# NOTE

## Made in the U.S.A.: The Constitutional Crisis Behind America's Arms Export Regime

AROOSHE PAHOOJA GIROTI*

*When weapons stamped "Made in the U.S.A." fall from the sky, it defines how ordinary people around the world experience American power. Accordingly, the authority to sell U.S.-made weapons has become one of the strongest tools of foreign policy. When used strategically, arms exports can strengthen our partners, advance national security interests, and even dissuade allies from accumulating nuclear weapons, all without risking American lives. But today, where administrations routinely authorize large-scale weapons sales to address global security challenges, the downsides of the U.S. arms export regime have become impossible to ignore.*

*Selling weapons to foreign countries risks entangling the U.S. in protracted conflicts, arming repressive regimes, and fueling human rights abuses. Despite robust "End-Use" monitoring programs by the Executive Branch, once weapons leave U.S. soil, the realities of war make them nearly impossible to track, monitor, or rescind, as weapons are frequently retransferred to third parties without authorization or are captured by unintended recipients, exposing U.S. technology to reverse-engineering by adversaries. Despite these risks, and more, FY2024 marked the highest year of military sales in U.S. history.*

*The Constitution largely vests Congress with the authority over arms exports through its Article I Foreign Commerce Clause power. Out of recognition that arms exports implicate questions of foreign policy and national security, Congress delegated much of this authority to the Executive Branch, creating an arms export regime that balanced the strengths of both Branches. In practice, however, this shared authority has devolved into a "tug of war" for control, with Congressional oversight steadily eroding since the 1980s. Today, the Executive Branch is generally free to authorize an arms sale unless Congress passes*

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*legislation prohibiting or modifying it—a power that Congress has never successfully asserted.*

*This Note argues that the expansion of the U.S. arms export regime demands a fresh examination of the balance of power between the Legislative and Executive Branches. It proposes Congress re-wire the arms export approval process by adopting a "Joint Resolution of Approval" (JRA) mechanism, codified in the National Security Powers Act and the National Security Reforms and Accountability Act, which restores democratic guardrails over this powerful foreign policy tool while respecting the Executive's authority to respond decisively to global security threats. This Note's solution does not seek to dismantle the arms export regime. On the contrary, it aims to bring greater transparency to the approval process and to outline actionable steps Americans can take when demanding accountability from their elected officials, thereby restoring Congressional oversight over the Executive in this "tug of war."*

*Drawing parallels from the 1970s antiwar movement and protests of the 2020s against arms exports, this Note contends that the political moment is ripe for reform. It further cautions that excluding the public from consequential foreign policy decisions altogether erodes trust in political leadership and deteriorates the quality of a representative democracy; even perceived exclusion is dangerous. After all, while the tactics of warfare evolve in parallel to the advancements in technology and geopolitics of the day, one constant has always remained: Americans want a voice in shaping the meaning of U.S. leadership. Thus, Congressional input, regardless of its ultimate effect on a proposed sale, adds a discrete value to the arms export process. Restoring this lever of accountability over at least the riskiest weapons sales would realign the arms export regime with democratic principles—just as the Constitution demands.*

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## INTRODUCTION

On the morning of August 9, 2018, in the town of Dhahyan in northern Yemen, a bus filled with young schoolboys was driving to the local mosque for an excursion. The summer sun was already bearing down, and the driver wanted to buy some water for the children. He parked the bus outside a local grocery store and went inside. Shortly after, an aerial bomb landed just meters away, killing twenty-five boys on the bus and wounding another dozen.[1] One thirteen-year-old

1. *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sep. 2, 2018, at 00:00 ET), https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime [https://perma.cc/67FU-8C9U].

survivor sustained a painful leg wound. "Even if I am able to run and play in the future," he said, "I will not find anyone to play with."[2]

The bomb that killed these schoolboys was a GBU-12 Paveway II.[3] Human Rights Watch obtained photos and videos of the munition remnants, tracing the weapon to defense manufacturer Lockheed Martin. Markings on the debris indicated the bomb was produced at a General Dynamics Corporation facility in Garland, Texas.[4] Paveway precision-guided munitions have been linked to at least a dozen Saudi-led coalition attacks on civilian sites in Yemen, including weddings, funerals, schools, and hospitals.[5]

In the aftermath of the bus bombing, Senator Chris Murphy (D-CT) called on Congress to end the sale of weapons to Saudi Arabia. He said, "[I]f you take the time to meet with Yemeni Americans, they will tell you that inside Yemen, this bombing campaign is not perceived as a Saudi bombing campaign. It is perceived as a United States-Saudi bombing campaign. What we are doing is radicalizing the Yemeni people against the United States."[6]

Senator Murphy's statement captures an intensifying wave of public and political concern over the proliferation of U.S. arms exports, which culminated in Congress's attempt to assert its oversight authority. In July 2019, Congress invoked the 1976 Arms Export Control Act (AECA) to pass bipartisan legislation that would end U.S. arms sales to Saudi Arabia.[7]

In response, President Trump vetoed the bill and declared a national emergency, citing tensions with Iran, to bypass congressional review and approve the sale of over $8 billion in weapons to the Saudi-led coalition.[8] He did so by invoking Section 36 of the AECA, a rarely-used "emergency" provision that allows the President to transfer arms without the otherwise mandated 30-day period of congressional review.[9] The Trump Administration's action highlights two critical

2. Sarah El Sirgany & Sheena McKenzie, *Saudi Coalition Spokesman Denies War Crimes in Yemen Following Report by Human Rights Watch*, CNN (Sep. 3, 2018, at 14:31 ET), https://www.cnn.com/2018/09/02/middleeast/saudi-yemen-school-bus-strike-war-crime-intl [https://perma.cc/V8GB-RV7L].

3. HUM. RTS. WATCH, *supra* note 1.

4. *Id.*

5. Diana Ohlbaum & Rachel Stohl, *Yes, Congress, There Is Something You Can Do About Reckless Arms Sales*, JUST SEC. (June 9, 2020), https://www.justsecurity.org/70652/yes-congress-there-is-something-you-can-do-about-reckless-arms-sales [https://perma.cc/6WTH-FP3C].

6. SENATOR CHRIS MURPHY, *Senator Murphy Demands Congress Act to End Unauthorized U.S. Military Involvement in Yemen*, at 01:19–01:35 (YouTube, Mar. 20, 2018), https://www.youtube.com/watch?v=8xrA7n1DozE.

7. The Senate passed S.J. Res. 36 and 38 on June 20, 2019, and the House passed S.J. Res. 36 and 38 on July 17, 2019. PAUL K. KERR, CONG. RSCH. SERV., RL31675, ARMS SALES: CONGRESSIONAL REVIEW PROCESS 7 (2025).

8. *See* Zachary Cohen & Ryan Browne, *Trump Declares Emergency to Expedite Arms Sales to Saudi Arabia and UAE*, CNN (May 24, 2019, at 19:54 ET), https://www.cnn.com/2019/05/24/politics/trump-arms-sales-saudi-arabia-uae [https://perma.cc/9CT2-CELH]; *Donald Trump Vetoes Bills Prohibiting Arms Sales to Saudi Arabia*, GUARDIAN (July 25, 2019, at 16:09 ET), https://www.theguardian.com/us-news/2019/jul/25/donald-trump-vetoes-bills-prohibiting-arms-sales-to-saudi-arabia [https://perma.cc/7EM9-U9HH].

9. *See* Memorandum of Justification for Emergency Arms Transfers and Authorizations to the Kingdom of Saudi Arabia, The United Arab Emirates, and the Hashemite Kingdom of Jordan to Deter Iranian Malign Influence, 84 Fed. Reg. 35652, 35652–58 (July 24, 2019) [hereinafter Memorandum of

issues in the U.S. arms export regime: Congress must find a supermajority to overturn a presidential veto to halt arms sales, and the Executive Branch can invoke its emergency powers to bypass even brief windows of legislative oversight.

Since the 2018 Yemen bus bombing, the consequences of the U.S. arms export regime have become unignorable. Fiscal year 2024 marked the highest year of military sales in U.S. history.[10] Foreign military sales (government-to-government sales) reached $117.9 billion, representing a 45.7% increase from FY2023.[11] This amount is roughly equivalent to the 2024 GDP of the entire country of Kenya, cementing the U.S. as the world's leading arms exporter.[12]

Domestic growth reflects a broader trend in global militarization. In an increasingly uncertain world, countries are engaged in the most aggressive arms buildup since the Cold War.[13] In 2024, global military expenditure reached a record $2.72 trillion, a 9.4% increase from 2023.[14] This mammoth jump is largely attributed to the demand for replenishing stockpiles and improving preparedness in a world brimming with geopolitical tension.[15] While many countries contribute to global militarization, the U.S. alone accounted for an astounding 37% of worldwide defense spending in 2024.[16]

Between 2020 and 2024, the U.S. exported the most arms to Saudi Arabia, Ukraine, and Japan, and was the leading supplier to import-heavy countries like Israel, Ukraine, Qatar, Saudi Arabia, and Poland, among others.[17] Major deals included $23 billion in F-16 fighter jets and maintenance to Türkiye, $18.8 billion in F-15s to Israel, and $7.2 billion in F-35s to Romania.[18]

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Justification]; KERR, *supra* note 7. Before 2019, Section 36 was invoked three times: in 1979 by President Carter to authorize the immediate sale of weapons to North Yemen, in 1984 by President Regan to Saudi Arabia, and in 1990 by President Bush to Saudi Arabia. JEREMY M. SHARP, CHRISTOPHER M. BLANCHARD & CLAYTON THOMAS, CONG. RSCH. SERV., IN11127, U.S. ARMS SALES TO THE MIDDLE EAST: TRUMP ADMINISTRATION USES EMERGENCY EXCEPTION IN THE ARMS EXPORT CONTROL ACT 2 (2019).

10. *Fiscal Year 2024 U.S. Arms Transfers and Defense Trade: Fact Sheet*, U.S. DEP'T OF STATE: BUREAU OF POL.-MIL. AFFS. (Jan. 24, 2025), https://www.state.gov/fiscal-year-2024-u-s-arms-transfers-and-defense-trade [https://perma.cc/G3MK-J86Q].

11. *Id.*

12. *GDP, Current Prices: Billions of U.S. Dollars: Kenya*, INT'L MONETARY FUND, https://www.imf.org/external/datamapper/NGDPD@WEO/KEN?zoom=KEN&highlight=KEN [https://perma.cc/Q8LK-RSGF] (last visited Oct. 17, 2025).

13. *World Military Spending Hits $2.7 Trillion in Record 2024 Surge*, REUTERS (Apr. 27, 2025, at 18:05 ET), https://www.reuters.com/business/aerospace-defense/world-military-spending-hits-27-trillion-record-2024-surge-2025-04-27.

14. *Id.*

15. *U.S. Arms Exports Reach Record USD 318.7 Billion in Fiscal Year 2024*, DEF. INDUS. EUR. (Jan. 24, 2025), https://defence-industry.eu/u-s-arms-exports-reach-record-usd-318-7-billion-in-fiscal-year-2024 [https://perma.cc/FK2A-Q35K].

16. REUTERS, *supra* note 13.

17. MATHEW GEORGE, KATRINA DJOKIC, ZAIN HUSSAIN, PIETER D. WEZEMAN & SIEMON T WEZEMAN, STOCKHOLM INT'L PEACE RSCH. INST., TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2024, at 2, 6 (2025), https://www.sipri.org/sites/default/files/2025-03/fs_2503_at_2024_0.pdf [https://perma.cc/NB4E-8W7N].

18. U.S. DEP'T OF STATE: BUREAU OF POL.-MIL. AFFS., *supra* note 10.

Behind these figures lies a profound human cost. Civilians across the globe are dying from arms branded "Made in the U.S.A." at a rate previously unseen in human history. Notably, the AECA does mandate the government to maintain an "End-Use Monitoring" program to ensure that exported defense articles are used only for their intended purpose and in compliance with international law.[19] However, the reality of war interferes with even the most robust monitoring efforts. Once weapons leave U.S. soil, they become very difficult to track or rescind, even as humanitarian conditions evolve on the ground or conflict dynamics shift.[20] This is especially true for small arms and light weapons, which are easy to move.[21] Loss of oversight limits U.S. leverage over how weapons are used and weakens the ability to hold end-users accountable. Therefore, the arms export approval process becomes the most critical point of control that lawmakers have to ensure weapons end up in the right hands.

The Constitution envisions the regulation of military equipment sales to foreign countries to be a legislative power, arising out of the Foreign Commerce Clause.[22] As the administrative state grew, and out of recognition that arms exports implicate questions of both foreign affairs and national security, Congress delegated some of its authority to the President. Now, authority over arms sales has become a *shared* power between the Executive and the Legislative branch.[23] Since the contours are undefined and each branch vies for more influence in the process, the authority to regulate the arms export regime has, for decades, become a "tug of war."

