JUSTICIABILITY AS A CANON OF AVOIDANCE AND A NORMATIVE GOOD IN WAR POWERS LITIGATION

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INTRODUCTION

On September 29, 2021, a group of bipartisan congresspeople led by Jim McGovern (D, MA) and former congressman Peter Meijer (R, Michigan) introduced H.R. 5410: The National Security Reforms and Accountability Act ("NSRAA").[1] If passed, the NSRAA would be the first significant amendment to the 1973 War Powers Resolution.[2] Passed in the wake of the Vietnam War as a check on the President's Commander-in-Chief powers, the War Powers Resolution requires the President to report the commitment of military forces to Congress within forty-eight hours of deployment.[3] If Congress, within sixty days, does not (1) declare war; (2) enact specific authorization for the use of such force; or (3) extend the sixty-day period, the President "shall terminate any use of United States Armed Forces."[4]

According to McGovern and Meijer, their bill would "reclaim" Congress's constitutionally prescribed role in war powers disputes which, in their view, has been improperly eroded by a substantial expansion of the President's Commander-in-Chief powers.[5] In the eyes of some scholars and members of Congress, like McGovern and Meijer, the War Powers Resolution currently suffers from two major deficiencies: first, the President can easily circumvent the Resolution's sixty-day clock by simply ending

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[1] National Security Reforms and Accountability Act, H.R. 5410, 117th Cong. (2021) [hereinafter "NSRAA"]. The bill is currently in committee. Similar legislation has also been proposed in the Senate but without any judicial enforcement provisions. *See* National Security Powers Act of 2021, S. 2391, 117th Cong. (2021).

[2] War Powers Resolution, 50 U.S.C. §§ 1541–48 (1973).

[3] *Id*. at § 1544(a)–(b).

[4] *Id*. at § 1544(b). Section 1544(b) also waives the Resolution's termination provisions if Congress is "physically unable to meet as a result of an armed attack upon the United States." *Id*.

[5] Connor O'Brien, *Lawmakers Aim for Blockbuster Overhaul of War Powers, Arms Sale*, POLITICO (Sept. 30, 2021), https://www.politico.com/news/2021/09/30/war-powers-act-bipartisan-overhaul-514794; *see also* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297 (1988).

military operations before the clock expires;[6] second, the Resolution does not define the term "hostilities,"[7] which has led Presidents to construe the term narrowly, allowing them to evade the procedural requirements of the Resolution altogether.[8]

The NSRAA addresses both problems. First, it reduces the War Powers Resolution's sixty-day clock to a stricter twenty-day clock.[9] Second, it defines the term "hostilities" more expansively to include "*any* situation involving *any* continuous or intermittent use of lethal or potentially lethal force by or against United States forces . . . carried out through land, sea, air, space, or cyber operations, or through any other domain, including whether or not such force is deployed remotely."[10]

But the NSRAA goes one step further in reforming the War Powers Resolution. It provides that if the President fails to submit a report detailing the commitment of armed forces—or if the President fails to withdraw armed forces past the NSRAA's twenty-day clock and Congress has not otherwise passed statutory authorization for the introduction of such armed forces—Congress can sue the President and seek injunctive or declaratory relief under its Article I appropriations[11] power.[12] Under the War Powers Resolution as it stands today, there is no such judicial-enforcement

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[6] *See* Koh, *supra* note 5, at 1299; NATIONAL SECURITY REFORMS AND ACCOUNTABILITY ACT, https://mcgovern.house.gov/uploadedfiles/national_security_reforms_and_accountability_act_fact_sheet.pdf (last visited Sept. 5, 2022) (published by Congressman Jim McGovern) [hereinafter NATIONAL SECURITY REFORMS FACT SHEET].

[7] War Powers Resolution, 50 U.S.C. §§ 1541 ("It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, 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.").

[8] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 458–59 (2012); *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7–40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State) (arguing that the Obama Administration's 2011 military operation in Libya did not rise to the level of "hostilities" within the meaning of the War Powers Resolution); NATIONAL SECURITY REFORMS FACT SHEET, *supra* note 6.

[9] NSRAA, H.R. 5410, 117th Cong. § 104(c)(1) (2021). ("If the Congress does not enact a specific statutory authorization for the use of United States forces . . . within 20 days of the introduction of such forces into hostilities or a situation where there is a serious risk of hostilities, the President shall withdraw, remove, or otherwise cease the use of such forces.").

[10] *Id*. at § 110(a)(2) (emphasis added).

[11] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[12] NSRAA, H.R. 5410 § 107(a)(1) ("If an officer or employee of the executive branch, including the President and an officer or employee of the Executive Officer of the President, fails to comply with a provision of this joint resolution, upon the adoption of a resolution . . . the House of Representatives or the Senate may bring an action in the name of the House of Representatives or the Senate (as the case may be) for such relief as may be appropriate, including declaratory judgment and any form of ancillary relief, including injunctive relief.").

provision.[13] Currently, Congress may either prohibit appropriations for uses of force that violate the Resolution, or use more indirect methods of accountability, such as impeachment, holding up executive appointments, or political shaming.[14]

Since Congress passed the War Powers Resolution in 1973, it has tried several times to enforce per se violations of the Resolution in court.[15] However, a federal court has never reached the merits of a war powers dispute between Congress and the President.[16] Instead, courts have relied on a series of Article III justiciability doctrines, namely, standing,[17] the political question doctrine,[18] ripeness,[19] mootness,[20] and equitable discretion, to dismiss war powers cases.[21]

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[13] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 185 n.90 (1996).

[14] *Id*. at 170.

[15] *See* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 1 (2012) (collecting cases).

[16] *Id*.

[17] Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (holding that members of Congress lacked standing to seek declaratory judgment against President Clinton for violating War Powers Clause and War Powers Resolution by directing United States forces' participation in NATO airstrikes against Federal Republic of Yugoslavia without congressional authorization); Holtzman v. Schlesinger, 484 F.2d 1307, 1308, 1315 (2d Cir. 1973) (holding that member of Congress lacked standing to seek declaratory judgment and injunctive relief for bombings in Cambodia); Kucinich v. Obama, 821 F. Supp. 2d 110, 112, 125 (D.D.C. 2011) (dismissing lawsuit for lack of standing by members of Congress seeking to challenge President Obama's military operations in Libya as violating War Powers Clause and War Powers Resolution).

[18] Sanchez-Espinoza v. Reagan, 770 F.2d 202, 204–05 (D.C. Cir. 1985) (Scalia, J.) (holding that suit by members of Congress challenging military aid to Nicaraguan Contras as violating War Powers Resolution presented a political question); Crockett v. Reagan, 558 F. Supp. 893, 895, 989 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (holding that suit by members of Congress challenging U.S. military presence in, and aid to, El Salvador as violating War Powers Clause and War Powers Resolution presented a political question); Mitchell v. Laird, 488 F.2d 611, 613, 615 (D.C. Cir. 1973) (holding that suit by members of Congress challenging Vietnam War as violating War Powers Clause presented a political question); *Holtzman*, 484 F.2d at 1313 (holding that lawsuit by member of Congress challenging bombings in Cambodia as violating War Powers Clause presented a political question); Lowry v. Reagan, 676 F. Supp. 333, 334, 337 (D.D.C. 1987) (dismissing suit by members of Congress seeking declaratory judgment that President Regan violated War Powers Resolution in failing to file reports to Congress of military operations in Persian Gulf as presenting political question); Drinan v. Nixon, 364 F. Supp. 854, 855–56 (D. Mass. 1973) (dismissing lawsuit by member of Congress challenging bombings in Cambodia as violating War Powers Clause as presenting a political question).

