CONGRESSIONAL AUTHORITY OVER ARMED CONFLICT AND ITS UNTAPPED POWER UNDER ARTICLE IV

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Modern conflicts have significantly challenged the conventional understanding of the constitutional separation of powers regarding the regulation of armed conflict. For decades, the executive branch has been accumulating more authority to conduct military operations, relatively independent of direct congressional approval.[1] This transformation has been, in part, due to Congress's acquiescence to the actions of the executive branch.[2] Although Congress still maintains the "Power of the Purse," giving it the ultimate authority to functionally approve or disapprove armed conflicts, several political factors have resulted in considerable executive latitude to engage in armed conflict. These political factors include political discord, lump-sum appropriations, and clever use of reprogramming authorities.[3] Consequently, while its appropriation power remains a potent tool, the appropriation power's utility in the routine authorization and regulation of armed conflicts has diminished.[4] However, there is another under-utilized constitutional power Congress may also wield to regulate executive action. The Constitution, through Article IV, Section 3, grants Congress the authority to regulate the disposal of Government property—known as the "Property Clause."

Under this clause, Congress has the constitutional authority to define and oversee the disposition of all Government assets, to include munitions, food, fuel, and any other military property. Through its appropriations authority, Congress controls the allocation of funds for procuring new government property but may also establish stipulations for its use from the outset. Simultaneously, Congress wields the capacity to impose specific conditions for the disposal of existing government property at a later stage. The Property Clause constitutes the second

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[1] *See, e.g.*, McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L. J. 2512, 2515 (2018).

[2] *Id*. at 2578–79.

[3] See *infra* notes 6–14 and accompanying text.

[4] *See* Neumeister, *supra* note 1, at 2517–23.

component of Congress's constitutional prerogative to establish usage conditions for already-purchased property, regardless of whether any conditions were initially set during the appropriation process. It appears that the full potential of the Property Clause remains largely untapped.

This Article presents a novel approach for Congress to enhance its role in regulating armed conflicts through its Constitutional authority. By leveraging the Property Clause, Congress can effectively limit the executive's authority to dispose of military equipment in the execution of an unauthorized armed conflict. To illustrate how the Property Clause may be effectively used to achieve this, this Article examines how the Property Clause could be incorporated into the War Powers Resolution ("WPR") such that it is triggered when the Armed Forces directly or indirectly disposes of, or is likely to dispose of, Government property during hostilities against foreign nations Utilizing the Property Clause could represent one-half of a constitutional pincer movement, where constraints are initially imposed through conditions attached to appropriations (that is, the first half of the pincer) and further limitations are imposed on the disposal of existing Government property (the second half). From cradle to grave, Congress has the authority to set conditions on the use of property. Yet Congress has thus far only used its authority to set conditions at the cradle.

This Article begins by providing a concise overview of the practical challenges associated with Congress's appropriations powers. Part II delves into the limitations of the current state of the WPR and its overall lack of effectiveness. Part III explores the significance of the Property Clause and the constitutional authority it bestows upon Congress. Part IV presents an analysis a along with illustrative language demonstrating potential modifications that incorporate the Property Clause.

I. THE POWER OF THE PURSE AND EXECUTIVE FLEXIBILITY

Congress's appropriations power serves as its primary means to simultaneously empower and restrain the executive branch by allocating funds to achieve specific ends and attaching conditions on when and how to spend the funds.[5] Yet, despite this great authority, it is functionally limited by both Congress's need for politically unity and the complexities inherent in the modern executive branch. In comparison to the Congresses of the eighteenth and nineteenth centuries, which could allocate specific appropriations to a much smaller and simpler executive branch, today's Congress faces disadvantages. Presently, Congress generally lacks the institutional capacity to provide anything

[5] *See generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

other than lump-sum funding to the executive, granting substantial discretion in its use.[6]

That is not to say that Congress does not or will not flex its appropriations muscle, as there are numerous examples of this in every annual budget. However, in the post-9/11 world, Congress has struggled to employ the appropriations power to effectively regulate unauthorized armed conflict.[7] Nevertheless, Congress does wield its appropriations authority to enforce its will on both significant and minor matters.[8] Extensive literature has been dedicated to this power and it is evident that Congress may tailor funding conditions according to its discretion, ranging from relatively trivial line items (for example, prohibiting funds for the retirement of the U.S. Air Force E-3 Sentry aircraft),[9] to expressions of national policy (for example, Leahy vetting),[10] to outright denial of funds for armed conflicts (for example, denying funds for the Vietnam War[11] or denying funds for the "continuous presence in Somalia of United States military personnel . . . after September 30, 1994").[12] During armed conflicts between 1970 and 2007, Congress exercised its appropriations power on five occasions to explicitly restrict or terminate the executive's deployment of the U.S. military overseas.[13]

Generally, the appropriations power has inherent weaknesses in two key areas: (1) executive flexibility in the funding space (for example, creative interpretations or use of existing funding streams and reprogramming authorities); and (2) political considerations that impact the decision-making process within Congress.