However, since the passage of the AECA in 1976, congressional oversight over arms exports has steadily eroded, allowing the Executive Branch to execute major weapons transfers with minimal oversight from Congress. Senator Murphy's concerns capture a worrying sentiment percolating on Capitol Hill:

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19. *See* CTR. FOR CIVILIANS IN CONFLICT, DEMYSTIFYING END-USE MONITORING IN U.S. ARMS EXPORTS (2021), https://civiliansinconflict.org/wp-content/uploads/2021/09/EUM-Brief.pdf [https://perma.cc/QKV6-S25T]. For a comprehensive analysis on "Blue Lantern" and "Golden Sentry," two programs administered by the Department of State and Department of Defense (DOD) designed to ensure recipients of arms comply with requirements around use, transfer, and security, see *id.*

20. WHY IT MATTERS: *The Cost of the U.S. Arms Trade*, at 26:55–28:14 (Apple Podcasts, Oct. 26, 2022).

21. *Id.* For an example of the traceability issues associated with small arms, consider the U.S. military support of Iraq. After the U.S. invasion in 2003, the U.S. sent $2.5 billion worth of American weapons to the Iraqi regime, "including everything from small arms to 'armored personnel carriers [and] military helicopters.'" A. Trevor Thrall & Caroline Dorminey, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, CATO INST. (Mar. 13, 2018), https://www.cato.org/policy-analysis/risky-business-role-arms-sales-us-foreign-policy (quoting PAUL HOLDEN ET AL., INDEFENSIBLE: SEVEN MYTHS THAT SUSTAIN THE GLOBAL ARMS TRADE 61 (2017)). Although thousands of U.S. troops were on the ground, maintaining close relationships with their Iraqi counterparts, "many of those weapons went missing." *Id.* Between 2003 and 2008, "360,000 out of 1 million small arms disappeared," including 2,300 Humvees. *Id.* Although the U.S. has created "buyback" programs to incentivize the return of small arms, the programs are notoriously difficult to execute successfully, so the U.S. no longer engages in them regularly. WHY IT MATTERS, *supra* note 20, at 28:50.

22. *See* discussion *infra* Part II.

23. *Id.*

elected officials are increasingly frustrated by the barriers preventing them from exercising meaningful oversight over America's expanding global military role.

This Note does not seek to dismantle the U.S. arms export regime, as the sale of weapons to allies and partners can be vital to national security and American interests. Rather, in a world where defense spending is skyrocketing and public demand for political accountability grows louder each day, this Note calls for a shift in the export regime to require affirmative congressional approval for certain arms sales in order to restore democratic oversight over Executive action. In doing so, this Note sheds much-needed light on the process of arms transfers, so that ordinary Americans seeking accountability from their elected representatives have a meaningful way to demand change.

Part I will survey the most prominent advantages and disadvantages of arms exports on domestic politics and global security. This discussion is key to illustrating that the balance of power in the arms export regime is not just a legal puzzle to be solved, but a delicate foreign affairs dilemma to be managed, too. Part II will explore the constitutional foreign affairs power, arguing that, although the authority to regulate international arms exports resides mostly in Congress's Article I Foreign Commerce Clause power, it has evolved into a *shared* power between the Legislative and the Executive. Part III will explore the "tug of war" between both branches since the 1960s, detailing the rise of congressional oversight and its subsequent erosion. This part will conclude by highlighting why Congress should act to "pull back" its constitutional authority and reestablish democratic oversight over arms transfers.

Part IV introduces the Joint Resolution of Approval, a move that restores the balance of power between the Executive and Legislative under the AECA. Part V tackles the advantages and disadvantages of this approach, codified in two bills proposed by Congress in 2021: the National Security Powers Act (NSPA) and the National Security Reforms and Accountability Act (NSRAA). While getting legislation through Congress is politically challenging, this Note will draw parallels between the anti-Vietnam War protests of the 1970s and public opposition to arms exports of the 2020s to argue that passing these bills is tantamount to restoring public trust in the legislative process. This Part will conclude by reminding the reader that the constitutional "tug of war" is only one dimension of this debate. The human cost of arms exports must be foregrounded to architect a more accountable arms export regime.

## I. COMPETING FOREIGN POLICY CHALLENGES IN THE ARMS EXPORT REGIME

Weapons themselves do not cause war.[24] War stems from complex social, economic, territorial, and ideological factors converging in rational and irrational ways that make violence seem like a viable tool for political change. But injecting weapons into unstable regions can inflame these tensions, catalyzing the risk of

24. ANDREW J. PIERRE, THE GLOBAL POLITICS OF ARMS SALES 5 (1982).

violence.[25] In today's interconnected world, even localized arms races can have far-reaching consequences. Once a violent conflict erupts, the widespread accessibility of sophisticated weapons dramatically raises the stakes.[26] Moreover, when weapons are procured from abroad, suppliers risk becoming entangled in the fight, overlaying their own histories and interests onto an already volatile environment.[27] This external involvement can radically reshape the conflict environment.

In 2024, global military spending reached $2.72 trillion.[28] For its part, the United States oversaw 16,227 foreign military sales with an open case value of approximately $845 billion.[29] The arms trade has thus become a central pillar of American foreign policy, dwarfing many other forms of international engagement in both scale and consequence. This Part will explore the most significant advantages and disadvantages confronted by U.S. officials when deciding to export weapons, highlighting the impacts on military strategy and the economy, and exploring the risks of unintended consequences.

### A. ADVANTAGES OF ARMS EXPORTS AS A TOOL FOR FOREIGN POLICY

Equipping U.S. allies enhances their ability to defend themselves while reducing the likelihood that American troops need to be sent into harm's way. Incumbents use this strategy to avoid direct military intervention that may be domestically unfavorable or internationally dangerous. The Biden Administration, for example, did not shy away from selling advanced weapons systems to Ukraine, but publicly declared it would not send any U.S. troops, a domestically unpopular solution.[30] In fact, bipartisan support for weapons transfers to Ukraine illustrates just how normalized arms-based intervention has become as a foreign policy tool.[31] Selling weapons becomes a way to defend our allies without compromising the safety of troops or jeopardizing political support for incumbents.

Second, exporting advanced military technology affords the U.S. considerable diplomatic leverage by establishing close ties with foreign governments. These linkages endure beyond the mere delivery of weapons, laying the foundation for

25. *See id.* at 3.

26. *Id.* at 5.

27. *Id.*

28. REUTERS, *supra* note 13.

29. U.S. DEP'T OF STATE: BUREAU OF POL.-MIL. AFFS., *supra* note 10. According to the State Department, the total value of transferred defense articles, defense services, and security cooperation activities conducted under the FMS program in FY2024 was $117.9 billion. *Id.*

30. *See US Says Won't Send Troops to Ukraine After Macron Comments*, BARRON'S (Feb. 27, 2024, at 11:54 ET), https://www.barrons.com/news/us-will-not-send-troops-to-fight-in-ukraine-white-house-8864139b [https://perma.cc/8G42-6K5J]; Nick Schifrin & Dan Sagalyn, *Biden Administration Announces Its Final Aid Package to Ukraine Before Trump Takes Office*, PBS: NEWS HOUR (Jan. 8, 2025, at 18:45 ET), https://www.pbs.org/newshour/show/biden-administration-announces-its-final-aid-package-to-ukraine-before-trump-takes-office-2 [https://perma.cc/58LU-JVTT].

31. *See Large Bipartisan Majority Approves US Military Aid to Ukraine*, UNIV. OF MD. SCH. OF PUB. POL'Y: PROGRAM FOR PUB. CONSULTATION (July 27, 2023), https://publicconsultation.org/ukraine/large-bipartisan-majority-approves-us-military-aid-to-ukraine [https://perma.cc/H3N5-NCGV].

years of future cooperation.[32] Although the impact of U.S. influence is hard to measure, anecdotes suggest that arms exports are a precursor to establishing other critical links of a defense partnership, such as foreign basing, overflight rights, or joint military exercises.[33] Many would argue that the provision of arms does not invariably translate into enduring, irretractable influence, as demonstrated by Egypt's dramatic shift away from Soviet influence in the 1970s despite substantial military assistance.[34] And while it is true that arms exports are not a *guarantee* of determinative influence, they certainly increase its likelihood. The symbiotic linkage between America and the foreign nation entangles it within the U.S. military complex, lessening the probability that the foreign state will turn into an adversary and enabling the U.S. to extend geopolitical influence with confidence.

Third, beyond bilateral influence, arms exports also advance multilateral strategic objectives, particularly through alliances like NATO. Operating with compatible technology, known as "interoperability," enhances communications security, reliability in tracking, and ease of conducting joint exercises.[35] Despite restrictions limiting the transfer of weapons to third parties, even if weapons fall into the wrong hands, it is better to fight known rather than unknown systems.[36] Moreover, failure to meet a country's demand for weapons imports may lead governments to procure arms from countries like Russia or China, increasing the third country's reliance on an adversary.

Lastly, the growth of the defense industry has significant political consequences, entrenching interests that lobby for continued exports, regardless of the humanitarian toll. The aerospace and defense industry generated over $995 billion in total business activity during 2024 alone, dominating every single other manufacturing sector in the United States.[37] On the supply side, the weapons manufacturing industry supports a significant number of employment opportunities across various sectors: direct employment of technicians, engineers, and project managers, as well as indirect employment through the supply chain of raw materials, components, transportation, and maintenance. In 2024, the aerospace and defense industry was responsible for over 2.2 million American jobs.[38] Defense

32. WHY IT MATTERS, *supra* note 20, at 15:15–16:34.

33. *Id.* at 16:34–18:12.

34. PIERRE, *supra* note 24, at 164.

35. *See* WHY IT MATTERS, *supra* note 20, at 14:38–15:17; *Interoperability: Connecting Forces*, N. ATL. TREATY ORG. (Apr. 11, 2023, at 13:50 ET), https://www.nato.int/cps/en/natohq/topics_84112.htm [https://perma.cc/UQ3M-T9NQ]. Note that NATO standardization is not the unique burden of U.S. suppliers; standardization could also be achieved by having our allies purchase French, German, or other similar interoperable weapons.

36. *See generally* Harris Maidenbaum, *Structuring the Unstructured to Better Evaluate Known and Unknown Threats*, ONTIC (Nov. 2, 2021), https://ontic.co/resources/article/structuring-the-unstructured-to-better-evaluate-known-and-unknown-threats [https://perma.cc/2FU3-N74S].

37. *2025 Facts & Figures: American Aerospace & Defense Industry Continues Economic Dominance*, AEROSPACE INDUS. ASS'N (June 17, 2025), https://www.aia-aerospace.org/news/american-aerospace-defense-industry-continues-economic-dominance [https://perma.cc/5GP5-8MZD].

38. *Id.*

contractors benefit from economies of scale—reducing per-unit costs as production increases—especially when the government has already subsidized development of munitions.[39] On the demand side, the effects of U.S. influence and equipment standardization create long-term dependencies whereby foreign nations develop a reliance on American manufacturers for maintenance and on the U.S. military for training. In sum, exporting weapons has become a normalized tool of foreign policy because it is politically advantageous for incumbents and economically beneficial for American industry.

### B. DISADVANTAGES OF ARMS EXPORTS AS A TOOL FOR FOREIGN POLICY

Despite the strategic value of arms exports as a foreign policy tool, the disadvantages cannot be overlooked. The first major issue involves retransferring weapons to third parties. Although prohibited without written U.S. government authorization, states receiving American-made weapons sometimes intentionally transfer them to non-state actors without following their contractual obligations, as demonstrated by Saudi Arabia arming Yemeni factions with links to al-Qaeda to fight against the Houthis.[40] This makes it difficult for U.S. lawmakers to confidently target the end-user.

Absent intentional retransfers, in the chaos of war, weapons will inevitably end up on the wrong side relative to U.S. interests.[41] Recent reports from Russia and Ukraine highlight the troubling occurrences of retransfers in the modern theatre of conflict. Javelin shoulder-fired anti-tank missile systems sold to Ukraine have reportedly been found on the Russian side of the border, with some even making their way to Tehran.[42] As allies retreat or abandon equipment on the battlefield, U.S. weapons can be captured, transferred to adversaries, and potentially reverse-engineered, despite robust mitigation efforts.[43] These risks are further compounded by the looming possibility that today's allies may become tomorrow's enemies, as evidenced by the U.S.'s covert support of the Mujahideen, a group that later reorganized under the banner of the Taliban.[44]

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39. *See* WHY IT MATTERS, *supra* note 20, at 3:46–4:37.

40. Nima Elbagir, Salma Abdelaziz, Mohamed Abo El Gheit & Laura Smith-Spark, *Exclusive Report: Sold to an Ally, Lost to an Enemy*, CNN, https://edition.cnn.com/interactive/2019/02/middleeast/yemen-lost-us-arms [https://perma.cc/8G87-JRQ2] (last visited Oct. 17, 2025).

41. *Id.* (discussing how America's military equipment was "passed on, sold, stolen or abandoned" after being provided to Yemen).

42. *See* Tom O'Connor, *Israel Worries U.S. Weapons for Ukraine Are Ending Up in Iran's Hands*, NEWSWEEK (June 15, 2023, at 07:09 ET), https://www.newsweek.com/israel-worries-us-weapons-ukraine-are-ending-irans-hands-1806131 [https://perma.cc/9SDQ-JJVH]; Natasha Bertrand, *Russia Has Been Sending Some US-Provided Weapons Captured in Ukraine to Iran, Sources Say*, CNN: POLITICS (Mar. 14, 2023, at 11:33 ET), https://edition.cnn.com/2023/03/10/politics/russia-iran-ukraine-weapons [https://perma.cc/RJR7-LN2J].

43. *See* Bertrand, *supra* note 42.

