirable to answer but also likely unavoidable.[21] These considerations only loom larger in President Trump's second administration, given his repeated use of lethal military force not authorized by Congress against alleged drug trafficking boats and his notably open musing about using military force further afield in places like Greenland and Panama.[22]

The legal debates about justiciability have, to date, focused primarily on courts' ability to give meaning to constitutional text and statutes designed to rein in the President—that is, whether courts can say definitively what constitutes "war" under the Constitution or "hostilities" under a statute that aimed to implement Congress's war-declaration authority.[23] To the majority of scholars and judges who have weighed in on the justiciability issue, the question whether a court can intervene in war powers disputes has the same answer as the question whether these terms have judicially knowable meanings. Some have no trouble attributing meaning to the terms; others retort that they are so standardless as to require dismissal on *Baker*'s so-called textual grounds.[24] The dominance of this debate is reflected in war powers reform efforts: legislators have advocated various new statutory provisions that aim to make

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[16] 369 U.S. 186 (1962).

[17] *Id.* at 217.

[18] *See infra* Part III.B.

[19] *See infra* Part III.B.

[20] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

[21] Boumediene v. Bush, 553 U.S. 723, 797–98 (2008).

[22] *See* Konstantin Toropin, *Trump Administration Announces 16th Deadly Strike on an Alleged Drug Boat*, Associated press (Nov. 4, 2025), https://apnews.com/article/boat-strikes-drug-cartels-hegseth-trump-deec973bc09899e6b586f121beb466f4 [https://perma.cc/AAR8-N699]; Scott Neuman, *Is Trump's Rhetoric on Greenland, Canada and Panama Canal a 'Madman Strategy'?*, Nat'l Pub. Radio (Jan. 11, 2025), https://www.npr.org/2025/01/11/nx-s1-5253910/donald-trump-greenland-panama-canal-canada [https://perma.cc/ZDZ6-LKWX].

[23] 50 U.S.C. §§ 1541, 1543.

[24] *See infra* notes 111–21 and accompanying text.

existing limits on unilateral presidential action enforceable in court by explicitly defining the scope and duration of a conflict that amounts to "War."[25]

Yet this text-based discussion fails to consider the substantial prudential considerations that counsel against justiciability. This Note argues that, even if it is possible for Congress or a court to give meaning to "War" as used in Article I—that is, even if the textual problem is resolved—the grave and deeply political consequences of a court's decision to adjudicate war powers disputes counsel judicial restraint. This Note illustrates this point by analyzing war powers suits through the forward-looking fifth *Baker* factor,[26] which calls for dismissal of cases in the face of an "unusual need for unquestioning adherence to a political decision already made."[27] The uncertainty and value-laden judgments a court must confront when it adjudicates war powers cases on their merits, this Note argues, give rise to such an unusual need and demand dismissal even if the textual grounds would not otherwise so require.[28] In raising this novel resolution to the justiciability question, the Note demonstrates not just the shortcomings of the debate so far but also the insufficiency of prior legislative reform efforts. However, this Note concludes that the prudential concerns obligating nonjusticiability are not insurmountable: congressional action to codify the sort of value judgments that confront courts in the war powers context can help overcome justiciability barriers and allow courts to more clearly establish where Congress's Declare War powers end and the President's Commander in Chief authority begins. By elaborating and responding to these prudential arguments for nonjusticiability in the war powers arena, this Note contributes to existing efforts to rebalance the constitutional allocation of the war powers.

This Note proceeds as follows. Part II surveys the relevant legal and political history of unauthorized presidential uses of military force. Part III discusses the political question doctrine and identifies inconsistencies in the ways courts have applied it to war powers suits. Part IV assesses the risks that judicial intervention in cases involving active armed conflict pose to U.S. troops and foreign policy interests, and it concludes that these risks should be unacceptable to the courts and thus favor not ruling at all. Part V concludes this Note with a discussion of ways that Congress can codify prudential judgments otherwise undesirable for courts to make themselves, empowering the judiciary to more clearly define the allocation of the war powers.

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[25] *See, e.g.*, National Security Powers Act of 2021, S. 2391, 117th Cong. §§ 105–107 (2021); A Bill to Repeal the Authorizations for Use of Military Force Against Iraq, S. 316, 118th Cong. §§ 1–2 (2023); An Act to Repeal the Authorization for Use of Military Force Against Iraq Resolution, H.R. 3261, 117th Cong. § 1 (2021).

[26] *See* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 Stan. L. Rev. 1031, 1053 (2023) (arguing that the political question doctrine is heavily focused on foreign affairs).

[27] Baker v. Carr, 369 U.S. 186, 217 (1962).

[28] *See infra* Parts III.C, IV.

II. The Legal and Political Background of Unilateral Presidential Uses of Force

The President's ability to credibly threaten and actually send U.S. forces into unilateral, lethal, long-term armed conflict abroad—as President Trump has done[29]—has not always been the norm in the history of U.S. war powers. In fact, in the country's early days, the President usually acted according to the view that he had little, if any, authority to use military force without Congress's express authorization; premodern presidents certainly did not engage in offensive action, nor even actions designed to preempt imminent threats, without Congress's approval. But following the Second World War, this norm eroded dramatically, giving rise to the OLC's two-pronged test (permitting short-term, small-scale offensive military intervention wherever the President saw a national interest) as well as a significant (but largely unsuccessful) attempt by Congress to rein in the President with statutory restrictions on his use of military force. As this Part will illustrate, the courts have struggled to make sense of this extraordinary shift in presidential practice. This Part begins by surveying relevant pieces of the political history of unilateral presidential use of force and the development of justiciability doctrine around this growing practice, and it concludes by illustrating the problems that courts face in war powers disputes through an example of unauthorized presidential military action that intractably split both Congress and the D.C. Circuit.

A. Unilateral Presidential Action Throughout History

Before diving deeper into the doctrine, it is worth revisiting the history of unilateral presidential use of military force—particularly to emphasize the continuity of this interbranch power struggle over several decades and Congress's non-acquiescence to the President's ever-expanding understanding of his Commander in Chief authorities.

1. Early War Powers Practice: Interbranch Collaboration

During the Founding era, Presidents viewed their ability to unilaterally exercise military force under their Commander in Chief authority as relatively limited.[30] Indeed, when then-General George Washington led the revolutionary armed forces as Commander in Chief, he was subject to near-constant instruction from the Continental Congress on issues as minute as the distribution

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[29] *See supra* note 1 and accompanying text; *see also* Neuman, *supra* note 22. Of course, President Trump is not the only president to unilaterally direct significant military action. *See infra* Part II.A.2–3.

[30] Barron & Lederman, *Framing the Problem*, *supra* note 10, at 772.

of flour[31] and as militarily significant as the execution of court-martial sentences.[32] By the Civil War, this understanding had not changed much, at least within the courts. When that conflict began, President Abraham Lincoln took the highly unusual step of unilaterally proclaiming a blockade against the seceding states and began to seize ships that violated it.[33] Defendants whose ships had been seized challenged the blockade in court, arguing that it violated the separation of powers because it unlawfully amounted to an act of war.[34] Their suit ultimately reached the Supreme Court, which acknowledged the difficulty of the case but upheld the act in a 5–4 decision. The Court reasoned that Congress had passed a retroactively applicable resolution approving the blockade—that is, the Court found no separation of powers issue because Congress's approval had "cure[d] the defect" in President Lincoln's unilateral act.[35] In acknowledging such a "defect," the majority implicitly seemed to accept the cabined view of presidential war powers expounded by the dissent, which argued that "the President had no power" to act with hostility against "enemies" without congressional approval.[36] The lack of disagreement on this critical point illustrates the limited conception of presidential war powers at the time.

The decades following the Civil War were generally defined by "congressional government . . . in foreign affairs."[37] Presidents deployed a smattering of unilateral, often defensive, uses of military force, but most large-scale military engagements through World War II occurred only with Congress's authorization.[38] The President's unilateral use of military force, in short, is a relatively recent development; there is little indication from the practices of the Founders that the President had extensive authority to unilaterally engage the U.S. in armed conflict.

2. The First Modern Unilateral Presidential Engagements

Prior to World War II, there were few examples of large-scale, long-term unilateral presidential military action, and certainly no broad assertions of near-unlimited Commander in Chief authority to take such action.[39] Thus, one

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[31] 12 Journals of the Continental Congress, 1774–1789, at 902–03 (Worthington Chauncey Ford ed., 1905).

[32] 24 Journals of the Continental Congress, 1774–1789, at 509–10 (Worthington Chauncey Ford ed., 1905).

[33] Prize Cases, 67 U.S. (2 Black) 635, 670–72 (1863).

[34] *Id.* at 670.

[35] *Id.* at 671.

[36] *Id.* at 698–99 (Nelson, J., dissenting).

[37] Curtis A. Bradley, Historical Gloss and Foreign Affairs: Constitutional Authority in Practice 131 (2024) (quotation marks omitted).

[38] *Id.* at 128–32.

[39] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 Harv. L. Rev. 941, 1031–32 (2008) (hereinafter Barron & Lederman, *Constitutional History*).

of the earliest significant examples of a President's unilateral use of military force was President Harry Truman's intervention in Korea. After the start of hostilities in the Korean Peninsula in 1950, the United Nations Security Council authorized U.N. member states to assist South Korea in repelling North Korea's invasion.[40] President Truman committed troops to South Korea almost immediately and—because Congress was in recess at the time—without congressional approval. President Truman was assured by his Secretary of State and the Senate Majority Leader that his authority as Commander in Chief permitted such unilateral action, and thus—despite widespread support for the Korean War in Congress and among the public—President Truman never sought nor received congressional authorization of U.S. involvement in the three-year conflict.[41] Without serious challenge to his reliance on the Commander in Chief Clause for the conflict, President Truman's actions never presented a constitutional issue for the courts to consider.

