Notes

INTRODUCTION

1. Congressional Record, Senate, June 28, 1950, pp. 9322–23 (Taft); Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law*, 2nd ed. (University of Illinois Press, 1989): 28; Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?" *American Journal of International Law* 89, no. 1 (1995): 21; Mary L. Dudziak, "The Gloss of War: Revisiting the Korean War's Legacy," *Michigan Law Review* 122, no. 2 (2023): 154.
2. "The President's News Conference, January 11, 1951," *Presidential Papers*, www.trumanlibrary.gov/library/public-papers/7/presidents-news-conference (Truman); Congressional Record, Senate, January 5, 1951, pp. 59–60 (Taft); Ted G. Carpenter, "United States' NATO Policy at the Crossroads: The 'Great Debate' of 1950–1951," *International History Review* 8 (August 1986): 389, 412 (public opinion).
3. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner Books edition, 2004), xxvii. The first edition was published in 1973. To be sure, the view that decisions to go to war are among the most momentous for the nation has a deep history. Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Grey and Company, 1833), § 1166.
4. John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton University Press, 1993), ix (my italics added).
5. Political scientist Mariah Zeisberg summarizes this and other scholarship. Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013): 14–15; Eugene V. Rostow, "Bad Cases Make Bad Law," *Texas Law Review* 50 (1972): 833, 836; Eugene V. Rostow, "Once More unto the Breach: The War Powers Resolution Revisited," *Valparaiso University Law Review* 21 (1986): 1, 51–52.
6. To name just a few: David Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016); Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* (Ballinger Publishing Co. 1976); Martin S. Sheffer, *The Judicial Development of Presidential War Powers* (Praeger, 1999).
7. William M. Treanor, "The War Powers Outside the Courts," *Indiana Law Journal* 81, no. 4 (2006): 1333.
8. Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* (University of Chicago Press, 2010): 3.
9. William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton University Press, 2011); Sarah Burns, *The Politics of War Powers: The Theory and History of Presidential Unilateralism* (University of Kansas Press, 2019): 4–5; Matthew C. Waxman, "War Powers Reform: A Skeptical View," *Yale Law Journal Forum*, March 8, 2024, www.yalelawjournal.org/forum/war-powers-reform-a-skeptical-view.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

10. David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding," *Harvard Law Review* 121 (2008): 689–704.
11. Waxman, "War Powers Reform: A Skeptical View."
12. Joshua Rovner, *Strategy and Grand Strategy* (International Institute for Strategic Studies, 2025), 10–11.
13. David Strauss, *The Living Constitution* (Oxford University Press, 2010).
14. Curtis A. Bradley, *Historical Gloss and Foreign Affairs: Constitutional Authority in Practice* (Harvard University Press, 2024): 119–45.
15. James Madison, "Federalist No. 37," in *The Federalist Papers*, ed. Clinton Rossiter (Penguin Books, 1961), 229.
16. Philip Bobbitt's, *The Shield of Achilles* (Knopf, 2002) is the leading book in this area, and on law and strategy more broadly. Another on the multidirectional relationships between constitution-writing and warfare is Linda Colley's *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World* (Liveright Publishing Corp., 2021).
17. Bobbitt, *Shield of Achilles*, 206; Dan Reiter & Allan C. Stam, *Democracies at War* (Princeton University Press, 2002); Michael C. Desch, "Democracy and Victory: Why Regime Type Hardly Matters," *International Security* 27, no. 2 (2002): 5; Alexander B. Downes, "How Smart and Tough Are Democracies? Reassessing Theories of Democratic Victory in War," *International Security* 33, no. 4 (2009): 9.
18. Sarah E. Kreps and Douglas L. Kriner, "Unfettered Foreign Policy? Domestic Checks on Presidential Powers after 9/11," in *Checking the Costs of War*, eds. Sarah E. Kreps and Douglas L. Kriner (University of Chicago Press, 2025), 1, 27–29.
19. I thank Philip Bobbitt for this crucial point. Other important works on it include Howell & Pevehouse, *While Dangers Gather*; Kriner, *After the Rubicon*.
20. Kriner, *After the Rubicon*, 10.
21. Bradley, *Historical Gloss and Foreign Affairs*, 119–45.
22. Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010), 3–15.
23. Explaining how structural realist theories of international relations ignore the internal characteristics of states such as domestic law, see, for example, John J. Mearsheimer, *The Tragedy of Great Power Politics*, updated ed. (W.W. Norton, 2014), chap. 1, esp. 10–11, 17–18. By contrast, "liberal" international relations theorists de-emphasize the role of constitutional law by arguing the victors of domestic–political competitions determine foreign policy; see, for example, Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51, no. 4 (1997): 513–53. Peter Trubowitz contrasts these theoretical approaches in *Politics and Strategy: Partisan Ambition & American Statecraft* (Princeton University Press, 2011), 2–3. For a classic statement holding that law is often an epiphenomenal reflection of political elites, see Karl N. Llewellyn, "A Realistic Jurisprudence – The Next Step," *Columbia Law Review* 30, no. 4 (1930): 448–50. Jack L. Goldsmith and Daryl J. Levinson describe "one view of U.S. constitutional law [that] tracks the skepticism of international realists that law can stand in the way of political self-interest." "Law for States: International Law, Constitutional Law, Public Law," *Harvard Law Review* 122, no. 7 (May 2009): 1833. Posner and Vermeule acknowledge that "law and politics are hard to separate and lie on a continuum," though they take the view that "the major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework … but from politics and public opinion." *The Executive Unbound*, 4.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

1 REVOLUTIONARY WAR POWERS: THE CONSTITUTIONAL BLUEPRINT

1. Alexander Hamilton, "Federalist No. 1," in *The Federalist Papers*, ed. Clinton Rossiter (Penguin Books, 1961), 33–37. Historian Gordon Wood has likewise called the Founding a "grand experiment in republicanism." Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford University Press, 2009), 4.
2. Ron Chernow, *Washington: A Life* (Penguin Press, 2010), 352, 369.
3. Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford University Press, 2003), 101–14; Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802* (The Free Press, 1975), 1–78.
4. C. Vann Woodward, "The Age of Reinterpretation," *American Historical Review* 66, no. 1 (October 1960): 1, 2–8, www.jstor.org/stable/1845704.
5. Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Louisiana State University Press, 1973), 3–51; Hamilton, "Federalist No. 24," 157–62.
6. See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton University Press, 1993), 3–10; Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner Books edition, 2004), 1–26; Charles A. Lofgren, "War-Making under the Constitution: The Original Understanding," *Yale Law Journal* 81, no. 1 (1972): 672, www.jstor.org/stable/795214. For a contrary view, see John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," *California Law Review* 84, no. 1 (1996): 167, https://doi.org/10.15779/Z38DH85.
7. James Madison, *Letters and Other Writings of James Madison*, vol. 4 (J. B. Lippincott & co., 1865), 491–92. This was written in 1795, when Madison was a congressman.
8. Hamilton, "Federalist No. 8," 66–71.
9. David C. Hendrickson, *Union, Nation, or Empire: The American Debate of International Relations, 1789–1941* (University Press of Kansas, 2009), 42.
10. I discuss this in Matthew C. Waxman, "The Power to Wage War Successfully," *Columbia Law Review* 117, no. 3 (2017): 613, 616–17, https://scholarship.law.columbia.edu/faculty_scholarship/223. In Chapter 8 of this book, I argue that debate over this claim is at the heart of the Korean War *Steel Seizure Case*.
11. Hamilton, "Federalist No. 70," 423–31.
12. On the evolution of how the United States finances wars, and how that has affected constraints on war, see Sarah E. Kreps, *Taxing Wars: The American Way of War Finance* (Oxford University Press, 2018).
13. "George Washington's Library Book Returned 221 Yrs Late," *Reuters*, May 20, 2010, www.reuters.com/article/lifestyle/george-washingtons-library-book-returned-221-yrs-late-idUSTRE64J4EG/.
14. David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition," *NYU Law Review* 85, no. 4 (2010): 177, https://ssrn.com/abstract=1669452.
15. Robert W. Love, Jr., *History of the U.S. Navy: 1775–1941* (Stackpole Books, 1992), 11–17.
16. Harold Sprout and Margaret Sprout, *The Rise of American Naval Power 1776–1918* (Naval Institute Press, 1990), 11. Originally published in 1939, this classic history was republished in 1990.
17. *Articles of Confederation*, art. IX; on linguistic ambiguities of the Declare War Clause, see Michael W. McConnell, *The President Who Would Not Be King: Executive Power under*

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

the Constitution (Princeton University Press, 2020), 188–201. On original understandings, see Lofgren, "War-Making under the Constitution: The Original Understandings"; Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Grey and Company, 1833), §§1163–68.

18. George Mason, "Comment in the Convention Debates, August 17, 1787," in *The Records of the Constitutional Convention of 1787*, ed. Max Farrand, rev. ed. (Yale University Press, 1937), 319.
19. W. Taylor Reveley III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (University Press of Virginia, 1981), 82–85; Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* (Ballinger, 1976), 30–32; Story, *Commentaries*, §§1166–68.
20. Story, *Commentaries*, §§1508–09, 1170.
21. *The Records of the Federal Convention*, ed. Max Farrand (Yale University Press, 1911–1937), 2:318–19; Schlesinger, *Imperial Presidency*, 4; Reveley, *War Powers of the President and Congress*, 83–84.
22. Story, *Commentaries*, §§1163–68.
23. Kohn, *Eagle and Sword*, 85–86; Story, *Commentaries*, §1186.
24. Craig L. Symonds, *Navalists and Antinavalists: The Naval Policy Debate in the United States, 1785–1827* (University of Delaware Press, 1980), 17–25; Sprout and Sprout, *The Rise of American Naval Power 1776–1918*, 11.
25. Joseph J. Ellis, *The Quartet: Orchestrating the Second American Revolution, 1783–1789* (Vantage Books, 2015), 67–93; Walter Stahr, *John Jay: Founding Father* (Bloomsbury, 2015), 121–22.
26. Edling, *A Revolution in Favor of Government*, 89–100.
27. Robert Leider, "Federalism and the Military Power of the United States," *Vanderbilt Law Review* 73 (2020): 989, https://scholarship.law.vanderbilt.edu/vlr/vol73/iss4/2.
28. Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford University Press, 2016), 330–31, 495–96; Allan R. Millett, "The Constitution and the Citizen-Soldier," in *The United States Military Under the Constitution of the United States, 1789–1989*, ed. Richard H. Kohn (New York University Press, 1991), 97, 101–2.
29. Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Harvard University Press, 2001), 42–50 (slave rebellions); Samuel Huntington, *The Soldier and the State* (Belknap Press of Harvard University Press, 1957), 167.
30. Kohn, *Eagle and Sword*, 86–87.
31. William H. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* (Public Affairs Press, 1957), 1.
32. Jeremi Suri, *The Impossible Presidency: The Rise and Fall of America's Highest Office* (Basic Books, 2017), 12–22. Some influential Framers were more concerned about excessive British parliamentary power than about excessive British crown power. Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Harvard University Press, 2014).
33. David Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016), 33–55; "George Washington to Alexander Hamilton, 31 March, 1783," *Founders Online*, National Archives, https://founders.archives.gov/documents/Hamilton/01-03-02-0197.
34. David G. Adler, "The Law: The Framers and Executive Prerogative: A Constitutional and Historical Rebuke," *Presidential Studies Quarterly* 42, no. 2 (June 2012): 376, www.jstor.org/stable/41427395.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

35. Kevin Arlyck, *The Nation at Sea: Federal Courts and American Sovereignty in the Age of Revolution* (Cambridge University Press, 2025), Chapter 1.
36. The definitive work is Amanda Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (Oxford University Press, 2017).

2 WAR POWERS IN THE EARLY REPUBLIC

1. Curtis A. Bradley, *Historical Gloss and Foreign Affairs: Constitutional Authority in Practice* (Harvard University Press, 2024), 119–45.
2. Theodore Roosevelt, "St. Clair's Defeat," *Harper's New Monthly Magazine*, January 1896, 400.
3. Quoted in "George Washington to the United States Senate and House of Representatives, December 12, 1791," *Founders Online*, National Archives, https://founders.archives.gov/documents/Washington/05-09-02-0166.
4. Examples include Gregory Ablavsky, "The Savage Constitution," *Duke Law Journal* 63, no. 5 (2014): 999, 1080; Gregory Ablavsky, "Administrative Constitutionalism and the Northwest Ordinance," *University of Pennsylvania Law Review* 167, no. 7 (2019): 1631, 1638–52; Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law," *Harvard Law Review* 132, no. 7 (2019): 1787, 1825–29.
5. Ned Blackhawk, *The Rediscovery of America: Native Peoples and the Unmaking of U.S. History* (Yale University Press, 2023), 228.
6. Gregory Ablavsky and W. Tanner Allread, "We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution," *Columbia Law Review* 123, no. 2 (2023): 264.
7. This section draws on Matthew Waxman, "Remembering St. Clair's Defeat," *Lawfare*, November 4, 2018, www.lawfaremedia.org/article/remembering-st-clairs-defeat.
8. Abraham D. Sofaer, *War, Foreign Affairs, and the Constitution: The Origins* (Ballinger, 1976), 119–24.
9. Sofaer, *War, Foreign Affairs, and the Constitution*, 79.
10. Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power*, CRS Report for Congress No. RL31836 (Congressional Research Services, April 2, 2003); Matthew Waxman, "Remembering St. Clair's Defeat," *Lawfare*, November 4, 2018, www.lawfaremedia.org/article/remembering-st-clairs-defeat.
11. Arthur A. Ekirch, Jr., *The Civilian and the Military: A History of the American Antimilitarist Tradition*, 2nd ed. (Independent Institute, 2010), 36; J. C. A. Stagg, *Mr. Madison's War: Politics, Diplomacy, and Warfare in the Early Republic* (Princeton University Press, 1983), 123.
12. George Washington, "Proclamation, September 25, 1794," *Founders Online*, National Archives, https://founders.archives.gov/documents/Washington/05-16-02-0494. Parts of what follows are drawn from Matthew Waxman, "Remembering the Whiskey Rebellion," *Lawfare*, September 25, 2018, www.lawfaremedia.org/article/remembering-whiskey-rebellion.
13. Militia Act of 1792 (May 2, 1792), 1 Stat. 264.
14. Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802* (The Free Press, 1975), 161.
15. Kohn, *Eagle and Sword*, 158–73; Waxman, "Remembering the Whiskey Rebellion."
16. William R. Casto, *Foreign Affairs and the Constitution in the Age of the Fighting Sail* (University of South Carolina Press, 2006), 53–55.
17. Alexander Hamilton, "Pacificus No. 1 [June 29, 1793]," *Founders Online*, National Archives, https://founders.archives.gov/documents/Hamilton/01-15-02-0038.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

