

Taiwan, War Powers, and Constitutional Crisis

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Many policy assessments assume that the president would have the domestic legal authority necessary to respond with immediate military force in the event that China were to pursue an unexpected attack on Taiwan. But this view is in some tension with history. Prior presidents have, at times, expressed serious doubts as to whether they can go to war with China without Congress. And while Congress once authorized the defense of Taiwan, it has spent the past several decades deliberately withholding that authorization as part of the broader U.S. policy of strategic ambiguity. Today's executive branch has never conceded that the president lacks the inherent constitutional authority to use military force in such circumstances, but it has acknowledged—first internally, now publicly—that the Constitution's Declare War Clause raises serious questions about his ability to enter the United States into major armed conflicts without Congress. Thus even the executive branch is likely to view the question of whether the president alone has the constitutional authority to intervene in the defense of Taiwan as an extremely difficult one.

This Essay traces these two parallel histories—the evolution of U.S. security commitments to Taiwan on the one hand, and executive branch views on the Declare War Clause on the other—to examine how the United States has found itself in this predicament and what might be done about it. In doing so, it contributes to war powers scholarship by tracing the contemporary “anticipated nature, scope, and duration” test’s historical antecedents in earlier executive branch constitutional reasoning relating to the Declare War Clause and provides context on how these reservations might co-exist with broad executive branch claims of presidential authority. Finally, it closes by examining how executive branch lawyers might try to legally justify an effort to defend Taiwan from a sudden and unexpected attack by China on the president’s inherent constitutional authority in light of what experts expect that conflict will look like—and, finding these options wanting, considers what steps Congress and the executive branch might take to ensure Congress has the opportunity to authorize a military response on a timeline that better aligns with the strategic requirements that defending Taiwan is likely to entail.

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I. INTRODUCTION

The status of Taiwan has been a point of tension between China and the United States for more than half a century. But in recent months, the issue has seemed to bring the two major powers' relationship perilously close to the breaking point. Under President Xi Jinping, a more powerful and assertive People's Republic of China has targeted Taiwan with bellicose rhetoric and increasingly provocative military maneuvers, both of which seem intended to signal that China is willing to assert its claim of sovereignty by force if necessary.¹ The United States, meanwhile, has doubled down on its longstanding support for Taiwan's continued autonomy, including through increased arms sales and the renewed deployment of military trainers and advisors.² President Biden has even suggested that the United States would come to Taiwan's defense if China were to attack—a statement that, his staff was quick to clarify, did not signal a change to the position of “strategic ambiguity” that the United States has long maintained on how it might respond to such a scenario.³ That said, as Chinese leaders have

1. See Oriana Skylar Mastro, *The Taiwan Temptation: Why Beijing Might Resort to Force*, 100 FOREIGN AFFS. 58 (2021), <https://www.foreignaffairs.com/articles/china/2021-06-03/china-taiwan-war-temptation> (discussing recent actions by China and concluding that it signals a willingness on China's part to reclaim Taiwan by force). *But see* Jude Blanchette & Ryan Hass, *The Taiwan Long Game: Why the Best Solution Is No Solution*, 102 FOREIGN AFFS. 102 (2022), <https://www.foreignaffairs.com/china/taiwan-long-game-best-solution-jude-blanchette-ryan-hass> (presenting a more complex assessment of China's motivations).

2. See Kelsey Ables, *U.S. to Provide Up to \$345 Million in Military Aid to Taiwan*, WASH. POST (July 29, 2023), <https://www.washingtonpost.com/world/2023/07/29/taiwan-military-aid-biden/>; Nancy A. Youssef & Gordon Lubuld, *U.S. to Expand Troop Presence in Taiwan for Training Against China Threat*, WALL ST. J. (Feb. 23, 2023), <https://www.wsj.com/articles/u-s-to-expand-troop-presence-in-taiwan-for-training-against-china-threat-62198a83>.

3. Amy B. Wang, *Biden Says U.S. Troops Would Defend Taiwan in Event of Attack by China*, WASH. POST (Sept. 19, 2022), <https://www.washingtonpost.com/politics/2022/09/18/biden-taiwan-military-china-attack/>. While a senator, Biden criticized similar statements by then-President George W. Bush. See Joseph R. Biden, Jr., *Not So Deft on Taiwan*, WASH. POST (May 2, 2001), <https://www.washingtonpost.com/archive/opinions/2001/05/02/not-so-deft-on-taiwan/2adf3075-ee98-4e70-9be0-5459ce1edd5d/>.

reportedly set a goal of being able to credibly threaten an invasion of Taiwan by 2027,⁴ events may soon force the United States to bring its willingness to intervene into razor sharp focus.

These developments have sparked a wealth of recent literature on what a conflict over Taiwan might look like and its potentially far-reaching consequences.⁵ A popular focus of these assessments—and of many U.S. policymakers⁶—is the possibility that China will pursue a sudden, unexpected attack on Taiwan, most likely by disguising its military preparations as another of the increasingly common military exercises and maneuvers that China has pursued in Taiwan’s vicinity in recent years.⁷ Less attention, however, has been paid to the domestic legal framework that would govern any U.S. military response to such an attack.⁸ Many policy assessments seem to operate on the assumption that the president has the legal authority to quickly respond to an attack on Taiwan as he sees fit and

4. See Dustin Volz, *CIA Chief Says China Has Doubts About Its Ability to Invade Taiwan*, WALL ST. J. (Feb. 26, 2023), <https://www.wsj.com/articles/cia-chief-says-china-has-doubts-about-its-ability-to-invade-taiwan-670b8f87> (quoting Central Intelligence Agency Director William Burns as saying, “President Xi has instructed the [Chinese military] to be ready by 2027 to invade Taiwan, but that doesn’t mean that he’s decided to invade in 2027 or any other year as well”).

5. See, e.g., SUSAN M. GORDON ET AL., U.S.-TAIWAN RELATIONS IN A NEW ERA: RESPONDING TO A MORE ASSERTIVE CHINA (Council on Foreign Rels., 2023); RYAN HASS ET AL., U.S.-TAIWAN RELATIONS: WILL CHINA’S CHALLENGE LEAD TO A CRISIS? (2023); CROSSING THE STRAIT: CHINA’S MILITARY PREPARES FOR WAR WITH TAIWAN (Joel Wuthnow et al. eds., 2022); HAL BRANDS & MICHAEL BECKLEY, DANGER ZONE: THE COMING CONFLICT WITH CHINA (2022); KEVIN RUDD, THE AVOIDABLE WAR: THE DANGERS OF A CATASTROPHIC CONFLICT BETWEEN THE U.S. AND XI JINPING’S CHINA (2022).

6. See Edward Wong et al., *U.S. Officials Grow More Concerned About Potential Action by China on Taiwan*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/2022/07/25/us/politics/china-taiwan-biden-pelosi.html> (noting concern among U.S. policymakers); see also, e.g., Memorandum from Rep. Mike Gallagher, Found. for Def. of Democracy, on Battle Force 2025: A Plan to Defend Taiwan Within the Decade (Feb. 17, 2022); Rep. Elaine Luria, *Congress Must Untie Biden’s Hands on Taiwan*, WASH. POST (Oct. 11, 2021), <https://www.washingtonpost.com/opinions/2021/10/11/elaine-luria-congress-biden-taiwan/>; Admiral James A. Winnefeld & Michael J. Morrell, *The War That Never Was?*, PROCEEDINGS (Aug. 2020), <https://www.usni.org/magazines/proceedings/2020/august/war-never-was>.

7. See, e.g., BRANDS & BECKLEY, *supra* note 5, at 104–06; Elbridge Colby, *America Must Prepare for a War Over Taiwan*, FOREIGN AFFS. (Aug. 10, 2022), <https://www.foreignaffairs.com/united-states/america-must-prepare-war-over-taiwan>; Mastro, *supra* note 1, at 67. There is an ongoing policy debate over how realistic this sort of surprise attack scenario really is. See *infra* notes 230–232 and accompanying text. This Essay does not take a position on this issue but addresses the domestic legal framework that would apply in the event of such an attack.

8. While this Essay focuses on domestic law questions, any U.S. military intervention in defense of Taiwan would also raise complicated international law questions. For useful recent discussions of these issues, see Shawn William Brennan, *Assessing the Legal Framework for Potential U.S. Conflict with China Over Taiwan*, 99 INT’L L. STUD. 991, 1000–05 (2022); Major Ryan M. Fisher, *Defending Taiwan: Collective Self-Defense of a Contested State*, 32 FLA. J. INT’L L. 101 (2020).

would not require additional authorization from Congress.⁹ The only recent examination of the issue in legal scholarship similarly concludes that the president already has “sufficient legal authority to adequately respond to most scenarios involving [Chinese] aggression against Taiwan[,]” making additional action by Congress unnecessary.¹⁰

This understanding, however, is in some tension with history. Presidents and their advisors have at times expressed serious doubts about whether the president has the legal authority to engage in a major war with China over Taiwan without Congress’s advance authorization.¹¹ This reflects broader reservations within the executive branch about possible limits that the Constitution’s Declare War Clause—which gives Congress, not the president, the authority to “declare War”¹²—puts on the president’s own inherent constitutional authority to use military force, particularly where it may involve the United States in a major armed conflict. While these reservations were once mostly kept within the confines of the executive branch, recent presidents from both major political parties have now incorporated them into their publicly stated legal views.¹³ To be certain, these reservations are neither universally held nor destined to be shared by future presidents. Nor have they led the executive branch to rule out the possibility that the president can commit the United States to a major armed conflict on his own authority. But they do suggest that even the executive branch’s views on whether the president has the inherent constitutional authority to come to Taiwan’s defense—an act that most experts agree could lead to the most significant armed conflict since World War II—are likely to be more conflicted than is widely acknowledged.

Nonetheless, the president’s sole constitutional authority to use military force has come to play a central role in the legal framework that would govern any military response to an unexpected attack on Taiwan. While Congress has authorized military action in defense of Taiwan in the past, it has not done so for decades. Instead, as a complement to the current U.S. position of strategic ambiguity—which seeks to maintain a credible capability to act in Taiwan’s defense without firmly committing to do so—Congress has chosen to withhold any authorization for military action until

9. See, e.g., MARK F. CANCEAN ET AL., THE FIRST BATTLE OF THE NEXT WAR: WARGAMING A CHINESE INVASION OF TAIWAN 16–21 (Ctr. for Strategic & Int’l Stud., Jan. 2023) [hereinafter 2023 CSIS Study] (assuming “immediate U.S. intervention” as baseline scenario in war games); BRANDS & BECKLEY, *supra* note 5, at 125–48 (no discussion of congressional authorization in strategic planning); Colby, *supra* note 7 (similar).

10. Brennan, *supra* note 8, at 1049. The author does note, however, that “there may be beneficial policy reasons for Congress to act proactively on an authorization for military force regarding Taiwan.” *Id.*

11. See *infra* notes 32–42 and accompanying text (discussing the Eisenhower administration).

12. U.S. CONST. art. I, § 8, cl. 11.

13. See *infra* Part II (tracing this evolution in executive branch positions).

a threat is evident and an appropriate response can be debated.¹⁴ This means that the United States' ability to respond to a sudden, unexpected attack on Taiwan will rely on the president's constitutional authority alone, at least until Congress can enact additional legislation. A president faced with such an attack would thus have to decide whether to delay a military response until Congress can act or initiate one on his own legal authority. Policy experts assess that the former could undermine the defense of Taiwan and potentially make the ensuing conflict longer and more devastating.¹⁵ But the latter would arguably require an unprecedentedly broad claim of inherent presidential authority over the use of military force that is in clear tension with recent executive branch legal positions.¹⁶ An international crisis over Taiwan could thus also trigger a constitutional crisis at home—one that threatens the legitimacy of the president's response and risks undermining popular and congressional support for what is certain to be a difficult war to come.

This Essay explores how the United States has found itself in this predicament and what might be done to address it. Part I traces the evolution of U.S. security commitments towards Taiwan and related legal arrangements, from the Truman administration's initial intervention through the Taiwan Relations Act that has helped to define the current era of strategic ambiguity. Part II then examines how the executive branch's views on the president's inherent authority to use military force have changed over this same period, with a focus on persistent reservations within the executive branch about possible outer limits imposed by the Declare War Clause. Finally, Part III outlines what a future conflict with China over Taiwan is expected to entail and considers how the executive branch might frame the legality of a military response, both on the president's authority alone and in potential coordination with Congress.

Pursuing this line of analysis not only identifies specific points of concern relating to Taiwan but sheds light on nuances in executive branch practice that are underappreciated in existing war powers scholarship. A common view in this literature is that the executive branch is strongly inclined, if not inexorably driven, to assert broad inherent presidential authority over the use of military force.¹⁷ But the persistence of internal reservations regarding possible Declare War Clause limitations and corresponding reluctance to rely on broad claims of presidential authority to pursue major armed conflicts throughout much of the post-war era suggests that there may be more at work than just single-minded self-aggrandizement. To the contrary, these historical antecedents support the

14. See *infra* Part I (reviewing history of U.S. security commitments to Taiwan).

15. See *infra* notes 245–249 and accompanying text.

16. See *infra* Part III.A (discussing possible executive branch legal positions).

17. See *infra* note 225 and accompanying text.

view that the contemporary “anticipated nature, scope, and duration” test adopted by recent presidential administrations to avoid possible Declare War Clause constraints¹⁸ is not a recent innovation but instead reflects a longstanding line of constitutional thinking within the executive branch that has co-existed alongside broad assertions of presidential authority over the use of military force. Recent scholarship on executive branch legal decision-making in turn suggests that these seemingly contradictory positions may reflect a more complex constellation of legal views within the executive branch¹⁹—one that may lead the executive branch to prefer not to pursue major armed conflicts without congressional authorization in the future, including, most relevantly, the defense of Taiwan, even if it refuses to disavow that possibility altogether.

None of this means that Congress needs to begin debate on an authorization for the defense of Taiwan today, when a war with China over Taiwan seems neither imminent nor inevitable.²⁰ But as China’s ability to credibly threaten a sudden and unexpected attack on Taiwan increases, so will the risks inherent in the legal status quo.²¹ For this reason, both Congress and the executive branch must be prepared to revisit this legal framework and incorporate steps to do so into U.S. strategic planning, so that Congress has the opportunity to act quickly in the event of a sudden and unexpected attack by China. Failing to take this step risks undermining not only the effective defense of Taiwan but the constitutional system that supports and legitimates the United States’ use of military force, at precisely the moment when it may be most needed.

II. EVOLVING SECURITY COMMITMENTS TO TAIWAN

Today, U.S. security commitments and the threat of military force that backs them up play an essential role in maintaining Taiwan’s continued autonomy.²² Less than a century ago, however, Taiwan barely registered on the United States’ strategic radar, let alone as a point of such significance

18. Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 31 (2011) [hereinafter 2011 Libya Opinion] (memorandum opinion for the Attorney General dated Apr. 1, 2011).

19. See *infra* notes 206–225 and accompanying text.

20. See Timothy R. Heath, *Is China Planning to Attack Taiwan? A Careful Consideration of Available Evidence Says No*, WAR ON THE ROCKS (Dec. 14, 2022), <https://warontherocks.com/2022/12/is-china-planning-to-attack-taiwan-a-careful-consideration-of-available-evidence-says-no/>.

21. One recent expert analysis assesses that China may acquire the capability to invade and seize Taiwan in the face of U.S. intervention by the end of the decade. See GORDON ET AL., *supra* note 5, at 56–59.

22. See GORDON ET AL., *supra* note 5, at 53–56 (discussing the importance of U.S. military deterrence of China in maintaining peace in the Taiwan Strait).

that it might warrant a war with another major power.²³ This section examines the evolution of this relationship through the lens of these security commitments and the related domestic legal authorities that help make the threat of force they imply credible. As this brief history shows, U.S. security commitments towards Taiwan have changed significantly over this period, from an early commitment to come to Taiwan's defense to the more recent position of strategic ambiguity. Congress has in turn complemented these approaches, first by authorizing the defense of Taiwan to make the threat of force more credible and then later by narrowing the legal authorities that the United States might use to respond to underscore the incentives of strategic ambiguity. This shift, however, may have serious ramifications for how such a scenario would play out today.

Mainland China's efforts to exercise control over Taiwan predate the United States itself by almost a century.²⁴ China's Qing dynasty first annexed the island of Taiwan (also known as Formosa), the Penghu (or Pescadores), and many of the other nearby islands on which modern Taiwan is built in 1683 following a brief military conflict with the islands' local rulers, who had only recently ousted Dutch colonial powers. China asserted sovereignty over the islands until 1895 when it ceded them to Japan as part of the terms that ended the First Sino-Japanese War. Following the conclusion of World War II, Japanese forces surrendered control of Taiwan to the nationalist government of the Republic of China, which had overthrown the Qing dynasty and aligned itself with the victorious Allies against Japan. The authoritarian leader of the nationalist government, Chiang Kai-shek, took this surrender as Japan returning sovereignty over Taiwan to China—an outcome that, in his view, had been promised by Allied leaders in the 1943 Cairo Declaration.²⁵ The other Allies, however, saw the Declaration as largely aspirational. They instead maintained that Taiwan remained under Japanese sovereignty, at least until Japan surrendered its claims over Taiwan as part of the Treaty of San Francisco in 1951.²⁶

This debate over the validity of Kai-shek's claims, however, was soon overcome by events. As World War II came to an end, China's long

23. Cf. WARREN COHEN, *AMERICA'S RESPONSE TO CHINA: A HISTORY OF SINO-AMERICAN RELATIONS 182–84* (6th ed. 2019) (discussing the Truman administration's pre-1950 willingness to allow Taiwan to fall under the control of the Chinese Communist movement).

24. The historical account in this section draws from, among other sources, DONG WANG, *THE UNITED STATES AND CHINA: A HISTORY FROM THE EIGHTEENTH CENTURY TO THE PRESENT* (2d ed. 2021); COHEN, *supra* note 23; GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776* (2008); and JONATHAN MANTHORPE, *FORBIDDEN NATION: A HISTORY OF TAIWAN* (2005).

25. See Conference of President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill in North Africa (Dec. 1, 1943), *in* DEP'T ST. BULL., Dec. 4, 1943, at 393 ("It is their purpose that . . . all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China.").

26. See Treaty of Peace with Japan art. 2(b), Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

simmering civil war between its nationalist government and Communist revolutionaries returned to a boil. By December 1949, nationalist forces were forced to cede control of China's mainland and flee to Taiwan along with more than a million regime officials, sympathizers, and civilian refugees. Chiang Kai-shek declared the city of Taipei to be the Republic of China's new capital, while the communist revolutionaries soon established the People's Republic of China government in Beijing. Each regime claimed to be the government of all of China, including both the mainland and Taiwan. Several countries soon recognized the communist regime in Beijing as China's government. The United States, however, led a bloc that continued to view the regime in Taipei as having this capacity. Among other consequences, this allowed Taiwan to retain control of China's representation at the United Nations.

The Truman administration was initially agnostic regarding the outcome of China's civil war. But when North Korean forces invaded South Korea in June 1950 with support from both the People's Republic of China and the Soviet Union, Truman and his advisors quickly concluded that communist forces across the region had gone on the offensive and took steps to intervene. On June 27th, in the same public statement in which he announced he was sending U.S. troops to Korea, Truman told the American people that he had ordered U.S. naval forces to the Strait of Taiwan in order to "prevent any attack on Formosa[.]" declaring that "the occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area."²⁷ At the same time, he urged the Republic of China to "cease all air and sea operations against the mainland[.]" putting Taiwan under U.S. protection while simultaneously restricting it from attempting to retake its lost territory.²⁸ Truman framed this forced ceasefire as an attempt to prevent the resolution of Taiwan's status by force in violation of the purposes of the U.N. Charter. "The determination of the future status of Formosa[.]" he asserted, "must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations."²⁹

Truman's gambit appeared to work, as hostilities in the Taiwan Strait soon cooled. This in turn excused the Truman administration from having to clarify what legal authority would have allowed Truman to follow up on his threats and order the Seventh Fleet to come to Taiwan's defense. That said, in justifying the deployment of U.S. troops to Korea, the Truman administration had argued that the president's constitutional role as

27. Statement Issued by the President (June 27, 1950), *in* 7 FOREIGN RELATIONS OF THE UNITED STATES, 1950, KOREA 202 (S. Everett Gleason ed., 1976), <https://history.state.gov/historicaldocuments/frus1950v07/d119>.

28. *Id.*

29. *Id.*

Commander in Chief gave him broad authority to use the military “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” without authorization from Congress.³⁰ Truman’s Secretary of State Dean Acheson, himself a prominent attorney, later dismissed the idea that there was “any serious doubt—in the sense of non-politically inspired doubt—of the President’s constitutional authority to do what he did” in Korea.³¹ This confidence may well have extended to military action in Taiwan as well.

