



The Decline of Congress in the Conduct of Foreign Relations

Jack Goldsmith

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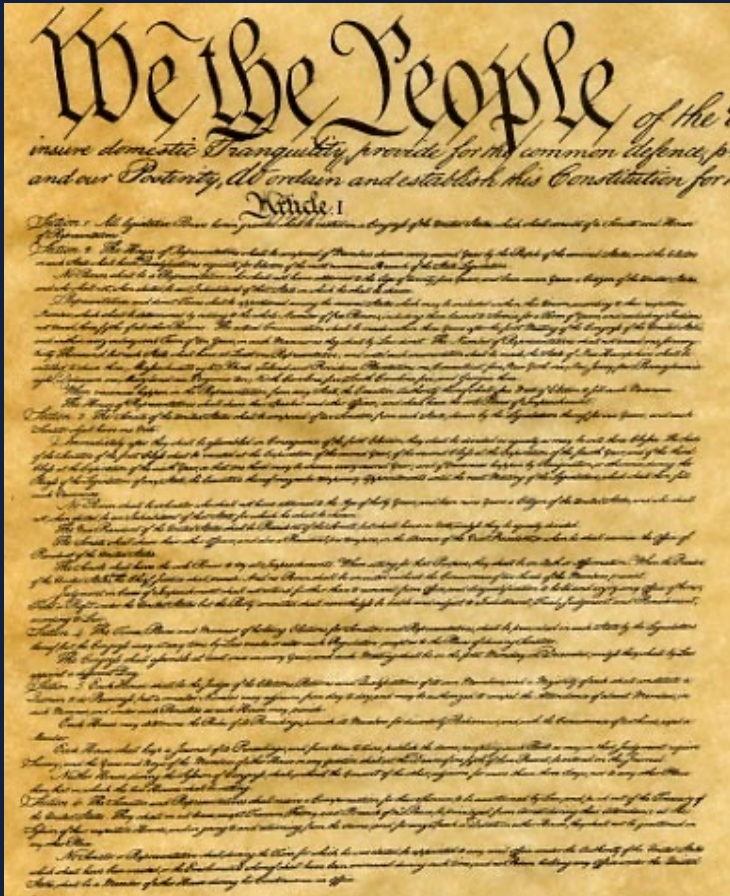
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The Constitution and War



- Congress given power (among other things):
 - to declare War;
 - grant Letters of Marque;
 - to raise and support Armies (with appropriations every two years);
 - to provide and maintain a Navy;
 - to make Rules for land and naval Forces;
 - to provide for calling forth the Militia and for organizing, arming, and disciplining it.
- President:
 - “shall be Commander in Chief” of military and militia

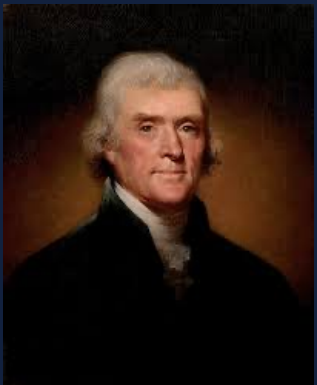
The Framers on War (e.g.)



“No offensive expedition of importance can be undertaken until after [Congress has] deliberated on the subject and authorized such a measure.”