18. Casto, *Foreign Affairs and the Constitution*, 67–74; "Madison's 'Helvidius' Essays, August 24–September 18, 1793 [Editorial Note]," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/01-15-02-0055.
19. George Washington, "September 19, 1796: Farewell Address," Miller Center, University of Virginia, accessed November 21, 2025, https://millercenter.org/the-presidency/presidential-speeches/september-19-1796-farewell-address.
20. Harold Sprout and Margaret Sprout, *The Rise of American Naval Power, 1776–1918* (Naval Institute Press, 1990), 44–45.
21. Congress also enacted the notorious Sedition Act, criminalizing false and malicious speech defaming government officials.
22. *Bas v. Tingy*, 4 U.S. 37, 40 (1800).
23. Bradley, *Historical Gloss and Foreign Affairs*, 119–45.
24. 8 Annals of Cong. 1631–32 (1798).
25. 8 Annals of Cong. 1631–707 (1798); Sofaer, *War, Foreign Affairs, and the Constitution*, 144–47.
26. Craig L. Symonds, *Navalists and Antinavalists: The Naval Policy Debate in the United States, 1785–1827* (University of Delaware Press, 1980), 70–80.
27. Sofaer, *War, Foreign Affairs, and the Constitution*, 139–64; David Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016), 33–55; David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (University of Chicago Press, 1997), 241–48.
28. *Little v. Barreme*, 6 U.S. 170 (1804).
29. Much of that scholarship is cited in Jane Manners, "Executive Power and the Rule of Law in the Marshall Court: A Re-Reading of *Little v. Barreme* and *Murray v. The Charming Betsy*," *Fordham Law Review* 89, no. 5 (2021): 1944, n. 13.
30. Alexander DeConde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797–1801* (Scribner, 1966), 66–70.
31. *The Papers of Thomas Jefferson*, vol. 30, January 1, 1798–January 31, 1799, ed. Barbara B. Oberg (Princeton University Press, 2003), 189–91, 238–40. I have taken the liberty of modernizing some of the letters' original capitalization.
32. Sprout and Sprout, *The Rise of American Naval Power*, 11–12.
33. David P. Currie, *The Constitution in Congress: The Jeffersonians 1801–1829* (University of Chicago Press, 2001), 164.
34. Michael Beschloss, *Presidents of War: The Epic Story, from 1807 to Modern Times* (Crown, 2018), 61.
35. Donald Hickey, *The War of 1812: A Forgotten Conflict* (University of Illinois Press, 2012), 255.
36. Hickey, *The War of 1812*, 111, 121, 167; Kenneth B. Moss, *Marque and Reprisal: The Spheres of Public and Private Warfare* (University Press of Kansas, 2019), 222.
37. Hickey, *The War of 1812*, 70.
38. Daniel Webster, *Daniel Webster on the Draft: Text of a Speech Delivered in Congress, December 9, 1814*, Books and Publications, no. 131 (1917), https://digicom.bpl.lib.me.us/books_pubs/131.
39. Currie, *The Constitution in Congress: The Jeffersonians*, 167–75.
40. Hickey, *The War of 1812*, 264–74.
41. *Martin v. Mott*, 25 U.S. 19 (1827).
42. Peter J. Kastor, "The War over Federalism: The Constitutional Battles in the War of 1812," in *What So Proudly We Hailed: Essays on the Contemporary Meaning of the War of 1812*, eds. Pietro S. Nivola and Peter J. Kastor (Brookings Institution Press, 2012), 122–52.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

43. James Madison, "Special Message to Congress on the Treaty of Ghent" (February 18, 1815), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/february-18-1815-special-message-congress-treaty-ghent.
44. James Madison, "Special Message to Congress on the Treaty of Ghent."
45. Allan R. Millett, Peter Maslowski, and William B. Feis, *For the Common Defense: A Military History of the United States from 1607 to 2012*, 3rd ed. (Free Press, 2012), 108–13.
46. Russell F. Weigley, *History of the United States Army* (Macmillan Publishers, 1967), 133.

3 WAR POWERS AND AMERICAN EXPANSION

1. Social Science Research Council, *Historical Statistics of the United States, 1789–1945: A Supplement to the Statistical Abstract of the United States* (U.S. Bureau of the Census, 1949).
2. Andrew Preston, *Total Defense: The New Deal and the Invention of National Security* (Harvard University Press, 2025), 14–15.
3. Charles N. Edel, *Nation Builder: John Quincy Adams and the Grand Strategy of the Republic* (Harvard University Press, 2014), 107–09.
4. Deborah A. Rosen, *Border Law: The First Seminole War and American Nationhood* (Harvard University Press, 2015), 84–90.
5. Nicholas D. Anderson, *Inadvertent Expansion: How Peripheral Agents Shape World Politics* (Cornell University Press, 2025), chapter 3.
6. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner Books edition, 2004), 26–27.
7. Josiah Quincy, *Memoirs of the Life of John Quincy Adams*, ed. Charles Francis Adams (Crosby, Nichols, Lee and Company, 1860), 82.
8. John Quincy Adams and Luis de Onís, "John Quincy Adams to Louis de Onis, July 23, 1818," Andrew Jackson Papers, Library of Congress, www.loc.gov/resource/maj.01049_0288_0297/?st=gallery.
9. William Earl Weeks, "John Quincy Adams's 'Great Gun' and the Rhetoric of American Empire." *Diplomatic History* 14, no. 1 (1990): 25–42.
10. James Monroe, "Second Annual Message" (November 16, 1818), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/november-16-1818-second-annual-message.
11. These speeches and actions are detailed in Abraham D. Sofaer, *War, Foreign Affairs, and the Constitution: The Origins* (Ballinger, 1976), 361–64.
12. Rosen, *Border Law*, 64.
13. Matthew C. Waxman, "The Power to Threaten War," *Yale Law Journal* 123 (2014): 1626–91.
14. James Monroe, "Seventh Annual Message" (December 2, 1823), The American Presidency Project, www.presidency.ucsb.edu/documents/seventh-annual-message-1. This section draws heavily on Matthew Waxman, "The Anniversary of the Monroe Doctrine," *Lawfare*, December 2, 2018. www.lawfaremedia.org/article/anniversary-monroe-doctrine.
15. Kori Schake, *Safe Passage: The Transition from British to American Hegemony* (Harvard University Press, 2017), 43.
16. Edel, *Nation Builder*, 180–83.
17. Dexter Perkins, *Hands Off: A History of the Monroe Doctrine* (Little, Brown and Company, 1941), 45; J. Reuben Clark, Jr., *Memorandum on the Monroe Doctrine*, December 1928, U.S. Department of State, Publication No. 37 (1930).
18. David P. Currie, *The Constitution in Congress: The Jeffersonians 1801–1829* (University of Chicago Press, 2001), 207–10.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

19. Schlesinger, *The Imperial Presidency*, 27–28.
20. Currie, *The Constitution in Congress: The Jeffersonians 1801–1829*, 215–18.
21. Schlesinger, *The Imperial* Presidency, 28–29.
22. Henry Cox, *War, Foreign Affairs, and Constitutional Power, vol. 2: 1829–1901* (Ballinger, 1984), 17–20; Kenneth E. Shewmaker, "'Congress Only Can Declare War' and 'The President Is Commander in Chief': Daniel Webster and the War Power," *Diplomatic History* 12, no. 4 (1988): 386–87.
23. Daniel Webster, "On the Loss of the Fortification Bill in 1835," Senate Speech (January 14, 1846) in *The Great Speeches and Orations of Daniel Webster*, ed. Edwin P. Whipple (Little, Brown and Company, 1879), 407, 419–20.
24. John M. Belohlavek, "'Let the Eagle Soar!' Democratic Constraints on the Foreign Policy of Andrew Jackson," *Presidential Studies Quarterly* 10, no. 1 (Winter 1980): 44; *Register of Debates in Congress*, 23rd Cong., 2nd Sess., 733 (March 3, 1835).
25. Cox, *War, Foreign Affairs, and Constitutional Power*, 21–22.
26. *Fleming v. Page*, 50 U.S. (9 How.) 603, 614 (1850).
27. James K. Polk, *War Message to Congress*, May 11, 1846, Miller Center, University of Virginia, https://millercenter.org/the-presidency/presidential-speeches/may-11-1846-war-message-congress.
28. Act of May 13, 1846, ch. 16, 9 Stat. 9, "An Act providing for the Prosecution of the existing War between the United States and the Republic of Mexico."
29. Daniel Webster, "Speech at Public Dinner in Philadelphia, Dec. 2, 1846," in *The Writings and Speeches of Daniel Webster*, vol. 4 (Little, Brown and Company, 1903), 29, 31–32.
30. Amy S. Greenberg, *A Wicked War: Polk, Clay, Lincoln, and the 1846 Invasion of Mexico* (Vintage Books, 2012), 248–54.
31. *Congressional Globe*, 30th Cong., 1st Sess. 95 (January 3, 1848).
32. This section draws heavily on Matthew Waxman, "The Mexican-American War and Constitutional War Powers," *Lawfare*, February 2, 2020. www.lawfaremedia.org/article/mexican-american-war-and-constitutional-war-powers.
33. John Pinheiro, *Manifest Ambition: James K. Polk and Civil-Military Relations during the Mexican War* (Praeger Security International, 2007), 62.
34. Pinheiro, *Manifest Ambition*, chapter 3; Richard Bruce Winders, *Mr. Polk's Army: The American Military Experience in the Mexican War* (Texas A&M University Press, 1997), chapter 3.
35. Ira I. Katznelson, "Flexible Capacity: The Military and Early American Statebuilding," in *Shaped by War and Trade: International Influences on American Political Development*, eds. Martin Shefter and Ira Katznelson (Princeton University Press, 2002), 82–110.
36. Currie, *The Constitution in Congress*, 167–72.
37. Winders, *Mr. Polk's Army*, 72.
38. Pinheiro, *Manifest Ambition*, 140–41; Winders, *Mr. Polk's Army*, 35–49.
39. William H. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* (Public Affairs Press, 1957), 41.
40. Greenberg, *A Wicked War*, 109.
41. David M. Golove, "The Commander in Chief and the Laws of War," *Proceedings of the Annual Meeting (American Society of International Law)* 99 (2005): 198–201.
42. On this phenomenon generally, see Rebecca Ingber, "International Law Constraints as Executive Power," *Harvard International Law Journal* 57, no. 1 (2016): 49.
43. William Learned Marcy to General Kearny, June 3, 1846, in Dwight L. Clarke, *Stephen Watts Kearny: Soldier of the West* (University of Oklahoma Press, 1961), 394–97, Appendix A.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

44. Stephen Watts Kearny, "Kearny Proclamation," August 22, 1846, in *The History of the Military Occupation of the Territory of New Mexico from 1846 to 1851, by the Government of the United States*, ed. Ralph Emerson Twitchell (Smiths Brooks Company, 1909), 78–80.
45. Congressional Globe, 29th Cong., 2nd Sess., December 9 and 13, 1846.
46. David Yancey Thomas, *A History of Military Government in Newly Acquired Territory of the United States* (Columbia University Press, 1904), 106–10.
47. Thomas, *A History of Military Government*, 109–111; James K. Polk, "Message to Congress Regarding the Treaty of Guadalupe Hidalgo" (July 6, 1848), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/july-6-1848-message-regarding-treaty-guadalupe-hidalgo.
48. *Cross v. Harrison*, 56 U.S. (15 How) 164, 190 (1853).
49. James K. Polk, "Fourth Annual Address to Congress" (December 5, 1848), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/december-5-1848-fourth-annual-message-congress.
50. David Nickles, *Under the Wire: How the Telegraph Changed Diplomacy* (Harvard University Press, 2003), 19–47.
51. Schlesinger, *Imperial Presidency*, 50–51; Sofaer, *War, Foreign Affairs, and the Constitution*, 276–79.
52. Thomas Jefferson, "First Annual Message" (December 8, 1801), The American Presidency Project, www.presidency.ucsb.edu/documents/first-annual-message.
53. Sofaer, *War, Foreign Affairs, and the Constitution*, 206–24.
54. An Act for the Protection of the Commerce and Seamen of the United States against the Tripolitan Cruisers, 7th Cong., 1st Sess. (February 6, 1802), 2 Stat. 129.
55. Max Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* (Basic Books, 2014), 46–48; Cox, *War, Foreign Affairs, and Constitutional Power*, 52–54.
56. Matthew Waxman, "Remembering the Bombardment of Greytown," *Lawfare*, July 13, 2019. www.lawfaremedia.org/article/remembering-bombardment-greytown.
57. *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860).
58. Secretary of Navy John P. Kennedy to Commodore M. C. Perry, November 13, 1852, in U.S. Congress, *Senate, Message of the President of the United States … Relative to the Naval Expedition to Japan* (S. Exec. Doc. no. 34, 33rd Cong., 2nd Sess., 1855), 2; Acting Secretary of State C.M. Conrad to Secretary of Navy John P. Kennedy, November 5, 1852, S. Exec. Doc. 34 (33rd Cong., 2nd Sess., 1855), 4; Shewmaker, "'Congress Only Can Declare War' and 'The President Is Commander in Chief': Daniel Webster and the War Power," 404–05.
59. *Congressional Globe*, 35th Cong., 1st Sess., 1705 (1857).
60. President James Buchanan, "Special Message to Congress" (February 18, 1859), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/february-18-1859-special-message-regarding-transit-across; Seward's speech appears in *Congressional Globe*, 35th Cong., 2nd Sess., 1120 (1859); President James Buchanan, "Annual Message to Congress" (December 19, 1859), The American Presidency Project, www.presidency.ucsb.edu/documents/third-annual-message-congress-the-state-the-union.