Similarly consequential for the balance of war powers between the President and Congress was the Vietnam War. U.S. involvement in that conflict began gradually, but ramped up quickly during President John F. Kennedy's term in office: by the time of his death, the United States had committed more than 16,000 troops to the country.[42] President Johnson further escalated U.S. military activity in Vietnam, with his top advisors writing that a "central object of the United States" was to prevent communist victory in Vietnam.[43] The decisions to commit troops and expend military force in Vietnam went years without congressional approval. President Lyndon Johnson did eventually receive Congress's approval for the war: in 1964, after what the Executive Branch characterized as an attack on U.S. ships by North Vietnamese forces, Congress passed the Gulf of Tonkin Resolution, which permitted the President to "take all necessary steps, including the use of armed forces," to secure "freedom" in Southeast Asia.[44] Notwithstanding this authorization, and even as the war continued to escalate, President Johnson maintained that his authority as Commander in Chief permitted him to unilaterally wage the war in

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[40] Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 Geo. L.J. 597, 622–25 (1993).

[41] *Id.* at 625–31. President Truman's administration also pointed to a resolution of the United Nations Security Council, which "called on all members to render every assistance" to South Korea's war effort, as authority supporting the intervention. U.S. Dep't of State, Authority of the President to Repel the Attack in Korea (July 3, 1950), *in* H.R. Rep. No. 81-2495, at 61, 61–62. But the administration's legal arguments were almost exclusively dedicated to showing that "[t]he President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof" and may therefore deploy military forces abroad as he sees necessary. *Id.* at 62.

[42] 5 The Pentagon Papers: The Defense Department History of the United States Decisionmaking on Vietnam 27 (Noam Chomsky & Howard Zinn, eds., 1972).

[43] McGeorge Bundy, *National Security Action Memorandum No. 273* (Nov. 26, 1963), https://history.state.gov/historicaldocuments/frus1961-63v04/d331 [https://perma.cc/SSD9-8Q4R].

[44] Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, §§ 1–2, 78 Stat. 384 (1964).

Vietnam.[45] That uneasy equilibrium was short-lived, however, as the remainder of this Section explains.

3. The War Powers Resolution

The Vietnam War's unpopularity caused Congress to make its first, and essentially only, notable attempt to push back on the President's increasing dominance over war powers. In early 1971, Congress repealed the Gulf of Tonkin Resolution, leaving the rest of the war without the Constitution's required congressional authorization.[46] The war nonetheless continued. As antiwar sentiment grew, Congress went a step further when, over President Richard Nixon's veto, it passed the 1973 War Powers Resolution ("WPR").[47] Congress intended the WPR to codify its Declare War Clause authority and to limit the use of force in situations that Congress had not authorized.[48] To accomplish the objective of restraining presidential warmaking power, the WPR restricted the President to engaging in only "hostilities" 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."[49] And when the President does engage U.S. troops in armed conflict, he is required to report to Congress within forty-eight hours and receive congressional authorization within sixty days—without which he must withdraw troops.[50]

The contentiousness of the interbranch struggle over the war powers waned in the years following the Vietnam War, though it never fully disappeared. President Nixon had vetoed the WPR because he saw it as "unconstitutional and dangerous to the best interests" of the country due to its attempted curtailing of the Commander in Chief powers he had previously claimed;[51] but, perhaps as a result of President Nixon's unpopularity on leaving office, Presidents Gerald Ford and Jimmy Carter took more accommodating views of the WPR.[52] In any event, the lack of large-scale, extended armed conflicts during their terms made President Ford's and President Carter's administrations uneventful from a war powers standpoint. Various military operations with limited scope, like President Carter's ill-fated attempt to rescue U.S. nationals

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[45] *See U.S. Commitments to Foreign Powers: Hearing Before the S. Comm. On Foreign Relations*, 90th Cong. 125–26 (1967) (text of President Johnson's Aug. 18, 1967 news conference).

[46] An Act to Amend the Foreign Military Sales Act, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

[47] Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541–1548).

[48] *Id.* § 1541(a).

[49] *Id.* § 1541(c).

[50] *Id.* §§ 1543(a), 1544(b).

[51] Daniel L. Koffsky, *Legal Assessment of the War Powers Resolution*, Dep't of Just., Off. of Legal Couns. 5 (1993), https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19930609_legal_assessment_of_the_war_powers_resolution.pdf [https://perma.cc/9R9U-TFM2].

[52] Barron & Lederman, *Constitutional History*, *supra* note 39, at 1074–79.

held hostage in Iran, were not sufficiently long-term or large-scale to raise concerns about the constitutional division of the war powers.

Since then, however, the WPR has generally failed to restrain the President in the use of military force. History has illustrated two significant defects: first, the WPR's failure to define its operative term, "hostilities," has left open the question of what sort of conduct violates the law.[53] And second, its sixty-day limitation on troop deployment has been interpreted by the Executive Branch as implicitly authorizing all deployments of shorter duration—including multiple, broken-up deployments relating to the same conflict—and has consequently worked an expansion, not limitation, of the President's authority in practice.[54]

Consequently, though presidents have generally complied with the WPR's reporting requirement (the statutory mandate to notify Congress within forty-eight hours of engaging troops in armed conflict),[55] none has complied fully with—or even acknowledged being bound by—the statute's withdrawal requirement (mandating an end to unilateral presidential military action after sixty days if not ratified by Congress). A 2019 Congressional Research Service report on post-WPR practices highlights dozens of cases in which the President's unilateral military actions were of dubious or disputed legality under the WPR.[56] Apparent violations of this provision have occurred under essentially every president from Ronald Reagan to Donald Trump, and multiple campaigns lasting several months or longer have brought the extent of the President's Commander in Chief authority before open courts: namely, the bombings of Yugoslavia,[57] Libya,[58] and the Islamic State of Iraq and the Levant (ISIL).[59] The current President's pre-election promises to deploy the

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[53] *See* Brendan Flynn, Comment, *The War Powers Consultation Act: Keeping War Out of the Zone of Twilight*, 64 Cath. U. L. Rev. 1007, 1029–33 (2015); Brian H. Spaid, *Collective Security v. Constitutional Sovereignty: Can the President Commit Troops Under the Sanction of the United Nations Security Council Without Congressional Approval*, 17 U. Dayton L. Rev. 1055, 1078–80 (1992); Tess Bridgeman & Stephen Pomper, *A Giant Step Forward for War Powers Reform*, Just Sec. (July 20, 2021), https://www.justsecurity.org/77533/a-giant-step-forward-for-war-powers-reform/ [https://perma.cc/YBS8-CEBD].

[54] *See* Letter from Walter Dellinger, Off. Legal Couns., to Four U.S. Senators on the Deployment of United States Armed Forces into Haiti (Sept. 27, 1994). https://www.justice.gov/file/147196/dl [https://perma.cc/358F-64FK].

[55] *See, e.g.*, Tess Bridgeman, *Trump's War Powers Legacy and Questions for Biden*, Just Sec. (Feb. 23, 2021), https://www.justsecurity.org/74903/trumps-war-powers-legacy-and-questions-for-biden/ [https://perma.cc/V5KU-QVLX].

[56] Matthew C. Weed, Cong. Rsch. Serv., R42699, The War Powers Resolution: Concepts and Practice (2019); *see also* James P. Terry, *The President as Commander in Chief*, 7 Ave Maria L. Rev. 391 (2009).

[57] Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (discussing President Bill Clinton's continued bombing of Yugoslavia after Congress voted not to authorize the strikes).

[58] Oona A. Hathaway, *How the Erosion of U.S. War Powers Constraints Has Undermined International Law Constraints on the Use of Force*, 14 Harv. Nat'l Sec. J. 336, 342 (2023) (discussing the 2011 bombing campaign against Libya).

[59] Smith v. Obama, 217 F. Supp. 3d 283, 302–03 (D.D.C. 2016), *dismissed as moot sub nom.*, Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018) (dismissing a complaint alleging that the military campaign against ISIL was unconstitutional).

military against Mexican drug cartels generated concerns in Congress over the allocation of the war powers, and his unilateral uses of military force while in office, have renewed fears that the WPR does not meaningfully constrain the President.[60]

Because of this lack of success, advocates and members of Congress have frequently suggested and proposed provisions to amend the WPR over the years. Yet, despite the relative openness of the Biden administration to such reform,[61] none has become law. One recent proposed bill that gained a great deal of traction was the National Security Powers Act.[62] The bill, which never passed the Senate, noted that a key objective was to define "hostilities" under the WPR, as doing so would make that statute "meaningful."[63] That proposal echoed the efforts of a number of scholars who have addressed the issue of unilateral presidential military action. In fact, one academic proposal that was nearly contemporaneous with the bill made defining "hostilities" the first plank of a list of WPR reform priorities (the other planks included a call for greater transparency in presidential reports to Congress on the unilateral use of force).[64] Another scholarly work published shortly after focused entirely on the definition of "hostilities" and how it could be better defined to restrain presidential unilateralism.[65] One commonality among each of these proposals is that they attempt to induce greater judicial involvement and achieve greater presidential restraint by better defining the set of prohibited unilateral activities in which the President can engage. Though such a provision is responsive to the textually grounded justiciability objection described in the next Section, this Note illustrates in Parts III and IV that the provisions are inadequate to overcome the prudential justiciability barriers raised in *Baker*, which are not the focus of current debate but will likely rise to prominence should the current reform proposals become law.

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[60] *See* Finucane, *supra* note 3; Michael Schmitt, *U.S. Saber Rattling and Venezuela: Lawful Show of Force or Unlawful Threat of Force?*, Just Sec. (Nov. 4, 2025), https://www.justsecurity.org/123896/us-venezuela-threat-show-force/ [https://perma.cc/FCB4-PGJD]; *see also* Nakashima & Robertson, *supra* note 1; Rona, *supra* note 1.

[61] *See* Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 256 — Repeal of Authorization for Use of Military Force Against Iraq Resolution of 2002 (June 14, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf [https://perma.cc/2CT4-KKDZ].

[62] S. 2391, 117th Cong. §§ 105–107 (2021).