In practice, Congress faces political challenges when attempting to confront a unitary executive.[14] The structural design of Congress presents the first

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[6] *See, e.g.*, Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 90–91 (1995).
[7] *See* Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 476–78 (2011).
[8] U.S. CONST. art. I, § 9, cl. 7.
[9] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395, 149.
[10] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 1204.
[11] H.R.J. Res. 636, 93d Cong. (1973) (enacted as Pub. L. No. 93-52, § 108, 87 Stat. 130, 134).
[12] Pub. L. No. 103-139, § 8151, 107 Stat. 1418 (1995).
[13] AMY BELASCO, LYNN CUNNINGHAM, HANNAH FISCHER, & LARRY NIKSCH, CONG. RSCH. SERV., RL33803, CONGRESSIONAL RESTRICTIONS ON U.S. MILITARY OPERATIONS IN VIETNAM, CAMBODIA, LAOS, SOMALIA, AND KOSOVO: FUNDING AND NON-FUNDING APPROACHES tbl. 1 (2007); *see also* RICHARD F. GRIMMETT, CONG. RSCH. SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 5 (2007).
[14] Alan L. Feld, *The Shrunken Power of the Purse,* 89 B.U. L. REV. 487, 494 ("In sum, congressional control over federal expenditures has been weakened in several ways. Permanent appropriations constrain Congress's ability to review and change priorities through the appropriation process.

challenge, as it tends to default to inaction when a majority agreement cannot be reached. The second political challenge arises from potential public perception of withdrawing funding from ongoing armed conflicts, as Congress aims to avoid appearing as though it is abandoning the troops. These, and other obstacles, significantly hinder Congress's ability to effectively regulate the executive in armed conflicts.

The structure of Congress is, by design, a fragmented institution that requires majority agreement, and occasionally a supermajority, to act. Political parties, individual Congress members' perspectives, and competing geographic interests consistently divide Congress.[15] In today's political climate, Congress often tends toward inaction (such as in the case of government shutdowns) or passing compromised bills that may be so diluted as to miss the mark.[16] In theory, congressional gridlock can benefit Congress: "[t]he burden of [C]ongressional inaction shifts in Congress's favor . . . when a desired outcome requires enactment of new legislation."[17] However, in the context of armed conflict, inaction unequivocally favors the executive by creating a gray area, which allows the executive to invoke his Article II authorities.

Engaging in armed conflict does not require new enabling legislation, and funding can be secured from existing funding streams. Once the armed conflict is underway, the executive has put Congress in a political pickle by typically forcing one of three outcomes: withhold funding for troops engaged in active hostilities—generally a politically unappetizing move; acquiesce by maintaining the status quo vis-à-vis funding; or fully fund and authorize the executive's actions.[18]

The executive branch may also secure funds to initiate or maintain armed conflicts within its own existing coffers. The executive possesses the ability to finance the initial stages of an armed conflict through regular Department of Defense (DoD) operations and maintenance funds, as well as reprogramming authority, without explicit congressional approval if it is deemed to be in the national interest.[19] This applies not only to minor military interventions, such as the 2011 military intervention in Libya, but also to large-scale combat operations

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Explicit grants of discretion to alter or suspend congressional directives for the use of funds transfer the ability to make choices to executive agencies.").

[15] *See id*. at 488.

[16] Drew Desilver, *The Polarization in Today's Congress has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://pewrsr.ch/3YfKsfL.

[17] Feld, *supra* note 14, at 488.

[18] *See* Ackerman & Hathaway, *supra* note 7, at 477.

[19] *Id*.

like Operation Desert Storm.[20] Operation Desert Storm's initial deployment was financed using existing DoD funds, and specific appropriations for Desert Storm were not requested until six weeks into operations.[21] Indeed this has been a regular executive practice throughout history: in emergent circumstances, creatively spend or commit funds and seek congressional approval later.[22] Should Congress begin appropriating funds toward the emergent situation via the regular committee process, the executive can request "emergency" supplemental appropriations that bypass those congressional authorizing committees.[23] During the Iraq War, Presidents Bush and Obama both frequently utilized emergency funding requests not only to expedite appropriations through Congress, but also to put Congress at a political disadvantage, knowing that if Congress did not approve the request, it would be seen as denying troops in the field the materiel they needed to fight and win.[24]