4 CIVIL WAR AND WAR POWERS OF NECESSITY

1. Total casualties were higher in World War II, but the Civil War's carnage was much greater when adjusted for population.
2. Daniel Farber, *Lincoln's Constitution* (University of Chicago Press, 2003), 118, 136–38.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

3. Lucius Wilmerding, Jr., "The President and the Law," *Political Science Quarterly* 67, no. 3 (September 1952): 321.
4. Reginald C. Stuart, *The Half-Way Pacifist: Thomas Jefferson's View of War* (University of Toronto Press, 2018), 44.
5. Thomas Jefferson, "Annual Message to Congress" (October 27, 1807), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/october-27-1807-seventh-annual-message.
6. Abraham Lincoln, "July 4th Message to Congress" (July 4, 1861), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress.
7. Abraham Lincoln, "July 4th Message to Congress" (July 4, 1861), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress.
8. Act of August 6, 1861, ch. 63, 12 Stat. 326.
9. James McPherson, *Tried by War* (Penguin Press, 2008), 1–2.
10. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner Books edition, 2004), 66.
11. Abraham Lincoln, "July 4th Message to Congress" (July 4, 1861).
12. Amanda Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (Oxford University Press, 2017), 159–84.
13. Lincoln quoted in Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (Simon and Schuster, 2005), 352–53.
14. Abraham Lincoln, *The Collected Works of Abraham Lincoln*, vol. 4, eds. Roy P. Basler et al. (Rutgers University Press, 1953–1955), 344, 347; Mark E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford University Press, 1991), 8–9.
15. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
16. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).
17. Seth Barrett Tillman, "Ex Parte Merryman: Myth, History, and Scholarship," *Military Law Review* 224 (2016): 481, 492–506.
18. *Ex parte Merryman*, 17 F. Cas. at 152.
19. Rehnquist, *All the Laws but One*, 34–5.
20. David Currie, "The Civil War Congress," *University of Chicago Law Review* 73, no. 4 (2006): 1131, 1161–62.
21. Abraham Lincoln, "July 4th Message to Congress" (July 4, 1861).
22. *An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases*, 12 Stat. 755 (1863).
23. Tyler, *Habeas Corpus in Wartime*, 170–71.
24. Proclamation No. 104, 13 Stat. 734 (September 15, 1863).
25. Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Harvard University Press, 2010), 158.
26. Abraham Lincoln, "Proclamation 81 – Declaring a Blockade of Ports in Rebellious States," (April 19, 1861), The American Presidency Project, www.presidency.ucsb.edu/documents/proclamation-81-declaring-blockade-ports-rebellious-states.
27. Stephen M. Griffin and Matthew C. Waxman, "War Powers: Congress, the President, and the Courts – A Model Casebook Section (September 13, 2020)," Columbia Public Law Research Paper No. 14–669, https://ssrn.com/abstract=3692831.
28. Thomas H. Lee and Michael D. Ramsey, "The Story of the *Prize Cases*: Executive Action and Judicial Review in Wartime," in *Presidential Powers Stories*, eds. Christopher H. Schroeder and Curtis A. Bradley (Foundation Press, 2009), 53–92.
29. Neff, *Justice in Blue and Gray*, 59–62.
30. Mark E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford University Press, 1991), 205.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

31. *The Prize Cases*, 67 U.S. 635 (1863), 668–69.
32. 67 U.S. at 693 (Nelson, J., dissenting).
33. Many examples are discussed in later chapters, including Office of Legislative Counsel, Department of Justice, "Re: Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency" (January 17, 1962), https://s3.documentcloud.org/documents/5836225/73-1501862.pdf. (Chapter 9); John C. Yoo, "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," in *Opinions of the Office of Legal Counsel*, vol. 25 (*U.S. Department of Justice*, September 25, 2001): 188, www.justice.gov/file/146041-0/dl?inline (Chapter 12).
34. Jeremi Suri, *The Impossible Presidency: The Rise and Fall of America's Highest Office* (Basic Books, 2017), 84.
35. Russell F. Weigley, *American Way of War: A History of United States Military Strategy and Policy* (Indiana University Press, 1977), 130.
36. Quoted in Millett and Maslowski, *For the Common Defense: A Military History of the United States of America* (Free Press, 1994), 143.
37. G. Edward White, "Recovering the Legal History of the Confederacy," *Washington & Lee Law Review* 68 (2011): 467, 539–52.
38. David Currie, "The Civil War Congress," *University of Chicago Law Review* 73, no. 4 (2006): 1196–99.
39. Roger Lowenstein, *Ways and Means: Lincoln and His Cabinet and the Financing of the Civil War* (Penguin Press, 2022), 88–106.
40. Mark E. Neely Jr., *Lincoln and the Triumph of the Nation* (University of North Carolina Press, 2011), 201.
41. The two cases were *Hepburn v. Griswold*, 75 U.S. 603 (1870) and *The Legal Tender Cases*, 79 U.S. 457 (1871).
42. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press, 2012), 234–39.
43. Witt, *Lincoln's Code*, 197–99.
44. Charles Sumner, "Speech in the Senate, on His Bill for the Confiscation of Property and the Liberation of Slaves belonging to Rebels" (May 19, 1862), in *Charles Sumner: His Complete Works* (Lee and Shepard, 1900), 44, 46; Cong. Globe, 37th Cong., 2nd Sess., 2918; Andrew Kent, "The Constitution and the Laws of War during the Civil War," *Notre Dame Law Review* 85, no. 5 (2010): 1872–93.
45. David Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016), 152–58; Congressional Globe, 37th Cong., 2nd Sess., 495–517.
46. Mark E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford University Press, 1991), 83.
47. Edward Bates, "Memorandum on the Emancipation Proclamation" (December 31, 1862). Accessible at www.loc.gov/item/mal2081800/.
48. *Legal Tender Cases*, 79 U.S. at 540–41.
49. *Stewart v. Kahn*, 78 U.S. 493, 506–07 (1870).
50. Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War* (Harvard University Press, 2015), 3–7. On the range of federal powers, including war powers, for abolishing slavery, see James Oakes, *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution* (W.W. Norton & Co., 2021).
51. Michael Vorenberg, *Lincoln's Peace: The Struggle to End the American Civil War* (Knopf, 2025), xii–xxxi.
52. Vorenberg, *Lincoln's Peace*, 295–317.
53. *Ex parte Milligan*, 71 U.S. 2, 181 (1866).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

54. *The Milligan Case*, ed. Samuel Klaus (A. A. Knopf, 1929), 11.
55. Matthew Warshauer, *Andrew Jackson and the Politics of Martial Law* (University of Tennessee Press, 2006).
56. Detlev F. Vagts, "Military Commissions: A Concise History," *American Journal of International Law* 101, no. 1 (2007): 38–39; Farber, *Lincoln's Constitution*, 146–48; Abraham Lincoln, "Proclamation 94: Suspending the Writ of Habeas Corpus" (September 24, 1862), The American Presidency Project, www.presidency.ucsb.edu/documents/proclamation-94-suspending-the-writ-habeas-corpus; *The Milligan Case*, ed. Samuel Klaus (A. A. Knopf, 1929), 88–89.
57. Charles Warren, *The Supreme Court in United States History*, vol. 3 (Little, Brown, and Company, 1922), 149–61.
58. *Ex parte Milligan*, 71 U.S. at 127.
59. *Ex parte Milligan*, 71 U.S. at 140 (Chase, J., concurring).
60. Witt, *Lincoln's Code*, 311.
61. Samuel Issacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism," *Theoretical Inquiries in Law* 5 (2004): 10–28; Clinton Rossiter, *The Supreme Court and the Commander In Chief* (Cornell University Press, 1976), 26–39.
62. Andrew Johnson, "Proclamation on the End of the Confederate Insurrection" (April 2, 1866), Miller Center, https://millercenter.org/the-presidency/presidential-speeches/april-2-1866-proclamation-end-confederate-insurrection; Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War* (Harvard University Press, 2015).
63. *Ex parte Milligan*, 71 U.S. at 109.
64. *Ex parte Vallandigham*, 68 U.S. 243 (1863).
65. *Ex parte Milligan*, 71 U.S. at 120.
66. *Ex parte Milligan*, 71 U.S. at 139 (Chase, J., concurring).
67. See Chapter 2.
68. Alexander Hamilton, *The Federalist*, No. 23, in *The Federalist Papers*, ed. Clinton Rossiter (Signet Classics, 2003).

5 WAR POWERS AND AMERICAN EMPIRE

1. Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000* (Penguin Random House, 1987), 199–202; Fareed Zakaria, *From Wealth to Power: The Unusual Origins of America's World Role* (Princeton University Press, 1999), chapter 5.
2. Philip Zelikow, "Why Did America Cross the Pacific? Reconstructing the U.S. Decision to Take the Philippines, 1898–99," *Texas National Security Review* 1, no. 1 (2017): 39.
3. David Trask, *The War with Spain in 1898* (Macmillan, 1981), 28–29.
4. Lewis L. Gould, *The Spanish-American War and President McKinley* (University Press of Kansas, 1982), 41; David Trask, *The War with Spain*, 58.
5. Joint Resolution for the Recognition of the Independence of the People of Cuba, Demanding that the Government of Spain Relinquish Its Authority and Government in the Island of Cuba, and to Withdraw Its Land and Naval Forces from Cuba and Cuban Waters, and Directing the President of the United States to Use the Land and Naval Forces of the United States to Carry These Resolutions into Effect, Joint Res. 24, 55th Cong., 30 Stat. 738 (1898).
6. Richard F. Hamilton, *President McKinley, War and Empire* (Routledge, 2006), 117; S. J. Res. 189, 55th Cong. (1898); Jennifer K. Elsea and Matthew C. Weed, *Declarations of*

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (Congressional Research Service, 2014).

7. *New York Evening Journal*, April 25, 1898, available at https://digitalcollections.nypl.org/items/f57791e0-c61e-012f-d532-58d385a7bc34.
8. Letter from James Madison to Thomas Jefferson, April 2, 1798, in *Papers of James Madison*, vol. 17, eds. David B. Mattern et al. (University of Virginia Press, 1991), 104.
9. Ivan Musicant, *Empire by Default: The Spanish-American War and the Dawn of the American Century* (Henry Holt and Co., 1998), 184–85; Julius W. Pratt, *America's Colonial Experiment: How the United States Gained, Governed, and in Part Gave Away a Colonial Empire* (Prentice-Hall, 1950), 52; Trask, *The War with Spain*, 41. For a view that McKinley was firmly in control, see Nick Kapur, "William McKinley's Values and the Origins of the Spanish-American War: A Reinterpretation," *Presidential Studies Quarterly* 41, no. 1 (2011): 18, 23.
10. Commission Appointed by the President to Investigate the Conduct of the War Department in the War with Spain, S. Doc. No. 221, 56th Cong., 1st Sess., 276–77 (1900).
11. Christopher Mattison, "That Time Most of the Army Spent an Entire War on Sick Call." *Task & Purpose*, April 24, 2023. https://taskandpurpose.com/history/spanish-american-war-disease/.
12. S.J. Res. 24, 55th Cong. (1898).
13. S.J. Res. 189, 55th Cong. (1898).
14. Warren Zimmermann, *First Great Triumph: How Five Americans Made Their Country a World Power* (Farrar, Straus and Giroux, 2002), 134–48.
15. Philip C. Jessup, *Elihu Root* (Dodd, Mead & Co., 1938), 183.
16. Jessup, *Elihu Root*, 215.
17. Samuel Flagg Bemis, A *Diplomatic History of the United States* (Holt, Rinehart and Winston, 1955), 469.
18. Trask, *The War with Spain*, 384.
19. Ernest R. May, *Imperial Democracy: The Emergence of America as a Great Power* (Imprint Publications, 1991), 244–47.
20. On this series of decisions, see Zelikow, "Why Did America Cross the Pacific?," 36–66.
21. The Senate also passed a resolution clarifying its view that there would be no permanent annexation of the Philippines. Andrew Kent, "*Boumediene*, *Munaf*, and the Supreme Court's Misreading of the Insular Cases," *Iowa Law Review* 97 (2011): 101, 119.
22. Brian McAllister Linn, *The Philippine War, 1899–1902* (University Press of Kansas, 2000), 173.
23. Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States* (Henry Holt and Co., 2019), 103.
24. Elihu Root, "Extract from the Report of the Secretary of War for 1901," in *The Military and Colonial Policy of the United States: Addresses and Reports by Elihu Root*, eds. Robert Bacon and James Brown Scott (Harvard University Press, 1916), 286.
25. Jessup, *Elihu Root*, 331–33.
26. Root, "Extract from the Report of the Secretary of War for 1901," 252.
27. The 1901 *Insular Cases*, to that effect, included *Downes v. Bidwell*, 182 U.S. 244 (1901).
28. Quoted in Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* (Oxford University Press, 2009), 85–96.
29. David Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016), 190–97.
30. Immerwahr, *How to Hide an Empire*, 110.
31. The United States already had a few small overseas holdings, but it did not administer them as colonies like European powers did.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

32. President William McKinley, "Message to Congress" (December 3, 1900), in *Congressional Record*, 56th Cong., 2d Sess., 4 (1901).
33. Theodore Roosevelt, *An Autobiography*, ed. Wayne Andrews, 2nd ed. (Octagon, 1958 [1913]), 197.
34. Stewart Brewer, *Borders and Bridges: A History of U.S.-Latin American Relations* (Praeger, 2006), 86; Kenneth J. Hagan, *This People's Navy: The Making of American Sea Power* (Free Press, 1991), 235–36.
35. Quoted in Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner Books edition, 2004), 89.
36. Zimmermann, *First Great Triumph*, 4.
37. Elihu Root, "The Power of the President to Send United States Troops Out of the Country," in *The Military and Colonial Policy of the United States: Addresses and Reports by Elihu Root*, eds. Robert Bacon and James Brown Scott (Harvard University Press, 1916), 157–58.
38. Elihu Root, "Report of the Secretary of War for 1899," in *The Military and Colonial Policy of the United States: Addresses and Reports by Elihu Root*, eds. Robert Bacon and James Brown Scott (Harvard University Press, 1916), 351–52.
39. L. Michael Allsep, Jr., "New Forms for Dominance: How a Corporate Lawyer Created the American Military Establishment," PhD diss. (University of North Carolina at Chapel Hill, 2008), 301–2.
40. "Gen. Miles' Testimony," *New York Times*, March 25, 1902; Russell F. Weigley, *History of the United States Army* (Macmillan, 1967), 319–20.
41. Speech at the Whig Convention at Richmond, *The Writings and Speeches of Daniel Webster, National Edition* (Little, Brown, & Co., 1903), 95.
42. These instructions were contained in the Second Militia Act of 1792, section 1, which established federal standards for state militias. On the legal state and varied proficiencies of state militias in the Spanish–American War, see Graham H. Cosmas, *An Army for Empire: The United States Army in the Spanish-American War* (Texas A&M University Press, 1994), 7–8.
43. Elihu Root, "Report of the Secretary of War for 1902," in *The Military and Colonial Policy of the United States: Addresses and Reports by Elihu Root*, eds. Robert Bacon and James Brown Scott (Harvard University Press, 1916), 445–46.
44. Militia Act of 1903 (Dick Act), 32 Stat. 775 (1903).
45. Militia Act of 1908, ch. 204, 35 Stat. 399 (May 27, 1908). On the War of 1812 episode, see Chapter 2.
46. Samuel P. Huntington, *The Soldier and the State* (Belknap Press of Harvard University Press, 1957), 170.
47. Allan R. Millett, "The Constitution and the Citizen-Soldier," in *The United States Military under the Constitution of the United States, 1789–1989* (New York University Press, 1991), 107.
48. Jerry Cooper, *The Rise of the National Guard: The Evolution of the American Militia, 1865–1920* (University of Nebraska Press, 1997), 124; John K. Mahon, *History of the Militia and the National Guard* (Macmillan, 1983), 142.
49. *Authority of President to Send Militia into a Foreign Country*, 29 Opinions of the Attorneys General 322 (1912).
50. Millett, "The Constitution and the Citizen-Soldier," 109.
51. See the Supreme Court conscription cases discussed in Chapter 6. The Supreme Court also upheld this arrangement many decades later in *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