[63] Press Release, Representatives James P. McGovern & Peter Meijer, National Security Reforms and Accountability Act (Sept. 30, 2021), https://mcgovern.house.gov/uploadedfiles/national_security_reforms_and_accountability_act_fact_sheet.pdf [https://perma.cc/CF3J-DQRC].

[64] Tess Bridgeman & Stephen Pomper, *Good Governance Paper No. 14: War Powers Reform*, Just Sec. (Oct. 30, 2020), https://www.justsecurity.org/73160/good-governance-paper-no-14-war-powers-reform/ [https://perma.cc/ZE5X-2MU3]; *see also* Katherine Hawkins, *Reclaiming Congress's War Powers*, Project on Government Oversight (Feb. 19, 2020), https://www.pogo.org/analysis/recommendations-for-reclaiming-congress-war-powers [https://perma.cc/ESU7-P5SN].

[65] *See* Erica H. Ma, *The War Powers Resolution and the Concept of Hostilities*, 13 Northeastern U. L. Rev. 519, 526 (2021).

In short, the unilateral use of military force by presidents claiming to exercise their Commander in Chief authority has become commonplace since the end of the World War II. Despite Congress's attempt to codify its Declare War powers in the WPR and reclaim lost ground in the interbranch struggle over the war powers, the balance of power in the context of armed conflicts has continued to tip heavily in favor of the President.

B. The United States in Yugoslavia: An Example of Courts' Responses to War Powers Suits

To better illustrate the difficult issues that confront courts when they hear suits involving Article I's Declare War Clause, consider *Campbell v. Clinton*,[66] a case that arose during the 1999 multilateral bombing of Yugoslavia. In March 1999, President Bill Clinton announced a campaign of air and cruise missile attacks on the Balkan country in order to bring an end to the "genocide" of ethnic Albanians in Kosovo and "avert humanitarian disaster."[67] Two days later, President Clinton asked Congress to approve the action and sanction further intervention but, after nearly a month of deliberation, the House of Representatives voted against an authorization for the continued use of military force in Yugoslavia (though it also voted against a resolution condemning the President's actions). This left further U.S. military action without constitutional authorization. Undeterred, President Clinton continued the bombing campaign for an additional seventy-nine days.[68]

While the conflict was ongoing, thirty-one members of Congress who opposed U.S. involvement filed suit against President Clinton in the District Court for the District of Columbia, seeking a declaratory judgment that the President's unilateral use of force unlawfully violated both the WPR (because it lasted longer than sixty days and failed to receive congressional approval) and the constitutional separation of war powers.[69] After the district court granted President Clinton's motion to dismiss, the members of Congress appealed to the D.C. Circuit. Both at trial and on appeal, the President did not address the merits of the plaintiffs' contentions that he acted unconstitutionally, arguing solely that the issue was nonjusticiable because the case was moot, the plaintiffs lacked standing, and the suit raised political questions.[70]

Faced with cases like these, what is a court to do? Some courts are hesitant to hear such suits on their merits and will rely on one or more justiciability doctrines to remove the case from their docket without even deciding whether a war, in the constitutional sense, has occurred. One common way out for

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[66] 203 F.3d 19 (D.C. Cir. 2000).

[67] John M. Broder, *In Address to the Nation, Clinton Explains the Need to Take Action*, N.Y. Times (Mar. 25, 1999), https://archive.nytimes.com/www.nytimes.com/library/world/europe/032599kosovo-us.html [https://perma.cc/Z5DN-5LXA].

[68] *Campbell*, 203 F.3d at 20.

[69] *Id.*

[70] *See* Brief for Appellee at 19–37, *Campbell*, 203 F.3d 19 (No. 99–5214).

these courts is Article III standing: it is rare that someone who can show actual injury because of the actions of U.S. military forces—for example, an international organization with facilities damaged by military actions,[71] or a soldier charged with engaging in a conflict she believes is unlawful[72]—is willing and able to present a complaint in U.S. court.[73] In cases like *Campbell*, courts may also rely on ripeness principles to dismiss the suit: ripeness, in the separation of powers context, calls on courts to avoid adjudicating interbranch disputes until the political branches reach a "a constitutional impasse" in which the defendant branch continues to defy the plaintiff branch even after the latter has exhausted the self-help mechanisms available to it.[74] Because Congress has plenty of its own remedies to perceived violations of its constitutional authority, it must usually avail itself of them before turning to the courts.

But perhaps the most common justiciability doctrine that courts raise in Declare War Clause cases is the political question doctrine ("PQD") elaborated by *Baker*, in which the Court refined the doctrine in response to a redistricting-related Equal Protection suit. That case described six circumstances in which courts should dismiss suits as nonjusticiable because the suits require answering "political questions." In the war powers context, courts invoking the PQD to find a case nonjusticiable most often rely on the second *Baker* factor, which proscribes ruling where there is a "lack of judicially discoverable and manageable standards" to resolve an issue.[75] These courts reason that they have no knowledge of the meaning of "war" in the constitutional sense and so have no standard against which to assess the President's conduct—in other words, these courts find "war" to be undefinable, which leaves them completely unequipped to say whether the President has engaged in it without congressional authorization.

This eagerness to dismiss does not mean that the courts—or even individual judges on the same courts—share common views on justiciability in the war powers context. The *Campbell* court illustrates this well: when tasked with deciding whether President Clinton's unilateral military action violated the separation of powers, the three judges on the panel wrote four different opinions setting out four different theories of nonjusticiability, even though

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[71] *See, e.g.*, El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 840–44 (D.C. Cir. 2010) (en banc).

[72] *See, e.g.*, Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970); Massachusetts v. Laird, 451 F.2d 26, 29 (1st Cir. 1971).

[73] *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 297 (D.D.C. 2016) (dismissing for lack of standing a suit by a U.S. servicemember alleging that a unilateral use of force was unconstitutional).

[74] Goldwater v. Carter, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring). The *Campbell* majority's analysis sounded in the legislative standing principles elaborated in Raines v. Byrd, 521 U.S. 811, 821 (1997), but it also tracked Justice Powell's reasoning in *Goldwater*. *Compare Goldwater*, 444 U.S. at 998 (Powell, J., concurring) ("If the Congress chooses not to confront the President, it is not our task to do so."), *with Campbell*, 203 F.3d at 23 (declining to rule on the merits because "Congress certainly could have passed a law forbidding the use of U.S. forces").

[75] Baker v. Carr, 369 U.S. 186, 217 (1962).

the judges all agreed that the case should be dismissed.[76] Speaking for two judges on the panel, Judge Laurence Silberman's majority opinion provided an explanation that sounded in both standing and ripeness concerns: not only do members of Congress generally lack "standing to assert an institutional injury as against the executive," but even if they could have somehow showed standing, "Congress certainly could have passed a law forbidding the use of U.S. forces" in Yugoslavia—that is, the members of Congress had failed to exhaust the self-help available to remedy their alleged injury.[77] But in a pair of dueling concurrences, Judge Silberman and his colleague in the majority, Judge David Tatel, vehemently disagreed about the applicability of the PQD to the case. Judge Tatel noted the numerous cases in which courts found military action sufficient to constitute war;[78] Judge Silberman pointed out that none of those cases, nor even the plaintiffs in *Campbell*, had offered "any constitutional test for what is war."[79] The remaining judge on the panel, Judge A. Raymond Randolph, separately analyzed the standing issue and found, without considering the PQD, that the plaintiffs lacked it.[80]

Thus, the constitutionality of President Clinton's unilateral action to commence a bombing campaign in Yugoslavia escaped judicial review on the merits. Underlying this rather straightforward outcome, however, was a deep-seated disagreement about the role of courts in adjudicating the separation-of-powers issues inherent in presidents' unilateral use of military force.

* * *

Many unilateral presidential military actions have been the target of lawsuits seeking judicial relief against the President's expanding war powers. When courts have dismissed such suits, they have deployed varying strategies. In some cases, courts have relied on standing and ripeness to dismiss complaints before ever reaching the merits of war-related balance of power disputes, but in others they have invoked the PQD (though not always the same category of political question) to dismiss such suits as beyond the cognizance of the judiciary.[81] Yet it is not necessarily a given that courts must always refrain in this way: courts themselves have pointed to ways that Congress can ameliorate issues like standing and ripeness, leaving the PQD as the most substantial area of ongoing debate.[82] As Part III.B illustrates more completely, the courts' treatment of the PQD in cases involving war powers or broader foreign affairs issues has been far from uniform. And, as Part IV demonstrates, it matters which political question category the courts invoke (given the differing

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[76] Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000).
[77] *Id.* at 20–21, 23.
[78] *See id.* at 37–38 (Tatel, J., concurring).
[79] *Id.* at 25 (Silberman, J., concurring).
[80] *See id.* at 28 (Randolph, J., concurring).
[81] Vladeck, *supra* note 12, at 48–51.
[82] *See, e.g.*, Dellums v. Bush, 752 F. Supp. 1141, 1150–51 (D.D.C. 1990).

outcomes of text-based and prudential analyses); courts' prior reliance on the meaning of "war" in the constitutional sense has obscured (for judges and war powers reformers alike) the need to address the prudential concerns that may preclude courts from taking up such cases on their merits.

III. The Political Question Doctrine and *Baker*'s Fifth Factor

This Part explains more explicitly the role that the PQD plays and should play in war powers litigation. It begins with a brief account of the PQD's rationale and origins before surveying the various and contradictory ways courts have applied (or refused to apply) the PQD to war powers disputes. It ends with an explanation of *Baker*'s fifth category and its suitability as the analytical foundation for the remainder of this Note.