When Congress and the executive are at odds, the restrictions and conditions imposed on executive action through appropriations begins a game of funding cat and mouse. Recent instances unrelated to armed conflict highlight the executive's flexibility in utilizing funds, underscoring the functional freedom of movement the executive enjoys in the funding environment. Former president Donald Trump's use of DoD funds to build a southern border wall is one example of creative, though perhaps disingenuous, legal reasoning to reprogram funds. In short, then president Trump requested funding from Congress to fulfill his campaign promise of building a southern border wall.[25] Congress partially funded the wall, granting $1.3 billion for construction instead of the $5.7 billion sought.[26] Having been denied the full funding for the border wall, President Trump declared a national emergency at the southern border.[27] The national emergency declaration triggered 10 U.S.C. § 2808, granting the DoD authority to utilize unobligated military construction funds for other government projects.[28] Additionally,

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[20] *See* Raven-Hansen & Banks, *supra* note 6, at 87; JEREMIAH GERTLER, CONG. RSCH. SERV., R41725, OPERATION ODYSSEY DAY (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS 22 (2011) ("At the rate of expenditures, DOD estimates that the total incremental cost—i.e. expenses over and above the normal costs of day-to-day activities—of Libya-related operations could reach about $800 million during FY2011. The Defense Department expects to cover the added operational costs temporarily, at least, through 'cash flowing,' which involves reallocating funds originally intended for other purposes within the defense budget.").
[21] *Id*.
[22] Neumeister*, supra* note 1, at 2519.
[23] Ackerman & Hathaway, *supra* note 7, at 493.
[24] *Id*. at 506–07.
[25] Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency to Fund Border Wall, Democrats Promise a Fight*, NPR (Feb. 15, 2019, 5:00 AM), https://n.pr/3ZZbrOg.
[26] *Id*.
[27] Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).
[28] Consolidated Appropriations Act, 2019, Pub L. No. 116-6, § 229, 133 Stat. 13 (2019); Jacqueline Lewis, *The Executive's Power of the Purse in National Emergency: The President's Plan to Poach Defense Funds to Build the Wall*, 34 GEORGETOWN IMMIGR. L.J. 825, 827 (2020).

President Trump intended to use 10 U.S.C. § 284 authority and § 8005 authority to reprogram $2.5 billion and "up-to" $4 billion, respectively, to the wall from the DoD's drug interdiction fund through a series of secretary of defense determinations.[29]

President Trump's actions to reallocate funds faced legal challenges, as they were deemed to violate statutory authority. However, the case was ultimately dismissed due to President Joe Biden's election and the subsequent cancellation of the border wall construction.[30] Nonetheless, nearly $10 billion of DoD funds had already been redirected to the wall, diverting resources from crucial areas such as military construction, F-35 fighter jets, and National Guard equipment, before either litigation or political pressure could intervene.[31] The executive, as a single individual, can act more swiftly than Congress or the courts, resulting in difficult-to-undo actions.

Another instance highlighting creativity in funding allocation is the recent use of Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) funds by the DoD. These funds were used to reimburse DoD installations for expenses associated with the evacuation and housing of Afghan refugees. OHDACA funding is intended for "humanitarian assistance . . . humanitarian relief and for other humanitarian purposes *worldwide.*"[32] As the name suggests, the intent is to use this funding *overseas* and it is almost exclusively used to support foreign partners.[33] Despite OHDACA's emphasis on overseas humanitarian assistance, the DoD used this funding stream to reimburse U.S.-based installations for $238 million.[34] The DoD's rationale for using overseas humanitarian funds for domestic installations was presumably based on the direct causal link between the expenses and the humanitarian disaster that arose from Afghanistan's rapid collapse.[35] While some may not consider the use of OHDACA funds for such purposes as a significant breach of the constitutional balance of power, it does underscore the executive's ability to creatively and flexibly find funding when necessary.

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[29] *See, e.g.*, *id.*; *The White House Fact Sheet: The Funds Available to Address the National Emergency at Our Border*, WHITE HOUSE (Feb. 26, 2019), https://bit.ly/47Yl15E.
[30] *See* Sierra Club v. Trump, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.* Biden v. Sierra Club, 142 S. Ct. 46 (2021).
[31] John M. Donnelly, *Most of Pentagon Billions Moved to Border Wall Not Recoverable*, ROLL CALL (May 7, 2021, 7:36 PM), https://bit.ly/4eNtWcy.
[32] 10 U.S.C. § 2561(a)(1) (2022) (emphasis added).
[33] *See* DEP'T OF ARMY, NO. 12-21, COMMANDER'S GUIDE TO SUPPORTING REFUGEES AND INTERNALLY DISPLACED PERSONS 27 (2012) (describing the purpose of OHDACA as a permanent fund for "[p]rojects to assist the civilian populations of developing nations.") (emphasis added).
[34] DEP'T OF DEF. OFF. OF INSPECTOR GENERAL, DODIG-2023-040, MANAGEMENT ADVISORY: DOD RESTORATION COSTS TO REPAIR FACILITIES AFTER SUPPORTING OPERATION ALLIES REFUGE AND OPERATIONS ALLIES WELCOME HOME 5 (2022).
[35] *See id*.