44. *See* Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Aug. 15, 2025, at 09:31 ET), https://www.cfr.org/backgrounder/taliban-afghanistan [https://perma.cc/9SNL-KJ4E]. For example, during CIA-led Operations Cyclone (1979–1989) and Timber Sycamore (2013–2017), U.S.-origin weapons systems provided to U.S.-allied non-state groups were lost or stolen. Dylan Cordle & Jen

Next, arms sales to governments with weak oversight capacity can exacerbate conflict and sustain corruption. When recipients violate end-use terms, these deals risk undermining broader diplomatic efforts. Given that there is almost no mechanism to rescind weapons once they have been delivered, even if the humanitarian situation changes on the ground, the U.S. has very little leverage over how the weapons are used once they leave U.S. soil. This danger was evident in the early 2000s after the U.S. transferred a vast quantity of weapons to the post-Saddam Iraqi regime.[45]

Further, supplying arms requires fine-tuned attention to geopolitical nuances and balancing competing objectives; miscalculations can have devastating consequences. Selling advanced technology might reduce a state's sense of insecurity, making it less incentivized to acquire more powerful nuclear weapons. But in other cases, conventional weapons sales may have the opposite effect. For example, the transfer of F-16 fighter jets to Pakistan was initially approved in the 1980s because the Reagan Administration believed it would dissuade Pakistan from acquiring nuclear weapons.[46] Since then, Pakistan has become the world's fifth-largest importer of major arms while maintaining an expansive nuclear arsenal.[47]

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Spindel, *Grappling with End-Use Monitoring*, F. ON THE ARMS TRADE BLOG (Jan. 8, 2024), https://www.forumarmstrade.org/blog/category/looking-ahead-2024 [https://perma.cc/E93L-N8JV]. "[M]ore than 600 of the 2,300 Stinger missiles provided to the Mujahideen in Operation Cyclone were unaccounted for." *Id.* Javelin and TOW anti-tank missiles under Timber Sycamore have since been traced to possession of ISIS. *Id.* For a discussion of the tradeoffs involved in the CIA's historic, covert support of the Mujahideen, see Kirsten Lundberg, *The Politics of a Covert Action: The U.S., the Mujahideen, and the Stinger Missile*, in LIVING THE POLICY PROCESS 37–65 (Philip B. Heymann ed., 2008).

45. Following the 2003 invasion of Iraq, America's regional security strategy involved arming the post-Saddam government to strengthen its ability to fight insurgents. Douglas Birch, *U.S. Now Faces Threat of U.S.-Made Weapons in Iraq*, THE CTR. FOR PUB. INTEGRITY: NAT'L SEC. (Aug. 21, 2014), https://publicintegrity.org/national-security/u-s-now-faces-threat-of-u-s-made-weapons-in-iraq [https://perma.cc/8KT5-D5NV]. Between 2005 and approximately 2014, the U.S. sold about $8 billion in weapons to the Iraqi government, ranging from Abrams tanks, naval vessels, and F-16 fighter jets, to portable equipment and vast quantities of ammunition. *Id.* Proponents of the sale dismissed concerns about diversion and retransfers, arguing that insurgents lacked the technical skills necessary to maintain and operate American-made weapons. *Id.* In reality, Iraqi forces funneled a significant amount of these weapons to paramilitary groups, most notably the Popular Mobilization Units (PMUs), an umbrella organization of 40 or 50 distinct militias, to combat the Islamic State. *See Iraq: End Irresponsible Arms Transfers Fueling Militia War Crimes*, AMNESTY INT'L (Jan. 5, 2017), https://www.amnesty.org/en/latest/press-release/2017/01/iraq-end-irresponsible-arms-transfers-fuelling-militia-war-crimes [https://perma.cc/T8CD-ZXVA]. Amnesty International extensively documented widespread human rights abuses by PMU units, including forced disappearances, extrajudicial killings, torture, and other unlawful violations, all committed under the cloak of state. *See id.* Later, a declassified audit of the DOD in 2016 revealed the DOD failed to maintain accurate, up-to-date records on the quantity and location of over $1 billion worth of weapons transferred to Iraq and Kuwait. *Iraq: US Military Admits Failures to Monitor Over $1 Billion Worth of Arms Transfers*, AMNESTY INT'L (May 24, 2017), https://www.amnesty.org/en/latest/press-release/2017/05/us-military-admits-failures-to-monitor-over-1-billion-worth-of-arms-transfers [https://perma.cc/5BNC-CNRX]. By supplying arms without effective safeguards or oversight mechanisms, U.S. arms sales not only failed to prevent abuses by groups like the PMU but also stubbed the U.S.'s own efforts to promote stability in Iraq and the wider region.

46. PIERRE, *supra* note 24, at 29–30.

47. GEORGE ET AL., *supra* note 17, at 6 (highlighting Pakistan's role as a leading importer of major arms); Hans M. Kristensen, Matt Korda & Eliana Johns, *Pakistan Nuclear Weapons, 2023*, BULL. OF

Furthermore, foreign policy commitments often conflict. The goal of strengthening bilateral relations or bolstering a country's capacity to respond to an armed attack can run contrary to another goal, such as promoting human rights or the respect for the rule of law.[48] This tension is evident in the U.S.'s delicate relationship with Turkey and the Kurds. While the U.S. supports Kurdish communities through diplomacy, humanitarian aid, and political advocacy, it also supplies Turkey with small arms, tanks, armored personnel carriers, and other equipment which has been directly linked to documented abuses by the Turkish military against Kurdish civilians, particularly in the southeast.[49] In this case, U.S. military support for Turkey directly undercuts its commitment to the Kurdish people in the same region.

In sum, each weapons export decision involves complex judgement calls and significant tradeoffs.[50] While the advantages are numerous, particularly domestically, the disadvantages can have compromising, long-term consequences for global security.

## II. THE CONSTITUTION AND FOREIGN AFFAIRS POWER

### A. CONSTITUTIONAL TEXT AND STRUCTURE

Having established that the arms export regime is a flawed yet essential pillar of U.S. foreign policy, we turn to a constitutional analysis of the foreign affairs power to understand how the sale of weapons ought to be regulated. The Constitution envisions foreign affairs to be a shared power, syphoning different authorities to the Executive and Legislative Branches.[51] Certain powers, like the President's "Commander in Chief" authority, are granted exclusively to the Executive.[52] Other powers are situated more comfortably in the President's domain but do require "Advice and Consent of the Senate," such as the power to make treaties and appoint ambassadors.[53] Meanwhile, key authorities like the power to regulate "[c]ommerce with foreign [n]ations,"[54] "declare [w]ar,"[55]

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THE ATOMIC SCIENTISTS (Sep. 11, 2023), https://thebulletin.org/premium/2023-09/pakistan-nuclear-weapons-2023 [https://perma.cc/VPL3-633R] (discussing how Pakistan continues to grow its nuclear arsenal).

48. PIERRE, *supra* note 24, at 7.

49. *See* Sardar Aziz, *The US-Iraqi Kurdistan Relationship: In Pursuit of Partnership*, EMIRATES POL'Y CTR. (Apr. 10, 2023), https://epc.ae/en/details/featured/the-us-iraqi-kurdistan-relationship-in-pursuit-of-partnership [https://perma.cc/B4UK-P3B4]; *Weapons Transfers and Violations of the Laws of War in Turkey*, HUM. RTS. WATCH (Nov. 1995), https://www.hrw.org/legacy/summaries/s.turkey95n.html [https://perma.cc/G33Q-F68G].

50. PIERRE, *supra* note 24, at 7.

51. *See* THE FEDERALIST NO. 69 (Alexander Hamilton) ("The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. . . . The one can perform alone what the other can do only with the concurrence of a branch of the legislature.").

52. U.S. CONST. art. II, § 2, cl. 1.

53. *Id.* at cl. 2.

54. U.S. CONST. art. I, § 8, cl. 3.

55. *Id.* at cl.11.

"raise and support [a]rmies,"[56] "provide and maintain a [n]avy,"[57] and "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces,"[58] are assigned to Congress, though subject to a presidential veto.[59]

While the Constitution envisions some spheres of authority in the realm of foreign affairs, it realistically creates zones of overlapping control.[60] This friction is not an incidental consequence, but a defining feature of the Constitution.[61] The system of checks and balances was designed to guard against the concentration of power in any one branch and to reflect democratic principles of accountability and representation.[62] Involving both branches in foreign affairs decisionmaking fosters transparency and ensures that decisions reflect, at least in part, the nuanced interests of American constituencies, many of whom have a personal connection to U.S. engagements abroad.

In fact, the Founders assigned Congress the power to declare war precisely because they were wary of unchecked executive power in matters of foreign conflict. As James Madison wrote to Thomas Jefferson, "The constitution supposes, what the History of all Gov[ernments] demonstrates, that the Ex[excutive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ature]."[63]

### B. DELEGATION TO THE EXECUTIVE

As the federal government expanded, Congress delegated some of its authority to the Executive Branch, as it has done in many other areas.[64] Through the Foreign Military Sales Act of 1968, Congress authorized "the President to sell and transfer defense articles, services, and training" subject to statutorily prescribed conditions.[65] The Executive Branch increasingly took the lead in administering arms while Congress mainly retained oversight authority and the power to appropriate funds for gifts through aid packages, for example.

To be sure, the Executive is described as "the sole organ . . . in the field of international relations."[66] But even the strongest formulations of executive foreign

56. *Id.* at cl.12.

57. *Id.* at cl.13.

58. *Id.* at cl.14.

59. *See* U.S. CONST. art. I, § 7, cl. 2 (outlining the President's power to veto legislation).

60. Larry A. Mortsolf, *Revisiting the Legislative Veto Issue: A Recent Amendment to the Arms Export Control Act*, 8 DEF. INST. SEC. ASSISTANCE MGMT. J. 10, 11 (1986) (outlining Congress's overlapping legislative veto power and its ability to "become directly involved in numerous day-to-day affairs of the Executive Branch.").

61. Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS. (Mar. 2, 2017, at 14:28 ET), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/7CTW-P3ST].

62. *See id.* ("The drafters distributed political power and imposed checks and balances to ward off monarchical tyranny embodied by Britain's King George III.").

63. Letter from James Madison to Thomas Jefferson on U.S. CONST. art. I, § 8, cl. 11 (Apr. 2, 1798), *reprinted in* UNIV. OF CHICAGO PRESS, https://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html [https://perma.cc/MP2F-9R9H].

64. Mortsolf, *supra* note 60, at 10.

65. *Id.* at 10–11.

66. United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 320 (1936).

affairs power recognize the authorities constitutionally vested in Congress. Arms transfers—fundamentally tied to war powers and commerce with foreign nations—sit squarely within Congress's legislative domain. Article I, Section 8 grants Congress the authority to regulate commerce with foreign nations, a power which plainly encompasses the sale of defense articles, services, and training.[67] In fact, it is entirely possible Congress could regulate such sales by private firms and purchasers without ever involving the President.[68] In practice, however, because arms exports implicate both foreign relations and national security, Congress has increasingly *shared* this authority with the Executive. This is an act of discretion, not one of constitutional necessity.

The division of responsibilities reflects the unique strengths of each branch—a relationship explicitly contemplated in the Constitution. Because the contours of the arms export regime have not been carved out, the shared authority over this power has led to a persistent "tug of war" as each branch vies for more political and regulatory authority.

### C. INSTITUTIONAL STRENGTHS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

Advocates for increased Executive Branch decisionmaking may frame their preference for a singular, decisive foreign policy voice within the broader theory of the unitary executive, which posits that the President should have plenary control over all executive functions—including diplomacy and national security.[69]

Proponents of this theory may argue that Congress is not attuned to nuances in global issues, so its decisionmaking is more influenced by politics than by weighted deliberation.[70] They may also argue that the Executive Branch's ability to present a unified stance on foreign policy holds paramount importance in diplomatic engagements, for inconsistencies can undermine America's role as a global leader and international stability generally. Furthermore, discord over foreign policy in Congress can be messy, leading to diplomatic complications that can damage bilateral relationships.[71] The diversity of opinions might even cancel each other out, paving the way for a more decisive Executive. While these critiques of the legislature have significant merit, they risk overstating the Executive's consistency and downplaying the democratic legitimacy of congressional input envisioned in the Constitution.

Advocates for legislative involvement would argue that selling weapons to another country has generational consequences for victims, and Americans want to have meaningful input in those decisions. Congressional hearings and investigations provide a unique—and often *only*—forum for public scrutiny and debate. Cognizant of looming reelections, Congressmembers might be more input

67. Mortsolf, *supra* note 60, at 10.

68. *Id*. at 11

69. *Unitary Executive Theory (UET)*, CORN. L. SCH. LEGAL INFO. INST. (July 2024), https://www.law.cornell.edu/wex/unitary_executive_theory_%28uet%29 [https://perma.cc/G99T-JXC4].

70. *See generally* WOODROW WILSON CENTER, *Congress' Influence on Foreign Policy: For Better or Worse?*, at 25:55–26:35 (YouTube, Sep. 5, 2012), https://www.youtube.com/watch?v=qoBR6MJpcB8 [https://perma.cc/PBZ8-FRAZ].

71. *See Id*. at 17:02–18:20.

sensitive than Executive officials whose job security may be somewhat insulated from public perception.[72] While it is impossible for the 535 members of Congress to negotiate the details of every arms sale agreement, for at least the most consequential sales, involving the largest transfers to countries with documented records of human rights abuses, congressional input is critical.[73]

Congressmembers may be well situated to balance competing foreign policy objectives inherent in the sale of weapons. They can import popular values and beliefs from their constituents into their voting behavior, which career Executive Branch officials may not have the authority to rely on for their own decisionmaking.[74] Plainly put, the Senate Foreign Relations Committee and House Foreign Affairs Committee are well-resourced counterweight to the Executive Branch's otherwise black box decisionmaking, representing a vital check and balance on executive power consistent with Articles I and II.[75]

## III. THE TUG OF WAR

Shifting political climates have always put pressure on the balance of power between the Executive and Legislative Branches in arms exports. While the lead up to the 1960s saw a delegation of authority over arms exports to the President, the 1970s ushered in a series of political events which put pressure on Congress to "pull" some of its Constitutional authority back.[76]

The Vietnam War triggered an unprecedented antiwar movement. The first war to be widely televised, it shocked Americans on a moral level. People were appalled by the devastation and violence they confronted every night on their television screens.[77] The mandatory draft was viewed as an intrusive overreach by the Executive Branch, as many Americans felt they were forced to support a cause they did not believe in. The Watergate scandal marked a decline in public trust in the Executive Branch and provoked new interest in the importance of

72. *See* Andrew Hall, *State Elections, Policy Choices, and Accountability*, STAN.: INST. FOR ECON. POL'Y RSCH. (Nov. 2021), https://siepr.stanford.edu/publications/policy-brief/state-elections-policy-choices-and-accountability [https://perma.cc/Z5PV-4HGL] (discussing how electoral pressures change the behavior of policymakers).

73. Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685, 696 (1984) (advocating that Congress must play a "proper role" in oversight of arms agreements).

74. *See* Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336 (2001) (discussing how Congress should take into account "popular values and beliefs" when creating laws).

75. *See* Elias Yousif, *Eroding What's Left of Congressional Arms Transfer Oversight*, THE STIMSON CTR. (June 4, 2025), https://www.stimson.org/2025/eroding-whats-left-of-congressional-arms-transfer-oversight [https://perma.cc/CNG7-GMVA] (discussing the involvement of the Senate Foreign Relations and House Foreign Affairs Committees as one of the "few practical instruments Congress has to meaningfully intercede in the arms sales process"); John Ramming Chappell, *The Rise and Fall of Section 502B*, 21 NW. J. HUM. RTS. 1, 6 (2023).

76. *See* Masters, *supra* note 61 (discussing how changing political climates shift the balance of power between the Executive and the Legislative Branches in foreign relations).

77. *See* Michael Mandelbaum, *Vietnam: The Television War*, 37 NAVAL WAR COLL. REV. 157, 161 (1984).

congressional oversight.[78] Following Vietnam, increased military involvement in Iran and Saudi Arabia, done largely to protect economic interests and reestablish American credibility, was also conducted in part without transparency to Congress and the public, making Americans feel further disregarded.[79] For these reasons, this period of executive authority has been dubbed the "imperial Presidency."[80]

The backlash against these events marked the apex of public perception that presidential authority in foreign affairs had gone too far. Importantly, it showed Congress that ordinary Americans wanted more representation in decisions over U.S. involvement in global conflict. In response, Congress passed a series of landmark reforms to reclaim oversight authority in foreign affairs, including the War Powers Resolution,[81] National Emergencies Act,[82] the Foreign Intelligence Surveillance Act,[83] and the Foreign Assistance Act.[84] This legislation imposed a range of notification, reporting, and certification requirements which wired in channels of collaboration between the Executive and Legislative on an array of foreign policy issues.[85] Chief among them was the AECA.[86] Passed in 1976, this legislation gave Congress one of its strongest tools to influence the Executive Branch's decisions on arms sales. This Part will explore how, despite the original aims of the AECA, congressional oversight of arms exports has steadily eroded over the past fifty years to the point of near nonexistence.

### A. THE AECA ARMS EXPORT REGIME TODAY

Today, the Executive Branch is generally free to proceed with an arms sale *unless* Congress passes legislation prohibiting or modifying the sale.[87] Under the AECA, the President must submit the arms sale proposal to Congress through a system of informal and formal notifications.[88] The AECA permits arms transfers

78. Chappell, *supra* note 75, at 5–6 (citing Barbara Keys, *Congress, Kissinger, and the Origins of Human Rights Diplomacy*, 34 DIPLOMATIC HIST. 823, 834 (2010)).

79. *See* Kenneth M. Pollack, *Securing the Gulf*, 82 FOREIGN AFFS. 2, 2–3 (2003) (discussing America's "twin pillars" foreign policy strategy in the Persian Gulf during the 1970s and 1980s).

80. Chappell, *supra* note 75, at 5 (citing HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 45–46 (1990)).

81. 50 U.S.C. §§ 1541–1550.

82. 50 U.S.C. §§ 1601–1651.

83. 50 U.S.C. §§ 1801–1885c.

84. 22 U.S.C. § 2151.

85. KOH, *supra* note 80 at 104.

86. 22 U.S.C. §§ 2751–2799. The AECA is the general law governing Foreign Military Sales and commercial sales of defense articles, defense services, and training. The AECA "authorizes the President to control the import and export of defense articles and services" by issuing "a license to an individual or organization that wishes to export defense articles or services." *Arms Export Control Act (1976)*, CORN. L. SCH. LEGAL INFO. INST. (June 2022), https://www.law.cornell.edu/wex/arms_export_control_act_(1976) [https://perma.cc/2WDL-4HKK]. Exporting such items is not permitted without a license. *Id.* The AECA came into existence in 1976 with the passage of the Foreign Military Sales Act (FMSA) of 1968. Mortsolf, *supra* note 60, at 12. An amendment in the AECA changed the name from FMSA to the AECA. *Id.*

87. KERR, *supra* note 7, at 10.

88. *See* 22 U.S.C. §§ 2751–2799; KERR, *supra* note 7, at 1–2.

only under narrowly defined conditions, including for (1) "internal security"; (2) "legitimate self-defense"; (3) "preventing or hindering the proliferation of weapons of mass destruction and of the means of delivering such weapons."[89] If either the President or Congress determines that a recipient country has violated AECA conditions, arms transfers may be halted. Sales may only resume if the violation ceases, and the recipient provides credible assurances that it will not recur.[90] The notification requirement gives Congress its most powerful lever over the Executive: *time* to exercise a veto to combat or halt human rights violations and enforce restrictions under the AECA.

1. Informal Notifications

Under the AECA, the State Department submits an informal notification of a proposed arms sale before the Executive can initiate the formal approval license.[91] In the informal notification process, the Senate Foreign Relations Committee and House Foreign Affairs Committee are notified between twenty and forty calendar days—depending on the weapons system and destination country—before the formal process begins.[92] While non-binding, these timelines provide a meaningful opportunity for senior foreign affairs officials to raise concerns, request information, negotiate changes, and potentially place approvals on hold before the formal notification process begins.[93]

The Executive Branch will typically respect the informal notification process out of courtesy; no law formally "prevents an administration from proceeding with a formal notification in the face of an informal hold."[94] Nevertheless, the informal notification process is an excellent example of constitutional foreign affairs power in action: It respects the institutional strengths between both branches, encouraging good-faith collaboration that gives senior lawmakers a meaningful opportunity to engage with executive officials over the nuances inherent in arms export decisions.

2. Formal Notifications

While informal notifications are often confidential, formal notifications are generally public, marking the beginning of congressional debates, civil society

89. 22 U.S.C. § 2754.

90. 22 U.S.C. § 2753(c)(3)–(4).

91. KERR, *supra* note 7, at 1.

92. *See id.*; DEF. SEC. COOP. AGENCY, SECURITY ASSISTANCE MANAGEMENT MANUAL (SAMM) DSCA 5105.38-M at tbl C5.T.16. (2025).

93. *See DSCA 5105.38-M, supra note 92* at C5.5.6.3; KERR, *supra* note 7, at 1–2.

94. Elias Yousif, *A Primer on the Emergency Declaration for Arms Transfers to Isreal*, THE STIMSON CTR. (Jan. 8, 2024), https://www.stimson.org/2024/emergency-declaration-for-arms-transfers-to-israel [https://perma.cc/FHK3-D6S7]. *See generally* Diana Ohlbaum & Rachel Stohl, *An "Emergency" Arms Deal: Will Congress Acquiesce in Another Blow to Its Authority?*, JUST SEC. (June 6, 2019), https://www.justsecurity.org/64413/an-emergency-arms-deal-will-congress-acquiesce-in-another-blow-to-its-authority [https://perma.cc/GT79-2LFM].

awareness, and advocacy-building.[95] This is the point at which the administration begins publicly justifying its decision and facing the associated political costs.[96] Sales are divided into Foreign Military Sales (FMS) which are government-to-government transactions, and Direct Commercial Sales (DCS) which are direct commercial transactions between a U.S. company and a foreign entity.[97]

*a. Foreign Military Sales*

The AECA requires the President to formally notify the Senate Foreign Relations Committee, the House Foreign Affairs Committee, and the Speaker of the House thirty calendar days before the Executive Branch can take final steps to initiate an arms sale.[98] This notification requirement is triggered whenever the Executive Branch seeks to issue a Letter of Offer and Acceptance (LOA) for an FMS of major defense equipment or to approve the relevant license of a DCS valued at $14 million or more, or defense articles or services valued at $50 million or more.[99] For sale to NATO members and other select countries, including Israel, the rules are more relaxed. The President must formally notify Congress fifteen calendar days before, and the threshold for notification can be as high as $300 million.[100]

*b. Direct Commercial Sales*

Section 36(c)(1) of the AECA requires the President to formally notify the House and Senate committees and the Speaker of the House of DCS thirty calendar days before the State Department can issue the export license.[101] Congress must be notified of proposed sales over $14 million for major defense equipment, and $50 million for defense articles or services.[102] For NATO members and other select countries, including Israel, the slack is again loosened, and notifications

95. Yousif, *supra* note 94.

96. *Id.*

97. Foreign military sales give the U.S. government more input into the terms of the deal and come with follow-on maintenance and technical support, but they include a 3.2% administrative surcharge some buyers would rather avoid, covering costs like employee salaries and contract administration fees. DCS involve more direct negotiations between the supplying firm and the recipient, offering both more flexibility and freedom to negotiate price, terms, and follow-on support arrangements. *See Administrative Surcharge Rate Change*, DEF. SEC. COOP. AGENCY, https://samm.dsca.mil/loanote/administrative-surcharge-rate-change (last visited Oct. 18, 2025); DEREK GILMAN, FOREIGN MILITARY SALES 1–2 (2014).

98. KERR, *supra* note 7, at 2.

99. *See id.* Sub-threshold sales also pose significant oversight issues. To evade review, controversial sales can be broken into smaller packages with lower dollar values to not trigger the congressional reporting requirement. *See* Yousif, *supra* note 94. "A 2020 Government Accountability Office report found that, since January 2017, the Department of State had approved 4,221 below-threshold arms transfers to Saudi Arabia and the UAE worth more than $11 billion. These sales proceed with virtually no congressional or public oversight and allow Presidents to shirk the political costs of authorizing sales that often carry considerable humanitarian and strategic risks." *Id.*

100. KERR, *supra* note 7, at 2.

101. *Id.* at 3; *see also* 22 U.S.C. § 2776(c)(1).

102. KERR, *supra* note 7, at 2.

can go out fifteen calendar days before the sale.[103] Notification requirements also vary by type of weapons system sold.[104] Note, unlike FMS, congressional notifications for proposed DCS packages are often not made public and are only viewed by a few representatives and their aides.[105] This exception creates a gap in oversight that muddies the AECA's transparency goals.

### B. "THE CORE BARGAIN"

The AECA was a monumental rebalancing of congressional power in foreign affairs, singularly because the notification requirements provided Congress time to exercise a legislative veto.[106] During these formal and informal periods of statutory review, Congress could modify or overturn proposed administrative actions through simple congressional action. The legislative veto included several forms: a committee chairman's veto (an individual chairman's block), a one-house veto (simple majority in one chamber), or a two-house veto (by concurrent resolution).[107]

The "core bargain" of the AECA was always the legislative veto.[108] It gave Congress the power to "hedge on its bet" by delegating authority to the Executive Branch while retaining ultimate ability to veto specific administrative decisions.[109] Congress could become more involved in the daily affairs of the White House while also respecting the Executive's expertise, affording it flexibility to respond to emergency conflict situations.[110] The AECA's "core bargain" embodied the Constitution's vision of shared authority in foreign affairs over arms exports. This move became synonymous with Congress's responsiveness to domestic discontent over the Executive's foreign affairs power in the 1970s.

### C. THE EROSION OF THE "CORE BARGAIN" AFTER *CHADHA*

But this rebalancing was short-lived. In 1983, the Supreme Court declared the legislative veto unconstitutional in *Immigration and Naturalization Service v. Chadha*, stripping Congress of its most powerful foreign policy tool.[111] Chief Justice Warren Burger argued that the legislative veto ran contrary to the requirements of Article I which states that bills shall be approved by both the House and the Senate and then be presented to the President for approval.[112] The issue with the

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103. *Id.*

104. *Id.*

105. John Ramming Chappell et al., *Law and Policy Guide to US Arms Transfers to Israel*, JUST SEC. (Nov. 8, 2023), https://www.justsecurity.org/90010/a-law-and-policy-guide-to-us-arms-transfers-to-israel [https://perma.cc/EDS6-SU7K].

106. *See* Mortsolf, *supra* note 60, at 11.

107. *Id.*

108. Then-Senator Joe Biden referred to the "core bargain" of the AECA as the "historic compromise." Biden, Jr., *supra* note 73, at 693. He also referred to the AECA under the pre-*Chadha* system as "a most significant" statute. *Statement Introducing the Arms Export Reform Act of 1986*, 99th Cong. 1 (1986) (statement of Joseph R. Biden, former Senator of Delaware).

109. Mortsolf, *supra* note 60, at 11.

110. *Id.*

111. 462 U.S. 919, 959 (1983).