[19] Doe v. Bush, 323 F.3d 133, 134–35 (1st Cir. 2003) (holding that suit by members of Congress seeking to prevent President George W. Bush from initiating war with Iraq was not ripe); Dellums v. Bush, 752 F. Supp. 1141, 1149–52 (D.D.C. 1990) (dismissing suit brought by members of Congress to prevent President George H.W. Bush from to attacking Iraq without congressional authorization during the Gulf War for lack of ripeness).

[20] Conyers v. Reagan, 765 F.2d 1124, 1127–29 (D.C. Cir. 1985) (holding action brought by U.S. House members challenging the constitutionality of military invasion of Grenada was mooted by termination of invasion); *Sanchez-Espinoza*, 770 F.2d at 210 (holding that action brought by members of Congress challenging U.S. paramilitary operations in Nicaragua under War Powers Resolution was moot because Boland Amendment appropriations rider expired at the end of Fiscal Year 1983).

[21] *Lowry*, 676 F. Supp. at 337 (dismissing suit by members of Congress seeking declaratory judgment that President Regan violated War Powers Resolution for failing to file reports to Congress of military operations in Persian Gulf because constraints of equitable discretion precluded judicial review);

The NSRAA offers a solution to courts' silence in war powers litigation. Adopting reforms proposed by several scholars to use the judiciary in war powers disputes between the President and Congress, the NSRAA attempts to bypass at least one justiciability obstacle to such suits—standing.[22] It does so by creating an explicit cause of action for the House and the Senate to jointly vindicate their Article I appropriations power in federal court if the President fails or refuses to comply with the provisions of the act and making clear, in order to bolster Article III and legislative standing, that a failure by the President to comply with the NSRAA harms Congress's appropriations power.[23]

But standing is only one tool courts use to remain silent in war powers litigation between Congress and the President.[24] While the NSRAA's cause of action might permissibly give Congress the standing it needs to vindicate its appropriations power in war powers litigation, it does not eliminate the other justiciability hurdles courts have carefully set up to remain uninvolved for prudential and normative reasons.

This note argues that notwithstanding the NSRAA, courts will and should continue to abstain in national security disputes between Congress and the President. Courts *will* continue to abstain in national security disputes under the NSRAA between Congress and the President because, even with an air-tight cause of action provision and Article III and legislative standing, the NSRAA ignores that courts refuse to reach the merits in national security disputes by deploying Article III justiciability doctrines as canons of constitutional avoidance.[25] Whether courts rely on a lack of standing or another Article III abstention doctrine, courts will avoid reaching the merits of war powers disputes because of the difficult constitutional questions raised, namely, whether legislation constraining the President's Commander-in-Chief Powers[26] (such as the NSRAA or the War Powers

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Crockett, 720 F.2d at 1356–57 (dismissing suit by members of Congress challenging U.S. military presence in, and aid to El Salvador because constraints of equitable discretion precluded judicial review); Conyers v. Reagan, 578 F. Supp. 324, 325–56 (D.D.C. 1984) (dismissing suit by members of Congress challenging U.S. military operations in Grenada because constraints of equitable discretion precluded judicial review).

[22] *See* John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1412 (1988); Koh, *supra* note 5, at 1335–36.

[23] NSRAA, H.R. 5410, 117th Cong. §§ 105, 107(a)(2)(A)–(C), 108(a) (2021).

[24] *See* Ely, *supra* note 22, at 1412; McKaye Neumeister, Note, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2545–57 (2018).

[25] Dep't of Com. v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable." (quoting Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944)).

[26] U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").

Resolution) is constitutional.[27] Courts *should* continue to abstain in national security disputes under the NSRAA because Congress already has avenues to vindicate its appropriations power without relying on unelected judges.[28]

Part I of this note explains the judicial enforcement provisions of the NSRAA and argues that they mostly pass muster under the Supreme Court's legislative standing jurisprudence. Part II explains why courts will likely continue to abstain in national security disputes, notwithstanding the viability of the NSRAA's judicial enforcement provisions. Part III will lay out the normative case against judicial intervention in national security disputes between Congress and the President under the NSRAA or any future legislation that Congress may enact.

I. THE NSRAA'S JUDICIAL ENFORCEMENT PROVISIONS AND JUSTICIABILITY

A. Summarizing the NSRAA's Judicial Enforcement Provisions

The NSRAA provides an express cause of action for Congress to vindicate its appropriations power before a three-judge panel upon adoption of a joint resolution by both the House of Representatives and Senate stating that the President failed or refused to abide by the act's requirements.[29] The act authorizes "such relief as may be appropriate, including declaratory judgment and any form of ancillary relief, including injunctive relief."[30] In addition to a failure to withdraw troops within twenty days in the absence of congressional authorization, failure to "provide any information to Congress as required by this joint resolution shall be treated as the failure of such officer or employee to comply with [the] joint resolution."[31] All actions are to be filed in the United States District Court for the District of Columbia

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[27] *See* Dept. of Justice, Office of Legal Counsel, *Authority of the President under Domestic and International Law to Use Military Force against Iraq*, 26 Op. O.L.C. 1, 16 n.18 (2002) (questioning of the constitutionally of the War Powers Resolution). *See also, e.g.*, Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud That Contributed Directly to the 9/11 Attacks*, 45 CASE W. RES. J. INT'L L. 109, 117 (2012) ("Put simply, the power 'to declare War' does not equate to the power to limit 'the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances' as asserted in the War Powers Resolution."); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1664 (2002) ("Presidents . . . have refused to acknowledge [the War Powers Resolution's] legality.").

[28] *See* J. Richard Broughton, *What Is It Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 724 (2001) (arguing that judicial abstention in war powers disputes produces more responsible political institutions); s*ee also* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 323–24 (2002) (arguing for increased reliance on the political branches to resolve constitutional questions given comparatively better information and accountability as compared with the judiciary).

[29] NSRAA, H.R. 5410, 117th Cong. §§ 107(a)(1), (b)(1), (d)(1) (2021).

[30] *See id*. § 107(a)(1).

[31] *See id*. § 107(c).

under an expedited timeline.[32] Final decisions by the United States District Court for the District of Columbia are only appealable directly to the Supreme Court.[33]

B. Causes of Action and Standing

In order to properly bring suit under a federal statute, a plaintiff must have a cause of action and Article III standing.[34] A cause of action is the statutory or constitutional authority that allows a plaintiff to bring suit. Article III standing is the doctrine that determines who is entitled to invoke the power of the federal courts to decide cases.[35] The NSRAA properly provides Congress with a cause of action to bring suit and likely satisfies Article III standing requirements.

1. The NSRAA Properly Provides Congress with a Cause of Action

The NSRAA easily satisfies the cause of action requirement. Indeed, Congress already has a cause of action to sue in court to vindicate its appropriations power directly under the Appropriations Clause of the Constitution.[36] The NSRAA simply adds a belt to the suspenders of the Appropriations Clause by providing explicitly that the House and Senate have the power to sue any "officer or employee of the executive branch, including the President and an officer or employee of the Executive Office[] of the President," who fails to comply with the legislation's limits on the use of force abroad.[37] That explicit statutory grant allows Congress to bring suit directly under the NSRAA.

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[32] *See id*. § 107(d)(1) ("The action shall be filed in the United States District Court for the District of Columbia, and shall be heard not later than 30 days after the action is filed by a 3-judge court convened pursuant to section 2284 of title 28, United States Code."); *id*. at § 107(d)(4) ("It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.").