When discussing Congress's constitutional authority in matters of war making, the focus often centers on its appropriations powers, as formal declarations of war have become seemingly obsolete and its other national defense authorities mainly deal.[36] As a practical matter, Congress's appropriations power has limited effectiveness on significant issues of national security, particularly in the current political environment. While Congress has the ability to tailor funding conditions and has exercised its power to restrict or terminate military deployments in the past, it does not frequently impose its will due to political obstacles and its own fragmented nature. The executive branch, on the other hand, has greater flexibility in utilizing existing funding streams and reprogramming authorities, allowing it to initiate and sustain armed conflicts without explicit congressional approval. The executive's ability to creatively allocate funds highlights its functional freedom of movement in the funding environment. These examples demonstrate that the executive can act swiftly, often with difficult-to-undo consequences, while Congress struggles to effectively regulate executive actions.

II. ISSUES FACING THE WAR POWERS RESOLUTION

The 1973 WPR signifies Congress's concerted effort to reclaim some of its diminished control over the executive's ability to initiate military action without congressional consent.[37] Passed in the wake of the Vietnam War, the WPR aimed to reassert the role of Congress in armed conflict, as envisioned by the Constitution's framers (according to Congress).[38] However, the effectiveness of the WPR is subject to much debate and discourse. Major criticisms can be categorized into two interconnected groups: (1) the WPR does not bind the executive's Article II authority to act in the national interest;[39] and (2) the WPR

[36] *See, e.g.*, John C. Dehn, *War is More Than a Political Question*, 51 LOY. U. CHI. L.J. 485, 491–96, 509 n.138 (2019) (discussing Congress's power to declare war, grant "letters of Marque and Reprisal," establish rules governing the military as well as captures on land and sea, the authority to raise and support Armies, provide for a Navy, calling forth and arming the various militia, among others).

[37] War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548, § 1543(a) (2022)).

[38] 50 U.S.C. § 1541(a) (2024) ("It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.").

[39] *See, e.g.*, Overview of the War Powers Resolution, 8 Op. O.L.C. 271 (1984). C*ontra Fall Symposium On The 2001 And 2002 Authorization for Use of Military Force Resolutions and Their Relevance to the Current Military Operations Against The Islamic State in Iraq And Syria*., 5 AM. U. NAT'L SEC. L. BRIEF 69, 103 (2015) ("And I have a bit of a hard time understanding that because if anybody takes a look at Article II, you see clearly that the President is not endowed with any specific war powers whatsoever. And I think, if anything, the War Powers Resolution grants the President

has no organic enforcement mechanism and is, therefore, essentially a symbolic action by Congress.[40] Additionally, much of the discussion surrounding the WPR centers around two key provisions: one that imposes consultation and reporting requirements on the executive, and another that limits the executive's authority to engage in hostilities beyond a period of 60 days.

The WPR Consultation Clause sets forth two conditions that, if met, mandates the executive to consult with Congress. It states:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.[41]

The requirement for prior consultation serves as the initial obligation under the WPR. However, if consultation is not feasible prior to introducing armed forces into hostilities, Section 4 of the WPR mandates that a report be submitted within 48 hours after such introduction.[42]

It is worth noting that the WPR deliberately uses the term "hostilities" vice "armed conflict" to encompass situations where a "state of confrontation" exists even without actual combat.[43] After a report has been made pursuant to Section 4, Section 5(b) requires the executive to withdraw the armed forces from hostilities after 60 days (extendable up to 90 days if the executive determines it to be necessary) unless Congress specifically authorizes the hostilities.[44]

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war powers. It's not specifically telling him how to run his Army and Navy as Commander-in-Chief, but it certainly tells him when he can and cannot use it.").

[40] *See, e.g.*, MATTHEW C. WEED, CONGR. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 65–67 (2019).

[41] 50 U.S.C. § 1542 (1973).

[42] *Id*. § 1543.

[43] H.R. Rep. No. 93-287 at 7 (1973); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, Op. Att'ys Gen. 193–94 (1980).

[44] 50 U.S.C. § 1544(b) (1973). The requirement reads as follows:

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon

However, executives since President Nixon have baulked at the WPR's requirements, selectively complying, while objecting to these requirements.[45] The U.S. Department of Justice's Office of Legal Counsel's (OLC) opinion on the 2011 Libya military intervention succinctly argues that the WPR does not restrict the executive's control over the armed forces based on his Article II authority:

> [T]he President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.[46]

Under this reading the WPR does not bind the executive but rather empowers him to act, as it acknowledges and, in a way, encourages unilateral decisions to engage in hostilities within the 60-day window.