112. *See id.*

legislative veto was that a unilateral act, not endorsed by the Constitution, had become an appropriate exception to bicameralism and presentment requirements.[113]

Prior to *Chadha*, Congress incorporated the legislative veto into over 200 statutory provisions to maintain oversight over the powers it delegated to the Executive.[114] Post-*Chadha*, reasserting control over that delegated authority became nearly impossible. It now requires a full legislative process: approval by both chambers and a President's signature. But given that the President would likely veto a congressional effort to curtail its action, Congress must secure a two-thirds vote in each chamber to override the presumptive veto, an especially high bar for laws that once relied on a simpler legislative veto mechanism.[115]

The evisceration of the legislative veto ushered in a period of expansive Executive Branch authority in foreign affairs. As then-Senator Joe Biden put it in 1986 while the minority leader of the Senate Foreign Relations Committee, "*Chadha* seems to me, in fact, to be a blessing in disguise, in every respect save one. *Chadha* leaves us, I believe, dangerously uncertain about the role of Congress, and especially the Senate, in formulating and implementing foreign policy."[116]

Since 1983, halting, blocking, or amending a sale of weapons to foreign countries to enforce provisions under the AECA has become nearly impossible. In *Chadha*'s aftermath, Congress passed Public Law 99-247, amending the AECA to bring it into compliance with *Chadha* by replacing the legislative veto with a requirement of a Joint Resolution of Disapproval (JRD) to block an arms sale.[117] Before, the AECA allowed Congress to block a proposed sale of weapons with a simple legislative veto, such as a majority vote in both chambers. Now, if Congress wants to halt an arms export, Public Law 99-247 requires it to ask the President to block his *own* arms sale approval. Realistically, this is an insurmountable barrier and was the precise reason why Senator Murphy's legislation to halt exports to Saudi Arabia failed. To overcome the expected presidential veto, Congress must pass a JRD by a two-thirds majority in each house.[118] If Congress fails to pass a JRD, the sale can move forward.[119]

Technically, the informal and formal notification requirements still give Congress time to issue a JRD. Section 36(b)(1) of the AECA prohibits the State

113. *Id.* at 956 ("These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution.").

114. *Id.* at 967 (White, J., dissenting) (stating that the end of the legislative veto "sounds the death knell for nearly 200 other statutory provisions"); *see also* John Ramming Chappell, *The Chadha Effect: How SCOTUS Put a Chokehold On Congressional Powers*, RESPONSIBLE STATECRAFT (Sep. 23, 2021), https://responsiblestatecraft.org/2021/09/23/the-chadha-effect-how-scotus-put-a-chokehold-on-congressional-powers [https://perma.cc/5JRZ-6M5S].

115. Chappell, *supra* note 114.

116. Biden, Jr., *supra* note 73, at 693.

117. Mortsolf, *supra* note 60, at 15 (discussing how Public Law 99-247 substituted the term "joint resolution" for "concurrent resolution[,]" and a concurrent resolution is not the equivalent of a bill and does not have a presentment requirement. In comparison, a "joint resolution" becomes law as a bill does, so it requires presentment.).

118. *See* Chappell, *supra* note 75, at 28.

119. *See, e.g.*, KERR, *supra* note 7, at 8.

Department from issuing a LOA for an FMS if Congress "enacts a joint resolution prohibiting the proposed sale," and Section 36(c)(2) prohibits the Department from issuing an export license for a DCS if Congress "enacts a joint resolution prohibiting the proposed export."[120] But in reality, given the difficult supermajority threshold from *Chadha*, Congress has never successfully blocked a proposed arms sale using a JRD.[121] As a result, Congress has become largely sidelined in arms export decisionmaking, despite the AECA's formal safeguards.[122]

One could argue that, even absent a successful JRD, Congress's strong opposition to proposed arms deals may nevertheless affect both the timing and composition of exports. In other words, from the fact that Congress has never vetoed an arms sale, it does not follow that Congress is not a meaningful counterweight to executive action. Theoretically, the fact that Congress could veto a sale may encourage the Administration to work with the Legislature, give early notification of proposed sales, and take into consideration their opinions. Moreover, even if a veto is unlikely, strong bicameral and bipartisan opposition is difficult for the Executive Branch to ignore.

For example, in 1986, President Reagan formally notified Congress of his proposed sale to Saudi Arabia of defense articles and services, including 1,700 Sidewinder missiles, 100 Harpoon missiles, and most controversially, 200 Stinger missile launchers and 600 Stinger missile reloads.[123] Shortly thereafter, the Senate passed legislation blocking these sales, and the House concurred.[124] Reagan then vetoed the resolution, but concluded he would not include the Stinger missiles and launchers in the sale proposal. By a razor-thin margin, the Senate sustained the veto by 66-34, and the sale of Sidewinder and Harpoon missiles proceeded.[125] Although Congress failed to overcome the presidential veto, bicameral and bipartisan opposition influenced the Administration to significantly modify the proposed sale.

However, as the following Section will explore, the Executive Branch has found new ways to bypass congressional review altogether, cutting off any ability for the legislature to influence an arms export decision.

### D. SECTION 36 EMERGENCY WAIVER AUTHORIZATIONS

Not only has the legislative veto been invalidated—Congress's strongest lever of authority under the AECA—but over the past three Administrations, the Executive Branch has increasingly deployed a previously obscure section of the AECA to "pull" even more authority away from Congress: the Section 36 waiver.[126]

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120. *Id.* at 4.
121. *Id.*
122. *See, e.g.*, Yousif, *supra* note 75.
123. KERR, *supra* note 7, at 8.
124. *Id.*
125. *Id.*
126. *See generally* THE JUST SECURITY PODCAST: *A Human Rights Law Returns to Spark Debate on U.S. Arms Sales*, at 16:45–17:30 (Apple Podcasts, Jan. 19, 2024).

In his formal notification to Congress under 36(b)(1), 36(c)(2), or 36(d)(2), the President can state that "an emergency exists" which requires the sale or export license to be made immediately "in the national security interests of the United States . . . ."[127] Critically, there is no statutory definition of an "emergency," giving the President broad discretion to make this determination. To initiate the emergency waiver under the AECA, at the time of notification, the President must provide Congress with a "detailed justification for his determination, including a description of the emergency circumstances" that requires decisive action, and a "discussion of the national security interests involved."[128] This releases the President from the congressional review requirement, and the sale or license can proceed almost immediately.[129]

1. The Section 36 Waiver Since 2019

The Section 36 waiver has been the weapon of choice for both the Biden and the two Trump Administrations. Effectively, the Section 36 waiver not only limits the opportunity for Congress to block a proposed sale using a JRD, but it also reduces the time available for public debate, foreclosing discussions about the merits of the transfer, the risks involved, and the mitigation measures necessary to address those risks.[130] The following Section will highlight recent, monumental sales to the governments of Saudi Arabia and Israel to illustrate how the Section 36 waiver scheme works in practice.

*a. 2019 Sales to Saudi Arabia*

On May 24, 2019, then-Secretary of State Michael Pompeo submitted a series of formal notifications to Congress signaling the Administration's intent to approve more rounds of FMS to Saudi Arabia under AECA Section 36. One notification detailed a sale "of continued Tactical Air Surveillance System Aircraft Support for an estimated cost of $136 million."[131] The second detailed "Follow-On Support and Services" for the Royal Saudi Air Force for an estimated cost of $800 million,[132] and the third was "Aircraft Follow-On Support and Services" for a whopping $1.8 billion.[133]

127. 22 U.S.C §§ 2776(b)(1), 2776(c)(2), 2776(d)(2); *see also* KERR, *supra* note 7, at 6 (explaining the mechanism by which the president describes "an emergency exists").

128. 22 U.S.C § 2776(c)(2).

129. KERR, *supra* note 7, at 6. Note, these justifications are also not subject to judicial review either, so the scope of Presidential authority under Section 36 lacks oversight from the two other branches.

130. *See* Yousif, *supra* note 75; *supra* Part I.

131. DEF. SEC. COOP. AGENCY, KINGDOM OF SAUDI ARABIA – CONTINUED TACTICAL AIR SURVEILLANCE SYSTEM AIRCRAFT SUPPORT, TRANSMITTAL NO. 18-31 (2019), https://media.defense.gov/2024/Dec/11/2003606660/-1/-1/0/SAUDI_ARABIA_18-31.PDF.

132. DEF. SEC. COOP. AGENCY, KINGDOM OF SAUDI ARABIA – AIRCRAFT FOLLOW-ON SUPPORT AND SERVICES, TRANSMITTAL NO. 18-21 (2019), https://media.defense.gov/2024/Dec/11/2003606659/-1/-1/0/SAUDI_ARABIA_18-21.PDF.

133. DEF. SEC. COOP. AGENCY, KINGDOM OF SAUDI ARABIA – AIRCRAFT FOLLOW-ON SUPPORT AND SERVICES, TRANSMITTAL NO. 19-01 (2019), https://media.defense.gov/2024/Dec/11/2003606662/-1/-1/0/SAUDI_ARABIA_19-01.PDF.

To initiate the Section 36 waiver, President Trump declared a national emergency, citing tensions with Iran, to bypass the congressional review period.[134] Each of these three notifications included a Section 36(b) provision that used repetitive "emergency" language, invoking the President's emergency declaration.[135] However, reporting suggests that many of the sales in the package "bore no clear relationship to the emergency being declared."[136] One permitted the transfer of bombs from the UAE to Jordan, another was designed to bolster the UAE's counterterrorism operations, and many involved manufacturing and coproduction agreements, benefits which would take years to materialize, involving Spain, France, Italy, Korea, and Australia, countries far from the influence of Iran and its proxies.[137]

Under the AECA, a sale of over $50 million to Saudi Arabia would require a congressional notification and a 30-day review period. Because of the Section 36 waiver, however, Saudi Arabia was authorized to buy over $2.736 billion of U.S. military equipment—over *fifty-four* times the reporting threshold in non-emergency situations—and Congress was unable to review whether the transaction violated the AECA. Undoubtedly, Iran is a legitimate national security threat, but when such threat is considered in light of the monumental, comprehensive, and importantly controversial nature of this arms package, the failure to include congressional lawmakers is significant.

*b. 2023 and 2025 Sales to Israel*

In December 2023, then-Secretary Antony Blinken authorized two transfers to Israel in quick succession using the Section 36 waiver.[138] On December 8, the Executive Branch notified Congress that "an emergency exists which requires the immediate sale" of 120-millimeter tank cartridges and support equipment to Israel.[139] Secretary Blinken then approved an FMS estimated at $106.5 million, surpassing the $100 million threshold under the AECA that ordinarily triggers the congressional review period.[140] In its formal notification, the State Department concluded that "an emergency exists that requires the immediate sale to the Government of Israel . . . thereby waiving the congressional review requirements

134. Memorandum of Justification, *supra* note 9, at 35652, 35656.

135. *See, e.g.*, DEF. SEC. COOP. AGENCY, *supra* note 131 ("The Secretary of State has determined and provided detailed justification that an emergency exists that requires the immediate sale to the Kingdom of Saudi Arabia of the above defense articles (and defense services) in the national security interests of the United States, thereby waiving the Congressional review requirements under Section 36(b) of the Arms Export Control Act, as amended.").

136. Ohlbaum & Stohl, *supra* note 5. At the time, the State Department Inspector General Steve Linick was investigating that very emergency declaration, allegedly looking into whether then-Secretary "Pompeo acted improperly in the process of developing a legal justification" for an emergency. *Id.* He was fired before his report came out. *Id.*

137. Ohlbaum & Stohl, *supra* note 94.

138. *Id.*

139. Arms Sale Notice, 89 Fed. Reg. 101579, 101580–101584 (Dec. 16, 2024).

140. *See id.*; KERR, *supra* note 7, at 4 tbl.1.

under Section 36(b) of the Arms Export Control Act, as amended."[141] On December 29, Secretary Blinken determined that "an emergency exists that requires the immediate sale" of additional 155-millimeter projectiles and "related equipment" to Israel.[142]

Over a year later, on February 28, 2025, Secretary of State Marco Rubio again invoked the Section 36 emergency waiver authority, notifying Congress that "an emergency exists which requires the immediate sale" of $675.7 million worth of munitions, including various 1,000-pound bombs and associated Joint Direct Attack Munition (JDAM) guidance kits.[143] This is over six times the reporting threshold which would ordinarily trigger congressional oversight.

There are reasons to question the necessity of declaring an emergency and bypassing Congress for such large-scale arms transfers.[144] Recall, the U.S. government already affords Israel an expedited review process, with a congressional review period for FMS at just fifteen days, the same privilege extended to NATO countries and other close allies, and about half the length allotted for most other countries.[145] Given the already-accelerated timeline, consulting with Congress before approving such a large transfer would not have significantly delayed action, but it would have ensured that elected representatives had a chance to weigh in.

Invoking an "emergency" to bypass congressional review is further undermined by the fact that many weapons transfers approved under this fast-track process will not be delivered for several years. Consider the February 28, 2025 authorization to sell $675.5 million of equipment to Israel. The notification declared that "an emergency exists" requiring immediate sale, thereby waiving the congressional review requirement under Section 36(b) of the AECA.[146] However, the very same notification document also stated that "[d]eliveries are estimated to begin in 2028."[147] If the weapons themselves will not arrive for three years, it is difficult to argue that taking fifteen days for congressional review would practically hinder the administration's objective. More fundamentally, invoking an emergency to justify sales three years in advance erodes the very meaning of the term.

2. How Section 36 Emergency Waivers Undermine the "Core Bargain"

Congress implemented the emergency authorization provision under AECA Section 36 out of recognition that the Executive must be empowered to swiftly

141. Arms Sale Notice, *supra* note 139.

142. DEF. SEC. COOP. AGENCY, ISRAEL – 155MM ARTILLERY AMMUNITION, TRANSMITTAL NO. 24-16, at 29 (2023), https://media.defense.gov/2024/Dec/11/2003606409/-1/-1/0/PRESS%20RELEASE%20-%20ISRAEL%2024-16%20CN.PDF.