[33] *See id*. § 107(d)(3).

[34] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998) (explaining differences between a statutory cause of action and Article III standing).

[35] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 101 (7th ed. 2015).

[36] *See, e.g.*, Harrington v. Schlesinger, 528 F.2d 455, 456, 459 (4th Cir. 1975) (dismissing suit brought by four members of Congress alleging U.S. involvement in Vietnam violated Appropriations Clause for lack of Article III standing but accepting that plaintiff-legislators had cause of action to sue under Appropriations Clause).

[37] NSRAA, H.R. 5410 § 107(a)(1).

2. The NSRAA Likely Satisfies Article III and Legislative Standing Requirements

To establish standing, a plaintiff must show (i) that they suffered an injury in-fact that is concrete, particularized, and actual or imminent; (ii) that the defendant likely caused the injury; and (iii) that the injury would likely be redressed by judicial relief.[38] In addition to these three "bedrock" rules of standing, a legislator or legislative body seeking to assert a separation of powers claim must satisfy a specialized set of standing rules articulated by the Supreme Court.[39] Generally, legislative injuries must be "institutional" rather than "individual." That is, individual legislators do not have standing to pursue a separation of powers claim.[40] But Congress as an institution *does* have standing to sue over injuries it has suffered as a legislative body *as a whole*.[41]

a. Article III Standing

Congress would likely satisfy Article III standing requirements under the NSRAA. When the President ignores the requirements of the War Powers Resolution or the NSRAA, there is injury-in-fact to Congress's Article I appropriations power. As Section 108 of the NSRAA clarifies, "no funds authorized to be appropriated or otherwise made available under any provision of law may be obligated or expended for any activity by United States forces," for which congressional authorization is not obtained consistent with the NSRAA.[42] As a result, "a failure by the executive branch to comply with the NSRAA . . . would amount to a nullification of each chamber's appropriation power."[43] Causation and redressability requirements of Article III standing follow logically from that injury. The

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[38] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). Additionally, Congress can confer Article III standing by statute by "elevat[ing] to the status of legally cognizable injuries concrete *de facto* injuries that were previously inadequate in law." *Id.* at 2205 (quoting Spokeo v. Robins, 578 U.S. 330, 341 (2016)).

[39] Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 9 (2016).

[40] Raines v. Byrd, 521 U.S. 811, 813–14 (1997) (holding that individual legislators did not have standing to challenge the Line Item Veto). Individual legislators do however have standing to challenge that their legislative vote was "completely nullified" as when a legislative act goes into effect (or does not go into effect) despite the legislator-plaintiff having cast a vote that was "sufficient to defeat (or enact)" the act. *Id*. at 823 (citing Coleman v. Miller, 307 U.S. 433 (1939)).

[41] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 799–806 (2015) (holding that state legislature challenging creation of independent redistricting commission in the state had standing to sue as "an institutional plaintiff asserting an institutional injury").

[42] NSRAA, H.R. 5410 § 108(a).

[43] Soren Dayton & Erica Newland, *Enforcement Provisions in New National Security Reforms Packages*, LAWFARE (Nov. 5, 2021), https://www.lawfareblog.com/enforcement-provisions-new-national-security-reforms-packages; *see also* United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976) (holding that Congress could establish standing to vindicate its appropriations power); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d. 53, 58, (D.D.C. 2015) (holding that U.S. House of Representatives could sue executive branch for violations of Appropriations Clause and denying executive branch's motion to dismiss for lack of standing).

President caused the injury by failing to remove troops within the twenty-day clock or by failing to inform Congress of military activity without congressional authorization or appropriation. A court could redress the injury by issuing an injunction requiring the President to abide by the NSRAA's statutory requirements. For example, a court could order the withdrawal of troops if the President continues a use of force past the NSRAA's twenty-day clock without congressional authorization.[44]

b. Legislative Standing

Under the NSRAA, Congress likely satisfies the Supreme Court's legislative standing requirement that an injury must be an "institutional" rather than an "individual" one. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that the state legislature had standing to challenge the creation of an independent redistricting commission in the state because the suit was not brought by an individual legislative member as in *Raines v. Byrd*.[45] The Arizona Legislature instead sued as "an institutional plaintiff asserting an institutional injury," commencing the action after authorizing votes in both of its chambers.[46] Preventing the Legislature from challenging the independent redistricting commission's legality "would 'completely nullif[y]' any vote by the Legislature . . . purporting to adopt a redistricting plan," according to the Legislature's argument that the Elections Clause vests in it "primary responsibility for redistricting."[47]

Those standards are likely met by the NSRAA, which allows Congress to bring suit pursuant to a joint resolution by the House and Senate asserting an institutional injury.[48] The NSRAA makes clear that the failure of the President to comply with its procedural requirements harms Congress's appropriations power.[49] Accordingly, preventing Congress from suing pursuant to a joint resolution asserting an institutional appropriations injury would, as in *Arizona Independent Redistricting Commission*, "completely

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[44] *See* Dayton & Newland, *supra* note 43.

[45] *See Ariz. State Legislature*, 576 U.S. at 801–02; *Raines*, 521 U.S. at 813–14.

[46] *See Ariz. State Legislature*, 576 U.S. at 802.

[47] *Id*. at 800, 830 (quoting Raines, 521 U.S. at 823–24).

[48] NSRAA, H.R. 5410, 117th Cong. §§ 105, 107(a)(2)(A)–(C) (2021) (describing procedures for joint resolution). It remains unclear whether a single house or committee has standing to bring a separation of powers suit in the appropriations context. *See* Neumeister, *supra* note 24, at 2546–48 (discussing the debate).

[49] NSRAA, H.R. 5410 § 108(a)(1) ("Notwithstanding any other provision of law, no funds authorized to be appropriated or otherwise made available under any provision of law may be obligated or expended for any activity by United States forces for which—prior congressional authorization is required under section 4(a) but has not been obtained.").

nullify any vote by [Congress]" purporting to enforce its statutory and constitutional rights.[50]

Questions remain about the viability of the NSRAA's legislative standing provision. Primarily, the Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* was careful to explain that it was not deciding the issue of whether Congress has standing to bring suit against the President.[51] Some scholars argue that, at least where both the House and Senate authorize suit, Congress has standing to sue the President when the executive branch "intrudes on core legislative authority," for example, Congress defending powers granted to itself through the NSRAA.[52] But even assuming the NSRAA unquestionably confers upon Congress a cause of action and Article III and legislative standing, the courts will and should continue deploying abstention doctrines to war powers disputes between Congress and the President as a canon of constitutional avoidance.[53]

II. ARTICLE III JUSTICIABILITY AS A CANON OF CONSTITUTIONAL AVOIDANCE

The canon of constitutional avoidance instructs courts not to "pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of."[54] Although not traditionally thought of as a justiciability doctrine, constitutional avoidance is closely related to Article III justiciability. In "The Least Dangerous Branch," Alexander Bickel grouped Article III justiciability doctrines and constitutional avoidance together as "passive virtues"—doctrines of self-restraint that avoid overreach into political processes by courts, thereby protecting their

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[50] *See Ariz. State Legislature*, 576 U.S. at 803 *see also* United States House of Representatives v. Mnuchin, 976 F.3d 1,13–14 (D.C. Cir. 2020), *cert. granted, judgment vacated sub nom*. Yellen v. United States House of Representatives, 142 S. Ct. 332 (2021) (suggesting that when the executive branch nullifies even a single chamber's appropriations power, that chamber has standing to vindicate its appropriations rights).

