# War Powers and the Return of Major Power Conflict

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ABSTRACT

*The United States is, by many accounts, facing a renewed risk of major power conflict. This Article considers what the reemergence of this risk may mean for the executive branch's operational understanding of constitutional war powers, specifically as they relate to the use of military force. After outlining the relationship between U.S. strategic concerns and executive branch legal interpretations and reviewing the most recent historical parallel—the Truman administration's reconsideration of war powers in the early Cold War—it examines three aspects of the executive branch's current understanding for tensions with the strategic demands of major power conflict: the anticipated nature, scope, and duration test used to identify possible Declare War Clause limitations; the President's exclusive authority to engage in national self-defense; and the domestic legal effects of collective defense treaties.*

*Finding that the anticipated nature, scope, and duration test is likely to prove more constraining in the context of major power conflict than it has for past asymmetric conflicts, this Article then surveys executive branch practice to identify ways it may adapt its understanding, from a return to broad claims of inherent and exclusive presidential authority to use force to more targeted adaptations relating to treaties, self-defense, and even prerogative. From there, it puts the executive branch's decision in the broader context of inter-branch relations and considers alternatives, including the pursuit of statutory authorization. Ultimately, it argues that the political branches must acknowledge and begin dialogue on how to approach the new strategic challenges the United States is facing. Otherwise, they risk compounding the political crisis of a major power conflict with a constitutional crisis over how the President may respond.*

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## I. INTRODUCTION

The United States is no stranger to war. But in recent decades, its experience has been mostly limited to wars against substantially weaker adversaries. In the post-Cold War era, this trend has reflected the United States' hegemonic status and its focus on non-state threats to its national security. And while major power conflict with the Soviet Union or People's Republic of China was a risk for decades prior, most of the United States' military efforts nonetheless centered on smaller, regional conflicts.[1] To be certain, these asymmetric conflicts presented the United States with serious challenges. But none entailed a level of threat approaching that of a war with an enemy whose capabilities more closely rival the United States' own.

This era of asymmetric conflict, however, may be over. In their respective national security strategies, both the Biden and Trump administrations have identified major power competition as an increasingly preeminent national security threat, with fears of an ascending China and bellicose Russia rapidly eclipsing the concerns over global terrorism and weapons of mass destruction that preoccupied their predecessors.[2] Once seen as an outside risk, the possibility of conflict with another major power is now at the center of the highest levels of strategic planning and raising new questions about the adequacy of the status quo. "U.S. foreign policy was developed in an era that is fast becoming a memory," incumbent U.S. National Security Advisor Jake Sullivan recently wrote in *Foreign Affairs*.[3] "Strategic competition [with China and Russia] has intensified and now touches almost every aspect of international politics[.]"[4] For the United States to survive and thrive, Sullivan suggests, "[o]ld assumptions and structures must be adapted to meet the[se] [new] challenges."[5]

This Article considers what this shift in strategic focus from asymmetric to major power conflict may mean for one such set of assumptions and structures: the executive branch's operational understanding of constitutional war powers, specifically regarding the use of military force. Few matters of constitutional law are more hotly contested. But in recent years, the executive branch has employed an understanding of constitutional war powers that has remained relatively consistent

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[1] For a detailed survey of U.S. military engagements through these periods, see generally ALLAN R. MILLETT ET AL., FOR THE COMMON DEFENSE (3rd ed. 2012).

[2] *See* WHITE HOUSE, NATIONAL SECURITY STRATEGY 6 (2022) (Biden administration); WHITE HOUSE, NATIONAL SECURITY STRATEGY 25 (2017) (Trump administration).

[3] Jake Sullivan, *The Sources of American Power: A Foreign Policy for a Changed World*, FOREIGN AFFS., Oct. 24, 2023, at 2.

[4] *Id.*

[5] *Id.*

across presidential administrations and has avoided serious challenges from Congress and the courts. The standards this understanding imposes are quite permissive in the context of asymmetric conflict, allowing the executive branch to justify a wide range of military action without having to secure prior congressional authorization. But in the context of major power conflict, the same standards—in particular, the "anticipated nature, scope, and duration" test used to identify possible Declare War Clause limitations[6]—are likely to prove far more constraining, even on limited military actions. This is likely to be seen as a problem by senior policymakers as they wrestle with the growing prospect of major power conflict and increasingly rely on the ability to credibly threaten the use of military force to deter major power adversaries. How this tension will be resolved is unclear, but the consequences—both for the separation of powers and for the foreign policy it helps produce—could be immense.

To analyze these possibilities, Part II begins by outlining the relationship between the strategic needs of the United States and the executive branch's operational understanding of constitutional war powers. Part III then examines how the shift in strategic focus from asymmetric to major power conflict might impact this understanding. After reviewing the Truman administration's reaction to similar circumstances at the onset of the Cold War, it examines potential tensions with three aspects of the executive branch's current views—the anticipated nature, scope, and duration test; the President's self-defense authority; and the relevance of collective defense treaties—and draws from prior executive branch positions to identify alternative views it could pursue. Finally, Part IV considers how the other branches might react to these same strategic pressures, and the implications that this might have for how the United States approaches this new era.

The strategic pressures that come with the return of major power conflict are likely to push the executive branch to adapt its understanding of constitutional war powers in a manner that imposes fewer possible legal constraints on the use of military force against major power adversaries. Contemporary skepticism of presidential authority makes a full denouncement of Declare War Clause limitations politically risky. But prior executive branch practice points to more targeted alternative adaptations it might pursue, including in relation to self-defense, collective defense treaties, and even presidential prerogative. The limited utility of these adaptations, however, also makes cooperation with Congress—up to and including prior statutory authorization—a more

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[6] *See* WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 7 (Dec. 2016) [hereinafter 2016 Framework Report].

legally and politically preferable approach, if the political branches can reach agreement on a shared approach. To accomplish this, however, the political branches need to open a dialogue on the strategic challenges of the present moment and begin the difficult process of working towards a shared solution.

## II. WAR POWERS IN STRATEGIC CONTEXT

To some, the proposition that a shift in strategic concerns could change how one understands the Constitution may seem strange. After all, the usual indicia of constitutional meaning—text, structure, original intent—are not usually affected by international relations. But legal interpretations are also the products of the institutions that produce them, whose interests often extend beyond maximal faith to the law. For the executive branch, these interests include the strategic needs of the United States. And as this section describes, the context in which the executive branch develops its views on constitutional war powers allows such interests to weigh heavily.

The Constitution's allocation of war powers is not an exercise in precision. Article I gives Congress the power to "raise and support Armies[,]" "provide and maintain a Navy[,]" and "declare War[,]" among other authorities.[7] But Article II makes the President the "Commander in Chief of the Army and Navy" and vests them with the undefined but capacious-sounding "executive Power[,]" without clarifying how these authorities intersect with those assigned to Congress.[8] Nor does the President's authority end there, as historical records strongly suggest that the Framers understood the President to have some *implied* inherent authority to act in national self-defense as well.[9] While most legal scholars believe that the Declare War Clause was intended to give Congress substantial authority over war initiation (at least outside the self-defense context), a persistent minority maintains that the authority it gives is a mere anachronism.[10] Nor have investigations into the

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[7] U.S. CONST. art. I, § 8.

[8] *Id.* art. II, §§ 1–2.

[9] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1911); *see also* LOUIS FISHER, PRESIDENTIAL WAR POWER 8–10 (2d rev. ed. 2004); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 31–32 (1976).

[10] *Compare* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORNELL L. REV. 46, 115–16 (2007); FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 9, at 1–16; MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 80–84 (1990); W. TAYLOR REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS 29–40 (1981); *with* JOHN YOO, THE POWERS OF WAR AND PEACE 144–55 (2005).

meaning of the President's executive power[11] or role as Commander in Chief[12] unequivocally resolved whether either gives the President authority over war initiation. Absent any clear consensus, the key contours of constitutional war powers remain open to substantial debate.

Ordinarily, one would expect the federal courts to resolve such ambiguities. But war powers questions rarely result in litigation. Where they do, federal courts have (since at least the Vietnam era) often used flexible justiciability doctrines to avoid reaching the merits on war powers questions, usually on the grounds that Congress has not objected clearly enough to warrant judicial intervention in national security matters best handled by the political branches.[13] The outside risk of judicial intervention and need for broader public legitimacy still encourages the executive branch to justify itself in legally plausible terms,[14] usually by invoking historical practice as evidence of tacit acquiescence by Congress.[15] But the courts' reticence leaves ample room for negotiation and accommodation between the political branches—and for reliance on novel legal interpretations by the executive branch, whose understanding of constitutional war powers most directly informs U.S. military operations by virtue of the President's control over the military.[16]

Congress has facilitated this approach by rarely legislating limits on what actions the President may take. This is not to say that Congress is uninvolved in matters of war and peace, as it plays an indispensable role in authorizing, funding, and overseeing executive branch actions. But its influence often operates through persuasion and leverage, giving the executive branch reasons to accommodate congressional views rather than mandating that it do so.[17] The main exception to this pattern is the War Powers Resolution that Congress enacted over

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[11] *Compare* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PENN. L. REV. 1269, 1345–58 (2020); *with* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 239–50 (2007).

[12] *Compare* Saikrishna Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1, 64–67 (2023); *with* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 252–56 (1996).

[13] *See* Louis Fisher, *Litigating the War Power with* Campbell v. Clinton, 30 PRES. STUDS. Q. 564, 567–74 (2005).

[14] *See* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 833–40 (2013); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1128–31 (2013).

[15] *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1494–1504 (2010).

[16] *See* Christopher Fonzone, *What the Military Law of Obedience Does (and Doesn't) Do*, AMER. CONST. SOC'Y FOR L. & POL'Y 13–17 (Mar. 2018).

[17] *See* Philip Bobbitt, *War Powers*, 92 MICH. L. REV. 1364, 1388–96 (1994).

President Nixon's veto in 1973.[18] But even there, textual ambiguities and lacking judicial enforcement often make it operate less as a hard limit and more as another step in a broader process of contestation and accommodation.[19]

Combined with the constitutional ambiguity surrounding war powers, these interbranch dynamics leave the executive branch with substantial discretion in articulating the legal views that informs its military operations. The President in turn has the authority to adopt whatever view they prefer for the executive branch, consistent with their duty to "take Care that the Law be faithfully executed[.]"[20] But relying on an implausible interpretation of the law risks both opposition from Congress and reversal by the federal courts, as well as the political consequences of acting in a manner seemingly inconsistent with the rule of law. For these reasons, Presidents generally rely on the advice of executive branch lawyers who work in support of their policy-making peers throughout the bureaucracy. While politically-appointed attorneys are likely to be particularly motivated to advance the President's agenda, career attorneys are often seen as reservoirs of non-partisan expertise whose views are more likely to align with broader institutional interests that persist across presidential administrations, including rule of law concerns.[21] This association can in turn make both the views of experienced civil servants and prior (especially bipartisan) executive branch precedents important sources of legitimacy, lending their views added weight.[22]

When examining an unsettled legal question, executive branch lawyers often see what Daphna Renan has called a "zone of reasonable disagreement."[23] Individual lawyers may see one "best view" of the law as the most legally persuasive, other less persuasive but still plausible views as within the zone, and still other potential legal arguments as too implausible to be defended and thus outside the zone.[24] But the lawyer's role is usually not to decide which to adopt, but to instead advise the President and other senior policymakers on the options available.[25]

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[18] Pub. L. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48 (2006)).

[19] *See* Scott R. Anderson, *The Underappreciated Legacy of the War Powers Resolution*, LAWFARE (Nov. 9, 2023), https://www.lawfaremedia.org/article/the-underappreciated-legacy-of-the-war-powers-resolution [https://perma.cc/A3F2-TT4G].

[20] U.S. CONST. art. II, § 3, cl. 5.

[21] *See* David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 30–32, 36–39 (2012).

[22] *See id.* at 44–45; Bradley & Morrison, *supra* note 15, at 1141–43.

[23] Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 873 (2017).

[24] *See* Bob Bauer, *The National Security Lawyer, in Crisis*, 31 GEO. J. LEGAL ETHICS 175, 249–55 (2018); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1713–23 (2011).