143. DEF. SEC. COOP. AGENCY, ISRAEL – MUNITIONS GUIDANCE KITS AND MUNITIONS SUPPORT, TRANSMITTAL NO. 25–26 (2025), https://media.defense.gov/2025/Mar/03/2003653978/-1/-1/1/PRESS%20RELEASE%20-%20ISRAEL%2025-26%20CN.PDF.

144. *See generally Who Are Israel's Main Weapons Suppliers and Who Has Halted Exports?*, REUTERS (May 10, 2024, at 05:19 ET), https://www.reuters.com/world/who-are-israels-main-weapons-suppliers-who-has-halted-exports-2024-05-09 [https://perma.cc/J38Y-M5S5].

145. Ohlbaum & Stohl, *supra* note 94.

146. DEF. SEC. COOP. AGENCY, *supra* note 143.

147. *Id.*

approve arms exports in the context of rapidly evolving national and global security situations. However, these authorizations have now become the default pathway for approving massive arms sales to specific countries, threatening to dilute their original purpose. When sales are repeatedly greenlit by emergency waivers or the emergency transfer of weapons is slated for delivery years down the road, the justification of urgency loses credibility, undermining both the intent behind the law and the Executive's legitimate authority to act in emergency situations. In practice, emergency waivers become mechanisms to sidestep congressional review of arms sales.

It is certainly true that an ongoing war may be a valid example of an emergency, and if given the opportunity, lawmakers might agree to the emergency designation. But they also might not. Congressmembers might question whether ongoing war is a valid justification for approving continued sales, especially when a conflict has been prolonged and rife with humanitarian concerns, as in the case of Saudi Arabia and Yemen, and Israel and Gaza. After all, arms sales often occur in the context of an ongoing armed conflict, creating a precedent where the Executive can repeatedly invoke emergency waivers for the duration of a conflict. One wonders whether the use of "emergency" waivers itself is contributing to the protraction of hostilities, especially when these sales are taking place during a period of explosive growth in U.S. military spending.[148] The context behind the Section 36 waiver authorizations exacerbates concerns that emergency powers are being used, not transparently for necessity, but for expediency.

The Executive Branch certainly has the experience and information necessary to evaluate the existence of an emergency. But Congress's unique institutional strengths also make it particularly well-suited to weigh in, specifically to deliberate the humanitarian implications of arms transfers in the context of an ongoing emergency. As the branch most responsive to constituent concerns, Congress can add a unique perspective to reviewing large-scale weapons sales, especially when there are credible concerns about violations of international humanitarian law (IHL).[149]

For example, one of the most plausible justifications under the AECA for Saudi Arabia's use of U.S.-supplied arms in Yemen was "legitimate self-defense."[150] However, numerous reports, including a significant ABA report in May 2017 from the Center for Human Rights, found "that the Saudi-led coalition's use of force in Yemen was not legitimate self-defense" because it failed to meet the legal principals of necessity and proportionality.[151] This was a central concern of Senator Murphy, who attempted to pass legislation in 2018 curtailing the sale of weapons to Saudi Arabia.[152]

148. *See* REUTERS, *supra* note 13 (reporting how world military spending hit $2.7 trillion in 2024, marking the steepest year-on-year increase since the end of the Cold War).

149. *See generally* KAREN SOKOL, CONG. RSCH. SERV., LSB11211, ARMS TRANSFERS AND INT'L LAW 1 (2024).

150. Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy, Alexandra Francis & Alyssa Yamamoto, *The Legality of U.S. Arms Sales to Saudi Arabia for Use in Yemen*, JUST SEC. (Mar. 7, 2018), https://www.justsecurity.org/53449/u-s-arms-sales-saudi-arabia-yemen [https://perma.cc/RH58-Y8BY].

151. *Id.*

152. SENATOR CHRIS MURPHY, *supra* note 6.

Similar concerns have been raised regarding Israel's use of U.S.-made weapons in Gaza. Although the U.S. government does not usually publicly tie U.S. made weapons to IHL violations abroad, the Biden Administration took a rather unusual step to release an assessment which did just that. In a 2024 communication to Congress under its NSM-20 reporting obligations, the State Department reported,

> [G]iven Israel's significant reliance on U.S.-made defense articles, it is reasonable to assess that defense articles covered under NSM-20 have been used by Israeli security forces since October 7 in instances inconsistent with its IHL obligations or with established best practices for mitigating civilian harm.[153]

Independent reporting corroborates this finding. According to Al Jazeera, many of the ariel bombs dropped by the Israeli Defense Forces in October 2023 conflict were MK-80 series munitions.[154] The same General Dynamics factory in Garland, Texas that manufactured the Paveway II bomb, which killed the twenty-five schoolboys in Yemen, also contracts with the government to produce the MK-80 series bomb.[155] Additionally, MK-80 series munitions can be fitted with sophisticated targeting devices called Joint Direct Attack Munition (JDAM), turning them into "smart" bombs equipped with GPS guidance. All the world's JDAMs are made by Boeing in St. Louis, Missouri.[156] In light of such evidence, a growing number of western countries have moved to ban or restrict arms sales to Israel under their domestic arms export statutes.[157]

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153. U.S. DEP'T OF STATE, REPORT TO CONGRESS UNDER SECTION 2 OF THE NATIONAL SECURITY MEMORANDUM ON SAFEGUARDS AND ACCOUNTABILITY WITH RESPECT TO TRANSFERRED DEFENSE ARTICLES AND DEFENSE SERVICES (NSM-20) 22 (2024).

154. Zoran Kusovac, *Analysis: Israel's Gaza Bombing Campaign Is Proving Costly, for Israel*, AL JAZEERA (Nov. 3, 2023), https://www.aljazeera.com/news/2023/11/3/analysis-israels-gaza-bombing-campaign-is-proving-costly-for-israel [https://perma.cc/27RY-AUWJ].

155. *See Contract Summary to General Dynamics Ordinance and Tactical Systems, Inc.*, USASPENDING https://www.usaspending.gov/award/CONT_AWD_W52P1J22F0208_9700_W52P1J19D0015_9700 [https://perma.cc/99XE-N38H] (last visited Oct. 18, 2025).

156. *See Joint Direct Attack Munition GBU- 31/32/38*, U.S. AIR FORCE, https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104572/joint-direct-attack-munition-gbu-313238 (last visited Oct. 18, 2025); Stephen Losey, *Boeing Wins $7.5 Billion Contract from US Air Force for Guided Bombs*, DEFENSENEWS (May 28, 2024), https://www.defensenews.com/air/2024/05/28/boeing-wins-75-billion-contract-from-us-air-force-for-guided-bombs [https://perma.cc/5R3H-5LE3].

157. In September 2024, the United Kingdom announced it would limit arms sales to Israel after finding that, under the UK Export Control Act of 2002, military gear could not be exported to any country where "there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law." Michael T. Klare, *Canada and UK Restrict Arms Sales to Israel Over Gaza War*, ARMS CONTROL ASS'N (Oct. 2024), https://www.armscontrol.org/act/2024-10/news/canada-and-uk-restrict-arms-sales-israel-over-gaza-war [https://perma.cc/7J9D-8HGN] (quoting Foreign Secretary of the United Kingdom David Lammy). After investigating outstanding arms export licenses to Israel, the UK found several dozen posed a "clear risk" of violating international law in Gaza, and it has since halted the export of "key components for fighter aircrafts, helicopters, and drones." *Id.* In doing so, the UK joins a growing number of western countries that have banned or restricted the sale of weapons to Israel, including Canada, Belgium, Italy, Spain, Germany, the Netherlands, and Slovenia. *See* Alia Shoaib, *Map of Countries That Have Stopped Weapons Exports to Israel*, NEWSWEEK (Aug. 8, 2025, at 14:03 ET), https://www.newsweek.com/map-countries-weapons-exports-israel-2110947 [https://perma.cc/3FP5-X2WG].

Once U.S.-made weapons leave the country, monitoring end-use becomes exceptionally difficult, if not logistically impossible. Despite robust efforts by the Executive Branch, the realities of war often interfere with even the best-intentioned humanitarian efforts. This makes the approval, negotiation, or rejection of an arms sale the most significant lever of control. Given the seriousness of potential humanitarian violations, Congress should be empowered—as demanded by the Constitution—to review arms sales based on credible evidence of misuse. But the Section 36 waiver excludes them from the process altogether.

In sum, under the core bargain of the AECA, Congress delegated authority to the Executive, "pushing" its power onto the Executive Branch, subject to its ability to "pull" it back using a legislative veto. This was the central condition upon which Congress made this delegation in the context of the Vietnam War. Then *Chadha* enabled the Executive Branch to "pull" more authority away from Congress, given the high bar of the JRD, and "push" Congress even further away using the Section 36 waiver. If *Chadha* existed when the AECA was enacted, the core bargain would have looked different. Today, Congress's "pull" levers under the AECA are essentially non-existent.

## IV. THE JOINT RESOLUTION OF *APPROVAL*

To restore the AECA's original balance, this Part proposes the implementation of a Joint Resolution of Approval (JRA), which would require congressional approval before certain arms sales proceed, instead of permitting disapproval after. This Part will trace the JRA's historical formulation from a 1986 bill proposed by then-Senator Joe Biden to two pieces of contemporary legislation: the National Security Powers Act (NSPA) and the National Security Reforms and Accountability Act (NSRAA).

Currently, an arms sale under the AECA moves forward *unless* it is blocked by Congress through a joint resolution of disapproval. Because the Executive Branch has already been delegated authority to approve such sales, reversing that delegation requires a veto-proof two-thirds majority in both chambers.[158]

The JRA framework restructures this delegation of authority. Instead of granting the Executive default power to authorize arms transfers, the JRA would withhold that delegation unless Congress affirmatively approves the sale by a simple majority in both houses.[159] Under this system, if Congress either fails to act or if a majority is not reached in either chamber, then the sale cannot proceed.[160]

The joint resolution of "approval" deliberately evokes the joint resolution of "disapproval" to emphasize their differences: under the current system, inaction or failure to achieve a veto-proof majority means tacit congressional approval; under a JRA framework, inaction or failure to obtain a majority in either house

158. *See supra* Section III.B.

159. John Ramming Chappell, *Herding Cats: Prioritizing Human Rights in the Conventional Arms Transfer Policies*, 9 J. GLOB. JUST. & PUB. POL'Y 72, 116 n.270 (2023). The JRA is also referred to as the "flip the script" approach. Ohlbaum & Stohl, *supra* note 5.

160. *See* Ohlbaum & Stohl, *supra* note 5.

means denial. Unlike a legislative veto, a JRA is fully consistent with the Supreme Court's *Chadha* decision because it requires passage through the ordinary legislative process.

In practice, the JRA would foster a more consultative process for approving arms transfers.[161] Because the Executive Branch would need an affirmative majority in both chambers before issuing a license, for example, it would be incentivized to engage with Congress early—addressing concerns, answering questions, and adjusting requirements to secure the necessary number of votes.[162] Unlike the current system, which requires a nearly impossible veto-proof supermajority to block a sale, the JRA lowers the threshold to a simple majority: from 67 to 51 votes in the Senate and from 290 to 218 in the House. This shift not only makes the process more collaborative but also strengthens Congress's oversight role. Instead of passively hoping Congress cannot come up with the votes to stop a sale, the Executive Branch would have to actively earn congressional support to move forward with a sale.[163] By requiring legislative buy-in upfront, the JRA better reflects the balance of power envisioned by the Constitution over this foreign affairs power.

John Ramming Chappell, an expert on arms export law and policy, endorses the JRA, stating that "[it] incentivizes the Executive and Legislative Branches to work collaboratively rather than adversely. Each has a piece of the puzzle, and they have to put them together to pass. Instead of now, where the Executive Branch has both pieces and Congress can take away a piece."[164]

The JRA was the premise behind a bill introduced by then-Senator Joe Biden in 1986 while he was the ranking minority leader of the Senate Committee on Foreign Affairs, and it lays the foundation for contemporary interpretations. He proposed a JRA for only "controversial" sales, defined by dollar amount and the nation that is buying.[165] Although Biden acknowledged that case-by-case approval of arms sales is time intensive, he concluded it was "the only way for

161. Telephone Interview with John Ramming Chappell, Advoc. & Legal Advisor at the Ctr. for Civilians in Conflict, U.S. Program (Aug. 15, 2025).

162. *Id.*

163. Chappell, *supra* note 159, at 116–17.

164. Telephone Interview with John Ramming Chappell, Advoc. & Legal Advisor at the Ctr. for Civilians in Conflict, U.S. Program (Mar. 28, 2024).

165. Biden, Jr., *supra* note 73, at 697. Given the frequency of arms sales and the demands on Congress, it is important to limit the need for congressional approval to only the most controversial sales. But how does one define "controversial"? Realistically, it is difficult to imagine how Congress would vote on the hundreds of proposed arms sales each year that require congressional notification. Therefore, JRAs would necessarily be limited to a subset of major sales that, due to the type of equipment and nature of the target regime, pose significant risks of abuse. *See* Chappell, *supra* note 159, at 118. Congress could use many factors to evaluate riskiness, such as the likelihood that the weapons would aid in the commission of war crimes, be used in violations of human rights and humanitarian law, or be used to commit acts which may constitute crimes against humanity or genocide. *See* National Security Reforms and Accountability Act, H.R. 5410, 117th Cong. § 203 (2021). Diana Ohlbaum and Rachel Stohl also suggest, that in assessing riskiness, policymakers should evaluate the likelihood weapons would be retransferred to an unauthorized third party or fuel corruption. Ohlbaum & Stohl, *supra* note 5.