[51] *See Ariz. State Legislature*, 576 U.S. at 803 n.12.

[52] Bradford C. Mank, *Does a House of Congress Have Standing Over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141, 187–89 (2016) (arguing that the Court's finding of jurisdiction in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (holding one-house legislative veto unconstitutional), implies that there is legislative standing to sue executive officials in cases in which both houses of Congress intervene as parties); Neumeister, *supra* note 24, at 2546; *see also* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1549 (2012) ("*Chadha*, in short, held only that Congress has a sufficient institutional stake to support a case or controversy where it seeks to defend a power granted to it by a statute.").

[53] *See* Dayton & Newland, *supra* note 43 (arguing that Congress, bringing suit under the NSRAA, would likely have Article III and legislative standing).

[54] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring). Justice Brandeis's framing of constitutional avoidance is known as the "last resort rule" and is different from his alternative formulation of the canon which instructs a court to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id*. at 348.

authority and credibility.[55] Thus, when a litigant presents a court with serious constitutional issues, courts can use Article III doctrines as grounds to avoid deciding an unnecessary constitutional question.[56]

War powers disputes between Congress and the President raise precisely the sort of serious constitutional questions that merit using Article III justiciability doctrines as canons of avoidance. Indeed, such a case presents one of the most "difficult, unresolved, and contested issues in constitutional law."[57] Without Article III justiciability doctrines, a court would have to answer the difficult merits question of whether the President's decision to engage in hostilities using unappropriated funds or in the absence of a declaration of war was nonetheless constitutional given the President's authority as Commander-in-Chief. Neither the Supreme Court nor any lower court has ever decided that question.[58] Instead, courts have refused to answer the question by using justiciability doctrines as canons of avoidance.

Although courts have not explicitly made a connection between constitutional avoidance and justiciability in war powers litigation,[59] they have invoked Article III justiciability doctrines while alluding to a desire to avoid the thorny separation of powers questions such cases present.[60] In so

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[55] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (2d ed. 1986); *see also* Harlan Grant Cohen*, A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 38–39 (2017).

[56] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751–52 (1984) (explaining that justiciability questions "must be answered by reference to the [Article] III notion that federal courts may exercise power only in the last resort, and as a necessity").

[57] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051 (2005).

[58] David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV., Issue 4, at 685, 746 (2014) ("Notably, the Court has never directly addressed the legal questions of when an appropriations restraint on the President's war making ability is unconstitutional or whether Congress can preemptively defund a war.").

[59] Scholars have also implied, but not explicitly made clear, the connection between Article III and constitutional avoidance in war powers litigation. *See* Yoo, *supra* note 13, at 184 ("Given these broad [justiciability] doctrines, it should come as no surprise that the Supreme Court has avoided challenges to the use of the war power."); *infra* note 61 and accompanying text.

[60] Campbell v. Clinton, 52 F. Supp. 2d 34, 40 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000) ("Any case involving coordinate and co-equal branches of government raises separation of powers concerns."); Spence v. Clinton, 942 F. Supp. 32, 36 (D.D.C. 1996) ("This case presents basic constitutional issues involving the separation of powers, including the various jurisdictional issues addressed in the parties' memoranda. As a general proposition, courts adopt a doctrine of judicial abstention in such matters."); Ange v. Bush, 752 F. Supp. 509, 512 (D.D.C. 1990) ("The determination sought by Ange in each of his three challenges to the President's actions in the Persian Gulf is one which the judicial branch cannot make pursuant to the separation of powers principles embodied in the court's equitable discretion and in the political question doctrine."); Crockett v. Reagan, 558 F. Supp. 893, 902 (D.D.C 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) ("When a member of Congress is a plaintiff in a lawsuit, concern about separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief.").

doing, the courts have collapsed Article III justiciability doctrines into canons of constitutional avoidance in war powers litigation.[61]

In *Dellums v. Bush*, the District Court for the District of Columbia came closest to suggesting constitutional avoidance as the missing link between the separation of powers concern on the merits and use of justiciability doctrines. In *Dellums*, fifty-four members of Congress sued for injunctive relief to prevent President George H.W. Bush from attacking Iraq without congressional authorization during the Gulf War.[62] The court ultimately dismissed the case on Article III justiciability grounds—namely, ripeness. But Judge Greene of the District of Columbia District Court implied that constitutional avoidance also played a role in the decision to dismiss:

> [t]he principle that courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs. Judicial restraint must, of course, be even further enhanced when the issue is one—as here—on which the other two branches may be deeply divided.[63]

Judge Greene's opinion indicates that when courts use Article III doctrines to dismiss war powers cases, they are acting with prudence and restraint given the difficult constitutional question implicated on the merits.[64] *Dellums* and other cases do not serve as guides for defeating justiciability challenges in war powers litigation.[65] Instead, they stand for the proposition that courts are consciously using "various constitutional doctrines of justiciability . . . to preclude judicial review of questions

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[61] *See* Broughton, *supra* note 28, at 713 ("The judiciary, however, has . . . stopped short of officiating disputes between the political branches regarding the proper allocation of war and diplomatic powers, thanks, in significant measure, to the justiciability doctrines borne of the separation of powers."); *id*. at 712 (noting that although no war powers cases deals "comprehensively with the textual commitment of the issue to the political branches or with questions about the nature and desirability of political branch constitutional deliberation, each opinion provide[s] a rationale for disposing of the case that avoided judicial resolution of the war powers question and worked to preserve the separation of powers"); *see also* Neumeister, *supra* note 24, at 2569.

[62] Dellums v. Bush, 752 F. Supp. 1141, 1144 (D.D.C. 1990).

[63] *Id*. at 1149.

[64] *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1982) (Bork, J., concurring) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.").

[65] *See generally* Ely, *supra* note 22; Neumeister, *supra* note 24. In their respective works, Professor Ely and Ms. Neumeister offer several workarounds to the justiciability doctrines used by courts to abstain in war powers litigation suggesting that these justiciability doctrines are not in fact formidable jurisdictional obstacles. But finding workarounds to Article III justiciability doctrines ignores the reality of *why* courts fail to reach the merits in war powers litigation, that is, as a canon of avoidance.

implicating the allocation of constitutional war powers" as canons of avoidance.[66] Although the NSRAA helps address issues of standing, it fails to confront the battery of other Article III justiciability doctrines that the courts can and should still deploy as canons of avoidance.[67]

A. The Political Question Doctrine

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[68] In *Baker v. Carr*, the Court outlined six factors to determine whether a controversy implicates a nonjusticiable political question, including:

> (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment of multifarious pronouncements by various departments on one question.[69]

The six *Baker* factors provide courts with a range of reasons to abstain from the merits of a war powers dispute. Since the enactment of the War Powers Resolution, at least five lower federal courts have relied on the political question doctrine to avoid reaching the merits of a war powers dispute between the President and Congress.[70] In so doing, these courts have

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[66] Broughton, *supra* note 28, at 712; *see also* Neumeister, *supra* note 24, at 2569 ("The courts have developed each of the procedural roadblocks discussed above in the national security context because they held a particular view of the separation of powers and of the judiciary's role.").

[67] *Cf.* Bradley & Goldsmith, *supra* note 57, at 2051 (explaining and endorsing courts' limited review of congressional authorization for war as an avoidance principle given the difficult constitutional questions implicated).