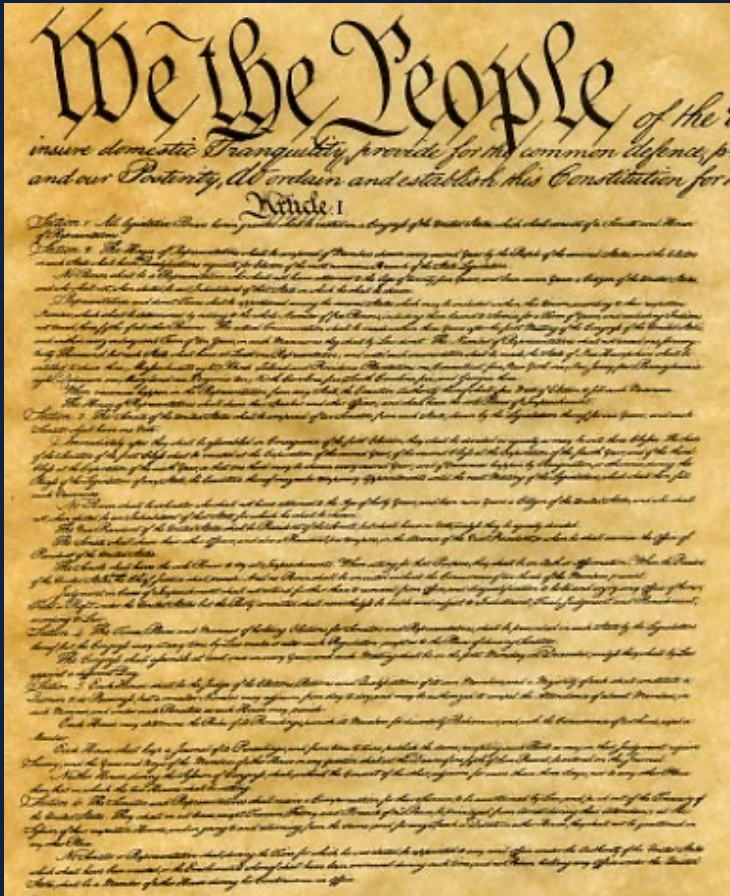


“The constitution supposes . . . that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care vested the question of war in the Legisl[ature].”



“We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body. . . .”

The Constitution and Treaties



- The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;”
- “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties* made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land;*”

Hamilton on Joint Collaboration in International Agreements (1)



Hamilton, Federalist No. 75

“The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while *the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.*”

Hamilton on Joint Collaboration in International Agreements (2)



Hamilton, Federalist No. 75

“The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the *sole disposal of a magistrate created and circumstanced as would be a President of the United States.*”

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The Rise of the Standing Army

- Founding: *718*
- After War of 1812: *12,000*
- After Spanish-American War: *60,000*
- After World War I: *200,000*
- After World War II: *1.5 million*
- Today: *1.3 million* (plus 1 million reserves)

The Expansion of Self-Defense



“The Executive [has] the power to repel sudden attacks.”

Expansion:

- Protect the lives and property of U.S. citizens abroad.
- Unit self-defense
- Anticipatory self-defense
- Collective self-defense

OLC on POTUS' Offense War Powers

AUTHORITY TO USE MILITARY FORCE IN LIBYA

The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest.

Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

April 1, 2011

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum memorializes advice this Office provided to you, prior to the commencement of recent United States military operations in Libya, regarding the President's legal authority to conduct such operations. For the reasons explained below, we concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