Truman’s successor, however, was not so sanguine. Shortly after entering office in 1953, President Eisenhower—who as a candidate had criticized Truman for having “lost China”—ended the prohibition on nationalist forces using military force across the strait in hopes this that this would put increased pressure on Beijing. Instead, by 1954, the United States was facing escalating hostilities between communist and nationalist Chinese forces, particularly over several Taiwan-held islands off the shore of mainland China. Eisenhower himself repeatedly expressed concern to his National Security Council that he lacked sufficient legal authority to come to Taiwan’s defense if the situation escalated, as this would entail direct conflict with China. He would “have to get Congressional authorization, since it would be war[.]” Eisenhower warned in a September 1954 meeting.³² He went on, “If Congressional authorization were not obtained there would be logical grounds for impeachment. Whatever we do must be done in Constitutional manner.”³³ Eisenhower ultimately ruled out coming to the defense of the offshore islands but was determined to help the Republic of China hold Taiwan and the Penghu islands. He concluded 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.”³⁴ But in the meantime, he and his advisors settled on a strategy to “tidy up [their] constitutional position at home” so that they

30. 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 61 (1950) [hereinafter 1950 Korea Memo]. Excerpts were also reprinted in the U.S. Department of State Bulletin. *See* DEP’T ST. BULL., July 31, 1950, at 173.

31. DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 414 (1969).

32. Memorandum of Discussion at the 214th Meeting of the National Security Council, Denver (Sept. 12, 1954), *in* 14 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, CHINA AND JAPAN 618 (John P. Glennon et al. eds., 1985), <https://history.state.gov/historicaldocuments/frus1952-54v14p1/d293>.

33. *Id.*

34. 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>.

could be confident that he had the legal authority to come to Taiwan's defense if needed.³⁵

The main prong of this strategy was a mutual defense treaty with the nationalist government in Taipei, which was signed later that year.³⁶ Among other provisions, the treaty stated that each party would view an attack on the other as “dangerous to its own peace and security” and committed them to “act to meet the common danger in accordance with [their] constitutional processes.”³⁷ This commitment, however, was limited to “Taiwan and the Pescadores” and did not reach either the offshore islands under dispute nor the mainland.³⁸ At Eisenhower's instruction, Secretary of State John Foster Dulles also secured a separate commitment from Kai-shek that any decision to pursue military action against mainland China would be made jointly with the United States.³⁹ This deliberately underscored the reality that, while it technically recognized the regime in Taipei as the government of all of China, the United States was only committing to defend those territories under its effective control—and on the understanding that Taiwan would not itself pursue escalatory actions. U.S. officials hoped that this commitment would be sufficient to deter Beijing. Some (but not all) also believed that it might amplify the president's legal authority to respond to Chinese aggression against Taiwan and the Penghu (or Pescadores).⁴⁰

As the treaty awaited Senate ratification, however, communist Chinese forces launched a major offensive. Fearing that they might be setting the stage for a direct attack on Formosa and the Pescadores, Eisenhower turned to Congress for statutory authorization to come to Taiwan's defense. In a public message requesting that authorization on Jan. 24, Eisenhower hedged on whether it was truly necessary. “Authority for some of the actions which might be required would be inherent in the authority of the Commander-in-Chief,” he noted.⁴¹ “Until Congress can act I would not hesitate, so far as my Constitutional powers extend, to take whatever emergency action might be forced upon us”⁴² But in private conversations with congressional

35. *Id.* (attributing this statement to Secretary of State John Foster Dulles).

36. 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 (entered into force Mar. 3, 1955).

37. *Id.* art. V.

38. *Id.* art. VI.

39. See Memorandum by the Secretary of State to the President (Nov. 23, 1954), in 14 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, CHINA AND JAPAN, PART 1, at 929 (John P. Glennon et al. eds., 1985), <https://history.state.gov/historicaldocuments/frus1952-54v14p1/d403> (confirming terms of side agreement).

40. See Memorandum of Discussion at the 221st Meeting of the National Security Council, Washington (Nov. 2, 1954), *supra* note 34, at 828 (noting possible disagreement on this point between Secretary of State Dulles and Attorney General Herbert Brownell, Jr.).

41. Message from the President to the Congress, Washington (Jan. 24, 1955), in 2 FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, CHINA 117 (Harriet D. Schwar ed., 1986), <https://history.state.gov/historicaldocuments/frus1955-57v02/d34>.

42. *Id.*

leaders, some of whom urged the administration not to seek such authorization, Dulles suggested that it was “highly doubtful” that the President had the constitutional authority to act in Taiwan’s defense without Congress, and that the administration did not want to do so strictly on the basis of the mutual defense treaty, even if ratified⁴³—a view that Eisenhower made clear he shared in later discussions within the National Security Council.⁴⁴ Congress ultimately obliged Eisenhower in the form of a joint resolution authorizing the President to use the military “as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack.”⁴⁵ The Senate ratified the mutual defense treaty a few weeks later.

Together, the joint resolution and mutual defense treaty provided the President with broad authorization to use the military to address threats to Taiwan. The Eisenhower administration found it needed them as it prepared for the real possibility that it would be pulled into an armed conflict with Chinese communist forces, both throughout 1955 and again in 1958 during a second Taiwan Strait crisis. “Lately there has been a very definite feeling among the members of the Cabinet, often openly expressed,” Eisenhower wrote in his personal diary in March 1955, “that within a month we will actually be fighting in the Formosa straits.”⁴⁶ Among other measures, Eisenhower and his advisors openly speculated about the possible use of tactical nuclear weapons in any resulting conflict, underscoring the breadth of authorization that they understood Congress had provided. Fortunately, neither crisis spiraled into a broader war.

Communist and nationalist Chinese forces regularly exchanged limited hostilities over the next two decades, but never at the level of intensity that had surrounded the crises of 1955 and 1958. For the United States, the focus of regional competition with communism soon shifted to Vietnam. The People’s Republic of China, meanwhile, was distracted by both its own Cultural Revolution and a breakdown in its relationship with the Soviet Union, which eventually led to open hostilities along the two countries’ shared border. Some in the United States saw this schism as an opportunity to drive a wedge into the global Communist movement. By 1967, former

43. Memorandum of a Conversation, Department of State, Washington (Jan. 20, 1955, 9:00 AM), *in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, CHINA 59 (Harriet D. Schwar ed., 1986), <https://history.state.gov/historicaldocuments/frus1955-57v02/d22>.

44. *See* Memorandum of Discussion at the 233d Meeting of the National Security Council, Washington (Jan. 21, 1955, 9:00 AM), *in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, CHINA 91-95 (Harriet D. Schwar ed., 1986), <https://history.state.gov/historicaldocuments/frus1955-57v02/d26>.

45. Act of Feb. 7, 1955, Pub. L. 84-4, 69 Stat. 7.

46. Diary Entry by the President (Mar. 26, 1955), *in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, CHINA 405 (Harriet D. Schwar ed., 1986), <https://history.state.gov/historicaldocuments/frus1955-57v02/d172>.

Vice President Richard Nixon was calling for a gradual end to the People's Republic of China's international isolation⁴⁷—and when he was elected President the next year, he saw the opportunity to put this policy change into motion.

Over his first few years in office, Nixon and his Secretary of State Henry Kissinger made several quiet efforts at establishing a direct line of communication with People's Republic of China Premier Zhou Enlai. They eventually succeeded, leading Kissinger to make two secret trips to Beijing in July and October 1971. There the two governments agreed that Nixon would make a historic visit to Beijing the following year. Around this same time, the U.N. General Assembly was debating whether the Republic of China should still be allowed to control China's U.N. seat. The United States floated a proposal that would give the seat to the People's Republic of China while allowing Taiwan to remain in the body as well but couldn't muster sufficient support. Instead, in October 1971, the General Assembly elected to transfer control of China's U.N. seat to the People's Republic of China and remove the representatives of the Republic of China from the body.⁴⁸

Nixon's historic visit to Beijing the following year proved to be the beginning of a sea change in China-U.S. relations, including around the issue of Taiwan. In a joint statement issued at the conclusion of the visit, the United States "acknowledge[d] that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China" and "reaffirm[ed] its interest in a peaceful settlement of the Taiwan question by the Chinese themselves[,]" with a goal of "progressively reduc[ing] its forces and military installations on Taiwan as the tension in the area diminishes."⁴⁹ By co-signing this statement, China implicitly accepted this endorsement of a peaceful resolution to Taiwan's status—a move that, combined with reductions in the U.S. military presence on Taiwan, helped to reduce the extent to which the issue was a major barrier to improved bilateral relations, at least temporarily.

The Watergate scandal and Nixon's subsequent resignation slowed the pace of U.S. engagement with China. Nonetheless, over the next several years, the two countries took small, uneven steps towards more normal relations, even as the United States also retained ties with Taiwan and

47. See Richard Nixon, *Asia After Viet Nam*, FOREIGN AFFS. (Oct. 1, 1967), <https://www.foreignaffairs.com/articles/ united-states/1967-10-01/asia-after-viet-nam> ("For the long run, [this policy] means pulling China back into the world community—but as a great and progressing nation, not as the epicenter of world revolution.")

48. See G.A. Res. 2758 (XXVI) (Oct. 25, 1971).

49. Joint Statement Following Discussions with Leaders of the People's Republic of China (Feb. 27, 1972), in 17 FOREIGN RELATIONS OF THE UNITED STATES, 1967-1976, CHINA, 1969-1972, at 815 (Edward C. Keefer ed., 2006), <https://history.state.gov/historicaldocuments/frus1969-76v17/d203>.

continued to address its security concerns through arms sales and other forms of support. Among other measures, these efforts at rapprochement—as well as deepening concern in Congress over the executive branch’s handling of overseas military engagements in the aftermath of the Vietnam War—led Congress to repeal the joint resolution authorizing the defense of Taiwan and the Penghu in 1974.⁵⁰ This left the mutual defense treaty standing as the only legal codification of U.S. security commitments to Taiwan. Nor was it clear that the treaty itself did much to authorize the president to act on Taiwan’s behalf, as Congress had expressly rejected the idea that any such authorization could be inferred from Senate ratification of a treaty in the War Powers Resolution enacted the prior year.⁵¹

By early 1978, the Carter administration finally felt it was time to explore full normalization. After months of back and forth, the result was a second joint communique on December 15th of that year announcing to the public that the United States and the People’s Republic of China had agreed to recognize each other and begin diplomatic relations, effective January 1, 1979.⁵² This communique “acknowledge[d] the Chinese position that there is but one China and Taiwan is part of China[,]” but also confirmed that “the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.”⁵³ In related remarks, Carter went even further, noting that the United States would “continue to have an interest in the peaceful resolution of the Taiwan issue” and had taken steps to ensure that normalization would “not jeopardize the well-being of the people of Taiwan.”⁵⁴ Carter soon issued a presidential memorandum directing agencies to maintain various relations with Taiwanese officials on an informal basis and suggesting that he would go to Congress to seek additional authorities where he could not do so on his own. Nonetheless, the move to recognize Beijing required a downgrade in relations with Taipei, which the United States would no longer recognize as a foreign government. As part of this de-recognition, the Carter administration initiated the year-long process of withdrawing from the 1954

50. See State Department/USIA Authorization Act, Fiscal Year 1975, Pub. L. 93-475, § 3, 88 Stat. 1439, 1439 (Oct. 26, 1974) (repealing joint resolution); see also Henry Tanner, *Senate Unit Acts to Repeal Taiwan Defense Measure*, N.Y. TIMES (July 22, 1971), <https://www.nytimes.com/1971/07/22/archives/senate-unit-acts-to-repeal-taiwan-defense-measure-senate-unit-would.html> (discussing motivation behind initial 1971 vote in support of repeal in the Senate foreign relations committee).

51. See War Powers Resolution, Pub. L. 93-148, § 8(a)(2), 87 Stat. 555, 558 (1973) (codified at 50 U.S.C. § 1547(a)(2)).

52. See Address by President Carter to the Nation (Dec. 15, 1978), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1977-1980, FOUNDATIONS OF FOREIGN POLICY 504-07 (Kristin L. Ahlberg ed., 2014), <https://history.state.gov/historicaldocuments/frus1977-80v01/d104> (quoting full final text of the joint communique).

53. *Id.* at 505.

54. *Id.* at 506.

mutual defense treaty—a step it ultimately completed in 1980, over an unsuccessful legal challenge by members of Congress.⁵⁵

A major contingent in Congress, however, continued to have reservations about normalization, particularly as it related to Taiwan. Several sought to use Carter's request for implementing legislation to lock in certain types of support for Taiwan. As a result, the Taiwan Relations Act that Congress eventually passed contained language declaring “any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States[.]”⁵⁶ To curb these threats, the Act established it as U.S. policy to “provide Taiwan with arms of a defensive character” and “maintain the capacity of the United States to resist any resort to force” that would threaten Taiwan.⁵⁷ Where such threats presented themselves, it directed the President “to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan” and suggested that “[t]he President and the Congress shall [then] determine, in accordance with constitutional processes, appropriate action by the United States in response to any such danger.”⁵⁸

The Act's legislative history leaves few doubts about what this language was intended to accomplish. Early drafts more closely replicated the security commitments in the (soon to be defunct) mutual defense treaty. But the Carter administration and its allies in Congress opposed these terms on the grounds that committing too firmly to Taiwan's defense would hinder rapprochement with China and invite moral hazard by the authoritarian regime in Taiwan, which was widely perceived as an unreliable partner. Secretary of State Warren Christopher passed the formula that was ultimately used on to allies on the Senate foreign relations committee as a compromise, in that it suggested a possible U.S. response without committing to one. A majority of the members of the committee accepted this approach and voted down subsequent amendments that they feared would have gone further in implying that the United States would act in Taiwan's defense.⁵⁹ Importantly, the committee also voted unanimously to add the language referencing “constitutional processes” in order to leave no doubt that the Act itself did not authorize military action in Taiwan's defense.⁶⁰ As the Senate committee report describes, this language makes

55. See *Goldwater v. Carter*, 444 U.S. 996 (1979).

56. Taiwan Relations Act, Pub. L. No. 96-8, § 2(b)(4), 93 Stat. 14, 14 (Apr. 10, 1979) (codified at 22 U.S.C. § 3301 note).

57. *Id.* § 2(b)(5)-(6), 93 Stat. 14, 14.

58. *Id.* § 3(c), 93 Stat. 14, 15.

59. See MARTIN B. GOLD, A LEGISLATIVE HISTORY OF THE TAIWAN RELATIONS ACT: BRIDGING THE STRAIT 132–36 (2016).

60. See *id.* at 136–37 (“In proposing his amendment, [Sen. John] Glenn emphasized that passing [the Act] should not be construed as authorizing force in Taiwan's defense.”).

clear that “the allocation of war-making power within the United States Government is precisely what it would have been in the absence of the provision—that the President has no greater authority to introduce the armed forces into hostilities than he would have had had the provision not been enacted.”⁶¹ The House later incorporated the same basic formula into its own version of the bill and, from there, it became part of the final conference version that was eventually enacted into law.⁶²

On signing the Taiwan Relations Act, Carter asserted that “Congress and the executive branch have cooperated effectively in this matter” and that the Act was “consistent with the understandings we reached in normalizing relations with the Government of the People’s Republic of China.”⁶³ Chinese officials, however, disagreed, particularly on arms sales. The issue proved to be a recurring bilateral irritant, chilling aspirations for further rapprochement. By early 1982, the Reagan administration felt it necessary to initiate a process to try to come to a mutual understanding on the issue. This resulted in a third joint communique in which the United States stated its intent to “reduce gradually its sales of arms to Taiwan” in recognition of China’s “fundamental policy to strive for a peaceful solution to the Taiwan question”—a pairing that was supposed to link reduced arms sales to China’s perceived level of commitment to the peaceful resolution of Taiwan’s status.⁶⁴ At the same time, senior U.S. officials provided a separate set of six verbal assurances to Taiwanese officials, which reaffirmed the terms of the Taiwan Relations Act and indicated that the United States would not consult with China on arms sales to Taiwan, set a fixed date to end them, or formally recognize Chinese sovereignty over Taiwan, among other terms.⁶⁵

Together, these three sets of measures—the Taiwan Relations Act, the three joint China-U.S. communiqués, and the six U.S. assurances to Taiwan—have more or less defined the U.S. position towards Taiwan into the present day.⁶⁶ The core of this position is what has come to be known as the “One China” policy, which acknowledges the view that Taiwan is a part of China but resists any effort to change the status quo—whether

61. S. REP. NO. 96-7, at 32 (1979) (Senate Committee on Foreign Relations report).

62. See H.R. REP. NO. 96-71, at 13–14 (1979) (Conf. Rep.) (discussing how the final law reconciled House and Senate versions).

63. Statement on Signing H.R. 2479 Into Law, 1 PUB. PAPERS 640–41 (Apr. 10, 1979).

64. United States-China Joint Communique on United States Arms Sales to Taiwan, 2 PUB. PAPERS 1052, 1052–53 (Aug. 17, 1982).

65. See SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF11665, IN FOCUS: PRESIDENT REAGAN’S SIX ASSURANCES TO TAIWAN (2023), <https://sgp.fas.org/crs/row/IF11665.pdf> (documenting various official accounts of the verbal assurances provided).

66. Current U.S. Department of State guidance continues to cite these documents as foundational elements of U.S. policy on Taiwan. See U.S. Dep’t of State, Bureau of E. Asian & Pac. Affs., *Fact Sheet: U.S. Relations with Taiwan*, U.S. DEP’T OF STATE (May 28, 2022), <https://www.state.gov/u-s-relations-with-taiwan/>.

through a Chinese invasion or Taiwanese declaration of independence—outside of peaceful negotiations between the two sides.⁶⁷ The related position of strategic ambiguity, meanwhile, provides both China and Taiwan with incentives to maintain this status quo by pledging U.S. support for Taiwan’s capability for self-defense and maintaining the U.S. ability to intervene militarily on Taiwan’s behalf, but without firmly committing to do so. This implies that the weight of U.S. military power could well push back against Chinese efforts at forced reunification, but not with such certainty that it would create moral hazard and invite provocations by Taiwan, including more assertive moves towards independence.⁶⁸

Over the decades, this basic framework has weathered a number of changing circumstances within and among the parties. Arguably the most significant of these changes came in 1987, when Taiwan abandoned single-party authoritarian rule in favor of liberal democracy—a move that strengthened Taiwan’s bonds with the United States and other global democracies, even as it gave greater voice to those favoring independence. By the mid-1990s, this shift—combined with the China-U.S. disagreements over human rights following the 1989 Tiananmen Square massacre and a corresponding willingness by Congress and the Clinton administration to reengage with Taiwanese political leaders—ultimately contributed to China backing away from cross-strait discussions of peaceful reunification and returning to a more assertive posture aimed at deterring Taiwanese movement towards independence.

In early 1996, this culminated in what some have called a third Taiwan Strait crisis: a series of large-scale Chinese military exercises and troop movements close to Taiwan that coincided with Taiwanese elections. The Clinton administration initially responded with statements of disapproval, including some that reiterated the Taiwan Relations Act’s language that “any effort to determine the future of Taiwan by other than peaceful means” would be seen as “a threat to the peace and security of the Western Pacific area and of grave concern to the United States[,]” suggesting the possibility of military intervention.⁶⁹ After China proceeded undeterred, the Clinton administration chose to deploy two U.S. aircraft carrier groups to the vicinity

67. For a useful and thorough overview of the “One China” policy and its evolution, see RICHARD C. BUSH, A ONE-CHINA POLICY PRIMER (Brookings Inst., Mar. 2017), <https://www.brookings.edu/wp-content/uploads/2017/03/one-china-policy-primer-web-final.pdf>.

68. See Nien-chung Chang-Liao & Chi Fang, *The Case for Maintaining Strategic Ambiguity in the Taiwan Strait*, 44 WASH. Q. 45, 46–49 (2021).

69. KRISTEN GUNNESS & PHILLIP C. SAUNDERS, AVOIDING ESCALATION AND AVOIDING WAR: LESSONS FROM THE 1995-1996 TAIWAN STRAIT CRISIS 19–21 (Inst. for Nat’l Strategic Stud., Dec. 2022), https://ndupress.ndu.edu/Portals/68/Documents/strat_perspective/china/china-perspectives-17.pdf. China reportedly took these threats seriously enough to increase intelligence collection on possible U.S. intervention, but concluded it was not likely. *See id.*

of Taiwan until after its elections. At the same time, U.S. officials also reassured their Chinese counterparts that the United States continued to oppose Taiwanese independence, including through public statements. While this was widely framed as a moment of crisis between China and the United States, the deployments were more of a show of force than preparation for actual hostilities, as U.S. officials believed that China had neither the intent nor the ability to successfully seize Taiwan.⁷⁰ Instead, the incident does more to underscore the way in which the framework of strategic ambiguity has allowed the United States to offer carrots and sticks to both sides to maintain the status quo.⁷¹

By most accounts, the United States has been relatively successful at maintaining this balancing act, managing the issue of Taiwan in a manner that has allowed all three parties to dramatically increase their political and economic ties over the past several decades.⁷² But as China's growing economic and military power has brought it closer to parity with the United States, this framework has come under increased stress.⁷³ Since coming to power in 2012, President Xi Jinping has proven willing to aggressively assert China's national interests abroad, including in relation to Taiwan.⁷⁴ He has also reasserted control over once autonomous areas like Hong Kong, casting cold water on the once popular idea that Taiwan might be reincorporated into China while retaining a substantial degree of autonomy.⁷⁵ For its part, Taiwan has elected a pro-independence president in both 2016 and 2020, over strong objections from the Chinese government.⁷⁶ And in the United States, concerns over China's actions across several domains have led many politicians to escalate their own heated rhetoric towards China, increase their support for Taiwan's continued autonomy, and explore various ways of limiting China's influence, both in the United States and abroad.⁷⁷ Taiwan is thus perhaps best seen as

70. See GUNNESS & SAUNDERS, *supra* note 69, at 23–24.

71. *But see* Chang-Liao & Fang, *supra* note 68, at 47 (arguing that, in the 1996 crisis, strategic ambiguity led both sides to problematically “prob[e] the extent of the US commitment”).