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

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

[70] *See* GARCIA, *supra* note 15. *Campbell v. Clinton* dismissed a suit brought by thirty-one members of Congress arguing that the U.S. involvement in Kosovo violated the War Powers Clause and the War Powers Resolution on standing grounds but Judge Silberman, concurring, wrote that he also would have

relied on various *Baker* factors to abstain from the merits. They have dismissed claims as political questions because (1) war powers are textually committed to both Congress and the President;[71] (2) resolution of the claim would require fact-finding beyond the court's competence;[72] (3) defining the term "hostilities" lacks judicially manageable standards;[73] or (4) because judicial involvement might risk "the potentiality of embarrassment . . . from multifarious pronouncements by various departments on one question."[74]

Sometimes, courts have not relied on the *Baker* factors at all in dismissing on political question grounds. Relying on a broad and prudential formulation of the political question doctrine, the D.C. Circuit in *Mitchell v. Laird* dismissed a lawsuit brought by thirteen members of the House of Representatives challenging the Vietnam War on political question grounds because courts should not "substitute [their] judgment for that of the President, who has an unusually wide measure of discretion in foreign affairs."[75]

A potential rejoinder to using the political question doctrine to avoid the merits question in war powers litigation might be found in *Zivotofsky v. Clinton* (*Zivotofsky I*).[76] In *Zivotofsky I,* the Court was asked to assess the constitutionality of Section 214(d) of the Foreign Relations Authorization Act.[77] The statute provided that an American citizen born in Jerusalem may list Israel as his or her place of birth on a U.S. passport. This provision conflicted with State Department policy that an American citizen born in Jerusalem could list Jerusalem *but not* Israel or Jordan as their place of birth, given the disputed status of Jerusalem at the time.[78] The Court held that the dispute was not barred under the political question doctrine because Zivotofsky's claim raised a "familiar" judicial exercise of constitutional interpretation: deciding whether Congress or the President has the authority to determine the place of birth on U.S. passports.[79] This same reasoning could undercut the understanding that war powers litigation presents a political question because deciding the merits of a war powers case may also be a "familiar" judicial exercise of constitutional interpretation: does the

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dismissed for petitioners presenting a political question. 203 F.3d 19, 24–25 (D.C. Cir. 2000) (Silberman, J., concurring).

[71] Ange v. Bush, 752 F. Supp. 509, 511–15 (D.D.C. 1990).

[72] Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd* per curiam, 720 F.2d 1355, 1357 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985).

[73] *Campbell*, 203 F.3d at 25 (Silberman, J., concurring).

[74] Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)), *aff'd*, No. 87-5426 (D.C. Cir. 1988) (per curiam).

[75] Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973).

[76] Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012) [hereinafter *Zivotofsky I*].

[77] *Id*. at 192–93.

[78] *Id*. at 191–93.

[79] *Id*. at 196.

President's Commander-in-Chief power trump Congress's appropriations power?[80]

But *Zivotofsky I* involved a very different type of dispute than a war powers dispute under the NSRAA. *Zivotofsky I* dealt with a "relatively modest" and "obscure" foreign affairs dispute concerning a statute that affected a very small number of people.[81] A war powers dispute, on the other hand, implicates the interests of the entire nation and presents a grave risk for constitutional error on the battlefield affecting real lives.[82] These implications will continue to provoke judicial anxiety post-NSRAA.

Accordingly, courts could still deploy the political question doctrine as a canon of avoidance notwithstanding *Zivotofsky I* in two ways. First, courts could simply rely on traditional *Baker* factors to dispose of a war powers dispute. Professor Yoo, for example, argues that war powers are textually committed to the political branches, and there are no "judicially discoverable and manageable standards for resolving these cases because the Framers quite consciously designed war powers to have no fixed rules of conduct or process."[83]

Second, courts could construe the political question doctrine more broadly in war powers cases, as in *Mitchell v. Laird*.[84] Pre-*Baker*, the touchstone of the political question doctrine was judicial anxiety that an issue was so "momentous" or "strange" as to call into question courts'

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[80] *See* Cohen, *supra* note 55, at 39.

[81] Michael D. Ramsey, *War Powers Litigation After* Zivotofsky v. Clinton, 21 CHAP. L. REV. 177, 177, 180 (2018).

[82] *See* Bradley & Goldsmith, *supra* note 57, at 2051; Barkow, *supra* note 28, at 325–26; *see also* Campbell v. Clinton, 203 F.3d 19, 27–28 (D.C. Cir. 2000) (Silberman, J., concurring) ("In most cases this will also be an issue of the greatest sensitivity for our foreign relations. Here, the President claimed on national television that our country needed to respond to Yugoslav aggression to protect our trading interests in Europe, and to prevent a replay of World War I. A pronouncement by another branch of the U.S. government that U.S. participation in Kosovo was 'unjustified' would no doubt cause strains within NATO.").

[83] Yoo, *supra* note 13, at 300–01 (quoting Baker v. Carr, 369 U.S. 186, 211, 217 (1962)). Additionally, *Zivotofsky I* only evaluated two of *Baker*'s six factors, the lack of judicially manageable standards and textual commitment to another branch of government. *Zivotofsky I*, 566 U.S. at 195 ("We have explained that a controversy 'involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'") (quoting Baker v. Carr, 369 U.S. 186, 217) (1962)). It did not discuss the more open-ended *Baker* factors such as the concern for "respect due [to] coordinate branches" and the "potentiality of embarrassment of multifarious pronouncements by various departments." Baker, 369 U.S. at 216–17; Ramsey, *supra* note 81, at 178–79 (explaining that these factors are the most easily invoked to defeat justiciability). These more malleable factors from *Baker* could re-appear in a war powers dispute to avoid a merits inquiry. *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law* 70 U. COLO. L. REV. 1395, 1402 (1999).

[84] 488 F.2d 616 (D.C. Cir. 1973); *see also* Goldwater v. Carter, 444 U.S. 996, 1000 (1979) (Powell, J., concurring) ("[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government").

competency in resolving the dispute.[85] And it is particularly "difficult to think of many questions as fundamental and important" as whether the executive branch can unilaterally engage in hostilities as part of its inherent Article II powers.[86] While it is undoubtedly the duty of the courts to "say what the law is," war powers is a political area involving enormous questions of the "nation, [and] not individual rights," justifying a broad interpretation of the political question doctrine as a canon of avoidance.[87]

B. Mootness and Ripeness

Depending on the factual circumstances, mootness and ripeness are doctrines of justiciability that remain traditional avenues upon which courts can abstain in war powers litigation, notwithstanding the NSRAA.

1. Mootness

Article III requires a live case or controversy for a court to exercise its judicial power.[88] A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[89] Because military operations may be short-lived, if Congress sues the President under the NSRAA, but the military operation ends before a court can reach a final judgment, relief is moot.[90] The NSRAA shortens the War Powers Resolution's sixty-day clock to a twenty-day clock to evade mootness problems.[91] But short military operations on the order of hours and days will still run into mootness issues.[92] Thus, with respect to these shorter conflicts, courts may still use mootness to avoid the difficult constitutional questions.

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[85] BICKEL, *supra* note 55, at 183–84; *see also* Cohen, *supra* note 55, at 39.

[86] *Cf.* Barkow, *supra* note 28 at 296 (arguing for a prudential political question doctrine in election cases given the importance of the Article II question of how to select the President); Bradley & Goldsmith, *supra* note 57, at 2051.

[87] *See* Marbury v. Madison, 5 U.S. 137, 166 (1803); Barkow, *supra* note 28, at 325–26 ("[T]here is certainly a difference—in degree, if not in kind—between structural questions concerning the operation of government and those questions that directly implicate individual liberty."); Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 74 (1977) (noting that courts will decline to decide a question when "an issue . . . is simply so awesome in its consequences that ultimate resolution, to be legitimate, must necessarily rest with a political branch"); *see also* Zivotofsky I, 566 U.S. at 218–19 (Breyer, J., dissenting) (noting that *Zivotofsky I* presents an issue of individual rights).