6 A CONSTITUTION FOR TOTAL WAR

1. John Milton Cooper, Jr., *Woodrow Wilson: A Biography* (Alfred A. Knopf, 2009), 362–71.
2. David M. Kennedy, *Over Here: The First World War and American Society* (Oxford University Press, 1982), 13–14.
3. Justus D. Doenecke, *Nothing Less than War: A New History of America's Entry into World War I* (University of Kentucky Press, 2011), 287–88.
4. Woodrow Wilson, "Joint Address to Congress" (April 2, 1917), National Archives, www.archives.gov/milestone-documents/address-to-congress-declaration-of-war-against-germany.
5. Arthur S. Link, *Woodrow Wilson: Revolution, War, and Peace* (Harlan Davidson, Inc., 1971), 72–74.
6. Woodrow Wilson, "A World League for Peace" (Address to the Senate in Washington, DC, January 22, 1917), American Presidency Project, www.presidency.ucsb.edu/documents/address-the-senate-the-united-states-world-league-for-peace.
7. Link, *Woodrow Wilson: Revolution, War, and Peace*, 71, 77.
8. Doenecke, *Nothing Less than War*, 291–97; David M. Kennedy, *Over Here*, 20.
9. John J. Pershing, *My Experiences in the World War* (Frederick A. Stokes, 1931), 100–11.
10. Paul Kennedy, *The Rise and Fall of the Great Powers* (Vintage Books, 1987), 200–03.
11. Leonard P. Ayres, *The War with Germany: A Statistical Summary* (Government Printing Office, 1919).
12. William G. Ross, *World War I and the American Constitution* (Cambridge University Press, 2017), 15.
13. Kennedy, *Over Here: The First World War and American Society*, 148.
14. John Whiteclay Chambers II, *To Raise an Army: The Draft Comes to Modern America* (The Free Press, 1987), 1, 196, 200.
15. Christopher Capozzola, "Body and Soul: The Selective Draft Law Cases and World War I," *Journal of Supreme Court History* 44, no. 3 (2019): 295–306.
16. Chambers, *To Raise an Army*, 1.
17. This section draws on Matthew Waxman, "Remembering the Selective Draft Law Cases," *Lawfare*, January 7, 2022, www.lawfaremedia.org/article/remembering-selective-draft-law-cases.
18. Brief for Plaintiff in Error at 10, *Arver v. United States*, 245 U.S. 366 (1918).
19. Brief for the United States at 22–29, *Ruthenberg v. United States*, 245 U.S. 480 (1918).
20. *Selective Draft Law Cases*, 245 U.S., 366, 381 (1918).
21. "Chief Justice White Rebukes Foe of the Draft," *New York Times*, December 14, 1917, 22.
22. Robert Higgs, *Crisis and Leviathan* (Oxford University Press, 1987), 135.
23. Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton University Press, 1948), 247.
24. Lindsay Rogers, "The Constitutional Difficulties of American Participation," *Contemporary Review* 112 (1917): 32.
25. Rossiter, *Constitutional Dictatorship*, 241–42.
26. Kennedy, *Over Here*, 134–37.
27. Mark R. Wilson, *Destructive Creation: American Business and the Winning of World War II* (University of Pennsylvania Press, 2016), 8–9.
28. Food and Fuel Control Act, Pub. L. No. 65–41, § 1, 40 Stat. 276 (1917); Edward S. Corwin, *Total War and the Constitution* (Alfred A. Knopf, 1947), 39.
29. 55 Cong. Rec. 3795 (1917).
30. Wilson, *Destructive Creation*, 9.
31. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford University Press, 1998), 47–65, 120.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

32. *Lochner v. New York*, 198 U.S. 45 (1905).
33. Lindsay Rogers, "Presidential Dictatorship in the United States," *Quarterly Review*, no. 231 (1919): 127, 137.
34. 55 Cong. Rec. 3823–24 (1917).
35. H. R. Rep. No. 75, 65th Cong., 1st Sess. 1 (1917).
36. 55 Cong. Rec. 3809, 3816 (1917).
37. Robert D. Cuff, *The War Industries Board: Business-Government Relations during World War I* (Johns Hopkins University Press, 1973), 1.
38. G. Edward White, *The Constitution and the New Deal* (Harvard University Press, 2000), 97–98.
39. Edward S. Corwin, *The President: Office and Powers 1787–1957* (New York University, 1957), 234–35.
40. Overman Act, ch. 78, 40 Stat. 556 (1918).
41. See, e.g., *United States v. Chem. Found Inc.*, 272 U.S. 1, 11–14 (1926); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86–93 (1921). See also Clarence A. Berdahl, *War Powers of the Executive in the United States* (University of Illinois Press, 1921), 204.
42. Westel W. Willoughby, *The Constitutional Law of the United States* (Baker, Voorhis, and Company, 1929), 1569.
43. Christopher N. May, *In the Name of War: Judicial Review and the War Powers Since 1918* (Harvard University Press, 1989), 19–20.
44. A copy of a pamphlet is available at https://artsandculture.google.com/asset/world-war-i-anti-draft-pamphlet-charles-schenck/dAE1fuuw7-VcEA?hl=en.
45. Woodrow Wilson, "Third Annual Message" (Washington, DC, December 7, 1915), The American Presidency Project, www.presidency.ucsb.edu/documents/third-annual-message-19.
46. Wilson, "Joint Address to Congress" (April 2, 1917).
47. George Sutherland, *Constitutional Powers and World Affairs* (Columbia University Press, 1919), 101–02.
48. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* (W.W. Norton, 2005), 186.
49. Laura Weinrib, "The Limits of Dissent: Reassessing the Legacy of the World War I Free Speech Cases," *Journal of Supreme Court History* 44, no. 3 (2019): 278–94.
50. *Schenck v. United States*, 249 U.S. 47, 52 (1919).
51. *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).
52. *Abrams v. United States*, 250 U.S. 616, 622 (1919).
53. Edgar Bronson Tolman, "Review of Recent Supreme Court Decisions." *American Bar Association Journal* 8, no. 5 (1922): 281–87.
54. Zechariah Chafee, Jr., "Freedom of Speech in War Time," *Harvard Law Review* 32, no. 8 (1919): 932, 958.
55. Woodrow Wilson, "Address to a Joint Session of Congress Concerning the Terms of Armistice Signed by Germany" (November 11, 1918), The American Presidency Project, www.presidency.ucsb.edu/documents/address-joint-session-congress-concerning-the-terms-armistice-signed-germany.
56. John Milton Cooper, *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (Cambridge University Press, 2001), 10–11; Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (Princeton University Press, 2019), 219, 232–33; Stephen M. Griffin, *Long Wars and the Constitution* (Harvard University Press, 2013), 83–84.
57. Cooper, *Breaking the Heart of the World*, 319–66.
58. S. Rep. No. 66–176, 66th Cong., 1st Sess. 6 (1919).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

59. Woodrow Wilson, *The Messages and Papers of Woodrow Wilson, Volume 2: 1881–1884*, ed. Arthur Stanley Link (Princeton University Press, 1967), 1206.
60. Avery C. Rasmussen & Saikrishna Prakash, "The Peace Powers: How to End a War," *University of Pennsylvania Law Review* 170, no. 3 (2022): 717, 778–80; Ross, *World War I and the American Constitution*, 319–66.
61. See, e.g., the arguments of congressman and future Secretary of State Cordell Hull (D-TN), 59 Cong. Rec. 5343, 5411 (1920), as well as arguments by Reps. Linthicum (D-MD) and Clark (D-MO) 59 Cong. Rec. 5417, 5338, 5347–48, 5353, 5357 (1920).
62. Wesley M. Bagby, "Woodrow Wilson, a Third Term, and the Solemn Referendum," *American Historical Review* 60, no. 3 (1955): 567–75.
63. Cooper, *Breaking the Heart of the World*, 379; Cooper, *Woodrow Wilson*, 564–65.
64. 59 Cong. Rec. 6562 (1920).
65. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 163 (1919).
66. *Ruppert v. Caffey*, 251 U.S. 264 (1920).
67. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).
68. Walter Bagehot, *The English Constitution* (Cornell University Press, 1966 [1867]), 79–80.
69. Woodrow Wilson, *Congressional Government: A Study in American Politics* (Houghton Mifflin Co., 1901), 282. Wilson originally published this book, his doctoral dissertation, in 1885.
70. Matthew C. Waxman, "Constitutional War Powers in World War I: Charles Evans Hughes and the Power to Wage War Successfully," *Journal of Supreme Court History* 44, no. 3 (November 2019): 267–77.

7 A CONSTITUTION FOR NEUTRALITY, WORLD WAR, AND PEACE

1. David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929–1945* (Oxford University Press, 1999), 386–87.
2. H. C. Engelbrecht and F. C. Hanighen, *Merchants of Death: A Study of the International Armament Industry* (Dodd, Mead and Co., 1934), 6.
3. H. J. Res. 167, 74th Cong. (1935) (proposing the Ludlow Amendment).
4. Ernest C. Bolt, Jr., *Ballots before Bullets: The War Referendum Approach to Peace in America, 1914–1941* (University Press of Virginia, 1977), 163.
5. George Gallup, "What We, the People, Think about Europe," *New York Times Sunday Magazine*, April 30, 1939, 1–2.
6. Matthew Waxman, "Remembering the Ludlow Amendment," *Lawfare*, January 10, 2019, www.lawfaremedia.org/article/remembering-ludlow-amendment.
7. Neutrality Act of 1935, 49 Stat. 1081; Neutrality Act of 1936, 49 Stat. 1152; Neutrality Act of 1937, 50 Stat. 12; Neutrality Act of 1939, 53 Stat. 1147.
8. Charles A. Kupchan, *Isolationism: A History of America's Efforts to Shield Itself from the World* (Oxford University Press, 2020), 180.
9. Edward S. Corwin, *Total War and the Constitution* (Knopf Publishing Group, 1947), chapter 1; Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford University Press, 2012), chapter 2.
10. Andrew Preston, *Total Defense: The New Deal and the Invention of National Security* (Belknap Press, 2025), 148–50.
11. Proclamation No. 2348, 4 Fed. Reg. 3809 (September 5, 1939) (neutrality proclamation); Proclamation No. 2352, 4 Fed. Reg. 3851 (September 8, 1939) (limited emergency proclamation).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

12. Executive Order No. 8244, 4 Fed. Reg. 3863 (September 8, 1939) (Army); Executive Order No. 8245, 4 Fed. Reg. 3863 (September 8, 1939) (Navy); Executive Order No. 8246, 4 Fed. Reg. 3863 (September 8, 1939) (State Department).
13. Proclamation No. 2352, 4 Fed. Reg. 3851 (September 8, 1939) (limited emergency proclamation).
14. Arthur Krock, "In the Nation: Congress and the 'Limited' National Emergency," *New York Times*, September 14, 1939, 18.
15. Franklin D. Roosevelt, "Press Conference," September 8, 1939, Franklin D. Roosevelt Presidential Library and Museum, www.fdrlibrary.marist.edu/archives/collections/franklin/?p=collections/findingaid&id=508.
16. Kennedy, *Freedom from Fear*, 440.
17. Franklin D. Roosevelt, "Address at the University of Virginia" (June 10, 1940), The American Presidency Project, www.presidency.ucsb.edu/documents/address-university-virginia.
18. Executive Office of the White House, "Press Conference No. 650" (June 7, 1940), Franklin D. Roosevelt Presidential Library and Museum, www.fdrlibrary.marist.edu/resources/images/pc/pc0102.pdf.
19. "Congress Stirred By Help to Allies," *New York Times*, June 7, 1940.
20. *Opinion of the Attorney General on Exchange of Over-Age Destroyers for Naval and Air Bases*, 39 Op. Att'y Gen. 484 (1940); Robert H. Jackson, "*Address at the First Inter-American Bar Association*" (March 27, 1941), Department of Justice, www.justice.gov/sites/default/files/ag/legacy/2011/09/16/03-27-1941.pdf.
21. David Barron, *Waging War* (Simon & Schuster, 2016), 252–53; William R. Casto, *Advising the President: Attorney General Robert H. Jackson and Franklin D. Roosevelt* (University of Kansas Press, 2018), 76–82.
22. Tami Davis Biddle, "Democratic Leaders and Strategies of Coalition Warfare: Churchill and Roosevelt in World War II," in *The New Makers of Modern Strategy: From the Ancient World to the Digital Age*, ed. Hal Brands (Princeton University Press, 2023), 569, 574.
23. Buel W. Patch, "Conscription in the United States," *CQ Researcher*, August 14, 1940; "Wide Backing Seen for Conscription," *New York Times*, July 14, 1940.
24. Proclamation No. 2425, 5 Fed. Reg. 3699 (September 16, 1940) (Selective Service Registration).
25. J. Garry Clifford & Samuel R. Spencer, Jr., *The First Peacetime Draft* (University of Kansas Press, 1986), 154, 180.
26. S.J. Res. 286, 76th Cong. (1941).
27. Preston, *Total Defense*, 148–50.
28. Franklin Delano Roosevelt, "Radio Address Announcing an Unlimited National Emergency" (May 27, 1941), American Presidency Project, www.presidency.ucsb.edu/documents/radio-address-announcing-unlimited-national-emergency.
29. Lend-Lease Act, Pub. L. No. 77–11, 55 Stat. 31 (1941), § 3(a)(1)–(2).
30. Luke J. Schumacher, "Franklin D. Roosevelt, World War II, and the Reality of Constitutional Statesmanship," *Texas National Security Review* 7, no. 2 (Spring 2024): 56, 83, 84, https://doi.org/10.26153/tsw/52239.
31. Edward S. Corwin, *The President: Office and Powers: 1787–1957; History and Analysis of Practice and Opinion* (New York University Press, 1957), 237, 239.
32. 77 Cong. Rec. 1973 (1941).
33. 77 Cong. Rec. A179 (1941).
34. Dale C. Copeland, *Economic Interdependence and War* (Princeton University Press, 2015), 185–246; Scott D. Sagan, "The Origins of the Pacific War," *Journal of Interdisciplinary History* 18, no. 4 (Spring 1988): 893.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