72. See GORDON ET AL., *supra* note 5, at 23–24 (discussing success of the status quo).

73. See *id.* at 24–28; Blanchette & Hass, *supra* note 1, at 103–05 (similar assessment).

74. See Chun Han Wong & Keith Zhai, *China's Xi Jinping Set to Give 'Wolf Warrior' Diplomacy More Bite*, WALL ST. J. (Oct. 26, 2022), <https://www.wsj.com/articles/chinas-xi-jinping-set-to-give-wolf-warrior-diplomacy-more-bite-11666784679> (discussing Chinese diplomats' adversarial approach to United States).

75. See Javier C. Hernández & Steven Lee Myers, *As China Strengthens Grip on Hong Kong, Taiwan Sees a Threat*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/07/01/world/asia/taiwan-china-hong-kong.html>.

76. See John Liu et al., *'On a Tightrope': How Taiwan's President Navigated the U.S. and China*, N.Y. TIMES (Apr. 2, 2023), <https://www.nytimes.com/2023/04/02/world/asia/taiwan-president-tsai-ing-wen.html>.

77. See Edward Wong & Ana Swanson, *U.S. Aims to Constrain China by Shaping Its Environment, Blinken Says*, N.Y. TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/26/us/politics/china-policy-biden.html>.

both a contributor to and a symptom of this broader deterioration in China-U.S. relations, as well as the stage on which the worst consequences may well play out.

Considering these changing circumstances, some have called for an end to strategic ambiguity and a move towards firmer U.S. commitments to come to Taiwan's defense.⁷⁸ Thus far, however, the United States has largely responded to growing concerns over China's intentions towards Taiwan in familiar ways. Its primary focus has been on improving Taiwan's ability to defend itself from hostile invasion through an infusion of arms sales as well as military training, advice, and assistance, in what some have called a "porcupine strategy."⁷⁹ The United States has also sought to strengthen its own capabilities and positioning in the Pacific, including through enhanced cooperation with regional allies.⁸⁰ Some aspects of these policies are new, such as the re-deployment of U.S. military personnel to Taiwan after several decades away.⁸¹ But these various lines of effort fit squarely within the framework set out by the Taiwan Relations Act as efforts to enhance Taiwan's capability for self-defense and the United States' own ability to intervene. Other novel policy responses—such as increased U.S. support for Taiwanese participation in international organizations⁸²—wink at greater Taiwanese autonomy but stop well short of abandoning U.S. opposition to Taiwanese independence. To the contrary, senior U.S. officials continue to reiterate the latter as a central part of the broader U.S. commitment to the peaceful resolution of cross-strait issues, including Taiwan's status.⁸³

78. See, e.g., Raymond Kuo, *'Strategic Ambiguity' Has the U.S. and Taiwan Trapped*, FOREIGN POLY (Jan. 18, 2023), <https://foreignpolicy.com/2023/01/18/taiwan-us-china-strategic-ambiguity-military-strategy-asymmetric-defense-invasion/>; David Frum, *Why Biden Is Right to End Ambiguity on Taiwan*, ATLANTIC (May 24, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/biden-strategic-ambiguity-taiwan-gaffe-china/631644/>; Richard Haass & David Sacks, *American Support for Taiwan Must Be Unambiguous*, FOREIGN AFFS. (Sept. 2, 2020); Elbridge Colby & Walter Slocombe, *U.S. 'Ambiguity' on Taiwan is Dangerous*, WALL ST. J. (May 23, 2016), <https://www.wsj.com/articles/u-s-ambiguity-on-taiwan-is-dangerous-1464022837>.

79. See, e.g., Edward Wong & John Ismay, *U.S. Aims to Turn Taiwan Into Giant Weapons Depot*, N.Y. TIMES (Oct. 5, 2022), <https://www.nytimes.com/2022/10/05/us/politics/taiwan-biden-weapons-china.html>.

80. See Lolita C. Baldor, *How the U.S. is Boosting Military Alliances to Counter China*, ASSOCIATED PRESS (Feb. 2, 2023), <https://apnews.com/article/politics-antony-blinken-beijing-north-korea-china-9f9432c118f297fc27a9be01c460316e>.

81. See Nancy A. Youssef & Gordon Lubold, *U.S. to Expand Troop Presence in Taiwan for Training Against China Threat*, WALL ST. J. (Feb. 23, 2023), <https://www.wsj.com/articles/u-s-to-expand-troop-presence-in-taiwan-for-training-against-china-threat-62198a83>.

82. See Antony J. Blinken, U.S. Sec'y of State, Press Statement: Supporting Taiwan's Participation in the UN System (Oct. 26, 2021), <https://www.state.gov/supporting-taiwans-participation-in-the-un-system/>.

83. See, e.g., Antony J. Blinken, U.S. Sec'y of State, Speech at George Washington University: The Administration's Approach to the People's Republic of China (May 26, 2022), <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/> ("We oppose any unilateral changes to the status quo from either side; we do not support Taiwan independence; and we expect cross-strait differences to be resolved by peaceful means.").

While members of Congress are often among the most vocal proponents of stronger U.S. support for Taiwan, Congress as a whole has been similarly careful to frame its actions within the parameters established by the Taiwan Relations Act. Most recent pieces of authorizing legislation that substantively relate to Taiwan have included provisions stating or implying an intent to remain consistent with the framework established by the Taiwan Relations Act.⁸⁴ The most recent National Defense Authorization Act, which includes a number of provisions on Taiwan, does so no fewer than fourteen times.⁸⁵ The strong implication is that this legislation should be interpreted consistent with key aspects of the Taiwan Relations Act, including its provision withholding the authorization for the use of military force. Consistent with this view, Congress has rejected proposals that would suggest a departure from the posture of strategic ambiguity or Congress's related withholding of statutory authorization for the use of military force.⁸⁶ Where Congress has restated or elaborated on certain elements of the Taiwan Relations Act framework, it has also generally been careful to keep within the same basic limits, especially when it comes to the possibility of authorizing the use of military force. Twice in recent years, for example, Congress has enacted provisions establishing it as "the policy of the United States to maintain the capacity . . . to resist a *fait accompli*"—defined to mean a "resort to force by the People's Republic of China to invade and seize control of Taiwan before the United States can respond effectively"—"that would jeopardize the security of the people of Taiwan."⁸⁷ Yet this stops conspicuously short of actually authorizing

84. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) [hereinafter 2022 NDAA] (multiple references); Taiwan Assurance Act of 2020, Pub. L. No. 116-260, § 312(6), 134 Stat. 1182, 3099 (2020); Taiwan Allies International Protection and Enhancement Initiative Act of 2019, Pub. L. No. 116-135, § 2(a), 134 Stat. 278, 278 (2020); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1260D, 133 Stat. 1198, 1681 (2019); Asia Reassurance Initiative Act of 2018, Pub. L. No. 115-409, § 209(a)(2), 132 Stat. 5387, 5398 (2018); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1258, 132 Stat. 1636, 2058 (2018); Taiwan Travel Act, Pub. L. No. 115-135, § 2(1), 132 Stat. 341, 341 (2018).

85. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, §§ 1263(a), 1265(6), 5502(b), 5506(a), 5510, 5512, 136 Stat. 2395, 2858–59, 3292, 3299, 3305, 3308–09 (2022) [hereinafter 2023 NDAA].

86. The 117th Congress recently declined to take up the Taiwan Invasion Prevention Act, a proposal that would have expressly authorized the use of force to defend Taiwan. *See* Taiwan Invasion Prevention Act, S. 332, 117th Cong. § 102 (as introduced in Senate on Feb. 22, 2021); *see also* H.R. 1173, 117th Cong. § 102 (as introduced in House on Feb. 8, 2021) (companion legislation). During the third Taiwan Strait crisis in 1996, the Senate similarly rejected language in a House-approved concurrent resolution that would have stated that the United States "should assist in defending [Taiwan] against invasion, missile attack, or blockade by the People's Republic of China." H.R. Con. Res. 148, § 7, 104th Cong. (as introduced in House on Mar. 7, 1996); *see also* Steven M. Goldstein & Randall Schriver, *An Uncertain Relationship: The United States, Taiwan, and the Taiwan Relations Act*, 165 CHINA Q. 147, 158–60 (2001) (discussing the debate around this language).

87. 2023 NDAA, *supra* note 85, § 1263; *see also* 2022 NDAA, *supra* note 84, § 1247 (same language).

military action to that effect, consistent with the Taiwan Relations Act it cites.

From this perspective, the security commitments that the United States has made to Taiwan have undergone quite a change. Truman began with a firm commitment to come to Taiwan's defense backed solely by the President's own claim of constitutional authority. Eisenhower later persuaded Congress to throw its own weight behind this guarantee, through both a mutual defense treaty and a statutory authorization to use military force. But as the relationship between the United States and the People's Republic of China changed, so did U.S. security commitments to Taiwan. While the United States continues to support both Taiwan's capacity to defend itself and its own ability to intervene on Taiwan's behalf, it has made its actual willingness to intervene contingent on the extent to which both parties avoid any effort to upset the status quo through means other than peaceful negotiations. Congress has in turn complemented this approach by rescinding its prior authorization to defend Taiwan with force and expressly withholding any such authorization until a future date—a position it has repeatedly reinforced, including through its frequent references to the Taiwan Relations Act in subsequent legislation.

The legislative history of the Taiwan Relations Act is quite unequivocal as to what this legal status quo means in practice: “the President has no greater authority to introduce the armed forces into hostilities than he would have had had the [Act] not been enacted.”⁸⁸ In other words, in the event of a sudden and unexpected attack on Taiwan—one that occurs before Congress and the executive branch can complete the consultations anticipated by the Taiwan Relations Act and pursue further legislative action—the United States' ability to respond will be contingent on the president's inherent constitutional authority to use military force, at least until Congress is able to enact supplemental legislation. In this sense, the policy of strategic ambiguity is rooted in an even more fundamental legal ambiguity that has hovered in the background of U.S. policy towards Taiwan since Truman's initial intervention: Can the president truly direct the U.S. military to defend Taiwan on his own constitutional authority, or must he secure authorization from Congress? Answering this question, in turn, requires a shift in focus away from the specific context of Taiwan and towards a broader issue: the scope of the president's constitutional war powers.

88. S. REP. NO. 96-7, at 32 (1979).

III. CHANGING EXECUTIVE BRANCH VIEWS ON PRESIDENTIAL WAR POWERS

The credibility of security commitments is informed not just by whether a country has the military capacity to make good on its threats, but also by whether its internal laws and institutions will allow its political leaders to do so. In the United States, such questions are addressed first and foremost by the various war-related authorities that the Constitution assigns to the different branches of government. This section takes up this issue of constitutional war powers with a focus on the question that is most intimately connected to the possible defense of Taiwan: the extent to which the president can enter the United States into a major armed conflict without approval from Congress. As this section shows, the executive branch's views on this issue are more complex and contested than is widely understood, including in existing war powers scholarship. Since at least the Korean War, the executive branch has occasionally asserted that the president has this authority, and it has consistently refused to rule out the possibility. But it has also frequently acknowledged—initially in internal discussions, later as part of public legal analyses—that this position raises serious constitutional questions, particularly where the military action in question is not in self-defense. Perhaps for this reason, the executive branch has often tried to avoid relying on such legal theories. In this sense, coming to the defense of Taiwan presents what may be the hardest possible case for the use of this authority: an action that seems likely to result in a major armed conflict but has little to do with U.S. national self-defense.

While a great deal of legal scholarship has been written on how the Constitution's allocation of war powers ought to be understood, there continues to be widespread disagreement on a number of fundamental aspects of the issue.⁸⁹ This in large part reflects the relative silence of the federal courts, which have often been reticent to take up and resolve questions regarding the constitutional allocation of war powers, even in those rare cases where such issues fall within their jurisdiction.⁹⁰ For this

89. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696–98 (1997) (summarizing the literature and noting that “[t]he debate has reached a point of stalemate”). The traditional divide is between presidentialists who believe the executive branch has the lion’s share of constitutional authority over the use of military force, see for example, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364 (1994), and congressionalists who maintain that the Constitution assigns most such authority to Congress, except perhaps in certain dire circumstances of self-defense, see for example, Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT’L SEC. L. & POL’Y 319 (2012); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45 (2007); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

90. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 272–74 (2d rev. ed. 2004).

reason, this Essay pursues a different tack and focuses on the stated views of the executive branch as opposed to an original analysis of constitutional law in this area. This is not intended to suggest that these views are necessarily correct or well-founded. To the contrary, the executive branch's legal views tend to be extremely generous to the presidency in ways that both Congress and legal scholars routinely disagree with.⁹¹ But the president's operational control of the military means that the views of the executive branch are uniquely relevant to situations involving the use of military force, as they are the primary legal views that will guide the individual servicemembers participating in any given military operation. For this reason, they provide the most useful vantage for understanding how legal considerations are likely to impact a policy decision to come to the defense of Taiwan.

Of course, any account of the president's constitutional war powers must begin with the text of the Constitution. Article I of the Constitution gives Congress several substantial authorities that directly relate to armed conflict, including not just the authority to "declare War" provided by the Declare War Clause, but also the authority to "raise and support Armies," "provide and maintain a Navy[.]" and "make Rules for the Government and Regulation of the land and naval Forces[.]" among others.⁹² But Article II makes the President the "Commander in Chief of the Army and Navy of the United States"⁹³ and vests him with what many believe to be a central role in guiding U.S. foreign policy through the negotiation of treaties, acceptance of diplomats, and related foreign affairs authorities. While it is not expressly provided for in the text of the Constitution, records of the constitutional debates strongly suggest that the Framers also understood the president as having some inherent constitutional authority to defend the United States and repel attacks against it.⁹⁴ The result is a good deal of ambiguity around the precise roles that each political branch is supposed to play on matters of war and peace, including which branch has the authority to enter into different types of conflicts. In the absence of any authoritative resolution by the courts, the executive branch has frequently argued that

91. See, e.g., Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SEC. J. F. (Apr. 14, 2011), <https://harvardnsj.org/2011/04/14/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion-2/>.

92. U.S. CONST. art. I, § 8, cls. 11–16.

93. U.S. CONST. art. II, § 2, cl. 1.

94. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1911); see also FISHER, *supra* note 90, at 8–10; ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 31–32 (1976).

past practice should be used to inform how these constitutional war powers operate.⁹⁵

This sort of historical practice is the main support that the Truman administration cited for its fateful June 1950 decision to intervene in Korea.⁹⁶ Just a few years earlier, the Justice Department's Office of Legal Counsel had concluded in the context of the possible deployment of U.S. troops to Palestine that the president's inherent Article II constitutional authority to use military force was most likely limited to defending U.S. persons or property and closely related actions.⁹⁷ But in the June 1950 memorandum justifying the Truman administration's actions in Korea, the State Department—acting at the direction of Secretary of State Dean Acheson, himself a prominent constitutional lawyer—made a much broader claim of inherent presidential authority based on a long history of prior presidents using military force on their own authority, including 85 specific incidents that it briefly described in an appendix.⁹⁸ According to the memorandum, this showed that “[t]he United States has, throughout its history, upon order of the Commander in Chief of 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 such peace and security.”⁹⁹ It also pointed to U.N. Security Council resolutions authorizing the use of force in Korea as a supplemental legal basis for concluding that intervention was consistent with U.S. foreign policy interests, though it stopped short of asserting that a Senate-ratified treaty like the U.N. Charter can serve as a substitute for bicameral congressional action.¹⁰⁰ Notably, the memorandum does little to address or even acknowledge Congress's war-related constitutional authorities, except in select quotations from legislators disclaiming the idea that they meaningfully constrain the president's own.¹⁰¹

95. *See, e.g.*, 2011 Libya Opinion, *supra* note 18, at 29–30; The President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Supp. Op. O.L.C. 321, 322 (2013) [hereinafter 1970 Cambodia Memo] (memorandum opinion for the Special Counsel to the President dated May 22, 1970).

96. The historical account in this section draws from, among other sources cited, ALLAN R. MILLETT ET AL., *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES FROM 1607 TO 2012* (3rd ed. 2012); JULIAN E. ZELIZER, *ARSENAL OF DEMOCRACY* (2010); and HERRING, *supra* note 24.

97. Memorandum on the Power of the President to Send American Troops to Palestine (1948), <https://knightcolumbia.org/documents/scsn12xrs2>. This memorandum is one of several discussed in this Essay that became available to the public in late 2022 as a result of Freedom of Information Act litigation. *See* Charlie Savage, *U.S. Discloses Decades of Justice Dept. Memos on Presidential War Powers*, N.Y. TIMES (Sept. 16, 2022), <https://www.nytimes.com/2022/09/16/us/politics/war-powers-justice-dept-president.html>.

98. *See* 1950 Korea Memo, *supra* note 30.

99. *Id.* at 63–64.

100. *See id.* at 65–67.

101. *See id.* at 63 (quoting Sen. Walsh of Montana from a 1919 Senate floor debate).

Perhaps for this reason, the chairman of the Senate foreign relations committee asked the Truman administration to address these issues in greater detail in the context of another policy debate the following year. He and his counterpart for the Senate's armed services committee then assembled these views into a report for the public.¹⁰² This report acknowledges Congress's various war-related authorities, including those provided by the Declare War Clause, but concludes that they "[do] not impair the authority of the President, in the absence of a declaration of war, to do all that may be needful as Commander in Chief to repel invasion, to repress insurrection, and to use the Armed Forces for the defense of the United States[,]” including “the protection of some national interest or some concern of American foreign policy” overseas.¹⁰³ The report suggests that Congress might be able to “restrain the President from using the armed forces, through the enactment of neutrality statutes” in times of peace, so long as Congress leaves “wide discretion in the Executive to adapt to changing conditions”—a congressional authority it appears to derive from the Declare War Clause.¹⁰⁴ But absent such affirmative measures, the Truman administration did not view the President's authority as being limited by any need for congressional concurrence. To the contrary, in a separate report he provided to Congress as part of the same policy debate, Acheson went so far as to assert that the President's “authority to use the Armed Forces in carrying out the broad foreign policy of the United States . . . may not be interfered with by the Congress[,]” suggesting that the Constitution assigns such decisions exclusively to the president's control.¹⁰⁵

That said, this bold vision of presidential authority did not mean that the Truman administration was uninterested in hedging its bets. Within weeks of ordering troops into Korea, Truman's cabinet considered seeking a congressional resolution affirming their actions at Acheson's recommendation.¹⁰⁶ Instead, in a special address to Congress a few weeks later, Truman thanked the body for “its strong, bi-partisan support of the

102. 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, at iii (Comm. Print 1951) [hereinafter 1951 War Powers Report] (discussing the circumstances around the authoring and publication of the report).

103. *Id.* at 2.

104. *Id.* at 19–20.

105. Memorandum from U.S. Sec'y of State Dean Acheson to S. Comm. on Foreign Rel. & S. Comm. on Armed Servs. (Jan. 6, 1951), in Staff of S. Comm. on Foreign Rel. & S. Comm. on Armed Servs., 82nd Cong., Assignment of Ground Forces of the United States to Duty in the European Area 92 (Comm. Print 1951) [hereinafter Hearings on Assignment of Ground Forces (1951)]. Acheson did, however, concede in testimony that the President's ability to use the military in certain regards was contingent on congressional appropriations. See *id.* at 94.