[25] *See, e.g.*, David J. Barron, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions, DEP'T OF JUST., OFF. OF LEGAL COUNS. (July 16, 2010),

Within the zone of reasonable disagreement, policy preferences and other considerations may push the decision-maker towards certain plausible legal positions over others. Executive branch lawyers may even work with policymakers to balance rule of law concerns with policy equities, producing a legal position that is both legally plausible and advances the agency's policy agenda.[26]

While context and process can greatly impact how the executive branch reaches legal positions,[27] there are certain identifiable patterns in much of its legal decision-making. As developing a legal position requires substantial interagency deliberation and debate, it is generally not something the executive branch does unless required. Similarly, once a position is reached, there is often a strong inclination to retain that position unless external shocks (such as an unforeseen policy crisis) or internal realignments (such as a change in leadership) force a change.[28] Precisely because of this durability and the process-oriented drive for consensus, the executive branch generally prefers to avoid unnecessarily ruling out possible legal arguments in a way that may constrain the President in the future.[29] In practice, this often manifests as an instinct to preserve available arguments that the President has broad presidential authority, even when relying most directly on other, narrower grounds.

Edward Corwin's classic description of the Constitution as "an invitation to struggle for the privilege of directing American foreign policy" is an apt description of its approach to war powers.[30] But a combination of factors generally puts the executive branch in the lead role in this contest, subject only to outer legal constraints imposed by the other branches and the external and internal political pressures inherent to the nation's highest office. For better or worse,[31] this gives the President substantial leeway in articulating the understanding of constitutional

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at 1, https://www.justice.gov/media/1226496/dl [https://perma.cc/RM86-RVLF] (describing the Office of Legal Counsel as "help[ing] the President fulfill his or her constitutional duties").

[26] *See* Bauer, *supra* note 24, at 233–38; Renan, *supra* note 23, at 835–45; Morrison, *Constitutional Alarmism*, *supra* note 24, at 1714–23. Some criticize this practice as self-dealing inconsistent with rule of law principles. *See* Bruce Ackerman, *Lost Inside the Beltway*, 124 HARV. L. REV. F. 13, 34–35 (2011).

[27] *See* Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 366–69 (2013).

[28] *See id.* at 366; *see also* Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT'L L. 680, 687–689, 698–699 (2016).

[29] *See Ingber, Interpretation Catalysts*, *supra* note 27, at 379; Ingber, *The Obama War Powers Legacy*, *supra* note 28, at 689–92, 694–96.

[30] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 201 (5th rev. ed. 1984).

[31] The descriptive account in this section should not be mistaken for a normative endorsement. For compelling critiques of these practices, see Rebecca Ingber, *The Insidious War Powers Status Quo*, 133 YALE L.J.F. 747, 750–770 (2024), and Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 1, 15–32 (2021).

war powers that informs U.S. diplomacy and military operations—and makes that understanding particularly sensitive to the President's policy concerns, including the perceived strategic needs of the United States.

## III. THE EXECUTIVE BRANCH AND THE PRESSURES OF MAJOR POWER CONFLICT

Few policy matters are of as central concern to the executive branch as matters of war and peace. And few matters of war and peace are likely to weigh as heavily as the possibility of major power conflict. While asymmetric conflicts can undoubtedly be dangerous, the power disparity between the United States and weaker adversaries limits the risk of harm they present, allowing more margin for error and greater space for policy trade-offs. By contrast, major power adversaries' ability to quickly deploy massive military force makes them more capable of capitalizing on even minor vulnerabilities, which can in turn reduce this tolerance for risk and elevate security concerns over other competing priorities.

These pressures in turn have a direct relationship with the executive branch's understanding of constitutional war powers. Threats regarding the use of military force are common currency in international relations, as they are routinely used to deter undesirable actions by adversaries. But to be effective, a threat must be credible, meaning that the leader issuing it is perceived as being able and willing to deliver on that threat if provoked. As Matthew Waxman has explored, this implicates not just military capacity, but also the perception that the leader in question is understood to have the legal authority to direct that military response—a question that, in the United States, is answered by one's understanding of constitutional war powers.[32] This need for credibility can be an underappreciated source of congressional and popular influence over the executive branch's use of military force, as congressional authorization is the most indisputable source of legal authority to use military force and both forms of support are likely necessary to sustain any significant military effort over time.[33] But policymakers' desire for leverage on the international plane can also put pressure on executive branch lawyers to advance or at least preserve more expansive claims of presidential authority. As the executive branch's legal views are the ones that most directly inform the actions of military and other executive branch personnel, advancing such claims can allow the President to more credibly threaten a broader range of military actions.

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[32] Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1638–46 (2014).

[33] *See id.* at 1664–74.

Nor are such claims easy to disprove, as mere assertions of legal authority are not normally justiciable unless acted upon, even outside the immediate war powers context.[34]

With this context in mind, this section considers how the executive branch might respond to a shift in strategic focus from asymmetric threats to major power conflict.[35] For historical context, it first examines the most recent precedent for such a shift: the Truman administration's adaptation to the new international pressures of the early Cold War. From there, it turns to contemporary executive branch views on war powers to consider how they may interact with a reemergence of major power conflict.

### A. Adaptation in the Early Cold War

This would not be the first time that the United States has faced a renewed possibility of major power conflict. At the onset of the Cold War, the United States suddenly found itself confronted with a second nuclear power in the form of the Soviet Union, whose global ambitions—along with those of its revolutionary allies in China—seemed directly opposed to the interests of the United States and its allies. In response, the Truman administration not only adopted a muscular strategy for countering perceived Soviet (and Chinese) encroachment, but articulated a new understanding of the President's constitutional war powers that allowed for the use of force at the scale and with the rapidity that this strategy demanded.[36] As the most recent historical precedent, examining this era may in turn shed light on how a similar return of major power conflict could impact executive branch decision-making today.

By the end of World War II, the executive branch had long claimed that the President has the inherent authority to deploy troops overseas "on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests."[37] The latter interests, however, were generally framed as relating to certain rights and privileges under international law, not broader foreign policy interests.[38] Presidents had occasionally gone further by acting in defense of

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[34] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (describing the "irreducible constitutional minimum of standing" as requiring an "injury in fact") (internal citations and quotations omitted).

[35] *See supra* notes 2–5 and accompanying text.

[36] For other accounts of this historical period, see Mary L. Dudziak, *The Gloss of War: Revisiting the Korean War's Legacy*, 122 MICH. L. REV. 149, 163–192 (2023); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 52–98 (2013); FISHER, PRESIDENTIAL WAR POWER, *supra* note 9, at 97–100; GLENNON, *supra* note 10, at 80; ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 130–35 (1973).

[37] *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941).

[38] *See* U.S. DEP'T OF STATE, OFFICE OF THE SOLICITOR, RIGHT TO PROTECT CITIZENS IN

"inchoate interests" not yet cognizable under international law or subjecting neighboring countries to "intervention and police supervision[.]"[39] But these efforts were usually justified as part of the longstanding Monroe Doctrine, which was itself rooted in a broad conception of "self-preservation" under international law.[40] An internal 1948 U.S. Justice Department memorandum addressing the possibility of sending U.S. troops to Palestine underscored the limits this left on presidential authority. It affirmed that the President could deploy troops to protect U.S. lives and property, which might reasonably include "[m]ilitary activity designed to enforce peace . . . [where] reasonably necessary to protect property interests there."[41] But going further "without congressional mandate" outside of the region covered by the Monroe Doctrine, the memorandum warned, would go "considerably beyond existing precedents."[42]

This more constrained vision of presidential power was already under pressure, both from a series of presidents who had deliberately pushed the limits of their constitutional authority[43] and from academics and activists seeking a legal foundation for the United States to play a more active role internationally.[44] But it was not until 1949 that two major developments changed the strategic lens through which the Truman administration was viewing the world: the Soviet Union's successful testing of a nuclear weapon and Communist revolutionaries' seizure of mainland China.[45] By early 1950, senior U.S. policymakers had developed a new internal strategy that painted strategic competition with the Soviet Union and China in dire terms and urged a dramatic build-up of United States and allied military capacity to deter and push back against Communist encroachment.[46] Among other items, it called for "a

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FOREIGN COUNTRIES BY LANDING FORCES 38–48 (3d rev. ed. 1934).

[39] CLARENCE ARTHUR BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 45, 55 (1921); *see also* EDWARD CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 158–63 (1917).

[40] *See* U.S. DEP'T OF STATE, J. REUBEN CLARK, UNDERSECRETARY OF STATE, MEMORANDUM ON THE MONROE DOCTRINE ix-xxv (1930) (originally drafted in 1928).

[41] *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, on The Power of the President to Send American Troops to Palestine (Aug. 4, 1972) (on file with Knight First Amendment Institute at Columbia University), https://knightcolumbia.org/documents/scsn12xrs2 [https://perma.cc/QAW3-2UMH].

[42] *Id.* at 8.

[43] *See* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1381–83 (2012) (discussing the "Jackson-Lincoln" and progressive models of the presidency).

[44] *See, e.g.*, JAMES GRAFTON ROGERS, WORLD POLICING AND THE CONSTITUTION 18–26 (1945).

[45] *See* GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 638–39 (2008).

[46] *See* A Report to the National Security Council by the Executive Secretary (Lay) (Apr. 14, 1950), *in* 1 FOREIGN RELATIONS OF THE UNITED STATES, 1950, NATIONAL SECURITY AFFAIRS; FOREIGN ECONOMIC POLICY 234, 234 (Frederick Aandahl et al. eds., 1977), https://history.state.gov/historicaldocuments/frus1950v01/d85 [https://perma.cc/JA7X-UAXX].

level of military readiness" sufficient to both serve "as a deterrent to Soviet aggression" and allow for "immediate military commitments and . . . rapid mobilization should war prove unavoidable."[47]

This need for a rapid response capability came to a head in June 1950, when Soviet-backed North Korea launched a surprise invasion of South Korea. Fearing a broader Communist offensive, Truman and his advisors responded with swift diplomatic and military action. Even as the U.N. Security Council was negotiating an authorizing resolution,[48] Truman approved "an all-out order . . . to the Navy and Air Force to waive all restrictions on their operations in Korea and to offer the fullest possible support to the South Korean forces."[49] Truman and his senior advisors did not consult with congressional leaders until the following day.[50] While Truman's actions proved overwhelmingly popular, including within Congress, his decision to move forward without prior congressional authorization became the subject of extended debate in the Senate.[51] His advisors considered pursuing a congressional resolution in the days that followed but ultimately elected not to, in part on the advice of allied congressional leaders who feared that doing so would undermine the President's claim of inherent constitutional authority.[52]

Instead, then-Secretary of State Dean Acheson—a well-regarded attorney in his private life—began to build a legal case in support of the president's actions. On July 3, 1950, he provided Congress with a memorandum broadly asserting that "[t]he United States ha[d] throughout its history, upon order of the Commander in Chief to the Armed Forces, and without congressional authorization, acted to prevent violent and unlawful acts in other States from depriving the United States and its nationals of the benefits of [international] peace and security."[53] Key to his argument was an appended report providing a list of eighty-five

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[47] *Id.* at 289–90.

[48] *See* S.C. Res. 83 (June 27, 1950).

[49] Memorandum of Conversation, by the Ambassador at Large (Jessup), (June 26, 1950), *in* 7 FOREIGN RELATIONS OF THE UNITED STATES, 1950, KOREA 178, 179 (S. Everett Gleason ed., 1976), https://history.state.gov/historicaldocuments/frus1950v07/d105 [https://perma.cc/R662-6LQ9].

[50] *See* Memorandum of Conversation, by the Ambassador at Large (Jessup), (June 27, 1950), *in* 7 FOREIGN RELATIONS OF THE UNITED STATES, 1950, KOREA 200 (S. Everett Gleason ed., 1976), https://history.state.gov/historicaldocuments/frus1950v07/d118 [https://perma.cc/BL4T-TLZ7] (documenting consultation).

[51] *See* 96 Cong. Rec. 9319–29 (1950).

[52] *See* Memorandum of Conversation, by the Ambassador at Large (Jessup), Washington (July 3, 1950, 4:00 PM), *in* 7 FOREIGN RELATIONS OF THE UNITED STATES, 1950, KOREA 286–91 (S. Everett Gleason ed., 1976), https://history.state.gov/historicaldocuments/frus1950v07/d205 [https://perma.cc/T88U-DSYX].