[88] Burke v. Barnes, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case.").

[89] Powell v. McCormack, 395 U.S. 486, 496 (1969).

[90] Conyers v. Reagan, 765 F.2d 1124, 1125–26 (D.C. Cir. 1985); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 598 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (Scalia, J.).

[91] NSRAA, H.R. 5410, 117th Cong. (2021).

[92] *See* Campbell v. Clinton, 203 F.3d 19, 33–34 (D.C. Cir. 2000) (Randolph, J., concurring).

2. Ripeness

Ripeness doctrine prevents courts from adjudicating premature disputes.[93] The NSRAA's cause of action based on the joint resolution of the House and Senate may eliminate ripeness as a ground upon which courts could abstain in war powers litigation. In a separation of powers context, ripeness prevents courts from adjudicating disputes between Congress and the President "until each branch has taken action asserting its constitutional authority" and the branches reach "a constitutional impasse."[94] By passing a joint resolution that the President is spending unappropriated funds in contravention of the NSRAA and Article I, Congress will have asserted its constitutional authority to create a ripe constitutional impasse.[95]

But a constitutional impasse is a two-way street, and the President also has to take the right kind of action in order for a dispute to ripen. In *Dellums*, the Federal District Court for the District of Columbia used ripeness as a canon of avoidance by asserting that the buildup of troops in Kuwait was not sufficiently definite to constitute an offensive military operation.[96] As noted by Professor Waxman, even Congress agrees that threats of force are constitutionally committed to the executive branch.[97] If a court could reasonably construe action as a threat of war rather than an actual war, ripeness again becomes a tool of justiciability available to courts as a canon of avoidance.

C. Equitable Discretion

Even if *Zivotofsky I* eliminates the political question doctrine as a canon of avoidance in war powers litigation, courts still retain the powers of equitable discretion to decline to hear a case. In several war powers cases brought by members of Congress, which were dismissed for presenting a political question, courts rested in the alternative on their own equitable discretion in refusing to reach the merits of the case.[98]

Equitable discretion gives courts broad power to abstain in national security cases. A court can abstain by citing its lack of general institutional

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[93] *See* HART & WECHSLER, *supra* note 35 at 212; Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 807 (2003) (citation omitted).

[94] Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring).

[95] *See* Sanchez-Espinoza, 770 F.2d at 211 (D.C. Cir. 1985) (Ginsberg, J., concurring) (affirming dismissal of lawsuit by twelve members of the House of Representatives challenging aid given to Nicaraguan Contras because "no gauntlet ha[d] been thrown down [] by a majority of the Members of Congress" to create a ripe dispute).

[96] Dellums v. Bush, 752 F. Supp. 1141, 1152 (D.D.C. 1990).

[97] *See* Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1642 (2014).

[98] *See* Lowry v. Reagan, 676 F. Supp. 333, 337 (D.D.C. 1987); Crockett v. Reagan, 558 F. Supp. 893, 902 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

competence compared to the political branches in resolving a dispute between Congress and the President.[99] To illustrate, the Supreme Court suggested using equitable discretion as a canon of avoidance in war powers litigation in *Arizona State Legislature v. Arizona Independent Redistricting Commission* on the basis of institutional incompetence.[100] The Court held that the Legislature had standing but qualified its ruling in a footnote: "a suit between Congress and the President would raise separation-of-powers concerns absent here."[101] In other words, given the separation of powers questions presented in war powers litigation, a court could exercise its equitable discretion as a canon of avoidance, even if the NSRAA otherwise confers a cause of action and legislative standing. Alternatively, a court could abstain because there is an alternative legislative remedy available: the power to cut off appropriations.[102]

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While Congress can write itself a cause of action to vindicate its appropriations power, it cannot require federal judges to "surrender their discretion to dismiss those suits in which concerns for separation of powers prove[s] particularly intense."[103] The NSRAA might help give Congress Article III and legislative standing. But it cannot avoid the other justiciability hurdles presented in war powers litigation, such as the political question doctrine, mootness, ripeness, and equitable discretion, each of which courts will continue to deploy as canons of avoidance given the intense separation of powers concerns such suits present. Courts do not want to reach the merits of war powers disputes. Nor should they.

III. WHY COURTS SHOULD CONTINUE TO ABSTAIN IN WAR POWERS LITIGATION

The previous section explained the methods by which courts would continue to abstain in war powers litigation even with legislation such as the

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[99] LOUIS FISHER, PRESIDENTIAL WAR POWERS 303 (3d ed. 2013); *see also infra* § III.D.

[100] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n., 576 U.S. 787 (2015).

[101] *Id*. at 804 n.12.

[102] *See* ALAN WRIGHT & ARTHUR R. MILLER, ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3531.11.2 (3d ed. 2018) (citing Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981)) ("Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action."); *see also infra* § III.C.

[103] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWERS AFTER THE IRAN-CONTRA AFFAIR 223 (1990). This is especially true of proposals that go even further than the NSRAA. For example, some scholars have proposed legislation explicitly requiring that courts "not decline to make a determination on the merits based on the doctrine of political question, remedial discretion, equitable discretion or any other finding of non-justiciability." FISHER, *supra* note 99, at 273. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH, 60–63 (1993).

NSRAA. This section argues that providing Congress with a cause of action to sue the President for violations of the NSRAA is normatively undesirable.

A. The NSRAA Violates the Structure of the Constitution

The NSRAA's central problem is that it ignores the Constitution's structure, which commits war powers disputes to the political branches.[104] The Commander-in-Chief Clause gives the President the "primary role in deciding when and how to wage war."[105] Congress, through the Declare War Clause and its appropriations power, has the authority to "approv[e] the interventions either through authorization before operations have begun or through appropriations after the fact."[106] And while the courts are required to adjudicate cases and controversies under Article III, the Constitution "does not require one single, constitutionally correct method for going to war."[107] The Constitution instead expects a struggle between the political branches to establish processes for going to war.[108] Inserting the courts into that struggle violates constitutional structure. In the words of Justice Robert Jackson, "only Congress itself can prevent power from slipping through its fingers."[109]

B. Courts Lack Judicially Manageable Standards to Decide War Powers Disputes on the Merits

Courts lack judicially manageable standards to decide war powers disputes between the political branches. The predicate question of whether the President spent unappropriated funds for a use of force that violates the War Powers Resolution, as amended by the NSRAA, is likely workable for a court to decide.[110] A court "would engage in straightforward statutory interpretation" to determine if the President spent unallocated and unauthorized appropriations past the NSRAA's twenty-day clock for military hostilities or otherwise failed to comply with the procedural requirements of the NSRAA.[111] But the ultimate *constitutional* question—

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[104] As explained earlier this "textual commitment" also serves as a reason for courts to abstain in war powers litigation on political question grounds. *See supra* note 83 and accompanying text.
[105] Yoo, *supra* note 13, at 188.
[106] *Id*.
[107] *Id*. at 287.
[108] *Id*. at 170.
[109] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).
[110] Neumeister, *supra* note 24, at 2557–60.
[111] *Id*.

whether the President can spend unappropriated funds pursuant to inherent executive power—is not within judicial competence.[112]