106. 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>.

steps we are taking” and for “[t]he expressions of support which have been forthcoming from the leaders of both political parties for the actions of our [g]overnment[.]” framing the war as if it were already a jointly pursued endeavor.¹⁰⁷ In the same speech, Truman also laid out a legislative agenda that he maintained was needed to pursue the conflict in Korea, including supplemental appropriations. Some would later cite Congress’s approval of these measures as tacit approval for the war.¹⁰⁸ But this did little to save Truman. Public opinion soon soured on him in substantial part over his perceived mishandling of the costly and unpopular war, for which voters held him primarily responsible.¹⁰⁹

The Eisenhower administration entered office skeptical of its predecessor’s broad claims of executive power, including in relation to war powers.¹¹⁰ Even as a senior military officer during the Truman administration, Eisenhower had subtly bucked its broad claims of executive authority by acknowledging “the responsibility of the Congress to exercise the broad over-all policy direction” relating to the deployment of the armed forces to Europe.¹¹¹ A similar philosophy soon emerged within his administration, wherein he and his advisors sought congressional authorization for major security commitments, including in relation to Taiwan and later the Middle East.¹¹² In line with this approach, the Eisenhower administration declined to pursue a 1954 military intervention in Indochina that Eisenhower had proposed and supported after it failed to win support from Congress.¹¹³ “[U]nder our Constitution,” Secretary of State John Foster Dulles reported telling the French officials who had urged the intervention, “the President d[oes] not have the authority to authorize acts of belligerency without the approval of the Congress”¹¹⁴—a view Eisenhower himself reiterated with the press.¹¹⁵ Politics certainly played a part in this calculus, as Eisenhower and his advisors had seen how Truman’s failure to secure advance congressional support for the Korean War left him uniquely vulnerable to domestic criticism when the conflict did not go

107. Special Message to the Congress Reporting on the Situation in Korea, 1 PUB. PAPERS 527 (July 19, 1950).

108. See 1970 Cambodia Memo, *supra* note 95, at 333; CHARLES A. STEVENSON, CONGRESS AT WAR: THE POLITICS OF CONFLICT SINCE 1789, at 24–25 (2007).

109. See MAX HASTINGS, THE KOREAN WAR 314–15 (1987).

110. See DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 309–10 (2016).

111. Hearings on Assignment of Ground Forces (1951), *supra* note 105, at 10.

112. See FISHER, *supra* note 90, at 117–25.

113. See STANLEY KARNOW, VIETNAM: A HISTORY 212–14 (2d rev. ed. 1997).

114. The Secretary of State to the Department of State (Apr. 24, 1954), in 13 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, INDOCHINA 1395 (John P. Glennon ed., 1982), <https://history.state.gov/historicaldocuments/frus1952-54v13p1/d791>.

115. The President’s News Conference of March 10, 1954, 1 PUB. PAPERS 299, 306 (1960) (“[T]here is going to be no involvement of America in war unless it is a result of the constitutional process that is placed upon Congress to declare it.”).

well.¹¹⁶ Eisenhower also frequently noted the advantages of cooperating with Congress, as statutory authorization made U.S. threats more credible and thus effective as deterrents.¹¹⁷ Yet his administration's approach appears to have reflected genuine constitutional considerations as well, as evidenced by the frequency with which such legal concerns appeared in high-level policy discussions.

This did not mean, however, that the Eisenhower administration abdicated the inherent authority to use military force altogether. Publicly, he was generally careful to keep his options open, including by suggesting that he might have some capacity to act without Congress even when seeking congressional authorization.¹¹⁸ At times, he and his advisors asserted that the President had the constitutional authority to pursue military action in national self-defense, in support of an ally with which the United States had a Senate-ratified treaty committing to their defense, and where circumstances did not allow time for congressional authorization, though they frequently suggested they might seek congressional authorization anyway or after the fact.¹¹⁹ The furthest the administration appears to have pushed the president's unilateral authority was its 1958 decision to send U.S. troops to Lebanon to defend U.S. lives and property and stabilize conditions there, at the local government's request.¹²⁰ Eisenhower and his senior advisors worried about the constitutionality of their actions but felt that defending U.S. nationals and property was a sufficient constitutional basis to move forward without Congress.¹²¹ That said, to assuage potential congressional concerns, they consulted with congressional leaders in

116. Cf. ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 158–63 (1973) (accusing Eisenhower of pursuing congressional authorization because “a resolution, by involving Congress in the takeoff, might incriminate it in a crash landing”).

117. See Memorandum of a Meeting, White House, Washington (January 1, 1957, 2–5:50 PM), in 12 *FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, NEAR EAST REGION; IRAN; IRAQ* 432 (John P. Glennon ed., 1991), <https://history.state.gov/historicaldocuments/frus1955-57v12/d182> (describing Eisenhower as noting that “greater effect could be had from a consensus of Executive and Legislative opinion” in reassuring allies).

118. See *supra* notes 41–45 and accompanying text (discussing Eisenhower's request for a joint resolution authorizing the defense of Formosa).

119. See, e.g., The Secretary of State to the Department of State, *supra* note 114, at 1395 (self-defense); 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 (in defense of a treaty ally); Memorandum of a Conversation, Department of State, Washington, *supra* note 42, at 73 (where circumstances do not allow for congressional authorization).

120. See Special Message to the Congress on the Sending of United States Forces to Lebanon (July 15, 1958), in 1 *PRESIDENTIAL PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1958*, at 550 (1959).

121. See Memorandum for the Record by the Secretary of State's Special Assistant (Greene) (June 17, 1958), in 11 *FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, LEBANON AND JORDAN* 149 (Louis J. Smith ed., 1992), <https://history.state.gov/historicaldocuments/frus1958-60v11/d92> (quoting Secretary of State Dulles as raising “our constitutional problem and the dilemma it poses”).

advance of the deployment and committed to pursuing formal congressional authorization if the mission persisted, expanded, or became more dangerous.¹²² While Eisenhower and his advisors did not say as much expressly, the suggestion was that the need for congressional authorization grew with the scope and risk of the deployment.

Subsequent administrations shifted back in the direction of the Truman administration, at least in their outward representations of presidential authority. In a 1962 letter to the Senate Foreign Relations Committee, for example, the Kennedy administration framed Eisenhower's requests for congressional authorization as "invit[ations to] Congress to associate itself with his exercise of his constitutional functions as Commander-in-Chief," downplaying any suggestion that they might have reflected constitutional requirements.¹²³ This perspective carried through to the Cuban missile crisis later that year, wherein President Kennedy quickly made clear in public remarks that he did not believe he needed further authorization from Congress to pursue a military response to the build-up of nuclear weapons on Cuba.¹²⁴ He later went further and publicly threatened to retaliate against the Soviet Union for any nuclear missile launched from Cuba against any nation in the Western Hemisphere,¹²⁵ a position Congress had supported but not strictly authorized in a joint resolution a few weeks prior.¹²⁶ In the end, however, the only military response the Kennedy administration pursued was a blockade (described as a "quarantine") to prevent any armaments or other hostile materials from arriving on Cuba, a limited military operation that an internal Justice Department memorandum concluded was well within the president's inherent constitutional authority to pursue without Congress.¹²⁷

122. *See* Memorandum of a Conference with the President, White House, Washington (July 14, 1958), *in* 11 FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, LEBANON AND JORDAN 223 (Louis J. Smith ed., 1992), <https://history.state.gov/historicaldocuments/frus1958-60v11/d127> (discussion with congressional leadership).

123. 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>.

124. *See* The President's News Conference of September 13, 1962, 1 PUB. PAPERS 674-79 (1963). This position was backed by executive branch lawyers in internal discussions. *See* ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 14-15 (1987).

125. *See* Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 1 PUB. PAPERS 808 (Oct. 22, 1962); Joint Resolution Expressing the Determination of the United States with Respect to the Situation in Cuba, Pub. L. No. 87-733, 76 Stat. 697 (1962).

126. *See* Joint Resolution Expressing the Determination of the United States with Respect to the Situation in Cuba, Pub. L. No. 87-733, 76 Stat. 697 (1962).

127. *See* Legal and Practical Consequences of a Blockade of Cuba, 1 Supp. Op. O.L.C. 486, 490-91 (Oct. 19, 1962). Indeed, the memorandum went even further and concluded that "it is doubtful if Congress could circumscribe this right" while citing the recently enacted resolution as a sign of congressional support. *Id.* at 491.

The escalating war in Vietnam, however, presented a different story. Prior to 1964, overt U.S. military assistance to South Vietnam had been largely limited to trainers, advisors, and other forms of non-combat support for South Vietnam's own military efforts.¹²⁸ That year, the Johnson administration began to seriously consider whether the United States should begin directly engaging North Vietnam to stop their gradual advance.¹²⁹ An internal legal assessment provided to Johnson by Secretary of State Dean Rusk with input from the Justice Department asserted that the President had the inherent authority to send U.S. troops into combat in Vietnam, but warned that "Supreme Court decisions have not determined the extent of the President's authority to deploy and use United States armed forces abroad in the absence of express authorization from the Congress" and that Congress had expressed more concern in cases involving "the commitment of organized United States forces to combat . . . because of the clearer possibility it carries of involving the United States in large-scale hostilities."¹³⁰ Perhaps for this reason, President Johnson's policy advisors saw "Congressional validation of [such] wider action" as "essential before . . . act[ing] against North Vietnam[.]"¹³¹ Executive branch staff even went so far as to prepare draft legislative text for such authorization, though the President and his advisors ultimately determined that it was not politically feasible in light of pending elections.¹³²

This assessment changed a few months later, however, when a U.S. ship conducting surveillance in the Gulf of Tonkin appeared to come under attack by North Vietnamese forces.¹³³ The Johnson administration quickly dusted off its draft joint resolution, which Congress enacted a few days

128. See MILLETT ET AL., *supra* note 96, at 514–16.

129. See KARNOW, *supra* note 113, at 356–63.

130. Memorandum from Sec'y of State Dean Rusk to President Lyndon Baines Johnson (June 29, 1964), in Stephen M. Griffin, *A Bibliography of Executive Branch War Powers Opinions Since 1950*, 87 TUL. L. REV. 649, 658 (2013).

131. Memorandum from the President's Special Assistant for National Security Affairs (Bundy) to the President (May 22, 1964), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968: VIETNAM, 1964, at 350 (John B. Glennon et al. eds., 1992), <https://history.state.gov/historicaldocuments/frus1964-68v01/d167>; see also KARNOW, *supra* note 113, at 373–77 (describing the internal debate on congressional authorization).

132. See Memorandum for the Record (June 15, 1964), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968: VIETNAM, 1964, at 186 (John B. Glennon et al. eds., 1992), <https://history.state.gov/historicaldocuments/frus1964-68v28/d95> (documenting decision by senior policy advisors that "a Congressional Resolution is not now feasible"); Memorandum from the President's Special Assistant for National Security Affairs (Bundy) to the Secretary of State and the Secretary of Defense (McNamara) (June 15, 1964), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968: VIETNAM, 1964, at 500 (John B. Glennon et al. eds., 1992), <https://history.state.gov/historicaldocuments/frus1964-68v01/d214> (collecting related memoranda and draft legislative text).

133. See KARNOW, *supra* note 113, at 380–92.

later.¹³⁴ While the precise degree of legal authorization this Gulf of Tonkin resolution provided would later become a point of contention with Congress, both internal and external memoranda quickly began citing it as confirmation of congressional support for pursuing a broader array of military activities against North Vietnam and throughout Southeast Asia.¹³⁵ In public, however, this was once again generally couched as supplementing or confirming the president's inherent constitutional authority. A 1966 legal memorandum produced for Congress by State Department Legal Adviser Leonard Meeker, for example, justified military action in Vietnam by reference first to a broad vision of the president's constitutional authority to use military force and then to regional treaty arrangements before finally discussing the Gulf of Tonkin resolution.¹³⁶ Meeker also pointed to an array of appropriations and authorizations legislation as a further source of congressional authorization,¹³⁷ anticipating arguments that would later come to play a significant role in the conflict.

Several internal executive branch legal opinions from this era, however, acknowledged concerns about possible outer limits on the president's constitutional authority. In a June 1965 memorandum to President Johnson addressing a proposal to send 30,000 to 40,000 additional soldiers to South Vietnam to engage North Vietnamese forces located there, Attorney General Nicholas Katzenbach suggested that, "[i]n the absence of some action by Congress, the only legal limitation on the power of the President to commit the armed forces arises by implication from [the Declare War Clause]."¹³⁸ Katzenbach read that clause as suggesting that only Congress can provide "substantially unlimited authority to use the armed forces to conquer and, if necessary, subdue a foreign nation[.]" but felt the President could pursue smaller scale actions on his own authority "so long as his action does not amount to an infringement of the power of Congress to declare all-out war."¹³⁹ Katzenbach concluded that the President did not need congressional authorization for the actions being contemplated as "the likelihood of involving the United States in all-out war as a result . . . is

134. *See* Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. 88-408, 78 Stat. 384 (1964).

135. *See, e.g.*, Memorandum from Leonard C. Meeker to President Lyndon Baines Johnson (Apr. 6, 1965), *in* Griffin, *supra* note 130, at 669; 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) [hereinafter 1965 Vietnam Memo], <https://history.state.gov/historicaldocuments/frus1964-68v02/d345>; Memorandum from Leonard C. Meeker to President Lyndon Baines Johnson (June 11, 1965), *in* Griffin, *supra* note 130, at 676.

136. *See* Memorandum on the Legality of United States Participation in the Defense of Viet-Nam, Mar. 4, 1966, DEP'T ST. BULL., 1966, at 484-88.

137. *See id.* at 488.

138. 1965 Vietnam Memo, *supra* note 135, at 752.

139. *Id.*

relatively slight in view of the limitations on both the size of the force committed and the nature of the mission[,]” which were to take place entirely within South Vietnam with that state’s consent—meaning it would not be “an act of war against a foreign nation[,]” something, he implies, that would be more likely to require congressional approval.¹⁴⁰ Nonetheless, Katzenbach also noted that the actions under consideration were also clearly authorized both by the Gulf of Tonkin resolution and related appropriations, thereby avoiding any concerns regarding possible constitutional limitations on the president’s own Article II authority to direct them.¹⁴¹

In May 1970, Assistant Attorney General (and future Chief Justice) William Rehnquist, who was then acting as the head of the Justice Department’s Office of Legal Counsel, reached a similar conclusion in an internal legal opinion addressing U.S. military action targeting North Vietnamese forces in nearby Cambodia. “[I]f the contours of the divided war power contemplated by the framers of the Constitution are to remain,” he wrote to President Nixon’s White House Counsel, “constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale.”¹⁴² While Rehnquist did not think this threshold was a low one, he seemed to think it was less remote than Katzenbach. “[T]he high water mark of executive action without express congressional approval is, of course, the Korean War[,]” he observed.¹⁴³ In regard to action in Cambodia, Rehnquist leaned heavily on the fact that Congress had, in his view, authorized the use of military force in Southeast Asia through the Gulf of Tonkin resolution and subsequent legislation. “Faced with a substantial troop commitment to such hostilities made by the previous Chief Executive, and approved by

140. *Id.* at 753–54.

141. *See id.* Katzenbach acknowledged “some legislative history to the effect that the Congressional approval did not extend to involvement in large-scale land war in Asia[,]” but concluded that “[t]hese limitations—if they exist—are not infringed by the limited measures now contemplated.” *Id.* at 754.

142. 1970 Cambodia Memo, *supra* note 95, at 331–32. This was an expanded version of a memorandum that Rehnquist had prepared on the same topic a week earlier, which contained a briefer discussion of possible constitutional limits on the president’s authority to use military force. *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) (“Although the authority to declare war is vested in the Congress, the President as Commander in Chief and sole organ of foreign affairs has constitutional authority to engage U.S. forces in limited conflict While the precise division of constitutional authority between President and Congress in conflicts short of all-out war has never been formally delimited, there is no doubt that the President with the affirmance of Congress may engage in such conflicts.”).

143. 1970 Cambodia Memo, *supra* note 95, at 333. Rehnquist also noted that Congress had “voted authorizations and appropriations to arm and equip the American troops[,]” suggesting that the full scope of the Korea conflict may not have been predicated solely on the president’s constitutional authority. *Id.* That said, he also acknowledged that legislative support to troops in the field may not be the equivalent of outright authorization. *See id.*

successive Congresses,” Rehnquist wrote, “President Nixon has an obligation as Commander in Chief of the country’s armed forces to take what steps he deems necessary to assure their safety in the field[.]” including through military action against North Vietnamese forces in Cambodia.¹⁴⁴ This was “a decision made during the course of an armed conflict as to how that conflict should be conducted,” not “a determination that some new and previously unauthorized military venture shall be undertaken”—the latter being a step, Rehnquist implies, that might require additional approval from Congress.¹⁴⁵

These issues became harder to avoid, however, as Congress soured on the Vietnam conflict and sought to pressure the Nixon administration into bringing it to a close by limiting relevant statutory authorities.¹⁴⁶ Following the repeal of the Gulf of Tonkin resolution in January 1971,¹⁴⁷ Nixon himself shifted the focus of his public legal justification for continued operations in Southeast Asia to his own constitutional authority—specifically, in his words, the President’s “constitutional right . . . to use his powers to protect American forces when they are engaged in military actions,” an authority that he argued extended to “winning a just peace” as they wound down the war.¹⁴⁸ His administration, however, struck a somewhat more pragmatic note and instead argued in federal court that Congress had authorized the conflict not just through the Gulf of Tonkin resolution but also through various other appropriations and authorization legislation.¹⁴⁹ Once U.S. troops departed Vietnam in March 1973, this latter argument shifted even further to the fore, as the Nixon administration argued that Congress had implicitly authorized the continued bombing of enemy forces in Cambodia through “the authorization and appropriation process” and by “reject[ing] proposals by some members to withdraw this congressional participation and authority by cutting off appropriations for necessary military expenditures and foreign assistance.”¹⁵⁰ Only after Congress expressly cut off appropriations did the Nixon administration finally cease military operations—a step the White House publicly described as being “in compliance with a specific, direct, and binding instruction from

144. *Id.* at 337.

145. *Id.*

146. See FISHER, *supra* note 90, at 137–44.

147. See Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

148. Interview with President Nixon (July 1, 1970), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, FOUNDATIONS OF FOREIGN POLICY, 1969-1972, at 224 (David H. Herschler & Louis J. Smith eds., 2003), <https://history.state.gov/historicaldocuments/frus1969-76v01/d67>.

149. See, e.g., *Orlando v. Laird*, 443 F.2d 1039, 1041 (2d Cir. 1971) (describing the government’s position that “military action was authorized and ratified by congressional appropriations expressly designated for use in support of the military operations in Vietnam”).

150. Department Discusses Presidential Authority to Continue U.S. Air Combat Operations in Cambodia, DEP’T ST. BULL., May 1973, at 655 (statement sent to Senate foreign relations committee by Secretary of State William Rogers).

the Congress[.]” in spite of the “grave reservations” Nixon continued to hold.¹⁵¹

That same year, Congress took steps to reassert its own authority over matters of war and peace in the form of the War Powers Resolution, which it enacted over President Nixon’s veto.¹⁵² The Resolution imposed an array of statutory limitations on the president’s authority to use military force absent congressional authorization, including a 60-to-90-day time limit that the Nixon administration argued was unconstitutional.¹⁵³ But aside from a non-binding provision purporting to articulate the conditions under which the president can use military force on his own authority¹⁵⁴—the Resolution did not address constitutional limits on the President’s inherent authority to use military force stemming from the Declare War Clause. Instead, its main effect was to shift the focus of much of the debate around war powers to the separate constitutional question of whether and when Congress can impose limits on the President’s authority by statute.

This relative silence on the issue was facilitated by the fact that, in the decades immediately following the Vietnam War, the executive branch did not have much appetite for the sort of large-scale military operations that most clearly raised Declare War Clause concerns. Most of the military operations the executive branch pursued in this period were discrete uses of force against weaker adversaries aimed at limited strategic objectives, meaning there was little risk they would evolve into major armed conflicts.¹⁵⁵ What proved to be the deadliest U.S. military operation of this era—the 1982-1983 peacekeeping effort in Lebanon—was the subject of controversy in regard to the application of aspects of the War Powers Resolution, but was ultimately authorized by Congress.¹⁵⁶ The most politically significant military operations—the 1983 intervention in Grenada and 1989 intervention in Panama, both of which forced changes in the targeted

151. Termination of U.S. Combat Activity in Cambodia, 9 WEEKLY COMP. PRES. DOC. 984 (Aug. 15, 1973).

152. War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-48).

153. *See id.* § 5(b), 87 Stat. 556 (codified at 50 U.S.C. § 1544(b)); Veto of the War Powers Resolution, 1 PUB. PAPERS 893 (Oct. 24, 1973).

154. *See* Pub. L. 93-148, § 2(c), 87 Stat. 555 (codified at 50 U.S.C. § 1541(c)) (asserting that the president’s inherent Article II constitutional authority to use military force absent a declaration of war or statutory authorization is limited to “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces”). *But see* H.R. REP. NO. 93-547, at 8 (1973) (Conf. Rep.) (describing this provision as a “statement” on which “[s]ubsequent sections of the joint resolution are not dependent” while referencing a non-binding provision in a prior Senate version of the legislation as a model).

155. *See* MILLETT ET AL., *supra* note 96, at 569-93, 606-07 (describing the limited scale of U.S. military operations in the post-Vietnam War era).