A. The Political Question Doctrine

The PQD is generally understood today as a recognition of the limits on federal courts' jurisdiction—a function of their ability to hear only "cases" or "controversies" under Article III.[83] As opposed to judicial questions, political questions are "by law for the determination of the executive or legislative departments, or possibly of the people themselves."[84] Underlying this distinction are two broad and related purposes: judicial restraint (the doctrine "restrain[s] the Judiciary from inappropriate interference in the business of the other branches of Government")[85] and judicial (lack of) competence.[86] This distinction has a long pedigree at the Supreme Court—according to some of the doctrine's proponents, Chief Justice Marshall became one of its earliest advocates when he concluded that "[q]uestions, in their nature political . . . can never be made in . . . court."[87]

The clearest formulation of the doctrine's substance to date was handed down by the Supreme Court in *Baker*. There, the Court described six basic factors of political questions that courts, if confronted by an issue characterized by any one of them, should not resolve:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially

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[83] Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (noting that "no justiciable 'controversy' exists when parties seek adjudication of a political question").

[84] Melville Fuller Weston, *Political Questions*, 38 Harv. L. Rev. 296, 299 (1925). *See also* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (explaining that the PQD "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed" to the political branches).

[85] United States v. Munoz-Flores, 495 U.S. 385, 386 (1990).

[86] *See* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (noting that "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than control of the armed forces).

[87] Marbury v. Madison, 5 U.S. 137, 170 (1803).

> discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[88]

The *Baker* Court admonished, however, that the judiciary remains the "ultimate interpreter of the Constitution," and so reviewing courts must be cautious and perform "a discriminating analysis of the particular question posed . . . in the specific case" before determining that the PQD precludes ruling on an issue.[89] Still, where resolving the issue requires courts to decide the correctness of a "policy choice[]" or "value determination[]," such an issue must not be found suitable for judicial review.[90]

The doctrine has been applied regularly since *Baker*. the Court has used the PQD to avoid ruling on suits involving, for instance, the legitimacy of a state government,[91] the deployment and training of the National Guard,[92] and the process of impeachment for federal judges.[93] Some commentators argue that the Supreme Court's decision in *Zivotofsky ex rel. Zivotofsky v. Clinton*[94]—in which the Court reversed the lower court's dismissal on PQD grounds of a suit challenging the President's decision to omit certain information from a passport without mentioning several of the *Baker* factors[95]—weakened the doctrine, and that the court's failure to even mention the last three factors indicated that they are in disfavor.[96] However, extensive "lower court practice" and the doctrine's extensive use throughout history have allowed it to persist vibrantly.[97]

The final three of the *Baker* factors—often called the prudential factors—are of special importance in suits regarding foreign affairs and the military.[98]

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[88] Baker v. Carr, 369 U.S. 186, 217 (1962).

[89] *Id.* at 211.

[90] El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) (alterations in original)).

[91] Luther v. Borden, 48 U.S. 1, 40 (1849).

[92] *Gilligan*, 413 U.S. at 10.

[93] Nixon v. United States, 506 U.S. 224, 228 (1993).

[94] 566 U.S. 189 (2012).

[95] *Id.* at 197.

[96] *See, e.g.*, Shannon M. Doughty, *The Time for Judgment Has Arrived: The Zivotofsky v. Clinton Effect on the Political Question Doctrine's Application to the War Powers Resolution*, 52 Case W. Res. J. Int'l L. 715, 727 (2020). *But see* Michael D. Ramsey, *War Powers Litigation After* Zivotofsky v. Clinton, 21 Chap. L. Rev. 177, 188 (2018).

[97] Bradley & Posner, *supra* note 26, at 1048–49.

[98] As one recent quantitative study noted, "[T]he major pattern of the cases is the application of the political question doctrine when the relevant legal sources . . . are unclear, particularly in the area of foreign relations. In these cases, the courts rely on prudential considerations relating

Of course, to the extent that the Constitution's text addresses foreign affairs, it locates those authorities in the political branches: the President has the power to "receive Ambassadors,"[99] the President and the Senate collectively have the power to "make Treaties,"[100] and—as relevant here—Congress alone may "declare War."[101] But where foreign affairs controversies appear before a court, the final three "prudential" factors typically weigh heavily against hearing such a case.[102] The Supreme Court has explained that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,"[103] giving the prudential factors outsized importance when a suit would require a court to rule on foreign affairs conflicts, even when courts consider the textual factors first or alongside the prudential factors.[104] The reason for their significance in cases implicating foreign affairs is the recognition that courts lack the knowledge and expertise, as well as the fact-finding capabilities and ability to speak in a unified manner, that the other branches have when it comes to interactions with foreign powers.[105] The prudential factors are often applied together when assessing foreign affairs considerations, but need not—and, as an empirical matter, do not[106]—always travel together.[107] And so, while courts cannot "shirk their responsibility" to adjudication of legal and constitutional claims merely because they involve the "Nation's foreign relations,"[108] it is generally true that courts "ha[ve] little competence in determining precisely" how their decisions will affect foreign interests,[109] a fact that counsels against judicial review on prudential grounds.

B. Use of the PQD in Declare War Clause Litigation

Given the importance of *Baker*'s prudential factors in weighing the justiciability of foreign affairs-related litigation, it is somewhat surprising that courts hearing disputes over war powers have most frequently applied the second *Baker* category (which is concerned not with prudential but primarily

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to the limits of judicial capacity to" dismiss suits. Bradley & Posner, *supra* note 26, at 1067; *see also* Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 73 (2d Cir. 2005) (dismissing a suit as barred by the PQD because ruling would "imped[e] the success of this important foreign policy initiative" and "threat[en] the foreign policy interests of the United States"); Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (explaining that "the very nature of executive decisions as to foreign policy is political, not judicial.").

[99] U.S. Const., art. II, § 3.

[100] *Id.* art. II, § 2.

[101] *Id.* art. I, § 8, cl. 11.

[102] *See* Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 Iowa L. Rev. 941, 947–48 (2004).

[103] Haig v. Agee, 453 U.S. 280, 292 (1981).

[104] *See, e.g.*, Al-Tamimi v. Adelson, 916 F.3d 1, 14–15 (D.C. Cir. 2019); Made in the U.S.A. Found. v. United States, 242 F.3d 1300, 1317 (11th Cir. 2001); Al Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 155 (4th Cir. 2016).

[105] Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005).

[106] Bradley & Posner, *supra* note 26, at 1053.

[107] *Id.*

[108] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[109] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983).

textual considerations) or even dismissed the PQD altogether. To be sure, the courts are split on the justiciability of war powers cases—and like other splits, this question is one for which there are several viable approaches that have been considered by different courts, judges, and scholars. But the predominant point of contention in courts taking up this issue has been whether claims under the WPR and the Declare War Clause implicate *Baker*'s second factor, the "lack of judicially discoverable and manageable standards for" resolving the claim—that is, whether courts know the meaning of "war" in the constitutional sense.[110]

Indeed, the dueling concurrences in *Campbell*, discussed in Part II.B, made this issue their centerpiece. Judge Silberman argued that, even if a plaintiff with standing had sued to enjoin President Clinton's bombing campaign, "no one is able to bring this challenge because the [] claims are not justiciable" under the second *Baker* factor.[111] According to Judge Silberman, "[e]ven if this court knows all there is to know about the Kosovo conflict, we still do not know what standards to apply" to determine whether a war took place.[112] Judge Tatel, by contrast, argued that "[w]hether the military activity in Yugoslavia amounted to 'war' . . . is no more standardless than any other question regarding the constitutionality of government action."[113] Emphasizing precedents in which various courts had determined that war existed, Judge Tatel concluded that the second *Baker* factor could not preclude judicial resolution of cases regarding the Declare War Clause.[114]

This disagreement mirrored one that had occurred between the circuits in the decades preceding *Campbell*. During the Vietnam War, the courts heard a number of cases challenging the President's prosecution of the war absent congressional authorization as violative of the Declare War Clause. In one such case, the Second Circuit concluded that "the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard" that courts may use to rule on the constitutionality of unilateral presidential military action.[115] Two years later, the D.C. Circuit held that "[t]here would be no insuperable difficulty in a court determining whether" the conflict constituted a "war" in the constitutional sense.[116] But both of these decisions stood in sharp contrast to a decision the Second Circuit made near the start of the war that had found no "set of manageable standards" against which to weigh claims that the President's use of military force was unconstitutional.[117] Arguably, this disagreement over the second factor even reached the level of the Supreme Court: in reinstating an injunction prohibiting the

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[110] Baker v. Carr, 369 U.S. 186, 214 (1962).
[111] Campbell v. Clinton, 203 F.3d 19, 24–25 (D.C. Cir. 2000) (Silberman, J., concurring).
[112] *Id.* at 26. (Silberman, J., concurring).
[113] *Id.* at 37 (Tatel, J., concurring).
[114] *Id.* at 39–41 (Tatel, J., concurring).
[115] Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).
[116] Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973).
[117] Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970).

bombing of Cambodia on constitutional grounds, Justice William O. Douglas concluded that "the question of justiciability" was not "substantial," because war *was* occurring.[118] This issue was not fully aired, however, as Douglas was overruled by the rest of the Court later the same day.[119] And none of these three decisions received consistent adherence by later courts' ruling on similar issues, like when the D.C. Circuit affirmed the district court's dismissal of a suit against President Reagan over his administration's aid to the Nicaraguan Contras,[120] or when a New York district court dismissed a suit to enjoin the placement of U.S. missiles in England (both courts citing *Baker*'s second factor as the primary reason for the dismissal).[121]

Yet there are precedents that acknowledge the relevance of the other *Baker* factors to war powers litigation, some of which pay little attention to the textual factors. In a recent *en banc* decision, for instance, the D.C. Circuit relied heavily on prudential considerations to support the dismissal of a claim for damages by a plaintiff whose factory the U.S. government bombed after designating it an al-Qaeda affiliate.[122] The court argued from prudential considerations, concluding that the decision to undertake the bombing was the kind of decision "clearly for nonjudicial discretion," as it involved consideration of "delicate" and "complex" factors that the judiciary "has neither the aptitude" nor "facilities" to weigh.[123] And in dismissing a challenge to President Reagan's use of force in the Persian Gulf, a different court cited not the second but the sixth *Baker* factor, the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."[124] In another example, the court reviewing President Reagan's commitment of troops to El Salvador dismissed the suit on PQD grounds after concluding that the case "require[d] judicial inquiry into sensitive military matters," the factfinding of which the court lacked "the resources and expertise" necessary to complete.[125]

The upshot is that, because courts have most frequently disagreed on the applicability of the "manageable standards" category to war powers cases, and because courts find little guidance in statutes like the WPR, there is no clear jurisprudential consensus about whether and how to apply the PQD in war powers suits. Consequently, courts and reformers alike lack definitive guidance on the circumstances under which they may resolve suits against

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[118] Holtzman v. Schlesinger, 414 U.S. 1316, 1318–20 (1973).