As proponents of judicial intervention in war powers disputes explain, the ultimate constitutional question would involve balancing "the Executive's arguments about its constitutional powers over national security against the congressional plaintiffs' arguments about the constitutional powers of Congress over national security and appropriations."[113] But the outcomes of freeform balancing of this kind depend entirely on how a court characterizes the competing interests of the political branches. These interests differ substantially and cannot be readily compared without a high degree of subjectivity.[114] Congress has a constitutional interest in appropriations and war declarations;[115] the President has a constitutional interest to act as Commander-in-Chief.[116] Assigning weights to these constitutional interests to decide which is "weightier" is not a scientific or objective task; doing so risks surrendering the decision to the personal preference of the balancer.[117] For that reason, courts have correctly concluded that there are no judicially manageable standards for adjudicating war powers disputes and that such cases present a political question.[118]

The political branches, on the other hand, can define the contours of their constitutional duties with respect to war powers.[119] Since the passage of the War Powers Resolution, Congress and the President have reached a rough

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[112] *See* Campbell v. Clinton, 203 F.3d 19, 28 (D.C. Cir. 2000) (Silberman, J., concurring) ("In sum, there are no standards to determine either the statutory or constitutional questions raised in this case, and the question of whether the President has intruded on the war-declaring authority of Congress fits squarely within the political question doctrine.").

[113] Neumeister, *supra* note 24, at 252.

[114] *See* Donald J. Herzog, *The* Kerr *Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 34 (2007) ("Balancing tests are notoriously manipulable: everything hangs on how we characterize the competing interests, and that work, like sausage-making, and for the same reason, usually gets done offstage.").

[115] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War.").

[116] U.S. CONST. art. II, § 2, cl. 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of").

[117] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 974 (1987) ("Sometimes the Court looks at actual numbers [when balancing constitutional interests], but frequently it adopts a seat-of-the-pants approach, freely speculating on the real world consequences of particular rules."); *see id.* at 975 ("If constitutional cases rarely offer the possibility of a common scale, it should hardly surprise us that majority and dissenting opinions often reach conflicting conclusions about the balance of the competing interests.").

[118] Campbell v. Clinton, 203 F.3d 19, 24–25 (D.C. Cir. 2000) (Silberman, J., concurring). The Court might find a different constitutional test, one focused on the "text and history" of the constitution more judicially manageable. *See* D.C. v. Heller, 554 U.S. 570, 595 (2008); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022). But that test may have other normatively undesirable consequences for congressionalists, namely, the Court holding the War Powers Resolution unconstitutional. *See* Yoo, *supra* note 13, at 171–73 (arguing that the original understanding of war powers prevents Congress from using any method of control other than its appropriations power to restrict unilateral uses of force by the executive); *infra* § III.D.

[119] *See* Barkow, *supra* note 28, at 323.

"constitutional settlement" over the application of war powers—Presidents generally comply with the War Powers Resolution despite questioning its constitutionality.[120] That settlement has remained consistent and better reflects the structure of the constitutional allocation of war powers between Congress and the President.

C. Congress Has Political Remedies to Enforce Violations of War Powers by the President

The NSRAA is unnecessary because Congress has other avenues to vindicate its appropriations power should it believe the Executive has exceeded its constitutional authority as Commander-in-Chief. Congress may pass legislation cutting off appropriations for uses of force that violate the War Powers Resolution.[121] Additionally, if the President ignores Congress's restrictions on funding, Congress can deny the President non-military appropriations,[122] refuse to confirm presidential appointments,[123] or pursue impeachment.[124] These are undoubtedly extreme measures that would require an enormous amount of political willpower. But the NSRAA requires an equivalent amount of political willpower to pass the joint resolution necessary to initiate suit.[125]

It is true that even if Congress restricts appropriations for a use of force violating the NSRAA or the War Powers Resolution, the President can ignore that directive.[126] But bringing the courts into the equation does not

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[120] Cohen, *supra* note 55, at 26; RICHARD F. GRIMMETT, CONG. RSCH. SERV., RL 33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2012).

[121] FISHER, *supra* note 99, at 275 (collecting examples of congressional appropriations restrictions to restrict presidential war powers).

[122] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[123] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.").

[124] U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

[125] NSRAA, H.R. 5410, 117th Cong. § 107(c)(1) (2021).

[126] Neumeister, *supra* note 24, at 2570–71. It is also true that the President is more likely to ignore a directive from Congress restricting appropriations than he or she is to ignore a directive form the courts. *Id.* at 2575–76 n.341. But on a strong theory of departmentalism, if a President thinks a court has unnecessarily intruded into executive power, there are arguments that the President constitutionally should resist a courts directive to comply with war powers restrictions. *See* Henry Paul Monaghan, *Marbury and Administrative Law*, 83 COLUM. L. REV. 1, 9 (1983) ("Viewed simply as a matter of logic, the judicial duty 'to say what the law is' does not demand an independent judgment rule; it is in fact quite consistent with a clear-mistake standard."). Presidents and members of congress, too, take oaths to support the Constitution. *See* Barkow, *supra* note 28, at 324.

necessarily solve war powers disputes in Congress's favor. First, if a court chooses only to decide the predicate statutory question and not the ultimate constitutional question, the Executive will still have unsolved constitutional arguments to assert as a basis to ignore war powers restrictions imposed by Congress vis-à-vis the NSRAA. Second, if a court chooses to hear the constitutional merits question, Congress is gambling on a court ruling in its favor such that the Executive could no longer assert any constitutional defenses against the NSRAA.[127] And there is good reason to believe Congress would lose that gamble.

D. Congress is Likely to Lose a Merits Challenge to the NSRAA

The NSRAA, like most reforms involving the judiciary in war powers litigation, comes from congressionalists who contend that the executive branch has usurped its constitutionally prescribed role with respect to war powers and needs to be held to heel.[128] But involving the judiciary in this dispute does not guarantee a ruling in Congress's favor.[129] In fact, the Supreme Court could do just the opposite and condemn the NSRAA, or the War Powers Resolution, as unconstitutionally trampling over executive power.[130] And indeed, the trend in the federal courts—both generally[131] and specifically in the context of national security, foreign affairs, and war powers—has been to expand, rather than to restrict, presidential power.[132] By asking the courts to decide the allocation of war powers between the political branches, Congress runs afoul of a cardinal rule of courtroom practice: never ask a witness a question to which you don't know the answer.[133] Or, worse—never ask a witness a question, the answer to which, will lose you your case.

The merits case following *Zivotofsky I*, *Zivotofsky v. Kerry* ("*Zivotofsky II*"), is a good example of the trend toward expanding executive power.[134] After finding that *Zivotofsky I* did not present a political question, the Court in *Zivotofsky II* found for the executive branch in holding that the question of whether to list "Jerusalem" or "Israel" on a passport was a function of the exclusive presidential power to "receive ambassadors and other public ministers."[135] *Zivotofsky II*, therefore, should serve as an important lesson

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[127] Neumeister, *supra* note 24, at 2575–76 n.31.
[128] *See* O'Brien, *supra* note 5.
[129] FISHER, *supra* note 99, at 303.
[130] *See* Turner, *supra* note 27.
[131] *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).
[132] *See generally* LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER (2017); Koh *supra* note 5.
[133] FISHER, *supra* note 99, at 303–04.
[134] Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1 (2015) [hereinafter Zivotofsky II].
[135] *Id*. at 11–12.

for Congress: even if it can avoid "the political question shield," the Court can constitutionalize executive power in a manner harmful to Congress's interests.[136]

Given the federal courts' affinity to expand presidential powers, it is likely that the Court would decide in favor of the President on the question of whether statutes like the NSRAA or the War Powers Resolution trample over the President's inherent authority. Such a decision would strip Congress of a method of control over the President's war powers that otherwise would remain unaffected but for the Court reaching the merits.[137] The War Powers Resolution is not a perfect method of control, but for the most part, Presidents have complied with its procedural requirements, reflecting the constitutional push-and-pull between Congress and the President to establish processes for the use of force.[138] Congress risks disturbing its delicate constitutional settlement with the President over the scope of war powers through the NSRAA.[139]

E. Courts Lack the Accountability and Expertise of Congress and the President

While Congress and the President are democratically accountable to the people, the courts are not. Unelected judges, appointed for life, ordering the President to withdraw troops should provoke unease.[140] On the other hand, "[t]he political branches at least are accountable to the electorate if they behave 'monstrously.'"[141] If the electorate perceives that the President has usurped constitutional war powers authority, the President can be held democratically accountable. If congressional restrictions on Presidential war powers through democratic and transparent votes are unpopular, the electorate will instead hold members of Congress democratically

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[136] Cohen, *supra* note 55, at 22.