156. *See* Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (Oct. 12, 1983); *see also* FISHER, *supra* note 90, at 160-61 (discussing the operation and legal controversy).

countries' governments—were not authorized by Congress but were framed as emergency measures necessary to protect the lives and property of U.S. nationals as well as security and stability in the region around the United States.¹⁵⁷ Each also involved the use of overwhelming force against far weaker adversaries in a manner that presented little risk of meaningful escalation and was over in a matter of weeks, falling short of the type of major armed conflict that executive branch Declare War Clause concerns had come to focus on. For these reasons, the relatively few executive branch legal opinions on war powers issues that are publicly available from this era tend to focus on identifying historical precedents for more limited uses of military force without addressing the possible outer limits of the president's authority.¹⁵⁸ Where the issue of the president's constitutional authority to commit the United States to major armed conflicts arose, the executive branch would often deflect by focusing on the practical need for interbranch cooperation.¹⁵⁹

The possibility of a major armed conflict did not clearly raise its head again until 1990, when the George H.W. Bush administration had to consider how to respond to the invasion of Kuwait by Iraq, an indisputably weaker state that nonetheless had a significant military capability and would require substantial ground troops to dislodge.¹⁶⁰ By his own account, then-Deputy Attorney General (and future two-time Attorney General) William Barr, who had previously headed up the Office of Legal Counsel, advised Bush that “there [wa]s no doubt that [he] ha[d] the authority to launch an attack” on Iraqi forces, even without congressional authorization.¹⁶¹ Others

157. See Letter to the Speaker of the House and the President Pro Tempore of the Senate on the United States Military Action in Panama, 2 PUB. PAPERS 1734 (Dec. 21, 1989); Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Grenada, 2 PUB. PAPERS 1512 (Oct. 25, 1983); FISHER, *supra* note 90, at 162–69.

158. See, e.g., Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6 (1998) (memorandum and associated letter by Attorney General William Barr dated Dec. 4, 1992) (addressing intervention in Somalia in support of humanitarian operations); Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274–75 (1993) (memorandum dated Oct. 30, 1984) (identifying a non-exclusive list of circumstances in which the president can use military force on his own inherent constitutional authority); Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115, 121–22 (1985) (memorandum dated Nov. 7, 1979) (discussing legal authority to act in defense of U.S. persons and property abroad).

159. See, e.g., Presidential Power to Use the Armed Force Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187–88 (1985) (memorandum dated Feb. 12, 1980) (noting that Korea and Vietnam-type operations “cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money”).

160. See MILLETT, *supra* note 96, at 593–605.

161. Interview by the Miller Center at the University of Virginia with William P. Barr 83–84 (Apr. 5, 2001) [hereinafter 2001 Barr Interview], https://s3.amazonaws.com/web.poh.transcripts/Barr_William.pdf. Barr also claimed that he offered Bush an alternate “bootstrap” argument that the president could initiate hostilities against Iraqi forces in self-defense of the U.S. troops Bush had already deployed to neighboring Saudi Arabia. See *id.* at 84.

in the administration, however, may have been somewhat less bullish. While he more or less agreed with Barr's bottom line, White House Counsel C. Boyden Gray advised President Bush in an August 1990 memorandum that, "[d]epending on the size of the commitment, its likely duration, and the risk of involvement in hostilities," he could "proceed either without any formal congressional approval at all, or seek a joint resolution of Congress endorsing your action"—advice that suggests congressional authorization might be necessary (or at least advisable) for larger, longer, or riskier military operations.¹⁶² Regardless, Barr recalls that both he and Gray ultimately urged Bush to seek congressional support on the logic that doing so put the administration in the "strongest possible position."¹⁶³ Per their advice, Bush pursued such authorization later that year, though he and his administration maintained that doing so was not legally necessary.¹⁶⁴

Barr's apparent disagreement notwithstanding, the view that the Declare War Clause might limit the President's authority appears to have been alive and well elsewhere in the executive branch. In June 1993, career attorneys in the Office of Legal Counsel provided the newly arrived Clinton administration with a lengthy internal memorandum outlining what it described as "the Department's best assessment of the merits of the legal issues" raised by the War Powers Resolution.¹⁶⁵ In discussing the president's constitutional authority to use force absent congressional authorization, the memorandum noted the importance of "assessing whether a 'war' exists within the meaning of [the Declare War Clause][,]" in which case "prior congressional authorization for the proposed use of force would be necessary."¹⁶⁶ "[T]he constitutional text, the evidence of the framers' intent, and the practice of past Presidents and Congresses, suggest a number of factors that should be considered" in any such assessment, it noted, including whether the anticipated military operation was "likely to be extensive in scope and duration[,]" "consistent with or in furtherance of other laws[,]" or "in its nature defensive[,]" as well as whether "the military situation permitted the President to seek and obtain congressional approval

162. Memorandum from C. Boyden Gray to President George H.W. Bush (Aug. 7, 1990), *in* Griffin, *supra* note 130, at 710.

163. 2001 Barr Interview, *supra* note 161, at 84.

164. *See* Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (Jan. 14, 1991); *see also* Statement on Signing the Resolution Authorizing the Use of Force Against Iraq, 1 PUB. PAPERS 40 (Jan. 14, 1991) ("[M]y signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests . . .").

165. 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 1 (June 9, 1993) [hereinafter 1993 WPR Memo], <https://www.justice.gov/olc/page/file/1532256/download>.

166. *Id.* at 34.

before beginning the operation.”¹⁶⁷ Its discussion of this issue did not go much further, in large part because the memorandum was focused on the statutory limits imposed by the War Powers Resolution. But the career attorneys then in the Office of Legal Counsel clearly believed that the Constitution—and the Declare War Clause in particular—may well set meaningful outer limits on the president’s authority to use military force, at least in certain circumstances.

The Clinton administration soon opted to bring what had up to this point been a mostly internal position out into the light. Assistant Attorney General Walter Dellinger, head of the Office of Legal Counsel, produced the first such opinion in 1994 at the request of several U.S. senators who had inquired after the legal basis for the U.S. military intervention into Haiti earlier that year. He concluded that the operation “was not a ‘war’ within the meaning of the Declar[e] War Clause” as the “anticipated nature, scope, and duration of the planned deployment” suggested, among other factors, only a “limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.”¹⁶⁸ He reached a similar conclusion the next year in another opinion regarding the deployment of a similar number of U.S. troops to Bosnia as peacekeepers, on the logic that the “consensual nature and protective purposes” meant that the operation was unlikely to result in “extensive or sustained hostilities.”¹⁶⁹ As Dellinger explained in a contemporaneous law review article, this approach “implicitly acknowledges that there are significant limitations on the President’s ability to deploy our military forces into hostilities[,]” which manifest as a “requirement that [the president] make specific determinations about the scope, nature, and duration of the deployment before deciding that it falls within his constitutional authority to act without congressional authorization.”¹⁷⁰ That said, the Clinton administration did not find these limitations to be particularly constraining, as evidenced by the substantial deployments of more than 20,000 troops it pursued in both Haiti and Bosnia as well as the substantial air campaigns it pursued in Bosnia and Kosovo, none of which had (or were seen as requiring) congressional authorization.¹⁷¹

167. *Id.* at 34–35.

168. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 177, 179 (1999) [hereinafter 1994 Haiti Memo] (memorandum dated Sept. 27, 1994).

169. Proposed Deployment of United States Armed Forces into Bosnia, 16 Op. O.L.C. 327 (1997) [hereinafter 1995 Bosnia Memo] (memorandum dated Nov. 30, 1995).

170. Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIA. L. REV. 107, 118 (1995).

171. *See* FISHER, *supra* note 90, at 183–86, 198–201. The Clinton administration did ultimately conclude that Congress had authorized the Kosovo air campaign through appropriations legislation, but not until it was already well under way. *See* Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 346–61 (Dec. 19, 2000) [hereinafter 2000 Kosovo Opinion].

Even this outer limit, however, did not sit well with attorneys in the subsequent George W. Bush administration, particularly following the September 11th terrorist attacks. In a pair of internal opinions, the Office of Legal Counsel reversed tack and reasserted the view that the Constitution gives the President almost unfettered authority to use military force. The first, authored by Deputy Assistant Attorney General John Yoo just days after the September 11th attacks, focused on the use of force to “retaliate for those attacks” and to act against “similar threat[s] to the security of the United States and the lives of its people, whether at home or overseas[.]” though it also suggested that the president’s authority to use military force might extend beyond situations of self-defense.¹⁷² The second legal opinion, authored by Assistant Attorney General Jay Bybee the next year, confirmed this broader view by arguing that the president’s “constitutional authority to undertake military action” extended to “protect[ing] the national security interests of the United States[.]” to include the focus of Bybee’s analysis: the invasion of Iraq.¹⁷³ Neither analysis viewed the Declare War Clause as setting meaningful limits on the president’s authority in this regard, which was seen as “plenary” and not directly constrained by any requirement for congressional authorization.¹⁷⁴ To the contrary, Yoo maintained that the Declare War Clause only gave Congress the authority to make formal declarations of war that the Framers “well understood . . . were obsolete” and had no bearing on the conduct of hostilities.¹⁷⁵

Both opinions, however, proved controversial. While he publicly flirted with acting pursuant to his inherent constitutional authority, President Bush ultimately opted not to rely on the theory in either memorandum and instead pursued congressional authorization for both military campaigns.¹⁷⁶ A later opinion issued by a different leadership team in the Office of Legal Counsel avoided citing either opinion to justify another U.S. intervention in Haiti in 2005; instead, it only referenced opinions from prior administrations and

172. The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nationals Supporting Them, 25 Op. O.L.C. 188, 214 (2012) [hereinafter 2001 Terrorism Memo] (memorandum dated Sept. 25, 2001).

173. *See* Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 152 (2013) [hereinafter 2002 Iraq Memo] (memorandum dated Oct. 23, 2002).

174. 2001 Terrorism Memo, *supra* note 172, at 211–12; *see also* 2002 Iraq Memo, *supra* note 173, at 151 (“The Constitution nowhere requires for the exercise of [the president’s authority to use military force] the consent of Congress.”).

175. 2001 Terrorism Memo, *supra* note 172, at 192. Specifically, Yoo argued that a declaration of war “was only necessary to ‘perfect’ a conflict under international law” and thereby “fully transform the international legal relationship between two states from one of peace to one of war[.]” not as a prerequisite for the use of force. *Id.*

176. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *see also* FISHER, *supra* note 90, at 208–30 (discussing the context around the enactment of both authorizations).

simply avoided any discussion of Congress’s constitutional authorities altogether.¹⁷⁷ Towards the end of Bush’s time in office, his Office of Legal Counsel went even further and issued an internal memorandum asserting that “certain propositions stated in several opinions by the Office of Legal Counsel [from 2001 to 2003] respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office.”¹⁷⁸ That said, while this memorandum withdrew or caveated a number of opinions from this era, it did not address or repeal either war powers opinion, leaving their status unclear.

Regardless, the incoming Obama administration soon tacked back in the direction set by the Clinton administration. In a 2011 opinion justifying U.S. military intervention in Libya, Assistant Attorney General Caroline Krass, the new head of the Office of Legal Counsel, expanded on the approach developed by Dellinger and articulated a two-part framework for determining whether the President could use military force on his own inherent Article II authority: specifically, whether the anticipated military operation would (1) “serve sufficiently important national interests” and (2) not be of a “nature, scope, and duration” so extensive as “to constitute a ‘war’ requiring prior specific congressional approval under the Declaration of War Clause.”¹⁷⁹ The latter were framed more as an exercise of constitutional avoidance than hard constitutional requirements, as the opinion was careful to only acknowledge a “*possible* constitutionally-based limit” on the president’s authority.¹⁸⁰ Nonetheless, applying this standard, Krass concluded that the “nature, scope, and duration” of the anticipated Libya operation—which was “limited to airstrikes and associated support missions”—did not rise to the level of a “war” for constitutional purposes, as it “avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces” and “did not ‘aim at the conquest or occupation of territory.’”¹⁸¹

177. See Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 30 (2013) (memorandum authored by Assistant Attorney General Jack Goldsmith dated Mar. 17, 2004).

178. 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>; see also BARRON, *supra* note 110, at 420–24 (discussing the significance of this memorandum in the context of war powers).

179. 2011 Libya Opinion, *supra* note 18, at 33. The opinion also suggests that the President’s authority exists “at least insofar as Congress has not specifically restricted it,” acknowledging the possibility that Congress could set statutory limits on the President’s authority without conceding its authority to do so. *Id.* at 28.

180. *Id.* at 31 (emphasis added).

181. *Id.* at 38 (quoting 1995 Bosnia Memo, *supra* note 169, at 332).

A few years later, the Obama administration's Office of Legal Counsel reached a similar conclusion regarding airstrikes against Islamic State in Iraq and the Levant ("ISIL") terrorist group in Iraq, which it had predicated in part on the need to defend U.S. diplomatic and military personnel from advancing ISIL forces.¹⁸² These limited objectives, the opinion concluded, combined with the fact that the operations would be "restricted to airstrikes and associated support missions" made it "less likely that the operations would be of a lengthy duration or that, as a result of the[m], the United States would 'find itself involved in extensive or sustained hostilities'" of a sort that might require Declare War Clause authorization.¹⁸³ Within months, however, the Obama administration concluded that broader and more diverse military action was warranted. Instead of relying on the President's constitutional authority, the administration turned to statutory authority and concluded that such military actions had already been authorized by Congress through the 2001 and 2002 AUMFs.¹⁸⁴ This allowed the administration to not only dodge any questions of constitutional limitations on the president's inherent constitutional authority, but, perhaps more pressingly, to avoid the 60-to-90-day limitation imposed by the War Powers Resolution as well.¹⁸⁵

Importantly, in the Obama administration's final weeks in office, the two-part Libya standard also found its way into a capstone report the administration released on the legal framework governing the use of military force.¹⁸⁶ This report was part of a broader effort to promote executive branch disclosure of key national security-related legal authorities, a practice the Obama administration sought to institutionalize through a series of executive actions.¹⁸⁷ While the Trump administration dismantled most of these disclosure mechanisms shortly after entering office, Congress stepped in and enacted a statutory provision requiring that the Trump administration inform Congress of any changes in the views expressed in the Obama

182. *See* Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 120–22 (2014) [hereinafter 2014 ISIL Memo].

183. *Id.* at 120–22 (quoting 1995 Bosnia Memo, *supra* note 169, at 332).

184. *See* Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria, 2 PUB. PAPERS 1213, 1213–14 (Sept. 23, 2014).

185. *See* CHARLIE SAVAGE, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY 685–90 (rev. ed. 2017).

186. *See* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 7–8 (Dec. 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf.

187. *See* Statement on Releasing the "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," 2 PUB. PAPERS 1601 (Dec. 5, 2016).

administration's framework report.¹⁸⁸ When the Trump administration first did so in March 2018, it noted no departures from the Obama administration's views on the president's constitutional authority in the unclassified portion of the report that was eventually made public.¹⁸⁹ Nor did the unclassified portion of a subsequent report that the Trump administration filed in October 2020 after Congress amended the statute to make the report an annual requirement.¹⁹⁰

This continuity was confirmed in May 2018, when Assistant Attorney General Steven Engel, head of the Trump administration's Office of Legal Counsel, produced a legal opinion justifying Trump's April 2018 decision to launch airstrikes on Syria in response to the Syrian government's decision to use chemical weapons on its own civilians.¹⁹¹ This was the second time Trump had taken such action, but the first time his administration had provided the public with a substantial legal justification for his actions.¹⁹² In doing so, his Office of Legal Counsel embraced and applied the two-part Libya test. Moreover, in conducting its "anticipated nature, scope, and duration" analysis, the opinion evaluated not just the immediate military operation precipitated by the president's actions but "the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia and Iran."¹⁹³ As part of this effort, it noted that "[w]e were advised that escalation was unlikely (and reviewed materials supporting that judgment)" and then identified specific measures that the Trump administration had undertaken to minimize the risk of escalation into broader hostilities—particularly with Russia, whose military personnel were co-located at some of the Syrian sites targeted by the airstrikes—as factors

188. See National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, § 1264, 131 Stat. 1283, 1689–90 (2017) (codified as amended at 50 U.S.C. § 1549).

189. See REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2018), <https://www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf>.

190. See REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/10/Annual-1264-Report-on-Legal-and-Policy-Framework-re-Military-Use-of-Force.pdf>; see also National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, § 1261, 133 Stat. 1189, 1689 (2019) (amending 50 U.S.C. § 1549). The author was a plaintiff in litigation to secure the public release of this report. See Scott R. Anderson & Benjamin Wittes, *Forcing President Trump to Comply with the Law*, LAWFARE (Oct. 21, 2020), <https://www.lawfaremedia.org/article/forcing-president-trump-comply-law>.

191. See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. (slip op.) 1, 9–10 (2018) [hereinafter 2018 Syria Memo], https://www.justice.gov/d9/opinions/attachments/2018/05/31/2018-05-31-syrian-airstrikes_1.pdf.

192. See Charlie Savage, *Trump Had Power to Attack Syria Without Congress, Justice Dept. Memo Says*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/trump-war-powers-syria-congress.html>.

193. 2018 Syria Memo, *supra* note 191, at 21.

contributing to its conclusion that the operation did not amount to a “war” that might require advance congressional authorization.¹⁹⁴ In other words, it appeared to take possible Declare War Clause limits seriously, particularly in relation to another major power like Russia.

That said, the Trump administration may have walked back from this perspective in its other most prominent engagement with the issue: a 2020 internal Office of Legal Counsel opinion by Engel justifying the airstrike that killed Iranian general Qassem Soleimani in Baghdad, Iraq.¹⁹⁵ While only a heavily redacted version of this opinion is publicly available, it still clearly applies the two-part Libya test. But when it addresses the risk of escalation, the only unredacted text on the topic simply notes that Trump’s advisors told him that the strike “would be unlikely to escalate into a full-scale war” and that this, along with other factors that may be discussed in redacted portions of the opinion, was sufficient to allow President Trump to “reasonably determine” that the actions did not rise to the level of a war for constitutional purposes.¹⁹⁶ Assessing this analysis is difficult given the redactions, but what is publicly known about the dynamics around the Soleimani strike raises questions about the reasonableness of that conclusion.¹⁹⁷ Given this, the opinion appears to lean heavily on deference to the factual and policy assessments of the president and his advisors.

This same opinion also hints at another aspect of the Libya framework that has not yet been squarely addressed by the executive branch: whether there are exceptions to possible Declare War Clause limitations for actions taken in self-defense. The executive branch has long cited self-defense as one of the strongest grounds on which the President has the unilateral authority to use military force.¹⁹⁸ Recent presidential administrations, however, haven’t generally framed such actions as an exception to possible Declare War Clause limitations, now that the latter have been incorporated

194. *Id.* at 21–22.

195. See Memorandum from Steven A. Engel, Assistant Attorney General, for John A. Eisenberg, Legal Advisor to the National Security Council, Re: January 2020 Airstrike in Iraq Against Qassem Soleimani (Mar. 10, 2020) [hereinafter 2020 Soleimani Memo], https://www.justice.gov/d9/2023-04/2020-03-10_soleimani_airstrike_redacted_2021.pdf.

196. *Id.* at 18–20. Notably, prior Office of Legal Counsel opinions only expressly applied this deferential reasonableness standard to the first national interests prong of the two-part Libya test, not the second “anticipated nature, scope, and duration” prong. See 2018 Syria Memo, *supra* note 191, at 1; 2011 Libya Opinion, *supra* note 18, at 1.

197. See Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?*, LAWFARE (Jan. 3, 2020), <https://www.lawfaremedia.org/article/did-president-have-domestic-legal-authority-kill-qassem-soleimani>.

198. See, e.g., 1951 War Powers Report, *supra* note 102, at 7–8 (noting that the practice using military force to protect U.S. persons and property was “[s]o common . . . that some people have been misled into thinking that the protection of American rights abroad is almost the only justification for the use of troops abroad in the absence of organized hostilities, and without the specific authority of Congress”).

into public legal analyses.¹⁹⁹ To the contrary, both recent Office of Legal Counsel opinions dealing with actions taken at least in part for reasons of self-defense—the Obama administration’s 2014 ISIL opinion and the Trump administration’s 2020 Soleimani strike opinion—still applied the anticipated nature, scope, and duration test derived from the Declare War Clause in their analyses.²⁰⁰ Several well-informed observers, however, have asserted that at least some within the executive branch do not believe that the Declare War Clause-related restrictions acknowledged by the two-part Libya test apply to acts of national self-defense.²⁰¹ Consistent with this view, the Soleimani opinion suggests that the Trump administration applied the two-part Libya framework—which it describes as normally being “employed when the President seeks to advance national interests *apart from the defense of U.S. persons*”—in spite of “the president ha[ving] the constitutional authority to take defensive measures to protect U.S. persons, including U.S. forces deployed in a foreign theater[.]”²⁰² What precisely this means is far from clear given the redactions. But for present purposes, it is enough to acknowledge that some in the executive branch may well see any otherwise applicable Declare War Clause limits as less restrictive or even inapplicable in cases of national self-defense.

The Biden administration has thus far suggested that it shares the view of presidential war powers originally articulated by the Obama administration and largely continued by the Trump administration. None of the publicly available portions of the three annual legal framework reports that Biden has filed to date suggest any significant departure from these views on potential Declare War Clause limitations.²⁰³ In congressional

199. *But see* 1993 WPR Memo, *supra* note 165, at 34 (identifying “whether the action is in its nature defensive, of American citizens, territory or property” as a factor indicative of whether a use of military force is a “war” for constitutional purposes).

200. *See* 2020 Soleimani Memo, *supra* note 195, at 12; 2014 ISIL Memo, *supra* note 182, at 16.