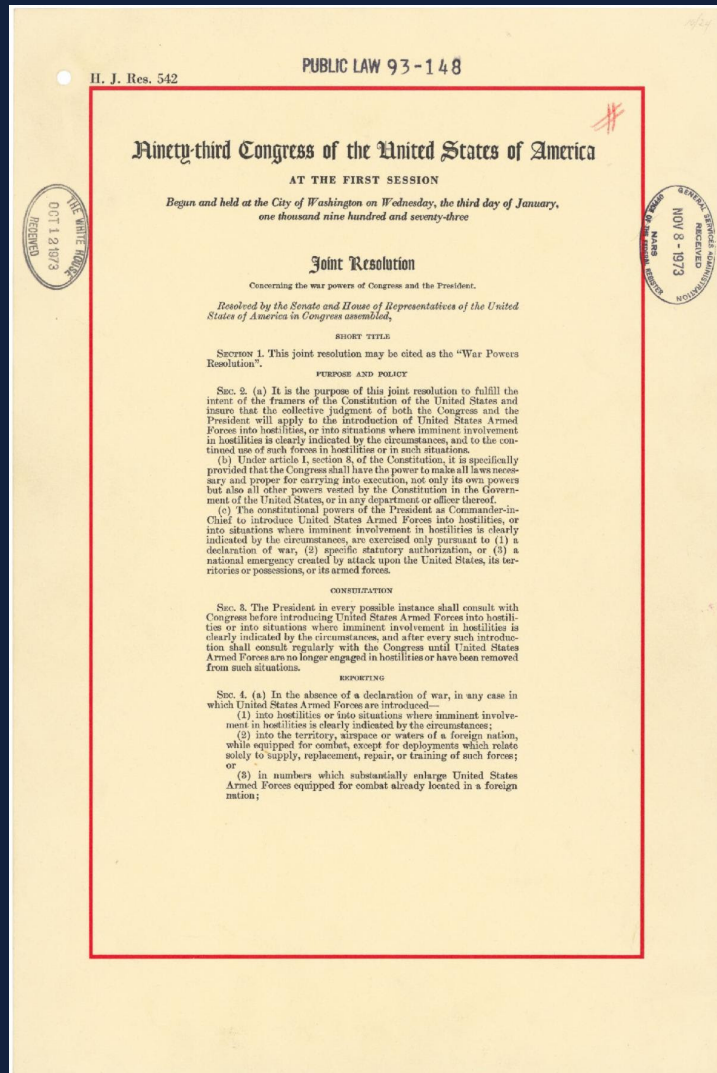
I.

In mid-February 2011, amid widespread popular demonstrations seeking governmental reform in the neighboring countries of Tunisia and Egypt, as well as elsewhere in the Middle East and North Africa, protests began in Libya against the autocratic government of Colonel Muammar Qadhafi, who has ruled Libya since taking power in a 1969 coup. Qadhafi moved swiftly in an attempt to end the protests using military force. Some Libyan government officials and elements of the Libyan military left the Qadhafi regime, and by early March, Qadhafi had lost control over much of the eastern part of the country, including the city of Benghazi. The Libyan government's operations against its opponents reportedly included strafing of protesters and shelling, bombing, and other violence deliberately targeting civilians. Many refugees fled to Egypt and other neighboring countries to escape the violence, creating a serious crisis in the region.

On February 26, 2011, the United Nations Security Council ("UNSC") unanimously adopted Resolution 1970, which "[e]xpress[ed] grave concern at the situation in the Libyan Arab Jamahiriya," "condemn[ed] the violence and use of force against civilians," and "[d]eplor[ed] the gross and systematic violation of human rights" in Libya. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187/Rev. 1 (Feb. 26, 2011). The resolution called upon member states, among other things, to take "the necessary measures" to prevent arms transfers "from or through their territories or by their nationals, or using their flag vessels or aircraft"; to freeze the assets of Qadhafi and certain other close associates of the regime; and to "facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance" in Libya. S.C. Res. 1970, ¶¶ 9, 17, 26. The resolution did not, however, authorize members of the United Nations to use military force in Libya.

- The President can use military force unilaterally if he can “reasonably determine that the action serves important national interests.”
- The President need only go to Congress for “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.”

The Useless War Powers Resolution (1973)



Presidents have interpreted away the War Powers Resolution, and Congress has done nothing in response.

Why the Decline of Congress in War?

- Part of broader trend shifting power from Congress to Executive
- Congress has created massive standing army with massive weapons
- Presidents use these tools as they see fit
- The world grew more dangerous, requiring fast action
- Congress does not want responsibility for war decisions
- War is stealthy and removed from democratic deliberation
- Rally around the flag effect once POTUS acts

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The Rise of Executive Agreements

1. *Ex Post* Congressional-Executive Agreement
2. *Ex Ante* Congressional-Executive Agreement
3. Executive Agreement Pursuant to Treaty
4. *Sole Executive Agreement*

Ex Ante Congressional-Executive Agreements



“President shall conclude agreements to effectuate policies and purposes of this [Mutual Defense Assistance] Act” of 1949



Foreign Assistance Act of 1961 authorizes President to enter into agreements committing appropriated development funds