[53] Memorandum by the U.S. Department of State on the Authority of the President to Repel the Attack in Korea (July 3, 1950), *in* Background Information on Korea, H.R. Rep. No. 81-2495, at 63–64 (1950) [hereinafter 1950 Korea Memorandum].

prior military actions pursued on the president's inherent authority, which a Senator had submitted into the congressional record as part of an earlier 1941 debate.[54] While that earlier report offered a more limited account of the purposes behind these deployments, Acheson cited them collectively as support for the proposition that, "even before the ratification of the United Nations Charter, the President had used the Armed Forces of the United States without consulting the Congress for the purpose of protecting the foreign policy of the United States."[55] In the present case, this included "[t]he continued existence of the United Nations as an effective international organization[,]" though Acheson stopped short of suggesting that U.N. Security Council authorization was legally required.[56] Any role Congress might have had, meanwhile, was barely discussed.

The Truman administration later elaborated on these views in 1951 as part of the "Great Debate" over the deployment of U.S. troops to Europe under the recently signed North Atlantic Treaty.[57] A resulting report—reflecting executive branch views but published by Congress—grounded the President's broad authority to use military force in his constitutional role as Commander in Chief and control of U.S. foreign policy.[58] "In time of peace the President is just as much Commander in Chief as he is in time of war," it asserted, but "that power is directed, not at subduing an enemy, but at broader considerations of national policy."[59] As for treaties, the Take Care Clause gave the President "the authority and the duty to carry out [their terms]" and the "discretion to decide [through] what measures, within the sphere of his constitutional powers," as such agreements were "the law of the land" under the Supremacy Clause.[60] When it came to the use of force, however, this authority was only "confirmatory of" the President's existing inherent authority to use military force, which extended to such circumstances "irrespective of the [U.N.] Charter" and other treaty obligations.[61]

By contrast, the report took a narrow view of the Declare War Clause, which it framed as giving Congress only the "very little used"

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[54] *See id.* at 67–68; *see also* 87 Cong. Rec. 5,926–32 (1941) (original publication).

[55] 1950 Korea Memorandum, *supra* note 53, at 65.

[56] *See id.* at 66–67.

[57] For accounts of the Great Debate, see FISHER, PRESIDENTIAL WAR POWER, *supra* note 9, at 111–115; ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 135–40 (1973).

[58] *See* STAFF OF S. COMM. ON FOREIGN RELS. & S. COMM. ON ARMED SERVS., 82ND CONG., POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES 1 (Comm. Print 1951) [hereinafter 1951 War Powers Report].

[59] *Id.* at 5.

[60] *Id.* at 2.

[61] *Id.* at 24, 26.

ability to issue formal declarations of war.[62] It conceded that "the magnitude of present-day military operations and international policies require[d] a [substantial] degree of congressional support."[63] But in its view, Congress's influence came through appropriations and other legislation that facilitated and sustained the executive branch's use of military force, not a role in deciding how force would be used. Indeed, in a separate report and related testimony he provided to Congress, Acheson went so far as to argue that the authority to use military force in pursuit of U.S. foreign policy interests was exclusive to the President and beyond Congress's authority to regulate by statute, except to the extent it might withhold military appropriations altogether.[64]

Perhaps most tellingly, the broader report reflecting the Truman administration's views concluded with an acknowledgement that the "constitutional doctrine" the executive branch was articulating had been "largely molded by practical necessities."[65] As for which practical necessities, the report left few doubts, as it asserted that "[r]epelling aggression in Korea or Europe cannot wait upon congressional debate."[66]

Truman's decision to act on his own claim of inherent authority ultimately came to be seen as a political mistake, as responsibility for the Korean War ultimately cost him and his party immensely in the 1952 elections.[67] But much of his constitutional vision has nonetheless endured. Subsequent presidents have occasionally made concessions to Congress's war powers, and none have followed Truman's model in pursuing a major armed conflict on their own presidential authority. Yet they have maintained his most central claim: that the President has broad, inherent constitutional authority to use military force to advance U.S. foreign policy interests, even without prior authorization from Congress.

### B. Tensions with Contemporary Views and Possible Alternatives

In many ways, today's encounter with the renewed prospect of major power conflict resembles this early Cold War period. Once again, the United States is facing two familiar major power adversaries—this time

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[62] *Id.* at 17–19.

[63] *Id.* at 27.

[64] STAFF OF S. COMM. ON FOREIGN RELS. & S. COMM. ON ARMED SERVS., 82ND CONG., POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES, ASSIGNMENT OF GROUND FORCES OF THE UNITED STATES TO DUTY IN THE EUROPEAN AREA 92–94 (Comm. Print. 1951).

[65] *Id.*

[66] *Id.* at 21.

[67] *See* FISHER, *PRESIDENTIAL WAR POWER*, supra note 9, at 100–104.

the People's Republic of China and the Russian Federation—whose global ambitions seem at odds with its interests and allies. A once prevalent sense of U.S. global military superiority is gone, replaced by a more complicated—and potentially much more dangerous—system of strategic competition.

Other relevant considerations, however, are quite different, including the political environment in which the executive branch is operating. The Truman administration approached its reconsideration of war powers in a political context that was exceptionally amenable to broad claims of presidential authority. The global spread of Communism was the subject of immense and widespread concern. Years of war had acclimated Americans to presidential initiative in foreign affairs. Public intellectuals had long advocated for an internationalist vision like Truman's and quickly came to his defense.[68] Prior presidents from both parties had advocated for broad presidential authority, and the shift Truman pursued had vocal bipartisan allies, including among congressional leaders. Indeed, Truman's initial decision was fairly uncontroversial; only as the Korean War dragged on did it become a point of concern.[69]

By contrast, since the Vietnam War, contemporary Americans have become increasingly skeptical of broad claims of presidential war powers.[70] More recently, this skepticism has also been amplified by public dissatisfaction over decades-long military campaigns in Afghanistan and Iraq.[71] Substantial portions of both major political parties are now wary of overseas military entanglements, both in Congress and the broader public.[72] These views are in turn being reinforced by vocal communities of academics and activists who urge foreign policy restraint.[73]

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[68] *See* Louis Fisher, *Scholarly Support for Presidential Wars*, 35 PRES. STUD. Q. 590, 593–596 (2005).

[69] *See* DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 298–301 (2016); GRIFFIN, *supra* note 36, at 88–90.

[70] *See* Steven Kull et al., Americans on War Powers, Authorization for Use of Military Force, and Arms Sales: A National Survey of Registered Voters, UNIV. OF MD. PROGRAM FOR PUB. CONSULTATION (2022), https://vop.org/wp-content/uploads/2022/03/WarPowersReport031822.pdf [https://perma.cc/6UXN-56VW]; Frank Newport, *Public Wants Congress to Approve Military Action, Bombings*, GALLUP (July 7, 2008), https://news.gallup.com/poll/108658/public-wants-congress-approve-military-action-bombings.aspx [https://perma.cc/6AV5-R4ZS].

[71] *See* Ruth Igielnik & Kim Parker, *Majorities of U.S. Veterans, Public Say the War in Iraq and Afghanistan Were Not Worth Fighting*, PEW RSCH. CTR. (July 10, 2019), https://www.pewresearch.org/short-reads/2019/07/10/majorities-of-u-s-veterans-public-say-the-wars-in-iraq-and-afghanistan-were-not-worth-fighting/ [https://perma.cc/2RLF-FEB8].

[72] *See* Ash Jain, *The Scrambled Spectrum of U.S. Foreign-Policy Thinking*, FOREIGN POL'Y (Sept. 27, 2023), https://foreignpolicy.com/2023/09/27/republican-debate-trump-biden-foreign-policy-ideology/ [https://perma.cc/6BWJ-8QT7].

[73] *See* Beverly Gage, *The Koch Foundation is Trying to Reshape Foreign Policy. With Liberal Allies*, N.Y. TIMES (Sept. 10, 2019), https://www.nytimes.com/interactive/2019/09/10/magazine/charles-koch-foundation-education.html [https://perma.cc/LD5E-GREH]; *see also* RONALD

Of course, such sentiments may change over time or in reaction to an international crisis. But until they do, they seem likely to make claims of broader presidential authority a riskier political proposition than in Truman's day.

The starting point for the executive branch's operational understanding of war powers is also different than it was in Truman's era. While the core of the Truman administration's legal vision remains intact, several decades of experience—including through the pressures of the post-Vietnam era and the end of the Cold War—have led the executive branch to make certain changes. The U.S. Justice Department's Office of Legal Counsel put forward what is probably the clearest articulation of the executive branch's current views in a 2011 opinion justifying the Obama administration's intervention in Libya, stating:

> [T]he President's legal authority to direct military force . . . turns on two questions: first, whether United States operations . . . would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.[74]

This two-part framework is not necessarily exhaustive: elsewhere, for example, the opinion indicates that this authority only "exists at least insofar as Congress has not specifically restricted it," suggesting that certain statutory restrictions might apply as well.[75] But it has proven resilient. Both the Obama administration and the Trump administration consistently employed this two-part framework in justifying subsequent military authorizations, despite their partisan differences.[76] While the Biden administration has not publicly released any

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O'ROURKE & MICHAEL MOODIE, CONG. RSCH. SERV. RL44891, U.S. ROLE IN THE WORLD: BACKGROUND AND ISSUES FOR CONGRESS 6–10 & app. B (Jan. 19, 2021) (outlining parameters of broader policy debate).

[74] *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20, 33 (2011) (dated Apr. 1, 2011) [hereinafter 2011 Libya Opinion].

[75] *Id.* at 28.

[76] *See* Memorandum from Steven A. Engel, Assistant Attorney General, U.S. Department of Justice, to John E. Eisenberg, Legal Advisor to the National Security Council 11–12 (Mar. 10, 2020), https://www.justice.gov/d9/2023-04/2020-03-10_soleimani_airstrike_redacted_2021.pdf [hereinafter 2020 Iraq Opinion]; *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. (slip op.) 1, 9–10 (2018) [hereinafter 2018 Syria Opinion]; *Targeted Airstrikes Against the Islamic State of Iraq and the Levant*, 38 Op. O.L.C. 82, 95–98 (2014) [hereinafter 2014 Iraq Opinion].

legal opinions that expressly employ it, senior officials have confirmed that the administration similarly abides by it in congressional testimony.[77] And efforts to challenge this understanding in the courts have fallen flat, in substantial part because no concerted effort has been made to oppose it in Congress.[78] In this sense, it reflects a rare point of persistent, bipartisan consensus.

The remainder of this section considers how three key aspects of this understanding of constitutional war powers—the anticipated nature, scope, and duration test; the President's exclusive authority to engage in national self-defense; and the relevance of collective defense treaties—are likely to be affected by the shift in strategic focus to major power conflict. For each, it considers not just the extent to which these views may be in tension with perceived U.S. strategic needs, but ways in which they might be adapted to better accommodate such concerns, specifically by searching past executive branch practice for possible alternative understandings

### 1. Declare War Clause Limitations

The core logic of the anticipated nature, scope, and duration test—that some level of major armed conflict may require congressional authorization under the Declare War Clause, even if lesser uses of military force do not—has been a recurring feature of internal executive branch legal views for much of the postwar era.[79] While the Truman administration acknowledged no such limits, several subsequent administrations did so and incorporated them into their own legal assessments as a means of channeling potential objections by Congress and the federal courts, if not as an expression of genuine constitutional concern.[80] "[I]f the contours of the divided war power contemplated by the framers are to remain," then-Assistant Attorney General (and later Chief Justice) William Rehnquist explained in a 1970 memorandum, then "constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach

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[77] *See Authorizations of Use of Force: Administration Perspectives: Hearing Before the S. Comm. on Foreign Rels.*, 117th Cong., 5, 28 (2021).

[78] *See* Smith v. Obama, 217 F. Supp. 3d 283, 301–303 (D.D.C. 2016); Kucinich v. Obama, 821 F. Supp. 2d 110, 118–21 (2011).

[79] For a more detailed history of executive branch views on this issue, *see* Scott R. Anderson, *Taiwan, War Powers, and Constitutional Crisis*, 64 VA. J. INT'L L. 171, 191–212 (2023).