201. *See* Robert Chesney & Eric Talbot Jensen, *The Pentagon’s General Counsel Defends the Legality of the Soleimani Strike*, LAWFARE (Mar. 11, 2020), <https://www.lawfaremedia.org/article/pentagons-general-counsel-defends-legality-soleimani-strike>; Jack Goldsmith, *The Ease of Writing an OLC Opinion in Support of Military Action Against North Korea*, LAWFARE (Sept. 14, 2017), <https://www.lawfaremedia.org/article/ease-writing-olc-opinion-support-military-action-against-north-korea>.

202. 2020 Soleimani Memo, *supra* note 195, at 17 (emphasis added).

203. *See* REPORT ON THE LEGAL POLICY FRAMEWORKS FOR THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/2023-3-1-1081-4623000369_EXT_Unclassified_1264_Annual_Report_for_CY_2022_Tab-B.pdf (covering calendar year 2022); UNCLASSIFIED ANNEX: REPORT ON THE LEGAL AND POLICY FRAMEWORKS FOR THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2022), https://www.whitehouse.gov/wp-content/uploads/2022/03/1264_Report.pdf (covering calendar year 2021); Statements and Releases, White House, Unclassified Annex: Notification on the Legal and Policy Frameworks for the United States’ Use of Military Force and Related National Security

testimony, senior administration officials—some of whom helped craft the Obama administration’s related legal positions—have asserted that these positions largely remain in place.²⁰⁴ That said, the Biden administration has not yet had much reason to opine on the outer limits of the President’s authority, meaning points of disagreement may yet emerge.

What can one take away from this brief history? From at least the Truman administration onward, the executive branch has undoubtedly maintained that the Constitution gives the president substantial inherent authority to use military force, even absent advance authorization from Congress. One recurring view—expressed by the Truman administration and echoed most clearly by the early George W. Bush administration—sees this authority as more or less plenary and rejects the idea that the Declare War Clause imposes any meaningful limits on it. A second perspective, however, acknowledges that the Declare War Clause may constrain the president’s constitutional authority to commit the United States to a major armed conflict, at least where it is unrelated to national self-defense. Moreover, while this latter view was once mostly reflected in persistent reservations expressed within the executive branch, presidential administrations from both major political parties have now publicly acknowledged it in their legal analysis, specifically as the second anticipated nature, scope, and duration prong of the two-part Libya framework.²⁰⁵ At a minimum, this suggests that this test is not just a passing or partisan innovation, as has sometimes been suggested.²⁰⁶ Instead, it reflects a persistent line of thinking that has co-existed within the executive branch alongside broad views of the president’s constitutional authority for much of the past century.

Importantly, this line of thinking also appears to have been more than just an intellectual exercise. Executive branch officials raised a lack of congressional authorization as a genuine legal consideration in several internal policy discussions relating to major military operations. The executive branch in turn chose to secure some degree of congressional authorization for every major armed conflict it pursued outside the Korean War, even as it frequently asserted that such steps were not legally necessary. The legislative action that the executive branch pointed to as congressional

Operations (Apr. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/04/unclassified-annex-report-on-the-legal-and-policy-frameworks-for-the-united-states-use-of-military-force-and-related-national-security-operations/> (covering calendar year 2020).

204. See *Authorizations of Use of Force: Administration Perspectives: Hearing Before the S. Comm. on Foreign Rel.*, 117th Cong. (2021) (includes testimony from Caroline Krass, the author of the 2011 Libya Office of Legal Counsel opinion, in her later capacity as General Counsel for the Department of Defense).

205. See *supra* notes 178–196 (discussing practice during the Obama and Trump administrations).

206. See, e.g., STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 201–03 (2013).

authorization was not always clear or express, opening the executive branch up to criticisms that it was just seeking some colorable basis for claiming formal congressional authorization as opposed to Congress's actual knowing and willing consent.²⁰⁷ But the fact that the executive branch made deliberate efforts to secure even colorable grounds for being able to argue that it had secured congressional authorization suggests that the ability to make those legal arguments is seen as having some genuine utility.

The most straightforward explanation for the co-existence of these competing viewpoints may be that the executive branch has simply been inconsistent over time. There is undoubtedly some truth to this: the executive branch's views have evolved and, in some cases, have even oscillated between presidents of different political parties. There is, however, a good deal of consistency as well, in ways that do not track easily on to patterns in which party controls the presidency. Nor does simple inconsistency explain how certain administrations appear to have embraced both views simultaneously, one internally and the other in public.²⁰⁸ Fortunately, recent scholarship on executive branch lawyering provides a useful framework for understanding how these two seemingly incompatible viewpoints might co-exist in this way.

Discussions of executive branch lawyering often draw a useful distinction between what can be described as “best views” of the law, meaning those positions that an attorney believes are the most readily legally defensible, and “available” views of the law, meaning those positions that satisfy what is seen as a lower but acceptable standard for legal credibility.²⁰⁹ In many cases, the executive branch is able to exercise some discretion in deciding between these views, allowing it to choose among available legal positions so as to better serve certain policy interests.²¹⁰ For this reason, executive branch lawyers often find it necessary to reconcile their interest in

207. See, e.g., *id.* at 125–28 (discussing the Gulf of Tonkin resolution).

208. See, e.g., *supra* notes 41–45, 128–145 and accompanying text (discussing the Eisenhower administration's approach to securing statutory authorization for the defense of Taiwan and the Johnson and Nixon administration views on aspects of the Vietnam War, respectively).

209. See, e.g., Bob Bauer, *The National Security Lawyer, in Crisis: When the “Best View” of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 249–50 (2018) (distinguishing between the “best view” of the law and “strong, reasonable, or even plausible legal theories” executive branch lawyers might adopt); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1714–15 (2011) (distinguishing between “the best view of the law” and “its best view of the law” in regard to the Office of Legal Counsel's practice); see also Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 871–75 (2017) (discussing a similar “concept of legal indeterminacy or a zone of ‘reasonable disagreement’”).

210. Whether this is desirable—and the extent to which it should be institutionally limited—is a subject of longstanding debate. Compare BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 98–100 (2010) (criticizing this “facilitative approach” among executive branch lawyers and urging institutional reforms to limit it), with Morrison, *Constitutional Alarmism*, *supra* note 209, at 1715 (discussing this as “an important and distinctive part of the way [the Office of Legal Counsel] operates”).

advancing the most legally credible position with other interests identified by the policy clients whom they advise. In dialogue with these interests, executive branch lawyers may depart from what they viewed as the best view of the law in isolation and adopt available legal positions that better accommodate their clients' policy preferences.²¹¹

Among other consequences, this adds to the natural diversity in viewpoints that executive branch lawyers—both political and civil service—bring to their work, yielding disagreements that must be reconciled through some sort of decision making process to produce any institutional executive branch legal position.²¹² The often slow and deliberate process of resolving these internal disagreements and arriving at an institutional legal position lends executive branch legal positions a degree of path dependency, in that officials are often resistant to adopting or revising legal positions until they are presented with a change in external circumstances (or internal priorities) that provides them with adequate incentive to do so.²¹³ These circumstances can in turn provide incentives to the actors and processes within the executive branch in variable ways that can shape the resulting legal position.

The president, of course, is not formally constrained by the views of the broader bureaucracy. As the most senior legal officer for the executive branch, he can adopt whatever legal position on its behalf that he likes, so long as he can do so consistent with his constitutional obligations.²¹⁴ That said, ignoring the broader executive branch altogether can come at a cost. As career civil servants are often seen as reservoirs of non-partisan expertise, openly disregarding their views can undermine the legitimacy of the president's actions and raise questions as to whether he is acting consistent

211. See Bauer, *supra* note 209, at 233–38 (discussing “the law-policy interplay”); Morrison, *supra* note 209, at 1714–23 (discussing the Office of Legal Counsel’s “regular practice . . . of helping its clients find lawful ways to pursue their objectives”); Renan, *supra* note 209, at 835–45 (discussing “porous legalism”). This process—and particularly the determination as to what legal positions are available versus not available—is often more complex and ethically fraught than reflected in this brief descriptive sketch. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 38–39 (2007) (“There is no magic formula for how to combine legitimate political factors with the demands of the rule of law.”).

212. See David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 34–39 (2012). For an examination of this process as it relates to U.S. government views on international law, see Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a “They,” Not an “It,”* 96 MINN. L. REV. 194 (2011).

213. See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L L. 359, 366–69 (2013) (discussing what the author calls “interpretation catalysts”); cf. Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (discussing path dependency in the general operation of common law systems).

214. Cf. Memorandum from Acting Ass’t Att’y Gen. David J. Barron on Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), <https://www.justice.gov/media/1226496/dl?inline> (describing the Office of Legal Counsel as “help[ing] the President fulfill his or her constitutional duties to . . . ‘take Care that the Laws be faithfully executed’”) (emphasis added).

with the rule of law and in line with his constitutional duties.²¹⁵ Departing from well-established executive branch practice can have a similar effect, particularly where that practice is bipartisan and longstanding, meaning that it is more likely to be perceived as representing institutional or national interests as opposed to political or personal preferences.²¹⁶ For these reasons, even where an incumbent presidential administration seeks to change the executive branch's legal positions, the president and his political appointees often engage the broader bureaucracy on its views and try to tie their preferred position to past precedents. This in turn gives career civil servants and others within the broader executive branch the opportunity to frame and influence those senior officials' decisions, even if they are not ultimately bound by the executive branch's existing views.²¹⁷

In the historical context outlined above, the situations calling for the executive branch to articulate a public legal position on the use of military force can be roughly grouped into two categories, each of which presents actors within the executive branch with a different set of incentives. The first are situations where the executive branch is asked to explain what legal authority there might be for some hypothetical use of military force in the future.²¹⁸ Where this occurs, the executive branch often has an incentive to at least preserve available legal arguments so as to avoid constraining how the executive branch might respond if such a scenario were to later arise—a calculus that may well include broader claims of inherent presidential authority that are considered available but may prove controversial because they are less legally credible.²¹⁹ Preserving arguments in this way can also present some strategic advantages, particularly where the president and his advisors may wish to use the threat of military force as a deterrent. In these cases, preserving a broad claim of inherent presidential authority to use military force allows the executive branch to more credibly threaten a broader range of military action, as it suggests that the president might act even where there are doubts as to whether he could secure timely congressional approval.²²⁰ Indeed, in such scenarios, the executive branch

215. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1141–43 (2013); Fontana, *supra* note 212, at 44–45.

216. See Bradley & Morrison, *Legal Constraint*, *supra* note 215, at 1137–40; Fontana, *supra* note 212, at 44–45.

217. See Fontana, *supra* note 212, at 44–45; Bradley & Morrison, *Legal Constraint*, *supra* note 215, at 1134–37.

218. This is closest to what Ingber calls an “event-driven” interpretation catalyst. See Ingber, *supra* note 213, at 367 n.29.

219. *Cf. id.* at 379 (discussing the incentive that executive branch lawyers face to “preserv[e] as much flexibility as possible for the [p]resident” when developing positions for litigation, precisely due to concerns about constraining future executive branch actions).

220. See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1669–74 (2014) (discussing the relationship between democratic constraints and the credibility and associated deterrent effect of threats of military force).

may even have an incentive to affirmatively assert the availability of these broader legal positions more vocally so as to communicate this possibility more clearly to potential adversaries and maximize the deterrent effect of related threats. This might prove controversial with certain outside audiences that oppose such broad claims of presidential authority, but the risks are in many ways limited: as the president has not actually relied on the legal position at issue, there are no ongoing military operations that an opposed Congress or declining public support can obstruct or withhold support from, nor any likely grounds for possible judicial review.

These incentives are flipped, however, where the executive branch is putting forward a legal position meant to justify military operations it expects to actually undertake.²²¹ Public opposition is more meaningful for active military operations, as they receive more public attention and involve actual costs for which voters may seek to hold the president and other elected officials accountable. For this reason, relying on a controversial claim of inherent Article II presidential authority may undermine support in Congress—both on principled grounds regarding a possible intrusion on congressional authority and on political grounds as Congress is less likely to be politically bought in—which could hinder efforts to secure additional appropriations and authorization that might be needed down the road. A less legally credible basis for one’s actions also raises the outside risk of a successful legal challenge, which can have a substantial bearing on executive branch risk-benefit calculations, despite courts’ traditional reluctance to intervene in the war powers space.²²² All of these risks, moreover, weigh heavier in relation to major armed conflicts, as the more substantial military risk, extended duration, and heightened costs they entail provide substantially more opportunities for controversy and disruption than more limited military operations. Where these risks are substantial, the executive branch may see more advantage in hedging them by relying on a less controversial legal justification—which, in the case of uses of military force, is likely to involve some sort of congressional authorization and therefore also entails the added benefit of sharing at least some political responsibility. Moreover, doing so in one case does not mean that the executive branch could not rely on a more assertive view of presidential authority in a future case—and, to the extent executive branch officials may be concerned with such perceptions, they can always be express about preserving that option for the future.

221. Ingber describes this as a “future-action or policy-driven” interpretation catalyst. *See* Ingber, *supra* note 213, at 367 n.29.

222. *See* Bradley & Morrison, *Legal Constraint*, *supra* note 215, at 1128–31; Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 893–94 (2013).

Applying this necessarily oversimplified framework to the brief history outlined above helps to make sense of the executive branch's seemingly disparate views on the Declare War Clause. Since the Truman administration, the executive branch has generally treated the legal argument that the president has the broad authority to use military force unrestrained by the Declare War Clause as an available one. This would likely have been seen as particularly useful during the Cold War, when presidents routinely used the threat of swift, large-scale military responses as a means of deterring the Soviet Union and other rivals—a fact that may help explain why several early Cold War administrations were intent on emphasizing this view in public statements, even as they expressed reservations about it in private.²²³ Nor has the executive branch ruled out this possibility today, as evidenced by the discussion of “possible” Declare War Clause limits in the 2011 Libya opinion.²²⁴ Asserting that this legal argument is available, however, does not mean that the executive branch necessarily views it as being as equally legally credible as other possible legal positions. To the contrary, the persistence of internal Declare War Clause reservations suggests that at least some executive branch lawyers historically have not, and the incorporation of the anticipated nature, scope, and duration test into the executive branch's legal positions now publicly acknowledges the possible constitutional issues such a position is likely to raise. These legal doubts no doubt reflect political and policy risks as well, as members of Congress, the public, and perhaps even the federal courts are more likely to view any military action relying on these legal positions as less legitimate—contrary views that are likely to prove most problematic in relation to major armed conflicts that are costly and extended in duration. This in turn may help explain why the executive branch has often seemed reticent to engage in these major armed conflicts without some degree of congressional authorization, even as it has sometimes publicly asserted that such authorization is not legally necessary.

For war powers scholarship, this nuance complicates the common narrative that the modern executive branch is strongly inclined, if not inexorably driven, to assert ever broader claims of constitutional authority over the use of military force.²²⁵ This view is undoubtedly correct in that the

223. *See, e.g., supra* notes 129–138 (discussing discrepancies in public and private legal assessments in the Kennedy and Johnson administrations).

224. 2011 Libya Opinion, *supra* note 18, at 31.

225. *See, e.g.,* SCHLESINGER, *supra* note 116, at viii–ix (describing how “the circumstances of an increasingly perilous world . . . seemed to compel a larger concentration of authority in the Presidency”); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 118–22 (1990) (discussing factors that have “inevitably forced the executive branch into a continuing pattern of evasion of congressional restraint”); GRIFFIN, *supra* note 206, at 6–8 (discussing the post-1945 “apprehension of an existential threat” as driving presidential claims to “the unilateral power under Article II to initiate war, ‘real’ war, full-scale war”).

executive branch has previously claimed—and, more recently, has at least preserved the argument—that it has broad authority to use military force without congressional authorization, including in relation to major armed conflicts. But the executive branch has also long acknowledged—first internally, now publicly—that the Declare War Clause raises questions about the legal credibility of this position as applied to major armed conflicts, at least where pursued for reasons other than self-defense. Those questions are in turn serious enough that the executive branch has often taken steps to avoid relying on it in relation to potential major armed conflicts by seeking at least some degree of congressional authorization for its actions, leaving the Korean War as the sole clear precedent to the contrary. In this sense, the executive branch does not currently appear to reject the proposition that the Declare War Clause may constrain the president's ability to engage in major armed conflicts in practice, even if it has occasionally suggested as much in public statements in the past. But these constraints operate more as risks to the legal credibility of presidential action—which can in turn raise an array of related legal, policy, and political concerns—than hard legal limits. This is unlikely to satisfy critics who believe the Constitution draws sharper lines in this area or that the Declare War Clause constrains the executive branch's participation in more than just major armed conflicts. Nor does it necessarily mean that the executive branch will never see fit to cross that line and pursue a major armed conflict on the president's sole authority, particularly if internal and external factors align to empower certain executive branch actors who take a broader view of presidential authority in this area—or if a president decides to adopt such a view, in spite of reservations in the bureaucracy. But it nonetheless reflects a degree of internalized constitutional constraint when it comes to the use of military force, specifically in relation to major armed conflicts not required for reasons of self-defense.

In the specific context of Taiwan, however, this presents a policy problem. The executive branch has undoubtedly preserved the option of coming to Taiwan's defense absent Congress, even if doing so means entering into a major armed conflict with China. By most accounts, the threat that the United States may do so—muddied as it is by strategic ambiguity—continues to serve as an important deterrent to more aggressive Chinese military action. But in so far as it will require a major war with China, making good on this threat absent authorization from Congress is something that even the executive branch sees as raising difficult constitutional questions. In other words, even the executive branch is likely to recognize that proceeding on the president's authority alone will put the defense of Taiwan on the weakest possible constitutional footing, with all the practical and political downsides that can entail. Recognizing this, the question then turns to how the executive branch and Congress might

attempt to square this circle and fortify the legal grounds on which any potential U.S. defense of Taiwan against an unexpected attack by China might proceed.

IV. TENSIONS AND STRATEGIES FOR RESOLUTION

For decades, U.S. security commitments to Taiwan and executive branch views on constitutional powers have largely proceeded along parallel trajectories. But today, the looming possibility of a conflict with China over Taiwan threatens to put them on a collision course. In the event of a sudden and unexpected attack by China, the legal status quo described in Part I puts the onus of defending Taiwan squarely on the president's inherent constitutional authority. Yet the possibility of a conflict with another major power like China appears to be exactly the type of scenario—a major armed conflict unrelated to self-defense—in which even the executive branch has acknowledged that the president's claims of constitutional authority are at their weakest, as documented in Part II. This section considers how these tensions might play out in the context of a sudden and unexpected attack by China on Taiwan. After outlining what experts expect a war with China over Taiwan will look like, it first considers how the executive branch might legally justify a military response premised on the president's own Article II constitutional authority. Finding these options lacking, it considers what steps Congress and the executive branch might be able to take in advance of such an attack to make a turn to unilateral action by the president unnecessary.

Policy experts have analyzed numerous ways in which a conflict with China over Taiwan might play out. In early 2023, scholars at the Center for Strategic and International Studies (“CSIS”) released one of the most comprehensive efforts to date: a study consisting of multiple iterations of a complex war game intended to model the operational outcomes over the first four weeks of a hypothetical amphibious invasion of Taiwan by China in 2026—the only recent study of its kind available to the public.²²⁶ This section uses this CSIS study and other similar assessments to outline what a near future war with China over Taiwan is expected to look like, before applying this understanding in its legal analysis.

The CSIS report focuses on the most widely discussed military scenario: an amphibious invasion of Taiwan by China. This generally begins with Chinese military forces surrounding Taiwan by air and sea before attempting to seize points of entry on the main island through which it can land an invading force—an effort that is sometimes preceded or accompanied by preemptive strikes against U.S. and other allied military forces in the region

226. 2023 CSIS Study, *supra* note 9, at 16–21.

in order to reduce their ability to respond in support of Taiwan.²²⁷ That said, this is only one of several possibilities. Another increasingly discussed scenario is a blockade or quarantine of Taiwan, wherein China does not invade Taiwan but instead uses aerial and maritime assets to isolate it from the global economy until the resulting costs compel it to surrender or to weaken it in advance of an invasion.²²⁸ A third possibility would be for China to focus its efforts on outlying islands instead of the main island of Taiwan, either as an independent objective or as a prelude to broader military operations.²²⁹ Notably, in all three scenarios, the bulk of the fighting—at least for U.S. military forces—would be at air and at sea, not on the ground.

There is some disagreement on the extent to which China would be able to achieve the element of surprise in pursuing any of these operations. Several experts have noted that there would most likely be an array of preparatory measures China would have to pursue in any of these scenarios, which would signal its intent well before hostilities begin.²³⁰ That said, China is believed to already be engaged in a deliberate campaign to wear down Taiwan's preparedness through frequent military exercises and other provocative behaviors, all of which may have the effect of concealing

227. See *id.* at 106–11; see also STACIE PETTYJOHN ET AL., DANGEROUS STRAITS: WARGAMING A FUTURE CONFLICT OVER TAIWAN (Ctr. for a New Am. Sec., June 2022) [hereinafter 2022 CNAS Study]; ROBERT D. BLACKWILL & PHILIP ZELIKOW, THE UNITED STATES, CHINA, AND TAIWAN: A STRATEGY TO PREVENT WAR 38–40 (Council on Foreign Rel., Feb. 2021); Joshua Keating, *Imagining the Unimaginable: The U.S., China, and War Over Taiwan*, THE MESSENGER (June 12, 2023), <https://themessenger.com/grid/test-imagining-the-unimaginable-the-us-china-and-war-over-taiwan>; David Lague & Maryanne Murray, *T-DAY: The Battle for Taiwan*, REUTERS (Nov. 5, 2021), <https://www.reuters.com/investigates/special-report/taiwan-china-wargames/> (scenarios five and six).