In terms of executive limitations, the OLC opinion primarily focuses on restrictions rooted in the Constitution rather than those derived from statutes.[47] The opinion notes that the only true constitutional restraint is whether the "military engagement . . . constitutes a 'war' within the meaning of the Declaration of War Clause . . . ."[48] OLC provides a broad definition of war, describing it as "prolonged and substantial military engagements" that expose servicemembers to "significant risk over a substantial period."[49] Rather than view the WPR as unconstitutionally limiting the executive's Article II authority, the OLC opinion views the WPR as a recognition of the executive's inherent authority

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> the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Id.

[45] E.L. Gaston, *War Powers Far from a Hot Battlefield: Checks and Balances on Presidential War-making through Individual and Unit Self-Defense*, 10 HARV. NAT'L SEC. J. 195, 228–29 (2019) (noting executives have under-reported hostilities, submitted reports late, or not submitted reports at all).

[46] Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 33 (2011).

[47] *See id*. at 31.

[48] *Id*.

[49] *Id*.

to employ the armed forces in situations short of war.[50] Thus, it takes constitutional authority to limit constitutional authority.

In the WPR Congress cited Article I, Section 8 of the Constitution (the Necessary and Proper Clause) for its constitutional authority to regulate the executive.[51] The Necessary and Proper Clause gives Congress "the power to make all laws necessary and proper for carrying into execution, not only its own powers, but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."[52] While this may be the case, there is no organic enforcement mechanism for any WPR provisions.[53] Congress, for its part, has generally been unassertive in enforcing the WPR's consultation and reporting requirements through any means, including the appropriations power.[54]

Based on OLC's strong implication that only constitutional authority can limit the executive's use of the armed forces, the appropriations power is Congress's counteracting power. However, as discussed earlier, the political will to exercise this power is often fraught with practical and political limitations. Nevertheless, there is one particularly intriguing proposal to enhance the "constitutional" effectiveness of the WPR by leveraging the House of Representatives' parliamentary procedure to trigger a functional funding cutoff.[55] This proposal involves modifying the House of Representatives' internal parliamentary procedures to include the "rule of germaneness," which necessitates a relationship between an amendment and the matter being amended.[56] For example, if Congress (or the House alone) passes a resolution determining that military action is not congressionally authorized (and consequently subject to the WPR's withdrawal requirements), the germaneness rule would enable any House representative to effectively veto military funding via a simple point of order objection.[57] If the House desired to fund the military action despite concerns with the WPR, then a simple majority would overrule the point of order objection.[58] Advantageously, a simple majority within the House

[50] *See id*.
[51] 50 U.S.C. § 1541(b) (1973).
[52] *Id*.
[53] *But see id*. § 1544(c) (Section 5(c) provides that the executive shall remove armed forces from hostilities if the Congress passes a concurrent resolution to do so. However, this provision is very likely an unconstitutional legislative veto under INS v. Chadha, 462 U.S. 919 (1983)).
[54] *See* Gaston, *supra* note 45, at 229–29; Laurence D. Pierce, *The Consultation Clause of the 1973 War Powers Resolution*, 1 ANTIOCH L. J. 125, 139 (1981).
[55] Michael J. Glennon & Charles Tiefer, *How to End Forever Wars*, LAWFARE (Sep. 9, 2019, 8:00 AM), https://bit.ly/3NfmI5o.
[56] *Id*.
[57] *Id*.
[58] *Id*. (noting that this parliamentary procedure rule would be veto-proof, insulated from Senate meddling, avoid litigation, and not an unconstitutional legislative veto under *Chadha*).

alone would determine whether to fund the action. Since it is an internal matter of the House protected under Article I, Section 5 of the Constitution, it would not require presentment to take effect. Therefore, it would be subject to neither presidential veto nor Senate objection.[59] The authors of this proposal have named this parliamentary mechanism the "war powers lockbox," describing the reliance on the House's inherent constitutional authority to achieve its objective.[60] Implementing the war powers lockbox or a similar device, derived from the Constitution, would satisfy the OLC opinion's notion of "constitutionally based" limitations.

Various other amendments and courses of action have been proposed to strengthen the WPR. These range from seeking injunctive relief from the judiciary to enforce a statute—political question concerns aside—to modifying the time limitations and adding a priority joint resolution procedure to aid Congress in sustaining or overriding executive action.[61] Amendments that link the WPR's provisions to an automatic funding cutoff unless Congress proactively authorizes additional funding, such as the war powers lockbox, appear to hold the most promise.[62]

The WPR remains largely unenforced and symbolic. Executives selectively comply with its requirements and creatively interpret its terms. Congress, for its part, has only sporadically used its appropriations powers to pressure the executive regarding the introduction of forces into hostilities since the passage of the WPR.