[80] *See, e.g.*, Stephen M. Griffin, *A Bibliography of Executive Branch War Powers Opinions Since 1950*, 87 TUL. L. REV. 649, 658 (2013) (reprinting memorandum from Secretary of State Dean Rusk to President Lyndon Baines Johnson, dated June 29, 1964); Memorandum from Attorney General Katzenbach to President Johnson (June 10, 1965), *in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968, VIETNAM, JANUARY–JUNE 1965, at 752 (David C. Humphrey et al. eds., 1996), https://history.state.gov/historicaldocuments/frus1964-68v02/d345 [https://perma.cc/4CZH-6HWM].

a certain scale."[81] The Korean War was, in turn, the "high water mark" for how far presidents had gone on their own authority, suggesting that the threshold for potential Declare War Clause limitations lay somewhere beyond.[82]

Discussion of this possible outer limit on the President's authority, however, largely remained internal to the executive branch. Outward representations generally acknowledged no such constraint.[83] Even where Presidents pursued congressional authorization for military action, the executive branch often framed it as legally unnecessary.[84] At times, this no doubt reflected objections to such limits by officials who rejected them and were intent on protecting presidential authority over foreign affairs. But even among those who accepted the possibility of Declare War Clause limitations, publicly acknowledging as much would have been an awkward fit with U.S. strategy throughout much of the Cold War, which leveraged the President's claimed inherent authority to make sudden and catastrophic use of nuclear weapons—an act that seems clearly in tension with Declare War Clause limitations—as an important source of deterrence.

Nonetheless, by 1993, these internal views on the Declare War Clause were sufficiently well-established that career attorneys in the Office of Legal Counsel were able to provide the incoming Clinton administration with a list of "factors that should be considered in assessing whether a 'war' exists within the meaning of [the Declare War Clause], so that prior congressional authorization for the proposed use of force would be necessary."[85] These included whether the proposed

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[81] *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Supp. Op. O.L.C. 321, 331–32 (2013) (dated May 22, 1970) [hereinafter 1970 Cambodia Opinion]. This was an expanded version of an earlier memorandum. *See Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Era*, 1 Supp. Op. O.L.C. 313, 313 (2013) (dated May 14, 1970).

[82] 1970 Cambodia Opinion, *supra* note 81, at 333. Rehnquist also concluded that "[t]he duration of the Vietnam conflict, and its requirements in terms of both men and material, ha[d] long since become sufficiently large so as to raise the most serious sort of constitutional question had there been no congressional sanction of that conflict." *Id.* at 335.

[83] *See, e.g.*, *Presidential Power to Use of the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187–88 (1985) (dated Feb. 12, 1980) [hereinafter 1980 War Powers Opinion].

[84] *See, e.g.*, Statement on Signing the Resolution Authorizing the Use of Force Against Iraq, 1 Pub. Papers 40 (Jan. 14, 1991); Letter from the Assistant Secretary of State for Congressional Relations (Dutton) to the Chairman of the Senate Foreign Relations Committee (Fulbright) (Mar. 14, 1962), in 2 FOREIGN RELATIONS OF THE UNITED STATES, 1961–1963, VIETNAM, 1962, at 224 (John P. Glennon et al. eds., 1990), https://history.state.gov/historicaldocuments/frus1961-63v02/d108 [https://perma.cc/JFV2-ESQW].

[85] Memorandum from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, to Alan Kreczko, Special Assistant to the President and Legal Adviser, National Security Council 34–35 (June 9, 1993), https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19930609_legal_assessment_of_the_war_powers_resolution.pdf [https://perma.cc/53NP-RT66] [hereinafter 1993 War Powers Resolution Memorandum].

military action would be "extensive in scope and duration," "in furtherance of other laws," or "in its nature defensive . . . [.]"[86] The Clinton administration subsequently chose to bring these factors out into the light as a means of addressing concerns over military interventions in Haiti and Bosnia. Reformulated as an assessment of a proposed military operation's "anticipated nature, scope, and duration[,]" this test "implicitly acknowledge[d] that there are significant limitations on the President's ability to deploy [U.S.] military forces" without congressional approval.[87] Those limitations had little bearing on the sorts of military operations that the Clinton administration wished to pursue, however, as it readily justified them under the test it set out.[88]

In the wake of the September 11th attacks, the George W. Bush administration initially rejected the idea that the Declare War Clause placed any limits on the president's "plenary" authority to use military force, describing in two war powers-related opinions—one relating to the global war on terrorism, the other relating to Iraq—that it was instead an authority that even the Framers "well understood . . . w[as] obsolete[.]"[89] But the Bush administration later declined to rely on this view in justifying its own military operations, and instead chose to secure congressional authorization for its major military campaigns in Afghanistan and Iraq[90] and rely on the opinions of prior administrations to justify other non-congressionally authorized actions.[91] The administration eventually went so far as to rescind other post-September 11th opinions for unduly minimizing Congress's own war powers, though not the two war powers opinions themselves.[92]

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[86] *Id.*

[87] Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIA. L. REV. 107, 118 (1995) (article by then-head of the Office of Legal Counsel).

[88] *See Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 177–179 (1999) (dated Sept. 27, 1994) [hereinafter 1994 Haiti Opinion]; *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 332–334 (2002) (dated Nov. 30, 1995) [hereinafter 1995 Bosnia Opinion].

[89] *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nationals Supporting Them*, 25 Op. O.L.C. 188, 192 (2012) (dated Sept. 25, 2001) [hereinafter 2001 Terrorism Memorandum]; *see also Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 143, 151-152 (2013) (dated Oct. 23, 2002) [hereinafter 2002 Iraq Memorandum].

[90] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter 2001 AUMF]; Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) [hereinafter 2002 AUMF].

[91] *See Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30, 31–33 (2013) (dated Mar. 17, 2004) [hereinafter 2004 Haiti Opinion].

[92] *See* Steven G. Bradbury, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, *Memorandum for the Files Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, at 1 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf [https://perma.cc/MFM6-5UNL]; *see also* BARRON, *supra* note 69, at 420–24 (discussing significance).

Perhaps for this reason, when the Obama administration had to justify its 2011 military intervention in Libya, it returned to the Clinton administration's formulation. The language it settled on—"whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause"[93]—has since become a uniform feature of executive branch legal justifications for military action, including through the subsequent Trump and Biden administrations.[94]

As described by the executive branch, applying the anticipated nature, scope, and duration test requires a "highly fact-specific" assessment that "turns on no single factor."[95] That said, the leading consideration appears to be whether U.S. military forces will "encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment."[96] The Office of Legal Counsel has in turn been clear that only "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period[,]" are likely to implicate possible Declare War Clause requirements.[97] While the Korean War still serves as the high water mark in this regard, some more recent opinions have declined to take a position on the constitutionality of the Truman administration's actions.[98] Importantly, this analysis is not limited to the military action the United States intends to pursue, but incorporates "the risk that an initial strike could escalate into a broader conflict."[99] Some risk of escalation is acceptable, as is some risk of even significant U.S. casualties. But at the point where these risks create "circumstances in which the exercise of [Congress's] power to declare war [would be] effectively foreclosed" by a serious risk of escalation into a war for constitutional purposes, prior congressional authorization is arguably required under the Declare War Clause.[100]

This test has proven highly permissive in the context of asymmetric conflict, creating what Jack Goldsmith and Matthew Waxman have described as a "clarified and strengthened . . . constitutional space for

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[93] 2011 Libya Opinion, *supra* note 74, at 33.

[94] *See supra* notes 76–77 and accompanying text.

[95] 2011 Libya Opinion, *supra* note 74, at 37.

[96] *Id.* at 31 (quoting 1994 Haiti Opinion, *supra* note 88, at 179). The executive branch has also occasionally identified "the limited antecedent risk that United States forces would . . . inflict substantial casualties" as a relevant factor, *id.*, but it has rarely played a significant role in the executive branch's analysis.

[97] 2011 Libya Opinion, *supra* note 74, at 31.

[98] *See, e.g.*, 2014 Iraq Opinion, *supra* note 76, at 101 n.6.

[99] 2018 Syria Opinion, *supra* note 76, at 21.

[100] *Id.* at 20 (quoting 1995 Bosnia Opinion, *supra* note 88, at 333).

light-footprint warfare."[101] In large part, this reflects the executive branch's assessment that weaker adversaries are generally going to be less willing and able to respond to U.S. military action in ways that might lead to a major armed conflict. Where a proposed U.S. military operation entails "limited means, objectives, and intended duration"[102] and does not "serv[e] an open-ended goal," like "the conquest or occupation of territory" or "a change in the character of a political regime[,]"[103] a weaker adversary is generally seen as having limited incentives to escalate into a broader conflict. Using "a force of sufficient size to deter armed resistance" has also been cited as a factor reducing escalation risk.[104] The most important consideration, however, may be the United States' qualitative technical edge. The executive branch has acknowledged that the use of grounds troops often entails "difficulties of withdrawal and risks of escalation" that "arguably' indicat[e] 'a greater need for approval [from Congress] at the outset."[105] But it generally views "air [and] naval operations" as avoiding these concerns, as they can strike quickly and at a great distance, limiting the opportunities for reprisals or challenges of withdrawal. [106] Implicit in this logic, of course, is the assumption that the targeted party lacks the means to strike back in kind and at a similar distance. Nonetheless, the executive branch has framed even extensive air campaigns against weaker adversaries in Iraq, Libya, Syria, and elsewhere as being below the threshold for Declare War Clause concerns on such grounds.[107]

The shift to major power conflict, however, threatens to turn many of these assumptions on their head. Both China and Russia possess a comparable ability to project military force at a significant distance against air and naval forces, mitigating many of the qualitative advantages that the United States enjoys over asymmetric rivals. An adversary whose military capabilities rival the United States' own will also not be as easily deterred by the threat of U.S. escalation or overwhelming shows of U.S. military force, as it will be better equipped to respond in kind. Indeed, major power adversaries engaged in strategic

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[101] Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39.2 WASH. Q. 7, 13 (Summer 2016).

[102] 2014 Iraq Opinion, *supra* note 76, at 120 (quoting 2011 Libya Opinion, *supra* note 74, at 39).

[103] 2018 Syria Opinion, *supra* note 76, at 20–21 (quoting 1995 Bosnia Opinion, *supra* note 88, at 332).

[104] 1994 Haiti Opinion, *supra* note 88, at 179 n.10.

[105] 2011 Libya Opinion, *supra* note 74, at 38 (partially quoting 1995 Bosnia Opinion, *supra* note 88, at 332).

[106] 2014 Iraq Opinion, *supra* note 76, at 119 n.16 (citing 1995 Bosnia Opinion, *supra* note 88, at 332–33).

[107] *See* 2018 Syria Opinion, *supra* note 76, at 18–22; 2014 Iraq Opinion, *supra* note 76, at 118–122; 2011 Libya Opinion, *supra* note 74, at 37–39.

competition with the United States may see it as more necessary to respond in a substantial manner to even limited U.S. military operations, in order to retain the credibility of their own threats to use force and their intended deterrent effect on the United States. In short, many of the factors that reduced the risk of escalation in the context of asymmetric conflict don't clearly apply to conflicts with major power adversaries.

A recent study by scholars at the Center for Strategic and International Studies (CSIS) provides a valuable illustration of how a contemporary major power conflict might complicate this sort of war powers analysis. Using a series of complex war games, the authors projected possible operational outcomes that would likely result from a range of hypothetical scenarios in which China and the United States went to war over Taiwan.[108] The results showed that "[a] conflict with China would be fundamentally unlike the regional conflicts and counterinsurgencies that the United States has experienced since World War II, with casualties exceeding anything in recent memory."[109] Scenarios in which the United States opened with relatively limited military actions quickly escalated into a major conflict[110] and even short delays in a U.S. military response often had serious operational consequences.[111] As a result, across the various scenarios it evaluated, the study projected that there would be between 6,900 and 10,000 U.S. casualties in the first four weeks of the resulting conflict, an amount equal to nearly four times the daily U.S. casualty rate during the Korea and Vietnam wars.[112] Few of these fatalities involved U.S. ground troops; instead, the vast majority were U.S. aviators, sailors, and support personnel stationed throughout the Pacific region, who quickly became the targets of long-range Chinese attacks.[113] Even where the United States and its allies successfully defended Taiwan, the ensuing devastation was sufficient to substantially degrade the United States' global and regional

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[108] Cancian et al., *The First Battle of the Next War*, CTR. FOR STRATEGIC & INT'L STUDS. (Jan. 2023), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/230109_Cancian_FirstBattle_NextWar.pdf [https://perma.cc/2EVE-HVSD].