228. See Chris Buckley et al., *How China Could Choke Taiwan*, N.Y. TIMES (Aug. 25, 2022), <https://www.nytimes.com/interactive/2022/08/25/world/asia/china-taiwan-conflict-blockade.html>; MICHAEL E. O'HANLON, CAN CHINA TAKE TAIWAN? WHY NO ONE REALLY KNOWS (Brookings Inst., Aug. 2022); BRADLEY MARTIN ET AL., IMPLICATIONS OF A COERCIVE QUARANTINE OF TAIWAN BY THE PEOPLE'S REPUBLIC OF CHINA (RAND Corp., 2022); BLACKWILL & ZELIKOW, *supra* note 227, at 35–37; Lague & Murray, *supra* note 227 (scenarios three and four). Recent reports indicate that Taiwanese officials see this as the most likely scenario. See Jenny Leonard & Debby Wu, *Taiwan Sees Chinese Economic Blockade More Likely than War*, BLOOMBERG (Apr. 13, 2023), <https://www.bloomberg.com/news/articles/2023-04-13/risk-of-chinese-economic-blockade-has-taiwan-preparing-response>.

229. See BLACKWILL & ZELIKOW, *supra* note 227, at 32–35; CHRIS DOUGHERTY ET AL., THE POISON FROG STRATEGY: PREVENTING A CHINESE FAIT ACCOMPLI AGAINST TAIWANESE ISLANDS (Ctr. for a New Am. Sec., Oct. 2021); Lague & Murray, *supra* note 227 (scenarios one and two). An attack on Penghu (also known as the Pescadores) could have different political and legal ramifications than an attack on other outlying Taiwan-held islands, as it is expressly included as part of “Taiwan” by the Taiwan Relations Act. See 22 U.S.C. § 3314(2).

230. See John Culver, *How We Would Know when China is Preparing to Invade Taiwan*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 3, 2022), <https://carnegieendowment.org/2022/10/03/how-we-would-know-when-china-is-preparing-to-invade-taiwan-pub-88053> (discussing military indicators); Gerard DiPippo, *Economic Indicators of Chinese Military Action Against Taiwan*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 16, 2022), <https://www.csis.org/analysis/economic-indicators-chinese-military-action-against-taiwan> (discussing economic indicators).

possible preparations for an attack and causing confusion regarding its intentions.²³¹ For its part, the CSIS study assumes as a baseline that these efforts will be somewhat successful and only reveal China's intentions two weeks before an invasion takes place, but also includes scenarios where China achieves a greater degree of surprise.²³²

There is also disagreement across projections about who is most likely to succeed in any such conflict. The United States and its allies succeeded at defending Taiwan in all but the most pessimistic scenarios that CSIS ran in its study but have reportedly been far less successful in various classified war games that the U.S. government had conducted.²³³ Other simulations have ended with the two sides in an effective stalemate.²³⁴ As one leading expert has noted, “[A] potential U.S.-China war over Taiwan . . . poses analytical and policy challenges that make predicting outcomes especially difficult.”²³⁵

There is, however, one clear point of almost universal consensus: any conflict with China over Taiwan will be a devastating one. As the CSIS study describes, “[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.”²³⁶ The authors of the CSIS study estimate that there would likely be between 6,900 and 10,000 U.S. casualties in the first four weeks of the conflict alone.²³⁷ This translates into an approximate daily fatality rate more than four times what the United States experienced during the course of the conflicts in Korea and Vietnam and a minimum number of total combat fatalities that is more than the United States suffered in the Afghanistan and Iraq conflicts combined.²³⁸ The high floor of possible fatalities underscores

231. See Chris Buckley & Amy Chiang Chien, *China's Military, 'Chasing the Dream,' Probes Taiwan's Defenses*, N.Y. TIMES (Aug. 11, 2023), <https://www.nytimes.com/2023/08/11/world/asia/china-taiwan-military.html>.

232. See 2023 CSIS Study, *supra* note 9, at 69–70.

233. Compare 2023 CSIS Study, *supra* note 9, at 142, with Tara Copp, *'It Failed Miserably': After Wargaming Loss, Joint Chiefs are Overhauling how the U.S. Military Will Fight*, DEF. ONE (July 26, 2021), <https://www.defenseone.com/policy/2021/07/it-failed-miserably-after-wargaming-loss-joint-chiefs-are-overhauling-how-us-military-will-fight/184050/> (describing a “brutal [U.S.] loss” in a Taiwan war game); Michele Flournoy, *America's Military Risks Losing Its Edge*, FOREIGN AFFS. (Apr. 20, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-20/flournoy-americas-military-risks-losing-its-edge> (“The Pentagon’s own war games reportedly show that current force plans would leave the military unable to deter and defeat Chinese aggression in the future.”).

234. See 2022 CNAS Study, *supra* note 227, at 4–5.

235. O'HANLON, *supra* note 228, at 1.

236. 2023 CSIS Study, *supra* note 9, at 119.

237. See *id.* at 119–20.

238. *Id.* at 119–20 (comparing daily fatalities to the height of the Vietnam War in 1968, during which the United States suffered an estimated 30 killed per day). The United States suffered an average of about 30 daily fatalities over the course of the Korean War as well. See DAVID A. BLUM & NESE F.

the fact that escalation into a more substantial conflict was almost unavoidable, even in scenarios where China or the United States opened with more moderate or incremental actions. Moreover, these fatalities are limited to the area around Taiwan during the initial four week period of operations covered by the CSIS study and do not reflect the possibility of escalation into other theaters or a protracted or episodic conflict—all of which, the study authors warn, are realistic possibilities that would likely lead to substantially greater casualties.²³⁹ While the CSIS study also excluded nuclear weapons from its model, another recent simulation run by the Center for a New American Security saw the conflict quickly escalate to include the use of nuclear weapons.²⁴⁰ In light of these projections, the CSIS study warns that “[c]ivilian decisionmakers must recognize that the decision to defend Taiwan during an invasion would result in heavy casualties” and be prepared to proceed in spite of them.²⁴¹ Nor are such casualties limited to the United States and its allies: even in scenarios that were designed to favor China, the war games informing the CSIS study resulted in hundreds of lost Chinese aircraft and ships and an average of 17,000 Chinese casualties.²⁴²

Moreover, the costs would not be solely human: the CSIS study also projects that “[t]he United States would suffer tremendous damage to its military forces” and that “[r]ebuilding these capabilities would take many years and would occur at a slower rate than China’s rebuild[.]”²⁴³ This could result in a substantial decline in the U.S. global position, even if the defense of Taiwan is successful. There would also be costs for both the United States and the broader international community that are not reflected in the CSIS study’s scope. One recent assessment predicts that a war over Taiwan would “devastate the global economy by closing off vital shipping lanes, halting the production and delivery of semiconductors, and likely stopping trade between China and the West.”²⁴⁴

DEBRUYNE, CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 8, tbl.6 (2020) (documenting 33,739 hostile deaths in the Korean War between June 25, 1950 and July 27, 1953). The Department of Defense reported 5,375 hostile deaths among military and civilian Defense Department personnel in Afghanistan and Iraq as of Aug. 28, 2023. See U.S. Dep’t of Defense, *Casualty Status*, <https://www.defense.gov/casualty.pdf> (last visited Aug. 28, 2023).

239. See 2023 CSIS Study, *supra* note 9, at 142–44.

240. See 2022 CNAS Study, *supra* note 227, at 7–8 (describing how China “detonated a nuclear weapon not far from Hawaii to demonstrate the credibility of its threats”); 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), <https://www.foreignaffairs.com/articles/china/2022-05-20/fight-over-taiwan-could-go-nuclear> (analyzing this development and the risk of nuclear escalation in greater depth).

241. 2023 CSIS Study, *supra* note 9, at 119–20.

242. See *id.* at 90–92.

243. *Id.* at 143.

244. GORDON ET AL., *supra* note 5, at 43–45.

The CSIS study also helps to illustrate the potential trade-offs of a delay in a U.S. military response, as might be necessary to secure congressional authorization in the event of an unexpected attack by China. In the set of twenty-four simulations mentioned above, one set of scenarios assumed a delay of just a few days, while a second assumed a longer delay of two weeks.²⁴⁵ This roughly tracks the time it might take for Congress to negotiate and enact a war authorization in the event of an unexpected attack on Taiwan, as Congress has taken at least 48 hours to do so in the past, even when the measure in question was ultimately passed with nearly unanimous support,²⁴⁶ while a single opposed Senator may be able to use the filibuster and other procedural tactics to delay enactment of legislation by up to two weeks if he or she is determined to do so.²⁴⁷ In the war games, a brief delay provided the side representing China with certain limited strategic benefits, while a longer delay had an even more substantial effect.²⁴⁸ As the associated report describes, “delay means more Chinese forces ashore on Taiwan, higher casualties, and more infrastructure destruction for all parties[,]” consequences that “not only make[] the U.S. task [of defending Taiwan] more difficult” but “may also make off-ramps more difficult to find at the end of the conflict.”²⁴⁹

These expert projections as to what a war over Taiwan is likely to look like underscore the difficult legal position that a sudden and unexpected attack by China would put the executive branch in. To respond effectively, the president will almost certainly have to move at a pace faster than Congress can debate and enact new legislation. But the scenario it is widely expected to lead to—a major armed conflict not pursuant to national self-defense—is exactly the sort of action that even the executive action has recognized as raising Declare War Clause concerns if pursued without advance authorization from Congress. As to how the president might respond to such a challenging scenario, there are two possible avenues: on his own authority and in coordination with Congress.

245. *See* 2023 CSIS Study, *supra* note 9, at 56.

246. The 2001 AUMF, for example, was approved 420-1 in the House and 98-0 in the Senate on September 14, 2001, 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).

247. *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).

248. *See* 2023 CSIS STUDY, *supra* note 9, at 100.

249. *Id.* at 119.

A. Within the Executive Branch

In the event of an imminent or actual attack on Taiwan, the executive branch's legal analysis of possible military responses is almost certain to begin with the two-part Libya framework. Applying this framework would be most consistent with the bipartisan practice of other recent presidents and thus presents the path of least resistance in building consensus, both internally and externally. Within that framework, the first prong requiring that the President be able to "reasonably determine that the action serves important national interests" is unlikely to present a serious concern: recent administrations have interpreted that requirement in a manner that is extremely deferential to the president²⁵⁰ and both Congress and prior presidents have repeatedly identified the peaceful resolution of the status of Taiwan as an important contributor to regional stability in which the United States has a strong national interest.²⁵¹ The more difficult questions relate to the second prong's inquiry into the "anticipated nature, scope, and duration" of the military operations being considered, which in turn determines whether it might constitute a "war" requiring congressional authorization under the Declare War Clause.

The executive branch has previously described this inquiry as "highly fact-specific and turn[ing] on no single factor."²⁵² The closest the executive branch has come to articulating a standard has been to suggest that this threshold will generally only be crossed by "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."²⁵³ The most important variable in this regard appears to be whether U.S. troops are "likely to encounter significant armed resistance and whether they [a]re likely to 'suffer or inflict substantial casualties as a result of the deployment'"²⁵⁴ of the sort associated

250. See 2018 Syria Memo, *supra* note 191, at 9 (framing this inquiry as "whether the President could *reasonably determine* that the action serves important national interests") (emphasis added); 2011 Libya Opinion, *supra* note 18, at 1 (similar); see also Curtis Bradley & Jack Goldsmith, *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018), <https://www.lawfaremedia.org/article/olcs-meaningless-national-interests-test-legality-presidential-uses-force>.

251. See *supra* Part I (reviewing past congressional and executive branch practice); see also Brennan, *supra* note 8, 1026–28 (reaching a similar conclusion). *But see* Katherine Yon Ebright, *Unilateral Use of Force in the 'National Interest': Taiwan Doesn't Meet the Test*, JUST SECURITY (Nov. 12, 2021), <https://www.justsecurity.org/79172/unilateral-use-of-force-in-the-national-interest-taiwan-doesnt-meet-the-test/> (arguing to the contrary).

252. 2011 Libya Opinion, *supra* note 18, at 37. For a similar summary of how the executive branch applies this standard, see Brennan, *supra* note 8, at 1009–12.

253. 2011 Libya Opinion, *supra* note 18, at 31.

254. 2018 Syria Memo, *supra* note 191, at 19 (quoting 1994 Haiti Memo, *supra* note 168, at 179).

with “*extensive or sustained* hostilities.”²⁵⁵ Even substantial troop deployments may not cross this threshold where the nature of their mission or conditions surrounding their deployment suggest there is a “limited antecedent risk that United States forces w[ill] encounter significant armed resistance or suffer or inflict substantial casualties”²⁵⁶ Substantial “airstrikes and associated support missions” often do not either,²⁵⁷ at least where they are pursued with “limited means, objectives, and intended duration”²⁵⁸ and in a manner that limits their exposure to retaliatory attacks.²⁵⁹ That said, the executive branch has also identified factors that may weigh in favor of requiring advance congressional authorization, including the deployment of ground troops²⁶⁰ and the pursuit of military objectives like seizing territory and implementing regime change,²⁶¹ all of which are seen as complicating a possible withdrawal in the event of escalation. Similarly, “the risk that an initial [attack] could escalate into a broader conflict” is a factor supporting the need for congressional authorization, though it can be reduced by focusing military operations on a narrow purpose, limiting unnecessary collateral damage, and otherwise reducing factors that might make the attack seem like it warrants a larger reciprocal response.²⁶² The underlying logic for all these factors is that allowing the executive branch to pursue these sorts of military operations without advance authorization risks “confront[ing] [Congress] with circumstances in which the exercise of [Congress’s] power to declare war is effectively foreclosed[,]” in the event that hostilities escalate to a scale that constitutes a war for constitutional purposes but from which it is impossible for the United States to extricate itself.²⁶³

Even by this deliberately open-ended and flexible standard, the executive branch would be hard-pressed to conclude that intervening to oppose an attempted Chinese invasion of Taiwan—the scenario analyzed by the CSIS study—would be anything other than a “war” for constitutional

255. 2018 Syria Memo, *supra* note 191, at 20 (quoting 1995 Bosnia Memo, *supra* note 169, at 332).

256. 1994 Haiti Memo, *supra* note 168, at 179.

257. 2014 ISIL Memo, *supra* note 182, at 120.

258. *Id.* at 120 (quoting 2011 Libya Opinion, *supra* note 18, at 39).

259. *See* 2018 Syria Memo, *supra* note 191, at 20 (noting the fact that “the operation would proceed without the introduction of U.S. troops into harm’s way” as a factor weighing against a need for congressional authorization).

260. *See* 1995 Bosnia Memo, *supra* note 169, at 333–34 (acknowledging that the “deployment of 20,000 troops *on the ground* is an essentially different, and more problematic, type of intervention” than air or naval operations).

261. *See id.* at 332.

262. 2018 Syria Memo, *supra* note 191, at 21–22.

263. 1995 Bosnia Memo, *supra* note 169, at 333.

purposes.²⁶⁴ The fact that the rate of U.S. combat fatalities is expected to substantially exceed what the United States experienced during the Korean War—the prior “high water mark” of presidential uses of military force without congressional authorization—is alone a very strong indicator that the requisite standard is met; the widespread devastation U.S. forces would inflict on China, the clear risk of escalation into other theaters and domains, and the extent to which both states are projected to have their regional capabilities substantially diminished, even where they accomplish their respective strategic goals, confirms it.²⁶⁵ While there are parallels one can draw to past military operations that were found to fall short of the “war” threshold, they are almost entirely superficial. It is true that defending Taiwan would not involve deploying ground troops, but U.S. air and maritime assets would still be engaged in extensive hostilities and remain well within China’s reach, making any meaningful withdrawal impossible. The resulting military operation may not be extended in duration, but that is simply because of the rapidity with which the two major powers would be able to strike their respective military forces in the region. The United States may be able to reduce the risk of escalation by, for example, not striking China’s mainland, but even the consequences of the more limited hostilities around Taiwan alone covered by the CSIS study would far exceed any other U.S. military operation in recent decades in terms of U.S. casualties. And while the United States certainly would not view defending Taiwan as seizing territory or engaging in regime change, China may well disagree and can be expected to respond as if it were. The unavoidable reality is that experts assess that a war between China and the United States is likely to entail “the most intense fighting since World War II, with thousands of casualties on both sides”²⁶⁶ If that does not constitute a “war” for constitutional purposes, then what does?

Intervening on Taiwan’s behalf in one of the other two scenarios discussed above—a blockade or a Chinese attempt to take some of Taiwan’s less central islands—presents a more complicated question, but only slightly. Hindering or interrupting these sorts of operations is something the United States might be able to reasonably accomplish with more limited military operations—for example, by running a blockade—and one could imagine policymakers making a colorable case that China would not be willing to

264. In his analysis concluding that the president has adequate constitutional authority to defend Taiwan, Brennan only considers an invasion scenario that includes “[p]reparatory [a]ttacks on U.S. [a]ssets in the [r]egion” and leans heavily on self-defense as the domestic legal basis for a U.S. military response. *See* Brennan, *supra* note 8, at 1029–34. This Essay addresses self-defense separately below. *See infra* notes 269–272 and accompanying text.

265. *See supra* notes 236–244 and accompanying text.

266. GORDON ET AL., *supra* note 5, at 8–9.

escalate to a major war with the United States over certain limited efforts.²⁶⁷ Executive branch lawyers might even choose to analyze sequential and related military operations in isolation in order to more easily conclude that each is permissible in ways that would be hard if they were evaluated in the aggregate, a practice they have pursued in other related contexts.²⁶⁸ That said, this logic can only go so far, as if and when the cumulative U.S. response becomes substantial enough to meaningfully threaten China's strategic objectives, the risk of serious escalation reemerges. In other words, framing the defense of Taiwan as one of a thousand cuts doesn't change the consequences that China is widely expected to impose when push comes to shove.

Of course, there are other legal arguments executive branch lawyers might turn to if they cannot reasonably avoid the conclusion that defending Taiwan rises to the level of a war for constitutional purposes. One possibility might be to frame the defense of Taiwan as an act of national self-defense and more openly embrace the view that such acts are not subject to Declare War Clause limitations.²⁶⁹ While the executive branch has acknowledged that there should be some proportionality between an act of self-defense and the threat it is addressing, it has also claimed broad discretion in determining what response is necessary and has premised broad military campaigns on the grounds of defending U.S. persons and property in the past.²⁷⁰ This sort of self-defense argument becomes much more plausible if China opens its assault on Taiwan by preemptively attacking U.S. military forces in the region, as this could arguably be grounds for a broader campaign against China's regional military presence, with defending Taiwan being an incidental benefit of that effort.²⁷¹ (Notably, this reflects a strategic consideration that policy assessments rarely account for: while a preemptive attack on U.S. military forces in the region may give China an operational advantage, it would also provide the clearest legal basis for a robust and comprehensive U.S. military response—a factor that may ultimately make it self-defeating.) That said, if China resists making the first move against U.S. military forces, then a self-defense argument becomes much more difficult. Absent an attack on or imminent threat to U.S. forces in the region, the only other clear hook for a self-defense argument would be the approximately

267. For an assessment that leans heavily on this sort of generous framing, see Brennan, *supra* note 8, at 1036–37 n.180 (discussing U.S. intervention in response to a Chinese invasion of outlying Taiwanese islands without preparatory attacks on U.S. assets).

268. See TESS BRIDGEMAN, WAR POWERS RESOLUTION REPORTING: PRESIDENTIAL PRACTICE AND THE USE OF ARMED FORCES ABROAD, 1973-2019, at 24–25 (Jan. 2020), <https://warpowers.lawandsecurity.org/wpr-reporting-1973-2019.pdf> (discussing similar framing of “intermittent” engagement in hostilities in some War Powers Resolution reporting).

269. See *supra* notes 198–202 and accompanying text (discussing this view).

270. See, e.g., 1993 WPR Memo, *supra* note 165, at 35 n.30.

271. See Brennan, *supra* note 8, at 1029–34 (discussing such a scenario).

80,000 U.S. nationals and 200 U.S. service members currently located in Taiwan.²⁷² But this would be a thin reed on which to hang the sort of substantial military operation that is likely to be needed to defend Taiwan as a whole. Moreover, China could undermine the basis for this legal argument by taking steps to avoid harming U.S. nationals and service members in Taiwan, or even by permitting them to leave or be evacuated.