III. THE PROPERTY CLAUSE

Article IV, Section 3 of the Constitution is generally concerned with territories aspiring to statehood and outlines the process for admitting new states into the Union.[63] Naturally, it grants Congress the requisite authority to directly govern these territories.[64] This grant of authority is known as the Property Clause:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this

[59] *Id*.
[60] *See id*.
[61] *See* Weed, *supra* note 40, at 65–97 (discussing various amendments to the WPR and their relative pros and cons).
[62] *Id*.
[63] U.S. CONST. art. IV, § 3.
[64] *Id*.

> Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[65]

While the first part of Section 3, Clause 2 specifically deals with territory, the phrase "other Property" encompasses all property, both real and personal, owned by the U.S. government. The judiciary has had limited opportunities to interpret this aspect of the Constitution and, to the extent it has been litigated, the focus has primarily been on the authority of Congress to regulate land within states vice the power of and limitations on disposing of "other Property."[66]

The Property Clause grants Congress authority over all government-owned property. In *Ashwander v. Tennessee Valley Authority,*[67] the Supreme Court analyzed the contours of "the power of disposal" over federal property.[68] The Supreme Court heard a challenge to the constitutionality of a congressional program to develop a dam in partnership with the Tennessee Valley Authority.[69] As part of the contract with the Tennessee Valley Authority, the United States owned the dam-generated hydroelectricity, which the government then sold. A suit was brought alleging, inter alia, that Congress lacked the authority to sell the electricity generated from the dam.[70] The Court ruled that Article IV, Section 3 of the Constitution authorized Congress to "dispose" of legally acquired electricity through sale to third parties.[71]

During the analysis of the Property Clause, the Court considered the extent of "other Property" and whether the Constitution prescribed "inherent limitations which render invalid the disposition of property."[72] It concluded that "other Property" encompassed not only real property but also leases, royalties, mineral rights, and all personal property belonging to the federal government. The Court relied on historical understanding of the clause, citing Justice Joseph Story's history of the Constitution, which states in relevant part:

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[65] *Id*. cl. 2.
[66] *E.g.*, United States v. Vaello-Madero, 142 S. Ct. 1539, 1541 (2022); Kleppe v. New Mexico, 426 U.S. 529, 540–41 (1976) (citing *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 673–74 (1945); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922); *Dorr v. United States*, 195 U.S. 138, 149 (1904); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840); Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336–37 (1810)); Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 NEV. L. J. 145, 147 n.7 ("Most recent scholarship on the Property Clause has focused on the power of the United States to own land within states.").
[67] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 331–32 (1936).
[68] *Id*.
[69] *Id*. at 315–18.
[70] *Id*. at 331.
[71] *Id*. at 340–41.
[72] *Id*. at 330.

> [The power of disposal] is not confined to the territory of the United States; but extends to "other property belonging to the United States;" so that it may be applied to the due regulation of all other *personal* and real property rightfully belonging to the United States. And so it has been constantly understood, and acted upon.[73]

Concluding that Congress is constitutionally vested with the power to dispose of personal property, it then turned to any inherent limitations of that power.[74] It found no inherent limitations on how property should be disposed of, leaving the means of disposal to Congress's discretion.[75] As the clause does not specify the method of disposal, Congress is only required to act appropriately based on the "nature of the property."[76]

Other jurisprudence analyzing Section 3 mainly focuses on the real property (that is, "territories") aspect of the section.[77] In *United States v. San Francisco*,[78] the Supreme Court reaffirmed that Congress's power under the Property Clause is "without limitations."[79] Congress was constitutionally empowered to determine both means of disposal and any limits on that disposal.[80] In *Kleppe v. New Mexico*,[81] the Supreme Court turned to the language of the Constitution itself to determine the limitations of Congress's Property Clause authority, focusing on what regulations are "needful" and "respecting" of public lands.[82] It again confirmed that Congress has the exclusive responsibility for determining rules that are necessary and respectful of public property.[83] Regarding federally-owned real property, the Court found that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate."[84]

While these cases dealt with Congress's constitutional authority over real property per the Property Clause, there is no linguistic or logical reason why Congress would not have the same authority over the "other Property" of the U.S. government. The authority, and any inherent restrictions, that is derived from the Property Clause necessarily applies to both "territory" and "other Property" given