Congress delegates to the President the power to make agreements

Sole Executive Agreements



Litvinov Agreement (1933)



Destroyers for Bases (1940)



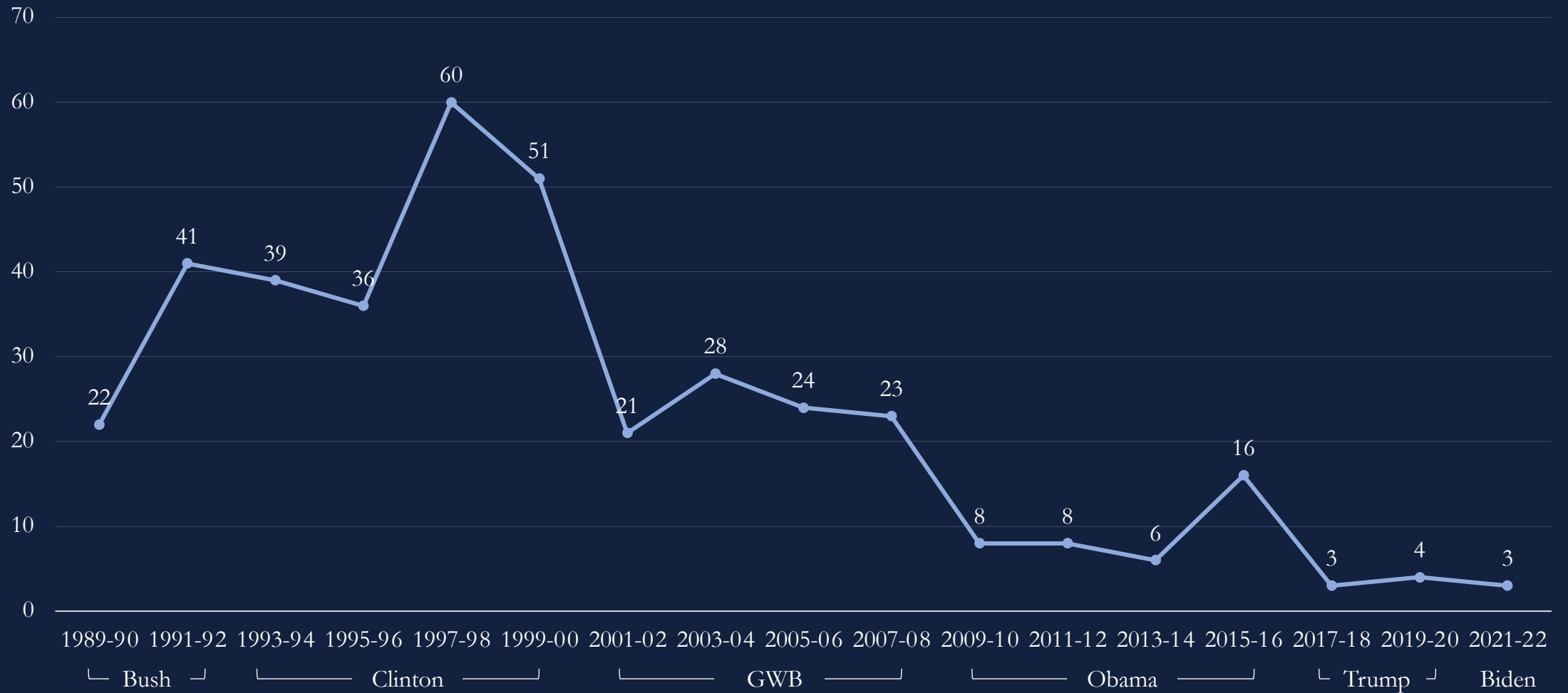
Algiers Accords (1981)

Article II authorizes the President to make agreements

The Decline of Treaties

	Treaties	Executive Agreements	% Treaties
1789 – 1839 (50 years)	60	27	69%
1839 – 1889 (50 years)	215	238	47%
1889 – 1939 (50 years)	524	917	36%
1939 – 1989 (50 years)	702	11,698	5.6%
1989 – 2016 (27 years)	388	6,172	6.3%