Alternatively, the executive branch could attempt to argue that existing legislation provides a degree of tacit congressional authorization to come to Taiwan's defense, something it has done in the recent past in spite of limitations installed by the War Powers Resolution.²⁷³ In many ways, this may seem like an easy task in regard to Taiwan, given the frequency with which Congress cites the Taiwan Relations Act and its assertion that "any effort to determine the future of Taiwan by other than peaceful means . . . [is] a threat to the peace and security of the Western Pacific area and of grave concern to the United States[.]"²⁷⁴ But frequent references to the Taiwan Relations Act are a double-edged sword, as that statute and its legislative history are so clear that they do *not* provide any authorization for the use of military force—positions reinforced by Congress's frequent reincorporation of that framework into Taiwan-related legislation.

To be clear, none of these arguments are categorically unavailable to the executive branch. The president is the chief legal officer of the executive branch and can adopt whatever legal position he prefers on its behalf. The fact that executive branch legal assessments are often highly deferential to policymakers on factual and policy assessments suggests that executive branch lawyers are unlikely to pose an insurmountable obstacle to the president and his advisors if they are intent on concluding that defending Taiwan does not pose a risk of escalation or doesn't meet the "war" threshold on other factual and policy grounds.²⁷⁵ The issue is instead that these arguments are hard to make in a way that is credible. Concluding that there is no risk of escalation or that major hostilities are unlikely to ensue from defending Taiwan will be a hard case to make to the public, Congress, and other external audiences, not least because countless credible policy

272. See Lili Pike & Jim LaPorta, *The U.S. Is Preparing Evacuation Plans for American Citizens in Taiwan*, THE MESSENGER (June 12, 2023), <https://themessenger.com/news/the-u-s-is-preparing-evacuation-plans-for-american-citizens-in-taiwan-exclusive>.

273. See 2000 Kosovo Opinion, *supra* note 171, at 339–46 (arguing that section 8(a)(1) of the War Powers Resolution, 50 U.S.C. § 1547(a)(1), only creates a rebuttable presumption against inferring authorization for military operations from appropriations and other similar legislation and concluding that this presumption was overcome by appropriations legislation authorizing the 1999 military intervention in Kosovo).

274. 22 U.S.C. § 3301(b)(4); see also *supra* notes 84–87 and accompanying text (discussing Congress's subsequent reiteration of this position).

275. See, e.g., 2020 Soleimani Memo, *supra* note 195, at 20 ("[W]e concluded that the President *could reasonably determine* that the nature, scope, and duration of hostilities . . . would not rise to the level of a war for constitutional purposes.") (emphasis added).

experts have spent several years publicly making the contrary argument. The same is likely to be true of assertions that defending all of Taiwan is necessary to defend U.S. nationals living there, particularly if China does not threaten them directly. And reading the Taiwan Relations Act or related legislation as authorizing force would run counter to the longstanding understanding of that law and its quite explicit legislative history. A lack of credibility is not necessarily fatal, but it can have serious consequences for both congressional and public support, two things the executive branch is certain to need if it may be on the verge of entering into a major armed conflict with China. Importantly, it can also have ramifications for the legacy of presidents and those who advise them. After all, entering the United States into what may well prove to be the most serious armed conflict since World War II is one thing; doing so based on what appears to be poor judgment at best and pretext at worst is quite another.

Given the challenges inherent in reconciling the defense of Taiwan with the two-part Libya framework, some presidents may be tempted by an arguably cleaner legal move: disavowing possible Declare War Clause limits altogether and returning to a position closer to the view that the president has the plenary constitutional authority to use military force in pursuit of U.S. national interests. The likely scale of a war with China means that this would almost certainly be the broadest claim of inherent presidential authority over matters of war and peace since at least the Korean War. But asserting it would allow the executive branch to avoid the sorts of contortions required to square the defense of Taiwan with the anticipated nature, scope, and duration test. Nor would this position necessarily be unprecedented, as the legal positions of the Truman administration and early George W. Bush administration that assert a plenary presidential authority over the use of military force, among others, remain available to cite as historical antecedents. Indeed, even as recent presidents have acknowledged possible Declare War Clause limits, they have been careful not to rule out this possibility entirely. This no doubt reflects the fact that there are individuals both within the executive branch and outside of it who believe that this is the way the Constitution should be read.

Yet the same combination of legal and policy factors that have deterred recent presidents from taking this step in relation to other recent major armed conflicts seems likely to make such a choice equally unappealing here. The longstanding persistence of internal Declare War Clause reservations underscores the extent to which there are genuine concerns with the legal credibility of this position, even within the executive branch—concerns that are likely to weigh even heavier with external audiences, such as Congress and the public. Moreover, disavowing the possibility of Declare War Clause limits requires the president to depart from the publicly stated views of the past several presidential administrations (and the internal views of several

more), which may in turn raise questions about his commitment to the rule of law and broader institutional interests in ways that undermine the legitimacy of his decision. Perhaps most importantly, the president would be relying on a historically broad claim of presidential authority at a moment when members of both major political parties are skeptical of broad claims of presidential authority to use military force.²⁷⁶ This is likely to put future public and congressional support for what may well prove to be a historic military undertaking at risk. In short, even if this option is legally available, it is not one that sets the United States up for success in a coming war with China. No doubt this is why the executive branch has avoided relying on this argument in every major armed conflict it has pursued since the Korean War.

There remains a final option that a president could pursue, which happens to be the same one President Eisenhower considered early in the first Taiwan Strait crisis, before securing congressional support: the president could act immediately in Taiwan's defense and ask Congress to ratify his actions after the fact. Eisenhower claimed he would have done so while acknowledging the unconstitutionality of his actions and accepting the risk of impeachment if Congress disagreed with his judgment.²⁷⁷ Such an approach may seem strange to modern audiences, but it reflects a longstanding legal tradition that has a number of supporters, even within past congresses.²⁷⁸ A more risk-averse modern version might avoid any express acknowledgement of unconstitutionality (or reference to impeachment) and instead simply argue that exigent circumstances did not allow time to consult with Congress—a factor that the executive branch has indicated might excuse violations of Declare War Clause limits in the past²⁷⁹—while asserting that ex post congressional authorization renders any constitutional violation moot.

In some ways, this may seem like it provides the best of both worlds, as it allows the president to respond with speed while benefitting from the cooperation of Congress. But it comes with risks as well. Allowing the

276. See STEVEN KULL ET AL., AMERICANS ON WAR POWERS, AUTHORIZATION FOR USE OF MILITARY FORCE AND ARMS SALES: A NATIONAL SURVEY OF REGISTERED VOTERS (Program for Public Consultation, School of Public Policy, University of Maryland, 2022), <https://vop.org/wp-content/uploads/2022/03/WarPowersReport031822.pdf?eType=EmailBlastContent&eId=68f8771b-e461-4638-a5f4-acba13309ba0>.

277. See Memorandum of Discussion at the 221st Meeting of the National Security Council, Washington (Nov. 2, 1954), *supra* note 34, at 837.

278. 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 94, at 226–27 (Jefferson administration); HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829-1901, at 216–20 (1984) (Lincoln administration); see also S. REP. NO. 91-129, at 32 (1969) (endorsing this approach in Senate Foreign Relations Committee report); FISHER, *supra* note 90, at 263–64 (same).

279. See 1993 WPR Memo, *supra* note 165, at 34.

president to act alone, even temporarily, still undermines the effect of any remaining Declare War Clause limits and risks placing Congress in the unenviable position of having to rebuke (or simply refuse to support) a war that is already under way—the sort of scenario that even the executive branch has previously recognized as undermining the intent behind Declare War Clause limitations.²⁸⁰ At the same time, it also puts the president in the vulnerable position of having to ask Congress to validate and share responsibility for a decision he has already made, a step some legislators may well be willing to pass on if it does not have clear policy consequences. If this occurs, then the president may well find himself in the weakest possible position: pursuing (or extricating the United States from) an armed conflict that was entirely of his own making and whose validity he has publicly failed to get confirmed by Congress. The proposition is a high risk one, particularly for the president—which may be part of the reason it has fallen into disuse. But if the situation is dire enough, one can imagine a president intent on coming to the timely defense of Taiwan while doing as little damage to the constitutional order as possible deciding that this is, in fact, the least worst option available.

That said, none of these are enviable options for the executive branch. A president who finds himself with no alternative legal basis for coming to the defense of Taiwan may yet pick one and accept the consequences, if he deems it important enough. But a preferable option by far—especially for a decision as consequential as going to war with China—would be the same route that other recent presidents have pursued for major armed conflicts: seeking some sort of congressional authorization. In the event of a sudden, unexpected attack on Taiwan by China, experts assess that the president may not be able to delay a U.S. military long enough to do so without compromising the defense of Taiwan and contributing to a longer and more difficult armed conflict. But perhaps if the executive branch and Congress recognize the need for congressional authorization in advance of such an attack, there are steps they could take to make it a more realistic possibility, even in such dire circumstances.

B. *With Congress*

The proposition that Congress should have a role in authorizing the defense of Taiwan should be no surprise to anyone who has read the Taiwan Relations Act. That law directs the president “to inform Congress promptly of any threat to the security or the social or economic system of the people

280. *See* 1995 Bosnia Memo, *supra* note 169, at 333 (discussing the need for advance congressional authorization so that Congress is not “confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed”).

on Taiwan . . . ,” at which point “[t]he President *and the Congress* shall determine . . . appropriate action” in response.²⁸¹ While some might read this language as suggesting that the president should only seek authorization when a threat to Taiwan is evident and on the horizon, its authors were quite clear that this wasn’t the case. “Where possible,” the House foreign affairs committee’s report on the legislation directed, “the President should inform Congress of anticipated dangers and should not await their actual occurrence.”²⁸² In other words, the Taiwan Relations Act anticipates that the “appropriate action” that Congress and the executive branch agree to take may come well before a threat is actually imminent—something that is particularly important in addressing the potential for a sudden, unexpected attack by China.

The most straightforward way for Congress to provide its consent to the defense of Taiwan from such attacks would undoubtedly be for it to enact a joint resolution giving the president broad authorization to use military force in defense of Taiwan as he sees fit, just as it did in 1955 during the first Taiwan Strait crisis.²⁸³ From the executive branch’s perspective, this approach would no doubt have the advantage of providing the president with maximum flexibility in deciding how to respond to rapidly changing events. It would also allow him to threaten the use of force with greater credibility, which may enhance his ability to avoid conflict through more effective deterrence. And Congress could provide this authorization at nearly any time in advance of an attack on Taiwan, making the timing relatively easy—though, as discussed below, the risk of escalation and other considerations may complicate the issue.

Yet an open-ended authorization is likely to be a more difficult sell today than it was in 1955, perhaps for good reason. Both Congress and the public have become much more skeptical of how the executive branch uses military force since before the Vietnam War.²⁸⁴ More recently, the extended and wide-ranging military operations that the executive branch has pursued under the 2001 and 2002 AUMFs, in ways that those authorizations did not clearly anticipate, has left members of Congress from both political parties equally skeptical of how the executive branch might use too open-ended a war authorization.²⁸⁵ This became apparent in the recent debate over the Taiwan Invasion Prevention Act, a failed 2021 legislative proposal that would have given the president broad authority to come to Taiwan’s

281. 22 U.S.C. § 3302(c) (emphasis added).

282. H. REP. NO. 96-26, at 8 (1979).

283. See *supra* note 45 and accompanying text.

284. See 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> (documenting consistent strong public support for requiring congressional approval for the use of military force from 1973 to present).

285. See KULL ET AL., *supra* note 276, at 7 (discussing sentiments on repeal of the 2001 AUMF).

defense.²⁸⁶ “Given the experience not only of the last four years of a reckless president but of the previous 20 years of endless war,” one senior foreign policy advisor for a progressive senator noted in remarks to the press, “the dangers of creating another open-ended war authorization should be obvious.”²⁸⁷ Other legislators from both political parties expressed similar reservations, even where they were otherwise strong supporters of Taiwan. In the end, the proposal never made it out of committee.

An alternative approach would be to wait until more details regarding the nature of the threat to Taiwan are evident and to then enact a more narrowly tailored authorization. This is the route that supporters of a stronger congressional role in war authorizations are likely to prefer as it limits the risk of executive branch overreach. The executive branch, however, is likely to push back on efforts to provide too tailored an authorization on the grounds that it would not provide the strategic flexibility necessary to address the threat to Taiwan. Drafting a more tailored authorization is also likely to be more contentious and require more extended debate, as there are more possible points of disagreement both among legislators and with the executive branch. This makes it difficult to determine when exactly such a debate should begin. Acting earlier is likely to require a broader authorization, as one cannot anticipate exactly what the threat will look like. But if one waits too long, then there may not be enough time to debate and enact a tailored authorization before an attack takes place, leaving the defense of Taiwan to hang on the president’s Article II authority once again. Too much delay also increases the risk that Congress will have to debate authorization legislation against the backdrop of an imminent or ongoing crisis, putting immense pressure on it to act quickly. In the past, similar circumstances have led Congress to drop proposals for transparency requirements and other measures meant to promote congressional control on the grounds that they were too controversial and would require more debate than there was time to allow.²⁸⁸ Ironically, while delay may provide Congress with more information about the threat to

286. See Taiwan Invasion Prevention Act, H.R. 1173, 117th Cong. § 102 (as introduced Feb. 8, 2021); see also S. 332, 117th Cong. (as introduced Feb. 22, 2021) (Senate companion bill). While sponsored by Republicans, one Democratic representative endorsed the Act as “a good starting point[.]” Luria, *supra* note 6.

287. Jack Detsch, *Now You’re in a Situation’: Democrats Pressure Biden on Taiwan*, FOREIGN POLY (Oct. 20, 2021), <https://foreignpolicy.com/2021/10/20/biden-taiwan-democrats-congress-china/> (quoting foreign policy advisor to Sen. Bernie Sanders); see also Andrew Desiderio, *Congress Pressures Biden to Defend Taiwan*, POLITICO (Nov. 5, 2021), <https://www.politico.com/news/2021/11/05/congress-biden-taiwan-519689> (collecting views).

288. See Gregory D. Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014), <https://www.buzzfeed.com/gregoryjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most> (discussing debates around the 2001 AUMF); KARNOW, *supra* note 113, at 389–90 (discussing debates around the Gulf of Tonkin resolution).

which they are responding, waiting too long is likely to make it much harder for Congress to use that information effectively.

The role that the threat of a U.S. military response plays in deterring China is likely to further complicate any such debates. Some policymakers within the executive branch may be concerned that openly seeking authorization from Congress will be seen by China as a signal that the United States is unlikely to come to Taiwan's defense absent such authorization, weakening strategic ambiguity's deterrent effect. Alternatively, while successfully enacting an authorization would make the threat of U.S. intervention more credible and thereby improve this deterrent effect, it could also be seen as an escalatory move by China, triggering a response that further aggravates the crisis. While real, these risks are easy to overstate in the abstract. After all, the United States has pursued numerous other measures to increase its ability to credibly threaten the use of force in the region, from deploying new military forces to strengthening alliances, often for the expressly stated purpose of balancing China.²⁸⁹ There is no reason to believe that debating possible congressional authorization for the use of military force entails any greater risk of escalation than these measures. There may even be ways to use congressional authorization or other measures to reinforce deterrent efforts—for example, by making certain escalatory or otherwise objectionable behavior on the part of China a triggering event for certain action by Congress, thereby providing China an added incentive not to pursue it. All that said, the link between legal authorization and deterrence is a real one, and good reason for Congress to coordinate its consideration of these issues with relevant executive branch officials.

The more serious risk is an unavoidable one inherent in pursuing any congressional authorization: the possibility that Congress will choose not to provide it. While this may seem unlikely given Congress's usual strong stance in support of Taiwan, congressional support for a major armed conflict on Taiwan's behalf would be a major step beyond current types of support and should not be seen as a foregone conclusion. Unless it was simply the result of some technical or non-substantive disagreement, a failed vote in Congress on a war authorization could indeed reduce the credibility of any U.S. threat to come to Taiwan's defense and thereby weaken any deterrent effect on China. This reflects the fact that it would also weaken any claim that the president might still make that he has the Article II authority to come to Taiwan's defense, as that claim would now be set

289. See, e.g., David Pierson & Olivia Wang, *A Defense Agreement Likely to Deepen Chinese Rancor*, N.Y. TIMES (Aug. 21, 2023), <https://www.nytimes.com/2023/08/19/world/asia/china-biden-camp-david.html> (discussing recent U.S. agreement with Japan and South Korea).

against the apparent will of Congress,²⁹⁰ as well as the prospect that the president could sustain any such operation given the lack of congressional support. Indeed, this risk of undermining what has thus far been an effective status quo may be enough to discourage the executive branch from seeking congressional authorization until it is clearly necessary—by which point, it may in fact be too late.

That said, there are other steps Congress could take in coordination with the executive branch that would not involve a public vote on a war authorization and could thus avoid these risks. The most effective alternative might be to enact expedited procedures that would allow Congress to consider a future war authorization on a faster timeline that better matches the strategic demands of defending Taiwan. Such procedures are an increasingly common feature of the legislative process and often serve to bypass Senate filibusters and other measures that can otherwise obstruct or substantially delay covered types of legislation.²⁹¹ In recent years, Congress has learned to make effective use of certain expedited procedures in and associated with the War Powers Resolution to force votes on resolutions expressing disapproval of the executive branch's policies.²⁹² The War Powers Resolution also contains similar procedures for war authorizations, but in an antiquated form that has never been used and may not ultimately be effective.²⁹³ Building on this experience, each chamber of Congress could amend its rules to provide for expedited procedures that are narrowly tailored to an unexpected attack on Taiwan by China. For example, these procedures could be designed to compel a vote on a war authorization within 24 hours of a triggering event, such as a certification by the President that an attack on Taiwan is believed to be imminent or has occurred. As this would not leave much time for debate, this vote could be on a more general pre-written authorization to come to Taiwan's defense, but only for a limited period before requiring reauthorization. Congress could then choose to revise, repeal, or otherwise adjust the scope of the authorization prior to reauthorizing it. For those particularly concerned with executive branch overreach, these subsequent reauthorizations could themselves be made eligible for expedited procedures on the condition that they also include

290. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring) (discussing the “lowest ebb” of presidential authority).

291. For descriptions of general congressional practice regarding expedited procedures, see MOLLY E. REYNOLDS, *EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE* (2017); CHRISTOPHER M. DAVIS, *CONG. RSCH. SERV.*, RL30599, *EXPEDITED PROCEDURES IN THE HOUSE: VARIATIONS ENACTED INTO LAW* (2015).

292. For a detailed account of how these expedited procedures have been used in relation to the conflict in Yemen, see Scott R. Anderson, *Yemen and the Limits of Congressional War Powers*, *TEX. NAT'L SEC. REV.* (Nov. 14, 2019), <https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/>.

293. *See* 50 U.S.C. § 1545; *see also* MICHAEL GREENE, *CONG. RSCH. SERV.*, R47603, *WAR POWERS RESOLUTION: EXPEDITED PROCEDURES IN THE HOUSE AND SENATE 4–8* (2023).

periodic reauthorization requirements, ensuring continued congressional engagement with opportunities to adjust the scope of the authorization provided at regular intervals.

Whatever form it may take, the process for securing congressional authorization will take time and debate. For this reason, the most immediate priority is for Congress and the executive branch to acknowledge the need for (or at least the serious advantages of) congressional authorization and to incorporate it into their strategic planning for a possible future conflict over Taiwan. Deliberately accounting for congressional authorization in these plans is the best way to ensure that Congress has an opportunity to weigh in and provide its authorization (or not) in a manner and at a time that complements broader U.S. policy objectives. Failing to account for it, meanwhile, risks putting the country on weak and contested constitutional footing just as it is facing what may be one of its greatest foreign policy challenges.

V. CONCLUSION

For the moment, it is far from clear that Congress needs to rush and authorize the use of military force in defense of Taiwan. By its own account, China will most likely not be ready to invade Taiwan before 2027 and there are few signs that it is ahead of schedule. Strategic ambiguity and the legal status quo that supports it has allowed the United States to successfully navigate periods of tension over Taiwan's status in the past and may yet do so again, despite its critics. Hoping for the best, however, is no excuse not to prepare for the worst. This is why the United States has already begun to take steps to better prepare for—and perhaps thereby deter—a future conflict over Taiwan, including by updating its regional deployments, strengthening Taiwan's capacity for self-defense, and building regional relationships that will allow U.S. and allied military forces to respond to a Chinese attack on Taiwan more effectively, if and when the United States decides that it must do so.

This Essay argues that the domestic legal framework that would support any such military response warrants similar consideration. The executive branch will undoubtedly be in a better legal and political position if it has authorization from Congress when it decides to come to Taiwan's defense. There are also ways that Congress can position itself to be able to provide this authorization that balance the relevant costs and benefits better than a simple open-ended authorization. But to be effective, these measures need to be in place before a sudden and unexpected attack on Taiwan becomes a reality. By contrast, maintaining the status quo will not only ensure that a President faced with such an attack will have to make a difficult decision between bad options that all threaten the legitimacy of what is likely to prove

the United States' most significant military undertaking in generations, but potentially have broader ramifications for our constitutional system.

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