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[73] 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1319 (1831) (emphasis added).
[74] *Ashwander*, 297 U.S. at 331.
[75] *Id*. (citing *Gratiot*, 39 U.S. at 533, 538).
[76] *Id*. at 338.
[77] *See generally,* Schmitt, *supra* note 66.
[78] United States v. San Francisco, 310 U.S. 16, 29 (1940) (citing *Gratiot*, 39 U.S. at 533, 538).
[79] *Id*.
[80] *Id*. at 29–30.
[81] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).
[82] *Id*.
[83] *See id*.; *see also* Schmitt, *supra* note 66, at 79.
[84] *Kleppe*, 426 U.S. at 540.

its plain language meaning and reading. In fact, while litigation rarely acknowledges Congress's broad power over U.S. government personal property, Congress's authority under the Property Clause forms the constitutional basis for its delegation of authority to the General Services Administration (GSA).[85] The GSA's mission is to procure, utilize, and dispose of federal property, both real and personal.[86] The GSA's authority to set regulations on the disposal of federal property is uncontroversial.

Inherent within the "complete power" that Congress has over Federal property is its ability to impose conditions on its use, analogous to conditions imposed through the Appropriations Clause.[87] The Supreme Court has equated these two: "[a]lso beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges."[88] The significance of Congress's power over other property of the U.S. government is that Congress may, under this authority, impose conditions on the property's disposal once it has been acquired.

This raises the question of what "dispose" means. At the time of the drafting of the Constitution, "dispose" had multiple verb usages, including:

1. To employ to various purposes; to diffuse . . . .

2. To give; to place; to bestow . . . .

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[85] Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) ("[GSA's authority] to maintain, operate, and alter federal buildings, including their 'grounds, approaches, and appurtenances . . . [is derived] from Congress's power under the Constitution 'to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States.'").

[86] *See* Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 101.

[87] Schmitt, *supra* note 66, at 91–92. Schmitt writes:

> For regulation of activities that take place directly on federal land or involve the use or disposal of federal property to further congressional policy on nonfederal lands, a court might analogize such enactments to actions taken pursuant to the spending power. For regulation of extraterritorial activities that affect federal lands, a court might analogize such enactments to actions taken pursuant to the Commerce Clause.
>
> Congressional actions under the Property Clause to manage or to control the direct disposition of federal property should receive the same deferential review given to exercises of the spending power. In both instances, a reviewing court would find itself in the awkward position of telling a coequal branch how best to manage its resources - money, in the case of the spending power, and real or personal property, in the case of the Property Clause power.

Id.

[88] Ivanhoe v. McCracken, 357 U.S. 275, 295 (1958).

3. To turn to any particular end or consequence . . . .

4. To adapt; to form for any purpose.[89]

Samuel Johnson's Dictionary of the English Language, a frequently referenced source for older definitions, provides six additional definitions of "dispose" that similarly convey the ability to determine the outcome of an object's status.[90] The modern definitions of "dispose," as in "dispose of," are:

1.a(1): to get rid of . . . .

1.a(2): to deal with conclusively . . . .

1.b: to transfer to the control of another . . . .

2: to place, distribute, or arrange especially in an orderly way.[91]

Both the historical and the modern meanings of "dispose" essentially grant the power to regulate an object, although the historical definition may be slightly broader than the modern usage. Again, this understanding of Congress's power, though not often relied on, has been affirmed by the judiciary and in practice is the source of the GSA's authority.

The Property Clause, although overshadowed by the Appropriations Clause in terms of Congress's power, is a potent tool. Under the Property Clause, Congress can regulate the use of federal real and personal property, including imposing conditions on its usage. If the conditions imposed through the Appropriations Clause represent ex-ante control over property usage, the "Other Property" Clause grants Congress ex-post authority to regulate the disposal of property.[92] Congress can impose limitations on the disposal of munitions, food, fuel, and other resources. This authority serves as a constitutionally-based restriction on the executive, as envisioned in the OLC Libya opinion, and may also be politically advantageous for Congress compared to relying solely on the Appropriations Clause.

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[89] *Disposal*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773 4th folio ed.).
[90] *Id*.
[91] *Dispose*, MERRIAM-WEBSTER DICTIONARY, https://bit.ly/4eZ0joS.
[92] *See* Edwards v. Carter, 580 F.2d 1055, 1076 (US. App. D.C. 1978) ("The power to dispose of property is a power with specific constitutional limitations, substantially identical to the appropriation power, and by the Constitution, like the appropriation power and the power to levy taxes, it rests exclusively with the Congress.").

IV. WPR & THE PROPERTY CLAUSE

Simply put, Congress could amend the WPR to prohibit the disposal of DoD property in combat operations in a way that is analogous to cutting off funding via the Appropriations Clause. Utilizing the Property Clause offers several advantages for Congress. First, it is a constitutional authority that, according to the Supreme Court, is equivalent to the Appropriations Clause and may be used to limit executive action.[93] Second, by limiting the disposal of munitions, food, fuel, etc., it diminishes the value of the executive's flexibility to make use of alternative funding mechanisms to obtain desired goods, as discussed in Part I, because the authority to utilize the good itself is prohibited, however obtained. Lastly, this approach may be more acceptable for Congress as it shields them from political concerns about abandoning troops involved in active hostilities—the troops would be armed and prepared for action, only awaiting authorization to dispose of government property.