[109] *Id.* at 119.

[110] *See id.* at 111–114.

[111] *See id.* at 119 ("The longer the United States delays entering the war, the more difficult the fight.").

[112] *See id.* at 119–20 (comparing the projections of about 140 killed per day to the height of the Vietnam War in 1968, when the United States was suffering an estimated thirty killed per day). The United States also suffered an average of about thirty daily fatalities over the course of the Korean War. *See* DAVID A. BLUM & NESE F. DEBRUYNE, CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 8 (2020) (compiling statistics at table six).

[113] *See* Cancian, *supra* note 109, at 111–14, 133–34.

position for decades.[114] All this in a set of simulations that limited their participants' actions to the Pacific theater and excluded the possible use of nuclear weapons—constraints that obviously would not apply in a real world conflict.[115]

This sort of outcome—which is representative of any number of major power conflict scenarios—poses a serious legal challenge for the executive branch. The potential consequences of such a conflict are undeniably on par with, if not in excess of, those experienced during the Korean War, which has often (but not always) been treated as the high-water mark for military action that does not trigger possible Declare War Clause limitations. More limited military actions could raise similar concerns as well, so long as there was a risk of escalation into this sort of major power conflict. All told, this makes the anticipated nature, scope, and duration test substantially more constraining when applied to major power adversaries than it has proven in the context of asymmetric conflict.

Of course, these constraints are unlikely to be absolute. There may be genuine reason to believe that certain limited military operations—rescue missions, for example, or escorts for friendly vessels—are unlikely to trigger escalation because they do not substantially compromise a major power adversary's interests enough to warrant escalation. There may also be steps the executive branch can take to reduce the risk of escalation. The Trump administration identified several in a 2018 legal opinion justifying air strikes in Syria, which documented how the United States took extra care to avoid triggering a conflict with Russia (whose personnel were deployed at several Syrian military bases) by avoiding locations where Russian forces were co-located, coordinating through existing deconfliction procedures, and clearly communicating its limited nature and objectives.[116] In addition, the multi-variate and deferential nature of the anticipated nature, scope, and duration test leaves ample room for motivated reasoning, if executive branch lawyers and policymakers are truly intent on crafting a legal justification for their actions without regard for its (or their) ultimate credibility.

The harder cases, however, will be those that are of the most central concern in an era of major power conflict, wherein the United States feels the need to act in direct opposition to a major power adversary. In

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[114] *See id.* at 143–144.

[115] Another recent war game focused on a China-U.S. conflict over Taiwan ended in the use of nuclear weapons. *See* Stacie Pettyjohn et al., *Dangerous Straits: Wargaming a Future Conflict Over Taiwan*, CTR. FOR A NEW AM. SECURITY 7–8 (June 2022); *see also* Stacie L. Pettyjohn & Becca Wasser, *A Fight over Taiwan Could Go Nuclear: War-Gaming Reveals how a U.S.-Chinese Conflict Might Escalate*, FOREIGN AFFS. (May 20, 2022).

[116] *See* 2018 Syria Opinion, *supra* note 76, at 20–22.

such cases, both the risk of escalation and the potential relevance of Declare War Clause limits are likely to be much harder to deny or evade. Waiting for congressional authorization in line with such limits, however, may be an unpalatable solution for senior policymakers, given the operational costs delays can incur.[117] Indeed, even acknowledging a need for prior congressional authorization might be seen as a problem, for fear that it would weaken deterrence by suggesting major power adversaries would have a short-term strategic advantage. For these reasons, executive branch lawyers may well find themselves under significant pressure from policymakers to instead adapt the executive branch's operational understand of war powers in a way that could permit U.S. military action in such scenarios.

The most clean-cut way to do so would arguably be to stop acknowledging Declare War Clause limitations altogether and return to something closer to the Truman administration's broad view of presidential war-making authority. The fact that the executive branch consistently discusses "possible" Declare War Clause limits suggests that it has never fully ruled out this possibility,[118] and the opinions of the early George W. Bush administration, which still have not been rescinded, could provide a more recent executive branch precedent for this view.[119] A slight variant on this approach might instead assert that the threshold for Declare War Clause concerns is, in fact, well beyond the Korean War and not met by whatever operation is being considered. But this argument, while perhaps less in direct conflict with recent executive branch precedents, seems unlikely to be received much differently than rejecting Declare War Clause limitations altogether. After all, if a direct conflict between nuclear powers is not a war for constitutional purposes, what is?

Moreover, while both options may be seen as legally available within the executive branch, either would be a substantial departure from both the publicly stated, bipartisan views of the executive branch in recent decades and a line of constitutional reasoning regarding the meaning of the Declare War Clause that has persisted within the executive branch for far longer. Asserting either view would also constitute the most ambitious claim of presidential war-making authority in the better part of a century. Particularly in a post-Vietnam era marked by widespread and bipartisan skepticism of such claims, this seems likely

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[117] For example, in the Taiwan scenarios evaluated by the 2023 CSIS study discussed above, a delay of four days gave the opposing side certain limited strategic advantages while a longer delay of two weeks had a more substantial effect. *See* Cancian, *supra* note 109, at 100. This roughly corresponds with the time that it may take to secure congressional authorization under different scenarios. *See infra* notes 180–181 and accompanying text.

[118] *See* 2011 Libya Opinion, *supra* note 74, at 31.

[119] *See supra* notes 89, 91 and accompanying text.

to come with potentially significant political costs. Among the public, this could have consequences for the incumbent president's broader political and policy agenda. Within Congress, it could have more direct consequences for the President's ability to secure supplemental funding and other resources they are likely to need to pursue any resulting major power conflict effectively.

For this reason, the executive branch may prefer a more targeted adaptation, focused on what is arguably the most problematic aspect of Declare War Clause limitations: the President's ability to respond immediately in the event of a crisis. One possibility would be what John Locke famously called "prerogative": a presidential ability to act in response to a crisis, even where that action might otherwise be unlawful or even unconstitutional, so long as it is later put up to Congress for ratification.[120] While this practice has understandably fallen into disfavor, it reflects a tradition dating back to the Jefferson and Lincoln administrations[121] and has been endorsed by, among others, the Vietnam-era Senate foreign relations committee.[122] President Eisenhower seriously considered such a step in regard to the defense of Taiwan, though he ultimately succeeded in securing statutory authorization before any military action was needed.[123] A more contemporary (and risk-averse) version of this strategy might have the President avoid acknowledging that his initial military response is unconstitutional, but instead concede that it is subject to reasonable constitutional doubt and commit to pursuing imminent congressional authorization as a means of rendering any constitutional questions moot. Either way, this would allow the President to act in the short-term while still preserving the formal constitutional requirement for congressional authorization.

Of course, by legitimating otherwise unlawful (even unconstitutional) actions by the President, this approach would raise obvious rule of law concerns. Moreover, if Congress refuses to ratify, it runs the risk of leaving the President solely responsible for a war they have conceded is arguably illegal, which may have political consequences up to and

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[120] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 83–88 (C.B. Macpherson ed., 1980).

[121] *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392–97 (1989) (discussing the "liberal paradigm of emergency power"); *see also* SOFAER, *supra* note 9, at 226–227 (Jefferson administration); HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829–1901, at 216–220 (1984) (Lincoln administration).

[122] *See* S. Rep. No. 91-129, at 32 (1969); *see also* FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 9, at 263–64.

[123] *See* Memorandum of Discussion at the 221st Meeting of the National Security Council, Washington (Nov. 2, 1954), in 14 FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, CHINA AND JAPAN 837 (John P. Glennon et al. eds., 1985), https://history.state.gov/historicaldocuments/frus1952-54v14p1/d375 [https://perma.cc/EU94-ZT9E] ("The President commented that if he saw a massive Chinese Communist attack developing, he would act at once and thereafter put his actions up to Congress for its judgment, even if this were to risk his impeachment.").

including impeachment. But if the situation is dire enough—and particularly if the President is confident that Congress will support their actions after the fact—then a return to prerogative may be seen as the least disruptive way to square pressing U.S. strategic needs with the Constitution's assignment of war powers.

That said, there may be other, more targeted adaptations the executive branch could pursue instead. As noted above, the two-part Libya framework is not exhaustive and there are other factors that might bear on the executive branch's assessment of possible Declare War Clause limitations. Two seem potentially relevant enough to warrant specific discussion: the President's exclusive authority to act in national self-defense and the possibility that military action may be authorized by treaty.

2. An Exception for Self-Defense

The proposition that the President has some inherent, if not exclusive, constitutional authority to take military action in defense of the United States dates back to the Framers.[124] Most scholars agree that, at a minimum, this authority extends to circumstances where the United States itself is "actually invaded, or in such imminent Danger as will not admit of delay[,]" as these are the circumstances in which the Constitution allows the states themselves to act in self-defense.[125] Congress recognized a somewhat broader authority in the War Powers Resolution, which describes the President as having the inherent constitutional authority to respond to "attack[s] upon the United States, its territories or possessions, or its armed forces."[126] The executive branch has gone further still and asserted at various points that the President's inherent authority also reaches the protection of overseas U.S. nationals and civilian governmental personnel plus certain other closely related actions.[127]

Exactly what military action a President can pursue under this inherent self-defense authority has been the subject of less discussion. At times, the executive branch has claimed that the President's authority extends not just to rescuing protected entities but thwarting imminent attacks against them and retaliating militarily against attackers.[128] While this most often involves military action against those directly engaged in attacks on protected entities, the executive branch has also

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[124] *See supra* note 9 and accompanying text.

[125] *See* SOFAER, *supra* note 9, at 4 (quoting U.S. CONST. art. I, § 10).

[126] 50 U.S.C. § 1541(c).

[127] *See* Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274–277 (1993) (dated Oct. 30, 1984).

[128] *See* 1980 War Powers Opinion, *supra* note 83, at 186–88.

taken broader military action against entities involved in patterns of such attacks to "degrade and disrupt" their capabilities and "deter" them from pursuing further attacks.[129] On other occasions, presidents have cited threats to U.S. persons and property as a justification for broader military operations, ranging from the protection of certain related foreign persons and property to actions that seem aimed at regional stabilization or even regime change.[130] That said, national self-defense is rarely the sole grounds for such military operations, making it difficult to disaggregate what actions are justified on that basis versus others.

Even less clear is what portion of this self-defense authority is exclusive to the President and thus cannot be limited by statute or Congress' own constitutional authorities. These two types of authority—inherent versus exclusive—are frequently conflated, sometimes deliberately, but are quite distinct, with the latter generally serving as a subset of the former.[131] But they can be difficult to distinguish, as Congress and the executive branch have only rarely been in such direct conflict over a question of self-defense that the President finds it necessary to assert a claim of exclusive authority.

The most notable such incident occurred in 1975, as the Ford administration wrestled with whether and how to rescue U.S. and foreign nationals from various locations in Southeast Asia despite post-Vietnam statutory restrictions on the use of funds for hostilities there.[132] After initially asking for clarifying legislation from Congress, Ford instead ordered a military rescue on his own authority. While it was never firmly settled whether the statutes restricted rescue operations, the Ford administration ultimately asserted that the President "had adequate constitutional power despite the funds limitation provisions to take out Americans and . . . those foreign nationals whose rescue was . . . so interwoven with that of U.S. citizens that the two were impossible to segregate[,]" implying exclusive presidential authority in

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[129] President Joseph R. Biden, Jr., *Letter to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution*, WHITE HOUSE (Jan. 25, 2024), https://www.whitehouse.gov/briefing-room/presidential-actions/2024/01/25/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution-public-law-93-148-12/ [https://perma.cc/AK57-3VZF].

[130] *See* FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 9, at 162–69 (discussing interventions in Grenada and Panama).

[131] *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 741–743 (2008) (discussing the conflation of these two concepts); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (drawing a distinction between a President's ability to act on his or her "independent powers" in areas of "concurrent authority" with Congress and areas subject to "exclusive presidential control").