Treaties Since 1990



The Demise of Collaboration with Congress on International Agreements

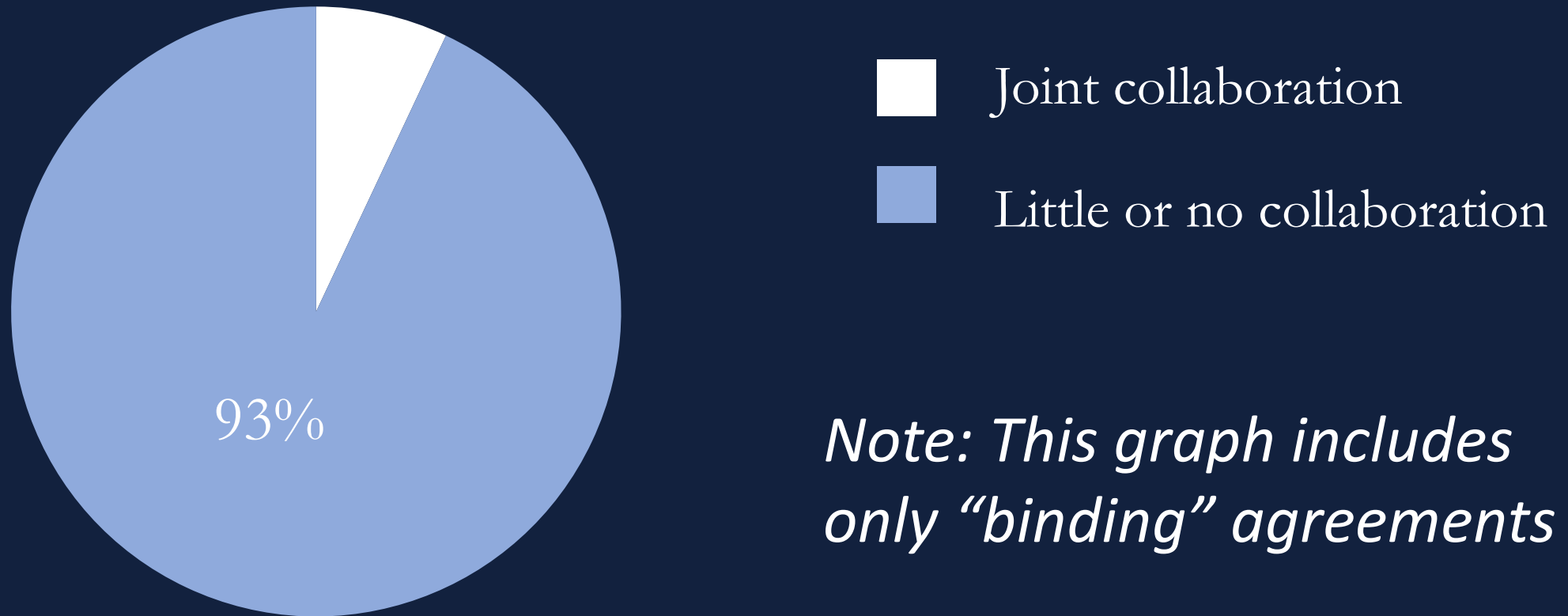
Real Collaboration

- Treaties (6%)
- Ex Post Congressional-Executive Agreements (< 1%)

Little or no Collaboration

- Ex Ante Congressional-Executive Agreement ($\approx 85\%$)
- Executive Agreement Pursuant to Treaty (< 1%)
- Pure Executive Agreement ($\approx 8\%$)