35. Michael W. McConnell, *The President Who Would Not Be King: Executive Power under the Constitution* (Princeton University Press, 2020), 29.
36. Louis William Koenig, *Presidency and the Crisis: Powers of the Office from the Invasion of Poland to Pearl Harbor* (King's Crown Press, 1944), 4–6.
37. For prewar numbers, see *The World Almanac and Book of Facts* (New York World-Telegram, 1939), 948.
38. Mark R. Wilson, *Destructive Creation: American Business and the Winning of World War II* (University of Pennsylvania Press, 2016); James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (Oxford University Press, 2011).
39. Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press, 1948), 265.
40. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934).
41. Corwin, *Total War*, 172.
42. 88 Cong. Rec. 7044 (1942).
43. Franklin D. Roosevelt, "Fireside Chat 22" (September 7, 1942), Miller Center, https://millercenter.org/thepresidency/presidential-speeches/september-7-1942-fireside-chat-22-inflation-and-food-prices.
44. Corwin, *Total War*, 64–65.
45. Stabilization Act of 1942, Pub. L. No. 77–729, 56 Stat. 765 (1942).
46. Barron, *Waging War*, 272–75, 284.
47. Wilson, *Destructive Creation*, 187–234.
48. Executive Order No. 9438, 3 C.F.R., 1944 Supp. 60 (1944).
49. *Opinion of the Attorney General on Power of the President under the War Labor Disputes Act to Seize Properties Affected by Strikes*, 40 Op. Att'y Gen. 312 (1944).
50. George H. Gallup, *The Gallup Poll: Public Opinion 1935–1971* (Random House, 1972), 444; Maury Klein, *A Call to Arms: Mobilizing America for World War II* (Bloomsbury Press, 2013), 705.
51. The case, later vacated, was *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir. 1945).
52. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Government Printing Office, 1982), 6.
53. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (Vintage Books, 1998), 188–90.
54. Executive Order No. 9066, 7 Fed. Reg. 1407 (February 19, 1942).
55. *Korematsu v. United States*, 323 U.S. 214, 223 (1944).
56. *Hirabayashi v. United States*, 320 U.S. 81 (1943).
57. *Korematsu v. United States*, 323 U.S. 214, 240 (Murphy, J., dissenting).
58. *Korematsu v. United States*, 323 U.S. 214, 244–46 (Jackson, J., dissenting); John Q. Barrett, "A Commander's Power, a Civilian's Reason: Justice Jackson's *Korematsu* Dissent," *Law and Contemporary Problems* 68, no. 1 (2005): 57.
59. *Ex parte Endo*, 323 U.S. 283 (1944); Samuel Issacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism," *Theoretical Inquiries in Law* 5 (2004): 20–25, http://dx.doi.org/10.2139/ssrn.427821.
60. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*, 238–39.
61. *Trump v. Hawaii*, 585 U.S. 667 (2018).
62. U.N. Charter art. 2, ¶ 4; art. 51.
63. Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013), 124–35; Jane E. Stromseth, "Rethinking War Powers: Congress, the President, and the United Nations," *Georgetown Law Journal* 81 (1993): 597.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

64. S. Res. 192, 78th Cong. (1943).
65. Corwin, *Total War*, 217–18.
66. See Chapter 2.
67. Franklin D. Roosevelt, "Radio Address at a Dinner of the Foreign Policy Association" (October 21, 1944), The American Presidency Project, www.presidency.ucsb.edu/documents/radio-address-dinner-the-foreign-policy-association-new-york-n-y.
68. 91 Cong. Rec. 10965 (1945) (statement of Sen. Connally).
69. Louis Fisher, "Sidestepping Congress: Presidents Acting under the UN and NATO," *Case Western Law Review* 47, no. 4 (1997): 1237, 1252–53.
70. Fisher, "Sidestepping Congress," 85; 91 Cong. Rec. 10968 (Statement of Sen. Connally).
71. *The Charter of the United Nations: Hearings before the S. Comm. on Foreign Relations*, 79th Cong., 300 (1945).
72. Andrew Clapham, *War* (Oxford University Press, 2021), 48.
73. John Lewis Gaddis, *Surprise, Security, and the American Experience* (Harvard University Press, 2005), 39–58.

8 WAR POWERS FOR COLD WAR

1. Charles N. Edel and Hal Brands, *The Lessons of Tragedy: Statecraft and World Order* (Yale University Press, 2019), 66–67.
2. See U.S. Department of War, *Annual Report of the Secretary of War* (Government Printing Office, 1932–current).
3. James F. Schnabel and Robert J. Watson, *The Joint Chiefs of Staff and National Policy*, vol. 3, 1950–1951 (Office of Joint History, Office of the Chairman of the Joint Chiefs of Staff, 1998), 21.
4. Melvyn P. Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (Stanford University Press, 1992).
5. National Security Council, *NSC 68: United States Objectives and Programs for National Security* (1950), Truman Library, 32, www.trumanlibrary.gov/library/research-files/report-nationalsecurity-council-nsc68?documentid =NA&pagenumber=67.
6. William A. Taylor, *Every Citizen a Soldier: The Campaign for Universal Military Training after World War II* (Texas A&M University Press, 2014), 147–60.
7. Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945–1954* (Cambridge University Press, 2010), 69–118; Andrew P. N. Erdmann, "Cold War, but No Garrison State," *Orbis* 45, no. 3 (2001): 453.
8. Mariah C. Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013), 95–125.
9. Hogan, *A Cross of Iron*, 24–26.
10. Douglas T. Stuart, *Creating the National Security State: A History of the Law that Transformed America* (Princeton University Press, 2008), chaps. 2–4.
11. Harold D. Lasswell coined the term garrison state in "The Garrison State," *American Journal of Sociology* 46, no. 4 (1941): 455–68, www.jstor.org/stable/2769918.
12. Stephen M. Griffin, *Long Wars and the Constitution* (Harvard University Press, 2013), 62.
13. Todd S. Sechser and Matthew Fuhrmann, *Nuclear Weapons and Coercive Diplomacy* (Cambridge University Press, 2017), 174–76.
14. Mary L. Dudziak, "The Gloss of War: Revisiting the Korean War's Legacy," *Michigan Law Review* 122 (2023): 163–85; Charles A. Stevenson, *Congress at War: The Politics of Conflict Since 1789* (National Defense University Press, 2007), 24–25.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

15. Harry S. Truman, "Press Conference" (June 29, 1950), Truman Library, www.trumanlibrary.gov/library/public-papers/238/presidents-news-conference.
16. Arthur M. Schlesinger Jr., *The Imperial Presidency* (Mariner Books edition, 2004), 134–35.
17. U.S. Department of State, "Authority of the President to Repel the Attack in Korea," *Department of State Bulletin* 23 (July 3, 1950): 173; Griffin, *Long Wars and the Constitution*, 71–85.
18. Griffin, *Long Wars and the Constitution*, 78.
19. U.S. Department of State, "Authority of the President to Repel the Attack in Korea," 174–77.
20. Mary L. Dudziak, "The Gloss of War: Revisiting the Korean War's Legacy," *Michigan Law Review* 122 (2023): 149.
21. Schlesinger, *The Imperial Presidency*, 135.
22. Lawrence Freedman, *Command: The Politics of Military Operations from Korea to Ukraine* (Oxford University Press, 2022), 24–29.
23. Executive Order No. 10340, 17 Fed. Reg. 3139 (April 8, 1952).
24. Harry S. Truman, "Radio and Television Address to the American People on the Need for Government Operation of the Steel Mills," April 8, 1952, The American Presidency Project, www.presidency.ucsb.edu/documents/radio-and-television-address-the-american-people-the-need-for-government-operation-the.
25. Maeva Marcus, *Truman and the Steel Seizure Case* (Duke University Press, 1994), 251–53; Cliff Sloan, *The Court at War* (Public Affairs, 2023), 7.
26. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).
27. *Youngstown*, 343 U.S. at 668 (Vinson, C. J., dissenting).
28. *Youngstown*, 343 U.S. at 700. (Vinson, C. J., dissenting).
29. *Youngstown*, 343 U.S. at 613–14 (Frankfurter, J., concurring).
30. *Myers v. United States*, 272 U.S. at 52, 293 (1926) (Brandeis, J., dissenting).
31. *Youngstown*, 343 U.S. at 613 (Douglas, J., concurring).
32. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).
33. John Q. Barrett, "The Nuremberg Roles of Justice Robert H. Jackson," *Washington University Global Studies Law Review* 6 (2007): 511.
34. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).
35. *Youngstown*, 343 U.S. at 659 (Burton, J., concurring); 343 U.S. at 662 (Clark, J., concurring).
36. William G. Howell, Saul P. Jackman, and Jon C. Rogowski, *The Wartime President: Executive Influence and the Nationalizing Politics of Threat* (University of Chicago Press, 2013), 183–210.
37. Marcus, *Truman and the Steel Seizure Case*, 225.
38. George Washington, *Farewell Address*, September 17, 1796, The American Presidency Project, www.presidency.ucsb.edu/documents/farewell-address
39. Mira Rapp-Hooper, *Shields of the Republic: The History and Hereafter of America's Alliances* (Harvard University Press, 2023), 17–46.
40. Dean Acheson, *Present at the Creation: My Years in the State Department* (W. W. Norton, 1969), 368–70.
41. Acheson quoted in Phil Williams, *The Senate and U.S. Troops in Europe* (St. Martin's Press, 1985), 23.
42. Campbell Craig and Fredrik Logevall, *America's Cold War: The Politics of Insecurity* (Belknap Press, 2009), 104.
43. Ted Galen Carpenter, "United States' NATO Policy at the Crossroads: The 'Great Debate' of 1950–1951," *International History Review* 8 (August 1986): 410; Donald A. Carter, *Forging the Shield: The U.S. Army in Europe, 1951–1962* (Center of Military History, U.S. Army, 2015), 24.
44. Carpenter, "United States' NATO Policy at the Crossroads," 405.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

45. Williams, *The Senate and U.S. Troops in Europe*, 62–69.
46. Harry S. Truman, "Press Conference" (January 4, 1951), American Presidency Project, www.presidency.ucsb.edu/documents/the-presidents-news-conference-567.
47. U.S. Senate, Committee on Foreign Relations and Committee on Armed Services, *Powers of the President to Send the Armed Forces Outside the United States*, Committee Print, 82d Cong., 1st Sess. (1951): 2, 26–27.
48. U.S. Senate Committee, *Powers of the President*, 16.
49. *Assignment of Ground Forces of the United States to Duty in the European Area*: Hearings before the Senate Committees on Foreign Relations and Armed Services, 82d Cong., 1st Sess. 93 (1951).
50. *New York Herald Tribune*, January 10, 1951, reprinted in *Appendix to the Congressional Record*, January 19, 1951, A153.
51. 97 U.S. Cong. Rec. 2993, 2995 (March 29, 1951).
52. 97 U.S. Cong. Rec. 2993, 2995 (March 29, 1951).
53. 97 U.S. Cong. Rec. 2993 (March 29, 1951).
54. Carpenter, "United States' NATO Policy at a Crossroad," 389–415.
55. Carter, *Forging the Shield*, 24.
56. 97 U.S. Cong. Rec. 3282, 3283 (April 4, 1951).
57. Williams, *The Senate and U.S. Troops in Europe*, 107.
58. Schlesinger, *The Imperial Presidency*, 140; Acheson, *Present at the Creation*, 496.
59. Schlesinger, *The Imperial Presidency*, 165.
60. Craig and Logevall, *America's Cold War*, 100; Rapp-Hooper, *Shields of the Republic*, 48.
61. U.S. Committee, *Powers of the President*, 27.

9 NUCLEAR WAR POWERS AND COVERT WAR POWERS

1. Bernard Brodie, "Implications for Military Policy," in *The Absolute Weapon: Atomic Power and World Order*, ed. Bernard Brodie (Harcourt, Brace and Co., 1946), 67.
2. Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (Free Press, 1990), 173, 180–81. See also Paul Bracken, *The Command and Control of Nuclear Forces* (Yale University Press, 1983), 200.
3. Francis Wormuth and Edwin Brown Firmage, *To Chain the Dog of War* (University of Illinois Press, 1989), 272.
4. Francis Gavin, *Nuclear Statecraft: History and Strategy in America's Nuclear Age* (Cornell University Press, 2012), 17–18. Of course, atomic weapons were dropped on Hiroshima and Nagasaki in 1945, though only one side had them.
5. Edward Samuel Corwin, *Total War and the Constitution* (Books for Libraries Press, 1947), 6–10; Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy* (Princeton University Press, 2000), 59–60.
6. Alex Wellerstein, "The Struggle for Postwar Control," in *Restricted Data: The History of Nuclear Secrecy in the United States* (University of Chicago Press, 2021).
7. U.S. Senate, Special Committee on Atomic Energy, *Report on the Atomic Energy Act of 1946: Report (to Accompany S. 1717)*, S. Rep. No. 1211, 79th Cong., 2nd Sess., 11.
8. Peter Douglas Feaver, *Guarding the Guardians: Civilian Control of Nuclear Weapons in the United States* (Cornell University Press, 1992), 87–106.
9. David E. Lilienthal, *The Journals of David Lilienthal, Vol. II: The Atomic Energy Years 1945–1950* (Harper & Row, 1964), 391.
10. Atomic Energy Act of 1946, § 6 (a)(2), Pub. L. No. 79–585, 60 Stat. 755.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