[132] For other accounts of this incident, see BARRON, *supra* note 69, at 347–362; FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 9, at 156–58.

this regard.[133] A later military operation to recover the captured crew of the *USS Mayaguez* also included a post-rescue strike on Cambodia, though it remains unclear whether it was punitive or to protect participating U.S. forces.[134]

The executive branch has also occasionally addressed the President's exclusive self-defense authority in the context of section 5(b) of the War Powers Resolution, which generally requires that the President remove U.S. military forces from hostilities within sixty to ninety days if Congress has not provided its authorization.[135] In his original veto message, President Nixon argued that this restriction was an unconstitutional infringement on the President's war powers,[136] an objection taken up by a number of his successors.[137] Several internal executive branch legal assessments, however, have accepted section 5(b) as constitutionally valid, but only on the understanding that it is adequately flexible to account for foreseeable contingencies. If it were not, they have indicated, then the President would still be able to act in certain exigent circumstances of national self-defense, implying some exclusive constitutional authority to do so.[138]

In one of its early post-September 11th legal opinions on war powers, the George W. Bush administration went further and suggested that any presidential response to a "national emergency" arising out of an "attack against the United States" would be "beyond Congress's power to regulate[,]" including through the War Powers Resolution.[139] "N[o] statute," the opinion later emphasized, "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[140] That said, given the George W. Bush administration's aforementioned decision not to rely on this understanding and subsequent rescission of similar opinions,[141] the status of these views is unclear.

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[133] *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings before the Subcomm. on Int'l Sec. and Sci. Affs. of the Comm. on Int'l Relations*, 94th Cong. (1974) [hereinafter 1975 War Powers Hearing].

[134] *See* Protection of American Lives and Property Abroad, B-133001, 55 Comp. Gen. 1081, 1094–95 (1976).

[135] *See* 50 U.S.C. § 1544(b).

[136] *See* Veto of the War Powers Resolution, 1 PUB. PAPERS 893 (Oct. 24, 1973).

[137] *See* 1993 War Powers Resolution Memorandum, *supra* note 75, at 38–48 (discussing different administrations' positions towards the withdrawal provisions of the War Powers Resolution).

[138] *See, e.g.*, *id.* at 42–44; 1980 War Powers Opinion, *supra* note 83, at 196.

[139] 2001 Terrorism Opinion, *supra* note 89, at 210–12 & n.30.

[140] *Id.* at 214.

[141] *See supra* note 92 and accompanying text.

The executive branch has also hinted at the President's exclusive self-defense authority in discussing possible Declare War Clause limitations. In an internal 1993 memorandum, career attorneys in the Office of Legal Counsel identified whether a proposed military operation is "in its nature defensive, of American citizens, territory[,] or property" as a factor weighing against the applicability of Declare War Clause limitations, suggesting some exclusive presidential authority to engage in this sort of national self-defense.[142] But no such exception was incorporated into the anticipated nature, scope, and duration test later articulated by the Clinton administration. When the Obama administration cited "the protection of American citizens and property" as a national interest underlying 2014 airstrikes against the Islamic State in Iraq, it conducted a separate anticipated nature, scope, and duration analysis, implying that even such self-defense actions were subject to possible Declare War Clause limitations.[143]

But more recently, in a heavily redacted 2020 Office of Legal Counsel opinion justifying the airstrike that killed Iranian paramilitary commander Qassem Soleimani, the Trump administration appears to have suggested that such an exception does exist. "While the President has the constitutional authority to take defensive measures to protect U.S. persons, including U.S. forces deployed in a foreign theater," it stated, the military operation targeting Soleimani "warranted the kind of 'fact-specific assessment of the anticipated nature, scope, and duration of the planned military operation' that we have employed when the President seeks to advance national interests *apart from the defense of U.S. persons*."[144] This strongly implies that the Trump administration, at least, viewed such defensive measures as not being subject to the same possible Declare War Clause limitations as military action pursued in support of other national interests. The fact that the strike targeting Soleimani appears to have been viewed as the latter, not the former, may in turn be a sign that his relevant activities, described as "actively developing plans for further attacks on Americans in Iraq and throughout the region," may not have been sufficiently related to an active attack to fall within the scope of the President's exclusive self-defense authority.[145]

From these scant glimpses, it seems clear that the executive branch views the President as having some exclusive constitutional authority to act in national self-defense and to pursue certain other closely related acts. The exact boundaries of this exclusive authority are not well-

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[142] 1993 War Powers Resolution Memorandum, *supra* note 83, at 34.

[143] 2014 Iraq Opinion, *supra* note 76, at 98.

[144] 2020 Iraq Opinion, *supra* note 76, at 17 (emphasis added).

[145] *Id.* at 8.

defined but seem narrower than the President's inherent self-defense authority and strongest where the President is pursuing military action that is narrowly tailored to eliminate an imminent or active threat to U.S. persons. This ambiguity as to the exact scope of this authority is almost certainly not an accident, as it allows the executive branch to preserve some flexibility to act in exigent circumstances, even where constitutional and statutory limits might otherwise apply. Moreover, as such limits are rare, the executive branch has likely encountered relatively few circumstances in which it has had to identify and assert such exclusive authority.

This may change, however, if the return to major power conflict makes the anticipated nature, scope, and duration test more of a constraint on the President's authority to use military force. At a minimum, the executive branch will likely see an exclusive presidential authority to engage in self-defense as an important means of ensuring that it can address threats that major adversaries might pose to U.S. military forces and other key U.S. nationals, personnel, and property, even where such action might otherwise raise Declare War Clause concerns due to the risk of escalation into a major power conflict. The executive branch may also see advantage in at least preserving the argument that the President has the exclusive authority to pursue a more substantial military response, not least because this may be a more effective deterrent. This might even provide an alternate legal basis for a U.S. nuclear deterrent, albeit only where responding in self-defense, not situations of first strike.[146]

There are also ways the executive branch might use an exclusive self-defense authority to advance broader strategic goals. For example, the President could deploy U.S. troops to allied territories to create what are sometimes called "tripwires," wherein a threat against or attack on that allied position will also threaten the U.S. soldiers stationed there and trigger the President's self-defense authority.[147] The President could then claim the ability to pursue military action under his exclusive constitutional authority over self-defense. Similar arguments could also be made in relation to allied territories where a significant number of U.S. nationals are resident, or even where there is a substantial amount of U.S.-owned property. Such tripwires aren't necessarily fool-proof, as major power adversaries may be able to tailor their actions in a way that avoids or limits any direct threat against U.S. personnel

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[146] *See* Mary DeRosa & Ashley Nicolas, *The President and Nuclear Weapons: Authorities, Limits, and Process*, NTI PAPER 6–8 (Dec. 2019), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3237&context=facpub [https://perma.cc/4LAT-NXVF].

[147] *See* Patrick Hulme & Matthew Waxman, *War Powers Reform, U.S. Alliances, and the Commitment Gap*, LAWFARE (July 5, 2023), https://www.lawfaremedia.org/article/war-powers-reform-u.s.-alliances-and-the-commitment-gap [https://perma.cc/CQG7-MLR3].

and property. But at a minimum, they substantially complicate potential adversaries' strategic calculus in considering an attack.

Depending on how far the executive branch is willing to push, an exclusive self-defense authority might also be used to pursue more ambitious military objectives. Past presidents have premised major military interventions, including cases of regime change, in part on the need to defend U.S. nationals.[148] By his own account, then-Deputy Attorney General (and later Attorney General) William Barr similarly advised President George H.W. Bush that he could justify the 1990 invasion of Iraq simply by virtue of determining that Iraq posed a threat to U.S. soldiers that had already been deployed to the region, without seeking congressional authorization.[149] In each of these cases, the self-defense justification appears to have largely been a fig leaf concealing ulterior motives. And using such an expansive view of the President's exclusive self-defense authority as transparent pretext seems likely to raise many of the same political risks as other broad claims of presidential war-making authority. Nonetheless, it may have appeal for an executive branch intent on taking military action.

For present purposes, the key point is that the executive branch has previously recognized some exclusive presidential authority to engage in national self-defense. Whatever its precise scope, this exception may take on new significance in an era of major power conflict, as a means of evading possible Declare War Clause limitations.

3. Authorization by Treaty

The return of major power conflict—with China and Russia specifically—has also made a number Cold War-era international agreements newly relevant once again. Paramount among these are the more than half-dozen collective defense treaties that the United States entered into between 1947 and 1960,[150] each of which commits the United States to aid in the defense of the other parties if attacked, including through the potential use of military force. Such treaties are finding renewed

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[148] *See supra* note 130 and accompanying text.

[149] Interview by the Miller Center at the University of Virginia with William P. Barr 83–84 (Apr. 5, 2001), https://s3.amazonaws.com/web.poh.transcripts/Barr_William_update.interview.pdf [https://perma.cc/KE9P-SRFQ] (describing this "bootstrap argument").

[150] *See* Inter-American Treaty of Reciprocal Assistance, Dec. 3, 1948, 62 Stat. 1681, 21 U.N.T.S. 77; North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 224, 34 U.N.T.S. 243 [hereinafter North Atlantic Treaty]; Security Treaty, Aust.-N.Z.-U.S., Sept. 1, 1951, 3 U.S.T. 3420, 131 U.N.T.S. 83; Mutual Defense Treaty, U.S.-S. Kor., Oct. 1, 1953, 5 U.S.T. 2368, TIAS 3097, 238 U.N.T.S. 199; Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28 (dissolved in 1977); Mutual Defense Treaty Between the United States of America and the Republic of China, China-U.S., Dec. 2, 1954, 6 U.S.T. 433, T.I.A.S. 3178 (withdrew in 1980); Treaty of Mutual Cooperation and Security, U.S.-Japan, June 19, 1960, 11 U.S.T. 1632, T.I.A.S. 4509, 373 U.N.T.S. 186.

importance as the United States seeks to strengthen these alliances as bulwarks against China and Russia. But they are also resurrecting long standing debates over whether such treaties can authorize the use of military force as a matter of U.S. domestic law.

Collective defense treaties were the products of Cold War strategic pressures as filtered through the constraints of the nascent United Nations system.[151] The U.N. Charter barred the use of force between states absent U.N. Security Council authorization, but excepted actions pursuant to "the inherent right of individual or collective self-defence."[152] As the United States and its allies became concerned about Soviet and Chinese aggression, they committed to collective self-defense under this exception as a means of heightened deterrence. While the exact treaty language varied, Article 5 of the North Atlantic Treaty provides a representative model. It asserts that "an armed attack against one or more of [the parties] in Europe or North America shall be considered an attack against them all" and commits each party to "assist the Party . . . so attacked by taking . . . such action as it deems necessary, including the use of armed force . . . ."[153] Under international law, this language obligates each party to assist each other in the event of a qualifying armed attack, but stops short of firmly dictating any particular measure, including the use of military force. Its domestic legal effect, however, is less clear.

Prior to ratification, the executive branch expressly stated that collective defense treaties like the North Atlantic Treaty would not authorize U.S. participation in war. This was a condition of the Senate's support for such treaties, which emphasized that U.S. participation—including any decision to use force—needed to be "by constitutional process[.]"[154] In line with this understanding, former Secretary of State Dean Acheson publicly reiterated in 1949 that the then-newly negotiated (but not yet ratified) North Atlantic Treaty "d[id] not mean that the United States would be automatically at war if one of the nations covered by the pact is subject to armed attack[,]" as "[u]nder our Constitution the Congress alone has the power to declare war."[155] Both the North Atlantic Treaty and subsequent collective defense agreements

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[151] For other accounts of these treaties' history, see FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 9, at 105–111, and GLENNON, *supra* note 10, at 205–220.

[152] U.N. Charter, art. 51.

[153] North Atlantic Treaty, *supra* note 150, art. 5.

[154] S. Res. 239, 80th Cong. (1948) (the Vandenberg Resolution).