Joint Collaboration in Agreement-Making Today is Relatively Rare



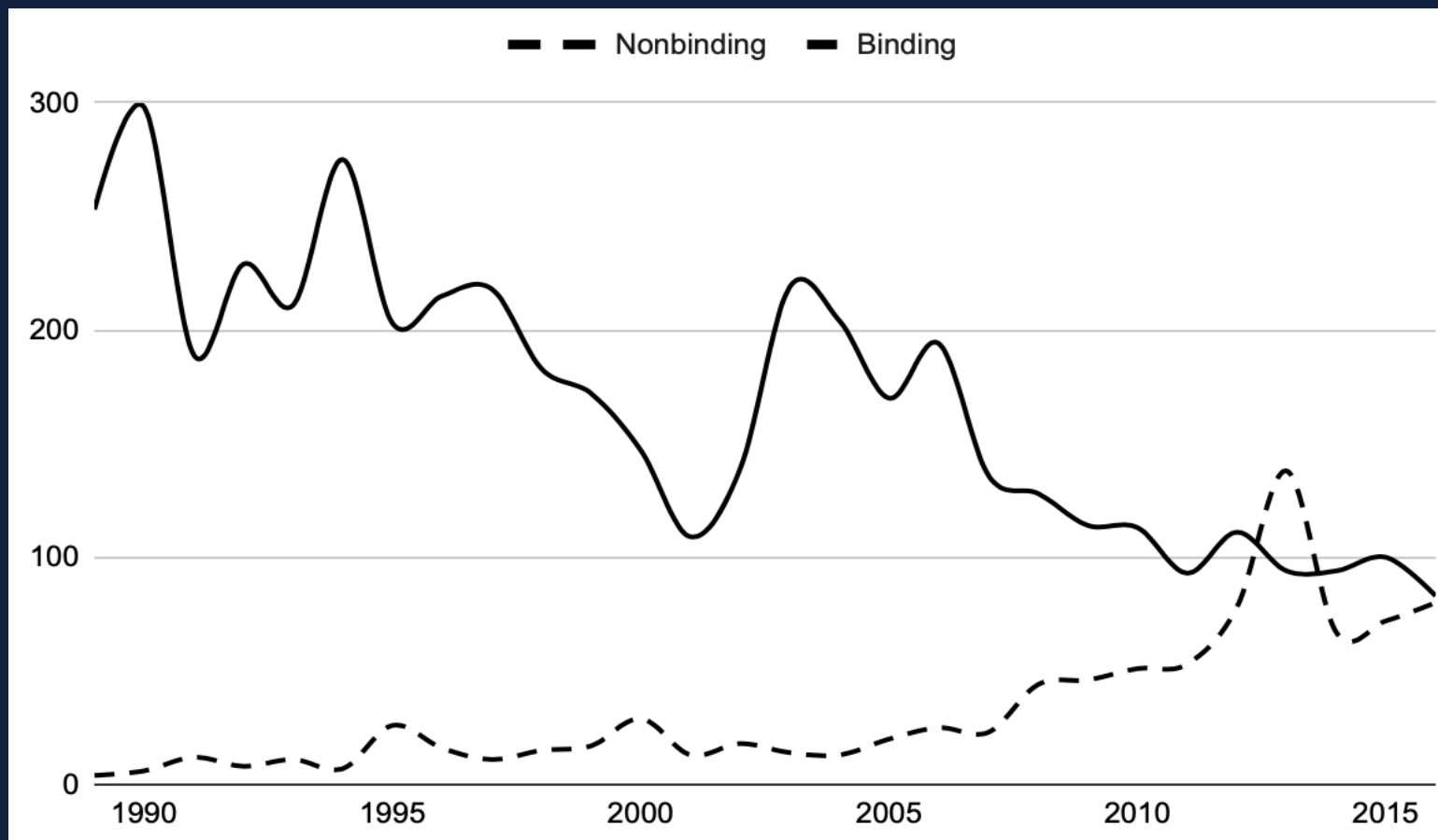
Nonbinding Agreements

- Not governed by international law
- Executive branch can make without congressional approval
- Executive branch can make on any topic
- No judicial review
- Often as robust in practice as binding executive agreements
- Almost certainly constitutional