11. Feaver, *Guarding the Guardians*, 107–48. On planning for nuclear war-fighting, see Marc Trachtenberg, "A 'Wasting Asset': American Strategy and the Shifting Nuclear Balance, 1949–1954," in *History & Strategy* (Princeton University Press, 1991).
12. Feaver, *Guarding the Guardians*, 104–06.
13. Francis J. Gavin, "Rethinking the Bomb: Nuclear Weapons and American Grand Strategy," *Texas National Security Review* 2, no. 1 (2019): 74, 97. http://dx.doi.org/10.26153/tsw/867.
14. David Alan Rosenberg, "The Origins of Overkill: Nuclear Weapons and American Strategy, 1945–1960," *International Security* 7, no. 4 (Spring, 1983): 3, 11–12. https://doi.org/10.2307/2626731.
15. William Klingaman, David S. Patterson, and Ilana Stern, eds., *National Security Policy*, vol. 19 of *Foreign Relations of the United States*, 1955–1957 (Government Printing Office, 1990), doc. 53.
16. Rosenberg, "The Origins of Overkill," 25.
17. Lisle A. Rose and Neal H. Petersen, eds., *National Security Affairs*, vol. 2, pt. 1, of *Foreign Relations of the United States, 1952–1954* (Government Printing Office, 1984), 593.
18. John Foster Dulles, "Policy for Security and Peace," *Foreign Affairs*, April 1, 1954.
19. Samuel F. Wells, Jr., "The Origins of Massive Retaliation," *Political Science Quarterly* 96, no. 1 (Spring 1981): 31–52, www.jstor.org/stable/2149675.
20. Peter J. Roman, "Ike's Hair Trigger: U.S. Nuclear Predelegation, 1953–1960," *Security Studies* 7, no. 4 (Summer 1998): 121; David Alan Rosenberg, "U.S. Nuclear War Planning 1945–1960," in *Strategic Nuclear Targeting*, eds. Desmond Ball and Jeffrey Richelson (Cornell University Press, 1986), 35, 48.
21. Feaver, *Guarding the Guardians*, 42–43.
22. On "clogging" decisions for war, see Chapter 1.
23. Dwight D. Eisenhower, "Special Message to the Congress Regarding United States Policy for the Defense of Formosa" (January 24, 1955), The American Presidency Project, www.presidency.ucsb.edu/documents/special-message-the-congress-regarding-united-states-policy-for-the-defense-formosa.
24. Joint Resolution Authorizing the President to Employ the Armed Forces of the United States [for Protecting the Security of Formosa], Pub. L. No. 84–4, 69 Stat. 7 (1955).
25. "Memorandum of Discussion at the 214th Meeting of the National Security Council, Denver" (September 12, 1954), in *Foreign Relations of the United States, 1952–1954*, vol. 14 (Government Printing Office, 1984).
26. "Memorandum of Discussion at the 233rd Meeting of the National Security Council, Washington" (January 21, 1955), in *Foreign Relations of the United States, 1955–1957*, vol. 2 (Government Printing Office, 1986).
27. "China," in *Foreign Relations of the United States*, ed. Harriet D. Schwar, vol. 2, 1955–1957 (Government Printing Office, 1986), doc. 26.
28. Matthew Waxman, "Remembering Eisenhower's Formosa AUMF," *Lawfare*, January 2019, www.lawfaremedia.org/article/remembering-eisenhowers-formosa-aumf.
29. "Near East Region; Iran; Iraq," in *Foreign Relations of the United States*, eds. Paul Claussen, Edward C. Keefer, Will Klingaman, and Nina J. Noring, vol. 12, 1955–1957 (Government Printing Office, 1991), doc. 182.
30. *Executive Sessions of the Senate Foreign Relations Committee Together with Joint Sessions of the Senate Armed Services Committee*, Historical Series, vol. 9, 85th Cong., 1st Sess., 1957, 14 (Government Printing Office, 1979).
31. *To Promote Peace and Stability in the Middle East: Report of the Committee on Foreign Relations and the Committee on Armed Services on S.J. Res. 19*, 85th Cong., 1st Sess., February 14, 1957, 9 (Government Printing Office, 1957), 9.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

32. Michael Patrick Hulme, "In the Shadow of Congress" (PhD diss., University of California San Diego, 2023), 109–12.
33. Stephen Kinzer, *The Brothers: John Foster Dulles, Allen Dulles, and Their Secret World War* (Times Books, 2013), 148–49.
34. Nick Cullather, *Secret History: The CIA's Classified Account of Its Operations in Guatemala 1952–1954* (Stanford University Press, 1999), 74–123; Loch K. Johnson, *The Third Option: Covert Action and American Foreign Policy* (Oxford University Press, 2022), 85–88.
35. Kenneth Conboy and James Morrison, *Feet to the Fire: CIA Covert Operations in Indonesia, 1957–1958* (Naval Institute Press, 1999).
36. Stephen Knott, *Secret and Sanctioned* (Oxford University Press, 1996), 79–101.
37. Stephen M. Griffin, *Long Wars and the Constitution* (Harvard University Press, 2013), 100–04, 108–09; William I. Hitchcock, *The Age of Eisenhower* (Simon & Schuster, 2018), 153, 175.
38. On the period's blurriness between war and peace, see Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford University Press, 2012), 68–71.
39. Loch K. Johnson, "Covert Action and Accountability: Decision-Making for America's Secret Foreign Policy," *International Studies Quarterly* 33, no. 1 (March 1989): 81–109. https://doi.org/10.2307/2600495.
40. Austin Carson, *Secret Wars: Covert Conflict in International Politics* (Princeton University Press, 2018), 3–15.
41. National Security Act of 1947, Pub. L. No. 80–253, § 102(d)(5), 61 Stat. 495, 498 (1947).
42. John Prados, *Presidents' Secret Wars* (Ivan R. Dee, 1996), 20–28.
43. L. Britt Snider, *The Agency and the Hill: CIA's Relationship with Congress, 1946–2004* (Center for the Study of Intelligence, 2008), 259–60.
44. 102 Cong. Rec. S5292 (April 9, 1956) (statement of Sen. Leverett Saltonstall).
45. Johnson, "Covert Action and Accountability," 90.
46. Johnson, "Covert Action and Accountability," 96.
47. Johnson, "Covert Action and Accountability," 96–8.
48. Griffin, *Long Wars and the Constitution*, 110–12.
49. Office of Legislative Counsel, Department of Justice, "Re: Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency" (January 17, 1962), https://s3.documentcloud.org/documents/5836225/73-1501862.pdf.
50. Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton & Company, 2007), 65; Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Report), Book I, S. Prt. No. 94-755, 94th Cong., 2nd Sess. 33–36 (1976).
51. The CIA General Counsel continued to harbor doubts about this specific argument. Lawrence R. Houston, CIA Counsel "Legal Basis for Cold-War Activities" (January 15, 1962), https://nsarchive.gwu.edu/document/18278-national-security-archive-doc-04-memorandum.
52. Joint Resolution Expressing the Determination of the United States with Respect to the Situation in Cuba, Pub. L. No. 87–733, 76 Stat. 697 (1962).
53. Julian E. Zelizer, *Arsenal of Democracy: The Politics of National Security – From World War II to the War on Terrorism* (Basic Books, 2012), 148–70.
54. Griffin, *Long Wars and the Constitution*, 113–14.
55. "Congressional Meeting, October 22, 1962," in *The Presidential Recordings of John F. Kennedy: The Great Crisis*, eds. Philip D. Zelikow and Ernest May, vol. 3 (W.W. Norton & Co., 2001), 180.
56. John F. Kennedy, "Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba," in *Public Papers of the Presidents of the United States: John F.*

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

Kennedy, 1962, Book I – January 1 to December 31, 1962 (Government Printing Office, 1962), 808.
57. Supplemental Opinions of the Office of Legal Counsel of the United States Department of Justice, in *Legal and Practical Consequences of a Blockade of Cuba* (Government Printing Office, 1962), 486.
58. Internal treatments of the resolution within Congress and the Executive Branch are examined in Patrick Hulme, "Congress, the Cuba Resolution and the Cuban Missile Crisis," *Lawfare*, April 22, 2021, www.lawfaremedia.org/article/congress-cuba-resolution-and-cuban-missile-crisis.
59. George Perkovich, "The Other Terrifying Lesson of the Cuban Missile Crisis," *Politico*, January 16, 2018, www.politico.eu/article/terrifying-lesson-of-the-cuban-missile-crisis-nuclear-weapons-kennedy/.
60. Martin J. Sherwin, *Gambling with Armageddon* (Penguin Random House, 2022), 6.
61. President John F. Kennedy, "Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba," in *Public Papers of the Presidents of the United States: John F. Kennedy, 1962, Book I – January 1 to December 31, 1962* (October 22, 1962), 808.
62. Gavin, Nuclear Statecraft, 33–34; Fred Kaplan, *The Bomb: Presidents, Generals, and the Secret History of the Bomb* (Simon & Schuster, 2020), 36–47. My understanding of these relationships among intelligence, nuclear decision-making, and constitutional powers owes much to Philip Bobbitt's work.
63. Sherwin, *Gambling with Armageddon*, 331.
64. Aleksandr Fursenko and Timothy Naftali, *Khrushchev's Cold War: The Inside Story of an American Adversary* (W.W. Norton & Co., 2007).
65. This lecture of May 5, 1961, was reprinted in J. William Fulbright, "American Foreign Policy in the 20th Century Under an 18th-Century Constitution," *Cornell Law Review* 47, no. 1 (Fall 1961), http://scholarship.law.cornell.edu/clr/vol47/iss1/1.

10 VIETNAM AND ITS CONSTITUTIONAL AFTERMATH

1. Mark Atwood Lawrence, *Assuming the Burden: Europe and the American Commitment to War in Vietnam* (University of California Press, 2005).
2. Quoted in Edward J. Marolda, "Grand Delusion: U.S. Strategy and the Tonkin Gulf Incident," *Naval History Magazine*, July 2014, www.usni.org/magazines/naval-history-magazine/2014/july/grand-delusion-us-strategy-and-tonkin-gulf-incident.
3. Mark Atwood Lawrence, *The Vietnam War: A Concise International History* (Oxford University Press, 2008), 65.
4. "Lyndon B. Johnson Tapes on the Gulf of Tonkin Incident," *White House Tapes*, National Security Archive at George Washington University, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB132/tapes.htm; Robert J. Hanyok, "Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2–4 August 1964," *Cryptologic Quarterly*, n.d., 1–55, www.history.navy.mil/research/library/online-reading-room/title-listalphabetically/s/skunks-bogies-silent-hounds-flying-fish.html.
5. Lyndon B. Johnson, "Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin" (August 4, 1964), The American Presidency Project, www.presidency.ucsb.edu/node/238730.
6. Senate Historical Office, "Chairman J. William Fulbright and the 1964 Gulf of Tonkin Resolution," June 12, 2023, Senate Stories, www.senate.gov/artandhistory/senate-stories/chairman-fulbright-and-the-tonkin-gulf-resolution.htm.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

7. Lyndon B. Johnson, *The Vantage Point: Perspectives of the Presidency, 1963–69* (Holt, Rinehart & Winston, 1971), 115.
8. U.S. Department of State, Office of the Historian, *Foreign Relations of the United States, 1964–1968, vol. VI: Vietnam, January-August 1968*, doc. 109, https://history.state.gov/historicaldocuments/frus1964-68v06/d109.
9. Fredrik Logevall, *Choosing War: The Lost Chance for Peace and the Escalation of War in Vietnam* (University of California Press, 1999).
10. Stanley Karnow, *Vietnam: A History* (Penguin Books, 1991), 390.
11. H. J. Res. 1145, 88th Cong. (1964).
12. Karnow, *Vietnam*, 390.
13. Hedrick Smith, "Gulf of Tonkin Measure Voted in Haste and Confusion in 1964," *New York Times*, June 25, 1970.
14. H. R. McMaster, *Dereliction of Duty* (Harper Collins, 1997), 62–63.
15. Logevall, *Choosing War*; Brian VanDeMark, *Into the Quagmire: Lyndon Johnson and the Escalation of the Vietnam War* (Oxford University Press, 1995).
16. Selective Service System, *Induction Statistics* (Washington, DC: Selective Service System, accessed 2025), www.sss.gov/history-and-records/induction-statistics; Beth Bailey, *America's Army: Making the All-Volunteer Force* (Harvard University Press, 2009), 15–16.
17. Vietnam Veterans Memorial Fund, "The Draft," *Vietnam Veterans Memorial Fund*, accessed October 27, 2025, www.vvmf.org/topics/The-Draft/.
18. U.S. Department of State, Office of the Historian, "Memorandum from Attorney General Katzenbach to President Johnson," in *Foreign Relations of the United States, 1964–1968, Vol. II: Vietnam, January–June 1965* (June 10, 1965), doc. 345, https://history.state.gov/historicaldocuments/frus1964-68v02/d345. The italics are my own.
19. Department of State, *Department of State Bulletin*, vol. 54 (Government Printing Office, 1966), 473.
20. John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton University Press, 1993), 27–30.
21. Joseph D. Celeski, *Special Air Warfare and the Secret War in Laos: Air Commandos 1964–1975* (Air University Press, 2019), 303–04.
22. "Unexploded Bombs Still Taking Toll in Laos," *Voice of America*, November 2, 2009, www.voanews.com/a/a-13-2009-02-02-voa34-68796482/411754.html.
23. Joshua Kurlantzick, *A Great Place to Have a War: America in Laos and the Birth of a Military CIA* (Simon & Schuster, 2017), 107–33.
24. Ely, *War and Responsibility*, 77–82.
25. Kurlantzick, *A Great Place to Have a War*, 181–82, 203–05.
26. Kurlantzick, *A Great Place to Have a War*, 107–23.
27. Jay Peterzell, "Legal and Constitutional Authority for Covert Operations," Center for National Security Studies, *First Principles* 10, no. 3 (Spring 1985): 1–3; John Prados, *Presidents' Secret Wars*, rev. ed. (Elephant Paperbacks, 1996), 285; General Counsel Lawrence R. Houston Memorandum to Director of Central Intelligence, "Symington Subcommittee Hearings" (October 30, 1969); Memorandum for the Record, "Director's Conversation with Senator Stennis Regarding Agency Program in Laos" (August 23, 1971). Sections of these memos are reprinted in Christy Macy and Susan Kaplan, *Documents: A Shocking Collection of Memoranda, Letters, and Telexes from the Secret Files of the American Intelligence Community* (Penguin Books, 1980).
28. Ely, *War and Responsibility*, 82–86.
29. Mitchell Rogovin, Special Counsel to the Director of Central Intelligence, *Testimony before the House Select Intelligence Committee Hearings*, December 9, 1975, 1729–32.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