[119] *Id.* at 1321.

[120] Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (citing two textual PQD factors—primarily the lack of judicially manageable standards—and one prudential factor to dismiss the suit).

[121] Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1337–38 (S.D.N.Y. 1984) (citing *Baker*'s second factor to dismiss the suit).

[122] El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010)

[123] *Id.*

[124] Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987).

[125] Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

allegedly unlawful or unconstitutional uses of military force. This confusion leaves open the possibility of applying the sometimes-overlooked prudential considerations, including the fifth *Baker* factor, in such cases.

C. Taking Up Baker*'s Fifth Factor*

Baker's fifth factor—the unquestioning-adherence factor—is especially valuable, even among the prudential factors, in analyzing war powers cases because it emphasizes the need for courts to consider the consequences of adjudicating war powers disputes before engaging with the merits of the dispute. In requiring courts to dismiss suits involving an "unusual need for unquestioning adherence to a political decision already made,"[126] it calls for a forward-looking analysis that asks courts to consider the consequences of reaching a merits judgment on a decision prior to reaching the merits at all.[127] The unquestioning-adherence factor is particularly relevant where the circumstances are such that "the consequences of [ruling] may be so far-reaching that any uncertainty as to its validity becomes intolerable."[128] Where a weighing of the costs and benefits of ruling on the merits illustrates that the risks of issuing a judgment outweigh the action's benefits,[129] or where the results of ruling on the merits would be unpredictable and inherently risky,[130] adjudication on the merits is inappropriate under the unquestioning-adherence factor. Part IV illustrates why adjudicating war powers disputes, even under a statutory regime

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[126] Baker v. Carr, 369 U.S. 186, 217 (1962).

[127] *Id.* at 213 (noting "the need for finality in the political determination," in situations in which an "emergency's nature demands '[a] prompt and unhesitating obedience,'" (quoting Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827)); *see also, e.g.*, Hwang Geum Joo v. Japan, 413 F.3d 45, 52 (D.C. Cir. 2005) (declining to decide a case because "adjudication by a domestic court not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's 'delicate' relations with China and Korea, thereby creating 'serious implications for stability in the region'"); Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 825 (9th Cir. 2017) (describing the unquestioning-adherence factor as a "most compelling factor" when a merits ruling against the government would "frustrate our nation's foreign policy" and "decades" of "considerable efforts" related to a military construction project); Made in the U.S.A. Found. v. United States, 242 F.3d 1300, 1318 (11th Cir. 2001) ("[Economic] considerations further militate in favor of judicial restraint, given that a decision declaring NAFTA unconstitutional would be likely to have a destabilizing effect on governmental relations and economic activity across the North American continent."); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (reasoning that foreign affairs disputes raise political questions because they are "delicate, complex, and *involve large elements of prophecy*" (emphasis added)); Atlee v. Laird, 347 F. Supp. 689, 708 (E.D. Pa. 1972) (declining to rule where doing so would undermine "the confidence and conviction of a democratic society"), *aff'd sub nom.*, Atlee v. Richardson, 411 U.S. 911 (1973).

[128] Weston, *supra* note 84, at 328.

[129] *E.g.*, Nzelibe, *supra* note 102, at 992–95.

[130] *See* Linder v. Calero Portocarrero, 747 F.Supp 1452, 1467 (S.D. Fla. 1990) (holding that "an adjudication on the merits" of a suit dealing with a civil war in Nicaragua would "implicate the inherent inability of the judiciary to predict the international consequences flowing from a decision on the merits"), *rev'd on other grounds sub nom.*, Linder v. Portocarrero 963 F.2d 332 (11th Cir. 1992).

that has defined "war" or "hostilities," is uniquely unpredictable and inherently risky.

That courts (and some scholarship as well) have largely focused on *Baker*'s second factor does not diminish the prudential factors' importance in war powers cases. The Supreme Court has recognized repeatedly that courts lack the expertise or ability to timely resolve disputes related to military action: it has admitted to a deficit of "competence in determining precisely" how courts' rulings will affect foreign nations,[131] and it has acknowledged that, with respect to "control of a military force," it is "difficult to conceive of an area of governmental activity in which the courts have less competence."[132] As Justice Breyer has noted, these deficiencies mean that "a judicial effort to" evaluate claims implicating foreign policy "risks inadvertently jeopardizing sound foreign policy decisionmaking by the other branches of Government."[133] These strong prudential considerations favoring nonjusticiability are important not merely because they offer an alternative basis for the decisions courts are already making—their existence suggests that, even if litigants and reformers take the steps necessary to avoid the justiciability problems prior cases have encountered, courts may not and should not be receptive to war powers suits.

When compared to the textual factors that courts have typically relied on, there are significant legal reasons to believe that courts will continue to cite the unquestioning-adherence factor to dismiss war powers suits, even in the face of successful efforts to clearly define "war" or "hostilities." On a doctrinal level, the use of *Baker*'s unquestioning-adherence factor sidesteps the split among courts about whether the meaning of "war" or of "hostilities" is a justiciable question, as well as the secondary question (for courts that find the question justiciable) about the precise meaning of those terms. It also follows clearly from the purposes of the PQD: insofar as the doctrine seeks to "exclude[] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to" the political branches,[134] the unquestioning-adherence factor furthers that purpose by preventing courts (even when the meaning of "war" is clear) from serving as a forum for escalating disputes over the propriety of unilateral presidential military actions. For these reasons, it provides an obvious response to those who believe they can define "war" in the constitutional sense.

Responding to those who believe they can provide judicially manageable standards for war powers disputes bears with increasing importance on real-world policy debates. Current WPR reform proposals, if successful, aim to make the second *Baker* factor obsolete (in war powers disputes, at least). Such proposals emphasize defining key terms in the WPR (thus making its

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[131] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983).

[132] Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[133] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 217–18 (2012) (Breyer, J., dissenting).

[134] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

standards more judicially manageable).[135] Yet, even if these proposals were to become law, or even if courts were to adopt Judge Tatel's view that the meaning of "war" is judicially knowable, the fundamental prudential problems that courts encounter when they rule on the merits of war powers disputes remain and counsel against judicial intervention on the issue. Part IV elaborates these arguments, demonstrating that the unquestioning-adherence factor independently calls for judicial restraint in the face of war powers litigation due to the value judgments a merits ruling on the matter would necessarily raise. Part V responds to the important policy implication that Part IV raises—that existing proposals to rein in unilateral presidential use of force are insufficient—by arguing that Congress can provide courts with tools to remedy breaches they find without using their discretion in ways that pose risks to U.S. interests and lives abroad, empowering them to rule on these weighty separation of powers questions.

IV. Assessing the Consequences of Judicial Review in War Powers Litigation

To illustrate the uncertainty created when courts attempt to resolve challenges to a president's unilateral use of force, this Part maps out the decisions available to a court faced with a suit under the WPR or the Constitution's Declare War Clause (both of which require the court to determine whether the President exceeded the authority granted to him by Congress, in the process raising the same justiciability concerns). It demonstrates that, in such cases, courts are put in a position of either ruling in the President's favor or else making a decision with unpredictable and potentially risky implications for U.S. foreign policy interests and U.S. troops' lives. As a consequence, this Part concludes that courts must dismiss such challenges as nonjusticiable political questions under the analysis called for by *Baker*'s unquestioning-adherence factor.

A. Applying the Unquestioning-Adherence Factor in War Powers Suits

Suppose, for the sake of analysis, that a party with standing comes before a court in the midst of a months-long presidentially led overseas operation that uses military force. As in prior cases,[136] the party alleges that the President's actions violate the WPR because the engagement or positioning of troops has lasted beyond the sixty-day deadline for the President to receive congressional approval; alternatively, the party alleges that the President's actions have violated the Declare War Clause because the conflict has exceeded the minimum

[135] *E.g.*, National Security Powers Act of 2021, S. 2391, 117th Cong. §§ 105–107 (2021); *see also* Bridgeman & Pomper, *supra* note 53; Flynn, *supra* note 53, at 1037–39.

[136] *See, e.g.*, *supra* notes 111–25 and accompanying text.

constitutional threshold for war, and only Congress can commit the country to war. To resolve this alleged violation, the party further asks the court to enjoin the use of military force and declare them unlawful.[137] Even if the court has a perfectly manageable standard for adjudicating the party's claims, the unquestioning-adherence factor compels the court to first consider the likely consequences of a merits adjudication in the case before even considering the merits—if the result of ruling at all (regardless of the merits of the particular claim at issue) leads to unpredictable and unacceptably risky results (including due to the incentives created by ruling), the unquestioning-adherence factor counsels in favor of dismissal.[138]

If the court does proceed to the merits, it begins to confront a series of decisions. First, the court must decide whether the President's actions comply with the WPR and with the Constitution. As Part III noted, these inquiries differ slightly but largely involve the same factfinding and considerations—both will require the court, to the best of its abilities, to decide whether the scope, nature, and objectives of the conflict rise to the level of "hostilities" or "war."[139] If the court rules in favor of the President and finds no such violation, no further action is required from the court. But the court is not entirely in the clear, even here—it has taken the President's side in an interbranch dispute over the extent of the Commander in Chief authority, and its ruling could run head-first into later congressional actions disapproving of the President's use of force. These concerns are especially strong given the conclusion in the following paragraphs that the unquestioning-adherence factor counsels against a judgment adverse to the President in essentially every circumstance. Far from being unproblematic, ruling in the President's favor on the merits would likely be an asymmetric process that systematically pits the courts against Congress. The risks of future constitutional crises should make the court hesitant to rule, even if it finds no constitutional violation in the case before it.