[155] Dean Acheson, U.S. Sec'y of State, The Meaning of the North Atlantic Pact, Radio Address (Mar. 27, 1949) in DEP'T ST. BULL., Apr. 1949, at 1; *see also* Prakash, *supra* note 10 and accompanying text (describing Congress's constitutional war declaration power).

incorporated the requirement that they be implemented through the parties' "constitutional processes" into their texts.[156]

But the executive branch was less definitive in other contexts. As discussed above, the Truman administration later posited that the President had the authority to enforce the terms of treaties under the Take Care Clause, but viewed this authority as simply confirmatory of the powers already possessed by the President when it came to the use of force.[157] The subsequent Eisenhower administration held a narrower view of the president's ability to use force without Congress, but nonetheless reassured treaty allies that the United States would respond "immediately" in the event of an armed attack and seek authorization from Congress after the fact.[158] Forced to account for this discrepancy in 1954 congressional testimony, then Secretary of State John Foster Dulles explained the administration's view that, while "[o]nly the Congress can place the country in a state of war[,]" the President "has an inherent authority to act to defend the vital interests of the United States wherever . . . instant response seems to be required" until Congress can weigh in—and that, "if a treaty finds that a certain area is vital to the United States, that the President would be more apt" to use this authority.[159] Subsequent executive branch legal opinions generally walked a similar line, viewing treaties as legal confirmation that certain interests were within the President's inherent authority to use military force to protect, but not as a substitute for congressional authorization in circumstances where such authorization would otherwise be required.[160]

Nonetheless, concerns that the executive branch might try to use treaty commitments to justify the use of force persisted, especially given their frequent invocation in relation to the Vietnam War.[161] In its first stab at war powers reform, the Senate initially accepted the possibility that a "national commitment" to use force on behalf of an ally could be

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[156] North Atlantic Treaty, *supra* note 150, art. 11.

[157] *See* 1951 War Powers Report, *supra* note 58, at 24.

[158] *See, e.g.*, The Secretary of State to the President of the Republic of Korea (Rhee) (July 24, 1953), in 15 FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, KOREA, PART 2 (John P. Glennon ed., 1984), Doc. 715, https://history.state.gov/historicaldocuments/frus1952-54v15p2/d715 [https://perma.cc/PE46-C6UC] ("If in violation of the armistice the Republic of Korea is subjected to unprovoked attack you may of course count upon our immediate and automatic military reaction.").

[159] *Foreign Policy and its Relation to Military Programs: Hearings before the Comm. on Foreign Rels. of the United States Senate*, 83rd Cong. 11, 36 (1954).

[160] *See, e.g.*, 1970 Cambodia Opinion, *supra* note 81, at 329; Memorandum by Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, DEP'T ST. BULL., Mar. 4, 1966, at 485.

[161] *See, e.g.*, *id.* at 480–81.

codified into law by a treaty as readily as a statute.[162] But during negotiations over the later War Powers Resolution, the Senate ultimately acceded to the views of the House that the Declare War Clause requires bicameral authorization by statute (or possibly concurrent resolution). As a result, section 8(a)(2) of the Resolution directs that "[a]uthority to introduce [U.S.] Armed Forces into hostilities" should not be inferred from "any treaty heretofore or hereafter ratified . . .".[163] This has the effect of not just barring any inference of congressional authorization from future treaties but rescinding any authorization provided by past treaties.

The Ford administration quickly sought to reassure nervous allies by reaffirming that the president's inherent constitutional authority could still be used to "carry out the terms of security commitments contained in treaties[.]"[164] Subsequent administrations have similarly relied on the President's inherent authority to support treaty allies and pursue action under the U.N. Charter, without suggesting that treaties themselves provide added domestic legal authority to do so.[165] Since the development of the two-part Libya framework, this has meant that treaty obligations are usually cited in relation to the first national interests prong, not the second prong addressing possible Declare War Clause limitations.[166] But this in turn implies that there remain certain military actions—those whose anticipated nature, scope and duration rise to the level of a war for constitutional purposes—that the President may not be able to undertake in support of allies without prior authorization from Congress.

The return of major power conflict may make this limitation a concern. Most of the United States' collective defense treaties were negotiated with China and Russia in mind, and those countries remain the primary sources of concern for most treaty allies. But military action against either major power adversary, even in defense of a treaty ally, is likely to present a serious risk of escalation and thus raise Declare War Clause concerns. Even acknowledging this concern could in turn weaken those treaties' intended deterrent effect. For these reasons, the executive branch may see advantage in being able to justify the use of military force based on such treaties. But doing so is likely to encounter significant legal and policy obstacles.

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[162] *See* S. Res. 85, 91st Cong. (1969).

[163] War Powers Resolution, Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1547(a)(2)).

[164] 1975 War Powers Hearing, *supra* note 133, at 90–91 (statement of U.S. Department of State Legal Adviser Monroe Leigh).

[165] *See, e.g.*, 2004 Haiti Opinion, *supra* note 91, at 33; Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 7, 11–12 (1998) (dated Dec. 4, 1992).

[166] *See, e.g.*, 2011 Libya Opinion, *supra* note 74, at 33–35.

The most comprehensive approach would likely be to argue that collective defense treaties are the equivalent of federal law under the Supremacy Clause and thus are subject to presidential enforcement under the Take Care Clause, as the Truman administration once did. But this would be a serious departure from the more recent executive branch precedents discussed above. It is also difficult to square with contemporary Supreme Court decisions that set an exceptionally high bar for finding that a treaty is self-executing and has the domestic force of law.[167] Nor is it clear such a conclusion would help regarding the collective defense treaties at issue, as each deliberately avoids obligating the United States to use military force. The President might be able to claim the ability to decide an appropriate response as part of his enforcement authority, as the Truman administration suggested.[168] But this would run counter to the numerous subsequent executive branch statements discussed above that disclaim the suggestion that such treaties change the respective authorities of the political branches.

Moreover, even if one accepts that these collective defense treaties at one point constituted domestic authorization, it would be hard to avoid the conclusion that section 8(a)(2) of the War Powers Resolution has since repealed any such authorization. Congress's authority to supersede the domestic legal effects of treaties through subsequent legislation is "firmly established."[169] While the executive branch might reasonably argue that the forward-looking application of section 8(a)(2) impermissibly restricts the actions of future presidents and senates[170]—a variant of the argument it has made in regard to section 8(a)(1), which similarly restricts past and future inferences of congressional authorization from statutes[171]—this would only help with treaties entered into after the War Powers Resolution's enactment. The closest the executive branch could likely get would be to argue that certain post-1973 follow-on treaties—like the protocols used to admit new members into North Atlantic Treaty Organization (NATO)—restore whatever implied

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[167] *See* Medellin v. Texas, 552 U.S. 491, 504–14 (2008).

[168] *See supra* note 60 and accompanying text.

[169] LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 211 (2d ed. 1996); *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("[I]f there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control."); Restatement (Third) of U.S. Foreign Relations Law § 115(1)(a) (Am. L. Inst. 1987) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.").

[170] *See* 1993 War Powers Resolution Memorandum, *supra* note 75, at 48–50 (describing prior administrations as having made this argument while finding it unpersuasive).

[171] *See Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327, 331–39 (Dec. 19, 2000).

authorization was provided by their parent agreements.[172] But this would be a slender reed on which to build the legal case for pursuing a major armed conflict that the President would not otherwise have the constitutional authority to pursue.

For these reasons, the executive branch may instead have to limit itself to a more modest view of the relevance of treaties. In the past, executive branch lawyers have expressed support for the idea that "a collective defense treaty justifies presidential use of force in support of a harried ally until Congress has had ample time to determine whether it favors American military involvement in the conflict."[173] But squaring even this narrow effect with the Declare War Clause and section 8(a)(2) is not easy. The closest one might get would be to treat a collective defense treaty as a factor weighing against the application of Declare War Clause limits under the anticipated nature, scope, and duration test for limited military operations pursued while Congress weighs a broader response. This would not be an "authorization" of the sort rescinded by section 8(a)(2) nor a full substitute for Declare War Clause requirements. Instead, it would simply be a factor mitigating some of the usual concern that limited military operations might "effectively foreclos[e]" Congress's ability to exercise its Declare War Clause authority by triggering escalation, presumably on the logic that the treaties reflect some cognizable congressional awareness of—and perhaps even partial consent to—that possibility.

As a strictly legal matter, this argument may not be entirely persuasive. But if a President were to see an urgent need to come to the immediate assistance of a treaty ally—and particularly if they assess that Congress and the broader public are likely to support such action after the fact—then it may well prove plausible enough for the executive branch to rely upon, at least in the short term.

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The shift in strategic focus from asymmetric to major power conflict is likely to result in new pressures on executive branch lawyers, especially in relation to possible Declare War Clause limitations. Whether and how these result in changes in the executive branch's operational

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[172] *See, e.g.*, Protocols to the North Atlantic Treaty on the Accession of the Republic of Finland and the Kingdom of Sweden, July 11, 2022, S. TREATY DOC. No. 117-3 (2022). Notably, the resolution of ratification for these protocols does declare that "membership in NATO remains a vital national security interest of the United States" and that "an attack against Finland or Sweden . . . [would] jeopardize United States national security interests." 168 Cong. Rec. S3879, 3900 (daily ed. Aug. 3, 2022).

[173] 1993 War Powers Resolution Memorandum, *supra* note 85, at 32–33 n.28 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 233 (2d ed. 1988)).

understanding of constitutional war powers will depend on the specific circumstances and individuals involved. But past executive branch practice points to several established directions in which it may adapt these views. The broadest possible changes—an outright rejection of Declare War Clause or other constitutional limitations on the President's authority to use military force—may not be politically feasible in the post-Vietnam era. But other, more targeted adaptations—relating to prerogative, national self-defense, and collective defense treaties—could at least avert what the executive branch is likely to see as the most serious concern arising from a need for prior congressional authorization, namely the ability to pursue swift military action in scenarios involving major power adversaries.

The more limited nature of these targeted adaptations, however, may also change the executive branch's calculus. Only reliance on an exclusive Presidential authority to engage in national self-defense offers a possible escape from Declare War Clause limitations. The other adaptations—prerogative and treaty-based arguments—simply defer the need for congressional support. The War Powers Resolution's aforementioned sixty to ninety day cut-off in turn sets a hard statutory limit for securing such support, one that is likely to prove harder for the executive branch to evade in the context of potential major power conflict than it has in the past.[174] Moreover, in light of the relative power parity among the parties, many potential major power conflicts—even those pursued in national self-defense—are likely to be more substantial undertakings requiring supplemental support from Congress before too long. This need for ex post congressional ratification reduces the marginal benefit of relying on the president's inherent (or exclusive) authority over seeking prior congressional authorization, at least in situations that the executive branch can anticipate. Combined with the heightened deterrent effect that prior congressional authorization can provide, this may strengthen the case for the executive branch to at least explore such a step. What degree of cooperation is actually feasible, however, will depend not just on the executive branch's approach, but how the other branches of government respond in turn.

[174] One of the executive branch's main arguments as to why certain major military operations do not constitute "hostilities" subject to this statutory limitation have been that such operations are air campaigns that present a limited risk of U.S. casualties or escalation. *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Rels.*, 112th Cong., 14–15 (2011) (testimony of U.S. Department of State Legal Adviser Harold Koh). For the same reasons discussed in relation to possible Declare War Clause limitations above, these arguments are likely to be more difficult to make credibly in the context of major power conflict. *See supra* Part III.B.1.

## IV. POSSIBLE INTERBRANCH REACTIONS

When exactly those outside of the executive branch will become aware of a change in its understanding of constitutional war powers is unclear. Initially, the executive branch is likely to keep discussions regarding possible adaptations closely held. But at some point, it will either need to rely on whatever new understanding it has adopted or begin to discuss it publicly to enhance the credibility of threats that are predicated upon it. Whenever this occurs, statutory reporting requirements make it likely that at least Congress and possibly the broader public will be made aware of whatever new understanding the executive branch has adopted.[175]

Even before then, however, the other branches of the federal government may well be independently aware of any growing risk of major power conflict. Their own perception of that risk is in turn likely to shape both their independent response and their reaction to the executive branch's actions.

This section considers how each branch may experience and respond to the possible return of major power conflict as well as the executive branch's own reaction to it. For Congress, the question of how it engages with the executive branch and exercises its own war powers may prove decisive in the ultimate tack pursued by the United States. But for the federal courts, the more important issue may be the incentives it chooses to present to the political branches.

### A. Cooperation or Conflict with Congress

One way or another, Congress will have to confront whatever strategic choices the executive branch makes in relation to the perceived threat of major power conflict, including any associated shifts in its understanding of constitutional war powers. In extreme circumstances, this may not take place until after the executive branch initiates military action, leaving Congress with a limited opportunity to agree or disagree. But in most cases, there will be opportunities for Congress to solicit or anticipate the executive branch's plans in these regards.