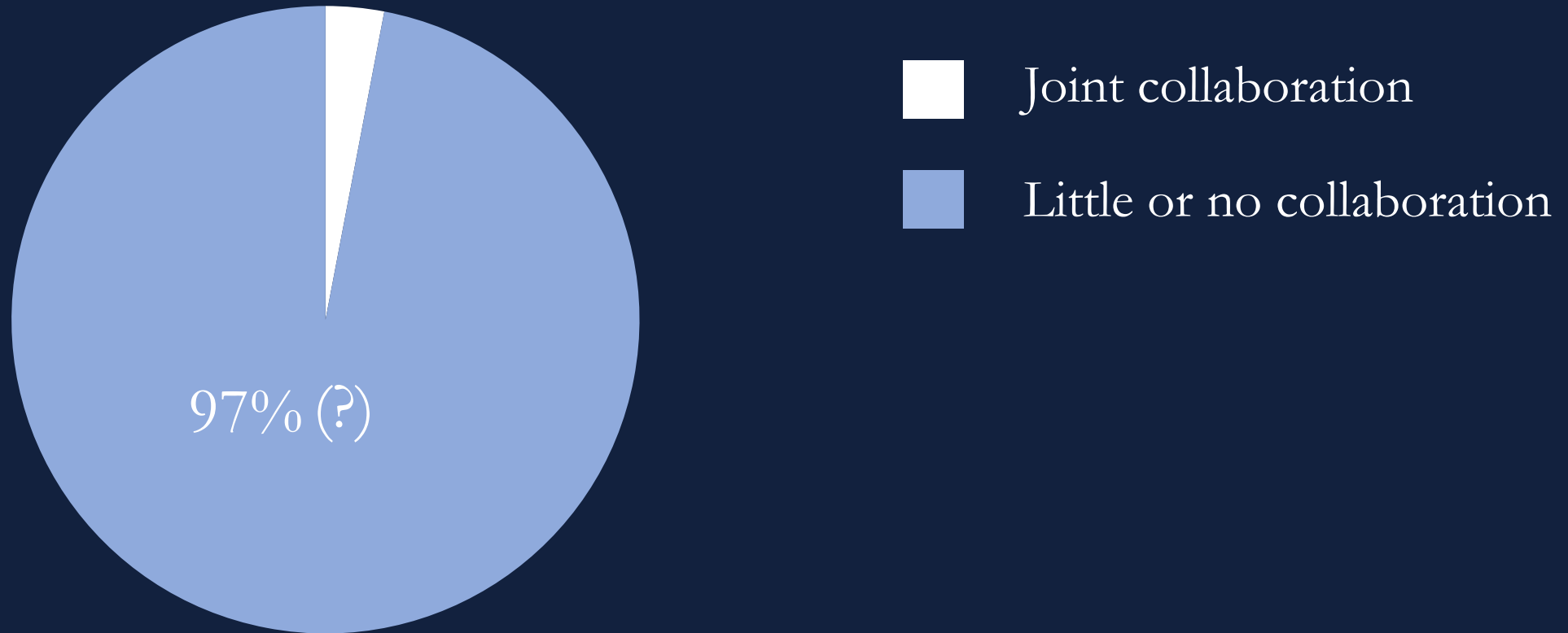
Recent Prominent Examples

- Iran Deal
- Paris Climate Agreement (core emissions pledge)
- OECD/G20 agreement on global tax reform
- Artemis Accords (outer space)
- US-EU data transfer framework
- U.S.-Taliban agreement on withdrawal of U.S. forces from Afghanistan

Non-Binding Agreements On the Rise



Joint Collaboration in Agreement-Making When Non-binding Agreements Included



Why the decline in joint collaboration?

- Part of broader trend shifting power from Congress to Executive
- Increasing demand for international agreements
- High bar to treaties
- Rising partisanship/increased polarization
- Rising anti-internationalism of Republican party
- Presidents need to get things done

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Pros, Cons, Lessons

Thank you.