Modifying the WPR to limit executive action via the Property Clause would not require a massive overhaul of the WPR; though as a practical political matter it may be unachievable. This Article proposes a few suggested changes to the WPR to illustrate how the Property Clause could be integrated to bolster Congress's ability to regulate armed conflict; however, this Article will not provide suggestions for every single instance where the Property Clause would be incorporated. Proposed language provided in italics.

> **§ 1541(c) "Presidential executive power as Commander-in-Chief; limitation"**
> The *delegated* power of the President as Commander-in-Chief *to dispose of any Government property, to include combat equipment, by the* United States Armed Forces *while engaged* in hostilities, *in direct or indirect support* of hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, *may be* exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.
>
> **§ 1542 "Consultation; initial and regular consultations"**
> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, *and those circumstances indicate that Government property, to include*

[93] *Id.*

combat equipment, may be disposed of without congressional authorization. After every such introduction, *the President*, shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

§ 1543 "Reporting requirement"

(a) "Written report; time of submission; circumstances necessitating submission; information reported"

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced *and the disposal of Government property against foreign nationals, not previously authorized, is clearly indicated by the circumstances*-

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

§ 1544(b) "Congressional action; Termination of use of United States Armed Forces; exceptions; extension period"

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall *cause the* United States Armed Forces *to cease disposing of Government property* with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such *disposal of Government property by the* United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use *Government property* in the course of bringing about a prompt *cessation of disposing of Government property*.

Shifting the authority of the WPR to the disposal of property could be used in conjunction with the Appropriations Clause to limit executive action to engage in hostilities. The Appropriations Clause could be used to set conditions on any new equipment, while the Property Clause could be used to set conditions for the use or disposal of existing equipment. This congressional pincer movement could provide comprehensive boundaries on the executive's ability to engage in hostilities by restricting the materiel necessary to accomplish the mission. Congress could also pass a stand-alone bill that conditions the use of DoD property at large to the adherence to the WPR. However, it is important to note that any modifications to the WPR or bills tying DoD property to WPR conditions would be subject to the presentment clause, which raises legitimate concerns about political feasibility.

It is essential to recognize that this approach would not be a cure-all solution resulting in flawless constitutional harmony. The executive could still interpret or define the concept of "hostilities" creatively when determining the start of the 60-day clock. For instance, then President Barack Obama argued that military operations in Libya were consistent with the WPR and did not require congressional authorization since U.S. ground troops were not engaged in sustained fighting or facing significant risks of casualties.[94] This reinterpretation of "hostilities" allowed the Obama Administration to employ "light-footprint" warfare tactics involving drones, special operations, air, and cyber-attacks that were either not "sustained" or posed minimal risk of U.S. casualties, thereby bypassing the requirements of the WPR.[95] Such creative interpretations would continue to pose challenges for the WPR, regardless of any amendments related to the Property Clause.

However, on a broader scale, Congress could still leverage the Property Clause in such situations, if it so chooses, to effectively regulate armed conflicts since "light-footprint" warfare still necessitates the use and disposal of government munitions, food, and fuel. Therefore, Congress can exercise its "complete power" in this realm to prohibit the utilization of existing combat materiel while employing the Appropriations Clause to restrict future usage.

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[94] DEP'T OF STATE. & DEP'T OF DEF., REPORT ON UNITED STATES ACTIVITIES IN LIBYA 25 (2011); *see also* Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, LAWFARE (June 16, 2011, 08:38 AM), https://bit.ly/3NjM2Hi.

[95] Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7, 13–14 (2016).

V. CONCLUSION.

The dynamics of modern conflicts have raised profound challenges to the traditional constitutional framework that governs the authorization of armed conflict. The shifting balance of power between the executive and Congress poses a significant dilemma. While Congress's traditional appropriations power remains vital for regulating armed conflicts, its practical utility has been compromised by various factors, including political discord and creative use of existing funds and reprogramming authority.

However, the introduction of the Property Clause offers a potential avenue for Congress to enhance its regulatory role. By leveraging this constitutional authority, Congress can complement its appropriations power and restrain unauthorized armed conflicts by prohibiting the disposal of current Government property. This innovative approach suggests that amending the WPR to include the disposal of government property during hostilities can be a pivotal step in achieving greater control over military actions, allowing Congress to play a more assertive role in shaping the future of armed conflict in the 21st century.