And if the court agrees with the plaintiff and finds the use of military force unlawful or unconstitutional, the court's path forward becomes even murkier. If the court takes up the plaintiff's request for injunctive relief, it begins to encounter a number of difficult questions, the first of which is: what precisely can the court enjoin? If the plaintiff is a servicemember contesting a deployment order (a likely case given that he or she could establish

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[137] These remedies are typical and are generally available in suits alleging ongoing violations of the Constitution or federal law. *See* John F. Preis, *In Defense of Implied Injunctive Relief*, 22 Wm. & Mary Bill Rts. J. 1, 39–40 (2013).

[138] Weston, *supra* note 84, at 328; Linder v. Calero Portocarrero, 747 F. Supp 1452, 1467 (S.D. Fla. 1990), *rev'd on other grounds sub nom.*, Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992).

[139] There is already a difficult line-drawing problem here: Giving any definition to either of these terms will effectively sanction all unilateral presidential military action that does not fall within their ambit. But this Part has assumed that there are clear standards on this point—perhaps because Congress knows and accepts that risk by legislating a definition for either or both terms in an updated WPR, as some proposals and scholars have suggested. *See* Flynn, *supra* note 53, at 1037–39.

standing),[140] the court might enjoin the whole operation and order a cessation of hostilities and the return of forces to their prior stations, as was sought in *Mitchell v. Laird*.[141] Or it might enjoin the further deployment of new troops to combat in the conflict, as the plaintiffs in *Orland v. Laird* requested.[142] But either result could be disastrous—as the 2021 withdrawal of forces from Afghanistan illustrates, even a long-planned withdrawal of troops from congressionally authorized overseas conflicts can be chaotic and bloody.[143] Hastily planned withdrawals from shorter-term hostilities, where the mission may not yet be accomplished and active conflict remains ongoing, would likely fare no better. A court-ordered withdrawal—or a de facto withdrawal effected by an order prohibiting the replenishment of troops in the conflict—is likely to be even more so. An injunction against the use of force by U.S. troops will not prevent their adversaries from using force against them. Even under more favorable conditions, though—that is, assuming that a short-notice withdrawal of forces is neither bloody nor chaotic—the court will be left directing troop movements as well as highly complex logistical processes and will have to closely monitor military leadership for compliance with its orders.[144]

Even the most steadfast judge is likely to be inundated with frequent reports on the hostilities submitted by the government, which has every incentive to appeal to necessity under rapidly changing circumstances to seek revision or exception to the judge's prior decision. And the risk of being forced to later make these decisions, which courts are, by their own admission, not competent to make,[145] along with the unpredictability that would follow, should make courts hesitant to rule on the dispute at all. Further, a merits ruling in such a case would likely raise a new series of political questions,[146] which itself suggests a need for adherence.[147] Each of these reasons suggests a need for unquestioning adherence to decisions already made.

It is true that Congress, on seeing the court's injunction, could quickly vote to ratify the President's conduct, rendering the issue moot. Congress's

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[140] Ramsey, *supra* note 96, at 183.

[141] Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973).

[142] Orlando v. Laird, 443 F.2d 1039, 1040 (2d Cir. 1971).

[143] *See* U.S. Dep't of State, After Action Review on Afghanistan January 2020 – August 2021, at 11 (Mar. 2022).

[144] *See* Bryan J. Fencl, Closing the Door Behind You: How the United States Army Conducts Logistical Withdrawals After Lengthy Operations 23, 31–38 (2013) (explaining the logistical challenges of withdrawing from the wars in Vietnam and Iraq); Noah Shachtman, *Iraq Withdrawal, Logistical Nightmare?*, Wired (Feb. 27, 2009), https://www.wired.com/2009/02/the-logistics-o/ [https://perma.cc/M7QC-76FW]. *See generally* Marta Pawelczyk, *Contemporary Challenges in Military Logistics Support*, 20 Sec. & Def. Q. 85 (2018).

[145] *See* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[146] Particularly the "textually demonstrable constitutional commitment" factor and the "initial policy determination" factor. Baker v. Carr, 369 U.S. 186, 217 (1962).

[147] Weston, *supra* note 84, at 328; Linder v. Calero Portocarrero, 747 F. Supp 1452, 1467 (S.D. Fla. 1990), *rev'd on other grounds sub nom.*, Linder v. Portocarrero 963 F.2d 332 (11th Cir. 1992).

infamous gridlock and inaction notwithstanding,[148] whether Congress decides to ratify the use of military force is beside the point. The issue here is that, by ruling on the merits of the case, the court has placed itself in the position of creating substantial and unpredictable risk (including the risk that Congress does not step in to remedy the President's potentially unlawful action) to U.S. troops' lives and the country's standing abroad. But decisions about the appropriate level of risk to introduce into active military operations are precisely the sort of "value determinations" that the PQD was designed to keep out of the courts and instead in the hands of the political branches;[149] this risk, and the President's superior ability to evaluate it, indicates that the entire case is one in which there is "unusual need for unquestioning adherence to a political decision already made."[150]

That there are certain circumstances in which injunctive relief appears safer to utilize—for instance, circumstances in which the primary means of force used is bombing (as opposed to boots-on-the-ground combat),[151] or where the challenged military activity is merely a build-up of troops not yet engaged in combat[152]—does not make judicial intervention in war powers cases any more prudent. The forward-looking analysis required by the unquestioning-adherence factor requires that courts consider not just the immediate risk of taking action in the circumstances particular to the case at hand—which may, admittedly, be quite low—but also, in the unpredictable future, consequences of adjudicating the merits of such a claim. And enjoining even seemingly low-stakes presidential actions creates dangerous long-term incentives for the President and an impossible line-drawing problem for the judiciary: if the court elaborates some threshold above which it considers the circumstances too dangerous to enjoin military action, it ups the ante for the President. He not only has near-unchecked authority to undertake military action above that threshold in the future—he also, in fact, has the incentive to do so in future conflicts, so that such operations will evade injunctions and other judicial interference. Far from preserving the WPR and the Constitution, judicial review increases the risk that the President will more brazenly violate them with increasingly broad and hastily implemented military activity—again, at the expense of U.S. lives and interests.[153] The evaluation of this risk, again, is a task that the courts cannot take on as an institutional matter, and it further indicates that the resolution of these cases on the merits

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[148] *See generally* Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 Notre Dame L. Rev. 2217 (2013).

[149] Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring).

[150] *Baker*, 369 U.S. at 217.

[151] *See Campbell*, 203 F.3d at 20; Holtzman v. Schlesinger, 414 U.S. 1316, 1316 (1973).

[152] *See* Dellums v. Bush, 752 F. Supp. 1141, 1143 (D.D.C. 1990).

[153] This analysis does not mean that the President *will* engage in more dangerous activities to evade judicial intervention—merely that courts' intervention incentivizes him to do so and is thus inherently risky and unpredictable.

of the war powers issue would be unwise. Prudence and the unquestioning-adherence factor require leaving the case undecided.

Even a solely declaratory finding that the operation was unlawful (without further action against the operation by the court), or injunctive relief with respect only to the plaintiff (which would accomplish nearly the same result by leaving all the other servicemembers to wage an unlawful conflict), could lead to dangerous upheaval. This is because the Uniform Code of Military Justice requires servicemembers to obey lawful—and only lawful—orders.[154] A court finding that the operation and use of force is unlawful thus practically places the court within the chain of command—it gives members of the armed forces license to disobey any orders furthering the conflict found to be unlawful. In such a scenario, any servicemember would be well within their right to refuse to follow such orders, potentially endangering those around them. And in the admittedly more plausible scenario in which those servicemembers continue to follow orders from their superiors notwithstanding the court's decision, those carrying out the President's unlawful commands could themselves be subject to criminal penalty in the future.[155] This risk may be the most speculative of those discussed so far, but it is one a court must consider—and its very possibility weighs against judicial intervention on the case's merits.

No doubt the most likely response to a judicial determination that the military action was unlawful (and a remedy of any kind) is further defiance by the Executive, which will almost surely claim broad foreign affairs authority and act to maximally protect U.S. lives.[156] But that does not diminish, much less obviate, the risks of judicial intervention. Dismissing as unlikely the risks created by the court's decision fails to consider that those risks (and their unpredictability) constitute the problem that *Baker*'s fifth factor seeks to avoid altogether. Further, the risk that the political branches will disobey the courts and damage their legitimacy is a risk itself that the court must consider as part of factor five analysis: after all, the possibility that "judicial judgment will be ignored" has long been one of the problems the PQD has sought to avoid.[157] In other words, the loss of legitimacy to the courts overall that would result from the President's decision to disregard or skirt the implications of a court's judgment is yet another problem likely to arise when a court rules on a war powers dispute, and it is a prudential issue whose consideration is called for

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[154] 10 U.S.C. §§ 890, 892 ("Any person subject to this chapter who violates or fails to obey any lawful general order . . . shall be punished as a court-martial may direct.").

[155] *E.g.*, United States v. Calley, 48 C.M.R. 19, 24 (1973) (appeal from the conviction of the soldier who led the My Lai massacre in Vietnam).

[156] *See* Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025) (vacating district court order that lacked "due regard for the deference owed to the Executive Branch in the conduct of foreign affairs"); *see also* Authority to Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6, 7 (Dec. 4, 1992) [https://perma.cc/6TCF-T2CY].

[157] Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 75 (1961).

by the unquestioning-adherence factor. Put differently, the risk of presidential disobedience only counsels further in favor of dismissal.