30. Ely, *War and Responsibility*, 72.
31. Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Report), Book I, S. Prt. No. 94-755, 94th Cong., 2nd Sess. 33–36 (1976): 157.
32. The following points from Rehnquist's memo are contained in William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Opinion for the Special Counsel to the President, "The President and the War Power: South Vietnam and the Cambodian Sanctuaries" (May 22, 1970). Rehnquist had signed a shorter version of this memo on May 14, and he later presented these arguments to Congress and publicly.
33. Randall Bennett Woods, *Fulbright: A Biography* (Cambridge University Press, 1995), 373.
34. Joseph A. Fry, *Debating Vietnam: Fulbright, Stennis, and Their Senate Hearings* (Rowman & Littlefield Publishers, 2006), 171–73.
35. John E. Mueller, *War, Presidents and Public Opinion* (John Wiley & Sons, Inc, 1973), 53; Woods, *Fulbright*, 411.
36. George Q. Flynn, *The Draft, 1940–1973* (University Press of Kansas, 1993), 171; Robert K. Griffith Jr., *The U.S. Army's Transition to the All-Volunteer Force, 1968–1975* (U.S. Army Center of Military History, 1997), 11.
37. John Lehman, *Making War: The 200-Year-Old Battle between the President and Congress over How America Goes to War* (Charles Scribner's Sons, 1992), 86.
38. S. Res. 85, 91st Cong. (1969).
39. Pub. L. No. 92-129, § 401 (1971).
40. Kelly McHugh, "Understanding Congress's Role in Terminating Unpopular Wars," *Democracy and Security* 10, no. 3 (2014): 204.
41. Pub. L. No. 91-171, § 643 (1969).
42. Pub. L. No. 91-652, § 7(a) (1971).
43. David J. Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016), 314–20.
44. Lehman, *Making War*, 88.
45. Julian E. Zelizer, *Governing America: The Revival of Political History* (Princeton University Press, 2012), 317.
46. Zelizer, *Governing America*, 317; Fry, *Debating Vietnam*, 163–67.
47. *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970).
48. Maurice Carroll, "Soldier Wins Right to Challenge War in Vietnam," *New York Times*, June 20, 1970, 5.
49. See, e.g., *Da Costa v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971).
50. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973).
51. Burt Neuborne, "I Fought the Imperial Presidency, and the Imperial Presidency Won," American Civil Liberties Union, July 29, 2019, www.aclu.org/issues/national-security/i-fought-imperial-presidency-and-imperial-presidency-won.
52. *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973).
53. Eugene R. Fidell, "Why Did the Cambodia Bombing Continue?," *Green Bag 2d*, 13 (2010): 321.
54. "Vietnam War U.S. Military Fatal Casualty Statistics," National Archives, April 29, 2008, www.archives.gov/research/military/vietnam-war/casualty-statistics; Gordon L. Rottman, *US Army Infantryman in Vietnam 1965–73* (Osprey Publishing Ltd, 2012), 7.
55. Bailey, America's Army, 4–36; Thomas S. Gates Jr., *The Report of the President's Commission on an All-Volunteer Armed Force* (U.S. Government Printing Office, 1970); Jennifer Mittelstadt, *The Rise of the Military Welfare State* (Harvard University Press, 2015), 17–45.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

56. Military Selective Service Act of 1967, Amendments of 1971, Pub. L. No. 92-129, 85 Stat. 348 (1971) (Paragraph 35 amended Section 17(c) to reflect July 1, 1973, as the date induction authority expired; Title II of Public Law 92-129 amended 37 U.S.C. §203(a) to reflect the new monthly basic pay rate of servicemembers).
57. See Introduction of Arthur Schlesinger, *The Imperial Presidency* (Houghton Mifflin, 1973), for a discussion of this work, which he subsequently updated.
58. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973); Michael J. Glennon, *Constitutional Diplomacy* (Princeton University Press, 1990), 87–122.
59. Stephen M. Griffin, "Against Historical Practice: Facing up to the Challenge of Informal Constitutional Change," *Constitutional Commentary* 35, no. 2 (2019): 79, 98.
60. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 1999), 177.
61. Whittington, *Constitutional Construction*, 175–76.
62. Ely, *War and Responsibility*, 52–53.
63. Lori F. Damrosch "Covert Operations," *American Journal of International Law* 83, no. 4 (1989): 795, 797, https://scholarship.law.columbia.edu/faculty_scholarship/4116.
64. 119 Cong. Rec. 25079 (1973).
65. Public Law 93-559, 88 Stat. 1795 (December 30, 1974).
66. L. Britt Snider, *The Agency and the Hill: CIA's Relationship with Congress* (Center for the Study of Intelligence, 2008), 33.
67. Loch Johnson, "Legislative Reform of Intelligence Policy," *Polity* 17, no. 3 (Spring 1985): 549, 552–53.
68. Church Report, Book I, 36 (1976).
69. Church Report, Book I, 38 (1976).
70. Senator J. William Fulbright, address at Yale University, April 3, 1971.
71. Gerald R. Ford, "Imperiled, Not Imperial," *Time*, May 10, 1980.

11 A CONSTITUTION FOR COLD WAR VICTORY AND NEW WORLD ORDER

1. Quoted in Thomas C. Reed, *At the Abyss: An Insider's History of the Cold War* (Presidio Press, 2005), 234–35.
2. Ronald Reagan, "Remarks at the Annual Convention of the National Association of Evangelicals in Orlando, FL" (March 8, 1983), American Presidency Project, www.presidency.ucsb.edu/documents/remarks-the-annual-convention-the-national-association-evangelicals-orlando-florida; Ronald Reagan, *An American Life* (Simon & Schuster, 1990), 550.
3. National Security Decision Directive Number 32: "U.S. National Security Strategy" (May 20, 1982), Ronald Reagan Presidential Library & Museum, www.reaganlibrary.gov/public/archives/reference/scanned-nsdds/nsdd32.pdf; Edward C. Keefer, *Caspar Weinberger and the U.S. Military Buildup, 1981–1985* (Historical Office of the Secretary of Defense, 2023), 65.
4. Artem Ilyanok, "'The Hamlet of Nations': The Reagan Administration and the Battle for American Foreign Policy" (Undergraduate Honors Thesis, Columbia University, 2024).
5. Steven G. Calabresi and Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press, 2008), 374–83.
6. Quoted in Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Little Brown & Co., 2007), 43.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

7. David Locke Hall, *The Reagan Wars: A Constitutional Perspective on War Powers and the Presidency* (Westview Press, 1991), 137.
8. *Weekly Compilation of Presidential Documents*, 18, no. 26 (July 5, 1982): 1066, https://hdl.handle.net/2027/uc1.b5130233?urlappend=%3Bseq=1.
9. Theodore B. Olson, "Overview of the War Powers Resolution (October 30, 1984)," in *Opinions of the Office of Legal Counsel*, vol. 8 (U.S. Department of Justice, 1984), 271, 275, 279.
10. Matthew C. Weed, Congressional Research Service, *The War Powers Resolution: Concepts and Practice* (2019), 13–14; Matthew C. Waxman, "War Powers Reform: A Skeptical View," *Yale Law Journal Forum* 133 (March 8, 2024): 779, 789–90.
11. Lebanon Emergency Assistance Act of 1983, Pub. L. No. 98–43, 97 Stat. 214 (1983); Congressional Research Service, *The War Powers Resolution*, 10.
12. Ronald Reagan, "Statement on Signing the Lebanon Emergency Assistance Act of 1983" (June 27, 1983), Ronald Reagan Presidential Library & Museum, www.reaganlibrary.gov/archives/speech/statement-signing-lebanon-emergency-assistance-act-1983; Hall, *The Reagan Wars*, 147–48.
13. Bernard Gwertzman, "No Policy Shift, White House Says," *New York Times*, August 30, 1983, A8.
14. Quoted in Gail E. S. Yoshitani, *Reagan on War: A Reappraisal of the Weinberger Doctrine, 1980–1984* (Texas A&M University Press, 2011), 106–107.
15. William Inboden, *The Peacemaker: Ronald Reagan, the Cold War, and the World on the Brink* (Penguin Publishing Group, 2022), 232.
16. Ronald Reagan, "Statement on Signing the Multinational Force in Lebanon Resolution" (October 12, 1983), Ronald Reagan Presidential Library & Museum, www.reaganlibrary.gov/archives/speech/statement-signing-multinational-force-lebanon-resolution; David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb – A Constitutional History," *Harvard Law Review* 121, no. 4 (2008): 941, 1079–80.
17. Bernard Gwertzman, "Shultz Declares Debate Harmed Lebanon Effort," *New York Times*, March 2, 1984, A1, www.nytimes.com/1984/03/02/world/shultz-declares-debate-harmed-lebanon-effort.html; Caspar W. Weinberger, "'The Uses of Military Power': Remarks Prepared for Delivery by the Hon. Caspar W. Weinberger, Secretary of Defense, to the National Press Club, Washington D.C., November 28, 1984," *PBS*, www.pbs.org/wgbh/pages/frontline/shows/military/force/weinberger.html.
18. Hal Brands, *Making the Unipolar Moment: U.S. Foreign Policy and the Rise of the Post-Cold War Order* (Cornell University Press, 2016), 240.
19. S. Comm. on Foreign Relations, *War in the Persian Gulf: The U.S. Takes Sides: A Report*, S. Prt. No. 100-60, 100th Cong., 1st Sess., 41 (1987).
20. "NSPG Meeting, May 18, 1987," Box 91309, Folder 0152, *National Security Planning Group (NSPG): Records, 1981–1988*, Ronald Reagan Presidential Library & Museum, www.reaganlibrary.gov/public/digitallibrary/smof/execsec-nspg/91309/40-752-81131938-91309-001-2019.pdf.
21. Richard Halloran, "Captive Iranians Said to Help U.S. Find Mines in the Gulf," *New York Times*, September 24, 1987, A1.
22. Brian Finucane, "Renewed Tensions in the Persian Gulf: Further War Powers Lessons from the Tanker War," *Just Security*, August 16, 2023, www.justsecurity.org/87650/renewed-tensions-in-the-persian-gulf-further-war-powers-lessons-from-the-tanker-war/.
23. *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).
24. Jonathan Fuerbringer, "Reagan Pledges to Fight a Proposal by the Senate to Prohibit U.S. Naval Operations in the Persian Gulf," *New York Times*, September 26, 1987, A5.
25. *INS v. Chadha*, 462 U.S. 919 (1983).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

26. Waxman, "War Powers Reform: A Skeptical View," 793–95.
27. David Hoffman, "Reagan Won't Invoke War Powers Law: President Rejects Voice for Congress in Gulf Escort Operation," *Washington Post*, October 11, 1987; Richard A. Mobley, "Deterrence Without Escalation: Fresh Insights into U.S. Decisionmaking During Operation Earnest Will," *Joint Force Quarterly*, no. 106 (July 27, 2022), https://ndupress.ndu.edu/Media/News/News-Article-View/Article/3106465/deterrence-without-escalation-fresh-insights-into-us-decisionmaking-during-oper/; Steven V. Roberts, "U.S. Ships Shell Iran Installation in Gulf Reprisal," *New York Times*, October 20, 1987, A1.
28. Stephen M. Griffin, *Long Wars and the Constitution* (Harvard University Press, 2013), 181–93; Savage, *Takeover*, 46–48.
29. U.S. Congress, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and House Select Committee to Investigate Covert Arms Transactions with Iran, *Report of the Congressional Committees Investigating the Iran-Contra Affair, with Supplemental, Minority, and Additional Views, 100th Cong., 1st sess., H. Rep. 100–433; S. Rep. 100–216* (U.S. Government Printing Office, 1987), 3–22.
30. Harold H. Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Yale University Press, 1990), 2–3.
31. U.S. Congress, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, Minority Views, 437–52.
32. Savage, *Takeover*, 46–48.
33. David J. Barron, *Waging War: The Clash between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016), 378.
34. U.S. Congress, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, Minority Views, 466–69.
35. U.S. Congress, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, Minority Views, 466–69, 474.
36. Barron and Lederman, "The Commander in Chief at the Lowest Ebb," 1082–83.
37. George H. W. Bush, "Address before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict" (March 6, 1991), The American Presidency Project, www.presidency.ucsb.edu/node/265314.
38. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).
39. Lynne Duke, "War Toll Estimate: Up to 30,000 GIs in 20 Days," *Washington Post*, November 1, 1990, A1; "Potential War Casualties Put at 100,000; Gulf Crisis: Fewer U.S. Troops Would Be Killed or Wounded Than Iraq Soldiers, Military Experts Predict," *Reuters*, September 5, 1990.
40. William P. Barr, interview by Jim Young, Nancy Baker, Russell Riley, and Dan Meador, *George H. W. Bush Oral History Project* (Miller Center, University of Virginia, April 5, 2001).
41. *Hearings on the Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings before the S. Comm. on Armed Servs.*, 101st Cong., 2d Sess., 136 (November 27, 1990).
42. *Crisis in the Persian Gulf Region, Day 3*, 101st Cong., 339 (November 29, 1990) (statement of James Webb, former Secretary of the Navy).
43. *Crisis in the Persian Gulf Region, Day 5*, 101st Cong., 701–703 (December 3, 1990) (statement of Dick Cheney, Secretary of Defense).
44. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).
45. George H. W. Bush and Brent Scowcroft, *A World Transformed* (Random House, 1998), 446.
46. Bush and Scowcroft, *A World Transformed*, 445.
47. S.C. Res. 82, U.N. Doc. S/1501 (June 25, 1950); S.C. Res. 83, U.N. Doc. S/1511 (June 27, 1950); S.C. Res. 84, U.N. Doc. S/1588 (July 7, 1950).
48. Thomas M. Franck and Faiza Patel, "UN Police Action in Lieu of War: 'The Old Order Changeth,'" *American Journal of International Law* 85, no. 1 (1991): 63–74, https://doi

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

.org/10.2307/2203558; *The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearing before the S. Comm. on the Judiciary*, 102d Cong., 1st Sess. (January 8, 1991), 220–385.
49. *Crisis in the Persian Gulf Region* 101st Cong., 2nd Sess. (December 3, 1990), 703.
50. *U.S. Policy in the Persian Gulf: Hearings before the S. Comm. on Foreign Relations*, 101st Cong. (December 4, 1990), 27.
51. United Nations Security Council – S.C. Res. 751, U.N. Doc. S/RES/751 (April 24, 1992); S.C. Res. 794, U.N. Doc. S/RES/794 (December 3, 1992); George Bush, "Address to the Nation on the Situation in Somalia" (December 4, 1992), The American Presidency Project, www.presidency.ucsb.edu/node/267749.
52. *Authority to Use U.S. Military Forces in Somalia*, 16 Op. Att'ys Gen. 6 (1992) (attaching Op. O.L.C.).
53. *Deployment of U.S. Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994).
54. Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, "Legal Assessment of the War Powers Resolution," to Alan Kreczko, Special Assistant to the President and Legal Adviser, National Security Council (June 9, 1993), www.justice.gov/d9/pages/attachments/2022/09/02/la_19930609_legal_assessment_of_the_war_powers_resolution.pdf.
55. William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, "The President and the War Power: South Vietnam and the Cambodian Sanctuaries," Memorandum Opinion for the Special Counsel to the President (May 22, 1970), www.justice.gov/file/147716/dl?inline=.
56. Scott R. Anderson, "War Powers and the Return of Major Power Conflict," *University of Chicago Legal Forum* (2024): 1, 16–18.
57. *Deployment of U.S. Armed Forces into Haiti*, n 7, 10.
58. Walter Dellinger, *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996).
59. Thomas L. Friedman, "Clinton Sending More Troops to Somalia; a Firm Deadline for a Pullout Will Be Set," *New York Times*, October 7, 1993, A1; Department of Defense Appropriations Act, 1994, Pub. L. No. 103–139, § 8151(b)(2)(B), 107 Stat. 1418, 1476 (1993).
60. Bill Clinton, *My Life* (Alfred A. Knopf, 2004), 552, 555.
61. U.S. Department of Justice, Office of Legal Counsel, *Authorization for Continuing Hostilities in Kosovo* (December 19, 2000), www.justice.gov/file/146196/dl?inline=.
62. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000).
63. Caroline D. Krass, Principal Deputy Assistant Attorney General, "Authority to Use Military Force in Libya," Memorandum Opinion for the Attorney General, Office of Legal Counsel (April 1, 2011), www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf.
64. Harold Hongju Koh, Legal Advisor to Department of State, "Testimony on Libya and War Powers before the Senate Foreign Relations Committee" (June 28, 2011), https://2009-2017.state.gov/documents/organization/167452.pdf.