Congress to retain the same degree of control [it] had over arms sales before *Chadha*."[166]

In 2021, the JRA was codified in two proposed bipartisan bills: the NSPA, introduced by Senator Chris Murphy (D-CT) in the Senate, and the NSRAA, introduced by Representative James McGovern (D-MA) in the House.[167] These bills breathe new life into Senator Biden's original idea. The NSRAA and NSPA contain two critical changes: (1) they require the President to obtain congressional *approval*—that is, an affirmative vote—for FMS and DCS above a specific monetary threshold to countries outside the NATO alliance and a list of certain key defense partners;[168] (2) they provide limits and accountability on the Executive Branch's authority to declare emergencies under Section 36.[169] As Annie Shiel, the Advocacy Director for the Center for Civilians in Conflict, explained, "[a]round the globe, US-made weapons fuel war and violence, devastate civilian communities, and enable gross human rights violations. It's clear that Congress needs better tools to conduct real oversight and curb harmful arms transfers, and this legislation does just that."[170]

First, the proposal in the House requires congressional approval any time the Executive Branch wants to authorize over $14 million worth of either air-to-ground munitions, tanks, armored vehicles, fixed and rotary, manned and unmanned aircrafts, and training services to certain countries.[171] This provision would enhance congressional oversight by lowering the thresholds for all destinations to $14 million, both for Major Defense Equipment and other articles and services. These lower amounts would help ensure that today's repeated, sub-threshold sales do not continue to bypass congressional review.[172] As a result, more sales would require explicit congressional approval, instead of relying solely on notification periods

166. Biden, Jr., *supra* note 73, at 697.

167. *See* National Security Powers Act of 2021, S. 2391, 117th Cong. (2021); H.R. 5410.

168. *See, e.g.*, S. 2391 § 203(b)(1) ("No letter of offer may be issued under the Arms Export Control Act . . . to any country or international organization . . . no license may be issued under such Act . . . and no lease may be made under chapter 6 of such Act . . . of any such item to any such country or organization, *unless there is enacted a joint resolution* or other provision of law authorizing such sale, export, lease, or loan, as the case may be.") (emphasis added); H.R. 5410 § 202(a)(2) ("no license may be issued under this Act . . . for the export of any defense articles or services described in paragraph (2) with respect to a proposed export to a foreign country or international organization *unless . . . (ii) there is enacted into law a joint resolution of approval* under paragraph (5) with respect to the license[]. . . .") (emphasis added).

169. *See* S. 2391 §§ 301–306; H.R. 5410 §§ 301–306.

170. *Statement on Reintroduction of National Security Reforms and Accountability Act*, CTR. FOR CIVILIANS IN CONFLICT (July 27, 2023), https://civiliansinconflict.org/press-releases/statement-on-reintroduction-of-national-security-reforms-and-accountability-act [https://perma.cc/M49S-REKA].

171. *National Security Reforms and Accountability*, REP. JIM MCGOVERN, https://mcgovern.house.gov/uploadedfiles/national_security_reforms_and_accountability_act_fact_sheet.pdf [https://perma.cc/X3AX-7B8Z] (last visited Oct. 18, 2025). Presently under the AECA, export of Major Defense Equipment only triggers congressional review if it reaches the threshold of $25 million for NATO countries and select allies, or $14 million for other destinations. Other defense articles have higher limits, escaping congressional oversight up until $100 million for NATO and allies, and $50 million for other destinations. KERR, *supra* note 7, at 4 tbl.1.

172. REP. JIM MCGOVERN, *supra* note 171.

permitting Congress to disapprove within the statutory timeframe—a power it has never successfully exercised anyway.

Here, the JRA flips the current presumption, at least for the riskiest arms sales, ending the *de facto* requirement that Congress enact a veto-proof supermajority to stop an arms sale. Opponents of the JRA argue that requiring congressional approval for each arms transfer would overwhelm an already overburdened Congress, forcing lawmakers to devote time to quotidian arms transfers, leaving less capacity to address other matters.[173] Furthermore, an already gridlocked Congress may not be able to greenlight sales at the speed necessary to respond to rapidly evolving global conflicts. However, a hybrid approach requiring approval only for major transfers to non-allies would limit oversight to only arms transfers that pose the greatest human rights risks.[174] A coalition of civil society organizations found that Senator Murphy's proposed legislation "would 'only require votes on approximately 60 cases per year, many of which could be packaged together to reduce the number of votes.'"[175]

Second, the proposed legislation also curtails the Executive Branch's authority to declare emergencies, thereby adding congressional accountability mechanisms to the President's presently unconstrained use of Section 36 waivers. The NSRAA, for example, limits the duration of a declared emergency to thirty days, unless Congress explicitly authorizes an extension.[176] This guardrail on executive action would help prevent a precedent where repeated "emergency" authorizations enable ongoing sales that, in turn, prolong the very conflicts used to justify invoking those emergency powers in the first place.

The NSRAA also requires the President to submit more detailed reports to Congress explaining the basis of emergency declarations, and it sets out specific ways to terminate such declarations. Specifically, "[a]ny emergency powers invoked by the President pursuant to a national emergency declared under this section shall relate to the nature of, and may be used only to address, that emergency."[177] This would give Congress actionable pathways to evaluate whether the ongoing "emergency" authorization is a justified reason to continue issuing export licenses once the 30-day period expires. Furthermore, this legislation would introduce a "Bar on Permanent Emergencies."[178] Given there are currently 39 emergencies on the books, some dating back to the 1970s, this legislation requires an

173. Chappell, *supra* note 159, at 117.

174. *Id.* at 115 n.268. While many allied countries certainly have worrisome human rights records, this shift is a meaningful compromise because it places the burden of approval on Congress for the majority of the riskiest arms transfers. *Id.*

175. *Id.* at 117 (citing *NGO Letter to Congress on Arms Transfer Oversight Legislation*, CTR. FOR CIVILIANS IN CONFLICT (Oct. 26, 2021), https://civiliansinconflict.org/press-releases/ngo-letter-to-%20congress-on-arms-transfer-oversight-legislation [https://perma.cc/7GEY-PBN4]).

176. National Security Reforms and Accountability Act, H.R. 5410, 117th Cong. § 302 (2021) ("A declaration of a national emergency . . . shall be effective for 30 days beginning on the day after the date of the issuance of the proclamation and shall terminate when that 30-day period expires unless there is enacted into law a joint resolution of approval under section 203 with respect to the proclamation.").

177. *Id.*

178. *Id.*

annual renewal of emergencies—subject to congressional approval—and imposes a five-year total limit on all states of emergencies.[179]

Political scientist James Sundquist once stated, "[t]he fundamental problem in trying to make the government of the United States work effectively, is not to preserve the separation of powers but to overcome it."[180] The JRA, as codified in the NRSAA and NSPA, valiantly attempts to do this by restoring the "core bargain" of the AECA. It incentivizes the two branches to work together, as opposed to working in opposition. Given the high stakes of modern arms transfers, interbranch cooperation is critical to ensuring democratic legitimacy and humanitarian accountability. The JRA could be Congress's best chance at "pulling" some power back that has eroded over the last fifty years.

## V. THE JOINT RESOLUTION OF APPROVAL AND IMPORTANCE OF POLITICAL TRUST

While the JRA restores the AECA's "core bargain" in theory, its real-world efficacy depends on the political will of lawmakers. The foundational critique of the JRA is that Congress today is a factional decisionmaking body that cannot pass laws. While the legislative veto might have been a powerful bulwark against the Executive, "pushing" Congress away in a pre-*Chadha* world, the Congress of today is very different from what it was in the 1970s or in 1983. Switching from a disapproval-based model to an approval-based model may not fix the core issue that Congress is politically deadlocked, unable to make decisions, even by a simple majority.[181] Some would argue that if congressional opinion is so deeply divided, it is merely an illusory counterweight to the Executive Branch. However, the simple majority required for approval, as opposed to a supermajority required for disapproval, lessens the likelihood of congressional gridlock.[182] In any event, the inability to reach consensus could be an indication that the sale is too controversial—a feature, not a bug of the JRA process.

JRA critics could alternatively assert that the Executive Branch is not "pushing" Congress away at all. A central pillar of foreign policy, arms sales should not be messy battles fought in public hearings, but instead, should be made

179. *See* REP. JIM MCGOVERN, *supra* note 171; H.R. 5410 § 302. ("A national emergency declared by the President under section 201(a) or previously renewed under this subsection that is not otherwise terminated . . . shall terminate on the date that is one year after the date on which the President transmitted to Congress the proclamation declaring the emergency or the date on which Congress enacted into law a previous renewal pursuant to this subsection, unless[] (1) the President publishes in the Federal Register and transmits to Congress an Executive order renewing the emergency; and (2) there is enacted into law a joint resolution of approval renewing the emergency[]. . . .").

180. Biden, Jr., *supra* note 73, at 687 (quoting James L. Sundquist, *Without the Legislative Veto. . .: More Confrontation, Stalemate, Deadlock*, WASH. POST, June 26, 1983, at D8).

181. Drew DeSilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades [https://perma.cc/ED9A-4DC2] (highlighting the increasing ideological differences between members of Congress).

182. Chappell, *supra* note 159, at 115–16 (assuaging concerns of gridlock by highlighting Congress's quick approval of arms sales to Ukraine to demonstrate that Congress can swiftly rally a majority to approve significant arms exports).

behind closed doors to preserve the coherent and credible voice of America on the world stage. Perhaps the Executive's expert authority is precisely what is required to negotiate and authorize the sale of weapons on a case-by-case basis. So why did the Founders envision Congress to be involved in foreign military commitments? For what purpose did they, "accordingly with studied care, vest[] the question of war in the Legisl[ature]"?[183]

Perhaps the Founders, unfamiliar with the devastation of a Paveway-II bomb, nevertheless foresaw the risks of unchecked executive power in matters of foreign conflict. While war, evolving parallel to advancements in technology and geopolitical changes, has always presented new challenges to each generation that confronts it, one constraint has always remained: Americans expect to have a voice in U.S. foreign policy.

The U.S. is uniquely a country of immigrants with personal ties to every nation on Earth. Ordinary Americans have a genuine stake in defining both what it means to be American and what it means to lead globally as Americans. When public voices, through congressional representatives, are not even considered—and instead purposefully excluded—from consequential foreign policy decisions, the resulting sense of injustice may lead to an erosion of public trust that can have serious, lasting political consequences, undermining the integrity of our representative democracy.[184]

America's role in global militarization has resulted in widespread public outcry and an intense political backlash not only felt on Capitol Hill, but in the streets, on college campuses, in community centers, state capitols, and outside defense contractors across the country since the early 2020s.

A well-respected poll conducted by the Eurasia Group Foundation annually surveys the viewpoints of voting-age Americans on their perspectives of U.S. foreign policy issues. The 2022 issue found nearly 70% of respondents disagreed in some capacity with the continuation of U.S. arms sales to Saudi Arabia, with nearly 35% strongly indicating their opposition.[185] These numbers are corroborated by a poll conducted by Data for Progress that put opposition to continued sales to Saudi Arabia at 64% in 2021.[186] Notable examples of political protests opposing U.S. arms sales to Saudi Arabia include activists blocking Raytheon facilities in Portsmouth, Rhode Island;[187] Yemeni-Americans rallying in Dearborn, raising flags with photos

183. Letter from James Madison to Thomas Jefferson, *supra* note 63.

184. *See* Claudia Landwehr & Armin Schäfer, *The Promise of Representative Democracy: Deliberative Responsiveness*, 31 RES PUBLICA 359, 370–71 (2025) (exploring how elite decisionmaking that is unplugged and insulated from citizen deliberation undermines accountability in a representative democracy).

185. MARK HANNAH, ZURI LINETSKY, CAROLINE GRAY & LUCAS ROBINSON, RETHINKING AMERICAN STRENGTH: WHAT DIVIDES (AND UNITES) VOTING-AGE AMERICANS 17 (2022), https://instituteforglobalaffairs.org/wp-content/uploads/2022/10/2022-09-Rethinking-American-Strength.pdf [https://perma.cc/UA7R-D5YW].

186. Ahmad Ali, *A Strong Majority of Voters Oppose the U.S. Arms Sale to Saudi Arabia*, DATA FOR PROGRESS (Dec. 7, 2021), https://www.dataforprogress.org/blog/2021/12/7/a-strong-majority-of-voters-oppose-the-us-arms-sale-to-saudi-arabia [https://perma.cc/9FFN-V2WQ].

187. Steve Ahlquist, *Activists Block Entrance to Raytheon's Portsmouth Facility*, UPRISE RI (Aug. 12, 2021, at 14:17 ET), https://upriseri.com/fang-raytheon-ram-inc [https://perma.cc/J9A6-HFCQ].

of mutilated children;[188] and groups like CODEPINK gaining popularity, mobilizing against official foreign visits.[189]

Public opposition reemerged in the context of U.S. arms exports to Israel, especially among young Americans. According to the Pew Research Center, in December 2023, 46% of Americans aged 18–29 disapproved of the Biden Administration's response to the Israel-Hamas war.[190] In 2024, 45% of Americans aged 18–29 opposed providing military aid to Israel, including 29% who strongly opposed it.[191] In 2024, only 16% of Americans under the age of 30 favored the U.S. providing continued military aid to Israel.[192]

While the dynamics of global conflict are complex, perceived political distrust, especially among young Americans, carries real political weight. Around the country, university campuses have become flashpoints of protests for people condemning the inhumane conditions in Gaza and calling for the cessation of weapons sales to the Israeli government, among other demands.[193] At the same time, hundreds of thousands of voters cast "uncommitted" ballots in the 2024 Democratic primaries to express their frustration over the Biden Administration's handling of the war.[194] These developments highlight how disconnected many Americans may feel from their elected representatives. Constituents want to be heard, and when Congress fails to listen, frustration grows.