[137] For this exact reason, it is unclear why Congress would want to advance the NSRAA given the likelihood that a 6–3 conservative majority of the Supreme Court is more likely to defer to executive power than legislative power. *See* Martha Kinsella, *Supreme Court Considers Expanding Presidential Powers*, BRENNAN CTR. (Dec. 9, 2020), https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-considers-expanding-presidential-power. If the point of the NSRAA is to "reclaim" Congress's authority in war powers litigation, it picked a strange moment in the Court's history to attempt to do so.

[138] Cohen, *supra* note 55, at 26.

[139] *See* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 52 (2015) ("[I]f one is concerned about the growth of executive power, one should not assume that more robust judicial review will be a corrective, because it is possible, if not probable, that courts will end up legitimating many exercises of executive authority.").

[140] Campbell v. Clinton, 203 F.3d 19, 27–28 (D.C. Cir. 2000) (Silberman, J., concurring).

[141] Barkow, *supra* note 28, at 324 (quoting Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991)).

accountable. If judges' decisions lead to consequences on the battlefield, they cannot simply be voted out.

Courts also lack the relevant expertise in adjudicating war powers cases.[142] Foreign affairs and war powers cases involve complex factual and policy questions for which "the Judiciary has neither the aptitude, facilities nor responsibility."[143] For example, the determination of whether there have been "hostilities" such that the provisions of the War Powers Resolution or the NSRAA have been triggered is "hampered by a Court's lack of access to the relevant intelligence information necessary to make that determination."[144] The President is privy to regular briefings from the intelligence community, and Congress assimilates that intelligence in the form of open or closed hearings before its own intelligence committees.[145] Comparatively, courts are evaluating the "ever-changing intensity of 'hostilities'" on a cold record of evidence without the benefit of the quicker and better-resourced information-aggregation of the political branches.[146]

F. Politicization, Reputation, and Legitimacy of the Courts

It is an understatement to say that public confidence in the Supreme Court is low and that many see it as an increasingly politicized institution.[147] Asking courts to determine whether the President, notwithstanding the NSRAA, must withdraw or may retain armed forces abroad will no doubt spark public outcry regardless of the Court's judgment. That is especially so given that a suit under the NSRAA, brought by one political branch (Congress) against another (the President), creates the appearance that the suit was not brought to vindicate institutional interests but, rather, partisan interests.[148] The partisan appearance of such suits is further exacerbated by public sentiment that the Supreme Court nomination process is itself a political exercise contributing to the politicization of the courts.[149] In

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[142] *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 46–48 (1992).

[143] Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[144] Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987).

[145] L. BRITT SNIDER, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE 29–30 (1997).

[146] Lowry, 676 F. Supp. at 340 n.53; Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) ("By asking the court to determine the constitutionality of the President's actions, Ange asks the court to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore.").

[147] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

[148] *See* Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place*, 21 CHAP. L. REV. 55, 79–80 (2018) (arguing that congressional lawsuits "embroil the courts in highly partisan political fights").

[149] *Id. See also* John Fritze & Chelsey Cox, *Poll: Most Americans See Politics over Substance in Supreme Court Confirmation Process*, USA TODAY (Apr. 15, 2022), https://www.usatoday.com/story/news/politics/2022/04/15/ketanji-brown-jackson-poll-finds-

resolving a dispute under the NSRAA, the public may view a decision in favor of Congress or the President as a partisan matter rather than a constitutional one.[150]

The Court may feel confident that in resolving a dispute under the NSRAA, its interpretation of the Constitution is correct. But it also must acknowledge that there could be a price to pay.[151] Bringing a charged congressional lawsuit has the potential to undermine the reputation and legitimacy of the Court.[152] Taking up the question that the NSRAA begs would reflect judicial immodesty that the Court alone can provide the right answer to any constitutional question and ignore the reality that going to war is a matter of politics and policy.[153] Legalizing a war may be difficult for the public to accept and hard for it to follow.[154] Judicial abstention in war powers litigation is therefore necessary to preserve—or help restore—precious trust in the judiciary.[155]

CONCLUSION

The NSRAA ultimately fails to recognize that judges dismiss war powers litigation between Congress and the President on Article III grounds as a canon of avoidance. It also fails to consider the normative value of judicial neutrality with respect to war powers disputes. Likely realizing these

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skepticism-over-confirmation-process/7310985001/; *see also* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 150 (2019).

[150] *See* Devins, *supra* note 148, at 79–80.

[151] *Id*. *See also* Ariane de Vogue, *Kagan Calls Leak of Draft Opinion Overturning Roe 'Horrible' and Expects Investigation Update by Month's End*, CNN (Sept. 13, 2022), https://www.cnn.com/2022/09/12/politics/kagan-supreme-court-roe-draft-opinion-leak-investigation/index.html ("[J]udges create legitimacy problems for themselves—undermine their legitimacy—when they . . . stray into places where it looks like they are an extension of the political process or where they are imposing their own personal preferences.").

[152] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

[153] Barkow, *supra* note 27, at 336 (citing Bush v. Gore, 531 U.S. 98 (2000)).

[154] *See* Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 38–39 (2012).

[155] Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (noting that the Court's authority "ultimately rests on sustained public confidence in its moral sanction" and such a feeling "must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements"); *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW xii (2010) ("The Court itself must help maintain the public's trust in the Court, the public's confidence in the Constitution, and the public's commitment to the rule of law.").

failures, the Senate's proposed reform of the War Powers Resolution does not contain any judicial enforcement mechanisms.[156]

The NSRAA's judicial enforcement provision will not prevent courts from avoiding war powers litigation and is normatively undesirable. But that does not mean reform of the War Powers Resolution is unnecessary. It may be true that the allocation of war powers between the political branches is unequal. And the NSRAA's attempt to reform the War Powers Resolution by shortening its clock and more concretely defining "hostilities" might be good ways to re-allocate that balance through the political process.[157] But what the NSRAA cannot and should not do is involve the judiciary in defining that balance. Courts are ill-equipped to settle the constitutional boundaries between Congress and the President over the scope of their war powers. Comparatively, the political branches are equipped to settle a constitutional boundary between themselves through statutes like the NSRAA without a judicial enforcement mechanism. Congress may be committed to seeking relief through the courts; however, it may be disappointed to find that courts will continue to deploy Article III justiciability doctrines as canons of avoidance.

[156] *See* National Security Powers Act of 2021, S. 2391, 117th Cong. (2021).
[157] NSRAA, H.R. 5410, 117th Cong. §§ 104(c)(1), 110(a)(2) (2021).