12 WAR POWERS AND TERROR THREATS

1. George W. Bush, "Remarks Following a Meeting with the National Security Team," *Weekly Compilation of Presidential Documents*, no. 37 (September 12, 2001): 1302.
2. George W. Bush, "President Declares 'Freedom at War with Fear,'" Office of the Press Secretary, The White House, September 20, 2001, accessed November 24, 2025, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

3. John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006), 2–4.
4. Benjamin Wittes, *Law and the Long War* (Penguin Press, 2008), 22–25.
5. John C. Yoo, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," in *Opinions of the Office of Legal Counsel*, vol. 25 (U.S. Department of Justice, September 25, 2001), 188, www.justice.gov/file/146041-o/dl?inline.
6. Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224–225 (2001).
7. George W. Bush, "Statement on Signing the Authorization for Use of Military Force," *Weekly Compilation of Presidential Documents* 37, no. 38 (September 18, 2001): 1333.
8. National Commission on the Terrorist Attack Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Government Printing Office, 2004), 113, 126–34.
9. S. Rep. No. 113–288, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 11 (2014).
10. George Tenet, *At the Center of the Storm: My Years at the CIA* (Harper Collins, 2007), 316.
11. Mark Mazzetti and Scott Shane, "Drones Are Focus as C.I.A. Nominee Goes before Senators," *New York Times*, February 7, 2013; Yoo, *War by Other Means*, 48–49; James Risen and David Johnston, "Bush Has Widened Authority of C.I.A. to Kill Terrorists," *New York Times*, December 15, 2002.
12. "American-Born Taliban Fighter Jailed in Norfolk," *The Virginian-Pilot*, April 6, 2002; "'Enemy Combatant' Hamdi to Be Released," *NBC News*, October 25, 2004.
13. Charlie Savage, "Appeals Court Overturns Terrorism Conviction of Salim Ahmed Hamdan, Bin Laden's Driver," *New York Times*, October 16, 2012.
14. Jennifer K. Elsea, "Abu Zubaydah and the State Secrets Doctrine," *CRS Legal Sidebar* LSB10764 (Congressional Research Service, January 6, 2023).
15. James Risen and Judith Miller, "Threats and Responses: Hunt for Suspects; C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen," *New York Times*, November 5, 2002.
16. Abby Goodnough and Scott Shane, "Padilla Is Guilty on All Charges in Terror Trial," *New York Times*, August 17, 2007, www.nytimes.com/2007/08/17/us/17padilla.html; Ashby Jones, "A DOJ Sidestep? Charges Coming Against Alleged U.S.-Based Terrorist," *Wall Street Journal*, February 27, 2009, www.wsj.com/articles/BL-LB-9563.
17. Rebecca Ingber, "International Law Constraints as Executive Power," *Harvard International Law Journal* 57, no. 1 (2016): 56, 95–96, https://scholarship.law.bu.edu/faculty_scholarship/262.
18. George W. Bush, "Humane Treatment of al Qaeda and Taliban Detainees," Memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff (February 7, 2002), 5, www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184_2.pdf; Jay S. Bybee, Assistant Attorney General, "Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees," Memorandum for Alberto R. Gonzales and William J. Haynes II (January 22, 2002), 10, www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf; Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton & Company, 2007), 39, 110.
19. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
20. *Hamdi v. Rumsfeld*, 542 U.S. at 554 (Scalia dissenting, joined by Stevens).
21. John C. Yoo, *Memorandum for the Attorney General*, memorandum to John Ashcroft, November 2, 2001, www.justice.gov/sites/default/files/olc/legacy/2011/03/25/johnyoo-memo-for-ag.pdf.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

22. William E. Moschella, Assistant Attorney General, "Memorandum to Pat Roberts, Chairman, Peter Hoekstra, Chairman, John D. Rockefeller, IV, Vice Chairman, Jane Harman, Ranking Minority Member, Select Committee on Intelligence" (December 22, 2005) 2, https://irp.fas.org/agency/doj/fisa/doj122205.pdf.
23. Barack Obama, "The President's News Conference," in *Weekly Compilation of Presidential Documents* (Office of the Federal Register, National Archives and Records Administration, 2014), 9–10. www.govinfo.gov/content/pkg/DCPD-201400588/pdf/DCPD-201400588.pdf; S. Rep. No. 113–288 (2014), *Committee Report on the CIA's Detention and Interrogation Program*, vii; Jennifer K. Elsea, "Abu Zubaydah and the State Secrets Doctrine," *CRS Legal Sidebar* LSB10764 (Congressional Research Service, January 6, 2023).
24. Jay S. Bybee, "Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A," Memorandum to Alberto R. Gonzales (August 1, 2002), 39, www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf.
25. Detainee Treatment Act of 2005, Pub. L. No. 109–148, § 1003(a), 119 Stat. 2680.
26. John McCain, *Statement on the Detainee Treatment Act*, Cong. Rec. vol. 151, no. 128 (October 5, 2005): S11064.
27. George W. Bush, Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," in *Public Papers of the Presidents of the United States: George W. Bush, Book II, 2005* (Office of the Federal Register, National Archives and Records Administration, 2006), 1901–903.
28. R. Jeffrey Smith, "McCain Names Practices Detainee Bill Would Bar," *Washington Post*, September 25, 2006.
29. George W. Bush, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," *The White House*, September 6, 2006, https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.
30. FISA Amendments Act of 2008, Pub. L. No. 110–261, 122 Stat. 2436; Edward C. Liu, *Surveillance of Foreigners Outside the United States Under Section 702 of the Foreign Intelligence Surveillance Act (FISA)* (Congressional Research Service, 2016), https://crsreports.congress.gov/product/pdf/R/R44457.
31. *Boumediene v. Bush*, 553 U.S. 723 (2008).
32. Steven G. Bradbury, Principal Deputy Assistant Attorney General, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001," Memorandum for the files (January 15, 2009), https://irp.fas.org/agency/doj/olc/olc011509.pdf.
33. Michael Ignatieff, "Lesser Evils," *New York Times Magazine*, May 2, 2004, www.nytimes.com/2004/05/02/magazine/lesser-evils.html.
34. American Civil Liberties Union, *A Call to Courage: Reclaiming Our Liberties Ten Years After 9/11* (American Civil Liberties Union, 2011), 9.
35. 158 Cong. Rec. S7024 (daily ed. Nov. 28, 2012) (statement of Sen. Feinstein); 158 Cong. Rec. S7299 (daily ed. Nov. 30, 2012) (statement of Sen. Leahy).
36. John C. Yoo and Robert J. Delahunty "Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States," Memorandum to Alberto R. Gonzales (October 23, 2001), 3, https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011023.pdf.
37. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).
38. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (O'Connor, J., plurality opinion).
39. Barack Obama, Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

Facilities," *Federal Register* 74, no. 16 (January 27, 2009): 4897–900; Barack Obama, Executive Order 13491 of January 22, 2009, "Ensuring Lawful Interrogations," *Federal Register* 74, no. 16 (January 27, 2009): 4893–96.

40. Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (Little, Brown & Co. 2015), 241.
41. Eric Holder, "Attorney General Eric Holder Speaks at Northwestern University School of Law," Chicago, IL, March 5, 2012, U.S. Department of Justice, Office of Public Affairs, www.justice.gov/archives/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.
42. White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (December, 2016). Available at www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.
43. White House, *The National Security Strategy of the United States of America* (September 2002), 15.
44. John Lewis Gaddis, *Surprise, Security, and the American Experience* (Harvard University Press, 2004), 85–86.
45. "Legal and Practical Consequences of a Blockade of Cuba," in *Supplemental Opinions of the Office of Legal Counsel*, vol. 1 (U.S. Department of Justice, 1962): 486. Also at www.justice.gov/file/147796-0/dl.
46. Derek Chollet and James Goldgeier, *America between the Wars: From 11/9 to 9/11: The Misunderstood Years between the Fall of the Berlin Wall and the Start of the War on Terror* (Public Affairs, 2008), 94.
47. In the end, the Bush Administration formally justified its Iraq war as pursuant to UN Security Council authorization, not as an exercise of preemptive self-defense. William H. Taft and Todd F. Buchwald, "Preemption, Iraq, and International Law," *The American Journal of International Law* 97, no. 3 (2003): 557–63, www.jstor.org/stable/3109840.
48. Yoo, "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," 188.
49. Jay S. Bybee, "Authority of the President under Domestic and International Law to Use Military Force Against Iraq," in *Opinions of the Office of Legal Counsel*, vol. 26, (U.S. Department of Justice, 2002): 152. Also at www.justice.gov/file/145926-0/dl?inline.
50. William H. Taft IV and Todd F. Buchwald, "Preemption, Iraq, and International Law," *American Journal of International Law* 97, no. 3 (2003): 557–63.
51. Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107–243, § 3, 116 Stat. 1498 (2002).
52. George W. Bush, "Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002, October 16, 2002," in *Public Papers of the Presidents of the United States: George W. Bush, 2002, Book II* (Office of the Federal Register, 2006), 1814–15. Also at www.govinfo.gov/content/pkg/PPP-2002-book2/pdf/PPP-2002-book2-doc-pg1814.pdf.
53. Robert Draper, *To Start a War: How the Bush Administration Took America into Iraq* (Penguin Press, 2020), 221–31.
54. "President Bush Outlines Iraqi Threat," George W. Bush White House Archives, October 7, 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html.
55. Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* (University of Chicago Press, 2010), 273–76.
56. Gaddis, *Surprise, Security, and the American Experience*, 72–73.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

13 CONCLUSIONS AND THE FUTURE OF WAR POWERS

1. This crucial point is elegantly made by Philip Bobbitt, "War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath," *Michigan Law Review* 92 (1994): 1386. His work teaches how the American war-powers system operates within a complex strategic environment. In even broader terms, Bobbitt argues that forms of warfare and constitutional order will continue to evolve in response to one another, and that this co-evolution is vital for democracies. Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (Knopf, 2008).
2. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118–31, § 1250A (2023); Megan Mineiro, "House Gives Bipartisan Approval to $900 Billion Defense Bill," *New York Times*, December 10, 2025, www.nytimes.com/2025/12/10/us/politics/house-approves-defense-bill.html.
3. For such a critical view, see Stephen Wertheim, *Tomorrow, the World: The Birth of U.S. Global Supremacy* (Belknap Press, 2020). I borrow here some of the terminology of Dale Copeland, *Economic Interdependence and War* (Princeton University Press, 2015), 73.
4. Ashley S. Deeks, *The Double Black Box: National Security, Artificial Intelligence, and the Struggle for Democratic Accountability* (Oxford University Press, 2025), chapter 3.
5. William H. Rehnquist, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, memorandum opinion for the Special Counsel to the President, Office of Legal Counsel, May 22, 1970.
6. Lawrence Freedman, *The Future of War: A History* (Public Affairs, 2017), xxi. Whatever future warfare looks like, Bobbitt's *Terror and Consent* remains relevant for its account of how constitutional order should evolve to match changing forms of conflict.
7. Deeks, *The Double Black Box*, 128.
8. Jack Goldsmith and Matthew Waxman, "The Legal Legacy of Light-Footprint Warfare," *The Washington Quarterly* 39, no. 2 (Summer 2016): 7–21.
9. Mara Karlin, "The Return of Total War," *Foreign Affairs*, October 22, 2024, www.foreignaffairs.com/ukraine/return-total-war-karlin.
10. Lily Kuo and Pei-Lin Wu. "Taiwan Reassured – and Surprised – by Pentagon Focus on Deterring China," *Washington Post*, March 31, 2025.
11. Richard W. Maass, "Legal Deterrence by Denial: Strategic Initiative and International Law in the Gray Zone," *Texas National Security Review* 8, no. 3 (Summer 2025): 54–73.
12. Taiwan Relations Act, Pub. L. No. 96–8, §§ 3(a)–3(c), 93 Stat. 14 (1979); National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, §§ 1263–1264, 136 Stat. 2395 (2022); National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118–31, §§ 1307–1309, 137 Stat. 136 (2023).
13. Dexter Filkins, "The Future of Warfare Comes to America," *New Yorker*, July 14, 2025, www.newyorker.com/newsletter/the-daily/the-future-of-warfare-comes-to-america.
14. Christian Brose, *The Kill Chain: Defending America in the Future of High-Tech Warfare* (Hachette Books, 2020), 195–96; Iskander Rehman, *Planning for Protraction: A Historically Informed Approach to Great Power War and Sino-US Competition* (International Institute for Strategic Studies, 2024), 104.
15. Matthew C. Waxman, "War Powers Reform: A Skeptical View," *Yale Law Journal Forum* 133 (2024): 776–95, https://yalelawjournal.org/essay/war-powers-reform-a-skeptical-view. Bobbitt's review of Ely, cited above, is notable not only for its critique of the conventional view that prior congressional authorization is required for major hostilities but also for its skepticism about reform proposals built around rigid legal formulas.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 12 Nov 2026 at 07:18:29, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms.
https://www.cambridge.org/core/product/0F7CBE6C2704996C23DBCC2E99703255