Political trust is a necessary condition in a representative democracy, and a decline in trust fundamentally deteriorates its quality. Political science research teaches us that political distrust unconditionally pushes people away from representative democracy and may stimulate support for alternative decisionmaking models.[195] Across the

188. George Hunter, *Dearborn Crowd Protests Bombing of Yemen*, THE DET. NEWS (Apr. 5, 2015, at 20:32 ET), https://www.detroitnews.com/story/news/local/wayne-county/2015/04/05/dearborn-crowd-protests-bombing-yemen/25341029 [https://perma.cc/ZR85-X22H].

189. *Activists to Protest Saudi Crown Prince's Visit to Washington, DC*, CODEPINK, https://www.codepink.org/saudiprince (last visited Oct. 18, 2025).

190. Note, these numbers reflect disapproval due to both pro-Israel and pro-Palestinian sentiment. *Americans' Views of the Israel-Hamas War*, PEW RSCH. CTR. (Dec. 8, 2023), https://www.pewresearch.org/politics/2023/12/08/americans-views-of-the-israel-hamas-war [https://perma.cc/N9KJ-PAWT].

191. Laura Silver, Becka A. Alper, Scott Keeter, Jordan Lippert & Besheer Mohamed, *Views of the U.S. Role in the Israel-Hamas War*, PEW RSCH. CTR. (Mar. 21, 2024), https://www.pewresearch.org/2024/03/21/views-of-the-u-s-role-in-the-israel-hamas-war [https://perma.cc/CFT2-N3X5].

192. *Id.*

193. *See, e.g.*, Max Matza, *Major Gaza Protests at US Universities*, BBC (Apr. 26, 2024), https://www.bbc.com/news/world-us-canada-68901927 [https://perma.cc/KV7W-3S2M].

194. Joey Cappelletti, *The Democratic Protest Vote Movement Over the Israel-Hamas War Spreads from Michigan to Other States*, AP NEWS (Mar. 11, 2024, at 00:03 ET), https://apnews.com/article/uncommitted-biden-trump-war-15f96be36b4d5ac167c7ceda72fe65d1 [https://perma.cc/3LFA-S78A].

195. Tom W. G. van der Meer & Lisa A. Janssen, *Pushing and Pulling: The Static and Dynamic Effects of Political Distrust on Support for Representative Democracy and Its Rivals*, 47 POL. BEHAV. 1389, 1393 (2025). Experts agree on three different directions of change: direct democracy (an ambition for "more" democracy), "stealth democracy" (which mirrors a technocracy), or non-democratic rule, such as authoritarian modes of government. *See id.* While the empirical evidence over the direction of change is scattered, one trend is absolutely clear: political distrust indiscriminately pushes citizens away

country, there has been a spike in self-immolations,[196] protests at defense contractor facilities supplying arms to Israel,[197] and troublingly, violent attacks against Jewish-Americans.[198] These phenomena cannot be unlinked from peoples' sentiments towards U.S. military support for Isreal. In a representative democracy, people want involvement in political decisionmaking, even perceived involvement. In fact, for democratization to succeed, people must feel that the costs of electoral competition are lower than the costs of violent competition.[199] People excluded from participating peacefully may turn elsewhere to manifest the political change they seek, endangering innocent lives and threatening the very bedrock of our political system.

It is impossible to ignore the reality that people are frustrated by their systemic exclusion from global arms export decisions. This frustration is both palpable and deeply rooted in historical precedent. After all, the AECA itself was Congress's response to the rise of Executive authority. Today, the Gaza protests bear a striking resemblance to the anti-Vietnam war movement. During the 1960s, universities became hubs of antiwar organizing, with students leading sit-ins, teach-ins, rallies, and building occupations to protest the U.S.'s military engagement in Vietnam.[200] A similar dynamic unfolded on university campuses across the country. Student groups orchestrated encampments, walkouts, and rallies, demanding changes to America's military support of Israel.[201] Although both movements were motivated by different objectives—the anti-Vietnam War movement demanding an end to the mandatory draft and a withdrawal of U.S. troops, and the Gaza protests demanding an end of military support to Israel and cutting financial ties with businesses and companies

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from the status quo in favor of "anything else," and it particularly dampens support for the representative model. *See id.*

196. *See, e.g.*, Michael Balsamo, *US Airman Dies After Setting Himself Ablaze Outside Israeli Embassy in Israel-Hamas War Protest*, AP NEWS (Feb. 26, 2024, at 21:39 ET), https://apnews.com/article/israel-us-embassy-man-fire-air-force-f730a09009ce56d818f87a8f4dcc6ca7 [https://perma.cc/PG7L-Y3CY]; Rachael Devaney, *Cape Cod Who Set Self on Fire Outside Boston Israeli Consulate Died Four Days Later*, CAPE COD TIMES (Sep. 25, 2024, at 12:53 ET), https://www.capecodtimes.com/story/news/2024/09/25/matthew-nelson-cape-cod-self-immolated-palestine-israeli-consulate-boston/75369040007 [https://perma.cc/VE5G-49UU].

197. *See, e.g.*, Perrin Moore, *'War Profiteers Not Welcome;' Dozens Gather to Protest Elbit Systems in Ladson on May Day*, ABCNEWS4 (May 4, 2025, at 14:08 ET), https://abcnews4.com/news/lowcountry-and-state-politics/war-profiteers-not-welcome-dozens-gather-to-protest-elbit-systems-in-ladson-on-may-day-wciv-abc-news-4-charleston-sc-south-carolina-elbit-systems-of-america [https://perma.cc/P6SD-7DDV].

198. *See, e.g.*, Ana Faguy, *Woman Dies from Injuries Suffered in Boulder Antisemitic Attack*, BBC (June 30, 2025), https://www.bbc.com/news/articles/c2d00elp0k6o [https://perma.cc/P985-XDLU].

199. For a discussion of the factors leading to electoral participation versus violent mobilization, especially in the post-war transition context, see Nancy Bermeo, *What the Democratization Literature Says—or Doesn't Say—About Postwar Democratization*, 9 GLOB. GOVERNANCE 159, 163–64 (2003).

200. *Protests and Backlash*, PBS: AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-student-antiwar-protests-and-backlash [https://perma.cc/KQR7-QBCC] (last visited Oct. 18, 2025). For a comprehensive analysis of the anti-Vietnam war movement and its central role in elevating the importance of human rights in U.S. foreign policy, see generally BARABARA J. KEYS, RECLAIMING AMERICAN VIRTUE: THE HUMAN RIGHTS REVOLUTION OF THE 1970S (2014).

201. Andrea Shalal & Bianca Flowers, *Explainer: How US Campus Protests Over Gaza Differ from Vietnam War Era*, REUTERS (May 4, 2024, at 10:58 ET), https://www.reuters.com/world/us/how-us-campus-protests-over-gaza-differ-vietnam-war-era-2024-05-04 [https://perma.cc/YTP2-ZU5M].

that support Israel's military actions—both share core features: they are youth-led movements concerned with ending the suffering and death of civilians.[202]

Thus, if history is our guide, congressional approval over arms exports should not be a bump the Executive Branch swerves around before approving a controversial sale, but a critical *factor* of the decisionmaking process, as Congress originally intended when it enacted the AECA in an earlier moment of public reckoning.

The risk of pragmatic, constitutional analysis is, after all, that we lose sight of the human element at the heart of this debate. Globally, selling weapons has catastrophic consequences and potentially radicalizes generations against the foreign arm supplier. Domestically, when Americans feel the Executive Branch is entangled in unpopular global conflicts, peoples' distrust in political leadership grows and becomes exceedingly difficult to repair. The time has once again come for Congress to "pull" back some of its foreign affairs power from the Executive Branch and enact the NSPA and NSRAA, which together offer the clearest path towards constitutionally robust oversight in the post-*Chadha* era.

## CONCLUSION

When weapons stamped "Made in the U.S.A." fall from the sky onto foreign lands, victims perceive this as an act of war. Whether the destruction of civilian life and infrastructure is consistent with international law, a tragic byproduct of war, or the harsh reality of modern conflict, such distinctions are ultimately irrelevant to those affected.[203] The reality is, American involvement on the world stage has practical consequences; even perceptions of American involvement can fuel anger and resistance for generations to come.

In a documentary by TRT World released in February 2024, three boys stand with their arms around each other outside of a bombed school building in northern Yemen, not far from the school bus bombing that killed the twenty-five schoolboys. One says, "[w]hen you decide to perform *jihad*, then that's it. We forget about studies, we forget about this and that. . . . They destroyed the homes. America . . . [is] responsible for this."[204] Whether America is responsible, as a factual matter, has no bearing on the argument. A generation of Yemeni children have grown up with profound vitriol against the U.S., pledging themselves in service of a war that the American people, through their representatives, never agreed to.

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202. *Id*. Comparisons here are not intended to overlook the nuances of either movement. Differences are, of course, abound. For example, some of the Vietnam protests were "violent, unlike the largely peaceful demonstrations seen thus far" over Gaza, and while many Americans know people who have been killed or harmed in Israel or Palestine, there are no U.S. troops on the ground. *See id*. (citing Kevin Kruse, a Princeton University professor).

203. When explosive weapons are used in populated areas, up to 90% of the victims can be civilians. U.N. Secretary-General, *Protection of Civilians in Armed Conflict*, ¶ 8, U.N Doc. S/2024/385 (May 14, 2024) ("In 2023, almost 30,000 civilians were killed and injured by the use of explosive weapons in just six conflicts[]. . . . Civilians accounted for 90 per cent of those killed and injured. . . .").

204. TRT WORLD, *Yemen: The Third Frontier*, at 22:27–22:42 (YouTube, Feb. 2, 2024) (emphasis added), https://www.youtube.com/watch?v=KcLldrtJT7M&t=1348s [https://perma.cc/4UP4-7U6S].

As U.S. arms exports reach historic highs, and oversight over end-users remains persistently difficult, we risk creating new adversaries—many of whom we will not recognize until they shape the next era of conflict. Inevitably, these future threats will occupy the time of military experts, diplomats, and strategists as we once again ask ourselves: how did we get here?[205] This should matter to anybody who values American leadership, democratic integrity, and the rule of law.

Arms sales not only reflect U.S. foreign policy, but they also shape alliances, wars, and moral culpability. While the authority to regulate arms sales is constitutionally granted to Congress, largely under the Foreign Commerce Clause, it has evolved into a *shared* power, reflecting the institutional strengths of each branch; both perspectives considered necessary to deliberate over the merits of these consequential deals. However, since the passage of the Arms Export Control Act (AECA) in 1976, the invalidation of the legislative veto in *INS v. Chadha* in 1983, and the implementation of the Joint Resolution of Disapproval in 1986, congressional oversight has become toothless. Furthermore, the use of Section 36 emergency authorization waivers has removed even the *threat* of a congressional veto. The Executive has effectively "pushed" Congress out of the decisionmaking process altogether.

In 2024, a year that marked a record-high in U.S. arms exports, the country was at an inflection point reminiscent of the Vietnam War era, where public frustration over expansive executive foreign affairs power became unignorable. In the 1970s, Congress met the political moment by pulling back some of its oversight authority with its passage of the AECA. Today, as military spending continues to rise, failing to recalibrate the constitutional balance may lead to deeper domestic and international instability. Congress has a rare opportunity to capitalize on this political moment by passing the National Security Powers Act (NSPA) and the National Security Reform and Accountability Act (NSRAA). Doing so would not just restore constitutional balance but also reinvigorate public trust in the legislative process. It is entirely possible that, if given the opportunity, Congress might ultimately decide not to interfere with executive authority over arms sales. But the Constitution demands they have an opportunity to try.

The constitutional debate might never be settled, but perhaps that is the point. We cannot, after all, achieve constitutional perfection, but a shared commitment to democratic government demands that we strive to do better. An accountable

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205. "Blowback" was a term first used by the CIA in 1954 to describe the unintended consequences of U.S. government activities. *See generally* CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2000) (describing "blowback" as the negative unintended consequences of U.S. foreign policy). For a contemporary example of "blowback," consider the proliferation of the suicide bomb in Waziristan, Pakistan after the U.S. drone campaign into the region during 2004. The rise in suicide bombers—and particularly female suicide bombers—became a symbol of the unexpected and grotesque ways that tribal groups' behavior can mutate when confronted with tactics of modern warfare. *See* AKBAR AHMED, THE THISTLE AND THE DRONE: HOW AMERICA'S WAR ON TERROR BECAME A GLOBAL WAR ON TRIBAL ISLAM 80 (2013) ("The suicide bomber, as an instrument of terror often used by the [Pakistani Taliban], is rooted in the war on terror and is specific to the age of globalization.").

export regime must be one that recognizes the human consequences of arms sales. After all, behind every decision to sell weapons is the choice to inject violence into the everyday lives of ordinary people around the world. As much as this is a debate about the skills and powers of the President or Congress, it is also about the twenty-five schoolboys on a field trip whose lives were forever cut short by the bombs manufactured in Garland, Texas.

When Americans spend years watching weapons stamped with their name drop in conflicts they neither approved nor can influence, it erodes faith in the very idea of representative government. As Congress reconsiders its role, the question is not just who controls where our weapons go. It's who bears our name when they fall.