In sum, all of the options available to a court faced with litigation against a president's unlawful or unconstitutional use of military force put it in the position of issuing a judgment with uncertain but likely dangerous (to U.S. troops' lives and to U.S. interests abroad) results. Aside from ruling in the President's favor, any other resolution that a court could bring to a war powers suit involves decisions that either create immediate risk to troops' lives or incentivize future risky behaviors that courts are not equipped to predict or control. The imprudence of taking on such risks is exactly the sort that creates an "unusual need" for adherence to the political branches' decisions on the case before the court.[158] Thus, in order to prevent "inappropriate interference in the business of the other branches of Government"[159] and avoid making decisions that affect troops' lives—a "value determination[]" typically made in "the halls of Congress or the confines of the Executive Branch"[160]—the unquestioning-adherence factor demands that courts not reach the merits of war powers suits.

B. Complications in Light of the Changing Nature of War

War is not static—like many other activities, it has changed dramatically in even the fifty or so years since many of the cases addressing justiciability in war powers suits were decided.[161] This Section considers whether and how those changes should affect courts' analysis under *Baker*'s fifth factor.

Perhaps the most notable change to armed conflict involving the U.S. in recent years has been the shift from fighting countries, or at least organized revolutionary groups purporting to be a government, to fighting nonstate organizations like terrorist groups. The last major conflict authorized by Congress was, in fact, against the country of Iraq;[162] but the United States' deadliest conflict this century was fought against the Taliban and Al Qaeda in Afghanistan and around the world. In authorizing this conflict, Congress did not limit the President to one geographic location—it permitted him to engage in armed conflict against any "nation[], organization[], or person[]" who aided in the September 11, 2001 terrorist attacks.[163] It is under this authority that the U.S.

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[158] Baker v. Carr, 369 U.S. 186, 217 (1962).

[159] United States v. Munoz-Flores, 495 U.S. 385, 394 (1990).

[160] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[161] *See generally* Barron & Lederman, *Constitutional History*, *supra* note 39.

[162] *See generally* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (codified at 50 U.S.C. § 1541 note) (granting the President the authority to use the U.S. military against Iraq in response to its alleged connections to Al Qaeda and development of weapons of mass destruction).

[163] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

has used military force against various extremist groups in places as disparate as central Asia and western Africa over the past two decades. And it is this same sort of "war" on nonstate actors that President Trump has begun to carry out against drug cartels and "narcoterrorists" during his second term.[164]

This change has not gone unnoticed in the scholarship. As some have argued, the "rise of global terrorism represents the newest and most serious challenge to the old law of armed conflict framework."[165] It threatens to "destabilize[] the boundaries taken for granted by the laws of armed conflict," and "problematize[] the distinction in domestic jurisprudence between national security matters and purely domestic matters."[166] And because terrorist organizations and other nonstate actors are so amorphous and difficult to fight, many scholars have concluded that the fight against them has drawn the President to use increasingly unchecked military force.[167] Consequently, their rise has further permitted the allocation of the war powers to shift in the President's favor, enabling abuses that arguably require increased judicial intervention to restrain.[168]

While it may be true in individual cases that the increased focus of international conflicts on combatting boundary-defying nonstate actors and organizations has empowered new abuses, and that the courts have an increased role to play in vindicating individual rights (like the right of habeas corpus in *Boumediene v. Bush*),[169] these considerations have little bearing on the unquestioning-adherence factor analysis. In fact, the general tendency of conflicts with nonstate actors to be drawn out and geographically disparate should make courts even warier of intervening. For the reasons discussed in Part IV.A, judicial intervention to stop or prevent conflict only creates an incentive for the President to take actions dangerous or hasty enough to avoid judicial intervention. That this inherent risk is higher in an age of conflict with nonstate actors only strengthens the conclusion that the unquestioning-adherence factor will continue playing a role in courts' dismissal of war powers suits, regardless of the presence of manageable standards.

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[164] Chin & Lin, *supra* note 1; *see also* Rona, *supra* note 1; Schmitt, *supra* note 60.

[165] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 710 (2004).

[166] *Id.* at 711.

[167] *See generally, e.g.*, David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 Pepp. L. Rev. 685 (2014); Samuel R. Howe, Note, *Congress's War Powers and the Political Question Doctrine After* Smith v. Obama, 68 Duke L.J. 1231 (2019). For instance, it is because the recent strikes against boats in the Caribbean have involved only sporadic attacks by "unmanned aerial vehicles launched from naval vessels in international waters" that the Trump Administration has claimed the WPR does not constrain its unilateral uses of military force against alleged drug traffickers. Nakashima & Robertson, *supra* note 1.

[168] *Cf.* Boumediene v. Bush, 553 U.S. 723, 765 (2008) (rejecting the notion that "the political branches have the power to switch the Constitution on or off at will").

[169] *See id*. at 793–96.

V. Empowering the Judiciary: A Proposal to Strengthen the WPR and Facilitate Judicial Intervention in Conflicts

The basic problem that this Note illustrates and now seeks to address is that, even in war powers cases where the plaintiff has standing, and even if courts achieve consensus that the meaning of "war" is justiciable (either because they adopt Judge Tatel's view in *Campbell* or because Congress amends the WPR to define "hostilities" as some have suggested),[170] courts are still likely to find that prudential considerations preclude a merits decision. Simply put, even if courts know how to spot an unlawful or unconstitutional war, the question of what comes next poses a substantial challenge to courts' nature, capabilities, and role in the constitutional order. Resolving this problem requires congressional action that essentially short-circuits the uncertain and risky chain of effects emanating from courts' merits review of war powers suits. This Part offers a relatively straightforward solution that will allow courts to step in where one of the political branches disrupts the constitutional war powers allocation: Congress must codify the remedy applicable where courts find violations of the WPR.

A. Statutory Commands as a Familiar Judicial Exercise

Before discussing this particular proposal, it is worth explaining why a statutory remedy is especially desirable in this context. Courts, when addressing the PQD in the foreign relations context, have strongly implied that they are more willing to rule in cases where a statutory provision is at issue. Statutes are easier to enforce—that is, less likely to generate justiciability concerns under the PQD—because, unlike the Constitution, they can provide for clear definitions of terms and encode value judgments. They therefore keep such decisions out of the judiciary's hands and give courts the task of merely administering political (values-based) decisions already made—a remedy to both the textual and the prudential concerns underlying the PQD.[171] The Supreme Court has echoed this reasoning, noting that "one of the Judiciary's characteristic roles is to interpret statutes," and they "cannot shirk this responsibility merely because" there is a connection between the statute and "the conduct of this Nation's foreign relations."[172] Accordingly, it did not hesitate to rule, despite the PQD, in a case where an administrative agency's rule made pursuant to a statutory authorization conflicted with an international treaty.[173] Further, in explaining its understanding of the doctrine, the D.C. Circuit has

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[170] *See supra* notes 61–64, 76–78 and accompanying text.

[171] And, significantly, it is the WPR's failure to accomplish either of these objectives that has precipitated many of the lawsuits discussed in this Note, as well as the prudential concerns explained by Part IV.

[172] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[173] *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 254 n.25 (1984).

noted that the involvement of foreign affairs interests "does not necessarily prevent a court from determining whether" some statutory provision applies to the President's conduct, and that, while "courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches," they may always consider "claims '[p]resenting purely legal issues.'"[174]

In fact, cases in which the President's compliance with a statute is at issue are the most likely suits to be purely legal. If Congress were to codify a proposal that arguably infringes on the President's authority as Commander in Chief while simultaneously lowering the stakes of deciding that question by codifying its own value judgment about the remedy, it would put the (merits) issue of the war powers' allocation squarely before the courts in its most answerable form. Put differently, by taking value-laden decisions about how to resolve war powers disputes (illustrated in Part IV.A) out of the courts' hands, Congress would leave the courts only to decide the underlying question of law. And such questions are clearly within the judicial power: where the "federal courts are not being asked to supplant a foreign policy decision of the political branches," but instead to "enforce a specific statutory right," they engage in a "familiar judicial exercise" of statutory interpretation and constitutional review.[175] Deciding whether Congress's proactive restrictions on the President's unilateral actions lie within its Declare War power—as opposed to delineating the scope of the President's Commander in Chief authority in light of a specific conflict—is such a judicial exercise, and one the Supreme Court has expressed comfort in undertaking.[176]

B. Codifying the Remedy to WPR Violations

Given these factors favoring the use of a statutory provision, Congress could act to empower the courts to rule on the underlying merits question about the war powers' allocation by codifying a provision for a particular remedy given an unauthorized use of military force beyond some legal threshold (preferably one with some factual definitiveness so as to avoid the "lack of standards" problem already thoroughly discussed in cases and commentary).[177] In other words, Congress should endeavor to provide courts faced with war powers suits a remedy to apply almost mechanically after making the relevant factual and legal determination and finding that the President overstepped legal bounds with his unilateral military actions. For instance, Congress could provide that courts must, after such a finding, enjoin the military from deploying additional troops to the relevant area of hostilities or prohibit the Department of the Treasury from disbursing further expenditures on

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[174] El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (quoting Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring)).

[175] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012).

[176] *Id.*

[177] *See supra* notes 110–19.

the conflict. What precise remedy such a statute provides is not particularly relevant, though the tighter control Congress exercises, the greater the deterrent effect of the provision (and the more likely it is to infringe on the President's Commander in Chief authority).[178] The most important element of this provision is that it leaves the court without discretion as to the remedy: because the prudential concerns that give rise to PQD problems for justiciability arise when courts must make value-laden, policy-heavy decisions about how to address unilateral presidential military actions, Congress could resolve the PQD problems by merely taking the decision out of future courts' hands today with a policy judgment of its own about how unauthorized military operations should end.