If Congress generally supports the executive branch's approach, then it might consider providing broad advance statutory authorization for related military action, much as it did in several circumstances during the early Cold War. This would eliminate any constitutional doubt regarding the President's authority to act and thereby enhance the credibility and deterrent effect of any threats they may issue. It would

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[175] *See* 50 U.S.C. § 1549 (requiring an annual report on the executive branch's legal and policy frameworks for the use of military force and notice of any changes within 30 days).

also eliminate any need for the executive branch to adopt legal views that further marginalize Congress's own authorities. But this approach is likely to face more resistance than it once did, as perceived manipulation of the 2001 and 2002 Authorizations for Use of Military Force (AUMFs) by the executive branch has made many legislators wary of broad delegations of authority. This political reality was on full display in 2021, when a proposal to pre-authorize military action in support of Taiwan—an issue that enjoys broad bipartisan support—failed to secure even a modicum of support in Congress. "Given the experience not only of the last four years of a reckless president, but the previous 20 years of endless war," one senior foreign policy advisor for a progressive senator noted, "the dangers of creating another open-ended war authorization should be obvious."[176]

Of course, war authorizations need not be open-ended. Congress could set limits on the type and scale of force it authorizes, install reporting requirements, and even require periodic renewal to ensure it has opportunities to revisit whatever scope of authority it provides. But negotiating a more fine-tuned authorization—both with the executive branch and within Congress—is likely to be labor-intensive, taking time and energy away from Congress's broader legislative agenda.

By contrast, if Congress opposes military action the President seems to be considering, then it may wish to enact legislation expressly prohibiting such action and barring the use of appropriated funds for it. While not fool proof, this would put the President in the weakest possible legal position for justifying military action if he were to proceed. And if the President does so anyway, it would set up the sort of clear conflict between the political branches that the courts have suggested would be ripe for adjudication, making the specter of judicial review a far more real threat for the executive branch.[177] As now-Justice Brett Kavanaugh once wrote, "it is not likely a winning strategy . . . for a President to assume that he will be able to avoid judicial disapproval of wartime activities taken in contravention of a federal statute."[178] This may give Congress an edge in such disputes, if it is able to overcome institutional inertia and take the steps necessary to make its objections clear.

Even if Congress is not ready to move forward with authorizing (or prohibiting) any specific military action, there are steps it could take to improve its own capacity to engage on such questions in the future.

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[176] Jack Detsch, *'Now You're in a Situation': Democrats Pressure Biden on Taiwan*, FOREIGN POL'Y (Oct. 20, 2021, 2:44 PM), https://foreignpolicy.com/2021/10/20/biden-taiwan-democrats-congress-china/ [https://perma.cc/CA53-WSPT].

[177] *See* Zivotofsky v. Clinton, 566 U.S. 189, 195–97 (2012).

[178] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1480 (2009).

Foremost would be to improve its oversight capacity through expanded staff, enhanced resources, and clearer jurisdictional lines so that it has a clearer sense of how the executive branch is responding to the pressures of major power competition.[179] Improved transparency and reporting requirements could similarly ensure a steadier flow of relevant information from the executive branch.

Congress could also take steps to address the main reason why prior congressional authorization is often seen as inconsistent with military crises: the deliberate and sometimes unreliable pace at which it operates. Congress has taken at least forty-eight hours to enact even nearly unanimous war authorizations in the past,[180] while a single opposed senator can, under conventional procedures, obstruct legislation for up to two weeks.[181] At times, Congress has also proven unwilling to engage on war measures, even when requested by the executive branch for military action with broad bipartisan support;[182] and even where Congress does engage, the results are not always clear.[183]

Expedited procedures that guarantee a timely floor debate and eventual final vote on a qualified proposal where certain emergency conditions are met could help assuage these concerns. This would be true even if these procedures were to only apply to a pre-negotiated authorization of limited scope and duration that simply buys time while Congress considers a more custom authorization. Such procedures could be a valuable complement to broader proposals for war powers reforms that focus on constraining the executive branch[184] by ensuring that the pursuit of authorization from Congress is compatible with U.S. strategic requirements, thereby reducing the executive branch's incentive to rely on presidential authority alone in responding to

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[179] *See* Matthew C. Waxman, *War Powers Reform: A Skeptical View*, 133 YALE L.J.F. 776, 797–801 (2023) (emphasizing the importance of congressional oversight of the military).

[180] The 2001 AUMF, for example, was approved 420-1 in the House and 98-0 in the Senate on September 14, 2021, three days after the terrorist attacks to which it was responding. *See* 147 Cong. Rec. H5683, S9421 (daily ed. Sept. 14, 2001). The Gulf of Tonkin resolution was similarly approved 416-0 in the House and 88-2 in the Senate on August 7, 1964, approximately three days after the precipitating incident in Vietnam. *See* 110 Cong. Rec. 18554-55, 18470-71 (1964).

[181] *See* VALERIE HEITSHUSEN, CONG. RSCH. SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 18–19, tbl. 1 (2017) (calculating possible delay). Certain Senate procedural rules are waived for declarations of war, which may reduce this time in some cases. *See* Standing Rules of the Senate, R. XVII(5), S. Doc. No. 117-8, at 13 (2013).

[182] *See, e.g.*, CHARLIE SAVAGE, POWER WARS 638–54 (rev. ed. 2017) (discussing failed Obama administration efforts to secure congressional support for interventions in Syria and Libya).

[183] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 20 (D.C. Cir. 2000) (noting how, on a single day, Congress "voted down a declaration of war 427 to 2 and an 'authorization' of [airstrikes in Kosovo] 213 to 213, but it also voted against requiring the President to immediately end U.S. participation in the NATO operation and voted to fund that involvement").

[184] For a discussion of some such proposals, *see Policy Roundtable: The War Powers Resolution*, TEX. NAT'L SEC. REV. (Nov. 14, 2019), https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/ [https://perma.cc/Q4JV-LBHT] (includes contribution by author).

international crises. Indeed, the War Powers Resolution itself installs never-used expedited procedures for certain war authorizations.[185] Expanding and modernizing these procedures could put Congress in a stronger position to engage on matters of war and peace, in the manner that the sponsors of the War Powers Resolution intended.

The most likely congressional response, however, may be silence. The fact that pursuing congressional action generally requires supermajority support makes passivity a natural default position for Congress. There may also be good strategic reasons for silence, particularly if policymakers believe major power adversaries could see congressional action as an escalation. And equipoise may appeal to legislators who see political risk in a more affirmative stance, or who simply wish to conserve time and resources for other legislative priorities.

The difficulty is that remaining passive for too long—such as until a crisis occurs—is more likely to put the political branches into conflict with each other. Delaying debate over prior congressional authorization makes it more likely that the President will encounter a crisis in which they feel the need to act before Congress can weigh in, inviting broad claims of presidential authority that may undermine Congress's own vision of its constitutional authority. By that point, Congress's ability to respond will be more limited, as any legislation opposing the President's actions is almost certain to incur a presidential veto. An opposed Congress will likely instead have to resort to withholding (or heavily conditioning) any ex post authorization, supplemental funding, or other legislation sought by the President. Doing so, however, may well entail the political risk of being framed as cutting off support for U.S. soldiers engaged in hostilities. Meanwhile, the ongoing debate over the legality of military action in question is likely to risk further eroding the President's public legitimacy and increasing any related political costs. And perhaps most importantly, uncertain congressional support is likely to undermine the credibility of any commitment the President may make to pursue a more extended military campaign, potentially limiting their ability to leverage the threat of continued or expanded hostilities as a means of encouraging the other parties to move towards an end to hostilities.

Identifying the optimal moment for Congress to act is undoubtedly a challenge, both for congressional leaders and their executive branch counterparts. But declining to do so runs the greatest risk of not only conceding Congress's remaining constitutional role in matters of war and peace but putting the United States on disadvantageous footing just as it undertakes what may be the greatest challenge it has faced in

[185] *See* 50 U.S.C. § 1545.

generations: a genuine major power conflict. Avoiding this outcome requires that the political branches undertake the lengthy and often difficult process of reaching a more shared understanding on the challenges ahead and possible ways forward. Even if these efforts ultimately fall short of a fully coordinated response, dialogue regarding their perspectives and preferences will allow each political branch to better take account of the other in pursuing their individual responses.

B. (Dis)Engagement by the Federal Courts

Of course, the political branches are not the only parts of the federal government that are likely to be sensitive to the pressures of major power conflict. To the extent that federal judges feel institutionally ill-equipped to second-guess the political branches on national security matters, the return of major power conflict is likely to make any perceived margin for error even slimmer. For this reason, some judges may be tempted to revert to what was once a popular position: the view that the line between the President's and Congress's war powers presents a political question not suitable to judicial resolution.[186]

Such categorical abstention, however, could have far-reaching consequences. Without even the outside threat of judicial intervention, the executive branch may well feel empowered to assert exceptionally broad claims of inherent and exclusive presidential authority over the use of military force. Absent judicial enforcement of statutory restrictions, Congress's only means of preserving its own constitutional authority would be to leverage its ability to withhold funding and otherwise obstruct the executive branch's ability to execute its own agenda. This would undoubtedly benefit the executive branch in the short-term, as its unity and dispatch would allow it to act even as Congress debates a response. But if a critical mass within Congress were to decide to bring the President to heel, the tables would flip, as there would be no judicial remedy for claims that Congress is improperly intruding into whatever exclusive authority to use military force the President might have. Between these two points, there would be substantial collateral damage as one political branch seeks to bludgeon the other into compliance—conditions that do not lend themselves to effective foreign policymaking or the sort of unified front that one would hope to present to a major power adversary.[187]

Perhaps for this reason, even those federal courts that have invoked the political questions doctrine in relation to war powers have

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[186] *See, e.g.*, *Campbell*, 203 F.3d at 24–28 (Silberman, J., concurring).

[187] For a similar discussion of the availability and desirability of non-judicial remedies in disputes between the political branches, *see* Committee on the Judiciary v. McGahn, 951 F.3d 510, 528–30 (D.C. Cir. 2020), and *id.* at 548–50 (Rogers, J., dissenting).

generally left the door slightly open to justiciability, at least where there is a clear conflict between the political branches.[188] By putting the onus on Congress to act, this arguably inverts the burden imposed by the Declare War Clause. But it nonetheless provides the executive branch an added incentive to avoid constitutional brinkmanship and accommodate Congress's preferences, as doing otherwise too blatantly increases the risk of judicial intervention.[189]

In a new era of major power conflict, such a role will be especially important. Congressional preferences are an important, if imperfect, democratic counterweight to how the executive branch perceives and reacts to new strategic pressures. Leaving a door open to potential judicial engagement will help discourage either political branch from going too far in disregarding the views and preferences of the other, no matter how malleable the lines of constitutional authority between the two may prove. And if the two political branches ultimately disagree to the point that there is a clear conflict between them, then judicial intervention may be the most timely and efficient way to resolve the resulting impasse, before the costs it imposes on the nation prove too great.

## V. CONCLUSION

The return of major power conflict promises to change how the executive branch views and pursues U.S. national security. As an essential part of that system, the executive branch's operational understanding of constitutional war powers may change along with it. This is not necessarily a bad thing, as the inherent plasticity with which war powers operate—and the cycles of competition and accommodation that this has facilitated between the political branches—may well have contributed to the United States' survival over its nearly three centuries of existence. But it comes with undeniable risks as well, both for the coming generation that may have to live with the real prospect of major power conflict and for the separation of powers that they ultimately pass on to their descendants.

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[188] *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 302 (D.D.C. 2016), *dismissed sub nom.* Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018); Dellums v. Bush, 752 F. Supp. 1141, 1145 (D.D.C. 1990); Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355, 1357 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); *see also* Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) ("[W]hen an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is. That duty will sometimes involve the resolution of litigation challenging the constitutional authority of one of the three branches, but courts cannot avoid their responsibility merely because the issues have political implications.") (internal citations and quotations omitted).

[189] *See* Deeks, *supra* note 14, at 889–96.

To reduce these risks, the political branches need to acknowledge the changing strategic demands facing the country and begin a dialogue aimed at reaching a common understanding on possible ways forward in the event that major power conflict becomes a reality. The executive branch is arguably in the best position to lead in this effort, by treating unilateral action as a last resort and instead working towards a collaborative response. Failing to do so, in turn, threatens to divide the United States at what may be one of its moments of greatest challenge.