It is true that the same risks to U.S. troops and foreign policy interests as those outlined in Part IV.A would be present given a statute that predetermines the remedy where the President violates the WPR, but in fact it is Congress that is taking on those risks—not the courts. The discretion is in Congress's hands to decide what level of risk it takes on, but once Congress has made that decision, it is up to courts to merely enforce the law. Such a statute would remove entirely from the courts the value judgment about which solution is right, and which risks are acceptable to take on, thus eliminating the issues requiring dismissal under the unquestioning-adherence factor analysis. In short, by providing for the remedy in advance, Congress makes a political decision of its own that courts have compelling reasons to adhere to, notwithstanding the President's opposing decisions. This provision would, in effect, begin to "legislate away the jurisdictional shields by which the courts have insulated themselves from the war powers process."[179]

The question that naturally follows when courts consider applying this remedy is whether Congress has the authority under the Constitution to codify such a provision—which is exactly the point. To frame this proposal in terms of the unquestioning-adherence factor analysis, a decision about whether to enforce the statutory remedy comes without the consequences and uncertainties illustrated in this Note because regardless of how the court rules, it need not engage in risky decisions about troop movements and allocations. Either it finds that Congress has the better argument about the war powers' allocation and enforces the remedy—in which case it need not make any "unmoored

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[178] Questions about whether Congress has unconstitutionally infringed on the President's foreign affairs authority will be squarely before a court hearing suits seeking either of the remedies suggested as examples in this paragraph. *See, e.g.*, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act Omnibus Appropriations, 33 Op. O.L.C. 1, 4 (2009) [https://perma.cc/Q33U-R3WY] (arguing that a bar on spending for certain foreign affairs functions "impermissibly interferes with the President's authority to manage the Nation's foreign diplomacy," just as a direct bar on those functions would).

[179] Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. Rev. 1338, 1345–46 (1993) (reviewing John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993)).

determination[s]" about foreign policy,[180] because Congress has already made its determination as to what the policy should be—or it strikes down the remedy as exceeding Congress's power—in which case the court will not take any further action, and Congress will have the ability to codify a remedy that does fall within its Declare War powers. Of course, the more restrictive the remedy that Congress instructs the courts to impose, the more likely the courts are to strike it down as violative of the President's independent authority.[181] But such a judgment would necessarily entail a merits ruling on the war powers allocation, which is precisely the outcome this solution seeks to achieve. Because a pre-specified remedy removes a great deal of discretion (and therefore uncertainty) from the courts' decision-making, it allows for a more straightforward resolution on the merits of the underlying constitutional questions.

Further, creating such a judicially enforceable remedy to presidential unilateralism through statute is pragmatically desirable because it avoids the gridlock or lack of political will that frequently characterize congressional (in)action in the face of foreign relations emergencies and allow the President's conduct to go unchecked. For instance, recall that in the events leading up to *Campbell*, two critical votes failed in Congress: one to approve of President Clinton's actions, and one to disapprove of them.[182] Despite the seemingly implicit acknowledgement that the military intervention in Yugoslavia rose to the level of "hostilities" under the WPR (because the vote on approval was held within the sixty-day reporting period), Congress failed to take any meaningful action (namely, a disapproval resolution that would have mandated the withdrawal of forces from hostilities) to restrain the President. This failure could have occurred for any number of reasons: perhaps a majority of members of Congress agreed with the use of force as a policy matter, or maybe they feared being viewed as unpatriotic for voting to discontinue the use of forces. From a purely political standpoint, members of Congress frequently decline to weigh in on foreign affairs because their constituents have little interest in them and because speaking out against a president of the same party risks primary election challenges.[183] In sum, the total inability to opine on the legality

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[180] *Zivotofsky*, 566 U.S. at 196.

[181] Additionally, it is more likely that a court would rule on the constitutionality of such a statute than find its validity nonjusticiable—in other words, this proposal is unlikely to raise additional political questions. This is because, for instance, the reason a court might refuse to enforce a statute requiring it to enjoin troop movements is not that the ability to decide that statute's validity is textually committed to another branch, but that Congress cannot vest courts with authorities beyond the judicial power. *See* Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 469 (1930). Such a judgment would still require the court to rule that the ability to control troop movements in that context is within the President's lawful authority.

[182] *See* Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000); *see also supra* note 68 and accompanying text.

[183] *See Congress' Influence on Foreign Policy: For Better or Worse?*, Wilson Ctr. (Oct. 17, 2011), https://www.wilsoncenter.org/event/congress-influence-foreign-policy-for-better-or-worse [https://perma.cc/J4RT-EGJH]; Andrew Kenealy, *How Congress Can Engage the American Public on Foreign Policy*, Lawfare (Aug. 11, 2025), https://www.lawfaremedia.

of presidential conduct due to mere political concerns is a problem that exists in Congress, but not in the courts. A Congress hoping to avoid politically motivated gridlock in the future has every incentive to make the values-based decision about remedies now and leave hotly contested questions of constitutionality to the courts—by making a political judgment in advance about how war powers suits should be resolved, Congress can empower future courts to merely "say what the law is"[184] and avoid entanglement with values-heavy political questions.[185]

This proposal could be improved by integrating it with other proposals that aim to bypass congressional gridlock for conflict-related votes. For instance, one recent bill would have created stricter reporting requirements (compared to those of the WPR) and provided for a fast-track procedure in both chambers of Congress for considering disapproval resolutions.[186] To address the broader balance of power issues raised in this Note, such a proposal could require courts hearing war powers suits to transmit their findings that the use of force is unlawful or unconstitutional to Congress (with no further action by the court), then mandate similarly fast-tracked procedures for Congress to consider whether to accept or adopt the findings in a resolution of disapproval. Such a mechanism could be limited to conflicts that Congress has not already explicitly considered with a vote of approval or disapproval under the WPR. The effect of this mechanism would be to create, for potentially unlawful conflicts outside the public consciousness, a pathway to congressional consideration unencumbered by party politics and complex legislative procedures. By a similar token, the numerous proposals to repeal long-standing (and outdated) authorizations for the use of military force could be paired with provisions describing the remedies courts must implement in the face of continued military action taken in the no-longer-authorized conflict[187]—a problem that confronted some courts during the Vietnam War.[188] By making the courts a partner in these ways, Congress would go far in ensuring that its efforts to restrain presidential unilateralism in military affairs are not hindered by gridlock or the optics concerns that prevent action against presidential overreach; simultaneously, Congress would empower politically neutral courts to sift through tough legal and factual issues by reserving for itself the ultimate disposition of war powers suits.

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org/article/how-congress-can-engage-the-american-public-on-foreign-policy [https://perma.cc/G8NP-9PDV].

[184] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[185] *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[186] *See* National Security Powers Act of 2021, S. 2391, 117th Cong. §§ 105–107 (2021).

[187] *See, e.g.*, A Bill to Repeal the Authorizations for Use of Military Force Against Iraq, S. 316, 118th Cong. §§ 1–2 (2023); To Repeal the Authorization for Use of Military Force Against Iraq Resolution, H.R. 3261, 117th Cong. § 1 (2021); To Repeal the Joint Resolution Entitled "A Joint Resolution to Promote Peace and Stability in the Middle East," H.R. 3283, 117th Cong. § 1 (2021).

[188] *See* Mitchell v. Laird, 488 F.2d 611, 615–16 (D.C. Cir. 1973).

Requiring contemporaneous congressional action before or in place of specified judicial remedies is particularly effective from a doctrinal standpoint because it further ameliorates the unpredictability underlying the unquestioning-adherence factor. Whatever concerns might exist about the unpredictable consequences of judicial intervention, a rule requiring Congress to act contemporaneously further minimizes those concerns by reducing the number of cases in which courts themselves must act to restrain the President's deployment of forces. In other words, this setup necessarily means that courts will be faced with fewer decisions that implicate "value determinations" or policy decisions "constitutionally committed" to the political branches, because it will frequently put the final disposition of a war powers case in Congress's hands.[189] Though previously specified, judicially administered remedies should ameliorate the problems with judicial discretion raised in Part IV, fast-tracking congressional action on the remedy to a dispute could further reduce courts' discretion and therefore more effectively empower the courts to adjudicate the deeper constitutional issues underlying such disputes.

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Ultimately, any combination of the solutions outlined in this Part would function to reduce the risk that courts find the question of war powers allocation nonjusticiable—but they cannot eliminate that risk altogether. As Professor Harold Koh has written, "Congress cannot legislate judicial courage, any more than it can legislative executive self-restraint,"[190] and it is impossible to guarantee that future courts will prove faithful partners in Congress's efforts to reassert its Declare War powers. But by encoding a remedy that courts can implement without discretion, Congress can at least push the courts to finally weigh in on the long-standing open question of the war powers' allocation.[191]

VI. Conclusion

Though the Framers may have envisioned the waging of war as a collaborative effort shared by the President and Congress, the last eighty years have seen a decisive shift of that allocation in favor of the President—despite Congress's (occasional) protests. The courts' response to this shift has been, almost across the board, acquiescence in the form of various justiciability doctrines. In general, they have been directionally correct in doing so, but their oft-repeated rationale for declining to intervene in the interbranch

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[189] *Japan Whaling*, 478 U.S. at 230.

[190] Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair 181 (1990).

[191] *Cf.* Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. . . . [T]he Court might not [always] have this luxury.").

struggle over war powers—that they lack sufficiently manageable standards to know what "war" under the Constitution or "hostilities" under the WPR mean—only tells half the story. Long-upheld prudential principles restated in the PQD counsel against intervention by the courts in the absence of a statutory remedy because courts lack the ability to alter the status quo without making the sort of value judgments (about U.S. lives and foreign policy) that are reserved for the political branches.

The important practical implication of this conclusion is that many current reform efforts would fall well short of their objective. Even if Congress were to codify a clearer definition of "hostilities" and clearer restrictions on the President's ability to engage in them, courts more than likely would have to continue dismissing war powers litigation against the President due to these prudential considerations. War powers reform proposals, as currently formulated, would thus fail to rein in the sort of unilateral uses of military force (against drug cartels, for instance) that have recently been the source of great controversy.[192] But all is not lost for Congress: by codifying a value judgment of its own regarding the right action to take when the President has overstepped his Commander in Chief authority, Congress can empower the courts to intervene and adjudicate the constitutional distribution of the war powers.

[192] *See supra* notes 1, 22, 60, and accompanying text.